



Ottawa, Friday, September 15, 1989

Appeal No. 3018

IN THE MATTER OF an application heard April 27, 1989,
pursuant to section 67 of the *Customs Act*, R.S.C. 1986,
c. 1, as amended;

AND IN THE MATTER OF a decision of the Deputy
Minister of National Revenue dated May 12, 1988, with
respect to a Request for a Redetermination filed pursuant to
section 63 of the Act.

BETWEEN

M & S X-RAY SERVICES LIMITED

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

AND

CANADIAN CHIROPRACTIC ASSOCIATION

Intervenant

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal declares that the model 440 Zenith Thompson Pneumatic Terminal Point (chiropractic) table should be classified under tariff item 47600-1 as "... diagnostic articles: instruments ...," rather than under tariff item 51901-5 as "House, office, cabinet or store furniture.... In chief part by value of metal, n.o.p.," as determined by the respondent.

Kathleen Macmillan

Kathleen Macmillan
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

W. Roy Hines

W. Roy Hines
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. 3018

M & S X-RAY SERVICES LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

and

CANADIAN CHIROPRACTIC ASSOCIATION

Intervenant

Customs Tariff - Tariff classification - Whether model 440 Zenith Thompson Pneumatic Terminal Point tables should be classified under tariff item 47600-1 as "... diagnostic articles: instruments ...," rather than under tariff item 51901-5 as "House, office, cabinet or store furniture.... In chief part by value of metal, n.o.p."

DECISION: *The appeal is allowed. The model 440 Zenith Thompson Pneumatic Terminal Point table performs a valuable function in the diagnostic process, in that it provides the proper conditions under which an accurate diagnosis can be made. The features which are unique to this table minimize the distortion to the skeletal configuration which would otherwise occur on a table without these features. The Tribunal also finds that the table was designed to perform, and does perform, a significant operational role in the diagnostic process. While a major or primary function of the table may be treatment, this does not preclude its classification as a diagnostic instrument. There is no separate tariff item for treatment equipment, and the chiropractic table cannot be fairly described as furniture when tariff item 47600-1 more specifically describes the goods.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: April 27, 1989
Date of Decision: September 15, 1989*

*Panel Members: Kathleen Macmillan, Presiding Member
Sidney A. Fraleigh, Member
W. Roy Hines, Member*

Counsel for the Tribunal: Donna J. Mousley

Clerk of the Tribunal: Lillian Pharand

*Appearances: John R. Peillard, for the appellant
Jean Fitzgerald, for the respondent*

Cases Cited:

The Trimont Corporation Ltd. v. The Deputy Minister of National Revenue for Customs and Excise (1961), 1957-1962 T.B.R. 244; *Metropolitan Bio-Medical Laboratories v. The Deputy Minister for National Revenue for Customs and Excise* (1977), 6 T.B.R. 445; *Abbott Laboratories, Limited v. The Deputy Minister of National Revenue for Customs and Excise* (1977) 9 T.B.R. 334; *Whiteco v. The Deputy Minister of National Revenue for Customs and Excise* (1986) 11 T.B.R. 94.

Statutes Cited:

Customs Act, R.S.C. 1970, c. C-40, s. 47; Customs Tariff, R.S.C. 1970, c. C-41, Tariff items 47600-1, 42700-1 and 51901-5.

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TRIBUNAL: KATHLEEN MACMILLAN, Presiding Member
SIDNEY A. FRALEIGH, Member
W. ROY HINES, Member

REASONS FOR DECISION

SUMMARY

At issue is the tariff classification of a chiropractic table, model 440 Zenith Thompson Pneumatic Terminal Point, made by Williams Manufacturing and imported from the United States. The appellant claims that the table should be classified under tariff item 47600-1 as "diagnostic articles: instruments ...," rather than under tariff item 51901-5 as, "House, office, cabinet or store furniture.... In chief part by value of metal, n.o.p.," as determined by the respondent.

The appeal is allowed. While the model 440 Thompson chiropractic table is not able to distinguish one disease from another, or determine the nature of a disease, it performs a valuable function in the diagnostic process, in that it provides the proper conditions under which an accurate diagnosis can be made. The features which are unique to this table minimize the distortion to the skeletal configuration which would otherwise occur on a table without these features. The Tribunal also finds that the table performs a significant operational role in the diagnostic process. While a major or primary function of the table may be treatment, this does not preclude its classification as a diagnostic instrument. There is no separate tariff item for treatment equipment, and the chiropractic table cannot be fairly described as furniture when tariff item 47600-1 more specifically describes the goods.

THE LEGISLATION

Customs Tariff

47600-1 *X-ray apparatus and X-ray film; microscopes, illuminating devices and stands for use therewith; prepared surgical sutures; the following surgical, dental, veterinary and diagnostic articles: instruments; sterilizers; cobalt-therapy*

units; anaesthesia, surgical suction and oxygenadministering apparatus including motive power and wall outlets but not piping systems. Parts of all the foregoing; electric light lamps designed for use with all the foregoing; portable cases and containers for all the foregoing

42700-1 machines, n.o.p., and accessories, attachments, control equipment and tools for use therewith; parts of the foregoing:

Other than the following

51901-5 house, office, cabinet or store furniture of wood, iron or other material, and parts thereof, not to include forgings, castings, and stampings of metal, in the rough:

In chief part by value of metal, n.o.p.

THE FACTS

This appeal concerns a model 440 Zenith Thompson Pneumatic Terminal Point (chiropractic) table (model 440 Thompson table) which was imported to Canada at Guelph, Ontario, from the United States on October 9, 1986. This particular model of chiropractic table was created by J. Clay Thompson, D.C., after whom the table is named, and is manufactured by Williams Manufacturing of Elgin, Illinois.

The chiropractic table at issue in this appeal has the following characteristics. The surface area is divided into separate and independent, hard, foam-filled cushions, representing the cervical, dorsal, lumbar, and pelvic areas. There are a two-piece cushioned headpiece, which is adjustable, and an ankle support. One of the unique features of the table is what is referred to in the marketing brochure as its "hylo" capacity, which allows the patient to mount from a standing position and be lowered automatically to a horizontal position.

The first witness for the appellant was J. Clay Thompson, creator of the Thompson table. Dr. Thompson has developed methods of chiropractic diagnosis and treatment called the "Thompson Leg Check" and the "Thompson Terminal Point Technique." The Tribunal was shown a videotape which demonstrated these chiropractic procedures, and Dr. Thompson also presented direct evidence as to the application of the model 440 Thompson table.

The Thompson Leg Check is a technique for determining if a spinal misalignment exists and where such a problem has arisen. According to Dr. Thompson, the leg check technique is effective in diagnosing 80 to 85 percent of conditions requiring chiropractic assistance. The lengths of the legs are compared when the patient is lying on the table in a horizontal position,

with legs bent at a 45 degree angle and with head turned in both directions. If the legs consistently balance, the spinal column is determined to be free from difficulty. If one leg is longer than the other, corrective techniques are administered, the nature of which depend on the patient's position when the leg imbalance was identified.

Dr. Thompson's Terminal Point Technique is the method of treatment he developed using the leg check diagnosis and the terminal point table. First, the body is positioned critically on the table. Using the hylo table, the prone position of the body emulates the body's standing position. Second, the tension mechanism for each of the table segments is adjusted to take into account the body weight of the patient. Next, a series of leg checks are done in order to locate the area of spinal misalignment. When the problem is located, the cushion supporting the area is raised and the chiropractor makes his adjustive thrust. The legs are then re-checked to determine the results of the adjustment and whether further treatment is required.

The main feature which distinguishes the model 440 Thompson table is the mechanism which gives it the name "Terminal Point." Each of the four cushion areas is equipped with a mechanism which allows that area of the body to be "weighed." The practitioner then adds an additional two or three pounds in order that the chiropractor's thrust may be accomplished with the minimal amount of force relative to the body weight of the patient. The cushion can then be raised so that only the specific area of the spine represented by the cushion is affected by the adjustment or "thrust." When the chiropractor makes his adjustment, the drop mechanism allows the cushion to fall half an inch to its "terminal point."

Questioned about the value of the table to the diagnostic process, Dr. Thompson made the following points. The fact that a patient is lowered to a horizontal position from a standing position, rather than having to climb onto the table and be physically positioned by a chiropractor, is important to the diagnostic process. The misalignment of a patient's spine occurs when the patient is in an upright position. Tables which must be climbed onto allow this normal positioning of the spine to be distorted. The second feature noted by Dr. Thompson was the ability of the independent two-part headpiece to adjust to the proper level and angle. He explained that the cervical area controls the relaxation of the patient and therefore, the head, neck and shoulders must be positioned to minimize tension in the body. On tables which do not have a divided headpiece, the head must rest to the side or be tilted at an angle. Such positions distort the results of the leg checks and do not allow for the maximum relaxation of the body.

Dr. Thompson also explained an advantage of the model 440 Thompson table in the treatment function. The table effectively isolates the thrust to the area where it is intended by raising the area where the spine is in difficulty. When a patient is lying on a flat table, on the other hand, the spine is in suspension. Any adjustments rendered cannot be focussed on problem areas with the same degree of precision, and thrusts can also force articulations of the spine together.

Counsel for the appellant entered into evidence an information brochure which summarized the advantages of the model 440 Thompson table over other types of chiropractic tables in the following way:

The greatest single difference between other chiropractic adjusting tables and the Thompson Terminal Point Table is that each cushion will singly, or in combination, drop one-half inch. The spinal adjustment is given when the cushion reaches the bottom of its drop (the terminal point of the drop.) The patient's body is unable to react fast enough to resist the adjustive thrust. Since there is no muscular resistance, very little force is used. The adjustment is more effective, and the pain and strain to both the patient and doctor is eliminated....

Dr. Thompson was questioned as to whether he could achieve the same results in his diagnosis and treatment using a regular, non-mechanical table or even the floor. He replied that in his opinion, whereas this might be possible, he would not consider it, as there would be no way of controlling the adjustive thrust or of determining its effect.

Mr. Dale McCooley, a Doctor of Chiropractic who has been practising in the City of Ottawa for 25 years, emphasized that diagnosis and treatment are very much an iterative process. The skeletal or spinal condition of the patient is analysed and treatment delivered accordingly. Then the diagnosis is carried out again to determine the effect of the treatment and whether further treatment is required. In the opinion of Dr. McCooley, it is vital to an accurate diagnosis that the patient be positioned correctly on the table. When asked by respondent's counsel if it would be possible to use a conventional table for the diagnostic element of the process and then move the patient to Dr. Thompson's table for the treatment aspect, he replied that it would not be. In Dr. McCooley's opinion, it would be impossible to accurately carry out the five categories of leg checks outlined by Dr. Thompson without the proper positioning of the patient which the table allows.

THE ISSUES

The appellant argues that the particular model of chiropractic table at issue is properly classified as a diagnostic instrument considering the application of the table by the chiropractic community, the jurisprudence and the ordinary meaning of the words in the tariff item. In the alternative, the appellant asserts that the chiropractic tables are better described as "machines, n.o.p., ..." under tariff item 42700-1, than as office furniture, and that they meet the definition of "machine" adopted by the Tariff Board in the case of *The Trimont Corporation Ltd. v. The Deputy Minister of National Revenue for Customs and Excise (1961), 1957-1962, 2 T.B.R. 244.*

The respondent, on the other hand, states that the chiropractic tables are not "diagnostic instruments" as they do not contribute specifically to the diagnostic process by providing or evaluating information. If the tables do perform a diagnostic function, this function is secondary to the main function of the table which is treatment of the patient. As the goods must be classified according to their primary function, they cannot be classified as "diagnostic instruments." Furthermore, the tables are not machines and thus cannot be classified under tariff item 42700-1. Rather, argues counsel, they are mechanical furniture as they could still perform their function without their mechanical features.

DECISION

It is immediately apparent that the chiropractic tables at issue do not fit easily into classic notions of what is considered "furniture" or "diagnostic instruments." While the tariff classifications for these items are descriptive rather than use oriented, because of the unique character of the goods, it is necessary to consider various criteria in order to best describe and classify them. To this end, counsel for both parties proposed a number of tests which have developed through the jurisprudence on tariff item 47600-1 for classifying "diagnostic instruments".

The case of *Metropolitan Bio-Medical Laboratories v. The Deputy Minister of National Revenue for Customs and Excise (1977)*, 6 T.B.R. 445, decided by the Tariff Board and referred to by both parties, concerns the classification of a computer system capable of analysing medical and statistical information relating to a patient. The Tariff Board heard expert medical testimony and referred to several dictionaries before arriving at the following definition, at page 457:

It is noteworthy that all the foregoing define diagnostic as of or pertaining to diagnosis as a first meaning, and of value to, assisting or subserving diagnosis as a second. Thus an instrument which is of value to or aids in diagnosis can be said to be a diagnostic instrument.

In concluding that the computer made a significant contribution to the diagnostic process and was therefore "well within the category of goods that are properly described as diagnostic instruments," the Tariff Board further remarked:

It was brought out in the evidence that the Uni-Lab II system itself performs no laboratory tests. Neither does it carry out a diagnosis in the sense that it can distinguish one disease from another, or determine the nature of a disease. This is solely the work of the physician. What it does in the diagnostic laboratory is collect and record the results of in-line testing equipment in a speedy and efficient way. In short, it produces test results on a scale and at a speed which would not be possible by manual methods. By so doing both parties agreed, it contributes significantly to patient care, an important contribution where speed of diagnosis is of the essence.

While the model 440 Thompson chiropractic table, like the Uni-lab II, is not able to "distinguish one disease from another, or determine the nature of a disease," it performs a function which is important to the diagnostic process. That is, it provides the proper conditions under which an accurate diagnosis can be made. The features, which are unique to this table -its ability to lower a patient from a standing to a prone position and to position the head properly - minimize the distortion of the skeletal configuration which would otherwise occur if a patient were compelled to crawl onto the table and rest his or her head to the side. The Tribunal finds that the Thompson table meets the test set out in the *Metropolitan Bio-Medical Laboratories* case as it performs a valuable function which aids in the diagnostic process.

Both counsel also refer to the decision in *Abbott Laboratories, Limited v. The Deputy Minister of National Revenue (1977) 9 T.B.R. 334*, at page 340, where the Tariff Board stated:

The words "diagnostic articles: instruments" in tariff item 47600-1 are clearly intended to refer to things in the nature of a device or apparatus constructed to a particular design, size and shape and having a particular operational role, as were the goods in the Bio-Medical Laboratories appeal.

Counsel for the appellant argues, on the basis of this case, that goods must be designed to fulfil a diagnostic function in order to be classified under tariff item 47600-1. Counsel for the respondent emphasizes that such goods must have a "particular operational role" in the diagnostic process in the sense that they provide or analyse information.

The Tribunal does not accept that operational role must be interpreted restrictively to require the provision or analysis of information. Based on the evidence presented, the Tribunal is of the opinion that the model 440 Thompson table improves the quality, and possibly the accessibility, of information available to the chiropractor, thus contributing to a more accurate diagnosis. The Tribunal also notes that many items considered to be diagnostic instruments by the general public or members of the trade do not analyse information. A stethoscope is an example. The fact that the sole responsibility for analysis rests with the medical practitioner should not preclude an article from being classified as a diagnostic instrument.

The Tribunal considers the goods at issue in this case to have an operational role or function in diagnosis. The table is physically present during, and prior to, diagnosis. Adjustments are made to the table and its "hylo" capability is activated in order to prepare a patient for diagnosis. The fact that the table's features do not come into play during the leg check process does not preclude it from having a function or role in diagnosis. The Tribunal sees no reason to restrict the interpretation of diagnostic instrument to use at a specific time in the procedure.

As to the issue of design, it is evident that Dr. Thompson created the table with a view to improving the chiropractor's effectiveness generally, and in particular, to produce optimal results using the Thompson technique of diagnosis and treatment.

Lastly, counsel for the respondent argues that the Tribunal is required to classify goods according to their primary function and cites the case of *Whiteco v. The Deputy Minister of National Revenue for Customs and Excise (1986) 11 T.B.R. 94*. The issue in that case was whether silver nitrate applicators are better classified as surgical instruments or medicinal and pharmaceutical preparations. In concluding that the applicators are better classified as pharmaceutical preparations, the Tariff Board stated, at page 97:

The classification of the applicator and the compound in issue must not be made solely in regard to its function or usage but must take into account its own nature and essential characteristics.

The choice to be made here is to classify the goods as furniture or as diagnostic instruments. There is no separate tariff item for treatment equipment, and it is the task of this Tribunal to classify the goods under the tariff item which most accurately and specifically describes them, whether or not that is in accordance with their primary purpose. The Tribunal is of the opinion that the table cannot, for any purpose, be fairly described as office, house, cabinet or store furniture. On the other hand, while it is chiefly a treatment table, the model 440 Thompson table is also a valuable diagnostic aid. The Tribunal therefore declares that the Thompson Terminal Point tables at issue should be classified as "... diagnostic articles: instruments ..." for the purpose of the Customs Tariff, as tariff item 47600-1 most accurately describes the goods. In this result, the Tribunal need not consider the arguments relating to the classification of the tables as "machines, n.o.p.,...."

CONCLUSION

The appeal is allowed. The Tribunal declares that the model 440 Zenith Thompson Pneumatic Terminal Point (chiropractic) table should be classified under tariff item 47600-1 as "diagnostic articles: instruments ...," rather than under tariff item 51901-5 as "House, office, cabinet or store furniture.... In chief part by value of metal, n.o.p.," as determined by the respondent.

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