



Ottawa, Wednesday, August 31, 1994

**Appeal Nos. AP-93-274 and AP-93-294**

IN THE MATTER OF appeals heard on March 30, 1994,  
under section 67 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 dated July 29 and August 25, 1993, with  
respect to requests for re-determination under section 63 of the  
*Customs Act*.

**BETWEEN**

**CONTINUOUS COLOUR COAT LIMITED**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeals are dismissed.

Lise Bergeron  
Lise Bergeron  
Presiding Member

W. Roy Hines  
W. Roy Hines  
Member

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

Nicole Pelletier  
Nicole Pelletier  
Acting Secretary

**UNOFFICIAL SUMMARY**

**Appeal Nos. AP-93-274 and AP-93-294**

**CONTINUOUS COLOUR COAT LIMITED**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

*The appellant imports various plastic sheets. These sheets are produced by the Dunmore Corporation of Newtown, Pennsylvania, and used as a coating for steel or aluminum products, which are used by the appellant's customers to manufacture a broad range of goods such as closet door mirrors and other construction-type materials requiring brass-plated, gold-plated or silver-plated metal. The issue in these appeals is whether the various non-cellular flexible plastic sheets imported by the appellant are properly classified under tariff item No. 3920.42.00 as "Other ... sheets, film ... of plastics, non-cellular ... Of polymers of vinyl chloride ... Flexible," as determined by the respondent, or should be classified under tariff item No. 3920.62.00 as "Other ... sheets, film ... of plastics, non-cellular ... Of polyethylene terephthalate" or tariff item No. 3921.90.90 as "Other ... sheets, film ... of plastics ... Other ... Other," as claimed by the appellant.*

**HELD:** *The appeals are dismissed. The Tribunal considers that the goods in issue are properly classified under tariff item No. 3920.42.00 as "Other ... sheets, film ... of plastics, non-cellular ... Of polymers of vinyl chloride ... Flexible." The Tribunal is of the opinion that the goods in issue should be considered copolymers which, for purposes of classification, are polymers of vinyl chloride. Neither the polyethylene terephthalate nor the polyvinyl chloride polymers, of which the goods in issue are primarily composed, contribute 95 percent or more by weight to the total polymer content. Therefore, in accordance with the first paragraph of Note 4 to Chapter 39 of Schedule I to the Customs Tariff, where one comonomer predominates by weight, which in this case is polyvinyl chloride, the goods should be classified in the heading covering that comonomer. As the evidence shows that the goods in issue are flexible as opposed to rigid, they are properly classified, as determined by the respondent, under tariff item No. 3920.42.00.*

*Place of Hearing: Ottawa, Ontario*

*Date of Hearing: March 30, 1994*

*Date of Decision: August 31, 1994*

*Tribunal Members: Lise Bergeron, Presiding Member*

*W. Roy Hines, Member*

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

*Counsel for the Tribunal: Hugh J. Cheetham*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Shane B. Brown, for the appellant*

*Anne Michaud, for the respondent*

Appeal Nos. AP-93-274 and AP-93-294

CONTINUOUS COLOUR COAT LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LISE BERGERON, Presiding Member  
W. ROY HINES, Member  
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

These are appeals under section 67 of the *Customs Act*<sup>1</sup> (the Act) from two decisions of the Deputy Minister of National Revenue<sup>2</sup> (the Deputy Minister) dated July 29 and August 25, 1993.

The appellant imports various plastic sheets. These sheets are produced by the Dunmore Corporation (Dunmore) of Newtown, Pennsylvania, and used as a coating for steel or aluminum products, which are used by the appellant's customers to manufacture a broad range of goods such as closet door mirrors and other construction-type materials requiring brass-plated, gold-plated or silver-plated metal.

The issue in these appeals is whether the plastic sheets imported by the appellant in September and October 1991 are properly classified under tariff item No. 3920.42.00 of Schedule I to the *Customs Tariff*<sup>3</sup> as "Other ... sheets, film ... of plastics, non-cellular ... Of polymers of vinyl chloride ... Flexible," as determined by the respondent, or should be classified under tariff item No. 3920.62.00 as "Other ... sheets, film ... of plastics, non-cellular ... Of polyethylene terephthalate" or tariff item No. 3921.90.90 as "Other ... sheets, film ... of plastics ... Other ... Other," as claimed by the appellant.

The relevant portions of the tariff nomenclature of Schedule I to the *Customs Tariff* read as follows:

39.20            *Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials.*

*-Of polymers of vinyl chloride:*

3920.42.00    --Flexible

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

2. See *An Act to amend the Department of National Revenue Act and to amend certain other Acts in consequence thereof*, S.C. 1994, c. 13, s. 7.

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

*-Of polycarbonates, alkyd resins, polyallyl esters or other polyesters:*

3920.62.00 *--Of polyethylene terephthalate*

39.21 *Other plates, sheets, film, foil and strip, of plastics.*

*-Cellular:*

3921.90 *-Other*

3921.90.90 *---Other*

Counsel for the appellant called two witnesses. The first witness was Mr. Neil Gillespie, Technical Product Manager responsible for product development, including new products, at Dunmore. Mr. Gillespie was previously employed first as Senior Chemist and then as Chief Chemist by the same company. Mr. Gillespie testified as an expert witness. In his evidence, Mr. Gillespie described the goods in issue as flexible film more than 15 cm in width, non-cellular, incorporating dyed polyethylene terephthalate (PET) film, vacuum-deposited aluminum molecules, polyvinyl chloride (PVC) (with plasticizer and inorganic pigment) backing and scratch-resistant coating (SRC). Mr. Gillespie was of the view that all subcomponents of the goods in issue, other than the aluminum molecules, plasticizer and stabilizer, are "plastics" as that term is defined in Note 1 to Chapter 39 of Schedule I to the *Customs Tariff* and that the essential character of the film is its appearance of bright polished brass, gold or silver. Mr. Gillespie noted that this appearance is provided by the dyed PET film and the vacuum-deposited aluminum. Further, the film resists corrosion, which would occur on the metal to which the film is applied, and is more resistant to abrasion, thereby preserving its bright appearance. These characteristics are provided by the PET film and the SRC. The only role or purpose of the PVC, he indicated, is to allow for the application of the goods in issue to tight bends, which is facilitated by the PVC's compressibility.

Mr. Gillespie indicated that about 25 percent of the cost of producing the goods in issue relates to PVC, about 50 percent relates to other material costs, including the PET, and about 25 percent relates to the various processes involved in laminating or otherwise combining the subcomponents. Mr. Gillespie confirmed that his breakdown was made separately from the cost breakdown prepared by Mr. Michael T. Sullivan, former Vice-President - Operations for Dunmore, referenced in the appellant's brief. Mr. Gillespie also indicated that the PET represents just over 10 percent by weight of the goods in issue and the PVC, over 85 percent. Mr. Gillespie filed a report from his supplier of PVC, which sets out a breakdown of the PVC by components. The report provides that the PVC resin represents about 53 percent of the PVC film. Mr. Gillespie testified that the balance of the components in the PVC are not "plastics."

Mr. Gillespie agreed with the following definition of "copolymer" from the Gage Canadian Dictionary:

*a chemical compound made up of large molecules, formed by the polymerization of two or more different compounds.*<sup>4</sup>

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4. (Toronto: Gage Publishing Limited, 1983) at 261.

Mr. Gillespie stated that the goods in issue are not "copolymers" because they are made of distinct individual layers that are laminated, not polymerized. For the same reasons, Mr. Gillespie stated that the term "polymer" does not apply to the goods in issue. He added that the term "polymer blend" is also inappropriate because a polymer blend represents the mixture of various polymers to create a new material in which the individual polymers have become commingled. Mr. Gillespie testified that the goods in issue should be considered "laminates" because the layers are not mixed or do not undergo a chemical reaction.

During cross-examination, Mr. Gillespie stated that he had not prepared the cost breakdowns mentioned in his evidence and did not know the year to which the breakdown related or the quantity of goods upon which the breakdowns were based. Mr. Gillespie also confirmed that the costing methodology that he used was not consistent with that used by Mr. Sullivan. In response to questions from the Tribunal, Mr. Gillespie stated that, although there are products available in the marketplace that are similar to the goods in issue, the colorant used in the goods in issue is unique, as are the thickness of the layers of the subcomponents and the SRC. He also stated that the particular characteristic that would attract a purchaser of the goods in issue would be the scratch resistance of the film. Mr. Gillespie agreed that the goods in issue are 99 percent plastic.

The appellant's second witness was Mr. George A. Fletcher, who works in Marketing & Product Development for Continuous Colour Coat Limited. Mr. Fletcher testified as an expert witness in product development engineering. Mr. Fletcher stated that the characteristic of the goods in issue that is most important to the appellant is the distinctiveness of the image of the product, that is, its mirror-like qualities. This characteristic is provided with respect to the brass or gold forms of the goods in issue by the dyed PET film and the aluminum. Mr. Fletcher added that the PVC, in fact, reduces the quality of the appearance of the product.

In response to questions from the Tribunal, Mr. Fletcher explained that the appellant takes the goods in issue and bonds them to steel or aluminum, which is then sold to its customers in flat stock in coil form. The customers then do the forming of the end product.

Counsel for the respondent called Dr. Kevser Taymaz as a witness. Dr. Taymaz has been a chemist with the Polymers Laboratory, Laboratory and Scientific Services Directorate of the Department of National Revenue, since 1981. Dr. Taymaz was qualified as an expert in chemistry. She indicated that, in preparation for the hearing, she analyzed samples of the silver and gold forms of the goods in issue. The results of this analysis are set out in her witness report. Dr. Taymaz described how the product is made up of two layers, a PVC and a PET layer, that are laminated together. She testified that, in the silver sample, the PVC layer represents 82 percent of the weight of the total product and the PET layer, 10 to 11 percent. The balance of the product is made up of components such as the SRC and stabilizers. In the gold sample, the PVC layer accounts for approximately 87 percent by weight of the total product and the PET layer, about 10 percent. Fifty-nine percent by weight of the PVC layer is represented by the PVC resin. Dr. Taymaz agreed that the whole product could be described as a laminate.

During cross-examination, Dr. Taymaz stated that, in scientific terms, copolymers are polymers made from two or more different kinds of monomers. A polymer blend is the mixture of two different polymers. Dr. Taymaz described the goods in issue as being made from two different polymers or polymeric products that are laminated. In response to questions from the Tribunal, Dr. Taymaz described the goods in issue as plastic products made from polymers. Further, she stated that, scientifically, a product made by laminating two or more sheets of

polymers would be referred to as a polymer. In response to a question from counsel for the respondent arising from the Tribunal's questions, Dr. Taymaz agreed that, when she used the word "polymer" in her last answer, she was referring to each layer or sheet of the goods in issue and not to the total product. She stated that the total product would be referred to as a compound of polymers or a polymeric product. Dr. Taymaz then agreed that, in a strict sense, the following is an appropriate definition of "polymer:"

*any of a large number of natural or synthetic, organic or inorganic compounds composed of very large molecules that are made up of many light, simple molecules chemically linked together.*<sup>5</sup>

The Tribunal recalled Mr. Gillespie and Dr. Taymaz and asked each of them what definition or meaning they would give to the term "polyester" and what distinction they would make between this term and the term "polymer." Mr. Gillespie stated that a polyester was a specific polymer made up of the following chemicals, ethylene glycol and terephthalic acid. He added that "polyester" is a generic term for this particular chemical composition, which is a plastic polymer. In response to a question from the Tribunal, Mr. Gillespie agreed that a polyester is a subdivision of a polymer. Dr. Taymaz responded to the question by making an analogy to a group of fruits. A polymer would refer to fruits as a whole, and a polyester would be a particular type of fruit, such as an apple. Then PET, which is a type of polyester, would be a type of apple, such as McIntosh or Delicious.

In argument, counsel for the appellant submitted that the goods in issue should be classified on the basis of their essential character. He argued that the appellant's evidence shows that this character is associated either with the product's distinctive image or appearance related to the PET and aluminum or with the SRC, and not with the bendability that the PVC brings to the product. Counsel also suggested that the relative cost of subcomponents should be considered relevant to a product's essential character. In this regard, he noted that PVC does not play a dominant role in the composition of the goods in issue, as it accounts for only 23 percent of their cost.

With respect to Dr. Taymaz's testimony as to how she would describe the goods in issue, counsel for the appellant suggested that this should be understood as indicating that, although each layer of the product retains its distinct characteristics as a polymer, the term "polymer" is not applicable to the whole product, which she described as a laminate. This suggestion related to counsel's submissions with respect to Mr. Gillespie's testimony and the relevance of Note 4 to Chapter 39 of Schedule I to the *Customs Tariff* to the issue before the Tribunal. Counsel submitted that Note 4 is not applicable to this case because, to apply the note, one must determine that the goods in issue are copolymers or a polymer blend. Counsel argued that the evidence supports the view that the term "polymer" is used to define when something will be called a copolymer as opposed to another term. However, a copolymer is a homogenous material, not a material made up of many polymers that can be separated, as is the case with the goods in issue. Further, Mr. Gillespie testified that the goods in issue are neither a copolymer nor a polymer blend.

Counsel for the respondent first submitted that the goods in issue are properly classified in heading No. 39.20 because they are non-cellular sheets of plastic which are "not reinforced, laminated, supported or similarly combined with other materials." Although counsel

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5. *Ibid.* at 873.

acknowledged that the goods in issue could be described as a "laminated," she submitted that they are a laminate of two or more plastics which are not laminated with other materials.

Turning to the applicability of Note 4 to Chapter 39 of Schedule I to the *Customs Tariff*, counsel for the respondent suggested that, for purposes of this case, the note could be read as follows:

*For the purpose of this Chapter, except where the context otherwise requires, copolymers ... and polymer blends are to be classified in the heading covering polymers of that comonomer which predominates by weight over every other single comonomer, comonomers whose polymers fall in the same heading being regarded as constituting a single comonomer.*

In counsel's submission, the third paragraph of Note 4 also sets out what a copolymer is for purposes of the *Customs Tariff* when it states that copolymers cover all polymers in which no single monomer contributes 95 percent or more by weight to the total polymer content. Counsel argued that the total polymer content of the goods in issue includes the PVC and PET together. The evidence is that there is no single monomer which contributes 95 percent or more by weight to the goods in issue. Counsel submitted that this interpretation of the third paragraph of Note 4 is also supported by the observations of the Harmonized System (HS) Committee's Summary of Comments on Chapter 39 and Observations by the Technical Team.<sup>6</sup> In this document, the HS Committee indicates that, concerning the distinction between homopolymers and copolymers, there was agreement with respect to a text that could provide the basis for a legal note. This text reads as follows:

*Polymers in which a single monomer contributes 95% or more by weight of the total polymer content are to be regarded as homopolymers.*

*This definition carries the clear implication that copolymers, i.e. those products in which no single monomer contributes 95% of the polymer content, are also covered by the expression "polymers."<sup>7</sup>*

Counsel then directed the Tribunal to Subheading Note 1 to Chapter 39 which, she suggested, could be read as follows: within any one heading of Chapter 39, copolymers are to be classified in the same subheading as homopolymers of the predominant comonomer, provided such copolymers are not more specifically covered by any other subheading and provided there is no residual subheading named "Other" in the series of subheadings concerned. Counsel submitted that, in this case, there is no more specific subheading than that suggested by the respondent and that there is no residual subheading named "Other." Thus, the goods in issue should be classified on the basis of the predominant comonomer, the PVC.

Counsel for the respondent added that, scientifically, the respondent did not dispute the definition of the term "copolymer" offered by the appellant, but that it was the respondent's position that, for purposes of the *Customs Tariff*, this term had been redefined by the third paragraph of Note 4 to Chapter 39 of Schedule I to the *Customs Tariff*. Counsel also noted that

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6. Customs Co-operation Council, Harmonized System Committee, 21st Session, Brussels, 1980, Doc. 26.185 E, O. Eng. N8-339.

7. *Ibid.* at 4.

Dr. Taymaz's agreement with the dictionary definition had been qualified by her statement that she agreed with it "scientifically."

In reply, counsel for the appellant stated that the appellant does not accept that the goods in issue are plastics and submitted that whether a determination that they are not plastics would preclude classification in heading No. 39.20 is a real issue. Counsel also submitted that the third paragraph of Note 4 to Chapter 39 of Schedule I to the *Customs Tariff* should be interpreted on the basis of the proper interpretation of the terms found in that paragraph and that this would lead to the position put forward by the appellant.

The Tribunal considers that the goods in issue are properly classified under tariff item No. 3920.42.00 as "Other ... sheets, film ... of plastics, non-cellular ... Of polymers of vinyl chloride ... Flexible." The Tribunal comes to this conclusion bearing in mind that it is the legislation and the principles applicable to the interpretation of the legislation, including those set out in the General Rules for the Interpretation of the Harmonized System<sup>8</sup> (the General Rules), that must govern the classification of the goods in issue. The Tribunal is particularly cognizant of Rule 1 of the General Rules. As noted by the Tribunal in *York Barbell Co. Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,<sup>9</sup> Rule 1 of the General Rules is of the utmost importance when classifying goods under the Harmonized Commodity Description and Coding System<sup>10</sup> (the Harmonized System). Rule 1 of the General Rules states that classification is first determined by the wording of the headings and any relative Section or Chapter Notes. In addition, Rule 6 of the General Rules states, in part, that classification at the subheading level is to be determined according to the terms of the relevant subheadings and any related Subheading Notes and, *mutatis mutandis*, Rules 1 through 5 of the General Rules.

In considering first the terms of heading No. 39.20, the Tribunal is persuaded that the evidence shows that the goods in issue are sheets or films of plastic. In response to a direct question from the Tribunal, Mr. Gillespie agreed that the goods in issue are 99 percent plastic. Further, the Tribunal is of the opinion that the evidence shows that the goods in issue are non-cellular and, although laminated, are not laminated with other materials.

Consideration of Rules 1 and 6 of the General Rules also requires the Tribunal, in this case, to consider the Chapter, Section and Subheading Notes to Chapter 39 of Schedule I to the *Customs Tariff*. The Tribunal agrees with counsel for the respondent that Note 4 and Subheading Note 1 to Chapter 39 provide a broader definition of the terms "copolymer" and "polymer" than the dictionary definitions of these terms offered in evidence. More specifically, the third paragraph of Note 4 offers a specific definition of the term "copolymer" that is meant to facilitate the classification of the products covered by Chapter 39. The Tribunal finds it reasonable to interpret these terms in a manner consistent with the HS Committee's statement that, for purposes of the definition in the third paragraph of Note 4, copolymers may also be termed "polymers."

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

9. (1992), 5 T.C.T. 1150, Appeal No. AP-91-131, March 16, 1992.

10. Customs Co-operation Council, 1st ed., Brussels, 1987.



The Tribunal is of the opinion that the goods in issue should be considered copolymers, which, for purposes of classification, are polymers of vinyl chloride.<sup>11</sup> Neither the PET nor the PVC polymers, of which the goods in issue are primarily composed, contribute 95 percent or more by weight to the total polymer content of the product. Therefore, in accordance with the first paragraph of Note 4 to Chapter 39 of Schedule I to the *Customs Tariff*, where one comonomer predominates by weight, the goods in issue should be classified in the heading covering that comonomer which, in this case, is PVC. Further, as the evidence shows that the goods in issue are flexible as opposed to rigid, they are properly classified, as determined by the respondent, under tariff item No. 3920.42.00.

Accordingly, the appeals are dismissed.

Lise Bergeron  
Lise Bergeron  
Presiding Member

W. Roy Hines  
W. Roy Hines  
Member

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

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11. In this regard, the Tribunal finds of assistance the comments of the HS Committee's Technical Team in discussing what became the basis for Note 4 to Chapter 39, when it states: "This definition [of homopolymer] carries the clear implication that copolymers, i.e. those products in which no single monomer contributes 95% of the polymer content, are also covered by the expression 'polymers'." (Emphasis added)