

Ottawa, Wednesday, September 12, 1990

Appeal No. 3077

IN THE MATTER OF an appeal heard on March 9, 1990,
under section 67 of the *Customs Act*, R.S.C., 1985, c. 1,
2nd Supplement;

AND IN THE MATTER OF a decision of the
Deputy Minister of National Revenue for Customs and
Excise, dated August 3, 1988, with respect to a notice of
objection filed pursuant to paragraph 63 (1)(a) of the
Customs Act.

BETWEEN

DAVID E. GILLANDERS

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal finds that the appellant failed to submit evidence showing that the glass panel fireplace screen could be classified under tariff item 69515-1.

Sidney A. Fraleigh

Sidney A. Fraleigh
Presiding Member

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.
Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. 3077

DAVID E. GILLANDERS

Appellant

and

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

Respondent

Customs Act - Tariff Classification.

This is an appeal under section 67 of the Customs Act from a decision of the Deputy Minister of National Revenue for Customs and Excise dated August 3, 1988. At issue is whether the glass panel fireplace screen imported from Farallon Studios, Sausalito, California, under Vancouver entry number H 120970 dated June 25, 1987, should be classified under tariff item 32615-1 as "Manufactures of glass, n.o.p." or under tariff item 69515-1 as "Original sculptures...."

The Tribunal finds that the appellant failed to submit evidence showing that the glass panel fireplace screen fits within tariff item 69515-1.

Held: *The appeal is dismissed.*

Place of Hearing: Vancouver, British Columbia
Date of Hearing: March 9, 1990
Date of Decision: September 12, 1990

Tribunal Members: Sidney A. Fraleigh, Presiding Member
Robert J. Bertrand, Q.C., Member
Kathleen E. Macmillan, Member

Clerk of the Tribunal: Molly Hay

Appearances: Clark Roberts, for the appellant
Bruce S. Russell, for the respondent

Statute Cited: Customs Tariff, R.S.C., 1970, c. C-41, as amended.

Memorandum Cited: Memorandum D10-11-15.

Appeal No. 3077

DAVID E. GILLANDERS

Appellant

and

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

Respondent

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ROBERT J. BERTRAND, Q.C., Member
KATHLEEN E. MACMILLAN, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act* (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister), dated August 3, 1988, as to the classification of a glass panel fireplace screen imported by the appellant from Farallon Studios of Sausalito, California, under Vancouver entry number H 120970. The appellant seeks a declaration that the glass panel fireplace screen be classified under tariff item 69515-1.

FACTS

The glass panel fireplace screen was labelled by the appellant's customs broker as "3 dim. glass panel w/swan design intaglio" on the customs entry form dated June 25, 1987, and imported under tariff item 32615-1 as "Manufactures of glass, n.o.p." The sender, Farallon Studios, described the glass panel fireplace screen on the Canada Customs invoice dated June 11, 1987, as "28" wide x 36" high original etched glass panel."

On August 27, 1987, the appellant requested, under paragraph 60(1)(a) of the Act, a re-determination of the tariff classification of the glass panel fireplace screen under tariff item 69515-1 as an original sculpture.

On February 10, 1988, the initial classification was confirmed by the regional Tariff and Values Administrator under subsection 60(3) of the Act.

On April 18, 1988, the appellant filed a request for re-determination of the tariff classification under paragraph 63(1)(a) of the Act.

On August 3, 1988, the Deputy Minister made, under subsection 63(3) of the Act, a decision confirming the initial classification and stating the following:

The fact that an article is ornamental in nature or is a three-dimensional form does not necessarily make it an original sculpture.

Under subsection 67(1) of the Act, the appellant filed an appeal of the Deputy Minister's decision with the Tariff Board on October 3, 1988.

The appeal, originally filed with the Tariff Board, is taken up and continued by the Canadian International Trade Tribunal (the Tribunal) under section 60 of the *Canadian International Trade Tribunal Act*.¹

The hearing was held in Vancouver on March 9, 1990.

According to the appellant, the glass panel fireplace screen is a 3/4-inch glass panel, 28 inches in height by 36 inches in width, into which has been carved a design of two swans facing in opposite directions with their tail feathers intertwined.

The glass panel fireplace screen was commissioned by the appellant from Jerry Cebe of Sausalito, California. It is an original, etched glass panel of a series of not more than ten according to the Canada Customs invoice from Farallon Studios dated June 11, 1987.

The glass panel fireplace screen is apparently placed for display purposes in front of the fireplace in the appellant's living room.

Counsel for the appellant, stating that the issue was a matter of law and not a question of fact, called no witness. Counsel, however, filed as exhibits a letter dated October 9, 1986, from the appellant to Mr. Jerry Cebe of Farallon Studios (Exhibit A-1), a résumé of Mr. Jerry Cebe of Farallon Studios (Exhibit A-2) and a letter dated March 7, 1990, from Carol Cebe of Farallon Studios to the appellant (Exhibit A-3).

The respondent called as a witness, Mr. John Sadler, a sculptor, painter and teacher at the Ottawa School of Art.

The witness gave his views as to what constitutes a sculpture today and commented on a definition of the word "sculpture" as defined in Webster's New World Dictionary (Exhibit B-2). The witness testified that, in his view and on the basis of the rendition of the glass panel fireplace screen on the second page of Exhibit A-1, the glass panel fireplace screen was not a sculpture.

Counsel for the respondent filed, as an exhibit, a photograph of the glass panel fireplace screen sent to the respondent by the appellant as part of this case (Exhibit B-3).

ISSUE

The issue is whether the glass panel fireplace screen imported from Farallon Studios, Sausalito, California, under Vancouver entry number H 120970 dated June 25, 1987, should be classified under tariff item 32615-1 as "Manufactures of glass, n.o.p." or under tariff item 69515-1 as "Original sculptures...."

1. S.C. 1988, c. 56.

LEGISLATION

The statutory provisions, as they read at the relevant time, are as follows:

Customs Tariff

32615-1 Manufactures of glass, n.o.p.

Original sculptures and statuary, including the first twelve replicas made from an original work or model; assemblages:

69515-1 The professional production of artists only and valued at not less than seventy-five dollars each

Memorandum D10-11-15

The Department of National Revenue's Memorandum D10-11-15 defines sculptures as follows:

Three-dimensional forms created by carving (wood, stone or other hard materials) ... They may be in the round, intaglio (recessed) or in relief (raised).

ARGUMENTS

Counsel for the appellant argued that the only function served by the glass panel fireplace screen is to provide aesthetic appeal and enhance the appearance of the living room. The fact that it has a utility function does not preclude its aesthetic qualities. Otherwise, art would have to be excluded because the function of art is to provide aesthetic appeal. He also argued that, although the glass panel fireplace screen is placed for display purposes in front of the fireplace in the appellant's living room, it is not used as a fireplace screen (i.e., to shield from sparks and smoke emitted by fires), as sparks and smoke would obscure the glass panel fireplace screen with soot.

Counsel stated that, by having height, width and depth, the glass panel fireplace screen is three-dimensional and that, by having a design carved into it, the glass panel fireplace screen is, in the language of the Memorandum, a sculpture in intaglio.

Counsel for the respondent argued that an object designed to perform a specific function cannot be classified as a sculpture, regardless of whether the ultimate owner uses it for that function or merely displays it. He also argued that, if a decorative object is designed for a specific functional purpose, it is no longer an original work of art.

Counsel contended that the glass panel fireplace screen is not a three-dimensional figure and not a sculpture.

FINDING OF THE TRIBUNAL

The meaning of the word "sculpture" does not appear to be an issue here, as both parties agreed on the definition contained in Memorandum D10-11-15, which reflects the definitions found in commonly used dictionaries.

In Memorandum D10-11-15, sculptures are described as "Three-dimensional forms created by carving (wood, stone or other hard materials) ... They may be in the round, intaglio (recessed) or in relief (raised)."

The appellant contends that the design on the glass panel fireplace screen has been carved in intaglio.

In the Memorandum, the word "intaglio" is explained by the word "recessed." In the language of the Memorandum, a sculpture in intaglio is a recessed three-dimensional form created by carving wood, stone or other hard materials.

Testimony by Mr. Sadler revealed that a sculpture is characterized by its third dimension. The mere cutting of a glass panel to size does not make a sculpture out of that glass panel. In order for the glass panel to form the basis for a sculpture, the design carved in it must be a three-dimensional form.

As counsel for the appellant pointed out when questioning the expert witness, it was not possible for the witness to get a sense of the tridimensionality of the object on the strength of the evidence (Exhibit B-3).

The Tribunal is of the view that, likewise, it cannot ascertain by simply examining a photo or drawing whether the glass panel fireplace screen at issue is a sculpture in intaglio or a simple etching of a glass surface. To properly classify the screen, the Tribunal would have to view the object itself or examine a witness who is familiar with the goods at issue and knowledgeable in the field of sculpture in intaglio. Only then could the Tribunal ascertain the nature of the carving and whether the carving is of sufficient depth to provide a significant third dimension that would bring the screen under the definition of intaglio.

It is incumbent upon an appellant, who alleges that the goods were improperly classified and that the goods should be classified under a tariff item exempting such goods from customs duties, to submit evidence showing that the goods in issue do fall within that tariff item.

The Tribunal finds that the appellant has failed to submit such evidence.

Since the Tribunal is not in a position to recognize the glass panel fire screen as a sculpture, it is not necessary to deal with the issue of whether a functional object could be a sculpture.

CONCLUSION

The appeal should be dismissed.

Sidney A. Fraleigh

Sidney A. Fraleigh
Presiding Member

Robert J. Bertrand , Q.C.

Robert J. Bertrand , Q.C.
Member

Kathleen E. Macmillan

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