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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

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JARDINE DAVIES, INC.,
Petitioner,

- versus - C.T.A. CASE NO. 2634

THE COMMISSIONER OF CUSTOMS,
Respondent.

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10/16/80

D E C I S I O N

Involved herein are Manila Protests Nos. 8902 and 8903 filed by Theo H. Davies & Co., Far East, Ltd. (now Jardine Davies, Inc.) against the alleged over-assessment and collection of customs duty and advance sales tax by the Collector of Customs of Manila on two separate importations of refractory materials covered under Entry Nos. 28674 and 39634, both series of 1973. Respondent Commissioner of Customs having affirmed in toto the decision of the Collector of Customs finding correct the imposition of these levies under Tariff Heading 38.19 at 50% ad valorem of the Tariff and Customs Code, and dismissing the related claims for refund of alleged overpaid customs duty and advance sales tax, petitioner Jardine Davies, Inc. appealed to this Court.

There is no dispute about the facts of the case, respondent having admitted all the allegations of facts in the Petition for Refund (Review) filed by petitioner with this Court, except as to the correct tariff classification of the two separate shipments of refractory materials, and having submitted this case for decision based on the records and pleadings without controverting the evidence, oral and documentary, presented by petitioner, and without filing his memorandum although he was given ample time to do so.

As borne out by the records, petitioner Jardine Davies, Inc. (formerly Theo H. Davies & Co., Far East, Ltd.) is a corporation organized and existing under the laws of the Philippines, with principal office and place of business at the Jardine Davies Building, 222 Buendia Avenue, Makati, Metro Manila. It was, and still is, an importer of refractory materials supplied by Morgan Refractories Ltd. in Liverpool, England. On two separate occasions, petitioner imported refractory materials abroad the SS "Puerto Princesa" and the SS "Ebani", which arrived at the Port of Manila on May 8, 1973 and June 22, 1973, and covered by Entry Nos. 28674 and 39634, both series of 1973. Alleging over-assessment and payment of customs duty and advance sales tax by the Collector of Customs of Manila on these two separate shipments, petitioner filed Manila Protest No. 8902 and Manila Protest No. 8903.

The particulars of the shipments involved in

Manila Protests Nos. 8902 and 8903, as stated in the decision of the Collector of Customs of Manila dated April 8, 1974, are as follows: (pp. 37-38, Customs records.)

Manila Protest No. 8902

That a shipment, consisting of 182 packages of refractory constructional goods marked "T.H.D. 869 E. Makati, Rizal", consigned to the herein protestant arrived at this Port on May 8, 1973 from Liverpool aboard the SS "Puerto Princesa", Reg. No.777, under Bill of Lading No. M-51; that the said shipment was declared under Entry No. 28674, Series of 1973, under Tariff Heading 69.02 at 10% ad valorem; however, the customs appraiser concerned appraised the said shipment under Tariff Heading 38.19-B at 50% ad valorem; and because of this the amount of ₱54,587.00, representing additional duty, tax and other charges, was paid as evidenced by Central Bank O.R. No. 205459 dated June 19, 1973. This assessment was contested by the protestant claiming that the duty and tax should have been based on Tariff Paragraph 69.02 at 10% ad valorem and the corresponding Protest was filed for the refund of the sum of FIFTY-FOUR THOUSAND FIVE HUNDRED AND EIGHTY-SEVEN (₱54,587.00) PESOS; and

Manila Protest No. 8903

That a shipment, consisting of 126 packages of refractory constructional goods marked "T.H.D. 870-E, Makati, Rizal", consigned to the herein protestant arrived at this Port on June 16, 1973 from Liverpool aboard the SS "Ebani", Reg. No. 1027, under Bill of Lading No. M-138; that the said shipment was declared under Entry No.39634, Series of 1973, under Tariff Heading 69.02 at 10% ad valorem; however, the appraiser concerned appraised the said shipment under Tariff Heading 38.19-B at 50% ad valorem; and because of this, the amount of ₱19,967.00, representing additional duty, tax and other charges, was paid as evidenced by Central Bank O.R. No. 205493 dated June 22, 1973. This assessment was contested by the protestant claiming that the duty and tax should have been based on Tariff Paragraph 69.02 at 10% ad valorem and the corresponding Protest was filed for the refund of the sum of NINETEEN THOUSAND NINE HUNDRED AND SIXTY-SEVEN (₱19,967.00) PESOS.

The parties are not in dispute on the computation of the customs duty and advance sales tax paid by, or amount refundable to, petitioner as the case maybe. As itemized by petitioner, which is not disputed by respondent, the following is the computation of the amounts of customs duty and advance sales tax being claimed by petitioner as refundable in case the shipments in question should be classified under Tariff Heading 69.02 at 10% ad valorem as claimed by it instead of Tariff Heading 38.19-B at 50% ad valorem as applied by respondent:

126 pkgs. Refractory Materials ex S/S EBANI, B/L No. M138, Reg. #1027 ENTRY NO. 39634 (1973) - O/R No. 205493 - ₱29,725.00

	10%	50%	DIFFERENCE
CUSTOMS DUTY	₱4,590.00	₱22,951.00	₱18,361.00
ADVANCE SALES TAX	4,828.00	6,434.00	1,606.00
	₱9,418.00	₱29,385.00	₱19,967.00

182 pkgs. Refractory Materials ex S/S PUERTO PRINCESA, B/L No. M51, Reg. #773 ENTRY NO. 38674 (1973) - O/R No. 205459C - ₱83,346.00

	10%	50%	DIFFERENCE
CUSTOMS DUTY	₱12,549.00	₱62,744.00	₱50,195.00
ADVANCE SALES TAX	15,172.00	19,564.00	4,392.00
	₱27,721.00	₱82,308.00	₱54,587.00

The lone question tendered for resolution is the correct tariff classification of the imported refractory materials; that is, whether they should fall under Tariff Heading 69.02 at 10% ad valorem as contended by petitioner or under Tariff Heading 38.19-B at 50% ad valorem as applied by respondent, both of the Tariff and Customs Code.

In the resolution of the issue posed by this appeal, one important aspect of the case to consider is that under TCC No. 2932 dated September 22, 1972, the Tariff Commission has already ruled that (1) Tri-Mor Castable Refractories and (2) Plastic or Mouldable Refractories used for furnace construction and maintenance in sugar mills, cement and other industries are classified in Tariff Heading 68.07 with rate of duty at 15% (now 20%) ad valorem. (Exh. "R" - Certified true copy of Tariff Commission Classification No. 2932 classifying Tri-Mor Castable Refractories and Plastic or Mouldable Refractories under Tariff Heading 68.07.) That the refractory materials involved in this case are identical to, or identified as, Tri-Mor Castable

Refractories and Plastic or Mouldable Refractories referred in TCC No. 2932 dated September 22, 1972 of the Tariff Commission classified under Tariff Heading 68.07 at 20% ad valorem is asserted by petitioner itself under paragraph 6 of its Petition for Refund (Review) filed in this Court. To quote:

> 6. That this contention is supported, among other evidences, by no less than the Tariff Commission, the Governmental Agency to determine proper tariff classification, who declared in its tariff ruling No. 2932 of September 22, 1972, that commodities like those involved in the present petition which had been identified as "Tri-Mor castable refractories" and "plastic mouldable refractories" are classified under Heading 68.07 at 20% ad valorem. A copy of Tariff Ruling No. 2932 dated September 22, 1972 is attached hereto as Annex "A" and made an integral part of this petition.

Section 505 of the Tariff and Customs Code makes it the duty of the Tariff Commission to investigate, among others:

> "SEC. 505. Functions of the Commission. - The Commission shall investigate -
>
> xxx xxx xxx
>
> "(d) all questions relative to the arrangement of schedules and classification of articles in the several schedules of the tariff law;
>
> xxx xxx xxx
>
> (i) the nature and composition of and the classification of articles according to tariff commodity classification and heading number for customs revenue and other related

purposes which shall be furnished to NEDA, Board of Investments, Central Bank of the Philippines and Secretary (now Minister) of Finance."

And in the exercise of its functions and powers, the Tariff Commission, under Section 508 of the Tariff and Customs Code, is authorized:

> SEC. 508. Access to Documents and Assistance to the Commission. -The Commission or its duly authorized representative shall have access to any document, paper or record, pertinent to the subject matter under investigation, in the possession of any person, firm, co-partnership, corporation or association engaged in the production, importation or distribution of any article under investigation, and shall have power to summon witnesses, take testimony, administer oaths, and to issue subpoena duces tecum requiring the production of books, papers or documents relating to the matter under investigation. The Commission may also request the views, recommendations and/or assistance of any government office, agency or instrumentality, and such office, agency or instrumentality shall cooperate fully with the Commission.

Since the ruling contained in TCC No. 2932 dated September 22, 1972 was issued by the official instrumentality of the Government empowered to investigate all questions relative to the arrangement of schedules and classification of articles in the several schedules and chapters of the tariff law; as well as the nature and composition of and the classification of articles according to tariff commodity classification and heading number for customs revenue and other related purposes; and is authorized to have access to any document or record pertinent to the subject matter under investigation in the possession of any person, firm, corporation or association engaged in the production, importation or distribution of any article under investigation, with powers to summon witnesses, take testimony and to issue subpoena duces tecum requiring the production of books and documents; and also to request the views, recommendations and assistance of any government office or agency, the ruling commands much respect and weight, and it lays down a sound rule on the matter. (Tan vs. Municipality of Pagbilao, Quezon, L-14264, April 30, 1963, 7 SCRA 887; Sarmiento, et al. vs. Nolasco, et al., L-38565, November 15, 1974, 61 SCRA 81; Commissioner of Internal Revenue vs. P.J. Kiener Company, Ltd., et al., L-24754, July 18, 1975, 65 SCRA 142.) Because of its decisive effects on the present case, we will quote at length from the ruling.

> This concerns the tariff classification of "(1) Tri-Mor "Castable Refractories and (2) Plastic or Mouldable Refractories used for furnace construction and maintenance in sugar mills, cement and other industries.
>
> A study of the brochure submitted showed that castable refractories consist of granular refractory aggregate together with a suitable hydraulic binding agent while plastic refractories or "mouldables" are refractory materials containing a clay type binder. Castables are supplied in a granular dry blend

form while plastic refractories are in moist unformed mixes ready for moulding into whatever profile is required. These products are also called "monolithic refractories" because they are jointless when installed and require no mortar or cement to bind them together.

It will be noted that both castable and plastic refractories are made from the common materials used in firebrick and other refractory products, namely: fireclay, silica, magnesite, dolomite, etc., all of which are mineral products falling in Chapter 25 of the Code.

Heading 68.07 of the Tariff Code provides for, among others, compounded heat resisting or heat or sound insulating mineral substances or articles thereof, not fired, other than substances and articles with a basis of asbestos. The pertinent Brussels Explanatory Notes provide that the heading also covers compounded heat-resisting or heat or sound insulating mixtures of mineral materials imported in bulk provided they contain no asbestos (apart from certain specified tolerances).

In view of the foregoing, subject articles are classified in heading 68.07 with rate of duty at 15% ad valorem.

The evidence adduced by petitioner, both oral and documentary, which werenever questioned or controverted by respondent, definitely and unequivocally show that the refractory materials imported by it fall under Tariff Heading 68.07 at 20% _ad valorem_. (Testimony of Fernando Tecson, Jr., t.s.n., hearing on December 9, 1977; Exh. "Q" - Brochure showing the properties of Tri-Mor Castable Refractories which demonstrate the qualities of the refractory materials imported by petitioner as falling under Tariff Heading

68.07 with rate of duty at 20% *ad valorem* covered under TCC No. 2932 of the Tariff Commission; Exh. "S" - Mimeographed Brochure on Morganite Refractories showing the properties, elements and uses of the refractory materials imported by petitioner which prove that they fall under Tariff Heading 68.07 at 20% *ad valorem*.) And while respondent states under paragraph 2 of his answer that "the Bureau of Customs is not strictly bound by the *opinions* of the Tariff Commission on classification of merchandise" (underlining supplied), the records of this case show that in subsequent importations of petitioner of the same refractory materials, the said Bureau had classified and imposed the *ad valorem* duty of 20% under Tariff Heading 68.07, in accordance with the above ruling of the Tariff Commission. (Exh. "T" - Import Entry and Internal Revenue Declaration for Jardine Davies, Inc., S/S "Kurama Maru", July 23, 1977; Exhs. "T-1" & "T-2", Export Packing Specifications; Exh. "U" - Import Entry and Internal Revenue Declaration for Jardine Davies, Inc., S/S "City of Elinburg", May 3, 1977; Exh. "U-1" - Export Packing Specification; Testimony of Fernando Tecson, Jr., t.s.n., hearing on December 7, 1977.) There being full adherence to Tariff Commission Circular No. 2939 dated September 22, 1972 by the Bureau of Customs, there should be no uneven application of the ruling contained therein by treating the shipments in question in a different level for tariff classification purposes.

We can press further the reason why the shipments of refractory materials involved in this case should be classified under Tariff Heading 68.07 at 20% ad valorem by considering the purpose for which or to which these imported articles are adapted or applied.

The general purpose for which an article is used must govern the assessment of duty; any other rule would lead to confusion and injustice. It is the general use to which articles are chiefly adapted and for which they are chiefly used that determines their character within the meaning of the tariff laws. It is the predominating use to which articles are generally applied or used that determines their character for the purpose of fixing the duty, and not the specific or special use which any particular importer may make of the articles imported. (La Compaña General de Tabacos de Filipinas vs. United States, 8 Phil. 438; citing Hartranft vs. Langfeld, 125 U.S. 128; See also, Chester Industries, Inc. vs. Commissioner of Customs, CTA Case No. 2560, May 9, 1974; Domingo S. Jose, Inc. vs. Commissioner of Customs, CTA Case No. 2568, May 6, 1977; National

Dental Supply, Inc. vs. Commissioner of Customs, CTA Case No. 2757, May 16, 1979; Campos Rueda Corporation vs. Commissioner of Customs, CTA Case No. 2829, July 28, 1980.)

The uncontroverted evidence adduced by petitioner, both oral and documentary, definitely established the fact that the general purpose or predominating use to which the imported refractory materials in question are applied or employed, and for which petitioner imported them, is for furnace construction and maintenance in sugar mills, cement and other industries where heat must be controlled (t.s.n., pp. 20-21, hearing on December 9, 1977); or where heat is contained (t.s.n., pp. 6-7, hearing on December 9, 1977). These refractory materials have the properties, elements and use of articles falling within Tariff Heading No. 68.07 at 20% <u>ad valorem</u>. (Exh. "S" - Mimeographed Brochure on Morganite Refractories.) Since Tariff Heading 68.07, as expressly provided therein, includes, among others, "mixtures and articles of heat-insulating, sound-insulating, or sound-absorbing mineral materials", other than articles of asphalt under Tariff Heading 68.08, and refractories used for furnace construction and maintenance in sugar mills, cement and other industries fall under Tariff Heading 68.07 (Exh. "R" -

Tariff Commission Classification No. 2932 dated September 22, 1972, *supra*), the two shipments of refractory materials should logically be classified under Tariff Heading 68.07 at 20% *ad valorem*. Any other tariff classification would lead to confusion and injustice.

We find no merit therefore in the allegation of respondent in his answer as affirmative and special defense that the importations in question fall under Tariff Heading 38.19 at 50% *ad valorem* of the Tariff and Customs Code. Aside from the fact that absolutely no evidence was presented by him to prove his contention, respondent submitted this case on the basis of the pleadings and records, and the latter definitely and unequivocally show that the two shipments of refractory materials fall under Tariff Heading 68.07 at 20% *ad valorem*. As a matter of fact, as discussed above, on subsequent importations of petitioner of the same refractory materials, respondent classified the said articles under Tariff Heading 68.07 with rate of duty at 20% *ad valorem* in accordance with TCC No. 2932 dated September 22, 1972 of the Tariff Commission, which apparently indicates acquiescence if not concurrence thereto. The same is true with respect to the position taken by petitioner as to the correct tariff classification of its importations. While contending that its two shipments of refractory materials involved in this case are classifiable under Tariff Heading 69.02 at 10% ad valorem, petitioner's evidence, both oral and documentary, clearly and unmistakably prove the fact that they fall under Tariff Heading 68.07 at 20% ad valorem.

We note however that with regard to the claim for refund of advance sales tax in the total amount of ₱5,998.00, the same can not be passed upon by the Court in view of the fact that nothing in the records shows that petitioner had filed its written claim for refund thereof with the Commissioner of Internal Revenue and that the latter was made a party to this case. Without satisfying these jurisdictional requirements, which in the instant case are lacking, the same is fatal to the claim of petitioner for the refund of the overpaid advance sales tax. (Wise & Company vs. Commissioner of Customs, CTA Case No. 2717, December 29, 1977, see also resolution dated January 15, 1979, certiorari denied in G.R. NO. L-51242, March 7, 1980; National Dental Supply Incorporated vs. Commissioner of Customs, CTA Case No. 2826, June 30, 1980; Campos Rueda Corporation vs. Commissioner of Customs, CTA Case No. 2829, July 28, 1980.) Accordingly, only the overpaid customs duty in the toal amount of ₱51,417.00, computed as follows, is refundable to petitioner Jardine Davies, Inc.:

	Customs Duty 20%	Customs Duty 50%	Difference
Entry No. 38674 (1973) 182 packages Refractory Materials S/S "Puerto Princesa" May 8, 1973	₱25,098	₱62,744	₱37,646
Entry No. 39634 (1973) 126 packages Refractory Materials S/S "Ebani" June 22, 1973	₱ 9,180	₱22,951	₱13,771
Total overpaid customs duties			₱51,417

WHEREFORE, the decision appealed from is modified. Respondent Commissioner of Customs is hereby ordered to refund to petitioner the sum of ₱51,417.00. Without pronouncement as to costs.

SO ORDERED.

Quezon City, Metro Manila, October 16, 1980.

AMANTE FILLER
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge