



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-017

Editions Gallery Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, July 26, 2006*

TABLE OF CONTENTS

DECISION.....i
STATEMENT OF REASONS1
TARIFF CLASSIFICATION.....1
ORIGIN3

IN THE MATTER OF an appeal heard on February 21, 2006, 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 President of the Canada Border Services Agency dated June 23, 2005, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

EDITIONS GALLERY LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed in part.

Ellen Fry
Ellen Fry
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 21, 2006

Tribunal Member: Ellen Fry, Presiding Member

Counsel for the Tribunal: Eric Wildhaber

Clerk of the Tribunal: Valérie Cannavino

Parties: David Kadosh, for the appellant
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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 President of the Canada Customs and Revenue Agency (CBSA) dated June 23, 2005, made pursuant to subsection 60(4) of the *Act*. The importations at issue occurred between March and December 2003. There are two issues in this appeal.
2. The first issue is whether the goods in issue, acrylic sculptures, are properly classified as statuettes of plastics under tariff item No. 3926.40.10 of the schedule to the *Customs Tariff*,² as determined by the CBSA, or should be classified as original sculptures and statuary, in any material, under tariff item No. 9703.00.00, as claimed by Editions Gallery Ltd. (Editions Gallery).
3. The second issue, which is explained further below, concerns the origin of the goods in issue.
4. By letter to the parties dated October 21, 2006, the Tribunal communicated its decision that it would hear the matter by way of written submissions pursuant to rules 25, 25.1 and 36.1 of the *Canadian International Trade Tribunal Rules*.³

TARIFF CLASSIFICATION

5. Editions Gallery submitted that the goods in issue are original sculptures and statuary, in any material, of tariff item No. 9703.00.00. The CBSA argued that they cannot be classified under that tariff item because they are mass-produced reproductions, which are expressly excluded from that tariff item by way of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁴ to Chapter 97.
6. 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*⁵ and the *Canadian Rules*.⁶ 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*⁷ and to the *Explanatory Notes*. In dealing with the *General Rules*, the Tribunal must seek to apply Rule 1 first, only moving on to the following rule, and so on, if the preceding rule does not enable the goods in issue to be classified. Once classification has been determined pursuant to the *General Rules* at the chapter and heading levels, the classification at the subheading and tariff item levels is done pursuant to the *Canadian Rules*.
7. Sections 10 and 11 of the *Customs Tariff* are as follows:
 - 10.(1) Subject to subsection (2), the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.
 - ...
 11. In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36 [*Customs Tariff*].
3. S.O.R./91-499.
4. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].
5. *Supra* note 2, schedule [*General Rules*].
6. *Supra* note 2, schedule.
7. Customs Co-operation Council, 1st ed., Brussels, 1987.

Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.

8. Rule 1 of the *General Rules* reads as follows:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes

9. Rule 1 of the *Canadian Rules* reads as follows:

For legal purposes, the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, mutatis mutandis, to the General Rules for the Interpretation of the Harmonized System, on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.

10. The Notes to Chapter 97 read as follows:

WORKS OF ART, COLLECTORS' PIECES AND ANTIQUES

...

3. Heading 97.03 does not apply to mass-produced reproductions or works of conventional craftsmanship of a commercial character, even if these articles are designed or created by artists.⁸

...

11. The *Explanatory Notes* to heading No. 97.03 read as follows:

97.03 – ORIGINAL SCULPTURES AND STATUARY, IN ANY MATERIAL.

This heading covers original sculptures and statuary, ancient and modern

...

The same sculpture may therefore be reproduced as two or three “copies” . . . Only rarely does the total number of replicas exceed twelve.

...

The heading **excludes** the following articles, even if they are designed or created by artists:

...

(c) Mass-produced reproductions in plaster, staff, cement, papier maché, etc.

...

12. The evidence shows that the goods in issue are all mass-produced commercial plastic statuettes reproducing the artwork of an artist after his death. Each statuette was made in editions of several hundred reproductions. Accordingly, such goods fall squarely within the exclusion to heading No. 97.03 that is set out in Note 3 to Chapter 97. Consequently, the goods in issue are not original sculptures and statuary, of any material, of tariff item No. 9703.00.00. Rather, pursuant to Rule 1 of the *General Rules* and Rule 1 of the *Canadian Rules*, they are properly classified under tariff item No. 3926.40.10 as statuettes of plastics and, therefore, the appeal on this issue is dismissed.

8. This paragraph also appears in the *Explanatory Notes*.

ORIGIN

13. Editions Gallery also submitted that the goods in issue are of U.S. origin and, therefore, should benefit from the United States Tariff rather than the Most-Favoured-Nation (MFN) Tariff argued by the CBSA.

14. Determination of the origin of the goods is provided for in subsections 58(1) and (2) of the *Act*, which, at the time of the importations, read as follows:

58.(1) Any officer, or any officer within a class of officers, designated by the Minister for the purposes of this section, may determine the origin . . . of imported goods at or before the time they are accounted for under subsection 32(1), (3) or (5).

(2) If the origin . . . of imported goods [is] not determined under subsection (1), the origin . . . of the goods [is] deemed to be determined, for the purposes of this Act, to be as declared by the person accounting for the goods in the form prescribed under paragraph 32(1)(a). That determination is deemed to be made at the time the goods are accounted for under subsection 32(1), (3) or (5).

58.(1) L'agent chargé, ou l'agent appartenant à une catégorie d'agents chargée, par le ministre de l'application du présent article peut déterminer l'origine [...] des marchandises importées au plus tard au moment de leur déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).

(2) Pour l'application de la présente loi, l'origine [...] des marchandises importées qui [n'a] pas été déterminé[e] conformément au paragraphe (1) [est] considéré[e] comme ayant été déterminé[e] selon les énonciations portées par l'auteur de la déclaration en détail en la forme réglementaire sous le régime de l'alinéa 32(1)a). Cette détermination est réputée avoir été faite au moment de la déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).

15. These provisions indicate that there is always a determination of origin made when goods are accounted for. If there is no explicit determination, subsection 58(2) of the *Act* indicates that there is a deemed determination. In this instance, the evidence shows that the goods in issue were the subject of a deemed determination of MFN origin, given that the waybills and B-3 Canada Customs Coding Forms that were received by the Tribunal on February 13, 2006, from the CBSA all show that the goods in issue had received an MFN origin, or Tariff Treatment Code 02, in Field No. 14.⁹

16. The Detailed Adjustment Statement (DAS) dated December 13, 2004, informed Editions Gallery that the notice was issued under subsection 59(2) of the *Act*, which provides as follows:

(2) An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-determination or further re-determination under subsection (1) shall without delay give notice of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.

(2) L'agent qui procède à la décision ou à la détermination en vertu des paragraphes 57.01(1) ou 58(1) respectivement ou à la révision ou au réexamen en vertu du paragraphe (1) donne sans délai avis de ses conclusions, motifs à l'appui, aux personnes visées par règlement.

17. The DAS dated December 13, 2004, also indicated that the goods had been determined to be of MFN origin (i.e. Tariff Treatment Code 02, or MFN, see Field No. 14) and that the rate of customs duty is 6.5 percent (Field No. 33).

9. Customs Memorandum D17-1-10, "Coding of Customs Accounting Documents", Appendix B (27 January 2003).

18. Subsection 60(1) of the *Act* provides as follows:

60.(1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of *origin*, tariff classification, value for duty or marking . . .

[Emphasis added]

60.(1) Toute personne avisée en application du paragraphe 59(2) peut, dans les quatre-vingt-dix jours suivant la notification de l'avis [...] demander la révision ou le réexamen de *l'origine*, du classement tarifaire ou de la valeur en douane, ou d'une décision sur la conformité des marques.

[nos italiques]

19. Editions Gallery sent an adjustment request form dated January 18, 2005, to the CBSA. On this form, under the heading "Explanation", Editions Gallery informed the CBSA of the adjustment request that it was making: "Duty free under NAFTA, and we also appeal the classification." The Tribunal interprets this as a request for re-determination of the origin of the goods.

20. In its letter dated May 16, 2005, the CBSA Recourse Division indicated that it was refusing the request to make a re-determination of origin, stating as follows:

. . . There was no NAFTA origin decision made in these cases. Unfortunately, the Recourse Division may only consider a re-determination of origin request under Section 60 of the Customs Act if an origin decision was previously made. Consequently, the Recourse Division is unable to consider the origin re-determination request in these cases. As a result the tariff treatment for these cases remains as originally entered under MFN.

. . .

21. The Tribunal understands from the foregoing that the CBSA Recourse Division did not consider it possible to make a re-determination of origin under section 60 of the *Customs Act* because it was of the view that an origin determination had not previously been made.

22. However, the CBSA issued DASs on June 23, 2005, that indicate not only the CBSA's decision on classification but also that the goods are of MFN origin and that the MFN "rate of duty is 6.5%". Those DASs indicate that they represent ". . . decision[s] of the President of the Canada Border Services Agency under subsection 60(4) of the Customs Act . . .", i.e. a re-determination. Although the CBSA Recourse Division did not consider that it could make a re-determination of origin, the fact is that, in order to re-determine the duty rate, the CBSA needed to decide whether the initial deemed determination of origin would stand; otherwise, it would not know what duty rate to apply. The Tribunal therefore considers that the DASs issued on June 23, 2005, included a re-determination of origin which confirms the original MFN determination.

23. Editions Gallery appealed this re-determination of origin to the Tribunal by its notice filed on July 22, 2005. Therefore, the Tribunal has jurisdiction to consider this issue under subsection 67(1) of the *Act*.

24. The parties agree that the goods in issue were imported from the United States, and the documentary evidence supports this conclusion. Concerning the place of manufacture, the evidence includes copies of NAFTA certificates of origin indicating the United States as the country of origin. Correspondence from the CBSA Recourse Division and argument made by the CBSA express the view that the NAFTA certificates of origin are incomplete. However, no such deficiency is apparent to the Tribunal on the face of the certificates of origin, and neither the correspondence from the Recourse Division to Editions Gallery nor the CBSA's argument indicates what specific deficiencies they allegedly contain. The Tribunal does not

consider that there is any convincing evidence to indicate that the goods were manufactured elsewhere than in the United States or had value content from other than the United States.

25. Accordingly, the Tribunal finds that the evidence indicates that the goods are of U.S. origin. Consequently, the appeal on this issue is allowed.

26. For the foregoing reasons, the appeal is allowed in part. The Tribunal finds that the goods in issue are properly classified under tariff item No. 3926.40.10 as statuettes of plastics and, consequently, dismisses the appeal on the issue of classification. The Tribunal finds that the goods are of U.S. origin and, consequently, allows the appeal on the issue of the origin of the goods.

Ellen Fry

Ellen Fry
Presiding Member