Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. AP-2011-057R and AP-2011-058R

Marmen Énergie Inc. and Marmen Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Thursday, July 7, 2016

Canada

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IN THE MATTER OF appeals heard on August 23, 2012, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Federal Court of Appeal dated May 7, 2014, which set aside the decision of the Canadian International Trade Tribunal in Appeal Nos. AP-2011-057 and AP-2011-058 dated December 14, 2012, and referred the matter back to the Canadian International Trade Tribunal.

BETWEEN

MARMEN ÉNERGIE INC. AND MARMEN INC. **Appellants**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeals are dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 7, 2015
Tribunal Member:	Jason W. Downey, Presiding Member
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PARTICIPANTS:

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STATEMENT OF REASONS

BACKGROUND

1. This matter is further to a judgment of the Federal Court of Appeal (the Court) dated May 7, 2014,[1] which remanded the decision of the Canadian International Trade Tribunal (the Tribunal) in *Marmen Énergie Inc. and Marmen Inc. v. President of the Canada Border Services Agency*.[2]

2. In *Marmen FCA*, the Court found as follows:

> [5] As the appellants have demonstrated, it cannot be concluded with any certainty that tariff item No. 9903.00.00 requires that all the host goods have a farming, agricultural, horticultural or agri-business connection. Indeed, an addition to the classified goods in tariff item No. 9903.00.00 introduced in 2000 - "machinery for filling bottles for use in the beverage industry" - indicates *on the face of it* that all listed goods need not be connected to farming, agriculture, horticulture or agri-business. The CITT in its elaborate reasons does not deal with this description.
>
> [6] In the absence of some explanation, a decision that is based on the premise that all host goods have a farm related use restriction in circumstances where the aforesaid description does not, cannot stand the test of reasonableness.
>
> [7] The appeal will accordingly be allowed, the judgment of the CITT will be set aside and the matter will be referred back to the Tribunal for adjudication based on an analysis which takes into account the addition of "machinery for filling bottles for use in the beverage industry" in tariff item No. 9903.00.00.
>
> [Emphasis added]

3. Further to the Court's decision, on May 12, 2014, Marmen Énergie Inc. and Marmen Inc. (Marmen) wrote to the Tribunal requesting an opportunity to file written submissions. The Tribunal granted this request and extended the same opportunity to the President of the Canada Border Services Agency (CBSA). Marmen filed written submissions on July 9, 2014. The CBSA filed written submissions on August 14, 2014.

4. On August 18, 2014, Marmen asked to file reply submissions. The CBSA consented to Marmen's request, and the Tribunal granted the request. On October 7, 2014, Marmen filed reply submissions.

5. The Tribunal held a teleconference with counsel for the parties on March 9, 2015, and informed them that a public hearing would be held. The Tribunal indicated that the objective of the hearing would be to hear arguments on the legislative history pertaining to tariff item No. 9903.00.00. The Tribunal invited the parties to file written submissions specifically addressing those issues prior to the hearing. Marmen filed submissions on April 2, 2015, and the CBSA filed submissions on May 29, 2015.

6. A public hearing was held by the Tribunal in Ottawa, Ontario, on July 7, 2015.

7. On October 13, 2015, the Tribunal asked Marmen to file a complete copy of modifications made to the *Tariff* by way of order in Council titled *Technical Amendments Order (Customs Tariff) 2000-4*.[3] Marmen had filed an incomplete excerpt of said *Order* as part of its submissions of April 2, 2015. The Tribunal also gave the parties an opportunity to file simultaneous comments with regard to the contents of

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1. *Marmen-Énergie Inc. v. Canada (Border Services Agency)*, 2014 FCA 118 (CanLII) [*Marmen FCA*].
2. (14 December 2012), AP-2011-057 and AP-2011-058 (CITT) [*Marmen CITT*].
3. S.O.R./2001-31 [*Order*].

the *Order*. Marmen filed its comments on October 13, 2015. The CBSA informed the Tribunal on October 15, 2015, that it had no comments. The record was closed on October 22, 2015.

ISSUE

8. The goods in issue are various parts that are used in the manufacture of structures, namely, towers. As will be explained below, those towers serve as mounts or bases for wind-powered electricity generators.

9. Marmen claims that these imported parts are entitled to the benefit of tariff item No. 9903.00.00 of the schedule to the *Customs Tariff*[4] on the basis that they are articles and materials that enter into the cost of manufacture or repair of articles for use in *windmills*. Marmen stakes at least part of its position on the fact that the French term for *windmills* in tariff item No. 9903.00.00 is *éoliennes*; it argues that the meaning of that French word is wide and should encompass large energy-generating units such as those that it produces.

10. The CBSA takes the position that the goods in issue are not entitled to the benefit of tariff item No. 9903.00.00 on the basis that they do not pertain to windmills, nor are they articles and materials that enter into the cost of manufacture or repair of articles for use in generating sets for use on the farm for farm purposes only.

TRIBUNAL'S ANALYSIS

11. As directed by the Court, the Tribunal re-adjudicated the matter on the basis of an analysis which takes into account the addition of the words "machinery for filling bottles for use in the beverage industry" in tariff item No. 9903.00.00 pursuant to section 27 of the *Order*.[5]

12. After careful consideration of the body of evidence filed by the parties on this matter and associated submissions, the Tribunal finds that the words "machinery for filling bottles for use in the beverage industry" of tariff item No. 9903.00.00 may possibly not pertain exclusively to farming, agriculture, horticulture or agri-business; the beverage industry certainly intersects with farming and agri-business, but it appears that it is not exclusively confined to those sectors.

13. As will be discussed below, the Tribunal nevertheless finds that the inclusion of the words "machinery for filling bottles for use in the beverage industry" in tariff item No. 9903.00.00 does not denature that tariff item to the point of allowing an expansive interpretation which would enable the inclusion of goods such as wind-powered electricity generators, which were distinctly characterized by witnesses at the hearing in *Marmen CITT* and other constant evidence on file, as belonging to the energy sector. The Tribunal finds that there is neither a policy nor a linguistic basis for Marmen's position, without acceding to contortions of both fact and law. More fundamentally, a wind-powered electricity generator is not a "windmill" as contemplated by the schedule to the *Customs Tariff*.

Machinery for Filling Bottles for Use in the Beverage Industry

14. The words "machinery for filling bottles for use in the beverage industry" were added to tariff item No. 9903.00.00 of the schedule to the *Customs Tariff* by the *Order* in 2001.[6] The CBSA takes the position that the host goods listed in tariff item No. 9903.00.00 are "... generally related/connected to farming,

4. S.C. 1997, c. 36.
5. The Tribunal notes that, although the *Order* was enacted in 2001, section 6 of the *Order* provides that it was to take effect as of January 1, 1998.
6. See note 5.

agriculture, horticulture or agri-business . . ."[7] [underlining in original], but concedes that "machinery for filling bottles for use in the beverage industry" are ". . . not exclusively related to farming, agriculture, horticulture or agri-business."[8] The CBSA filed compelling evidence with regard to the importance of fruit and vegetable drinks in the agri-business sector, but concedes that the above tariff language may not be reserved for this sector exclusively.[9]

15. The Tribunal understands from this evidence that the beverage industry clearly intersects with agri-business at many levels and plays an important role in this domain; however, it is also clear that not *all* the beverage industry is exclusively and necessarily related/segmented to agri-business *per se*. As such, the evidence in this matter does not conclusively establish that *all* "machinery for filling bottles for use in the beverage industry" is confined to the use of agri-business exclusively; however, it remains that an important portion of that machinery will certainly be used by that sector. As such, the Tribunal should have further explained and nuanced its conclusion of *Marmen CITT* to the effect that ". . . each of the 'host' goods in [tariff item No. 9903.00.00] relates in some way to agriculture . . . ."[10]

16. At this juncture, Marmen invited the Tribunal to decree that the addition of the words "machinery for filling bottles for use in the beverage industry" in some way broadened the scope of tariff item No. 9903.00.00 to the extent that it would somehow disinherit and surrender its agricultural/agri-business orientations and from thereon allow the encompassing of wind-powered electricity generators of the type devoted to the energy sector.

17. The Tribunal finds that the mere reference to the "beverage industry", a sector that clearly and fundamentally intersects with farming and agri-business, does not denature tariff item No. 9903.00.00, when read as a whole and in context. Marmen is attempting to read into that tariff item a meaning that it simply does not contain.

18. That tariff item is meant to provide tariff relief to certain goods which are clearly used by the farming, agriculture, horticulture or agri-business sectors, as well as to machinery of one sector, the beverage industry, whose boundaries evidently intersect with farming and agri-business even though they may extend beyond those sectors. Marmen has not demonstrated that there ever existed a policy intention, by this addition itself or by any other means, to expand that tariff item to include completely different goods, such as those of the energy-generating sector for example.[11] The schedule to the *Customs Tariff* does not operate in a vacuum—it is not a linguistic playground. Rather, it is the expression of a policy intention of how Canada will tax, or not, certain goods entering the country.

19. Marmen goes on to argue that, because the beverage industry is not fully contained in the agri-business sector, it would necessarily follow, according to Marmen's logic, that it may very well relate to goods of another sector as well, in this case, the energy sector. Hence, it believes that the French term

7. Exhibit AP-2011-057R-10A at para. 17, Vol. 1.
8. *Ibid.* at para. 20.
9. Exhibit AP-2011-057R-23A, tabs 5, 6, Vol. 1B.
10. *Marmen CITT* at para. 96.
11. That industry is devoid of any connection to farming, agriculture, horticulture or agri-business, whereas the beverage industry importantly intersects with the agri-business sector, if admittedly all of that industry is not exclusively found in that sector.

éolienne must be given a *broader* meaning than the more *restrictive* English term *windmill* found in the tariff item.[12] The Tribunal does not agree.

20. The Tribunal knows of no rule of interpretation that can justify the broadening of a restrictive term (here, windmill) by reason of the use in the other official language of a term that *may* appear to be wider in its colloquial meaning (here, *éolienne*) but that can also be read as having the same meaning when the schedule to the *Customs Tariff* and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[13] are read as a whole.[14]

21. The words "*moulins à vent*" were replaced with the word "*éoliennes*" in 1987. That change occurred in tariff item No. 8412.80.20 as it read at the time.[15] That tariff item pertained to "windmills" as described in the *Explanatory Notes*. No evidence was filed with regard to a policy rationale behind that linguistic change. Similarly, Marmen was unable to provide any evidence of a policy intention to allow for duty-free entry of large wind farm electric generating units. The Tribunal is convinced that ample evidence of such a policy choice would have been available to Marmen had such a policy intention ever existed. Because no evidence of a desired policy change exists, the Tribunal interprets the fact that the French term was changed while the English term (windmills) remained the same as nothing more than a linguistic drafting choice that carries no policy consequences at all. If anything, this appears to be more in the realm of linguistic harmonisation rather than an implicit deconstruction of the structure of the schedule to the *Customs Tariff*.

22. In these appeals, Marmen took a quixotic run at the schedule's "windmill" armed with the spear of linguistics. Ultimately, that spear was no more than a straw. In *Marmen CITT*, the Tribunal entertained those linguistic arguments as a manner of disposing of these appeals, maybe to a fault, as that approach may have been unnecessarily confusing;[16] in retrospect, this is likely an occasion where the Tribunal ought not to have been a slave to the manner in which a party argued its case.[17] More to the point, this matter can also be resolved through the simpler and more fundamental approach that follows.

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12. The Tribunal already determined the differences between the types of goods used in the farming sector and those used in the energy-generating sector and found these goods to be two distinct products. *Marmen CITT* at paras. 65, 73.
13. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
14. See note 19.
15. Exhibit No. AP-2011-057R-10A at paras. 65-66, Vol. 1.
16. The Tribunal was also a victim of that confusion. In *Marmen CITT*, the Tribunal was not always clear as to when it was using certain terms in their colloquial sense or the sense that is set out in the schedule to the *Customs Tariff* or the *Explanatory Notes*. For example, wind farm electricity generators are sometimes referred to as "wind turbines"; those words have a specific meaning in the explanatory notes to heading No. 84.12. The Tribunal finds it unfortunate that counsel for the parties did not attempt to assist the Tribunal in clearing up that inconsistency during these remand proceedings. For example, the first diagram in the Appendix incorrectly identifies the depicted apparatus as a "wind turbine"; in actual fact, that apparatus is more properly described as a "wind-powered electricity generator" because "wind turbine", according to the *Explanatory Notes*, is a synonym for "windmill". The Tribunal had no intention of describing two different goods in the same manner. However, that is what the Tribunal inadvertently did by also describing the second diagram as a "windmill". The same mistake was made in the French version of the Appendix. In *Marmen CITT*, the Tribunal clearly stated that it was in the presence of two distinct apparatuses.
17. Counsel for the CBSA was also drawn into the confusion of Marmen's arguments; a more basic approach would also have better assisted the Tribunal in resolving these matters.

A Wind-powered Electricity Generator is not a "Windmill"

23. In centering its position in these appeals on the linguistic arguments above, Marmen essentially chose to ignore almost entirely the CBSA's extensive submissions on the fact that wind-powered electricity generators are not "windmills", the former being classified in heading No. 85.02 and the latter, in heading No. 84.12.[18] The position taken by the CBSA is correct and properly dispositive of these appeals.

24. The explanatory notes to heading No. 84.12 state that "windmills" are "wind engines" or "wind turbines" or "wind motors" (the three terms describe goods of the same kind). They are all ". . . power units . . . which directly convert into mechanical energy the action of the wind on blades . . . of a propeller or rotor." Such devices do *not* contain electricity generators *but* they can be used to drive generators. That distinction is fundamental because when a "windmill" or "wind turbine" is combined with an "electric generator" (i.e. so that the wind-driven component drives a generator), it ceases to be a windmill and, instead, becomes a "wind-powered" "electric generator unit" or "generating set".

25. The *Explanatory Notes* clearly set out that, when a windmill is combined with an electricity generator, the resultant good is specifically *excluded* from heading No. 84.12 as follows: "Electric generator units composed of wind motors *mounted integrally* with an electric generator . . . are **excluded** [and are instead classified in] (**heading 85.02**)" [emphasis added].

26. For tariff classification purposes, when a windmill is in such a way combined with an electric generator, it is no longer a windmill of heading No. 84.14; rather, it becomes an electric generating set of heading No. 85.02 and, more specifically, one that is wind-powered (tariff item No. 8502.31.00).

27. Indeed, "wind-powered" "electric generator units" or "electric generating sets" of subheading No. 8502.31 consist of ". . . the combination of an electric generator and any prime mover . . ." such as a "wind engine" or a "windmill".[19] Consequently, all "electric generators units", large or small, fall in heading No. 85.02, ranging from ". . . those for operation in aircraft slipstreams . . ." up to large wind apparatuses of the type that Marmen outfits.

28. Marmen's imported parts go into the towers that support "wind-powered" "electric generating sets" of subheading No. 8502.31. That those goods may colloquially be known as "wind turbines" or "windmills" or *éoliennes* is really of no importance for the purposes of customs classification because the schedule to the *Customs Tariff* explicitly limits the meaning of words as described by the explanatory notes to heading No. 84.12. Therefore, as soon as what is commonly known as a "wind turbine" or "windmill" or *éolienne* has the same *description* as what is found in subheading No. 8502.31, it is classified in that heading.[20]

29. As its name says, the *Harmonized Commodity Description and Coding System* exists so that goods can be classified according to their "description". The Tribunal must be guided by those descriptions, first and foremost, because their authority is above that of common parlance, which can vary not only from language to language but also from place to place around the world.

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18. Exhibit AP-2011-057R-10A at paras. 22-50, Vol. 1.
19. Again, for the purposes of the schedule to the *Customs Tariff*, a "wind engine" is a "windmill, and is also "wind turbine" (the three terms being synonymous according to the *Explanatory Notes*).
20. A U.S. decision classifies wind farm electricity-generating turbines in the same manner. See *RE: NY E82319 Revoked; Steel towers for wind-driven turbine electric generator* (25 September 2001), HQ 964757. This decision has been put on the record of these appeals for greater ease of reference.

30. For the purposes of the schedule to the *Customs Tariff*, the Tribunal finds that an *éolienne* is a "windmill" of heading No. 84.12.[21] What Marmen argues to be an *éolienne* is in fact *not* a "windmill" at all: when the Tribunal matches the characteristics of the good that Marmen brings forward as being an *éolienne* with the language that is contained in the schedule, the Tribunal finds that good to be properly described as a "wind-powered" "electrical generator unit" or an "electric generating set" of subheading No. 8502.31 and, therefore, finds that it must be classified as such.[22]

31. Because the goods in issue are parts that are associated with a "wind-powered" "electric generator unit" or "electric generating set" of subheading No. 8502.31 and not with windmills of heading No. 84.12, they are not entitled to the benefit tariff item No. 9903.00.00. Articles and materials that enter into the cost of manufacture or repair of generating sets *for use on the farm for farm purposes* only, whether wind powered or otherwise, would be entitled to the duty-free benefit of tariff item No. 9903.00.00. Marmen concedes that the towers in which its parts are used are mounts or bases for goods that are *not* for use on the farm, let alone for farm purposes. Accordingly, Marmen cannot benefit from tariff item No. 9903.00.00 on that basis either.

DECISION

32. The appeals are dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

21. To be sure, the terms "windmills" and *éoliennes* are no longer found in heading No. 84.14. As underscored by the CBSA, they were however in tariff item No. 8412.80.20 as of 1987 (Exhibit AP-2011-057R-10A at paras. 66-71, Vol. 1). As indicated above, previously, the French term for "windmills" was "*moulins à vent*"; the Tribunal reads the term *éoliennes* as being no more than an updated version of "*moulins à vent*"—the French terms that were used for "windmills" prior to the adoption of the *Harmonized Commodity Description and Coding System* in 1987, and the wholesale revamping of the structure the *Customs Tariff* and schedule at that time (S.C. 1987, c. 49). Importantly, that exercise occurred at a time when the Tribunal suspects that a wind-powered generating industry may not even have existed. In the Tribunal's view, this is no reason to justify adopting the extraneous colloquial meaning that Marmen seeks to give to the term *éoliennes*. In any event, a "wind-powered" "electric generating set" of subheading No. 8502.31 is not an *éolienne* other than in its colloquial meaning. When contrasting the certainty of the word "windmills" with the purported uncertainty of the word *éoliennes*, the Tribunal finds that, had Parliament intended what Marmen suggests, legislators would not have relied on a colloquialism; instead, the schedule to the *Customs Tariff* would have read as set out below. Marmen's position also fails because the schedule to the *Customs Tariff* does not read that way. Absent any indication of a policy intention to extend duty-free benefits to wind farm electricity generators, Marmen's position cannot succeed on a linguistic argument alone: there is simply no plausible reason for the use of the word "*éoliennes*" in tariff item No. 9903.00.00 other than as the updated word for "windmills". As such, the Tribunal is satisfied that Parliament intended the word "*éoliennes*" to mean "windmills" and, therefore, for both terms to have the same meaning as "windmills" in the English version of the *Explanatory Notes*.

22. Tariff item No. 9903.00.00 does *not* read "windmills of heading No. 84.12 and wind-powered electric generator units of subheading No. 8502.31".