CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, July 25, 1995

Appeal Nos. AP-94-116 and AP-94-186

IN THE MATTER OF appeals heard on December 9, 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 April 13 and August 11, 1994, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

FARMER'S SEALED STORAGE INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Lise Bergeron
Lise Bergeron
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-94-116 and AP-94-186

FARMER'S SEALED STORAGE INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is an importer and distributor of a machine called the "Ag-Bagger," which is part of the "Ag-Bag Sealed Feed Storage System." The goods in issue, Ag-Bags, are three-ply, co-extruded, polyethylene, open-ended bags, measuring 8 to 10 ft. in diameter and 100 to 150 ft. in length, which attach to the Ag-Bagger. The issue in the present appeals is whether the Ag-Bags are properly classified under tariff item No. 3917.32.00 as other tubes of plastics, not reinforced or otherwise combined with other materials, without fittings, or under tariff item No. 3923.21.00 as sacks and bags of polymers of ethylene for the conveyance or packing of goods, as determined by the respondent, or should be classified under tariff item No. 8436.99.20 as other parts of agricultural machinery, as claimed by the appellant.

HELD: *The appeals are dismissed. The Tribunal recognizes that, in determining whether goods are parts of other goods, the facts of each individual case must be considered. In the present appeals, the Tribunal relies on the following facts in support of its finding that the Ag-Bags are not parts of the Ag-Bagger: (1) the Ag-Bags remain attached to the Ag-Bagger for only one day, but continue to perform as a storage unit for approximately two years after they are removed from the Ag-Bagger; (2) it takes a very brief period of time, about 3 to 5 minutes, to attach the Ag-Bags to the Ag-Bagger; (3) the Ag-Bags must be removed from the Ag-Bagger in order for proper fermentation of the feed to take place and to allow them to perform effectively as a storage unit; (4) the Ag-Bags are not reusable; and (5) numerous Ag-Bags may be used during the life of one Ag-Bagger.*

Furthermore, the Tribunal does not find that the Ag-Bags are either specifically named or generically described in heading No. 39.17 as "[t]ubes ... of plastics." The Tribunal finds that the Ag-Bags are generically described in heading No. 39.23 as "[a]rticles for the ... packing of goods, of plastics" and specifically named under tariff item No. 3923.21.00 as bags of "polymers of ethylene."

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*December 9, 1994*
Date of Decision:	*July 25, 1995*
Tribunal Members:	*Arthur B. Trudeau, Presiding Member* *Lise Bergeron, Member* *Lyle M. Russell, Member*
Counsel for the Tribunal:	*Heather A. Grant*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Michael A. Kelen, for the appellant* *Frederick B. Woyiwada, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-94-116 and AP-94-186

FARMER'S SEALED STORAGE INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
LISE BERGERON, Member
LYLE M. RUSSELL, Member

REASONS FOR DECISION

These are appeals under section 67 of the *Customs Act*[1] (the Act) from two decisions of the Deputy Minister of National Revenue dated April 13 and August 11, 1994, made under section 63 of the Act.

The appellant is an importer and distributor of a machine called the "Ag-Bagger," which is part of the "Ag-Bag Sealed Feed Storage System." The goods in issue, Ag-Bags, are three-ply, co-extruded, polyethylene, open-ended bags, measuring 8 to 10 ft. in diameter and 100 to 150 ft. in length, which attach to the Ag-Bagger. The issue in the present appeals is whether the Ag-Bags are properly classified under tariff item No. 3917.32.00 of Schedule I to the *Customs Tariff*[2] as other tubes of plastics, not reinforced or otherwise combined with other materials, without fittings, or under tariff item No. 3923.21.00 as sacks and bags of polymers of ethylene for the conveyance or packing of goods, as determined by the respondent, or should be classified under tariff item No. 8436.99.20 as other parts of agricultural machinery, as claimed by the appellant.

The first witness to appear on behalf of the appellant was Mr. Keith Randall Lavier, part owner of Farmer's Sealed Storage Inc. Mr. Lavier explained how the Ag-Bag Sealed Feed Storage System works, in particular, that a sealed feed storage system provides for the anaerobic fermentation of feed through the conversion of acetic acid to lactic acid, thereby making the feed more digestible for cattle.

By referring to an information pamphlet, Mr. Lavier described the operation of the Ag-Bagger. According to Mr. Lavier, as chopped feed is introduced into the Ag-Bagger, a rotor compacts it into an Ag-Bag, which has been sealed at one end. Once filled, the Ag-Bag is completely sealed, and fermentation of the feed begins. The feed is then stored in the Ag-Bag for up to two years.

Mr. Lavier testified that the Ag-Bags are available in two lengths to provide for the needs of different herd sizes. He described the Ag-Bags as being comprised of three layers of material: (1) a white outer layer designed to reflect the heat of the sun and ultraviolet rays, which would otherwise degrade the plastic; (2) a carbon black inner layer designed to prevent the sun from penetrating through to the feed; and

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

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(3) a middle layer designed to add strength to the Ag-Bags. According to Mr. Lavier, the three layers have a thickness of approximately 9.5 mils. Depending upon which type of Ag-Bagger is purchased, two or three Ag-Bags are sold with it.

Mr. Lavier also spoke about the benefits of the Ag-Bag Sealed Feed Storage System and introduced into the record a copy of a pamphlet entitled "The Advantages of the Ag-Bag System." This pamphlet focusses on the advantages of the Ag-Bag system primarily with respect to its function as a storage unit.

During cross-examination, Mr. Lavier stated that it takes about 3 to 5 minutes for two people to attach an Ag-Bag to the Ag-Bagger. He further estimated that it takes one day to fill an Ag-Bag and that, once empty, it is not reusable. Mr. Lavier explained that holes are usually made in the Ag-Bags during the process of removing feed, thereby ruining them.

Mr. Art Schuette was the second witness to appear on behalf of the appellant. Mr. Schuette is Vice-President of Sales of Ag-Bag Corporation and a member of its Board of Directors. Mr. Schuette testified in respect of the fermentation process that occurs within the Ag-Bags and compared the function of the Ag-Bag Sealed Feed Storage System to that of a silo.

The third witness to appear on behalf of the appellant was Mr. Wayne Ovens, a dairy farmer. Mr. Ovens stated that he sometimes uses an Ag-Bag for more than a two-year period and that, at any one time, he may have up to 10 Ag-Bags located on his farm. Mr. Ovens further testified that he only owns one Ag-Bagger.

In his submissions, counsel for the appellant first addressed the issue of whether the Ag-Bags are parts of agricultural machinery under tariff item No. 8436.99.20. He argued that the wording of the tariff item is virtually identical to the wording of the tariff item under the classification system prior to the Harmonized Commodity Description and Coding System[3] (the Harmonized System) under which the Ag-Bags were classified by the Tribunal in a decision dated September 9, 1991,[4] which decision was never appealed.

Counsel for the appellant reiterated the arguments that he presented in the previous appeal in support of the appellant's position in the present appeals that the Ag-Bags are parts of agricultural machinery. These arguments focussed on the following points: (1) the Ag-Bags, in conjunction with the Ag-Bagger, constitute an "integrated mechanical system similar to a conventional upright silo with a built-in loader and unloader;[5]" (2) the Ag-Bagger, in conjunction with the Ag-Bags, represent a "scientifically integrated mechanical system providing benefits to the stored feed[6]" and, consequently, the Ag-Bags should be classified as parts of that system; (3) the Ag-Bagger derives its name from the fact that the Ag-Bags are the most important part of the machine; (4) the Ag-Bags are no less parts of the Ag-Bagger because it costs less to replace them than to make them reusable or because they continue to function as units for fermentation once they have been filled;

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3. Customs Co-operation Council, 1st ed., Brussels, 1987.
4. *Farmer's Sealed Storage v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. 2935.
5. *Ibid.* at 2.
6. *Ibid*.

and (5) the Ag-Bags are expensive and have a warranty of two years, in contrast to products such as ink or computer tape, which have been held to be consumable supplies as opposed to parts.[7]

Counsel for the appellant subsequently reviewed the Tribunal's reasons in the previous appeal, in particular its reasons for finding that the Ag-Bags are "committed part[s] of the Ag-Bagger.[8]" Counsel also referred to the Tribunal's finding in that appeal that Parliament did not intend duties to be applied to parts of agricultural implements or machinery.

Counsel for the appellant went on to argue that the issue of whether the Ag-Bags are parts of agricultural machinery cannot be re-adjudicated by the Tribunal, citing the principle of *res judicata* as authority. Citing from Osborn's Concise Law Dictionary, counsel submitted that "[o]nce a matter or issue between parties has been litigated and decided, it cannot be raised again between the same parties.[9]" Counsel submitted that the present appeals pertain to exactly the same goods, involve the same parties and address the same issue as in the previous appeal and that, in finding that the goods in the previous appeal were "parts of agricultural machinery," this issue cannot be re-litigated in the present appeals.

Counsel for the appellant did not deny that the appeals must still proceed with respect to the remaining issue, namely, whether the Ag-Bags are properly classified under tariff item No. 3917.32.00 or under tariff item No. 3923.21.00. By way of general argument, counsel submitted that Parliament did not intend for goods classified prior to the introduction of the Harmonized System to be subject to higher tariffs as a result of re-classification under the Harmonized System.[10]

Specifically, with respect to whether the Ag-Bags are classifiable under tariff item No. 3923.21.00, counsel for the appellant submitted that the respondent has implicitly admitted that this classification is incorrect, since a subsequent inconsistent decision was rendered, classifying the Ag-Bags as tubes of plastics under tariff item No. 3917.32.00 in the decision dated August 11, 1994. Furthermore, counsel submitted that the word "packing" in heading No. 39.23 implies that goods are being packed to be moved, which clearly does not include the Ag-Bags. He argued that the Ag-Bags are meant to stay in one place in order for the feed to ferment and to be preserved for future use.

With respect to whether the Ag-Bags are classifiable under tariff item No. 3917.32.00, counsel for the appellant submitted that they are commonly referred to as bags and not tubes. Moreover, the Ag-Bags are reinforced and come with fittings, contrary to the terms of subheading No. 3917.32 under which the respondent classified them in the decision dated August 11, 1994. More specifically, counsel submitted that the Ag-Bags do not meet the description of "lay-flat tubing" contained in the Six-Language Dictionary of Plastics and Rubber Technology[11], as they were described by the respondent in that decision.

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7. *Xerox Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise* (1988), 17 C.E.R. 47, Tariff Board, Appeal Nos. 2678 and 2722, July 15, 1988.
8. *Supra*, note 4 at 5.
9. Seventh ed. (London: Sweet & Maxwell, 1983) at 288.
10. In support of this argument, counsel referred to section 131 of the *Customs Tariff* and Customs Notice N-331, Extension of Authority to Restore the Pre-HS Tariff Rates, Department of National Revenue, Customs and Excise, May 15, 1989.
11. (London: LIFFE Books, 1965) at 391

In conclusion, counsel for the appellant argued that the Ag-Bags are components of the Ag-Bagger and, therefore, based on Note 4 of Section XVI of Schedule I to the *Customs Tariff*, the Ag-Bags ought to be classified in the heading appropriate to the function of the whole machine.

Counsel for the respondent began his argument by referring to the decision in *The Deputy Minister of National Revenue for Customs and Excise v. Androck Inc.*,[12] which, in his view, stands for the proposition that, in determining whether goods are "parts" of something for the purposes of classification in Schedule I to the *Customs Tariff*, the facts of each case, including the individual nature of the particular goods in issue must be taken into account. Counsel subsequently referred the Tribunal to the decision in *Xerox Canada*, in which the Tariff Board listed a number of factors which were considered in making such a determination. These factors include the degree of permanence of the item attached to the machine; the frequency of its replacement over the life of the machine; its disposal after its replacement; whether the item is consumed or spent during the machine's operation; and whether the item can be replaced by the user or whether a trained technician is required to perform this task. In counsel's view, these factors ought to be considered in making a decision in the present appeals as to whether the Ag-Bags are parts of agricultural machinery.

Counsel for the respondent went on to consider the facts of this case in the context of the factors set out in *Xerox Canada* and submitted that the Ag-Bags cannot be considered parts of agricultural machinery because the Ag-Bags have a function all of their own as storage units, which is completely separate from their use in conjunction with the Ag-Bagger. In support of this position, counsel relied primarily on literature submitted by the appellant which discusses the advantages of the Ag-Bag system from that perspective. Counsel further referred to the following points in support of his argument: (1) it takes about 3 to 5 minutes to attach an Ag-Bag to the Ag-Bagger, and the Ag-Bag is not attached with any special fittings; (2) the Ag-Bag usually remains attached to the machine for only one day while it is being filled; and (3) the Ag-Bag does not begin its proper function until it is removed from the Ag-Bagger and sealed at both ends. Counsel also referred to the dimensions and specifications of the Ag-Bags to argue that their features are designed in view of their use as a storage unit and not of their use while attached to the Ag-Bagger. In support of this view, counsel referred to factors such as the strength of the Ag-Bags, the materials from which they are made and their dimensions.

On the issue of *res judicata*, counsel for the respondent, in reference to the decision in *Javex Company Ltd. v. Oppenheimer*,[13] argued that, in the present appeals, *res judicata* does not apply because the appeals deal with a new tariff system, a new importation of goods and, finally, different choices of classification and, therefore, different issues.

Counsel for the respondent submitted that the Ag-Bags are clearly described in tariff item No. 3923.21.00 as bags of "polymers of ethylene," and more generally in heading No. 39.23 as "[a]rticles for the conveyance or packing of goods, of plastics." He argued that the wording of the heading does not support the interpretation given to it by counsel for the appellant, specifically that the Ag-Bags must be intended for conveyance once packed.

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12. (1987), 13 C.E.R. 239, Federal Court of Appeal, Court File No. A-1491-84, January 28, 1987.
13. [1959] Ex. C.R. 439.

Counsel for the respondent further submitted that, should the Tribunal not find that the Ag-Bags are bags because they are open at both ends at the time of importation, the Ag-Bags are properly described as "[t]ubes" in heading No. 39.17. Counsel also submitted that there is nothing in heading No. 39.23 to suggest that an article "for the conveyance or packing" cannot have a process going on inside it at the same time as it is being used for conveyance or packing, such as the process of fermentation as in this case.

In reply, counsel for the appellant argued that the circumstances of the present appeals are similar to those described in the decision in *Outboard Marine Corporation of Canada. v. The Deputy Minister of National Revenue for Customs and Excise*,[14] which was cited with approval by the Federal Court of Appeal in *Androck*. In *Outboard Marine*, grass catchers were held to be integral parts of a lawnmower and, therefore, were properly classified as parts of a lawnmower. On the other hand, in *Androck*, the grass catchers were imported as optional add-ons to a lawnmower and were not necessary for the operation of a lawnmower.

In reaching its decision in the present appeals, the Tribunal first considered whether the principle of *res judicata* applies to prevent the Tribunal from making a finding as to whether the Ag-Bags are other than parts of agricultural machinery for the purposes of classification in Schedule I to the *Customs Tariff*. Upon review of the law and the facts of this case, the Tribunal is of the view that *res judicata* does not apply. The Tribunal bases this view primarily on the fact that it is not bound by its previous decisions. Although the Tribunal appreciates that consistency in its decisions is desirable, this objective should not be pursued at the expense of the merits of an individual case.

Furthermore, in support of its position, the Tribunal relies on the fact that the present appeals involve different importations of goods and a different issue than in the previous appeal. In Appeal No. 2935, it had to consider the classification of goods in an earlier version of the *Customs Tariff*, which tariff nomenclature pre-dated the implementation of the Harmonized System in Canadian law, under which the Ag-Bags must presently be classified. In that appeal, the Tribunal found that the goods in issue were better described as parts of agricultural machinery under tariff item No. 40924-1 than as an article of polypropylene under tariff item No. 93907-1. In the present appeals, the Tribunal is required to determine whether the Ag-Bags should be classified as parts of agricultural machinery, as bags of polymers of ethylene for the conveyance or packing of goods or as tubes of plastics, not reinforced or otherwise combined with other materials, without fittings. In the Tribunal's view, the issue in the previous appeal is not identical to the issue in the present appeals.

In determining the classification of the Ag-Bags, the Tribunal is cognizant that Rule 1 of the General Rules for the Interpretation of the Harmonized System[15] is of the utmost importance. Rule 1 provides that classification is first determined by the wording of the headings and any relative Section or Chapter Notes. In the Tribunal's decision in *York Barbell Co. Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,[16] it considered Rule 1 in view of the classification of goods as either parts of something or as entities in their own right. In that decision, the Tribunal stated that "the first consideration of the Tribunal is whether the goods are named or generically described in a particular heading of the tariff schedule. If the

14. (1981), 7 T.B.R. 423.
15. *Supra*, note 2, Schedule I.
16. 5 T.C.T. 1150, Appeal No. AP-91-131, March 16, 1992.

goods are named in the heading, they are classified there, subject to any relevant legal note. If not, the Tribunal would give consideration to the heading of the product for which the goods are claimed to be a part.[17]"

Before considering whether the Ag-Bags are named in a particular heading or are classifiable as parts of another product for the purposes of classification within the tariff schedule, the Tribunal is of the view that it must first consider whether the Ag-Bags are parts of the Ag-Bagger in the generic sense.

The Tribunal recognizes that, in determining whether goods are parts of other goods, the facts of each individual case must be considered. In the present appeals, the Tribunal relies on the following facts in support of its finding that the Ag-Bags are not parts of the Ag-Bagger: (1) the Ag-Bags remain attached to the Ag-Bagger for only one day, but continue to perform as a storage unit for approximately two years after they are removed from the Ag-Bagger; (2) it takes a very brief period of time, about 3 to 5 minutes, to attach the Ag-Bags to the Ag-Bagger; (3) the Ag-Bags must be removed from the Ag-Bagger in order for proper fermentation of the feed to take place and to allow them to perform effectively as a storage unit; (4) the Ag-Bags are not reusable; and (5) numerous Ag-Bags may be used during the life of one Ag-Bagger.

The Tribunal believes that there is merit in the distinction made by the Tariff Board in its decision in *Xerox Canada* between parts and supplies. In the Tribunal's view, the Ag-Bags lack, in particular, the degree of permanence in respect of their role with the Ag-Bagger necessary for them to be considered as parts of the machine. Although Ag-Bags will continue to be used for approximately two years after they are removed from the Ag-Bagger, they are attached to the machine for only a day or so. Furthermore, similar to the goods in issue in *Light Touch Stenographic Services Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*[18] and *Canadian Totalisator Company, A Division of General Instruments of Canada v. The Deputy Minister of National Revenue for Customs and Excise;*[19] Ag-Bags are intended to be used only once with the Ag-Bagger. While the Tribunal accepts that the proper fermentation and storage of the feed require the feed to be compacted in the Ag-Bags and that this factor requires that the Ag-Bags operate jointly with the Ag-Bagger for a brief period of time, in the Tribunal's view, the Ag-Bags' primary function is performed while they are not attached to the Ag-Bagger.

Therefore, the Tribunal is of the view that the Ag-Bags do not constitute parts of the Ag-Bagger and, consequently, may not be considered as parts of agricultural machinery for the purposes of classification.

The Tribunal must now consider whether the Ag-Bags are specifically named or generically described in heading No. 39.17 as "[t]ubes ... of plastics" or in heading No. 39.23 as "[a]rticles for the conveyance or packing of goods, of plastics."

The Tribunal does not find that the Ag-Bags are either specifically named or generically described in heading No. 39.17 as "[t]ubes ... of plastics." The Explanatory Notes to the Harmonized Commodity Description and Coding System[20] to heading No. 39.17 define "tubes, pipes and hoses" as "(i) hollow products ... of a kind generally used for conveying, conducting or distributing gases or liquids" and

17. *Ibid.* at 1151.
18. Canadian International Trade Tribunal, Appeal No. 2809, June 23, 1989.
19. (1986), 11 T.B.R. 120.
20. Customs Co-operation Council, 1st ed., Brussels, 1986.

"(ii) sausage casings ... and other lay-flat tubing." In the Tribunal's opinion, the Ag-Bags are properly described as bags, given that this is how they are commonly referred to and that they are sealed at one end for the purposes of compacting the feed. The Tribunal is persuaded by the arguments of counsel for the respondent that, similar to cartons which are flat and folded at the time of importation, to find that the Ag-Bags are tubes as opposed to bags would lead to an illogical conclusion. Therefore, in the Tribunal's view, the Ag-Bags are not "tubes" for the purposes of classification in heading No. 39.17.

In the Tribunal's view, the Ag-Bags are generically described in heading No. 39.23 as "[a]rticles for the ... packing of goods, of plastics." The Tribunal is not persuaded by the arguments of counsel for the appellant that implicit in the term "packing" is the notion that goods are intended to be moved. In the Tribunal's view, the term "packing," in the grammatical and ordinary sense, means that goods are to be filled, whether they end up being moved or remain stationary. The Tribunal agrees with counsel for the respondent that the fact that the Ag-Bags provide for the process of fermentation of the feed does not preclude them from being classified in this heading. The Tribunal further finds that the Ag-Bags are properly classified in heading No. 39.23 and more specifically under tariff item No. 3923.21.00 as bags of polymers of ethylene.

Accordingly, the appeals are dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Lise Bergeron
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