



Ottawa, Friday, November 27, 1992

Appeal No. AP-92-025

IN THE MATTER OF an appeal heard on September 29, 1992, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated January 23, 1991, with respect to a request for re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

EILEEN M. NIELSON

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal concludes that the 1990 Dodge Caravan, imported by the appellant for her personal use during her two-year stay in Canada, is more properly classified under tariff item No. 9803.00.00 as "Conveyances ... temporarily imported by a person who is not a resident of Canada for use by that person in Canada."

Kathleen E. Macmillan

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Presiding Member

Sidney A. Fraleigh

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Member

Robert C. Coates, Q.C.

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Member

Michel P. Granger

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-025

EILEEN M. NIELSON

Appellant

and

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

Respondent

The appellant, Ms. Eileen M. Nielson, is an American citizen who formerly resided in Canada for five years, returning to the United States in 1985. In September 1990, she returned to Canada with her family as her husband had acquired a temporary job in the country. It was their intention to return to the United States after the two-year job term. The appellant maintained her job in the United States, commuting each day from Nepean, Ontario, to Ogdensburg, New York. She purchased a 1990 Dodge Caravan prior to her return to Canada and was assessed taxes and duty at the border. Being considered a former resident of Canada returning to resume residence, the vehicle was classified under tariff item No. 9805.00.00.

HELD: *The appeal is allowed. The Tribunal concludes that the 1990 Dodge Caravan, imported by the appellant for her personal use during her two-year stay in Canada, is more properly classified under tariff item No. 9803.00.00 as "Conveyances ... temporarily imported by a person who is not a resident of Canada for use by that person in Canada."*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: September 29, 1992
Date of Decision: November 27, 1992*

*Tribunal Members: Kathleen E. Macmillan, Presiding Member
Sidney A. Fraleigh, Member
Robert C. Coates, Q.C., Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Janet Rumball

*Appearances: Eileen M. Nielson, for the appellant
Linda J. Wall, for the respondent*

Appeal No. AP-92-025

EILEEN M. NIELSON

Appellant

and

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

Respondent

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
SIDNEY A. FRALEIGH, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal made pursuant to section 67 of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise made pursuant to section 63 of the Act. That decision confirmed the classification of an imported 1990 Dodge Caravan under tariff item No. 9805.00.00 of Schedule I to the *Customs Tariff*.² At the time of importation of the vehicle, the appellant was informed that she would have to pay a total of \$2,180.52, including \$697.15 in customs duty, \$1,383.37 in federal sales tax and \$100.00 in excise tax. In this appeal under section 67 of the Act, only the tariff classification of the imported vehicle is at issue.

The issues in this appeal are:

- (a) whether the Dodge Caravan is properly classified under tariff item No. 9805.00.00 and subject to assessment duty under tariff item No. 8703.23.00 as determined by the respondent; and
- (b) whether the alleged provision of misinformation by customs officials can relieve the appellant of the duties payable under the Act.

The tariff nomenclature relevant to the respondent's classification reads as follows:

87.03 *Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading No. 87.02), including station wagons and racing cars.*

8703.23.00 *--Of a cylinder capacity exceeding 1,500 cc but not exceeding 3,000 cc*

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

9805.00.00 *Goods imported by a member of the Canadian Forces, an employee of the Canadian Government, or by a former resident of Canada returning to Canada to resume residence therein after having been a resident of another country for a period of not less than one year, or by a resident returning after an absence from Canada of not less than one year, and acquired by that person for personal or household use and actually owned abroad by and in the possession and use of that person for a least six months prior to that person's return to Canada.*

The appellant, Ms. Eileen M. Nielson, is an American citizen who formerly resided in Canada with her family for five years, returning to the United States in 1985. She had landed immigrant status in Canada for approximately two years prior to her departure. Her husband, Lloyd Nielson, is a Canadian citizen.

In March 1990, Mr. Nielson acquired a temporary job in Canada to work on the Canadian Agricultural Census. Initially, he was hired for a six-month term that was extended to two years. Ms. Nielson testified that it was always the family's intention to return to the United States subsequent to her husband's work term in Canada.

To accommodate her husband's temporary employment, Ms. Nielson transferred her position with the U.S. Department of Health and Human Services from Denver, Colorado, to Ogdensburg, New York, to which she commuted each day from Nepean, Ontario. While residing in Canada, she maintained her health insurance in the United States. The family leased a house during their tenure in Canada. At the time of the hearing, Mr. Nielson had returned to the United States, with the remaining family members and their possessions scheduled to follow on October 15, 1992.

Ms. Nielson testified that, when she entered Canada, she was given a temporary visitor's permit and instructed to contact immigration officials in Ottawa to arrange for a more permanent status. She was informed that her entry into Canada could be denied on a temporary permit and that the permit would not be indefinitely renewed. As she commuted to the United States during the work week, she re-applied for landed immigrant status, a condition, she was informed, under which her entry into Canada could not be denied. At the time of the hearing, Ms. Nielson had not yet been granted landed immigrant status.

As Mr. Nielson's position in Canada was temporary, the family had to pay for the move and was responsible for the administrative details of moving their possessions across the border. Prior to her return to Canada, Ms. Nielson called the Department of National Revenue, Customs and Excise, on July 13, 1990, to obtain information with regard to the movement of these goods into Canada. She claims to have inquired about any duties and taxes payable on the vehicle that she was intending to purchase in the United States.

Ms. Nielson testified that Environmental Protection Agency (EPA) emission standards for vehicles are more stringent in Denver than in Ontario. Their former vehicle, a 1982 or 1983 Dodge Aries had been purchased in Canada and returned to the United States with the family in 1985. As this vehicle did not meet the EPA emission standards, the family was given a one-time exemption to get the vehicle to the United States. Ms. Nielson testified that because it was their intention to return to the United States, they decided to purchase a new vehicle there so that it could accompany them on their return without costly changes, a second exemption not being available.

Ms. Nielson asserts that she was informed by a customs official that because she was a U.S. citizen and had been out of the country for five years, the vehicle could be brought into Canada without incurring any tax or duty. The vehicle was purchased on July, 13, 1990, the same date as the telephone conversation with the customs official. It was imported into Canada on September 17, 1990, at which time the appellant was informed that she would have to pay a total of \$2,180.52, representing customs duty, federal sales tax and excise tax.

The appellant submitted that because she relied on erroneous information provided by customs officials to her detriment, the duty and taxes that have been paid should be refunded. She also questioned whether she was actually returning to Canada to resume residence as used in tariff item No. 9805.00.00.

Counsel for the respondent noted that at the time of the importation of the Dodge Caravan, the appellant was a former resident of Canada who was returning after a five-year absence. She and her family were not first-time residents. As such, it was submitted that they do not meet the definition of "settler" as set out in the regulations applicable to tariff item No. 9807.00.00.³ For that reason, tariff item No. 9807.00.00 is inapplicable to the goods in issue in this appeal.

According to the respondent's brief, tariff item No. 9813.00.00⁴ is inapplicable because the goods in issue did not originate in Canada. At the hearing, however, it became known that the goods were manufactured in Windsor, Ontario, and exported to the United States. Counsel for the respondent drew the Tribunal's attention to Note 11(b) to Chapter 98 of Schedule I to the *Customs Tariff* and suggested that the Dodge Caravan could not be classified under tariff item No. 9813.00.00 "except upon payment of the customs duties to which [it] would have been liable had [it] not been exported from Canada." The Tribunal informed counsel that it did not need to hear further argument on this point.

3. Tariff item No. 9807.00.00 includes "Goods, as defined by regulations made by the Minister, imported by a settler for the settler's household or personal use, if actually owned by and in the possession and use of the settler prior to the settler's arrival in Canada, under such regulations as the Minister may make."

Section 2 of the *Definition of "Settler" for the Purpose of Tariff Item No. 9807.00.00 Regulations*, SOR/90-226, Canada Gazette Part II, Vol. 124, No. 9, p. 1437, April 5, 1990, reads as follows:

2. For the purpose of tariff item No. 9807.00.00 of Schedule I to the *Customs Tariff*, "settler" means any person who enters Canada with the intention of establishing, for the first time, a residence for a period of not less than 12 months, but does not include a person who enters Canada in order to reside in Canada for the purpose of

(a) employment for a temporary period not exceeding 36 months; or

(b) studying at an institute of learning.

4. "Goods, including containers or coverings filled or empty, originating in Canada, after having been exported therefrom, if the goods are returned without having been advanced in value or improved in condition by any process of manufacture or other means, or combined with any other article abroad, under such regulations as the Minister may make."

It was submitted that, as a returning former resident of Canada, the appellant falls within tariff item No. 9805.00.00 and that the Dodge Caravan falls within the definition of "goods" of that tariff item. The goods were acquired after March 31, 1977. Pursuant to Note 7(c)(i) of Chapter 98 of Schedule I to the *Customs Tariff*, duty is therefore payable on the value for duty in excess of \$10,000. The tariff item that describes the rate of duty applicable to the goods is tariff item No. 8703.23.00.

It was further submitted that misinformation allegedly received by the appellant from customs officials is not a circumstance entitling the appellant to be relieved from the application of the provisions of the *Customs Tariff*. It was submitted that the *Customs Tariff*, as a taxing statute, cannot be given an equitable construction and that this Tribunal lacks the jurisdiction to exempt the appellant's goods from the application of the tariff.

During the hearing, the actual residence status of the appellant became questionable, and the issue was raised as to the applicability of tariff item No. 9803.00.00, which reads as follows:

Conveyances and baggage temporarily imported by a person who is not a resident of Canada for use by that person in Canada.

In the *Non-residents' Temporary Importation of Baggage and Conveyances Regulations*⁵ (the Regulations), "resident" is defined to mean:

a person who, in the settled routine of that person's life, makes his home, resides and is ordinarily present in Canada.

Also of relevance is the definition of "temporary resident," which is defined to mean:

(a) a person who is not a resident and who resides temporarily in Canada for the purpose of

(i) employment for a period not exceeding 36 months, or

(ii) studying at an institution of learning, and

(b) the spouse and dependants of a person described in paragraph (a).

It is impossible for the Tribunal to consider the appellant a "resident" of Canada, as it does not consider her stay in the country to be part of the "settled routine of [her] life." This is clearly reflected in the facts. It was the family's intention to return to the United States: Ms. Nielson maintained her job with the U.S. federal government, to which she commuted each day; she maintained her health insurance in the United States; the family leased rather than purchased a house for a short term; and the appellant purchased a vehicle in the United States knowing that it met the EPA emission standards and could be returned without costly alterations. Nor does the Tribunal believe that the appellant returned to Canada to "resume residence" as this expression is used in tariff item No. 9805.00.00.

Similarly, it is clear that Mr. Nielson would meet the definition of a "temporary resident" as his stay in Canada was for the purpose of "employment for a period not exceeding

5. SOR/87-720, Canada Gazette Part II, Vol. 121, No. 26, p. 4693, December 10, 1987.

36 months," being for only 24 months. And the appellant, who is not a resident and who is the spouse of a temporary resident, would qualify as a temporary resident under paragraph (b) of that definition. It was the appellant's intention to keep the Dodge Caravan in Canada for only a temporary period, during her family's stay in Canada and for her personal use.

The Regulations⁶ also define "conveyance" to mean "any vehicle ... that is used to move persons or goods" with an exclusion for mobile home trailers that are more than 2.6 metres in width. Clearly, the 1990 Dodge Caravan, imported by the appellant, meets this definition.

On the basis of the Tribunal's reading of the relevant tariff nomenclature, the legal rules and notes for their interpretation, and in particular the Regulations respecting the interpretation of tariff item No. 9803.00.00, the Tribunal concludes that the most appropriate tariff classification for the imported vehicle is under tariff item No. 9803.00.00. In light of this determination, the Tribunal did not consider the second issue raised in the appeal.

For the foregoing reasons, the appeal is allowed.

Kathleen E. Macmillan
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Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

6. Amended by registration SOR/88-542, Canada Gazette Part II, Vol. 122, No. 23, p. 4451, October 18, 1988.