

Ottawa, Tuesday, January 20, 1998

Appeal No. AP-96-205

IN THE MATTER OF an appeal heard on June 12, 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 October 21 and 22, 1996, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

FORMICA CANADA 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

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-96-205

FORMICA CANADA 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 made under section 63 of the *Customs Act*. Both parties agree that the goods in issue described as rigid non-cellular laminated sheets, 1.24 mm in thickness, which are composed of three main layers, the core layer which is kraft paper impregnated with a phenolic resin, the decorative layer which is paper impregnated with a melamine-formaldehyde resin and the overlay layer which is alpha-cellulose paper impregnated with a melamine resin, are properly classified under tariff item No. 3921.90.90 as other sheets of plastics and that they are named in classification No. 3921.90.90.20. The issue in this appeal is whether they qualify for the benefits of Code 7934 of the schedule to the *Chemicals and Plastics Duties Reduction or Removal Order, 1988*. More particularly, the Tribunal must determine whether the goods in issue are melamine-formaldehydes or phenol-formaldehydes and, therefore, fall within the exclusions listed in Code 7934.

HELD: The appeal is allowed. The Tribunal agrees with the parties that the goods in issue are properly described as “[h]igh pressure, paper reinforced, decorative laminates.” The Tribunal also agrees that, in order for the goods in issue to qualify for the benefits of Code 7934, the following two conditions must be met: (1) the goods in issue must be classified under one of the tariff items covered by Code 7934; and (2) the goods in issue must not fall within the exclusions. There is no issue with respect to the first condition. The respondent found, and the Tribunal agrees, that the goods in issue are properly classified under tariff item No. 3921.90.90 as other sheets of plastics, which is one of the tariff items listed in Code 7934. The Tribunal does not agree with the respondent that the goods in issue are phenol-formaldehydes. The evidence shows that the goods in issue are “[h]igh pressure, paper reinforced, decorative laminates,” products which contain melamine-formaldehyde and phenol-formaldehyde resins. They also contain at least one other ingredient, i.e. cellulose. In the Tribunal’s view, by combining the melamine-formaldehyde and the phenol-formaldehyde, the appellant creates a new product, which does not fall within the exclusions listed in Code 7934.

Place of Hearing: Ottawa, Ontario

Date of Hearing: June 12, 1997

Date of Decision: January 20, 1998

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

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Margaret Fisher

Appearances: Michael Sherbo, for the appellant
Louis Sébastien, for the respondent

Appeal No. AP-96-205

FORMICA CANADA 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 under section 67 of the *Customs Act*¹ (the Act), heard by one member of the Tribunal,² from decisions of the Deputy Minister of National Revenue made under section 63 of the Act and dated October 21 and 22, 1996.

The goods in issue are described as rigid non-cellular laminated sheets, 1.24 mm in thickness. They are composed of three main layers: the core layer which is kraft paper impregnated with a phenolic resin; the decorative layer which is paper impregnated with a melamine-formaldehyde resin; and the overlay layer which is alpha-cellulose paper impregnated with a melamine resin. At the time of importation, the goods in issue were classified under tariff item No. 3921.90.90 of Schedule I to the *Customs Tariff*³ as other sheets of plastics. Pursuant to subsection 60(1) of the Act, the appellant requested the benefits of Code 7934 of the schedule to the *Chemicals and Plastics Duties Reduction or Removal Order, 1988*.⁴ The respondent confirmed the classification of the goods in issue under tariff item No. 3921.90.90; however, the respondent found that they did not qualify for the benefits of Code 7934. Requests for a further re-determination were filed by the appellant pursuant to subsection 63(3) of the Act. The respondent confirmed the classification of the goods in issue, but again denied the appellant's request for the benefits of Code 7934. In his decision, the respondent indicated that the goods in issue are "[h]igh pressure, paper reinforced, decorative laminates" and that they are named in classification No. 3921.90.90.20.

Both parties agree that the goods in issue are properly classified under tariff item No. 3921.90.90 as other sheets of plastics and that they are named in classification No. 3921.90.90.20. The issue in this appeal is whether the goods in issue qualify for the benefits of Code 7934. More particularly, the Tribunal must determine whether the goods in issue fall within the exclusions listed in Code 7934, which reads, in part, as follows:

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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. SOR/88-74, December 31, 1987, *Canada Gazette* Part II, Vol. 122, No. 2 at 750.

- 7934 Goods of tariff item No. ... 3921.90.90, excluding the following:
Melamine-formaldehydes;
Phenol-formaldehydes;
...
Polymers of ethylene;
Polymers of methyl methacrylate.

At the hearing, Ms. Dina Barsoum, Technical Manager at Formica Canada Inc., testified on behalf of the appellant. Ms. Barsoum was qualified as an expert witness in the field of chemistry, as well as in the manufacture of the goods in issue. She described the goods in issue as high-pressure decorative laminates which are produced by impregnating sheets of paper with a formaldehyde resin. More precisely, the goods in issue are made up of layers, the surface layer is impregnated with melamine-formaldehyde, and the core layer is impregnated with phenol-formaldehyde. The layers are pressed together under heat and pressure to produce decorative laminates. She explained that the goods in issue are composed mostly of paper. More precisely, a sheet is usually made up of 71 percent paper and 29 percent resin, 13 percent of which is phenol-formaldehyde and 15 percent of which is melamine-formaldehyde. She testified that the goods in issue are made up of a combination of different sheets, including phenol-formaldehyde and melamine-formaldehyde sheets, that are cured and melted into high-pressure decorative laminates. In her view, once the process is complete, the goods in issue can no longer be described as melamine-formaldehydes or phenol-formaldehydes.

Mr. Brian J. Finch, Chief, Polymers Laboratory, Department of National Revenue, testified on behalf of the respondent. He was qualified as an expert witness in the chemical composition of polymers. He described the goods in issue as multi-layered plastic materials reinforced with paper which are composed of two polymers: melamine-formaldehyde, which is the primary component found in the surface layer; and phenol-formaldehyde, which is found in the core layer. He explained that the surface is composed of layers of paper reinforced with melamine-formaldehyde, while the core is composed of layers of paper impregnated with phenol-formaldehyde. The papers are assembled to obtain the desired thickness and are then pressed together. The finished product is sanded on the back to even it out so that it can be glued to a surface, such as a kitchen counter or a desktop. Mr. Finch testified that the goods in issue are known in the industry not only as high-pressure decorative laminates but also as multi-layered products of melamine-formaldehyde and phenol-formaldehyde reinforced with paper, or simply as paper-reinforced plastics.

Mr. Finch explained the analysis that was performed on the goods in issue in order to determine their composition. He explained that the technique used is known as "infrared spectrophotometry." He testified that samples of the two major layers which make up the goods in issue were taken and run through an infrared spectrum. Two different components were identified: a melamine-formaldehyde resin which contained an amount of cellulose, which is the principal constituent of paper; and a phenol-formaldehyde resin, which also contained some cellulose. Mr. Finch compared what happens to the melamine-formaldehyde and the phenol-formaldehyde when they are pressed together to what happens to an egg when it is fried. He explained that, when an egg is fried, the egg protein, which starts off in liquid form, solidifies. It is still an egg; however, it has now set into a material that is quite different in physical form. According to Mr. Finch, the process of the protein setting is very similar to the process that occurs with the melamine-formaldehyde and the phenol-formaldehyde, in that the products are cross-linked and solidified.

Mr. Finch testified that, in his view, the common characteristic amongst the exclusions listed in Code 7934 is that they are all polymer-type products. In cross-examination, he testified that the goods in issue become one product as a result of combining two layers of impregnated paper using a high-pressure

process which involves heat. The melamine-formaldehyde and the phenol-formaldehyde resins are cured into rigid form and become one sheet. Mr. Finch testified that, once the two layers are joined together, it is impossible to take them apart. He explained that the total polymer content of the goods in issue is the sum of the melamine-formaldehyde resin and the phenol-formaldehyde resin. Finally, he testified that, in his view, whether one puts the two together or considers them separately, they are copolymers.

The appellant's representative noted that both parties and their witnesses agreed that the goods in issue are properly described as "[h]igh pressure, paper reinforced, decorative laminates" and that they are named in classification No. 3921.90.90.20. He agreed with counsel for the respondent that, in order for the goods in issue to qualify for the benefits of Code 7934, the following two conditions must be met: (1) the goods in issue must be classified under one of the tariff items covered by Code 7934; and (2) the goods in issue must not fall within the exclusions. The representative argued that there is no issue with respect to the first condition. The respondent found, and the parties agreed, that the goods in issue are properly classified under tariff item No. 3921.90.90, which is one of the tariff items listed in Code 7934. The only remaining issue is, therefore, whether the goods in issue fall within the exclusions.

The appellant's representative argued that the goods in issue do not fall within the exclusions listed in Code 7934 because they are not specifically named therein. He noted that "[h]igh pressure, paper reinforced, decorative laminates" are not included in the list of exclusions. He also argued that the goods in issue cannot be excluded from Code 7934 simply on the basis that they contain melamine-formaldehyde and phenol-formaldehyde. He argued that, if this had been Parliament's intent, it would have used words such as "excluding any goods containing" instead of or in addition to the words "excluding the following." The representative argued that Code 7934 excludes "melamine-formaldehydes" and "phenol-formaldehydes," but does not exclude goods that contain a combination of both these products. In his view, the use of semi-colons after each item supports this argument.

According to the appellant's representative, counsel for the respondent's reliance on Note 4 of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁵ (the Explanatory Notes) to Chapter 39, which provides that "copolymers ... and polymer blends are to be classified in the heading covering polymers of that comonomer unit which predominates by weight over every other single comonomer unit," to support his argument that the goods in issue are phenol-formaldehydes and, therefore, fall within the exclusions is without merit for several reasons. He argued that Note 4 only deals with the classification of "polymers" at the heading level. He submitted that there are other explanatory notes which deal with the classification of "polymers" at the subheading level. The representative argued that, by referring to other explanatory notes, the Tribunal could easily reach different conclusions. For example, he referred the Tribunal to the Explanatory Notes to Chapter 39, which deal with the classification of "[c]ombinations of plastics and materials other than textiles," which, in his view, cover goods similar to the goods in issue. He argued that these goods are classified according to their essential character. No mention is made of the percentage of polymer content. Furthermore, even by giving the Explanatory Notes the broadest possible interpretation, the Tribunal could still not find that the goods in issue are either melamine-formaldehydes or phenol-formaldehydes. In the representative's view, the goods in issue are a different product because they go through a further manufacturing step, i.e. the high-pressure lamination.

The appellant's representative referred to subsection 68(3) of the *Customs Tariff*, which provides that "[t]he words and expressions used in Schedule II, wherever those words and expressions are used in

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

Schedule I, have the same meaning as in Schedule I,” in support of his argument that, because the words “high pressure, paper reinforced, decorative laminates” are used in Schedule I, but are not found in Code 7934, the goods in issue qualify for the benefits of Code 7934 and should not be excluded. Finally, the representative referred to Code 3970 of the schedule to the *Customs Duties Reduction or Removal Order, 1988, No. 1*⁶ which gives special treatment to “[s]heets of melamine-formaldehyde resins and of unsaturated polyesters, reinforced with paper, of tariff item No. 3921.90.90, for use in the manufacture of laminated products” to show that there is a difference between sheets of melamine-formaldehyde reinforced with paper, sheets of phenol-formaldehyde reinforced with paper and high-pressure decorative laminates.

Counsel for the respondent argued that the goods in issue fall within the exclusions listed in Code 7934, as they are phenol-formaldehydes. He referred to Note 4 of the Explanatory Notes to Chapter 39, which provides that “copolymers ... and polymer blends are to be classified in the heading covering polymers of that comonomer unit which predominates by weight over every other single comonomer unit,” and to the Tribunal’s decision in *Continuous Colour Coat Limited v. The Deputy Minister of National Revenue*⁷ in support of his argument. Counsel argued that Code 7934 does not set any limitations. Code 7934 does not provide that, to be excluded, the polymers must be separate and distinct and that they cannot be mixed together. He argued that Code 7934 only refers to tariff items and not classification numbers, which, in his view, are irrelevant in determining whether or not a particular product falls within the exclusions. He referred to a document entitled “Customs Tariff - Departmental Consolidation 97” in support of his argument, in which it is stated that “[t]he statistical subdivisions, the 9th and 10th digits, have been developed to provide the means for collection of statistical data by Statistics Canada. These digits do not form part of the *Customs Tariff* legislation.” Counsel submitted that the reference by the appellant’s representative to Code 3970 should be disregarded, as that code deals with paper products.

In reply, the appellant’s representative noted that Code 7934 excludes such products as “[p]olymers of ethylene” and “[p]olymers of methyl methacrylate.” In his view, the use of the words “polymers of” only before certain products is determinative. He noted that Code 7934 does not use the words “polymers of melamine-formaldehyde” and “polymers of phenol-formaldehyde.” Hence, he argued that, even if the Tribunal accepts that the goods in issue are “polymers of phenol-formaldehyde,” they still would not be excluded from Code 7934.

The Tribunal agrees with the parties that the goods in issue are properly described as “[h]igh pressure, paper reinforced, decorative laminates.” The Tribunal also agrees that, in order for the goods in issue to qualify for the benefits of Code 7934, the following two conditions must be met: (1) the goods in issue must be classified under one of the tariff items covered by Code 7934; and (2) the goods in issue must not fall within the exclusions. There is no issue with respect to the first condition. The respondent found, and the Tribunal agrees, that the goods in issue are properly classified under tariff item No. 3921.90.90 as other sheets of plastics, which is one of the tariff items listed in Code 7934. The only remaining issue is, therefore, whether the goods in issue fall within the exclusions.

To exclude the goods in issue from Code 7934, the Tribunal must find that they are “melamine-formaldehydes” or “phenol-formaldehydes.” In the respondent’s view, the goods in issue are “phenol-formaldehydes” and, therefore, are excluded from Code 7934. The Tribunal does not agree. The evidence shows that the goods in issue are “[h]igh pressure, paper reinforced, decorative laminates,”

6. SOR/88-73, December 31, 1987, *Canada Gazette* Part II, Vol. 122, No. 2 at 631.

7. Appeal Nos. AP-93-274 and AP-93-294, August 31, 1994.

products which contain melamine-formaldehyde and phenol-formaldehyde resins. They also contain at least one other ingredient, i.e. cellulose. In the Tribunal's view, by combining the melamine-formaldehyde and the phenol-formaldehyde, the appellant creates a new product, which does not fall within the exclusions listed in Code 7934. The Tribunal acknowledges that the statistical subdivisions, the 9th and 10th digits, do not form part of the *Customs Tariff* legislation; however, it is of the view that the fact that "[h]igh pressure, paper reinforced, decorative laminates" are named in classification No. 3921.90.90.20 supports the conclusion that the goods in issue are separate and distinct products.

Mr. Finch testified that the goods in issue are polymers or copolymers of melamine-formaldehyde or phenol-formaldehyde. The Tribunal notes that, even if it accepts this evidence, Code 7934 does not specifically exclude such products. The words "polymers of" do not appear before the words "[m]elamine-formaldehydes" or "[p]henol-formaldehydes," while they do appear before other products listed in the exclusions. The Tribunal agrees with the appellant's representative that this must mean that, for "polymers" to be excluded from Code 7934, the words "polymers of" must appear before the particular products listed in the exclusions. The Tribunal adopts this view despite Mr. Finch's testimony that the common characteristic amongst the exclusions listed in Code 7934 is that they are all polymer-type products.

Accordingly, the appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member