

Ottawa, Thursday, August 31, 2000

Appeal No. AP-98-012

IN THE MATTER OF an appeal heard on January 24, 2000,
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Deputy Minister of
National Revenue dated March 16 and April 24, 1998, with
respect to a request for re-determination under subsection 63(3) of
the *Customs Act*.

BETWEEN

EM PLASTIC & ELECTRIC PRODUCTS LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-98-012

EM PLASTIC & ELECTRIC PRODUCTS LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* with respect to the importation of GATORFOAM® laminated foam panels. The parties agree that the goods in issue are properly classified under tariff item No. 3921.90.90 as “composite goods of plastic sheets being a combination of cellular and non-cellular in which the non-cellular component is predominant by weight”. The sole issue is whether GATORFOAM® qualifies for the benefits of Code 7934.

HELD: The appeal is allowed. The Tribunal finds that the goods in issue are not excluded under Code 7934. At the outset, the Tribunal is not persuaded that the *General Rules for the Interpretation of the Harmonized System* can apply in every instance, if at all, to the tariff code. Even if the Tribunal were to accept that the interpretation of the tariff code could be governed by the *General Rules for the Interpretation of the Harmonized System*, the Tribunal is not convinced that the rules would apply differently at the tariff item and tariff code levels. If that were the case, this would lead to irreconcilable results, such as in this case, where the goods in issue end up having two competing essential characters depending on whether the goods are to be classified under a tariff item or to qualify for benefits under a tariff code. The Tribunal agrees that the goods in issue cannot have two essential characters, one for tariff item and one for tariff code interpretation.

The Tribunal also relied on *Formica Canada v. DMNR*. In the present matter, like in *Formica*, the layers of the goods in issue went through a process of heat and pressure in laminating the components of those goods. The Tribunal is persuaded that this process, and not polymerization, created a new product, GATORFOAM®, which is not urea-formaldehyde or polymer of styrene, but a combination of those materials and others. The Tribunal is of the view that Code 7934 does not exclude “goods composed of” materials, but excludes only the materials themselves.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 24, 2000
Date of Decision:	August 31, 2000
Tribunal Members:	Richard Lafontaine, Presiding Member Zdenek Kvarda, Member Arthur B. Trudeau, Member
Counsel for the Tribunal:	Michèle Hurteau
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael A. Sherbo, for the appellant Susanne Pereira, for the respondent

Appeal No. AP-98-012

EM PLASTIC & ELECTRIC PRODUCTS LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member
ZDENEK KVARDA, Member
ARTHUR B. TRUDEAU, Member

REASONS FOR DECISION

BACKGROUND

This is an appeal under section 67 of the *Customs Act*¹ from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency) dated March 16 and April 24, 1998, with respect to the importation of GATORFOAM® laminated foam panels. The parties agree that the goods in issue are properly classified under tariff item No. 3921.90.90 of Schedule I to the *Customs Tariff*² as “composite goods of plastic sheets being a combination of cellular and non-cellular in which the non-cellular component is predominant by weight”. The relevant tariff nomenclature reads as follows:

39.21	Other plates, sheets, film, foil and strip, of plastics. -Cellular:
3921.90	-Other ---Containing not more than 70% by weight of plastics and combined with textile materials in which man-made fibres predominate by weight over any other single textile fibre:
3921.90.90	---Other

The sole issue in this appeal is whether GATORFOAM® qualifies for the benefits of Code 7934 of the schedule to the *Chemicals and Plastics Duties Reduction or Removal Order, 1988*.³ 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:

7934	Goods of tariff item No. . . . 3921.90.90, excluding the following: ... Urea-formaldehydes; ... Polymers of styrene.
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1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. R.S.C. 1985 (3d Supp.), c. 41.
3. S.O.R./88-74.

EVIDENCE

The appellant called two witnesses. The first witness, Mr. James Low, is the Materials Manager at EM Plastic & Electric Products Ltd. He testified as to the appellant's business, which is to distribute products and materials to the signage, screen printing and point-of-purchase display industries, which include photo mounters and laminating companies. Mr. Low agreed that GATORFOAM® is a foam panel and that its strength begins with its core, which is made of a light durable polystyrene foam. Mr. Low also testified that polystyrene foam, in combination with the facer, gives GATORFOAM® its strength, as the foam would not provide, by itself, the strength. He also testified that the smoothness of GATORFOAM® was more important than the foam for mounting pictures or screen printing.

The second witness, Mr. Edward J. Burke, is the Marketing Technical Service Manager at International Paper, which manufactures the goods in issue. The Tribunal accepted Mr. Burke as an expert in chemistry and as a technical expert with respect to the goods in issue.

Mr. Burke described GATORFOAM® as a laminate with a polystyrene core and a man-made veneer surface (facer) on the outside. The veneer provides key properties to the goods in issue, such as stiffness and a smooth surface, and is the major contributing factor in the overall stiffness and performance of the product. The veneer is made of a saturated grade paper impregnated with urea-formaldehyde resin and forms the outer layer of the goods in issue. It is calendered to give it an ultra-smooth surface and is then laminated to the polystyrene foam in the GATORFOAM® manufacturing operation. An adhesive bond is applied between the facers and the foam core. As the polystyrene foam core comes in various thicknesses, the volume of the polystyrene core will differ.

Where the goods in issue are used for photo mounting, Mr. Burke testified that it is important for the veneer surface to be smooth enough to mount a resin-coated photograph, since a resin-coated photograph will show any defects in the material underneath. It is also important, in that case, that the product be very strong, rigid and warp-resistant, as well as resistant to humidity. Those properties are built into the facer material. Mr. Burke further testified that the thickness of the core is a contributing factor in terms of the strength.

Mr. Burke testified that a polymer is a large molecule that is made by small chemical-reacting molecules called monomers. The process of making polymers is called polymerization. Mr. Burke stated that the bonding process is not polymerization. He further testified that GATORFOAM® contains some 25 percent polystyrene foam which is a minor constituent of the product. The goods in issue have characteristics which are dramatically different from those of polystyrene foam and could not, in his view, be called polymer of styrene. The characteristics of the goods in issue differ from those of polymers of styrene in that the former are much stiffer and have a much smoother surface, while the laminated nature of the material gives it a very high strength-to-weight ratio. In Mr. Burke's opinion, a polystyrene panel does not have a very smooth surface, stiffness or a durable facer on it; therefore, it dents easily. In his estimation, such a foam panel could not be used for graphic arts applications.

Mr. Burke testified that GATORFOAM® comes in more than one thickness for different applications. He testified that the strength of the goods in issue comes from a combination of the thickness of the panel and the high tensile strength of the veneer. In discussions about the definition of strength as opposed to stiffness, Mr. Burke testified that, if the definition of strength is impact resistance, then the strength comes from the properties of the veneer facer and not from the thickness of the polystyrene foam core. Further, Mr. Burke agreed that the literature refers to GATORFOAM® as a laminated foam panel.

Mr. Burke also testified that one cannot use the term polymer to describe GATORFOAM®, as the goods in issue are made of several different materials which have been laminated together. Each material is a distinct layer. He agreed that the goods in issue consist of several things which originated with various polymers. In describing the strength and rigidity of the goods in issue, Mr. Burke testified that there is some synergy when the facers, adhesive and foam are bonded together. This provides a stiffness that none of the three individual layers, by itself, would have, the bonding process thereby creating a new set of properties, i.e. strength and stiffness. The increase in the thickness of the foam core would make some difference in the strength, but it is the bonding process which provides the strength, he concluded.

Mr. Brian J. Finch, Chief, Polymer Products Laboratory, Canada Customs and Revenue Agency, was qualified as a chemist. Mr. Finch testified that a polymer is a molecule characterized by a very long length and a repetition of smaller units called monomers. He testified that a copolymer is a polymer which is produced from more than one monomer. Polymerization, he explained, is a broad term given for any mechanism used to produce long-chain molecules from short-chain monomers.

Mr. Finch explained that the difference between polystyrene and a polymer of styrene is that the former is generally regarded as a polymer composed of the styrene monomer, while a polymer of styrene is a polymer in which the principal monomer unit is styrene. A polymer of styrene comprises both polystyrene and copolymers, in which styrene is the principal monomer unit.

Mr. Finch stated that the goods in issue were analyzed under his supervision. They are made of two outside layers of urea-formaldehyde polymer and paper comprising approximately 29 percent per layer by weight, an adhesive composed of ethylene-vinyl acetate copolymer and a core made of cellular material which was identified as polystyrene, which comprised approximately 41 percent by weight. In terms of volume, Mr. Finch testified that the veneer facers comprised some 5 percent, while the cellular polystyrene core comprised approximately 95 percent of the goods in issue. The percentage of volume for the adhesive was negligible. In terms of thickness, the veneer facers were about 0.6 millimetres, while the polystyrene core was approximately 2.4 millimetres. The adhesive was negligible.⁴

In terms of the chemical composition of the core of the goods in issue, Mr. Finch testified that it was made of polystyrene where the predominant monomer unit is styrene. He also testified that the predominant monomer unit in the goods in issue is styrene. He further testified that the goods in issue do not go through a polymerization process, but that a polymer of styrene would be used to create a foamed or a cellular layer which, combined with the other components through the use of adhesive, heat and pressure, creates the goods in issue.

Mr. Finch stated that he could not disagree with any of the testimony given by Mr. Burke.

ARGUMENT

The appellant submitted that the evidence clearly shows that the goods in issue are formed of five layers, namely, two outer layers made of paperboard impregnated with urea-formaldehyde, two layers of adhesive and a core layer of polystyrene, which are put together with adhesive bonding through a heat and pressure lamination process.

The appellant submitted that the testimony showed that the goods in issue, GATORFOAM®, are not polymers nor copolymers. To form a polymer, a chemical reaction at a molecular level known as

4. *Transcript of Public Hearing*, 24 January 2000, at 80 and 81.

polymerization has to take place. This, the appellant submits, is not the case for the goods in issue, as they do not go through a polymerization process, but a process of adhesive bonding which is not equivalent.

The appellant recalled that the characteristics of GATORFOAM® are smoothness and strength, which are different from the characteristics of the individual components. The smoothness characteristic comes from the paperboard impregnated by urea-formaldehyde, while the strength is derived from the adhesive bonding and lamination process of the different materials. Therefore, it was argued, GATORFOAM® is a product different from the individual components; it is a new finished product.

In the appellant's submission, the goods in issue have been classified under tariff item No. 3921.90.90 which is listed in Code 7934. The issue is whether GATORFOAM® is excluded under Code 7934. The appellant argued that the list of exclusions found at Code 7934 does not provide for the trade name GATORFOAM®. GATORFOAM® is a product composed of multiple layers that are bonded together. There is nothing in the exclusion "[p]olymers of styrene" that would lead to the conclusion that a multi-layered product, such as GATORFOAM®, is excluded. The tariff code speaks only to polystyrene, and the testimony clearly indicated that GATORFOAM® is not only made of polystyrene, but of five layers of different products. The tariff code does not exclude a finished product composed of sheets of polystyrene covered on both sides by a sheet of paperboard impregnated with urea-formaldehyde. Such wording, it was argued, cannot be read into the tariff code.

The appellant relied on the Tribunal's decision in *Formica*⁵ which dealt with exclusions under Code 7934. In that case, the Tribunal decided that the combination of two products made a new product and that, where there is an exclusion for one of the components, such an exclusion does not apply to the new product. In the appellant's submission, this argument applies to GATORFOAM® which, like the product in *Formica*, is constituted from a combination of materials which form a new product and an exclusion for one of the components does not exclude the finished product. Further, the appellant argued that there is no wording such as "goods composed of" or "goods containing" in Code 7934 to permit an interpretation that such goods would be excluded.

As evidenced by Mr. Burke's testimony, which was not contradicted by Mr. Finch, GATORFOAM® is not a polymer. As the goods in issue are not polymers, it was argued, GATORFOAM® cannot be excluded under Code 7934 as "[p]olymers of styrene". The evidence is clear that GATORFOAM® was not formed by polymerization but by adhesive bonding. If it is not formed by polymerization, then the goods in issue are not a polymer. If the goods in issue are not polymers, as testified by Mr. Burke, then, the appellant argued, GATORFOAM® is not a polymer of styrene and cannot be excluded under Code 7934.

In reply to the respondent's written and oral submissions that the application of Code 7934 should be based on the essential character of the goods in issue, the appellant submitted that Code 7934 must be interpreted on the basis of the ordinary meaning of the words contained therein. The respondent's interpretation, it was argued, would require the addition of words such as "excluding goods having the essential character of the following" in the text of the tariff code. Moreover, the use of such an approach would lead to two interpretations: one for the goods classified according to Rule 1 of the *General Rules of the Interpretation of the Harmonized System*⁶ where one would not apply the criteria of essential character;

5. *Formica Canada v. DMNR* (20 January 1998), AP-96-205 (CITT) [hereinafter *Formica*]. *Formica* was upheld by the Federal Court of Appeal. See *Canada (Deputy Minister of National Revenue –M.N.R.) v. Formica Canada*, [1999] F.C.J. No. 580.

6. *Supra* note 2 [hereinafter *General Rules*].

and one for the goods classified according to Rule 3 where the essential character criteria would be applied and which would be read into Code 7934. The tariff code, the appellant argued, must be interpreted on its face. To summarize, the terms of Code 7934, the rules of statutory interpretation and the General Rules do not allow for the interpretation of the tariff code as suggested by the respondent either by adding the words “essential character” or interpreting those words according to Rule 3.

On this point, the appellant further submitted that the essential character of the goods in issue is not polymer of styrene, as the evidence clearly indicated that GATORFOAM® is not a polymer, but a product made of five layers which are bonded by heat and pressure. In the event that one needed to make a determination in respect of the essential character of the goods in issue, the appellant submitted that the essential character would be from the paperboard layer, not the styrene core, which represents over 50 percent of the weight of the goods in issue.

The appellant submitted that the respondent based the classification of the goods in issue on the non-cellular component at the tariff item level and on the cellular component at the tariff code level for the purposes of having the goods in issue excluded under Code 7934. The goods in issue, it was argued, cannot have two essential characters.

Finally, with respect to the respondent’s submission that Chapter 39 covers polymers only, the appellant submitted that Chapter 39 covers a broad range of products and, while they are not all polymers, such products may be made of polymers.

The respondent submitted that the Tribunal, in determining whether Code 7934 applies, has to decide whether the goods in issue are classified under a tariff item that is listed in the tariff code and whether they fall within a list of exclusions under the tariff code. It was argued that, given that the parties have agreed to the tariff classification of the goods in issue, the appellant implicitly agreed that GATORFOAM® is a polymer and only polymers are classified in Chapter 39.

The respondent also submitted that the essential character of GATORFOAM® is polystyrene, which is a polymer of styrene, which specifically falls within one of the exclusions under Code 7934. To support this contention, the respondent argued that the essential character used at the tariff item level can, by analogy, be used in determining the application of the essential character at the tariff code level. It was submitted that the essential character of the goods in issue, for purposes of applying the tariff code, is polystyrene, as it is the predominant component by volume of GATORFOAM®. Therefore, given that polystyrene is a polymer of styrene that is specifically excluded under the tariff code, the goods in issue cannot qualify for the benefits of the tariff code. It was further submitted that, at the tariff code level, volume is the most accurate and appropriate method of determining the essential character of GATORFOAM®.

The respondent argued that the perception of the product is key in determining what it actually is. In the respondent’s submission, the goods in issue are just foam and are marketed as foam panels, not as paperboard impregnated with urea-formaldehyde. Moreover, in looking at the actual chemical composition of the goods in issue, it was submitted that the predominant monomer unit is styrene which is in keeping with the concept that polystyrene makes up the greatest proportion of the foam.

In addressing *Formica* which was relied upon by the appellant, the respondent argued that the goods in that case were different from the goods in issue, in that they were made of homogenous materials, as opposed to GATORFOAM® which is made of paper, urea-formaldehyde and polystyrene. In *Formica*, as the layers were made up of the same material, and as a result of heat and pressure used during the lamination process, they melted together into an irreversible single component of paper. This is not the case

with GATORFOAM®, the respondent argued. The respondent concluded that the goods in issue are not a new product in the same sense as in *Formica*.

In *Formica*, the respondent argued, the Tribunal placed great weight on the fact that the words “polymers of” did not precede the words “[m]elamine-formaldehydes” and “[p]henol-formaldehydes” in the tariff code and that the products in *Formica* did not fall within the specific list of exclusions. In this case, the tariff code speaks of “[p]olymers of styrene” within the list of exclusions, not just of “styrene”. The distinction is important because of the Tribunal’s position in *Formica*. Finally, in *Formica*, the end product was “[h]igh pressure, paper reinforced, decorative laminates” produced under high heat, containing melamine-formaldehyde and phenol-formaldehyde resins. That is not the case here, the respondent submitted.

Finally, the respondent argued that, for the purposes of tariff classification, weight was the criterion used to determine the essential character of the goods in issue, as the respondent had to determine whether they were made of cellular or non-cellular components. At the tariff code level, the respondent submitted, the issue is different, in that one is looking at the chemical composition of the goods in issue. Therefore, at the tariff item level, one would look at the physical attributes of the goods in issue, while, at the tariff code level, one would look at their chemical attributes. The respondent also relied on Rule 3 (b) of the General Rules to argue that the application of Code 7934 should be based on the essential character of the goods in issue. The goods excluded under Code 7934 include urea-formaldehydes and polymers of styrene. Polystyrene is a polymer of styrene which is a component of GATORFOAM® and which constitutes approximately 96 percent of the volume of the foam, thereby giving it its essential character. Accordingly, GATORFOAM® is excluded under Code 7934. The respondent concluded by stating that the fact that two different criteria are used is not necessarily contradictory and that there is nothing in the legislative scheme that requires the use of the same criterion.

DECISION

With respect to the classification of the goods in issue, the Tribunal is guided by section 10 of the *Customs Tariff* which provides that, unless otherwise provided, the classification of imported goods under a tariff item shall be determined in accordance with the General Rules and the *Canadian Rules*.⁷ Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁸ and to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.⁹

The Tribunal notes that the parties agree that the goods in issue are properly classified in Chapter 39 as “plastics and articles thereof” and more particularly as “composite goods of plastic sheets being a combination of cellular and non-cellular in which the non-cellular component is predominant by weight” under tariff item No. 3921.90.90.

The Tribunal has taken into consideration the various arguments of the parties with respect to classification under the tariff item and the tariff code. With respect to the tariff item, the evidence clearly indicates that the goods in issue are made of cellular and of non-cellular components. Based on the evidence and the agreement of the parties, the Tribunal finds that the goods in issue are other “plastics and articles

7. *Supra* note 2.

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

9. Customs Co-operation Council, 2d ed., Brussels, 1996.

thereof” within the meaning of Chapter 39 and that the goods in issue are properly classified under tariff item 3921.90.90 as “composite goods of plastic sheets being a combination of cellular and non-cellular in which the non-cellular component is predominant by weight”.

The Tribunal now turns to whether the goods in issue are excluded under Code 7934. The Tribunal finds that the goods in issue are not excluded under Code 7934 for the following reasons.

The respondent argued that the General Rules, and in particular Rule 3 (b) with respect to the essential character of the goods in issue, can apply to the tariff code. At the outset, the Tribunal is not persuaded that the General Rules can apply in every instance, if at all, to the tariff code. As specifically stated in subsection 10(1) of the *Customs Tariff*, the classification of imported goods under a tariff item is determined according to the General Rules which set out the principles that govern the classification of goods under a tariff item. In reviewing subsection 10(1) of the *Customs Tariff* and the General Rules, the Tribunal is of the opinion that this set of principles which govern the classification of goods under a tariff item, may not, strictly speaking, apply to tariff codes. Moreover, Rule 1 of the *Canadian Rules* reiterates that classification of goods in the tariff item of a subheading or of a heading shall be determined according to the General Rules. Nowhere does it say that these rules apply to the interpretation of tariff codes.

However, even if the Tribunal were to accept that the interpretation of the tariff code could be governed by the General Rules, the Tribunal is not convinced that the rules would apply differently at the tariff item and tariff code levels. If that were the case, this would lead to irreconcilable results, such as, in this case, where the goods in issue end up having two competing essential characters depending on whether the goods are to be classified under a tariff item or to qualify for benefits under a tariff code. The Tribunal agrees with the appellant that the goods in issue cannot have two essential characters, one for tariff item and one for tariff code interpretation. Consequently, the Tribunal is persuaded by the appellant’s arguments on this matter.

The Tribunal is of the opinion that *Formica* is of assistance in disposing of this appeal, particularly as it relates to the application of the tariff code. The Tribunal is not persuaded by the respondent’s argument that the principles applied in *Formica* are not relevant to the circumstances of this case. In *Formica*, the Tribunal had to determine whether the goods met two conditions to qualify for the benefits of Code 7934: (1) the goods must be classified under one of the tariff items covered by the tariff code; and (2) the goods must not fall within the exclusions. In that case, the Tribunal found that the goods were classified under a tariff item covered by the tariff code. The evidence in that case showed that the goods were multi-layered paper-reinforced, decorative laminates that underwent a laminating process similar to the one in the present matter. The product in *Formica* contained melamine-formaldehyde and phenol-formaldehyde resins and cellulose. The Tribunal concluded that the combination of those materials created a new product which did not fall within the exclusions under Code 7934.

In the present matter, the Tribunal finds, and the parties agree, that the goods in issue are properly classified under tariff item 3921.90.90, which is covered in Code 7934. The issue that remains is whether the goods in issue fall within the exclusions. As in *Formica*, the goods in issue are composed of multi-layers. Unlike in *Formica* where the core layer was composed of kraft paper impregnated with plastic, GATORFOAM® is composed of polystyrene; in the Tribunal’s view, this difference is of no material significance. What is significant is the fact that, like in *Formica*, the layers went through a process of heat and pressure in laminating the components of the goods in issue. The Tribunal is persuaded that this process, and not polymerization, creates a new product, GATORFOAM®, which is not urea-formaldehyde or polymer of styrene, but a combination of those materials and others. The Tribunal is of the view that Code 7934 does not exclude “goods composed of” materials, but excludes only the materials themselves.

Therefore, the Tribunal finds that the goods in issue are not excluded under Code 7934 and qualify for the benefits of the tariff code. Consequently, the appeal is allowed.

Richard Lafontaine

Richard Lafontaine
Presiding Member

Zdenek Kvarda

Zdenek Kvarda
Member

Arthur B. Trudeau

Arthur B. Trudeau
Member