CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, September 9, 1993

Appeal No. AP-92-045

IN THE MATTER OF an appeal heard on February 19, 1993, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue for Customs and Excise dated April 22, 1992, pursuant to section 59 of the *Special Import Measures Act* with respect to requests for re-determination made under section 58 of the *Special Import Measures Act*.

BETWEEN

M & M TRADING INC. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-045

M & M TRADING INC. **Appellant**

and

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

This is an appeal under section 61 of the Special Import Measures Act from two decisions of the Deputy Minister of National Revenue for Customs and Excise dated April 22, 1992, pursuant to section 59 of the Special Import Measures Act. The issue is whether the respondent correctly imposed anti-dumping and countervailing duties on footwear imported from Brazil by the appellant. The duties were imposed on the basis of the Tribunal's injury finding dated May 3, 1990, under section 42 of the Special Import Measures Act, which stated that the dumping and subsidizing of certain boots and shoes had caused, were causing and were likely to cause material injury to the production in Canada of like goods. Sandals were among the goods specifically excluded from the said finding. In considering whether the respondent correctly imposed the duties, it must therefore be determined whether the imported subject goods are sandals, as submitted by the appellant, and are, thereby, exempt from the imposition of anti-dumping and countervailing duties resulting from the Tribunal's finding, or whether they are shoes, as determined by the respondent, and therefore subject to the duties.

***HELD*: *The appeal is allowed. The footwear imported by the appellant satisfies the general physical criteria for sandals. The inclusion of the word "generally" in the above-mentioned criteria established by the Tribunal in its statement of reasons dated May 18, 1990, to the above-mentioned finding suggests that footwear that does not meet all of the stated criteria may still be considered to be sandals. Therefore, the footwear in question is excluded from the Tribunal's injury finding and is not subject to anti-dumping and countervailing duties.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*February 19, 1993*
Date of Decision:	*September 9, 1993*
Tribunal Members:	*Kathleen E. Macmillan, Presiding Member* *W. Roy Hines, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Michael Kaylor, for the appellant* *Christine Hudon, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-045

M & M TRADING INC. **Appellant**

and

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

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
W. ROY HINES, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*[1] (SIMA) from two decisions of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) dated April 22, 1992, pursuant to section 59 of SIMA. The issue is whether the respondent correctly imposed anti-dumping and countervailing duties on footwear imported from Brazil by the appellant. The duties were imposed on the basis of the Tribunal's injury finding[2] (the Tribunal's finding) dated May 3, 1990, under section 42 of SIMA, which stated that the dumping and subsidizing of certain boots and shoes had caused, were causing and were likely to cause material injury to the production in Canada of like goods. Sandals were among the goods specifically excluded from the said finding. In considering whether the respondent correctly imposed the duties, it must therefore be determined whether the imported subject goods are sandals, as submitted by the appellant, and are, thereby, exempt from the imposition of anti-dumping and countervailing duties resulting from the Tribunal's finding, or whether they are shoes, as determined by the respondent, and therefore subject to the duties.

The appellant is an importer of various types of footwear. On July 28, 1990, under Canada Customs Coding Form No. 12351-040044131 (Entry A), the appellant imported goods described as "Ladies Leather Sandals" (the subject goods). A detailed adjustment statement was issued to the appellant on September 27, 1990, re-determining that the subject goods were women's leather shoes from Brazil and were, therefore, subject to the imposition of anti-dumping duties as provided in the Tribunal's finding. The appellant, thereafter, made a request for re-determination on November 15, 1990, on the basis that the subject goods were sandals, not shoes, and were therefore not subject to the imposition of anti-dumping duties. On June 13, 1991, an officer of the Department of National Revenue (Revenue Canada) re-determined that the goods in question were subject to a 27.6-percent anti-dumping duty and a 17.4-percent countervailing duty. On August 15, 1991, the appellant requested a

1. R.S.C. 1985, c. S-15.
2. *Women's Leather Boots and Shoes Originating in or Exported from Brazil, the People's Republic of China and Taiwan; Women's Leather Boots Originating in or Exported from Poland, Romania and Yugoslavia; and Women's Non-Leather Boots and Shoes Originating in or Exported from the People's Republic of China and Taiwan*, Inquiry No. NQ-89-003, May 3, 1990; Statement of Reasons dated May 18, 1990.

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re-determination by the Deputy Minister. On April 22, 1992, the Deputy Minister re-determined that the goods in question were subject to the Tribunal's finding and the imposition of anti-dumping and countervailing duties.

On December 23, 1990, under Canada Customs Coding Form No. 12351-040046656 (Entry B), the appellant imported goods described as "Ladies Leather Sandals" (also the subject goods). A detailed adjustment statement was later sent to the appellant on March 1, 1991, re-determining that the subject goods were women's leather shoes and imposing anti-dumping and countervailing duties. On May 2, 1991, the appellant made a request for re-determination on the basis that the subject goods were sandals, not shoes. On November 8, 1991, a designated officer with Revenue Canada re-determined that the subject goods were women's leather shoes since they did not comply with the departmental guidelines, "General Guidelines Utilized for Determining What is a Sandal" (the Guidelines) dated November 1, 1990, requiring that they be 33 percent open. On January 30, 1992, the appellant made a request for re-determination by the Deputy Minister and, on April 22, 1992, the Deputy Minister re-determined that the subject goods were women's leather shoes and, therefore, subject to the Tribunal's finding and the imposition of anti-dumping and countervailing duties.

In regard to Entry A, Mr. Joerg Peschlow, President of M & M Trading Inc., testified that, in all but one instance, the samples submitted to Revenue Canada corresponded to the subject goods. He identified them as Huarache sandals, styles 6050 and 6051, and entered them as Exhibits A-1 and A-2, respectively. In his view, these goods were accepted by the Deputy Minister as being sandals, as indicated in rulings that he issued to the appellant on October 26, 1990, and April 12, 1991.

In one instance, an employee selected the wrong shoe sample, style 6060, which was submitted to Revenue Canada. When the error came to Mr. Peschlow's attention, he took samples of styles 6050 and 6051 to Revenue Canada in Ottawa to substantiate that those were the correct goods covered by Entry A. He further testified that the sample sent in error was a manufacturer's sample and that his company had never imported that style of footwear.

With respect to Entry B, there was no disagreement between the appellant and the respondent as to the identification of the subject goods. The only disagreement was whether the subject goods were sandals or shoes.

Ms. Poh Lan Song, the Senior Buyer for Giant Tiger, and Mr. Jean-Guy Gallant, Buyer for Chaussures Pitt Ltée, testified that they purchased footwear matching that identified by Mr. Peschlow to be styles 6050 and 6051. They introduced into evidence advertisements which featured the subject goods and described them as ladies' Huarache sandals.

Ms. Madeleine Jean, a Senior Program Officer with Revenue Canada, appeared for the respondent and explained that the criteria used by Revenue Canada to determine what is a sandal are those set out in the Tribunal's statement of reasons to the above-mentioned finding, namely:

> *[S]andals were generally defined as an open shank footwear employing narrow ribbons, straps or thongs to form the upper and attachment, in which the difference between the combined height of the sole and any heel in the heel area, and the height of the sole in the forward area, did not exceed two centimetres.*[3]

3. *Ibid.* at 4.

Ms. Jean stated that, in addition to this definition of sandals in the Tribunal's statement of reasons, Revenue Canada has also developed its own criteria for determining what is a sandal, based upon the results of consultations with importers and manufacturers. The criteria found in the Guidelines are as follows:

> *1) [F]ootwear for which the difference between the combined height of the sole and any heel in the heel area, and the height of the sole in the forward area, exceeds two centimetres, cannot be classified as a sandal.*
>
> *2) Footwear with either an open toe, or an open heel or both heel and toe open will be considered a sandal if at least 33% of the circumference of the footwear measured at the sole-upper line is open and the upper is constructed largely of narrow straps or ribbons....*
>
> *3) Footwear with both toe and back closed is normally considered to be a shoe.*

In her testimony, Ms. Jean made no reference to the authenticity of the samples that were actually imported, but testified that the samples of footwear provided to her did not qualify as sandals because they did not conform fully to the Guidelines.

Ms. Jean testified that Exhibit B-1, a sample of footwear marked as style 6050, was a shoe despite the fact that it had an open toe and heel and was over 33 percent open, since the straps were stitched together. However, she admitted that the criteria concerning straps were not specified in the Guidelines.

In Ms. Jean's view, based upon the information in the file that was transferred to her along with the samples, not all of the samples provided by the appellant concerning its importations met the 33-percent open criterion. She referred specifically to a sample provided from Entry A bearing the name Ferrazzoli and having style 6050 permanently embossed on the inside (Exhibit B-2). She stated that the sample had been measured by a representative of Revenue Canada and that it was 32.5 percent open and, therefore, did not meet the 33-percent open criterion. With respect to Entry B, she stated that the appellant provided two samples, one marked Ferrazzoli 6295 (Exhibit B-3), for style 6050, and the other marked Rodéo 44337368 (Exhibit B-4), for style 6051. The samples, when measured, were found to be 30 percent and 29 percent open, respectively.

In rendering its decision, the Tribunal is bound by the description of sandals that is given in the statement of reasons to the above-mentioned finding. Although Revenue Canada's administrative decisions, rulings or external guidelines provide guidance, they are not determinative in this instance.

The description given to sandals in the Tribunal's statement of reasons to the above-mentioned finding is less than precise, reflecting no doubt about the virtual impossibility of anticipating accurately the countless styles of sandals available on the market.

The inclusion of the word "generally" in the definition suggests to the Tribunal that not only the physical features, but also the general character of the footwear, should be taken into account in distinguishing between a sandal and a shoe. In this respect, the Tribunal interprets "generally" to mean "usually." The word allows for the possibility that a style of footwear might meet all the physical criteria set out for sandals, but could still be considered a shoe or, conversely, that footwear could fall short in terms of heel height or strap width, but still meet the general description of a sandal, as generally recognized by trade usage.

The respondent raised the issue of the identification of the footwear that was actually imported by the appellant. However, from the evidence presented, the Tribunal is satisfied that the subject goods correspond to those identified by Mr. Peschlow as being samples of Ferrazzoli styles 6050 and 6051.

Turning first to the physical criteria, the subject goods meet the requirements for heel-to-sole height ratio. They also comprise narrow straps to form the upper and attachment. The factor that is less obvious is the degree to which they are open. They fall somewhat short of meeting Revenue Canada's Guidelines of 33 percent open at the sole upper-line, as they are between 29 percent and 32.5 percent open. However, given the inherent potential for measurement error and the fact that the Guidelines are not binding in law, the Tribunal is inclined to give this shortfall little weight.

The evidence clearly established that the subject goods are viewed as sandals by retailers and the buying public. A number of retail advertisements entered into evidence identified the particular subject goods as Huarache sandals. In the Tribunal's opinion, the subject goods exhibit similar characteristics to sandals, in that they are used for beachwear, worn without socks or stockings, are cool and multi-strapped.

Therefore, according to the Tribunal, the subject goods meet the description of sandals as set out in the Tribunal's statement of reasons to the above-mentioned finding and are not subject to anti-dumping or countervailing duties under SIMA. In the Tribunal's view, the subject goods satisfy the general physical criteria set out in the definition of sandals in the statement of reasons in question and are also clearly identified as sandals by the retail trade.

The Tribunal further notes that, had it found that the goods imported by the appellant corresponded to the sample identified by Ms. Jean and entered as Exhibit B-1, the Tribunal would still have found that the subject goods qualify as sandals according to the definition of sandals in the statement of reasons to the above-mentioned finding. The subject goods also have narrow straps to form the upper and attachment, and meet the criteria with respect to the height of the sole.

Accordingly, the appeal is allowed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member