

Ottawa, Friday, January 14, 2000

Appeal No. AP-98-108

IN THE MATTER OF an appeal heard on August 23, 1999,
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Deputy Minister of
National Revenue dated March 19, 1998, with respect to a request
for re-determination under section 63 of the *Customs Act*.

BETWEEN

NATURIN CANADA

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Peter F. Thalheimer

Peter F. Thalheimer
Member

Zdenek Kvarda

Zdenek Kvarda
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-98-108

NATURIN CANADA

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal pursuant to section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue (now the Commissioner, Canada Customs and Revenue Agency) dated March 19, 1998. The goods in issue are fibrous sausage casings. They are composed of regenerated cellulose, predominant by weight, mixed with other minor components, such as glycerol, moisture and reinforcing paper. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3917.10.12 as sausage casings of cellulosic materials, as determined by the respondent, or should be classified under tariff item No. 4823.90.91 as sausage casings of paper, as claimed by the appellant.

HELD: The appeal is allowed. The Tribunal must classify 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 must determine the essential character of the goods in issue. The Tribunal is of the view that the evidence demonstrates that specialized paper, which gives fibrous casings their high cross-dimensional strength, is the component that gives the goods in issue their essential character. The Tribunal, therefore, finds that the goods in issue should be classified under tariff item No. 4823.90.91 as sausage casings of paper.

Place of Hearing: Ottawa, Ontario
Date of Hearing: August 23, 1999
Date of Decision: January 14, 2000

Tribunal Members: Arthur B. Trudeau, Presiding Member
Peter F. Thalheimer, Member
Zdenek Kvarda, Member

Counsel for the Tribunal: Marie-France Dagenais

Clerk of the Tribunal: Anne Turcotte

Appearances: David A. Liston, for the appellant
Claude Morissette, for the respondent

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NATURIN CANADA

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THE DEPUTY MINISTER OF NATIONAL REVENUE

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TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
PETER F. THALHEIMER, Member
ZDENEK KVARDA, Member

REASONS FOR DECISION

INTRODUCTION

This is an appeal pursuant to section 67 of the *Customs Act*¹ from a decision of the Deputy Minister of National Revenue (now the Commissioner, Canada Customs and Revenue Agency) dated March 19, 1998. The goods in issue are fibrous sausage casings. They are composed of regenerated cellulose, predominant by weight, mixed with other minor components, such as glycerol, moisture and reinforcing paper. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3917.10.12 of Schedule I to the *Customs Tariff*² as sausage casings of cellulosic materials, as determined by the respondent, or should be classified under tariff item No. 4823.90.91 as sausage casings of paper, as claimed by the appellant.

The tariff nomenclature relevant to this appeal is as follows:

- 39.17 Tubes, pipes and hoses, and fittings therefor (for example, joints, elbows, flanges), of plastics.
- 3917.10 -Artificial guts (sausage casings) of hardened protein or of cellulosic materials
---Not tied or otherwise closed at one end:
- 3917.10.12 ----Of cellulosic materials
- 48.23 Other paper, paperboard, cellulose wadding and webs of cellulose fibres, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibres.
- 48.23.90 ---Other
- 4823.90.91 ----Sausage casings

EVIDENCE

Mr. Tony Alfano, Customer Service Manager, Naturin Canada, and Dr. Richard Waldman testified on behalf of the appellant. Mr. Alfano testified that a casing is a basic aid to production and is used to form the meat into a sausage. He explained that there are four types of sausage casing: fibrous, cellulosic, plastic

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

and collagen. He testified that the goods in issue, which are referred to in the marketplace as Nalo fibrous casings, are made of hemp paper and regenerated cellulose. He further testified that the fibrous casings are distinguishable from the cellulosic casings. The fibrous casings, which are 10 times more expensive than the cellulosic casings because of the cost of the hemp paper, are mostly used for their strength; the cellulosic casings are almost exclusively used for hot dogs. He stated that the strength of the fibrous casings is necessary to ensure that the size of the final products is consistent. He further stated that, from a customer's perspective, the cellulosic casing does not offer a marketable product which can be put in a pre-formed package where the size is always consistent for a certain weight.

Dr. Waldman was qualified as an expert in the production and manufacture of sausage casings. He testified that the casings are used to make sausage products and smoked meat products. He stated that they basically perform the function of encasing the meat during processing and that they also provide the means by which to shape the product into a sausage. Dr. Waldman provided the Tribunal with a brief history of the development of the fibrous casing. He stated that fibrous casings evolved from pure cellulosic casings in order to provide strength and diameter control. Dr. Waldman testified that fibrous casings are produced from very high-quality hemp paper that contains a definite type of fibre that has many cross-dimensional patterns. The paper is formed into a cylinder or a tube. It is then run through a dye in an acid bath which puts a cellulose xanthate liquid onto the casing to permeate the paper pores, to glue the paper together and to provide a smooth surface to the casing. He stated that the acid is used to regenerate the cellulose. He further stated that the paper is more expensive than the cellulose and that it is the paper that determines the thickness of the casing.

Dr. Waldman testified that, in his opinion, the essential characteristic of the fibrous casing is its strength, which is derived, in great majority, from the specialized paper. He also testified that, regardless of the fact that the cellulose provides most of the weight, it does not provide the essential character of the casing. He further testified that, in his opinion, the term "fibrous" means the distinction between a cellulosic casing and a fibrous casing, a fibrous casing being based on paper.

In cross-examination, Dr. Waldman acknowledged that cellulose composes the vast majority of the weight of the goods in issue and that, without cellulose, fibrous casings would not exist.

Mr. Brian Finch, Chief, Polymer and Textile Products Laboratory, Department of National Revenue (now Canada Customs and Revenue Agency), gave evidence on behalf of the respondent. Mr. Finch was qualified by the Tribunal as an expert in organic chemistry. He testified that the goods in issue were analysed under his supervision. He also testified that the goods in issue are made of a combination of reinforced paper and regenerated cellulose, the regenerated cellulose being compounded with glycerol and water. He also indicated that the paper represents 16 percent of the total weight of the fibrous casing, that the regenerated cellulose represents 65 percent of the weight and that the glycerol and moisture together represent 19 percent of the weight. Mr. Finch stated that, in his opinion, the essential characteristics of the fibrous casings are strength, permeability and weight. He further stated that, while the specialized paper does contribute an amount of strength to the overall product, the cellulose adds to that strength by permeating the paper and forming unions between the individual fibres. He testified that it is the regenerated cellulose that allows for the permeability to moisture, smoke and flavour components and the impermeability to some materials, such as bacteria. Finally, Mr. Finch testified that weight is an important factor in determining the essential character of a product and that the regenerated cellulose is the largest single component of the fibrous

casings. He concluded that, in his opinion, from his analysis and the available literature,³ the goods in issue should be considered paper-reinforced cellulosic casings.

In cross-examination, Mr. Finch acknowledged that the strength of the fibrous casings is derived significantly from the paper.

ARGUMENT

The appellant's representative submitted that the goods in issue should be classified in accordance with Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System*,⁴ 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 the Harmonized Commodity Description and Coding System*⁵ to Rule 3 of the *General Rules* further provides that the factor which determines the essential character will vary between different types 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 there is a range of factors which may be relied upon in determining essential characteristics and that it is the factor which has the most relevance that should be relied upon. He further argued that weight is an irrelevant consideration insofar as the fibrous casings are concerned and that it should not be considered as an important factor in determining the essential characteristic of the goods in issue. He referred to the Tribunal's decision in *Formica Canada v. DMNR*⁶ where the Tribunal held that, notwithstanding that the goods were essentially made of paper, they were properly classified in Chapter 39 as other sheets of plastic.

The appellant's representative argued that it is the cross-dimensional strength of the fibrous casing which is the essential characteristic of the product and that its strength is derived primarily from the paper component. He submitted that the goods in issue were developed because the pure cellulose product did not provide sufficient strength. He argued that there is a significant increase in cost as a result of the fact that the paper is used, but that the cost increase is offset by the benefits achieved when the casings are strengthened with paper. The representative further argued that the cellulose is only added to fill the pores in the paper, to provide a smooth surface and to seal the seam and is not added to give it strength.

Finally, the appellant's representative made reference to a decision issued by the United States Court of International Trade, filed with the appellant's brief, relating to goods which, he suggested, are identical to the goods in issue. The decision classified the goods under a tariff item similar to the one being urged by the appellant.

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 submitted that weight should be a significant factor in determining the essential character of the goods in issue and that regenerated cellulose is the heavier component of the goods in issue. While counsel acknowledged that the hemp paper does provide reinforcement to the sausage casing, he argued that it is the regenerated cellulose that contributes to the overall strength of the product and allows the

3. *Encyclopedia of Chemical Technology*, 3d ed. (New York: Wiley, 1978); and *Sausage Casing Technology*, Exhibit B-1.

4. *Supra* note 2, Schedule I [hereinafter *General Rules*].

5. Customs Co-operation Council, 1st ed., Brussels, 1986 [hereinafter *Explanatory Rules*].

6. (20 January 1998), AP-96-205 (CITT).

casings to be stretched and shaped. He further argued that the regenerated cellulose also provides important properties to the casings, such as being impermeable to bacteria and allowing for a smoother finish so that the paper will not stick to the product.

Counsel for the respondent submitted that the goods in issue are a second generation of cellulosic casings and that, historically, fibrous sausage casings have been made with regenerated cellulose since 1940.⁷ He further submitted that paper was introduced to the product only to reinforce it and that the critical properties of the goods in issue are provided by the regenerated cellulose, thus making the regenerated cellulose the component that gives fibrous sausage casings their essential character. In his argument, counsel referred to a classification opinion issued in 1971 to ensure the uniform application of the Brussels Nomenclature where goods described as artificial sausage casings composed of 73 percent regenerated cellulose and 27 percent fibres were classified as plastics.

With respect to the decision issued by the United States Court of International Trade, counsel for the respondent argued that the Tribunal is not bound by the tariff classification of another country.

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*.⁸ 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.

Rule 2 (b) of the *General Rules* 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 a material or substance. Given that the goods in issue are made of a combination of regenerated cellulose and paper, they are referred to in heading No. 39.17, which covers sausage casings of cellulosic materials, as well as in heading No. 48.23, which provides for sausage casings of paper. 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 materials 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 Rule 3 further indicates that the factor which determines essential character will vary

7. *Supra* note 3.

8. *Supra* note 2, Schedule I.

as between different kinds of goods and may be the value of a material or the role of a constituent material in relation to the use of the goods.

In the Tribunal's view, the goods in issue have evolved, over the years, from pure cellulosic casings to fibrous casings and that a clear distinction must be made between the two. The Tribunal accepts the evidence that the cross-dimensional strength of the fibrous casings is derived from the reinforced paper and that the use of this specialized paper is necessary for size control and uniformity. While it is clear from the evidence that the regenerated cellulose does add to the strength of the fibrous casings, the Tribunal is persuaded that the reinforced paper is the component that imparts high cross-dimensional strength to the fibrous casings and that it is the paper component of the fibrous casings that gives them their essential character. In this respect, the Tribunal is persuaded that the use of the specialized paper gives the fibrous casings the high cross-dimensional strength which allows for certain applications, in terms of production of sausage meats that would not be possible with casings exclusively composed of regenerated cellulose. The Tribunal also acknowledges the cost differential between the reinforced paper and the regenerated cellulose, the paper being more expensive, and concludes, from the use of this specialized paper, when none is necessary, that the specialized paper is required to obtain cross-dimensional strength and to supply size control and uniformity to the final product and is the component that gives the goods in issue their essential character.

Furthermore, while the Tribunal is not bound by the tariff classification of another country, it is worth noting that the United States⁹ did indicate that fibrous casings composed of fibrous paper and regenerated cellulose should be classified as articles of paper.

The Tribunal is persuaded by the evidence that the reinforced paper is the component that gives the goods in issue their essential character and that they should be classified under tariff item No. 4823.90.91 as sausage casings of paper.

For the foregoing reasons, the appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Peter F. Thalheimer

Peter F. Thalheimer
Member

Zdenek Kvarda

Zdenek Kvarda
Member

9. *Vista International Packaging v. United States*, 93-02-00074 (14 June 1995); and *Brechtien v. United States*, 94-11-00721 (14 March 1996).