CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, July 11, 1989 **Appeal No. 3042**

IN THE MATTER OF an application heard May 8, 1989, pursuant to section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) as amended;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated May 26, 1988, with respect to a request for a redetermination filed pursuant to section 63 of the *Customs Act*.

BETWEEN

SEALAND OF THE PACIFIC LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal declares that the "M.V. Cherokee IV" should be classified under tariff item 44005-1 as "Yachts and pleasure boats, exceeding 9.2 metres in length overall," rather than under tariff item 44000-1 as, inter alia, "Ships, vessels, dredges, scows, yachts, boats and other water borne craft...," as determined by the respondent.

Kathleen Macmillan
Kathleen Macmillan
Presiding Member

John C. Coleman
John C. Coleman
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. 3042

SEALAND OF THE PACIFIC LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

Customs Tariff - Tariff classification - Whether the M.V. Cherokee IV should be classified under tariff item 44000-1 as, inter alia, "Ships, vessels, dredges, scows, yachts, boats and other water borne craft...," or under tariff item 44005-1 as "Yachts, and pleasure boats, exceeding 9.2 metres in length overall."

DECISION: *It is well established in customs law that goods must be classified according to their nature at the time of importation. As the M.V. Cherokee IV met the description of a pleasure vessel at the time it was imported, it is properly classified under tariff item 44005-1. Also, tariff item 44005-1 is a descriptive rather than a "for use" item. Thus, while the appellant applied for an exemption from the payment of federal sales tax under the Excise Tax Act on the basis that the vessel would be used in a commercial sport fishing operation, this has no bearing on the present appeal, as considerations of the vessel's intended use are not relevant to the tariff items at issue.*

Place of Hearing:	*Vancouver, British Columbia*
Date of Hearing:	*May 8, 1989*
Date of Decision:	*July 11, 1989*
Panel Members:	*Kathleen Macmillan, Presiding Member* *John C. Coleman, Member* *W. Roy Hines, Member*
Counsel for the Tribunal:	*Donna J. Mousley*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Lorne A. Green, for the Appellant* *Jean Fitzgerald, for the Respondent*
Cases Cited:	*Aritech Inc. (Canada) v. The Deputy Minister of National Revenue for Customs and Excise (1985), 10 T.B.R. 89; Kelley v. The Deputy Minister of National Revenue for Customs and Excise (1985), 10 T.B.R. 70; The Minister of National Revenue v. MacMillan and Bloedel Ltd. et al., [1965] S.C.R. 366.*

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Statutes and Regulations Cited: *Customs Tariff, R.S.C. 1985, c. C-54, Schedule II, Tariff Items 44000-1 and 44005-1; Customs Tariff, S.C. 1987, c. 49; Excise Tax Act, R.S.C. 1970, c. E-13, s. 8.1, Part XVII, Schedule III (now R.S.C. 1985, c. E-15, s. 11, Part XVII, Schedule III); Canada Shipping Act, R.S.C. 1985, c. S-9, s. 2; Regulations Respecting the Application of Section 8.1 of Part XVII of Schedule III of the Excise Tax Act to Ships and Other Marine Vessels, C.R.C. c. 597, subs. 2(a).*

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 3042

SEALAND OF THE PACIFIC LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: KATHLEEN MACMILLAN, Presiding Member
JOHN C. COLEMAN, Member
W. ROY HINES, Member

REASONS FOR DECISION

SUMMARY

This is an appeal pursuant to section 67 of the *Customs Act* concerning the customs tariff classification of the "M.V. Cherokee IV" imported into Canada from the United States on July 28, 1987. The appellant seeks a declaration that the vessel is properly classified under tariff item 44005-1 as "Yachts and pleasure boats, exceeding 9.2 metres in length overall." The respondent has classified the goods under the general classification for marine vessels in tariff item 44000-1, which includes, inter alia, "Ships, vessels, dredges, scows, yachts, boats and other water borne craft...."

The appellant argues that the relevant time for the purpose of Customs Tariff classification is the time of importation. It also argues that tariff item 44005-1 is a descriptive rather than a "for use" provision, and thus the vessel should be classified by its description at the time of importation and not according to its intended use.

The respondent contends that use is a central criterion in the description of the vessel as a "pleasure boat." On the basis that the vessel was to be used in a commercial sport fishing operation, the appellant applied under section 8.1, Part XVII, Schedule III of the *Excise Tax Act* to claim an exemption from the payment of federal sales tax. The respondent argues that the vessel cannot then be described as a "pleasure boat" for the purpose of classification under the Customs Tariff.

The appeal is allowed. It is well established in customs law that goods must be classified according to their nature at the time of importation. Also, tariff item 44005-1 is a descriptive and not a "for use" item. Thus, the appellant's application under the *Excise Tax Act* has no bearing on the present appeal as considerations of the vessel's intended use are not relevant to the tariff items at issue. The M.V. Cherokee IV is properly classified under tariff item 44005-1, as it met the description of a pleasure vessel at the time of importation.

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THE LEGISLATION

The statutory provisions relevant to this appeal are as follows:

Customs Tariff

Tariff Items

44000-1	*Ships, vessels, dredges, scows, yachts, boats and other water borne craft and floating, submersible or semi-submersible structures such as docks, caissons, pontoons, coffer-dams, production platforms, drilling ships, drilling barges, drilling rigs, jack-up drilling platforms and other drilling platforms; combinations of all the foregoing; all of the foregoing whether or not self-propelled, assembled or complete:*

Other than the following.

44005-1	*Yachts and pleasure boats, exceeding 9.2 meters in length overall.*

Canada Shipping Act

2. "passenger" means any person carried on a ship, but does not include
...

(b) a person carried on a ship that is not a Safety Convention Ship who is
(i) the master, a member of the crew or a person employed or engaged in any capacity on board the ship on the business of that ship,
(ii) the owner or charterer of the ship, a member of his family or a servant connected with his household,
(iii) a guest of the owner or charterer of the ship if it is used exclusively for pleasure and the guest is carried on the ship without remuneration or any object of profit, or
(iv) under one year of age, or
...

"passenger ship" means a ship carrying passengers;

"pleasure yacht" means a ship however propelled that is used exclusively for pleasure and does not carry passengers;

Excise Tax Act

SCHEDULE III

PART XVII

TRANSPORTATION EQUIPMENT

8.1 Ships and other marine vessels, purchased or imported for use exclusively in such marine activities, other than sport or recreation, as the Governor in Council may by regulation prescribe; articles and materials for use exclusively in the manufacture, equipping or repair of those tax exempt goods.

The regulatory provisions relevant to this appeal are as follows:

REGULATIONS RESPECTING THE APPLICATION OF SECTION 8.1 OF PART XVII OF SCHEDULE III OF THE EXCISE TAX ACT TO SHIPS AND OTHER MARINE VESSELS

Marine Activities Prescribed

2. The following are hereby prescribed to be marine activities for the purposes of section 8.1 of Part XVII of Schedule III to the Excise Tax Act:
(a) public transportation by water provided by marine vessels designed and permanently equipped to carry 12 or more passengers;
...

THE FACTS

This is an appeal pursuant to section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue, Customs and Excise. It concerns the vessel "M.V. Cherokee IV" imported into Canada at Victoria, B.C., from the United States on July 28, 1987, under customs tariff item 44005-1. This item includes "Yachts and pleasure boats, exceeding 9.2 metres in length overall...." The vessel has since been renamed the "M.V. Charlotte Princess." On September 18, 1987, the Department of National Revenue issued a Notice of Assessment to Sealand of the Pacific Ltd. (Sealand), owner of the vessel, reclassifying it under tariff item 44000-1 as, inter alia, "Ships, vessels, dredges, scows, yachts, boats and other water borne craft...." On November 2, 1987, the appellant filed a request for a redetermination of the tariff classification. The Deputy Minister rendered her decision on May 26, 1988, confirming the tariff classification as 44000-1.

The M.V. Charlotte Princess is 133 feet in length (approximately 42 metres), 30 1/2 feet at the beam and draws 12 1/2 feet of water. She weighs 534 gross tons and is powered by a 500

HP diesel engine. The ship was built in Lauzon, Quebec, in 1956 and commissioned as a lightship. She was christened Lightship #1 and operated by the Canadian government off the east coast of Canada in the North Atlantic Ocean. The vessel was retired, sold and exported to the United States in 1972 where she was converted to a luxury vessel and renamed "M.V. Northlite." In 1979, the M.V. Northlite was sold again and renamed the "M.V. Romance." Finally in 1985, the vessel was acquired by M.V. Cherokee Marine Enterprises Inc. of Los Angeles, California, and renamed "M.V. Cherokee IV." The vessel was registered in the United States at the time of sale to the appellant. Her home port was Long Beach, California.

Mr. Robert Wright, President of Sealand, first became interested in the M.V. Cherokee IV while he was looking for a craft which could be used in his charter sport fishing operation. He was particularly interested in acquiring a vessel which would create an ambience of luxury for the charter guests and would serve as a "floating hotel" for four- or five-day sport fishing excursions. In May of 1987, he went to Los Angeles to assess the ship's suitability for this purpose. The Tribunal was shown several pictures of the interior and exterior of the vessel as it appeared at the time of purchase by Sealand, and Mr. Wright gave the following description. The vessel had two lounges; the main "funnel" lounge complete with a fireplace, and another upper lounge. It had seventeen state rooms with private washrooms, a full service kitchen, T.V.'s and sound equipment, and outside deck areas which featured suntanning facilities, a jacuzzi and a barbecue. Mr. Wright testified that the vessel was being used by its owners at that time for their personal recreation and to entertain clients.

When the sale was arranged, various documents were required to be issued by the U.S. Department of Transportation and Coast Guard in which the vessel was referred to as a "pleasure craft." After its arrival in Canada, Sealand applied to Revenue Canada to have the vessel declared exempt from federal sales tax under section 8.1, Part XVII, Schedule III of the *Excise Tax Act* on the basis that it was to be used exclusively in a commercial sport fishing operation. The M.V. Charlotte Princess is registered in the Canada Registry of Shipping, dated April 13, 1989, as a "steel passenger vessel" and is currently undergoing modifications in order to be certified as a passenger vessel under the *Canada Shipping Act.* She has been operating as a passenger vessel in Sealand's sport fishing enterprise since the time of importation.

The second witness for the appellant was Mr. Peter Hart, a mechanical engineer and partner of a naval architecture company in the business of designing, building and refitting ships. Mr. Hart was hired by Mr. Wright in May of 1987 to go to Los Angeles with two of Sealand's captains and one of their engineers to conduct an inspection and survey of the M.V. Cherokee IV. It was Mr. Hart's opinion that the vessel could only be described as a pleasure craft at the time of purchase because it lacked the requisite safety and navigational equipment to qualify it as a passenger vessel for the purpose of the *Canada Shipping Act*. For the voyage to Victoria, approximately $30,000 of this equipment was purchased. However, it was the opinion of Mr. Hart that even with this additional equipment, the vessel would not have complied with Canadian requirements for passenger vessels at the time of import.

Mr. Alexander Grieg of the Ship Safety Division of the Canadian Coast Guard then gave an account of the examination of the vessel conducted by that department under the Passenger Vessel Compliance Program. He explained that until late 1986, charter vessels did not require

certification by the Coast Guard as they were not defined under the *Canada Shipping Act* and were not technically considered to come within the definition of a passenger vessel. The Act was then amended to require that excursion vessels like the M.V. Charlotte Princess be made to comply with passenger vessel requirements. For this purpose, vessels were able to enter a compliance program which allowed them to undertake the modifications necessary to meet those requirements gradually over a three-year period.

Mr. Grieg said he made a survey and safety inspection of the M.V. Charlotte Princess early in 1988 in connection with that vessel's application under the program. He explained that there are three categories of inspection: an inspection of the hull for seaworthiness, an inspection of the machinery and various auxiliary mechanisms and an inspection of the life-saving and fire-fighting equipment. In his judgment, the vessel complied with most of the requirements at the time of inspection although certain modifications were still required before a safety certificate could be issued. He anticipated the vessel would meet those requirements and be issued a certificate by the end of its current refit period.

The respondent questioned Mr. Grieg about the hull of the vessel in connection with its design as a lightship. A lightship, he explained, is essentially a floating buoy which is used to mark hazards to navigation. It has a large light on it and extremely heavy ground equipment consisting of anchors and chains for securing it in position. When questioned by the respondent if there were anything unique about the hull of the vessel which would classify it as a pleasure craft, he stated that, within certain parameters, any type of hull can be used for a variety of purposes and certainly as a pleasure craft. In his opinion, the M.V. Charlotte Princess would have been fairly described as a pleasure craft at the time his inspection was carried out.

THE ISSUES

The argument of the appellant is twofold. First, for the purpose of customs tariff classification, goods must be classified at the time of importation. Second, tariff item 44005-1 is a descriptive rather than a "for use" classification and therefore the vessel must be classified on the basis of its description at the time of importation rather than its intended use. In support of the first argument, counsel for the appellant referred to the Tariff Board case of *Aritech Inc. (Canada) v. The Deputy Minister of National Revenue for Customs and Excise (1985), 10 T.B.R. 89*, where the Board said:

> *The evidence is clear that the infrared detection devices measure infrared energy and indicate that measurement within precise parameters to a control unit within the burglar alarm system. The Board must, however, consider the goods at the time of importation and not their use in a burglar alarm installation. Events that take place after the initial measurement have no further connection to the goods in issue.*

The appellant also argues that because tariff item 44005-1 uses description and not intended use as the means of classifying the vessel, the fact that the vessel has been used for commercial purposes since importation is not relevant to its classification under the Customs Tariff. Other tariff items describing marine vessels which are excepted from the general tariff

classification, such as 44002-1 and 44009-1, are distinctly expressed in "for use" terms in contrast to tariff item 44005-1.

Counsel for the appellant further states that the definition of "passenger ship" in the *Canada Shipping Act* should not be considered as that Act and the Customs Tariff are not *in pari materia*, that is, they have nothing to do with one another. Finally, he argues, as irrelevant to this appeal, the fact the appellant applied for an exemption from the payment of sales tax under the *Excise Tax Act* on the grounds that the vessel was to be used in a sport fishing operation and had been modified for use in a commercial enterprise. The test under the *Excise Tax Act* is entirely different from that of the customs tariff item and the modifications to the vessel took place subsequent to the vessel's importation.

The respondent, on the other hand, argues that use is a central criterion in describing a vessel as a "pleasure boat" for the purpose of classifying it under tariff item 44005-1. As the word "pleasure" alone distinguishes tariff item 44005-1 from the general classification for boats and yachts in tariff item 44000-1, only those yachts and boats used for the pleasure of their owners qualify for entry under tariff item 44005-1. If use is not considered, argues counsel for the respondent, luxury passenger vessels used in commercial ventures or any other type of vessel having luxury features would be imported under that item.

Counsel for the respondent further argues that the new Customs Tariff which uses the Harmonized Commodity Description and Coding System, referred to as the Brussels Nomenclature, may be used as an aid in interpreting the tariff items in issue although that Act was not in force at the time the vessel was imported. As marine vessels are described and classified under the new Customs Tariff by their intended use, counsel suggests that the legislators of the tariff items in issue intended that they be interpreted according to use criteria.

Sealand intended to use the M.V. Charlotte Princess in a commercial sport fishing operation, and for that reason the appellant applied for an exemption from the payment of federal sales tax under the *Excise Tax Act*. The vessel is also described in commercial terms in the Canada Registry of Shipping as a "steel passenger vessel." Counsel for the respondent argues that it is not open to the appellant to classify the M.V. Charlotte Princess as a commercial vessel for the purposes of one act and as a pleasure vessel for another. She further states that whereas no evidence has been presented as to the use of the vessel immediately prior to its import, there is cogent evidence as to the intended and actual use of the vessel upon its arrival in Canada, and for this reason the vessel should be classified on the basis of intended use.

Finally, counsel for the respondent argues on the authority of *Kelley v. the Deputy Minister of National Revenue for Customs and Excise (1985), 10 T.B.R. 70* that hull design is a primary consideration in classifying a vessel. She claims that, as there is nothing unique about the hull design of the M.V. Charlotte Princess which justifies classifying it as a pleasure vessel, it must be classified under the general tariff item.

DECISION

It is well established in customs law that goods must be classified according to their nature at the time of importation. This principle was stated by the Supreme Court of Canada in *The Minister of National Revenue v. MacMillan and Bloedel Ltd. et al., [1965] S.C.R. 366* and has been affirmed on many occasions since that time. The decision in *Aritech Inc. (Canada) v. The Deputy Minister of National Revenue* cited by the appellant is one example. Based on the description of the vessel provided by the three witnesses and the photographs of the vessel as it appeared at the time of its importation to Canada, the Tribunal finds that the M.V. Cherokee IV was properly described as a "pleasure boat" and should be classified under tariff item 44005-1.

It is apparent that the use and characteristics of vessels of this size can change throughout their considerable lives. In this case, the vessel was transformed from a lightship to a luxury yacht to a "floating hotel." However, tariff item 44005-1 is not a "for use" item. The Tribunal notes that some tariff items for marine vessels classify those goods according to their intended use while others do not employ use terminology. This suggests that if the import duty on pleasure boats were to be determined on the basis of their intended use, parliament would have made this clear.

The Tribunal considers that it is often useful to refer to the Brussels Nomenclature to aid in the interpretation of ambiguous language in the Customs Tariff, and respondent's counsel invited it to do so in this case. As she stated, the new Customs Tariff using the Brussels Nomenclature classifies marine vessels almost exclusively according to their intended use. However, the Brussels Nomenclature was adopted after the facts in this appeal arose, and the Tribunal concludes it has limited use in this case. In the Customs Tariff at issue, it seems clear that parliament intended that some categories of marine vessel be classified according to use and where that terminology is not employed, that they be classified by description.

The Tribunal further finds that the vessel's treatment under the *Excise Tax Act* and the *Canada Shipping Act* has no bearing on this appeal. The test under section 8.1, Part XVII, Schedule III of the *Excise Tax Act* is based on the intended use of the vessel and not its description at the time of purchase or import. Similarly, vessels are defined under the *Canada Shipping Act* for the purpose of certifying their safety and seaworthiness in relation to their use in commercial ventures and the M.V. Charlotte Princess began operating as a passenger vessel only subsequent to her importation. It is also noteworthy that Mr. Grieg, witness for the respondent, considered that the vessel did not qualify at the time of importation for passenger vessel status but would have met the standards set for pleasure craft.

Counsel for the respondent also made reference to the *Kelley* case in arguing that the hull design of the vessel should be a determining factor in classifying it. On this point, the Tribunal first notes that the Tariff Board's comments on hull design in the *Kelley* case were not central to the reasoning in that case as the Board classified the barge in question on the grounds that it was an antique and not on its description as a marine vessel. Moreover, the respondent's witness, Mr. Grieg, stated that within certain parameters, the hull of a vessel may be used for a variety of purposes, including for a pleasure craft. Finally, there is no onus on the appellant to establish that the vessel is of a description unique to a pleasure craft. Rather, the appellant is required to show only that the vessel is better and more specifically described as a pleasure craft than under the general tariff item for water borne craft.

CONCLUSION

The Tribunal finds that the M.V. Cherokee IV met the description of a pleasure boat at the time it was imported and is properly classified under tariff item 44005-1.

Kathleen Macmillan
Kathleen Macmillan
Presiding Member

John C. Coleman
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Member

W. Roy Hines
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Member