Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-013

Kverneland Group North America Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, April 30, 2010

Canada

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IN THE MATTER OF an appeal heard on January 20, 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 April 1, 2009, with respect to requests for re-determination, pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

KVERNELAND GROUP NORTH AMERICA INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 20, 2010
Tribunal Member:	Diane Vincent, Presiding Member
Counsel for the Tribunal:	Nick Covelli
Research Director:	Audrey Chapman
Research Officer:	Gary Rourke
Manager, Registrar Office:	Michel Parent
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PARTICIPANTS:

Appellant	**Counsel/Representative**
Kverneland Group North America Inc.	Michael Kaylor
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Lune Arpin

WITNESS:

Raymond Racine
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Kverneland Group North America Inc. (Kverneland) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from decisions made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. The issue in this appeal is whether hay bale wrappers (the goods in issue), classified under tariff item No. 8422.40.91 of the schedule to the *Custom Tariff*,[2] qualify for the benefits of tariff item No. 9903.00.00 as articles for use in tractors powered by an internal combustion engine for use on the farm.

PROCEDURAL HISTORY

3. Between May 1, 2003, and July 9, 2004, Kverneland imported the goods in issue under four separate transactions.[3] The goods in issue were classified under tariff item No. 8422.40.91 as hay bale wrappers.

4. On December 14, 2005, Kverneland requested an advance ruling on the tariff classification of the goods in issue. On January 26, 2006, the CBSA issued an advance ruling, classifying the goods in issue under tariff item No. 8422.40.91.[4]

5. On March 25 and April 1, 2009, the CBSA issued re-determinations of the tariff classification pursuant to subsection 60(4) of the *Act*, confirming the classification of the goods in issue under tariff item No. 8422.40.91.[5]

6. On June 9, 2009, pursuant to section 67 of the *Act*, Kverneland filed a notice of appeal with the Tribunal, claiming that the goods in issue qualified for the benefits of tariff item No. 9903.00.00.

7. On July 27, 2009, Kverneland filed a brief in support of its claim.

8. On September 9, 2009, with Kverneland's consent, the Tribunal granted the CBSA an extension of time to file its brief, which it did on October 15, 2009.

9. The Tribunal held a public hearing in Ottawa, Ontario, on January 20, 2010. Mr. Raymond Racine, a farm equipment representative for Kverneland, testified on its behalf. The CBSA did not call any witnesses.

GOODS IN ISSUE

10. The goods in issue are six models of the Kverneland Taarup brand of hay bale wrappers with the following model numbers: 7120, 7420, 7500, 7517, 7655 and 7664.[6]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. Tribunal Exhibit AP-2009-013-09A, tab 1.
4. Tribunal Exhibit AP-2009-013-16A, tab 1.
5. No documentary evidence was filed with regard to Kverneland's request for a re-determination of the tariff classification of the goods in issue pursuant to subsection 60(1) of the *Act*.
6. Tribunal Exhibits AP-2009-013-019 and AP-2009-013-020.

11. No physical exhibits were filed at the hearing. Photographs and product literature for the six models were submitted as evidence.[7]

ANALYSIS

Law

12. In appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of goods in accordance with prescribed interpretative rules.

13. 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.[8] 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.

14. 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[9] and the Canadian Rules[10] set out in the schedule."

15. 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, then regard must be had to Rule 2, and so on.[11] 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."

16. 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[12] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[13] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise.[14]

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7. Tribunal Exhibit AP-2009-013-016A, tab 9.
8. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
9. S.C. 1997, c. 36, schedule [*General Rules*].
10. S.C. 1997, c. 36, schedule.
11. 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* apply to classification at the tariff item level (i.e. to eight digits).
12. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
13. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
14. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), paras. 13, 17.

17. Section 13 of the *Official Languages Act*[15] provides that the English and French versions of any act of Parliament are equally authoritative.

18. In the present appeal, the parties agree that the nomenclature of the *Customs Tariff* that applied to the goods in issue at the time of their importation provides as follows:

> **84.22** **Dish washing machines; machinery for cleaning or drying bottles or other containers; machinery for filling, closing, sealing, or labelling bottles, cans, boxes, bags or other containers; machinery for capsuling bottles, jars, tubes and similar containers; other packing or wrapping machinery (including heat-shrink wrapping machinery); machinery for aerating beverages.**
>
> . . .
>
> **8422.40** **-Other packing or wrapping machinery (including heat-shrink wrapping machinery)**
>
> . . .
>
> 8422.40.91 - - - -. . . Hay bale wrappers . . .

19. The different models of the goods in issue were described by Mr. Racine as having different features and accessories, but all performing the same function, which is to wrap a bale of hay in a protective plastic film.[16] On the basis of the evidence, the Tribunal agrees with both Kverneland and the CBSA that the goods in issue are properly classified under tariff item No. 8422.40.91 as hay bale wrappers.

20. The source of disagreement between the parties—and the issue in this appeal—is whether the goods in issue also fall within the scope of tariff item No. 9903.00.00 and thereby are entitled to duty-free treatment.

21. Tariff item No. 9903.00.00 provides as follows:

> **9903.00.00** **Articles and materials that enter into the cost of manufacture or repair of the following, and articles for use in the following:**
>
> . . .
>
> **Tractors powered by an internal combustion engine, not including tractors of the type used on railway station platforms, road tractors for semi-trailers or tractors of a kind for hauling logs (log skidders), and buckets, shovels, grabs, grips, bulldozer or angledozer blades, scarifiers, pneumatic tires and inner tubes for use therewith and for use on the farm** . . . .

22. Chapter 99 of the *Customs Tariff*, which includes tariff item No. 9903.00.00, provides special classification provisions that allow certain goods to be imported into Canada with tariff relief. As each heading of Chapter 99 has only one subheading and one tariff item number under it, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter.[17] Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no *Classification Opinions* or *Explanatory Notes* to consider.

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15. R.S.C. 1985 (4th Supp.), c. 31.
16. *Transcript of Public Hearing*, 20 January 2010, at 8-9.
17. However, note 1 to Chapter 99 provides that the rule of specificity in Rule 3 (a) of the *General Rules* does not apply to the provisions of Chapter 99. This reflects the fact that classification in Chapters 1 to 97 and Chapter 99 is not mutually exclusive.

23. There are no section notes to Section XXI, which includes Chapter 99.

24. Note 3 to Chapter 99 is relevant to the present appeal and provides as follows:

> 3. 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.

25. In accordance with the preceding note, the goods in issue may only be classified in Chapter 99 after classification under a tariff item in Chapters 1 to 97 has been determined. As indicated above, the Tribunal accepts the classification of the goods in issue under a tariff item in Chapter 84, i.e. tariff item No. 8422.40.91. Therefore, the condition of note 3 to Chapter 99 has been met.

26. Therefore, the sole remaining issue before the Tribunal is to determine whether the goods in issue qualify for the benefits of tariff item No. 9903.00.00.

Do the Goods in Issue Qualify for the Benefits of Tariff Item No. 9903.00.00?

27. Kverneland submitted that the goods in issue qualify for the benefits of tariff item No. 9903.00.00 because they are articles "for use in" a tractor powered by an internal combustion engine, for use on the farm.

"Tractors"

28. Both Kverneland and the CBSA referred to the definition of "tractors" found in note 2 to Chapter 87 of the *Customs Tariff*.[18] "Tractors" are defined in that note as follows:

> For the purpose of this Chapter, "tractors" means vehicles constructed essentially for hauling or pushing another vehicle, appliance or load, whether or not they contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilizers or other goods.

29. Note 4 to Chapter 99 provides that "[t]he words and expressions used in [Chapter 99] have the same meaning as in Chapters 1 to 97." Accordingly, the definition of "tractors" found in note 2 to Chapter 87 is applicable to the use of "tractors" found in tariff item No. 9903.00.00.

30. Therefore, in order for the goods in issue to qualify for the benefits of tariff item No. 9903.00.00, they must be (1) articles, (2) for use in, (3) tractors powered by internal combustion engines and constructed essentially for hauling or pushing other vehicles, appliances or loads, and (4) for use on the farm.

31. The parties did not dispute that the intended use of the goods in issue is generally associated with the use of a tractor such as those mentioned above.

"Articles"

32. Kverneland submitted that the goods in issue meet the definition of "articles", for the purposes of tariff item No. 9903.00.00. It argued that the word "articles" should be construed broadly.

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18. Tribunal Exhibit AP-2009-013-03A, para. 21; Tribunal Exhibit AP-2009-013-09A, para. 24.

33. To support this proposition, Kverneland relied upon the Tariff Board's decision in *Singer Sewing Machine Company of Canada Ltd. v. M.N.R.C.E.* In its decision, the Tariff Board wrote the following:

> I accept the appellant's argument that the word "article" should be given a broad meaning. The Board in the *Star Shipping* case . . . ruled that the word "article" refers to a finished product, and the Federal Court of Appeal decided in the *Les Entreprises Kato Inc.* case . . . that "article" is a word general application. Similarly the Department of National Revenue has ruled that "articles" include such items as a television system, vending machines and a coin changer. I find that, on the basis of the dictionary definition and the cases cited by the appellant, and the fact that Parliament used different words in sections 1 and 2, "articles" must be given a broad meaning to include the subject goods.[19]

34. The CBSA did not submit any evidence to oppose Kverneland's submission that the goods in issue were not "articles" for the purposes of tariff item No. 9903.00.00.

35. The word "articles" is not defined for the purposes of tariff item No. 9903.00.00. However, in *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency*, the Tribunal accepted the *Canadian Oxford Dictionary* definition of "article" as "**1** a particular or separate thing, esp. one of a set . . . ."[20] Therefore, the Tribunal agrees with Kverneland that the ordinary meaning of the word "articles" is sufficiently broad to encompass the goods in issue.

"For use on the farm"

36. Kverneland submitted that the goods in issue were farm implements.[21] The CBSA did not dispute this submission, nor did it submit any evidence to demonstrate that the goods in issue were not for use on the farm. Throughout his testimony, Mr. Racine referred to the goods in issue within the context of agricultural activities performed on a farm.

37. The Tribunal therefore finds that the goods in issue are "for use on the farm" and meet this condition of tariff item No. 9903.00.00.

"For use in"

38. The crux of the dispute between the parties is whether the goods in issue are "for use in" a tractor.

39. Subsection 2(1) of the *Customs Tariff* defines the phrase "for use in" as follows:

> "for use in", wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.

40. In applying subsection 2(1) of the *Customs Tariff*, the Tribunal used a test with two requirements for determining whether goods are attached to other goods. In particular, the goods must be (1) physically connected and (2) functionally joined to the other goods.[22]

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19. 13 TBR 405 at 420.
20. (16 September 2009), AP-2008-012 (CITT) at para. 28.
21. *Transcript of Public Hearing*, 20 January 2010, at 27.
22. *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (29 November 2001), AP-2000-047 (CITT) [*Imation*]; *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT) [*PHD*]; *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT) [*Sony*]; *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT) [*Agri-Pack*]; *Jam Industries Ltd. v. President of the Canada Border Services Agency* (20 March 2006), AP-2005-006 (CITT) [*Jam Industries*].

41. Kverneland submitted that Tribunal jurisprudence had established, through its decisions in *Agri-Pack* and *Sony*, that the physical connection requirement for the phrase "for use in" does not have to involve a permanent connection. In both of these appeals, the goods, for which the benefit of the tariff relief provision of Chapter 99 was being sought, were not permanently connected to the host good, but were temporarily attached.

42. The CBSA agreed with Kverneland that the goods in issue are physically connected to the tractor.[23]

43. The Tribunal agrees with Kverneland and the CBSA that the goods in issue are physically connected to the tractor. When questioned as to whether the goods in issue were physically attached to the tractor, Mr. Racine testified that they are attached via a standard hitch located on the rear of the tractor.[24] Mr. Racine further stated that the goods in issue obtained their power through a system of hoses, which are connected to the tractor and control the pressure of the oil flow operated by the tractor's hydraulic system.[25] This evidence was not contradicted. Therefore, the Tribunal is satisfied that, when in use, the goods in issue are physically connected to a tractor.

44. Turning to the second requirement of the "for use in" test, Kverneland submitted that the Tribunal had established in several of its previous decisions that the "functionally joined" requirement was met when it is proven that the two components interact with each other when physically connected. Kverneland referred to the Tribunal's decisions in *Imation*, *Sony* and *Jam Industries*, where it was established that the goods, for which the benefit of the tariff relief provision of Chapter 99 was being sought, contributed to the function of the host good by virtue of their physical connection.

45. In the present appeal, Kverneland submitted that the tractor was the host good[26] and that the tractor and the goods in issue interacted or worked together (to perform a wrapping function) when physically connected.[27]

46. Furthermore, Kverneland submitted that the goods in issue were functionally joined to the tractor because the two were mutually dependent upon each other. Kverneland submitted that the tractor could not perform its function « of hauling or pushing » without the goods in issue and that the goods in issue could not perform their function of wrapping a bale of hay without the tractor.[28]

47. The CBSA submitted that Tribunal jurisprudence had established that, in order to meet the "functionally joined" requirement of the "for use in" test, the goods in issue must enhance the operation and functionality of the host good. The CBSA referred to the Tribunal's decisions in *Agri-Pack* and *Imation* to support this submission.

48. The CBSA submitted that, in the present appeal, it was the function of the goods in issue (that of wrapping a bale of hay) which was being enhanced or complemented by virtue of the physical connection to the tractor and, therefore, that it was the tractor that complemented and enhanced the function of the goods in issue and not vice versa.[29] The CBSA therefore submitted that the goods in issue did not meet the

23. Tribunal Exhibit AP-2009-013-09A, para. 20; *Transcript of Public Hearing*, 20 January 2010, at 75.
24. *Transcript of Public Hearing*, 20 January 2010, at 9.
25. *Ibid.* at 13.
26. *Ibid.* at 74.
27. *Ibid.* at 67.
28. Tribunal Exhibit AP-2009-013-03A at 4.
29. Tribunal Exhibit AP-2009-013-09A, para. 21.

"functionally joined" requirement of the test being used to determine whether these goods are "for use in" a tractor.[30]

49. In the present appeal, the Tribunal observes that the wording of tariff item No. 9903.00.00 is such that it is the host good that follows the words "articles for use in the following", that is "[t]ractors powered by an internal combustion engine . . . and for use on the farm . . . ."

50. Accordingly, for tariff item No. 9903.00.00 to apply to the goods in issue, the host good needs to be the tractor. The Tribunal must now determine whether the goods in issue are « for use in » the tractor. Following the Tribunal's reasoning in *Jam Industries*, in order for tariff item No. 9903.00.00 to apply to the goods in issue, it must be concluded that the goods in issue complement the function of the tractor and not that the tractor complements the function of the goods in issue.

51. In *Jam Industries*, the Tribunal expressed the opinion that the French version of the phrase "for use in" (i.e. "*devant servir dans*") makes it clear that the goods must enter into the composition of the host good for them to be functionally joined, in the sense that they complement the function of the host good.[31] In that case, the Tribunal found that musical instruments were not goods "for use in" an automated data processing machine, as the machine could function without the musical instruments. The machine complemented the function of the musical instruments, not vice versa.[32] This decision was upheld by the Federal Court of Appeal.

52. The Tribunal is of the view that the evidence indicates that the goods in issue do not complement the function of the tractor.

53. Like the automated data processing machine in *Jam Industries*, the tractor does not need the goods in issue in order to function. As suggested by the definition of the word "tractor", the function of a tractor is to haul or push another vehicle, appliance or load. The goods in issue, by being attached to the tractor, do not help the tractor « haul or push another vehicle, appliance or load ». Rather, they are the ones pulled by the tractor to the hay bale wrapping site.

54. Also, Mr. Racine's testimony makes it clear that the tractor does not use the goods in issue to haul or push wrapped bales of hay, or anything else for that matter. Mr. Racine described how each of the six models of the goods in issue operated when in use. He explained that, with regard to model No. 7120, the bales of hay are brought to the goods in issue and loaded onto the machine by a different tractor than the one to which the goods in issue are joined. Other models, such as model No. 7517, are capable of self-loading bales of hay by a metal extension arm.

55. Rather, the goods in issue rely upon the power from the tractor to wrap the bale of hay in plastic. In his testimony, Mr. Racine explained how the goods in issue obtained their power from oil pressure via their attachment to the hydraulic system of the tractor.[33] Although Mr. Racine stated that some models of the goods in issue can be powered by an alternative source of power, this is not the standard practice.[34] Once wrapped, the goods in issue release the bale of hay onto the ground[35], and the tractor hauls the goods in

30. The CBSA referred to the Tribunal's decisions in *Agri-Pack* and *PHD*.
31. While section 13 of the *Official Languages Act* provides that both language versions of an act of Parliament are equally authoritative, in *Tupper v. R.*, [1967] S.C.R. 589, the Supreme Court of Canada held that, where one version is more precise, it should be preferred over the broader version.
32. *Jam Industries*, paras. 44-45.
33. *Transcript of Public Hearing*, 20 January 2010, at 13.
34. *Ibid.* at 47-48.
35. *Ibid.* at 41.

issue towards the next bale. None of the models of the goods in issue are designed to haul or push the wrapped bales of hay.[36]

56. When asked if the goods in issue are necessary for the functioning of the tractor, Mr. Racine stated that the tractor did not need the goods in issue in order to be used on the farm.[37]

57. The host good, the tractor, complements the function of the goods in issue and not vice versa, as it provides the power required to operate the goods in issue, hauls the bales to the fields and hauls the bales to the site where the goods in issue will wrap the bales of hay. The goods in issue need the tractor in order to function, not vice versa.

58. The Tribunal finds that the goods in issue are not functionally joined to the tractor; therefore, they are not "for use in" the tractor.

DECISION

59. For the foregoing reasons, the Tribunal concludes that the goods in issue, classified under tariff item No. 8422.40.91, do not qualify for the benefits of tariff item No. 9903.00.00.

60. The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

36. *Ibid.* at 46.
37. *Ibid.* at 48-49.