



Ottawa, Tuesday, September 11, 2001

Appeal No. AP-2000-018

IN THE MATTER OF an appeal heard on March 5, 2001, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated March 1, 2000, with respect to a request for redetermination under section 63 of the *Customs Act*.

BETWEEN

TRANSILWRAP OF CANADA, LTD.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Michel P. Granger
Michel P. Granger
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-2000-018

TRANSILWRAP OF CANADA, LTD.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

This is an appeal under section 67 of the *Customs Act* from decisions of the Commissioner of the Canada Customs and Revenue Agency. The goods in issue are plastic film, made by lamination of polyethylene terephthalate and polyethylene, which are used as protective film for items such as menus and schedules. The first issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3920.10.00 as film of polymers of ethylene, as determined by the respondent, or should be classified under tariff item No. 3920.62.00 as film of polyethylene terephthalate, as claimed by the appellant. Should the appellant's position prevail with respect to the first issue, the second issue would be whether the goods in issue qualify for the benefits of Code 7934.

HELD: The appeal is allowed. The goods in issue, being made by lamination of ethylene and polyethylene terephthalate, are, *prima facie*, classifiable both in subheading No. 3920.10 as film of polymers of ethylene and in subheading No. 3920.62 as film of polyethylene terephthalate. Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System*, as adapted to deal with classification at the subheading level, provides that, where goods are *prima facie* classifiable in two subheadings and those two subheadings each refer to part only of the materials contained in composite goods, the goods shall be classified as if they consisted of the material which gives them their essential character, insofar as this criterion is applicable. In the Tribunal's view, in the present appeal, the factor that determines essential character is the role of a constituent material in relation to the use of the goods in issue. There is a clear nexus between the role of one of the constituent materials in relation to the use of the goods in issue and the essential character of those goods. In the Tribunal's view, the essential character of the goods in issue is their protective nature. The use of those goods is the protection of a substrate such as menus. The polyethylene terephthalate has a much more important role in that respect than that of the polyethylene. Indeed, the substrate being laminated to the goods in issue, there is no question that it is the polyethylene terephthalate that will first come in contact with whatever may fall or be put on the laminated product.

In the Tribunal's view, the main function of the polyethylene is to permit the binding of the polyethylene terephthalate to the substrate that it will protect. The goods in issue would not be the same were it not for the polyethylene. Nevertheless, it remains true that the purchasers of the goods in issue do not see the binding as an end in itself. They do not buy the goods in issue simply to bind a substrate. They want to afford protection to that substrate. The polyethylene plays a useful binding role, but it is only accessory to the main protective function of the goods in issue.

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 5, 2001
Date of Decision: September 11, 2001

Tribunal Members: James A. Ogilvy, Presiding Member
Peter F. Thalheimer, Member
Zdenek Kvarda, Member

Counsel for the Tribunal: Philippe Cellard

Clerk of the Tribunal: Margaret Fisher

Appearances: Barry P. Korchmar, for the appellant
Elizabeth Richards, for the respondent



Appeal No. AP-2000-018

TRANSILWRAP OF CANADA, LTD.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

TRIBUNAL: JAMES A. OGILVY, Presiding Member
PETER F. THALHEIMER, Member
ZDENEK KVARDA, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ from decisions of the Commissioner of the Canada Customs and Revenue Agency made under section 63 of the Act on March 1, 2000. The goods in issue are plastic film, made by lamination of polyethylene terephthalate (PET) and polyethylene, which are used as protective film for items such as menus and schedules. They were imported between February 16, 1994, and January 17, 1996. The first issue in this appeal is whether the goods are properly classified under tariff item No. 3920.10.00 of Schedule I of the *Customs Tariff*² as film of polymers of ethylene, as determined by the respondent, or should be classified under tariff item No. 3920.62.00 as film of polyethylene terephthalate, as claimed by the appellant. Should the appellant's position prevail with respect to the first issue, the second issue would be whether the goods in issue qualify for the benefits of Code 7934.

The relevant tariff nomenclature is as follows:

39.20	Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials.
3920.10.00	-Of polymers of ethylene
3920.62.00	--Of polyethylene terephthalate
Code 7934	Goods of tariff item No. ... 3920.62.00 ... excluding ... [p]olyethylene terephthalate film, of a width less than 15 cm.

EVIDENCE

Mr. Dennis Cline, Marketing Manager, Transilwrap of Canada, Ltd., testified on behalf of the appellant. Mr. Cline testified that the goods in issue are PET film, with an adhesive coating of polyethylene. The goods in issue are typically imported in large rolls, weighing approximately 460 kg. The typical width is approximately 150 cm. When the goods in issue are received at the appellant's warehouse, they are slit and rolled into a smaller size to meet the end user's handling needs and to fit the equipment.

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. R.S.C. 1985 (3d Supp.), c. 41.

Mr. Cline testified that the goods in issue are used for covering papers, book covers, maps, documents, posters, menus and temporary cards. According to Mr. Cline, the main function of the goods in issue is to protect the substrate (e.g. menus) over which it is laminated. The goods in issue provide resistance to heat, scratches, scuffs and tears. Mr. Cline testified that it is the PET that provides protection to the substrate and the polyethylene coating that permits the PET to adhere to the substrate.

Dr. Zhi Yuan (Wayne) Wang, Professor at the Department of Chemistry of Carleton University, also testified on behalf of the appellant. Qualified as an expert witness in polymer chemistry, Dr. Wang testified that it is the PET that provides the important critical properties of the final product, i.e. toughness, and heat and scratch resistance.

Mr. Brian Finch, Chief, Textile and Polymer Products Section, Laboratory and Scientific Services Directorate, Canada Customs and Revenue Agency, testified on behalf of the respondent. Qualified as an expert witness in polymer chemistry, Mr. Finch discussed the results of comparisons made between the PET and the polyethylene³ with respect to different film properties. Based on scientific literature, he testified that the PET is harder and has a higher tensile strength, tear strength prior to tear propagation, and melt temperature than does the polyethylene. He also testified that the polyethylene has higher elongation, tear strength after tear propagation, and resistance to impact than does the PET.⁴ Mr. Finch indicated that both the PET and the polyethylene have a very high water resistance.

Mr. Finch stated that the PET, because it is harder, would provide better protection against abrasion, scratches and scuffs. The high melt temperature of the PET also assists in preventing it from being damaged by heat (e.g. coffee cups). Mr. Finch acknowledged that water would not get through the PET to the polyethylene.

Mr. Finch testified that the polyethylene contributed to the central characteristics of the goods in issue. He testified that the polyethylene allows the goods in issue to be bonded to the substrate that they will protect. Mr. Finch also testified that the thickness of the polyethylene in the overall product would contribute to the stiffness of the product. Mr. Finch further indicated that the polyethylene is more resistant to sets⁵ than is the PET.

ARGUMENT

The appellant submitted that the essential character of the goods in issue is the protection of a substrate against impact, abrasion, scratches, scuffs and heat. The appellant argued that it is the PET, the first layer, that comes in direct contact with outside influences and that gives the goods in issue their protective character. The polyethylene only serves to affix the goods in issue to the substrate that they are protecting. Therefore, according to the appellant, the goods in issue should be classified under tariff item No. 3920.62.00 as film of PET. Given that the goods are more than 15 cm in width, they should also qualify for the benefits of Code 7934.

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3. Mr. Finch indicated that what has been referred to as polyethylene is in fact, in some cases, an ethylene vinyl acetate copolymer and, in other cases, an ethylene acrylic ester copolymer. Given that it has not been suggested that this distinction should have any impact on this appeal, the term “polyethylene” will be used in these reasons for decision.
 4. The test referred to in connection with the resistance to impact was not made with film but rather with solid pieces of PET and polyethylene.
 5. “A warp or bend or displacement caused by continued pressure or a continued position”, *The Canadian Oxford Dictionary*, 1998, s.v. “set”.

The respondent submitted that weight should be the factor relied upon to determine the essential character of the goods in issue. According to the respondent, weight is the fairest, most objective and most universally recognized means of determining the essential character of the goods in issue. To support its position, the respondent referred to instances in Chapter 39 of Schedule I of the *Customs Tariff*, which deals with plastics and articles thereof, where weight is specifically relied upon to effect classification.⁶

The respondent also submitted that the fact that the polyethylene contributes significantly to the nature of the goods in issue also militates in favour of classifying the goods in issue in subheading No. 3920.10 as film of polymers of ethylene. According to the respondent, in addition to acting as an adhesive, the polyethylene contributes to the tear resistance, stain resistance, thickness, stiffness and durability of the goods in issue.

The respondent acknowledged that, if the Tribunal determined that the goods in issue should be classified under tariff item No. 3920.62.00, then Code 7934 would apply.

DECISION

Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*.⁷ Section 11 provides, in part, that, in interpreting the headings and the subheadings in Schedule I, regard shall be had to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.⁸ In the present appeal, the parties agree that the goods in issue are properly classified in heading No. 39.20 as film of plastics. The disagreement lies at the subheading level. Rule 6 of the General Rules provides, in part, that the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and, *mutatis mutandis*, to Rules 2 to 5 of the General Rules.

The goods in issue, being made by lamination of ethylene and PET, are, *prima facie*, classifiable both in subheading No. 3920.10 as film of polymers of ethylene and in subheading No. 3920.62 as film of PET. Rule 3 (b) of the General Rules, as adapted to deal with classification at the subheading level, provides that, where goods are *prima facie* classifiable in two subheadings and those two subheadings each refer to part only of the materials contained in composite goods, the goods shall be classified as if they consisted of the material which gives them their essential character, insofar as this criterion is applicable. The Explanatory Notes to Rule 3 (b) provide that the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Two factors have been proposed to determine which material gives the goods in issue their essential character: weight and the role of a constituent material in relation to the use of the goods. The respondent submitted that weight is the fairest and most objective means of determining the essential character of the goods in issue. However, in the Tribunal's view, that weight can be considered an objective measure is not sufficient for it to be the determining factor in the classification of goods. It must also have an impact on the essential character of the goods. In the present appeal, the respondent has not demonstrated, nor can the

6. The respondent gave as an example Note 2 (d) to Chapter 39, which provides, in part, that solutions consisting of any of the products specified in heading Nos. 39.01 to 39.13 in volatile organic solvents when the weight of the solvent exceeds 50% of the weight of the solution are excluded from Chapter 39.

7. *Supra* note 2, Schedule I [hereinafter General Rules].

8. Customs Co-operation Council, 1st ed., Brussels, 1987 [hereinafter Explanatory Notes].

Tribunal find, such an impact. The respondent has not demonstrated that the material predominant by weight confers to the goods in issue their essential character. The fact that weight is sometimes used as a threshold for classification in Chapter 39 of Schedule I of the *Customs Tariff* does not mean that weight plays a crucial role for all goods classified in that chapter. As indicated in the Explanatory Notes to Rule 3 (b), the factor that determines essential character will vary from one kind of goods to another.

In the Tribunal's view, in the present appeal, the factor that determines essential character is the role of a constituent material in relation to the use of the goods in issue. There is a clear nexus between the role of one of the constituent materials in relation to the use of the goods in issue and the essential character of those goods. In the Tribunal's view, the essential character of the goods in issue is their protective nature. The use of those goods is the protection of a substrate such as menus. The PET has a much more important role in that respect than the polyethylene.

The substrate to be protected will be laminated to the goods in issue. Once this is done, there is no question that it is the PET that will first come in contact with whatever may fall or be put on the laminated product. Dr. Wong testified, and Mr. Finch acknowledged, that the PET protects the substrate against tears, abrasion, scratches, scuffs, stains and heat. Because of its low water absorbency, the PET also protects the substrate against liquid spillage.

The Tribunal accepts that film of polyethylene, by itself, would also protect a product against liquids. However, with respect to the goods in issue, the polyethylene would rarely, if ever, play that role. Indeed, as acknowledged by Mr. Finch, the water would never pass the first line defence, made up of the PET, to reach the polyethylene.

With regard to the other hazards identified, it is the Tribunal's view that the polyethylene would play only a minor protective role. Because of the higher tear strength after tear propagation, it may be that the polyethylene would prevent a bigger tear once a laminated product had been torn. The polyethylene may also provide better resistance to sets. However, such a protective role is clearly limited in comparison with that of the PET. As for the higher resistance to impact provided by a solid piece of polyethylene as compared to a solid piece of PET, this does not suffice to reverse the Tribunal's conclusion that, essentially, it is the PET that provides for the protection of the substrate.

In the Tribunal's view, the main function of the polyethylene is to permit the binding of the PET to the substrate that it will protect. The goods in issue would not be the same were it not for the polyethylene. Nevertheless, it remains true that the purchasers of the goods in issue do not view the binding as an end in itself. They do not buy the goods in issue simply to bind a substrate. They want to afford protection to that substrate. The polyethylene plays a useful binding role, but it is only accessory to the main protective function of the goods in issue. Similarly, while the amount of polyethylene used may impact the thickness and stiffness of the laminated product, this remains accessory to the protection afforded to the substrate.

Consequently, the Tribunal determines that it is the PET that gives the goods in issue their essential character. Pursuant to Rule 3 (b) of the General Rules, the goods in issue should therefore be classified under subheading No. 3920.62 as film of polyethylene terephthalate, more precisely, under tariff item No. 3920.62.00. Given that the goods in issue are more than 15 cm in width, they should also qualify for the benefits of Code 7934.

For the above reasons, the appeal is allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Peter F. Thalheimer
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Member

Zdenek Kvarda
Zdenek Kvarda
Member