CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, September 9, 1991

Appeal No. 2935

IN THE MATTER OF an appeal heard on May 1, 1991, under section 47 of the *Customs Act*, R.S.C., 1970, c. C-40, as amended.;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated November 30, 1987, with respect to a request for a re-determination pursuant to section 46 of the *Customs Act*.

BETWEEN

FARMER'S SEALED STORAGE **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the goods are better classified as parts under tariff item No. 40924-1 than as an article of polypropylene under tariff item No. 93907-1.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. 2935

FARMER'S SEALED STORAGE **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

This is an appeal under subsection 47(1) of the Customs Act from a decision made by the Deputy Minister of National Revenue, Customs and Excise, classifying polyethylene bags of 8 to 10 foot diameters and 95 to 150 foot lengths into which animal feed is compacted and stored under tariff item No. 93907-1 as articles of plastic. The appellant contends that the goods are more properly classified under tariff item No. 40924-1 as parts of agricultural implements or agricultural machinery being a part of the compacting device. In the alternative the appellant contends that the goods fall under tariff item No. 19300-1 as "bags of all kinds."

HELD: *The appeal is allowed. The Tribunal finds that the goods are better classified as parts under tariff item No. 40924-1 than as an article of polypropylene under tariff item No. 93907-1.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 1, 1991*
Date of Decision:	*September 9, 1991*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Kathleen E. Macmillan, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Michael A. Kelen, for the appellant* *Gilles Villeneuve, for the respondent*
Cases Cited:	*Burnbrae Farms Ltd. v. The Deputy Minister of National Revenue for Customs and Excise (1979), 6 T.B.R. 957; IMS International Mailing Systems Ltd. v. Deputy M.N.R. (Customs and Excise) (1988), 18 C.E.R. 57; Deputy Minister of National Revenue for Customs and Excise v. Androck Inc., Federal Court of Appeal, Court File No.: A-1491-84, January 28, 1987; Robert Bosch (Canada) Ltd. v. The Deputy Minister of National Revenue for Customs and Excise (1985), 10 T.B.R. 110; Outboard Marine Corporation of Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise (1981), 7 T.B.R. 423; Radex Ltée. v. Deputy M.N.R. (Customs and Excise) (1988), 17 C.E.R. 154; Light Touch Stenographic Services Ltd. v. The Deputy Minister of National Revenue for Customs and Excise, Canadian International Trade Tribunal, Appeal No. 2809, June 23, 1989; Canadian Totalisator Company, a Division of General Instruments of Canada v. The Deputy Minister of National Revenue for Customs and Excise (1986), 11 T.B.R. 120.*

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Appeal No. 2935

FARMER'S SEALED STORAGE **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
KATHLEEN E. MACMILLAN, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

The issue in this appeal is whether the goods in issue are more properly classified, as claimed by the appellant, as parts of agricultural implements or agricultural machinery, classified under tariff item No. 40924-1 or, in the alternative, as bags of all kinds, classified under tariff item No. 19300-1 or, as determined by the respondent, as goods composed of plastic not otherwise provided for, classified under tariff item No. 93907-1.

For the purposes of this appeal the relevant provisions of the *Customs Tariff*[1] are:

19300-1 *Paper sacks or bags of all kinds, printed or not.*

40924-1 *... All other agricultural implements or agricultural machinery, n.o.p.; Parts of all the foregoing.*

93907 — Articles of materials of the kinds described in headings 93901 to 93906 inclusive, n.o.p.:

93907-1 *Other than the following*

1. R.S.C., 1970, c. C-41, as amended.

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FACTS AND EVIDENCE

This is an appeal under subsection 47(1) of the *Customs Act*[2] (the Act) from a decision made by the Deputy Minister of National Revenue, Customs and Excise, dated November 30, 1987, classifying the goods in issue under tariff item No. 93907-1 as articles of plastic. The appellant contends that the goods are more properly classified under tariff item No. 40924-1 as a part of agricultural implements or agricultural machinery or, in the alternative, under tariff item No. 19300-1 as "bags of all kinds."

The goods were imported into Canada at the Windsor Customs Office on July 18, 1986, under Entry No. A650332, August 22, 1986, under Entry No. A668874, September 26, 1986, under Entry No. A686170 and October 23, 1986, under Entry No. A421577.

The appellant, Farmers Sealed Storage Inc., is a Canadian importer and distributor of a machine known as the "Ag-Bagger" manufactured by the AG-BAG Corporation of Nebraska, United States. The machine itself is a part of a feed storage system and consists basically of a unit that fills a large polyethylene bag with harvested forage and compacts the feed into what becomes an airtight bag thus permitting the commencement of fermentation and the process known as "ensiling." The Ag-Bagger may be equipped with an inoculator that sprays a lactic acid producing bacteria onto the forage to ensure successful fermentation.

The bags themselves, which are the goods at issue, are co-extruded 3 ply, 9.5 mil thick polyethylene, open ended bags in 8 to 10 foot diameters and from 95 to 150 feet in length. The extensive ply is white to reflect sunlight and harmful ultraviolet rays. The inner ply is black to offer further protection from ultraviolet rays. The middle ply is clear plastic and is included to add strength.

The bags are designed to fit only the Ag-Bagger machine. They are designed to store feed without loss of quality for a period of up to two years and have a warranty for that period of time. The Ag-Bags have no other use, function or purpose than as here described and the Ag-Bagger machine likewise has no other use, function or purpose than to compact and fill these bags.

ARGUMENTS

Counsel for the appellant first addressed several factual arguments. He submitted that the Ag-Bagger machine with the Ag-Bag is an integrated mechanical system similar to a conventional upright silo with a built-in loader and unloader. Second, both the packing machine and bag represent a scientifically integrated mechanical system providing benefits to the stored feed and the bags should be classified as part of that system. Counsel referred the Tribunal to two decisions in support of this proposition.[3] Third, the machine is called the Ag-Bagger machine because the Ag-Bag is the most important part of the machine. Fourth, just because it is less expensive to replace the Ag-Bag than to make it reusable should not disqualify it as a part. Fifth, the bags cost from $480 to $1000 each and have a warranty of two years, which is longer than that of the other parts of the machine, a situation that is quite different from ink or computer tape that, relative to the machine, are trivial products costing only a few dollars and that are consumed right away. Finally, that the goods do not have mechanical or moving parts is not determinative of whether they can be classified as parts.

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2. R.S.C., 1970, c. C-40 as amended.

3. *Burnbrae Farms Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, (1979), 6 T.B.R. 957; *IMS International Mailing Systems Ltd. v. Deputy M.N.R.(Customs and excise)* (1988), 18 C.E.R. 57.

Counsel argued that there are two competing n.o.p. (not otherwise provided for) "basket" tariff items and that the tariff item for the agricultural machinery and implements and parts thereof is the more specific. As such it would take priority. He also argued that the terms "agricultural implements or agricultural machinery" make that tariff item an end-use provision that takes priority over an *eo nomin*e provision without end-use qualification that merely gives some indiction as to the nature of the goods.

Counsel argued that the Ag-Bag is part of the Ag-Bagger machine. In support, he referred the Tribunal to the Federal Court of Appeal decision of *Deputy Minister of National Revenue for Customs and Excise v. Androck Inc.*,[4] arguing that the bags are related to the machine, the machine will not operate without the bag and as such they are a necessary and integral part thereof. He referred to the Tariff Board decisions of *Robert Bosch (Canada) Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*[5] and *Outboard Marine Corporation of Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*.[6] He also referred to *Radex Ltée. v. Deputy M.N.R. (Customs and Excise)*,[7] wherein it was determined that certain air ducts were found to be parts of cooking apparatus in part because they were specifically designed for the cooking and ventilation system, a situation, he argued, that is quite analogous to the goods in the present appeal.

In the alternative, counsel argued that the bags could be considered agricultural implements. He referred to the definition of "implement" found in The Oxford English Dictionary definition two states:

> *Something necessary to make a thing complete; an essential or important constituent part.*[8]

On this basis he argued that the Tribunal need not find that the bag is a part of the Ag-Bagger machine.

Counsel for the respondent argued that a part of a machine is used for extended periods of time until it wears out or breaks and needs to be replaced. In contrast the Ag-Bags are not parts of agricultural machinery because they are consumable goods, which have been held not to be parts. In support of this proposition he referred to *Light Touch Stenographic Services Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*[9] and *Canadian Totalisator Co., a Division of General Instruments of Canada v. The Deputy Minister of National Revenue for Customs and Excise*.[10]

To support his proposition that the bags are consumables, counsel noted that the bags have a life span of 12 to 36 months, the machine comes with three bags after which the user must purchase more, the bags are cut to remove the feed and the manufacturer recommends that the bags be cut up and burned after use, the appellants sell approximately 1000 to 1200 bags per year compared to approximately two to three dozen other parts and the appellant's parts' catalogue does not list the bags.

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4. *Federal Court of Appeal, Court File No.: A-1491-84, January 28, 1987.*
5. (1985), 10 T.B.R. 110.
6. (1981), 7 T.B.R. 423.
7. (1988), 17 C.E.R. 154.
8. The Oxford English Dictionary, 2nd Edition, Volume VII, Clarendon Press, Oxford, 1989, p. 722.
9. Canadian International Trade Tribunal, Appeal No. 2809, January 23, 1989.
10. (1986), 11 T.B.R. 120.

Counsel further argued that the jurisprudence relied on by the appellant is inappropriate in that the goods at issue were not consumable goods. He also argued that tariff item No. 40924-1 is not an end-use item and the evidence is such that the component of chief value is polyethylene, which is a form of plastic.

With regard to the appellant's argument that the bags can be considered an agricultural implement, counsel argued that the term should be given the same sense as agricultural machinery. Referring to the definition presented by the appellant he argued that if one were to replace the word "implement," as used in the tariff item, with that definition, agricultural implements would mean parts, a conclusion which negates use of that definition.

REASONS

After considering the full text of the appellant's alternative tariff classification the Tribunal eliminated it from further consideration as the goods in issue are clearly not composed of paper. The question then facing the Tribunal was whether the goods are better described as parts of agricultural machinery or as articles of polypropylene.

The Tribunal considered the many legal precedents cited by both counsel dealing with the question of whether certain goods could be considered parts of something else and found that none were applicable to the facts of this case. Indeed, in the *Androck* case[11], Mr. Justice Urie of the Federal Court of Appeal stated that "... we think it both unnecessary and undesirable to define the word 'parts' in such a way that it might apply in any factual context...." As there is no definition of part in the *Customs Tariff* and because it is not readily apparent in normal usage that one would describe the Ag-Bag as a part, the Tribunal resorted to dictionary definitions.

The word part is defined in The Oxford English Dictionary as:

> *[t]hat which together with another (part) or others (parts) makes up a whole* and *[e]ach of the separate or separable pieces that go to make up a machine or the like.*[12]

The Concise Oxford Dictionary, defines part to include:

> *3. ...; component of machine etc.*[13]

There is no doubt that the Ag-Bag is an important component of the Ag-Bagger and is specifically designed for use on that machine and has no other use. In fact the Ag-Bagger cannot fulfil its function without the Ag-Bag and conversely the Ag-Bag is useless without the Ag-Bagger. Consequently, it is the Tribunal's view that the Ag-Bag is a committed part of the Ag-Bagger machine. As stated by the Tariff Board in the *Robert Bosch* decision,[14]

> *The true test of whether an article can properly be considered to be a part of goods when parts thereof are mentioned in the tariff item depends on whether it is committed*

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11. *Supra*, note 4.
12. *Supra*, note 8, Volume XI, p. 258.
13. The Concise Oxford Dictionary, 7th Edition, Clarendon Press, Oxford, 1984, p. 746.
14. *Supra*, note 5.

> *for use with such goods. Whether it is so committed for use with the goods will depend in each case upon the scope of the description of the goods. An article that can be used with goods other than those described is regarded as not so committed and one that has no use other than with such goods and is necessary for their function is committed for use with them.*

In making its determination, the Tribunal reviewed the cases cited by the respondent that established that goods that are consumable cannot be considered parts. In both the *Light Touch* case[15] and *Canadian Totalisator*[16] case, the goods at issue were used up in the process: the ink as it was applied to the paper in the first instance and the paper as it fed through the machine in the second.

The Ag-Bag is not used up during the operation of the machine. In fact, the goods continue to serve two important functions after being filled by the machine, namely, ensiling and preserving of the feed. The Tribunal does not view the goods as consumable in the sense of the ink or computer paper tape rolls.

Another factor bearing upon the Tribunal's decision concerns the intent of the Parliament. The Tribunal notes that the goods at issue are used exclusively in agricultural endeavours and that the Ag-Bagger itself is duty-free because it is an agricultural machine. It is clear that it was the Parliament's intent to exempt from duty "[a]ll other agricultural implements or agricultural machinery, n.o.p." and "[p]arts of all the foregoing." When it is so clear that the machine itself was to be exempt, the Tribunal finds it difficult to accept that something so absolutely critical to its operation would not be subject to the same consideration as the machine itself. To find otherwise would constitute, in the Tribunal's view, an irrational restriction of the Parliament's clear intent.

CONCLUSION

The appeal is allowed. The Tribunal finds that the goods are better classified as parts under tariff item No. 40924-1 than as an article of polypropylene under tariff item No. 93907-1.

Sidney A. Fraleigh
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Member

15. *Supra*, note 9.
16. *Supra*, note 10.

DISSENTING VIEWS OF MEMBER MACMILLAN

Although I agree with my colleagues to a certain point, I disagree with their final conclusions on this case. I recognize that the Ag-Bagger machine has no function without the Ag-Bags and that the bags have no other use than with the machine. In my view, however, this is not sufficient to qualify the goods in issue as "parts" of an agricultural implement or machine.

To paraphrase the *Androck* case,[17] whether an item is a part or not must be determined by the particular facts at issue. The evidence in this case established that, once filled with feed, the bags cannot be reused with the Ag-Bagger machine. Over the average 20-year life of an Ag-Bagger machine, its owner would use hundreds of bags. The bags are not described as parts in any of the appellant's literature and are not included in its parts list.

In my view, parts of a machine are a more permanent component than the goods at issue in this case. A part is something that is used repeatedly and replaced once worn. Often parts must be replaced by qualified mechanics or service personnel. Parts are distinct from supplies that, although necessary for the machine's functioning, are readily consumed and easily replaced by the machine users themselves.

The cases cited by the appellant give considerable weight to whether the goods at issue are committed for use with the larger whole. However, none of the cases cited dealt with consumable items, but concerned accessories or interchangeable components. The point at issue in the *Robert Bosch* case,[18] for example, was whether car stereos were better described as parts of radio receiving sets for motor vehicles or as radio apparatus and parts thereof, n.o.p. In my view, goods can be committed for use with another item but, because they are consumed, do not form part of the item. Engine oil for automobiles is one example. The designed or committed for use test is therefore necessary, but is not a sufficient condition, for determining whether an article is a part of goods described in a tariff item number.

I disagree that the *Light Touch Stenographic*[19] and *Canadian Totalisator*[20] cases are not applicable in this instance because the goods at issue in those cases were consumed immediately. In my opinion, the important element linking all three cases is that the items are designed to be used only once with the machine they are claimed to be a part of, whereas the machine continues in use for many years. In my view, it is irrelevant that the goods are used up as the machine is operating or some time later.

In *Xerox Canada Inc. v. Deputy Minister of National Revenue (Customs & Excise) et al.,*[21] which was recently upheld by the Federal Court of Appeal,[22] the Tariff Board held that typewriter ribbon cartridges did not qualify as parts of a typewriter. In deciding the case, the Board distinguished between parts and supplies. In my opinion, this distinction is also valid with respect to the Ag-Bags.

My colleagues make a compelling argument concerning the intent of Parliament with respect to agricultural implements and machinery. I would only note, however, that the duty-free treatment is

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17. *Supra*, note 4.
18. *Supra*, note 5.
19. *Supra*, note 9.
20. *Supra*, note 10.
21. (1988), 17 C.E.R. 47.
22. Appeal No. A-945-88, April 17, 1991.

not a blanket provision that extends to all things agricultural. In order to enter duty-free the item must fall within the wording of the tariff item which, in this instance, means that it must meet the description of a part.

In my opinion, the Ag-Bags are not parts of the Ag-Bagger machine but are better described as supplies for the machine. Accordingly, I would classify the goods as the respondent has in tariff item No. 93907-1 as articles of polypropylene, n.o.p.

Kathleen E. Macmillan
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Member