

Ottawa, Tuesday, December 2, 1997

Appeal No. AP-96-082

IN THE MATTER OF an appeal heard on June 10, 1997, 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 June 28, 1996, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

ROLLINS MACHINERY LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-96-082

ROLLINS MACHINERY LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue under subsection 63(3) of the *Customs Act*. The issue in this appeal is whether goods described as rubber crawler tracks are properly classified under tariff item No. 4016.99.90 as other articles of vulcanized rubber other than hard rubber, as determined by the respondent, or should be classified under tariff item No. 4010.19.10 as other conveyor belts of vulcanized rubber being reinforced with textile materials that are cut to length, as claimed by the appellant.

HELD: The appeal is allowed in part. Adopting the common meaning of a conveyor belt as a thing that exists in a sort of fixed geometry and that functions to move a wide variety of things, including people, from one point to another, the Tribunal finds that the goods in issue, which move an excavator from one place to another, are not conveyor belts. However, the Tribunal finds that the goods in issue constitute conveyor belting, as that term is commonly defined. Inasmuch as no evidence was presented to establish that the goods were “[c]ut to length,” the Tribunal finds that the goods should be classified under tariff item No. 4010.19.90 as other conveyor belting.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 10, 1997
Date of Decision:	December 2, 1997
Tribunal Member:	Charles A. Gracey, Presiding Member
Counsel for the Tribunal:	Shelley Rowe
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Douglas J. Bowering, for the appellant Anne M. Turley, for the respondent

Appeal No. AP-96-082

ROLLINS MACHINERY LTD.

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and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member

REASONS FOR DECISION

This is an appeal, heard by one member of the Tribunal,¹ under section 67 of the *Customs Act*² (the Act) from a decision of the Deputy Minister of National Revenue under subsection 63(3) of the Act. The issue in this appeal is whether goods described as rubber crawler tracks, which parties agreed are composed of vulcanized rubber, are properly classified under tariff item No. 4016.99.90 of Schedule I to the *Customs Tariff*³ as other articles of vulcanized rubber other than hard rubber, as determined by the respondent, or should be classified under tariff item No. 4010.19.10 as other conveyor belts of vulcanized rubber being reinforced with textile materials that are cut to length, as claimed by the appellant. The following is the relevant tariff nomenclature from Schedule I to the *Customs Tariff*:

40.10	Conveyor or transmission belts or belting, of vulcanized rubber. -Conveyor belts or belting:
4010.19	--Other
4010.19.10	---Cut to length
4010.19.90	---Other
40.16	Other articles of vulcanized rubber other than hard rubber. -Other:
4016.99	--Other
4016.99.90	---Other

The appellant had initially sought classification of the goods in issue under tariff item No. 8431.49.90 as other parts of self-propelled bulldozers, but withdrew this position at the hearing and sought, instead, classification of the goods in issue under tariff item No. 4010.19.10 as other conveyor belts or belting cut to length. The Tribunal notes that Note 1(a) to Section XVI of Schedule I to the *Customs Tariff*, which section includes Chapter 84, states that Section XVI does not cover “[t]ransmission or conveyor belts or belting, of plastics of Chapter 39, or of vulcanised rubber (heading No. 40.10); or other

1. 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 *Customs Act*.

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

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

articles of a kind used in machinery or mechanical or electrical appliances or for other technical uses, of vulcanised rubber other than hard rubber (heading No. 40.16).” Therefore, goods classified in heading No. 40.10 or 40.16 are excluded from being classified in Chapter 84.

Presented in evidence as a sample of the goods in issue was a portion of a rubber crawler track about one foot in length, but sufficient to illustrate the construction and appearance of the goods in issue.⁴ The sample is made of a type of rubber into which are imbedded two cables running longitudinally, as well as metal teeth. Regular spaces or holes are found along the middle section of the sample, apparently to accommodate the drive and end sprockets. Although a sample of an entire rubber crawler track was not introduced as an exhibit, parties agreed that the sample was a portion of the goods in issue. It was not possible, however, to determine from the sample whether the goods in issue are continuous tracks or lengths of track, the ends of which are joined to form continuous tracks. Counsel for the respondent objected to the fact that the appellant did not present a complete sample of the goods in issue and that the appellant’s representative did not call any witnesses employed by the appellant. It could not, therefore, be established whether the goods were endless belts or cut to length. There being no possibility that a sample of the complete article, as imported, be presented, the Tribunal directed that the parties deal with the matter in argument.

Dr. Peter Frise, Associate Professor with the Department of Mechanical and Aerospace Engineering at Carleton University, was called to appear as a witness for the appellant and was qualified as an expert in power transmission. Dr. Frise began his testimony by differentiating between a “conveyor belt” and a “power transmission belt.” With a transmission belt, the power goes in at one end where the drive sprocket or pulley is located and the power comes out at the other end. The primary purpose of a power transmission belt, he explained, is to transmit power from the power source to the machine or implement that is to be operated by that power. With a conveyor belt, the energy is being transmitted along the belt to whatever is being moved, i.e. the dirt, coal, vehicle, etc. The pulley at the other end is not transmitting or receiving any power, but is just spinning around. On the basis of that distinction, Dr. Frise testified that the goods in issue are a type of conveyor belt.

Dr. Frise acknowledged that, while the general concept of a conveyor belt is as a device used to convey materials from one point to another, the conveyance of the excavator along the surface of the ground involved exactly the same engineering principles. He explained that, in engineering terms, there is no difference between the concept that when an excavator is in motion, one can observe either that the excavator is moving forward over the ground or that the ground is moving backward relative to the excavator. The observation depends upon one’s “frame of reference” whether on the ground beside the machine or on the moving machine.

In cross-examination, counsel for the respondent sought to clarify the common understanding that a conveyor belt is a piece of equipment used primarily to move materials, packaged goods and articles along its length from one fixed point to another. When Dr. Frise agreed with this common understanding, counsel challenged him that the conveyance of materials on a conveyor belt is different from the conveyance of a vehicle forward or backward. Dr. Frise disagreed, stating that the conveyance of the vehicle was not distinguishable in an engineering or a mathematical sense from the conveyance of materials. When offered a description of a conveyor belt as being used to carry sand, earth, ore, grain and similar materials, Dr. Frise agreed, but stated that, though correct, the description was not all encompassing.

4. Exhibit A-4.

In redirect, Dr. Frise explained that the term “conveyor belt” covers a much wider range of goods than is commonly understood. By way of illustration, he referred to such other goods as paper carriages for photocopiers and endless belts for belt sanders.

Also appearing as a witness for the appellant was Mr. Edgar Thyret, who was qualified as an expert in the area of the construction or fabrication and use of conveyor belts. Mr. Thyret stated that he had over 30 years of experience with the design and engineering of heavy-duty conveyor belts. He opined that the sample portion of the goods in issue was a section from an endless moulded conveyor belt. Mr. Thyret then explained how such belts are fabricated and that they are built up much like a sandwich with moulded rubber and cable. He explained that such a belt could be fabricated either as an endless belt of specific dimensions or as a length. In the latter case, a conveyor belt would be created by joining the ends in some manner. He agreed that it was not apparent from the sample portion of the goods in issue whether they were endless or comprised of lengths.

Mr. Thyret concurred with the view of Dr. Frise that the track that conveys an excavator is a type of conveyor belt and added other examples, such as snowmobile belts and treadmill belts. In Mr. Thyret’s opinion, the goods in issue are conveyor belts, in that they function to “convey” an excavator to which they are attached. Mr. Thyret conceded that, unlike the common understanding of conveyor belts as being fixed in place, conveyor belts can move through space, as do the goods in issue, and that the fact that goods do move through space does not detract from their nature as conveyor belts.

Mr. Peter Alderson, Marketing Manager, Steel Cord Conveyor Belting and Engineered Products at Scandura (Canada), Inc., a manufacturer of conveyor belting, appeared as a witness for the respondent and was qualified as an expert in the design, engineering, manufacture and marketing of conveyor belting. Mr. Alderson’s particular expertise is as a chemist, and he has been involved with the formulation of the rubbers that are used in the manufacture of conveyor belts. Counsel for the respondent introduced, through Mr. Alderson, documentation concerning several types of industrial conveyor belts used to transport bulk materials over considerable distances. She also introduced, through Mr. Alderson, a definition of “conveyor belt” as “a belt that carries materials from one place to another.”⁵ Mr. Alderson agreed with that definition and went on to describe various types of such belts. He opined that the goods in issue, as shown by the sample portion and as used as tracks for tracked vehicles, are not used and do not function as conveyor belts. However, he conceded that the goods in issue could, perhaps, be used in some applications to convey, for example, logs.

Mr. Alderson clearly did not agree with the broader definition of a conveyor belt put forward by the witnesses for the appellant. In fact, when questioned whether paper carriages for photocopiers could be considered conveyor belts, he said that they were merely mechanical components of photocopiers. In his opinion, “[c]onveyor belts are in a fixed geometry and they convey materials from one point to another.”⁶ He then referred to a number of features of a conveyor belt, such as “troughability” and “load support,” which are absent in the goods in issue. He acknowledged that the goods in issue do convey excavators, but stated that, in his opinion, they are not conveyor belts because they do not exist in a fixed geometry. He also agreed that his expertise was in the area of chemistry, and he claimed no expertise in engineering principles.

5. *Conveyor and Elevator Belt Handbook*, Rubber Manufacturers Association and The Rubber Association of Canada, 1989 at 80.

6. Tribunal Exhibit AP-96-082-9 at 2.

The appellant's representative, in his brief, provided dictionary definitions of "belt" and "conveyor" to assist the Tribunal in interpreting those terms in heading No. 40.10. "Belt" is defined as "a continuous band of tough flexible material (as leather, rubber, fabric, wire) for transmitting motion and power from one pulley to another or for conveying materials."⁷ "Conveyor" is defined as "a mechanical apparatus for carrying packages or bulk material from place to place"⁸ and "conveyor belt" as "an endless moving belt (as of canvas, rubber, metal) on which items, packages, or material to be moved may be placed and which operates over terminal pulleys or rollers together with receiving and delivery appliances."⁹

In oral argument, the appellant's representative pointed out that both of his expert witnesses considered the goods in issue to be conveyor belts and that this opinion was based on engineering principles. He argued that, as a result, the goods were classifiable in subheading No. 4010.19, but acknowledged that he had no evidence that the goods were "[c]ut to length," which would make the goods in issue classifiable under tariff item No. 4010.19.10. However, he pointed out that, even if the goods in issue were endless at the time of importation, they would have been cut to length at some point in order to become a finished product.

Counsel for the respondent argued first that, because the goods in issue did not convey materials from one place to another, they could not be considered to be conveyor belts and that this was an opinion shared by her expert witness who had many years of experience with a manufacturer of conveyor belts. She argued that the engineering experts were "pushing the limits and manipulating words by saying that the tracking conveys the excavator."¹⁰ She argued on the authority of two cases, *Olympia Floor and Wall Tile Company v. Deputy Minister of National Revenue for Customs and Excise*¹¹ and *Canadian National Railway Co. and Canadian Pacific Ltd. v. Canada*,¹² that if a word or term has a specific trade meaning, then the word or term should be construed as having that particular meaning, even though it may differ from the ordinary common meaning of the word. Counsel argued that the term "conveyor belt" must be defined according to the generally accepted mechanical engineering definitions, as opposed to the standard dictionary definitions of the word "convey."

Counsel for the respondent referred to *Marks' Standard Handbook for Mechanical Engineers*¹³ as support for describing a conveyor belt or continuous belting system as "one of a number of material-handling systems. The belt runs between two fitted points which can range from a few metres to several kilometres in distance. The materials or goods are transported along the upper surface of the conveyor belt between these two fixed points." Counsel also referred to the definition of "belt" as a "continuous band of tough, flexible material used for transmitting power or conveying materials."¹⁴

In the view of counsel for the respondent, the goods in issue do not meet these definitions, as they are parts of a track-laying system upon which the other parts are mounted. Further, the track-laying system, in general, and the goods in issue, in particular, do not transport goods or materials along their upper surface

7. *Webster's Third New International Dictionary of the English Language* (Springfield: Merriam-Webster, 1986) at 202.

8. *Ibid.* at 499.

9. *Ibid.*

10. *Transcript of Public Argument*, June 10, 1997, at 12.

11. 49 N.R. 66 at 77-78, Federal Court of Appeal, Court File No. A-115-82, September 14, 1983.

12. 171 N.R. 64 at 72-74, Federal Court of Appeal, Court File No. A-269-93, June 15, 1994.

13. Eighth ed. (New York: McGraw-Hill) at 10-55 and 10-56.

14. *Encyclopedia of Polymer Science and Engineering*, Vol. 2 (New York: John Wiley & Sons) at 193.

nor transmit power from one point to another. Rather, the track-laying system provides the traction point for the excavator with the surface of the ground to assist in the movement of the machine.

Counsel for the respondent argued that the evidence of Dr. Frise and of Mr. Thyret that the goods are conveyor belts ignores common sense and that Dr. Frise was manipulating an engineering term to try to fit a situation. She argued, as well, that it was nonsensical to conclude that the track conveyed the soil in one direction while propelling the excavator in the other.

Counsel for the respondent then argued that, even if the goods in issue were found to be conveyor belts, they could not be classified as requested by the appellant's representative since there was no evidence that they were "[c]ut to length."

In rebuttal, the appellant's representative argued that, even if the goods in issue are not conveyor belts, they can still be classified as "belting" in heading No. 40.10 in preference to the heading sought by the respondent, i.e. "[o]ther articles of vulcanized rubber."

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules for the Interpretation of the Harmonized System*¹⁵ (the General Rules) and the *Canadian Rules*.¹⁶ 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 and, provided such headings or Notes do not otherwise require, according to the principles set out in Rules 2 through 6, as well as the *Canadian Rules* which follow. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the *Explanatory Notes to the Harmonized Commodity Description and Coding System*¹⁷ (the Explanatory Notes) as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*. Thus, the Tribunal must first decide whether the goods in issue are named or described in general terms in a specific heading. If this is the case, they must be classified therein subject to any relative Section or Chapter Notes and taking into account the Explanatory Notes.

There is consensus between the parties that the goods in issue are made of vulcanized rubber. However, the Tribunal must consider whether the goods in issue fall within the terms of tariff item No. 4010.19.10 as other conveyor belts of vulcanized rubber cut to length or tariff item No. 4016.99.90 as other articles of vulcanized rubber other than hard rubber, or both, as interpreted with the aid of the relevant Section or Chapter Notes and the Explanatory Notes.

The Explanatory Notes to heading No. 40.10 provide, in part, as follows:

This heading covers conveyor or transmission belts and belting, wholly of vulcanised rubber, or of textile fabric impregnated, coated, covered or laminated with rubber.

The heading includes belting in the length (for subsequent cutting to length) as well as belts already cut to length (whether or not joined end to end or fitted with fasteners); it also covers endless belts.

The Tribunal agrees with counsel for the respondent that the goods in issue cannot be characterized as conveyor belts on the basis simply that, during operation, they may convey small amounts of soil in a

15. *Supra* note 3, Schedule I.

16. *Ibid.*

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

direction opposite to the movement of the excavator. However, in the Tribunal's view, the goods in issue may be characterized as conveyor belts on the basis that they convey an excavator. The Tribunal accepts the testimony of both the expert witnesses appearing on behalf of the appellant, particularly Dr. Frise, who were careful to point out the engineering concepts that led to their conclusion that the goods in issue convey an excavator.

However, having found that the goods in issue convey the excavator does not, in the Tribunal's view, indicate that the goods in issue are "conveyor belts" within the ordinary sense of the usage of the term. The Tribunal finds compelling the common understanding that a conveyor belt is a thing that exists in a sort of fixed geometry and that functions to move a wide variety of things, including people, from one point to another. Nevertheless, the Tribunal accepts the engineering principles so clearly enunciated by Dr. Frise relating to "frame of reference" and is persuaded that, although the goods in issue are not conveyor belts, the goods in issue, which move an excavator from one place to another, are a type of conveyor belting.

This leaves only the question of where within heading No. 40.10 the goods in issue should be classified. Inasmuch as no evidence was presented to establish that the goods were "[c]ut to length," notwithstanding the Tribunal's questions concerning this issue, the Tribunal finds that the goods should be classified under tariff item No. 4010.19.90 as other conveyor belting.

Having found that the goods in issue are other conveyor belting, the Tribunal is not persuaded that they can be classified in heading No. 40.16 in light of the Explanatory Notes to heading No. 40.16, which provide, in part, that it covers all articles of vulcanized rubber not covered by the preceding headings of Chapter 40 and the list of goods that are included in heading No. 40.16, which do not, with the exception of the "[o]ther" category, refer to goods similar to those in issue.

Therefore, the appeal is allowed in part, and the goods in issue should be classified as other conveyor belting under tariff item No. 4010.19.90.

Charles A. Gracey

Charles A. Gracey
Presiding Member