CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, February 28, 2000

Appeal Nos. AP-99-015 to AP-99-025

IN THE MATTER OF appeals heard on November 3, 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 March 8, 1999, with respect to requests for re-determination under subsection 63(3) of the *Customs Act*.

BETWEEN

CONVOY SUPPLY LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are allowed.

Patricia M. Close
Patricia M. Close
Presiding Member

Raynald Guay
Raynald Guay
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal Nos. AP-99-015 to AP-99-025

CONVOY SUPPLY LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

These are appeals pursuant to section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency) made on March 8, 1999, with respect to 11 shipments of two products, known as GlasPly IV and GlasPly Premier, imported from the United States between April 1996 and February 1997. The issues in the appeals relate both to jurisdiction and to classification.

The Tribunal was asked to decide, first, if the respondent and, hence, the Tribunal have jurisdiction with respect to the classification issue: (1) given that the respondent may have failed to address the designated officer's jurisdiction to classify the goods in issue within the 90-day statutory time period, as prescribed in paragraph 61(*a*) of the *Customs Act*, when the respondent made his decisions pursuant to subsection 63(3) of the *Customs Act*; and (2) given that the respondent may not have acted "with all due dispatch".

The classification issue in these appeals is whether the goods in issue are properly classified under tariff item No. 7019.32.10 as thin sheets (voiles), coated or impregnated with asphalt, of a kind used as roofing, as determined by the respondent, or should be classified under tariff item No. 6807.10.00 as articles of asphalt or of similar material (for example, petroleum bitumen or coal tar pitch) in rolls, as claimed by the appellant.

HELD: The appeals are allowed. The Tribunal can only be legally seized of an appeal if the respondent has properly exercised his jurisdiction. In the present case, the evidence indicates that the jurisdictional authority of the designated officer was addressed in correspondence from the respondent. By rendering a decision on the tariff classification as he did, the respondent implicitly recognized that the designated officer had properly exercised his jurisdiction. The fact that the respondent did not specifically address the issue of the designated officer's jurisdiction in his re-determination of the tariff classification made pursuant to section 63 of the *Customs Act*, is not, in the Tribunal's view, fatal to the respondent's jurisdiction to render a decision.

With respect to whether the respondent acted "with all due dispatch", the issue is whether the respondent, in making a decision 19 months after the requests for re-determination, acted "with all due dispatch". The appellant has not convinced the Tribunal that a 19-month wait for a re-determination by the respondent is, in this case, unreasonable, particularly given that it is economic rights of a company that are at stake and that the parties corresponded on this matter some 5 months after the appeals were launched. The Tribunal, thus legally seized of the appeals, moved to the classification issue.

The Tribunal held that the goods in issue should be classified under tariff item No. 6807.10.00 as articles of asphalt or of similar material (for example, petroleum bitumen or coal tar pitch) in rolls. The Tribunal relied on Rule 1 of the *General Rules for the Interpretation of the Harmonized System*, which provides that classification shall be determined according to the terms of the headings and any relative

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Section or Chapter Notes. The evidence shows that the goods in issue are coated with asphalt on both sides and with a liquid parting agent and are painted with lines, which is more than just a light coating. The two primary components within the fibreglass roof mat are fibreglass and asphalt, the latter accounting for approximately 70 percent of the overall weight of the product. They are roofing boards within the meaning of Note (2) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 68.07, as the roofing felts are flat thin pieces of fabric of raw fibreglass used as part of a roofing system. Exclusion (d) for "thin sheets (voiles)" as per subheading No. 7019.32 does not apply, as the goods do not meet the description for voiles found in the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 70.19. The fibre distribution is not random, and its orientation is in both the machine and cross-machine directions. Further, the glass fibres are not pressed or compacted, and it is possible to remove the glass fibres, albeit with difficulty, without damaging the ply sheet; they are, therefore, not "thin sheets (voiles)".

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 3, 1999
Date of Decision:	February 28, 2000
Tribunal Members:	Patricia M. Close, Presiding Member Raynald Guay, Member Richard Lafontaine, Member
Counsel for the Tribunal:	Michèle Hurteau
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Geoffrey C. Kubrick and Yasir A. Naqvi, for the appellant Elizabeth Richards, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-99-015 to AP-99-025

CONVOY SUPPLY LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member
RAYNALD GUAY, Member
RICHARD LAFONTAINE, Member

REASONS FOR DECISION

BACKGROUND

These are appeals pursuant to 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) made on March 8, 1999, with respect to the importation of two products known as GlasPly IV and GlasPly Premier. The appeals cover 11 shipments of the goods in issue imported from the United States between April 1996 and February 1997. The issues in the appeals relate both to jurisdiction and to classification.

The Tribunal was asked to decide, first, if the respondent and, hence, the Tribunal have jurisdiction with respect to the classification issue: (1) given that the respondent may have failed to address the designated officer's jurisdiction to classify the goods in issue within the 90-day statutory time period, as prescribed in paragraph 61(*a*) of the Act, when the respondent made his decisions pursuant to subsection 63(3); and (2) given that the respondent may not have acted "with all due dispatch".

The classification issue in these appeals is whether the goods in issue are properly classified under tariff item No. 7019.32.10 of Schedule I to the *Customs Tariff* [2] as thin sheets (voiles), coated or impregnated with asphalt, of a kind used as roofing, as determined by the respondent, or should be classified under tariff item No. 6807.10.00 as articles of asphalt or of similar material (for example, petroleum bitumen or coal tar pitch) in rolls, as claimed by the appellant. The appellant also asked, as a remedy, that the Tribunal order the respondent to refund the duties paid.

The Tribunal will first deal with the jurisdictional issue.

JURISDICTIONAL ISSUE

Counsel for the appellant stated that they were not asking the Tribunal to revisit the re-determinations made by the designated officer pursuant to paragraphs 61(*a*) and (*e*) of the Act. Rather, counsel asked that the Tribunal review the failure by the respondent to properly exercise his discretion pursuant to subsection 63(3). Specifically, counsel submitted that the respondent failed to address whether the designated officer had properly exercised his jurisdiction pursuant to section 61. By failing to address the jurisdictional issue when he rendered his decisions as to the tariff classification of the goods in issue

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

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pursuant to subsection 63(3), the respondent lost his jurisdiction and, consequently, the re-determinations are of no force and effect.

With respect to whether the respondent made the re-determinations "with all due dispatch" as provided for in subsection 63(3) of the Act, counsel for the appellant argued that, from the date of the initial request for re-determination of the tariff classification to the date of the decisions, some 19 months elapsed. Counsel stated that this was an unreasonable delay. He referred to *R.* v. *Askov*,[3] a Supreme Court of Canada decision where the Court decided that the rights of an accused had been violated because he had not been brought to trial within a reasonable time frame. Although there is no specific time frame in law for an accused to be tried, the Court stated that, in that case, the delay was unreasonable. Counsel submitted that the Court took into consideration the following factors when determining what was a reasonable time frame, which counsel applied to the present appeals: length of delay – in this case, 19 months before decisions were made by the respondent; explanation for the delay – none was given, and the appellant never waived this right; and prejudice – duties paid for the shipments of the goods in issue for a period of 19 months prior to the respondent making his decisions. Counsel also argued that the statute expressly requires the respondent to make a re-determination "with all due dispatch" and that, by delaying the re-determinations by some 19 months, he has not discharged his obligation. In conclusion, because the decisions were not made "with all due dispatch", the respondent has lost jurisdiction.

Counsel for the appellant submitted that the Tribunal has the proper authority to consider the respondent's jurisdiction pursuant to subsection 67(3) of the Act. Counsel argued that, pursuant to sections 16 and 17 of the *Canadian International Trade Tribunal Act*,[4] the Tribunal is vested with certain powers, rights and privileges normally conferred on a superior court of record, which include the authority to consider issues of jurisdiction. Further, the words "all matters related thereto" found at paragraph 16(*c*) of the CITT Act, confer on the Tribunal the authority to consider not only the hearing and the determination of the appeals but also all other related jurisdictional matters. For all these reasons, counsel submitted that the Tribunal has jurisdiction to hear the appeals and to determine the appropriate remedy which, in this case, is the refund of all duties paid by the appellant.

Counsel for the respondent submitted that the Tribunal, as a statutorily created appellate body, may exercise only that jurisdiction which is conferred on it by statute. Counsel submitted that the Tribunal's jurisdiction is derived from section 67 of the Act, which is limited to decisions on tariff classification made by the respondent under sections 63 and 64. The Tribunal has no jurisdiction to review a re-determination made by a designated officer under sections 60 and 61. In counsel's submission, the respondent properly exercised his jurisdiction under subsection 63(3). She argued that the appellant cannot now use arguments regarding the decisions made pursuant to section 63 to have the Tribunal overturn the re-determinations made pursuant to section 61. The appellant's remedy was to seek judicial review. In support of her position, counsel referred to *Richards Packaging* v. *DMNR*,[5] a recent Tribunal decision, where it was of the view that its jurisdiction relates to decisions made under sections 63 or 64 and that it does not have jurisdiction to judicially review a designated officer's re-determinations under section 61.

With respect to the issue of "with all due dispatch", counsel for the respondent, in rebutting counsel for the appellant's arguments, stated that the Department of National Revenue (Revenue Canada) (now the Canada Customs and Revenue Agency) was dealing with the appeals on two fronts at the same time: the appeals to the respondent and the re-determinations by the designated officer pursuant to section 61 of the

3. [1990] 2 S.C.R. 1199 [hereinafter *Askov*].
4. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
5. (10 February 1999), AP-98-007 and AP-98-010 (CITT) [hereinafter *Richards Packaging*].

Act. Furthermore, the appellant was informed as early as December 8, 1997, some five months after the appeals were filed with the Tribunal, of the preliminary recommendation made by Revenue Canada. By way of a letter dated January 21, 1999, Revenue Canada provided the appellant with its review of the jurisdictional issue with respect to the re-determinations made pursuant to section 61. Those were the subject of ongoing communications between the appellant and Revenue Canada to resolve the issue, and to suggest otherwise does not concur with the facts. She concluded by saying that the respondent had, in the circumstances, acted "with all due dispatch".

The Tribunal derives its jurisdiction from section 67 of the Act, which allows for an appeal from a decision of the respondent made pursuant to section 63 or 64. Therefore, the Tribunal must be satisfied that the respondent's decisions being appealed pursuant to section 67 were made under section 63 or 64. Pursuant to section 63 or 64, the respondent's decisions relate to value for duty and tariff classification. In the present appeals, the respondent rendered decisions regarding the tariff classification of the goods in issue as provided for in section 63. As stated in *Richards Packaging*, the Tribunal has no jurisdiction to judicially review a decision made by a designated officer pursuant to section 61, except where the Tribunal may need to ascertain whether it is legally seized of an appeal under the Act. The Tribunal can only be legally seized of an appeal if the respondent has properly exercised his jurisdiction. In the present case, the evidence indicates that the jurisdictional authority of the designated officer had been addressed in correspondence from the respondent. By so doing and by rendering decisions on the tariff classification as he did, the respondent, in the Tribunal's view, implicitly recognized that the designated officer had properly exercised his jurisdiction. Although the respondent did not reiterate and specifically address the issue of the designated officer's jurisdiction in his re-determinations of the tariff classification made pursuant to section 63, this is not, in the Tribunal's view, fatal to the respondent's jurisdiction to render a decision.

The Tribunal will now turn its attention to whether the respondent failed to render a decision "with all due dispatch" pursuant to subsection 63(3) of the Act and, if he did, whether he lost jurisdiction.

In arguing that a delay of 19 months for the respondent to render decisions is unreasonable, counsel for the appellant cited *Askov*. In *Askov*, the issue was whether there had been a breach of the principles of fundamental justice, in that an accused waited two years before going to trial. The case also raised the issue of whether such a delay infringed the fundamental "right to life, liberty and security" of the accused provided for by section 7 of the *Canadian Charter of Rights and Freedoms*.[6] The principles in *Askov* have been discussed and applied in cases involving the delay in hearing refugee claims, disciplinary complaints and human rights complaints where the fundamental "right to life, liberty and security of the person" is at stake. That is not the issue in these appeals. What is at stake here are the economic rights of a company, not the fundamental rights of an individual, and the principles enunciated in *Askov* do not apply in this instance.

In interpreting "with all due dispatch", the Tribunal is guided by section 63 of the Act, the circumstances of each case and the prejudice, if any, that the parties have suffered while awaiting a decision. The appellant has not convinced the Tribunal that a 19-month wait for re-determinations by the respondent is, in this case, unreasonable, particularly given the correspondence from the respondent some 5 months after the appeals were launched. Although the Tribunal notes that the appellant paid duties on the shipments of the goods in issue during the 19-month period, it is not convinced that the appellant suffered undue hardship. Based on the evidence before it, the Tribunal finds that the respondent acted "with all due dispatch" under subsection 63(3).

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6. *Constitution Act, 1982* (*Canada Act 1982* (U.K.), 1982, c. 11, Sch. B).

As it is the Tribunal's view that the respondent has not lost his jurisdiction to make a re-determination of the classification of the goods in issue, the Tribunal is legally seized of the appeals on the tariff classification.

CLASSIFICATION ISSUE

Mr. John Cambruzzi, Manager of Guarantee Services at Johns Manville Roofing Systems, testified on behalf of the appellant. Mr. Cambruzzi was qualified as an expert witness in the properties and construction of the GlasPly roofing materials. Counsel for the respondent did not call any witnesses.

Mr. Cambruzzi testified that, with respect to the manufacture of the glass mat, there were two primary processes: (1) the wet process, which is the most popular; and (2) the dry process. In the wet process, also described as a chopped fibre process, the raw fibreglass is generated to the proper diameter, which helps to ensure the tensile strengths required in the manufacture of the various mats. Once manufactured, the fibreglass fibres are introduced into slurry, or placed on a manufacturing conveyor belt, to ensure the equal dispersion or placement of the fibres in both the machine and cross-machine directions. Any excess moisture is then drawn off the fibreglass fibres. A binder is added to the fibreglass fibres, which essentially holds the mat together and takes the individual fibres and turns them into a roofing glass mat. The glass mat is allowed to cure and is rolled up. In concluding, Mr. Cambruzzi testified that: (1) there is no compression involved in this process; (2) the process is simply the application of fibres on a conveyor belt; (3) a binder is applied to both the top and bottom of the fibres; and (4) the fibres go through a curing stage, resulting in the end product.

With respect to the dry process, also described as a continuous fibre process, Mr. Cambruzzi testified that there is no moisture introduced in the manufacture of the glass mat. In the dry process, there are various continuous fibres that run across a belt, and a binder is applied to the continuous fibres. Since no moisture is introduced in the manufacturing process, the fibres are compressed and compacted to ensure a solid mat with the desired tensile strengths and integrity.

In response to counsel for the appellant's question as to whether it would be possible to remove a filament or piece of glass fibre without destroying the rest of the sheet, Mr. Cambruzzi testified that the fibres within the sheet used in the wet process are short and may be removed, albeit with difficulty.

In response to counsel for the appellant's query on whether the glass mat in issue meets the requirement that the individual glass fibres be distributed in random order, Mr. Cambruzzi responded that, when looking at the distribution of each individual glass fibre of the finished product or of the mat, the fibres would initially appear to be randomly displaced. However, in Mr. Cambruzzi's opinion, the ASTM standard indicates that "it is critical that you have fibre distribution and fibre orientation in both the machine direction, which would be the length of the roll, as well as the cross-machine direction".[7] He went on to say that this characteristic was critical in order to comply with the minimum tensile strengths of ASTM standard D 2178. Mr. Cambruzzi testified that, if the pattern were random, there would be variations within the sheets, such as extremes from one end to the other, for instance, dense applications of fibre in some areas versus light applications in others. This, he stated, would greatly affect the mat's ability to meet the requirements within that standard. In other words, if the fibres were truly randomly distributed, there would be no assurance that the mat would meet ASTM standard D 2178.

7. *Transcript of Public Hearing*, 3 November 1999, at 21.

With respect to the process of applying asphalt, Mr. Cambruzzi admitted that, while the literature on the goods in issue makes reference to a light coating, in his opinion, the process required more than a light coating of asphalt. He stated that the two primary components within the fibreglass roof mat of the goods in issue are fibreglass and asphalt. The asphalt accounts for approximately 70 percent of the overall weight of the product, which indicates that the product receives much more than a simple coating. The asphalt is an integral part of the ply felt and is very critical to the overall performance of a built-up roof application. In response to counsel for the appellant's question as to whether the goods in issue are "simply coated", Mr. Cambruzzi stated that, in his opinion, a product may be simply coated where a coating is applied to protect the product during storage or shipping or for some such reason. He also testified that the goods in issue could not be "thin sheets", as the definition in the tariff indicates that the product would be pressed or compacted in place, something which is not required in the wet process. Mr. Cambruzzi testified that, in addition to the asphalt, a liquid parting agent was applied to the glass mat and that lines were painted on the product. This process involves more than a light coating on the product, as its purpose is to ensure that, when the product is rolled up, it does not stick, as the asphalt has very good adhesive characteristics.

Mr. Cambruzzi testified that PermaPly R, a competing product of the goods in issue, was manufactured using the dry process. In comparison with the goods in issue, PermaPly R is manufactured using a continuous fibre process where the fibres run from one end of the sheet to the other. In Mr. Cambruzzi's testimony, "[i]t would be virtually impossible to get an entire fibre off of that particular product".[8] The product also did not meet the specifications of ASTM D 2178 with respect to porosity. In a visual check, PermaPly R "is substantially more porous than what a GlasPly IV product is".[9]

In cross-examination, Mr. Cambruzzi testified that the goods in issue are sprayed once with asphalt, while GlasBase Plus, not a good in issue, is sprayed three times with asphalt. Mr. Cambruzzi also acknowledged that GlasPly IV appeared to be 0.5 millimetres thick and that, when held up to the light, one could see through the sheet. Although Mr. Cambruzzi acknowledged that the goods in issue were porous, he disagreed with counsel for the respondent that the pinpricks in the product were manufactured; rather, in his view, the effect was one that occurred naturally. He also disagreed with counsel that, when the asphalt is applied, it is soaked into the roofing felt, since the fibreglass is inorganic, as is asphalt, and seeps through the felt from one end to the other. In his opinion, this is one of the advantages of having some porosity, in that there is some transfer of asphalt from the top side to the bottom side of the felt. In comparison with GlasPly IV, Mr. Cambruzzi testified that GlasBase Plus allows some asphalt to bleed through it, as GlasBase Plus has some porosity, not nearly as much as the goods in issue. Mr. Cambruzzi disagreed with counsel that GlasPly IV is designed to have maximum porosity, as the product would lose the stabilizing effect, but he did concede that GlasPly IV was more porous than GlasBase Plus.

In response to the Tribunal's questions, Mr. Cambruzzi indicated that the asphalt used in the manufacturing process of the goods in issue offers protection to the fibreglass and helps maintain a certain rigidity and integrity in the felt. The glass fibres act as reinforcement to the roofing system where there are, for example, harsh weather conditions or vast temperature changes. The fibreglass also gives some stability to the roofing system because, without it, the asphalt would, over a very short period of time, shrink or crack, which would lead to leaks.

In response to a question on whether the term "roofing boards", as found in Note (2) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[10] to heading No. 68.07,

8. *Ibid.* at 31.
9. *Ibid.* at 32.
10. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter *Explanatory Notes*].

was of common usage in the industry, Mr. Cambruzzi indicated that, to his knowledge, that term was not used. Common terms used for various membrane types are roofing felts, base sheets or cap sheets and roofing insulation. The Tribunal asked Mr. Cambruzzi whether there was a difference in the manufacturing process for GlasPly IV and GlasPly Premier with respect to coating and impregnating, as those terms are used in the appellant's literature, and, if so, what that difference would be. In response, Mr. Cambruzzi stated that, from a manufacturing standpoint, he did not believe that there was a distinction between coating and impregnating. Mr. Cambruzzi went on to say that, in the manufacturing process of the goods in issue, a nozzle applies asphalt to coat or impregnate both sides.

Mr. Cambruzzi testified that the fibres could be both nonwoven and random, but that is not the case for the goods in issue. With respect to the goods in issue, the fibres are nonwoven but not random, as that affects the tensile strength. When asked if a bond formed between the glass mat and the asphalt, Mr. Cambruzzi testified that the asphalt has adhesive characteristics, and, when it is applied to the mat at a very high temperature, the asphalt will harden. There is no chemical bond, but there is a physical bond.

ARGUMENTS

Appellant's Argument

Counsel for the appellant argued that the goods in issue should be classified in heading No. 68.07 as "articles of asphalt or of similar material (for example, petroleum bitumen or coal tar pitch)", which includes at Note 2 of the *Explanatory Notes* to that heading:

> Roofing boards consisting of a substrate (e.g., of paperboard, of web or fabric of glass fibre, of fabric of man-made fibre or jute, or of aluminium foil) completely enveloped in, or covered on both sides by, a layer of asphalt or similar material.

Counsel for the appellant argued that the goods in issue are roofing boards made of a substrate of web or fabric of glass fibre covered on both sides by a layer of asphalt. In counsel's submission, a roofing board is any asphalt ply, coated or covered with fibreglass, paper or any other product. They referred to Mr. Cambruzzi's testimony in which he indicated that a roofing board is a web or mat of glass fibre covered on both sides by a layer of asphalt. The asphalt is applied simultaneously through a nozzle on both the top and bottom of the glass mat during the production process.

With respect to the issue of whether the goods in issue are "simply coated", counsel for the appellant referred to the definitions of "coated" and "covered".[11] Counsel submitted that the terms are synonyms and that they are not particular industry terms. Counsel compared the goods in issue with GlasBase Plus, not a good in issue, where the respondent concluded that the latter is a roofing board consisting of a mat of glass fibre impregnated with hot asphalt and coated on one or both sides to meet the ASTM specification. Therefore, in that context, the visibility criteria that the respondent is advancing has no meaning, since there is nothing in either the *Customs Tariff* or the *Explanatory Notes* which would indicate that the visibility of the underlying glass fibre or the discernment of the glass fibre shape means that the goods in issue are coated rather than covered. Furthermore, in order to meet the exacting standards of ASTM D 2178, there must be a certain amount of asphalt applied. Finally, a liquid parting agent is applied and painted lines are added to enhance the value of the product. All this, in counsel's view, indicates that the goods in issue are more than "simply coated with bitumen or asphalt".[12]

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11. *The Oxford Thesaurus, An A – Z Dictionary of synonyms*, *s.v.* "coat" and "cover".
12. *Transcript of Public Argument*, 3 November 1999, at 6.

Regarding the issue of porosity, counsel for the appellant submitted that the porosity of the goods in issue is not relevant, in that, unlike GlasBase Plus where the ASTM specification[13] expressly allows for porosity, this is not the case for the goods in issue. The fact that one can see through the little pinholes may allow for some porosity; however, nowhere do the *Explanatory Notes* to heading No. 68.07 exclude products that are porous. Furthermore, there is no basis in the *General Rules for the Interpretation of the Harmonized System*[14] for the respondent's finding on the porous nature of the goods in issue.

Counsel for the appellant argued that the goods in issue cannot be classified in heading No. 70.19, as the use of the asphalt in the goods in issue "is of central importance and character in the makeup of the Roofing Felts".[15] Counsel stated that Mr. Cambruzzi testified that asphalt accounts for over 70 percent of the weight of the goods in issue and, therefore, meets the requirements of heading No. 68.07. The respondent's laboratory report shows that the glass fibres represent 18 to 20 percent of the weight of the goods in issue. As asphalt is the principal ingredient of the goods in issue, whose main purpose is to enhance the waterproofing of a roofing system, counsel submitted that the goods in issue cannot be classified as "thin sheets" or "voiles" pursuant to subheading No. 7019.32.[16]

Counsel for the appellant then proceeded to review the specific requirements of subheading No. 7019.32. In counsel's view, if one were to argue that the goods in issue are properly classified in that subheading, such classification may well apply to goods made using the dry process rather than the wet process. The only product manufactured by the appellant with the dry process was, for a short time, PermaPly R. Counsel submitted that heading No. 70.19 was intended to deal only with roofing boards that have clearly been manufactured using the dry process. That is not the case in these appeals.

The term "voile" is not defined in subheading No. 7019.32. Counsel for the appellant relied on a dictionary definition in which "voile" is defined as a "thin semi-transparent dress-material"[17] and "a fine soft sheer fabric used esp. for women's summer clothing or curtains".[18] While there was much discussion about the fact that the goods in issue are under 5 millimetres in thickness, i.e. the laboratory report indicated that the goods in issue were 1.2 millimetres thick, counsel submits that this is not a factor in determining whether the goods in issue can be classified in subheading No. 7019.32. Furthermore, the goods in issue are roofing felts, which are inflexible and fairly rigid. Counsel argued that, by the very nature of the physical characteristics of the roofing felts, these goods are not akin to a fabric responding to the above definition of "voile".

Turning to the testimony, counsel for the appellant stated that the evidence showed that, with respect to the goods in issue, the individual glass fibres are not distributed in random order, but are uniformly distributed throughout the product as required by the ASTM specification. The evidence also showed that the goods in issue are manufactured using the wet process and not the dry process. The latter is the only one where the glass fibres are pressed. With respect to the removal of a filament of glass fibre,

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13. Refers to ASTM standard D 4601 for GlasBase Plus. See *Transcript of Public Argument*, 3 November 1999, at 2.
14. *Supra* note 2, Schedule I [hereinafter *General Rules*].
15. Appellant's brief at para. 33.
16. Thin sheets (voiles) are nonwovens made from individual glass fibres (filaments) distributed in random order. The fibres are held together by means of a binder and pressed and may or may not incorporate reinforcement threads which are most often stretched lengthwise throughout the sheets. Unlike the glass mats, the individual filaments of these products cannot be removed by hand without damaging the sheet. Thin sheets can be distinguished from webs, mattresses and other insulation products by their regular thickness which does not exceed 5 millimetres.
17. *The Little Oxford Dictionary of Current English*, 6th ed., *s.v.* "voile".
18. *Webster's Ninth New Collegiate Dictionary*, *s.v.* "voile".

Mr. Cambruzzi testified that, in the case of the wet process, one could remove a filament of glass fibre without damaging the integrity of the entire sheet. Such is not necessarily the case with respect to goods manufactured using the dry process. In conclusion, counsel submitted that subheading No. 7019 does not apply to the goods in issue, as the glass fibres are not distributed in random order, they are not pressed, and they can be removed by hand without necessarily damaging the ply sheet. Therefore, the definition of "voile" does not apply to the goods in issue.

Counsel for the appellant submitted that the roofing felts should be classified in heading No. 68.07 pursuant to Rule 1 of the *General Rules*. In the alternative, should the Tribunal find that Rule 1 is not appropriate, counsel submitted that the goods in issue should be classified pursuant to Rule 3, as they are composed of two main materials: glass fibres (normally classified under tariff item No. 7019.32.10) and asphalt (normally classified under tariff item No. 6807.10.00). Since the goods in issue are composed of more than one material, Rules 3 (a) and (b) apply. As the asphalt component of the goods in issue is much more prominent than the glass fibre component, and since the latter is not discernible or visible under the asphalt cover, Rule 3 (a) applies, as heading No. 68.07 describes the product more specifically than heading No. 70.19. Where neither heading describes the goods in issue more specifically, counsel argued that the asphalt component clearly gives the goods in issue their "essential character" as a roofing material and that they should be classified under tariff item No. 6807.10.00.

Finally, counsel for the appellant asked that the Tribunal grant the appropriate remedy, which, in this case, is the refund of all duties paid by the appellant.

In reply, counsel for the appellant concluded that the evidence indicated that, with respect to the goods in issue, one could discern, although not well, the glass fibres if one were to brush off the sand. Further, the criteria in the *Explanatory Notes* to subheading No. 7019.32, "thin sheets (voiles)", are clearly not met in the case of the goods in issue. Finally, on the issue of roofing boards, counsel argued that the evidence clearly shows that the goods in issue will resist bending and need not be of any particular thickness. Further, the respondent has already acknowledged that GlasBase Plus, not a good in issue, which is 1.2 millimetres thick, is a roofing board.

Respondent's Argument

In response, counsel for the respondent submitted that the goods in issue are properly classified under tariff item No. 7019.32.10 in that they are thin sheets (voiles), coated or impregnated with asphalt, of a kind used as roofing. The *Explanatory Notes* to heading No. 70.19 describe the properties of glass fibre products and exclude any goods that would qualify under Chapter 68 "which are roofing [boards] with a [substrate] consisting of glass fibre web or fabric completely enveloped in or covered on both sides by a layer of asphalt or similar material".[19] Counsel submitted that the goods in issue do not fall in subheading No. 6807.10, as they are not completely enveloped in or covered on both sides with asphalt. Further, she stated that there is a difference between "completely enveloped" found at Note (2) of the *Explanatory Notes* to heading No. 68.07 and "coated" found in tariff item No. 7019.32.10. The term "envelop" is defined as "wrap up or cover completely . . . make obscure; conceal . . . completely surround".[20] In counsel's submission, Parliament sees a difference between "coated" and "covered by or enveloped in", as it set up two different tariff items. The goods in issue are nonwoven glass fibre roofing products that are simply coated or impregnated with asphalt. Counsel referred to the manufacturer's data sheets which describe

19. *Transcript of Public Argument*, 3 November 1999, at 32.
20. *The Concise Oxford Dictionary*, *s.v.* "envelop".

GlasPly IV as "being coated . . . with a light film of asphalt"[21] and GlasPly Premier as "asphalt-coated . . . and produced by first impregnating . . . fiber glass mat with a quality asphalt".[22] Thus, the goods in issue are properly classified under tariff item No. 7019.32.10.

Counsel for the respondent argued that porosity was a relevant feature and a factor in determining the tariff classification. With respect to GlasPly IV, the manufacturer states that "controlled porosity allows the product to readily accept hot asphalt and disperse it throughout the entire felt and stabilizes the bitumen after cooling".[23] Counsel submitted that the issues of porosity and visibility are indications of whether a product is coated or covered. The fact that something is more porous, as in the case of fibre sheets, indicates that the goods were not completely covered because some of the true nature of the fibre sheet can be seen. Counsel referred to GlasBase Plus, not a good in issue, which has a different ASTM specification and which was classified in Chapter 68. GlasBase Plus has little porosity, and Mr. Cambruzzi testified that there is little bleed-through. The evidence shows, however, that the goods in issue have a lot of porosity and that they disperse the asphalt. In the case of the goods in issue, the evidence shows that they are covered with one coat of asphalt. Finally, GlasBase Plus is a base product which has three coats of asphalt, allows for little bleed-through of asphalt and is nailable, while the goods in issue are ply felts which have one coat of asphalt and allow for the bleed-through of asphalt, and, as Mr. Cambruzzi testified, the goods in issue are only ever used as roofing felts. To conclude, each has different uses and is a different roofing product, which falls under different tariff items. The goods in issue are thin sheets and are properly classified in subheading No. 7019.32.

In response to the Tribunal's question on what constitutes a roofing board, counsel for the respondent's position was that there was little evidence before the Tribunal as to what constitutes a roofing board. Counsel submitted that roofing boards are similar to shingles, in that they provide a more substantial level of coverage of asphalt, such as what is found in GlasBase Plus, are less likely to wrinkle and are nailable. In summary, counsel submitted that roofing boards are thicker and more durable than roofing felts.

DECISION

After having carefully examined the evidence and the arguments of the parties, the Tribunal finds that the goods in issue should be classified under tariff item No. 6807.10.00 as articles of asphalt or of similar material (for example, petroleum bitumen or coal tar pitch) in rolls. In reaching its decision, the Tribunal was guided by section 10 of the *Customs Tariff*, which provides that the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the *General Rules* and the *Canadian Rules*.[24] The Tribunal was also guided by section 11 of the *Customs Tariff*, which provides that, in interpreting the headings and subheadings in Schedule I, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[25] and to the *Explanatory Notes*. In this instance, the Tribunal relied on Rule 1 of the *General Rules*, which provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes.

21. Respondent's brief at para. 33 and tab 6.
22. *Ibid.*
23. *Ibid.* at para. 37 and tab 6.
24. *Supra* note 2, Schedule I.
25. Customs Co-operation Council, 1st ed., Brussels, 1987.

In reaching its decision, the Tribunal was persuaded by the expert testimony given by Mr. Cambruzzi with respect to the properties and construction of the GlasPly roofing materials. The Tribunal relied on the description in Note (2) of the *Explanatory Notes* to heading No. 68.07, "[a]rticles of asphalt or of similar material (for example, petroleum bitumen or coal tar pitch)", which states:

> Roofing boards consisting of a substrate (e.g., of paperboard, of web or fabric of glass fibre, of fabric of man-made fibre or jute, or of aluminium foil) completely enveloped in, or covered on both sides by, a layer of asphalt or similar material.

The first issue that the Tribunal had to determine was whether the roofing felts were completely enveloped in or covered on both sides by asphalt or whether they were simply coated. The Tribunal is persuaded by the expert's opinion, and the evidence clearly shows, that the goods in issue are covered on both sides by asphalt and that it is more than just a light or simple coating. The Tribunal accepts Mr. Cambruzzi's view that a product may be simply coated where a coating is applied to protect the product during storage or shipping or for some such reason and that the goods in issue are more than "simply coated" or "lightly coated" with asphalt, as they also receive a coat of liquid parting agent and are painted with lines. The Tribunal also accepts Mr. Cambruzzi's view that the literature speaks of a "light coat" of asphalt, but that the process involves more than that. The Tribunal notes that the two primary components within the fibreglass roof mat of the goods in issue are fibreglass and asphalt, and that the asphalt accounts for approximately 70 percent of the overall weight of the product. This indicates to the Tribunal that the product receives much more than a simple coating of asphalt. The Tribunal is also persuaded that, as the asphalt is an integral part of the roofing felts and is very critical to the overall performance of a built-up roof application, the goods in issue are "articles of asphalt or of similar material" as per heading No. 68.07.

The second issue that the Tribunal had to determine was whether the roofing felts were roofing boards within the meaning of that term at Note (2) of the *Explanatory Notes* to heading No. 68.07. In testimony, Mr. Cambruzzi stated that the term "roofing board" is not a common industry term. He stated that, when referring to membrane types, the common terminology is roofing felts, base sheets or cap sheets, and roofing insulation. Mr. Cambruzzi spoke throughout his testimony of roofing felts. Counsel for the appellant argued that a roofing board is any asphalt ply, coated or covered with either fibreglass, paper or any other product. Counsel for the respondent submitted that roofing boards were similar to shingles, but more substantial, less likely to wrinkle and thicker and more durable than roofing felts. Further, Note (2) of the *Explanatory Notes* to heading No. 68.07 states that a roofing board consists of a substrate made, for example, of paperboard, of web or fabric of glass fibre, or of fabric of man-made fibre or jute. The Tribunal is persuaded that the roofing felts are roofing boards within the meaning of Note (2), as the evidence clearly shows that the roofing felts consist of a substrate made of flat pieces of fabric of raw glass fibre used as part of a roofing system.

In argument, counsel for the respondent submitted that porosity and visibility are relevant factors in determining the tariff classification. She argued that, as the goods in issue are more porous, this allows for more bleed-through of the asphalt which, in turn, indicates that the roofing felts are not "completely covered". Also, once held to the light, one could clearly see pinpricks, as well as the glass fibres. This line of argument does not persuade the Tribunal.

Furthermore, the Tribunal is of the view that the respondent cannot avail himself of exclusion (d) of the *Explanatory Notes* to heading 68.07.[26] To avail himself of the exclusion, namely, that the goods in issue are fabrics of glass fibre, simply coated or impregnated with asphalt, the respondent would need to clearly show to the Tribunal how the goods in issue are "thin sheets (voiles)" as described in subheading No. 7019.32. No such indication was provided and, in fact, the evidence is to the contrary.

The *Explanatory Notes* to subheading No. 7019.32 read as follows:

> **Thin sheets** (voiles) are nonwovens made from individual glass fibres (filaments) distributed in random order. The fibres are held together by means of a binder and pressed and may or may not incorporate reinforcement threads which are most often stretched lengthwise throughout the sheets.
>
> Unlike the glass mats, the individual filaments of these products cannot be removed by hand without damaging the sheet.
>
> Thin sheets can be distinguished from webs, mattresses and other insulation products by their regular thickness which does not exceed 5 mm.

Firstly, with respect to the random distribution of the individual glass fibres, Mr. Cambruzzi testified, and the evidence strongly suggests, that the individual glass fibres of the goods in issue are not in random order, although they may initially appear to give a random displacement of the fibres. Mr. Cambruzzi testified that, to meet the critical tensile strengths of ASTM standard D 2178, the fibre distribution and orientation had to be in both the machine and the cross-machine directions. He also stated that, if the pattern of the glass fibres was random, there would be variations within the sheets from one end to the other, such as dense applications of fibre in some areas and light applications in others. He concluded that this was not the case for the goods in issue. The Tribunal accepts this explanation and finds that the individual glass fibres are not distributed in random order.

Secondly, the goods in issue are manufactured using the wet process. Mr. Cambruzzi testified that the glass fibres are not pressed or compacted when the wet process is used, which is the case when the product is manufactured using the dry process. The Tribunal finds that the fibres used in the goods in issue are not pressed or compacted and, therefore, are not "thin sheets (voiles)" within the criteria set out in the *Explanatory Notes* to subheading No. 7019.32.

Thirdly, Mr. Cambruzzi testified that it would be possible to remove a filament of glass fibre from the goods in issue, although with difficulty. The Tribunal is satisfied, on the strength of the evidence, that the removal of the glass fibres may be done, albeit with difficulty, but would not result in damage to the ply sheet. Therefore, the Tribunal does not find that the goods in issue meet the criteria of "thin sheets (voiles)".

For the foregoing reasons, the appeals are allowed.

The Tribunal now turns to the matter of the refund of duties paid by the appellant. Paragraph 16(*c*) of the CITT Act confers on the Tribunal the jurisdiction to hear, determine and deal with appeals and all matters related thereto. That jurisdiction is circumscribed by Parliament and the regulations under which the Tribunal is authorized to act. In the present case, the Tribunal's authority under section 67 of the Act is to hear appeals from a person who deems himself aggrieved by a decision of the respondent pursuant to sections 63 and 64 of the Act. An appeal is launched when an importer disagrees with Revenue Canada about the classification of goods or the applicability of a tariff code. As it decided in *Atlas Alloys* v.

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26. Exclusion (d) reads : "Fabrics or webs, etc., of glass fibre, simply coated or impregnated with bitumen or asphalt (**heading 70.19)"**.

DMNR,[27] the Tribunal notes that, while the effect of one of its classification decisions could be that a refund is given, it is not within the Tribunal's jurisdiction to adjudicate claims for refunds. Its role is to decide whether the respondent's decision with respect to classification is correct.

Patricia M. Close
Patricia M. Close
Presiding Member

Raynald Guay
Raynald Guay
Member

Richard Lafontaine
Richard Lafontaine
Member

27. (23 April 1998), AP-97-073 (CITT).