



Ottawa, Thursday, July 3, 1997

Appeal Nos. AP-95-214, AP-95-215 and AP-95-237

IN THE MATTER OF appeals heard on March 17, 1997, 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 1, 3 and 4, September 8 and November 10, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**CROSS CANADA AUTO BODY SUPPLY (WINDSOR) LTD.  
AND AT PAC WEST AUTO PARTS LTD.**

**Appellants**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeals are dismissed.

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

Patricia M. Close  
Patricia M. Close  
Member

Lyle M. Russell  
Lyle M. Russell  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal Nos. AP-95-214, AP-95-215 and AP-95-237**

**CROSS CANADA AUTO BODY SUPPLY (WINDSOR) LTD.                      Appellants  
AND AT PAC WEST AUTO PARTS LTD.**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE                      Respondent**

These are appeals under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue. The parties agreed that the goods in issue described as goods “in the form of automotive body parts consisting of fenders, door shells and assemblies, header/side/rocker/nose/quarter/inner wheel panels, windshield frames, grille shells, trunk lids, mouldings, boxside and bedside assemblies, aprons and valances, front and rear bumpers and reinforcement bars for vehicles of heading 87.03 and 87.04 of the *Customs Tariff*” were properly classified under tariff item No. 8708.29.99. It was the appellants’ contention that the goods in issue qualified for duty-free entry under Code 2470 of Schedule II to the *Customs Tariff*.

**HELD:** The appeals are dismissed. Counsel for the respondent made a motion for a nonsuit and argued that the appeals should be dismissed. The Tribunal stated that, in this type of appeal, the onus is on the appellant to show that the respondent’s decision is incorrect. To do so in this case, the appellants must present before the Tribunal witnesses who can identify and describe the goods in issue. Since this was not done, the Tribunal ruled that there was no evidence before it on which it could hear cross-examination or argument. The Tribunal, therefore, dismissed the appeals for lack of evidence. As such, the Tribunal finds that the goods in issue do not qualify for duty-free entry under Code 2470.

Place of Hearing:                      Vancouver, British Columbia  
Date of Hearing:                      March 17, 1997  
Date of Decision:                      July 3, 1997

Tribunal Members:                      Robert C. Coates, Q.C., Presiding Member  
   Patricia M. Close, Member  
   Lyle M. Russell, Member

Counsel for the Tribunal:                      Joël J. Robichaud

Clerk of the Tribunal:                      Susanne Grimes

Appearances:                                      Mike Simpson, for the appellants  
   Anne M. Turley, for the respondent

Appeal Nos. AP-95-214, AP-95-215 and AP-95-237

**CROSS CANADA AUTO BODY SUPPLY (WINDSOR) LTD.                      Appellants**  
**AND AT PAC WEST AUTO PARTS LTD.**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE                      Respondent**

TRIBUNAL:                      ROBERT C. COATES, Q.C., Presiding Member  
   PATRICIA M. CLOSE, Member  
   LYLE M. RUSSELL, Member

### **REASONS FOR DECISION**

These are appeals under section 67 of the *Customs Act*<sup>1</sup> (the Act) from decisions of the Deputy Minister of National Revenue made pursuant to section 63 of the Act and dated August 1, 3 and 4, September 8 and November 10, 1995.

The goods in issue are described in the respondent's brief as goods "in the form of automotive body parts consisting of fenders, door shells and assemblies, header/side/rocker/nose/quarter/inner wheel panels, windshield frames, grille shells, trunk lids, mouldings, boxside and bedside assemblies, aprons and valances, front and rear bumpers and reinforcement bars for vehicles of heading 87.03 and 87.04 of the *Customs Tariff*."

At the time of importation, the goods in issue were classified under classification Nos. 8708.29.99.10 and 8708.29.99.90 of Schedule I to the *Customs Tariff*<sup>2</sup> as other parts and accessories of the motor vehicles of heading Nos. 87.01 to 87.05. Pursuant to paragraph 60(1)(b) of the Act, the appellants requested that the goods in issue that are made of metal be classified under classification No. 8708.29.99.10. The appellants also requested duty-free entry for all of the goods in issue under Code 2470 of Schedule II to the *Customs Tariff* (Code 2470). Both of the appellants' requests were denied. The appellants filed a further request for re-classification of the goods under classification No. 8708.29.99.10 and for duty-free entry under Code 2470 pursuant to paragraph 63(1)(a) of the Act. The request for re-classification was allowed; however, the request for duty-free entry under Code 2470 was denied on the basis that the goods had been found "to be either welded or further metal finished after the final forming process."

The parties agreed that the goods in issue were properly classified under tariff item No. 8708.29.99. It was the appellants' contention that the goods in issue qualified for duty-free entry under Code 2470. In his brief, the appellants' representative argued that the goods in issue met the description of the goods listed in the preamble to Code 2470. More particularly, he argued that the goods in issue were "[s]tampings, body, cowl, fender, front end, hood, instrument board, shields or baffles, of plain or coated metal, in the rough, trimmed or not, whether or not welded in any manner before final forming or piercing, but not metal finished in any degree, including such stampings incorporating pierce or clinch nuts, other than door pillars, shields and baffles for current models of the vehicles of heading No. 87.03 or 87.04."

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

At the hearing, counsel for the respondent raised two preliminary issues. First, she argued that Mr. Russell D. Newcombe, an official of the Department of National Revenue (Revenue Canada) who was summoned by subpoena to appear as a witness on behalf of the appellants should not be allowed to testify, on the basis that the evidence that he would be providing through his testimony was not relevant to the issue before the Tribunal. More specifically, counsel referred to a letter dated March 6, 1997, from the appellants' representative to the Tribunal which explained that Mr. Newcombe, who had issued a favourable ruling dealing with goods similar to those in issue, would be providing background information regarding his ruling. Counsel argued that such information was irrelevant because it related to goods other than those in issue. Furthermore, the ruling provided a general opinion with respect to the classification of these goods which did not form part of the decision under appeal. Counsel also noted that Mr. Newcombe's ruling was made in 1991, prior to the importation of the goods in issue. Next, counsel argued that it would be difficult for the appellants to discharge their onus in the present case since the representative would not be calling any witnesses who would be able to identify and describe the goods in issue.

In response, the appellants' representative argued that Mr. Newcombe should be allowed to testify, on the basis that he visited the appellants' premises and examined goods similar to those in issue and that the ruling which he issued dealt with such goods. The representative confirmed that Mr. Newcombe was the only witness whom he intended to call. The Tribunal ruled that Mr. Newcombe be allowed to testify to determine whether he could identify the goods brought to the hearing by the representative.

Mr. Newcombe testified as to his experience with Revenue Canada. He explained that, from 1982 to 1991, he worked in the area of tariff classification of automotive parts under the *Customs Tariff*. At the end of 1991, Mr. Newcombe issued two rulings, a general ruling on various metal auto parts that would qualify for duty-free entry under Code 2470 and a ruling to one of the appellants, AT PAC West Auto Parts Ltd. (AT PAC), specifically covering door assemblies with two stampings clamped together. Mr. Newcombe identified the goods brought to the hearing by the appellants' representative as being auto body parts and testified that they were similar to the ones that he had seen at AT PAC's premises. More particularly, Mr. Newcombe described the goods as two fenders, a cover for a wheel well and a piece stamping. At that point, counsel for the respondent objected to Mr. Newcombe giving further testimony with respect to the goods on the basis that he was not an expert in the automotive stamping industry. The Tribunal agreed, and Mr. Newcombe did not provide any further evidence in examination in chief.

In cross-examination, Mr. Newcombe testified that none of the goods brought to the hearing by the appellants' representative were listed on the ruling as having been examined by him during his visit of AT PAC's premises. He also testified that none of the goods which were listed on the ruling or any goods similar to those goods were brought to the hearing. In re-examination, Mr. Newcombe testified that he examined goods at AT PAC's premises similar to the goods which were brought to the hearing, even though such goods were not listed on the ruling.

At that point, counsel for the respondent made a motion for a nonsuit and argued that the appeals should be dismissed. Counsel submitted that the appellants had not brought any evidence to show that the respondent's decision that the goods in issue did not qualify for duty-free entry under Code 2470 because they were metal finished and further processed after final forming was incorrect. Counsel argued that the evidence presented did not even establish whether the goods brought to the hearing were similar to the goods in issue. As such, counsel argued that the appellants had not met their onus in the present case.

In response, the appellants' representative explained that most of the appellants' case was based on the ruling issued by Mr. Newcombe and Revenue Canada's departmental policy on what constituted metal finishing at the time that the goods in issue were imported. He then began arguing the appellants' position

with respect to the merits of the appeals and relying on evidence which was not before the Tribunal. He was therefore interrupted.

The Tribunal stated that, in this type of appeal, the onus is on the appellant to show that the respondent's decision is incorrect. To do so in this case, the appellants must present before the Tribunal witnesses who can identify and describe the goods in issue. Since this was not done, the Tribunal ruled that there was no evidence before it on which it could hear cross-examination or argument. The Tribunal, therefore, dismissed the appeals for lack of evidence.<sup>3</sup>

Although a motion for a nonsuit generally arises in civil or criminal proceedings, the Tribunal is of the opinion that it may entertain a request which has the same purpose, namely, the early dismissal of a case. However, in the Tribunal's view, such a motion should be granted only in exceptional circumstances and only if a *prima facie* case has not been made by an appellant.<sup>4</sup> As noted earlier, the appellants' contention in these appeals was that the goods in issue were "[s]tampings, body, cowl, fender, front end, hood, instrument board, shields or baffles, of plain or coated metal, in the rough, trimmed or not, whether or not welded in any manner before final forming or piercing, but not metal finished in any degree, including such stampings incorporating pierce or clinch nuts, other than door pillars, shields and baffles for current models of the vehicles of heading No. 87.03 or 87.04" and, hence, that they qualified for duty-free entry under Code 2470. However, no evidence was presented by the appellants to identify or describe the goods in issue or to show that they were not metal finished or further processed after final forming, which, in the Tribunal's view, the appellants were clearly obligated to do.<sup>5</sup> As a result, not only was there no case for the respondent to meet, but there existed no evidence before the Tribunal on which it could decide the issue. The Tribunal must, therefore, find that the goods in issue do not qualify for duty-free entry under Code 2470.

Accordingly, as stated at the hearing, the appeals are dismissed.

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

Patricia M. Close  
Patricia M. Close  
Member

Lyle M. Russell  
Lyle M. Russell  
Member

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3. *Transcript of Public Hearing*, March 17, 1997, at 25-26.

4. See, for example, S. Blake, *Administrative Law in Canada* (Toronto: Butterworths, 1992) at 42-43.

5. See, for example, *Michelin Tires (Canada) Ltd. v. The Deputy Minister of National Revenue for Customs and Excise* (1981), 7 T.B.R. 341.