CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, May 12, 1997

Appeal No. AP-95-065

IN THE MATTER OF an appeal heard on August 28 and 29, 1996, 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 May 2, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

STEEN HANSEN MOTORCYCLES LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

AND

MTD PRODUCTS LIMITED, MARUBENI CANADA LTD. AND KUBOTA CANADA LTD. **Interveners**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-95-065

STEEN HANSEN MOTORCYCLES LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

MTD PRODUCTS LIMITED, MARUBENI CANADA LTD. AND KUBOTA CANADA LTD. **Interveners**

The goods in issue are various models of lawn tractors manufactured by The Murray Ohio Manufacturing Co. and imported by the appellant, which carries on business in Edmonton, Alberta. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8433.11.00 as powered mowers for lawns, parks or sports-grounds, with the cutting device rotating in a horizontal plane, as determined by the respondent, or should be classified under tariff item No. 8701.90.19 as other tractors, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal is of the view that the evidence shows that the goods in issue are not constructed essentially for pushing many different types of implements, but rather are constructed essentially for use with mower decks for cutting grass. The Tribunal is also of the view that the goods in issue come within the wording of heading No. 84.33 and the relevant Section and Chapter Notes.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	August 28 and 29, 1996
Date of Decision:	May 12, 1997
Tribunal Members:	Lyle M. Russell, Presiding Member Arthur B. Trudeau, Member Charles A. Gracey, Member
Counsel for the Tribunal:	Hugh J. Cheetham
Clerks of the Tribunal:	Anne Jamieson and Margaret Fisher
Appearances:	Douglas J. Bowering, for the appellant Josephine A.L. Palumbo, for the respondent Michael A. Kelen, for MTD Products Limited Richard A. Wagner, for Marubeni Canada Ltd. and Kubota Canada Ltd.

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-95-065

STEEN HANSEN MOTORCYCLES LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

MTD PRODUCTS LIMITED, MARUBENI CANADA LTD. AND KUBOTA CANADA LTD. **Interveners**

TRIBUNAL: LYLE M. RUSSELL, Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal pursuant to subsection 67(1) of the *Customs Act*[1] (the Act) from decisions of the Deputy Minister of National Revenue dated May 2, 1995.

The goods in issue are various models of lawn tractors manufactured by The Murray Ohio Manufacturing Co. (Murray) and imported in 1994 by the appellant, which carries on business in Edmonton, Alberta. They were imported under tariff item No. 8433.11.00 of Schedule I to the *Customs Tariff*[2] as riding mowers. The appellant subsequently requested that they be reclassified under tariff item No. 8701.90.19 as tractors. The respondent denied this request, and the appellant filed a request for re-determination. By decision dated May 2, 1995, the respondent maintained the classification of the goods in issue under tariff item No. 8433.11.00 on the basis that: (i) their design fails to satisfy the requirements of the definition of "tractor" in Note 2 of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[3] (the Explanatory Notes) to Chapter 87; (ii) they are constructed essentially to cut grass; and (iii) they are distinguishable from the goods considered by the Tribunal in *Marubeni Canada Ltd.* v. *The Deputy Minister of National Revenue*[4] and *Ford New Holland Canada Ltd.* v. *The Deputy Minister of National Revenue*,[5] as they are not front mount machines.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8433.11.00 as powered mowers for lawns, parks or sports-grounds, with the cutting device rotating in a horizontal plane, as determined by the respondent, or should be classified under tariff item No. 8701.90.19 as other tractors, as claimed by the appellant.

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.
4. Appeal No. AP-93-311, December 14, 1994.
5. Appeal No. AP-93-388, February 3, 1995.

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There were three interveners in this case. Marubeni Canada Ltd. (Marubeni) and Kubota Canada Ltd. (Kubota) appeared in support of the appellant and MTD Products Limited (MTD) appeared in support of the respondent.

At the outset of the hearing, the appellant's representative clarified that only six models of Murray machines were under appeal, namely, model Nos. 38702, 40900, 42814, 42900, 46800 and 46900, all of which are referred to as lawn tractors. He also clarified that the models identified as Nos. 30550 and 30560, which are referred to as rear-engine lawn mowers, and as No. 46170, which is referred to as a garden tractor, are not in issue. The representative indicated that he would not be calling any witnesses and filed import documents which, he submitted, showed that the goods in issue are imported separately from the attachments used with them.

Counsel for the respondent called two witnesses. The first witness was Mr. Don J. Theroux, Market Manager for Murray Canada Inc. (Murray Canada). Mr. Theroux testified that the goods in issue are made by Murray and are identical or similar to other lawn tractors imported and sold by Murray Canada. Mr. Theroux stated that the goods in issue were designed and sold to cut grass and not to haul or push a vehicle or an appliance. He indicated that lawn tractors and rear-engine riding mowers are essentially the same, the difference between them being the location of the engine and the operator's seat. To the best of Mr. Theroux's knowledge, a mower deck is sold with every lawn tractor or power unit. In most cases, a lawn tractor is imported with the deck attached.

Mr. Theroux testified that Murray Canada sells power units with the mower deck attached as a single unit and that 99 percent of users never take the deck off. He acknowledged that approximately l percent of users have either a blade or a snowblower that they use with the power unit. In this regard, he provided sales figures for the period from May 1994 to April 1996. These figures show that Murray Canada sold over 3,500 lawn tractors, 28 blades and 19 snowblowers during that period.

Mr. Theroux was asked to compare the goods in issue with the goods that were the subject of the appeals in *Marubeni* and *Ford New Holland*. He stated that the goods in issue do not compete with the other goods, as they are different products, aimed at different customers. He indicated that, while the goods in issue are designed for the homeowner to cut grass, the goods which were the subject of the previous appeals are used in commercial, industrial and maintenance applications.

In cross-examination, Mr. Theroux explained that the mower decks were carried by the power unit, in that they are bolted underneath the power unit using cotter pins. He testified that the snowblower and blade attachments are offered primarily as a selling feature of the goods in issue.

The respondent's second witness was Mr. Harold J. Schramm of Downers Grove, Illinois, where he is a principal in a consulting business and also teaches in the area of machine design and development at a university and college. Mr. Schramm had a long career in the design and development of tractors and related vehicles at International Harvester Co. He is a member of a number of professional associations, including the American Society of Agricultural Engineers, the Society of Automotive Engineers and the American Society for Quality Control. The Tribunal accepted Mr. Schramm as an expert in tractor and lawn mower design.

In Mr. Schramm's opinion, the goods in issue are essentially designed and constructed to cut grass, as are rear-engine riding mowers. He stated that the goods in issue are referred to as "lawn tractors" because consumers wanted a riding mower that looked like a tractor. Therefore, a lawn tractor was designed which was essentially a riding mower with the engine placed at the front. He was also of the opinion that the mower

deck is an integral part of a lawn tractor because there is little else that can be done with the machine other than a limited amount of snowblowing and blade work.

Mr. Schramm was asked to compare the goods in issue with the goods that were the subject of the appeals in *Marubeni* and *Ford New Holland*. He stated that, although the basic design purpose of the other goods was also to cut grass, they had a different chassis design and were put to different uses. As commercial machines, they have the power and durability to operate for longer periods than a lawn tractor. This power and durability also allow them to use full engine power wherever possible. He also noted that the attachments on the other goods are found at the front of the machines and are easily attached and replaced. He also testified that the other goods have a true power take-off unit that can be used to operate other equipment. He agreed that comparing the two types of machines was like comparing apples and oranges.

With respect to Mr. Schramm's views as to what constitutes a tractor, he testified that a lawn tractor does not have the tractive ability to truly push or haul a vehicle or an appliance. He stated that, if one tried to do so, the lawn tractor would break down.

In cross-examination, Mr. Schramm stated that, while the goods considered by the Tribunal in *Marubeni* and *Ford New Holland* may come within the definition of "tractor" in the *Customs Tariff* and may have a number of the elements needed to be a tractor, in his opinion, they were not tractors because insufficient power from the power unit was used for traction.

Counsel for MTD called three witnesses. The first witness was Mr. John C. Hohmeier, President of MTD Products Limited. He has been with the company in various capacities since 1979. Mr. Hohmeier explained that MTD was established in 1963 through the purchase of Sale Engineering of Kitchener, Ontario, by MTD Products Inc. of Cleveland, Ohio. MTD has manufactured equipment since that time at its facilities in Kitchener, where it currently employs 750 people. To the best of Mr. Hohmeier's knowledge, MTD is the largest manufacturer of lawn tractors in Canada and has about 50 percent of the Canadian market. He stated that MTD intervened in this appeal because the goods in issue are very similar to the lawn tractors that MTD produces. With respect to the *Marubeni* and *Ford New Holland* appeals, Mr. Hohmeier stated that MTD did not intervene in those cases because it felt that the goods in those appeals were sold into a different market and, thus, did not compete directly with MTD's products. He added that those machines are targeted to commercial use and are much bigger, some four times heavier by weight, than MTD's machines.

Mr. Hohmeier provided the Tribunal with recent MTD sales figures for lawn tractors and implements.[6] These figures show that the number of snowblowers and blades combined sold by MTD in 1995 represented 0.8 percent of the number of lawn tractors sold by MTD in that year. He also stated that the mower decks are attached to the power units at MTD's factory and are always sold as part of an integrated unit. To the best of his knowledge, customers very seldom remove the mower decks from the power units.

In cross-examination, Mr. Hohmeier agreed that MTD advertises and makes available implements other than mower decks as options for purchasers. He stated, however, that, while these other implements were options, they were not very functional options.

The next witness for MTD was Mr. Hartmut Kaesgen, Executive Vice-President of MTD Products Inc. In this position, Mr. Kaesgen is responsible for engineering and product development. He has been a member of the board of directors of MTD Products Inc. since 1985. Mr. Kaesgen testified that the goods in

6. Exhibit C-1 (protected).

issue are integrated machines whose two components are useless one without the other. With respect to the machines that were the subject of the appeals in *Marubeni* and *Ford New Holland*, Mr. Kaesgen testified that these machines were considerably heavier and larger than the goods in issue and were designed for use as professional groundskeeping equipment.

The last witness for MTD was Mr. Hans Hauser of Columbia Station, Ohio. Mr. Hauser was accepted as an expert in the design and operation of the transmissions in the goods in issue. He testified that none of the transmissions in the lawn tractors in the 12- to 18-hp range could transmit more than 2.5 to 3 hp on an intermittent basis. If the machines attempted to do so, the result would be wheel slippage. Thus, the machines have limited traction capabilities. Mr. Hauser agreed with Mr. Schramm that the main purpose of the goods in issue is to cut grass.

In response to a question from the Tribunal, Mr. Hauser stated that the mower decks on the goods in issue are "carried" because the decks are hung onto the chassis of the power unit.

In argument, the appellant's representative first submitted that whether or not the goods in issue were imported with mower decks attached was irrelevant. He stated that of prime importance is the following note in the Explanatory Notes to heading No. 84.33:

> This heading also covers lawn mowers, known as riding lawn mowers, consisting of three or four wheeled basic machines fitted with a driving seat and having a permanently attached cutter, i.e., one which is removed only for repair or maintenance. Since their principal function is the mowing of lawns, they remain in this heading even if they have a coupling device for hauling or pushing light attachments such as a trailer.

The appellant's representative submitted that this note does not contain any conditions as to whether the removal of an attached cutter has to be simple or swift and does not require that the owner of the power unit do the removal. He argued that the evidence shows that the mower decks in this case may be changed twice a year and that mower decks are not the only attachments used with the power units. As such, the goods in issue are to be disqualified from classification in heading No. 84.33. In support of this position, he referenced the Tribunal's decision in *Lloydaire, Division of Eljer Manufacturing Canada Inc.* v. *The Deputy Minister of National Revenue*,[7] which, he submitted, provides that a particular product does not have to operate well, it only has to have the characteristics necessary to perform the function that it claims to perform.

The appellant's representative referred the Tribunal to Note 2 of the Explanatory Notes to Chapter 87, which provides as follows:

> For the purposes of this Chapter, "tractors" means vehicles constructed essentially for hauling or pushing another vehicle, appliance or load, whether or not they contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods.

The appellant's representative noted that the expert witnesses testified that, in their view, the tractors considered by the Tribunal in *Marubeni* and *Ford New Holland* were designed to cut grass, although they had other uses. He also noted that, even if those tractors were heavier than the goods in issue, the relevant provisions of the *Customs Tariff* do not make any distinction in this regard.

The appellant's representative submitted that, as the mower decks must be classified separately from the power units, it is essential that the classification of the power units be based on an evaluation of the power

7. Appeal No. AP-95-096, August 15, 1996.

unit on its own. In support of this position, he referred to the Tribunal's decision in *Teledyne Canada Mining Products* v. *The Deputy Minister of National Revenue for Customs and Excise*.[8] Finally, the representative submitted that, in the alternative, the goods in issue should be classified under tariff item No. 8479.89.99, which he described as a catch-all for machinery.

Counsel for Kubota and Marubeni first supported the submissions of the appellant's representative. He referred to the evidence of the expert witnesses who had problems with the definition of "tractor," as set out in Note 2 of the Explanatory Notes to Chapter 87, and suggested that the reason for this was that they had an agricultural tractor in mind when they thought of tractors. However, the definition of tractor in the *Harmonized Commodity Description and Coding System*[9] (the Harmonized System) is broader than this. He agreed with the representative that the effect of the Explanatory Notes to Chapters 84 and 87 is that one is not to classify in Chapter 84 something that fits in Chapter 87. In particular, one cannot classify the goods in issue in Chapter 84 because the mower decks are not permanently attached or, put otherwise, not fully integrated. Finally, he submitted that the Tribunal should follow the logic of its decisions in *Marubeni* and *Ford New Holland*.

Counsel for the respondent first submitted that the appellant's withdrawal of certain models from the appeal, thereby agreeing that these goods are properly classified as riding lawn mowers, was of particular importance since the remaining models are extremely similar to the models that are no longer in issue.

In reviewing the evidence about the goods that remain in issue, counsel for the respondent submitted that the evidence shows that, in the vast majority of cases, the mower decks are removed only for repair or maintenance. Furthermore, the evidence of Messrs. Theroux and Schramm is that the goods in issue are essentially purchased for the purpose of mowing lawns, which, they testified, would be true for 99 percent of purchasers. The evidence also indicates that the mower decks are not "pushed" by the power units, rather they are carried. Counsel submitted that the testimony of various witnesses reflected that the removal of the mower decks was a complicated task which may require the assistance of qualified experts. Furthermore, this only relates to the less than 1 percent of those who purchase implements other than mower decks. Counsel submitted that all the witnesses testified that the goods in issue do not compete with the goods considered by the Tribunal in *Marubeni* and *Ford New Holland* and that a comparison of these goods would amount to comparing apples and oranges. The latter machines are heavier commercial machines in a different class or market segment.

Turning to the relevant Explanatory Notes, counsel for the respondent submitted that such notes reflect the intended scope of the heading to which they relate, which must be examined in determining whether goods are to be classified in a specific heading. She also submitted that the Tribunal has stated that goods are to be classified on the basis of their primary description and use.[10] In this case, the evidence shows that the goods in issue have insufficient power to provide the necessary capacity for pushing and hauling in order for the goods in issue to be classified as tractors. Rather, the evidence shows that they are not designed or constructed for this purpose, but were principally designed to cut grass.

Counsel for MTD submitted that the evidence shows that the ordinary way in which the goods in issue are sold is as integrated machines. He stated that the reason for this can be found in one phrase in the Explanatory Notes to heading No. 84.33, namely, that the lawn mowers classified in this heading are to have a "permanently attached cutter, i.e., one which is removed only for repair or maintenance." By its very

8. Appeal No. AP-93-019, April 12, 1994.
9. Customs Co-operation Council, 1st ed., Brussels, 1987.
10. Citing *Reckitt & Colman Canada Inc. (formerly known as Boyle-Midway Ltd.)* v. *The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-92-350, July 7, 1994.

wording, this note provides that the cutter can be removed for repair or maintenance, but it is generally permanently attached. He noted that the evidence shows that MTD's combined sales of snowblowers and blades show that they are sold with less than 1 percent of lawn tractors. The evidence shows that, when these machines are sold, the mower decks are, effectively, permanently attached and that, in 99 percent of cases, they are not removed by the purchaser, not even for servicing or maintenance.

With respect to Note 2 of the Explanatory Notes to Chapter 87, counsel for MTD submitted that the evidence shows that the goods in issue are not constructed essentially for hauling or pushing another vehicle or load, but rather are constructed essentially for cutting grass. Regarding the *Marubeni* and *Ford New Holland* cases, counsel reminded the Tribunal of the evidence of MTD, that it did not intervene in those cases because the goods in those cases were quite different from the goods in this case. He then examined the Tribunal's reasoning in those cases and noted many factual differences in the evidence, which, he submitted, distinguished those cases from this one. In particular, he noted that, in *Marubeni*, the evidence was that 56 percent of purchasers bought more than one implement, as compared to less than 1 percent in this case. He also noted that, in *Marubeni*, the Tribunal was persuaded that the goods were constructed essentially for pushing many different types of implements, not just mower decks. Here, the evidence is the opposite.

In reply, the appellant's representative submitted that the appellant had not conceded anything with the removal of certain goods from the appeal. He also submitted that the use to which goods are put is not a requirement in classifying goods under the *Customs Tariff*, rather one has to consider the nature or essential character of the goods in issue.

The Tribunal considers that the goods in issue are properly classified under tariff item No. 8433.11.00 as powered mowers for lawns, parks or sports-grounds, with the cutting device rotating in a horizontal plane. The Tribunal comes to this conclusion bearing in mind that it is the legislation and the principles applicable to the interpretation of the legislation, including those set out in the *General Rules for the Interpretation of the Harmonized System*[11] (the General Rules), that must govern the classification of the goods in issue. The Tribunal is particularly cognizant of Rule 1 of the General Rules. As noted by the Tribunal in *York Barbell Co. Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*,[12] Rule 1 is of the utmost importance when classifying goods under the Harmonized System. Rule 1 states that classification is first determined by the wording of the tariff headings and any relative Section or Chapter Notes. The Tribunal agrees with the parties that, in the instant case, consideration of Rule 1 requires the Tribunal to consider Note 2 of the Explanatory Notes to Chapter 87, as well as the Explanatory Notes to Chapter 84.

The Tribunal adopts the definitions of the words "haul" and "appliance" set out in *Marubeni*.[13] With respect to the phrase "constructed essentially for," the Tribunal is persuaded that, in this case, unlike *Marubeni* and *Ford New Holland*, the evidence shows that the goods in issue are not constructed essentially for pushing many different types of implements, but rather are constructed essentially for use with mower decks for cutting grass and are considered ineffective in other uses. Although snowblowers and blades can be used with the goods in issue, there is no evidence of significant use of such implements. Rather, the evidence shows that less than 0.5 percent of purchasers buy either implement. This is in stark contrast to the evidence considered by the Tribunal in *Marubeni* and *Ford New Holland*. For instance, in *Marubeni*, the evidence was that 56.0 percent of the goods were sold with implements other than, or in addition to, mower

11. *Supra* note 2, Schedule I.
12. 5 T.C.T. 1150, Appeal No. AP-91-131, March 16, 1992.
13. *Supra* note 4 at 8-9.

decks. This evidence was corroborated by the evidence of a Kubota distributor whose records showed that 71.0 percent of the customers in the sample purchased snowblowers and cabs.

In addition, the Tribunal is persuaded that its previous decisions can also be distinguished on the basis that the goods in issue have very different characteristics, such as weight, power and the manner in which attachments are put on and taken off, that make it clear that the goods in those decisions are different types of machines sold into different market segments. The evidence also shows that the goods in issue are "lawn tractors" and referred to as such in a large part of the industry. While the Tribunal agrees with the appellant's representative that how members of an industry refer to a product may be of assistance in determining classification, it notes that it has also stated on many occasions that such references cannot be determinative of classification.[14] For all these reasons, the Tribunal is of the view that the goods in issue do not come within the definition of "tractor" in Note 2 of the Explanatory Notes to Chapter 87.

It remains to be considered whether there is anything in the relevant Explanatory Notes that would preclude classifying the goods in issue in heading No. 84.33. As noted, the Explanatory Notes to this heading provide that goods classified in this heading have a "permanently attached cutter, i.e., one which is removed only for repair or maintenance." The evidence in this case shows that 99 percent of purchasers use the goods in issue for cutting grass and do not detach their mower decks, except for maintenance and repair, and that even this is a very rare occurrence. There is overwhelming evidence that the goods in issue are, in fact, riding mowers. Thus, the Tribunal of the view that the goods in issue come within the wording of heading No. 84.33 and the relevant Explanatory Notes.

Accordingly, the appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member

14. For instance, see the Tribunal's comments in *Marubeni*, *ibid.* at 9, agreeing with the Tariff Board's comments in Appeal No. 795, that to classify a product on this basis, without reference to the legislation, may allow that legislation to be frustrated.