



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2004-013

Diversco Supply Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, August 12, 2005*

TABLE OF CONTENTS

DECISION OF THE TRIBUNALi
STATEMENT OF REASONS 1
 EVIDENCE..... 2
 ARGUMENT 2
 DECISION 3

IN THE MATTER OF an appeal heard on January 24, 2005, under subsection 67(1) 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 3, 2004, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

DIVERSCO SUPPLY INC.

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Place of Hearing: Ottawa, Ontario

Date of Hearing: January 24, 2005

Tribunal Member: Patricia M. Close, Presiding Member

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Clerk of the Tribunal: Margaret Fisher

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STATEMENT OF REASONS

1. This is an appeal under subsection 67(1) of the *Customs Act*¹ from a decision of the Commissioner of the Canada Customs and Revenue Agency (CCRA), dated May 3, 2004, under subsection 60(4) of the *Act*. The decision concerned AKBT532 scuba diving boots that were imported on May 23, 2001, by Diversco Supply Inc. (Diversco) under tariff item No. 6401.92.91 of the schedule to the *Customs Tariff*² as waterproof footwear with outer soles and uppers of rubber or plastics. The Canada Border Services Agency (CBSA) reclassified the goods under tariff item No. 6404.19.90 as other footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials. On appeal, the CBSA took the position that the goods should be classified under tariff item No. 6404.11.99 as other sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like, and Diversco took the position that they should be classified under tariff item No. 9506.29.00 as other water-sport equipment. Therefore, the issue is whether the goods should be classified in heading No. 64.04 or heading No. 95.06.

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

- | | |
|------------|--|
| 64.04 | Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials.
-Footwear with outer soles of rubber or plastics: |
| 6404.11 | --Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like |
| 6404.11.99 | ---Other |
| 95.06 | Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this Chapter; swimming pools and paddling pools.
-Water-skis, surfboards, sailboards and other water-sport equipment: |
| 9506.29.00 | ---Other |

3. The relevant excerpts from the *Explanatory Notes to the Harmonized Commodity Description and Coding System*³ are as follows:

[Chapter 64 - General]

With certain **exceptions** (see particularly those mentioned at the end of this General Note), this Chapter covers, under headings 64.01 to 64.05, various types of footwear (including overshoes) irrespective of their shape and size, the particular use for which they are designed, their method of manufacture or the materials of which they are made.

(A) Footwear may range from sandals with uppers consisting simply of adjustable laces or ribbons to thigh-boots (the uppers of which cover the leg and thigh, and which may have straps, etc., for fastening the uppers to the waist for better support). The Chapter includes:

(2) Ankle-boots, half-boots, knee boots and thigh-boots.

(8) Other footwear specially designed to protect against oil, grease, chemicals or cold.

[95.06]

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

2. S.C. 1997, c. 36.

3. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

(B) **Requisites for other sports and outdoor games (other than toys presented in sets, or separately, of heading 95.03)**, e.g.:

(2) Water-skis, surfboards, sailboards and other water-sport equipment, such as diving stages (platforms), chutes, divers' flippers and respiratory masks of a kind used without oxygen or compressed air bottles, and simple underwater breathing tubes (generally known as "snorkels") for swimmers or divers.

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.

EVIDENCE

4. Thomas Sinel, who has worked in the dive business since 1975 and who has been a certified diving instructor since 1978, testified on behalf of Diversco. In his view, the goods are low-cut boots made of nylon II neoprene and vulcanized rubber soles, glued and stitched, with vented side panels and protective tall heels. Their sole purpose and use is to insulate and protect scuba divers from hypothermia caused by the loss of body heat in water. As such, the goods are necessary for participation in the sport of scuba diving.

5. Les Allen, a senior analytical chemist in the textile and polymer sections of the CBSA's Laboratory of Scientific Services Directorate since 1990, testified on behalf of the CBSA. The Tribunal accepted him as an expert in the chemical composition of textiles and polymers. Mr. Allen stated that the goods are composed of an upper textile material cemented to an outer sole of rubbers or plastics. The upper is stitched together from a sheet of cellular neoprene rubber covered on the sides by knits of nylon filament yarns.

ARGUMENT

6. Diversco argued that the goods should be classified in heading No. 95.06 because they meet all the conditions of that heading, i.e. they are equipment for the sport of scuba diving that is not specified or included elsewhere in Chapter 95. Further support for this contention comes from the *Explanatory Notes* to heading No. 95.06, in particular paragraph (B)(2) dealing with requisite equipment for other sports including other water-sport equipment, and paragraph (B)(13) dealing with protective equipment for sports. Diversco argued that the goods are requisite and protective equipment for the sport of scuba diving because they are required to protect divers from the detrimental effects of low water temperature. To support this position, Diversco cited the decision in *Brooks Wetsuits Ltd. v. Canada (MNR)*⁴ with respect to protective sportswear. Diversco added that, as protective sportswear, the goods are excluded from Chapter 64 by Note (1)(f). Moreover, citing the Tribunal's reasoning in *Richards Packaging Ltd. and Duopac Packaging Inc. v. DMNR*,⁵ Diversco argued that there must be a uniformity of expression throughout the *Customs Tariff* and, as such, the goods cannot be excluded from Chapter 95 by Note 1(g) as sports footwear.

7. The CBSA argued that uniformity of expression holds "unless a contrary intention appears" and that there is such a contrary intention given that the definition of "sports footwear" in Chapter 64 is restrictive and Note 1(g) in Chapter 95 predates it. Thus, the goods are sports footwear under Note 1(g) and, as such, are excluded from Chapter 95. Further, the goods are not protective sportswear because the protective qualities of diving boots are not similar to those of the types of protective footwear excluded from Chapter 64. Thus, the goods are not excluded from Chapter 64. Rather, the goods are properly classified, by their material composition, in heading No. 64.04, particularly under subheading No. 6404.11, as sports footwear; tennis shoes, basketball shoes, gym shoes and the like. In this regard, the Tribunal should be

4. [1999] T-2236-93 (FCTD) [*Brooks Wetsuits*].

5. (10 February 1999), AP-98-007 and AP-98-010 (CITT).

guided by the meaning of “sport” set forth in *J.V. Marketing Inc. v. DMNR*.⁶ In the alternative, if the goods are *prima facie* classified in both headings, heading No. 64.04 is more specific than heading No. 95.06 and should be preferred in accordance with *Lexus Products Ltd. v. Commissioner of the CCRA*.⁷

DECISION

8. Section 10 of the *Customs Tariff* provides that the tariff classification of goods shall be determined in accordance with the *Canadian Rules*⁸ and the *General Rules for the Interpretation of the Harmonized System*.⁹ Rule 1 of the *Canadian Rules* provides that “the classification of goods in the tariff items of a subheading or of a heading” shall be determined according to the *General Rules*. The *General Rules* are comprised of six rules structured in cascading form. Rule 1 of the *General Rules* provides that, “classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes”. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Explanatory Notes*.

9. Pursuant to Rule 1 of the *General Rules* and Rule 1 of the *Canadian Rules*, the Tribunal finds that the goods in issue are properly classified in heading No. 64.04 as footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials. The General note to the *Explanatory Notes* in Chapter 64 indicate that, with certain exceptions, heading No. 64.04 covers various types of footwear. The examples listed in paragraph (A) of the *Explanatory Notes* to Chapter 64 include ankle-boots and half-boots, and other footwear specially designed to protect against the cold. Mr. Sinel and Mr. Allen both referred to the goods as “boots”, and the photographs indicate that they are roughly ankle-high. In addition, Mr. Sinel testified that the goods were designed to protect scuba divers against the cold. In Mr. Allen’s expert opinion, the boots are composed of “an upper of textile material and an outer sole of rubber”.¹⁰ This is consistent with a Diversco advertisement that Mr. Sinel mentioned, which describes the product as a “neoprene boot” with “rubber sole”. Mr. Allen referred to neoprene as the textile material of which the upper is composed. Thus, it is evident that the goods are covered by heading No. 64.04.

10. Within heading No. 64.04, subheading No. 6404.11, “Sports footwear; tennis shoes, basketball shoes, gym shoes and the like”, most accurately describes the goods. The presence of the semicolon indicates that goods are classified under subheading No. 6404.11 if they meet the definition of “sports footwear” or “tennis shoes, basketball shoes, gym shoes and the like”. Subheading Note 1 of Chapter 64 indicates as follows:

1. For the purposes of subheadings 6402.12, 6402.19, 6403.12, 6403.19 and 6404.11, the expression “sports footwear” applies only to:
 - (a) Footwear which is designed for a sporting activity and has, or has provision for the attachment of, spikes, sprogs, stops, clips, bars or the like;
 - (b) Skating boots, ski-boots and cross-country ski footwear, snowboard boots, wrestling boots, boxing boots and cycling shoes.

In the Tribunal’s view, the goods are designed for a sporting activity, i.e. scuba diving. In this regard, the Tribunal is mindful of its finding in *J.V. Marketing* that a “sport” is an athletic activity involving more or

6. (8 September 1995), AP-91-188(R) (CITT) [*J.V. Marketing*].

7. (11 January 2001), AP-99-117 (CITT) [*Lexus Products*].

8. R.S.C. 1985 (3d. Supp.), c. 41.

9. Customs Co-operation Council, 1st ed., Brussels, 1986 [*General Rules*].

10. *Transcript of Public Hearing*, 24 January 2005, at 23.

less vigorous bodily exertion for the purposes of exercise. However, the goods do not have the other characteristics of “sports footwear” within the meaning of subheading Note 1. Rather, they are “like” tennis shoes, basketball shoes, and gym shoes because they are footwear designed for use in a sporting activity and do not have, or have no provision for the attachment of, spikes, sprogs, stops, clips, bars, etc., and are not skating boots, ski-boots, cross-country footwear, wrestling boots, boxing boots or cycling shoes. Based on this definition, scuba diving boots are properly classified under subheading No. 6404.11.

11. Contrary to Diversco’s argument, Note 1(f) in Chapter 64 does not exclude the goods from Chapter 64 as “protective equipment”. The full paragraph refers to “shin-guards and similar protective sportswear”. While the goods in issue are protective in the sense that they protect scuba divers from the cold, they are not similar to shin-guards, which protect the leg against impact. In *Brooks Wetsuits*, the Federal Court found that neoprene sprayskirts have a protective function. However, most footwear has a protective function with regard to the feet, and this alone is insufficient to exclude the goods from Chapter 64 as “protective sportswear”. In addition, neoprene sprayskirts are classified under Chapter 61, which means that *Brooks Wetsuits* is not applicable. Further, the goods are more accurately classified as “footwear” than “sportswear”. The former ordinarily means “anything worn on the feet, e.g. shoes, boots, etc.”, while the latter means “clothes worn for playing sports”.¹¹

12. Moreover, the goods are excluded from Chapter 95. Note 1(g) in Chapter 95 excludes “[s]ports footwear (other than skating boots with ice or roller skates attached) of Chapter 64”. Although Diversco pointed out that it is a general principle of interpretation that a word must maintain the same meaning throughout the statute or regulation in which it appears,¹² paragraph 15(2)(b) of the *Interpretation Act*¹³ makes an exception where “a contrary intention appears”. In the Tribunal’s view, such a contrary intention is apparent here. By stipulating that the definition of “sports footwear” in subheading Note 1 of Chapter 64 applies “only” to five subheadings, including subheading No. 6404.11, the Tribunal must draw an irrefutable inference that it was intended to apply only to those five subheadings and not to other parts of the *Customs Tariff*. In the Tribunal’s view, “sports footwear” has a broader meaning in Note 1(g) in Chapter 95 than in subheading Note 1 in Chapter 64; that is, it covers all types of footwear that are designed for a sporting activity, except for skating boots with ice or roller skates attached. This coverage includes scuba diving boots.

13. Even if Rule 1 did not settle the matter, the Tribunal would nevertheless find that the goods in issue are properly classified in heading No. 64.04, pursuant to Rule 3(a) of the *General Rules*.¹⁴ Rule 3(a) provides that, where goods are *prima facie* classifiable under more than one heading, the most specific heading shall be preferred. Heading No. 95.06 covers a wide variety of articles and equipment for general physical exercise which, according to Note (B)(2) of heading No. 95.06, includes water-sport equipment such as diving stages, chutes, divers’ flippers and snorkels for swimmers or divers. While the list is non-exhaustive, the omission of scuba diving boots is notable, given that it expressly mentions flippers and snorkels. In contrast, heading No. 64.04 is specific to goods that are worn on the feet that have outer soles and uppers composed of the same material as the goods in issue. This is consistent with *Lexus Products*, where the Tribunal found that the term “other footwear”, in heading No. 64.05, was more specific than the term “toys”, in heading No. 95.03, because the former covers goods worn on the feet and the latter covers a wide variety of goods.

11. *Canadian Oxford Dictionary*, 2nd ed. (Don Mills, Ont.: Oxford University Press Canada, 2004).

12. P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Yvon Blais, 1991) at 279.

13. R.S.C. 1985, c. I-21.

14. Neither party has suggested that the goods in issue can be classified pursuant to the application of Rule 2. The Tribunal does not suggest otherwise, agreeing that it cannot.

14. Therefore, the appeal is dismissed.

Patricia M. Close _____

Patricia M. Close
Presiding Member