



HARMONIZED SYSTEM
COMMITTEE

-
31st Session
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O. Eng.

Brussels, 29 April 2003.

CLASSIFICATION OF USED WOODEN RAILWAY SLEEPERS

(NOTE FROM THE CANADIAN ADMINISTRATION)

(Item IX.6 on Agenda)

I. BACKGROUND

1. On 26 February, the Secretariat received a note from the Canadian Administration, requesting the matter at issue to be included on the agenda for the 31st Session of the HS Committee. The note, which points out the position of that administration in a dispute with the United States, is reproduced below. The Secretariat has numbered the paragraphs with a view to facilitating discussions.

II. NOTE FROM THE CANADIAN ADMINISTRATION

2. "I am writing to inform you of a dispute between the Canadian and US Administrations concerning the classification of used railway sleepers. While the two Contracting Parties are working together to see if an agreement can be reached, it may be necessary for the Harmonized System Committee to consider the classification of that product if a resolution cannot be found. I would appreciate, therefore, if this matter could be included on the agenda for the Committee's forthcoming 31st Session as it is of considerable importance to Canadian exporters of used railway sleepers.
3. The Canadian Administration's position is that the goods should be classified in heading 44.06 as that heading specifically names "railway or tramway sleepers (cross-ties) of wood." Conversely, the United States has ruled that these goods fall outside the scope of heading 44.06 because they are imported in a used condition. Instead, they have been classified in heading 44.07 as sawn lengths of wood (landscaping timber) of a thickness exceeding 6 mm.

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Description of Goods

4. The goods at issue are used railway sleepers (commonly known in **North America** as railroad ties) and measure 6" x 8" x 8' and 7" x 9" x 9'. The ties are creosote impregnated and have a number of holes at each end where the rail spikes and joiners have been removed. In some cases, the ties have damaged or split ends. They have been reclaimed from abandoned **Canadian** railroad tracks and exported to the **United States** for use in railroad track rehabilitation and landscaping applications.

Canadian Position

5. The used railroad ties at issue are clearly identifiable as railroad ties at the time they are presented to Customs. As can be seen from the description above, they are distinct products and recognized as "railway sleepers" in the industry. It is acknowledged that in some instances the ends of the ties may be split, but this does not alter their identity.
6. General Interpretative Rule 1 provides that, for legal purposes, classification under the Harmonized System (GIR) "**shall be according to the terms of the heading and any relative Section or Chapter Notes**". Heading 44.06 provides for "Railway or tramway sleepers (cross-ties) of wood". There is nothing in the text of the heading that limits the scope of the provision for railroad ties in that heading. No distinction is made between new and used railroad ties, neither is there any requirement that the ties be used in a specific application or comply with any country's standards. The railroad ties at issue have the shape, form and identity of railroad ties, and they have been used as railroad ties. There are no relevant Section or Chapter Notes. Accordingly, the railroad ties are classified in heading 44.06 by application of GIR 1.
7. The Explanatory Notes to heading 44.06 (page 807) also support classification under heading 44.06. They describe an identifiable product, "of a kind commonly used to support railway or tramway track". The railroad ties at issue fit that description in every respect — they are clearly of the kind (genre) used to support railway tracks and have the form, shape and identity of railroad ties and have been treated with creosote.
8. Even if heading 44.07 is accepted as an alternative classification option, the used railroad ties would be classified under heading 44.06 by the application of GIR 3 (a). Heading 44.06 provides a more specific description of the product.
9. In general, the Harmonized System does not distinguish between new and used goods. Thus, a used automobile is classified in the same heading as a new one. When the HS requires that used goods be classified separately from new goods, a separate provision is created for the used goods. For example, heading 40.12 provides specifically for retreaded or used pneumatic tires of rubber and heading 63.09 covers worn clothing. Thus, the railroad ties at issue cannot be precluded from classification under heading 44.06 simply because they are used goods.

10. It should be noted that used railroad ties are commonly used to upgrade **Canadian** and **US** railroads. Figures published for the year 2001 by the **US Rail Tie Association** (RTA) show significant usage of used wooden railroad ties (cross-ties) on **US** main and secondary rail lines, as follows :
- (a) Class 1 Railroads (main lines). 101,948 replacement ties were laid on existing tracks, representing approximately 1% of all replacement wooden railroad ties.
 - (b) Class 1 Railroads (main lines). 48,381 used ties were laid on new track, representing approximately 12% of the total number laid.
 - (c) Short-Line and Regional Railroads. 410,300 relays (6" x 7" smaller ties), representing approximately 22% of the total laid on these smaller gauge tracks.
11. While national industry standards may be a useful guideline in the classification process at the domestic level, they do not dictate classification at the HS heading level. A product cannot be precluded from classification under a given heading merely on the grounds that it does not meet one Contracting Party's national specifications. Such a practice would lead to inconsistency in the application of the Harmonized System, because industry standards may vary from country to country.

US Position

12. Heading 44.06 is an end-use provision even though it has no specifically worded "use" criteria in its legal text. The Explanatory Notes support this position by the use of the phrase "of the kind commonly used to support railway or tramway track."
13. Through wear and tear the used **Canadian** railroad ties have lost their identity at the time they are presented for classification purposes. Consequently, they fall to be classified as lengths of cross-sawn wood in heading 44.07, or in heading 44.21 if further worked.
14. **US** Additional General Interpretative Rule 1(a) has been applied to determine that the used railroad ties fall outside the class or kind of wooden products considered by the **US** Administration to be principally used as railroad ties. Therefore, the ties are excluded from heading 44.06 and fall within the general provisions of heading 44.07.
15. As presented in the **United States**, the railroad ties at issue do not meet **US** safety standards and physical specifications set by the **American Railway Engineering and Maintenance-of-Way Association (AREMA)**. This criterion has been applied by the **US** Administration to reiterate its claim that the goods are not identifiable as a product of heading 44.06.
16. As can be seen from the foregoing, **Canada** and the **United States** disagree on two fundamental classification issues. **Canada's** contention is that the legal text of heading 44.06 should not be interpreted as imposing an end-use condition on the goods after they are imported. Classification must be determined according to the nature of the goods at the time they are imported. Secondly, the **Canadian** Administration does not believe that the expression "**of a kind commonly used to support railway or tramway track**" in the Explanatory Note to heading 44.06 denotes end-use. Rather, we believe that phrase is descriptive in nature and does not require that the goods be used in a particular application. It should be noted that this expression is used throughout the Nomenclature.

17. The **US** Administration position is based on additional **US** Rule of Interpretation 1 (a) which states that **“a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States which the goods of a given class or kind are used at, or immediately prior to, the date of their importation”**. Thus, since according to the **US** Administration, the railroad ties are used principally as landscaping timbers, they cannot be classified in heading 44.06.
18. The **Canadian** Administration does not believe that a domestic classification rule can be employed at the heading or subheading levels to establish classification based on the “principal use” of the goods. General Interpretative Rules 1 to 6, and the legal notes, are the basis for classification in the Harmonized System.
19. The second area of disagreement rests with the condition of the used **Canadian** railroad ties at the time they are presented to **US** Customs for classification purposes. From the information provided above, it is clear that these goods are clearly identifiable as railroad ties for the purposes of heading 44.06. They are not simply cross-sawn lengths of wood. The railroad ties are of a kind used to support railway or tramway track and are classified in heading 44.06 even if they may be used in landscaping application. Classification is determined at the time of importation. Accordingly, the use to which the goods are put subsequent to importation is not a factor in determining classification, unless the text of the heading so requires.”

III. SECRETARIAT COMMENTS

20. The Secretariat understands that the **Canadian** and **US** Administrations give a different interpretation to the wording of heading 44.06, and that both administrations are currently working on a solution to the problem at issue. That being the case and taking into account the provisions of the dispute settlement process as envisaged in Article 10.1 of the HS Convention, the Secretariat considers that this is not the right time for the Committee to discuss the classification of the commodity at issue (i.e., used railway sleepers of wood). It suggests inviting the parties concerned to inform the Committee about the outcome of the dispute, if settled. If not settled, the Secretariat would like to invite the parties involved to refer the issue to the Committee, in conformity with the provisions of Article 10.2 of the Convention.
21. The Secretariat, therefore, proposes to take note of the submission presented by the **Canadian** Administration, pending the outcome of the dispute settlement process.
22. Having said this, the Secretariat has noted a reference to “**US** Additional General Interpretative Rule 1 (a)”, which was apparently applied by the **United States** in the case at issue, resulting in a classification different from that suggested by **Canada**. The **US** Administration may wish to provide information on this provision, as it might relate to the uniform application of the Harmonized System.

IV. CONCLUSION

23. The Committee is invited to take note of the Canadian note as set out in paragraphs 2 to 19 above, taking into account the comments of the Secretariat in paragraphs 20 to 22 above.
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