

Ottawa, Monday, July 17, 1995

Appeal No. AP-94-188

IN THE MATTER OF an appeal heard on February 21, 1995,
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 June 20, 1994, with respect to requests
for re-determination under section 63 of the *Customs Act*.

BETWEEN

HFI HARDWOOD FLOORING 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

Raynald Guay

Raynald Guay

Member

Charles A. Gracey

Charles A. Gracey

Member

Michel P. Granger

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-188

HFI HARDWOOD FLOORING INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the Customs Act from three decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the Customs Act. The issue in this appeal is whether certain tongued and grooved hardwood flooring is properly classified under tariff item No. 4418.90.90 as other builders' joinery and carpentry of wood, as determined by the respondent, or should be classified under tariff item Nos. 4409.20.11 and 4409.20.19 as continuously shaped wood flooring, of oak and other hardwood, respectively, as claimed by the appellant.

HELD: *The appeal is allowed. The Explanatory Notes to the Harmonized Commodity Description and Coding System to heading No. 44.09 state that the heading covers timber that has been continuously shaped along any of its edges, whether or not end-jointed. The Tribunal finds that a tongue-and-groove joint is an end joint. Therefore, the goods of heading No. 44.09 can be considered "continuously shaped" with a uniform cross-section throughout their length though they have tongued and grooved ends. The Tribunal finds, therefore, that the flooring in issue meets the description of goods classifiable in heading No. 44.09 and not that of goods classifiable in heading No. 44.18.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: February 21, 1995
Date of Decision: July 17, 1995*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Raynald Guay, Member
Charles A. Gracey, Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Anne Jamieson

*Appearances: Michael A. Kelen, for the appellant
Ian McCowan, for the respondent*

Appeal No. AP-94-188

HFI HARDWOOD FLOORING INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
RAYNALD GUAY, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from three decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the Act. The issue in this appeal is whether certain tongued and grooved hardwood flooring is properly classified under tariff item No. 4418.90.90 of Schedule I to the *Customs Tariff*² as other builders' joinery and carpentry of wood, as determined by the respondent, or should be classified under tariff item Nos. 4409.20.11 and 4409.20.19 as continuously shaped wood flooring, of oak and other hardwood, respectively, as claimed by the appellant.

Though not provided in evidence by the parties, it appears from the file that the three decisions of the respondent include eight separate importations over the period from April 16, 1992, to December 16, 1993. In rendering the decisions under subsection 63(3) of the Act, the respondent noted that the flooring in issue is tongued and grooved along both sides and ends. As such, it was argued that the Explanatory Notes to the Harmonized Commodity Description and Coding System³ (the Explanatory Notes) to heading No. 44.09 exclude the flooring in issue from classification in that heading as it has neither a repetitive design in relief nor a uniform cross-section throughout its length. With regard to the latter point, the cross-section of the flooring at the tongued and grooved ends was seen as different from that at any other place along the length of the flooring.

The flooring in issue is oak flooring, pre-finished oak flooring, red oak flooring, cherry flooring and maple flooring, consisting mostly of strip boards that are 2 3/4 in. or less in width. Some of the flooring consists of planks that are 3 in. or more in width. Pre-finished oak flooring is merely oak flooring that has been sanded and stained at the flooring mill prior to importation. All of the flooring in issue is tongued and grooved on all four sides. A tongue is milled on two edges, and a groove is milled on the opposite two edges.

-
1. R.S.C. 1985, c. 1 (2nd Supp.).
 2. R.S.C. 1985, c. 41 (3rd Supp.).
 3. Customs Co-operation Council, 1st ed., Brussels, 1986.

With respect to this appeal, the relevant tariff nomenclature of Schedule I to the *Customs Tariff* reads as follows:

44.09 *Wood (including strips and friezes for parquet flooring, not assembled) 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.*

4409.20 *-Non-coniferous*

---Flooring:

4409.20.11 *----Of oak*

4409.20.19 *----Other*

44.18 *Builders' joinery and carpentry of wood, including cellular wood panels, assembled parquet panels, shingles and shakes.*

4418.90 *-Other*

4418.90.90 *---Other*

Mr. Robert E. Kulhawy, President and Chief Executive Officer of HFI Hardwood Flooring Inc., testified on behalf of the appellant. Mr. Kulhawy is on the Board of Directors of the National Wood Flooring Association and is Chairman of its Environmental Committee. He teaches courses on the installation of hardwood flooring and is the author of numerous articles pertaining to wood flooring. He explained that the appellant is a wholesaler and exporter of wood flooring with five distribution centres and two sales offices across Canada. The appellant has been in this business since 1981. Mr. Kulhawy told the Tribunal that, prior to that time, he installed hardwood floors.

Mr. Kulhawy explained that hardwood flooring is distributed in pieces ranging in length from 12 in. to 8 ft. He noted that almost all hardwood flooring is tongued and grooved along its sides and ends to facilitate continuous assembly.⁴ A hardwood floor is supported by a subfloor, which is further supported by floor joists. As such, he insisted, the end joints are not structural joints. On questioning from the Tribunal, Mr. Kulhawy explained that wood flooring is merely a floor finish, just as is carpet or linoleum.

4. During cross-examination, Mr. Kulhawy said that industry statistics indicate that 99.8 percent of all hardwood flooring commercially manufactured in North America has tongued and grooved ends. He admitted that this figure may not include some small operations. However, to the best of his knowledge, none of the major Canadian mills manufacture wood flooring without tongued and grooved ends.

Having explained that a joiner is a carpenter specializing in cabinetmaking, Mr. Kulhawy insisted that a tongue and groove on a piece of flooring are not joinery and that a person who installs wood flooring is not a joiner. He added that hardwood flooring is continuously shaped along its length.

The appellant's second witness was Mr. Michael Nauth, Coordinator of the Carpentry Department at Algonquin College in Ottawa, Ontario. According to Mr. Nauth, the flooring in issue is continuously shaped and has a uniform cross-section. He added that the tongued and grooved end of the flooring could be described as an end joint.

Mr. Nauth does not consider tongued and grooved hardwood flooring to be builders' joinery. He told the Tribunal that tongue-and-groove joints on hardwood flooring may serve, in part, to support a load.⁵ However, without a subfloor, a hardwood floor would not be structurally sound. In contrast, a joiner's joints would result in a structurally sound assemblage of wood. After referring to a dictionary definition of "joiner" and giving examples of the types of structural joints that a joiner would make,⁶ Mr. Nauth added that a joiner would not make a tongue-and-groove joint. He stated that a hardwood floor installer is typically not a carpenter or joiner. Mr. Nauth reiterated that hardwood flooring is usually tongued and grooved on all four edges.

During cross-examination, Mr. Nauth acknowledged that the cross-section of the flooring in issue at the tongued and grooved ends is different from that along its length. However, he clarified that, within the industry, the flooring in issue would be considered as having a uniform cross-section. The tongued and grooved ends, he explained, are "just joints at the end[s]" of the boards.

The appellant's third witness was Mr. Gilbert H. Godard, Affairs Officer of the Canadian Lumbermen's Association (the CLA). Mr. Godard explained that the CLA represents approximately 250 Canadian manufacturers and wholesalers of timber products. He told the Tribunal that there are approximately 25 Canadian manufacturers of hardwood flooring of "importance," of which 12 are members of the CLA. In his opinion, all of the major Canadian manufacturers make hardwood flooring with tongued and grooved ends. Referring to Exhibit A-1, a sample of the flooring in issue, Mr. Godard said that it was continuously shaped because of the uniform thickness and width along its length and that it had a uniform cross-section. To his knowledge, in the Canadian trade, the term "builders' joinery" does not refer to a piece of tongued and grooved hardwood flooring.

In argument, counsel for the appellant referred to the terms of heading No. 44.09, which reads "continuously shaped ... along any of its edges." According to counsel, the evidence indicates that the flooring in issue is continuously shaped in that it is tongued and grooved along all four edges. Referring to the evidence of the appellant's three witnesses, counsel added that the flooring in issue has a uniform cross-section. Furthermore, the Explanatory Notes to heading No. 44.09 indicate that the heading includes such goods whether or not they are "end-jointed, e.g. finger-jointed." Counsel recalled the evidence of Mr. Nauth that a tongued and grooved end could be considered an end joint.

5. During cross-examination, however, Mr. Nauth clarified that, if the flooring were 1½ to 2 in. thick, the tongued and grooved end joints would have a structural aspect.

6. These included a dovetail joint, a mortise and tenon joint and a dowelled joint.

With respect to heading No. 44.18, counsel for the appellant argued that “[b]uilders’ joinery and carpentry of wood” include such things as doors, windows, shutters, stairs and door or window frames. Such goods are more sophisticated than the tongued and grooved flooring in issue. Counsel noted the testimony of the appellant’s witnesses to the effect that hardwood flooring is not joinery nor is it made by a joiner or carpenter. Furthermore, wood with a tongued and grooved end cannot be considered “[w]ood which has been mortised or tenoned, dovetailed or similarly worked at the ends” such as to be excluded from heading No. 44.09 by the Explanatory Notes to that heading.⁷

Counsel for the respondent explained that the respondent has taken the position that the flooring in issue is excluded from heading No. 44.09 because it has been worked at the ends. Counsel submitted that all boards that have been worked at the ends to facilitate joining should be classified in heading No. 44.18.

Counsel for the respondent referred to the Explanatory Notes to heading No. 44.09, which indicate that “[c]ontinuously shaped wood covers ... products with a uniform cross-section.” He argued that the flooring in issue is seen not to have a uniform cross-section when a comparison is made between the point of the tongue-and-groove joints and any other point along the length of the flooring. Furthermore, according to counsel, the flooring in issue is excluded from heading No. 44.09, as a tongue-and-groove joint at the end of the flooring can be considered “similarly worked” to wood that has been mortised, tenoned or dovetailed at its ends.⁸

With respect to the Explanatory Notes to heading No. 44.18, which indicate that the heading “applies to woodwork ... used in the construction of any kind of building, etc., in the form of assembled goods or as recognisable unassembled pieces,” counsel for the respondent argued that “recognisable unassembled pieces” describes an unassembled flooring system. Counsel submitted that the term “carpentry,” as found in heading No. 44.18, has broad import and could describe the act of laying a hardwood floor.

In considering the proper tariff classification of the flooring in issue, the Tribunal is guided by Rule 1 of the General Rules for the Interpretation of the Harmonized System.⁹ Rule 1 states that the classification of goods shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Furthermore, under section 11 of the *Customs Tariff*, the Tribunal is to have regard to the Explanatory Notes for purposes of interpreting the headings and subheadings in Schedule I to the *Customs Tariff*.

To paraphrase heading No. 44.09 for purposes of this appeal, the Tribunal notes that it covers continuously shaped, including tongued and grooved wood, whether or not it has been finger-jointed. The relevant Explanatory Notes explain that the wood classifiable in heading No. 44.09 includes timber that “has been continuously shaped along any of its edges ... to facilitate subsequent assembly ... whether or not ... end-jointed, e.g. finger-jointed.” Continuously shaped wood is defined to cover products “with a uniform cross-section throughout the length.” There is no question that the flooring in issue is tongued and grooved

7. Paragraph (b) at 629.

8. *Ibid.*

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

along four edges. The evidence is also clear that such joints facilitate subsequent assembly. At issue is whether the flooring can be considered “continuously shaped” because it has tongued and grooved ends.

The Tribunal finds it significant that the relevant Explanatory Notes have added that the continuously shaped wood of heading No. 44.09 may be end-jointed, though the terms of the heading refer only to finger-jointed wood. Though the Explanatory Notes define “end-jointed” to include finger-jointed, the Tribunal believes that the latter is provided only as an example of the former and that reference to an end joint may encompass more than a finger joint. As the “continuously shaped” wood of heading No. 44.09 may be end-jointed, the Tribunal believes that the flooring in issue can be classified in heading No. 44.09 if the tongue-and-groove joints found at the ends of the flooring are considered end joints. In this regard, the Tribunal notes the testimony of Mr. Nauth that such tongue-and-groove joints can be considered end joints.

The Explanatory Notes to heading No. 44.09 exclude from that heading “[w]ood which has been mortised or tenoned, dovetailed or similarly worked at the ends,” indicating that such goods are classifiable in heading No. 44.18. The Tribunal believes, therefore, that an end joint would not be found on wood that has been so worked at its ends. The Tribunal referred to the Explanatory Notes to heading No. 44.18 to understand what is classifiable in that heading. The Tribunal notes that the respondent classified the flooring in issue in heading No. 44.18 as “[b]uilders’ joinery and carpentry of wood.”

The Explanatory Notes to heading No. 44.18 state that “carpentry” refers to “woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc.” The evidence tendered in this appeal supports the conclusion that the flooring in issue is not used for structural purposes. In this regard, the Tribunal notes that a hardwood floor must be supported by a subfloor, which is supported by joists, that it is considered a mere floor covering by the industry and that flooring is one of the last installations in a house. The Tribunal also notes that the flooring is not used for anything akin to scaffolding or arch supports. Thus, the Tribunal believes that the flooring in issue does not qualify as “carpentry.”

The Explanatory Notes to heading No. 44.18 state that “joinery” applies “more particularly to builders’ fittings (such as doors, windows, shutters, stairs, door or window frames).” The Tribunal notes that the appellant’s three witnesses testified that tongued and grooved hardwood flooring was not builders’ joinery. Mr. Nauth’s testimony, for instance, was to the effect that there is a difference between the joints associated with builders’ joinery and tongue-and-groove joints. On this basis, the Tribunal concludes that the flooring in issue is not builders’ joinery.

Furthermore, the Tribunal believes that a tongue-and-groove joint is not similar to a tenon, mortise, dovetail or other similar joint that would be associated with builders’ joinery. Based on the testimony of Mr. Nauth, the Tribunal believes that the tongue-and-groove joints at the ends of the flooring in issue can be considered end joints as mentioned in the Explanatory Notes to heading No. 44.09.

The Explanatory Notes to heading No. 44.09 state that the heading covers timber that has been continuously shaped along any of its edges, whether or not end-jointed. The Tribunal finds that a tongue-and-groove joint is an end joint. Therefore, the goods of heading No. 44.09 can be considered “continuously shaped” with a uniform cross-section throughout their length though they have tongued and

grooved ends. The Tribunal finds, therefore, that the flooring in issue meets the description of goods classifiable in heading No. 44.09 and not that of goods classifiable in heading No. 44.18.

Accordingly, the appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member

Raynald Guay

Raynald Guay
Member

Charles A. Gracey

Charles A. Gracey
Member