

Ottawa, Friday, February 11, 2000

Appeal No. AP-98-047

IN THE MATTER OF an appeal heard on April 20, 1999, 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 April 30, May 7 and June 16, 1998, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

N.C. CAMERON & SONS, LIMITED

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-98-047

N.C. CAMERON & SONS, LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal pursuant to section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue (now Commissioner of the Canada Customs and Revenue Agency). The goods in issue are figurines, ornaments, picture frames and bookends. Each of these articles is composed of a mixture of approximately 48 percent cured unsaturated polyester (plastic), 47 percent by weight inorganic filler, 1 percent titanium dioxide and other additives. The first issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3926.40.10 as statuettes of plastics, under tariff item No. 3926.40.90 as other ornamental articles of plastics and under tariff item No. 3924.90.00 as other household articles and toilet articles of plastics, as determined by the respondent, or should be classified under tariff item No. 6810.99.00 as other articles of artificial stone, as claimed by the appellant. The second issue is whether certain figurines and ornaments, which are essentially a subset of the broader category, are properly classified under tariff item No. 3926.40.10 as statuettes of plastics and under tariff item No. 3926.40.90 as other ornamental articles of plastics, as determined by the respondent, or should be classified under tariff item No. 9505.10.00 as articles for Christmas festivities and under tariff item No. 9505.90.90 as other festive articles, as claimed by the appellant. The last issue is whether certain of the goods in issue, that is, crosses, qualify for the benefits of Code 2950.

HELD: The appeal is dismissed. The Tribunal classifies the goods according to Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System*, as they consist of more than one material, and has to determine the essential character of the goods in issue. The Tribunal is of the view that the evidence demonstrates that the polyester resin is the component that gives the goods in issue their essential character and that, thus, they are properly classified under tariff item No. 3926.40.10 as statuettes of plastics, under tariff item No. 3926.40.90 as other ornamental articles of plastics and under tariff item No. 3924.90.00 as other household articles and toilet articles of plastics. With respect to the alternative classification of some of the goods in issue as articles for Christmas festivities and as other festive articles under tariff item No. 9505.10.00 and tariff item No. 9505.90.90 respectively, the Tribunal is not persuaded, based on the evidence, that some of the goods in issue are associated with a particular festival or with Christmas festivities. Finally, the Tribunal finds that, in light of the evidence, none of the goods in issue qualify for the benefits of Code 2950.

Place of Hearing: Ottawa, Ontario
Date of Hearing: April 20, 1999
Date of Decision: February 11, 2000

Tribunal Members: Pierre Gosselin, Presiding Member
Patricia M. Close, Member
Peter F. Thalheimer, Member

Counsel for the Tribunal: Philippe Cellard
Marie-France Dagenais

Clerk of the Tribunal: Margaret Fisher

Appearances: David A. Liston, for the appellant
Duane Schippers, for the respondent

Appeal No. AP-98-047

N.C. CAMERON & SONS, LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
PATRICIA M. CLOSE, Member
PETER F. THALHEIMER, Member

REASONS FOR DECISION

INTRODUCTION

This is an appeal under section 67 of the *Customs Act*¹ from decisions of the Deputy Minister of National Revenue (now Commissioner of the Canada Customs and Revenue Agency) made under section 63 of the *Act*. The goods in issue are figurines, ornaments, picture frames and bookends. Each of these articles is composed of a mixture of approximately 48 percent cured unsaturated polyester (plastic), 47 percent by weight inorganic filler and 1 percent titanium dioxide and other additives. The first issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3926.40.10 of Schedule I to the *Customs Tariff*² as statuettes of plastics, under tariff item No. 3926.40.90 as other ornamental articles of plastics and under tariff item No. 3924.90.00 as other household articles and toilet articles of plastics, as determined by the respondent, or should be classified under tariff item No. 6810.99.00 as other articles of artificial stone, as claimed by the appellant. The second issue is whether certain figurines and ornaments, which are essentially a subset of the broader category, are properly classified under tariff item No. 3926.40.10 as statuettes of plastics and under tariff item No. 3926.40.90 as other ornamental articles of plastics, as determined by the respondent, or should be classified under tariff item No. 9505.10.00 as articles for Christmas festivities and under tariff item No. 9505.90.90 as other festive articles, as claimed by the appellant. The last issue is whether certain of the goods in issue, that is, crosses, qualify for the benefits of Code 2950 of Schedule II to the *Customs Tariff*.

The relevant tariff nomenclature is as follows:

39.24 Tableware, kitchenware, other household articles and toilet articles, of plastics.
3924.90.00 -Other
39.26 Other articles of plastics and articles of other materials of heading Nos. 39.01 to 39.14.
3926.40 -Statuettes and other ornamental articles
3926.40.10 ---Statuettes
3926.40.90 ---Other ornamental articles
68.10 Articles of cement, of concrete or of artificial stone, whether or not reinforced.
6810.99.00 --Other

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter *Act*].
2. R.S.C. 1985 (3d Supp.), c. 41.

- 95.05 Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.
- 9505.10.00 -Articles for Christmas festivities
- 9505.90 -Other
- 9505.90.90 --Other

Code 2950 reads as follows:

Communion sets; oil stocks, crosiers; benitiers; sprinklers; incensers; incense boats; baptismal shells and fonts; scapulars; chapelets; rosaries; religious statues, statuettes, medals or crosses; religious figures or plaques; Scroll sets; Chanuka candlesticks; Kiddush sets; Mezuzah boxes; Havdalah sets; Seder plates; religious ancestral shrines; parts of the foregoing.

EVIDENCE

Mr. Craig Cameron, President of N.C. Cameron & Sons, Limited and Chairman of the Board of The Canadian Gift & Tableware Association, and Ms. Grace Kiss, International Logistics Manager at N.C. Cameron & Sons, Limited, gave evidence on the appellant's behalf. Mr. Cameron, who has been with the company for 27 years in various capacities, provided the Tribunal with a brief history of the company and its business relationships and described the goods in issue as collectible figurines made of cold cast stoneware. Mr. Cameron testified that all the items in the collection have individual names, product numbers and slogans. Mr. Cameron explained that, since the figurines are fragile, they are wrapped in a high-quality box with extensive packaging to prevent breakage and that this kind of packaging is very important to a collector and adds value.

Mr. Cameron described for the Tribunal the Canadian market for these goods and stated that figurine collecting is very popular in Canada. He testified that the figurines in issue are perceived in the marketplace as imitation stone figurines and that they can be distinguished from figurines made of plastic, which are not considered collectibles.

Mr. Cameron provided the Tribunal with a brief summary of how the goods are manufactured from the artist's original flat art to the three-dimensional sculpture from which a silicone rubber mould is created to produce the figurines. Once the mould is created, the stone, combined with a binder, is cast into the mould and, with time, the material hardens to produce the figurine. The process is referred to as "cold cast". He described the composition of the goods as follows: 48 percent polyester resin, 47 percent calcium carbonate, which is basically crushed and powdered limestone; 1 percent titanium dioxide powder; and some other materials in small traces.

Mr. Cameron testified that, in the industry, a product of artificial stone is basically a product of stone mixed with resin to bind it together. He submitted that calcium carbonate is the base product for the figurine. He stated that it would be impossible to achieve the characteristics that the finished product needs in terms of level of detail, texture, weight, colours and porousness of the base material if, for example, sawdust instead of calcium carbonate were used to produce the goods in issue.

Mr. Cameron testified that these figurines are referred to as stoneware figurines and are perceived as such by the collectors. These products look like stone figurines, are marketed as such in card, gift and jewellery stores, and are presented as such at different trade shows for gifts and collectibles. Finally, Mr. Cameron testified that most of the figurines are associated with a specific season and a specific holiday.

Ms. Kiss testified that polyester resin and calcium carbonate products imported by the appellant's U.S. parent company were classified by the U.S. Customs Service in heading No. 68.10 as articles of artificial stone and that the Christmas items were classified under tariff item No. 9505.10.00 as articles for Christmas festivities. She also testified that the U.K. customs services essentially issued the same ruling for the products imported into the United Kingdom. In answer to a question by the Tribunal, Ms. Kiss testified that these rulings were not aimed at the appellant's specific products.

Ms. Kiss provided the Tribunal with computer-generated reports of the 1998 sales and shipping information for some of the figurines in issue associated with different festivities celebrated in Canada, such as Valentine's Day, St. Patrick's Day, Easter, Mother's Day, Thanksgiving, Halloween and Christmas, to show that those figurines relate to a particular festivity. She testified that there are also figurines that relate to special occasions like graduations, confirmations, baptisms, birthdays and weddings.

In cross-examination, Mr. Cameron acknowledged that, on the certificates of origin, the products are not described as being made of stone or artificial stone, but are referred to as polyester resin decorations. He also acknowledged that, in the appellant's catalogue, the wording used is "cold cast", which refers to the manufacturing process, and that stoneware is not mentioned anywhere.

Mr. Brian Finch, Chief of the Polymer & Textiles Laboratory of the Laboratory and Scientific Services Directorate of the Department of National Revenue (Revenue Canada) (now Canada Customs and Revenue Agency), and Mr. Myroslaw Mykoloy, proprietor of M M Products, a manufacturer of cultured marble products, gave evidence on behalf of the respondent. Mr. Finch was qualified by the Tribunal as an expert in the analysis of plastics. He testified that the products in issue were analysed under his supervision. He testified that the products in issue are made of a combination of unsaturated polyester resin and calcium carbonate, with titanium dioxide added as a colourant. Mr. Finch stated that, in his opinion, the calcium carbonate is used as a filler because of its minimal cost. Mr. Finch stated that, in his opinion, it is the polyester that gives the articles their shape and form. Mr. Finch testified that 94 percent of the value of the goods in issue is represented by the unsaturated polyester resin and that 5 percent of the value is represented by the filler. Mr. Finch also testified that, in his opinion, "cold cast" is just a term that applies to the moulding of a plastic article at room temperature. Mr. Finch stated, in cross-examination, that the details in the figurines in issue could not have been obtained with a coarser material such as sand.

Mr. Mykoloy was qualified by the Tribunal as an expert in imitation marble and moulded figurines. He testified that polyester resin, filler of different types and colour paste are the components of the goods that he produces. He stated that, in his opinion, resin is the necessary component used to harden the product and that the filler is only used to minimize costs.

Mr. Manmahipal Ahara, a tariff administrator for Revenue Canada, also testified on behalf of the respondent. Mr. Ahara testified as to the certificates of origin produced in the present case in relation to the goods in issue. He stated that, according to these certificates, the goods in issue are imported from the People's Republic of China and are identified as "general merchandise polyresin decoration".

ARGUMENT

The appellant's representative submitted that it would be appropriate for the Tribunal to classify the goods in issue in heading No. 68.10 as articles of artificial stone under Rule 1 of the *General Rules for the Interpretation of the Harmonized System*³ which provides that classification be based on the terms of the

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

heading. The representative referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁴ to heading No. 68.10 which provides, in part, that “[a]rtificial stone is an imitation of natural stone obtained by agglomerating pieces of natural stone or crushed or powdered natural stone (limestone, marble, granite, porphyry, serpentine, etc.) with lime or cement or other binders (e.g. plastics)”.

Furthermore, the appellant’s representative argued that, in terms of mixtures and combinations of materials and substances, Rule 2 (b) of the *General Rules* would find application in the present case. Rule 2 (b) provides, in part, the following:

Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance.

To assist in interpreting Rule 2 (b) of the *General Rules*, the appellant’s representative referred to paragraph (XII) of the *Explanatory Notes* to Rule 2, which provides, in part, the following:

It does not, however, widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading; this occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading.

Accordingly, the appellant’s representative submitted that the goods in issue are no longer plastic articles nor articles of calcium carbonate or powdered stone. They are articles of artificial stone which are specifically provided for in heading No. 68.10. He submitted that it is not important to determine which of the components gives the end product its essential characteristic because the end product, in and of itself, is classified in a specific heading.

The appellant’s representative made reference to rulings of the U.S. Customs Service, filed with the appellant’s brief, relating to goods which, he suggested, are very similar to the goods in issue. The rulings classified the goods under a tariff item similar to the one being urged by the appellant.

In the alternative, the appellant’s representative submitted that the goods in issue should be classified in accordance with Rule 3 (b) of the *General Rules* which provides, in part, that composite goods consisting of different materials shall be classified as if they consisted of the material which gives them their essential character. Paragraph (VIII) of the *Explanatory Notes* to Rule 3 further provides that the factor which determines the essential character will vary as between different kinds of goods and that it may 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 representative argued that the characteristics of the goods in issue, such as weight, design, texture and colour, are very different as a result of the use of calcium carbonate in the production of the goods and that, accordingly, the goods should be classified in heading No. 68.10 as articles of artificial stone.

The appellant’s representative argued that some of the goods in issue should be classified in heading No. 95.05 as festive articles. In support of his argument, the representative referred to the Tribunal’s decision in *Nicholson Equipment v. DMNR*.⁵ He also referred to Customs Notice N-179⁶ which elaborates

4. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter *Explanatory Notes*].

5. (25 April 1997), AP-96-080.

6. *The Administration of Heading 95.05* (3 November 1997).

guidelines on the administration of heading No. 95.05 by Revenue Canada. The representative submitted that it should apply to the goods in issue.

Counsel for the respondent argued that the goods in issue should be classified in accordance with Rule 3 (b) of the *General Rules* under the tariff item that describes more appropriately the essential character of the goods in issue. He further submitted that, as stressed by the evidence, the process of moulding is what gives the primary characteristics to the goods in issue and that the ability for an article to mould depends on the use of the polymer, the unsaturated polyester that is used in the process.

Counsel for the respondent submitted that the calcium carbonate, which is, undoubtedly an important component of the goods in issue, must be considered as a filler and that the polymer is the necessary component that gives the articles their detail and texture.

With respect to the rulings from the U.S. Customs Service, counsel for the respondent made reference to a compliance publication issued by the U.S. Customs Service, which, under heading 68.10, states in part:

In certain plastics products, stone material may merely serve as filler. This type of article (which should not be confused with agglomerated stone) is classifiable as plastics in Chapter 39 even though the plastics material and stone material may be blended together through the body of the product.

Counsel for the respondent argued that the evidence demonstrated that the stone material used serves as a filler to produce the goods in issue. He further submitted that, since the goods in issue derive their true character and essence from the polymer and not from the filler, they are properly classified as articles of plastics.

Finally, counsel for the respondent submitted that, in order for an article to be considered related to a specific festival, there has to be a nexus between the article for which tariff classification in heading No. 95.05 is claimed and the actual festival. In the present instance, the references to certain festive occasions are so general that the articles could be used for different occasions all year long. With respect to the issue of the religious articles and the application of Code 2950, counsel submitted that, since there is no religious tradition or religious value attached to these articles, they do not qualify for the benefits of the concessionary code.

DECISION

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules* and the *Canadian Rules*.⁷ The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the *Explanatory Notes* as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*.

The *General Rules* are structured in a cascading form. If the classification of an article cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. Rule 1 provides the following:

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

7. *Supra* note 2, Schedule I.

The appellant's representative argued that, since artificial stone is mentioned in heading No. 68.10, the goods in issue could be classified in that heading by virtue of Rule 1 of the *General Rules*. However, given that the plastic is more than merely a "binder" and that the goods are a mixture of calcium carbonate and plastic resin, the Tribunal is of the view that reference should be had to Rule 2 (b). That rule provides that any reference in a heading to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. Given that the goods in issue are made of a combination of unsaturated polyester resin (polymer) and calcium carbonate, they are referred to in heading No. 68.10, which covers articles of artificial stone, and in heading Nos. 39.24 and 39.26, which provide for articles of plastics. Rule 2 (b) further provides that the classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

Rule 3 (a) of the *General Rules* indicates that the classification of goods which are classifiable in two headings shall be effected by choosing the heading which provides the more specific description. However, Rule 3 (a) goes on to state that, when two headings each refer to part only of the material contained in composite goods, those headings are to be regarded as equally specific in relation to those goods. Hence, the application of the next rule, Rule 3 (b), which provides that the classification must be made as if the goods consisted of the material that gives them their essential character. Paragraph (VIII) of the *Explanatory Notes* to that rule further indicates that the factor which determines the essential character will vary as between different kinds of goods and that it may be determined by the value of a material or the role of a constituent material in relation to the use of the goods.

The Tribunal accepts the evidence that the use of calcium carbonate provides weight and affects the porousness of the base material and the way in which the paint is absorbed to allow texture and warmth of colour. While it is clear from the evidence that the calcium carbonate does not act merely as a filler, the Tribunal is persuaded that the polymer is the component that gives the goods in issue their essential character. In this respect, the Tribunal is persuaded that the use of the polymer, in proportions greater than are required to simply bind the stone powder, gives the compound its plasticity and allows it to flow into the finest details of the mould to provide the detailed shape and texture required in the product. The Tribunal also notes that the evidence indicates that the greater the details required, the more polymer is required to produce the goods in issue. The Tribunal notes the cost differential between the polymer and the calcium carbonate, the polymer being the more expensive, and concludes, from the use of a larger proportion of polymer when much less would suffice, that polymer is necessary to achieve the desired texture and detail and is the component that gives the goods in issue their essential character.

Given the foregoing, the Tribunal finds that the goods in issue are properly classified as articles of plastics in heading Nos. 39.24 and 39.26.

With respect to the festive nature of some of the products in issue, the *Explanatory Notes* to heading No. 95.05 provide that "[f]estive, carnival or other entertainment articles" include, among other articles, "other decorations . . . which are traditionally associated with a particular festival". In the Tribunal's view, the goods in issue are, first and foremost, collectibles and, as such, are purchased and displayed all year long. While it is true that the predominance of the appellant's sales occur in specific "shipping windows", this could relate just as much to import availability as to the date of the festival or festive occasion. With respect to the Christmas articles, the evidence shows that there are sales throughout the year to give collectors the opportunity to round out their collection. Accordingly, the Tribunal is not persuaded, based on the evidence, that some of the goods in issue are associated with a particular festival or with Christmas festivities. Finally, the Tribunal finds that, in light of the evidence, none of the goods in issue qualify for the benefits of Code 2950.

With respect to the rulings of the U.S. Customs Service filed by the appellant, the Tribunal notes that it is not bound by such rulings. Given the preceding analysis, the Tribunal does not share the conclusions of the U.S. Customs Service in these specific cases.

In conclusion, the Tribunal is of the view that the goods in issue are properly classified under tariff item No. 3924.90.00 as other household articles of plastics, under tariff item No. 3926.40.10 as statuettes of plastics and under tariff item No. 3926.40.90 as other ornamental articles of plastics. Consequently, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member