



Ottawa, Wednesday, November 10, 1993

**Appeal No. AP-89-288**

IN THE MATTER OF an appeal heard on February 18, 1993,  
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1  
(2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister  
of National Revenue for Customs and Excise dated  
January 31, 1990, with respect to a request for  
re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**EXCLUSIVE CARPETS LTD.**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Michèle Blouin  
Michèle Blouin  
Presiding Member

Desmond Hallissey  
Desmond Hallissey  
Member

Lise Bergeron  
Lise Bergeron  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-89-288**

**EXCLUSIVE CARPETS LTD.**

**Appellant**

**and**

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

**Respondent**

*The issue in this appeal is whether a Piper Aerostar airplane, Model 601P, bearing U.S. registration N3641Y, is more properly classified under tariff item No. 9802.00.00 as "Conveyances temporarily imported by a resident of Canada to be employed in the international, non-commercial transportation of that person and accompanying persons," as contended by the appellant, or properly classified under tariff item No. 8802.20.00 as "Airplanes and other aircraft, of an unladen weight not exceeding 2,000 kg," as contended by the respondent.*

**HELD:** *The appeal is dismissed. For the airplane in issue to be classified under tariff item No. 9802.00.00, the appellant had to show that it satisfied the terms and conditions set out in section 3 of the Temporary Importation of Conveyances by Residents of Canada Regulations. The Tribunal finds that the appellant does not qualify as a "commuter" under paragraph 3(d) of those Regulations because it is not persuaded that Mr. Alador G. Oze, the sole owner and President of Exclusive Carpets Ltd. and E-Z Cut Incorporated, was both "[operating] a business based in the United States" at the time of importation and using the airplane in issue "for travelling between his place of business and his residence," as required under paragraph (b) of the definition of "commuter" under section 2 of the Temporary Importation of Conveyances by Residents of Canada Regulations.*

*Place of Hearing: Winnipeg, Manitoba*

*Date of Hearing: February 18, 1993*

*Date of Decision: November 10, 1993*

*Tribunal Members: Michèle Blouin, Presiding Member  
Desmond Hallissey, Member  
Lise Bergeron, Member*

*Counsel for the Tribunal: Hugh J. Cheetham*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: Alain J. Hogue, for the appellant  
Frederick B. Woyiwada, for the respondent*

**Appeal No. AP-89-288**

**EXCLUSIVE CARPETS LTD.**

**Appellant**

**and**

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

**Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member  
DESMOND HALLISSEY, Member  
LISE BERGERON, Member

**REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) dated January 31, 1990.

The appellant has been in the business of selling carpets on a retail and contract basis, primarily in the province of Manitoba, since 1974. The appellant is a related company of E-Z Cut Incorporated (E-Z Cut), a company which has been in the business of selling carpet-cutting equipment, primarily in the United States, since 1987. Both companies are wholly owned by the same individual. On May 7 and 18, and June 9, 1988, the appellant brought into Canada a Piper Aerostar airplane, Model 601P, bearing U.S. registration N3641Y (the airplane in issue). At the time of these entries, the appellant's representative declared that the airplane in issue was owned by Exclusive Carpets, Inc. and/or E-Z Cut, Inc., both U.S. companies. Canada Customs (Customs) permits allowing temporary importation under tariff item No. 9802.00.00 of the *Customs Tariff*<sup>2</sup> were issued for each entry, based on the belief that a *bona fide* company existed in the United States. Customs officers proceeded to investigate the entries and became aware that there were no such companies registered in the United States and that the address given for the companies was a post office box for a customs broker in Pembina, North Dakota.

On June 21, 1988, a representative of the appellant presented a voluntary customs entry form for the airplane in issue and paid federal sales tax in the amount of \$22,767.23. At that time, the airplane in issue was classified under tariff item No. 8802.20.00. On June 28, 1988, a search warrant was executed, and the aircraft was seized under section 110 of the Act. On July 11, 1988, bond in the amount of \$45,534.46 was paid for the release of the aircraft.

In response to attempts by the appellant to obtain a refund of the moneys paid through the voluntary customs entry for the airplane in issue, the Department of National Revenue (Revenue Canada) asked the appellant to provide proof that there was a company registered in the United States at the time that the airplane in issue was imported. The appellant produced a certificate of incorporation dated July 25, 1988. Revenue Canada, therefore, advised the appellant that the existing classification, tariff item No. 8802.20.00, would be maintained, that the aircraft was taxable and that the taxes paid would not be refunded.

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1. R.S.C. 1985, c. 1 (2nd Supp.).
  2. R.S.C. 1985, c. 41 (3rd Supp.).

On March 13, 1989, the appellant requested that the airplane in issue be reclassified under tariff item No. 9802.00.00. This request was rejected on May 2, 1989. The appellant subsequently made a request, under section 63 of the Act, for a re-determination of the classification of the airplane in issue. The request for re-determination was rejected by the Deputy Minister in a decision issued on January 31, 1990.

The issue in this appeal is whether a Piper Aerostar airplane, Model 601P, bearing U.S. registration N3641Y, is more properly classified under tariff item No. 9802.00.00 as "Conveyances temporarily imported by a resident of Canada to be employed in the international, non-commercial transportation of that person and accompanying persons," as contended by the appellant, or properly classified under tariff item No. 8802.20.00 as "Airplanes and other aircraft, of an unladen weight not exceeding 2,000 kg," as contended by the respondent.

The appellant called one witness, Mr. Alador G. Oze, President and sole owner of both Exclusive Carpets Ltd. and E-Z Cut. Mr. Oze testified that, in early May 1988, prior to the purchase of the airplane in issue, he contacted a law firm in Grand Forks, North Dakota, and instructed it to incorporate companies with the same name as the appellant and E-Z Cut in the United States. He agreed that documentation shown to him by his counsel indicated that the airplane in issue was purchased on or about May 2, 1988. The witness also stated that the major portion of the use of the airplane in issue in the months of May and June 1988 was for business trips on behalf of E-Z Cut, originating in Canada to locations in the United States. He indicated that the airplane in issue was, in fact, bought for this purpose, i.e. to aid sales of E-Z Cut in the United States.

Mr. Oze testified that he arranged to pay the excise tax after he was contacted by a Customs officer in June 1988 because the official advised him that tax was owing. He also stated that, after having been approached by Customs, he contacted a law firm in North Dakota and requested that it provide him with the incorporation papers for these companies. He was advised that they had not been incorporated. Further, he was not given a reason why the incorporations had not taken place. Subsequently, Mr. Oze received these papers, which indicated that the companies had been incorporated in North Dakota on July 25, 1988.

During cross-examination, Mr. Oze stated that the two U.S. corporations had ceased to exist sometime in 1990. He also stated that E-Z Cut has a sales office in Naples, Florida, which was established in 1991. With respect to his instructions to U.S. counsel to incorporate the two North Dakota companies, Mr. Oze indicated that he did not have anything in writing that would confirm the date on which those instructions were given. After confirming that he had signed an "Aircraft Purchase Agreement" (APA) for the airplane in issue dated April 25, 1988, Mr. Oze explained that this document was not a bill of sale, but an agreement on the purchase price. The witness then confirmed that the document entitled "Aircraft Bill of Sale" for the airplane in issue was dated May 2, 1988, and set out a North Dakota address for a company bearing the same name as the appellant. Mr. Oze also positively identified documents that confirmed that an amount equal to the purchase price of the airplane in issue was transferred from his account to the seller's bank account in New York on May 2, 1988. Finally, Mr. Oze agreed that he did, from time to time, fly the airplane from one point to another within Canada, but that this was very seldom and did not exceed the amount of time needed to fly in the United States to maintain U.S. registration for the airplane in issue.

In redirect, Mr. Oze stated that, up until the time that he paid the taxes in question, there was no documentation showing that the airplane in issue was registered to a Canadian address.

Counsel for the appellant began his argument by emphasizing that the Tribunal should focus on the evidence relating to events that transpired in May, June and July 1988. Counsel pointed out that, under tariff item No. 9802.00.00, the appellant had to establish that the airplane in issue was a conveyance temporarily imported by a resident of Canada to be employed in the international, non-commercial transportation of that person and accompanying persons using the same conveyance. Counsel submitted that the key concern of the Tribunal should be the appellant's intentions with respect to the use and registration of the airplane in issue at the time that it was purchased. Counsel stated that the sole intent in purchasing the airplane in issue was for use in promoting its sales throughout the United States. Counsel suggested that the documentation relating to the purchase and registration of the airplane in issue shows an intention that it be placed in the name of a U.S. corporation, as evidenced by the North Dakota address entered on the APA.

Counsel noted that the evidence shows that, at the time that the appellant purchased the airplane, it had already contacted a U.S. law firm, given instructions to that law firm to incorporate companies in North Dakota, believed that this was occurring and continued to believe this throughout the months of May and June 1988. With respect to the delay in actually incorporating the companies in the United States, counsel suggested that it may have been that the U.S. law firm did not appreciate the urgency of the matter and added that the appellant's intention to have these companies incorporated was evidenced by the fact that the appellant continued the incorporation process even after having paid the tax on June 21, 1988. Counsel observed that if U.S. counsel had incorporated the companies in May or June 1988, this case would not now be before the Tribunal because, when Customs searched the registry, it would have found these companies. Further, counsel submitted that the instructions given by Mr. Oze should be considered as a valid pre-incorporation contract and that anything that the proposed companies did in the United States prior to their registration should be considered binding on these companies. Counsel also stated that the evidence of Mr. Oze has been consistent both throughout his dealings with the Deputy Minister and during his testimony before the Tribunal.

Counsel for the respondent first reminded the Tribunal that, while importations under both tariff items being proposed are made free of customs duty, it is only an importation under tariff item No. 9802.00.00 which would exempt the airplane in issue from excise tax. In other words, while the case deals with tariff classification, it is not dealing with the application of customs duties. With respect to tariff item No. 8802.20.00, counsel noted that this tariff item simply provides for airplanes with an unladen weight not exceeding 2,000 kg and that it is admitted that the airplane in issue is such an airplane and, thus, if tariff item No. 9802.00.00 does not apply, then tariff item No. 8802.20.00 does apply.

In order to interpret the wording of tariff item No. 9802.00.00, counsel referred to the *Temporary Importation of Conveyances by Residents of Canada Regulations*<sup>3</sup> (the Regulations). Section 3 of the Regulations sets out a number of conditions under which a conveyance may be imported. Counsel for the respondent submitted that, of the first four paragraphs of section 3, only paragraph (d) might apply to the matter at hand. Before examining paragraph 3(d), which deals with the case of a "commuter," counsel noted that paragraphs 3(f) and (g) also had to be complied with and that, in this case, they were not complied with because the airplane in issue was still based and registered in Winnipeg, Manitoba, which indicates that it cannot be characterized as being temporarily imported. With respect to paragraph 3(d), counsel stated that Mr. Oze did not qualify under any of the three

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3. SOR/82-840, September 7, 1982, Canada Gazette Part II, Vol. 116, No. 18 at 3075.

definitions of "commuter," because he was not employed by an employer based in the United States, nor the type of cross-border worker contemplated therein.

Counsel for the respondent then considered certain documentary evidence introduced at the hearing. He submitted that the APA, dated April 25, 1988, was entered into not only before the date on which Mr. Oze testified that he instructed the law firm in the United States but also well before these U.S. corporations were actually incorporated. Counsel observed that Mr. Oze could not provide any evidence about the former matter beyond his suggestion that this occurred in early May 1988. Further, counsel pointed out that these U.S. corporations were no longer in existence and that the operations in Florida are those of E-Z Cut and not of any U.S. corporation. Finally, counsel elaborated on his previous submission about the temporary nature of the importations contemplated under tariff item No. 9802.00.00 by stating that the tariff item was clearly intended to cover importations for very specific purposes and to permit travel only back and forth between very specific points. Counsel submitted that the appellant's actions could not be characterized as coming within these requirements.

In reply, counsel for the appellant submitted that paragraphs 3(f) and (g) of the Regulations should not be read as additional requirements to paragraphs (a) to (d), but that section 3 only requires that one fall within any of paragraphs (a) to (g). Counsel stated that the appellant clearly came under paragraph 3(d) as a "commuter." Counsel submitted that Mr. Oze qualified under paragraph (b) of the definition of "commuter" under section 2 of the Regulations as a "resident who himself operates a business based in the United States and who uses a non-duty paid conveyance for that business and for travelling between his place of business and his residence." With respect to the APA, counsel suggested that the fact that this agreement was made in the name of a Canadian company should not defeat the evidence that shows that the appellant had the intention that, if the deal were completed, the airplane in issue would be registered to a U.S. corporation. Counsel stated that this view is supported by the fact that the bill of sale was made out to a company in the United States. Counsel suggested that this document should also be seen as corroborating Mr. Oze's testimony with respect to instructing the U.S. law firm. Furthermore, counsel suggested that the Tribunal should not allow the comments of counsel for the respondent concerning the subsequent fate of the U.S. corporations to cloud the evidence relating to matters as they were in May and June 1988. Finally, counsel submitted that the evidence shows that the airplane in issue was used for business purposes in 1988 and has continued to be used for the same purpose since that time.

The Tribunal considers that the airplane in issue is properly classified under tariff item No. 8802.20.00 as "Airplanes and other aircraft, of an unladen weight not exceeding 2,000 kg." In coming to this conclusion, the Tribunal observes that section 3 of the Regulations sets out the terms and conditions by which a conveyance may be considered to be imported for purposes of the *Customs Tariff*. Counsel for the appellant argued that his client met the requirements of paragraph 3(d) as a "commuter" and should be considered as such under paragraph (b) of the definition of that word under section 2 of the Regulations. The Tribunal notes that, to meet the requirements of paragraph (b) of the definition of "commuter," the appellant had to show that Mr. Oze was "[operating] a business based in the United States" at the time of importation of the airplane in issue and that the airplane in issue was used "for travelling between his place of business and his residence." The Tribunal is not satisfied that the evidence establishes either of these conditions.

With respect to the first condition, the Tribunal is of the view that the evidence indicates that, at the time of importation, the business operating in the United States was E-Z Cut, a company incorporated in Manitoba with operations, i.e. the location of its head office and most, if not all, of its

employees, based in Winnipeg, Manitoba, in 1988. In other words, the evidence does not show that any business being operated by the appellant was "based" in the United States. In the Tribunal's opinion, the fact that the companies, eventually incorporated in North Dakota, were not incorporated at the time that the airplane in issue was imported and the fact that there was no evidence of any actual operations based in North Dakota at that time reinforce this conclusion. The latter point also addresses the second condition in the relevant definition of "commuter," whether the airplane in issue was used by the appellant "for travelling between his place of business and his residence." The Tribunal is of the view that these words cannot be read so broadly as to interpret them to mean any location in the United States. Rather, the words lend themselves to being understood as referring to a specific place or places linked to the operations of the business in the United States. As the Tribunal has found that, in this case, there was no business based in the United States, it cannot be said that the appellant was travelling between a place of business in the United States and his residence. Further, even if the Tribunal had found that the appellant was operating a business based in the United States and that the "place of business" was in North Dakota, there is no evidence that the airplane in issue was used to travel between a location in North Dakota and Mr. Oze's residence for purposes of such business.

Finally, with regard to the submission of counsel for the appellant that paragraphs 3(f) and (g) of the Regulations should not be read as additional requirements to paragraphs 3(a) to (d), the Tribunal agrees with counsel for the respondent that paragraphs 3(f) and (g) (as well as paragraph 3(e)) are requirements that are distinct from the requirements in paragraphs 3(a) to (d) and, as such, must also be satisfied to bring a conveyance within tariff item No. 9802.00.00. Although the Tribunal did not need to consider these elements because of its determination above, it adds that, in its opinion, the evidence does not support a conclusion that the appellant has satisfied these elements of section 3 of the Regulations.

Accordingly, the appeal is dismissed.

Michèle Blouin  
Michèle Blouin  
Presiding Member

Desmond Hallissey  
Desmond Hallissey  
Member

Lise Bergeron  
Lise Bergeron  
Member