

Ottawa, Friday, June 30, 2000

Appeal No. AP-99-083

IN THE MATTER OF an appeal heard on April 14, 2000, 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 August 18 and October 20, 1999, with respect to a request for redetermination under section 63 of the *Customs Act*.

BETWEEN

SANDVIK TAMROCK CANADA INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

AND

SECOROC, A DIVISION OF ATLAS COPCO CANADA INC.

Intervener

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Richard Lafontaine

Richard Lafontaine
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

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Appellant

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SECOROC, A DIVISION OF ATLAS COPCO CANADA INC.

Intervener

This is an appeal under 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 under section 63 of the *Customs Act*. The issue in this appeal is whether certain drill rods and coupling sleeves imported by the appellant qualify for the benefits of tariff item No. 9908.00.00 as articles for use in extracting machinery for extracting minerals directly from the working face of a mine. The appellant, supported by the intervener, claims that the goods in issue qualify for the benefits of tariff item No. 9908.00.00. The respondent determined that they do not.

HELD: The appeal is dismissed. The evidence before the Tribunal is that the goods in issue are predominantly for use in jumbo drills. It is the Tribunal's view that jumbo drills are not extracting machinery. The jumbo drill performs the function of a drill. The extraction function is not performed by the jumbo drill. Any minuscule amount of minerals that is flushed out by the flushing medium during the drilling process is insufficient to change the characterization of the drill's function from one of a drill to one of an extracting machine. In the same manner, the bolters, in which the goods in issue are used, also do not constitute extracting machinery for extracting minerals directly from the working face of a mine. Therefore, the goods in issue do not qualify for the benefits of tariff item No. 9908.00.00.

Place of Hearing: Ottawa, Ontario

Date of Hearing: April 14, 2000

Date of Decision: June 30, 2000

Tribunal Member: Richard Lafontaine, Presiding Member

Counsel for the Tribunal: Tamra Alexander

Clerk of the Tribunal: Anne Turcotte

Appearances: Richard A. Wagner, for the appellant and the intervener
Greg Moore, for the respondent

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TRIBUNAL: RICHARD LAFONTAINE, Presiding Member

REASONS FOR DECISION

This is an appeal under 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 under section 63 of the Act on August 18 and October 20, 1999. The issue in this appeal is whether certain drill rods and coupling sleeves imported by the appellant qualify for the benefits of tariff item No. 9908.00.00 of the Schedule to the *Customs Tariff*² as articles for use in extracting machinery for extracting minerals directly from the working face of a mine. The appellant, supported by the intervener, claims that the goods in issue qualify for the benefits of tariff item No. 9908.00.00. The respondent determined that they do not. The relevant tariff nomenclature is as follows:

9908.00.00 Utility vehicles of heading No. 87.03 and lorries (trucks) or shuttle cars of heading No. 87.04, for use underground in mining or in developing mineral deposits;
Articles (excluding tires and inner tubes) for use in the foregoing equipment, or for use in loading machinery for loading coal or for loading minerals directly from the working face of a mine, or for use in extracting machinery for extracting minerals directly from the working face of a mine.

EVIDENCE

Mr. Frederick Schmelzle, Senior Manager, Sandvik Rock Tools, Sandvik Tamrock Canada Inc., and Mr. Michael Grace, Superintendent of Division Mining Opportunities, Mines Research, Inco Limited (Inco), testified on behalf of the appellant. Mr. Schmelzle testified that the appellant is owned by Sandvik AB. The parent company operates three business segments: the Hard Materials Division (the manufacture of specialty steels), the Coromant Division (cemented carbide or cutting tools) and the Sandvik Mining and Construction (SMC) Division. The appellant forms part of the SMC Division. The appellant manufactures and sells drills, loaders, trucks, rock tools and breakers. The appellant also provides product support.

Mr. Schmelzle testified that there are two types of rock: hard rock and soft rock. The compressive strength of soft rock is in the 20,000 psi range. Rock with a higher compressive strength is considered to be hard rock. Examples of soft rock are limestone and sandstone. An example of hard rock is granite. A mechanized road header, that has a rotary cutting head, is used in soft-rock mining. It cannot be used in

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

hard-rock mining. Drilling and blasting are used in hard-rock mining in Canada. The majority of mining in Canada is underground hard-rock mining.

Mr. Schmelzle took the Tribunal through various publications from the appellant and its parent company. Mr. Schmelzle drew the Tribunal's attention to examples of drill rods, drill bits, coupling sleeves, jumbo drills, loaders and mechanized bolters. Mr. Schmelzle testified that there are three main types of rock-drilling techniques: percussive drilling, rotary crushing and rotary cutting. Percussive drilling is used in hard-rock mining in Canada. The function of the drill rod in percussive drilling is threefold: (1) to transmit the percussive energy to the host rock; (2) to provide rotation to the drill bit; and (3) to transmit feed pressure to keep the bit constantly on the bottom of the hole.

Mr. Schmelzle testified that a coupling sleeve must always be used with a drill rod. The drill rod has a drill bit attached to one end which does the physical drilling. The other end is coupled, by the coupling sleeve, directly to the rock drill. More than one drill rod can be coupled together to permit the drilling of longer holes. The drill rod has a hole through the centre of it which accommodates a flushing medium. The flushing medium is primarily water, air or air mist. This medium flushes rock cuttings from the bottom of the drill hole. Mr. Schmelzle testified that all drill rods are used in drilling machines and that over 80 percent of the drilling machines sold by the appellant are used in hard-rock mining.

Mr. Schmelzle testified that the "extraction process" in mining includes: locating the ore underground; drilling, blasting, mucking out the ore and bolting in the mining phase of the process; concentrating the minerals; smelting; and final refining. During the mining phase of the process, holes are drilled into the working face of the mine by rock-drilling jumbos. These holes are then loaded with explosives, and ore is blasted from the host rock. All machinery is removed from the working face of the mine during blasting. Mr. Schmelzle testified that, during the mining phase, the embedded mineral is extracted from the host rock. He also testified that the function of the rock-drilling jumbos is to extract minerals.

In cross-examination, Mr. Schmelzle acknowledged that the volume of ore that is flushed out of the drill rod by the flushing medium is "minuscule" in proportion to the ore muck pile that results from the blasting of the rock. He also stated that the composition of the blasted rock would be similar to that of the working face. When mining limestone, the rock may be from 80 to 100 percent limestone. When mining copper, the rock may be only 1 percent copper. Mr. Schmelzle also acknowledged that there are other applications for drill rods, for example, in the construction of roads and house foundations. Approximately 5 percent of the appellant's drill rod sales were for those purposes.

In response to questions from the Tribunal, Mr. Schmelzle testified that, in his opinion, extraction is the process of breaking apart the ore from the host rock. In order to do that, one must drill and then blast. In his view, excavation is the removal of the fragmented rock from the mine afterwards.

Mr. Grace testified that Inco's primary business is nickel mining. Inco has mines in Sudbury, Ontario; Thompson, Manitoba; Indonesia; and New Guinea. Mr. Grace testified that extracting minerals is a process that involves four phases: mining, milling (or concentrating), smelting and refining. The Tribunal viewed portions of two Inco videos which demonstrated these phases.

Mr. Grace testified that the drilling equipment drills at the working face of the mine. He also stated that one cannot blast without first drilling and that mechanized excavation cannot be used in hard-rock mining.

In response to questions from the Tribunal, Mr. Grace testified that, in his opinion, excavation is "the advance of the working face [of the mine] forward" and that extraction begins when the ore leaves the

mine and the milling process starts. In redirect, Mr. Grace adopted the definition of extraction contained in *A Dictionary of Mining, Mineral, and Related Terms*.

Mr. Michael Land, Manager – Sales Administration, Boart Longyear Inc. (Boart), testified on behalf of the respondent. Mr. Land testified that Boart’s head office is located in North Bay, Ontario, and that Boart has manufacturing facilities in Mississauga and Hailebury, Ontario. The Mississauga facility manufactures percussive drilling tools that compete with the goods in issue.

Mr. Land testified that the jumbo rock drill is a drilling machine. It drills holes in the working face of the mine. No ore is extracted when the drill has performed its function. Mr. Land described the Continuous Miner or mechanical miner that is used in soft-rock mining applications. It has a rotating head with picks on it that is in physical contact with the working face of the mine. The head loosens the rock or ore, which is then directed along a conveyor system to the back of the machine. Mr. Land testified that, in his view, the Continuous Miner is an extracting machine because it extracts ore or rock directly from the working face of the mine. There is no “extracting machine” used in hard-rock mining because no single machine completes the extracting function on its own.

In cross-examination, Mr. Land testified that, in his view, extraction is the removal of ore or rock from the working face of the mine. His definition of excavation was the same. Mr. Land defined mining as the process of removing ore or precious materials from a host rock in a format suitable for milling. Mr. Land also adopted the definition of extraction contained in *A Dictionary of Mining, Mineral, and Related Terms*. Mr. Land testified that the machinery used in the extraction process in hard-rock mining includes the jumbo drill, the ampholoader, the loader and the bolter. Mr. Land testified that the term “extracting machine” is not used in the mining industry.

Mr. Land acknowledged that the drills and loaders are used at the working face of the mine and that all equipment is removed from the working face of the mine when blasting occurs. Mr. Land also acknowledged that, while coal is purer than hard rock when removed from the working face of the mine, it must still be further refined before it is saleable.

ARGUMENT

In argument, the appellant, supported by the intervener, submitted that the goods in issue qualify for the benefits of tariff item No. 9908.00.00 as articles for use in extracting machinery for extracting minerals directly from the working face of a mine. The appellant submitted that, in order to qualify for the benefits of the tariff item, three conditions must be met: (1) the goods must be articles; (2) the goods must be for use in extracting machinery; and (3) the extracting machinery must be for extracting minerals directly from the working face of the mine. The appellant submitted that it and the respondent are in agreement that the goods in issue are articles and that the jumbo drills are used at the working face of the mine. The appellant submitted that the jumbo drills are “extracting machinery” for extracting minerals and that the goods in issue are for use in jumbo drills.

The appellant submitted that, in defining “extraction”, regard should be had to the technical trade meaning of the word.³ *A Dictionary of Mining, Mineral, and Related Terms* defines “extraction” as follows:

The process of mining and removal of coal or ore from a mine. . . . The separation of a metal or valuable mineral from an ore, or concentrate. . . . Extracting metal from ore, often expressed as a percentage.⁴

3. Reliance was placed on *Olympia Floor and Wall Tile v. DMNR* (1983), 49 N.R. 66 (FCA), for this proposition.

4. 1968, s.v. “extraction”.

Therefore, the appellant submitted that, in hard-rock mining, extraction is a process that includes the mining of the ore, the concentration or milling of the ore, smelting and refining. The appellant submitted that all the witnesses agreed that extraction is a process.

The appellant submitted that all machinery used in the extraction process is “extracting machinery”. In order to extract minerals from hard rock, one must drill and blast. Therefore, the jumbo drill is extracting machinery. The appellant also submitted that jumbo drills are extracting machinery because minerals are extracted by the flushing medium. It was submitted that the volume of extracted materials is not relevant. The appellant submitted that the preponderance of use of the goods in issue is in jumbo drills. The appellant submitted that it is not necessary to demonstrate that the goods in issue are exclusively used in extracting machinery.

The appellant submitted that the jumbo drills extract minerals. Ore is removed from the mine and that ore contains minerals. Even when mining soft rock, additional processing must be undertaken before the mineral is in saleable form.

In response to a question from the Tribunal, the appellant submitted that the use of the term “drilling machinery” in tariff item No. 9909.00.00 relates to machinery used in exploration. Since only drilling is done during exploration, that term was sufficient. However, it was not a sufficient term for use in tariff item No. 9908.00.00, as that would have limited the tariff item’s use to hard-rock mining applications. The tariff item is aimed at a broad range of mining equipment used in both soft- and hard-rock mining, the appellant submitted. The appellant also submitted that reference to the tariff items in the pre-harmonized system is not relevant to the issues before the Tribunal.

In response to a further question from the Tribunal, the appellant submitted that the naming of “loading machinery”, as well as “extracting machinery”, in tariff item No. 9908.00.00 was done to specifically address loaders and then catch all other machines used in the extraction process under the generic label of “extracting machinery”. The appellant submitted that the respondent acknowledged, in its letter of April 11, 2000, to the Tribunal, that the loaders are “extracting machinery”. The appellant submitted that the mention of loaders, separately, in the tariff item was possibly not necessary.

The appellant submitted that the respondent’s position, that only the mechanical miner is “extracting machinery”, is not tenable. The respondent’s witness acknowledged that no machine is known as “extracting machinery” in the trade. Further, that interpretation would limit the tariff item’s application to soft-rock mining. Since the majority of mining in Canada is hard-rock mining, it was the appellant’s position that Parliament could not have intended to limit the application of the tariff item in such a way.

The respondent submitted that tariff item No. 9908.00.00 applies only to articles for use in extracting machinery and not to articles for use in any machinery used in the extraction process. The respondent submitted that the jumbo drills are not extracting machinery and that they do not extract minerals. Therefore, the goods in issue are not for use in extracting machinery for extracting minerals directly from the working face of the mine.

The respondent submitted that extracting machinery goes up to the face of the mine, digs away at the rock face, collects the mineral from the rock face and transports it from the rock face. The example of an extracting machine is the Continuous Miner. The jumbo drill is not an extracting machine, as its work is done before the ore is separated from the rock face. The minuscule amount of materials that is removed from the rock face in the flushing medium is insufficient to constitute “extraction”.

The respondent further submitted that minerals are not extracted during the drilling and blasting phases of the process. The respondent submitted that the composition of the blasted rock is the same as that

of the rock face; therefore, no mineral has been extracted. The respondent submitted that extraction does not occur until the final refining phase and that this extraction does not occur at the working face of the mine.

The respondent submitted that the terms of tariff item No. 9908.00.00 highlight the inherent contradiction in the appellant's position. If all machinery used in the extraction process is extracting machinery, loaders should not be mentioned separately. In mentioning loaders separately, the tariff item indicates that loaders are not extracting machinery. Therefore, since loaders are part of the extraction process, the term extracting machinery cannot refer to all machinery used in the extraction process. The tariff item must refer to a specialized machine and not to many machines used in a process.

The respondent submitted that, had Parliament meant the tariff item to apply to machines used in the extraction process, and not just extracting machinery, it could have used those words. Since it did not, such a broad interpretation should not be given to the tariff item.⁵ The respondent also submitted that reference to the terms of the tariff item in the pre-harmonized system supports the respondent's position.

DECISION

The only issue before the Tribunal is whether the goods in issue qualify for the benefits of tariff item No. 9908.00.00 as articles for use in extracting machinery for extracting minerals directly from the working face of a mine. The Tribunal is of the view that, in order to qualify for the benefits of tariff item No. 9908.00.00, all of the following conditions must be met:

- (1) the goods must be articles;
- (2) the goods must be for use in extracting machinery; and
- (3) the extracting machinery must be for extracting minerals directly from the working face of a mine.

Should any of the above-mentioned conditions not be met, the goods in issue will not qualify for the benefits of tariff item No. 9908.00.00.

The evidence before the Tribunal is that the goods in issue are predominantly for use in jumbo drills used in hard-rock mining applications. It is the Tribunal's view that jumbo drills are not extracting machinery. The appellant submitted that extracting machinery is all machinery used in the extraction process. The Tribunal's view is that this interpretation of the term "extracting machinery" is not consistent with the remaining terms of the tariff item. Tariff item No. 9908.00.00 refers to:

Utility vehicles of heading No. 87.03 and lorries (trucks) or shuttle cars of heading No. 87.04, for use underground in mining or in developing mineral deposits;
Articles (excluding tires and inner tubes) for use in the foregoing equipment, or for use in loading machinery for loading coal or for loading minerals directly from the working face of a mine, or for use in extracting machinery for extracting minerals directly from the working face of a mine.

The equipment and articles covered by the tariff item can be broken down into distinct categories:

- (1) utility vehicles, lorries and shuttle cars of certain headings for use in underground mining or in developing mineral deposits;
- (2) articles for use in equipment listed in (1);
- (3) articles for use in loading machinery for loading coal;

5. Reliance was placed on *Ballarat Corporation v. DMNR* (19 December 1995), AP-93-359 (CITT), and *Sealand of the Pacific v. DMNR* (11 July 1989), 3042 (CITT), for this proposition.

- (4) articles for use in loading machinery for loading minerals directly from the working face of a mine; or
- (5) articles for use in extracting machinery for extracting minerals directly from the working face of a mine.

Accepting the appellant's definition of the extraction process as including the mining of the ore, the concentration or milling of the ore, smelting and refining, if the term "extracting machinery" were interpreted to mean all machinery used in the extraction process, there would be no need for the fourth category, as the loading machinery of the fourth category would be covered by the fifth category.⁶ In order to give meaning to all the terms of the tariff item, a more restrictive interpretation of extracting machinery is necessary.

It is the Tribunal's view that the term "extracting machinery" refers to a distinct machine that performs the function of extracting minerals. The evidence before the Tribunal is that the Continuous Miner performs that function. Therefore, this interpretation of the tariff item does not render the fifth category, set out earlier, empty of meaning. It is the Tribunal's view that the jumbo drill does not perform the function of extracting minerals. The jumbo drill performs the function of a drill. It drills a hole which is then filled with explosives. The extraction function is not performed at this stage in the process. It is the Tribunal's view that any minuscule amount of minerals that is flushed out by the flushing medium during the drilling process is insufficient to change the characterization of the drill's function from one of a drill to one of an extracting machine.

It is also the Tribunal's view that, had Parliament intended for the tariff item to apply more broadly, it would have used a different construction. For example, the tariff item could have read:

Articles (excluding tires and inner tubes) for use in the foregoing equipment, or for use in loading machinery for loading coal or for loading minerals directly from the working face of a mine, or for use in other extracting machinery for extracting minerals directly from the working face of a mine [emphasis indicates the change].⁷

This would have indicated Parliament's intent that the equipment listed before the term "extracting machinery" also be considered extracting machinery. The Tribunal is also not persuaded by the appellant's argument that Parliament could not have intended the term "extracting machinery" to cover only certain machinery used in soft-rock mining, given that the majority of mining in Canada is hard-rock mining. The provisions of Chapter 99 are exceptional in nature. It does not follow that, because the majority of mining in Canada is hard-rock mining, the provisions of tariff item No. 9908.00.00 must apply in the manner suggested by the appellant. Again, had that been Parliament's intent, Parliament could have chosen words to make that intent clear.

In conclusion, it is the Tribunal's view that the jumbo drills are not extracting machinery. The evidence before the Tribunal is that the goods in issue are predominantly for use in jumbo drills. The evidence is that the goods in issue are also used in bolters and in machinery for the construction of roads and house foundations. With respect to the use of the goods in issue in bolters, there was testimony and argument that bolters are also used in the extraction process and, therefore, constitute extracting machinery.

6. The Tribunal does not accept that the respondent's statement in his letter of April 11, 2000, to the Tribunal to the effect that a "scoop tram" or loader is an example of extracting machinery is determinative of the issue of whether loaders are extracting machinery.

7. Parliament could also have referred to articles for use in machinery used in the process of extracting minerals directly from the working face of the mine instead of the reference to articles for use in loading machinery for loading minerals directly from the working face of a mine and extracting machinery for extracting minerals directly from the working face of a mine, had the intent been for the tariff item to apply more broadly.

For the reasons set out above with respect to jumbo drills, the Tribunal does not accept that bolters constitute extracting machinery. There was no evidence or argument that the goods in issue qualify for the benefits of tariff item No. 9908.00.00 by reason of their use in machinery for the construction of roads and house foundations. Therefore, the Tribunal finds that the goods in issue do not meet the condition of being articles for use in extracting machinery for extracting minerals directly from the working face of a mine and, therefore, do not qualify for the benefits of tariff item No. 9908.00.00. Consequently, the appeal is dismissed.

Richard Lafontaine

Richard Lafontaine

Presiding Member