Date: 20071214

Docket: A-31-07

Citation: 2007 FCA 405

CORAM: **NOËL J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

INNOVAK DIY PRODUCTS INC.

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Heard at Montréal, Quebec, on November 22, 2007.

Judgment delivered at Ottawa, Ontario, on December 14, 2007.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] At issue is an appeal from a decision of the Canadian International Trade Tribunal (the "CITT"), which dismissed Innovak DIY Products Inc.'s ("Innovak") appeal of the President of the Canada Border Services Agency's (the "CBSA") advanced ruling for Tariff classification under paragraph 43.1(1)(*c*) of the *Customs Act*, 1985, c.1 (2nd Supp.) (the "*Customs Act*"). Innovak maintains that the goods in question should be classified as rubber articles, under heading No. 40.16 of the Schedule to the *Customs Tariff* S.C. 1997, c.36 (the "Act") and that the CBSA erred in holding otherwise.

RELEVANT FACTS

[2] The goods at issue in this appeal are bungee cords, made of man made vulcanized rubber that are covered with plaited polypropylene, cut to length and fitted with hooks. The vulcanized rubber interior is made of smaller individual rubber strands that are neither twisted nor braided. The outside plaited polypropylene is a protective cover that prevents the interior rubber cords from premature wear and tear.

[3] The CBSA, in an initial advance ruling, decided that the goods at issue should be classified as textiles, under Tariff item No. 5609.00.00. Innovak brought an appeal against the aforesaid decision which was dismissed by the CITT on December 20, 2005.

[4] Innovak later informed the CITT that the initial ruling that formed the subject matter of the appeal had been issued by an official who had not received the requisite designation from the CBSA to issue such rulings. A second ruling, identical to the first, was subsequently issued by an authorized officer and in order not to repeat the appeal process, the parties asked the CITT issue a fresh decision identical to first, but directed at the second ruling. The CITT obliged and this is the decision that is the subject of the present appeal.

CITT DECISION

[5] The CITT first notes that in its written submissions, Innovak agreed with the CBSA that the semi-finished goods (i.e. without the hooks) are properly classified under heading No. 56.04 as "[r]ubber thread and cord, textile covered…". This proposition is supported by the first paragraph of

Part III, *Explanatory Notes* to Section XI, which states, “Under Note 10 to this Section, elastic products consisting of textile materials combined with rubber threads are classified in Section XI”. The second paragraph of Part III confirms the following: “Rubber thread and cord, textile covered are included in heading 56.04” (CITT’s decision, para.22).

[6] The crux of the debate arose at the stage when the semi-finished goods underwent further modification and became an article that required a new Tariff classification (i.e., adding the hooks) (CITT’s decision, para. 10). While the CBSA suggested that the proper classification for the finished goods was as a textile under heading No. 56.09 (“Articles of yarn, strip or the like of heading No. 54.04 or No. 54.05, twine, cordage, rope or cables, not elsewhere specified or included”), Innovak maintained that the essence of the product lies in its elasticity, which is derived from the rubber and so, argued that the article should be classified as a rubber product, under heading No. 40.16 (“Other articles of vulcanized rubber other than hard rubber”) (CITT’s decision, para. 10).

[7] While the CITT recognizes that heading No. 56.09 does not appear to include unfinished articles that fall under heading No. 56.04, it concludes that the *Explanatory Notes* to heading No. 56.09 are inclusive in nature and so, the heading also covers the goods in issue. The heading and the notes provide respectively:

56.09 Articles of yarn, strip or the like of heading 54.04 or 54.05, twine, cordage, rope or cables, not elsewhere specified or included.	**56.09** Articles en fils, lames ou formes similaires des nos 54.04 ou 54.05, ficelles, cordes ou cordages, non dénommés ni compris ailleurs.

Explanatory Notes

This heading covers articles of the yarns of Chapters 50 to 55, articles of strip or the like of heading 54.04 or 54.05, and also articles of twine, cordage, rope or cables of heading 56.07, **other than** those covered by a more specific heading in the Nomenclature.

It includes yarns, cordage, rope, etc., cut to length and looped at one or both ends, or fitted with tags, rings, hooks, etc., (e.g., shoe laces, clothes lines, towing ropes), ships' fenders, unloading cushions, rope ladders, loading slings, dish "cloths" made of a bundle of yarns folded in two and bound together at the folded end, etc.

The heading **does not cover**:

(a) Bridles, reins, halters, harness, etc. (**heading 42.01**).

(b) Cords cut to length, with knots, loops, or metal or glass eyelets, of a kind used on Jacquard or other machines (**heading 59.11**).

(c) Textile fabrics and articles made from such fabrics, which are classified in their appropriate headings (e.g., shoe laces made from braids are classified in **heading 63.07**).

(d) Rope soles for sandals (**heading 64.06**).

(e) Articles for gymnastics and other articles of **Chapter 95**.

Notes explicatives

La présente position groupe les articles fabriqués avec des fils des Chapitres 50 à 55, avec des lames et formes similaires des n^{os} 54.04 ou 54.05 ou avec des ficelles, cordes ou cordages du n^{o} 56.07 et qui ne sont pas couverts d'une manière plus spécifique par d'autres positions de la Nomenclature.

Sont notamment rangés ici des fils, ficelles, cordes et cordages coupés de longueur, dont l'une ou les deux extrémités forment une boucle ou sont munies de ferrures, de crochets, d'anneaux ou d'autres accessoires (lacets de soulier, cordes à linge, câbles pour la traction, par exemple), les élingues de chargement, les défenses de bateaux, les coussins de déchargement, les échelles, les lavettes (pour le lavage des éviers, des carrelages, etc.) formées par une botte de fils ou de ficelles repliée en son milieu et enserrée près de son extrémité repliée, etc.

Sont **exclus** de cette position :

a) Les articles de bourrellerie (brides, rênes, licols, traits, etc. du **n^{o} 42.01**).

b) Les fils d'arcade pour mécaniques Jacquard et les autres produits pour usages techniques du **n^{o} 59.11**).

c) Les tissus et articles en tissus, qui suivent leur régime propre (les lacets de souliers fabriqués avec des tresses relèvent du **n^{o} 63.07**, par exemple).

d) Les semelles de chaussures (**n^{o} 64.06**).

e) Les agrès de gymnastique et autres articles du **Chapitre 95**.

[8] Although the bungee cords are not rope or cordage (as they are not braided or twisted), the bungee cords are similar products which, properly come within this classification (CITT's decision,

para. 25). According to the CITT, the second paragraph of the *Explanatory Notes* further extends the list of articles included under heading No. 56.09 and the third paragraph provides a list of goods that are explicitly excluded from the list and does not specifically exclude unfinished products under heading No. 56.04, which buttresses the view that the other types of cords or threads not similarly explicitly excluded are instead implicitly included under heading No. 56.09 (CITT's decision, para. 26).

[9] The CITT further rejects Innovak's contention that the goods in issue do not fall under the textile heading No. 56.09 as they are "elsewhere specified or included" in the section covering rubber articles, under heading No. 40.16 - "other articles of vulcanized rubber other than hard rubber." The CITT finds Innovak's argument problematic given that it would imply that, by putting hooks onto a textile product, the product would become a rubber article. While the essential character of the bungee cords may well be their rubber interior, this is only a relevant consideration under Rule 3(*b*) of the *General Rules* and should not be considered unless the classification cannot be directed under Rule 1, 2, or 3(*a*) (CITT's decision, para. 27).

[10] In conclusion, the CITT states that given that the semi-finished goods (the cord without the hooks) would fall under heading No. 56.04 and, as a result, could not, in their finished form fall under heading No. 40.16, the goods in issue are properly classified under heading No. 56.09 and under Tariff item No. 5609.00.00 (CITT's decision, para. 28).

POSITIONS OF THE PARTIES

[11] In support of its appeal, Innovak submits that the CITT erred in its interpretation of heading No. 56.09 by failing to note that heading No. 56.09 purposefully leaves out articles of rubber, thread and cord. Innovak argues that the implied exclusion rule applies in the interpretation of the *Explanatory Notes* for heading No. 56.09. Articles that are made of rubber should be included under heading No. 40.16 since Section XI, which covers textiles and textile articles, includes textiles that may be coated with rubber but not articles that are made of rubber and coated with textile (Appellant's Memorandum of Fact and Law, para. 29).

[12] According to Innovak, the fact that the unfinished goods were characterized as textiles does not preclude a finding that the finished product is properly classified as a rubber article (Appellant's Memorandum of Fact and Law, para. 52). The addition of the hooks transforms the goods in issue unto a useful article whose essential character is derived from the rubber thread (Appellant's Memorandum of Fact and Law, para. 55).

[13] The CBSA, on the other hand, submits that the CITT's decision to classify the bungee cords under heading No. 56.09 was reasonable and based on a proper interpretation of the relevant section, *Chapter and Explanatory Notes*. Section XI, heading No. 56.09, as the *Explanatory Notes* indicate, is inclusive and provides a non-exhaustive list of goods.

[14] The CBSA further submits that the goods in issue are specifically excluded from Chapter 40 (Rubber and Rubber articles). In particular Note 2(*b*) of the Chapter Notes to Section VII, Chapter

40 specifically states that the Chapter does not cover “Goods of Section XI (textiles and textile articles)”. As well, the *Explanatory Notes* to heading No. 40.16 specifically excludes the goods in issue when it states:

> The following are also excluded from this heading:
>
> (a) Articles of woven, knitted or crocheted fabrics, felt or non-wovens, impregnated, coated, covered or laminated with rubber falling in Section XI (see Note 3 to Chapter 56 and Note 4 to Chapter 59) and articles made from textile materials with rubber threads (Section XI).

ANALYSIS AND DECISION

[15] The standard of review for decisions of the CITT with respect to Tariff classifications is summarized in *Agri Pack v. Canada (Customs and Revenue Agency)*, [2005] F.C.J. No. 2059 (“*Agri Pack*”):

> **24** According to the wording of section 68(1) of the Act, appeals are authorized from CITT decisions on questions of law only. Matters of construction or interpretation of the Tariff and its Schedule are questions of law which, due to the CITT's extensive expertise in tariff classification, can only be reviewed on a standard of reasonableness simpliciter (Minister of National Revenue (Customs and Excise) v. Schrader Automotive Inc. (1999), 240 N.R. 381 (F.C.A.) at para. 4; Sandvik Tammock Canada Ltd. et. al. v. Minister of Revenue (Customs and Excise), [2001] F.C.J. No. 1692 (C.A.) at para. 13).
>
> **25** A Court reviewing an interpretation of the Tariff on a reasonableness standard must defer when confronted with any reasoning that rationally supports the CITT's interpretation (Star Choice Television Network Inc. v. Canada (Customs and Revenue Agency), [2004] F.C.J. No. 674 (C.A.) at para. 7). A decision is unreasonable if a tribunal adopts an interpretation that the words of the Tariff cannot reasonably bear.

[16] Section 10 of *the Customs Tariff* sets out that the classification of imported goods under a Tariff item shall be determined in accordance with the *General Rules* and the *Canadian Rules.* As the CITT sets out at paragraph 10 of its decision, the *General Rules* are applied in a consecutive order. Rule 1 establishes that a classification is determined according to the terms of the headings

and any relevant Section or Chapter Notes. Section 11 of the Act then specifies that regard shall be had to the *Explanatory Notes* to the Harmonized Commodity Description and Coding System that the World Customs Organization publishes. As was stated in *Agri Pack, supra* at paragraph 41, Chapter Notes, headings and sections have the status of law.

[17] In this case, the parties agreed that the unfinished materials – the vulcanized rubber plaited with polypropylene - were classified under the section on textiles, under heading No. 56.04 as "rubber thread and cord, textile covered". The parties further agreed that manufacturing of the textile covered rubber cord by cutting it to length and adding hooks on each end changed the nature of the good into an article. With the addition of hooks, Innovak submits that the article became a rubber article under Section VII, Chapter 40 and heading No. 40.16 while the CBSA maintains that the good remained properly classified in Section XI as a "Textile or Textile Articles" and thus, the CITT's classification of the bungee cord in heading No. 56.09 was reasonable.

[18] Innovak has not demonstrated that the CITT's decision to classify the bungee cords as a textile, under heading No. 56.09 is unreasonable. Once it is accepted that the unfinished cords are properly classified as goods under heading 56.04, the only matter which remains to be decided is the heading under which they might fall when considered as finished articles. The heading of Chapter 56 deals with classes of goods, specifically, 1) wadding, felt and non-wovens; 2) special yarn ; 3) twine, cordage, rope and cables.

[19] Heading 56.09 (see para. 7 above) includes articles made from two of those three classes of goods and no one has suggested that the finished cords would fall under the third – wadding, felt and non-wovens. As a result, heading 56.09 on its face would include the finished bungee cords, whether they are considered as falling within one or the other of those groups, so long as they are "not elsewhere specified or included." Since the CITT was satisfied that the bungee cords were not so specified or included anywhere else, its conclusion is reasonable and does not call for this Court's intervention.

[20] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I agree
M. Nadon J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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