



Ottawa, Tuesday, July 15, 2003

**Appeal No. AP-2002-022**

IN THE MATTER OF an appeal heard on December 9, 2002,  
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 April 4 and  
June 13, 2002, with respect to a request for redetermination made  
under section 60 of the *Customs Act*.

**BETWEEN**

**POWER TWINS PERFORMANCE PARTS LTD.**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary



## UNOFFICIAL SUMMARY

**Appeal No. AP-2002-022**

**POWER TWINS PERFORMANCE PARTS LTD.**

**Appellant**

**AND**

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

**Respondent**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), dated August 25, 1999, and January 25, 2000, pursuant to subsection 60(4) of the *Act*. The issue in this appeal is whether the plastic face shields that are designed for use with full-face motorcycle and snowmobile helmets imported by Power Twins Performance Parts Ltd. (Power Twins) are properly classified in heading No. 39.26 of the schedule to the *Customs Tariff*<sup>2</sup> as “other articles of plastics”, as determined by the Commissioner, or should be classified in heading No. 90.04 as spectacles, goggles and the like, corrective, protective or other, as claimed by Power Twins.

**HELD:** The appeal is dismissed.

The Tribunal finds, as mentioned in the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 90.04, that one of the key characteristics of both spectacles and goggles is that they are designed to cover the eyes. Based on the evidence, the Tribunal concludes that the goods in issue cover not just the eyes but, in fact, most of the face. Therefore, the goods in issue are not like spectacles or goggles and are not described by heading No. 90.04. However, they can be described as “articles of plastics” and are consequently classified in heading No. 39.26 according to Rules 1 and 3 (b) of the *General Rules for the Interpretation of the Harmonized System*.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: December 9, 2002  
Date of Decision: July 15, 2003

Tribunal Member: James A. Ogilvy, Presiding Member

Counsel for the Tribunal: John Dodsworth

Clerk of the Tribunal: Margaret Fisher

Appearances: Jeffrey Goernert and Marco Ouellet, for the appellant  
Susanne Pereira, for the respondent

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].  
2. S.C. 1997, c. 36.



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TRIBUNAL: JAMES A. OGILVY, Presiding Member

**REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>3</sup> from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), dated August 25, 1999, and January 25, 2000, pursuant to subsection 60(4) of the *Act*. The issue in this appeal is whether the plastic face shields that are designed for use with full-face motorcycle and snowmobile helmets imported by Power Twins Performance Parts Ltd. (Power Twins) are properly classified in heading No. 39.26 of the schedule to the *Customs Tariff*<sup>4</sup> as “other articles of plastics”, as determined by the Commissioner, or should be classified in heading No. 90.04 as spectacles, goggles and the like, corrective, protective or other, as claimed by Power Twins. In his decision, the Commissioner further determined that the goods in issue were excluded from classification in heading No. 90.04 by the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>5</sup> to that heading, which exclude “articles designed to cover or protect most of the face (e.g., visors for welders, screens and eye-shades for motor-cyclists; face masks for underwater swimming).”

The relevant portions of the *Customs Tariff* are as follows:

39.26	Other articles of plastics and articles of other materials of heading Nos. 39.01 to 39.14.
3926.10.00	-Office or school supplies
3926.20	-Articles of apparel and clothing accessories (including gloves)
3926.30.00	-Fittings for furniture, coachwork or the like
3926.40	-Statuettes and other ornamental articles
3926.90	-Other
3926.90.90	---Other
90.04	Spectacles, goggles and the like, corrective, protective or other.
9004.10.00	-Sunglasses
9004.90	-Other

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

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

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

- 9004.90.10 ---Prismatic eyeglasses for reading; safety goggles and safety spectacles, designed for use by workers employed in hazardous work
- 9004.90.90 ---Other

The *Explanatory Notes* to heading No. 90.04 are, in part, as follows:

This heading covers articles (usually comprising a frame or support with lenses or shields of glass or other material), for use in front of the eyes, generally intended either to correct certain defects of vision or to protect the eyes against dust, smoke, gas, etc., or dazzle; it also covers spectacles for viewing stereoscopic (three-dimensional) pictures.

Spectacles, pince-nez, lorgnettes, monocles, etc., used for correcting vision, generally have optically worked lenses.

Protective spectacles and goggles generally consist of plane or curved discs of ordinary glass (whether or not optically worked, or tinted), of safety glass, of plastics (polymethyl methacrylate, polystyrene, etc.), of mica, or of metal (wire gauze, or slotted plates). These articles include sunglasses, spectacles used for mountaineering or winter sports, goggles for airmen, motorists, motor-cyclists, chemists, welders, foundry workers, moulders, sand-blast machine operators, electricians, roadmen, quarrymen, etc.

The heading also includes goggles for underwater use; removable spectacles (e.g., sunglasses) for fitting to other spectacles (generally corrective spectacles) and used either as protective filters or, in some cases, as additional corrective lenses; polarising spectacles fitted with lenses of plastics for viewing three-dimensional films (whether or not with a paperboard frame).

...

As the heading covers **only** those spectacles, etc., designed to cover the eyes, it **excludes** articles designed to cover or protect most of the face (e.g., visors for welders; screens and eye-shades for motor-cyclists; face masks for underwater swimming).

## EVIDENCE

Both parties describe the goods in issue as including two types of plastic shields (non-heated and heated) for full-face motorcycle and snowmobile helmets. The shields are made of two pliable sheets of plastic that are layered to form a double lens and held together by a plastic frame; they are available either tinted or untinted. They come with the fittings needed to mount the goods in issue on the full-face helmets.

Power Twins' witness was Mr. Michael Hahn, President of Export Links Inc. Mr. Hahn testified that full-face helmets are those of which a portion of the helmet covers part of the face and are worn by high-speed motorcyclists and snowmobilers. The shields that attach to such helmets serve as protection for the wearer from dirt and other debris that fly off the track. Mr. Hahn testified that, in contrast to the "full-face" helmet, an "open-face" helmet exposes the entire face. The open-face helmet is worn primarily by riders of street motorcycles. According to Mr. Hahn, the goods in issue protect the eyes, whereas the shield that attaches to open-face helmets covers the entire face and, in contrast to the goods in issue, has no frame.

Mr. Hahn testified regarding the similarities between the goods in issue and goggles worn by motor-cross riders. Both the goods in issue and goggles function to cover and protect the eyes. The goggles fit snugly into the opening of the helmet and cover approximately the same area of the face as the goods in issue. Further, both the goods in issue and motor-cross goggles contain lenses and frames, in contrast to the

shields that are used with open-face helmets. Mr. Hahn explained that, when worn with a helmet, motor-cross goggles rest on the helmet, not the nose and ears, with the strap extending around the outside of the helmet. He stated that both the goods in issue and goggles are supported by the helmet.

## ARGUMENT

Power Twins argued that the goods in issue are classified in heading No. 90.04 according to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*<sup>6</sup> since they are like goggles and, therefore, specifically mentioned in that heading. In this regard, Power Twins submitted that both parties accept that the goods in issue are described as lenses and that the purpose of a lens, by definition, is to protect the eyes and to help the rider see. The full-face helmets for which the goods in issue are designed provide only enough of an opening to permit the rider to have the full range of vision. The outer shell of the helmet and its interior padding cover and protect most of the face. While the goods in issue cover other parts of the face, that coverage is minor and is only incidental to providing the rider a full range of vision. Further, the face coverage provided by the goods in issue is similar to that provided by goggles.

Power Twins noted that the function of the goods in issue, that is protection, is also specifically mentioned in heading No. 90.04. Power Twins argued that heading No. 90.04 “goggles and the like, ... protective” is a more accurate descriptor of shields for full-face helmets and their protective function than is the residual tariff item under heading No. 39.26. The goods in issue are like goggles because they incorporate a lens and are mounted in front of the eyes. Like goggles, they protect the eyes from dust, smoke and dazzle.

Power Twins disputed the Commissioner’s position that the goods in issue are not like goggles since they are not self-supporting but, instead, are attached to the helmet. Power Twins pointed to evidence indicating that the goggles do not rest on the nose and ears but on the helmet itself. In any case, Power Twins argued, it is not a requirement of heading No. 90.04 that the goods in issue rest on a portion of the face. Further, Power Twins disputed the Commissioner’s allegation that the goods in issue are not goggles on the grounds that they cover or protect a greater area of the face than do goggles. In this regard, Power Twins referred to evidence of Mr. Hahn, which indicates that the goods in issue and goggles both protect approximately the same area of the face, that is, the eyes.

Power Twins argued that the goods in issue are specifically described in the *Explanatory Notes* to heading No. 90.04, in that they are shields, supported by a frame, for use in front of the eyes, that “protect the eyes against dust, smoke, gas, etc., or dazzle”. It argued that the wording of the French version of heading No. 90.04, “*Lunettes (correctrices, protectrices ou autres) et articles similaires*”, even more specifically describes the goods in issue. With respect to the Commissioner’s position that the goods in issue are excluded from heading No. 90.04 by virtue of the *Explanatory Notes* to that heading, Power Twins argued that the goods in issue do not cover most of the face.

Power Twins disputed the Commissioner’s classification of the goods in issue as “other articles of plastics”, in accordance with Rules 1 and 3 (b) of the *General Rules*. Power Twins argued that the goods in issue are specifically excluded from heading No. 39.26 by Note 2 to Chapter 39, which states: “This Chapter does not cover . . . (r) Articles of Chapter 90”. It argued that heading No. 90.04 is more descriptive of the goods in issue than is the phrase “articles of plastics”. It disputed that the goods in issue are composite goods and that heading No. 39.26 fully describes the goods in issue. Further, Power Twins argued that, even

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6. R.S.C. 1985 (3d Supp.), c. 41 [*General Rules*].

if Rule 3 (b) were applied, the goods in issue should be classified in heading No. 90.04 since their role as a protective device gives them their essential character.

The Commissioner argued that the goods in issue are not classified in heading No. 90.04, given that they fall within the exclusion contained in the *Explanatory Notes* to that heading. He argued that the goods in issue cover or protect most of the face and are therefore excluded from heading No. 90.04 by the specific words of the *Explanatory Notes*. The Commissioner argued that the goods in issue are analogous to a screen or an eyeshade for motorcyclists, both of which are specifically excluded by the *Explanatory Notes*. The goods in issue cover more of the face than do some of the articles, such as eyeshades for motorcyclists, which are specifically excluded by the *Explanatory Notes*.

According to the Commissioner, whether or not the goods in issue are designed to protect only the eyes is not determinative of the issue since the *Explanatory Notes* to heading No. 90.04 also exclude articles that **cover** most of the face. The Commissioner argued that, according to the evidence, the goods in issue cover more than half the face, including the eyes, a portion of the forehead above the brow, the brow, the brow bone, the eye area, the eyelid area, under the eye, the temples, the cheek bone and the entire nose. Parts of the face covered by the goods in issue must be taken into account in determining whether they cover most of the face, whether or not the face is already covered by parts of the helmet.

The Commissioner also argued that the goods in issue are not like goggles and spectacles. They differ in several material respects, including the fact that, unlike the goods in issue, goggles are self-supporting and leave the nose exposed.

Since the goods in issue cannot be classified in heading No. 90.04 and in the absence of a heading that otherwise specifically describes the goods in issue, the Commissioner submitted, the goods in issue are classified in heading No. 39.26 in accordance with Rule 1 of the *General Rules* as “articles of plastics”. He argued that the French version of the *Customs Tariff* should be considered only if there is an ambiguity in the English version. Since there is no ambiguity in the English version of heading No. 90.04, the French version need not be invoked.

Given that the goods in issue come with the screws and frame necessary to be mounted on helmets and that the heated model includes wires to perform the heating function, the Commissioner suggested that they might be considered composite goods. According to Rule 3 (b) of the *General Rules*, composite goods are classified according to the material or component that gives the goods in issue their essential character. The Commissioner argued that the plastic gives the goods in issue their essential character.

## DECISION

The Tribunal is directed by section 10 of the *Customs Tariff* to classify the goods in issue in accordance with the *General Rules* and the *Canadian Rules*. Rule 1 of the *General Rules* provides that classification is to be determined according to the terms of the headings and any relative section or chapter notes. In interpreting the headings and subheadings, the Tribunal is directed by section 11 of the *Customs Tariff* to have regard to the *Explanatory Notes*.

In dispute in this appeal is whether the goods in issue are classified in heading No. 39.26, as determined by the Commissioner, or in heading No. 90.04, as claimed by Power Twins.

Heading No. 90.04 covers spectacles, goggles and the like, corrective, protective or other.

In this appeal, the parties have placed great emphasis on the wording of the *Explanatory Notes* to heading No. 90.04. In this case, the Tribunal accepts that the *Explanatory Notes* to that heading are particularly helpful in determining whether the goods in issue are like spectacles and goggles. However, it is worth repeating that, while the Tribunal must have regard to the *Explanatory Notes*, classification is to be determined according to the terms of heading No. 39.26 or 90.04 and any relative section or chapter notes.

In this regard, the composition of the goods in issue – two layers of plastic – is not in dispute. Both parties refer to the goods in issue as a shield or, alternatively, a lens; in either case, the descriptions are consistent with the language of the *Explanatory Notes*. Further, the evidence indicates that the goods in issue have a frame or support, such that their characteristics are consistent with the *Explanatory Notes* in this regard also. The frame surrounding the lens of the goods in issue provides the anchor points that allow attachment to the sides of the helmet. It is clear that the shields are “for use in front of the eyes.” Mr. Hahn stated that they protect against a variety of hazards.

Further, Mr. Hahn’s testimony indicates that the goods in issue are used for protection, not for vision correction. This function is specifically mentioned in heading No. 90.04. Though deviating from the exact wording of the *Explanatory Notes*, the Commissioner agrees on the aspect of protection. He offers the following: “The purpose [of the goods in issue] is to protect the eyes and other parts of the face from dust, dirt, bugs, rain, snow, and other objects or particles which can fly in the rider’s face to block his or her vision.”

Further, General Note (I) of the *Explanatory Notes* to Chapter 90 indicates that the goods listed in that chapter need not be high precision, and the example given is that of “ordinary goggles (heading 90.04)”.

Therefore, the physical and functional characteristics of the goods in issue appear to be consistent with those described in heading No. 90.04, and as elaborated on in the *Explanatory Notes*.

The Commissioner argued that the fact that the goods in issue are anchored on the helmet by screws distinguishes them from spectacles and goggles. Spectacles typically rest on the bridge of the nose and are held in place by arms that extend over the ears. Goggles are typically held in place by a headband or strap that extends around the head. Power Twins testified that goggles for use with full-face helmets are typically worn with the strap extending around the helmet, rather than directly around the user’s head.

In the Tribunal’s view, the *Explanatory Notes* to heading No. 90.04 indicate that the heading embraces, explicitly or implicitly, a broad range of possibilities for holding in place the goods in issue. The list of examples of goods covered includes pince-nez (nose alone), monocles (eye socket), and such items as clip-on sunglasses that do not touch the face at all (“removable spectacles ... for fitting to other spectacles”). One example, a lorgnette, has no device whatsoever for fastening it to the head or face and, in fact, it may not touch the face when in use; a lorgnette is held in the hand. The Tribunal therefore concludes that the means of holding the shield in place in front of the user’s eyes or face is not determinative of whether the goods in issue satisfy the term “and the like”.

The *Explanatory Notes* to heading No. 90.04 confirm the importance to classification in that heading of articles having a key characteristic of both spectacles and goggles, that is, that they are both designed to cover the eyes. The notes include the following:

As the heading covers **only** those spectacles, etc., designed to cover the eyes, it **excludes** articles designed to cover or protect most of the face.

The Tribunal must then address the question of whether the goods in issue are designed to cover the eyes. If they are designed to cover or protect most of the face, they are not described in heading No. 90.04. The commonly accepted meaning of “most” is the majority, that is, more than half. “Most” could be determined in terms of area or in terms of features (eyes, nose, chin, cheeks, etc.). There is difficulty in determining the coverage of the face with reference to either the area of the face or the number of features. The proportion of the total area of the face covered by the goods in issue may differ greatly depending in large part on the manner in which one measures such things as the height of the forehead and the extent of the inclusion of features to the sides (e.g. temples, cheeks). Reference to features is also fraught with difficulties, given that, in addition to the obvious differentiated features (eyes, nose, chin, etc.), each of these can be subdivided repeatedly. In fact, both parties did this in speaking of such features as eyebrows and cheekbones.

Mr. Hahn’s testimony is that the full-face helmet protects “as much of the face as possible, without obscuring vision ... from the bridge of the nose down and from above the eyebrows up and from each side as far back as possible.” He added that what remains unprotected is “[t]he area of the eyes and the immediate areas around the eyes.” The nose below the bridge is covered and protected by a nose guard, which is installed inside the helmet and is visible through the plastic shield. However, it is clearly also covered by the goods in issue and therefore, so is the nose itself. This becomes clear if the removable nose guard is removed from the helmet.

The examples given in the *Explanatory Notes* to heading No. 90.04 of those items that are specifically contemplated to cover most of the face include “screens and eye-shades for motor-cyclists”. The meanings of these terms are not entirely clear. Power Twins appears to accept screens as potentially referring to the shield for the open-face helmet, but not for the full-face helmet, and equates the term “eyeshades” with visors.

However, another example in the list found in the *Explanatory Notes* to heading No. 90.04, “face masks for underwater swimming”, may be more illuminating. Such masks typically cover vertically from the eyes at or above the eyebrows down to below the nose and above the mouth, and laterally from cheekbone to cheekbone. This is virtually the same facial area that is covered by the goods in issue. If this area is considered most of the face in the case of masks for underwater swimming, the same would be true of the goods in issue.<sup>7</sup>

The Tribunal agrees that the goods in issue are designed, with respect to size and shape, to accommodate the rider’s vision needs. This fact, along with the protective value of the goods in issue, establishes that the principal function of the goods in issue is related to the eyes. However, the *Explanatory Notes* to heading No. 90.04 make it clear that not all articles for covering or protecting the eyes are included in that heading.

The Tribunal concludes that, although the measurement of the totality of the face is subject to various interpretations, the goods in issue are designed to cover, and in fact do cover, the majority of the face, i.e. part of the forehead, the eyes, the cheekbones, the cheeks and the nose. The extensions of the shield to the sides also cover parts of the temples and sides of the cheeks. The Tribunal therefore concludes that, on **either** basis of measurement (area or number of facial features), the shield “covers or protects most of the

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7. The *Explanatory Notes* to heading No. 90.04 actually make the following distinction with respect to eye protection for swimming: goggles are included, masks are excluded.



face”. Therefore, the goods in issue are not like spectacles or goggles and are not described by heading No. 90.04.

The Tribunal is of the view that the goods in issue can be described as “articles of plastics”. Although the goods in issue come with mounting apparatus, the Tribunal finds that the description provided in heading No. 39.26 gives the goods in issue their essential character. Consequently, the goods in issue are classified according to Rules 1 and 3 (b) of the *General Rules* in heading No. 39.26.

Therefore, the appeal is dismissed.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member



Ottawa, Monday, July 28, 2003

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REVENUE AGENCY**

**Respondent**

**CORRIGENDUM**

The first sentence of the unofficial summary and the first sentence of the reasons for decision issued by the Canadian International Trade Tribunal on July 15, 2003, should read as follows: "This is an appeal under section 67 of the *Customs Act*<sup>1</sup> from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), dated April 4 and June 13, 2002, pursuant to subsection 60(4) of the *Act*."

By order of the Tribunal,

Michel P. Granger  
Secretary