CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, July 24, 1997

Appeal No. AP-96-016

IN THE MATTER OF an appeal heard on October 10, 1996, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated March 29, 1996, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

TRUDELL MEDICAL MARKETING LIMITED **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal No. AP-96-016

TRUDELL MEDICAL MARKETING LIMITED **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The goods in issue are three different models of surgical shoe covers imported by the appellant. They are made of nonwoven polypropylene fabric, and the outside edge has an elastic hemmed seam. Two of the models have a rubber anti-slip tread. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 6307.90.99 as other made up articles of other textile materials, as determined by the respondent, or should be classified under tariff item No. 6217.10.00 as other made up clothing accessories, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal is of the view that the classification opinion relating to subheading No. 6307.90 describes the goods in issue. The Tribunal, therefore, concludes that the goods in issue are properly classified under tariff item No. 6307.90.99 as other made up articles.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 10, 1996
Date of Decision:	July 24, 1997
Tribunal Member:	Arthur B. Trudeau, Presiding Member
Counsel for the Tribunal:	Hugh J. Cheetham
Clerk of the Tribunal:	Ivy Lai
Appearances:	James P. Jagger, for the appellant Ian McCowan, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-96-016

TRUDELL MEDICAL MARKETING LIMITED **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue dated March 29, 1996, heard by one member of the Tribunal.[2]

The appellant is involved in the marketing and distribution of medical supplies and equipment across Canada. The goods in issue are three different models of surgical shoe covers imported by the appellant. They are made of nonwoven polypropylene fabric, and the outside edge has an elastic hemmed seam. Two of the models have a rubber anti-slip tread. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 6307.90.99 of Schedule I to the *Customs Tariff*[3] as other made up articles of other textile materials, as determined by the respondent, or should be classified under tariff item No. 6217.10.00 as other made up clothing accessories, as claimed by the appellant.[4]

The relevant tariff nomenclature reads as follows:

62.17	Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading No. 62.12.
6217.10.00	-Accessories
63.07	Other made up articles, including dress patterns.
6307.90	-Other
6307.90.99	----Of other textile materials

The appellant's representative called one witness, Ms. Gail Robertson, Marketing Manager for Trudell Medical Marketing Limited and a registered nurse. Ms. Robertson was accepted as an expert in the marketing of the goods in issue and in the field of nursing. Ms. Robertson first described how the medical staff prepares to enter an operating room and stated that all such personnel wears outer garments or clothing

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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 the 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.).
4. At the outset of the hearing, the appellant's representative indicated that the appellant was no longer claiming that those models with an anti-lip tread should be classified under tariff item No. 6404.19.90 as other footwear.

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that are disposable. She explained that the goods in issue are worn over whatever footwear a person may be wearing and must be worn by anyone working in the operating room, isolation room or intensive care unit. Persons dispose of the goods in issue when leaving one of these areas. A new pair is put on if a person subsequently returns. Thus, a typical pair of the goods in issue would only be worn once. She explained that the goods in issue are primarily worn to prevent the tracking of dirt, debris or bacteria into a clean area such as the operating room. They are also used to protect footwear from coming into contact with blood and other fluids.

Ms. Robertson was shown a copy of the diagram of a protective covering found in the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[5] (the Classification Opinions) and was asked to indicate any similarities with or differences between the drawing and the goods in issue. She stated that the difference that stood out the most for her was that the product in the diagram appeared to be a closed unit with an elastic around the top, whereas the goods in issue are stitched along the bottom, up the side and about two thirds of the way across the top with elastic being applied around the remaining opening, leaving a small opening, whereas the product illustrated in the diagram has a large opening.

In cross-examination, Ms. Robertson stated that the purpose of the tread on those models of the goods in issue is to prevent slippage on an operating room floor. However, in her view, the goods in issue would not be bought for this purpose.

Counsel for the respondent called one witness, Ms. Lyne Desroches, Senior Chemist in a laboratory of the Department of National Revenue. Ms. Desroches has been in this position since 1992. Prior to that, she worked in other capacities in the laboratory. She had been asked to analyze the goods in issue, and her report was filed with the Tribunal. Ms. Desroches was qualified as an expert in chemistry and, more specifically, in the analysis of textile materials. Ms. Desroches explained that the goods in issue are made of point-bonded nonwoven polypropylene. She also described the process of manufacture.

In cross-examination, Ms. Desroches explained that she was of the view that the goods in issue were "made up" in that they were further processed and hemmed.

In argument, the appellant's representative submitted that the goods in issue are different from the product illustrated in the rather primitive diagram found in the Classification Opinions and that these differences are important in respect of classifying the goods in issue. He submitted that the goods in issue have additional seams, smaller openings and a greater degree of tailoring than the product illustrated in the diagram. He noted that, while the English version of the Classification Opinions text which describes the diagram uses the phrase "stretchable envelope," the French version uses the word "*souple*," meaning "flexible" or "soft," not the French word for stretchable, "*élastique*." Furthermore, although the text of the Classification Opinions states that the product illustrated can be worn over footwear, it is not certain that it does not have other uses. Even if the goods in issue are "very similar" to the product in the Classification Opinions, they are not identical. He submitted that whether or not an article falls under the same heading as the article to which it is most akin is not relevant under the *General Rules for the Interpretation of the Harmonized System*[6] (the General Rules) until Rule 4 is reached. In this case, the goods in issue can be classified otherwise before recourse to this rule is needed. He also submitted that, in the appellant's view,

5. Customs Co-operation Council, 1st ed., Brussels, 1987.
6. *Supra* note 3, Schedule I.

the respondent did not use the Classification Opinions as a guide to classifying the goods in issue. Rather, the respondent used them as a criterion for classification, which, in the appellant's view, is incorrect.

The appellant's representative submitted that the use and purpose of goods are part of their character, and thus, presumably, should be taken into account in classifying the goods. He submitted that the evidence shows that the use and purpose of the goods in issue are for protecting feet and shoes and that this reflects an ordinary understanding of the term "footwear." Therefore, the appellant could not agree with the respondent that the provisions in the *Customs Tariff* for footwear are not applicable to the goods in issue.

The appellant's representative proceeded to explain how the appellant approached classification of the goods in issue with specific reference to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[7] (the Explanatory Notes) and the wording of relevant headings. Heading No. 62.17 requires that articles classified within it be "made up." Note 7 (a) of the Explanatory Notes to Section XI states that, for purposes of Section XI, "made up" includes articles that are cut otherwise than into squares or rectangles. Ms. Desroches testified that the goods in issue were cut otherwise than into squares or rectangles and, thus, that they should be considered to be "made up." The representative directed the Tribunal to Note 12 of the Explanatory Notes to heading No. 62.17 which provides that this heading includes footwear without applied soles, excluding babies' booties.

The appellant's representative submitted that there are no Explanatory Notes which support the exclusion of shoe covers from the term "footwear." He stated that, elsewhere in the Explanatory Notes, the term is applied to slippers and disposable footwear with applied soles generally designed to be used only once.[8] Furthermore, textile footwear without applied soles is specifically excluded from Chapter 64 by operation of Note 1 (a) to Chapter 64 because it is specifically provided for in headings in Chapters 61 and 62.

With respect to the meaning of the phrase "clothing accessories," the appellant's representative stated that the Tribunal has accepted that an "accessory" can be understood as "something contributing in a subordinate degree to a general result or effect; an adjunct, or accompaniment.[9]" He submitted that the goods in issue contribute in a subordinate way to ordinary footwear worn by hospital workers, medical practitioners, etc., as they are worn to protect the feet and increase the cleanliness of an operating room.

Finally, the appellant's representative considered the changes to Note 1 (a) to Chapter 64, which came into effect on January 1, 1996. He requested that the appellant be provided reassurance from the Tribunal that classification of the goods in issue will not subsequently be changed due to these amendments. The representative subsequently withdrew this request.

Counsel for the respondent made submissions on three points. First, he submitted that section 11 of the *Customs Tariff* provides that regard will be had to the Classification Opinions. Therefore, the relevant opinion in this case has to be applied and is determinative of the matter. This is so because there is a match between the description accompanying the diagram in the Classification Opinions and the goods in issue. Counsel attempted to demonstrate this point by reference to what, he submitted, was an analogous situation with respect to the classification of certain plastic articles in heading No. 39.26.

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7. Customs Co-operation Council, 1st ed., Brussels, 1986.
8. Citing Notes A(6) and (10) of the Explanatory Notes to Chapter 64.
9. *Fisher Scientific Limited* v. *The Deputy Minister of National Revenue for Customs and Excise*, Appeal Nos. AP-89-181 and AP-89-244, May 3, 1994, at 5.

Counsel for the respondent's second point or submission was that the description accompanying both the opinion at issue and that referenced in heading No. 39.26 is that a distinction is being made between an article which has the specific form of the article named and the articles that are classified in the "other" or residual category, which do not tend to have the form or shape of the original article with which they are connected. He submitted that the reason for this difference has to do with the difference in the primary purpose of the articles and that the primary purpose of the residual articles is to provide protection. In the case of the goods in issue, this protection is in the form of protecting or maintaining a clean environment, be it in an operating room, clean room or isolation room.

Counsel for the respondent submitted that the goods in issue are not "clothing accessories" because they are disposable. Counsel suggested that the Tribunal examine the various goods that are classified in Chapter 62. He submitted that such an examination would reveal that no other goods in that chapter are as readily disposable as the goods in issue. He also submitted that the short "average life" or period of use of the goods in issue is unlike that of the apparel found in Chapter 62. In this regard, the goods found in Chapter 63, such as surgical masks, are broadly similar to the goods in issue.

Counsel for the respondent's final point had to deal with the nature of Note 1 (a) to Chapter 64. He submitted that, while this note excludes goods from Chapter 64, it does not mandate that they be classified elsewhere. Furthermore, the Explanatory Notes to Chapter 64 provide, in part:

> For the purposes of this Chapter, the term "footwear" does not, however, include disposable foot or shoe coverings of flimsy material (paper, sheeting of plastics, etc.) without applied soles. These products are classified according to their constituent material.

This, he submitted, is a specific direction to classify according to constituent material or, in other words, to classify the goods in issue in a manner consistent with the respondent's position.

In reply, the appellant's representative submitted that if Note 1 (a) was not intended to lead to classification of the goods mentioned in it in Chapter 61 or 62, it would have said so. He submitted that the subsequent changes to Note 1 (a) reflect the correctness of this view.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the General Rules. Rule 1 of the General Rules provides that classification is to be determined according to the terms of the headings and any relative Section or Chapter Notes. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the Classification Opinions and the Explanatory Notes, among other things, as guides to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*.

The fact that the parties agree that the goods in issue are "made up" is reflected in the wording of the heading that each has put forward for consideration. Therefore, the Tribunal must decide, in the context of the wording of heading No. 62.17, whether the goods in issue are "clothing accessories." While it might be said, in the most general terms, that the goods in issue "contribute to" or "accompany" footwear, the Tribunal does not agree that they do so in the sense of being a clothing accessory. The Tribunal is of the view that an examination of the clothing accessories provided for in this heading, i.e. articles such as dress shields, belts, sashes, sleeve protectors, collars and the like, persuades it that ready disposability is not a quality or character of the goods in heading No. 62.17. Furthermore, the goods provided for in heading No. 62.17 cannot be said to be intended to be used once, and then only for a few hours.

Not only do the goods in issue not come within the wording of heading No. 62.17, the Tribunal is also persuaded that they are contemplated by the opinion relating to subheading No. 6307.90. This opinion provides, in part, that the goods of subheading No. 6307.90 include:

> Protective covering made of a single oval piece of nonwoven fabric, the outside edge of which has an elastic hemmed seam. This product takes the form of a stretchable envelope which can be worn over footwear.

In the Tribunal's view, this describes the goods in issue that it has examined and is consistent with the description of the goods in issue given by both witnesses. The Tribunal, therefore, concludes that the goods in issue are properly classified under tariff item No. 6307.90.99 as other made up articles.

Accordingly, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member