

Ottawa, Thursday, October 16, 1997

**Appeal No. AP-96-092**

IN THE MATTER OF an appeal heard on June 13, 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 with respect to a request for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**NORTESCO INC.**

**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

Michel P. Granger

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Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-96-092**

**NORTESCO INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

The appellant imported the goods in issue into Canada in 1994 under transaction Nos. 13037015126401 and 13037015158397. The appellant classified the goods in issue as articles of agglomerated cork under tariff item Nos. 4504.10.00 and 4504.90.00. This classification was rejected by the respondent who, pursuant to section 63 of the *Customs Act*, classified the goods in issue under tariff item No. 4008.11.00 as sheets of cellular vulcanized rubber other than hard rubber.

**HELD:** The appeal is allowed. The Tribunal believes that the goods in issue have the essential character of cork. The cork predominates by weight, volume and price. While unvulcanized rubber is initially used as a binding substance with the cork and other ingredients, it is transformed into a vulcanized rubber following the mixing and vulcanizing process. It is clear that neither cork on its own nor rubber on its own provides all of the properties necessary for the end uses discussed by the witnesses. To be useful, a composite of the two is needed. The cork, because of its unique ability to “concertina” into itself without distorting the products, is critical to the usefulness of the products. This particular characteristic of cork is important for reducing “side flow” and leakage, long-term torque “fight back” and compressibility on uneven surfaces. It is these which, in the Tribunal’s view, give the goods in issue their essential character or principal feature.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: June 13, 1997  
Date of Decision: October 16, 1997

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

Counsel for the Tribunal: Gerry H. Stobo

Clerk of the Tribunal: Anne Jamieson

Appearances: Paul Hughes, for the appellant  
Louis Sébastien, for the respondent

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**NORTESCO INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member

**REASONS FOR DECISION**

This is an appeal, heard by one member of the Tribunal,<sup>1</sup> pursuant to subsection 67(1) of the *Customs Act*<sup>2</sup> (the Act) from a decision of the Deputy Minister of National Revenue as to the proper tariff classification of jointings: ASEA Nebar and Tico S/PA pads.

The appellant imported the goods in issue into Canada in 1994 under transaction Nos. 13037015126401 and 13037015158397. The appellant classified the goods in issue as articles of agglomerated cork under tariff item Nos. 4504.10.00 and 4504.90.00 of Schedule I to the *Customs Tariff*.<sup>3</sup> This classification was rejected by the respondent who, pursuant to section 63 of the Act, classified the goods in issue under tariff item No. 4008.11.00 as sheets of cellular vulcanized rubber other than hard rubber.

The ASEA Nebar jointings are imported in varying thicknesses, widths and lengths, which are determined by the end user. They have many different uses, as gasket material for large transformers in the hydro-electric industry, as flange sealers in the chemical industry and as lid gaskets on oil tankers.

Tico S\PA pads are similarly imported in varying sizes and thicknesses. They are used as an anti-vibration and anti-noise material on which compressors, pumps and large-size transformers sit.

The goods in issue are manufactured in England by Tiflex Limited (Tiflex), the cork elastomer division of James Walker Manufacturing.

The appellant's position is that these products are agglomerated cork. It is the cork ingredient which, it claims, gives the goods in issue their special nature. On the other hand, the respondent feels that the goods in issue are vulcanized rubber products with cork filler. The respondent claims that it is the rubber, not the cork, which gives the goods in issue their special qualities.

The appellant's representative called two witnesses. The first was Mr. Ian Johnson, Technical Manager at Tiflex. The second witness was Mr. Philippe Hess, owner of Nortesco Inc.

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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.).

Mr. Johnson was qualified as an expert with the concurrence of counsel for the respondent. Mr. Johnson received his post-secondary education in rubber and plastics from the National College of Rubber Technology in London, England. He has spent 40 years with James Walker Manufacturing, where, through a series of promotions, he has become Technical Manager at Tiflex. During his tenure, he has been responsible for product development, designing and ordering new plant and equipment, product formulation, customer liaison and quality control.

Tiflex's product line covers a wide range of rubber/cork articles, including rubber bearings, bellows and compensators used for joining ducting on gas stations and turbines, printer and textile rollers, flange gaskets, anti-noise and anti-vibration mounting pads, and flooring materials. Some of the products that Tiflex manufactures contain cork and some do not.

Mr. Johnson indicated that the particular formulation of any one product is different depending upon its different uses. A hydro-electric plant will want the product to exhibit certain performance characteristics which will, for example, be different from the characteristics that one is looking for in a flexible flooring product used in high-traffic areas. Yet, both products may contain the same or largely the same ingredient. They will, however, have different quantities of those ingredients and may be processed differently.

Mr. Johnson testified that the goods in issue have pre-determined amounts of unvulcanized rubber, cork, activators and extenders blended together in a mixer. As a result of the chemical interaction, the unvulcanized rubber transforms into a vulcanized state, and a cork/vulcanized rubber product which is flexible and strong is produced. According to Mr. Johnson, this product has at least six important characteristics which make it particularly useful:

- (i) low Poisson's ratio - this is the measure of "side flow" which occurs when the goods in issue are put under stress, as they would be, for example, when they are used as a gasket in a large hydro-electric transformer or when subject to stress from the weight of a two-ton compressor. If there is "side flow," bulging may occur particularly around the key stress points, such as bolt locations. This bulging may result in leakage or cause premature wearing of the equipment. According to Mr. Johnson, it is the cork, not the rubber, which is the most important ingredient to prevent this unwanted effect. He stated:

Yes. You see, cork is rather unique, there is nothing like it. It consists of many millions of little cells per cubic centimetre, and the reason why you can compress cork with no side flow -- in fact you can compress it over 60 per cent of its thickness and it won't flow sideways -- is because the cell walls on the cork have little concertinas in them. So when compressive forces are placed on them these little walls fold up beautifully. They don't bulge, as do normal sponge-type materials. They actually compress within themselves, just like a bellows. They fold up just like a bellows, with no increasing in lateral dimensions. That is why the cork works so well.

It is unique. There is nothing else like it.<sup>4</sup>

- (ii) long-term torque retention. While rubber has excellent short-term torque retention, over a longer period of time, say 20 years, the cork alone will give it "fight back" qualities. Mr. Johnson used the analogy of a wine bottle taken from the sea after many years in the water. The contents are often still drinkable because the cork remained intact despite the long passage of time.

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4. *Transcript of Public Hearing*, June 13, 1997, at 33.

- (iii) conformance to surfaces to be sealed which may be uneven. As Mr. Johnson indicates, elastomer cork materials can accommodate up to 40 percent reduction in their original thickness to seal uneven flanges, whereas, in rubbers, this would result in excessive bulging. This would, he states, invariably distort the flange and cause leaking:

[Y]ou can put a compressive force on it and this force is absorbed by the cork particles in the rubber matrix, and you get very minimum bulge [which] is very handy when you have large lids of uneven quality and rough surface where you have to take up several millimetres of variation in the flange.<sup>5</sup>

- (iv) low thermal conductivity.
- (v) ability to dampen noise and absorb vibration. Rubber-based products are, according to Mr. Johnson, much less able to absorb vibrations, particularly in extreme temperatures. It is important that the products retain these properties in all weather conditions. For example, the goods in issue are expected to perform in -40° Arctic conditions. A product which is primarily rubber, would, under similar conditions and performing similar duties, become hard and unsuitable.
- (vi) high coefficient of friction. Because cork has a high coefficient of friction, the goods in issue are less likely to move when a force is applied to them. For that reason, cork has a particularly valuable role to play in products such as slip-resistant flooring.

Mr. Johnson then went on to give an exact breakdown of the total weight of the different ingredients used to create the goods in issue. He noted that they are comprised of unvulcanized rubber products, chemical activators, extenders, plastics, fillers and cork, which were grouped into four primary groups: rubber, activators, extenders and cork. The confidential figures provided by Mr. Johnson revealed that, in each case, cork was the single predominant ingredient by weight followed by rubber, extenders and activators in that order.

Mr. Johnson then turned his attention to an analysis of the ingredients by volume. He stated that, when measured by volume, cork is still the predominant ingredient. Once again, he relied on confidential information entered onto the record from Tiflex to support this. He acknowledged that trying to determine the volume of each ingredient in the mix without knowing the exact formulation is very difficult. He stated:

It is very difficult to determine what the volumes of cork are in the mix without knowing the formulation, and without knowing the final density of the material.

When you know those you can actually calculate the volume of cork in there, because all of the other ingredients, except the cork, have clearly defined specific gravities. You can pick them out of all the supplies manuals, and from it you can work out the exact volume of those products are in the component. From that you can, knowing the final density, you can then, working through, very simply determine how much volume of cork is in that product.

But without knowing the formula and without knowing the final density of the materials, you cannot determine what the volume of cork is there accurately.

You can come some way towards it by looking at it under a microscope and physically measuring it, but it's not very satisfactory. The only way you can do it is by knowing the formula and knowing the final density of the product.<sup>6</sup>

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5. *Ibid.* at 23-24.

6. *Ibid.* at 43-44.

In his evidence, Mr. Johnson stated that cork was, in terms of overall cost, the most expensive ingredient in the mixture. He acknowledged that some of the activators are proportionally more expensive, but only small amounts of them are used.

The appellant's second witness, Mr. Hess, stated that he, through his company, has been importing products such as the goods in issue from The James Walker Group of Companies for over 28 years. Mr. Hess then sells these products to Canadian customers, such as Ontario Hydro, Manitoba Hydro and Asea Brown Boveri Inc. (a large international corporation which builds transformers in Quebec). With respect to very large transformer casings, such as those used in the hydro-electric industry, their flanges are rarely, if ever, even. According to Mr. Hess, the cork within the ASEA Nebar gives it enough memory to seal properly over long distances (i.e. wide bolt spacings). The cork helps to prevent the rubber from obtaining "permanent set," an undesirable effect. The seal, therefore, is more secure and durable over long periods of time.

With respect to Tico S/PA pads, Mr. Hess stated the following with regard to the cork and rubber ingredients:

Well, let me give you another aspect of the cork versus the rubber. As an anti-vibration material, in the far north, in the Arctic where we have 16 cylinder diesel generating stations where it is maybe 10-12 degrees in the summer, but it's minus 40 in the winter, at minus 40 degrees rubber is stiff, solid, it would not absorb any vibration. The vibration would bounce right through it. We used the Tico on the concrete pillars so that we don't get damage in the permafrost.<sup>7</sup>

Counsel for the respondent called one witness, Mr. Brian J. Finch, who was, with the appellant's comments, qualified as an expert. Mr. Finch is a chemist and is currently Chief, Polymer Products Laboratory at the Department of National Revenue. He has been involved in the analysis and administration of polymer (including rubber) products for almost 25 years. He also briefly served with the Department of Finance as an officer responsible for the trade administration policy in the polymer, plastics, organic chemicals and pharmaceuticals industry.

He began by explaining why, in his view, the goods in issue are properly classified as vulcanized rubber, even though they contain cork. He stated that rubber products can contain three components: (i) rubber polymer; (ii) vulcanizing agents, such as activators, accelerators or retarders; and (iii) extenders, fillers, stabilizers, pigments and plasticizers. He said that the cork component would fall into this last group, which, interestingly, can constitute over 50 percent of the weight of a product.

Mr. Finch testified that an analysis of the goods in issue was done by chemists at the laboratory. When the tests were conducted, the respondent did not have the exact formulations provided by the appellant to the Tribunal. The laboratory's analysis revealed that the percentage of total weight of rubber was 67 percent and cork 33 percent in ASEA Nebar. In Tico S/PA pads, the rubber weighed 76 percent of the total and cork 24 percent. From his perspective, therefore, the rubber was the predominant ingredient and cork, while giving the end product certain useful properties, was simply a filler. Given the results of the analysis, it is not surprising to see why the goods in issue were classified as they were.

The Tribunal is left with what appears to be two different breakdowns of the weight of the rubber and cork ingredients in the goods in issue. How does one reconcile the different figures given by the parties to the weight of the components?

It is clear that the weight of the components of the goods in issue can be broken down in different ways, each giving slightly different results. Using Mr. Johnson's figures, the collective weight of rubber,

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7. *Ibid.* at 67.

activators and extenders in ASEA Nebar would be almost 55 percent of the total, with the cork accounting for the remainder of the total weight.

In Tico S/PA pads, using the numbers provided by Mr. Johnson, the rubber, activators and extenders would weigh slightly more than 60 percent of the total, with the cork just under 40 percent. While different from the respondent's figures, these are not so different as to defy reconciliation.

Two explanations appear possible to explain these divergences. The first relates to the relative accuracy of the respondent's laboratory findings when compared with the exact formulation provided by the appellant. The second relates to the grouping of the individual components that went into the goods in issue.

Mr. Finch outlined the methodology used by the respondent's chemists to break down the goods in issue into their constituent parts to determine weights. In essence, the process works by extracting the plasticizers and other oils. These are identified and measured. The chemist then destroys the remaining cork material. The decomposed cork particles are washed out using an ultrasonic bath. What remains is essentially rubber. At that point, one can do the arithmetic to calculate the different weights of the ingredients. This process has, in his view, produced "quite good" results.

This type of analysis is, no doubt, quite accurate and, in cases where the exact formulations are unknown, the best alternative. However, Mr. Finch admitted that having the exact product formulations, as he now had with respect to the goods in issue, is more precise. In fact, Mr. Finch did not dispute the accuracy of the weight by components given by Mr. Johnson in his expert report and testimony. Understandably, the analysis conducted by the laboratory cannot, given the limitations which naturally beset such a procedure, be as accurate as knowing the exact weight that workers put into the mixer at Tiflex's factory.

Even if the respondent's analysis was fully accepted as entirely accurate, it still did not break out the weight of the rubber from the activators and extenders into their discrete weights, as did the appellant's analysis. It is quite conceivable, therefore, that, by using the respondent's numbers, the cork would be the predominant ingredient if the ingredients were broken out in the same manner as the appellant's breakdown.

With respect to attempting to analyze the goods in issue by volume, Mr. Finch testified that, without knowing the exact formulation, this was a hopeless exercise, even though this material breakdown by volume was the methodology endorsed in a 1984 decision of the Tariff Board.<sup>8</sup> Without knowing the exact formulation of the products, any attempt to analyze by volume was not considered by the respondent to be reliable enough, and it was not attempted. However, he continued, if one has the exact formulation, one can calculate the volumes with some degree of accuracy.

Mr. Finch stated that companies are loath to provide these formulations because they are highly protected commercial secrets. This creates difficulties in administering the tariff classification program as a result. The Tribunal believes that importers have a duty to share information necessary to assist the respondent in making tariff classification decisions. If importers do not co-operate, they can hardly "cry foul" if the resulting classification differs from the classification that they would propose. The respondent is quite

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8. *Nortesco Inc. v. The Deputy Minister of National Revenue for Customs and Excise*, 9 T.B.R. 164. This decision involved Treadmaster Mats and Tico S/PA pads. The issues in that case are, in many respects, similar to the facts at play in the present appeal. The Tariff Board concluded that, as the cork predominated by volume, the proper classification should be as a corkwood or cork bark rather than a rubber product.

right to be concerned about the classification process being administrable where certain key information is withheld. However, in this case, that information was provided, albeit very late in the day.

The Tribunal accepts the analysis by weight and volume of the individual ingredients, as submitted by the appellant. The Tribunal is, therefore, satisfied that cork is the largest single ingredient by weight or volume. Having concluded this, however, the Tribunal acknowledges that there is not a large difference between the cork and rubber when assessed by weight or volume.

In conducting a tariff classification analysis, sections 10 and 11 of the *Customs Tariff* indicate that items shall be classified according to the *General Rules for the Interpretation of the Harmonized System*<sup>9</sup> (the General Rules) and the *Canadian Rules*.<sup>10</sup> Consequently, the Tribunal must begin its analysis by looking to see if Rule 1 of the General Rules can assist in resolving this classification dispute. Rule 1 states:

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall 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 following provisions.

Resort can be had to this rule only where the goods in issue fall exclusively within the heading and any relative Section or Chapter Notes. An example where resort to Rule 1 of the General Rules is appropriate would be, for example, with respect to “live sheep” which are classified in heading No. 01.04: “Live sheep and goats.” Clearly, “live sheep” could only be classified in this heading.

Although the Tribunal has been urged to classify the goods in issue by the respondent according to the headings and Section Notes of heading No. 40.08 as “[p]lates, sheets, strip, rods and profile shapes, of vulcanized rubber other than hard rubber” or by the appellant in heading No. 45.04 as “[a]gglomerated cork (with or without a binding substance) and articles of agglomerated cork,” it cannot do so. The Chapter Notes are not helpful in classifying the goods in issue, which are a composite made up primarily of cork and rubber and do not, therefore, fit exclusively within one or the other heading.

As Rule 2 of the General Rules is not applicable in this case, the Tribunal must carry on to consider Rule 3, which states:

When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
- (c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

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9. *Supra* note 3, Schedule I.

10. *Ibid.*



While heading No. 45.04 may, because of the predominant cork content, appear more specific than heading No. 40.08, neither heading in and of itself completely describes the products. The Chapter Notes to Chapters 40 and 45 are not helpful in guiding the Tribunal towards the appropriate classification in these headings.

As the goods in issue are a composite, according to Rule 3 (a) of the General Rules, the Tribunal is required to regard the materials or substances as “equally specific.” This rule does not, therefore, resolve the classification question before us.

Rule 3 (b) of the General Rules requires the Tribunal to move from the observable, objective criteria into the more subjective realm of “essential character.”

*The Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>11</sup> note that “essential character” will vary depending upon the goods in issue; however, it may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

In Mr. Johnson’s opinion, the cork was the principal or predominant feature. He stated:

The rubber is there to bind the cork granules together to make a flexible, robust cork material. The rubber there is a binder. The cork gives the materials their properties that we are looking for [in] the applications that they are being used in.<sup>12</sup>

Mr. Finch, in giving evidence for the respondent, characterized the goods in issue as rubber with cork filler. This description, he continued, can cover products with many of the same properties as indicated by the appellant. Indeed, there are, according to Mr. Finch, a number of different rubber-based products which exhibit the same properties as a cork agglomerate. He could not, however, comment on the Poisson’s, or side flow, ratio of those products, as he had no experience with this characteristic. It was the rubber and not the cork which gave the goods in issue their essential character.

The Tribunal believes that the goods in issue have the essential character of cork. The cork predominates by weight, volume and price. While unvulcanized rubber is initially used as a binding substance with the cork and other ingredients, it is transformed into a vulcanized rubber following the mixing and vulcanizing process. It is clear that neither cork on its own nor rubber on its own provides all of the properties necessary for the end uses discussed by the witnesses. To be useful, a composite of the two is needed. The cork, because of its unique ability to “concertina” into itself without distorting the products, is critical to the usefulness of the products, as is its ability to withstand the pressure of significant weights. These particular characteristics of cork are important for reducing “side flow” and leakage, long-term torque “fight back” and compressibility on uneven surfaces. It is these which, in the Tribunal’s view, give the goods in issue their essential character.

Counsel for the respondent submitted a classification opinion rendered by the Harmonized System Committee on October 12, 1993, in which gaskets consisting by weight of 65 percent vulcanized rubber and 35 percent cork were classified in heading No. 40.08 (plates, sheets, strip, rods and profile shapes, of vulcanized rubber other than hard rubber) rather than in heading No. 45.04 (agglomerated cork with or

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

12. *Supra* note 4 at 15.

without a binding substance and articles of agglomerated cork). While the Tribunal is required to take this opinion into account, it is not binding on it. Indeed, the paucity of information contained in the opinion and the brief description of the rationale underpinning the positions of the different delegates lessen that opinion's persuasive value. Furthermore, the Tribunal notes that the weights for the rubber and cork in that product differ from those in the goods in issue. In the result, this opinion is of little assistance to the Tribunal in determining the proper tariff classification.

In conclusion, the Tribunal believes that the goods in issue should be classified in heading No. 45.04 (agglomerated cork with or without a binding substance and articles of agglomerated cork). The appeal is, therefore, allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Presiding Member