



Ottawa, Tuesday, June 2, 1992

Appeal No. AP-91-082

IN THE MATTER OF an appeal heard on February 20, 1992, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated May 14, 1991, relating to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

SUNTECH OPTICS INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The sunglasses in issue are not considered "clothing and footwear" within the meaning of section 1, Part XV, Schedule III to the *Excise Tax Act* as determined by the Governor in Council in the *Clothing and Footwear Determination Regulations*.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Charles A. Gracey

Charles A. Gracey
Member

Desmond Hallissey

Desmond Hallissey
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-082

SUNTECH OPTICS INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant is an unlicensed distributor of non-prescription sunglasses. The sunglasses are equipped with protective qualities which block out certain bands of light (ultraviolet rays) from the colour spectrum. The sunglasses were imported into Canada in a number of different styles, colours and shapes.

The issue in this appeal is whether the sunglasses are exempt from federal sales tax as being "clothing and footwear" within the meaning of section 1, Part XV, Schedule III to the Excise Tax Act and the Clothing and Footwear Determination Regulations.

HELD: *The appeal is dismissed. The Tribunal finds that the sunglasses are "goods that are for use with clothing" within the meaning of paragraph 2(q) of the Clothing and Footwear Determination Regulations, thus subject to federal sales tax pursuant to section 50 of the Excise Tax Act.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 20, 1992
Date of Decision: June 2, 1992

Tribunal Members: Arthur B. Trudeau, Presiding Member
Charles A. Gracey, Member
Desmond Hallissey, Member

Legal Services: France Deshaies

Clerk of the Tribunal: Janet Rumball

Appearances: S.E. Paul, for the appellant
M. Kinnear, for the respondent

Appeal No. AP-91-082

SUNTECH OPTICS INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
CHARLES A. GRACEY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This appeal is filed under section 81.19 of the *Excise Tax Act*¹ (the Act) with respect to a notice of decision issued on May 14, 1991, by the Minister of National Revenue confirming a notice of determination dated September 28, 1990, disallowing a \$504,131.41 refund in federal sales tax paid on goods imported during the period from August 26, 1988, to July 20, 1990.

The appellant is an unlicensed distributor of non-prescription sunglasses (the sunglasses). The sunglasses are equipped with protective qualities which block out certain bands of light (ultraviolet rays) from the colour spectrum. The sunglasses were imported into Canada in a number of different styles, colours and shapes.

The issue in this appeal is whether the sunglasses in question are exempt from federal sales tax as being "clothing and footwear" within the meaning of section 1, Part XV, Schedule III to the Act. Pursuant to subsection 51(1) of the Act, the tax imposed by section 50 does not apply to the sale or importation of such goods.

The meaning to be ascribed to "clothing and footwear" is determined through regulation by the Governor in Council.² In this respect, the relevant regulation is the *Clothing and Footwear Determination Regulations*³ (the Regulations).

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1. R.S.C., 1985, c. E-15, as amended.
 2. R.S.C., 1985, c. E-15, as amended, section 1, Part XV, Schedule III.
 3. SOR/84-247, *Canada Gazette Part II*, Vol. 118, No. 7, p. 1232.

SCHEDULE III

PART XV

CLOTHING AND FOOTWEAR

1. Clothing and footwear, including articles and materials for incorporation in home or commercial production thereof, as the Governor in Council may determine by regulation.

The relevant portions of the Regulations state:

2. For the purposes of Part XV of Schedule III to the Excise Tax Act, it is determined that clothing and footwear includes

...

(f) headwear such as balaclavas, cap covers, caps, ear muffs, hats, hoods, knitted headwear, night caps, rain bonnets, shower caps, toques, uniform hats and caps,

...

(k) miscellaneous clothing and accessories such as bathrobes, bathing suits, beach wear, belts, dusters, garter belts, gloves, house coats, mitts, neckties, night gowns, pyjamas, scarves, smoking jackets and suspenders,

but does not include

...

(n) goods that incorporate protective devices or other features that are required for use in sports, or recreational activities such as baseball and hockey gloves, bowling shoes, curling shoes, golf shoes, pants with protective padding, protective sport helmets and masks, skates, ski goggles and other similar types of goggles and spiked or cleated sports shoes or boots,

...

(q) goods that are for use with clothing and footwear such as crowns, equipment carrying harnesses, handbags, pennants, purses, sceptres, shields, umbrellas, wallets and other garnishments used as trimming for clothing and footwear,

...

Mr. Harold Atkinson, Sales Manager for Suntech Optics Inc. (Eastern Canada district), appeared as a witness for the appellant. He gave testimony as to the wide variety of styles (in excess of 200), colours and shapes of sunglasses carried by the appellant. He further described how the sunglasses were produced and the various materials from which they are made. The witness explained that the appellant's product lines can be categorized as ladies'

fashions, men's fashions, sport glasses and any of the "fashion forward" looks (e.g. the retro look). The appellant also carries children's sunglasses. Mr. Atkinson further testified that people wear sunglasses to protect their eyes and to look fashionable. The sunglasses protect the eyes by absorbing ultraviolet rays. He also identified many different activities for which sunglasses are used (e.g. shopping, driving, boating, hiking, etc.), but mentioned that there was no specific use for the appellant's sunglasses. The sunglasses are predominantly sold in drugstores. The choice of styles and colours is mainly guided by information found in sundry fashion magazines, sports magazines, trade shows, catalogues and given by a Montréal fashion consultant. In response to questions from counsel for the respondent, Mr. Atkinson stated that, generally, sunglasses are worn outdoors and are not made of textiles.

Counsel for the appellant called Dr. K. Slater, a professor at the School of Engineering, University of Guelph, and asked the Tribunal to have him qualified as an expert witness in the area of material science, properties of clothing, comfort and textiles. Counsel for the respondent objected to Dr. Slater being qualified as an expert in sunglasses. The Tribunal, upon hearing the qualifications of the witness, agreed to qualify him as an expert in textiles and clothing, but saw no relevant expertise with regard to sunglasses. Dr. Slater testified as to the four traditional functions of clothing being, adornment, status, protection from the elements and modesty. Finally, he added that in more recent times, his work had led him to believe that one of the most important aspects of clothing was to enhance comfort.

Counsel for the appellant first argued that sunglasses are clothing within the ordinary dictionary meaning of the word, which is "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time."⁴ The fact that sunglasses are not composed of textiles, she submitted, does not mean that sunglasses cannot be classified as clothing.

Counsel for the appellant then submitted that sunglasses meet all of the functions of clothing, being adornment, status, protection from the elements and modesty. The sunglasses fulfil each of these functions as follows: they are closely allied with fashion and used for adornment; designer sunglasses and the higher priced models may be purchased for status reasons; they protect the eyes from ultraviolet radiation; and they may hide an injury or protect the wearer from inquiring glances. Moreover, counsel argued that sunglasses also fulfil the fifth function, that of comfort: physical comfort by preventing an individual from squinting in the sunlight and mental comfort by having the eyes shaded as one moves in public.

Counsel for the appellant then argued that the sunglasses in issue should be exempted from federal sales tax by virtue of subsection 51(1) of the Act because they are of the type of goods exempted from tax under paragraphs 2(a) to 2(k) of the Regulations. More specifically, she submitted that the sunglasses are "headwear" within the meaning of paragraph 2(f) as they are analogous to ear muffs. In the alternative, she argued that the goods should fall under paragraph 2(k) of the Regulations as "miscellaneous clothing and accessories" because, like the items mentioned in that paragraph, sunglasses are commonly used for beach, normal street or home wear.

4. Webster's Third New International Dictionary, Merriam-Webster Inc., United States of America 1986, at p. 428.

Counsel for the appellant took the position that the words "includes" and "such as" in the Regulations denote that the paragraphs are not to be read as exhaustive. Consequently, even if the Tribunal found that sunglasses were not headwear or miscellaneous clothing and accessories, they, nonetheless, should be exempted as clothing. She submitted that the threshold test in determining whether an item is clothing should be whether the item is "a covering for the human body or [is] being worn." She said that sunglasses are worn and cover part of the body. Therefore, she argued, they pass the threshold test.

Counsel for the respondent first submitted that, as a matter of common sense and ordinary meaning, sunglasses are not clothing. She argued that sunglasses more properly fall under paragraph 2(n) as "goods that incorporate protective devices or other features that are required for use in sports, or recreational activities" because they are similar in function and form to masks and goggles, have a protective element due to their UV protection, and are for sports or recreational use. In the alternative, the sunglasses should be classified under paragraph 2(q) of the Regulations as "goods that are for use with clothing and footwear."

Having examined the evidence and considered the arguments, the Tribunal concludes that the appeal should be dismissed. In the Tribunal's view, the words "includes" and "such as" as used in section 2 of the Regulations suggest that the examples cited are clearly meant to be illustrative, as it would be unreasonable to expect the legislator to list every conceivable article that may be considered clothing. In the Tribunal's view, none of the goods cited as examples in the exemption clauses are sufficiently like sunglasses to infer their exemption.

The Tribunal finds that sunglasses are not clothing within the ordinary meaning of the word. However, there are many items listed in the Regulations that would not be, generally speaking, considered clothing (e.g. umbrellas, sceptres, etc.). The traditional functions and uses of clothing mentioned by the appellant are not conclusive as to whether goods qualify as clothing. The reason is that there are items that could meet those functions and still are excluded from the scope of the Regulations. Therefore, further analysis is necessary, and the Regulations best guide the Tribunal as to whether certain goods should be included or excluded as clothing.

Each paragraph of the Regulations is made of two parts. The first part is a general statement of the category intended to be covered by the paragraph. The second part is an enumeration of goods that are included in that category. That enumeration is a guide as to what the category intends to cover or include. The Regulations should be read in their ordinary and grammatical sense.

In the case at bar, the parties' counsel have retained four categories where sunglasses could fall, namely, paragraphs 2(f), 2(k), 2(n) and 2(q). The sunglasses are not expressly provided for within any of those paragraphs. Therefore, the Tribunal has to determine within which paragraph the sunglasses most logically fall.

As to paragraph 2(f), the Tribunal finds that sunglasses are not included in the class of items listed under headwear. They are something worn over the eyes and not on the head in order to cover the top of the head and to protect the skull. Nor are they sufficiently similar to any of the items listed to infer their inclusion under headwear.

As to paragraph 2(k), the appellant relied mostly on beach wear as being similar to sunglasses. Again, the Tribunal finds that sunglasses are not similar to the items mentioned in this paragraph. An accessory is something subordinate or secondary, adding to the beauty,

convenience or effectiveness of the thing it accessorizes. Sunglasses may add to the beauty of someone's overall appearance rather than enhance the clothes. They are, rather, separate and unrelated to clothing. Their role is to protect the eyes, not to coordinate or accompany the clothes.

As to paragraph 2(n), the Tribunal finds that sunglasses do not fit in that category. Sunglasses are not "required" for use in sports. The evidence has demonstrated that the appellant does not sell sunglasses which are sports-specific. Sunglasses may be worn for a wide variety of activities, such as simply walking outside or driving on a sunny day. Also, although sunglasses have some sort of protective device, it is not akin to the kind of protective devices enumerated or intended to be included in that paragraph.

The Tribunal finds that the sunglasses in issue best fall under paragraph 2(q) as goods that are for use with clothing. Sunglasses, like umbrellas, sceptres or purses, fulfil an independent function that is separate and unrelated to clothes, even though they are generally worn or carried when clothes are worn.

Finally, as to the question of costs raised by the appellant, the Tribunal notes that it does not have the power to award costs on the disposition of an appeal pursuant to subsection 81.27(2) of the Act.

For the foregoing reasons, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member