

Ottawa, Friday, December 18, 1998

Appeal No. AP-97-117

IN THE MATTER OF an appeal heard on June 16, 1998, 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 September 16, 1997, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

SANOFI CANADA INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Raynald Guay
Raynald Guay
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-97-117

SANOFI 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 two types of Oscar de la Renta beauty product sets, Lavish Luxuries and Spring Trio.

The main issue in this appeal is whether the goods in issue are properly classified, based on their essential character, under tariff item No. 3303.00.00 as perfumes and toilet waters, as determined by the respondent, or should be classified in the heading of the component among those comprising each set, which occurs last in numerical order, as claimed by the appellant. In the case of the Lavish Luxuries set, this means under tariff item No. 3307.30.00 and, in the case of the Spring Trio set, under tariff item No. 3304.99.00, as claimed by the appellant, or, if the goods are ultimately classified in this manner, under tariff item No. 3307.30.00, as claimed by the respondent..

HELD: The appeal is dismissed. In considering the essential character of each set, the Tribunal is of the view that the concentration of fragrance contained in each of the components is a relevant factor. The witness testified to the effect that perfume contains the highest concentration of fragrance, followed by eau de parfum and eau de toilette. The Tribunal infers from this testimony that, among the various components in each set, the highest concentration of fragrance in the Lavish Luxuries set is contained in the perfume, followed by the eau de toilette, while the highest concentration of fragrance in the Spring Trio set is contained in the eau de toilette.

A second factor considered by the Tribunal pertains to the value of the various components in each set. While the eau de toilette is the most expensive component on a per item basis, the perfume is the most expensive on a per ounce basis. Accordingly, once the weight of the components is standardized, the perfume turns out to be the most expensive component of the Lavish Luxuries set, followed by the eau de toilette, while the eau de toilette remains the most expensive component in the Spring Trio set.

Accordingly, the Tribunal is of the view that the perfume among the components in the Lavish Luxuries set and the eau de toilette among the components in the Spring Trio set define the essential character of their respective sets. As such, the Tribunal concludes that the goods in issue are properly classified in heading No. 33.03, as determined by the respondent.

Place of Hearing: Ottawa, Ontario
Date of Hearing: June 16, 1998
Date of Decision: December 18, 1998

Tribunal Members: Richard Lafontaine, Presiding Member
Raynald Guay, Member
Peter F. Thalheimer, Member

Counsel for the Tribunal: Heather A. Grant

Clerk of the Tribunal: Anne Jamieson

Appearances: Peter E. Kirby, for the appellant
R. Jeff Anderson, for the respondent

Appeal No. AP-97-117

SANOFI CANADA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member
RAYNALD GUAY, Member
PETER F. THALHEIMER, 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. The goods in issue are two types of Oscar de la Renta beauty product sets, Lavish Luxuries and Spring Trio.

The first issue in this appeal is whether the goods in issue are properly classified, based on their essential character, under tariff item No. 3303.00.00 of Schedule I to the Customs Tariff² as perfumes and toilet waters, as determined by the respondent, or should be classified in the heading of the component among those comprising each set, which occurs last in numerical order, as claimed by the appellant. In the case of the Lavish Luxuries set, this means under tariff item No. 3307.30.00 and, in the case of the Spring Trio set, under tariff item No. 3304.99.00, as claimed by the appellant, or, if the goods are ultimately classified in this manner, under tariff item No. 3307.30.00, as claimed by the respondent.

The second issue is whether the goods in issue qualify for preferential tariff treatment under the US tariff.

The relevant nomenclature reads as follows:

3303.00.00	Perfumes and toilet waters.
33.04	Beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen or sun tan preparations; manicure or pedicure preparations.
3304.99.00	--Other
33.07	Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties.
3307.30.00	-Perfumed bath salts and other bath preparations

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

Ms. Anne Tillman-Graham, Vice-President of Sales, Sanofi Canada Inc., appeared as a witness for the appellant. Ms. Tillman-Graham began her testimony by reviewing the components of each beauty product set, with reference to two documents³ setting out the ingredients of each of the components. The Lavish Luxuries set consists of six components: (1) perfume; (2) eau de toilette; (3) body lotion; (4) body bath; (5) foaming bath powder; and (6) perfumed dusting powder. The Spring Trio set consists of three components: (1) eau de toilette; (2) body lotion; and (3) body bath.

Ms. Tillman-Graham noted that the perfume in the Lavish Luxuries set contains two ingredients: (1) SD alcohol 39C; and (2) Oscar de la Renta fragrance. She explained that Oscar de la Renta fragrance is neither perfume nor eau de toilette by itself. Rather, the fragrance “is a combination of different components which make a specific smell.”⁴ The referenced documents show that the components of each set contain an ingredient identified as either Oscar de la Renta fragrance or simply fragrance.

Ms. Tillman-Graham explained that each component has a specific function. For example, the body lotion moisturizes the skin, while the foaming bath powder softens the bath water and moisturizes the skin. The function of the perfume and the eau de toilette, by contrast, is specifically to make you smell nice. Ms. Tillman-Graham explained that the layering of the various components on the skin will make the fragrance last longer. She noted that a distinction between the eau de toilette and the perfume is that the former contains a lower concentration of fragrance.

Ms. Tillman-Graham testified that the goods in issue are custom designed for a particular retailer and sold in May, around Mother’s Day, and in November and December, during the holiday season. She explained that the various components of each set are available for purchase individually, but in different sizes. Any sets unsold by the retailer during the limited selling period for the goods are returned to the appellant. She emphasized that the sets are advertised and marketed as a collection of products and not for their perfume and/or eau de toilette components. She explained that the buyer usually purchases the set as a gift for someone else.

In reviewing a list of materials contained in the two sets, Ms. Tillman-Graham noted the relative cost of the components, as well as their packaging. Two items of particular note were that the packaging represents the most significant material cost of each set and that, among the various components, the eau de toilette is the most expensive item, while the perfume is the least expensive.

Ms. Tillman-Graham explained that perfume is simply a specific product in a fragrance collection. It is usually in the smallest bottle with the largest price tag because it has the largest concentration of essential oils. The next level of fragrance is contained in the esprit de parfum or eau de parfum, followed by the eau de toilette and then the eau de cologne. As the level of fragrance decreases, the volume of alcohol increases. The other components, like the soaps and lotions, again carry different levels of fragrance.

In cross-examination, Ms. Tillman-Graham acknowledged that the perfume and eau de toilette comprise close to 50 percent of the value of the products contained in the Lavish Luxuries set. She also acknowledged that the eau de toilette in the Spring Trio set constitutes over 50 percent of the value of that set.

3. Exhibits A-3 and A-4.

4. *Transcript of Public Hearing and Argument*, June 16, 1998, at 9.

Further to questions from the Tribunal and counsel for the appellant, Ms. Tillman-Graham clarified that the difference between fragrance and perfume is that fragrance is a smell. It consists of essential oils with some other chemical derivatives and ingredients that stabilize the fragrance. Perfume, by contrast, contains a certain volume of smell.

In argument, counsel for the appellant submitted that there is no classification for gift sets and that, in accordance with the *General Rules for the Interpretation of the Harmonized System*⁵ (the General Rules), the sets are classifiable in the heading of the component in each set that occurs last in numerical order. Rule 3 (c) of the General Rules specifically provides that, “[w]hen 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.” In the case of the Lavish Luxuries set, the foaming bath powder falls last in numerical order, specifically, under tariff item No. 3307.30.00. With respect to the Spring Trio set, the body lotion and body bath both fall under the same tariff item, which is last in numerical order among the components, namely, tariff item No. 3304.99.00.

Counsel for the appellant argued that the goods in issue cannot be classified by virtue of Rules 1 through 3 (b) of the General Rules for a variety of reasons. In particular, he emphasized that the goods cannot be classified on the basis of their essential character because no one component gives each set its essential character. Counsel argued that what is being sold is the gift, not the individual components. In support of this view, counsel recalled that the packaging constitutes the single most expensive component of the product. He further argued that “[e]ssential character is not paper, but it is that ethereal notion of a gift.”⁶

In anticipation of counsel for the respondent’s arguments, counsel for the appellant submitted that there is a distinction between components and ingredients. Fragrance is an ingredient and not a component of the finished products. While the components of the sets are carriers of the fragrance, the fragrance remains but an ingredient and not a component. Therefore, the fragrance cannot be used in order to define the essential character of the goods in issue. He emphasized that the essential character of a product is not simply that which links components together, such as a common ingredient. In counsel’s view, the essential character is the single component that defines the product. In the case of the goods in issue, by contrast, each set has six or three fully functional components. He argued that, by considering the relative value of the components and materials of the sets, one will not be able to define the essential character of the products. From any perspective, the conclusion that one draws is that the packaging is the most expensive component. A similar consideration of the weight and volume of the various components likewise does not help determine the essential character of the goods.

In support of the appellant’s position, counsel for the appellant reviewed a number of Tribunal decisions that discuss the issue of essential character.⁷ Counsel also reviewed a number of U.S. Customs Service rulings that addressed the issue of essential character specifically within the context of goods put up

5. *Supra* note 2, Schedule I.

6. *Transcript of Public Hearing and Argument*, June 16, 1998, at 91.

7. The decisions referred to in the appellant’s brief include: *Oriental Trading (Mtl) Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal Nos. AP-91-081 and AP-91-223, August 31, 1992; *Weil Company Limited v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-92-096, May 10, 1993; *Proctor-Silex Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-92-225, January 11, 1994; and *Nortesco Inc. v. The Deputy Minister of National Revenue*, Appeal No. AP-96-092, October 16, 1997.

in sets for retail sale, in view of the fact that the Tribunal has never examined the concept in this context.⁸ Counsel submitted that, even though the Tribunal has never relied on Rule 3 (c) of the General Rules for the purposes of classifying goods, it should have no reticence to do so in this case.

Contrary to the arguments of counsel for the appellant, counsel for the respondent submitted that Rule 3 (b) of the General Rules clearly contemplates the possibility of one or more components establishing the essential character of a set of goods. In this case, the perfume and/or the eau de toilette can be considered to provide the essential character of the goods, which is “to perfume the body with the Oscar de la Renta fragrance.”⁹ In counsel’s view, this approach is consistent with the *Explanatory Notes to the Harmonized Commodity Description and Coding System*¹⁰ (the Explanatory Notes) to Rule 3 (b), specifically provision (X), which indicates that the essential character may be determined by more than one component, classified in one heading.

Counsel for the respondent submitted that the essential character of the goods in issue can be clearly determined by considering their function as a whole, namely, they provide a fragrance to the body. The individual components of each set provide different layers of scent for the body. While the fragrance is the ingredient that provides the scent, the function of each component is to provide for the fragrance. According to counsel, the Explanatory Notes to heading No. 33.03 support the respondent’s position. The Explanatory Notes specifically provide that heading No. 33.03 “covers perfumes in liquid, cream or solid form (including sticks), and toilet waters, designed to give fragrance primarily to the human body.” In counsel’s view, the perfume and eau de toilette are clearly designed to give fragrance to the body. Because the other components similarly work to give fragrance to the body, they also contribute to the overall purpose and function of the sets, which is to provide the “fragrancing.”

Counsel for the respondent then addressed the arguments raised by counsel for the appellant based on previous Tribunal decisions and U.S. Customs Service rulings.

In the alternative, counsel for the respondent argued that the goods in issue do not constitute goods put up in sets for retail sale and that, therefore, they are properly classified in terms of the classification of each individual item comprising the Lavish Luxuries and Spring Trio collections.

In determining the classification of the goods in issue, 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. Section 11 of the *Customs Tariff* further provides that, in interpreting the headings and subheadings in Schedule I, regard shall be had to the Explanatory Notes.

The Tribunal agrees with both counsel that Rules 1 and 2 of the General Rules are not determinative of the classification of the goods in issue, as no one heading provides a complete description of the goods. Rule 3 (a) is similarly not determinative. In spite of counsel for the respondent’s alternative argument that the goods in issue may not constitute goods put up in sets for retail sale, the Tribunal is persuaded otherwise. As stated by counsel for the appellant, “[t]his is a classic set of goods put up in sets for retail sale.”¹¹ Consistent

8. Ruling HQ 081193, U.S. Customs Service, August 2, 1988; Ruling HQ 559421, U.S. Customs Service, September 16, 1996; and Ruling HQ 087303, U.S. Customs Service, August 17, 1990.

9. Respondent’s brief at 12.

10. Customs Co-operation Council, 2nd ed., Brussels, 1996.

11. *Transcript of Public Hearing and Argument*, June 16, 1998, at 122.

with provision (X) of the Explanatory Notes to Rule 3 (b) of the General Rules, the goods in issue consist of a variety of different articles. These articles are, moreover, put together to meet a particular need, namely, the “fragrancing” of the body, discussed further below, and they are packaged so as to be suitable for sale directly to users without repacking.

The issue in this appeal is precisely whether the goods in issue can be classified based on their essential character, as contemplated by Rule 3 (b) of the General Rules, or whether Rule 3 (c) applies, in which case, the goods are classifiable in the heading which occurs last in numerical order among those which equally merit consideration.

Rule 3 (b) of the General Rules specifically provides as follows:

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.

The Explanatory Notes provide that “classification is made according to the component, or components taken together, which can be regarded as conferring on the set as a whole its essential character.” Provision (VII) of the Explanatory Notes to Rule 3 (b) further provides that, where goods are put up in sets for retail sale, “the goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.” Further guidance is provided by provision (VIII), which provides as follows:

The factor which determines essential character will vary as between different kinds of goods. It may, for example, 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.

The Tribunal notes that the goods in issue comprise a number of components. The Lavish Luxuries set consists of six components: (1) perfume; (2) eau de toilette; (3) body lotion; (4) body bath; (5) foaming bath powder; and (6) perfumed dusting powder. The Spring Trio set consists of three components: (1) eau de toilette; (2) body lotion; and (3) body bath. The evidence shows that each of these components contains an ingredient which is identified as fragrance. In her testimony, Ms. Tillman-Graham refers to the goods in issue as the Oscar de la Renta fragrance collection. In considering the essential character of each set, the Tribunal is of the view that the concentration of fragrance contained in each of the components is a relevant factor. Ms. Tillman-Graham testified to the effect that perfume contains the highest concentration of fragrance, followed by eau de parfum and eau de toilette. The Tribunal infers from this testimony that, among the various components in each set, the highest concentration of fragrance in the Lavish Luxuries set is contained in the perfume, followed by the eau de toilette, while the highest concentration of fragrance in the Spring Trio set is contained in the eau de toilette.

A second factor considered by the Tribunal pertains to the value of the various components in each set. In this regard, the Tribunal is of the view that the packaging is not a component of the goods in issue nor is it determinative, in this case, of their essential character. While the eau de toilette is the most expensive component on a per item basis, the perfume is the most expensive on a per ounce basis. Accordingly, once the weight of the components is standardized, the perfume turns out to be the most expensive component of the Lavish Luxuries set, followed by the eau de toilette, while the eau de toilette remains the most expensive component in the Spring Trio set.

The Tribunal is not persuaded by the argument that what is being sold is the notion of a gift and that, as a result, none of the components in the sets is determinative of their essential character. Rather, what is being sold is, first and foremost, a fragrance collection. Therefore, the Tribunal is of the view that the perfume among the components in the Lavish Luxuries set and the eau de toilette among the components in the Spring Trio set give each of these sets their essential character. As such, the Tribunal concludes that the goods in issue are properly classified in heading No. 33.03, as determined by the respondent. Given the Tribunal's decision on the classification issue, the appellant's second issue regarding the proper tariff treatment of the goods is moot.

Accordingly, the appeal is dismissed.

Richard Lafontaine

Richard Lafontaine
Presiding Member

Raynald Guay

Raynald Guay
Member

Peter F. Thalheimer

Peter F. Thalheimer