



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. AP-2009-012 and
AP-2009-047

S.F. Marketing Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, June 2, 2010*

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 DECISION 7

IN THE MATTER OF appeals heard on February 17, 2010, pursuant to 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 March 25 and 30 and June 22, 2009, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

S.F. MARKETING INC.

Appellant

AND

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

Respondent

DECISION

The appeals are dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 17, 2010

Tribunal Member: Ellen Fry, Presiding Member

Research Director: Audrey Chapman

Counsel for the Tribunal: Nick Covelli

Research Officer: Gary Rourke

Manager, Registrar Office: Michel Parent

Registrar Officer: Sarah MacMillan

PARTICIPANTS:**Appellant**

S.F. Marketing Inc.

Counsel/Representative

Michael Kaylor

Respondent

President of the Canada Border Services Agency

Counsel/Representative

Luc Vaillancourt

WITNESSES:

Jimmy Katsipis
Market Manager, Lighting Division
S.F. Marketing Inc.

David Ship
Manager, Production Services
National Arts Centre

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

BACKGROUND

1. These are appeals filed by S.F. Marketing Inc. (S.F. Marketing) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from 12 decisions made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the *Act*.

2. The issue in these appeals is whether five models of moving light heads (the goods in issue) are properly classified under tariff item No. 9405.40.90 of the schedule to the *Customs Tariff*² as other electric lamps and lighting fittings, as determined by the CBSA, or under tariff item No. 9405.40.20 as motion picture or theatrical spotlights, as submitted by the CBSA in the alternative, or should be classified under tariff item No. 8479.89.99 as other machines or mechanical appliances having individual functions not specified or included elsewhere in Chapter 84, as submitted by S.F. Marketing.

PROCEDURAL HISTORY

3. S.F. Marketing imported the goods in issue between July 5, 2004, and October 27, 2006.

4. On March 25 and 30, 2009, the CBSA issued 11 re-determinations of tariff classification pursuant to subsection 60(4) of the *Act*, in which it determined that the goods in issue were properly classified under tariff item No. 9405.40.90 as other electric lamps and lighting fittings.

5. On June 8 and June 9, 2009, pursuant to section 67 of the *Act*, S.F. Marketing appealed these 11 decisions to the Tribunal (Appeal No. AP-2009-012).

6. On June 22, 2009, the CBSA issued a second re-determination pursuant to subsection 60(4) of the *Act*, in which it also determined that the goods in issue were properly classified under tariff item No. 9405.40.90 as other electric lamps and lighting fittings.

7. On August 10, 2009, S.F. Marketing appealed the June 22, 2009, decision to the Tribunal (Appeal No. AP-2009-047) and asked the Tribunal to hold this appeal in abeyance pending the outcome of Appeal No. AP-2009-012 because the goods in issue were identical.

8. On August 28, 2009, the Tribunal denied the request to hold Appeal No. AP-2009-047 in abeyance. Instead, pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules*,³ the Tribunal combined Appeal No. AP-2009-012 and Appeal No. AP-2009-047.

9. The Tribunal held a public hearing in Ottawa, Ontario, on February 17, 2010. It heard testimony from two witnesses. Mr. Jimmy Katsipis, Market Manager for S.F. Marketing, testified on behalf of S.F. Marketing. Mr. David Ship, Manager of Production Services at the National Arts Centre in Ottawa, was qualified as an expert in stage lighting, and testified on behalf of the CBSA.

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

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

3. S.O.R./91-499.

GOODS IN ISSUE

10. The parties agreed at the opening of the public hearing that the goods in issue comprise five models of moving light heads with motors identified as the Newton 1200, IDEA Spot 575, Giotto Spot 400, Synthesis Spot 700 and Palco 3.⁴

ANALYSIS

Law

11. On appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of goods in accordance with prescribed interpretative rules.

12. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.⁵ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

13. Subsection 10(1) of the *Customs Tariff* provides as follows: “. . . 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^[6] and the Canadian Rules^[7] set out in the schedule.”

14. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, regard must be had to Rule 2, and so on, until classification is completed.⁸ Classification therefore begins with Rule 1, which provides as follows: “. . . 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.”

15. In addition, section 11 of the *Customs Tariff* provides as follows: “In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System^[9] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[10] published by the Customs Co-operation Council (also known as the

4. S.F. Marketing withdrew the portion of its appeals with respect to “parts” of the goods in issue. *Transcript of Public Hearing*, 17 February 2010, at 5-7.

5. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

6. S.C. 1997, c. 36, schedule [*General Rules*].

7. S.C. 1997, c. 36, schedule.

8. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Under Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

9. World Customs Organization, 2d ed., Brussels, 2003.

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

World Customs Organization), as amended from time to time.” Accordingly, unlike section or chapter notes, *Explanatory Notes* are not binding on the Tribunal. However, the Federal Court of Appeal has stated that the Tribunal should apply the *Explanatory Notes*, unless there is a sound reason to do otherwise.¹¹

Tariff Classification Issues

Are the goods in issue classifiable in heading No. 94.05?

16. Heading No. 94.05 reads as follows:

<p>94.05 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included</p>	<p>94.05 Appareils d'éclairage (y compris les projecteurs) et leurs parties, non dénommés ni compris ailleurs [...]</p>
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17. Tariff item No. 9405.40.20 reads as follows:

<p>9405.40.20 - - Motion picture or theatrical spotlights</p>	<p>9405.40.20 - - Projecteurs pour cinéma ou théâtre</p>
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18. The *Explanatory Notes* to heading No. 94.05 provide as follows:

<p>This group also includes searchlights and spotlights. These throw a concentrated beam of light (which can usually be regulated) over a distance onto a given point or surface, by means of a reflector and lenses, or with a reflector only.</p>	<p>Le présent groupe couvre également les projecteurs. Il s'agit d'appareils permettant de concentrer le flux d'une source lumineuse (qui peut généralement être réglé) en un faisceau dirigé sur un point ou une surface déterminée se trouvant à une distance plus ou moins grande, à l'aide d'un miroir réflecteur et d'une lentille ou d'un réflecteur seulement.</p>
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<p>Searchlights are used, e.g., for anti-aircraft operations, and spotlights, e.g., for stage sets and in photographic or film studios.</p>	<p>Certains projecteurs sont utilisés notamment en défense antiaérienne, alors que d'autres sont utilisés sur les scènes de théâtre et dans les studios photographiques ou cinématographiques.</p>
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19. The CBSA submitted that the goods in issue fall within the scope of heading No. 94.05 because they are considered “. . . a kind of spotlight” that can be operated remotely.¹²

20. S.F. Marketing submitted that the wording of heading No. 94.05 is limited to non-mechanical lamps and that the goods in issue are not commonly known as spotlights in the stage lighting industry, rather they are referred to as intelligent lights or moving heads.¹³

– Are the goods in issue spotlights?

21. The evidence indicates that the goods in issue “. . . throw a concentrated beam of light . . . over a distance onto a given point or surface, by means of a reflector and lenses, or with a reflector only”, as described in the *Explanatory Notes* to heading No. 94.05. Mr. Katsipis testified that the goods in issue

11. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), paras. 13, 17.

12. *Transcript of Public Hearing*, 17 February 2010, at 129-30.

13. *Ibid.* at 125.

produce a defined, single beam of light,¹⁴ that they all contain a lamp, lamp holder (socket), lens and reflector and that they all have the ability to pan, tilt and dim and, with the exception of the Palco 3, have the ability to focus.¹⁵ During the hearing, Mr. Katsipis used physical exhibit B-01, a “Spotlight IDEA SPOT 250”, to demonstrate how a beam of light is thrown over a distance onto a given point or surface. The parties indicated that this exhibit was very similar or identical to the goods in issue.¹⁶ In addition, physical exhibit A-03, a “Pink Floyd Pulse” DVD, showed similar models of “spots” and “moving lights” operating in a fashion similar to physical exhibit B-01.¹⁷

22. S.F. Marketing argued that the regulation contemplated by the *Explanatory Notes* was to be achieved through manual means, *not* mechanical means. However, the Tribunal does not consider that there is anything in the wording in the *Customs Tariff* that imposes this limitation. Heading No. 94.05 simply refers to “[l]amps and lighting fixtures, including . . . spotlights . . .” and does not contain any wording such as “hand-held lamps” or “non-mechanical lamps” that would limit the heading, as argued by S.F. Marketing. Similarly, the *Explanatory Notes* to heading 94.05 refer to “searchlights and spotlights” without limiting these articles to those that are mechanized.

23. Therefore, the goods in issue fulfill the performance characteristics of spotlights that are described in the *Explanatory Notes* to heading No. 94.05.

24. However, although the *Explanatory Notes* give a description of these performance characteristics of spotlights, they do not define the term “spotlight”.

25. The approach taken by both S.F. Marketing and the CBSA in arguing whether the goods in issue are spotlights was to consider if they are considered “spotlights” in industry usage. In considering industry usage, the Tribunal first examined S.F. Marketing’s marketing literature and product names for the five models of the goods in issue.

26. The Newton 1200 model is described in the marketing literature as a “professional followspot”, “[t]he Newton intelligent followspot . . .” and a “. . . new spotlight . . .” which “. . . revolutionizes the conventional spotlight concept . . .”.¹⁸ The Idea Spot 575 model, the Synthesis Spot 700 model and the Giotto Spot 400 model all contain “spot” in their model name, and the Tribunal notes that the witnesses consistently referred to spotlights as “spots” throughout their testimony. In addition, the Giotto Spot 400 is described in the marketing literature as an “. . . innovative professional moving head spot . . .”¹⁹ It is reasonable to expect that S.F. Marketing would use terminology in its marketing literature and product names that reflects industry usage. The Tribunal therefore concludes that S.F. Marketing considers that these four models of the goods in issue would be known in the industry as spotlights.

14. *Ibid.* at 15-26.

15. *Ibid.* at 52-54.

16. Tribunal Exhibit AP-2009-012-20.

17. *Transcript of Public Hearing*, 17 February 2010, at 48-50.

18. Tribunal Exhibit AP-2009-012-05A, tab 1, at 17, 20. Mr. Ship provided a definition of “followspot”, saying that it was a “. . . spotlight tending to be a longer throw, which means a further distance away from the performer . . . [a]nd it follows the person because it’s being controlled by a human being”; *Transcript of Public Hearing*, 17 February 2010, at 69.

19. Tribunal Exhibit AP-2009-012-05A at 61.

27. The fifth model, the Palco 3, is described differently in the marketing literature. It is described as an LED “colour changer”, which uses a LED light source to “. . . generate an evenly distributed light beam, suitable for illuminating large areas.”²⁰

28. However, when asked about the differences between the various models, Mr. Katsipis testified that, while each may have unique or extra features, all five models are very similar.²¹ Mr. Katsipis did not indicate that the Palco 3 was significantly different from the other four models of the goods in issue. Moreover, when Mr. Katsipis was asked if he agreed that people in the stage lighting industry “. . . refer to the goods in issue as spotlights, fixtures and, in [the] case of the Newton 1200, as a followspot”, he said he did agree.²² Mr. Katsipis stated: “. . . even if you go to my competitor, his spot, in other words a moving light that can do a circle on the wall will be identified as a spot.”²³

29. The testimony of the expert in stage lighting, Mr. Ship, lends further support to the view that the goods in issue are “spotlights”. Mr. Ship testified that the goods in issue are essentially motorized forms of spotlights. He compared the goods in issue to traditional hand-held spotlights as follows: “. . . they both produce light, they both produce lighting effects . . . we are able to position it on stage, we are able to effect the colour, we are able to effect a whole bunch of stuff interior to the beam of light.”²⁴ When asked about the function of the electric motor on the goods in issue, Mr. Ship testified that “. . . on a fundamental level, [the role] is to replace human fingers.”²⁵ When testifying concerning the Newton 1200, Mr. Ship referred to it as a “followspot”, rather than using different terminology to reflect the fact that it is mechanized.²⁶

30. The CBSA filed documentation from online sources that appear to classify non-motorized spotlights in a different category from motorized theatre lights of all types.²⁷ S.F. Marketing did not question the reliability of these sources but, when asked about the approach taken in this documentation, Mr. Ship testified: “I don’t think that [the differentiation they make] necessarily means that [the goods in issue] are not spotlights at heart.”²⁸

31. Considering the evidence as a whole concerning industry usage, the Tribunal concludes that where goods are both motorized and in the nature of a spotlight, the fact that they are motorized does not prevent them from being referred to in the industry as spotlights.

32. Therefore, the Tribunal considers that the goods in issue are spotlights.

– Are the goods in issue theatrical spotlights?

33. The evidence indicates that use in the theatre is a significant use of the goods in issue.

20. *Ibid.* at 83-85.

21. *Transcript of Public Hearing*, 17 February 2010, at 14, 52-54.

22. *Ibid.* at 51.

23. *Ibid.* at 52.

24. *Ibid.* at 97-98.

25. *Ibid.* at 98.

26. *Ibid.* at 69.

27. Tribunal Exhibit AP-2009-012-05A, tab 2.

28. *Transcript of Public Hearing*, 17 February 2010, at 106.

34. Product literature and manuals on the record state that the goods in issue are “. . . for professional use (theatre, TV or live concerts) . . .”,²⁹ “. . . for professional use on stages, in discotheques, theatres, etc. . .”,³⁰ or “. . . for use in high profile shows, theatres, Television studios and entertainment venues in general.”³¹

35. This is consistent with the testimony of both witnesses. Mr. Katsipis testified that the goods in issue are used for “. . . festivals, concerts, broadcasting, theatrical.”³² Likewise, Mr. Ship, in his capacity as an expert in stage lighting, testified that the goods in issue are used by professionals for, *inter alia*, the theatre³³ and specifically as “. . . theatrical fixture[s], to produce light and . . . lighting effects.”³⁴

36. Therefore, the Tribunal concludes that the goods in issue are “theatrical spotlights” and that they should be classified under tariff item No. 9405.40.20, which covers “theatrical spotlights”.

Are the goods in issue classifiable in heading No. 84.79?

37. Heading No. 84.79 reads as follows:

<p>84.79 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.</p>	<p>84.79 Machines et appareils mécaniques ayant une fonction propre, non dénommés ni compris ailleurs dans le présent Chapitre.</p>
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38. The *Explanatory Notes* to heading No. 84.79 provide as follows:

<p>This heading is restricted to machinery having individual functions, which:</p> <p>. . .</p> <p>(b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.</p>	<p>La présente position englobe les machines et appareils mécaniques ayant une fonction propre qui ne sont pas:</p> <p>[...]</p> <p>b) Repris plus spécifiquement à d'autres Chapitres.</p>
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39. S.F. Marketing argued that the goods in issue should be classified in heading No. 84.79 because the goods in issue are machines.³⁵

40. S.F. Marketing also argued that classification in Chapter 84 is the result that would be indicated by Tribunal jurisprudence, particularly the decision in *Bazaar & Novelty Co., A Division of Bingo Press & Speciality Limited v. Deputy M.N.R.*³⁶

41. As indicated above, the *Explanatory Notes* to heading No. 84.79 state that this heading includes only machinery that is *not* covered more specifically by a heading in any other chapter of the nomenclature. Because heading No. 94.05 refers to spotlights specifically, and heading No. 84.79 refers to machines and mechanical devices generally, heading No. 94.05 is more specific than heading No. 84.79.

29. Tribunal Exhibit AP-2009-012-05A at 20.

30. *Ibid.* at 34.

31. *Ibid.* at 61.

32. *Transcript of Public Hearing*, 17 February 2010, at 11.

33. Tribunal Exhibit AP-2009-012-11A, para. 13.

34. *Transcript of Public Hearing*, 17 February 2010, at 94.

35. *Ibid.* at 124.

36. (10 April 1996), AP-95-120 (CITT).

42. Therefore the goods in issue are properly classified in heading 94.05.

DECISION

43. For the foregoing reasons, the Tribunal concludes that the goods in issue should be classified under tariff item No. 9405.40.20 as theatrical spotlights.

44. The appeals are therefore dismissed.

Ellen Fry _____
Ellen Fry
Presiding Member