CANADIAN INTERNATIONAL TRADE TRIBUNAL

TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, June 13, 2002

Appeal No. AP-2001-017

IN THE MATTER OF an appeal heard on February 11, 2002, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the Canada Customs and Revenue Agency dated May 4, 2001, with respect to a request for redetermination under subsection 63(3) of the former *Customs Act* and subsection 60(4) of the current *Customs Act*.

BETWEEN

ACTIVE MARBLE & TILE LTD. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL

TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-2001-017

ACTIVE MARBLE & TILE 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 a decision of the Commissioner of the Canada Customs and Revenue Agency. The issue in this appeal is whether the marble and granite tiles imported by the appellant on August 21, 1997, and June 24, 1998, are properly classified under tariff item No. 6802.91.00 as "Worked monumental or building stone . . . Other: . . . Marble, travertine and alabaster" and tariff item No. 6802.93.00 as "Worked monumental or building stone . . . Other: . . . Granite", as determined by the respondent, or should be classified under tariff item No. 6802.21.00 as "Worked monumental or building stone . . . Other monumental or building stone and articles thereof, simply cut or sawn, with a flat or even surface: . . . Marble, travertine and alabaster" and tariff item No. 6802.23.00 as "Worked monumental or building stone . . . Other monumental or building stone and articles thereof, simply cut or sawn, with a flat or even surface: . . .Granite", as claimed by the appellant.

HELD: The appeal is dismissed. The granite and marble tiles in issue are not "simply cut or sawn". It is clear from the evidence that the edges of the tiles are cut and sawn and further processed by bevelling. The tiles in issue are properly classified under tariff item Nos. 6802.91.00 and 6802.93.00, since they are more than "simply cut or sawn", and, therefore, cannot be classified under tariff item Nos. 6802.21.00 and 6802.23.00.

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 11, 2002
Date of Decision: June 13, 2002

Tribunal Member: Ellen Fry, Presiding Member

Counsel for the Tribunal: Lynne M. Soublière

Clerk of the Tribunal: Margaret Fisher

Appearances: Michael A. Sherbo, for the appellant
Derek Rasmussen, for the respondent

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL

TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-2001-017

ACTIVE MARBLE & TILE LTD. **Appellant**

AND

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

TRIBUNAL: ELLEN FRY, Presiding Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] from a decision of the Commissioner of the Canada Customs and Revenue Agency. The issue in this appeal is whether the marble and granite tiles imported by the appellant on August 21, 1997, and June 24, 1998, are properly classified under tariff item No. 6802.91.00 of Schedule I to the *Customs Tariff*[2] as "Worked monumental or building stone . . . Other: . . . Marble, travertine and alabaster" and tariff item No. 6802.93.00 as "Worked monumental or building stone . . . Other: . . . Granite", as determined by the respondent, or should be classified under tariff item No. 6802.21.00 as "Worked monumental or building stone . . . Other monumental or building stone and articles thereof, simply cut or sawn, with a flat or even surface: . . . Marble, travertine and alabaster" and tariff item No. 6802.23.00 as "Worked monumental or building stone . . . Other monumental or building stone and articles thereof, simply cut or sawn, with a flat or even surface: . . .Granite", as claimed by the appellant.

On November 27, 1998, the respondent determined, under subsection 60(3) of the former Act[3] and subsection 59(1) of the current Act, that the tiles in issue were properly classified under tariff item Nos. 6802.91.00 and 6802.93.00. On May 4, 2001, the respondent redetermined, under subsection 63(3) of the former Act and subsection 60(4) of the current Act, that the tiles in issue were properly classified under tariff item Nos. 6802.91.00 and 6802.93.00. This final determination of the respondent was appealed to the Tribunal by notice of appeal dated July 17, 2001.

The relevant tariff nomenclature is as follows:

68.02 Worked monumental or building stone (except slate) and articles thereof, other than goods of heading No. 68.01; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing; artificially coloured granules, chippings and powder, of natural stone (including slate).

-Other monumental or building stone and articles thereof, simply cut or sawn, with a flat or even surface:

6802.21.00 --Marble, travertine and alabaster

6802.23.00 --Granite

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. R.S.C. 1985 (3d Supp.), c. 41.
3. Amendments were made to the Act in 1998; however, the tariff items at issue were unaffected by these amendments.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

-Other:

6802.91.00 --Marble, travertine and alabaster

6802.93.00 --Granite

EVIDENCE

The goods in issue consist of 15 different types of tiles, which are made of marble or granite, measuring 12 in. x 12 in., and which have one smooth even surface. All the tiles in issue are 3/8 in. thick, except for two types of granite tiles that are 1/2 in. thick. These tiles were imported on August 21, 1997, and June 24, 1998, and the appellant is seeking a reclassification of all 15 types of tiles. For the purposes of the hearing, the appellant filed 3 tiles as exhibits with the Tribunal, of which 2 were referred to in oral evidence: Exhibit A-1 is a marble tile, and Exhibit A-2 is a granite tile.

Mr. Marcel Golemme, General Manager of Active Marble & Tile Ltd., testified on behalf of the appellant. He stated that he had been working in the marble and tile industry since 1989 and that this had been a family business since 1966. Mr. Golemme did not appear as an expert witness, but his evidence indicated that he had considerable experience in this industry.

Mr. Golemme testified that, of the 15 different types of tiles that were imported, only the type of marble tiles filed as Exhibit A-1 was part of the original shipment imported into Canada. He explained that the remaining 14 types had since been sold. The appellant no longer has these types of tiles in inventory and was, therefore, unable to obtain samples for the hearing. Mr. Golemme testified that he saw the 14 different types of imported marble and granite tiles and that, other than their colour or the formation of the stone, the processing and appearance of the tiles were the same as those of the tiles filed as exhibits with the Tribunal. He also testified that the various imported marble tiles had the same characteristics as those of Exhibit A-1 and that the imported granite tiles had the same characteristics as those of Exhibit A-2. Mr. Golemme also explained that the only difference among the granite tiles was the thickness of two types of tiles, which are 1/2 in. thick instead of the standard 3/8 in., as indicated in the appellant's invoices filed by the respondent.

In his testimony, Mr. Golemme described the tile-making process. He explained that the marble and granite stone is extracted from the quarry and cut into small and large blocks. Mr. Golemme stated that only the smaller blocks are used for tile material and that these smaller blocks are then cut into slices a little thicker than the actual tile. The marble or granite slices are then polished or honed. Mr. Golemme explained that the honing process is similar to polishing, but that the end result is a tile that has a satin or patina finish, as opposed to the shiny appearance of the tiles in issue. He indicated that a tile is either polished or honed, not both. He explained that the polishing procedure is different for marble and granite tiles because granite is denser than marble and more cutting and polishing are required. Mr. Golemme indicated that, although granite may require more processing, the same polishing and honing procedures are followed for both types of stone.

After the polishing or honing, the edges of the tiles are then cut to the length and width of a standard tile: 12 in. x 12 in. Mr. Golemme indicated that the tiles go through a measuring process to ensure that they are actually 12 in. x 12 in. and not merely close to these dimensions.

Mr. Golemme then explained that the final process is the bevelling, or chamfering, of all four edges of the tile. He explained that the bevelling is a grinding process that cleans off the cut of the tile and puts an angled mitre edge on all four sides of the tile, which takes away the sharpness of the edge. Mr. Golemme stated that all the tiles in issue have bevelled edges.

In response to a question from the Tribunal on what constitutes a "simply cut tile", Mr. Golemme indicated that a "simply cut tile" is one that is merely cut in half, with nothing further done to it. He further stated that, in his view, there was nothing simple about the marble and granite tiles in issue and that, if a tile was cut, polished and bevelled on the edges and fitted for a specific use, it was not a tile that was simply cut. When asked if the marble tile filed as Exhibit A-1 was simply cut, Mr. Golemme stated that it was not. He also explained that the appellant did not perform any work on the tiles prior to selling them and that the tiles were sold as is, except, of course, when a tile would be cut to fit a particular area where it was being installed.

In response to another question from the Tribunal, Mr. Golemme described what would constitute a crudely sawn slab of marble or granite material. He explained that a marble or granite block would be cut into slices, similar to a loaf of bread, in order to obtain slabs of marble or granite. Mr. Golemme stated that these slabs would be polished on one side, but that the edges would have nothing done to them and would be in their original state. These edges, according to Mr. Golemme, would be best described as crudely sawn edges.

ARGUMENT

The appellant submitted that both parties agree that the tiles in issue should be classified in heading No. 68.02. It further submitted that they should be classified in the second subheading of heading No. 68.02 ("Other monumental or building stone and articles thereof, simply cut or sawn, with a flat or even surface"). The appellant argued that the tiles in issue are simply cut or sawn and are best classified in this subheading and, more particularly, under tariff item Nos. 6802.21.00 and 6802.23.00.

In its oral submissions, the appellant reviewed the wording of heading No. 68.02 and the subheadings and referred the Tribunal to the definitions of the words "articles thereof", "simply cut" and "worked". It stated that, since there was no dispute between the parties regarding the words "flat or even surface", it would not focus its argument on these words.

The appellant first referred to the definition of the term "article". It stated that the ordinary meaning of the word "article" is "any finished or semi-finished product which is not considered to be a material."[4] The appellant also referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[5] to heading No. 68.02, which refer to "[a]rticles such as slabs, tiles, etc." to advance the argument that the tiles in issue are "articles", as prescribed in the second subheading of heading No. 68.02.

The appellant then explained what was meant, in its view, by the term "simply cut" as found in the second subheading of heading No. 68.02. It referred to Mr. Golemme's testimony and stated that his opinion was a valid one in the context of the industry, but that it is the meaning of "simply cut", as provided in the Explanatory Notes, that is at issue in this case.

The appellant referred to the dictionary meaning of "simply", which is defined as "[i]n a plain and unadorning way".[6] According to the appellant, a plain and unadorning cut is when a tile is cut into a square or rectangular shape. The appellant provided examples of a number of similar phrases from the tariff where the expression "simply cut to a rectangular or square shape" was used. It referred to Note 7 of the

4. Customs Notice N-278, "Administrative Policy Tariff Item No. 9948.00.00", Department of National Revenue, 27 April 1999, at 2.
5. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter Explanatory Notes].
6. *American Heritage Dictionary*, 3d ed., *s.v.* "simply".

Explanatory Notes to Chapter 59 and to Note 9 of the Explanatory Notes to Chapter 40 where a product is described as "simply cut to rectangular (including square) shape". Based on these references, the appellant argued that "simply cut" means cut into a rectangular or square shape. It also argued that "simply cut" should have the same meaning throughout the *Customs Tariff*. The appellant, therefore, concluded that "simply cut" at the second subheading of heading No. 68.02 should also mean "simply cut into a rectangular or square shape". It also argued that procedures such as polishing or bevelling are not relevant to the definition of what constitutes a simply cut tile.

The appellant stated that the word "worked" in heading No. 68.02 indicates a product that has been polished and, if the product is not "worked", it would be classified in Chapter 25. The appellant also argued that the tile had to be "worked" and, therefore, polished, in order for it to be classified in heading No. 68.02. In support of this argument, the appellant referred to the Tribunal's decision in *Importation/Exportation Y&Y* v. *DMNRCE*,[7] in which the goods in question were 5 ft. x 7 ft. x 3/4 in. rectangular marble slabs that had been polished and that the Tribunal ruled should be classified under tariff item No. 6802.21.00. The appellant distinguished between the goods in question in *Y&Y* and the goods in issue. According to the appellant, both goods were cut into rectangular or square shapes and were polished, but only the goods in issue have bevelled edges. The appellant also referred to a U.S. Customs ruling[8] in which marble slabs were classified as slabs instead of tiles because edge working, such as bevelling, had not been carried out on the slabs. It argued that this U.S. Customs ruling was not valid in Canada and that it contradicted the Tribunal's decision in *Y&Y*.

The respondent submitted that the appellant bears the burden of proving that the classification determined by the respondent was wrong. He referred to the Tribunal's decision in *Unicare Medical Products* v. *DMNRCE*,[9] where the appeals were not allowed because the appellant had failed to discharge its onus of proof. The respondent also argued that the appellant must meet that burden of proof by providing the Tribunal with the required evidence to prove that the classification of the goods in issue was wrong. He referred to Mr. Golemme's statement that he did not believe that the tiles presented as exhibits were simply cut and, consequently, he argued that, based on the evidence, the tiles in issue cannot be classified as claimed by the appellant. The respondent also discussed the Tribunal's decision in *Loan To Tran* v. *DMNRCE*,[10] a case in which an appeal was dismissed because the appellant had not provided the Tribunal with an example of the goods in question and the Tribunal ruled that the evidence was insufficient.

The respondent submitted that the tiles in issue are properly classified in the second subheading of heading No. 68.02. He argued that the tiles must be classified in this subheading because they are not simply cut or sawn, due to the fact that they are cut to a very specific dimension, have bevelled edges, are polished, and are specifically cut or sawn into a final product, ready to be sold. The respondent distinguished between the tiles in issue, which are specifically cut or sawn into final products, and the slabs of marble and granite in *Y&Y*, which were simply or crudely sawn, with a polished flat surface on one side. He referred to a statement by the Tribunal in *Y&Y* that "the Tribunal would have had no difficulty in classifying them under tariff item No. 6802.91.00 because they would not simply be cut or sawn, but, on the contrary, would be specifically cut or sawn into final products."[11] The respondent further referred to Mr. Golemme's testimony in which he indicated that it was very important that the tile be cut to exact dimensions. The respondent also stated that Mr. Golemme explained that all the tiles have bevelled edges, that the bevelling was a finishing

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7. (12 September 1991), AP-90-081 (CITT) [hereinafter *Y&Y*].
8. (17 September 1992), HQ 951047 (USCS).
9. (21 June 1990), 2437, 2438, 2485, 2591, 2582 (CITT).
10. (7 August 1990), 2885 (CITT).
11. *Supra*, note 7 at 3.

step and that the appellant did not do anything further to the tiles before they were sold to customers. He argued that, consequently, Mr. Golemme's evidence supports his contention that the bevelling of the edges takes the tiles beyond being "simply cut or sawn". Therefore, since the tiles are specifically cut or sawn into final products and are ready to be sold, they cannot be classified as tiles that are "simply cut or sawn".

The respondent also referred to the U.S. Customs ruling referred to by the appellant. Acknowledging that the Tribunal is not bound by this ruling, he submitted that it was, nonetheless, instructive because of its discussion on the bevelling of tiles.

In response to the appellant's argument that "simply cut" meant cut into a square or rectangular shape, the respondent submitted that the fact that tiles are square or rectangular is not a determining criterion as to whether they are "simply cut or sawn". According to the respondent, the determining criterion is the fact that the tiles are final products, ready for sale, and that they are specifically cut to specific dimensions of 12 in. x 12 in. and bevelled at the time at which they are imported.

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*.[12] Section 11 provides, in part, that, in interpreting the headings and subheadings, regard shall be had to the Explanatory Notes.

The issue in this appeal is whether the marble and granite tiles imported by the appellant are properly classified under tariff item No. 6802.91.00 as "Worked monumental or building stone . . . Other: . . . Marble, travertine and alabaster" and tariff item No. 6802.93.00 as "Worked monumental or building stone . . . Other: . . . Granite", as determined by the respondent, or should be classified under tariff item No. 6802.21.00 as "Worked monumental or building stone . . . Other monumental or building stone and articles thereof, simply cut or sawn, with a flat or even surface: . . . Marble, travertine and alabaster" and tariff item No. 6802.23.00 as "Worked monumental or building stone . . . Other monumental or building stone and articles thereof, simply cut or sawn, with a flat or even surface: . . .Granite", as claimed by the appellant. In order to determine the classification of the tiles in issue, the Tribunal must decide whether they are "simply cut or sawn".

During the hearing, there was some discussion by the parties surrounding the marble and granite tiles filed as exhibits because only the marble tiles filed as Exhibit A-1 were part of the original shipment imported into Canada and subject to this appeal. However, the Tribunal accepts Mr. Golemme's evidence that he personally saw all 15 types of tiles and that the physical characteristics and processing techniques of those tiles are the same as those of the marble and granite tiles that were filed with the Tribunal as Exhibits A-1 and A-2.

The subheading proposed by the appellant refers to two distinct processes of working a tile: first, the work conducted on the cut edges of the tiles ("simply cut or sawn"), which, in this instance, is the bevelling, and, second, the work done on the surface of the tile ("flat or even surface"), such as polishing or honing. In this case, the effect on the tariff classification of the work done on the surface of the tile is not at issue. The sole issue is to determine whether the work done on the cut edges of the tiles puts the tiles in the category of "simply cut or sawn". As heading No. 68.02 and its second subheading do not provide any guidance on how to interpret "simply cut or sawn", the Tribunal must look to other sources for assistance.

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12. *Supra*, note 2, Schedule I.

The Tribunal considered the examples of similar phrases from the *Customs Tariff*, as provided by the appellant, but did not consider that these were helpful, given that these phrases were used in very different contexts from the contexts in heading No. 68.02. It also was not persuaded by the appellant's argument that "simply cut or sawn" meant cut into a square or rectangular shape.

The Tribunal accepts Mr. Golemme's opinion that, from an industry perspective and based on his experience in the industry, tiles are not "simply cut or sawn" if they have undergone further processing after being cut and that bevelling is a kind of further processing. Based on this opinion, the tiles in issue are not "simply cut or sawn" because, after being cut, they have been further processed by being bevelled. The Tribunal notes that Mr. Golemme's opinion was not contradicted by any other evidence. Further, this conclusion is consistent with the ordinary meaning of "simply", as found in the dictionary, "in a plain and unadorning way".

This conclusion is also consistent with the Tribunal's view in *Y&Y*. As noted by the appellant, that case dealt with the issue of whether polishing slabs of stone would make them ineligible for classification in the second subheading of heading No. 68.02. The Tribunal concluded in that case that, if the work done on the surface of the tile consisted of polishing, the slabs could still be classified in the second subheading of heading No. 68.02. It is also noteworthy that the Tribunal did not comment on the impact of bevelling on the tariff classification in *Y&Y*. In fact, in the present appeal, Mr. Golemme indicated that, from the description of the goods in question in *Y&Y*, it appears that the slabs had not been bevelled.

The Tribunal also made an *obiter* comment in *Y&Y* to the effect that classification under tariff item No. 6802.91.00 would have been the proper classification if the stone had been specifically cut or sawn into final products. It does not agree with the respondent's submission that *Y&Y* identified "specifically cut or sawn into final products" as a complete test for determining whether a tile fell into the second subheading of heading No. 68.02 from the perspective of whether it was "simply cut or sawn". The Tribunal did not consider what would be a complete test for this purpose; it simply commented on the impact on tariff classification of the likely next step in processing the specific stone in question. The Tribunal merely indicated that, if that kind of stone had been specifically cut into a final product, that would have meant that it could not be classified in the second subheading of heading No. 68.02.

Although both the respondent and the appellant referred to the U.S. Customs ruling in their oral submissions, the Tribunal does not rely on that ruling, as it is not bound by that decision.

For the foregoing reasons, it is the Tribunal's view that the tiles in issue are properly classified under tariff item Nos. 6802.91.00 and 6802.93.00. Consequently, the appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member