

Ottawa, Tuesday, January 14, 1997

Appeal No. AP-95-253

IN THE MATTER OF an appeal heard on June 3, 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 December 7, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

BRISTOL UNIFORMS NORTH AMERICA INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Raynald Guay
Raynald Guay
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-253

BRISTOL UNIFORMS NORTH AMERICA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue regarding the tariff classification of certain “bunker suits,” which are protective gear consisting of a coat and pants, designed for use by firefighters. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 6211.33.00 as other garments of man-made fibres and under tariff item No. 6203.43.00 as men’s trousers of synthetic fibres, as determined by the respondent, or should be classified in heading No. 62.10 as garments made up of fabrics of heading No. 56.02, 56.03, 59.03, 59.06 or 59.07, as claimed by the appellant.

HELD: The appeal is allowed. The heading proposed by the appellant provides that garments made up of fabrics of certain headings are to be classified in that heading. The Tribunal is satisfied that the goods in issue are made up, in part, of one of the fabrics and should be classified in heading No. 62.10.

Place of Hearing: Ottawa, Ontario
Date of Hearing: June 3, 1996
Date of Decision: January 14, 1997

Tribunal Members: Anthony T. Eyton, Presiding Member
Arthur B. Trudeau, Member
Raynald Guay, Member

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Anne Jamieson

Appearances: Brenda C. Swick-Martin, Julie Lane and Ken Sorensen, for the appellant
Lubomyr Chabursky, for the respondent

BRISTOL UNIFORMS NORTH AMERICA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ANTHONY T. EYTON, Presiding Member
ARTHUR B. TRUDEAU, Member
RAYNALD GUAY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue made under section 63 of the Act. In a series of importations between August 2, 1993, and June 28, 1994, the appellant imported into Canada “bunker suits,” which are protective gear consisting of a coat and pants, designed for use by firefighters.

Upon importation, the coats were classified under tariff item No. 6201.13.00 of Schedule I to the *Customs Tariff*² and the pants were classified under tariff item No. 6203.43.00. The appellant requested a re-determination of the tariff classifications under section 60 of the Act, pursuant to which the respondent classified the suits under tariff item No. 6210.10.00 as garments of fabrics of heading No. 56.02 or 56.03. The appellant then requested a further re-determination pursuant to section 63 of the Act. By decision dated December 7, 1995, the respondent advised that the coats had been classified under tariff item No. 6211.33.00 and that the pants had been classified under tariff item No. 6203.43.00.

The issue in this appeal is whether the goods in issue are properly classified under the aforementioned tariff items, as determined by the respondent, or should be classified in heading No. 62.10 as garments made up of fabrics of heading No. 56.02, 56.03, 59.03, 59.06 or 59.07, as claimed by the appellant. The respondent has conceded that, if the goods in issue are classifiable in heading No. 62.10, they qualify for concessionary duty relief under Code 1001 of Schedule II to the *Customs Tariff* as “[p]rotective suits and parts thereof of heading No. ... 62.10 ... for use in [a] noxious atmosphere.”³

The following is the relevant tariff nomenclature from Schedule I to the *Customs Tariff*:

56.02	Felt, whether or not impregnated, coated, covered or laminated.
5602.10	-Needleloom felt and stitch-bonded fibre fabrics
5603.00	Nonwovens, whether or not impregnated, coated, covered or laminated.
62.03	Men’s or boys’ suits, ensembles, jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear).

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

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

3. Subsection 68(2) of the *Customs Tariff* provides, among other things, that, notwithstanding the fact that a product is subject to duty under Schedule I, if the product falls within one of the categories of goods set out in Schedule II, the duty on that product is reduced or eliminated.

- 6203.43 --Of synthetic fibres
- 62.10 Garments, made up of fabrics of heading No. 56.02, 56.03, 59.03, 59.06 or 59.07.
- 62.11 Track suits, ski suits and swimwear; other garments
 - Other garments, men's or boys':
- 6211.33.00 --Of man-made fibres

The coats and the pants comprising the goods in issue are both made of identical materials. They each have the following three layers:

- outer layer - finishing layer made from a woven material known in the specialized garment trade as Nomex III;
- middle layer - moisture barrier made from nonwoven, spunlaced Kevlar, which is laminated with a waterproof plastic membrane known in the trade as Tetratex; and
- inner layer - thermal barrier consisting of a needleloom felt of man-made fibres, sandwiched between a plain weave fabric woven from Kermel Viscose and a layer of Kevlar felt.

Before proceeding with a review of the evidence and argument, the Tribunal notes that the parties devoted a considerable time in this appeal to issues relating to the second layer of the goods in issue and, in particular, as to whether or not the plastic membrane contained within that layer was a “cellular” plastic. The Tribunal has not recounted that part of the evidence and argument for reasons that will be apparent below.

Evidence

Counsel for the appellant called four witnesses. The first witness was Mr. Ian W.D. Hill, Managing Director of Bristol Uniforms Ltd. Mr. Hill testified that virtually all of the 700 to 1,000 bunker suits that the appellant manufactures in an average week are sold to fire departments. The appellant has manufactured protective clothing for over 40 years and sells bunker suits in over 75 countries. The suits are manufactured to meet the various countries' technical standards for fire-protective apparel.

Mr. Hill testified that the “common denominator” in the European, Canadian, US and other technical standards pertains to a garment's ability to resist the transmission of radiated or convective heat. This function is performed primarily by the thermal barrier, the inner layer of the goods in issue. All of the firefighters' protective gear manufactured by the appellant includes a thermal barrier. In Mr. Hill's estimation, without such a barrier, a suit could not pass any of the tests laid out in the relevant Canadian, US or European standards, or in those of the International Organization for Standardization.⁴

Mr. Hill stated that the ability of a garment to protect a firefighter from radiated heat is fundamental and that the thermal barrier is the single most important part of a protective garment. Even with a completely inflammable outer layer, a suit without a thermal barrier would offer a firefighter little protection from radiated heat. To illustrate his point, Mr. Hill asked the Tribunal to imagine placing a sheet of metal over a

4. Mr. Hill is on the following committees charged with developing and maintaining technical standards for fire-protective clothing: the British Standards Technical Committee, PSM/35; the European Committee for Standardization, TC/165; and the Committee of the International Organization for Standardization. The appellant is also represented on the Canadian General Standards Board committee with responsibility for protective gear.

flame. While neither the heat transmitted through the sheet nor the flame would be visible, if a person touched the sheet, they would be burned virtually instantaneously.

In cross-examination, Mr. Hill was asked whether the three layers of thermal barrier were sewn in a quilted pattern. He indicated that there are a variety of ways of describing the sewing in the thermal barrier. He acknowledged that some people might refer to it as quilting, but that he referred to it simply as stitching. He explained that, whereas Bristol Uniforms Ltd. had formerly simply stitched the thermal barrier together at the seams of the goods in issue, it recently began stitching the barrier using a cross-stitch to provide the thermal barrier with additional integrity and structure.

The appellant's second witness was Mr. Tom Francis, Sales Director of Bristol Uniforms North America Inc. He described, in broad terms, the appellant's operations in North America. In cross-examination, Mr. Francis acknowledged that, in some of the appellant's product literature, the word "quilted" is used in describing the thermal barrier. He also acknowledged that, in a letter which he wrote to the respondent in connection with this matter, he described the thermal barrier as being "quilt stitched." Finally, Mr. Francis agreed that the thermal barrier is stitched in a quilted fashion.

The appellant's third witness was Dr. Hugh J. Campbell, who the Tribunal accepted as an expert witness in flammability and chemical composition. Dr. Campbell is the Manager, Fire and Flammability at ORTECH Corporation, which is a research company that provides research and development services to industry and government on a fee-for-service basis. Dr. Campbell was familiar with the goods in issue, as it was ORTECH Corporation that tested those goods in connection with the appellant obtaining Canadian General Standards Board (CGSB) certification.

Dr. Campbell provided extensive testimony regarding each of the three layers of the goods in issue. He indicated that the thermal barrier itself is made up of three layers: the two outer layers being felts and the inner layer being a Kermel Viscose.

Dr. Campbell is on the CGSB committee charged with developing and maintaining the standard for firefighters' protective clothing.⁵ Dr. Campbell noted that the standard defines the thermal barrier in protective clothing as "[t]he component designed to provide protection against heat." He indicated that article 5 of the standard sets out a number of tests for protective garments, the first being a thermal protective performance (TPP) test. Based on certain tests performed on the goods in issue, Dr. Campbell opined that the goods in issue would not be able to pass the TPP test without the thermal barrier. On cross-examination, Dr. Campbell acknowledged that each of the three layers of the goods in issue has a separate function, but that each is necessary for the goods in issue to perform their protective function.

The appellant's fourth witness was Mr. Thomas B. Cartwright, Fire Chief of the Fire Department in Fort Erie, Ontario. Mr. Cartwright testified that he had been involved in fighting several thousand fires during the course of his career. He described the conditions that firefighters encounter in fighting fires. He stated that, while there is not an average temperature in a fire, temperatures in the 1,000-degree range are not "out of place." He indicated that his greatest concern as a firefighter was coming into contact with the heat generated by a fire.

5. "Firefighters' Protective Clothing for Protection Against Heat and Flame," National Standard of Canada, prepared by the Canadian General Standards Board, Can/CGSB-155.1-M88, August 1988.

Counsel for the respondent called Ms. Leslie E. Behnia, a chemist with the Organic and Food Products Laboratory of the Department of National Revenue, as a witness. She was accepted as an expert in textile analysis. Ms. Behnia explained the meaning of the various terms found in the headings and relevant *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁶ (the Explanatory Notes) at issue. She indicated that the term “quilted” describes a situation where a layer of “padding” is joined together with or sandwiched between layers of fabric and that the various layers are stitched together with external yarns or by heat sealing. In cross-examination, Ms. Behnia expressed the view that the thermal barrier was quilted by virtue of the criss-cross pattern of stitching employed.

Argument

Counsel for the appellant began their argument by reminding the Tribunal that the appellant was seeking duty relief under Code 1001. They submitted that there are four conditions that must be met to qualify for such relief. As the respondent had conceded that the goods in issue meet three of these conditions, counsel argued that the sole remaining issue was whether or not the goods in issue were classifiable in any of the headings contemplated by Code 1001.⁷ Counsel submitted that the goods in issue were classifiable in heading No. 62.10.

Garments made up of fabrics of heading No. 56.02, 56.03, 59.03, 59.06 or 59.07 may be classified in heading No. 62.10. Counsel for the appellant referred the Tribunal to heading No. 56.02, which applies to “[f]elt, whether or not impregnated, coated, covered or laminated.” They noted that the Explanatory Notes to that heading provide that the felt may be “covered on one or both surfaces with paper, cardboard, textile fabric, etc. (e.g., sewn or glued), **provided** the essential character of the product is that of felt.” Counsel submitted that the Explanatory Notes describe the thermal barrier of the goods in issue, in that the barrier is composed of layers of felt sewn to a layer of fabric.

In anticipation of counsel for the respondent’s argument, counsel for the appellant addressed the applicability of Note (f) of the Explanatory Notes to heading No. 56.02 to the thermal barrier. That note excludes certain “[q]uilted textile-products” from heading No. 56.02, even where they are made of felt. Counsel submitted that the fact that the appellant’s product literature describes the thermal barrier as “quilted” is not determinative for tariff classification purposes.

Counsel for the appellant then led the Tribunal through the *General Rules for the Interpretation of the Harmonized System*⁸ (the General Rules). They first referred the Tribunal to Rule 1, which states that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Counsel then directed the Tribunal to Note 5 of the Explanatory Notes to Chapter 62, which provides:

Garments which are, *prima facie*, classifiable both in heading No. 62.10 and in other headings of this Chapter ... are to be classified in heading No. 62.10.

Counsel for the appellant submitted that the goods in issue should be classified in heading No. 62.10 because they are made up of a fabric, felt, classifiable in heading No. 56.02. However, they argued that, if

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

7. Code 1001 provides duty relief for “[p]rotective suits and parts thereof of heading No. 39.26, 40.15, 61.13, 61.16, 61.17, 62.10, 62.16, 62.17, 63.07, 64.02 or 64.06 for use in [a] noxious atmosphere.”

8. *Supra* note 2, Schedule I.

the Tribunal were to find that the goods in issue are *prima facie* classifiable in heading No. 62.10 and, as the respondent contends, in heading Nos. 62.03 and 62.11, pursuant to Note 5 of the Explanatory Notes to Chapter 62, the suits should be classified in heading No. 62.10.

Counsel for the appellant submitted that, if the Tribunal was not satisfied that Rule 1 of the General Rules was dispositive, as Rule 2 is not applicable, it should go on to apply Rule 3 and, in particular, Rule 3 (b). That rule provides that “[m]ixtures, composite goods consisting of different materials or made up of different components ... shall be classified as if they consisted of the material or component which gives them their essential character.” In counsel’s submission, the thermal barrier provides the goods in issue with their essential character, in that it protects firefighters against the primary hazards, radiated heat and flame, which they face in firefighting.

In argument, counsel for the respondent acknowledged that the thermal barrier of the goods in issue is made primarily of felt. He submitted that the notion of essential character is of no significance in the present appeal. He stated that, if the Tribunal were to find that any of the fabrics of the headings listed in heading No. 62.10 are used in making the goods in issue, the appellant must prevail.

However, counsel for the respondent took the position that none of the fabrics used in making the goods in issue are classifiable in the headings contemplated by heading No. 62.10. With respect to the thermal barrier, counsel submitted that, notwithstanding the fact that it is made of felt, which would normally be classified in heading No. 56.02, it is excluded from that heading by virtue of Note (f) of the Explanatory Notes to that heading. Note (f) provides as follows:

[Heading No. 56.02] also excludes:

...

- (f) Quilted textile-products in the piece, composed of one or more layers of textile materials assembled by stitching or otherwise with padding material other than embroidery of heading 58.10 (heading 58.11).

Counsel for the respondent submitted that the thermal barrier is quilted and, therefore, falls within the scope of Note (f). In support, he relied on the following:

- the appearance of the thermal barrier, which, he submitted, is stitched in a traditional cross-stitch quilted pattern; and
- some of the appellant’s documents that refer to the thermal barrier as being quilt-stitched. For example, Exhibit B-2, the appellant’s style sheets for its various suits, repeatedly uses the word “quilted” in describing the thermal barrier. In a letter to the respondent, the appellant refers to the thermal barrier as being quilt-stitched.

Decision

Code 1001 provides concessionary duty relief on protective suits and parts thereof of certain headings in Schedule I, including heading No. 62.10. Heading No. 62.10 provides that garments made up of certain fabrics, including fabrics of heading No. 56.02, are classifiable in that heading. The thermal barrier of the goods in issue is made of felt, which would normally be classifiable in heading No. 56.02. The question, therefore, is whether the respondent is correct that Note (f) serves to exclude the thermal barrier from heading No. 56.02 and thus, in effect, excludes the goods in issue from heading No. 62.10.

For an item to fall within Note (f), it must be:

- a quilted textile-product in the piece;
- composed of one or more layers of textile materials; and
- assembled by stitching or otherwise with padding material other than embroidery of heading No. 58.10.

While the Tribunal believes there are sound arguments to support the view that the thermal barrier satisfies the first two of these requirements, it is not persuaded that it satisfies the last requirement. In particular, the Tribunal is of the view that the thermal barrier does not contain “padding material.” In reaching this view, the Tribunal considered a number of dictionary definitions of “pad” and “padding.”

For example, *The Random House Dictionary of the English Language*⁹ defines “padding” as “material, as cotton or straw, used to pad something¹⁰” and defines “pad” as “a cushionlike mass of soft material used for comfort, protection, or stuffing.¹¹” *The Gage Canadian Dictionary*¹² defines “padding” as “material used to pad with, such as foam rubber, cotton or synthetic fibre, or straw¹³” and defines “pad” as “something soft used for comfort, protection, or stuffing; cushion.¹⁴” *The Concise Oxford Dictionary of Current English*¹⁵ defines “pad” as a “cushion or soft stuffing used to diminish jarring, fill out hollows, absorb fluid, etc.¹⁶”

In the Tribunal’s view, the common element running through the definitions of “padding” is the notion of offering cushioning from a hard surface or impact. In other words, within the notion of padding, there is a functional element. In the Tribunal’s view, none of the materials used to make up the thermal barrier can fairly be characterized as padding. The felts used in the barrier are not designed or in any way intended to cushion the wearer from hard surfaces or impacts. Rather, the evidence indicates that the felts are present because of their insulative properties. Together, the layers in the thermal barrier serve to protect the wearer from radiated heat, which the Tribunal heard was the primary hazard faced by firefighters.

In addition, though difficult to convey in written reasons, having had the opportunity to physically inspect the samples of the thermal barrier put into evidence and assess their weight, thickness and overall appearance, the Tribunal does not consider that, on any reasonable construction, the thermal barrier can be said to contain “padding material.” In light of the foregoing, the Tribunal is of the view that the thermal barrier does not fall within the ambit of Note (f) and is not, therefore, excluded from heading No. 56.02. The Tribunal considers that the thermal barrier, being made primarily of felt, covered on one side with fabric and being sewn, is classifiable in heading No. 56.02. Therefore, the goods in issue are made up, at least in part, of one of the fabrics contemplated by heading No. 62.10.

9. Second ed. (New York: Random House, 1987).

10. *Ibid.* at 1393.

11. *Ibid.*

12. (Toronto: Gage Publishing, 1983).

13. *Ibid.* at 814.

14. *Ibid.*

15. Seventh ed. (Oxford: Clarendon Press, 1982).

16. *Ibid.* at 735.

The Tribunal notes that the quilt-stitching used to hold the thermal barrier together is a relatively recent innovation and provides the barrier with additional integrity and structure, as compared with the previous practice of stitching the barrier's three layers together only at the seams of the goods in issue. The stitching pattern chosen apparently has to do with machining and technology currently available and in use, rather than with any particular desire to imbue the thermal barrier with a diamond-shaped, quilt-stitched pattern.

That conclusion does not, however, end this matter. The appellant seeks classification in heading No. 62.10. The respondent has classified the goods in issue in heading No. 62.11 (coats) and heading No. 62.03 (pants). Note 5 of the Explanatory Notes to Chapter 62 provides that, where goods are *prima facie* classifiable in heading No. 62.10 and another heading of Chapter 62, they are to be classified in heading No. 62.10. That is precisely the situation in this case and, accordingly, the Tribunal finds that the goods in issue should be classified in heading No. 62.10 and, in particular, in subheading No. 6210.10, which expressly contemplates, *inter alia*, garments of fabrics of heading No. 56.02.

Accordingly, the appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Raynald Guay
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Member