

Ottawa, Friday, February 7, 1997

Appeal No. AP-96-001

IN THE MATTER OF an appeal heard on September 16, 1996,
under section 61 of the *Special Import Measures Act*,
R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a decision of the Deputy Minister of
National Revenue dated March 20, 1996, with respect to a request
for re-determination under section 58 of the *Special Import
Measures Act*.

BETWEEN

RENAISSANCE IMPORTS LTD.

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

Desmond Hallissey

Desmond Hallissey
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-96-001

RENAISSANCE IMPORTS LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 61 of the *Special Import Measures Act* from a re-determination of the Deputy Minister of National Revenue confirming the assessment of anti-dumping duties on certain shipments of photo albums imported into Canada by the appellant.

The backdrop for this appeal is provided by the Tribunal's order in Review No. RR-92-003. Pursuant to that review, the Tribunal decided to continue the Canadian Import Tribunal's finding in Inquiry No. CIT-11-87 in respect of certain photo albums.

The issue in this appeal is whether the goods in issue fall within the scope of the Canadian Import Tribunal's finding, as continued by the Tribunal.

HELD: The appeal is allowed. While the Tribunal accepts that the goods in issue do possess some of the characteristics of the goods described in the Canadian Import Tribunal's finding and statement of reasons, the Tribunal is satisfied that there are also significant differences, principally relating to the primary function of the goods in issue.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 16, 1996
Date of Decision:	February 7, 1997
Tribunal Members:	Robert C. Coates, Q.C., Presiding Member Raynald Guay, Member Desmond Hallissey, Member
Counsel for the Tribunal:	John L. Syme
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Michael A. Kelen, for the appellant Lubomyr Chabursky, for the respondent

Appeal No. AP-96-001

RENAISSANCE IMPORTS LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
RAYNALD GUAY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*¹ (SIMA) from a re-determination of the Deputy Minister of National Revenue confirming the assessment of anti-dumping duties on certain shipments of photo albums which were imported into Canada by the appellant.

The backdrop for this appeal is provided by the Tribunal's order in Review No. RR-92-003² (the Order). In that review, the Tribunal had to decide whether to rescind or continue, with or without amendment, the Canadian Import Tribunal's (the CIT) finding in Inquiry No. CIT-11-87³ in respect of certain photo albums. Pursuant to its review, the Tribunal decided to continue the CIT's finding without amendment. The issue in this appeal is whether the goods in issue fall within the scope of the CIT's finding, as continued by the Tribunal.

Counsel for the appellant called three witnesses. The appellant's first witness was Ms. Lise B. Ellacott, President and owner of Renaissance Imports Ltd. She testified that the appellant is in the business of importing and distributing "special quality" products, which are often unique in the Canadian market. The appellant's main product lines consist of gift and stationery items. The appellant is the exclusive Canadian distributor for a number of these products, including the goods in issue.

The goods in issue are photo albums which feature on their covers photographs by Australian photographer Anne Geddes. All of the photographs featured on the goods in issue are of babies or young children. Ms. Ellacott testified that Anne Geddes' work has been featured in a number of leading international magazines, such as *Life*, and that Anne Geddes has won several international gold awards for her photography. Ms. Ellacott testified that the goods in issue are described in the trade as "table talkers." This term is derived from the fact that the goods are intended to be displayed in plain view, perhaps on a coffee table, where the image on the cover will be visible and will draw attention to the album. She also indicated that the goods in issue are "collectibles," in the sense that they are produced in limited edition numbered series.

1. R.S.C. 1985, c. S-15.
2. *Photo Albums with Pocket, Slip-in or Flip-up Style Sheets (Imported Together or Separately), and Refill Sheets Thereof, Originating in or Exported from Japan, the Republic of Korea, the People's Republic of China, Hong Kong, Taiwan, Singapore, Malaysia and the Federal Republic of Germany, Order and Statement of Reasons*, February 25, 1993.
3. *Ibid.*, *Finding*, February 26, 1988, *Statement of Reasons*, March 11, 1988.

Ms. Ellacott testified that Anne Geddes photographs can be purchased in Canada as unframed prints. She indicated that such photographs would, on average, retail for \$16 and more. Counsel for the appellant entered a number of examples of the goods in issue into evidence through Ms. Ellacott. The goods come in a number of sizes and retail from \$20 to \$70. Counsel also entered as exhibits a number of “generic” photo albums, comparable in size and capacity to the goods in issue, which had been purchased at large chain stores. Counsel led Ms. Ellacott through a comparison of the retail and wholesale prices for the goods in issue and the generic albums. In summary, her evidence was that the goods in issue were approximately 4 to 10 times more costly than the generic albums at the retail level and 3 or 4 times more costly at the wholesale level.

Ms. Ellacott testified that the primary function of the goods in issue is that of a work of art. She summarized the main differences between the goods in issue and generic photo albums as follows:

- **price** - the goods in issue are many times more costly than generic albums;
- **channels of distribution** - the goods in issue are sold exclusively through relatively small, independent retailers, whereas the generic albums are typically sold through larger chain or franchise mass merchandisers; and
- **use** - generic photo albums are used for storing photographs, are typically kept on a shelf and are only brought out when a user wishes to view photographs. The goods in issue are not merely a means of storing photographs. Rather, they are designed to be displayed openly, in such a way as to encourage people to pick them up, admire the cover art and then examine the contents of the album.

During cross-examination, Ms. Ellacott acknowledged that her market research concerning the use of the goods in issue had been conducted primarily with retailers and not end-use consumers.

The appellant’s second witness was Mr. Kevin Rodrigo, National Marketing Manager with UR1 International (UR1), the Australian firm which produces the goods in issue. Mr. Rodrigo confirmed that each of the photographs used on the goods in issue is only used for a limited period of time. He noted that each album has a collector number which corresponds to the number which Anne Geddes has assigned to each of her photographs.

In cross-examination, Mr. Rodrigo was asked about the price at which UR1 sold the goods in issue to the appellant. He indicated that the absolute numbers were confidential. However, he stated that, in percentage terms, the cost of the photograph itself and the cost of putting the photograph on the goods in issue represented approximately half of UR1’s price to wholesalers, the other half being for materials. UR1 has been promoting Anne Geddes photographs and related products in Australia for three years and internationally for just under two years. Mr. Rodrigo explained that UR1 decided to market its Anne Geddes products internationally when it concluded that the Anne Geddes photographs were unique and could command a premium when sold as works of art.

The appellant’s third witness was Mr. James Matthews, Marketing Manager for Black’s Photo Corporation (Black’s) for the Ottawa/Kingston region. Mr. Matthews has been with Black’s for 25 years. He was accepted as an expert in the marketing of photo albums and on the various types of albums which are available in the Canadian market.

Mr. Matthews testified that the goods in issue are not sold by Black's or, to his knowledge, by any of its photography store competitors or by mass merchandisers. Mr. Matthews stated that the goods in issue are comparable in construction and capacity to generic photo albums sold by Black's; however, he noted that they are not comparable in terms of retail price. Given the similarity in construction and capacity, he attributed the difference in price to the cover photograph. With respect to the function of the goods in issue, Mr. Matthews testified that, unlike the goods in issue, the photo albums sold by Black's are principally storage devices and are not designed or intended to be left in plain view. He expressed the view that Black's would probably not be successful in selling the goods in issue in its stores, as its customers are interested in albums as storage devices.

In cross-examination, Mr. Matthews indicated that the goods in issue could be purchased to store photographs of a special occasion, such as an anniversary or a wedding. He also agreed that the large difference in the retail price between the goods in issue and generic albums could, in part, be attributed to the manner in which retail prices are calculated. In particular, he agreed that, if there is a \$5.00 difference between the price of two albums on import, once import duties, anti-dumping duties, a 40 percent wholesale margin and a 50 percent retail margin are added to obtain the retail price, that \$5.00 difference will be significantly greater. Finally, counsel for the respondent entered as exhibits a number of photo albums sold by Black's, ranging in price from \$19.99 to \$54.99. Mr. Matthews acknowledged that, notwithstanding their higher prices, he would still describe these goods as photo albums.

Counsel for the appellant opened his argument by noting that none of the members of the domestic industry whose goods are covered by the Order intervened in the appeal. Counsel submitted that this fact indicated that they were not "concerned" with the impact that the goods in issue would have on sales of their goods. Counsel then referred the Tribunal to its order in Review No. RR-89-012,⁴ which was continued by the Tribunal in Review No. RR-94-006.⁵ Counsel noted that, in continuing its previous order, in its statement of reasons, the Tribunal made extensive reference to the vulnerability of domestic producers to competition from low-priced imports. In counsel's submission, given the differences in prices and the channels of distribution between the goods in issue and goods covered by the Order, the goods in issue do not present a threat to domestic producers.

Counsel for the appellant also referred the Tribunal to its decision in *General Films Inc. v. The Deputy Minister of National Revenue*.⁶ Counsel submitted that *General Films* stands for the proposition that, in appeals under section 61 of SIMA, the Tribunal should have regard to the primary function of the goods in determining whether they fall within the scope of a given order or finding. In counsel's submission,

4. *Photo Albums with Self-Adhesive Leaves Originating in or Exported from Japan, the Republic of Korea, Hong Kong and the United States of America; Self-Adhesive Leaves Originating in or Exported from Hong Kong, the United States of America and the Republic of Korea; Photo Albums with Self-Adhesive Leaves (Imported Together or Separately) Originating in or Exported from the People's Republic of China; and Photo Albums with Self-Adhesive Leaves (Imported Together or Separately) and Self-Adhesive Leaves Originating in or Exported from Singapore, Malaysia and Taiwan, Order and Statement of Reasons*, September 4, 1990.

5. *Photo Albums with Self-Adhesive Leaves, Imported Together or Separately, and Self-Adhesive Leaves, Originating in or Exported from the Republic of Korea, Hong Kong, the People's Republic of China, Singapore, Malaysia, Taiwan, Indonesia, Thailand and the Philippines, Order and Statement of Reasons*, August 25, 1995.

6. Appeal No. AP-94-169, April 18, 1995.

the primary use of the goods in issue is as a piece of art and not, like generic albums, as a storage device. People wanting a simple storage device would, counsel argued, purchase a simple photo album and would not be willing to pay the premium associated with the goods in issue.

Counsel for the respondent argued that the sole issue before the Tribunal in this appeal was whether or not the goods in issue fall within the ambit of the Order. Counsel readily acknowledged that the goods in issue have an attractive cover photograph, but submitted that that does not alter the fact that the goods are primarily designed to store photographs. Counsel submitted that the price differential between the goods in issue and generic albums was a result of the compounding effect of successive markups rather than an intrinsic difference in value between the two types of goods. Counsel asked the Tribunal to consider the evidence of Mr. Matthews, who testified that certain higher-priced albums sold by Black's were, notwithstanding their higher prices, still photo albums. Finally, counsel submitted that, if a person wished to display an Anne Geddes photograph as a piece of art, that person could simply purchase a framed Anne Geddes print or a coffee table book containing Anne Geddes photographs.

In an appeal under section 61 of SIMA, the Tribunal must decide whether or not anti-dumping duties are payable on certain imported goods. That decision turns on whether the goods are goods of the same description as the goods to which a Tribunal order or finding applies. The starting point for the Tribunal in this appeal is the CIT's finding of February 26, 1988, in respect of photo albums. That finding was in respect of goods of the following description: "photo albums with pocket, slip-in or flip-up style sheets (imported together or separately), and refill sheets thereof."

In *J.V. Marketing Inc. v. Canadian International Trade Tribunal*,⁷ the Federal Court of Appeal held that, in deciding whether any imported goods fall within the scope of an injury finding, if the description of the goods in the finding is ambiguous, the Tribunal could refer to its statement of reasons to resolve the ambiguity.

In this appeal, the Tribunal is of the view that there is sufficient ambiguity in the language of the finding to justify reference to the CIT's statement of reasons. The product description is found on page 2 of its statement of reasons. Following that text, the following additional words of description appear:

Subject photo albums are storage devices into which photographs are inserted in individual pockets made of transparent film. There are five basic types of binding for these photo albums: sealed, ringed, coiled, flip and post. Sheets are produced from PVC (polyvinylchloride), polypropylene or polyethylene. Albums contain various numbers of sheets and may hold as many as 700 photographs. Album covers are made from many different types of material such as vinyl, leather, suede or fabric. Refill sheets are also sold in packs of various sizes, the most popular being 20- and 50-leaf packs. (Emphasis added)

Having considered the descriptions in the CIT's statement of reasons, the Tribunal is of the view that the goods in issue do not fall within the scope of the CIT's finding. While it is true that the goods in issue possess some of the characteristics of the goods described in the CIT's finding and statement of reasons, the Tribunal is of the view that there are differences which serve to remove the goods in issue from the scope of that finding.

7. Unreported, Federal Court of Appeal, File No. A-1349-92, November 29, 1994.

The principal distinguishing feature is the function which the goods in issue serve. In this regard, the Tribunal notes that the description in the CIT's statement of reasons indicates that the CIT considered photo albums whose primary function was clearly as "storage devices." While it is true that the goods in issue do provide a storage function for photographs, the Tribunal is of the view, based on the evidence of the witnesses for the appellant, that their primary function is as a piece of art.

The evidence of Mr. Matthews was that the photo albums sold by Black's are designed with the idea that they will be filed away in bookcases or on shelves. He indicated that, when purchasing albums for resale, Black's is careful to ensure that the outer dimensions of the albums are such as to permit them to be placed in bookcases or on shelves. Mr. Matthews also testified that he did not think that Black's would be successful in selling the goods in issue because, in his view, customers looking for a means of storing photographs are primarily interested in construction quality and capacity and, thus, would be unwilling to pay the premium for the cover art on the goods in issue.

In physical terms, the only thing which serves to distinguish the goods in issue from generic albums is the cover art. Clearly, the premium paid by consumers when purchasing the goods in issue is for that art. In the Tribunal's view, someone wishing to purchase an album to be used primarily for storing photographs on a shelf would be unlikely to purchase the goods in issue, as they are 5 to 7 times more expensive than generic photo albums. Such a person would be more likely to purchase a generic album, which, the evidence indicates, may be purchased for \$3 to \$5.

The Tribunal notes that, in terms of the relative value of the components of the goods in issue, the cost of the cover art represents approximately 50 percent of the total product cost. The cover art, in effect, adds 50 percent to the production cost of what would otherwise be a generic album. With the compounding effect of import duties, anti-dumping duties and wholesale and retail markups, that additional 50 percent comes to represent a significant price differential at the retail level. While price, in and of itself, is not an appropriate basis for finding that goods are not covered by a Tribunal finding or order, in this case, the Tribunal is satisfied that the price difference, and the fact that consumers are apparently willing to pay that difference, is reflective of the differing functions served by the goods in issue and generic albums.

On the basis of the foregoing, the appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member

Raynald Guay

Raynald Guay

Member

Desmond Hallissey

Desmond Hallissey

Member