Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-015

S.C. Johnson & Son, Limited

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, July 19, 2006

Canada

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IN THE MATTER OF an appeal heard on January 25, 2006, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency dated April 11, 2005, with respect to a request for review under subsection 60(4) of the *Customs Act*.

BETWEEN

S.C. JOHNSON & SON, LIMITED **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Elaine Feldman
Elaine Feldman
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 25, 2006
Tribunal Members:	Ellen Fry, Presiding Member Meriel V. M. Bradford, Member Elaine Feldman, Member
Counsel for the Tribunal:	Philippe Cellard
Registrar Officer:	Valérie Cannavino
Appearances:	Mark N. Sills and Brian R. Staples, for the appellant Andrew Gibbs and Yannick Landry, for the respondent

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. This is an appeal pursuant to section 67 of the *Customs Act*[1] from a decision of the President of the Canada Border Services Agency (CBSA) dated April 11, 2005, made under subsection 60(4) of the *Act*.

2. All the goods in issue are plug-in deodorizers, which use electricity to heat fragrances in order to disperse them and, hence, deodorize an area. They consist of the following two components, which are packaged together for retail sale: an electrical heating unit and a fragrance unit. Some electrical heating units have a fan, a night light, or an extra outlet or two that can be used to plug in other electrical devices. With respect to the fragrance units, some are in oil form and others in gel form. The consumer installs the fragrance unit in the electrical heating unit. When the fragrance has been used up, the consumer can purchase fragrance unit refills and install them in the electrical heating unit. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8516.79.90 of the schedule to the *Customs Tariff*[2] as other electro-thermic appliances of a kind used for domestic purposes, as determined by the CBSA, or should be classified under tariff item No. 3307.49.00 as other prepared room deodorizers, as claimed by S.C. Johnson & Son, Limited (S.C. Johnson).

3. The relevant nomenclature from the *Customs Tariff* is as follows:

. . .	
33.07	Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties.
. . .	
	-Preparations for perfuming or deodorizing rooms, including odoriferous preparations used during religious rites:
. . .	
3307.49.00	--Other
. . .	
85.16	Electric instantaneous or storage water heaters and immersion heaters; electric space heating apparatus and soil heating apparatus; electro-thermic hair-dressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric smoothing irons; other electro-thermic appliances of a kind used for domestic purposes; electric heating resistors, other than those of heading 85.45.
. . .	
	-Other electro-thermic appliances:
8516.79	--Other
. . .	
8516.79.90	---Other
. . .	

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.

4. Note 2 to Section VI provides the following:

> Subject to Note 1 above, goods classifiable in heading 30.04, 30.05, 30.06, 32.12, 33.03, 33.04, 33.05, 33.06, 33.07, 35.06, 37.07 or 38.08 by reason of being put up in measured doses or for retail sale are to be classified in those headings and in no other heading of the Nomenclature.

5. The following excerpts from the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[3] are also relevant to this appeal:

> *Explanatory Notes* to heading No. 33.07
>
> . . .
>
> (2) **Prepared room deodorisers, whether or not perfumed or having disinfectant properties**.
>
> Prepared room deodorisers consist essentially of substances (such as lauryl methacrylate) which act chemically on the odours to be overcome or other substances designed to physically absorb odours by, for example, Van der Waal's bonds. When for retail sale they are generally put up in aerosol cans.
>
> Products, such as activated carbon, put up in packings for retail sale as deodorisers for refrigerators, cars, etc. are also classified in this heading.
>
> . . .
>
> *Explanatory Notes* to Note 2 to Section VI
>
> Section Note 2 provides that goods (other than those described in headings 28.43 to 28.46) which are covered by heading 30.04, 30.05, 30.06, 32.12, 33.03, 33.04, 33.05, 33.06, 33.07, 35.06, 37.07 or 38.08 by reason of being put up in measured doses or for retail sale, are to be classified in those headings notwithstanding that they could also fall in some other heading of the Nomenclature. For example, sulphur put up for retail sale for therapeutic purposes is classified in **heading 30.04** and not in heading 25.03 or 28.02, and dextrin put up for retail sale as a glue is classified in **heading 35.06** and not in heading 35.05.
>
> . . .
>
> *Explanatory Notes* to heading No. 85.16
>
> . . .
>
> **(E) OTHER ELECTRO-THERMIC APPLIANCES OF A KIND USED FOR DOMESTIC PURPOSES**
>
> This group includes all electro-thermic machines and appliances **provided** they are **normally used in the household**. Certain of these have been referred to in previous parts of this Explanatory Note (e.g., electric fires, geysers, hair dryers, smoothing irons, etc.). Others include:
>
> . . .
>
> (19) Perfume or incense heaters, and heaters for diffusing insecticides.
>
> . . .

PRELIMINARY MATTER

6. On September 29, 2005, the CBSA requested that the Tribunal dismiss the appeal because of late filing.

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

7. The CBSA submitted that its decision was communicated to S.C. Johnson in detailed adjustment statements (DASs) dated March 29, 2005, and that the filing of S.C. Johnson's appeal on July 6, 2005, was beyond the 90-day deadline prescribed by subsection 67(1) of the *Act*. It argued that the DASs were the operative documents for the purpose of calculating the 90-day period for filing an appeal, not its April 11, 2005, letter sent to S.C. Johnson. It pointed out that the second last paragraph of the April 11, 2005, letter was essentially a replica of its decision of March 29, 2005, and argued that the letter was only a follow-up to the March 29, 2005, decision.

8. On September 30, 2005, S.C. Johnson responded to the CBSA's request. It argued that the operative document for the purpose of calculating the 90-day period for filing an appeal was the April 11, 2005, letter and that its appeal was therefore timely. It submitted that any ambiguity as to the proper date for use for calculating the appeal period should be resolved in its favour.

9. On November 3, 2005, the Tribunal dismissed the CSBA's request and indicated that it would provide reasons for its decision in its statement of reasons for its classification decision. Those reasons follow.

10. S.C. Johnson filed its appeal on July 6, 2005. To file on time, it needed to file within 90 days of the CBSA's decision. On March 29, 2005, the CBSA issued DASs concerning the classification issue covered by this appeal. On April 11, 2005, the CBSA sent a letter to S.C. Johnson labelled "Follow-up to the Detailed Adjustment Statements" concerning the same issue. Each document indicates that S.C. Johnson has 90 days from the date of the document to appeal. If the DASs were the decision being appealed, S.C. Johnson would be out of time by 9 days. If the April 11, 2005, letter were the decision being appealed, S.C. Johnson would be on time.

11. In its April 11, 2005, letter to S.C. Johnson, the CBSA wrote the following: ". . . This is to inform you that I have made a final ruling in support of my preliminary decision dated January 21, 2005 . . . ." In addition, in an e-mail to S.C. Johnson dated April 12, 2005, the CBSA indicated the following: ". . . In order to clarify a few things, I have forwarded a letter (ruling) along with the new TRS number to replace the one issued by the London office in October explaining my position . . . ." In the Tribunal's opinion, the letter referred to in the April 12, 2005, e-mail can only be the April 11, 2005, letter. Once again, on April 18, 2005, in a letter with the heading "Typographic error correction to the decision letter of April 11, 2005", the CBSA referred to the April 11, 2005, letter as the ". . . final decision letter . . . ." In light of that evidence, the Tribunal concludes that the April 11, 2005, letter, not the March 29, 2005, DASs, was the CBSA's final decision. Consequently, the Tribunal determines that the April 11, 2005, letter constitutes the decision being appealed and that the appeal was filed within the 90-day time limit prescribed under subsection 67(1) of the *Act*.

EVIDENCE

12. This section is a summary of some of the key elements of the testimony by the witnesses at the hearing.The evidence filed by the parties also included, in addition to the testimony, documents and physical exhibits.

13. S.C. Johnson called as a witness Ms. Maxine Byerlay, International Trade Compliance Manager, S.C. Johnson. Ms. Byerlay indicated that S.C. Johnson never sells the electrical heating unit without the fragrance unit. She testified that S.C. Johnson does sell the fragrance unit refills separately. She also testified that S.C. Johnson imports more fragrance unit refills than sets comprising an electrical heating unit and a fragrance unit. She indicated that, within the goods in issue, the value of the electrical heating unit and that

of the fragrance unit are about the same. She stated that the average lifespan of the electrical heating unit was two years and that the average lifespan of the fragrance unit was from one to two months. She also indicated that the extra outlets and night lights found in certain of the goods in issue are added as a convenience to the consumer.

14. The CBSA called as a witness Mr. Wendell Ward, Chief Instrumentation and Analytical Services Section, CBSA. Mr. Ward described the functioning of the electrical heating units that were part of the sets filed as exhibits by the CBSA. He indicated that, when the electrical heating units are plugged into an electrical outlet, they produce heat that causes the release of the fragrance into the room.

ARGUMENT

15. This section is an overview of some of the key elements of the parties' arguments. It is not a comprehensive statement of the arguments submitted by the parties in their briefs or at the hearing.

16. S.C. Johnson submitted that the goods in issue should be classified in heading No. 33.07 by application of Note 2 to Section VI. It also referred to the *Explanatory Notes* to heading No. 33.07 that mention the packaging of certain products and indicate that prepared room deodorizers and disinfectants are generally put up in aerosol cans. It submitted that the packaging of the goods in issue is the next logical technological step in the packaging of its products after the aerosol can. According to S.C. Johnson, the electrical apparatus that it uses for its products constitutes an integral part of the air deodorizing packaging for the product when put up for sale. It also stressed the fact that its marketing and distribution strategy for the goods in issue is aimed solely at the promotion of deodorizers. Electrical features, such as electrical outlets, have been added to some models solely as a convenience to the user.

17. S.C. Johnson submitted that, if the Tribunal found that the goods in issue were *prima facie* classifiable in both heading No. 33.07 as deodorizers and heading No. 85.16 as electro-thermic appliances, the former classification should prevail. To support its position, S.C. Johnson submitted that, regardless of the mechanism used to effect the delivery of the deodorizer, the material or component that gives the goods in issue their essential character is the fragrance unit. It argued that, but for the presence of the fragrance unit, a consumer would not buy the goods in issue. It also noted that the electrical heating unit has no replaceable parts.

18. S.C. Johnson referred to the Tribunal's decision in *Regal Confections Inc. v. Deputy M.N.R.*[4] concerning the classification of candy dispensers, where the Tribunal classified a candy dispenser containing candy as a toy rather than as a confectionery, because of its use as a toy before and after the candies have been consumed. It submitted that, unlike the situation in the case of the candy dispensers in *Regal*, the electrical dispensing systems have not taken over and transformed the essential character of the goods in issue from one of deodorizers to that of independent electrical dispensing products.

19. The CSBA submitted that the goods in issue are properly classified in heading No. 85.16 as electro-thermic appliances of a kind used for domestic purposes. It referred to *Regal* and submitted that, with the introduction of electric current, the essential character of the goods in issue has changed from that of their predecessors, the clay jar of potpourri and the aerosol cans.

20. The CBSA referred to the *Explanatory Notes* to Note 2 to Section VI, which provide examples of instances where the note would apply. It submitted that, while the note may apply to the classification of the

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4. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal*].

fragrance units when imported separately, it does not apply to the classification of the sets made up of the electrical heating unit and the fragrance unit that constitute the goods in issue. It argued that Note 2 does not apply to the exclusion of all other notes.

21. The CBSA submitted that the evidence presented by Mr. Ward demonstrated that the goods in issue were household electrical appliances that, for their operation, depend on the properties or effects of electricity to heat the fragrance units. According to the CBSA and pursuant to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*,[5] that evidence supported the classification of the goods in issue in heading No. 85.16.

22. The CBSA submitted that Rule 3 (b) of the *General Rules* also supported classification of the goods in issue in heading No. 85.16. It argued that the predominant feature of the electrical heating unit is that it relies on electrical current to heat the fragrance unit. The CBSA further argued that, when the electrical heating unit and the fragrance unit are put up for retail sale in a set, it is the electrical heating unit that gives the set its essential character, not the fragrance unit.

23. Finally, the CBSA submitted that, if the goods in issue could not be classified pursuant to Rule 3 (b) of the *General Rules*, they should be classified pursuant to Rule 3 (c). The CBSA argued that, as Rule 3 (c) requires that the goods be classified in the heading that occurs last in numerical order, it also supports the classification of the goods in issue in heading No. 85.16.

ANALYSIS

24. The various tariff classifications are set out in the schedule to the *Customs Tariff*. The schedule is divided into sections and chapters, each of which has its own notes, followed by a list of goods categorized in a number of headings and subheadings and under individual tariff items. The *Customs Tariff* contains its own rules for interpreting the schedule, which are found in sections 10 and 11. Section 10 of the *Customs Tariff* instructs the Tribunal that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules* and the *Canadian Rules*.[6] 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*[7] and the *Explanatory Notes*.

25. The *General Rules*, referred to in section 10 of the *Customs Tariff*, originated in the *International Convention on the Harmonized Commodity Description and Coding System*. They are structured in cascading form so that, if the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2 and so on. Rule 1 reads as follows:

> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the [subsequent rules].

26. The above legislation requires the Tribunal to follow several steps before arriving at the proper classification of goods on an appeal. First, it must examine the schedule to see if the goods fit *prima facie* within the language of a heading; second, it must review the section or chapter notes; and third, it must

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5. *Supra*, note 2, schedule [*General Rules*].
6. *Supra*, note 2, schedule.
7. Customs Co-operation Council, 2d ed., Brussels, 2003 [*Classification Opinions*].

examine the *Classification Opinions* and the *Explanatory Notes* for further guidance as to the proper classification.

27. If this process leads to classification in one, and only one, heading, the next step is to find the appropriate subheading and tariff item that cover the imported goods. If the process leads to classification in more than one heading, the remaining general rules must be applied, in sequence, until the most appropriate heading is found. If necessary, the same process is repeated at the subheading and tariff item levels by application of the *Canadian Rules* in the case of the latter.

28. As indicated above, the April 11, 2005, letter constitutes the decision being appealed. The goods in issue are listed by universal product code in the body of the letter. Ms. Byerlay testified that the goods in issue were the same as Exhibits A-1, A-3 and A-9 filed by S.C. Johnson except for the packaging and fragrances involved. She also testified that none of the electrical heating units in the goods in issue had night lights. On the contrary, Mr. Ward testified that the goods in issue submitted to him for analysis included goods whose electrical heating units had night lights. The Tribunal notes that both S.C. Johnson and the CBSA submitted as exhibits goods whose electrical heating units were equipped with night lights and fans. S.C. Johnson and the CBSA also referred to such goods in their written and oral submissions. On the basis of the evidence before it, the Tribunal concludes that the goods in issue include goods whose electrical heating units are equipped with night lights and fans.

29. It is clear from the information found on the packaging of the physical exhibits filed in this appeal and the testimony that the fragrance unit in the goods in issue, whether it contains oil or gel, deals with odours as contemplated in the *Explanatory Notes* to heading No. 33.07. Accordingly, it is clear that the fragrance unit, if considered independently from the electrical unit, would be classifiable in heading No. 33.07. Both parties agreed with this view.

30. It is also clear that the electrical heating unit, when considered on its own, is classifiable in heading No. 85.16 as an electro-thermic appliance of a kind used for domestic purposes. The electrical heating unit uses electricity to generate heat and, hence, is an "electro-thermic" "machine" or "appliance". The packaging of the physical exhibits and the testimony establish that the electrical heating unit is "normally used in the household". Furthermore, the evidence indicated that the electrical heating unit constituted a "perfume heater", which is one of the goods specifically listed in the *Explanatory Notes* to heading No. 85.16 as being included in that heading. Both parties agreed that the electrical unit, when considered on its own, would be classifiable in heading No. 85.16.

31. As a result, when the electrical heating unit and the fragrance unit are put up in a set for retail sale, the set is *prima facie* classifiable in both heading No. 85.16 and heading No. 33.07. Rule 3 of the *General Rules* provides directions as to how to effect classification in such a case. Rule 3 (a) provides that, when two or more headings each refer to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods. The *Explanatory Notes* to Rule 3 (a) provide that, when such is the case, classification of the goods shall be determined according to Rule 3 (b) or 3 (c).

32. Rule 3 (b) of the *General Rules* provides that goods put up in sets for retail sale shall be classified as if they consisted of the component which gives them their essential character. The *Explanatory Notes* to Rule 3 (b) provide that, for the purposes of this rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which: (a) consist of at least two different articles which are *prima facie* classifiable in different headings; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking. In the Tribunal's opinion, the goods in issue constitute goods put up in sets for retail sale, as they consist of two

articles that are *prima facie* classifiable in different headings, as discussed above. The two articles or components are put up together to meet a particular need or carry out a specific activity, i.e. to deodorize an area, and are packaged together in the way in which consumers would buy them.

33. The *Explanatory Notes* to Rule 3 (b) of the *General Rules* further provide that ". . . [t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods . . . ."

34. The exhibits filed with the Tribunal indicated that the electrical heating unit has a greater bulk than the fragrance unit. With respect to weight, no evidence was filed on this factor. In terms of the relative value of the fragrance and electrical heating units, Ms. Byerlay indicated that their value was approximately the same.

35. Considering the roles of the constituent units, the evidence indicates that the electrical heating unit lasts approximately two years, while the fragrance unit only lasts approximately one or two months.[8] Ms. Byerlay testified that a consumer who buys a set comprising an electrical heating unit and a fragrance unit will typically buy fragrance unit refills for the electrical heating unit once the fragrance has been used up, rather than buy a new set of electrical heating and fragrance units. In the Tribunal's view, given that the fragrance is used up and the fragrance unit is replaced, the fragrance unit plays a role that is subsidiary to that of the electrical heating unit.

36. S.C. Johnson argued that, but for the presence of the fragrance unit, a consumer would not buy the goods in issue. However, in the Tribunal's view, the evidence does not necessarily support this assertion. Given the significantly longer lifespan of the electrical heating unit, a consumer who buys the goods in issue will at one point possess an electrical heating unit but no fragrance unit. S.C. Johnson addresses the needs of that consumer by selling fragrance unit refills. In addition, the testimony before the Tribunal indicated that there are generic fragrance unit refills available on the market that fit into the S.C. Johnson electrical heating units. A consumer who is ready to buy a fragrance unit refill might decide to buy an electrical heating unit and a fragrance unit separately if that option is offered.

37. The Tribunal also considers that the electrical heating unit plays a key role in the functioning of the goods in issue, because the heat provided by the electrical heating unit is essential to dispersing the fragrance and making it effective. The addition of a fan to certain models increases the efficiency of the diffusion. These are important characteristics of the goods in issue and constitute a considerable evolution over the traditional aerosol can that could only disperse a single dose of fragrance at a time.

38. As for the fragrance units, the Tribunal recognizes that consumers may decide to purchase a particular model of the goods in issue based on which scent they prefer. However, the marketing of the goods in issue confirms the predominant role played by the electrical heating unit. The goods are called "PlugIns", referring to the fact that they are plugged into an electrical outlet. Additional electrical features have also been given prominence (fan, night light, extra outlet) in marketing the product. The packaging of the physical exhibits filed by the parties, in most cases, displays the name of the fragrance in smaller print than it does the electrical features.

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8. This situation may be paralleled somewhat to that where a consumer buys a set comprising a lamp and a light bulb. Normally, the lamp will significantly outlast the life of the light bulb.

39. Based on the foregoing, the Tribunal finds that the electrical heating unit gives the goods in issue their essential character.

40. In this appeal, S.C. Johnson argued that Note 2 to Section VI directed classification of the goods in issue in heading No. 33.07 as prepared room deodorizers. According to Note 2, goods classifiable in heading No. 33.07 by reason of being put up in measured doses or for retail sale are to be classified in that heading. The Tribunal agrees with the CBSA's interpretation that Note 2 applies to goods that, in bulk, would not be classifiable in one of the headings listed in Note 2, but become so classifiable when put up for retail sale. In the Tribunal's opinion, it cannot be said that the goods in issue are classifiable in heading No. 33.07 *by reason of* being put up for retail sale. Indeed, as discussed above, when the fragrance unit is not put up for retail sale with the electrical heating unit, but rather sold as a fragrance refill, it is already classifiable in heading No. 33.07 as a prepared room deodorizer.

41. According to Rule 3 (b) of the *General Rules* and given that the Tribunal finds that the electrical heating unit gives the goods in issue their essential character, the goods in issue should be classified as if they consisted of the electrical heating unit, that is, in heading No. 85.16, more specifically under tariff item No. 8516.79.90 as electro-thermic appliances of a kind used for domestic purposes.

42. For the foregoing reasons, the appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Elaine Feldman
Elaine Feldman
Member