

Ottawa, Wednesday, November 25, 1998

Appeal No. AP-97-033

IN THE MATTER OF an appeal heard on September 22, 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 March 11, 1997, with respect to requests
for re-determination under section 63 of the *Customs Act*.

BETWEEN

TECHNICAL GLASS PRODUCTS

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

AND

FPI FIREPLACE PRODUCTS INTERNATIONAL LTD.

Intervener

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

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TECHNICAL GLASS PRODUCTS

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

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FPI FIREPLACE PRODUCTS INTERNATIONAL LTD.

Intervener

This is an appeal under section 67 of the *Customs Act* from decisions by the Deputy Minister of National Revenue regarding two importations of glass ceramic sheets with a silica coating used in the making of gas fireplaces, which importations took place prior to and after a change in the legislation. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 7006.00.90 as glass of heading No. 70.06 other than float glass, as determined by the respondent, or should be classified under tariff item No. 7003.19.00 as other non-wired sheets of glass of heading No. 70.03, as claimed by the appellant.

HELD: The appeal is dismissed. With respect to the first importation, the appellant had to establish that the silica coating that was added to the ceramic glass after annealing constitutes a reflecting layer. The appellant's own evidence shows that the silica layer reduces the reflectivity of the glass and, consequently, the Tribunal concludes that the goods in issue are properly classified. With respect to the second importation, the appellant unsuccessfully tried to establish that the layer is non-reflecting, i.e. that it prevents light from being reflected on the surface of the glass. The appellant's test results produced in evidence show that the layer somewhat changed the reflectivity of the glass. However, the layer still does not prevent light from being reflected on the surface of the glass as required by the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 70.03.

Place of Video Conference

Hearing: Hull, Quebec, and Vancouver, British Columbia

Date of Hearing: September 22, 1998

Date of Decision: November 25, 1998

Tribunal Member: Pierre Gosselin, Presiding Member

Counsel for the Tribunal: Gilles B. Legault

Clerk of the Tribunal: Anne Turcotte and Margaret Fisher

Appearances: Neal Hempstock, for the appellant
Jan Brongers, for the respondent

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TECHNICAL GLASS PRODUCTS

Appellant

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TRIBUNAL: PIERRE GOSSELIN, Presiding Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from two decisions made by the Deputy Minister of National Revenue under section 63 of the Act and dated March 11, 1997. The hearing of this appeal proceeded by way of video conference in Hull, Quebec, and Vancouver, British Columbia. The intervener in this appeal, FPI Fireplace Products International Ltd., did not appear at the hearing.

The goods in issue, glass ceramic sheets with a silica coating used in the making of gas fireplaces, were imported on two separate occasions, prior to and after a change in the legislation. The issue in this appeal is whether these goods are properly classified under tariff item No. 7006.00.90 of Schedule I to the *Customs Tariff*² as glass of heading No. 70.06 other than float glass, as determined by the respondent, or should be classified under tariff item No. 7003.19.00 as other non-wired sheets of glass of heading No. 70.03, as claimed by the appellant. In fact, this case revolves around the wording of the two relevant headings of the nomenclature, which read as follows:

- 70.03 Cast glass and rolled glass, in sheets or profiles, whether or not having an absorbent, reflecting or non-reflecting layer, but not otherwise worked.³
- 70.06⁴ Glass of heading No. 70.03, 70.04 or 70.05, bent, edge-worked, engraved, drilled, enamelled or otherwise worked, but not framed or fitted with other materials.

(Emphasis added)

At the hearing, Mr. Sumio Oshita, a manager at Nippon Electric Glass Co., Ltd., of Osaka, Japan, testified on behalf of the appellant. Most of Mr. Oshita's testimony was about test results on the transmittance and reflectivity of samples of the goods in issue. Based on a chart indicating the percentage of

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

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

3. Heading No. 70.03 was amended in 1996 by the addition of the words "or non-reflecting" (*Harmonized System Conversion Order, 1996*, SOR/96-20, January 1, 1996, *Canada Gazette* Part II, Vol. 130, No. 2 at 186, section 124). Prior to that amendment, the heading read: "Cast glass and rolled glass, in sheets or profiles, whether or not having an absorbent or reflecting layer, but not otherwise worked."

4. As that heading has not been further divided into subheadings, it is referred to as subheading No. 7006.00 in Schedule I to the *Customs Tariff* and as heading No. 70.06 in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.

reflectivity between non-coated glass ceramic sheet and the goods in issue of a thickness of 5 mm, Mr. Oshita explained that there was less reflectivity in the goods in issue. As the chart identifies the percentage of reflectivity for different measures expressed in nanometres (nm), Mr. Oshita testified that the chart shows a larger difference of reflectivity at 300 nm (6 percent for non-coated sheets compared to 3 percent for the goods in issue) than at greater nanometre measures. However, Mr. Oshita did not explain why different measures in nanometres were used nor the impact that the dissimilar results for various measurements had on reflectivity. In examination, Mr. Oshita further testified that silica is applied as a microscopically thin coating of chemical compound.

In cross-examination, Mr. Oshita was asked, basically, to confirm the description of the goods in issue and how they are manufactured. He testified that the goods in issue are very light amber, transparent glass ceramic sheets which are produced by a rolling operation. The glass is formed by an annealing process. After annealing, a portion of the glass is coated on both surfaces with a clear layer of fused-in silica. Mr. Oshita confirmed that the purpose of the silica layer is to prevent either sulphur or acid from etching the product and not for reflection or non-reflection. He added that, occasionally, customers will have specific requirements, such as pencil edging in order to avoid chipping or breaking. These requirements are always specified on the invoice as a special order, as in the case of bent glass when that type of specification is made. Regarding the reflectivity shown in the test, Mr. Oshita admitted that there is a very small difference between the reflectivity of the goods in issue and the non-coated glass ceramic sheets.

Mr. Robert E. Maltby Jr., called by the respondent as an expert witness, also testified at the hearing. Mr. Maltby holds a B.Sc. in physics from Ohio State University. Mr. Maltby has more than 30 years of experience in the development of glass processing and glass processing equipment. This includes recent experience with R & D Reflections, Inc., of Wayne, Ohio, a company which manufactures testing machinery for flat, formed and coated glass. Mr. Maltby has testified as an expert witness in US courts based on his expertise in building optical equipment to measure car windshield quality. For the purposes of this appeal, the Tribunal recognized Mr. Maltby's expertise in the area of reflectivity as it concerns glass generally.

In Mr. Maltby's opinion, a silica layer is neither a reflecting layer nor a non-reflecting layer. He explained that, in order to make reflecting glass, a product such as an aluminum coating should be added to make the glass 50 to 100 percent reflecting. In the case of non-reflecting glass, he said, one common type of material to add would be magnesium fluoride, which is used to reduce to 1 percent or less the reflectivity of camera lenses and other reflecting surfaces. As to the test results produced by the appellant, Mr. Maltby explained that, with respect to the visual part of the spectrum, that is, what the eye can see (i.e. at 700 nm), the difference is in the order of 9 percent reflectivity for non-coated glass ceramic sheets versus 7 percent for the goods in issue. This, in his opinion, represents a very small difference.

In cross-examination, the appellant's representative pointed out to Mr. Maltby the fact that the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁵ (the Explanatory Notes) make no reference to a degree of reflectivity. In response, Mr. Maltby said that he offered his definition of non-reflectivity based on what textbooks and experience have taught him through the years to be a commonly accepted value of non-reflectivity. He also indicated that the difference between the percentage of reflectivity for non-coated sheets (6 percent) and the percentage of reflectivity for the goods in issue (3 percent) at 300 nm is linked to the fact that this measure deals with the ultraviolet part of the spectrum,

5. Customs Co-operation Council, 1st ed., Brussels, 1986, and 2nd ed., Brussels, 1996.

which cannot be seen, while, in terms of “light,” one would usually talk about the visual part of the spectrum. He concluded that the silica coating does not prevent light from being reflected from the surface of the glass.

In argument, the appellant’s representative referred to Note 2 (c) to Chapter 70, which states that “the expression ‘absorbent, reflecting or non-reflecting layer’ means a microscopically thin coating of metal or of a chemical compound (for example, metal oxide) which absorbs, for example, infra-red light or improves the reflecting qualities of the glass while still allowing it to retain a degree of transparency or translucency; or which prevents light from being reflected on the surface of the glass.” He stressed that the words “light from being reflected on the surface of the glass” are the key terms because the silica layer does lower the reflectivity whether one can see it or not. The note, the representative further argued, does not specify what degree of non-reflectivity is required nor does it specify that the prime purpose of the layer must be to make the glass non-reflecting. The representative concluded his argument by referring to a ruling of the U.S. Customs Service made in August 1992 that classified identical products to the goods in issue in heading No. 70.03. He pointed out, in this regard, that, under the *Harmonized Commodity Description and Coding System*,⁶ a tariff is supposed to be equivalent in every signing country to the first six digits of the nomenclature.

Counsel for the respondent first argued that the evidence shows that the difference in reflectivity between the goods in issue and the non-coated sheets is minimal, which, he said, is admitted by the appellant. Referring to the two distinct importations, counsel indicated that the first took place in September 1995, while the second was made in May 1996. This, he continued, affects the appeal, given that the text of heading No. 70.03 was amended in 1996 to add the words “or non-reflecting.”

Counsel for the respondent argued that, at the time of the first importation, the appellant would have had to demonstrate the exact opposite of what it has tried to establish in this case. In other words, the appellant would have had to establish that the silica coating improved the reflecting quality of the goods in issue because Note 2 (c) to Chapter 70, as it read then, provided that the expression “reflecting” meant a microscopically thin coating of metal or of a chemical compound that “improves the reflecting qualities of the glass” (emphasis added). Counsel also argued that the words “not otherwise worked” of heading No. 70.03 are key to this appeal. He contended that, in this regard, in the nomenclature, heading Nos. 70.03 and 70.06 work in tandem and, consequently, that something which would ordinarily fall in heading No. 70.03 will fall in heading No. 70.06 if it is “worked” in any manner other than by simply adding an absorbent or reflecting layer. Counsel also relied on the definition of the word “worked” in Note 2 (a) to Chapter 70, which states that “glass is not regarded as ‘worked’ by reason of any process it has undergone before annealing.” Counsel maintained that the evidence in this case reveals that the protective silicone layer has no reflecting characteristics and was added after annealing. This, he said, means that the goods in issue were, in fact, “otherwise worked.” As the Explanatory Notes to heading No. 70.06 contemplate glass that has been subjected to surface work, such as the goods in issue with their silica coating, counsel concluded that the goods in the first importation were, thus, properly classified under tariff item No. 7006.00.90.

With respect to the second importation, counsel for the respondent argued that, when heading No. 70.03 was amended to add the words “or non-reflecting,” Note 2 (c) to Chapter 70 was also amended to include a definition of these words. The relevant portion of that definition reads as follows: “a microscopically thin coating of metal or of a chemical compound ... which prevents light from being

6. Customs Co-operation Council, 1st ed., Brussels, 1987.

reflected on the surface of the glass.⁷ Counsel added that the expert witness for the respondent gave an example of a type of material that would be necessary to reduce the reflectivity to a level where it could be said to be non-reflecting, that is, 1 percent or less. Counsel further argued that it would not be logical to have added the words “or non-reflecting” if, as contended by the appellant, the words “reflecting or non-reflecting” in the heading were exhaustive. Again, since only an absorbent, reflecting or non-reflecting layer can be added after annealing for the purposes of heading No. 70.03 and since the goods in issue are neither of the above, they cannot be classified in that heading. Finally, counsel concluded his arguments by adding that the ruling of the U.S. Customs Service, on which the appellant relies, is simply a pre-classification ruling which was made by a US customs officer in 1992, without giving any specific reasons for the determination. There have since been some relevant changes in the heading, as noted earlier. He contended that the Tribunal is certainly not bound by such a decision, just as it is not bound by a decision of a Canadian Customs officer.

The Tribunal finds it important to clarify, at the outset, the issue in this appeal, given that some confusion has arisen further to Mr. Oshita’s testimony as to the existence of certain work that could have been done on the edges of the goods in issue. After carefully reviewing the evidence, the Tribunal takes the view that, for the purposes of this appeal, no specific work was done on the edges of the goods in issue. The evidence reveals that, when special orders were made from time to time with specific requirements, such as for bent glass or for pencil edging, such requirements were normally listed on the invoices. However, the importation documents submitted by the appellant only show that some bent glass was imported at the same time as the goods in issue were imported. Moreover, the portion of the respondent’s determination dealing with bent glass was not appealed to the Tribunal. The Tribunal is also convinced that, had other work been done on the edges of the goods in issue, the respondent would have made a determination accordingly. Thus, based on the evidence presented at the hearing and the documents on file, including the respondent’s determinations and the notice of appeal, the Tribunal is satisfied that the only issue in this appeal concerns the addition of a thin layer of silica on the glass ceramic sheets.

In the Tribunal’s view, in order to be successful in this appeal, the appellant had to establish that the silica coating that was added to the glass ceramic sheets after annealing constitutes either a reflecting or a non-reflecting layer for the purposes of heading No. 70.03 as it read before and after 1996 (it was not argued that the layer could have been absorbent within the meaning of heading No. 70.03).

With respect to the first importation, the evidence shows that the silica layer does not improve “the reflecting qualities of the glass,” as required by the definition in Note 2 (c) to Chapter 70. On the contrary, the appellant’s own evidence has established that the silica coating diminishes the reflecting qualities of the glass. Since the coating is not reflecting and is applied after annealing, the Tribunal considers that it is “otherwise worked” and, consequently, that it cannot be classified in heading No.70.03. The Tribunal, thus, accepts that the definition of the word “worked” in Note 2 (a) to Chapter 70 gives an indication that work done after annealing can make the goods fall outside heading No. 70.03, depending on the nature of that work. The Tribunal also notes that heading No. 70.06, which, among other things, refers to glass of heading No. 70.03, encompasses glass that has been “surface worked.” This, the evidence reveals, is the case for the goods in issue, which have a silica layer applied to both surfaces of the glass ceramic sheets.

With respect to the second importation, the Tribunal is of the view that to accept the appellant’s position regarding a layer that has a very small impact on the reflectivity of the glass and the sole purpose of

7. *Supra* note 3, section 123.

which is to prevent either sulphur or acid from etching on the product would be tantamount to depriving, of any significant meaning, the words “reflecting or non-reflecting” in Note 2(c) to Chapter 70. It could lead to the point where the addition of almost any layer would be enough to make the goods fall in that heading on the basis of either reflectivity or non-reflectivity. This cannot have been the intent underlying the change in the nomenclature in 1996. Furthermore, the Tribunal accepts Mr. Maltby’s testimony that, according to scientific standards, the silica layer does not prevent “light from being reflected on the surface of the glass,” because a percentage of 1 percent or less in terms of non-reflectivity is necessary to make the layer non-reflecting. Hence, the Tribunal accepts that, in interpreting the headings with regards to Chapter Notes and the Explanatory Notes, as it is required to do pursuant to sections 10 and 11⁸ of the *Customs Tariff*, it may need to consider, from time to time, expert testimony to determine if certain conditions exist, in this case, whether the addition of a silica layer “prevents light from being reflected on the surface of the glass” (emphasis added) as stated in Note 2 (c) to Chapter 70. This is especially the case here, as it is difficult to see any significant differences in terms of reflectivity between the goods in issue and the non-coated sheets. In fact, in this case, the appellant relied on scientific tests to try to establish that the reflectivity of the goods in issue is sufficiently affected to make the silica layer a non-reflecting layer. However, the Tribunal is convinced by Mr. Maltby’s counter-evidence that this layer does not prevent light from being reflected on the surface of the glass for the purposes of heading No. 70.03, as interpreted by the Tribunal.

Having found that the silica layer does not qualify as non-reflecting and knowing that it was applied after annealing, the Tribunal concludes, for the same reasons noted earlier as to the application of heading No. 70.06, that the goods in issue in the second importation are also properly classified under tariff item No. 7006.00.90.

For the foregoing reasons, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

8. Section 10 provides, among other things, that the classification of imported goods shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*. The relevant portion of Rule 1 states that, for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Section 11 provides, in turn, that, in interpreting the headings, regard shall be had to the Explanatory Notes.