



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2002-116

Black & Decker Canada Inc.

v.

Commissioner of the Canada
Customs and Revenue Agency

*Decision and reasons issued
Wednesday, November 3, 2004*

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IN THE MATTER OF an appeal heard on November 12, 2003, under subsection 67(1) 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, with respect to a request for redetermination under subsection 60(3) of the *Customs Act*.

BETWEEN

BLACK & DECKER CANADA INC.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 12, 2003

Tribunal Member: James A. Ogilvy, Presiding Member

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Clerk of the Tribunal: Margaret Fisher

Appearances: Michael A. Sherbo, for the appellant
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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal under section 67 of the *Customs Act*¹ of decisions of the Commissioner of the Canada Customs and Revenue Agency (CCRA) regarding the classification of battery packs for power tools imported by Black & Decker Canada Inc. (Black & Decker) between January 1998 and December 2000. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8507.30.90 of the schedule to the *Customs Tariff*² as other nickel-cadmium electric accumulators, as determined by the CCRA, or should be classified under tariff item No. 8508.90.10 as housings of electro-mechanical tools for working in the hand, with self-contained electric motor, as claimed by Black & Decker.

2. The tariff nomenclature relevant to this appeal is as follows:

85.07	Electric accumulators, including separators therefor, whether or not rectangular (including square).
8507.30	-Nickel-cadmium
8507.30.90	---Other
85.08	Electro-mechanical tools for working in the hand, with self-contained electric motor.
8508.90	-Parts
8508.90.10	---Housings
8509.90.90	---Other

EVIDENCE

3. Black & Decker called one expert witness, Mr. David Shaver. Mr. Shaver indicated that he works for Black & Decker in the design centre in Brockville, Ontario. He is an electrical engineer and has had formal training in both product safety and liability, as well as reliability training. On this basis, the Tribunal qualified Mr. Shaver as an expert in electro-mechanical power tools, including the accumulators and power packs associated with them in all the following aspects: design, manufacture, reliability and safety in general.

4. Mr. Shaver indicated that the battery packs comprised several cells welded together, a safety vent, some insulation material, an internal fuse and an outer casing. The outside of the battery pack included the grips or latches that securely connect the battery to the tool. He also indicated that the battery pack had a keying feature that determined how this battery pack could interface with the tool. Because the keying feature of each pack is unique to that combination of tool and battery pack, this feature ensures that the voltage output of the battery pack matches the requirement of the power tool and also prevents another manufacturer's battery from being used. In response to a question from the Tribunal, Mr. Shaver confirmed that the internal fuse was an electric component, as opposed to an electronic component, and that it would simply melt or disconnect when it overheated, thus rendering the power pack inoperative.

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

2. S.C. 1997, c. 36.

5. With respect to regulatory standards, Mr. Shaver testified that, in North America, the only standard that is in place for hand-held power tools and battery packs is the UL standard. He further indicated that the power tool, the battery pack and the charger are certified together under the UL standard as a system, not individually.

6. Mr. Shaver indicated that 80 percent of Black & Decker's sales consist of drills or drill drivers.³ In this connection, he testified that the ergonomics and the industrial design of the tool and the battery pack are optimized around the hand-held use of the drill driver and that circular saws, reciprocating saws and other products are secondary. He also indicated that, during the period at issue, Black & Decker sold a total of 240,000 power tools, of which 180,000-190,000 were individual drill drivers and 37,000 were combo kits. He explained that the combo kits comprised 2 or more power tools, but that a drill driver was included in every combo kit. He also indicated that a battery pack was sold with every drill driver but that combo kits that included 3 or 4 power tools were sold with only 2 battery packs. With respect to the other power tools, he indicated that Black & Decker sold 9,000 circular saws, 7,000 reciprocating saws, 262 flashlights and 14,000 individual battery packs during the same period. He indicated that Black & Decker tried to vary the contents of the combo kits to satisfy the requests of its wholesale customers.

7. Mr. Shaver also testified that the older versions of the Black & Decker drills had an integral battery source, in that the rechargeable battery was incorporated into the power tool and, typically, was not removable. He indicated that with higher voltage power requirements, it became difficult, if not impossible, to get all the cells inside the tool and still achieve the proper balance and ergonomics. He also testified that the chargers for the earlier models took too long to charge the battery. For these reasons, Black & Decker redesigned the tools so that they had removable battery packs. He confirmed that, from a design point of view, Black & Decker considers the battery pack to be a part of the power tool.

8. Under cross-examination, Mr. Shaver disagreed with the CCRA's contention that the battery pack itself could also be called an electric accumulator. Rather, he stated that it contains accumulators, but that the battery pack was more than that. His testimony in this regard confirmed that the battery pack can be used with a flashlight, a radio and possibly a vacuum. He also acknowledged that the battery pack can be sold separately, but that he was not aware of any generic version of the product. Regarding the various components, Mr. Shaver indicated that the battery pack did not contain a printed circuit board, that the housing and the keying feature were the largest components and that the welded cells constitute the heaviest and most costly components, representing 60 to 80 percent of the cost of the entire battery pack. He also confirmed that four of Black & Decker's professional-line products could be operated using an AC adaptor.

9. The CCRA called one expert witness, Dr. William A. Adams. Dr. Adams has a Ph.D. in physical chemistry and is the president of a high-technology company whose specialties are battery management technology and electro-chemical issues associated with fuel cells. On this basis, the Tribunal qualified Dr. Adams as an expert in batteries and battery pack technology.

3. The Tribunal notes that Mr. Shaver referred to drills and drill drivers collectively as a "family". Because no distinction was made between them in this proceeding, hereinafter the terms "drill" and "drill driver" are used interchangeably.

10. Dr. Adams testified that, in his opinion, a battery pack and an electric accumulator are identical “in terms of industrial and battery industry usage.” Furthermore, he stated that an electrical accumulator can consist of a single cell or a number of cells connected in some way.

11. In Dr. Adams’ opinion, the goods in issue comprised the following: nickel cadmium cells connected by welded tabs; a connector that would allow the battery pack to make electrical contact with a particular tool; components to prevent short circuits; and a plastic case. He opined that the plastic case was not critical to the operation of the battery and that its inclusion was more a matter of marketing and system design. However, under cross-examination, he also acknowledged that the part of the case that connected the battery pack to the tool was important with respect to its ergonomic design, the keying feature, UL approval and its function as a stand for the tool.

12. Dr. Adams was asked to distinguish between this battery pack and one that might be used with a cell phone. In doing so, Dr. Adams confirmed that there was no printed circuit board included in the battery pack for the power tools. He stated that a battery pack for a cellular phone would likely contain a printed circuit board because the lithium-ion-type technology found therein requires fairly complex charge control during charging and during the operation of the phone.

ARGUMENT

13. Black & Decker argued that the goods in issue are parts of the power tools and submitted that each battery pack comprised a number of cells, a fuse and a plastic housing component that is ergonomically designed to form a complete unit with the power tool. It further submitted that the battery packs are marketed, sold and shipped with the power tools and that there are only a very limited number of tools that could operate on an AC adapter. It emphasized that the evidence indicates that 80 percent of the use of the battery packs was specifically with drills.

14. With respect to whether the goods in issue are parts, Black & Decker referred the Tribunal to Memorandum D 10-0-1,⁴ which provides five criteria that have emerged over the years that set forth basic considerations for the classification of parts. Black & Decker submitted that the goods in issue met all these criteria and that, thus, the Tribunal ought to determine that they are parts. As parts, Black & Decker submitted, the battery packs should be classified in subheading No. 8508.90 as parts and specifically under tariff item No. 8508.90.10 as housings for power tools. It further submitted that the battery packs have to be classified as parts because they are specifically provided for under these provisions.

15. In support of this position, Black & Decker drew the Tribunal’s attention to Note 2(b) to Section XVI. In this regard, it submitted that Note 2(b) states that “[o]ther parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading . . . are to be classified with the machines of that kind”. With respect to the phrase “solely or principally”, Black & Decker submitted that this requirement was satisfied, since the battery packs are used “principally” with drills.

4. “Classification of parts and accessories in the Customs Tariff” (24 January 1994).

16. With respect to the Tribunal's decision in *Nokia Products Limited v. Deputy M.N.R.*,⁵ Black & Decker submitted that the facts of that appeal are virtually identical to those of the present appeal and support its position. Black & Decker also asked the Tribunal to consider the CCRA's preliminary decision statement, which supports its position that the battery packs are *prima facie* classifiable in heading No. 85.08.

17. With respect to a ruling of the U.S. Commercial Rulings Division,⁶ Black & Decker submitted that the Tribunal should disregard this ruling, since the Tribunal is not required to have regard to the decisions of other jurisdictions. With respect to the Harmonized System Committee (HSC), which issued a compendium decision on a battery pack for a cellular phone to the effect that the battery pack should be classified as an accumulator and not as a part of a cellular phone, Black & Decker submitted that the Tribunal ought to consider the process by which this decision was reached in determining the weight that it deserves. Furthermore, Black & Decker submitted that the compendium decision is fundamentally flawed and should be considered an opinion rather than a decision. In reply to a question from the Tribunal, Black & Decker submitted that the HSC should be considered a policy body and not an appeal body and that its decision should receive only the weight attributed to a compendium of classification opinions, which, it maintained, is not as binding as the terms of the heading. Lastly, Black & Decker argued that, since this compendium decision was issued after the importation of the goods in issue, it should not have retroactive effect.

18. The CCRA submitted that goods in issue can be used with several types of tools and that, pursuant to rule 1 of the *General Rules for the Interpretation of the Harmonized System*,⁷ the goods are properly classified under tariff item No. 8507.30.90 as other nickel-cadmium electric accumulators. It emphasized that the testimony of its expert witness was that these types of battery packs are considered in the industry to be electric accumulators.

19. The CCRA disagreed with Black & Decker's contention that the battery packs are parts and argued that they do not meet the criteria set out in Memorandum D-10-0-1. In this regard, the CCRA submitted that the goods do not form a complete unit with a specific tool, since it has been shown that the battery packs can operate several tools, including a radio and a vacuum, and that some of the tools can be operated with the battery pack using an AC adaptor. Furthermore, it submitted, the batteries are often marketed and shipped separately and can be purchased separately. It also submitted that the battery packs are not essential to the operation of the power tools and that they are not necessary or integral parts of the power tools.

20. With respect to *Nokia*, the CCRA argued that the facts in the present appeal are different from those in *Nokia* and that *Nokia* is therefore not relevant. In that regard, it argued that the battery packs do not contain printed circuit boards, whereas cellular phone batteries do. Furthermore, it submitted, the evidence shows that the battery packs are not essential, necessary or integral parts of the power tools. With respect to the decision by the HSC, the CCRA submitted that, if the Tribunal considered *Nokia* to be relevant, then it ought to have regard to the HSC decision.

21. The CCRA submitted that, if the Tribunal determines that the goods are parts, then it ought to have regard to Note 2(a) to Section XVI, which includes Chapter 85. It submitted that Note 2(a) specifies that "[p]arts which are goods included in any of the headings of Chapter . . . 85 . . . are in all cases to be classified in their respective headings". In this regard, it argued that, by reading Note 2(a) and pursuant to Rule 1 of the *General Rules*, the goods should be classified on the strength of the evidence as electric

5. (26 July 2000), AP-99-082 (CITT) [*Nokia*].

6. See Respondent's Brief, Tab 8.

7. *Supra* note 2, schedule [*General Rules*].

accumulators. Furthermore, the CCRA argued that Note 2(b) to Section XVI is not applicable, since the battery packs are not suitable for use solely or principally with a particular kind of machine.

22. The CCRA also argued that, if the Tribunal is of the view that the battery pack is composed of more than an electric accumulator, then it should look at which heading provides the most specific description. It submitted that the heading that covers electric accumulators provides the most specific description of the battery packs.

DECISION

23. Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules* and the *Canadian Rules*.⁸ Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁹ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.¹⁰

24. Note 2 to of the *Explanatory Notes* to Section XVI, which includes Chapter 85, reads in part as follows:

2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and Note 1 to Chapter 85, parts of machines . . . are to be classified according to the following rules:
 - (a) Parts which are goods included in any of the headings of Chapter 84 or 85 . . . are in all cases to be classified in their respective headings;
 - (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading . . . are to be classified with the machines of that kind.

25. The Tribunal notes that the *Explanatory Notes* to heading No. 85.08 under “Parts” read in part as follows:

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), parts of the tools of this heading are also classified here.

26. On their face, the *Explanatory Notes* to heading No. 85.08 appear to classify goods in heading No. 85.08 as long as they are parts of the tools of that heading. However, that classification is “[s]ubject to the general provisions regarding the classification of parts”, and specific reference is made to the *Explanatory Notes* to Section XVI. Note 2(a) of the *Explanatory Notes* to Section XVI classifies such parts in their respective headings *if* they are also goods that, on their own, are classifiable in Chapter 84 or 85. Thus, the Tribunal must first determine whether the goods in issue are, on their own, classifiable in heading No. 85.07 and, if not, whether they are classifiable as parts of the tools of heading No. 85.08 on the basis that they are suitable for use solely or principally with a particular kind of machine, as per Note 2(b) of the *Explanatory Notes* to Section XVI.

8. *Supra* note 2, schedule.

9. Customs Co-operation Council, 1st ed., Brussels, 1987.

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

Classification as Goods

27. The Tribunal notes that the *Explanatory Notes* to heading No. 85.07 provide a description for electric accumulators and state in part:

Electric accumulators (storage batteries) are used to store electricity and supply it when required.

Accumulators consist essentially of a container holding the electrolyte in which are immersed two electrodes fitted with terminals for connection to an external circuit. In many cases the container may be subdivided, each subdivision (cell) being an accumulator in itself; these cells are usually connected together in series to produce a higher voltage. A number of cells so connected is called a battery. A number of accumulators may also be assembled in a larger container.

28. In light of this description, the Tribunal finds that the goods in issue are not classifiable, on their own, as electric accumulators, as provided for in heading No. 85.07. Their attributes include the combination of multiple cells configured as a battery, nickel-cadmium chemistry, and a roughly rectangular shape. They incorporate plastic housings that are fitted to the batteries and designed to enable the power packs to interface physically and electrically with the machines to which they provide power. Although they do not contain any electronic circuitry, they do have a protective fuse. On this basis, the Tribunal finds that they are an assembly of components, one of those being an electric accumulator. In the Tribunal's opinion, the above-cited description of an electric accumulator does not allow for an assembly such as this to be classified in heading No. 85.07. Therefore, the Tribunal determines that the goods in issue are not, on their own, classifiable in heading No. 85.07.

Classification as Parts

29. The Tribunal must now consider whether the goods in issue can be considered parts of the tools of heading No. 85.08. In this connection, Black & Decker argued that these accumulators are parts of the goods for which they are designed, with which they are intended to be used and to which they are normally attached, that is, they are parts of hand-held power drills and similar power tools. Black & Decker introduced *Nokia* in support of its case. In *Nokia*, the Tribunal found that the goods in issue, battery packs for cellular telephones, were parts of cellular telephones. The pertinent analysis for determining whether goods are parts is as follows:

It is the Tribunal's view that the evidence demonstrates that the goods in issue are parts of cellular telephones. The goods in issue are *ergonomically designed to form a complete unit with a cellular telephone*, as the plastic housing forms the back of the telephone. Cellular telephones cannot work without a battery pack attached, as the *battery pack provides the telephone with its power*. The goods in issue have *no alternative function* than that of supplying power to a cellular telephone. It is not safe or prudent for a user to power a cellular telephone by other means. By design, the goods in issue are *committed for use with a particular model* of Nokia cellular telephone. Cellular telephones are also marketed and sold with battery packs, and the goods in issue are *marketed and sold for use with cellular telephones*. Therefore, the goods in issue are parts of cellular telephones.¹¹

[Emphasis added]

11. *Nokia* at 5-6.

30. The Tribunal also found the following in *Nokia*:

[T]he fact that the goods in issue are not imported with the cellular telephones or necessarily sold with the cellular telephones does not change their characterization as parts of cellular telephones.¹²

31. The CCRA argued that *Nokia* has no bearing on the present case, since the facts in the present case are different from those in *Nokia*.

32. The Tribunal is of the opinion that *Nokia* does not establish the principle that all criteria have to be met in order for the Tribunal to determine that goods are parts. Moreover, the Tribunal notes that Memorandum D10-0-1, although not authoritative in and of itself is in accord with this view, in that it states that “[u]sed *singly or in combination*, [the five criteria] are useful in determining whether or not an article constitutes a part” [emphasis added]. However, the Tribunal also notes that the particular circumstances surrounding *Nokia* allowed the Tribunal in that case to establish that all the criteria were met.

33. In the Tribunal’s view, it is appropriate to examine the same criteria that were set out in *Nokia* to determine whether the battery packs are parts. In the present case, the evidence shows that the goods in issue: (1) are essential to the operation of the tools to which they are attached, in that they provide the source of power;¹³ (2) form part of the housing of the total tool; (3) are uniquely fitted to and exclusive to a specific tool or range of tools;¹⁴ and (4) are ergonomically designed to fit the tool and contribute to the balance of the tool. The goods in issue are also necessary for the safe and prudent use of the tools, as the electrical connections are enclosed and the power source is locked into place on the tool.¹⁵ Further, the Tribunal notes that Black & Decker testified that the goods in issue replaced the battery packs that, in earlier models, were integrated into the power tool itself and not removable.

34. In the Tribunal’s view, the goods in issue are parts of the tools of heading No. 85.08. Therefore, the Tribunal then considered, pursuant to Note 2(b) of the *Explanatory Notes* to Section XVI, whether the goods in issue are suitable for use solely or principally with a particular kind of machine and, if so, whether to classify them with the machines of that kind. In this regard, the Tribunal finds that the goods in issue are suitable “principally” for use with “[e]lectro-mechanical tools for working in the hand, with self-contained electric motor”, as found in heading No. 85.08. The Tribunal cannot find that the goods in issue are suitable “solely” for machines of this kind, given that there is evidence on the record that indicates that they may be used with other devices, such as flashlights and radios. However, the Tribunal notes, in this regard, that the goods in issue are used predominantly with the tools of heading No. 85.08 (e.g. drills and saws) and that any portion used with the machines that are not covered by that heading is minuscule in comparison. In any case, the Tribunal’s finding that these goods are suitable principally for use with the tools in heading No. 85.08 sufficiently satisfies Note 2(b) of the *Explanatory Notes* to Section XVI.

12. *Nokia* at 6.

13. Although some models of the power tools in evidence are adaptable to either DC power packs or AC wall current, this is a very small proportion of the total.

14. Although not exclusive to tools covered in heading No. 85.08 (e.g. drills and saws), the Tribunal notes that only a minuscule portion of the goods in issue are used with other devices. In this regard, the evidence before the Tribunal indicates that, during the period at issue, Black & Decker sold 240,000 power tools, of which 262 were flashlights, roughly 0.1 percent of the total.

15. The regulatory agency that certifies the tools perceives the system as a whole. The witness for Black & Decker testified that “the tool and the battery pack and the charger get certified as a system.”

35. For these reasons, the Tribunal is of the view that the battery packs are parts and are for use solely or principally with “[e]lectro-mechanical tools for working in the hand, with self-contained electric motor”, as found in heading No. 85.08. Therefore, the Tribunal finds that they should be classified in subheading No. 8508.90 as parts suitable for use solely or principally with the tools found in heading No. 85.08.

36. Black and Decker further argued that the goods in issue should be classified under tariff item No. 8508.90.10 as housings. The Tribunal has noted that, in its view, the goods in issue are an assembly of components, one of which is the accumulator or accumulators, another of which is the plastic housing. In the Tribunal’s view the goods are therefore not classifiable under tariff item No. 8508.90.10, but should be classified instead under tariff item No. 8508.90.90 as other parts.

37. The appeal is therefore allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member