



Ottawa, Friday, May 2, 2003

Appeal Nos. AP-99-114, AP-99-115 and AP-2000-008

IN THE MATTER OF appeals heard on October 29, 2002, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated January 13, November 18 and December 24, 1999, and March 21, 2000, with respect to requests for redetermination under subsection 60(4) of the *Customs Act*.

BETWEEN

**SUZUKI CANADA INC. AND CANADIAN KAWASAKI
MOTORS INC.**

Appellants

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeals are allowed.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary



UNOFFICIAL SUMMARY

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SUZUKI CANADA INC. AND CANADIAN KAWASAKI
MOTORS INC.

Appellants

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
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Respondent

These are appeals under section 67 of the *Customs Act* from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) dated January 13, November 18 and December 24, 1999, and March 21, 2000, made pursuant to subsection 60(4) of the *Customs Act*. The goods in issue are all-terrain vehicles (ATVs).

The issue in these appeals is whether the goods in issue are properly classified under tariff item No. 8703.21.90 of the schedule to the *Customs Tariff* as other motor vehicles principally designed for the transport of persons, as determined by the Commissioner, or should be classified under the applicable tariff item of heading No. 87.11 as motorcycles and cycles fitted with an auxiliary motor, as claimed by Suzuki Canada Inc. (Suzuki) and Canadian Kawasaki Motors Inc. (Kawasaki).

HELD: The appeals are allowed. Suzuki and Kawasaki argued, among other things, that the ATVs could not be classified in heading No. 87.03, given that they do not have “a motor-car type steering system”, even though their steering system is based on the Ackerman principle. The Commissioner argued, among other things, that the ATVs are classified in heading No. 87.03, given that they are described in the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (Explanatory Notes) to that heading by the inclusion of item (6): “**Four-wheeled motor vehicles** with tube chassis, having a motor-car type steering system (e.g., a steering system based on the Ackerman principle).”

In this case, item (6) of the *Explanatory Notes* to heading No. 87.03 appears to indicate that any four-wheeled vehicle with a tube chassis, having a steering system based on the Ackerman principle, falls in heading No. 87.03. The Tribunal does not see why the fact that ATVs have a steering system based on the Ackerman principle would determine their exclusion from heading No. 87.11 and their inclusion in heading No. 87.03. The Tribunal acknowledges that ATVs, like motor cars and many other motor vehicles, have a steering system based on the Ackerman principle. Steering systems based on the that principle are used in almost all three-wheeled and four-wheeled vehicles, including golf carts, tractors and quadricycles but are not used in two-wheeled motorcycles. Given the evidence before the Tribunal, to rely on the fact that ATVs have a steering system based on the Ackerman principle as a determinative factor for classification would be erroneous.

What convinces the Tribunal of the classification of the goods in issue in heading No. 87.11 are the characteristics that they share with two-wheeled motorcycles. The Tribunal heard ample and non-refuted evidence to the effect that the goods in issue share have in common many features with two-wheeled motorcycles. Among those features are the handlebar steering system, the location of the different controls on the handlebars, the necessity to straddle the machine to balance it, the tube chassis design and the interchangeability of several parts. Accordingly, the Tribunal is of the view that the goods in issue are more

properly described in heading No. 87.11 as motorcycles, than in heading No. 87.03 as motor cars and other motor vehicles principally designed for the transport of persons.

Place of Hearing: Ottawa, Ontario

Dates of Hearing: October 29, 2002

Date of Decision: May 2, 2003

Tribunal Member: Patricia M. Close, Presiding Member

Counsel for the Tribunal: Dominique Laporte

Clerk of the Tribunal: Anne Turcotte

Appearances: Michael Hahn, Marco Ouellet and Jeffrey Goernert, for the appellants
Susanne Pereira, for the respondent

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**SUZUKI CANADA INC. AND CANADIAN KAWASAKI
MOTORS INC.**

Appellants

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
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Respondent

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

REASONS FOR DECISION

INTRODUCTION

These are appeals under section 67 of the *Customs Act*¹ from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner of the CCRA) dated January 13, November 18 and December 24, 1999, and March 21, 2000, made pursuant to subsection 60(4) of the *Act*. The goods in issue, all-terrain vehicles (ATVs), were imported between January 14, 1998, and March 11, 1999.

The goods in issue are manufactured by Suzuki Canada Inc. (Suzuki) and Canadian Kawasaki Motors Inc. (Kawasaki). Those manufactured by Suzuki are the following: (1) model year 1998: LT-F500FW (QuadRunner 500 4 x 4), LT-F4WDXW (KingQuad 300 4 x 4), LT-F4WDW (QuadRunner 250 4 x 4) and LT-F250W (QuadRunner 250); and (2) model year 1999: LT-F500FX (QuadRunner 500 4 x 4), LT-F300FX (KingQuad 300 4 x 4), LT-F250FX (QuadRunner 250 4 x 4) and LT-F250X (QuadRunner 250). Those manufactured by Kawasaki are the following: (1) model year 1998: Prairie, Prairie 4 x 4, Bayou 400 4 x 4, Bayou 300 4 x 4, Bayou 300 and Bayou 220; and (2) model year 1999: KVF 4 x 4, KVF, KVF 300 4 x 4, KVF 300, Bayou 400 4 x 4, Bayou 300 4 x 4, Bayou 300 and Bayou 220.

The issue in these appeals is whether the goods in issue are properly classified under tariff item No. 8703.21.90 of the schedule to the *Customs Tariff*² as other motor vehicles principally designed for the transport of persons, as determined by the Commissioner, or should be classified under the applicable tariff item of heading No. 87.11 as motorcycles and cycles fitted with an auxiliary motor, as claimed by Suzuki and Kawasaki.

EVIDENCE

Suzuki and Kawasaki called, as their first witness, Mr. Wayne Michael Duff, Regulations Enforcement Officer with the Department of Transport. Mr. Duff responded affirmatively when asked by Suzuki and Kawasaki if the goods in issue, as described in their brochures,³ met the definition of “all-terrain

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. R.S.C. 1985 (3d Supp.), c. 41.
3. Kawasaki and Suzuki’s brief, Tab 2.

vehicle” found in the *Motor Vehicle Safety Regulations*.⁴ He stated that the goods in issue were also considered “restricted-use motorcycles”⁵ under the *Regulations* and that, in order to import the goods in issue into Canada, compliance with the *Regulations* was required. In reply to a question from the Commissioner, Mr. Duff noted that there was a fundamental difference between a motorcycle and a restricted-use motorcycle, as defined under the *Regulations*, as the latter does not have on-road capability and does not meet some of the safety standards for motorcycles. Mr. Duff further testified that the goods in issue, as described in the Suzuki and Kawasaki brochures, did not meet the definition of “motorcycle” under the *Regulations*, that is to say, none had on-road capability.

Mr. Ronald Kenneth Gordon, National Manager, Logistics and Distribution, Suzuki, and Mr. Claude Pierre Gagné, National Service Manager, Kawasaki, testified next on behalf of Suzuki and Kawasaki. Mr. Gordon testified that ATVs evolved from a two-wheeled to a three-wheeled vehicle and then to a four-wheeled vehicle. He stated that, in 1987 or -1988, three-wheeled ATVs were replaced by four-wheeled ATVs for safety-related issues due to rollover accidents.

Mr. Gagné was qualified by the Tribunal as an expert in motorcycle and ATV mechanics. He explained that Kawasaki manufactures on-road and off-road motorcycles and that the latter comprises two-wheeled and four-wheeled versions. Mr. Gordon stated that it was the same for Suzuki. Mr. Gagné noted that motorcycles always have handlebar steering and that he was unaware of any motorcycles steered with a steering wheel or a steering gearbox. He explained that among the other characteristics that the goods in issue and motorcycles generally share are that they need to be straddled and that the body is used as part of the method of controlling the machine. A similar balance is required to ride a two-wheeled or three-wheeled motorcycle. Referring to a diagram of the ATV steering system,⁶ Mr. Gagné explained that there were no motor car components, such as a steering wheel, gearbox, universal joint or CV joint, and that all ATVs have a similar steering system. Mr. Gagné further noted that all Kawasaki four-wheeled ATVs have a steering system based on the Ackerman principle.

Both Mr. Gagné and Mr. Gordon stated that ATVs were often designated as quads, quad bikes, four-wheelers or just bikes.⁷ When asked whether Suzuki also manufactures automobiles, Mr. Gordon responded affirmatively, but noted that the automobile manufacturing plants did not assemble motorcycles. They both testified that, conversely, ATVs and two-wheeled motorcycles were manufactured in the same plants and that some parts of two-wheeled and four-wheeled motorcycles were interchangeable and even bore the same part numbers. Furthermore, they indicated that their motorcycles were retailed to their respective dealer network, commonly known as “bike shops”. Mr. Gagné and Mr. Gordon stated that the goods in issue were equipped with racks and trailer hitches to carry goods, that they were designed for such

4. C.R.C., c. 1038 [*Regulations*]. Subsection 2(1) of the *Regulations* defines “all-terrain vehicle” as follows: “a wheeled or tracked vehicle, other than a snowmobile or work vehicle, designed primarily for recreational use or for the transportation of property or equipment exclusively on undeveloped road rights of way, marshland, open country or other unprepared surfaces”.

5. Subsection 2(1) of the *Regulations* defines “restricted-use motorcycle” as follows: “a vehicle, including an all-terrain vehicle designed primarily for recreational use, that

- (a) has steering handlebars,
- (b) is designed to travel on not more than four wheels in contact with the ground,
- (c) does not have as an integral part of the vehicle a structure to enclose the driver and passenger, other than that part of the vehicle forward of the driver’s torso and a seat backrest, and
- (d) bears a label, permanently affixed in a conspicuous location, stating that the vehicle is a restricted-use motorcycle or an all-terrain vehicle and is not intended for use on public highways”.

6. Kawasaki’s brief, Tab 27.

7. *Transcript of Public Evidence*, 29 October 2002 at 66.

a purpose and that passengers were not permitted. Mr. Gagné stated that, in order to ride an ATV, one has to wear a helmet, straddle the unit and hold the handlebars. He noted that there were no seat belts or any kind of fastening device, as the rider needs to move around to control the unit, and that the same applied for two-wheeled or three-wheeled motorcycles.

When asked by counsel if he would agree with the testimony of one of the witnesses in the Tariff Board's decision in *Canadian Honda Motor Company Limited v. DMNR*⁸ that a motorcycle and a mechanized horse are analogous, Mr. Gagné agreed and noted that both are said to be ridden instead of driven, as the distinction lies on the fact that someone sits astride when riding. According to Mr. Gagné, the centre of gravity of an ATV is much higher than that of an automobile, and it is very important to be able to stand up when riding an ATV, as one needs to be able to control the machine by using what is referred to as "body English". Mr. Gagné noted that, whatever the number of wheels, the same principle applies and that the handlebar-mounted controls of two-wheeled, three-wheeled or four-wheeled motorcycles are very similar.

Mr. Gagné and Mr. Gordon also acknowledged that a motorcycle mechanic's training was totally different from an automobile mechanic's training, but stated that the former would encompass, in most cases, all motorcycles, regardless of their wheel configurations. Mr. Gordon also stated that ATVs were considered to be very similar to motorcycles by the Canadian Motosport Racing Club in terms of rules and that they competed on the same tracks. He also noted that the International Motorcycle Federation's statutes include "quad" under the definition of "motorcycling". Mr. Gordon stated that the term "bike" does not describe any particular kind of motorcycle, while the terms "quad bike" and "quad" are very well known internationally.

During cross-examination, Mr. Gordon stated that, when compared to two-wheeled on-road motorcycles, four-wheeled vehicles have a different use and are intended for a different segment of the market. Mr. Gagné also agreed that the Kawasaki brochure on ATVs only deals with ATVs and not motorcycles. In response to questions from the Tribunal, Mr. Gordon stated that some of the model names for Suzuki ATVs are "Quad Runner" and "King Quad". Mr. Gagné stated that the majority of the ATVs in the industry have a tube chassis, a characteristic that they share with motorcycles.

Dr. David E. Kelly, Director of Engineering at TRW Canada, gave evidence on behalf of Suzuki and Kawasaki. Dr. Kelly was qualified by the Tribunal as an expert in automotive engineering with an emphasis on steering systems. According to Dr. Kelly, the general usage of the word "system", in the context of "steering system", means, in the automotive industry, all the subcomponents that go together to deliver the design intent of the vehicle or its subsystem. He explained that the six fundamental components of a steering system used on a motor vehicle are the steering wheel, shaft, universal joint, gearbox, linkage and wheels. He further explained that the gearbox is used to change the rotational motion of the steering wheel to a lateral or translational movement and to magnify the steering input of the driver. When asked whether a quad or a restricted-use motorcycle steering system would be functional on a motor car, Dr. Kelly responded that it would not, as the universal joints, gearbox and steering wheel would be missing.

With respect to the steering system based on the Ackerman principle, Dr. Kelly explained that the basic definition is that the inside wheels need to turn at a sharper steer angle than the outside wheels, so that the wheels track in a straight line. He stated that almost any type of four-wheeled vehicle has a steering system based on the Ackerman principle, whether it be a golf cart, scooter, go-cart, tractor, quadricycle or the goods in issue. He stated that the goods in issue do not have a motor-car type steering system and that to

8. (1978), 6. T.B.R. 666 [*Honda*].

describe them as having such a system is a misstatement. He indicated that, in his view, the overall design of the goods in issue is based more on a motorcycle than on a motor car.

Mr. George E. Smith, National Coordinator of Speciality Vehicles for the Canada Safety Council, appeared on behalf of Suzuki and Kawasaki. He was qualified as an expert in ATV rider training. Dealing with the purpose of the handlebars on an ATV, he stated that they are designed for steering and for driver stability. He further noted that it would be detrimental to equip an ATV with a motor-car type steering system, as this would reduce the capacity to have an instant movement of the wheels. He also stressed the importance of weight shifting when turning with an ATV and stated that the technique used to ride an ATV is very similar to the one used to ride a motorcycle.

The Commissioner called no witnesses.

ARGUMENT

Suzuki and Kawasaki submitted that, pursuant to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*,⁹ the goods in issue are specifically covered in heading No. 87.11 as motorcycles. With respect to the decision in *Yamaha Motor Canada v. Commissioner of the CCRA*,¹⁰ they submitted that, although the Tribunal found that the goods in issue in that case were not tractors, it did not determine the correct tariff classification of the goods and did not state specifically that the goods were properly classified in heading No. 87.03 as it usually does. In addition, Suzuki and Kawasaki argued that *Yamaha* was not binding on the Tribunal. They further submitted that nothing in the heading or the *Explanatory Notes to the Harmonized Commodity Description and Coding System*¹¹ to heading No. 87.11 excluded three-wheeled or four-wheeled motorcycles. Regarding the *Explanatory Notes* that exclude “[f]our-wheeled motor vehicles, for the transport of persons, with tube chassis, having a motor-car type steering system” from heading No. 87.11, Suzuki and Kawasaki submitted that the goods in issue were not defined by these notes, as the expert testimony showed that they did not have a motor-car type steering system.

Suzuki and Kawasaki argued that there is a conflict of laws between the *Motor Vehicle Safety Regulations*, which designate ATVs as motorcycles, and the position of the CCRA to consider them as other vehicles. Relying on the decision of the Supreme Court of Canada in *Rizzo & Rizzo Shoes (Re)*,¹² they submitted that CCRA’s interpretation leads to absurd consequences. In addition, they submitted that the Federal Court of Appeal’s decision in *Soper v. Canada*¹³ stands for the principle that Parliament’s legislation is deemed to make a coherent system and that an interpretation favouring harmony between statutes should prevail over discordant ones. They argued, however, that to classify ATVs as motorcycles would lead to a completely harmonious interpretation between the *Motor Vehicle Safety Act*¹⁴ and the *Customs Tariff*.

9. R.S.C. 1985 (3d Supp.), c. 41, Schedule 1 [*General Rules*].

10. (6 December 2000), AP-99-105 (CITT) [*Yamaha*].

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

12. [1998] 1 S.C.R. 27.

13. [1998] 1 F.C. 124 (C.A.).

14. R.S.C. 1985, c. M-10.

Suzuki and Kawasaki cited an extract from *Honda* where the Tariff Board, finding that the goods in issue in that decision, three-wheeled all-terrain cycles, were classified as motorcycles, stated that “while the evolution of the motorcycle has clearly favoured the two wheel configuration, this does not mean that a machine that is powered, driven and steered in the same manner as the two wheel version, cannot be considered to be a motorcycle simply because it has three wheels.”¹⁵ They submitted, in light of that decision, that to add a wheel to a three-wheeled motorcycle does not have the effect of transforming it into something else.

Suzuki and Kawasaki also stated that the goods in issue were called “quad bikes” worldwide, which is defined as “a motorcycle with four large tyres, for off-road use.”¹⁶ They further argued that the ATVs have evolved from two-wheeled motorcycles, not motor cars, to three-wheeled and four-wheeled motorcycles.

According to Suzuki and Kawasaki, ATVs have the fundamental characteristics of a motorcycle and are driven as one drives a motorcycle. They are considered as a type of motorcycle by the motorcycle industry, dealers, users and the Department of Transport. They are also produced by motorcycle manufacturers in the same manufacturing plants and are sold by motorcycle dealers.

As to the steering system based on the Ackerman principle, Suzuki and Kawasaki argued that it was used in a variety of vehicles, including electric scooters, quadricycles and toys, and stated that it is not definitive of a motor-car type steering system. The Society of Automotive Engineers and the experts heard by the Tribunal have defined a motor-car type steering system as something other than the steering system found on the goods in issue. In their view, the goods in issue are not designated by heading No. 87.03, as they do not have a motor-car type steering system and could not function properly if they had such a system.

Finally, regarding heading No. 87.03, Suzuki and Kawasaki argued that there is no specific inclusion of four-wheeled motorcycles in this heading and that all vehicles other than snowmobiles have the same characteristics and are derived from a motor car or truck. With respect to heading No. 87.11, they argued that nothing in the *Explanatory Notes* excludes four-wheeled motorcycles from this heading. In support of their position, they relied on the *Explanatory Notes* to heading No. 87.12, which provide that cycles fitted with an auxiliary motor are directed to heading No. 87.11, without specifying the number of wheels.

The Commissioner urged that the Tribunal be guided by and follow the *Explanatory Notes*. In his view, the *Explanatory Notes* provide guidance as to how certain goods are to be treated by the Tribunal and, unless there are other compelling reasons, the Tribunal should follow them. He argued that, by stating that “[t]his heading covers a group of two-wheeled motorised vehicles which are essentially designed for carrying persons”, the *Explanatory Notes* to heading No. 87.11 explicitly exclude four-wheeled motorized vehicles.

In the Commissioner’s view, there is no evidence that the classification of the goods in issue in heading No. 87.03 as “vehicles principally designed for the transport of persons” is incorrect. The Commissioner submitted that the goods in issue do nothing more than transport persons, with the addition of some extra baggage.

15. *Supra* note 8 at 673.

16. *The Concise Oxford Dictionary*, 2001, s.v. “quad bike”.

Regarding the *Explanatory Notes* to heading No. 87.03 which state that the heading includes vehicles having a motor-car type steering system based on the Ackerman principle, the Commissioner submitted that, in order to be classified in this heading, the goods in issue do not need to have a motor-car type steering system, but rather a steering system similar to that of a motor car. He submitted that the expert testimony demonstrates that the goods in issue have a steering system based on the Ackerman principle. In addition, he submitted that the steering system of the ATVs and that of a motor car share a number of features, such as a column, linkage and wheels.

While conceding that, in *Yamaha*, the Tribunal did not specifically mention that the goods in issue in that case were properly classified in heading No. 87.03, the Commissioner argued that, by finding that heading No. 87.01 was not the proper classification, the practical deduction was that his classification in heading No. 87.03 stood. He also noted that the Tribunal could have classified the goods in a different heading at that time, but had chosen not to do so. He further argued that, by affirming the Tribunal's decision, the Federal Court of Appeal found the decision to be reasonable.

On the question of how the goods in issue are marketed, the Commissioner pointed out that the evidence does not indicate that they are marketed as motorcycles, as shown by the manufacturers' brochures dealing only with ATVs.

In response to Suzuki and Kawasaki's argument to the effect that there is a conflict of laws between the *Motor Vehicle Safety Regulations*, which designate ATVs as motorcycles, and the CCRA's position, which considers them other vehicles, the Commissioner submitted that the *Motor Vehicle Safety Act* and the *Customs Tariff* do not deal with the same subject matter. Dealing with *Honda*, he argued that the Tariff Board had decided the merit of that appeal under a completely different tariff scheme and that it did not have the guidance of the *Explanatory Notes*.

DECISION

Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules*. Section 11 provides, in part, that, in interpreting the headings and the subheadings in the schedule, regard shall be had to the *Explanatory Notes*.

The *General Rules* are structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on. 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 [subsequent rules].

The competing headings in this case are as follows:

- | | |
|-------|--|
| 87.03 | Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading No. 87.02), including station wagons and racing cars. |
| 87.11 | Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side-cars; side-cars. |

Suzuki, Kawasaki and the Commissioner all submitted that the goods in issue could be classified pursuant to Rule 1 of the *General Rules*. In order to put things into context, it is necessary to reproduce the

Explanatory Notes to heading Nos. 87.03 and 87.11. Item (6) of the *Explanatory Notes* to heading No. 87.03, which was added in February 1999, is italicized below. The *Explanatory Notes* read, in part, as follows:

[*Explanatory Notes* to heading No. 87.03]

This heading covers motor vehicles of various types (including amphibious motor vehicles) designed for the transport of persons. . . . The vehicles of this heading may have any type of motor (internal combustion piston engine, electric motor, gas turbine, etc.).

The heading also covers lightweight three-wheeled vehicles of simpler construction, such as:

- those fitted with motorcycle engine and wheels, etc. which, by virtue of their mechanical structure, possess the characteristics of conventional motor cars, that is motor car type steering system or both reverse gear and differential.

The heading also includes:

- (1) **Motor cars** (e.g., saloon cars, hackney carriages, sports cars and racing cars).
- (2) **Specialised transport vehicles** such as ambulances, prison vans and hearses.
- (3) **Motor-homes** (*campers*, etc.), vehicles for the transport of persons, specially equipped for habitation (with sleeping, cooking, toilet facilities, etc.).
- (4) **Vehicles specially designed for travelling on snow** (e.g., snowmobiles).
- (5) **Golf cars and similar vehicles**.
- (6) *Four-wheeled motor vehicles with tube chassis, having a motor-car type steering system (e.g., a steering system based on the Ackerman principle).*

[*Explanatory Notes* to heading No. 87.11]

This heading covers a group of two-wheeled motorised vehicles which are essentially designed for carrying persons.

In addition to motorcycles of the conventional type, the heading includes motor-scooters characterised by their small wheels and by a horizontal platform which joins the front and rear portions of the vehicle; mopeds, equipped with both a built-in engine and a pedal system; and cycles fitted with an auxiliary motor.

Motorcycles may be equipped to protect the driver against the weather or be fitted with a side-car.

Three-wheeled vehicles (e.g., the “delivery tricycle” type) are also classified here **provided** they do not have the character of motor vehicles of heading 87.03 (see the Explanatory Note to heading 87.03).

The heading further covers side-cars of all kinds, a type of vehicle which is designed for the transport of passengers or goods, and which cannot be used independently. They are equipped with a wheel on one side, the other side bearing fittings enabling the side-car to be attached to, and to travel alongside, a cycle or motorcycle.

The heading **excludes**:

- (a) Four-wheeled motor vehicles, for the transport of persons, with tube chassis, having a motor-car type steering system (e.g., a steering system based on the Ackerman principle) (**heading 87.03**).
- (b) Trailers designed for attachment to a cycle or motorcycle (**heading 87.16**).

Suzuki and Kawasaki argued that the ATVs could not be classified in heading No. 87.03, given that they do not have a motor-car type steering system, even if they are equipped with a steering system based on the Ackerman principle. The Commissioner argued that the ATVs fall in heading No. 87.03, given that they are described in the *Explanatory Notes* to that heading by the inclusion of item (6): “**Four-wheeled motor**

vehicles with tube chassis, having a motor-car type steering system (e.g., a steering system based on the Ackerman principle).”

Dealing first with the headings at issue, the Tribunal finds that the goods in issue are *prima facie* classifiable in both heading Nos. 87.03 and 87.11.

Looking at the *Explanatory Notes*, the Tribunal notes that almost all the goods in issue were imported before the amendment was made to those notes, which led to the inclusion and exclusion of four-wheeled motor vehicles with tube chassis, having a motor-car type steering system, under heading 87.03 and 87.11, respectively. The additions made to the *Explanatory Notes* and the opinion issued by the World Customs Organization result from a decision that classified a specific model of ATV¹⁷ in subheading No. 8703.21. The Tribunal’s practice has been, in coming to a decision, not to ignore relevant classification opinions and changes to the *Explanatory Notes*, even if they were issued after goods were imported. As stated in *Readi-Bake Inc. v. DMNR*,¹⁸ the *Explanatory Notes* serve the purpose of clarifying the words of the headings and do not change them. Although section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the classification opinions and the *Explanatory Notes* as amended from time to time, the Tribunal is bound by neither one nor the other.

As background information and to better understand the rationale of the decision that led to the classification opinion and the changes to the *Explanatory Notes*, the Minutes of the Harmonized System Committee (the Committee) meeting are instructive.¹⁹ It is stated that, with respect to the BREEZE YFA1, the Delegate of Australia commented that this vehicle was a further development of the motorcycle of which it presented several essential characteristics. He, therefore, supported classification in heading No. 87.11. The Delegate of Japan supported that decision. However, delegates who favoured classification in heading No. 87.03 pointed out that the “Ackerman steering principle was not used on motorcycles”. The Minutes of the Harmonized System Committee meeting further indicate that, after a brief discussion, a majority of members of the Committee decided to classify the BREEZE YFA1 in heading No. 87.03 and, to reflect this decision, the secretariat was instructed to prepare a classification opinion and draft amendments to the *Explanatory Notes* with a view to clarifying that ATVs are excluded from heading No. 87.11.

The classification opinion that was issued reads as follows:

- 8703.21 1. **Four-wheeled (two wheel-driven) All Terrain Vehicle** (“A.T.V.”) with tube chassis, equipped with a motorcycle type saddle, handlebars for steering and off-the-road balloon tyres. Steering is achieved by turning the two front wheels and is based on a motor-car type steering system (Ackerman principle). The vehicle is fitted with an automatic transmission with reverse gear, chain-driven rear axle, and front and rear drum brakes. It is powered by a four-stroke single cylinder engine of a cylinder capacity of 124 cc. It is not fitted with cargo racks or with a trailer hitch.

The Tribunal is far from being convinced by the rationale of the Committee’s decision. Indeed, the decision relies on the key element that a steering system based on the Ackerman principle, which is used in ATVs, is not used in motorcycles. As indicated by the expert testimony of Dr. Kelly, the basic definition of a steering system based on the Ackerman principle is that the inside wheels need to turn at a sharper steer angle than the outside wheels so that the wheels track in a straight line. Dr. Kelly explained that almost any

17. BREEZE YFA1. A subsequent classification dealing with an ATV fitted with cargo racks and a trailer hitch (Kodiak YFM400FW) was subsequently issued in May 1999.

18. (2 December 1996), AP-95-044 (CITT).

19. “Classification of four wheeled vehicles called ‘A.T.V.’ and study of the scope of heading 87.11” (Annex H/14 to Doc. 42.100 E), Suzuki and Kawasaki’s brief, Tab 23.

type of four-wheeled vehicle uses a steering system based on the Ackerman principle, whether it is a golf cart, scooter, go-cart, tractor, quadricycle or the goods in issue. In fact, he noted that, since the time of the old wagons with a central pivot point with two wheels on a solid axle, one could no longer make a four-wheeled vehicle that does not have a steering system based on the Ackerman principle.

In this case, item (6), which was added to the *Explanatory Notes* to heading No. 87.03, appears to indicate that any four-wheeled vehicle with a tube chassis, having a steering system based on the Ackerman principle, falls in heading No. 87.03. The Tribunal does not see why the fact that ATVs have a steering system based on the Ackerman principle would determine their exclusion from heading No. 87.11 and their inclusion in heading No. 87.03. The Tribunal acknowledges that ATVs, like motor cars and other motor vehicles, have a steering system based on the Ackerman principle. But this is so, as indicated by the expert testimony, for almost all four-wheeled vehicles, or for three-wheeled vehicles if two wheels are in the front. A steering system based on the Ackerman principle could, of course, not be used in a two-wheeled motorcycle. To rely on the fact that ATVs have a steering system based on the Ackerman principle as a determinative factor for classification is erroneous. In the Tribunal's view, this amounts to saying that ATVs must be classified in heading No. 87.03 and excluded from heading No. 87.11 because of their four-wheel design.

The 1999 addition to the *Explanatory Notes* implies that a motor-car type steering system is a steering system based on the Ackerman principle. The expert testimony does not support this conclusion. Indeed, Dr. Kelly explained that a motor-car type steering system uses six fundamental components, which are the steering wheel, shaft, universal joint, gearbox, linkage and wheels. The testimony of Mr. Gagné and Dr. Kelly indicates that an ATV does not have three of these components: a steering wheel, a gearbox and a universal joint or CV joint. Dr. Kelly also stated that the use of handlebars, in contrast with a steering wheel, results in a limitation of the angle when turning. The Tribunal also gives weight to Mr. Smith's testimony to the effect that it would be detrimental to equip an ATV with a motor-car type steering wheel system, as this would reduce the capacity to have an instant movement of the wheels. In light of this, the Tribunal does not agree that ATVs use a motor-car type steering system or even a similar system, albeit the two front wheels do turn because of a steering system based on the Ackerman principle. The fact that three major components that form part of a motor-car type steering system are missing and that, if equipped with such components, an ATV would no longer be functional is, in the Tribunal's opinion, conclusive that their steering is not based on a motor-car type steering system.

In light of the above, the Tribunal cannot give weight to the classification opinion and the simultaneous changes made to the *Explanatory Notes*. In *Nortesco v. DMNR*,²⁰ the Tribunal stated, in part, as follows: "While the Tribunal is required to take this opinion into account, it is not binding on it. Indeed, the paucity of information contained in the opinion and the brief description of the rationale underpinning the positions of the different delegates lessen that opinion's persuasive value. . . . In the result, this opinion is of little assistance to the Tribunal in determining the proper tariff classification."²¹ The Tribunal is faced with a similar situation here.

20. (16 October 1997), AP-96-092 (CITT).

21. *Ibid.* at 8.

Given that nothing precludes classification of the goods in issue in one or the other heading at issue, and since they are *prima facie* classifiable in both, the Tribunal finds that they are not classifiable pursuant to Rule 1 of the *General Rules*. Neither Rule 2 (a) nor Rule 2 (b) is applicable. Rule 3 (a) reads, in part, as follows:

The heading which provides the most specific description shall be preferred to headings providing a more general description.

The question that the Tribunal must answer is which heading more specifically describes the goods in issue. After having carefully reviewed the evidence on file and the testimony heard, the Tribunal is of the view that the goods in issue are more specifically described in heading No. 87.11 as “[m]otorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side-cars; side-cars.”

Dealing, first, with the scope of heading No. 87.11, the Tribunal is of the view that it encompasses more than two-wheeled motorized vehicles and can include three-wheeled and four-wheeled motorized vehicles. In the Tribunal’s opinion, the term “motorcycle” can certainly be interpreted as including four-wheeled motorized vehicles. The *Motor Vehicle Safety Regulations* include, under its definition of “restricted-use motorcycle”, the goods in issue. The unanimous testimony, as well as the literature,²² show that ATVs evolved from two-wheeled to three-wheeled vehicles and then to four-wheeled vehicles. One of the Tribunal’s predecessors, the Tariff Board, came to the same conclusion 25 years ago when it stated the following:

In the Board’s view, the origin of the word motorcycle obviously flows from the words motor and bicycle or tricycle. The early versions of the motorcycle . . . show various configurations of motorcycles, i.e. two rear wheels and single front wheel, two front wheels and single chain driven rear wheel and a two wheel motorcycle with a single wheel side car. Other exhibits illustrate the evolution of the motorcycle from 1860 until modern times.

[W]hile the evolution of the motorcycle has clearly favoured the two wheel configuration, this does not mean that a machine that is powered, driven and steered in the same manner as the two wheel version, cannot be considered to be a motorcycle simply because it has three wheels.²³ [Emphasis added]

The Commissioner also argued that, by stating that “[t]his heading covers a group of two-wheeled motorised vehicles which are essentially designed for carrying persons”, the *Explanatory Notes* to heading No. 87.11 exclude the goods in issue. However, the *Explanatory Notes* also state that “[t]hree-wheeled vehicles (e.g., the ‘delivery tricycle’ type) are also classified here **provided** they do not have the character of motor vehicles of heading 87.03”. This indicates to the Tribunal that, contrary to what is stated in the first paragraph of the *Explanatory Notes*, this heading covers more than two-wheeled vehicles.

The Tribunal notes the requirement that the goods in issue be “essentially” designed for carrying persons. This requirement, however, is part of the Explanatory Notes to heading 87.11 and not part of the Chapter Notes as it was the case in *Yamaha*.²⁴ In the Tribunal’s view, the term “essentially” still provides for subsidiary functions. Therefore, the fact that the goods in issue are equipped with front and rear cargo racks and that they have the capability of pushing or hauling does not, in the Tribunal’s view, necessarily preclude their classification in heading No. 87.11. In addition, the inclusion of the “delivery tricycle” in the

22. “Safe Use of All-Terrain Vehicles (ATVs) on the Farm”, Suzuki’s brief, Tab 20.

23. *Supra* note 8 at 672-73.

24. The Chapter Notes to heading 87.01 defined “tractors” as vehicles constructed essentially for hauling and pushing.

Explanatory Notes to heading No. 87.11 implies that the heading also covers vehicles that are designed for work and for the transportation of persons.

What convinces the Tribunal of the classification of the goods in issue in heading No. 87.11 are the characteristics that they share with two-wheeled motorcycles. The Tribunal heard ample and non-refuted evidence to the effect that the goods in issue share many features with two-wheeled motorcycles. Among those features are the handlebar steering system, the location of the different controls on the handlebars, the tube chassis design and the interchangeability of several parts. On this last point, the Tribunal even heard testimony that some parts bear the same number. There was also evidence that their overall design and mechanics are very similar to a two-wheeled motorcycle and that the ATV engine evolved from the two-wheeled motorcycle engine.

The Tribunal was also struck by the analogy between the ATV or motorcycle and a “mechanized horse”: ATVs are straddled and ridden like a two-wheeled motorcycle “or a mechanized horse”—not driven like a car. ATVs and two-wheeled motorcycles both require weight transfers to turn; so does a trained horse. ATVs, like two-wheeled motorcycles, are not driven like cars. The riders of ATVs and two-wheeled motorcycles wear similar equipment, such as helmets and goggles. There was also evidence to the effect that ATVs and two-wheeled motorcycles are manufactured by the same companies in the same plants and sold through the same dealers, often designated as “bike shops”. They also compete on the same tracks and are governed, as a type of motorcycle, by the motocross competition rules of the Canadian Motosport Racing Club.²⁵ Finally, although a motorcycle mechanics training is totally different from an automobile mechanics training, the first one usually encompasses all motorcycles, regardless of the wheel configuration.

Based on the above, the Tribunal is of the view that the goods in issue are more properly described in heading No. 87.11 as motorcycles than under heading No. 87.03 as motor cars and other motor vehicles principally designed for the transport of persons.

The Commissioner also argued that the Tribunal’s decision in *Yamaha* should stand, because, among other things, the Tribunal could have classified the goods in a different heading at that time, but chose not to do so. Although it is well established that the Tribunal is not bound by its jurisprudence, the Tribunal notes that classification in heading No. 87.11 was neither argued nor contemplated by the parties in *Yamaha* and that it was not presented with any evidence in support of classification in that heading at the hearing.

Having classified the goods in issue at the heading level, the Tribunal will next classify them similarly at the subheading level and tariff item level. The competing relevant tariff items in heading No. 87.11 are:

8711.20.00 -With reciprocating internal combustion piston engine of a cylinder capacity exceeding 50 cc but not exceeding 250 cc

8711.30.00 -With reciprocating internal combustion piston engine of a cylinder capacity exceeding 250 cc but not exceeding 500 cc

The Kawasaki brochures²⁶ indicate that all the Kawasaki models in issue, except for the Bayou 220, are equipped with an engine of a cylinder capacity exceeding 250 cc, but not exceeding 500 cc. The Bayou 220 is equipped with a 215 cc engine. The Suzuki brochures²⁷ indicate that models LT-F4WDW,

25. Suzuki and Kawasaki’s supplementary book of authorities, Tab 24.

26. “1998 ATV Series” and “Kawasaki ATV - 1999” Specifications, Kawasaki’s brief, Tab 2 at 10, 26.

27. Suzuki’s brief, Tab 2 at 6, 12.

LT-F250W, LT-F250X and LT-F250FX are equipped with an engine of a cylinder capacity of 246 cc. Models LT-F4WDXW, LT-F300FX, LT-F500FW, LT-F500FX are all equipped with an engine of a cylinder capacity exceeding 250 cc, but not exceeding 500 cc.

Consequently, the goods in issue should be classified as follows:

- Tariff item No. 8711.20.00—SUZUKI models LT-F4WDW, LT-F250W, LT-F250X and LT-F250FX—KAWASAKI model Bayou 220
- Tariff item No. 8711.30.00—SUZUKI models LT-F4WDXW, LT-F300FX, LT-F500FW, LT-F500FX—KAWASAKI models Bayou 300, Bayou 300 4 x 4, Bayou 400 4 x 4, KVF 300, KVF 300 4 x 4, KVF, KVF 4 x 4, Prairie, Prairie 4 x 4.

For the foregoing reasons, the appeals are allowed.

Patricia M. Close
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Presiding Member