Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2003-010

Agri-Pack

v.

Commissioner of the Canada Customs and Revenue Agency

Decision and reasons issued Tuesday, November 2, 2004

Canada

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IN THE MATTER OF an appeal heard on June 15, 2004, 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 June 8, 2003, with respect to a decision under section 60 of the *Customs Act*.

BETWEEN

AGRI-PACK **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Richard Lafontaine
Richard Lafontaine
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 15, 2004
Tribunal Members:	Pierre Gosselin, Presiding Member Patricia M. Close, Member Richard Lafontaine, Member
Counsel for the Tribunal:	Reagan Walker
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Dennis A. Wyslobicky, for the appellant Richard Casanova, for the respondent

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STATEMENT OF REASONS

1. This is an appeal pursuant to section 67 of the *Customs Act*[1] from a decision of the Commissioner of the Canada Customs and Revenue Agency (CCRA), dated June 8, 2003, under section 60 regarding the classification of eight kinds of onion bags. Agri-Pack imported the bags on August 26, 2002.

2. There are two issues in the appeal. The first is whether the goods in issue are properly classified under tariff item No. 6305.33.00 of the schedule to the *Customs Tariff*[2] as other sacks and bags, of a kind used for the packing of goods, of polyethylene strip or the like, as determined by the CCRA, or should be classified under tariff item No. 5608.19.90 as other made up nets of man-made textile materials, as claimed by Agri-Pack.

3. The second issue is whether the goods in issue can also be classified under tariff item No. 9903.00.00 as articles for use in combination machinery for bagging or boxing and weighing, or machinery for filling, for use with fresh fruit or vegetables, or for use in machinery for packing fresh fruit or vegetables from the dumper, feed table, bin or hopper stage to the box or bag closing stage, as claimed by Agri-Pack.

FIRST ISSUE

4. The Tribunal will address the first issue before turning to the tariff relief provision[3] associated with the second issue. The relevant tariff nomenclature for the first issue reads as follows:

56.08	. . . made up fishing nets and other made up nets, of textile materials.
	-Of man-made textile materials:
5608.19	--Other
5608.19.90	---Other
63.05	Sacks and bags, of a kind used for the packing of goods.
	-Of man-made textile materials:
6305.33.00	--Other, of polyethylene or polypropylene strip or the like

EVIDENCE ON FIRST ISSUE

5. Samples of bags identical to the goods in issue were filed in evidence as Exhibits A-1 through A-8. Exhibits A-1, A-7 and A-8 were onion bags without labels; Exhibits A-2 through A-6 were onion bags with labels. All the goods in issue were sold to three customers that provided end-use certificates attesting that, after buying the bags from Agri-Pack, they used them to pack fresh onions.

6. In support of its contention that the goods in issue are sacks and bags of a kind used for the packing of goods, Agri-Pack called as a witness its operations manager, Mr. Adrian De Jonge, a 15-year veteran of the vegetable-packing business. He testified that Agri-Pack was a distributor of vegetable bags and that

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. Note 3 to Chapter 99 states the following: "Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin *only after* classification under a tariff item in Chapters 1 to 97 has been determined and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met." (Emphasis added)

80 percent of the onion bag market consisted of 100 growers, packers and integrated grower-packers located in Ontario. Agri-Pack sells 10-lb., 25-lb., 50-lb. and "master" bags (the latter contains 3-lb. and 5-lb. onion bags; the other bags contain loose onions). The 25-lb. and 50-lb. bags are ordinarily labelled for specific customers. The goods in issue are made of a polypropylene weave, in order to provide water resistance and aeration to industry standards. If properly stored, the bags will last indefinitely, but, if placed in direct sunlight, they will break down after three or four months. It is very unlikely that the goods in issue would ever be re-used for any other purpose. Agri-Pack imports and distributes but does not manufacture the goods in issue.

7. The Canada Border Services Agency (CBSA) (formerly the CCRA) called as a witness Mr. Les Allen, a senior analytical chemist with the Textile Section of the CBSA. He testified that he had examined and analyzed all eight types of bags in his laboratory and prepared a report for the CBSA. His conclusion was that they were each made from a piece of open-mesh leno weave fabric that had been folded onto itself and then stitched along two sides, leaving the third side open to form the bag. The fabric itself had been woven from polypropylene strip. As long as the strip is less than 5 mm in width, which it was in each case, it is considered to be a textile material.

ARGUMENT ON FIRST ISSUE

8. Agri-Pack argued that the goods in issue were made up nets of textile materials within the meaning of heading No. 56.08. Agri-Pack parsed the above phrase in an attempt to demonstrate that each element thereof applied to the goods in issue. It contended that, for the purpose of the above heading, "made up" means "[a]ssembled by sewing, gumming or otherwise".[4] The ordinary meaning of "net", as found in *The Canadian Oxford Dictionary*, is "an open-meshed fabric of cord, rope, fibre, etc.",[5] which the CBSA found the goods in issue to be when it described them in its laboratory report as "open mesh bags consist[ing] of **leno weave fabrics**".[6] And "textile" is defined as "any woven fabric",[7] which is again consistent with the CBSA's laboratory report. Therefore, Agri-Pack submitted that, in accordance with Rule 1 of the *General Rules for the Interpretation of the Harmonized System*,[8] the goods in issue should be classified in the above heading. Moreover, the goods cannot be classified in heading No. 63.05, as determined by the CCRA, since they would be excluded by General Note 1 of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[9] to Chapter 63, which states the following: "In particular this sub-Chapter **does not include**: . . . Made up nets of **heading 56.08**."

9. The CBSA contended that the goods in issue could not be classified in heading No. 56.08, as claimed by Agri-Pack, since they were also excluded from that heading by the *Explanatory Notes*. The *Explanatory Notes* to heading No. 56.08 state in part as follows: "Made up nets of this heading are **restricted** to those nets not covered more specifically by other headings of the Nomenclature." The CBSA argued that the goods in issue fit squarely within the text of heading No. 63.05, since they are "[s]acks and bags, of a kind used for the packing of goods", and alluded to the fact that, while containing fresh onions, they are shipped, stored in warehouses and offered for sale in grocery stores, a process that could take weeks. Therefore, under Rule 1 of the *General Rules*, the goods in issue must be classified in this heading. Since the evidence established that the bags were woven from polypropylene strip, under Rule 1 of the

4. Note 7(e) to Section XI, "Textiles and Textile Articles".
5. 1998, *s.v.* "net".
6. Appellant's Brief, Tab 5, "Agency Rationale".
7. *Supra* note 5, *s.v.* "textile".
8. *Supra* note 2, schedule [*General Rules*].
9. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

General Rules and Rule 1 of the *Canadian Rules*,[10] the goods in issue are properly classified under tariff item No. 6305.33.00 as other sacks and bags "of polyethylene or polypropylene strip or the like".

DECISION ON FIRST ISSUE

10. In appeals under section 67 of the *Act* concerning tariff classification, the Tribunal hears the matter and determines the proper classification of the goods under appeal in accordance with the *General Rules* and the *Canadian Rules*. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System* and the *Explanatory Notes*. The *General Rules* are structured in a cascading form. If the classification of an article cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. The *Canadian Rules* reiterate that the classification of goods under the tariff item of a subheading or heading shall be determined according to the *General Rules*.

11. Based on the evidence, and having considered Agri-Pack's and the CBSA's arguments, it is the Tribunal's view that heading No. 63.05 more specifically describes the goods in issue. The *Explanatory Notes* to this heading read in part as follows: "This heading covers textile sacks and bags of a kind normally used for the packing of goods for transport, storage or sale. These articles, which vary in size and shape, include in particular flexible intermediate bulk containers, coal, grain, flour, *potato*, coffee *or similar sacks* . . ." (emphasis added).

12. The Tribunal agrees with the CBSA that heading No. 56.08 cannot cover the goods in issue by reason of the *Explanatory Notes* to that heading, which state that goods cannot fall under heading No. 56.08 if they are more specifically covered under another heading, which is the case here. Moreover, the Tribunal takes note of the fact that, in ordinary commerce, they are known and sold as *bags*, not nets. It is true however that the goods in issue are indeed made of open-weave netting material and that the *Explanatory Notes* to heading No. 56.08 include "net shopping bags and similar carrying nets (e.g., for tennis balls or footballs)". The Tribunal is of the view that the goods in issue are not of a similar kind. They are *not* used for the personal transportation of goods in situations such as between the supermarket and the home or between the office and the gym. Rather, they are clearly used in commerce for the storage, transport and sale of goods, within the scope of heading No. 63.05.

13. In advancing the contrary position, Agri-Pack contended that, where the language of a heading is clear, it should "trump" the application of the *Explanatory Notes*. The Tribunal cannot accept this argument, for two reasons. First, the language of heading No. 56.08 was *not* clear with regard to its application to the goods in issue, since heading No. 63.05 also covered the goods and, as explained above, in the Tribunal's opinion, it covered them more precisely. Second, such an interpretative approach ignores the clear statutory direction given to the Tribunal by section 11 of the *Customs Tariff* in considering tariff classification appeals: "In interpreting the headings and subheadings, regard shall be had to . . . the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time."

14. The Tribunal agrees with the CBSA that, since the evidence established that the bags were woven from polypropylene strip, under Rule 1 of the *General Rules* and Rule 1 of the *Canadian Rules*, the goods are properly classified under tariff item No. 6305.33.00, as other sacks and bags "of polyethylene or polypropylene strip or the like".

10. *Supra* note 2, schedule.

SECOND ISSUE

15. The second issue before the Tribunal is whether the goods in issue, in addition to being classified in Chapters 1 to 97, may also be classified under tariff item No. 9903.00.00 as articles for use in combination machinery for bagging or boxing and weighing, or machinery for filling, for use with fresh fruit or vegetables. Alternatively, are they articles for use in machinery for packing fresh fruit or vegetables from the dumper, feed table, bin or hopper stage to the box or bag closing stage? These are special importation provisions that allow goods to be imported into Canada with tariff relief.

PRELIMINARY MATTER

16. Before turning to this issue, it is necessary to deal with a related preliminary matter. The CBSA argued that tariff relief is only available under the above tariff item where it aptly describes the "end use" of the imported article. The CBSA called Mr. Rod McKenzie, a senior official in end-use policy at the CBSA, to explain its "end-use" procedures. The latter testified that, at the time of the importation of goods, an importer normally provides an end-use certificate attesting to the preferential use of the goods on the part of its purchaser. Alternatively, an importer can import the goods under Chapters 1 to 97, pay duty thereon and later claim a refund if the goods are subsequently sold to an end user covered by the preferential tariff item. Agri-Pack did neither in this case.

17. In addition, the CBSA argued that, even if one admits, for the sake of argument, that Agri-Pack *did* qualify for tariff relief under Chapter 99 at the time of importation (notwithstanding that it failed to file an end-use certificate at that time), it later diverted the goods in issue to another use (i.e. the packing and conveying of onions) once they left the bagging floor. Such diversion, the CBSA submitted, is contrary to section 32.2 of the *Act*, and the Tribunal is bound *not* to construe the schedule to the *Customs Tariff* in a manner inconsistent with the *Act*.

18. The Tribunal is of the view that the above argument must fail. Mr. McKenzie conceded that the term "end use" is not found in legislation, either in the *Act* or in the relevant regulations. Rather, it is a term that the CBSA uses internally, as well as in its public literature, to describe the process that *it* follows for administering section 32.2 of the *Act*. That section requires an importer of goods for which a preferential tariff classification has been claimed (on the B-3 application form for importing the goods) to correct the tariff declaration within 90 days of learning that the custodian of the goods has failed to comply with a condition imposed under the preferential tariff item. The obligation remains in effect for 4 years, and the CBSA therefore employs the expression "end use" on the assumption that the declared use must continue throughout the full 4 years.

19. Nothing binds the Tribunal to construe the schedule to the *Customs Tariff* in a manner consistent with the CBSA's administrative practice as described in the preceding paragraph. Moreover, nothing in the preferential tariff item in question indicates that the declared use of the imported articles must continue throughout the full 4 years. If the articles had to be used in the above-described machinery on a permanent basis, they would ordinarily be considered to be machinery *parts*, and the CBSA admitted that the above tariff item does *not* require the imported articles to be parts.

20. In *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency*,[11] the Tribunal found that certain film cartridges had been imported "for use in" laser imagers in spite of the fact that, once they were run through the imagers, their only purpose was to store the resulting laser image data.

11. (29 November 2001), AP-2000-047 (CITT) [*Imation Canada*].

This was because the laser imager and laser imaging film were so fully integrated that the one was virtually useless without the other. Similarly, in this case, if indeed the goods in issue are fully integrated into bagging machines, the fact that they will be used, once they are run through the machine, for the sole purpose of storing onions, is irrelevant for classification purposes. The only thing that the Tribunal must determine for classification under the "for use in" tariff relief provisions of Chapter 99 is whether the goods in issue are, in point of fact, sufficiently integrated into the above-described machinery as to constitute a single system, however brief the integration of each individual imported article may be.

EVIDENCE ON SECOND ISSUE

21. In support of its contention that the goods in issue were articles for use in the machinery described in tariff item No. 9903.00.00, Agri-Pack relied on the evidence of its operations manager, Mr. De Jonge, who testified that virtually all of Agri-Pack's customers were commercial farmers and packers that invariably used industrial machinery to bag their onions. To his knowledge, onions are not packed manually. He confirmed that he had seen the packing facilities of all but 5 percent of Agri-Pack's customers and that they all followed a similar process. First, the onions are graded, then they go to a hopper and onto a conveyor, then the conveyor brings them up to the weighing facility. Here, the bag is clamped to the machine, which is set for the required weight, and the bag is filled.[12]

22. The "master" bagging machines are manually operated, and the bags follow a different routine. An operator clamps the 50-lb. bag to the bagging machine (essentially a device that holds the bag open), and the operator fills the bag manually with 2-, 3- or 5-lb. bags taken from a sorting table. Once the "master" bag has been filled, someone manually ties it and puts it on a skid. The bagging machine has no other function than bagging onions, and the goods in issue have no other function, according to Mr. De Jonge, than to be packed with onions. Once packed, bags are not normally re-used, because their drawstring is cut when the contents are released into commerce.

23. Agri-Pack also called as a witness Mr. Dan Vander Kooi, Plant Manager, Hillside Gardens Ltd., a grower, packer and shipper of onions and carrots. Mr. Vander Kooi explained in detail, and with the aid of a video tape recording, the operation of bagging machinery at Hillside Gardens Ltd., namely, the Octo-Pak bagger and the edp® bagger, both of which are automated bagging machines, and the "master" bagging machine, which is operated manually. None of the bagging machines are used for vegetables other than fresh onions. The automated bagging machines each contain parts that are calibrated for specific sizes of onion bags, e.g. the collector timer, the photo eye, the collection delay timer, the adjustment clamps and the pull lever. The "master" bagging machine is used to hold the bag open for the operator, who then fills the bag with smaller bags. In addition to the above witnesses, Agri-Pack submitted end-use certificates from the remaining purchasers of the goods in issue attesting to the use to which their bagging machinery had been put.

24. The CBSA presented no evidence on the second issue other than that relating to the preliminary matter discussed above.

12. *Transcript of Public Hearing*, 15 June 2004 at 24.

ARGUMENT ON SECOND ISSUE

25. Agri-Pack argued that the goods in issue were articles for use in machinery for filling, for use with fresh fruit or vegetables or, in the alternative, articles for use in machinery for packing fresh fruit or vegetables from the dumper, feed table, bin or hopper stage to the box or bag closing stage, within the meaning of tariff item No. 9903.00.00.

26. Agri-Pack parsed the above provision, contending that there was no dispute that the goods in issue were "*articles*". The expression "*for use in*" has been defined in subsection 2(1) of the *Customs Tariff* as meaning "that the goods must be wrought or incorporated into, or attached to, other goods referred to in [the applicable] tariff item."

27. Tribunal jurisprudence[13] has interpreted the expression "attached to" in the above definition as meaning that the article must be physically attached *and* functionally joined to the machinery. Agri-Pack argued that there is no question that the goods in issue were physically attached, as the evidence indicated that, in each case, they were clamped to the bagging machinery. That they were functionally joined has been established by evidence that the onion bagging machinery cannot function without the specifically sized onion bags.

28. The CBSA argued that the goods in issue were mere containers for fresh onions and that, if one were to accept Agri-Pack's argument, any container that is used with a machine—such as a bottle containing water—could be imported under Chapter 99. The CBSA added that the goods were not physically connected to the machines, since they were only in contact for a few seconds and that they were not functionally joined, since they could be filled manually and stuffed with other items, such as firewood, and the machines could be used for other purposes as well, such as filling citrus bags or boxes.

DECISION ON SECOND ISSUE

29. The onus is on Agri-Pack to prove that the goods in issue are articles for use in machinery for filling, for use with fresh fruit or vegetables or for use in machinery for packing fresh fruit or vegetables from the dumper, feed table, bin or hopper stage to the box or bag closing stage within the meaning of tariff item No. 9903.00.00.

30. In the Tribunal's view, the "master" bags do not qualify for tariff relief under Chapter 99. Access to tariff item No. 9903.00.00 is limited to articles for use in combination machinery for bagging or boxing and weighing, or machinery for filling, for use with fresh fruit or vegetables, or for use in machinery for packing fresh fruit or vegetables from the dumper, feed table, bin or hopper stage to the box or bag closing stage. As explained above, the "master" bagging machine's only function is to hold the bag open while the operator manually fills it. The machine does not fill or pack the bag. It is impossible to characterize the *manual* packing of "master" bags as a process that is so integrated into the "master" bagging machinery as to constitute a single system with it. Rather, there are two separate phases to the "master" bagging operation, one mechanical and the other, manual. Since the function of "master" bags is to serve as containers for the manual phase of the operation, they cannot be said to be integrally connected with "*machinery* for filling" or

13. *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT) [*Sony 2*]; *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT); *Sony of Canada Ltd. v. Deputy M.N.R.* (12 December 1996), AP-95-262 (CITT) [*Sony 1*]; *Imation Canada*.

"*machinery* for bagging" (emphasis added) within the meaning of the above tariff item and therefore do not qualify for tariff relief under this tariff item.

31. Given the above-quoted definition of "for use in", the Tribunal must determine whether the goods are "wrought or incorporated into" (which they are not) or "*attached to*" the other goods mentioned in the above tariff item. In past cases, the Tribunal has effectively narrowed the meaning of "attached to" to mean that the goods must be physically connected and functionally joined to the goods listed in the tariff item. The "functionally joined" condition is derived from a long line of Tribunal cases where the Tribunal noted that the expression "attached to" does not merely bear its ordinary grammatical meaning. Indeed, given the legislative context in which the expression appears, it also connotes a functional relationship.

32. In this case, the onion bags are clearly connected physically to the Octo-Pak and edp® bagging apparatus, which, in the Tribunal's view, are machines, as they all use or apply some mechanical force. There is a physical link between the bags and the machines. The bags are attached and held securely in place until filled and removed. The bags used in the Octo-Pak and edp® bagging machines are functionally joined to these machines. These bagging or packing machines quite simply cannot bag or pack onions without having a bag attached to them. Moreover, a number of adjustments must be made in order to adapt the operation of the machine to the size of bag being used. Both witnesses for Agri-Pack stated that, to their knowledge, the goods in issue were used to bag onions using these types of machines, since this was the only cost-effective way to bag onions on a commercial scale. The CBSA failed to provide evidence to the contrary.

33. It is true that there was evidence that the bags were also used to *store* onions, for short periods of time, and to *ship* them to retail outlet warehouses.[14] However, as the Federal Court of Appeal has stated, such dual use does not prevent an article from falling within the meaning of the tariff relief classification provisions.[15] Indeed, the Tribunal previously stated[16] that such other uses—even other primary uses—will not disqualify a product from meeting the functionally joined test.

34. The Tribunal does not find that the bags must be "solely," or even "principally", used for the tariff relief purpose. Had tariff item No. 9903.00.00 been intended to be interpreted in this narrow manner, the legislator would have expressly so stated.

35. The fact that the bags are only temporarily attached to the machinery is not an impediment to classification under Chapter 99. As the Tribunal stated in *Sony 1*, "there is no requirement that the tape cartridges be *permanently* fastened to the tape drives to meet the statutory definition of 'for use in.'"[17](Emphasis added).

36. The bags are passive articles. However, as the Tribunal also previously determined, "the concept of 'functionally joined' simply means that the goods 'for use in' the host goods have a functional relationship (*be it active or passive*) with the host goods."[18] (Emphasis added)

37. Therefore, except for the "master" bags, the Tribunal finds that the goods in issue should be classified under tariff item No. 9903.00.00, as articles for use in machinery for filling, for use with fresh fruit

14. *Transcript of Public Hearing*, 15 June 2004 at 104-106.
15. *Entrelec Inc. v. Canada (Minister of National Revenue)* (14 September 2000), A-755-98 (F.C.A.).
16. *Sony 2*.
17. *Sony 1* at 3.
18. *Imation Canada* at 4.

or vegetables, or as articles for use in machinery for packing fresh fruit or vegetables from the dumper, feed table, bin or hopper stage to the box or bag closing stage.

38. The appeal is allowed in part.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Richard Lafontaine
Richard Lafontaine
Member