



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-057

Leeza Distribution Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, August 17, 2010*

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DECISION 13

IN THE MATTER OF an appeal heard on May 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 July 30, 2009, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

LEEZA DISTRIBUTION INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 20, 2010
Tribunal Member: Jason W. Downey, Presiding Member
Counsel for the Tribunal: Nick Covelli
Research Director: Rose Ritcey
Research Officer: Denise Bergeron
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PARTICIPANTS:**Appellant**

Leeza Distribution Inc.

Counsel/RepresentativesMicheal J. Papelian
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President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Leeza Distribution Inc. (Leeza Distribution) 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 Staron® sheets of a thickness of 13 mm (the goods in issue) are properly classified under tariff item No. 3920.51.90 of the schedule to the *Customs Tariff*² as other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials, of poly(methyl methacrylate), as determined by the CBSA, or should be classified under tariff item No. 9403.90.00 as parts of other furniture, as claimed by Leeza Distribution.

PROCEDURAL HISTORY

3. On October 19, 2005, in response to a request from Leeza Distribution, the CBSA issued an advance ruling on the tariff classification of the goods in issue, pursuant to subsection 43.1(1) of the *Act*. The CBSA classified the goods in issue under tariff item No. 3926.90.90.³ Leeza Distribution appealed the advance ruling, pursuant to subsection 60(2).

4. On May 15, 2006, pursuant to subsection 60(4) of the *Act*, the CBSA issued a re-determination of the tariff classification and classified the goods in issue under tariff item No. 9403.90.00.⁴

5. On February 26, 2008, the CBSA issued a national customs ruling which revised the tariff classification of the goods in issue. In this ruling, the CBSA referred to a classification opinion of the World Customs Organization (WCO) that classified “artificial marble” consisting of poly(methyl methacrylate) and aluminum hydroxide in subheading No. 3920.51.⁵ Consequently, the CBSA advised Leeza Distribution that the goods in issue were properly classified under tariff item No. 3920.51.90.⁶

6. Between March 5 and September 23, 2008, Leeza Distribution imported the goods in issue by way of five separate transactions; the goods were classified under tariff item No. 3920.51.90.

7. In June 2009, pursuant to subsection 60(2) of the *Act*, Leeza Distribution requested re-determinations of the tariff classification of the goods in issue.

8. On July 30, 2009, pursuant to subsection 60(4) of the *Act*, the CBSA issued re-determinations of the tariff classification and maintained the classification of the goods in issue under tariff item No. 3920.51.90.⁷

9. On October 16, 2009, pursuant to section 67 of the *Act*, Leeza Distribution filed the present appeal with the Tribunal.⁸

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

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

3. The advance ruling also applied to Staron® sheets of a thickness of 6 mm, which are not the subject of the current appeal.

4. Tribunal Exhibit AP-2009-057-06A, tab 3.

5. *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*, World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

6. Tribunal Exhibit AP-2009-057-06A, tab 2.

7. *Ibid.*, tab 1.

8. Tribunal Exhibit AP-2009-057-01.

10. The Tribunal held a public hearing in Ottawa, Ontario, on May 20, 2010. Mr. Jack McDonald, Vice-President and co-owner, Leeza Distribution, testified on Leeza Distribution's behalf; Mr. Paul B. Loo, Director, Analytical and Forensic Services, CBSA, also testified.⁹ The Tribunal qualified Mr. Loo as an expert on the chemistry of polymers.¹⁰

GOODS IN ISSUE

11. The goods in issue are solid surface materials, composed of poly(methyl methacrylate), compounded with aluminum hydroxide (37 percent by weight) and small amounts of plasticizers and colorant. When imported, the goods in issue are 13 mm in thickness, 760 mm in width and 3,680 mm in length. They are pre-polished, non-porous, resistant to stains and available in many colours. Among other uses, the goods in issue are used to produce countertops and tabletops in residential, healthcare, hospitality or commercial environments.¹¹

12. Leeza Distribution filed as exhibits a Staron® Solid Surfaces Fabrication Manual and a video, which was played at the hearing and which showed the process of transforming the goods in issue into countertops.¹²

ANALYSIS

Statutory Framework

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

14. 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 WCO.¹³

15. 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.

16. 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.

17. 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^[14] and the Canadian Rules^[15] set out in the schedule."

9. As part of its submission, the CBSA had indicated its intention to call Mr. Loo as a witness, who filed a witness statement. At the hearing, the CBSA stated that it would not be calling Mr. Loo even though he was present. However, the Tribunal called upon Mr. Loo to testify in order to assist the Tribunal in his area of expertise.

10. *Transcript of Public Hearing*, 20 May 2010, at 76-77.

11. Tribunal Exhibit AP-2009-057-08A at 3-4.

12. Tribunal Exhibit AP-2009-057-18.

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

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

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

18. 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.¹⁶

19. 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.”

20. 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 and the Explanatory Notes to the Harmonized Commodity Description and Coding System,¹⁷ published by the Customs Co-operation Council (also known as the WCO), as amended from time to time.”

21. 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 respected, unless there is a sound reason to do otherwise, as they serve as an interpretive guide to tariff classification in Canada.¹⁸

22. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

23. Thus, the Tribunal must first determine whether the goods in issue can be classified according to Rule 1 of the *General Rules* as per the terms of the headings and any relevant section or chapter notes in the *Customs Tariff* and any relevant *Classification Opinions* and *Explanatory Notes*.

Relevant Provisions of the Customs Tariff and Explanatory Notes

24. The nomenclature of the *Customs Tariff* which Leeza Distribution considers applicable to the goods in issue reads as follows:

Chapter 94

FURNITURE; BEDDING, MATTRESSES, MATTRESS SUPPORTS, CUSHIONS AND SIMILAR STUFFED FURNISHINGS; LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED; ILLUMINATED SIGNS, ILLUMINATED NAME-PLATES AND THE LIKE; PREFABRICATED BUILDINGS

...

94.03 Other furniture and parts thereof.

...

9403.90.00 -Parts

16. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 are applicable 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).

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

18. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), at paras. 13, 17 [*Suzuki*].

25. The legal notes to Chapter 94 provide the following:

1. This Chapter does not cover:

...

(d) parts of general use as defined in Note 2 to Section XV, of base metal (Section XV), or similar goods of plastics (Chapter 39) . . . ;

...

3. (A) In headings 94.01 to 94.03 references to parts of goods do not include references to sheets or slabs (whether or not cut to shape but combined with other parts) of glass (including mirrors), marble or other stone or of any other material referred to in Chapter 68 or 69.

26. The *Explanatory Notes* to Chapter 94 provide the following:

This Chapter covers, **subject** to the exclusions listed in the Explanatory Notes to this Chapter:

(1) All furniture and parts thereof (headings 94.01 to 94.03).

...

For the purposes of this Chapter, the term “furniture” means:

...

(B) The following:

(i) Cupboards, bookcases, other shelved furniture and unit furniture, designed to be hung, to be fixed to the wall or to stand one on the other or side by side, for holding various objects or articles (books, crockery, kitchen utensils, glassware, linen, medicaments, toilet articles, radio or television receivers, ornaments, etc.) and separately presented elements of unit furniture.

...

PARTS

This Chapter only covers parts, whether or not in the rough, of the goods of headings 94.01 to 94.03 and 94.05, when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings. They are classified in this Chapter when not more specifically covered elsewhere.

27. The *Explanatory Notes* to heading No. 94.03 provide the following:

This heading covers furniture and parts thereof, **not covered** by the previous headings. It includes furniture for general use (e.g., cupboards, show-cases, tables, telephone stands, writing-desks, escritaires, book-cases, and other shelved furniture, etc.), and also furniture for special uses.

The heading includes furniture for:

(1) **Private dwellings, hotels, etc.**, such as: cabinets, linen chests, bread chests, log chests; chests of drawers, tallboys; pedestals, plant stands; dressing-tables; pedestal tables; wardrobes, linen presses; hall stands, umbrella stands; side-boards, dressers, cupboards; food-safes; bedside tables; beds (including wardrobe beds, camp-beds, folding beds, cots, etc.); needlework tables; foot-stools, fire screens; draught-screens; pedestal ashtrays; music cabinets, music stands or desks; play-pens; serving trolleys (whether or not fitted with a hot plate).

...

- (5) **Shops, stores, workshops, etc.**, such as: counters; dress racks; shelving units; compartment or drawer cupboards; cupboards for tools, etc.; special furniture (with cases or drawers) for printing-works.

28. The nomenclature of the *Customs Tariff* which the CBSA considers applicable to the goods in issue reads as follows:

Chapter 39

PLASTICS AND ARTICLES THEREOF

...

39.20 Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials.

...

-Of acrylic polymers:

3920.51 --Of poly(methyl methacrylate)

...

3920.51.90 ---Other

29. The legal notes to Chapter 39 provide the following:

1. Throughout the Nomenclature the expression “plastics” means those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

...

2. This Chapter does not cover:

...

- (x) Articles of Chapter 94 (for example, furniture, lamps and lighting fittings, illuminated signs, prefabricated buildings);

...

10. In headings 39.20 and 39.21, the expression “plates, sheets, film, foil and strip” applies only to plates, sheets, film, foil and strip (other than those of Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).

30. The *Explanatory Notes* to Chapter 39 provide the following:

In general, this Chapter covers substances called polymers and semi-manufactures and articles thereof, **provided** they are not excluded by Note 2 to the Chapter.

...

Plates, sheets, film, foil and strip of heading 39.20 or 39.21

The expression “plates, sheets, film, foil and strip”, used in headings 39.20 and 39.21 is defined in Note 10 to the Chapter.

Such plates, sheets, etc., whether or not surface-worked (including squares and other rectangles cut therefrom), with ground edges, drilled, milled, hemmed, twisted, framed or otherwise worked or cut into shapes other than rectangular (including square), are generally classified in **headings 39.18, 39.19 or 39.22 to 39.26.**

31. The *Explanatory Notes* to heading No. 39.20 provide the following:

According to Note 10 to this Chapter, the expression “plates, sheets, film, foil and strip” applies only to plates, sheets, film, foil and strip and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked (for example, polished, embossed, coloured, merely curved or corrugated), uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use, for example, tablecloths).

32. The *Classification Opinions* on similar goods provide the following:

3920.51 1. «Artificial marble», in rectangular sheets (thickness 1.27 cm or 1.91 cm, width 63.5 cm or 76.2 cm, length 307.3 cm or 368.3 cm), consisting, mainly, of poly(methyl methacrylate) (33 % by weight) and aluminium hydroxide (66 % by weight).

Position of Parties

33. To a certain extent, the parties seem to agree that this appeal can be resolved by application of Rule 1 of the *General Rules*, but they disagree on which heading of the *Customs Tariff* is applicable.

34. Leeza Distribution also argued that the Tribunal could alternatively classify the goods in issue pursuant to Rule 3 (a) or (c) of the *General Rules*.

35. As far as the facts are concerned, the parties agree that the goods in issue are pre-polished, shipped in sheet form, composed of an acrylic polymer and are more than 0.25 mm thick.

Leeza Distribution

36. Leeza Distribution submitted that the goods in issue are parts of table or counters of a kind used in offices and for domestic purposes of heading No. 94.03 because they are committed by design for use in such furniture.

37. In its submission, Leeza Distribution referred to the definition of “part” in Memorandum D10-0-1,¹⁹ which states as follows: “A ‘part’ is defined as ‘an identifiable component of an article, machine, apparatus, equipment, appliance or specific good which is integral to the design and essential to the function of the product in which it is used’.”²⁰ Leeza Distribution also referred to the fact that the *Explanatory Notes* to Chapter 94 provide that the chapter covers parts that are designed wholly or principally for an article of heading Nos. 94.01 to 94.03.²¹

38. In support of its position that the goods in issue are committed by design for use in countertops and tabletops, Leeza Distribution submitted a letter from the manufacturer of the goods in issue, which reads as follows:²²

... the product we manufacture and supply to Leeza Distribution ... is shipped in sheets to be fabricated with few exceptions for a solid surface countertop / tabletop.

19. “Classification of Parts and Accessories in the *Customs Tariff*” (24 January 1994).

20. Tribunal Exhibit AP-2009-057-06A, para. 13.

21. *Ibid.*, paras. 14-15

22. *Ibid.*, tab 4.

When the goods arrive in Canada, simple finishing by cutting to length, edge profiling, gluing, and polishing is [performed] on the countertops. The 1/2" thickness and composition of the manufactured goods commits it by design with few exceptions for countertop / tabletop usage.

39. Leeza Distribution also submitted technical information on the performance properties of the goods in issue with respect to their stain, fungi and bacterial resistance, flame spread and smoke density, and surface resistance to boiling water and high temperatures.²³ According to Leeza Distribution, these properties confirm that the goods in issue are committed by design for use as countertops and tabletops.

40. In his testimony on behalf of Leeza Distribution, Mr. McDonald described the production process of the goods in issue, whereby they are poured on a cast line, calibrated to the correct thickness, cut to size and then ground or polished to the equivalent of a 220-grit finish, which is the standard for solid surface countertops.²⁴

41. Mr. McDonald also stated that approximately 95 percent of the goods in issue are sold to fabricators that manufacture kitchen countertops.²⁵ He referred to the video that showed the goods in issue being transformed into countertops after importation.²⁶

42. Moreover, Leeza Distribution submitted that the fact that the *Explanatory Notes* to heading No. 94.03 refer to "... furniture and parts thereof, **not covered** by the previous headings" and that paragraph (5) speaks of "counters" reinforces the argument that the goods in issue should be classified in Chapter 94.

43. Leeza Distribution argued that, since the goods in issue are committed by design for use as countertops, they are not "[p]arts of general use" of exclusionary Note 1(d) of Chapter 94.

44. Leeza Distribution also argued that, whereas Note 3(A) to Chapter 94 excludes sheets of marble and glass, it does not specifically exclude acrylic polymers from Chapter 94, thereby inviting the Tribunal to read into this legislative silence.

45. Leeza Distribution further argued that the sheet form of the goods in issue should not be seen as their principal or defining characteristic.²⁷ It relied on Mr. McDonald's testimony that the goods in issue are shipped in sheet form for ease of transport and because it would not be practical to complete the final manufacturing process overseas because of infinite variables linked to individual customer requirements or often unique installation site specifications.²⁸

46. Although Leeza Distribution recognized that the *Explanatory Notes* to heading No. 39.20 indicate that Chapter 39 covers goods that have been pre-polished, it contends that the process of grinding the goods in issue to a 220-grit finish at the factory means that the goods have been "further worked" prior to importation and, therefore, by virtue of Note 10 to Chapter 39, are excluded from the chapter.²⁹

23. *Ibid.*, tab 5.

24. *Transcript of Public Hearing*, 20 May 2010, at 27-28, 32-34.

25. *Ibid.* at 62.

26. *Ibid.* at 13-14.

27. Tribunal Exhibit AP-2009-057-06A, para. 10; *Transcript of Public Hearing*, 20 May 2010, at 25-27, 32.

28. *Transcript of Public Hearing*, 20 May 2010, at 16, 26.

29. *Ibid.* at 94-97.

47. Leeza Distribution added that, if the Tribunal considers the grinding to constitute “surface work”, then it could depart from the *Explanatory Notes* on the basis of the very specific design attributes of the goods in issue.³⁰

48. Alternatively, Leeza Distribution argued that, pursuant to Rule 3 (a) of the *General Rules*, the goods in issue could be classified in heading No. 94.03 because this heading provides the most specific description. Similarly, recourse to Rule 3 (c) would also result in the goods in issue being classified in heading No. 94.03, since this heading occurs last in numerical order after heading No. 39.20.

CBSA

49. In response to Leeza Distribution, the CBSA referred to the *Explanatory Notes* to Chapter 94, which state that parts of furniture are only classifiable in heading No. 94.03, when not more specifically covered elsewhere. According to the CBSA, even if the Tribunal were to consider the goods in issue as “parts”, they would not be classifiable in Chapter 94, since they are more specifically provided for in heading No. 39.20.

50. In particular, the CBSA submitted that heading No. 39.20 is more specific, as the goods in issue are clearly sheets of plastic and are not reinforced, laminated, supported or similarly combined with other materials. More specifically, the CBSA contended that the goods in issue are sheets of poly(methyl methacrylate), as provided for in subheading No. 3920.51.³¹

51. The CBSA noted that the *Explanatory Notes* to heading No. 39.20 distinguish between “surface-worked” and “further worked” and that goods are covered by that heading whether or not the former applies, but not the latter.

52. In particular, the CBSA noted that “polishing” is given as an example of “surface-work” in the *Explanatory Notes* to heading No. 39.20. According to the CBSA, the “further work” performed on the goods in issue only occurs after importation, by third party fabricators and is therefore inconsequential, as classification must be determined at the time of importation.³²

53. The CBSA added that there is no reasonable justification in the present circumstances for departing from the *Explanatory Notes*.

54. The CBSA also relied on United States Customs Border Protection (CBP) rulings and the *Classification Opinions* on the tariff classification of similar goods.

Tariff Classification of the Goods in Issue

55. The Tribunal first notes that it is not bound by CBSA customs memoranda or by the United States CBP rulings submitted by the CBSA.

30. *Ibid.* at 95-98.

31. Tribunal Exhibit AP-2009-057-08A, para. 21.

32. *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT); *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366; *Transcript of Public Hearing*, 20 May 2010, at 109.

56. The Tribunal also notes that Leeza Distribution requested that the Tribunal consider the classification of the goods in issue at the 10-digit statistical level. The Tribunal observes that this approach is not permissible by law.

57. As noted above, the Tribunal must first determine the proper classification at the heading level, having regard to the *General Rules* in sequence, beginning with Rule 1 and the terms of the headings and relevant notes.

58. In the current appeal, for the reasons discussed below, the Tribunal is satisfied that the goods in issue can be properly classified through the application of Rule 1 of the *General Rules* and that, accordingly, it is not necessary to consider subsequent rules.

59. In reaching its decision, the Tribunal had regard to the terms of heading Nos. 39.20 and 94.03, as well as to the notes to Chapters 39 and 94, and the *Explanatory Notes* to heading No. 39.20 and Chapter 94.

60. Leeza Distribution invited the Tribunal to look beyond the goods in issue themselves and to consider their intrinsic design qualities, which, it claimed, commit them for use as countertops.

61. In the Tribunal's view, there is little doubt that the goods in issue are destined for further transformation, principally as countertops.³³ However, the Tribunal must consider the characteristics of the goods in issue at the time of importation to determine their proper classification.³⁴

62. Leeza Distribution requested that the Tribunal not consider the sheet form of the goods in issue to be their defining characteristic. The Tribunal finds it difficult to do so.

63. The Tribunal considered the following definition of "sheet" in the *Webster's Third New International Dictionary*:³⁵

3 a : a broad stretch or surface of something that is usu. thin in comparison to its length and breadth

64. Given the dimensions of the goods in issue, the Tribunal is of the opinion that they are thin in comparison to their total width and length.

65. The Tribunal also notes that Leeza Distribution used the term countertop "sheets" when referring to the goods in issue in its own submissions³⁶ and that Mr. McDonald repeatedly referred to the goods in issue as "sheets" in his testimony.³⁷ It also notes evidence on the record from the foreign manufacturer of the goods in issue that also refers to them as "sheets".³⁸ Further, the Tribunal notes that the video submitted by Leeza Distributions shows the goods in issue to be sheets.³⁹

66. In view of the above, it is difficult for the Tribunal to construe that the goods in issue are anything but "sheets".

33. *Transcript of Public Hearing*, 20 May 2010, at 62.

34. Sections 17, 32 and 58 of the *Act*; subsection 20(1) of the *Customs Tariff*.

35. 1986, s.v. "sheet".

36. Tribunal Exhibit AP-2009-057-06A, paras. 4, 5, 7, 10, 17, 23, 24.

37. *Transcript of Public Hearing*, 20 May 2010, at 14-15, 19-20, 22, 25, 27, 29-30, 33-34, 44, 50, 52, 55, 57, 62.

38. Tribunal Exhibit AP-2009-057-06A, tab 4.

39. Tribunal Exhibit AP-2009-057-A-01.

67. The Tribunal had regard to the argument that sheets are the only form in which the goods in issue can practically be shipped to Canada due to infinite end-use installation variants. However, the Tribunal is confronted with the reality that this “sheet” form is the form in which the goods in issue are in fact imported.

68. As for the composition of the goods in issue, Mr. Loo, the Tribunal’s expert witness, confirmed that they are composed of poly(methyl methacrylate), an acrylic polymer, compounded with aluminum hydroxide and small amounts of plasticizers and colorant.

69. Mr. Loo explained that aluminum hydroxide is principally used as a filler and that, although it may have some structural properties, it is not used to “reinforce” the goods in issue as contemplated by the terms of heading No. 39.20. His testimony was not contested by Leeza Distribution.⁴⁰

70. At this point, the Tribunal must determine if the terms of the relevant section or chapter notes preclude the goods in issue from being classified under the terms of heading No. 39.20. The central issue here is whether the goods in issue are “surface-worked” or “further worked” at the time of importation.

71. If the goods in issue are “further worked”, they are excluded from Chapter 39 by virtue of Note 10 to the chapter.

72. As noted above, Leeza Distribution submitted that, at the time of importation, the goods in issue are “further worked” by virtue of having been ground and polished at the factory, whereas the CBSA submitted that they are only “surface-worked”.

73. The *Explanatory Notes* to heading No. 39.20 provide examples of what constitutes “surface-worked”, namely, “polished, embossed, coloured, merely curved or corrugated”.

74. The Tribunal considered the following dictionary definitions of the term “polish”:

verb 1 transitive & intransitive make or become smooth or glossy by rubbing. **2 transitive** (esp. **polished adjective**) refine or improve; add finishing touches to.⁴¹

1 : to make smooth and glossy usually by friction . . .

3 : to bring to a highly developed, finished, or refined state . . .

: to become smooth or glossy by or as if by friction.⁴²

75. The Tribunal notes the testimony of Mr. McDonald that, “. . . for the [goods in issue] to have that nice look and lustre the factory has to grind [them] down to a nice finish.”⁴³ Further, he testified that “. . . they finish off at about the equivalent of a 220 grit [finish], and that . . . is . . . pretty much industry standard in terms of finish, because matte finishes are the best in terms of resistance to showing scratches . . .”⁴⁴

40. *Transcript of Public Hearing*, 20 May 2010, at 81-84.

41. The Canadian Oxford Dictionary, second ed.

42. *Merriam-Webster’s Online Dictionary*, s.v. “polish”.

43. *Transcript of Public Hearing*, 20 May 2010, at 28.

44. *Ibid.* at 33.

76. Leeza submitted that the goods in issue are “pre-polished” by the manufacturer before importation into Canada.⁴⁵ Mr. McDonald testified that the polishing or the grinding done at the factory is to bring the goods in issue to the “. . . 220 finish that people expect in a kitchen.”⁴⁶ He added that a gloss meter ensures that the finish of “[e]very sheet that comes off the line [has] the exact consistency of gloss . . .” and that, if there were an undesirable reading on the gloss meter, the factory “. . . possibly could repolish . . .” the sheets.⁴⁷ He further testified that fabricators that use the goods in issue polish them only to match the finish already obtained by the factory.⁴⁸

77. The Tribunal notes that the words “glossy” and “finished” fall directly within the definitions of “polish”. Accordingly, on the basis of the evidence on the record, the Tribunal finds that the “grinding” process that the goods in issue undergo at the factory consists of polishing, which therefore qualifies the goods in issue as being “surface-worked”.

78. The Tribunal is of the opinion that “further work” in this case would be better defined by the fabrication, cutting, grooving, gluing and assembly that the sheets undergo by third-party countertop fabricators following their importation and as shown by the evidence.

79. In the event that the Tribunal were to reach such a conclusion, Leeza Distribution requested that the Tribunal overlook the *Explanatory Notes* to heading No. 39.20. According to Leeza Distribution, such an approach is warranted in the current appeal because the goods in issue are so obviously committed by design for use as countertops. The Tribunal does not agree.

80. The evidence on file demonstrates how the goods in issue are very well suited for use in countertops; however, their very nature, their dimensions and their characteristics also make them interesting for an infinite number of end uses. The content of the filed fabrication manual, along with Internet-based documents about Staron® products and Mr. McDonald’s testimony, has made this very clear.⁴⁹

81. In *Suzuki*, as noted above, the Federal Court of Appeal held that the Tribunal is obliged to apply the *Explanatory Notes* unless there is a sound reason to do otherwise. The Tribunal finds no such reason to ignore the *Explanatory Notes* to heading No. 39.20 in this appeal.

82. Consequently, the goods in issue are *prima facie* classifiable in heading No. 39.20 as sheets of poly(methyl methacrylate).

83. The Tribunal will next consider whether the goods in issue are also classifiable in heading No. 94.03 as parts of other furniture, i.e. tables and counters.

84. The Tribunal agrees with Leeza Distribution that the goods in issue are clearly *not* “parts of general use” and are therefore *not* excluded from Chapter 94 by virtue of Note 1(d) to the chapter.

85. The Tribunal notes that the *Explanatory Notes* to Chapter 94 state the following: “This Chapter only covers parts, whether or not in the rough, of the goods of headings 94.01 to 94.03 and 94.05, when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings. They are classified in this Chapter when not more specifically covered elsewhere.”

45. Tribunal Exhibit AP-2009-057-06A, paras. 10, 23.

46. *Transcript of Public Hearing*, 20 May 2010, at 63.

47. *Ibid.* at 33-34.

48. *Ibid.* at 63-64.

49. Tribunal Exhibit AP-2009-057-08A, tab A; Tribunal Exhibit AP-2009-057-18; *Transcript of Public Hearing*, 20 May 2010, at 57-59.

86. The Tribunal first had regard to the argument that the goods in issue are destined for use as countertops for kitchens, bathrooms and other environments. The Tribunal agrees that the dimensions, composition and performance qualities of the goods in issue make them a good choice for such end uses.

87. As mentioned above, the Tribunal believes that the form in which the goods in issue are imported is too generic to commit them exclusively for such end uses. Before any transformation occurs, the goods in issue are simple sheets of plastic polymer, without any distinctive characteristics that define them as being reserved exclusively for use as countertops. The unlimited possibilities that the goods in issue present for end use fabrication do not allow the Tribunal to consider them as being “designed solely or principally” for use in countertops.

88. Even if the Tribunal were to consider the goods in issue as parts of other furniture, it is of the view that they are more specifically provided for in heading No. 39.20 as other sheets of plastic, rather than in heading No. 94.03 as parts of furniture.

89. At the time of importation, the goods in issue are polymer sheets and are not recognizable as either countertops or any other end product for that matter, until further worked by third-party fabricators, which only occurs after importation. Accordingly, having regard to the *Explanatory Notes* to Chapter 94, the goods in issue are not classifiable in Chapter 94.

90. Finally, the Tribunal notes that the *Classification Opinions* with regard to “artificial marble” cited above supports the view that the goods in issue are classifiable in heading No. 39.20.

91. Leeza Distribution asked the Tribunal to also consider Rules 3 (a) and (c) of the *General Rules* to classify the goods in issue.

92. Even though the Tribunal has determined that the goods in issue can be classified according to Rule 1 of the *General Rules*, in order to correctly access Rules 3 (a) and (c), the Tribunal would need to do the following:

- (i) conclude that “parts of other furniture” is more specific than “other sheets of plastic” in order to classify the goods in issue in heading No. 94.03; and
- (ii) assume that the goods in issue are equally provided for in heading Nos. 39.20 and 94.03.

93. For the reasons discussed above as to the physical nature and composition of the goods in issue, the Tribunal is of the opinion that “other sheets of plastic” is in this case more specific than “parts of other furniture”. Therefore, in this case, Rule 3 (a) of the *General Rules* could not be applied.

94. Having determined that the goods in issue are properly classified in heading No. 39.20, the Tribunal must now apply Rule 6 in order to determine the applicable tariff item.

95. Among the subheadings in heading No. 39.20, subheading No. 3920.51 covers poly(methyl methacrylate). There are two tariff items within that subheading.

96. Tariff item No. 3920.51.10 covers two-coloured laminated plastic sheets, not exceeding 6.35 mm thickness, for use in the manufacture of lampshades. The goods in issue exceed such a thickness and are not used in the manufacture of lampshades; therefore, that tariff item is not applicable. Tariff item No. 3920.51.90 is described as “Other” and therefore applies.

DECISION

97. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 3920.51.90 as other plates, sheets, film, foil and strip, of plastic, non-cellular and not reinforced, laminated, supported or similarly combined with other materials, of poly(methyl methacrylate).

98. Therefore, the appeal is dismissed.

Jason W. Downey

Jason W. Downey
Presiding Member