



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-030

Grodan Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, June 7, 2012*

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IN THE MATTER OF an appeal heard on February 21, 2012, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated June 3, 2011, with respect to a request for further re-determinations pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

GRODAN INC.

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member

Gillian Burnett
Gillian Burnett
Acting Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 21, 2012

Tribunal Member: Jason W. Downey, Presiding Member

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Respondent	Counsel/Representative
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WITNESS:

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Grodan Inc. (Grodan) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from decisions made by the President of the Canada Border Services Agency (CBSA), dated June 3, 2011, pursuant to subsection 60(4).

2. The appeal concerns the tariff classification of plastic (polyethylene) film or sheeting, in particular, “Sunmaster Engineered Polyethelene”, “Oerlemans P.A.R. Enhancing Greenhouse Film” and “Bato Ground Cover” (the goods in issue).² These products are used exclusively as covering material for greenhouse structures and as ground cover material for greenhouse flooring.³

3. The issue in this appeal is whether, in addition to being classified under tariff item Nos. 3920.10.90 (greenhouse film) and 3920.20.90 (greenhouse ground cover) of the schedule to the *Customs Tariff*,⁴ the goods in issue can benefit, as Grodan claims, from duty-free treatment under tariff item No. 9903.00.00 as articles and materials that enter into the cost of manufacture or repair of agricultural or horticultural machines of heading No. 84.36.⁵

PROCEDURAL HISTORY

4. Between November 2004 and March 2007, Grodan imported the goods in issue in 11 separate transactions.⁶ The goods in issue were classified under tariff item Nos. 3920.10.90 (greenhouse film) and 3920.20.90 (greenhouse ground cover), and duties were paid accordingly.

5. Grodan then filed requests for refunds of the duties pursuant to subsection 73(1) of the *Act*, claiming that the goods in issue qualified for the benefits of tariff item No. 9903.00.00. Between December 7, 2007, and January 14, 2009, the CBSA granted refunds of the duties paid.⁷

6. However, on October 29, 2009, the CBSA issued Detailed Adjustment Statements notifying Grodan that an officer of the CBSA had further re-determined, pursuant to subsection 59(1) of the *Act*, that the goods in issue were not entitled to the benefits of tariff item No. 9903.00.00.

7. On January 22, 2011, Grodan requested, pursuant to subsection 60(1) of the *Act*, that the CBSA further re-determine the tariff classification of the goods in issue.

8. On June 3, 2011, pursuant to subsection 60(4) of the *Act*, the CBSA confirmed that the goods in issue could not be classified under tariff item No. 9903.00.00.⁸

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. Tribunal Exhibits AP-2011-030-04A, appendix at 18-22, and AP-2011-030-06A, tab 5.

3. Tribunal Exhibit AP-2011-030-06A, tab 2.

4. S.C. 1997, c. 36.

5. Grodan initially contended that, in the alternative, the goods in issue were “. . . articles for use in . . . [a]gricultural or horticultural machines of heading 84.36”, but it later turned its focus away from this position. *Transcript of Public Hearing*, 21 February 2012, at 101-102.

6. Tribunal Exhibit AP-2011-030-06B, tab 22.

7. Tribunal Exhibit AP-2011-030-06A at para. 5.

8. Tribunal Exhibit AP-2011-030-01, attachments.

9. Grodan filed its notice of appeal with the Tribunal on September 1, 2011.
10. Further to a request by Grodan, the Tribunal decided to hear the appeal together with Appeal No. AP-2011-031, another appeal that Grodan had filed on September 4, 2011, in respect of contemporaneous tariff classification decisions of the CBSA, dated June 6, 2011, concerning other greenhouse products.⁹
11. On February 21, 2012, the Tribunal held a public hearing in Ottawa, Ontario.
12. Photographs and product literature were submitted as evidence in lieu of physical exhibits.
13. Grodan did not call any witnesses. The CBSA called Mr. Tom Wingreen, Professor, Greenhouse Production and Woody Plant Courses, Department of Horticulture, Algonquin College. The Tribunal recognized Mr. Wingreen as an expert in greenhouse theory, production and practice.¹⁰

LEGAL FRAMEWORK

14. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.¹¹ The schedule is divided into sections and chapters, with Chapters 1 to 98 containing a list of goods categorized in a number of headings and subheadings and under tariff items. Chapter 99, which includes tariff item No. 9903.00.00, is divided into tariff items only.
15. When interpreting Chapter 99, the Tribunal must follow the approach prescribed in section 10 of the *Customs Tariff*.¹² Specifically, subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*¹³ set out in the schedule.¹⁴
16. The *General Rules* comprise six rules. For the purposes of Chapter 99, only the first five rules, with the exception of Rule 3 (a), are applicable.¹⁵

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9. Rule 6.1 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, authorizes the Tribunal to combine two or more proceedings to provide for a more expeditious or informal process, as the circumstances and considerations of fairness permit.
10. *Transcript of Public Hearing*, 21 February 2012, at 49.
11. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
12. Section 11 of the *Customs Tariff* relates to headings and subheadings and requires that regard be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*, World Customs Organization, 2d ed., Brussels, 2003, and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*, World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*], of which there are none for Chapter 99, given that it is reserved for special classifications.
13. S.C. 1997, c. 36, schedule [*General Rules*].
14. Subsection 10(1) of the *Customs Tariff* also refers to the *Canadian Rules*, but these only apply to the tariff items in Chapters 1 to 98.
15. Rule 6 of the *General Rules* simply states that Rules 1 through 5 are applicable to classification at the subheading level. There are no subheadings in Chapter 99. Rule 3 (a) is not applicable because note 1 to Chapter 99 provides that the rule of specificity in Rule 3 (a) does not apply to the provisions of Chapter 99. This reflects the fact, as indicated in note 3 to Chapter 99, that classification in Chapters 1 to 97 and Chapter 99 is not mutually exclusive.

17. The *General Rules* are structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on. Rule 1 provides as follows: “. . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes”

18. Note 4 to Chapter 99 provides as follows: “The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.” Thus, the meaning that the Tribunal gives to the words and expressions used in heading No. 84.36, for example, apply to identical words and expressions used in tariff item No. 9903.00.00.

19. In accordance with note 3 to Chapter 99, the goods in issue may only be classified in Chapter 99 after classification under a tariff item in Chapters 1 to 97 has been determined.

20. In the present case, the parties are in agreement that the goods in issue are properly classified under tariff item Nos. 3920.10.90 (greenhouse film) and 3920.20.90 (greenhouse ground cover). On the basis of the evidence, the Tribunal accepts this classification.

21. Therefore, the sole remaining issue before the Tribunal is to determine whether the goods in issue can benefit from duty-free treatment under tariff item No. 9903.00.00.

22. The relevant provisions of the *Customs Tariff* provide as follows:

Chapter 84

**NUCLEAR REACTORS, BOILERS, MACHINERY
AND MECHANICAL APPLIANCES; PARTS THEREOF**

...

84.36 Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment; poultry incubators and brooders.

...

Chapter 99

SPECIAL CLASSIFICATION PROVISIONS – COMMERCIAL

...

9903.00.00 Articles and materials that enter into the cost of manufacture or repair of the following, and articles for use in the following:

...

Agricultural or horticultural machines of heading 84.36;

...

ANALYSIS

“Articles and materials”

23. Grodan submitted that the goods in issue are articles or materials.¹⁶

16. Tribunal Exhibit AP-2011-030-04A at para. 16; *Transcript of Public Hearing*, 21 February 2012, at 101-102.

24. The CBSA submitted that the goods in issue are not articles, but conceded that they are materials.¹⁷
25. The terms “article” and “material” are not interchangeable. In *Prins Greenhouses Ltd. v. Deputy M.N.R.*,¹⁸ the Tribunal defined “article” as “...any finished or semi-finished product which is not considered to be a material.”¹⁹
26. The *Merriam-Webster OnLine Dictionary* defines “material” as “... the elements, constituents, or substances of which something is composed or can be made ...”.²⁰ In other words, a material goes into the production of an article.
27. In his testimony, Mr. Wingreen consistently referred to the goods in issue as “materials” that are used to cover the roofs, sides and floors of greenhouses.²¹
28. Therefore, the Tribunal finds that the goods in issue are materials and not articles.²²

“Agricultural or horticultural machines of heading 84.36”

29. According to Grodan, commercial greenhouses are agricultural or horticultural machines of heading No. 84.36 if they have mechanical features such as retractable roofs or sides, heating systems and irrigation systems.²³
30. Grodan referred to an advance ruling made by the CBSA pursuant to paragraph 43.1(1)(c) of the *Act*, dated July 19, 2007, in respect of another firm’s importations. This advance ruling states as follows: “For a greenhouse to qualify as a machine [of heading No. 84.36] it must have mechanical features i.e. retractable roofs or sides, heating systems, irrigations systems etc.”²⁴
31. Grodan also relied on *Prins Greenhouses* and *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency*,²⁵ in which the Tribunal found that integrated greenhouse systems are agricultural or horticultural machines of heading No. 84.36 on the basis that the clearly defined function of that system is to control and regulate the climate of a greenhouse to optimize plant growth.
32. According to Grodan, the greenhouse itself, when it has such features as roofing vents and siding that open and close using mechanical power, is such an integrated greenhouse system because, without all these combined elements, there would be no such system.²⁶

17. Tribunal Exhibit AP-2011-030-06A at paras. 42-43; *Transcript of Public Hearing*, 21 February 2012, at 117.

18. (9 April 2001), AP-99-045 (CITT) [*Prins Greenhouses*].

19. *Prins Greenhouses*, note 3.

20. Tribunal Exhibit AP-2011-030-06B, tab 9.

21. *Transcript of Public Hearing*, 21 February 2012, at 51, 55-56, 58-61, 64, 70, 75-76, 78, 82.

22. As such, the goods in issue are not “... articles for use in ... agricultural or horticultural machines of heading 84.36” for the purposes of tariff item No. 9903.00.00.

23. Tribunal Exhibit AP-2011-030-04A at para. 16.

24. *Ibid.* at 12.

25. (16 September 2009), AP-2008-012 (CITT) [*P.L. Light Systems*], rev’d 2010 FCA 226 (CanLII), aff’d (4 November 2011), AP-2008-012R (CITT) [*P.L. Light Systems (Remand)*].

26. *Transcript of Public Hearing*, 21 February 2012, at 95-98.

33. For its part, the CBSA drew a distinction between the greenhouse structure and systems used within the greenhouse, arguing that the greenhouse itself is not an agricultural or horticultural machine.²⁷ The CBSA referred to the fact that the integrated greenhouse system in *Prins Greenhouses* consisted of a flue gas condenser, boilers, a steel pipe and ventilation fans, which were interconnected by piping and cables to sensors and a computer, and that it did not include the greenhouse itself.²⁸ In *A.M.A. Plastics Ltd. v. President of the Canada Border Services Agency*,²⁹ the integrated greenhouse system was a trickle irrigation system.³⁰ The CBSA submitted that nowhere in *P.L. Light Systems*, which concerned greenhouse lighting, did the Tribunal state that an integrated greenhouse system includes the greenhouse itself.³¹

34. The CBSA used the analogy of a mechanic's garage, suggesting that simply because the garage houses machinery and has a mechanism to open and close the door does not make it a machine even if all these components contribute to the same function of providing an environment in which to fix cars.³² By application to greenhouses, the fact that there are boiler systems, computer systems, irrigation systems, etc., does not mean that the greenhouse walls that house these machines are to be classified as machinery as well.³³

35. The CBSA added that, on the contrary, the greenhouse itself is classified elsewhere in the schedule to the *Customs Tariff*. In particular, the CBSA contended that, if a greenhouse is prefabricated, then it is classified in heading No. 94.06.³⁴ Otherwise, it would be classified in Chapter 73.³⁵

36. Heading No. 84.36 covers machines. The terms of the heading provide as follows: "Other agricultural, horticultural . . . machinery . . ." Tariff item No. 9903.00.00 refers to "[a]gricultural or horticultural machines of heading 84.36".

37. Note 4 to Section XVI starts by stating as follows: "Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected . . .) *intended to contribute together to a clearly defined function . . .*" [emphasis added].

38. Thus, there is nothing to suggest that all the individual components must be mechanical. Rather, it seems that the whole unit, which results from the functioning of the individual components together, is what must be identified as a "machine". The key, then, is that the combination of the individual components results in a machine and that the individual components are ". . . intended to contribute together to a clearly defined function . . .", i.e. the clearly defined function of the machine.

39. Part (VII) of the *Explanatory Notes* to Section XVI clarifies that note 4 to Section XVI ". . . applies when a machine (including a combination of machines) consists of separate components which are intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or, more frequently, Chapter 85." Consequently, in respect of heading No. 84.36, the clearly defined function to which the individual and separate components contribute together must be "agricultural or horticultural".

27. *Ibid.* at 105.

28. *Ibid.* at 106-107.

29. (23 September 2010), AP-2009-052 (CITT).

30. Tribunal Exhibit AP-2011-030-06A at para. 61.

31. *Transcript of Public Hearing*, 21 February 2012, at 110.

32. *Ibid.* at 112.

33. *Ibid.*

34. Tribunal Exhibit AP-2011-030-06A at paras. 55-59.

35. *Transcript of Public Hearing*, 21 February 2012, at 110-11.

40. The *Webster's New World College Dictionary*³⁶ defines "machine" as follows: "3 a) a structure consisting of a framework and various fixed and moving parts, for doing some kind of work . . .". The *Gage Canadian Dictionary*³⁷ defines "machine" as follows: "1 a device consisting of an arrangement of interrelated fixed and moving parts powered mechanically, electrically, or electronically, designed to do a particular kind of work"

41. Accordingly, to fall in heading No. 84.36, a greenhouse does not necessarily have to be mechanical in its own right. The key is whether it and other components combine to form a machine which, as a whole, has a clearly defined agricultural or horticultural function.

42. In this respect, the Tribunal has previously established that an integrated greenhouse system is an agricultural or horticultural machine of heading No. 84.36 with the clearly defined agricultural or horticultural function of controlling and regulating the climate and environment of a greenhouse to optimize plant growth.³⁸

43. Mr. Wingreen testified that there are different kinds of integrated greenhouse systems, of which the kind at issue in *Prins Greenhouses* is but one example.³⁹

44. Thus, the core issue in the present appeal is whether the greenhouse itself (which includes the goods in issue) is a component of an integrated greenhouse system on the basis that, together with the other components of that kind of machine, it is intended to contribute to the regulation of the climate of the greenhouse in order to optimize plant growth.

45. The record of the present proceedings reveals, as follows, that the greenhouse itself contributes to the regulation of the climate of the greenhouse to optimize plant growth:

- Excerpts submitted by the CBSA from the literature on greenhouses state that the purpose of a greenhouse is to admit natural light for plant growth.⁴⁰
- The *Merriam-Webster OnLine Dictionary* definition of "greenhouse" indicates that the greenhouse is ". . . used for the cultivation or protection of tender plants".⁴¹
- Mr. Wingreen testified that protecting crops from rain, wildlife, the environment, pests and disease, keeping heat in so that crops, in Canada, can grow for a longer period of the year, or throughout the year, and controlling the climate within the structure to optimize the growing of the crops are what makes ". . . the whole structure a greenhouse."⁴² In this regard, he added that the greenhouse structure (as well as the cover material) is essential.⁴³
- Mr. Wingreen testified that an integrated greenhouse system would "normally not" be attached to the greenhouse structure itself, but he cited piping in a heating system as an exception that would "often" hang on the structure.⁴⁴ He also implied that sensors, which measure

36. Fourth ed., s.v. "machine".

37. 2000, s.v. "machine".

38. *Prins Greenhouses* at 8; *P.L. Light Systems* at para. 11.

39. *Transcript of Public Hearing*, 21 February 2012, at 54-55.

40. Tribunal Exhibit AP-2011-030-06B, tab 16 at 35.

41. *Ibid.*, tab 17.

42. *Transcript of Public Hearing*, 21 February 2012, at 71.

43. *Ibid.* at 76.

44. *Ibid.* at 55.

temperatures and light in the greenhouse, are attached to the greenhouse structure.⁴⁵ On cross-examination, he also explained how such sensors would automatically open or close louvers or control ventilation systems, which are either part of or otherwise attached to the structure of the greenhouse.⁴⁶ Mr. Wingreen also spoke of artificial lighting and irrigation. Tellingly, Mr. Wingreen testified that all these elements, including the greenhouse structure itself, optimize the growing conditions inside the greenhouse.⁴⁷

- Mr. Wingreen testified that a greenhouse necessarily consists of transparent or translucent cover materials, such as the goods in issue,⁴⁸ and that these goods and the ground cover themselves contribute to the control of the climate within the greenhouse to optimize plant growth.⁴⁹

46. That evidence is consistent with the Tribunal's finding in *P.L. Light Systems (Remand)*. In that case, the Tribunal found that aluminum reflectors for use in greenhouse lighting fixtures entered into the cost of manufacture of integrated greenhouse systems because, *inter alia*, the reflectors were "... designed for use exclusively in greenhouses..."⁵⁰ and lighting accounted for part of the cost of "...the greenhouse structure itself"⁵¹ [emphasis added]. Implicit in that conclusion was a finding that the greenhouse structure itself was a component of the integrated greenhouse system, which, together with the other components of such machine, was intended to contribute to the regulation of the climate of the greenhouse and to optimize plant growth. This is consistent with Mr. Wingreen's testimony in the present case.

47. Accordingly, heading No. 84.36 includes integrated greenhouse systems.

"Enter into the cost of manufacture or repair"

48. In the present appeal, it seems that the goods in issue were marketed and sold separately from greenhouses and from the other components of an integrated greenhouse system.⁵² As such, even though the goods in issue are intended to contribute to the clearly defined function of an integrated greenhouse system, they do not fall to be classified in heading No. 84.36. Indeed, as mentioned above, the parties agree that they are properly classified in heading No. 39.20. However, they could be classified under tariff item No. 9903.00.00 if it can be shown that they enter into the cost of manufacture or repair of an integrated greenhouse system.

49. Grodan argued that the goods in issue enter into the cost of manufacture or repair of agricultural or horticultural machines of heading No. 84.36 because they are used to cover the roofs, sides and floors of greenhouses and contribute to the same function, i.e. controlling the greenhouse environment to optimize plant growth.

45. *Ibid.* at 57.

46. *Ibid.* at 62-65.

47. *Ibid.* at 73-77.

48. *Ibid.* at 50-51.

49. *Ibid.* at 71-84.

50. *P.L. Light Systems (Remand)* at para. 30.

51. *Ibid.* at para. 33.

52. Tribunal Exhibit AP-2011-030-06A, tab 5.

50. The CBSA submitted that the goods in issue do not enter into the cost of manufacture or repair of agricultural machines of heading No. 84.36 because Grodan is an importer and supplier of greenhouse products and neither manufactures nor repairs greenhouses.⁵³

51. There are flaws with both of these positions. First, in assessing whether the goods in issue enter into the cost of manufacture or repair of a greenhouse or an integrated greenhouse system, it is immaterial whether they contribute to the clearly defined function of the integrated greenhouse system; that is the relevant test for heading No. 84.36, not tariff item No. 9903.00.00. Second, given that the issue relates to the goods in issue and the manufacture of other goods, the nature of the importer's business itself is also immaterial.

52. As discussed, in *P.L. Light Systems (Remand)*, the Tribunal found that articles or materials entered into the cost of manufacture of integrated greenhouse systems because, *inter alia*, they were designed for use exclusively in greenhouses and accounted for part of the cost of the greenhouse structure itself.

53. In the present case, the evidence discloses that the goods in issue are purposefully used with the greenhouse structure itself; otherwise, the structure is not a greenhouse.⁵⁴ Mr. Wingreen testified that the plastic film is used to cover the greenhouse structure and is attached to the greenhouse structure.⁵⁵ The plastic cover material covers the roofs and walls of the greenhouse structure.⁵⁶ The ground cover acts as a protective barrier between the earth and the greenhouse.⁵⁷ This use of the plastic film creates a unique environment specifically designed to produce and promote the growth of crops; without the film, or any dedicated covering, the structure is nothing more than a bare structure, devoid of vocation.

54. In terms of cost considerations, Mr. Wingreen explained that glass is the optimal covering material for light transmission to maximize plant growth, due to its high-clarity properties and long-term durability, but that plastic covering is much cheaper.⁵⁸ Glass covering has a much longer material life span than plastic covering, but is a much more expensive capital investment up front. Mr. Wingreen testified that plastic film deteriorates (mostly due to UV exposure) and has to be replaced with new film every three to five years, the cost of which also factors into the choice of building materials;⁵⁹ this clearly calls upon the notion of repair.

55. Mr. Wingreen indicated that a greenhouse builder would take into consideration the relative costs of the goods in issue and an alternative such as glass.⁶⁰ The use of a plastic covering in the original design and conception of a greenhouse necessarily implies that such a covering *will need* to be replaced within a few years, following the end of its expected life cycle. With respect to the ground cover, Mr. Wingreen agreed that the need for it is a factor that goes into the decision about which materials to use to build a greenhouse and noted that it is cheap.⁶¹

53. *Ibid.* at para. 37.

54. *Ibid.*, tab 5, *Transcript of Public Hearing*, 21 February 2012, at 73.

55. *Transcript of Public Hearing*, 21 February 2012, at 51, 75.

56. *Ibid.* at 52.

57. *Ibid.* at 79-80.

58. *Ibid.* at 59, 61, 70.

59. *Ibid.* at 59, 70. Mr. Wingreen testified that the covering would need to be replaced within three to four years, yet agreed with Grodan's proposition of a "... three- to five-year cycle".

60. *Transcript of Public Hearing*, 21 February 2012, at 62.

61. *Ibid.* at 84-85.

56. Therefore, considering that the goods in issue have a limited life span and must be replaced at given intervals, the Tribunal finds that the goods in issue enter into the cost of manufacture or repair of integrated greenhouse systems.

DECISION

57. For the foregoing reasons, the Tribunal concludes that the goods in issue are materials that enter into the cost of manufacture or repair of agricultural or horticultural machines of heading No. 84.36 for the purposes of tariff item No. 9903.00.00.

58. The appeal is allowed.

Jason W. Downey

Jason W. Downey
Presiding Member