

Ottawa, Tuesday, March 14, 1995

Appeal Nos. AP-93-358 and AP-93-353

IN THE MATTER OF appeals heard on September 8, 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 with respect to requests for re-determination
under section 63 of the *Customs Act*.

BETWEEN

INTERCRAFT INDUSTRIES OF CANADA INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeals are dismissed.

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

Anthony T. Eyton
Anthony T. Eyton
Member

Lise Bergeron
Lise Bergeron
Member

Nicole Pelletier
Nicole Pelletier
Acting Secretary

Appeal Nos. AP-93-358 and AP-93-353

INTERCRAFT INDUSTRIES OF CANADA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

These are appeals under section 67 of the Customs Act from decisions of the Deputy Minister of National Revenue. In Appeal No. AP-93-358, the Tribunal must determine whether it has the jurisdiction to hear the appeal. The issue in Appeal No. AP-93-353 is whether the goods in issue, medium-density fibreboard raw mouldings, are properly classified under tariff item No. 4411.19.00 as other fibreboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances, as determined by the respondent, or should be classified under tariff item No. 4409.10.00 as coniferous wood continuously shaped (tongued, grooved, rebated, champhered, V-jointed, beaded, moulded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed, as claimed by the appellant.

HELD: *The appeals are dismissed. The Tribunal lacks jurisdiction to hear Appeal No. AP-93-358 because the appellant has not satisfied the requirements set out in section 67 of the Customs Act. With regard to Appeal No. AP-93-353, the Tribunal finds that the appellant's arguments concerning the classification of the goods in issue are not convincing. The Tribunal agrees with the respondent that the goods in issue are properly classified under tariff item No. 4411.19.00.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 8, 1994
Date of Decision: March 14, 1995

Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Anthony T. Eyton, Member
Lise Bergeron, Member

Counsel for the Tribunal: Robert Desjardins

Clerk of the Tribunal: Anne Jamieson

Appearances: Michael Sherbo, for the appellant
Anne Michaud, for the respondent

Appeal Nos. AP-93-358 and AP-93-353

INTERCRAFT INDUSTRIES OF CANADA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ANTHONY T. EYTON, Member
LISE BERGERON, Member

REASONS FOR DECISION

These are appeals under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue. In Appeal No. AP-93-358, the Tribunal must determine whether it has the jurisdiction to hear the appeal. The issue in Appeal No. AP-93-353 is whether medium-density fibreboard raw mouldings are properly classified under tariff item No. 4411.19.00 of Schedule I to the *Customs Tariff*² as other fibreboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances, as determined by the respondent, or should be classified under tariff item No. 4409.10.00 as coniferous wood continuously shaped (tongued, grooved, rebated, champhered, V-jointed, beaded, moulded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed, as claimed by the appellant.

The Tribunal must first determine whether it has jurisdiction to hear Appeal No. AP-93-358. This appeal relates to requests for refund of duties made by the appellant pursuant to section 101 of the *Customs Tariff*. The appellant's representative explained to the Tribunal why the appellant had chosen to proceed by way of customs duty remission rather than by way of request for re-determination under section 63 of the Act. Although acknowledging that the appellant has no right of appeal to the Tribunal under section 101 of the *Customs Tariff*, he submitted that a decision of the Federal Court of Canada, in *Mueller Canada Inc. v. The Minister of National Revenue and The Deputy Minister of National Revenue*,³ could give the Tribunal some latitude in deciding this question of jurisdiction.

Counsel for the respondent argued that the Tribunal has no jurisdiction to hear Appeal No. AP-93-358, as the appellant has not satisfied the requirements set out in section 67 of the Act. She submitted that no request for re-determination pursuant to section 63 of the Act had been made by the appellant and that there were no decisions made by the respondent pursuant to section 63 or 64 of the Act in respect of the goods for which this particular appeal was filed. In her view, by deciding to proceed pursuant to section 101 of the *Customs Tariff*, the appellant did not obtain decisions appealable to the Tribunal. As to the judicial decision to which the appellant's representative referred, counsel argued that that decision is not applicable to the case at hand.

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. Unreported, Federal Court of Canada - Trial Division, Court File No. T-746-93, November 15, 1993.

The Tribunal agrees with counsel for the respondent that it lacks jurisdiction to hear Appeal No. AP-93-358. Section 67 of the Act provides that “a person who deems himself aggrieved by a decision of the Deputy Minister made pursuant to section 63 or 64 [of the Act] may appeal from the decision” to the Tribunal. In the Tribunal’s view, the return of the refund claims did not constitute a decision of the respondent made under section 63 or 64 of the Act. In this regard, the appellant’s representative has acknowledged that, in Appeal No. AP-93-358, there were no decisions under section 60 or 63 of the Act. As to the *Mueller* case, as contended by counsel, it can be distinguished from the facts of the present case. In the *Mueller* case, the applicant had made requests for re-determination pursuant to subsections 60(3) and 63(3) of the Act. The issue in that case was whether certain decisions to reject these requests were to be considered as decisions under the relevant section of the Act. In the present case, the appellant decided to proceed under section 101 of the *Customs Tariff*. This choice, to refer to the words used by the representative, “walked us [the appellant] right out of the right to appeal to the Tribunal.”

With regard to the classification issue, the appellant’s representative first referred to Rule 1 of the General Rules for the Interpretation of the Harmonized System⁴ (the General Rules), which provides that the classification of goods shall be determined “according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.”

The appellant’s representative also drew the Tribunal’s attention to Note 4 to Chapter 44 of Schedule I to the *Customs Tariff*, pursuant to which “[p]roducts of heading No. 44.10, 44.11 or 44.12 may be worked to form the shapes provided for in respect of the goods of heading No. 44.09, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular or submitted to any other operation provided it does not give them the character of articles of other headings.” As to the various processes which might change the character of an article, the representative referred to the Explanatory Notes to the Harmonized Commodity Description and Coding System⁵ (the Explanatory Notes) and, more specifically, to the Explanatory Notes to heading No. 44.10. The latter indicate that goods excluded from this heading are goods having the character of articles, “whether obtained directly by pressing, extrusion or moulding or by other processes.” Thus, he argued that the goods in issue should be classified in heading No. 44.09 because these goods have taken on the character of an article of that particular heading. In his view, the change in character was the result of the moulding, namely, one of the processes mentioned in the Explanatory Notes as changing the character of the goods.

In the view of the appellant’s representative, the applicability of the Explanatory Notes to heading Nos. 44.10, 44.11 and 44.12 can be drawn from Note 4 to Chapter 44, which provides for a direct relationship between the various goods falling in these headings.

In the alternative, the appellant’s representative contended that the goods in issue could be classified in heading No. 44.21 as other articles of wood. In his view, the word “wood” not only includes wood but also includes other articles, such as articles of fibreboard and of paperboard.

Counsel for the respondent submitted that the goods in issue are mechanically worked fibreboard of a density exceeding 0.8 g/cm³ and are properly classified in heading No. 44.11. After referring to Note 4 to Chapter 44, she argued that the goods in issue, although mechanically worked, retain their character as

4. *Supra*, note 2, Schedule I.

5. Customs Co-operation Council, 1st ed., Brussels, 1986.

fibreboard. She argued against the proposition that the Explanatory Notes to heading No. 44.10 also apply to other headings of the same Chapter.

With respect to heading No. 44.09, counsel for the respondent contended that this heading is not applicable to the goods in issue. Among various reasons, she noted that the goods in issue are not wood. However, should it be found that the goods in issue are classifiable in heading Nos. 44.09 and 44.11, Rule 3 (a) of the General Rules should apply. It provides that, if goods are *prima facie* classifiable in two headings, they will be classified in the heading that is most specific. As she noted, heading No. 44.11 is more specific, as it refers explicitly to fibreboard. In her view, a reading of the headings, as well as of the Explanatory Notes, makes clear that the legislator wanted to treat wood and manufactured wood separately.

Section 10 of the *Customs Tariff* provides that, in classifying goods, reference shall be had to the General Rules. Rule 1 of the General Rules, as stated before, provides that the classification of goods shall be determined “according to the terms of the headings and any relative Section or Chapter Notes.” Therefore, the immediate consideration of the Tribunal is whether the goods in issue are named or generically described in a particular heading of the tariff schedule. The Tribunal finds that the arguments put forth by the appellant’s representative concerning the classification of the goods in issue in either heading No. 44.09 or heading No. 44.21 are not convincing. There has been no dispute that the goods in issue are made of medium-density fibreboard with a density of approximately 0.86 g/cm³. Indeed, counsel for the respondent argued that the goods in issue are made of fibreboard, not wood, and are properly classified under tariff item No. 4411.19.00. The Tribunal is in agreement with this position. It is the Tribunal’s view that the goods in issue, albeit mechanically worked, have retained their character as fibreboard and have not taken the character of articles of other headings. In this connection, regard has been had to the Explanatory Notes to heading No. 44.11, which provide that fibreboard remains classified in this particular heading, whether or not it has been mechanically worked. The Tribunal also agrees with counsel for the respondent that the Explanatory Notes to heading No. 44.10 do not apply to other headings.

In light of the foregoing, the appeals are dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member

Anthony T. Eyton

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Member

Lise Bergeron

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Member