Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-034

Tai Lung (Canada) Ltd.

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, July 25, 2007

Canada

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IN THE MATTER OF an appeal heard on April 25, 2007, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency dated October 2, 2006, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

TAI LUNG (CANADA) LTD. **Appellant**

AND

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

DECISION

The appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Elaine Feldman
Elaine Feldman
Member

Serge Fréchette
Serge Fréchette
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 25, 2007
Tribunal Members:	Pierre Gosselin, Presiding Member Elaine Feldman, Member Serge Fréchette, Member
Research Manager:	Paul R. Berlinguette
Counsel for the Tribunal:	Eric Wildhaber Nick Covelli
Registrar Officer:	Marija Renic
Appearances:	Michael Kaylor, for the appellant Agnieszka Zagorska, for the respondent

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. This is an appeal pursuant to subsection 67(1) of the *Customs Act*[1] from decisions of the President of the Canada Border Services Agency (CBSA), dated October 2, 2006, under subsection 60(4) of the *Act*.

2. The goods in issue are footwear components, specifically, leather uppers incorporating a metal toe-cap and plastic outer soles. The issue in this appeal is whether the footwear components are properly classified in heading No. 64.03 of the schedule to the *Customs Tariff*[2] as complete footwear, as determined by the CBSA, or should be classified in heading No. 64.06 as parts of footwear, as claimed by Tai Lung (Canada) Ltd. (Tai Lung).

3. The relevant nomenclature from the *Customs Tariff* is as follows:

. . .

64.03	**Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather.**
. . .	
6403.40.00	**-Other footwear, incorporating a protective metal toe-cap**
. . .	
64.06	**Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable in-soles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof.**
6406.10	**-Uppers and parts thereof, other than stiffeners**
	- - -Of textile materials:
6406.10.11	- - - -Uppers, the external surface of which is 50% or more of textile materials
6406.10.19	- - - -Other
6406.10.90	- - -Other

4. The following *General Rules for the Interpretation of the Harmonized System*[3] are relevant to this appeal:

> 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 and, provided such headings or Notes do not otherwise require, according to the following provisions.
>
> 2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. *Ibid.*, schedule [*General Rules*].

5. The following excerpts from the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[4] are relevant to this appeal:

> [*Explanatory Notes* to Rule 1 of the *General Rules*]
>
> (I) The Nomenclature sets out in systematic form the goods handled in international trade. It groups these goods in Sections, Chapters and sub-Chapters which have been given titles indicating as concisely as possible the categories or types of goods they cover. In many cases, however, the variety and number of goods classified in a Section or Chapter are such that it is impossible to cover them all or to cite them specifically in the titles.
>
> (II) Rule 1 begins therefore by establishing that the titles are provided "for ease of reference only". They accordingly have no legal bearing on classification.
>
> (III) The second part of this Rule provides that classification shall be determined:
>
> (a) according to the terms of the headings and any relative Section or Chapter Notes, and
>
> (b) where appropriate, **provided the headings or Notes do not otherwise require**, according to the provisions of Rules 2, 3, 4, and 5.
>
> (IV) Provision (III) (a) is self-evident, and many goods are classified in the Nomenclature without recourse to any further consideration of the Interpretative Rules . . . .
>
> [*Explanatory Notes* to Rule 2 (a) of the *General Rules* with respect to incomplete or unfinished articles]
>
> (I) The first part of Rule 2 (a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.
>
> [*Explanatory Notes* to Rule 2 (a) of the *General Rules* with respect to articles presented unassembled or disassembled]
>
> V) The second part of Rule 2 (a) provides that complete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packing, handling or transport.
>
> (VI) This Rule also applies to incomplete or unfinished articles presented unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.
>
> (VII) For the purposes of this Rule, "articles presented unassembled or disassembled" means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, **provided** only assembly operations are involved.
>
> No account is to be taken in that regard of the complexity of the assembly method. However, the components shall not be subjected to any further working operation for completion into the finished state.
>
> Unassembled components of an article which are in excess of the number required for that article when complete are to be classified separately.
>
> [Provision (I)(A)(7) of the *Explanatory Notes* to heading No. 64.06]
>
> Assemblies of parts (e.g., uppers, whether or not affixed to an inner sole) not yet constituting nor having the essential character of footwear as described in headings 64.01 to 64.05.

4. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

6. On October 2, 2006, the CBSA issued the determination that footwear components imported by Tai Lung in an unassembled condition that consist of matching quantities of uppers and outer soles that would form complete footwear are classified in accordance with Rule 2 (a) of the *General Rules*. Tai Lung appealed to the Tribunal on November 6, 2006.

7. Mr. Doug Litton, a footwear consultant, testified on behalf of Tai Lung. The CBSA did not call any witnesses. Mr. Litton testified to the facts on which Tai Lung relied in arguing its case, the relevant elements of which are examined below. The Tribunal also viewed a video of Tai Lung's facilities in Scarborough, Ontario.

ARGUMENT

8. Tai Lung argued that the goods in issue must be classified according to Rule 1 of the *General Rules* and that there is no need to consider Rule 2 (a). In this regard, Tai Lung referred to the Chapter Notes of Section XII of the *Customs Tariff* that define the term "outer sole", as used in heading Nos. 64.01 to 64.05, to mean that part of the footwear (other than the attached heel) which, when in use, is in contact with the ground. It was Tai Lung's submission that it is the middle sole which is attached to the upper and that, when the two imported components, i.e. the upper attached to the middle sole and the outer sole, are put together, it is only the outer sole which is in contact with the ground. Since heading No. 64.06 specifically names parts of footwear (including uppers, whether or not attached to soles other than outer soles), Tai Lung argued that, on the basis of the *General Rules*, the goods in issue, i.e. the upper attached to the sole other than the outer sole and the outer sole, are included in this heading.

9. Tai Lung also argued that the *General Rules* are structured in a cascading form and that, because Rule 1 resolves the classification of the goods in issue, there is no need to consider Rule 2 (a). In support of its position, Tai Lung referred to the Federal Court of Appeal's decision in *Canada (Customs and Revenue Agency) v. Agri Pack*[5] which re-iterates this basic principle.

10. Tai Lung argued that it is a producer of finished safety footwear, in that it subjects two imported components to a number of manufacturing operations, including priming, gluing, heating, trimming, polishing, grinding, quality control and testing in order to meet CSA safety standards.[6]

11. Tai Lung argued that the processes that occur at its factory are more than mere assembly operations and that the goods produced take on a new form and possess different qualities and properties. In other words, further working operations are performed to render the goods in issue safety footwear. Consequently, the goods in issue do not satisfy the requirements of the *Explanatory Notes* to Rule 2 (a) of the *General Rules* regarding articles presented unassembled or disassembled.[7]

12. Tai Lung also argued that the upper, as imported, cannot be worn as a safety boot, since it does not meet CSA safety standards. Therefore, the upper does not have the essential character of safety footwear. Tai Lung argued that the provisions of the *Explanatory Notes* with respect to incomplete or unfinished articles do not apply, since all the components that make up the goods in issue have been imported, and that, as such, the "essential character" test does not apply.[8] Tai Lung argued that, even though the upper covers the foot and ankle, it cannot be worn for its intended purpose before full manufacturing operations have been completed.

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5. 2005 FCA 414.
6. In defining the term "manufacturing", Tai Lung made reference to *The Queen v. York Marble, Tile and Terrazzo Limited*, [1968] S.C.R. 140 at 145 (S.C.C.); *Fiat Auto Canada Limited v. The Queen*, 6 C.E.R. 82 (F.C.); *M.N.R. v. Enseignes Imperial Signs Ltée*, 3 TCT 5389 (S.C.C.).
7. See provision (VII) of the *Explanatory Notes* to Rule 2 (a).
8. For its interpretation of the *Explanatory Notes* to Rule 2 (a) covering incomplete or unfinished articles, Tai Lung relied on *Viessmann Manufacturing Company Inc. v. Deputy M.N.R.* (14 November 1997), AP-96-196 to AP-96-198 (CITT) [*Viessmann*]; *Renelle Furniture Inc. v. President of the Canada Border Services Agency* (23 March 2007), AP-2005-028 (CITT).

13. Furthermore, Tai Lung argued that, in the present appeal, Memorandum D11-3-3,[9] which defines "minor processing", does not apply, since the goods in issue were not imported from a *NAFTA* country.

14. The CBSA argued that the *eo nomine* principle no longer applies, as it was used to determine the way goods were classified prior to January 1, 1988. The *General Rules* supersede the *eo nomine* principle, and tariff classification is determined according to these rules. It submitted that 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* and the *Canadian Rules*.[10] Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings of the schedule to the *Customs Tariff*, regard shall be had to the *Explanatory Notes*.

15. The CBSA argued that, because the goods in issue were imported together, they form complete footwear and cannot be considered as "parts of footwear" for classification purposes. The CBSA also argued that Rule 2 (a) of the *General Rules* expands the scope of Rule 1 by allowing unassembled and unfinished goods to be classified as if they were assembled and finished for purposes of Rule 1.[11] In this regard, the CBSA submitted that the goods in issue clearly have the essential character of the finished and assembled product presented on the Canadian Tire Web site[12] and that the grinding, gluing, trimming, polishing and packaging do not alter this situation.[13] Moreover, because the goods in issue are the basic elements of footwear and were imported together, i.e. the outer soles were imported with the corresponding number and sizes of uppers, they constitute a finished product.

16. Furthermore, the CBSA submitted that, at the time of importation, the main features of the upper were present, such as hang tags describing the product and indicating the price, labels (e.g. CSA label) and laces. The CBSA also argued that, in the context of provision (VII) of the *Explanatory Notes* to Rule 2 (a) regarding unassembled or disassembled articles, the processes undertaken in Tai Lung's plant only serve to "finish" the product for retail sale. According to the CBSA, the principal feature of footwear, i.e. to cover the foot, the ankle and part of the leg,[14] is maintained regardless of the processes being applied.

17. The CBSA argued that goods must be classified according to their condition at the time of importation and not according to their intended use or modifications after importation. In support of its position, the CBSA referred to two decisions of the Supreme Court of Canada[15] and to *Dairy Farmers of Canada v. Deputy M.N.R.*[16]

18. The CBSA submitted that Memorandum D11-3-3 was only provided to the Tribunal in the context of a guideline with respect to the meaning of "minor processing", which includes cleaning, trimming, putting up in measured doses, packing and testing, i.e. operations that were identified in the video presentation. The CBSA argued that these processes constitute simple assembly and are far less complex

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9. Canada Border Services Agency, "NAFTA Country of Origin 'Marking Rules'", 31 January 1996.
10. *Supra* note 2, schedule.
11. With respect to incomplete or unfinished articles, the CBSA made reference to provision (I) of the *Explanatory Notes* to Rule 2 (a), which states that "[t]he first part of Rule 2 (a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, provided that, as presented, it has the essential character of the complete or finished article."
12. Tribunal Exhibit AP-2006-034-10A, Tab 11.
13. On this matter, the CBSA referred to *Viessmann*.
14. On this matter, the CBSA relied on *Atomic Ski Canada Inc. and Wilson Sports Canada v. Deputy M.N.R.* (8 June 1998), AP-97-030 and AP-97-031 (CITT), where the Tribunal concluded that the principal purpose of footwear is to cover the foot and part of the leg.
15. *Deputy M.N.R. v. MacMillan & Bloedel (Alberni) Limited*, [1965] S.C.R. 366 (S.C.C.); *Deputy M.N.R.C.E. v. Ferguson Industries Limited*, [1973] S.C.R. 21 (S.C.C.).
16. (26 March 1999), AP-98-055 (CITT) at 18.

than the activities not recognized as manufacturing in the Supreme Court of Canada's decision in *Deputy M.N.R.C.E. v. Research-Cottrell (Canada) Limited*.[17] The CBSA argued that there has been no manufacturing of the goods in issue because Tai Lung has not transformed the uppers and the outer soles by giving these materials a new form. In other words, no transformation of raw materials into finished goods has taken place. According to the CBSA, the components are already fully manufactured and do not change. The CBSA further argued that, unlike the complex assembly operation that constituted manufacturing in *Harry D. Shields Limited v. Deputy M.N.R.C.E.*,[18] putting two parts or components together, as in the present appeal, cannot be considered manufacture.

ANALYSIS

19. For the purposes of this appeal, the Tribunal must follow section 10 of the *Customs Tariff*, which provides that the tariff classification of goods shall be determined in accordance with the *General Rules* and the *Canadian Rules*. 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* comprise six rules structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1 of the *General Rules*, then regard must be had to Rule 2 of the *General Rules* and so on, until classification is completed.

20. Based on the evidence, and having considered Tai Lung's and the CBSA's arguments, it is the Tribunal's view that heading No. 64.06 describes the goods in issue. In advancing the contrary position, the CBSA contended that, because the uppers and the outer soles in issue were imported together, they form complete footwear and cannot be considered as "parts of footwear". It also submitted that the goods in issue have the "essential character" of the finished and assembled product and that they should therefore be classified as such pursuant to Rule 2 (a) of the *General Rules*.

21. The Tribunal does not accept these arguments. In the Tribunal's view, the language of heading No. 64.06 is clear with regard to its application to the goods in issue, in that it precisely covers parts of footwear, including uppers whether or not attached to soles other than outer soles. Consequently, Rule 1 of the *General Rules* resolves the classification, and there is no need to consider Rule 2. As for the CBSA's argument with regard to the application of Rule 2 (a), the Tribunal agrees with Tai Lung that the processes to which the goods in issue are subjected go beyond "assembly" to constitute "further working" and therefore fall outside the scope of Rule 2 (a). As explained by the witness for Tai Lung and demonstrated in the video, the goods in issue require further working, assembly and testing to be in a finished state and recognized as specialized safety footwear. Indeed, even though the upper covers the foot and ankle, it cannot be worn for its intended purpose before additional work has been completed. In the Tribunal's opinion, the goods in issue were imported in an unfinished state, i.e. requiring further working, and therefore fail to qualify as articles that merely require assembly, as envisaged by provision (VII) of the *Explanatory Notes* to Rule 2 (a).

22. With respect to the meaning of "minor processing", the Tribunal is of the view that the legislation, regulations and general guidelines that apply to the country of origin marking for goods imported from a *NAFTA* country (i.e. the United States or Mexico), outlined in Memorandum D11-3-3, have no relevance in the present appeal since they are designed to regulate access to preferential tariff treatment under *NAFTA*.

17. [1968] S.C.R. 684 at 693.
18. 7 T.B.R. 1.

DECISION

23. Based on the foregoing reasons, the Tribunal finds that the goods in issue should be classified in heading No. 64.06 as parts of footwear.

24. Accordingly, the appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Elaine Feldman
Elaine Feldman
Member

Serge Fréchette
Serge Fréchette
Member