



Ottawa, Tuesday, June 2, 1992

Appeal No. AP-90-082

IN THE MATTER OF an appeal heard on April 7, 1992,
under section 67 of the *Customs Act*, R.S.C., 1985, c. 1
(2nd Supp.), as amended;

AND IN THE MATTER OF a decision of the
Deputy Minister of National Revenue for Customs and Excise
dated June 26, 1990, with respect to a request for
re-determination made pursuant to section 63 of the
Customs Act.

BETWEEN

LADY SANDRA OF CANADA LTD.

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

AND

MATADOR CONVERTERS CO. LTD.

Intervenor

DECISION OF THE TRIBUNAL

The appeal is allowed in part. Though there has been some penetration of the agglutinating substance into the inner layers of the wadding, such penetration has not resulted in the fibres of the wadding being bonded throughout the width of the sheet. The Tribunal believes, therefore, that the goods are more properly classified under tariff item No. 5601.22.10 as wadding of man-made fibres. The Tribunal believes, however, that the 11-oz. format designed for use as a bumper pad was properly classified by the respondent.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Desmond Hallissey

Desmond Hallissey
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-082

LADY SANDRA OF CANADA LTD.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

and

MATADOR CONVERTERS CO. LTD.

Intervenor

The issue in this appeal is whether polyester fibre wadding, sprayed with a polymeric substance, and imported in rolls, are more properly classified under tariff item No. 5603.00.90 as "other nonwovens, whether or not impregnated, coated, covered or laminated" or, as claimed by the appellant, under tariff item No. 5601.22.10 as "wadding of man-made fibres."

HELD: *The appeal is allowed in part. Though there has been some penetration of the agglutinating substance into the inner layers of the wadding, such penetration has not resulted in the fibres of the wadding being bonded throughout the width of the sheet. The Tribunal believes, therefore, that the goods are more properly classified under tariff item No. 5601.22.10 as "wadding of man-made fibres." The Tribunal believes, however, that the 11-oz. format designed for use as a bumper pad was properly classified by the respondent.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: April 7, 1992
Date of Decision: June 2, 1992*

*Tribunal Members: Charles A. Gracey, Presiding Member
Sidney A. Fraleigh, Member
Desmond Hallissey, Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Dyna Côté

*Appearances: C. McKechnie, for the appellant
Dominique Gagné, for the respondent
Stuart Zuckerman, for the intervenor*

Appeal No. AP-90-802

LADY SANDRA OF CANADA LTD.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

and

MATADOR CONVERTERS CO. LTD.

Intervenor

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
SIDNEY A. FRALEIGH, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

The issue in this appeal is whether polyester fibre wadding, sprayed with a polymeric substance, and imported in rolls, are more properly classified under tariff item No. 5603.00.90 as "other nonwovens, whether or not impregnated, coated, covered or laminated" or, as claimed by the appellant, under tariff item No. 5601.22.10 as "wadding of man-made fibres."

The subject goods are 100-percent polyester fibres, imported in rolls. The material is used as fibrefill in quilts and comforters manufactured by Lady Sandra of Canada Ltd. The low-density fill has the desirable qualities of airiness, softness, high loft, easy recovery from compression, high bulk and good insulation. The goods in issue come in several formats, being P7 oz., P9.25 oz., LG10 oz., P11 oz., P13 oz., P14 oz., P15 oz., P15.25 oz. and P16 oz. P11 comprises two subclasses, one being soft and the other being more thoroughly resinated for use as a bumper pad in a baby's crib. Expert testimony for the respondent suggested that the P11, P13, P14 and probably P16 formats were the same product sold in different widths.

The fibres were sprayed with an acrylic agglutinant or binder on both sides. Such treatment serves to prevent the fibres from slipping over each other and to improve surface cohesion. It adds springiness and loft to the goods and prevents matting of the fibres during washing. The amount, by weight, of the resin may vary. There may be some penetration of the resin into the centre of the wadding.

The relevant tariff nomenclature of Schedule I to the *Customs Tariff*¹ is:

56.01 Wadding of textile materials and articles thereof; textile fibres, not exceeding 5 mm in length (flock), textile dust and mill neps.

1. R.S.C., 1985, c. 41 (3rd Supp.).

	-Wadding; other articles of wadding:
5601.22	--Of man-made fibres
5601.22.10	---Wadding

5603.00	Nonwovens, whether or not impregnated, coated, covered or laminated.
5603.00.90	---Other

Counsel for the appellant submitted that the Explanatory Notes to the Harmonized Commodity Description and Coding System² (Explanatory Notes) make it clear that there is a provision in Schedule I to the *Customs Tariff* for both sprayed waddings that are classified as nonwovens and sprayed waddings that are still considered waddings. The distinction is based on the extent to which the agglutinating substance has penetrated the material. If it has penetrated into the inner layers, the material is considered a nonwoven. In this regard, counsel noted that the laboratory results relied upon by the respondent indicated that the agglutinant had failed to penetrate the inner layers of four of the subject goods, namely P13, P14, P15 and P16.

Counsel argued that the term "wadding" is not a technical term and should be construed in its common and ordinary sense. He argued that all the subject goods conform to the dictionary definitions of "wadding," and are referred to as wadding in the trade. The goods are bought as wadding, used as wadding and sold as wadding.

Counsel referred to the Explanatory Notes to heading No. 56.01, at page 772, that state:

[Heading 56.01] covers wadding on which a small quantity of agglutinating substance has been dispersed in order to improve the cohesion of the surface fibres; in contrast to nonwovens, the fibres of the inner layers of such wadding are readily separable.

It should, however, be noted that wadding treated with an agglutinating substance and in which that substance has penetrated into the inner layers is classified as a nonwoven in **heading 56.03**, even if the fibres of the inner layers are readily separable.

Counsel noted that the presence of an agglutinating substance and the separability of the inner fibres are not determinative. The crucial distinction is how the agglutinating substance is applied and its degree of penetration. Has the material been "treated" with an agglutinating substance [nonwoven], or has a "small quantity of the agglutinating substance ... been dispersed" [wadding]? Counsel argued that the agglutinating substance applied by spray treatment is more properly referred to as having been "dispersed" than as having "treated" the material. Similarly, has the agglutinating substance "penetrated into the inner layers" of the material [nonwoven], or is its use such that it "improve[s] the cohesion of the surface fibres" [wadding]? Counsel argued that the term "penetrated" implies that such penetration was a matter of design and not used haphazardly.

2. Customs Co-operative Council, Brussels, First Edition, 1986.

Counsel also argued that laboratory analysis of the material is inappropriate and that a "five-senses" approach to assessing the material is proper. In this regard, he noted that scientific scrutiny may discern trace amounts of the agglutinating substance in the inner layers of the material that are not apparent to the eye or by touch. Counsel noted, however, that pursuant to the Explanatory Notes, to be considered a nonwoven, the fibres must be bonded throughout the material by the agglutinating substance, which the goods at issue are not. The Explanatory Notes to heading No. 56.03, at page 776, state:

Some nonwovens resemble ... wadding of heading 56.01 [T]he fact that the textile fibres or filaments [of nonwovens] are bonded throughout the thickness, and generally throughout the width, of the web or sheet also helps to distinguish [nonwovens] from certain types of wadding of heading 56.01.

Counsel for the respondent argued that in order to classify the goods as either a wadding or a nonwoven, it is essential to assess the penetration of the agglutinating substance into the fibres. Counsel argued that a wadding can be classified under heading No. 56.01 if only a small quantity of agglutinating substance has been dispersed over the surface to improve cohesion of the surface fibres. However, a wadding becomes a nonwoven when the agglutinating substance has penetrated into the inner layers of the wadding, bonding the fibres together. The material is then classifiable under heading No. 56.03. In this regard, counsel also referred to the Explanatory Notes at p. 772, quoted above, and argued that the agglutinating substance does not have to be present throughout the entire sample for it to be considered a nonwoven.

Counsel noted that various samples of the goods at issue have been submitted to laboratory analysis in order to determine the amount of penetration of the agglutinating substance. The laboratory reports indicate that the substance has penetrated throughout the thickness of the goods. Accordingly, it is the respondent's position that since the products at issue are held together by a bonding agent that has penetrated throughout the material, they should be regarded as nonwovens and properly classified under tariff item No. 5603.00.90.

Acknowledging that there is inconsistency in the relevant provisions of the Explanatory Notes to this appeal, the Tribunal found two statements in them to be of most significance to the resolution of this appeal. At page 772, under heading No. 56.01, it is stated that:

... wadding treated with an agglutinating substance and in which that substance has penetrated into the inner layers is classified as a nonwoven in heading 56.03, even if the fibres of the inner layers are readily separable.

The second reference, found at page 776 under heading No. 56.03, states that:

... the fact that the textile fibres or filaments are bonded throughout the thickness, and generally throughout the width, of the web or sheet also helps to distinguish [nonwovens] from certain types of wadding of heading 56.01.

On the basis of these two notes, the Tribunal believes that the small quantity of agglutinating substance which has penetrated into the inner layers of the wadding is insufficient to justify classifying the goods as a nonwoven. The Explanatory Notes suggest that not only must there be penetration into the inner layers, but that such penetration must result in the fibres or filaments of the wadding being bonded throughout the width of the web or sheet.

Mr. Wendell Ward, who has worked as a chemist at the Revenue Canada, Customs and Excise Laboratory since 1975, primarily in the textile section, served as an expert witness for the respondent. He had examined some of the imported goods under a microscope for purposes of tariff classification by the respondent. He testified that, under low magnification, he found a small amount of the binder in the centre of the samples that he tested and that it is probable that there would be small amounts in the centre of all samples. Under cross-examination, he noted that such a quantity of agglutinating substance would cause little or no binding of the inner fibres of the wadding.

Given the method of application of the agglutinating substance and the nature of the material to be treated, it is inevitable that minute quantities of the agglutinant will penetrate into the inner layers of the material. However, when such a quantity does not bind the inner fibres, is not visually apparent and can only be detected by microscope or chemical analysis, the Tribunal has difficulty in accepting the view that this minute presence should be determinative in classifying the material.

Though there has been some penetration of the agglutinating substance into the inner layers of the wadding, such penetration was not by design and has not resulted in the fibres of the wadding being bonded throughout the width of the sheet. The Tribunal believes, therefore, that the goods are more properly classified under tariff item No. 5601.22.10 as wadding of man-made fibres.

However, there is one exception to this decision. Mr. Bruce A. Burgermaster, who is currently the president and chief executive officer of the Carlee Corporation, the manufacturer of the goods at issue, served as a witness for the appellant. He testified that the 11-oz. format designed for bumper pads was heavily resinated. This substantiated a laboratory report prepared by Mrs. C. Copeland of the Laboratory and Scientific Services Directorate of Revenue Canada. The report indicated that, contrary to the other formats, the inner layers of the 11-oz. batting were not readily separable. Although samples of these goods were not presented at the hearing, it appears to the Tribunal from their description that they are distinct from the other formats. They are more thoroughly resinated to the extent that the fibres are not readily separable. There is no doubt that the agglutinating substance could have been found in the inner layers of the material in more than minute quantities.

Accordingly, the appeal is allowed in part.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Desmond Hallissey
Desmond Hallissey
Member