

Ottawa, Thursday, October 26, 1995

Appeal No. AP-94-232

IN THE MATTER OF an appeal heard on March 28, 1995, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated August 29, 1994, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

KAPPLER CANADA LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Lise Bergeron
Lise Bergeron
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-232

KAPPLER CANADA LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under subsection 67(1) of the Customs Act from a decision of the Deputy Minister of National Revenue. The goods in issue are coveralls imported into Canada by the appellant and used by persons employed in the removal of asbestos building materials. The appellant sought concessionary duty relief in respect of the goods in issue on the basis that they qualified under Code 1001 of Schedule II to the Customs Tariff. The respondent determined that the goods in issue did not qualify under Code 1001, as they were not protective suits for use in a noxious atmosphere.

HELD: *The appeal is allowed. The Tribunal is of the view that, to qualify under Code 1001, the goods in issue need not protect the wearer from every possible risk that a noxious atmosphere might pose. In the Tribunal's view, it is sufficient for the goods in issue to protect the wearer against some significant risk posed by that atmosphere. The Tribunal is of the view that the goods in issue protect the wearer and third parties from the risk of inhaling asbestos that, absent protective clothing, could have otherwise settled on the wearer's clothing or skin.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 28, 1995
Date of Decision: October 26, 1995

Tribunal Members: Lise Bergeron, Presiding Member
Charles A. Gracey, Member
Desmond Hallissey, Member

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Anne Jamieson

Appearances: D. Kevin Davis, for the appellant
Josephine A.L. Palumbo, for the respondent

Appeal No. AP-94-232

KAPPLER CANADA LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LISE BERGERON, Presiding Member
CHARLES A. GRACEY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue made pursuant to subsection 63(3) of the Act. The goods in issue are coveralls made of a fabric called “Tyvek.” Between July 8 and November 11, 1993, the appellant imported the goods in issue into Canada on six separate occasions. On importation, the goods in issue were classified by the appellant under tariff item No. 6210.10.00 of Schedule I to the *Customs Tariff*.² The appellant also sought concessionary duty relief in respect of the goods in issue on the basis that they qualified under Code 1001 of Schedule II to the *Customs Tariff*. The respondent determined that the goods in issue did not qualify for concessionary duty relief under Code 1001.

The issue in this appeal is whether the goods in issue qualify for duty relief under Code 1001 of Schedule II to the *Customs Tariff*.

The goods in issue, Tyvek coveralls, are one-piece hooded coveralls with a zippered front, attached feet and elasticized openings on the sleeves and hood. At the outset of the hearing held in this appeal, counsel for the appellant advised the Tribunal that the appellant was seeking duty relief only in respect of Tyvek coveralls bearing stock No. 1414. The goods in issue are worn by, among others, persons employed in the removal of asbestos building materials from various sorts of structures.

Code 1001 provides for concessionary duty relief for protective suits and parts thereof classified in certain headings, including heading No. 62.10, provided the suits and parts thereof are for use in a noxious atmosphere.

The Tribunal notes that it was agreed by the parties that a work site at which building materials made of asbestos are being installed or removed can be considered to have a noxious atmosphere. The only remaining issue for the Tribunal to consider in this appeal is, therefore, whether the goods in issue are “[p]rotective suits” for use in such an atmosphere.

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

Mr. Mike L. Willis, General Manager of Kappler Canada Ltd., gave evidence on behalf of the appellant. After providing the Tribunal with a general description of the goods in issue, Mr. Willis went on to give testimony regarding the Tyvek fabric from which the goods in issue are made. He testified that Tyvek is basically a type of polyethylene, produced through a “continuous spray” process which has the effect of eliminating or reducing the permeability of the fabric. Mr. Willis testified that, in an atmosphere containing asbestos, garments made of Tyvek create an effective barrier between workers and particles of asbestos. Particles of asbestos cannot pass through Tyvek due to its very small “pores.”

During cross-examination, Mr. Willis acknowledged that the goods in issue are used in various applications, only one of which is the installation or removal of asbestos-based products. He also acknowledged that the goods in issue do not protect the wearer’s hands or face and are not equipped with any form of connecting device that could accommodate a respirator.

Dr. David C.F. Muir, a professor of medicine and Director of the Occupational Health Department at McMaster University, gave evidence on behalf of the appellant. Dr. Muir was accepted by the Tribunal as an expert in occupational and environmental health.

Dr. Muir testified that there are two means by which asbestos contamination may occur as a consequence of working in an asbestos-laden atmosphere. First, fibres that are suspended in the air at a work site may be inhaled directly by persons working in the environment. Dr. Muir testified that persons working at such a work site are required by law to wear respirators in order to prevent this from occurring. Second, if persons working in an asbestos-filled atmosphere do not wear disposable protective clothing or undergo a thorough decontamination when they leave the work site, particles which have lodged in or settled on their skin or clothing may subsequently be shed and then inhaled by them or a third party. Dr. Muir indicated that inhalation by this secondary means posed a significant health risk and that workers employed in asbestos removal were, therefore, required by law to wear protective clothing.

Dr. Muir testified that he had had an opportunity to examine the goods in issue and was of the opinion that they were suitable for use as protective suits for the removal of asbestos. He based his view on the fact that the goods in issue are one-piece suits made of a material which is impervious to asbestos particles. He also noted that the goods in issue have elasticized sleeves and a close-fitting elasticized hood which would allow a worker to wear a respirator and safety goggles. Dr. Muir testified that, in his experience, it would be usual to have a breathing apparatus built right into a protective suit designed for use in applications such as asbestos removal.

During cross-examination, Dr. Muir acknowledged that the goods in issue must be used in conjunction with a respirator to provide protection from the risk of inhaling asbestos fibres at the work site. He also testified that the only serious health risk posed by exposure to asbestos stemmed from the possibility of inhalation and that, while the goods in issue do not directly prevent inhalation, by preventing the migration of particles onto the skin and clothing, the goods in issue effectively prevent the second means of contamination described above.

Counsel for the appellant argued that, as Schedule II to the *Customs Tariff* provides no definitions for the words “protective,” “suit” or any of the other words contained in Code 1001, those words should be given their plain and ordinary meaning. Counsel argued that, on the basis of the evidence given by Dr. Muir, the goods in issue are designed to serve a protective function.

Counsel for the respondent argued that the Tribunal should consider the legislative intent underpinning Code 1001 in deciding what meaning to attribute to the words of that provision. In particular, counsel referred the Tribunal to a memorandum from an official with the Department of Finance, in which the view was expressed that Code 1001 was intended to include protective suits, provided such suits are equipped with a breathing apparatus. In counsel's submission, as the goods in issue do not come with a breathing apparatus or make provision for the attachment of such an apparatus, they do not protect the wearer from the risk of inhalation of asbestos.

Counsel for the respondent also argued that the goods in issue did not fall within the definition of "suit" contained in Note 3 to Chapter 62 of Schedule I to the *Customs Tariff*. Counsel pointed out that, whereas the definition of "suit" in Note 3 provides that a suit means a set of garments composed of two or three pieces, the goods in issue are one-piece garments. On that basis, counsel argued that the goods in issue are not suits and, therefore, do not come within the ambit of Code 1001.

The Tribunal is of the view that the goods in issue do come within the ambit of Code 1001. To reach that conclusion, the Tribunal had to be satisfied that the goods in issue are protective suits or parts thereof for use in a noxious atmosphere. With respect to the latter issue, the Tribunal is satisfied that there is ample evidence to support the view that the atmosphere at a work site where asbestos is being removed is noxious. The Tribunal notes that the parties were on agreement on this point.

Counsel for the respondent argued that the goods in issue are not suits because they do not fall within the definition of "suit" set out in Note 3 to Chapter 62. In support of the view that that definition should apply to Code 1001, counsel referred the Tribunal to subsection 68(3) of the *Customs Tariff*. That subsection provides that "[t]he words and expressions used in Schedule II, wherever those words and expressions are used in Schedule I, have the same meaning as in Schedule I."

The Tribunal notes that the preamble to Note 3 to Chapter 62 provides that the definitions set out in that note apply only to heading Nos. 62.03 and 62.04. The parties agreed that the goods in issue are properly classified in heading No. 62.10. The Tribunal is, therefore, of the view that, notwithstanding subsection 68(3) of the *Customs Tariff*, the definition of "suit" found in Note 3 does not apply to Code 1001. Taken to its logical conclusion, counsel for the respondent's argument would result in a one-piece suit equipped with a respirator being excluded from Code 1001, on the basis that it does not qualify as a "suit."

The Tribunal did not find counsel for the respondent's argument concerning the legislative intent underpinning Code 1001 to be persuasive. The memorandum from the Department of Finance put in evidence in support of that argument was not put in through a witness. The Tribunal was not made aware of the author of the memorandum or the basis upon which the author was able to express views on the legislative intent behind Code 1001. Perhaps more importantly, there is, in the Tribunal's view, nothing in the language of Code 1001 to suggest that, in order to qualify for duty relief under that provision, a protective suit must be equipped with, or have provision for, the attachment of a breathing apparatus.

The Tribunal is satisfied that the goods in issue are protective suits for use in a noxious atmosphere. The Webster's New Twentieth Century Dictionary of the English Language defines "protective," in part, as "affording protection."³ That dictionary defines "protection," in part, as "the act of protecting; defense;

3. Second ed. (New York: Simon & Schuster, 1979) at 1446.

shelter from evil; preservation from loss, injury, or annoyance” and “one who or that which protects.”⁴
(Emphasis added)

It is true that the goods in issue do not, by themselves, afford a person working in a noxious atmosphere with protection against the risk of inhalation of asbestos particles. However, the Tribunal is of the view that, to qualify under Code 1001, the goods in issue need not protect the wearer from every possible risk that a noxious atmosphere might pose. In the Tribunal’s view, it is sufficient for the goods in issue to protect the wearer against some significant risk posed by that atmosphere. The Tribunal is of the view that, by providing an effective barrier between asbestos-laden atmosphere at a work site and any person wearing the goods in issue, they serve to protect the wearer and third parties from the risk of inhaling asbestos that could have otherwise settled on the wearer’s clothing or skin. The Tribunal accepts Dr. Muir’s testimony that the risk of exposure via this secondary means poses a significant health risk. The Tribunal also accepts Dr. Muir’s evidence that the goods in issue are well-suited for use in an asbestos-laden atmosphere to protect against this health risk.

Accordingly, the appeal is allowed.

Lise Bergeron
Lise Bergeron
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member

4. *Ibid.*