

Ottawa, Monday, May 10, 1993

Appeal No. AP-92-007

IN THE MATTER OF an appeal heard on November 20, 1992, under subsection 67(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue for Customs and Excise dated February 20, 1992, and April 6, 1992, with respect to requests for a re-determination pursuant to subsection 63(1) of the *Customs Act*.

BETWEEN

F. W. WOOLWORTH CO. LIMITED

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed (Presiding Member Blouin dissenting).

Michèle Blouin
Michèle Blouin
Presiding Member

John C. Coleman
John C. Coleman
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-007

F. W. WOOLWORTH CO. LIMITED

Appellant

and

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

Respondent

This is an appeal under subsection 67(1) of the Customs Act from decisions of the Deputy Minister of National Revenue for Customs and Excise maintaining the classification of the goods under tariff item No. 9404.21.00. The issue is whether the goods, which are the subject of this appeal, are properly classified under tariff item No. 9403.50.10 as parts of beds, as argued by the appellant, or under tariff item No. 9404.21.00 as "Mattresses - Of cellular rubber or plastics, whether or not covered," or under tariff item No. 9404.10.00 as "Mattress supports."

HELD: *The appeal is dismissed. The goods are properly classified under tariff item No. 9404.10.00 as mattress supports (Presiding Member, Michèle Blouin, dissenting).*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: November 20, 1992
Date of Decision: May 10, 1993*

*Tribunal Members: Michèle Blouin, Presiding Member
John C. Coleman, Member
Sidney A. Fraleigh, Member*

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Dyna Côté

*Appearances: Randall S. Witten, for the appellant
Frederick Woyiwada, for the respondent*

Appeal No. AP-92-007

F. W. WOOLWORTH CO. LIMITED

Appellant

and

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

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
JOHN C. COLEMAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ from decisions of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister), maintaining the classification of the goods under tariff item No. 9404.21.00 of the *Customs Tariff*² as "Mattresses - Of cellular rubber or plastics, whether or not covered." The appellant contends that the goods are more properly classified under tariff item No. 9403.50.10 as parts of beds.

At the hearing, Mr. J. Jasinski, an Import Tax Analyst for F.W. Woolworth Co. Limited and Kinney Canada Inc., referred to the goods as "foam bunkies." The foam bunkie is composed of a Canadian spruce wood frame measuring 6 ft. 1 in. by 3 ft. 1 in., to which is fastened a sheet of cardboard. A 2.5-in. thick polystyrene foam is then placed over the area and completely covered by a printed sheet of polystyrene.

Mr. Jasinski explained that the foam bunkies were specifically designed and manufactured for use with the mate's bed, a single bed, and bunk beds (collectively "beds") and that they served no other purpose. The beds are fitted with side rails to which are attached six thin slices of wood. The frame of the foam bunkie sits on top of the pieces of wood. If a mattress alone were placed on the slices of wood, it would fall through the rails. Counsel for the appellant reinforced this point by referring to a facsimile letter dated September 10, 1992, from Stephen Smith of Neo-Wood Products, the manufacturer, in the appellant's brief. In this letter, Mr. Smith specifically stated that the foam bunkies were "designed to sell with the twin bed and bunk beds."

Mr. Jasinski did agree with the suggestion from the Tribunal that a piece of plywood board could be rested on the slices of wood and a mattress placed on top of the plywood in place of the foam bunkie.

In discussing the nature of the foam bunkie in comparison to a mattress, Mr. Jasinski suggested that, given the fact that the foam bunkie only contained a thin layer of foam, it would be an uncomfortable sleeping surface. As a result, he suggested that most users would probably purchase a mattress to sit on top of the foam bunkie, and he referred to pictures of the bunk beds from the Neo-Wood Products' catalogue provided in the appellant's brief which, he stated, demonstrated that the foam bunkie was used as a base for a mattress. However, he could not

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

give any evidence of how frequently the beds and foam bunkies would be sold or were intended to be sold with a mattress. To illustrate the differences further, Mr. Jasinski referred to the practice of flipping a mattress to prolong its life, and stated that this practice was not applicable to the foam bunkie.

The foam bunkies were ordered and shipped with, but packed separately from, the beds. Two foam bunkies were shipped with each set of bunk beds, while only one was shipped with each mate's bed.

The foam bunkies are displayed and sold together with the beds without repackaging, and the foam bunkies are not sold separately from the beds. While, in principle, the beds could be purchased without the foam bunkie, Mr. Jasinski stated that, in practice, the appellant did not sell them separately.

Although the foam bunkies and beds were shipped together, they were invoiced separately. Counsel for the respondent questioned Mr. Jasinski about a letter from Kathy Snyder of Neo-Wood Products dated August 7, 1990, which was submitted with the appellant's brief as evidence of the reason why the foam bunkies and beds were invoiced separately. More specifically, counsel brought to Mr. Jasinski's attention the following statement: "Most of our customers do not order bunk beds and mattresses in sets. They order separately." Counsel suggested to Mr. Jasinski that this statement supported the view that the foam bunkies and beds were separate items. Mr. Jasinski responded that this might be true, but also referred to the other reason offered in the letter for invoicing the items separately, namely, that the items were manufactured at different locations.

The Tribunal further referred Mr. Jasinski to the letter of August 7, 1990, and to the fact that the author of the letter referred to the foam bunkies as mattresses. Mr. Jasinski could not explain this reference to a mattress, but stated that he was not aware of any other references to the foam bunkies as mattresses and that they are referred to as foam bunkies in the invoices.

In argument, counsel for the appellant referred to Rule 1 of the General Rules for the Interpretation of the Harmonized System³ (the General Rules) and submitted that the beds fit under heading No. 94.03 as "Other furniture and parts thereof," and more specifically under tariff item No. 9403.50.10 as bunk beds. Assuming that the beds were classified under heading No. 94.03, counsel then argued that the foam bunkies were parts of the beds because they served an integral role in the function performed by the beds and should also be classified under that heading.

Counsel for the appellant submitted that heading No. 94.04 did not apply to the foam bunkies as was suggested by the respondent, since the foam bunkie was something other than a mattress. However, in the event that it were found that the foam bunkie could be classified under either heading No. 94.03 or 94.04, counsel submitted that, according to Rule 3 of the General Rules, when goods may *prima facie* be classified under two different headings, the most specific description is to be used to classify the goods.

Counsel for the appellant referred to Note IV of the Explanatory Notes⁴ to Rule 3 (a) of the General Rules, and submitted that, although heading No. 94.04, covering mattresses of

3. *Supra*, note 2, Schedule I.

4. Explanatory Notes to the Harmonized Commodity Description and Coding System, Customs Co-operation Council, 1st ed., Brussels, 1986.

cellular plastic, might be more specific, it did not accurately reflect the composition of the foam bunkies since the foam bunkies were made up of less than 50 percent of cellular plastic. Counsel therefore concluded that, since heading No. 94.04 did not provide the most complete description, it was not to be considered the most specific.

In the event that the foam bunkie could not be classified according to the principles set out in Rule 3 (a) of the General Rules, counsel for the appellant submitted that General Rule 3 (b) should be relied on, which directs one to look at the component part of the subject goods which reflects its essential character. Counsel submitted that the bed, and not the foam bunkie, gave the goods their essential character as required under General Rule 3.

Counsel for the appellant referred to General Rule 3 (b) and argued that the beds and foam bunkies met the requirements for composite goods set out in Note IX of the Explanatory Notes to General Rule 3 (b). The beds and foam bunkies are either inseparable or separable components which are mutually complementary, are designed to be together, are sold together and which are not normally offered for sale in separate parts. Alternatively, counsel argued that the beds and foam bunkies met the test for goods put up for retail sale set out in Note X of the Explanatory Notes to General Rule 3 (b). The beds and foam bunkies are put up in a manner suitable for sale directly to users, without repacking.

In applying the General Rules, counsel for the respondent referred to Rule 1 and to the Explanatory Notes and argued that the foam bunkies were specifically identified as mattresses under tariff item No. 9404.21.00 and, as a result, they should be classified under tariff item No. 9404.21.00. Counsel submitted that, even though the foam bunkies incorporate a wooden frame, this did not change their character from that of a mattress. However, after having viewed the sample, counsel suggested that the Tribunal consider classifying the foam bunkies under tariff item No. 9404.10.00 as a mattress support. Counsel for the appellant, however, submitted that the foam bunkies did not contain springs or steel wire mesh which, he considered, were required under the heading for mattress supports in the *Customs Tariff*.

Counsel for the respondent argued that the terms used in the *Customs Tariff* should be given the meaning generally given in the trade, as was held in *Denbyware Canada Limited v. The Deputy Minister of National Revenue for Customs and Excise*,⁵ and that goods were to be classified according to their nature at the time of importation as stated in *The Deputy Minister of National Revenue for Customs and Excise v. Ferguson Industries Limited*.⁶ Counsel referred to the letter of August 7, 1990, in the appellant's brief to support the argument that, in the trade, the foam bunkies were generally referred to as mattresses and that the foam bunkies were normally sold separately from the beds.

Note 3 (b) of the Chapter Notes to Chapter 94 provides that "Goods described in heading No. 94.04, presented separately, are not to be classified in heading No. 94.01, 94.02 or 94.03 as parts of goods." Counsel for the respondent argued that, in this appeal, all of the evidence provided demonstrated that the foam bunkies were presented separately from the beds and, as a result, they could not be classified under heading No. 94.03.

To support his argument that the foam bunkies could not be classified as parts of beds, counsel referred to the Tariff Board decision in *Robert Bosch (Canada) Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,⁷ and argued that, in order for an item to be a part of

5. Unreported, Federal Court of Appeal, Appeal No. A-274-78, May 15, 1979.

6. [1973] S.C.R. 21.

7. (1985), 10 T.B.R. 110, 9 C.E.R. 62.

a product, it must be committed only for use with that product. Counsel for the respondent further relied on *Xerox Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*,⁸ in which the Tariff Board held that "just because something is designed to be inserted into another does not, for that reason alone, make it become a part of that other," and that the determination of whether an item was a part had to be made on a case-by-case basis.

The majority of the Tribunal finds that the foam bunkies are correctly classified under tariff item No. 9404.10.00 as mattress supports.

Section 10 of the *Customs Tariff* provides that in classifying goods reference shall be made to the General Rules. Rule 1 of the General Rules provides that the classification of goods shall be determined "according to the terms of the headings and any relative Section or Chapter Notes." Therefore, the first step is to identify headings that name or generically describe the goods in issue. The Tribunal finds that there are two possible headings: heading Nos. 94.03 and 94.04. Heading Nos. 94.03 and 94.04 are as follows:

94.03 Other furniture and parts thereof.

94.04 Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.

Under these headings, there are three possible tariff items: tariff item No. 9403.90.90 describing parts of beds, tariff item No. 9404.10.00 describing mattress supports and tariff item No. 9404.21.00 describing mattresses of cellular rubber or plastics, whether or not covered.

Upon visual inspection of the one-square-foot corner section of the foam bunkie and, after having heard the evidence of the witness for the appellant that the foam bunkie is in and of itself not a comfortable sleeping surface, that it is "designed as a base for a mattress" and that "its purpose on the bunk bed would be essentially to support a mattress," it became apparent to the Tribunal that the foam bunkie did not fit into the classic notion of what is considered a mattress. As a result, the Tribunal is of the view that tariff item No. 9404.21.00 does not adequately describe the foam bunkie.

Counsel for the appellant submitted that the foam bunkie could not be classified under tariff item No. 9404.10.00 as a mattress support since the Explanatory Notes stipulate that mattress supports must contain springs. However, the Tribunal notes that Note (A) to heading No. 94.04 in the English version of the Explanatory Notes states the following:

Mattress supports, i.e., the sprung part of a bed, normally consisting of a wooden or metal frame fitted with springs or steel wire mesh (spring or wire supports), or of a wooden frame with internal springs and stuffing covered with fabric (mattress bases).

The word "sprung" is the past participle of the verb "spring," which is defined in The New Lexicon Webster's Dictionary of the English Language,⁹ as follows:

to move as a result of elasticity, to spring back into position.

8. (1988), 13 T.B.R. 1, 17 C.E.R. 47, affirmed F.C.A., April 17, 1991.

9. Encyclopedic edition, (New York: Lexicon Publications, 1987) at 961.

Parliament's intention regarding the scope of the word "sprung" is made amply clear in the equally authoritative French language version of Note (A) to heading No. 94.04 in the Explanatory Notes, which reads as follows:

Les sommiers, c'est-à-dire la partie élastique des lits, généralement composée d'un cadre en bois ou en métal comportant des ressorts ou bien une toile ou treillis en fils d'acier (sommiers métalliques), ou bien constituée par un cadre en bois garni intérieurement de ressorts et de rembourrage et recouvert de tissu (sommiers tapissiers).

According to the Collins-Robert French~English English~French Dictionary,¹⁰ the word "*élastique*" means "elastic ... springy ... buoyant [and] flexible." Therefore, the common and ordinary usage of the word "sprung" or "*élastique*" is to describe goods composed of materials that have elastic qualities, and not only goods that contain springs.

Limiting the scope of the word "sprung" to those goods containing springs does not accord with the common and ordinary meaning of the word "*élastique*" as found in the French version of the Explanatory Notes of the heading or the common and ordinary meaning of the word "sprung" as found in the English version of the Explanatory Notes. Further, the phrases "normally consisting of" in the English version and "*généralement composée de*" in the French version of the Explanatory Notes are not words of limitation. The Tribunal therefore finds that the foam bunkie can be classified under heading No. 94.04 as a mattress support.

While the goods in issue could be considered parts of bunk beds as argued by the appellant, the evidence establishes that the foam bunkies are more properly classified under tariff item No. 9404.10.00 as mattress supports. A tariff item that more specifically describes goods must take precedence over a general provision such as "parts thereof." In the majority of the Tribunal's view, it is clear that "mattress support" under heading No. 94.04 more specifically describes the foam bunkie than the general phrase "parts thereof" in heading No. 94.03.

Finally, the majority of the Tribunal wishes to clarify a misconception that the appellant and respondent may have regarding the treatment of parts under heading No. 94.03. Counsel for the appellant proposed that the foam bunkies be classified under tariff item No. 9403.50.10 as parts of bunk beds. However, since there is no direction in the Section, Chapter or Explanatory Notes to classify the parts of furniture with the furniture, parts of furniture listed under subheading Nos. 9403.10 to 9403.80 are more properly classified under subheading No. 9403.90, which specifically refers to parts.

John C. Coleman

John C. Coleman
Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

10. Second edition, (London: Collins, 1991) at 244.

DISSENTING OPINION OF PRESIDING MEMBER BLOUIN

I would allow the appeal in part and classify the foam bunkies under tariff item No. 9403.90.99 as parts.

Mr. Jasinski's testimony was to the effect that a child could sleep on the foam bunkie, but he did not believe that the foam bunkie would support the pressure of an adult and that "an additional mattress would not add any support." In answering the Tribunal's questions, Mr. Jasinski said that "[w]hether there is a mattress on top or not, it [the foam bunkie] would still be just as sturdy," and the foam bunkie would probably not support an adult if a mattress were put on top of it.

Upon visual inspection of the one-square-foot corner section of the foam bunkie and after having heard Mr. Jasinski's evidence that the foam bunkie would not support an adult's weight because its base is made of cardboard, it became apparent to me that the cardboard base of the foam bunkie did not have the sufficient properties to "move as a result of elasticity, to spring back into position" and was not strong enough to support an adult. The foam bunkie does not fit into the classic notion of what is considered a mattress support. Therefore, I find that the foam bunkie cannot be classified under heading No. 94.04 as a mattress support because it does not reflect the product itself.

The evidence shows that the design of the foam bunkie is closely integrated with the design of the beds. They are mutually complementary. The foam bunkie is a combination of a mattress and a mattress support specifically built for the mate and bunk beds. The foam bunkies are sold together with the beds, not alone, unless required to replace a broken foam bunkie, and are not repacked. The foam bunkies are to be used as is, with the beds, to permit young children to sleep on them. The beds could not be used without a foam bunkie.

I consider that the foam bunkie should be classified under tariff item No. 9403.90.99 which specifically refers to parts.

Michèle Blouin
Michèle Blouin
Presiding Member