

Ottawa, Tuesday, April 18, 1995

Appeal No. AP-94-169

IN THE MATTER OF an appeal heard on January 26, 1995,
under section 61 of the *Special Import Measures Act*,
R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a decision of the Deputy Minister of
National Revenue dated May 17, 1994, with respect to a request
for re-determination under section 58 of the *Special Import
Measures Act*.

BETWEEN

GENERAL FILMS INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member

Charles A. Gracey

Charles A. Gracey
Member

Lyle M. Russell

Lyle M. Russell
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-169

GENERAL FILMS INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 61 of the Special Import Measures Act from a re-determination of the Deputy Minister of National Revenue confirming the assessment of anti-dumping duties on certain shipments of picture frames/photo albums which were imported into Canada by the appellant.

The backdrop for this appeal is provided by the Tribunal's order in Review No. RR-92-003. Pursuant to that review, the Tribunal decided to continue the Canadian Import Tribunal's finding, in Inquiry No. CIT-11-87, in respect of certain photo albums.

The issue in this appeal is whether the goods in issue fall within the scope of the Canadian Import Tribunal's finding, as continued by the Tribunal.

HELD: *The appeal is allowed. While the Tribunal accepts that the goods in issue do possess some of the characteristics of the goods described in the Canadian Import Tribunal's finding and statement of reasons, the Tribunal is satisfied that there are also significant differences, principally the function of the goods in issue.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 26, 1995
Date of Decision: April 18, 1995

Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Charles A. Gracey, Member
Lyle M. Russell, Member

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Anne Jamieson

Appearances: Steve Withers, for the appellant
Josephine A.L. Palumbo, for the respondent

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GENERAL FILMS INC.

Appellant

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THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
CHARLES A. GRACEY, Member
LYLE M. RUSSELL, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*¹ (SIMA) from a re-determination of the Deputy Minister of National Revenue (the Deputy Minister) confirming the assessment of anti-dumping duties on certain shipments of picture frames/photo albums which were imported into Canada by the appellant. The goods in issue have some of the characteristics of both picture frames and photo albums and have a metal front cover which contains a glass insert for the display of one photograph. The goods in issue are of post-bound construction and typically contain 40 clear plastic leaves into which photographs may be inserted.

The backdrop for this appeal is provided by the Tribunal's order in Review No. RR-92-003.² In that review, the Tribunal had to decide whether to rescind or continue, with or without amendment, the Canadian Import Tribunal's (CIT) finding in Inquiry No. CIT-11-87³ in respect of certain photo albums. Pursuant to that review, the Tribunal decided to continue the CIT's finding without amendment.

The issue in this appeal is whether the goods in issue fall within the scope of the CIT's finding, as continued by the Tribunal.

Mr. Steve Withers, President of General Films Inc., represented the appellant at the hearing and gave evidence on its behalf. He testified that the goods in issue fall outside the scope of the Tribunal's order on a number of grounds. He stated that the goods in issue are more appropriately described as frames rather than photo albums.

During cross-examination, the appellant's representative stated that there are several essential differences between the goods in issue and photo albums. He indicated that the first distinguishing feature is the price of the respective products. Whereas the goods in issue retail at prices in the \$20 range, photo

1. R.S.C. 1985, c. S-15.

2. *Photo Albums with Pocket, Slip-in or Flip-up Style Sheets (Imported Together or Separately), and Refill Sheets Thereof, Originating in or Exported from Japan, the Republic of Korea, the People's Republic of China, Hong Kong, Taiwan, Singapore, Malaysia and the Federal Republic of Germany*, Order and Statement of Reasons, February 25, 1993.

3. *Ibid.*, Finding, February 26, 1988, Statement of Reasons, March 11, 1988.

albums with comparable storage capacity retail in the \$3-to-\$4 range. The second feature that serves to distinguish the goods in issue from photo albums is use. The appellant's representative explained that the goods in issue are intended to be displayed in plain view, with a photograph in the frame/cover. He noted that photo albums are typically kept on bookshelves or in drawers and are used when someone wishes to look at them.

The appellant's representative also noted that the goods in issue differ from photo albums in terms of their physical appearance. Photo albums generally have a paper, leather or vinyl cover, whereas the goods in issue have a cover made of metal and glass. Finally, he testified that, in terms of the relative value of the components of the goods in issue, the frame/cover of the goods in issue costs approximately three times more than the album pages.

The appellant's representative acknowledged that, in some of the documentation relating to the goods in issue, they are described as "mini max album frames" and "mini max frame albums." He also admitted that the goods in issue are described in the trade as frames/albums and that the goods in issue do have the aspect of albums.

Mr. Murray E. Jackson, Manager, Recreational Products, Anti-dumping and Countervailing Division, Department of National Revenue, gave evidence on behalf of the respondent. He testified that the goods in issue are hybrid products, having some characteristics of photo albums and some characteristics of frames. Mr. Jackson testified that the determination of whether or not any given product falls within the scope of a finding of the Tribunal is made by referring to the product description in the relevant statement of reasons. In the present case, the goods in issue were determined to fall within the scope of the Tribunal's order on the basis that they are of post-bound construction and contain leaves for storing photographs. He also noted that the Tribunal's product description contemplated that the album covers could be made of different types of materials and mentioned, as examples, vinyl, leather, suede and fabric.

In argument, Mr. Withers submitted that the goods in issue are not photo albums per se, but rather picture frames capable of storing a number of photographs.

Counsel for the respondent made arguments regarding the methodology used to determine the anti-dumping duties which were assessed on the goods in issue and regarding whether or not the goods in issue fall within the scope of the Tribunal's order. With respect to the latter issue, counsel submitted that the CIT's statement of reasons described the goods subject to the finding as "storage devices into which photographs are inserted." Counsel also noted that the statement of reasons provided that goods subject to the finding could be constructed with various types of bindings, various numbers of pages and various types and sizes of covers. Counsel also submitted that the appellant has the onus to show that the Deputy Minister's re-determination is incorrect.

In an appeal under section 61 of SIMA, the Tribunal is to make an order or finding as to whether anti-dumping duties are payable on certain imported goods. Whether or not anti-dumping duties are payable depends upon whether the imported goods are goods of the same description as the goods to which a Tribunal order or finding applies. The starting point for the Tribunal in this appeal is the CIT's finding of February 26, 1988, in respect of photo albums. That finding was in respect of goods of the following

description: photo albums with pocket, slip-in or flip-up style sheets (imported together or separately), and refill sheets thereof.

In *J.V. Marketing Inc. v. Canadian International Trade Tribunal*,⁴ the Federal Court of Appeal held that, in deciding whether any imported goods fall within the scope of an anti-dumping finding, if the description of goods in the finding is ambiguous, the Tribunal could refer to its statement of reasons to resolve the ambiguity.

In this appeal, while the CIT's finding describes what might be thought of as conventional photo albums, the Tribunal is of the view that there is sufficient ambiguity in the language of the finding to justify reference to the CIT's statement of reasons. The product description from the CIT's finding is reproduced on page 2 of its statement of reasons. Following that text, the following additional words of description appear:

Subject photo albums are storage devices into which photographs are inserted in individual pockets made of transparent film. There are five basic types of binding for these photo albums: sealed, ringed, coiled, flip and post. Sheets are produced from PVC (polyvinylchloride), polypropylene or polyethylene. Albums contain various numbers of sheets and may hold as many as 700 photographs. Album covers are made from many different types of material such as vinyl, leather, suede or fabric. Refill sheets are also sold in packs of various sizes, the most popular being 20- and 50-leaf packs.

The CIT's statement of reasons then goes on to describe the various sizes of photo albums which are available.

Having considered the descriptions in the CIT's finding and statement of reasons, the Tribunal is of the view that the goods in issue do not fall within the scope of the CIT's finding. While it is true that the goods in issue possess some of the characteristics of the goods described in the CIT's finding and statement of reasons, the Tribunal is of the view that there are significant differences which serve to take the goods in issue outside the scope of that finding.

The principal distinguishing feature is the function which the goods in issue serve. The cover of the goods in issue is made of a metal frame with a glass insert on its outer surface. The frame has an opening on its inner surface to allow for the insertion of a photograph. In this way, the cover serves the dual purpose of a picture frame and a cover. Additionally, the metal construction of the frame permits the placement of the album in an upright position as a means of displaying a photograph. In the Tribunal's view, the primary function of the goods in issue is to serve as a picture frame. In the Tribunal's view, the storage function that the goods in issue provide is incidental to the frame function.

The Tribunal also notes the evidence that, in terms of the relative value of the components of the goods in issue, the frame/cover component costs approximately three times more than the album component. While price, in and of itself, may not be an appropriate basis for excluding goods from a finding, in this case, the Tribunal is satisfied that it is an appropriate consideration. In the Tribunal's view, a person wishing to simply have a means of storing photographs would likely purchase a photo album. The evidence indicates

4. Unreported, Federal Court of Appeal, Court File No. A-1349-92, November 29, 1994.

that such albums may be purchased for \$3 to \$4. Such a person would not likely purchase the goods in issue, as they are five to seven times more expensive than basic photo albums.

On the basis of the foregoing, the appeal is allowed.

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

Charles A. Gracey
Charles A. Gracey
Member

Lyle M. Russell
Lyle M. Russell
Member