

Ottawa, Monday, July 20, 1992

Appeal No. AP-91-132

IN THE MATTER OF an appeal heard on April 14, 1992,
under section 67 of the *Customs Act*, R.S.C., 1985, c. 1
(2nd Supp.) as amended;

AND IN THE MATTER OF 13 decisions of the
Deputy Minister of National Revenue for Customs and
Excise dated July 8, 1991, and August 10, 1991, with respect
to requests for re-determination pursuant to section 63 of
the *Customs Act*.

BETWEEN

DUMEX MEDICAL SURGICAL PRODUCTS LTD.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the laparotomy sponges in issue are properly classified under tariff item No. 3005.90.92 as other cotton wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-132

DUMEX MEDICAL SURGICAL PRODUCTS LTD.

Appellant

and

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

Respondent

The goods in issue are 100-percent cotton mesh disposable laparotomy sponges imported from China. At the time of importation, the goods are already cut to shape, sewn on the edges and have, incorporated in them, an x-ray detectable label that is required for hospital operating room use. They are in an unwashed and unsterile condition. They may or may not contain a loop for convenient handling.

At issue in this appeal is whether these laparotomy sponges are more properly classified under tariff item No. 3005.90.92 as other cotton wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes, as claimed by the appellant. The respondent claimed that the goods are properly classified under tariff item No. 6307.90.92 as other made up articles of cotton.

HELD: *The appeal is allowed. The Tribunal finds that the laparotomy sponges in issue are properly classified under tariff item No. 3005.90.92 as other cotton wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: April 14, 1992

Date of Decision: July 20, 1992

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

Legal Services: France Deshaies

Clerk of the Tribunal: Dyna Côté

*Appearances: Donald Goodwin, for the appellant
Gilles Villeneuve, for the respondent*

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DUMEX MEDICAL SURGICAL PRODUCTS LTD.

Appellant

and

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

Respondent

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

REASONS FOR DECISION

The goods in issue are 100-percent cotton mesh disposable laparotomy sponges imported from China. At the time of importation, the goods are already cut to shape, sewn on the edges and have, incorporated in them, an x-ray detectable label that is required for hospital operating room use. They are in an unwashed and unsterile condition. They may or may not contain a loop for convenient handling.

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Mr. William M. Goodwin, President of the appellant company, appeared as a witness. He testified that the business was started in January 1982 to market and distribute surgical products for use in hospital operating rooms. The appellant concentrates on disposable goods. In January 1985, it began producing its own products, the principal one being laparotomy sponges. He explained that the company receives the sponges in bulk from China - 100 sponges per bag, 1,000 sponges per case.

Mr. William M. Goodwin stated that to qualify for a tender, the sponges have to comply with the specifications of every hospital or group of hospitals, including the size of the sponge, sterile or unsterile, prewashed or unwashed, with or without a loop, etc. Then, depending on those specifications, they are shipped as received, in bulk form, or further processed by the appellant, that is, washed, packaged individually and sterilized as required. Each contract for the sale of the goods in issue certifies that they cannot be resold or reused.

Finally, the witness explained the appellant's sterilization process. The sponges are first packed individually. These packs are then put into a chamber, the air is evacuated and ethylene oxide is pumped in at high pressure. The ethylene oxide gas passes through the packages killing all the bacteria. No new bacteria can enter the packaging.

The appellant claimed that the laparotomy sponges are more properly classified under tariff item No. 3005.90.92 of Schedule I of the *Customs Tariff*,¹ the relevant nomenclature being:

- 30.05 Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

- 3005.90 -Other

- 3005.90.92 ----Of woven fabrics solely of cotton

The appellant argued that the imported laparotomy sponges are similar to the goods covered in heading No. 30.05. They are made of 100-percent woven cotton. They are packed for retail sale, the hospitals being the only customers and end users. The goods are for surgical use only; they are used in surgery for soaking up blood, they are cut to hospitals' specifications, they all contain an x-ray detectable label, and the hospitals certify on their purchase order that the goods will not be resold or reused. Finally, the appellant invoked Rule 3 (a) of the General Rules for the Interpretation of the Harmonized System (the General Rules) to the effect that when goods are, *prima facie*, classifiable under two headings, the heading which provides the most specific description shall be preferred to the heading providing a more general description. Counsel for the appellant submitted that the goods are more than "Other made up articles" of Chapter 63; he argued that tariff item No. 3005.90.92 is more specific than the tariff item claimed by counsel for the respondent.

Counsel for the respondent claimed that the laparotomy sponges are more properly classified under tariff item No. 6307.90.92, the relevant nomenclature being:

- 63.07 Other made up articles, including dress patterns.

- 6307.90 -Other

- 6307.90.92 ----Of cotton or other vegetable fibres, except solely of jute

Counsel submitted that the goods could be classified in heading No. 30.05 provided they were exclusively intended for sale directly, without re-packing, to users. He relied mainly on Chapter 30 of the Explanatory Notes to the Harmonized Commodity Description and Coding System² (the Explanatory Notes) which covers in heading 30.05:

Wadding and gauze for dressings (usually of absorbent cotton) and bandages, etc., not impregnated or coated with pharmaceutical substances, are also classified in this heading, provided they are exclusively intended (e.g., because of the labels affixed or special folding) for sale directly without re-packing, to users (private persons, hospitals, etc.) for use for medical, surgical, dental or veterinary purposes.

He argued that the appellant generally re-packages the goods before selling them to its clients. Consequently, they cannot be classified in heading No. 30.05.

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

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

After careful consideration of the evidence and arguments of the parties, the Tribunal concludes that the most appropriate tariff classification of the goods in issue is that advocated by counsel for the appellant. The laparotomy sponges are more properly classified under tariff item No. 3005.90.92 as other cotton wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

At the beginning of the argumentation, counsel for the respondent mentioned that his client was under the impression that all of the laparotomy sponges imported by the appellant were re-packaged. But the evidence clearly showed that this was not the case. Tenders and offers to the various hospital groups and hospitals introduced as evidence by counsel for the appellant showed that some of the goods were sold in bulk form as imported. Moreover, even if the goods were found to be re-packaged, the *Customs Tariff* only requires the goods to be "put up in forms ... for retail sale for medical [or] surgical ... purposes." When imported, those goods are already cut to shape and sewn on the edges and contain an x-ray detectable label. That is to say that they have been put up in forms for medical or surgical purposes. The evidence also showed that the goods are sold solely for retail sale, the hospitals being the only customers and end users.

Furthermore, when imported, the goods are in an "unfinished" state because, being unsterile, they are not suitable for utilization in the hospital rooms. The goods are packed individually only to allow the sterilization process to take place. The goods in issue being unfinished, but having the essential character of the finished article, Rule 2 (a) of the General Rules allows the classification of those goods in the same heading as the finished goods, which is heading No. 30.05.

With regard to the classification advocated by counsel for the respondent, the Tribunal did not believe that it properly characterized the goods. Heading No. 63.07, which includes "Other made up articles, including dress patterns," "covers made up articles of any textile material which are not included more specifically in other headings of Section XI or elsewhere in the Nomenclature" (emphasis added), according to the Explanatory Notes. The Tribunal believes that heading No. 30.05 is much more specific than heading No. 63.07 for the goods in issue.

Accordingly, the appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Charles A. Gracey

Charles A. Gracey
Member