CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, January 21, 2000

Appeal Nos. AP-98-058 and AP-98-082

IN THE MATTER OF appeals heard on April 7, 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 June 2, 1998, and October 16, 1998, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

MOTOVAN MOTOSPORT INC. AND
STEEN HANSEN MOTORCYCLES LTD. **Appellants**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal Nos. AP-98-058 and AP-98-082

MOTOVAN MOTOSPORT INC. AND STEEN HANSEN MOTORCYCLES LTD. — **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE — **Respondent**

The goods in issue are various models of motorcycle helmets which were imported into Canada between November 13, 1996, and October 17, 1997. The issue in these appeals is whether the motorcycle helmets in issue are properly classified under tariff item No. 6506.10.90 as other safety headgear, as determined by the respondent, or should be classified under tariff item No. 6506.10.10 as safety headgear "[f]or firemen; lead-impregnated or lead-lined, for X-ray operators; for mountaineering and climbing; for football; industrial safety helmets", as claimed by the appellants.

HELD: The appeals are dismissed. Neither the evidence nor the context of tariff item No. 6506.10.10 supports the appellants' position. Therefore, the Tribunal finds that the motorcycle helmets in issue are properly classified under tariff item No. 6506.10.90 as other safety headgear.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 7, 1999
Date of Decision:	January 21, 2000
Tribunal Member:	Peter F. Thalheimer, Presiding Member
Counsel for the Tribunal:	Gilles B. Legault
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Donald Petersen, for the appellants Étienne Trépanier and Louis Sébastien, for the respondent

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Appeal Nos. AP-98-058 and AP-98-082

MOTOVAN MOTOSPORT INC. AND STEEN HANSEN MOTORCYCLES LTD. **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: PETER F. THALHEIMER, Presiding Member

REASONS FOR DECISION

These are two appeals under section 67 of the *Customs Act*[1] from decisions of the Deputy Minister of National Revenue (now the Commissioner, Canada Customs and Revenue Agency) dated June 2, 1998 (AP-98-058) and October 16, 1998 (AP-98-082) regarding goods imported into Canada between November 13, 1996, and October 17, 1997. The appellants, which have the same representative, asked that the appeals be joined since they involve the same goods and the same issue.

The goods in issue are various models of motorcycle helmets. The issue in these appeals is whether the motorcycle helmets in issue are properly classified under tariff item No. 6506.10.90 of Schedule I to the *Customs Tariff*[2] as other safety headgear, as determined by the respondent, or should be classified under tariff item No. 6506.10.10 as safety headgear "[f]or firemen; lead-impregnated or lead-lined, for X-ray operators; for mountaineering and climbing; for football; industrial safety helmets", as claimed by the appellants.

At the hearing, the appellants called several witnesses. The appellants' representative asked the Tribunal to recognize most of the witnesses testifying on behalf of the appellants as experts in their own fields. The Tribunal refused the request either because: (1) the witnesses did not possess the specialized knowledge (whether acquired through formal training or work experience) required to be recognized as experts in the fields that they proposed; or (2) the witnesses' expertise was irrelevant to the issue or could not allow them to give an opinion, as matters on which they would have expressed such opinion fell outside their scope of expertise.

For instance, the Tribunal did not recognize Mr. Daniel Baldwin, a motorcycle, snowmobile and all terrain vehicle (ATV) dealer, as an expert in the field of Ontario's laws regarding the use of helmets when operating these vehicles, nor did it accept to qualify Mr. Baldwin as an expert on helmets that must be worn when driving these vehicles. However, the Tribunal heard Mr. Baldwin's testimony regarding facts on which he has personal knowledge: the absence of significant differences between the various kinds of helmets used when operating these vehicles; the fact that, in order to be used in Canada, these helmets have to pass one of four recognized standards; and the fact that the vast majority of his sales of ATVs are to farmers who use them for many farm applications. In cross-examination, Mr. Baldwin admitted that farmers who use ATVs wear helmets.

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

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The Tribunal also heard the testimony of Mr. Mervyn Stubinsky, a professional fur trapper. The appellants' representative wanted Mr. Stubinsky qualified as an expert witness in fur trapping. However, as the purpose of Mr. Stubinsky's expert testimony was to provide an opinion regarding his use of a motorcycle or helmet while he is trapping, the Tribunal was of the view that, although his 40 years as a trapper could well qualify him as an expert in fur trapping, he could not provide an opinion on something falling outside his scope of expertise, such as wearing a motorcycle helmet. Hence, the Tribunal concluded that Mr. Stubinsky's use of a helmet while trapping did not allow him to provide an expert opinion on the helmets in issue, just as wearing snowshoes would not allow him to give an expert opinion on snowshoes. The Tribunal, however, heard Mr. Stubinsky's testimony regarding his own personal experience of trapping and the fact that he wears a helmet to go from trap to trap when he uses either his snowmobile or his ATV, which are necessary nowadays in his profession.

Mr. Lawrence Hacking, who has extensive work experience in the motorcycle, ATV and snowmobile industries, also testified on behalf of the appellants. Mr. Hacking mentioned that the recreational vehicle business constitutes, in itself, an industry composed of manufacturers and dealers. Regarding the uses of motorcycles in other industries, Mr. Hacking testified that they are used in different industrial applications, for example, by motorcycle couriers, by police forces and in military applications. Mr. Hacking also explained that ATVs are used not only in agriculture but also in the oil and gas pipeline industry, while snowmobiles and, to a certain extent, motorcycles are now being used in the touring industry. In cross-examination, Mr. Hacking admitted that the main use of the three types of vehicles referred to above is for transportation in all cases, i.e. to move or travel from one point to another.

The last witness for the appellants was Mr. Pancho Deriger, a welding professor at Algonquin College. The crux of Mr. Deriger's testimony was that a welding helmet is strictly a visor with an opening that allows the welder to see his work. In fact, Mr. Deriger said, a welding helmet is a face shield rather than a real helmet, albeit known as a welding helmet.

Counsel for the respondent called one witness, Mr. Arne Bjermeland, a tariff administrator with the Department of National Revenue (now Canada Customs and Revenue Agency), who works in a section that deals with appeals. The relevancy of most of Mr. Bjermeland's testimony was highly questionable, since he explained how the impugned classification was made, which is beside the point, as it is precisely the Tribunal's jurisdiction in these appeals to apply its expertise to the matter and classify the goods in issue accordingly. Mr. Bjermeland's reference to the position paper that he prepared, which forms the basis of the respondent's brief, was also questionable, especially since it includes hearsay evidence regarding a conversation that he had with an individual from the Canadian Standards Association (CSA). The Tribunal nevertheless accepted to hear this evidence, especially because the appellants' representative urged the Tribunal to let Mr. Bjermeland continue with his testimony. Based on the explanations that he received from the CSA, Mr. Bjermeland distinguished industrial safety helmets from motorcycle helmets by the lesser degree of impact for which the former are designed, that is, to protect against small flying or falling objects, such as hammers. Mr. Bjermeland also testified that the expression "industrial safety helmets" in the *Customs Tariff* has a special connotation that is found in provincial regulations dealing with construction. Mr. Bjermeland concluded, based on his experience, that an industrial safety helmet is basically what is known as a hard hat or a safety hat.

In cross-examination, Mr. Bjermeland clarified that safety helmets are also required in industries other than the construction industry, such as for meat inspection. When asked to compare the different kinds of helmets introduced as exhibits, Mr. Bjermeland said that one helmet in particular, which he would classify

as an industrial safety hat, had padding and was somewhat of an intermediary product between the motorcycle helmet and the industrial safety helmet.

From the evidence adduced at the hearing, the appellants' main position was that the word "industrial" in the expression "industrial safety helmets" in tariff item No. 6506.10.10 should not be interpreted restrictively. The appellants' representative thus argued that, besides the construction industry, there are several types of industries, including the trapping, touring, recreational and motorcycle racing industries. As there is evidence that motorcycle or snowmobile helmets are used by workers or individual involved in these industries, the goods in issue, therefore, fall within the expression "industrial safety helmets" in the *Customs Tariff*.

In the Tribunal's view, this line of argument, on which most of the appellants' case rests, simply does not resist to analysis. The appellants do not contest that the helmets in issue are motorcycle helmets. Obviously, and the evidence supports that conclusion, motorcycle helmets are made to protect drivers and passengers of such transport vehicles and, for that reason, they have a much higher impact value than construction hats (the so-called "hard hats"[3]). In addition, not all drivers or passengers are working while aboard these vehicles. Thus, the mere fact that these helmets can be worn by individuals working in a specific industry does not make them industrial safety helmets. The same applies with respect to the recreational vehicle industry referred to by the appellants, since individuals who wear these helmets while aboard their motorcycle or snowmobile for transport or pleasure cannot be said to be part of that industry, just as automobile drivers and passengers of automobiles are not part of the automotive industry.

Furthermore, a paramount principle underlying the establishment of the *Harmonized Commodity Description and Coding System*[4] is that goods should be assigned a single classification based on the *General Rules for the Interpretation of the Harmonized System.*[5] As stated in *McGoldrick's Canadian Customs Tariff, "Harmonized System" Volume 1*:[6]

> These [*General Rules*] provide a methodical approach to classifying goods and ensure that products can be simply and clearly assigned a single classification number.[7]

The appellants' position would seriously undermine that principle because goods, irrespective of what they really are, could be classified based on some sort of secondary or incidental end use, such as the alleged industrial safety purposes of the motorcycle helmets.

The Tribunal also notes that section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had, among other things, to the *Explanatory Notes to the Harmonized Commodity Description and Coding System.*[8] The *Explanatory Notes* to heading No. 65.06 provide that the heading "covers, in particular safety headgear (e.g., for sporting activities, military or firemen's helmets, motor-cyclists', miners' or construction workers' helmets)". There are no *Explanatory Notes* to subheading No. 6506.10 and, hence, at the tariff item level of the Canadian nomenclature, Parliament elected to subdivide subheading No. 6506.10 into only two tariff items, one for specific safety

3. *Transcript of Public Hearing*, April 7, 1999, at 59-60.
4. Customs Co-operation Council, 1st ed., Brussels, 1987.
5. *Supra* note 2, Schedule I [hereinafter *General Rules*].
6. (Montréal: McMullin, 1998).
7. *Ibid*. at 16.
8. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter *Explanatory Notes*].

headgear (i.e. No. 6506.10.10) and the other as a residual tariff item for “other safety headgear” (i.e. No. 6506.10.90).

In fact, careful attention seems to have been paid in deciding which specific helmets or category of helmets would be covered by the non-residual tariff item. This, in part, is evidenced by the treatment that helmets for sporting activities and those for industrial safety receive in tariff item No. 6506.10.10. This tariff item, among other things, refers to specific helmets for mountaineering, climbing and football, which, evidently, fall within the category of helmets for “sporting activities” mentioned in the *Explanatory Notes* to heading No. 65.06. Tariff item No. 6506.10.10 also creates a generic category for “industrial safety helmets”, under which are the “miners’ or construction workers’ helmets” mentioned in the *Explanatory Notes*. Thus, in the case of sporting activities, Parliament took a generic description in the *Explanatory Notes* and broke it down by indicating which of these activities would be covered in the non-residual tariff item, the rest of the category falling in the residual tariff item. In the other case, Parliament did the opposite by creating, in the non-residual tariff item, a generic description for “industrial safety helmets” from the “miners’ or construction workers’ helmets” mentioned in the *Explanatory Notes*. And yet nothing is said on the motorcyclists’ helmets also mentioned in the *Explanatory Notes*. Rather than supporting the appellants’ position, the above seems to indicate that motorcycle helmets were voluntarily left outside the non-residual tariff item and, therefore, that they clearly fall in the residual tariff item as other safety headgear.

Neither the evidence nor the context of tariff item No. 6506.10.10 supports the appellants’ position. The Tribunal, therefore, finds that the goods in issue are properly classified under tariff item No. 6506.10.90 as other safety headgear.

Finally, the Tribunal is of the view that arguments made by the appellants, in their brief, with respect to motorcycle helmets being more akin to football helmets and, at the hearing, with respect to the classification of welders’ helmets, have little legal basis.

Consequently, the appeals are dismissed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member