

Ottawa, Friday, November 20, 1998

Appeal No. AP-97-116

IN THE MATTER OF an appeal heard on May 12, 1998, under subsection 67(1) 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 1 and 30, 1997, with respect to a request for re-determination under subsection 63(3) of the *Customs Act*.

BETWEEN

GILLETTE CANADA INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-97-116

GILLETTE 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*. The goods in issue are: (1) Liquid Paper DryLine permanent and temporary adhesive dispensers with cartridge (adhesive dispensers with cartridge); (2) Liquid Paper DryLine single line and double line correction film dispensers with cartridge (correction film dispensers with cartridge); (3) individually packaged Liquid Paper DryLine permanent and temporary adhesive refill cartridges (adhesive refill cartridges); and (4) individually packaged Liquid Paper DryLine single line and double line correction film refill cartridges (correction film refill cartridges).

The issues in this appeal are: (1) whether the adhesive dispensers with cartridge are properly classified under tariff item No. 3506.10.00 as products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg, as determined by the respondent, or should be classified under tariff item No. 8424.89.00 as other mechanical appliances for projecting, dispersing or spraying liquids or powders, as claimed by the appellant; (2) whether the correction film dispensers with cartridge are properly classified under tariff item No. 3823.90.90 as other chemical preparations of the chemical or allied industries, not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 8424.89.00 as other mechanical appliances for projecting, dispersing or spraying liquids or powders, as claimed by the appellant; (3) whether the adhesive refill cartridges are properly classified under tariff item No. 3506.10.00 as products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg, as determined by the respondent, or should be classified under tariff item No. 8424.90.40 as parts of the goods of tariff item No. 8424.89.00, as claimed by the appellant; and (4) whether the correction film refill cartridges are properly classified under tariff item No. 3823.90.90 as other chemical preparations of the chemical or allied industries, not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 8424.90.40 as parts of the goods of tariff item No. 8424.89.00, as claimed by the appellant.

HELD: The appeal is dismissed. In considering whether the dispensers with cartridge should be classified in heading No. 84.24, as submitted by the appellant's representative, the Tribunal acknowledges that the dispensers may be considered "mechanical appliances" based on the broad definition of "mechanically operated" set out in the Supplementary Note to Section XVI. However, the Tribunal notes that heading No. 84.24 refers to "[m]echanical appliances ... for projecting, dispersing or spraying liquids or powders." While it is clear that the dispensers "dispense" either correction film or adhesive, in the Tribunal's view, this action does not constitute "projecting," "dispersing" or "spraying," as contemplated by the terms of heading No. 84.24. Of the three terms, "dispersing" most closely describes the action of the dispensers and, yet, the verb "to disperse" means to "go, send, drive, or distribute in different directions or over a wide area." It is clear, in the Tribunal's view, that the dispensing of correction film or adhesive by the dispensers does not meet this description.

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 12, 1998
Date of Decision: November 20, 1998

Tribunal Members: Pierre Gosselin, Presiding Member
Peter F. Thalheimer, Member
Richard Lafontaine, Member

Counsel for the Tribunal: Heather A. Grant

Clerk of the Tribunal: Anne Jamieson

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

Appeal No. AP-97-116

GILLETTE CANADA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
PETER F. THALHEIMER, Member
RICHARD LAFONTAINE, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue made under section 63 of the Act and dated October 1 and 30, 1997. The goods in issue are: (1) Liquid Paper DryLine permanent and temporary adhesive dispensers with cartridge (adhesive dispensers with cartridge); (2) Liquid Paper DryLine single line and double line correction film dispensers with cartridge (correction film dispensers with cartridge); (3) individually packaged Liquid Paper DryLine permanent and temporary adhesive refill cartridges (adhesive refill cartridges); and (4) individually packaged Liquid Paper DryLine single line and double line correction film refill cartridges (correction film refill cartridges).

A dispenser consists of a plastic housing that flips open to allow for the insertion of a cartridge. Inside the dispenser are two gears and two plastic plugs which help secure the cartridge. In order to operate the dispenser and cartridge, a downward force is used, as well as a pulling motion. As the dispenser is moved across the surface to which the adhesive or correction film is to be applied, the gears rotate the tape inside the cartridge. The combination of the downward pressure and the pulling force cause the substance on the tape to be dispensed.

At the time of importation, the goods in issue are packaged for retail sale in the four groupings described above. The dispensers, whether packaged for sale with adhesive refill cartridges or correction film refill cartridges, are virtually identical and can be reused with either type of cartridge.

The issues in this appeal are the following:

- (1) whether the adhesive dispensers with cartridge are properly classified under tariff item No. 3506.10.00 of Schedule I to the *Customs Tariff*² as products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg, as determined by the respondent, or should be classified under tariff item No. 8424.89.00 as other mechanical appliances for projecting, dispersing or spraying liquids or powders, as claimed by the appellant;

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

- (2) whether the correction film dispensers with cartridge are properly classified under tariff item No. 3823.90.90 as other chemical preparations of the chemical or allied industries, not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 8424.89.00 as other mechanical appliances for projecting, dispersing or spraying liquids or powders, as claimed by the appellant;
- (3) whether the adhesive refill cartridges are properly classified under tariff item No. 3506.10.00 as products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg, as determined by the respondent, or should be classified under tariff item No. 8424.90.40 as parts of the goods of tariff item No. 8424.89.00, as claimed by the appellant; and
- (4) whether the correction film refill cartridges are properly classified under tariff item No. 3823.90.90 as other chemical preparations of the chemical or allied industries, not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 8424.90.40 as parts of the goods of tariff item No. 8424.89.00, as claimed by the appellant.

In the alternative, the appellant claims that the correction film refill cartridges should be classified under tariff item No. 3206.49.80 as other pigments.

The relevant tariff nomenclature reads as follows:

35.06	Prepared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives; put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg.
3506.10.00	-Products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg
38.23	Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included.
3823.90	-Other
3823.90.90	---Other
84.24	Mechanical appliances (whether or not hand-operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines.
8424.89.00	--Other
8424.90	-Parts
8424.90.40	---Of the goods of tariff item ... No. 8424.89.00

The appellant's representative submitted that both the adhesive dispensers with cartridge and the correction film dispensers with cartridge are classifiable in heading No. 84.24 based on the application of Rule 1 of the *General Rules for the Interpretation of the Harmonized System*³ (the General Rules). Citing the Notes to Section XVI, the representative argued that, because the dispensers include gears, they

3. *Ibid.*, Schedule I.

constitute “machines.”⁴ Furthermore, the dispensers meet the terms of heading No. 84.24 because they dispense liquids or solid materials, as described by the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁵ (the Explanatory Notes) to that heading. In response to an argument put forward by counsel for the respondent, the representative submitted that there is nothing in the Explanatory Notes to heading No. 84.24 that would exclude the dispensers from classification in that heading simply because they include cartridges at the time of importation.

The appellant’s representative further submitted that, even if the Tribunal did not find that the dispensers are classifiable in heading No. 84.24 as a result of the application of Rule 1 of the General Rules, but found instead that the dispensers constitute retail sets, then by application of Rule 3 (b), the dispensers would still be classified in heading No. 84.24, as it is the dispensers themselves and not the cartridges that give the dispensers their essential character. In support of this view, the representative focused on various characteristics of the dispensers, for example, that the dispensers are reusable, that their value is greater than the value of the cartridges and, finally, that the cartridges are discarded once used.

With respect to the classification of the separately imported refill cartridges, the appellant’s representative submitted that, pursuant to the Notes to Section XVI, they are classifiable as parts of machines of heading No. 84.24. Citing, in particular, Note 2(b) to Section XVI, the representative argued that the refill cartridges are for use solely or principally with the dispensers. Accordingly, in the representative’s view, the refill cartridges should be classified with the dispensers in heading No. 84.24.⁶

In responding to an analogy drawn by counsel for the respondent between the dispensers and Windex bottles, the appellant’s representative argued that, unlike Windex bottles, the dispensers are reusable and can be used with a variety of refill cartridges, including the two types in issue.

Counsel for the respondent submitted that the dispensers fail to meet the terms of heading No. 84.24 because they do not project, disperse or spray either liquids or powders. In counsel’s view, the dispensers simply dispense solids. Counsel then made some general observations about the goods in issue in order to support his submissions regarding the proper classification of the different items. He submitted that consumers buy the dispensers because of the substance on the tape inside the cartridge, namely, correction film or adhesive. In his view, the dispenser is simply an applicator.

Specifically with respect to the correction film dispensers with cartridge, counsel for the respondent submitted that they are simply a better, more efficient version of Liquid Paper correction fluid sold in a bottle with a brush attached to the cap. Counsel submitted that, in addition to being generically described in heading No. 38.23, there is a specific reference to “[c]orrecting fluids” in the Explanatory Notes to that heading. While counsel submitted that the correction film dispensers with cartridge are classifiable in heading No. 38.23 pursuant to the application of Rule 1 of the General Rules, they would be equally

4. In support of this view, the representative referred to the Tribunal’s decision in *Canadian Tire Corporation Ltd. v. The Deputy Minister of National Revenue*, Appeal No. AP-94-157, October 12, 1995.

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

6. In support of this argument, the representative cited the Tribunal’s decisions in *Bionaire Inc. v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-92-110, June 29, 1993, and *Procedair Industries Inc. v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-92-152, July 22, 1993, as well as Memorandum D10-0-1, *Classification of Parts and Accessories in the Customs Tariff*, Department of National Revenue Customs, Excise and Taxation, January 24, 1994.

classified therein as a result of the application of Rule 3 (b). Counsel further submitted that the terms of heading No. 35.06 even more clearly describe the adhesive dispensers with cartridge.

In response to particular arguments of the appellant's representative, counsel for the respondent submitted that the dispensers do not meet the general definition of a "system." Moreover, the refill cartridges do not meet the criteria for "parts" outlined in previous Tribunal decisions.⁷

In determining the classification of goods, the Tribunal is cognizant that Rule 1 of the General Rules is of the utmost importance. Rule 1 provides that classification is first determined by the wording of the heading and any relative Section or Chapter Notes.

The appellant's representative argued that the goods in issue collectively constitute a "system" and that this has some bearing on the classification of the different items in issue. The Tribunal is not persuaded that this, in and of itself, has any bearing on the proper classification of the goods. At the time of importation, the goods in issue constitute four different products, specifically, dispensers containing one of two types of cartridges and two types of refill cartridges. The classification of these products is based on their physical characteristics at the time of importation.

In considering whether the dispensers with cartridge should be classified in heading No. 84.24, as argued by the appellant's representative, the Tribunal acknowledges that the dispensers may be considered "mechanical appliances" based on the broad definition of "mechanically operated" set out in the Supplementary Note to Section XVI.⁸ However, the Tribunal notes that heading No. 84.24 refers to "[m]echanical appliances ... for projecting, dispersing or spraying liquids or powders." While it is clear that the dispensers "dispense" either correction film or adhesive, in the Tribunal's view, this action does not constitute "projecting," "dispersing" or "spraying," as contemplated by the terms of heading No. 84.24. Of the three terms, "dispersing" most closely describes the action of the dispensers and, yet, the verb "to disperse" means to "go, send, drive, or distribute in different directions or over a wide area."⁹ It is clear, in the Tribunal's view, that the dispensing of correction film or adhesive by the dispensers does not meet this description.

Furthermore, the Tribunal is not persuaded that the adhesive and correction film constitute "liquids or powders," as contemplated by the terms of heading No. 84.24. Although the Explanatory Notes to that heading provide that it "covers machines and appliances for projecting, dispersing or spraying steam, liquids or solid materials ... in the form of a jet, a dispersion (whether or not in drips) or a spray," the examples given of "solid materials" include sand, powders, granules, grit and metallic abrasives. In the Tribunal's view, the common element among these "solid materials" is that they are collections of tiny particles, closely resembling "powders," which is the term included in the heading. Neither the correction film nor the adhesive is similar in nature to these materials.

7. In particular, counsel referred to the Tribunal's decision in *Farmer's Sealed Storage Inc. v. The Deputy Minister of National Revenue*, Appeal Nos. AP-94-116 and AP-94-186, July 25, 1995.

8. The Supplementary Note to Section XVI provides as follows: "In this Section the term 'mechanically operated' refers to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion."

9. *The Concise Oxford Dictionary of Current English*, 9th ed. (Oxford: Clarendon Press, 1995) at 390.

Given that the dispensers with cartridge do not fall within the scope of heading No. 84.24 for the purposes of tariff classification, the argument of the appellant's representative that the refill cartridges should be classified as "parts" of the goods of heading No. 84.24 is moot.

Having concluded that the goods in issue are not classifiable in heading No. 84.24, the Tribunal must now consider whether the goods are properly classified in the headings determined by the respondent.

The Tribunal notes, at the outset, that heading Nos. 35.06 and 38.23 are broad indeed. Heading No. 35.06 includes "[p]repared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg," while heading No. 38.23 refers to "chemical products and preparations of the chemical or allied industries ... not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included."

Although the Tribunal acknowledges that the adhesive dispensers with cartridge consist of reusable dispensers, the Tribunal, nevertheless, considers that they are generically described as "products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg." The Explanatory Notes to heading No. 35.06 clearly contemplate appropriate packages for selling and applying the adhesive. Although the dispensers in this case are more elaborate than the packages or applicators described in the Explanatory Notes, in the Tribunal's view, this feature does not serve to exclude the dispensers from the scope of heading No. 35.06. The product is clearly an adhesive¹⁰ and is sold as such. The focus of the sales information is the fact that it is an adhesive, albeit with an applicator that places the adhesive neatly and precisely.¹¹ In the Tribunal's view, the dispenser itself is secondary.

With respect to the correction film dispensers with cartridge, the Tribunal is of the view that these, too, are generically described in the heading determined by the respondent. Heading No. 38.23 is a residual heading, similar to heading No. 35.06, encompassing "chemical ... preparations of the chemical or allied industries ... not elsewhere specified or included." The correction film is clearly a chemical preparation, as supported by the analysis of the product undertaken by the respondent.¹² Although the dispenser itself is reusable, the Tribunal considers it an applicator for the correction film, similar to the adhesive dispenser. The Explanatory Notes to heading No. 38.23 moreover specifically refer to "[c]orrecting fluids put up in packings for retail sale" as a product falling within the scope of the heading. These "correcting fluids" are further described as follows:

These are opaque (white or otherwise coloured) fluids consisting essentially of pigments, binders, and solvents, used for masking errors or other unwanted marks in typescripts, manuscripts, photocopies, offset printing masters or the like. They are usually put up in small bottles (the cap of which is usually provided with a small brush), in tins or in the form of pens.

Although the correction film dispensers with cartridge are not identical to correcting fluids in a bottle with a brush, the Tribunal considers the inclusion of such fluids in this heading as support for the

10. An analysis of the product established that the adhesive tape consists of an extremely thin layer of a pressure-sensitive adhesive composed of an acrylic polymer and a white release paper. See Tab 3 of the respondent's brief.

11. See Tab 2 of the respondent's brief.

12. See Tab 3 of the respondent's brief.

classification of the dispensers in the same heading. In both cases, the principal feature of the product is the correcting fluid or film, although each has an appropriate dispenser for applying the chemical product.

Having found that the adhesive dispensers with cartridge and the correction film dispensers with cartridge are classified in heading Nos. 35.06 and 38.23 respectively, the Tribunal finds that the adhesive refill cartridges and correction film refill cartridges are similarly classified in heading Nos. 35.06 and 38.23 respectively, for essentially the same reasons outlined by the Tribunal in respect of the classification of the two types of dispensers with cartridge in their respective headings.

The Tribunal further notes that it is not persuaded, based on the evidence and submissions, that the appellant's alternative argument, specifically that the correction film refill cartridges are akin to pigments and, therefore, should be classified in heading No. 32.06, has merit. In the Tribunal's view, the refills are neither specifically nor generically described in that heading.¹³

Accordingly, the appeal is dismissed.

Pierre Gosselin

Pierre Gosselin
Presiding Member

Peter F. Thalheimer

Peter F. Thalheimer
Member

Richard Lafontaine

Richard Lafontaine
Member

13. Heading No. 32.06 includes “[o]ther colouring matter; preparations as specified in Note 3 to this Chapter, other than those of heading No. 32.03, 32.04 or 32.05; inorganic products of a kind used as luminophores, whether or not chemically defined.”