CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, February 3, 1995

Appeal No. AP-93-388

IN THE MATTER OF an appeal heard on August 29 and 30, 1994, 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 dated December 30, 1993, with respect to a request for re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

FORD NEW HOLLAND CANADA LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Raynald Guay
Raynald Guay
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-388

FORD NEW HOLLAND CANADA LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under subsection 67(1) of the Customs Act from a decision of the Deputy Minister of National Revenue dated December 30, 1993. The appellant carries on business as a manufacturer and importer of tractors and equipment. The vehicles which are the subject of this appeal, model nos. CM 224 and CM 274/274-LR, are imported without implements attached. Some of the implements used with the goods in issue, such as mower decks, are imported separately, while other implements, such as snowblowers, are sourced domestically. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8433.11.00 as powered mowers for lawns, parks or sports-grounds, with the cutting device rotating in a horizontal plane, as determined by the respondent, or should be classified under tariff item No. 8701.90.19 as other tractors, as claimed by the appellant.

HELD: *The appeal is allowed. Consideration of Rule 1 of the General Rules for the Interpretation of the Harmonized System requires the Tribunal to consider Note 2 to Chapter 87 of the Customs Tariff. The Tribunal is of the opinion that the goods in issue are constructed essentially for pushing a wide range of implements including, but not limited to, mower decks. Further, the Tribunal finds that consideration of the Explanatory Notes to the Harmonized Commodity Description and Coding System to heading No. 84.33 leads to the conclusion that the goods in issue are not properly classified in that heading.*

Place of Hearing:	*Ottawa, Ontario*
Dates of Hearing:	*August 29 and 30, 1994*
Date of Decision:	*February 3, 1995*
Tribunal Members:	*Anthony T. Eyton, Presiding Member* *Raynald Guay, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Brenda C. Swick-Martin and Teresa A. Troester, for the appellant* *Ian M. Donahoe, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-388

FORD NEW HOLLAND CANADA LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ANTHONY T. EYTON, Presiding Member
RAYNALD GUAY, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue dated December 30, 1993.

The appellant carries on business as a manufacturer and importer of tractors and equipment. The vehicles which are the subject of this appeal, model nos. CM 224 and CM 274/274-LR, are imported without implements attached. Some of the implements used with the goods in issue, such as mower decks, are imported separately, while other implements, such as snowblowers, are sourced domestically.

The goods in issue were imported in May 1993. They originally entered under tariff item No. 8701.90.19 of Schedule I to the *Customs Tariff*[2] as other tractors. The respondent subsequently reclassified the goods in issue under tariff item No. 8433.11.00 as "front mount mowers." The appellant filed a request for re-determination. By decision dated December 30, 1993, the respondent maintained the classification of the goods in issue under tariff item No. 8433.11.00.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8433.11.00 as powered mowers for lawns, parks or sports-grounds, with the cutting device rotating in a horizontal plane, as determined by the respondent, or should be classified under tariff item No. 8701.90.19 as other tractors, as claimed by the appellant.

Counsel for the appellant called three witnesses. The appellant's first witness was Mr. William Chrisman, a customs representative with Ford New Holland, Inc. (Ford New Holland), a U.S. corporation. Mr. Chrisman has been a customs representative for six and a half years and is responsible for all importations into Canada. Mr. Chrisman explained that the appellant is a manufacturing and marketing company whose parent corporation is in the Netherlands. He testified that the appellant's sales material describes the goods in issue as commercial mowers, which are tractors that push different implements, primarily mowers. The goods in issue can be used with a number of other implements, including flail mowers, snow throwers, front blades, leaf and debris blowers, grass catchers and rotary brooms.

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

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Mr. Chrisman noted that the goods in issue do not have implements attached to them at the time of importation. He also stated that it is the appellant's practice to classify the goods in issue in heading No. 87.01, as tractors, and to classify implements separately in other headings. He indicated that the appellant imported other tractors, such as compact diesel tractors, in the same heading as that claimed for the goods in issue and that such classification had not been questioned.

With respect to a ruling of the U.S. Customs Service relating to goods similar to the goods in issue, Mr. Chrisman testified that the issue in that case was different from the issue in this appeal. He indicated that the ruling dealt with a different tariff item, namely, one for agricultural tractors, and that the ruling was currently under appeal.

During cross-examination, Mr. Chrisman stated that the letters "CM" presumably stood for "commercial mower," but that they could also mean "commercial machine." He agreed that the references to tractors in the sales material were primarily to CM tractors. Mr. Chrisman disagreed with the description of the goods in issue as incomplete tractors because they do not have a specific end use other than to push implements. Mr. Chrisman also did not agree that the goods in issue carry implements when they are performing work.

The appellant's second witness was Mr. John D. Riffanacht, Senior Design Engineer, Supplier Products Team, with Ford New Holland for eight years. In the first two years in this position, Mr. Riffanacht worked on the final development stages of the goods in issue. He explained that, from an engineering point of view, the goods in issue were designed to respond to a need for a more manoeuvrable and productive tractor in the weight range of the compact diesel tractors, which have a low centre of gravity and which can provide propulsion and power to operate many different implements.

Mr. Riffanacht presented a video prepared by Ford New Holland to show how the goods in issue operate and the ease with which attachments can be changed. He also discussed the design of the CM unit's hitch. He stated that a number of configurations, including a three-point hitch, were considered, but that, for ease of use, a two-pocket (point) hitch was decided upon. He noted that a three-point hitch was optional on most of the appellant's tractors and that about 12 percent of garden tractors (GT) are sold with a three-point hitch kit. He also testified that turf tires were standard with both GT units and the goods in issue.

With respect to whether the goods in issue "push" implements, Mr. Riffanacht testified that the implements are pushed by means of skid shoes or gauge wheels on the implements, which keep them off the ground when work is being performed. He emphasized that, when an attachment, such as a mower, is in the fully lowered position and work is being performed, it is not being carried by the tractor, but rather is being pushed. He also stated that most implements for about 90 percent of the tractors offered by the appellant are powered by the power take-off (PTO).

Mr. Riffanacht indicated that it was his understanding that the American Society of Agricultural Engineers' (ASAE) standard "ASAE X547" was only a proposed draft standard for commercial front-wheel drive mowers.

During cross-examination, Mr. Riffanacht agreed that the appellant's brochures describe the goods in issue as commercial mowers. He was of the view that more than 50 percent of a CM unit's horsepower

can be used for traction or as tractive power. He agreed that the goods in issue would meet the description of commercial front mount mowers as found in both the December 1992[3] and the July 1994[4] ASAE draft standards. Mr. Riffanacht also agreed that one cannot use an attachment from a competitor's comparable machine with the goods in issue. In response to questions from the Tribunal, Mr. Riffanacht stated that the appellant's GT units used implements similar to those used with the goods in issue.

The appellant's final witness was Mr. David F. Schleppi, a training development specialist with Ford New Holland. Mr. Schleppi has been with Ford New Holland since 1969. From 1987 to 1992, he was in marketing, specifically dealing with compact tractors. Mr. Schleppi testified that the goods in issue were developed in response to a loss in market share to similar goods produced by other manufacturers. He indicated that the target market for the CM series was the grounds maintenance business, which includes purchasers such as municipalities, recreational parks, campgrounds, office complexes, universities and sports fields. He noted that the appellant sold an average of one and a half implements with each unit. He confirmed that the appellant offers tire chains with the goods in issue and that, for climatic reasons, relatively more tire chains are sold in Canada than in the United States.

During cross-examination, Mr. Schleppi stated that he would expect that everyone who purchases the goods in issue also purchases mower decks and indicated that this was the most significant of the uses of the machines. He was not of the view that many customers buy more than one mower deck, because of cost. He identified the snow thrower as the next most popular implement in the Canadian market. Mr. Schleppi did not know what percentage of customers purchased snowblowers or any of the other implements.

Counsel for the respondent called two witnesses. The respondent's first witness was Mr. Ron Dods, Manager, Transportation Unit, Tariff Programs Division of the Department of National Revenue. This unit's responsibilities include the classification of tractors and lawn mowers. Mr. Dods discussed some of the factual background relating to two Tariff Board decisions,[5] the Tariff Board's decision in *John Deere Limited v. The Deputy Minister of National Revenue for Customs and Excise*,[6] the related decision[7] of the Federal Court of Appeal and Customs Notices N-187[8] and N-707.[9]

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3. Exhibit B-1.
4. Exhibit A-11.
5. *Reference by the Deputy Minister of National Revenue for Customs and Excise Pursuant to Section 46 of the Customs Act, for an Opinion as to What Criteria Should be Applied in Determining Whether Equipment Should be Classified as an Internal Combustion Tractor Coming Within Customs Tariff Item 409m(1) (now numbered 40938-1)* (1966), 3 T.B.R. 259, Appeal No. 795, September 20, 1966; and *Reference by the Deputy Minister of National Revenue for Customs and Excise, Pursuant to Section 49 of the Customs Act, Regarding the Tariff Classification of Certain Self-Propelled Lawn Grooming Riding Machines and Related Attachments* (1986), 11 T.B.R. 440.
6. (1988), 13 T.B.R. 33 and 16 C.E.R. 22.
7. *John Deere Limited v. The Deputy Minister of National Revenue for Customs and Excise* (1990), 107 N.R. 137, Federal Court of Appeal, File No. A-480-88, January 26, 1990.
8. Tariff Classification of Lawn Tractors and Garden Tractors, Department of National Revenue, Customs and Excise, January 14, 1988.
9. Tariff Classification of Certain Riding Power Mowing Machines, Department of National Revenue, Customs and Excise, June 17, 1992.

The respondent's second witness was Mr. John B. Sevart of Wichita, Kansas, where he is a principal in a consulting business. Among other things, Mr. Sevart previously taught for a number of years in the Engineering Faculty of Wichita State University, primarily in the area of machine design, and testified with respect to safety issues in a number of liability cases involving tractors and mowers. Mr. Sevart sits on a number of committees of various professional associations, including the ASAE. The Tribunal accepted Mr. Sevart as an expert in machine design as it relates to tractors and lawn mowers.

Mr. Sevart referenced some of Ford New Holland's sales literature and stated that he agreed with the description of the goods in issue as commercial front mowers and that this was how they were sold in the United States. He noted that the goods in issue are essentially designed to provide power (i.e. function as a power source) for mowers that cut grass and that as much as 90 percent of the power is absorbed by the mowing unit. Mr. Sevart testified that the goods in issue were distinguishable from tractors in at least two ways. First, in relation to what the goods in issue are designed to do, he explained that a tractor is designed to operate many different standardized implements produced by different manufacturers. This is achieved by standardized hitches and standardized PTOs, which the goods in issue do not have. Second, tractors fulfil their major function through traction or tractive power. Mr. Sevart stated that, although the goods in issue are premium mowing machines in the United States, they do not have the traction capabilities required of a tractor.

Mr. Sevart stated that the only definition for "front mowers" of which he is aware is the ASAE's draft standard "ASAE X547." Mr. Sevart agreed that the goods in issue meet both the 1992 and 1994 versions of the proposed draft definition. In his opinion, the primary function of the goods in issue is not to "push" implements, but to cut grass, and their use with attachments does not make them tractors. Further, he stated that a purchaser of the goods in issue basically obtains a power unit, which is an incomplete mower.

During cross-examination, Mr. Sevart agreed that many tractors have four-wheel drive capabilities and that this feature is not unique to the goods in issue. With respect to standards for three-point hitches, he stated that these apply to both agricultural and some industrial tractors and that the ASAE standard in this regard is only applicable to agricultural tractors. In response to questions from the Tribunal, Mr. Sevart testified that, in his opinion, Ford New Holland's GT unit is a riding mower and not a tractor. With respect to the amount of horsepower dedicated to an implement when the goods in issue are blowing snow, Mr. Sevart estimated this to be approximately 80 to 90 percent. In re-examination, Mr. Sevart stated that these estimates were based on his general knowledge and that he had never actually tested the goods in issue. He also agreed that his views with respect to GT units were given from an engineering point of view.

Counsel for the appellant submitted that the question before the Tribunal was whether the goods in issue are "constructed essentially for hauling or pushing another vehicle, appliance or load" within the meaning of Note 2 to Chapter 87 of the *Customs Tariff* and that the answer to this question was that they are. Counsel suggested that the problem with the respondent's position is that it focuses on the features of agricultural tractors, which are not the only tractors for classification purposes. Counsel noted that witnesses for both parties agreed that there are many types of tractors.

Counsel for the appellant argued that goods are to be classified as they are at the time of their importation.[10] In the instant case, the goods in issue are imported without attachments. Referring to the General Rules for the Interpretation of the Harmonized System[11] (the General Rules), counsel submitted that the Tribunal has previously stated that, pursuant to Rule 1 of the General Rules, it is to look at whether the goods in issue are named in a particular heading, and, if specifically named in a heading, the Tribunal is to classify them in such heading, subject to any relevant Chapter or Section Notes.[12] The key in this case is the definition of tractors in Note 2 to Chapter 87 of the *Customs Tariff*, which, counsel submitted, the goods in issue clearly meet, since the evidence shows that they are constructed essentially for "pushing" appliances. Counsel suggested that the testimonies of both Mr. Sevart, in his statement that the primary purpose of the goods in issue is to provide power and propulsion to the mower, and Mr. Riffanacht, in his evidence of how the goods in issue "push," support this conclusion.

Counsel for the appellant urged the Tribunal to take into account the recent decision of the Supreme Court of Canada in *Canada v. Antosko*[13] which, counsel submitted, indicates that the Supreme Court of Canada has reverted to a strict statutory interpretation test in circumstances where a provision is clear and unambiguous. Counsel submitted that the wording of Note 2 to Chapter 87 of the *Customs Tariff* is clear and unambiguous and that to impute to Note 2 a "primary purpose" test based on the *John Deere* decisions would thwart its meaning.

With respect to the advertising materials, counsel for the appellant cited previous decisions[14] of the Tariff Board and the Tribunal as supporting the view that such materials are not determinative of classification.

Counsel for the appellant also reviewed a number of Explanatory Notes to the Harmonized Commodity Description and Coding System[15] (the Explanatory Notes), which, counsel stated, supported classification of the goods in issue under the tariff item claimed by the appellant. Counsel submitted that the effect of Note 1 of the Explanatory Notes to Section XVI, which excludes goods from Section XVII from being covered by Section XVI, is that tractors cannot be classified as lawn mowers. Further, Note 2(e) of the Explanatory Notes to Section XVII, which excludes certain goods of Section XVI from being covered by Section XVII, makes it clear that lawn mowers cannot be classified as tractors. In addition, the Explanatory Notes to heading No. 87.01 provide that appliances or implements used with a tractor are to be classified in their appropriate headings, while the tractor is to be classified in heading No. 87.01.

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10. See, for example, *Reginald Bradley v. The Deputy Minister of National Revenue for Customs and Excise* (1990), 2 T.T.R. 345, Canadian International Trade Tribunal, Appeal No. AP-89-228, June 11, 1990.
11. *Supra*, note 2, Schedule I.
12. *York Barbell Co. Ltd. v. The Deputy Minister of National Revenue for Customs and Excise* (1992), 8 T.T.R. 161, Appeal No. AP-91-131, March 16, 1992.
13. [1994] 2 S.C.R. 312.
14. *Josiah Wedgwood and Sons (Canada) Ltd. v. The Deputy Minister of National Revenue for Customs and Excise* (1982), 8 T.B.R. 154 and 4 C.E.R. 164; and *San Francisco Gifts Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, Canadian International Trade Tribunal, Appeal No. AP-92-300, March 18, 1994.
15. Customs Co-operation Council, 1st ed., Brussels, 1986.

Counsel for the appellant submitted that the Explanatory Notes to heading No. 84.33 preclude the possibility of classifying the goods in issue in this heading. Counsel indicated that the Explanatory Notes to heading No. 84.32 apply *mutatis mutandis* to heading No. 84.33 in respect of tractors fitted with interchangeable attachments. The Explanatory Notes to heading No. 84.32 include the statement that, with respect to machines designed to be hauled by or mounted as interchangeable equipment on a tractor, "[a]ll these machines remain in this heading even if they are presented with (and whether or not mounted on) the tractor. The tractor itself is classified separately in heading 87.01." Further, the Explanatory Notes to heading No. 84.33 include the following:

> *This heading also covers lawn mowers, known as riding lawn mowers, consisting of three or four wheeled basic machines fitted with a driving seat and having a permanently attached cutter, i.e., one which is removed only for repair or maintenance. Since their principal function is the mowing of lawns, they remain in this heading even if they have a coupling device for hauling or pushing light attachments such as a trailer.*

Counsel submitted that this note provides that a machine may only be classified as a lawn mower if it is integrated with the mower deck by means of a permanently attached cutter. This is not the situation before the Tribunal. Counsel submitted that, on the facts of this case, the only things that could be classified in heading No. 84.33 are the mower decks.

Counsel for the respondent submitted that the goods in issue should be considered incomplete mowing machines which are only missing mowing blades. He analogized the goods in issue to a car that is presented without an engine, which, he suggested, is still a car. In support of this position, he referenced Mr. Sevart's description of the goods in issue as "incomplete front mowers" and the description of the goods in issue in the appellant's sales literature.

With respect to the Explanatory Notes to heading No. 84.33, counsel for the respondent agreed that the goods in issue do not have permanently attached cutters, but submitted that what was important in these notes was the reference to classifying by principal function and that the principal function of the goods in issue is to mow grass. Further, he submitted that the phrase "constructed essentially for" should be understood in the same manner as "principal function." He also suggested that the Tribunal may find the ruling of the U.S. Customs Service of assistance in considering these notes. Counsel submitted that the goods in issue should not be classified differently in Canada and the United States.

Counsel for the respondent reviewed the Tariff Board's decision in Appeal No. 795 and, in particular, the language in that decision that, he submitted, was similar to Note 2 to Chapter 87 of the *Customs Tariff*, while also noting the Tariff Board's anxiety about the concept of primary purpose or design. He further noted that the language in the Tariff Board's decision was similar to the language in Note 2 that speaks of tractors being "constructed essentially for hauling or pushing." He discussed certain of the characteristics of the goods in issue and suggested that they do not "haul" very well, as indicated in part by the lack of a three-point hitch.

The Tribunal considers that the goods in issue should be classified under tariff item No. 8701.90.19 as other tractors. 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, 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*,[16] Rule 1 is of the utmost importance when classifying goods under the Harmonized Commodity Description and Coding System.[17] Rule 1 states that classification is first determined by the wording of the headings and any relative Section or Chapter Notes.

In this case, consideration of Rule 1 of the General Rules requires the Tribunal to consider Note 2 to Chapter 87 of the *Customs Tariff*, which reads as follows:

> *For the purposes of this Chapter, "tractors" means vehicles constructed essentially for hauling or pushing another vehicle, appliance or load, whether or not they contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods.*

The Tribunal is persuaded by the evidence that the goods in issue were designed primarily for performing work related to grounds maintenance. More specifically, they were essentially designed to push implements along the ground to perform work. As Mr. Riffanacht explained, an implement is pushed by means of the skid shoes or gauge wheels which keep it off the ground when work is being performed. Although the goods in issue are used most often for mowing, it is clearly not the only use to which they are put. The evidence reveals that Canadian purchasers of the goods in issue purchase one and a half implements per unit and that not only is the snowblower the second most popular implement but also that most purchasers do not purchase more than one mower. Therefore, virtually half of the purchasers of the goods in issue are purchasing them to do more than mow lawns.

Further, the Tribunal finds that the implements used with the goods in issue may be considered appliances. The word "appliance" is not defined in the *Customs Tariff*. The Concise Oxford Dictionary of Current English defines "appliance" as:

> *[a] thing applied as means to an end; utensil, device, equipment.*[18]

As in its recent decision in *Marubeni Canada Ltd. v. The Deputy Minister of National Revenue*,[19] the Tribunal finds this definition helpful, as the various implements used with the goods in issue are "applied" to a unit to perform whatever work is to be performed with a particular implement and, thus, these attachments can be considered to be "equipment" to be used with the goods in issue.

The evidence shows that the goods in issue are marketed as "front mowers" and referred to as such in a large part of the industry. The evidence also shows, however, that the goods in issue are referred to and marketed as, among other things, tractors, CM tractors and commercial equipment. While the Tribunal agrees with counsel for the respondent that the way in which members of an industry refer to a product may be of assistance in determining classification, such references cannot be determinative of classification. The Tribunal repeats its agreement with the Tariff Board's comments in Appeal No. 795 that to classify a

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16. *Supra*, note 12.
17. Customs Co-operation Council, 1st ed., Brussels, 1987.
18. Seventh ed. (Oxford: Clarendon Press, 1982) at 41.
19. Canadian International Trade Tribunal, Appeal No. AP-93-311, December 14, 1994.

product on this basis, without reference to the legislation, may allow that legislation to be frustrated.[20] As noted above, in this case, classification must be guided by Note 2 to Chapter 87 of the *Customs Tariff* and, in this regard, the Tribunal has found that the goods in issue meet the definition of "tractor."

With respect to the Explanatory Notes to heading No. 84.33, the Tribunal finds that they lead to the conclusion that the goods in issue cannot be classified in this heading. First, the wording of the heading itself would only describe the goods in issue if they were imported with a mower implement attached. When the goods in issue are considered in the state in which they are imported, they do not remotely resemble the goods described in heading No. 84.33 or subheading No. 8433.11. Indeed, pursuant to the Explanatory Notes to heading No. 84.33 referenced in the argument above, to be a lawn mower, a product must, among other things, have a "permanently attached cutter, i.e., one which is removed only for repair or maintenance." It cannot be said that the mower attachments used with the goods in issue, which are imported separately and are detachable, are "permanently attached cutter[s]." The Tribunal agrees with the appellant that, at the time of importation, i.e. when the goods in issue have no attachments, they do not have the essential character of a lawn mower, since the essential character of a lawn mower is the grass-cutting assembly. The Tribunal also notes that that the smaller and cheaper GT units, which employ the same range of implements as do the goods in issue, are, if anything, perhaps more dedicated to lawn mowing than are the goods in issue and yet are classified as tractors in heading No. 87.01.

Accordingly, the appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Raynald Guay
Raynald Guay
Member

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20. *Supra*, note 5 at 269. See also reference to same in *Marubeni*, note 18.