



Ottawa, Monday, April 6, 1992

Appeal No. AP-90-075

IN THE MATTER OF an appeal heard on February 17, 1992, pursuant to 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 May 18, 1990, with respect to a request for re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

INDUSTRIAL ADHESIVES, DIVISION OF TIMMINCO LTD.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal finds that Korolam 100 FG, being a preparation consisting of polyurethane polymer and free methylene diphenyl isocyanate (MDI), was specifically formulated for use as a glue or adhesive. Accordingly, it is excluded from Chapter 39 and properly classified under tariff item No. 3506.91.90 of the *Customs Tariff*.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-075

INDUSTRIAL ADHESIVES, DIVISION OF TIMMINCO LTD. **Appellant**

and

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

The issue in this appeal is whether Korolam 100 FG is properly classified under tariff item No. 3506.91.90 as an adhesive based on rubber or plastics (including artificial resins) or, as claimed by the appellant, under tariff item No. 3909.50.90 as a polyurethane in primary form.

Korolam 100 FG, imported in five-gallon pails, is composed of approximately 94 percent polyurethane prepolymer and 6 percent methylene diphenyl isocyanate (MDI). Each of these two components contains a quantity of unreacted isocyanate which amounts in total to 5.7 percent, by weight, of the Korolam 100 FG. The excess MDI is present to subsequently react with water and chemically bind to the polyurethane, thus hardening into a solid.

Korolam 100 FG is sold to be used in laminating together two or more different plastic films such as polyester, polypropylene, polyethylene or nitrocellulose. The bonding process is achieved through the introduction of water vapour.

HELD: *The appeal is dismissed. The Tribunal finds that Korolam 100 FG, being a preparation consisting of polyurethane polymer and free MDI, was specifically formulated for use as a glue or adhesive. Accordingly, it is excluded from Chapter 39 and properly classified under tariff item No. 3506.91.90.*

Place of Hearing: *Ottawa, Ontario*
Date of Hearing: *February 17, 1992*
Date of Decision: *April 6, 1992*

Tribunal Members: *Charles A. Gracey, Presiding Member*
Arthur B. Trudeau, Member
Sidney A. Fraleigh, Member

Counsel for the Tribunal: *David M. Attwater*

Clerk of the Tribunal: *Dyna Côté*

Appearances: *W.B. Bambury, for the appellant*
F.B. Woyiwada, for the respondent

Appeal No. AP-90-075

INDUSTRIAL ADHESIVES, DIVISION OF TIMMINCO LTD. Appellant

and

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

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
ARTHUR B. TRUDEAU, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

The issue in this appeal is whether "Korolam 100 FG" is properly classified under tariff item No. 3506.91.90 as an adhesive based on rubber or plastics (including artificial resins) or, as claimed by the appellant, under tariff item No. 3909.50.90 as a polyurethane in primary form.

Korolam 100 FG is a pale straw-coloured clear liquid imported in five-gallon sealed metal pails. By weight, it is composed of approximately 94 percent polyurethane prepolymer and 6 percent methylene diphenyl isocyanate (MDI). Each of these two components contains a quantity of unreacted isocyanate which amounts in total to 5.7 percent, by weight, of the Korolam 100 FG.

The polyurethane component is produced by mixing MDI with polyols. By mixing them in proper proportions, an MDI-based polyurethane is produced, containing no residual MDI. However, Korolam 100 FG consists of the MDI-based polyurethane and additional MDI. The excess MDI is present to subsequently react with water and chemically bind to the polyurethane, thus hardening into a solid.

Korolam 100 FG is sold to be used in laminating together two or more different plastic films such as polyester, polypropylene, polyethylene or nitrocellulose. In a film-laminating operation, steam injected through a roller reacts with the excess MDI in the Korolam 100 FG as it is spread between the two films. This begins the bonding reaction, which is completed by the migration of water vapour through the plastic films over several days following the lamination operation. At this point, the plastic films are permanently bonded to each other.

For purposes of this appeal, the relevant provisions of Schedule I to the *Customs Tariff*¹ are as follows.

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

35.06 Prepared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg.

-Other:

3506.91 --Adhesives based on rubber or plastics (including artificial resins)

3506.91.90 ---Other

39.09 Amino-resins, phenolic resins and polyurethanes, in primary forms.

3909.50 -Polyurethanes

3909.50.90 ---Other

Counsel for the appellant argued that, under the former *Customs Tariff*, polyurethane with unreacted isocyanate of between 2.5 and 10.5 percent by weight was classified as being "without admixture." The tariff position under which resins were to be classified as adhesives required that they be "admixed with other materials" such as fillers, solvents, etc. For Korolam 100 FG imported in 1987, the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister), in a letter dated February 22, 1991, being Exhibit A-7, indicated that the goods were properly classified under the former tariff classification system as a polyurethane resin without admixture and not as a resin adhesive.

Counsel referred to note B(4) of the Explanatory Notes² to heading No. 35.06, which reads as follows:

This heading covers:

...

(B) **Prepared glues and other prepared adhesives, not covered by a more specific heading in the Nomenclature**, for example:

(4) **Preparations specifically formulated for use as adhesives**, consisting either of a mixture of several plastics falling individually in different headings of Chapter 39, or of plastics which, apart from any permitted additions to the products of Chapter 39 (fillers, plasticisers, solvents, pigments, etc.) contain other added substances not falling in that Chapter (e.g., waxes).

2. Harmonized Commodity Description and Coding System, Customs Co-operation Council, Brussels, First Edition (1986).

He argued that the goods in issue are not a mixture of several plastics nor of plastics containing other added substances not falling in that Chapter. The word "Preparations" in Note B(4) is a general provision for admixtures not elsewhere specifically provided. Since polyurethanes are specifically provided for in heading No. 39.09, they are excluded from the general provision for prepared adhesives.

The footnote to Note B states:

Except when they comply with the provisions of paragraph (A) above, the heading **excludes** products covered by a more specific heading in the Nomenclature, for example:

...

- (b) Other products, which can be used as glues or other adhesives either directly or after treatment....

On this basis, counsel for the appellant argued that plastics in solution are excluded from heading No. 35.06.

Counsel noted Rule 3(a) of the General Rules for the Interpretation of the Harmonized System (the General Rules) and argued that the more specific description of the goods is under heading No. 39.09.

Counsel for the respondent argued that the terms used in the *Customs Tariff* should be governed by the meaning generally given in the trade to the goods in issue. As the goods are manufactured, sold and generally known in the trade as an adhesive, they should be classified as an adhesive for *Customs Tariff* purposes.

Goods are to be classified according to their nature at the time of their importation. At this time, the goods are suitable for use as an adhesive without intervening chemical alteration and, therefore, should be classified as an adhesive.

Counsel referred to Note B(4) of the Explanatory Notes to heading No. 35.06 and argued that where a material has been specifically formulated for use as an adhesive and consists of a plastic containing another added substance not falling in Chapter 39, the material is to be classified under heading No. 35.06. As the goods consist of polyurethane, a plastic, plus MDI, a substance not falling in Chapter 39, and because this composition was specifically formulated to render the goods suitable for use as an adhesive, they should be classified under heading No. 35.06.

Counsel for the respondent argued that adhesives, based on rubber or plastics, including artificial resins, are to be classified under sub-heading No. 3506.91, and when they are not rubber cement, they are to be classified under tariff item No. 3506.91.90. As the goods are an adhesive based on polyurethane, an artificial plastic resin, they are to be classified under tariff item No. 3506.91.90.

The evidence is clear to the Tribunal that the goods in issue are composed of a polymer of polyurethane with additional free MDI. In the presence of water, the free MDI will react with the

polymer, thus further polymerising into a solid. The goods were designed for use as an adhesive and were imported as such.

Dr. Kevser Taymaz, who is an analytical chemist with particular knowledge of polymers, testified on behalf of the respondent. In her professional opinion, the free MDI found in the imported Korolam 100 FG was added to the polyurethane after the preparation of the polymer. This evidence was supported by Mr. Brian Finch who also testified for the respondent as an expert in polymer chemistry. This evidence was not rebutted by counsel for the appellant.

Regardless, in the Tribunal's opinion, it is not significant whether the polymer was prepared to have free MDI present in the final mixture or whether free MDI was added after the preparation of the polymer. The goods were formulated to have free MDI present in the final product. With this added substance, the Korolam 100 FG acts as a glue or adhesive, exactly what it was designed to do.

The General Explanatory Notes to Chapter 39, at page 553, state:

When as a result of the addition of certain substances, the resultant products answer to the description in a more specific heading elsewhere in the Nomenclature, they are **excluded** from Chapter 39; this is, for example, the case with:

- (a) Prepared glues - see exclusion (b) at the end of this General Explanatory Note.

The exclusion, found at page 555, states that:

In addition to the exclusions mentioned in Note 2, the Chapter **excludes**:

(...)

- (b) Preparations of polymers of headings 39.01 to 39.13 specially formulated for use as glues or adhesives and products of headings 39.01 to 39.13 put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg (**heading 35.06**).

The Tribunal finds that Korolam 100 FG, being a preparation consisting of polyurethane polymer and free MDI, was specifically formulated for use as a glue or adhesive. Accordingly, it is excluded from Chapter 39 and properly classified under tariff item No. 3506.91.90.

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