



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. AP-2002-115 and
AP-2003-029

Newtech Beverage Systems Ltd.

v.

Commissioner of the Canada
Customs and Revenue Agency

*Decision and reasons issued
Thursday, June 3, 2004*

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 PARTIAL DISSENTING OPINION OF MEMBER LAFONTAINE6

IN THE MATTER OF appeals heard on November 14, 2003, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated February 3, 2003, with respect to a request for re-determination under section 60 of the *Customs Act*.

BETWEEN

NEWTECH BEVERAGE SYSTEMS LTD.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 14, 2003

Tribunal Members: Richard Lafontaine, Presiding Member
James A. Ogilvy, Member
Ellen Fry, Member

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Clerk of the Tribunal: Anne Turcotte

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REASONS FOR DECISION

1. These appeals are pursuant to section 67 of the *Customs Act*¹ with respect to decisions of the Commissioner of the Canada Customs and Revenue Agency (CCRA) dated February 3, 2003. Appeal No. AP-2002-115 was filed with the Tribunal on March 11, 2003, and Appeal No. AP-2003-029 was filed on August 7, 2003.²

2. In its re-determinations, the CCRA classified the goods in issue under tariff item No. 9617.00.00 of the schedule to the *Customs Tariff*³ as other vacuum vessels. In these appeals, Newtech Beverage Systems Ltd. (Newtech) argued that the goods in issue should be classified under tariff item No. 8419.90.00 as parts of machinery for the treatment of materials by a process involving heating, other than machinery of a kind used for domestic purposes (commercial coffee makers). Newtech suggested heading No. 82.10, 84.13 or 84.79 as alternative classifications for the goods in issue .

3. The relevant tariff nomenclature is as follows:

- | | |
|------------|---|
| 8210.00 | Hand-operated mechanical appliances, weighing 10 kg or less, used in the preparation, conditioning or serving of food or drink. |
| 84.13 | Pumps for liquids, whether or not fitted with a measuring device; liquid elevators. |
| [8413.10] | -Pumps fitted or designed to be fitted with a measuring device: |
| 84.19 | Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 85.14), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric. |
| 8419.81.10 | ...
Machinery for making hot drinks, not including coffee making and dispensing machines but including espresso or cappuccino machines and combination roasting, milling and brewing machines;
... |
| 8419.81.90 | --Other |
| 8419.90.00 | -Parts |
| 84.79 | Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter. |
| 9617.00.00 | Vacuum flasks and other vacuum vessels, complete with cases; parts thereof other than glass inners. |

EVIDENCE

4. Newtech's witness was Mr. Thomas I. Warne. Mr. Warne was General Manager of Canadian operations for Bloomfield Industries Canada (Bloomfield) from 1989 until 2003; from 1998 until 2003, he was also Vice-President of Business Development for Bloomfield's U.S. parent company. His

1. R.S.C. 1985 (2d Supp.) c. 1.

2. In Application No. EP-2003-003, the Tribunal granted the application for an extension of time to file a notice of appeal with respect to the transactions in Appeal No. AP-2003-029.

3. S.C. 1997, c. 36.

responsibilities included management of the manufacturing and distribution operations in Canada. Mr. Warne worked on designing coffee brewers that would accommodate the goods in issue.

5. Mr. Warne testified that the goods in issue include various models of coffee pots used with commercial coffee makers. He described the various models of the goods in issue as being of two general types—the Air Pot[®] and the Thermal Gravity Pot[®]. The various models are similar in construction, in that they include an insulating liner, a Brew-Thru[™] lid or a Brew-Thru[™] stem stopper,⁴ a protective cover, and a fold-down handle. The Air Pot[®] has a pump system to extract the contents, whereas the Thermal Gravity Pot[®] uses a gravity flow system. The main differences in the various models of each type are their height and shape, the materials with which they are constructed and their capacity.

6. According to Mr. Warne, in the early 1990s, commercial coffee makers were redesigned to brew more coffee. The newer coffee makers are much taller than the older models, in order to handle the larger volumes of water needed. Accordingly, the goods in issue are designed specifically to fit the new commercial coffee makers and, consequently, are taller than the old-style glass decanters. Further, the Brew-Thru[™] lid was introduced; it is designed to limit the amount of heat loss prior to the coffee being served.

7. Mr. Warne testified that, since the old-style glass decanters are not as tall as the new commercial coffee makers, if they were to be used, the brewed coffee would be required to drop an unacceptable distance from the coffee maker before reaching the pot. This would result in unacceptable splashing and temperature loss of the brewed coffee.

8. Mr. Warne stated that commercial coffee makers are designed with devices, such as guides for the positioning of the receptacles, to ensure that the goods in issue are in the proper place when the coffee is brewed. Mr. Warne testified that the coffee makers for which the goods in issue are designed are used almost exclusively in commercial applications, given their size and cost.

9. The Air Pot[®] dispenses coffee when a lever or button on the top is pushed by the user. This activates a bellows inside the lid of the pot, forcing the coffee out. The Thermal Gravity Pot[®] has a lever near the bottom that, when pushed, opens a valve to serve the coffee.

10. According to Mr. Warne, nothing prevents a user from brewing coffee in a receptacle other than the goods in issue and then pouring it into the goods in issue to be dispensed at a later time. However, Bloomfield found that users did not do this because it required an additional step. The goods in issue are manufactured and purchased separately from the commercial coffee makers. However, the evidence indicated that they also have been sold together with the coffee makers.⁵ Mr. Warne testified that the goods in issue can keep coffee hot for 3 to 24 hours. Also, Mr. Warne indicated that the goods in issue would be considered to be of an acceptable quality if they were designed to lose no more than 15°F in 6 hours.

11. Mr. Warne also testified that the commercial coffee makers in question do not have internal receptacles to catch the brewed coffee. Consequently, if coffee were brewed without having the goods in issue or some other receptacle in place to catch the coffee, coffee would flow out of the coffee maker and be wasted.

4. Mr. Warne testified that the SGA-22 model does not have a Brew-Thru[™] lid.

5. *Transcript of Public Hearing*, 14 November 2003 at 35; Newtech's Supplementary Brief, tabs 6, 27.

ARGUMENT

12. Newtech argued that the goods in issue should be classified in subheading No. 8419.90 as parts of commercial coffee makers.

13. Newtech referred to a CCRA classification ruling, which classified commercial coffee makers under tariff item No. 8419.81.10. Newtech also referred to a U.S. Customs classification ruling that, it alleged, classified coffee pots like the goods in issue as parts of commercial coffee makers. Newtech argued that the goods in issue are parts of the commercial coffee makers, since they are integral to the design of the commercial coffee makers. In this regard, Newtech referred to evidence that commercial coffee makers have been modified to accommodate the goods in issue. Further, it alleged that the goods in issue are essential to the function of the coffee makers, since the goods in issue are required to serve the coffee.

14. Newtech argued that the goods in issue are not properly classified under tariff item No. 9617.00.00 as other vacuum vessels. Goods that are classified under this tariff item include goods that are passive receptacles that function to retain temperature. The goods in issue are mechanical appliances, since they have moving parts that work to dispense the coffee.

15. Should the Tribunal determine that the goods in issue are not parts, Newtech argued, as an alternative, the goods in issue should be classified in heading No., 82.10, 84.13 or 84.79.

16. The CCRA argued that the goods in issue are properly classified under tariff item No. 9617.00.00 as other vacuum vessels. It argued that the fact that the goods in issue include several attachments does not detract from the fact that they are essentially dispensers. It argued that the primary function of the goods in issue is to keep coffee hot and make it easy to serve. The CCRA argued that the goods in issue are described in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁶ to heading No. 96.17, in that they are designed to keep liquids at a fairly constant temperature for reasonable periods of time and include a double-walled receptacle, with a vacuum between the walls, and a protective outer layer of metal or plastic.

17. The CCRA argued that the Brew-ThruTM lid feature is not sufficient to make the goods in issue parts. The fact that the goods in issue need only sit under the brew basket of the coffee makers for the 3 1/2 to 5 1/2 minutes required to brew coffee detracts from Newtech's contention that the goods in issue are parts. In addition, the goods in issue include numerous different models, none of which are intended for exclusive use with any particular model of commercial coffee maker. In sum, the CCRA contended that the goods in issue lack the requisite degree of permanence to be considered parts.

18. The CCRA argued that the commercial coffee makers are able to perform their function of brewing and dispensing coffee with or without the goods in issue. In addition, the goods in issue are not integral to the design of the coffee makers. Further, the goods in issue are manufactured and imported separately from the coffee makers. The CCRA argued that the fact that the goods in issue dispense coffee is not inconsistent with the terms of heading No. 96.17 or the *Explanatory Notes* to that heading. It argued that the goods in issue should be considered accessories of commercial coffee makers, not parts. As subheading No. 8419.90 describes parts, not accessories of commercial coffee makers, the goods in issue are properly classified under tariff item No. 9617.00.00.

6. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

DECISION

19. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 9617.00.00 as other vacuum vessels, as determined by the CCRA, or should be classified under tariff item No. 8419.90.00 as parts of commercial coffee makers, as claimed by Newtech. Newtech also proposes several alternative classifications in the event that the Tribunal finds the goods in issue not to be parts.

20. The majority of the Tribunal is of the view that the goods in issue are parts of commercial coffee makers and, therefore, are *prima facie* classifiable under tariff item No. 8419.90.00.

21. The majority of the Tribunal is of the view that the commercial coffee makers that accommodate the goods in issue are classifiable under tariff item No. 8419.81.90. The evidence indicates that the commercial coffee makers are an entire coffee brewing system, consisting of coffee-making, storing and dispensing functions (coffee makers). The majority of the Tribunal notes that tariff item No. 8419.81.10 excludes “coffee making and dispensing machines”. However, in the view of the Tribunal, tariff item No. 8419.81.90, which describes other machinery, plant and equipment for making hot drinks or for cooking or heating food, covers commercial coffee making and dispensing machines.

22. Determining whether goods are parts is a fact-based decision, where several factors are relevant. In a previous decision,⁷ the Tribunal stated the following:

The Tribunal notes that each case must be determined on its own merits and that there is no universal test to determine whether one product is a part of another. The following criteria have been found to be relevant when such a determination is to be made: (1) whether the product in issue is essential to the operation of the other product; (2) whether the product in issue is a necessary and integral part of the other product; (3) whether the product in issue is installed in the other product; and (4) common trade usage and practice.⁸

23. Regarding the first factor, the majority of the Tribunal is of the view that the goods in issue are essential to the operation of the commercial coffee makers. It is clear that a receptacle is required in order to receive the brewed coffee that is dispensed from the part of the machine that brews the coffee (coffee brewer). Although receptacles other than the goods in issue can be used for this purpose, there was extensive testimony on the aspects of design that were specifically aimed at creating physical complementarity between the goods in issue and the commercial coffee brewers. These include the capacity and fit of the goods in issue in relation to the applicable coffee brewers, and the design of the Brew-Thru™ lids and stem stoppers.

24. For the same reasons, the majority of the Tribunal considers that the goods in issue are necessary and integral parts of the commercial coffee makers, as contemplated by the second factor.

25. With respect to the third factor, the majority of the Tribunal considers that the goods in issue are installed in the coffee makers, even though they are not permanently attached, because they are designed to fit snugly in position in the coffee makers when the coffee is being brewed. As discussed above, several aspects of design were specifically aimed at creating physical complementarity between the goods in issue and other portions of the coffee makers. The testimony indicated that the fit of the goods in issue to the commercial coffee makers was critical, not only in terms of the need for guides to ensure that the goods in issue are correctly positioned under the coffee brewer’s outlet, but also with respect to height and clearance.

7. *GL&V/Black Clawson-Kennedy v. Deputy M.N.R.* (27 September 2000), AP-99-063 (CITT).

8. *Ibid.* at 9.

26. Regarding the fourth factor, “common trade usage and practice”, the evidence indicates that the goods in issue are designed for most effective use with the commercial coffee makers, as discussed above, and are sold with and for those specific coffee makers. They are also advertised and marketed as integral parts of the commercial coffee brewing systems.⁹

27. Accordingly, the majority of the Tribunal is of the view that the evidence, when considered in light of the foregoing four factors, indicates that the goods in issue are parts of commercial coffee makers.

28. Therefore, the majority of the Tribunal considers that the goods in issue are *prima facie* classifiable under tariff item No. 8419.90.00

29. The majority of the Tribunal is of the view that the goods in issue are also *prima facie* classifiable under tariff item No. 9617.00.00.

30. The *Explanatory Notes* to heading No. 96.17 read, in part, as follows:

This heading covers:

- (1) **Vacuum flasks and other similar vacuum vessels** . . . This group includes vacuum jars, jugs, carafes, etc., designed to keep liquids, food or other products at fairly constant temperature, for reasonable periods of time.
- (2) **Outer cases, lids and cups** of metal, plastics, etc., for vacuum flasks or other vacuum vessels.

31. The Tribunal is satisfied that the goods in issue meet the requirements of heading No. 96.17 and the *Explanatory Notes*, as they are designed to keep liquids at a fairly constant temperature, for reasonable periods of time. The evidence indicates that the goods in issue can keep coffee hot from 3 to 24 hours and that a design that allows for the loss of 15°F or less in 6 hours is an acceptable product.

32. In the Tribunal’s view, the lid of the vacuum vessel, which is characterized as a Brew-Thru™ lid, is included in tariff item No. 9617.00.00, as described in the *Explanatory Notes* to heading No. 96.17. Therefore, it is not a feature that distinguishes the goods in issue from those that are classifiable in that heading, as suggested by Newtech. In addition, the Tribunal is satisfied that the Brew-Thru™ stem stopper (as distinct from the Brew-Thru™ lid), another feature of the goods in issue, is a part of the vacuum vessel, as it is inserted into the unit. Accordingly, the stem stopper is also included in tariff item No. 9617.00.00 under the designation “parts”, as described therein.

33. In the view of the majority of the Tribunal, given that the goods are *prima facie* classifiable under both tariff item No. 8419.90.00 and tariff item No. 9617.00.00, classification must be determined by applying Rule 1 of the *Canadian Rules*¹⁰ and Rule 3 (a) of the *General Rules for the Interpretation of the Harmonized System*,¹¹ which states:

When . . . goods are *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

9. Product literature regarding the Curtis Airpot Digital Coffee Brewing Systems and ThermoLogic™ Brewing System, Newtech’s Supplementary Brief, tab 6.

10. *Supra* note 3, schedule.

11. *Supra* note 3, schedule.

34. The majority of the Tribunal is of the view that the terms of tariff item No. 9617.00.00 provide a more specific description of the goods in issue. In light of the above, the majority of the Tribunal is of the view that the Thermal Gravity Pot® and the Air Pot® are properly classified under tariff item No. 9617.00.00 as other vacuum vessels.

35. The Tribunal has considered the alternative classifications proposed by Newtech and is not convinced that the goods in issue are classifiable in heading No. 82.10, 84.13 or 84.79. Newtech advanced little evidence, if any, to support its suggested alternative classifications in this regard, particularly with regard to the essential nature of the goods in issue or their mechanical abilities. The evidence does not indicate that any of these headings describes the essential nature of the goods.

36. Therefore, the appeals are dismissed.

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member

PARTIAL DISSENTING OPINION OF MEMBER LAFONTAINE

37. I agree with my colleagues that the goods in issue are properly classified under tariff item No. 9617.00.00.

38. However, I do not agree that the goods in issue are *prima facie* classifiable as parts of other machinery for making hot drinks under tariff item No. 8419.90.00, as I am not convinced that they are essential to the operation of the coffee brewing machines with which they may be employed, or that they are necessary and integral components of the coffee brewing machines, two key factors in determining whether goods are parts.¹²

39. Newtech has submitted that the goods in issue are parts of commercial coffee brewing systems or coffee brewing machines that are classified under tariff item 8419.81.10. I note that this tariff item specifically does not include *coffee making and dispensing machines*. Indeed, Newtech submitted that these machines were excluded under tariff item 8419.81.10 because they were classifiable under their own tariff item. I further note that the classification of commercial *coffee making and dispensing machines* was not in dispute by the parties.

12. See *York Barbell Company Limited v. Deputy M.N.R.C.E.* (19 August 1991), AP-90-161 (CITT), *SnyderGeneral Canada Inc. v. Deputy M.N.R.* (19 September 1994), AP-92-091 (CITT).

40. Therefore, in my view, the matter to be determined is whether the goods in issue are parts of coffee brewing machines alone, whose function is simply to make coffee, as distinct from parts of *coffee making and dispensing machines*. As noted above, the classification of the *coffee making and dispensing machines* was not at issue and, indeed, these latter machines were viewed as different goods altogether.¹³ It is my view that the goods in issue, as dispensers or servers, do not contribute to the process of making coffee and that the function of the goods in issue is at best akin to that of accessories,¹⁴ which are not essential to the goods with which they may be employed. In this regard, I also note that the goods in issue are referred to as accessories in some of the documentation.¹⁵ In light of the foregoing, I am of the view that the goods in issue are not parts. As accessories are not provided for under tariff item No. 8419.90.00, the goods in issue must be classified elsewhere.

41. Consequently, as it is my view that the goods in issue are not parts, I need not consider the rules for classifying parts, which are set out in Note 2 to Section XVI.

42. As noted above, I agree with my colleagues that the goods in issue are properly classified as vacuum vessels.

43. I also agree with my colleagues that the Brew-Thru™ lid and the Brew-Thru™ stem stopper are classifiable under tariff item No. 9617.00.00 and that, consequently, these features do not set them apart from goods that are classifiable under this tariff item. Naturally, I might add, these vessels also have a receiving and dispensing function, which, in my view, is a secondary or subordinate function. This is true of any vessel classified under tariff item No. 9617.00.00.

44. Finally, together with my colleagues, I am not convinced that the goods in issue are classifiable in heading No. 82.10, 84.13 or 84.79.

45. In light of the above, I am of the view that, pursuant to Rule 1 of the *Canadian Rules*, the Thermal Gravity Pot® and the Air Pot® are properly classified as “other vacuum vessels” under tariff item 9617.00.00.

46. Therefore, I would also dismiss the appeals.

Richard Lafontaine
Richard Lafontaine
Presiding Member

13. See *Transcript of Public Argument*, 14 November 2003 at 21.

14. See *Sharp Electronics of Canada Ltd. v. Deputy M.N.R.* (7 June 2000), AP-98-092 (CITT) at 8.

15. See CCRA’s brief, Tab 13.