CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, December 14, 1994

Appeal No. AP-93-311

IN THE MATTER OF an appeal heard on June 6 and 7, 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 October 13 and December 29, 1993, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

MARUBENI CANADA LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-311

MARUBENI CANADA LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The appellant imports Kubota F-Series vehicles (i.e. models F2100, F2400, FZ2100 and FZ2400) as an agent for Kubota Canada Ltd. The goods in issue are shipped in crates separately from the implements that are used with them. The appellant also imports certain implements, such as mower decks, that are used with the goods in issue. 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. The Tribunal agrees with the parties that, in this case, consideration of Rule 1 of the General Rules for the Interpretation of the Harmonized System requires it to consider Note 2 of the Explanatory Notes to the Harmonized Commodity Description and Coding System (the Explanatory Notes) to Chapter 87. The Tribunal is of the opinion that the evidence shows that the goods in issue are vehicles constructed essentially for pushing many different types of implements, not just mower decks. Further, the Tribunal is of the view that consideration of the Explanatory Notes 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*
Date of Hearing:	*June 6 and 7, 1994*
Date of Decision:	*December 14, 1994*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *Raynald Guay, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerks of the Tribunal:	*Janet Rumball* *Anne Jamieson*
Appearances:	*Richard A. Wagner, 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-93-311

MARUBENI CANADA LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
RAYNALD GUAY, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*[1] (the Act) from decisions of the Deputy Minister of National Revenue dated October 13 and December 29, 1993.

The appellant imports Kubota F-Series vehicles (i.e. models F2100, F2400, FZ2100 and FZ2400) as an agent for Kubota Canada Ltd. (Kubota Canada). The goods in issue are shipped in crates separately from the implements that are used with them. The appellant also imports certain implements, such as mower decks, that are used with the goods in issue.

The goods in issue were imported in a number of transactions throughout 1991 and 1992. They originally entered under tariff item No. 8701.90.19 of Schedule I to the *Customs Tariff*[2] as other tractors. The respondent subsequently issued detailed adjustment statements reclassifying the goods in issue under tariff item No. 8433.11.00 as "front mount mowers." The appellant filed requests for re-determination and, by decisions dated October 13 and December 29, 1993, the respondent maintained the classification of the goods in issue under tariff item No. 8433.11.00. The respondent's decision was supported by reference to the Tariff Board's decision in *John Deere Limited v. The Deputy Minister of National Revenue for Customs and Excise*,[3] the related decision[4] of the Federal Court of Appeal and Customs Notice N-187.[5]

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 first witness was Mr. Robert G. Hickey, General Manager, Operations/Finance/Administration, with Kubota Canada. Mr. Hickey has held this position for 13 years. In this position, he is involved with the

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. Appeal Nos. 2247, 2725 and 2779 (1988), 13 T.B.R. 33 and 16 C.E.R. 22.
4. *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.
5. Department of National Revenue, Customs and Excise, January 14, 1988.

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purchasing, marketing and selling of the goods in issue. Mr. Hickey explained that the appellant is an import agent for Kubota Canada. He testified that the goods in issue are imported in a partially disassembled state in crates and that they are imported separately from the implements that are used with them. The appellant's practice is to classify the goods in issue in heading No. 87.01, as tractors, and the implements in other tariff headings. He stated that the appellant imported Kubota Canada's B-Series tractors in the same tariff heading as that claimed for the goods in issue and that this classification had never been challenged.

Mr. Hickey explained that the primary difference between the FZ-Series and F-Series is that the FZ-Series features a zero diameter turning ability. However, all the goods in issue can be used with an number of implements, including different sizes of rotary mower decks, flail mowers, reel mowers, snowblowers, front blades, sweepers, rotary brooms, forklift attachments and debris blowers.

With respect to marketing, Mr. Hickey discussed how the F-Series was directed towards commercial users such as landscape contractors and municipal governments that previously used other products, such as the less expensive B-Series. He noted that Kubota Canada's customer surveys covering sales throughout Canada showed that 56 percent of the goods in issue were sold with implements other than, or in addition to, mower decks. The most popular of these other implements were front blades, sweepers and snowblowers.

During cross-examination, Mr. Hickey stated that the reference in Kubota U.S.A. Corporation (Kubota U.S.A.) brochures for the goods in issue, which describe the goods as "front mowers," should be understood to be a marketing term or definition that has grown within the industry in the United States. He stated that Kubota Canada refers to them as "front mount tractors." In re-examination, Mr. Hickey confirmed that, in many of the technical specification pages in the U.S. brochures, the goods in issue are referred to as "tractors."

The appellant's second witness was Mr. Philip Vandenberg, who has been Service/Engineering Manager, Tractors/Implements, with Kubota Canada for 11 years. At the outset of Mr. Vandenberg's testimony, counsel for the appellant presented three short sales and marketing videos produced by Kubota U.S.A. relating to both the goods in issue and the B-Series tractors. Mr. Vandenberg agreed that, in the videos, the goods in issue were, at times, referred to as "front mowers." He stated that this is how the industry typically refers to them.

Mr. Vandenberg discussed the development of the F-Series and, in particular, its relationship to the B-Series tractors. He stated that models in the two series shared approximately 60 percent of their parts, including the engine, transmission, clutch, brakes, hydraulic system and axles. Parts which are not common consist, in part, of the power steering system and operator's platform, including the seat and steering wheel, and the cosmetics of the vehicles. Further, the points of maintenance are very similar. Mr. Vandenberg testified that "[t]he heart of the F-Series is essentially a B-Series."

The F-Series was developed, explained Mr. Vandenberg, to satisfy a market demand by commercial users for a durable machine with front mount attachments which would provide excellent visibility of the work being done, so as to increase productivity. With respect to whether the goods in issue "push" their attachments when operating, Mr. Vandenberg testified that they did push the attachments by means of the skid shoes or wheels on the implements which keep the implements off the ground when work is being performed.

During cross-examination, Mr. Vandenberg explained that some of the snowblower attachments cannot be used on the F-Series without an adapter. He also stated that, because of differences in hitch configuration, B-Series attachments, other than the front blade, snowblower and sweeper, are not compatible with the F-Series. Mr. Vandenberg agreed that the "pushing" function that he mentioned did not power the implements; these are powered by the power take-off (PTO). More specifically, Mr. Vandenberg stated that implements are carried on the ground by wheels or skid shoes and pushed by the tractor. He also indicated that the B-Series and F-Series do not have the same PTO. With respect to the tires used on the F-Series, Mr. Vandenberg indicated that, although most of the goods in issue are sold with turf tires, Kubota Canada also stocks and sells bar tread tires for use on the F-Series. In response to questions from the Tribunal, Mr. Vandenberg indicated that the power delivered through the PTO to the implements for both the B-Series and F-Series is similar.

The appellant's final witness was Mr. Terry MacFarlane, President of B&T MacFarlane Ottawa Ltd. (B&T), a retail equipment dealer located in Nepean, Ontario. Mr. MacFarlane has been with B&T since 1960. B&T has been a Kubota dealer since 1972 and sells and services a wide range of Kubota products, including B-Series, G-Series and L-Series tractors, as well as the F-Series and implements. Mr. MacFarlane markets and sells the F-Series primarily to municipalities, government agencies, commercial landscapers and maintenance people. These customers were, to a large degree, purchasers of B-Series tractors prior to the introduction of the F-Series. However, they found the F-Series easier to use and more productive.

Mr. MacFarlane introduced a customer survey that he had prepared based on a random sample of the B&T warranty registration file of F-Series sales between 1987 and 1994. This sample related to 31 customers who purchased 51 of the approximately 70 units sold during that period. The sample showed that all these customers purchased mowers with their F-Series unit. Seventy-one percent purchased snowblowers and cabs; 29 percent purchased sweepers and 21 percent purchased blades. Purchases of other implements represented lower percentages. The sample also showed that 16 percent of these customers purchased one implement, 10 percent purchased two or three, 35 percent purchased four, 26 percent purchased five and 13 percent purchased more than five. Mr. MacFarlane testified that the majority of B&T's customers buy more than one implement because they operate year-round.

Mr. MacFarlane agreed that the B-Series tractors share a number of parts with the F-Series. He also indicated that, while he primarily sells turf tires with the F-Series, bar tread tires are available for them and that he once sold agricultural or lug-type tires with an F-Series unit. With respect to B&T's sales of B-Series tractors, Mr. MacFarlane testified that over 90 percent of those sales include turf tires because the purchasers intend to use the tractors to cut grass. Mr. MacFarlane was also of the view that the F-Series units "push" implements attached to them.

During cross-examination, Mr. MacFarlane explained that he was of the view that the implements were being "pushed" because of the direction in which they are moved, i.e. as opposed to "pulling." He agreed that, if the unit were moving forward, but that the PTO was not delivering any power to, for instance, a mower deck, then no grass would be cut.

Counsel for the respondent called four witnesses. The first witness was Mr. George Bannerman, Corporate Secretary of Gordon Bannerman Limited (GBL) of Rexdale, Ontario, which manufactures and sells sports turf maintenance equipment. Mr. Bannerman explained why GBL attachments require tractors with a three-point hitch and a standard PTO to perform their functions. He noted that the F-Series models have neither of these features.

Mr. Bannerman also testified that, to his knowledge, the industry standard for tractors using implements is a three-point hitch. Asked how the goods in issue are known in the trade, he stated that they are known as "out-front rotary mowers," not tractors, as their primary function is mowing.

During cross-examination, Mr. Bannerman agreed that there were different categories of tractors, including industrial tractors. He did not agree that tractor-trailers are "tractors" because they do not have a PTO and a three-point hitch capability, which are required to use the products that GBL manufactures. In response to questions from the Tribunal, Mr. Bannerman explained that the three-point hitch requirement for defining a tractor was meant only for the purpose of using the attachments that GBL manufactures.

The respondent's second 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 briefly discussed some of the factual background relating to two Tariff Board decisions,[6] the Tariff Board's decision in *John Deere*, the Federal Court of Appeal's decision in *John Deere* and Customs Notices N-187 and N-707.[7] With respect to the appellant's evidence relating to the use of common parts in the B-Series and the F-Series tractors, Mr. Dods advised that it was not unusual for different goods with interchangeable parts to have different tariff classifications. During cross-examination, Mr. Dods agreed that goods may be classified differently under the Harmonized Commodity Description and Coding System[8] (the Harmonized System) than they were under the previous tariff system.

The respondent's third witness was Mr. G.J. Brouwer of Brouwer Sod Farms Ltd., a sod-growing and supply business located in Keswick, Ontario. Mr. Brouwer had previously operated a company that produced a wide range of turf equipment, including various types of mowers, and recently started a new company which also produces a wide variety of goods, including turf maintenance equipment.

Mr. Brouwer testified as to a number of features of B-Series tractors, which, he suggested, distinguish them from F-Series units: (i) tires - the tires normally used on the B-Series tractors are usually bigger lug-type tires; (ii) wheel size - the wheel size on the B-Series is usually bigger to facilitate a larger tire that will provide more traction for pulling; (iii) transmission - B-Series generally have clutch-type standard transmissions, whereas F-Series usually have a hydrostatic automatic transmission; (iv) three-point hitch - B-Series have such a hitch, and the use of implements from various manufacturers is not restricted, as is the case with the F-Series which only has a two-point hitch; and (v) PTO - the B-Series PTO is more standard than the smaller PTO used in the F-Series.

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6. *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),* Appeal No. 795 (1966), 3 T.B.R. 259; 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,* Reference/Appeal No. 2294 (1986), 11 T.B.R. 440.
7. Department of National Revenue, Customs and Excise, June 17, 1992.
8. Customs Co-operation Council, 1st ed., Brussels, 1987.

With respect to how he would describe or classify the goods in issue, Mr. Brouwer said that he would classify them as "mower-dedicated power units" or "front mount mower power units," as they were in, his view, not tractors.

During cross-examination, Mr. Brouwer stated that his comments with respect to transmissions were not meant to apply to B-Series tractors specifically, but common types of tractors similar to the B-Series. He made a similar qualification with regard to his comments relating to PTOs. Mr. Brouwer agreed that there were different types of tractors, including farm tractors, industrial tractors and highway truck tractors. Mr. Brouwer stated that, although Kubota Canada's G-Series units are modelled after a tractor, he considers them machines built for home-owner or landscaping-type uses and, in particular, for mowing.

The respondent's final 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 American Society of Agricultural Engineers (ASAE). The Tribunal accepted Mr. Sevart as an expert in the application of design engineering to tractors and lawn mowers.

In Mr. Sevart's view, the criteria set out in the Tariff Board's decision in Appeal No. 795[9] to define a tractor are outdated and too broad. Mr. Sevart noted that, in the standard Kubota sales literature used in the United States, the goods in issue are described as front mowers and not tractors. Mr. Sevart stated that there is an engineering definition for "front mowers." This is found in the ASAE's draft standard "ASAE X547" for crush protective structures for front mount mowers. This draft definition reads as follows:

> *4.1. Front Mount Mower: A self-propelled machine designed and advertised primarily to supply power to mowers and other attachments mounted in front of propelling and steering wheels. These mowers generally weigh over 500 kilograms (1100 [lbs]) and less than 3700 kilograms (8160 [lbs]).*[10]

Mr. Sevart stated that the goods in issue would meet this definition. In his opinion, their primary function is to cut grass, and their use with attachments does not make them tractors. Mr. Sevart was also of the opinion that, even assuming that the goods in issue "pushed" implements, their essential purpose is the high-performance cutting of grass and not "pushing." Mr. Sevart indicated that the PTO, and not the pushing of a mower deck, causes the machine to cut grass.

During cross-examination, Mr. Sevart agreed that there were references in the U.S. marketing literature that described the goods in issue as tractors. With respect to the development of the ASAE's draft definition, he explained that the committee took the previous standard for compact utility tractors and rewrote it for the new product being identified as front mount mowers. Mr. Sevart agreed that Kubota Canada's B-Series tractors are properly described as tractors and, also, was of the view that a machine does not need to be able to use

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9. *Supra*, note 6.
10. Exhibit B-13.

ground-engaging tools to be a tractor. When asked whether he would call the goods in issue "snowblowers" if they were sold solely with the snowblower attachment, Mr. Sevart said that he would not and that he would still call them front mowers with snowblower attachments. In response to questions from the Tribunal, Mr. Sevart agreed that, in a sense, the goods in issue "push" implements along the ground.

In argument, counsel for the appellant first addressed the ruling of the U.S. Customs Service, introduced by the respondent at the outset of the hearing, and submitted that this ruling dealt with a different class of goods from the goods in issue. He also submitted that the ruling dealt with a different tariff item, namely, one for agricultural tractors, and noted that the ruling was currently under appeal.

Counsel for the appellant submitted that the case law and the Tribunal's previous decisions[11] stand for the proposition that goods are to be classified at the time of entry into Canada. He suggested that the evidence shows that the F-Series units were imported as complete units without attachments. With respect to the advertising materials, counsel cited the Tariff Board's previous decisions[12] as supporting the view that such materials are not determinative of classification.

Referring to the General Rules for the Interpretation of the Harmonized System[13] (the General Rules), counsel for the appellant submitted that the Tribunal has previously stated that, pursuant to Rule 1 of the General Rules, it is to look at whether goods 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 relative Section or Chapter Notes.[14] The question raised by the wording of heading No. 87.01 is: what is a tractor? This question is answered by Note 2 of the Explanatory Notes to the Harmonized Commodity Description and Coding System[15] (the Explanatory Notes) to Chapter 87 which states:

> *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.*

Counsel for the appellant submitted that the F-Series fits this description. Kubota Canada's uncontradicted evidence was that the F-Series was specifically designed and manufactured to push implements, in a manner similar to other tractors such as the B-Series. Counsel submitted that the videos and the evidence of the appellant's witnesses show that the goods in issue "push" implements when they are working. He also submitted that the respondent's expert witness also agreed that the implements were indeed "pushed."

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11. See, for example, *David F. Howat v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-92-362, February 22, 1994; and *Reginald Bradley v. The Deputy Minister of National Revenue for Customs and Excise*, 2 T.T.R. 345, Appeal No. AP-89-228, June 11, 1990.
12. *Josiah Wedgwood and Sons (Canada) Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, 4 C.E.R. 164, Appeal No. 1634, April 26, 1982; and Appeal No. 795, *supra*, note 6.
13. *Supra*, note 2, Schedule I.
14. *York Barbell Co. Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, 8 T.T.R. 161, Appeal No. AP-91-131, March 16, 1992.
15. Customs Co-operation Council, 1st ed., Brussels, 1986.

With respect to the Tariff Board's decision in *John Deere*, counsel for the appellant submitted that the majority considered the goods in issue to be tractors, but that it had to go on to consider the primary purpose or use of the goods. The Tariff Board then classified the goods as lawn mowers on the basis of a primary function test. The difference between the Harmonized System and the previous tariff system is that such a test is not part of the Harmonized System. If the Tribunal determines that the goods in issue are tractors, then they are to be classified as tractors.

Counsel for the appellant canvassed a number of Explanatory Notes which, he stated, supported classification of the goods in issue under the tariff item claimed by the appellant. These included Note 1 of the Explanatory Notes to Section XVI, which excludes goods of Section XVII from being covered by Section XVI, and Note 2(e) of the Explanatory Notes to Section XVII, which excludes certain goods of Section XVI from being covered by Section XVII. In his view, these notes make clear that tractors cannot be classified as lawnmowers and that lawnmowers cannot be classified as tractors. In addition, the Explanatory Notes to heading No. 87.01 indicate that there is a broad range of goods that can be tractors including "tractors for agricultural or forestry work, road tractors, heavy duty tractors for constructional engineering work, winch tractors, etc." Further, the Explanatory Notes to heading No. 87.01, under "Tractors Fitted With Other Machinery," state that implements are to be classified in their appropriate headings, while the tractor is to be classified in heading No. 87.01.

Counsel for the appellant submitted that the Explanatory Notes to heading No. 84.33 preclude the possibility of classifying the F-series in this heading. He 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." This, again, reflects the separation in the classification of implements and the classification of tractors. 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 has a permanently attached cutter. Otherwise, one must apply the Section Notes which, he submitted, conclude that cutters cannot be parts of tractors, and a tractor must be classified elsewhere. In other words, you cannot classify a tractor as a lawnmower.

Counsel for the respondent agreed that the key to this case is the application of Note 2 of the Explanatory Notes to Chapter 87. He 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, 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."

With respect to the Explanatory Notes to heading No. 84.33 discussed by counsel for the appellant, counsel for the respondent submitted that these notes should be interpreted as inclusionary, not exclusionary. He also suggested that the Tribunal may find the ruling of the U.S. Customs Service of assistance in considering these notes.

As for counsel for the appellant's argument with respect to the concept of "pushing" and its relationship to the words "constructed essentially for" in Note 2 of the Explanatory Notes to Chapter 87, counsel for the respondent referred to Mr. Sevart's evidence that, while it is true that the power unit pushes a mower deck across the lawn, the unit is essentially constructed for the mowing of grass. He submitted that the evidence relating to the special features of the F-Series which facilitate mowing, the manner in which the goods in issue are marketed and advertised, and the price differential between the F-Series and B-Series all further support this conclusion. Regarding the Explanatory Notes to Section XVII, counsel submitted that the Tribunal can only "get" to these notes if it has already decided that the goods in issue are tractors.

In reply, counsel for the appellant submitted that there was plenty of evidence relating to the marketing of the goods in issue as tractors and submitted that the price differential between different goods was not relevant for the purposes of classification.

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 System. Rule 1 states that classification is first determined by the wording of the tariff headings and any relative Section or Chapter Notes.

Although the previous cases considered by the Tariff Board may be of interest as background to the present case, they are not directly applicable because they considered the previous tariff system and not the Harmonized System. In this regard, the Tribunal agrees with the parties that, in the instant case, consideration of Rule 1 of the General Rules requires it to consider Note 2 of the Explanatory Notes to Chapter 87, which, as noted earlier, 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 of the opinion that the term "hauling" should be interpreted to include the concept of "pulling." Further, as Mr. Sevart explained, there is little distinction to be made between pushing or pulling, in an engineering sense, as both can be described as a vector force. To illustrate, when a tractor "pulls" something, it does so by virtue of traction, whereby its tires "push" the tractor along the ground, thereby effecting a pull on the object attached to it.

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16. *Supra*, note 14.

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.*[17]

The Tribunal finds this definition helpful in this case, as the various attachments or implements used with the goods in issue are "applied" to the F-Series units to perform whatever work is able to be performed with a particular attachment and, thus, these attachments can be considered to be "equipment" to be used with the F-Series units. When such implements are attached to the F-Series units and the units are operated by starting the motor and then engaging the PTO, as Mr. Vandenberg explained, the implements are pushed by means of the skid shoes or wheels on the implements which keep the implements off the ground when work is being performed.

With respect to the phrase "constructed essentially for," the Tribunal is persuaded that the goods in issue were constructed essentially for pushing many different types of implements, not just mower decks. The evidence is clear that the implements that are used the most with the F-Series are various sizes of mower decks. However, the appellant provided evidence of significant use of other implements. Kubota Canada's customer surveys covering sales throughout Canada showed that 56 percent of the goods in issue were sold with implements other than, or in addition to, mower decks. This evidence was corroborated by Mr. MacFarlane's records which showed that 71 percent of the customers in the sample purchased snowblowers and cabs. Mr. MacFarlane's records also showed that a significant number of other implements were purchased, reflected in the fact that 48 percent of the customers sampled purchased four or more implements. This is not surprising when one considers that a number of these commercial purchasers buy the goods in issue to operate throughout the year in a variable climate.

The evidence also shows that the goods in issue appear to be marketed in the United States primarily as "front mowers" and referred to as such in a large part of the industry. 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, as was the case in *San Francisco Gifts Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,[18] such references cannot be determinative of classification. In this regard, the Tribunal agrees with the Tariff Board's comments in Appeal No. 795 that to classify a product on this basis, without reference to the legislation, may allow that legislation to be frustrated.[19] As noted above, in this case, classification must be guided by Note 2 of the Explanatory Notes to Chapter 87 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 is of the view that these notes 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 separate and detachable mower attachments

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17. Seventh ed. (Oxford: Clarendon Press, 1982) at 41.
18. Canadian International Trade Tribunal, Appeal No. AP-92-300, March 18, 1994.
19. *Supra*, note 6 at 269.

used with the F-Series are "permanently attached cutter[s]." Rather, they are removable in a quick hitch manner that allows for the attachment and use of a wide variety of implements, other than a mower deck. When the goods in issue are considered, for example, as operating with a snowblower, the Tribunal finds it difficult to conclude that such machines are still lawn mowers. Having said this, the Tribunal is of the view that this point is not determinative, since the goods in issue are also not imported with a snowblower or any other implement attached.

Accordingly, the appeal is allowed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member