

Ottawa, Friday, February 21, 1997

Appeal No. AP-95-233

IN THE MATTER OF an appeal heard on April 30, 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 August 31 and September 11, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

S.C. JOHNSON AND SON, LIMITED

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

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

Susanne Grimes
Susanne Grimes
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-233

S.C. JOHNSON AND SON, LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The goods in issue are Glade Plug-Ins air freshener refills which are used with Glade Plug-Ins air freshener units. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3307.49.00 as other preparations for perfuming or deodorizing rooms, as determined by the respondent, or should be classified under tariff item No. 3307.41.00 as “agarbatti” and other odoriferous preparations which operate by burning, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal agrees with counsel for the respondent that the wording of tariff item No. 3307.41.00 does not lend itself to the broader meaning of the word “burning” urged by the appellant’s representative for a number of reasons and, therefore, finds that the goods in issue are properly classified under tariff item No. 3307.49.00 as other preparations for perfuming or deodorizing rooms.

Place of Hearing: Ottawa, Ontario
Date of Hearing: April 30, 1996
Date of Decision: February 21, 1997

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

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Anne Jamieson

Appearances: Michael Sherbo, for the appellant
Brian Tittlemore, for the respondent

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S.C. JOHNSON AND SON, LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ from decisions of the Deputy Minister of National Revenue dated August 31 and September 11, 1995, heard by one member of the Tribunal.²

The goods in issue are Glade Plug-Ins air freshener refills which are used with Glade Plug-Ins air freshener units. They were imported in a series of transactions in 1993. At the time of importation, the goods in issue were classified under tariff item No. 3307.49.00 of Schedule I to the *Customs Tariff*³ as prepared room deodorizers, whether or not perfumed, being other preparations for perfuming or deodorizing rooms which operate by evaporation. The appellant requested a re-determination that the goods in issue be classified under tariff item No. 3307.41.00 as “agarbatti” and other odoriferous preparations which operate by burning. The goods in issue were again classified under tariff item No. 3307.49.00. The appellant requested a further re-determination, and the respondent confirmed the classification of the goods in issue under tariff item No. 3307.49.00 on the basis that the goods in issue operate by evaporation, are not “agarbatti” and do not operate by burning.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3307.49.00 as other preparations for perfuming or deodorizing rooms, as determined by the respondent, or should be classified under tariff item No. 3307.41.00 as “agarbatti” and other odoriferous preparations which operate by burning, as claimed by the appellant.

The relevant tariff nomenclature in Schedule I to the *Customs Tariff* reads as follows:

33.07 Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties.

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. Section 3.2 of the *Canadian International Trade Tribunal Regulations*, added by SOR/95-27, December 22, 1994, *Canada Gazette* Part II, Vol. 129, No. 1 at 96, provides, in part, that the Chairman of the Tribunal may, taking into account the complexity and precedential nature of the matter at issue, determine that one member constitutes a quorum of the Tribunal for purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to the Act.
3. R.S.C. 1985, c. 41 (3rd Supp.).

- Preparations for perfuming or deodorizing rooms, including odoriferous preparations used during religious rites:
- 3307.41.00 --“Agarbatti” and other odoriferous preparations which operate by burning
- 3307.49.00 --Other

The appellant’s representative called one witness, Mr. James Finneran. Mr. Finneran is an electrical engineer whose work focuses on forensic investigations dealing with product failure analysis, including product design, and on fire investigations. He is a member of various organizations, including the American Academy of Forensic Sciences and the American Society for Testing and Materials. In addition, Mr. Finneran has direct experience with the goods in issue, as he was hired to investigate fires where the Glade Plug-Ins air freshener units were suspected of being the cause. Mr. Finneran was accepted as an expert in forensic engineering relating to fire investigations.

Mr. Finneran explained that the term “burning” has a very broad connotation in his line of work. With respect to fire investigations, it means combustion and may be understood to be the rapid oxidation of a fuel that produces light and heat. With respect to electrical products, the term has a broader meaning relating to temperature and heat and not to the production of fire, such as light. He defined “evaporation” as a process which produces vapour from a liquid or a solid by heating it. He stated that the broad meaning of “burning” could encompass a variety of odoriferous products. For instance, incense sticks are lit, and then the flame is extinguished because one does not want flaming combustion. Rather, one wants smouldering or glowing combustion.

Mr. Finneran noted that there are other heating devices which produce no combustion at all. He described a product which has a candle placed in a pot with a surface at the top of the unit upon which is poured some type of oil. The lighted candle heats the oil and vaporizes it. In doing so, the fragrance in the oil is released, which odorizes the room. In this example, the odoriferous preparation is not ignited nor is it heated to the point of combustion. He agreed that it is possible to define “burning” as something that is consumed or destroyed by fire or heat and that, in this sense, the goods in issue operate by burning.

In cross-examination, Mr. Finneran agreed that Glade Plug-Ins air freshener units operate by means of a vaporization process, as opposed to a combustion process. He also agreed that, in a sense, no fuel is actually oxidized in the operation of the air freshener units. He added that what happens is that the fuel or gel in the air freshener cartridge combines with oxygen and oxidizes at a slow rate to produce heat, but not light. In other words, the fuel is not ignited, but is heated to the point of vaporization.

Counsel for the respondent called one witness, Mr. Philippe G. St. Amour, Acting Senior Analytical Advisor and Acting Senior Commodity Advisor with the Analytical Section of the Organic and Food Products Laboratory of the Department of National Revenue, where he has been employed since 1986. Mr. St. Amour was accepted as an expert in the analysis of organic and inorganic substances and related processes, including combustion and evaporation.

Mr. St. Amour explained that evaporation is basically a reversible physical process by which the physical state of matter goes from either a solid or a liquid to a gaseous or vapour state. The process of change is facilitated by a heat input. He noted that this process is reversible in that, if one evaporates a substance, one has not changed the chemical nature of that substance and, if one took the heat source away, the matter could be condensed back to the original solid or liquid state. Combustion, however, does include a chemical change or chemical reaction; one starts with a certain compound, it is oxidized, and a new

compound is created, i.e. a chemical change occurs. Furthermore, the process is not reversible, in that one cannot recover the original fuel.

Mr. St. Amour stated that he had performed a chemical analysis of the goods in issue. In describing how the goods in issue function, he indicated that the gel in the cartridge is heated and evaporates through a porous membrane that is on top of the cartridge. In this process, the gel containing the odoriferous materials goes from a liquid state to a gaseous state. In Mr. St. Amour's view, this process is one of evaporation, since there is no chemical change in the odoriferous substances, the same materials are in the gel as are in the gaseous state and, in that state, they have not been changed chemically. In Mr. St. Amour's opinion, there is no combustion involved in this process because there is no fuel being burned, no appreciable amount of oxidation occurring and no chemical reaction occurring in respect of the heat that is produced.

With respect to "agarbatti," Mr. St. Amour stated that these incense sticks operate by being lit and that the fuel contained in them burns. The fuel also has perfume in it, and the heat produced by burning the stick evaporates the odoriferous substances in it. He distinguished this process from how the goods in issue function by stating that, although both products operate by evaporation, the heat that causes the evaporation in the incense sticks is produced from combustion, while the heat in the goods in issue is just heat, not something that results from combustion.

In cross-examination, Mr. St. Amour agreed that he was testifying that the difference between the incense sticks and the goods in issue had to do with the heat source in each product or, in other words, how heat is provided, and not how the products perfume a room, i.e. by evaporation.

In argument, the appellant's representative submitted that counsel for the respondent, in arguing that the goods in issue do not operate by burning, was relying on too narrow a definition of the word "burn." He submitted other definitions of the word, including "to consume or destroy by flames or heat,"⁴ and suggested that the scientific definition urged by the respondent may not be applicable in this case. Rather, the broader definition used by the industry should be used. The representative submitted that, if this broader definition is used, then the evidence of Mr. Finneran supports the view that the goods in issue do operate by burning, even though the goods in issue are not ignited or consumed to the point of combustion. Therefore, they should be classified under tariff item No. 3307.41.00.

The appellant's representative submitted that the implication of the respondent's position is that officials would have to ask an importer of incense how it was intended to be "burned" and, if the answer was by a means of a heating source that would heat the incense but not light it, then the incense would not be considered to operate by "burning." Therefore, incense "burned" with a flame would fall in one subheading and incense "burned" by heating would fall in another subheading. He submitted that the *Customs Tariff* does not reflect an intention to make such a distinction.

The appellant's representative submitted that the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁵ (the Explanatory Notes) to heading No. 33.07 also supported the classification claimed by the appellant. More specifically, he noted that Note (IV) of the Explanatory Notes to heading No. 33.07 states that preparations for perfuming or deodorizing rooms usually operate by evaporation or burning and suggested that the word "or" should be interpreted keeping in mind that all such

4. *The New Lexicon Webster's Encyclopedic Dictionary of the English Language* (New York: Lexicon, 1988) at 130.

5. Customs Co-operation Council, 1st ed., Brussels, 1986.

products operate by evaporation, in that there is never an odoriferous preparation that actually burns because, if that happened, the odoriferous preparation would be released so as to perfume the room.

Counsel for the respondent submitted that the word “burning” should be defined in terms of combustion for a number of reasons. First, he noted that the French version of tariff item No. 3307.41.00 reads as follows: “«Agarbatti» et autres préparations odoriférantes agissant par combustion.” He submitted that the French version of this tariff item was clearer and more specific than the English version in referring specifically to combustion and, thus, should be followed by the Tribunal. In addition, he submitted that this tariff item is qualified by the use of “agarbatti” as an example of the goods that are to be qualified under it. The evidence shows that “agarbatti” operates by burning, in the sense of combustion, in that it is the burning that ultimately results in the release of the odoriferous preparation in the incense. He submitted that this example suggests that other products classified under tariff item No. 3307.41.00 should operate in a similar manner. He contrasted this with the goods in issue, which operate by evaporation, as the gel is simply warmed by the air freshener unit.

Counsel for the respondent also referred to comments made by the Indian and Pakistani governments to the Harmonized System Committee during the session at which the proposal for a separate code number for this product was made.⁶ He submitted that these comments indicate that a separate code number was added to address “agarbatti” and similar types of materials which operate in a similar manner.

With respect to the classification of products such as aroma jars and incense heaters raised by the appellant’s representative, counsel for the respondent submitted that the classification of these products is not at issue and, thus, not relevant to the classification of the goods in issue. Turning to the representative’s submissions regarding the Explanatory Notes to heading No. 33.07, counsel submitted that the distinction in Note (IV) is between preparations that perfume rooms and those that deodorize, not between whether a particular product should be considered “agarbatti” and other odoriferous preparations that operate by burning. In terms of classifying the goods in issue, the Explanatory Notes themselves do not lend guidance, rather the Tribunal must look to the terms of the tariff items at issue. Having said this, counsel noted that paragraph (1) of Note (IV) does distinguish between the terms “burning” and “evaporation,” in that it refers to products that operate by burning “or” evaporation.

The Tribunal considers that the goods in issue are properly classified under tariff item No. 3307.49.00 as other preparations for perfuming or deodorizing rooms. 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*⁷ (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*,⁸ Rule 1 of the General Rules is of the utmost importance when classifying goods under the *Harmonized Commodity Description and Coding System*.⁹ Rule 1 of the General Rules states that classification is first determined by the wording of the tariff headings and any relative Section or Chapter Notes. The Tribunal notes that the parties agree that the goods in issue

6. Respondent’s Brief, Tab 8.

7. *Supra* note 3, Schedule I.

8. 5 T.C.T. 1150, Appeal No. AP-91-131, March 16, 1992.

9. *Supra* note 5, 1987.

are properly classified in heading No. 33.07. Based on the structure of this heading, the issue before the Tribunal is which of tariff item Nos. 3307.41.00 and 3307.49.00 covers the goods in issue.

The Tribunal agrees with counsel for the respondent that the wording of tariff item No. 3307.41.00 does not lend itself to the broader meaning of the word “burning” urged by the appellant’s representative. The Tribunal comes to this conclusion for a number of reasons. First, while there may be some ambiguity in the word “burning” in the English version of the *Customs Tariff*, the use of the word “*combustion*” in French clearly indicates that a notion of heating that includes a process of combustion was contemplated by the drafters of this provision. Both experts agreed that evaporation and combustion are two different processes, and the evidence is clear to the Tribunal that the goods in issue do not operate by combustion.

In addition, the Tribunal notes that the materials filed by the respondent with respect to the origin of this tariff item indicate that the types of products that were the subject of the request for a separate code number were quite different from the goods in issue. The Tribunal is not persuaded that the Explanatory Notes to heading No. 33.07 can bear the interpretation argued for by the appellant’s representative. In particular, the distinction between evaporation and burning reflected in the use of the word “or” in paragraph (1) of Note (IV) suggests again that a distinction is to be drawn between products that operate by evaporation and those that operate by combustion.

Accordingly, the appeal is dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member