



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-029

J. Walter Company Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, May 30, 2008*

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IN THE MATTER OF an appeal heard on June 15, 2007, under subsection 67(1) 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 June 26, 2006, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

J. WALTER COMPANY LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Ellen Fry
Ellen Fry
Member

Serge Fréchette
Serge Fréchette
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 15, 2007
Tribunal Members:	James A. Ogilvy, Presiding Member Ellen Fry, Member Serge Fréchette, Member
Counsel for the Tribunal:	Dominique Laporte
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal under subsection 67(1) of the *Customs Act*¹ from a decision made on June 26, 2006, by the President of the Canada Border Services Agency (CBSA) under subsection 60(4) of the *Act*.

2. The first issue in this appeal is whether the blending discs and circular finishing discs in issue should be classified under tariff item No. 6805.10.10 of the schedule to the *Customs Tariff*² as flap wheels and spiral bands on a base of woven textile fabric, as claimed by J. Walter Company Ltd. (Walter), or are properly classified under tariff item No. 6805.10.90 as other natural or artificial abrasive powder or grain on a base of woven textile material, as determined by the CBSA.

3. The second issue in this appeal is whether the line finishing drums in issue should be classified under tariff item No. 6805.30.10 as flap wheels and spiral bands on a base of materials other than woven textile fabric, paper or paperboard, as claimed by Walter, or are properly classified under tariff item No. 6805.30.90 as other natural or artificial abrasive powder or grain on a base of materials other than woven textile fabric, paper or paperboard, as determined by the CBSA.

Procedural History

4. The goods in issue were imported between August 26, 2002, and April 30, 2003, under tariff item Nos. 6805.10.10 and 6805.30.10.

5. On April 8, 2004, following an audit pursuant to subsection 59(1) of the *Act*, the CBSA decided to re-classify the blending discs and circular finishing discs under tariff item No. 6805.10.90 on the ground that they were not flap wheels or spiral bands. The CBSA maintained the classification for the line finishing drums under tariff item No. 6805.30.10. On April 7, 2005, Walter requested a re-determination of the tariff classification pursuant to subsection 60(4) of the *Act*.

6. On June 26, 2006, pursuant to subsection 60(4) of the *Act*, the CBSA confirmed its re-determination of the classification of the blending discs and circular finishing discs under tariff item No. 6805.10.90, but reversed its initial determination in respect of the line finishing drums, deciding that they were not flap wheels or spiral bands and were instead properly classified under tariff item No. 6805.30.90.

7. On September 22, 2006, Walter filed an appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Act*.

8. The Tribunal held a public hearing in Ottawa, Ontario, on June 15, 2007.

9. Mr. Berny Amiel, President, Walter Surface Technologies, and Mr. Claude Vandemeulebroocke, International Vice-President, Product Development, Walter Surface Technologies, were qualified as expert witnesses in the design and production of coated abrasives and gave testimony on behalf of Walter. Mr. Chester Collier, Vice-President of Sales, Walter Technologies pour surfaces, Mr. Ben Pulice, Purchasing Manager, Walter Surface Technologies, and Mr. Sylvain Fredette, President, Fred Welding Inc., also testified on behalf of Walter.

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

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

10. Mr. John Perrins, Senior Technical Officer, Mechanical Engineering, University of Ottawa, Faculty of Engineering, was qualified as an expert witness in mechanical engineering, steel fabrication and welding, and the composition and use of flap wheels and flap discs and testified on behalf of the CBSA. Mr. Lorne Rowland, Professor, Motive Power Trades, Algonquin College, and Mr. Roger E. Godin, Instructor, School of Transportation and Building Trades, Algonquin College, also gave testimony on behalf of the CBSA.

ANALYSIS

Law

11. For the purposes of this appeal, the Tribunal must follow section 10 of the *Customs Tariff*, which provides that the tariff classification of goods shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*³ and the *Canadian Rules*.⁴ Rule 1 of the *Canadian Rules* provides that “. . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the . . . General Rules . . .” The *General Rules* comprise six rules structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2 and so on, until classification is completed.

12. In addition, the Tribunal is guided by section 11 of the *Customs Tariff*, which 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*⁵ and to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.⁶

13. Rules 1 and 6 of the *General Rules* read as follows:

1. 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 following provisions.
6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

14. The Tribunal notes that both parties are in agreement with respect to the heading and the subheadings applicable to the goods in issue. It is at the tariff item level that they disagree. In this regard, Rule 1 of the *Canadian Rules* states the following:

1. For legal purposes, the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the General Rules for the Interpretation of the Harmonized System, on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.

3. *Ibid.*, schedule [*General Rules*].

4. *Supra* note 2, schedule.

5. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

6. World Customs Organization, 3d ed., Brussels, 2002 [*Explanatory Notes*].

15. In this appeal, there are no *Explanatory Notes* or *Classification Opinions* that offer guidance.

Tariff Classification at Issue

16. The relevant nomenclature of the *Customs Tariff* that was in effect when the goods in issue were imported reads as follows:

...	
68.05	Natural or artificial abrasive powder or grain, on a base of textile material, of paper, of paperboard or of other materials, whether or not cut to shape or sewn or otherwise made up.
6805.10	-On a base of woven textile fabric only
6805.10.10	-- -Flap wheels and spiral bands of a kind used with power-operated tools
...	
6805.10.90	-- -Other
...	
6805.30	-On a base of other materials
6805.30.10	-- -Flap wheels and spiral bands of a kind used with power-operated tools
...	
6805.30.90	-- -Other

First Issue—Classification of the Blending Discs and the Circular Finishing Discs

17. The Tribunal will first deal with the classification of the blending discs and the circular finishing discs. Walter described the blending discs as follows:

... [B]lending discs have an abrasive base and are used to grind down welds in order to blend them into a smooth surface. They combine grinding and sanding into a synchronized, one-step operation. The discs are mounted on handheld power grinders and feature flaps made of coated grain or cloth.

The blending discs in issue are Enduro-Flex™ flap discs, models 06B (Exhibit A-1) and 06F (Exhibit A-2) and Flexsteel™ flap discs, models 15R (Exhibit A-3) and 15Q (Exhibit A-4).

18. Walter described the circular finishing discs as follows:

These products cover a range of grinding and conditioning discs. Some are small - only 2.5 inches in diameter - and used for light to medium-duty surface finishing of all ferrous and non-ferrous metals. Other circular finishing discs are larger, between 4.5 and seven inches in diameter. They blend welds, clean surfaces, refine and enhance existing finishes or bring out a mirror finish on stainless steel, steel, [aluminum] or any other metals. Both the smaller and larger finishing discs feature a resistant abrasive flap and are mounted on power tools.

The circular finishing discs in issue are Quick-Step™ flap discs (Exhibit A-5) and Twist™ flap discs (Exhibit A-6).

19. The parties were in agreement that the blending discs and the circular finishing discs in issue fulfilled the terms of heading No. 68.05 and subheading No. 6805.10, as the base on which the abrasive was applied is composed of woven fabric. On the basis of the laboratory reports and testimony, the Tribunal sees no reason to take a divergent view.

20. The Tribunal proceeded by examining each tariff item and is left with a potential classification under the following two relevant tariff items proposed by the parties:

6805.10.10 -- -Flap wheels and spiral bands of a kind used with power-operated tools

6805.10.90 -- -Other

21. Applying Rule 1 of the *Canadian Rules*, the Tribunal must determine if the goods in issue meet the terms of tariff item No. 6805.10.10. If so, they must be classified under this tariff item as opposed to the residual tariff item. It was clear from testimony on both sides that the goods were to be used exclusively with power-operated tools, such as angle grinders.⁷

22. As the parties agreed that the goods were not spiral bands, and the Tribunal accepts this view, it must now determine whether the goods are flap wheels. The parties disagree on this point. Walter submitted that the discs are round, flat objects and that they have abrasive flaps. On the other hand, the CBSA argued that the blending and circular finishing discs consist of a series of layered woven man-made fibres laid down on each other around a flattened disc and that the horizontally adhered layers do not flap. The CBSA submitted that the blending discs and circular finishing discs meet the definition of “discs” and that the latter are implicitly excluded from tariff item No. 6805.10.10, which refers to “flap wheels”.

23. The first element that the Tribunal must consider is whether the blending discs and circular finishing discs have “flaps”. Testimony and an examination of the physical exhibits made it clear that each of the goods was constructed with a series of abrasive-impregnated textile flaps.⁸ The presence of flaps as an integral aspect of the construction of the goods is therefore not in question. The testimony also indicates that, because they are fastened to one side only, all flaps do flutter to a larger or smaller degree.⁹

24. The second element that the Tribunal must consider is whether the goods meet the description of “wheel”. The Tribunal notes that, in each instance, the form of the goods at right angles to the axis of rotation was circular. The goods were differentiated by the orientation of the flaps: on those that the CBSA regarded as flap discs, the flaps were cemented to the surface of the circle and lay relatively flat in the plane of that circle, radiating outward from the centre to the circumference of the circle. The CBSA contrasted these with other goods (not in issue) which it regarded as true flap wheels, on which the flaps were anchored to a cylindrical core, or hub, with the anchor lines lying parallel to its axis of rotation.¹⁰ In the former group of goods, contact with the material being worked on is generally at a shallow angle from the plane of the circle, whereas in the latter goods, the contact is typically roughly at right angles to the plane of the circle, around its circumference and parallel to its axis of rotation.

25. The CBSA argued that “flap wheel” and “flap disc” are distinct technical terms for which established, specific meanings exist and that, for this reason, the term “flap wheel” should not be interpreted broadly to include flap discs. Although Walter’s catalogue refers to the goods as “discs”, the testimony from the witnesses for Walter was that it was an arbitrary term and that there were no standards in the industry.¹¹ The documentary evidence submitted clearly indicates that other suppliers, such as Tyrolit, Flexovit and

7. *Transcript of Public Hearing*, 15 June 2007, at 45, 150.

8. *Ibid.* at 55, 62-63, 75.

9. *Ibid.* at 63.

10. *Ibid.* at 194; Exhibit A-29 (SE-14).

11. *Ibid.* at 46, 91.

SAIT, refer to the goods as both “wheels” and “discs”.¹² The Tribunal notes that, in testimony, there were differences of opinion on the use of the terms. A witness for the CBSA noted that, from an engineering perspective, the difference between a disc and a wheel is that the former is circular in shape and very thin, while the latter tends to have a thicker surface.¹³ In light of the evidence, the Tribunal notes that, in industry usage, such precision does not prevail and that there exist no terms of art.¹⁴ Indeed, one end user stated that, when ordering the goods, he used both terms interchangeably.¹⁵

26. In addition, the Tribunal notes that the CBSA laboratory reports¹⁶ clearly state the following with respect to the Enduro-Flex™ flap disc:

...

This sample, *in the shape of a wheel*, is 12.25 cm (diameter) by 1.31 cm (thick) with a 6.4 cm (diameter) depression and a 1.3 cm threaded hole in the depression

In answer to your question, it is my opinion that a *flap disc and a flap wheel are the same* for purposes of tariff item 6805.10.10.

[Emphasis added]

27. While such opinions are not in any way determinative, they are part of the overall evidence that cumulatively provides a reasonable indication of interchangeability in usage. This suggests that, with respect to the goods in issue, the terms are effectively synonymous. Moreover, the Tribunal notes that the warning that appears on the SAITBLEND™ disc, which is referred to as a disc in the manufacturer’s catalogue, states that “. . . [i]mproper use may cause *wheel* breakage and serious injury”[emphasis added].¹⁷

28. Dictionary definitions of the words “disc” and “wheel” were placed on the record. While neither of these definitions provides a conclusive answer, the question is reduced to whether the term “wheel” can subsume the term “disc”. In fact, the definitions provided on the record frequently use “disc” as part of the definition of “wheel”.¹⁸ As for a possible distinction between the two, based on which of the surfaces (flat face or circumference) is the functional one, the Tribunal notes that examples of wheels given in the dictionary entries include potter’s wheel and roulette wheel. In both examples, the functional surface is the plane of the circle at right angles to the axis of rotation which, if the CBSA’s distinction were adopted, would preclude these items from being considered wheels.

29. In light of the foregoing, the Tribunal is unable to draw a mutually exclusive distinction between a disc and a wheel and, in fact, sees the concept of wheel as encompassing the concept of disc.

30. The Tribunal therefore concludes that the goods in issue are included in the term “flap wheels” and finds that the blending discs and circular finishing discs in issue should be classified under tariff item No. 6805.10.10 as flap wheels of a kind used with power-operated tools.

12. Appellant’s Supplementary Documentary Exhibits, Tribunal Exhibit AP-2006-029-17A.

13. *Transcript of Public Hearing*, 15 June 2007, at 207.

14. *Ibid.* at 118.

15. *Ibid.* at 165.

16. Appellant’s Public Exhibits, Tab 4.

17. Exhibit A-33.

18. Appellant’s Supplementary Authorities, Tab.10.

Second Issue—Classification of the Line Finishing Drums

31. The Tribunal will now deal with the classification of the line finishing drums. These goods were described by Walter as being used to remove rust, scratches and surface imperfections, to produce consistent finishes or to perform tougher cleaning operations. Some of the drums have abrasive cloth which cuts aggressively while the interleaved flaps produce a smooth finish. Other models contain coarse-woven flaps for stripping paint and removing rust and scales. Like blending discs and circular finishing discs, all the line finishing drums are used with hand-held power-operated tools. The models in issue are Two-in-One™ drums¹⁹ (07K), FX™ drums²⁰ (07L) and Blendex™ drums (07M).²¹

32. By way of a letter dated June 12, 2007, the parties informed the Tribunal that they had come to the agreement that the line finishing drums should be classified under tariff item No. 6805.30.10.00 as “flap wheels”. The Tribunal sent a letter informing the parties that, despite their agreement, it would deal with these goods at the hearing in order to ensure that the tariff classification that they sought was the proper one.

33. The parties were in agreement that the line finishing drums in issue fulfilled the terms of heading No. 68.05 and subheading No. 6805.30, as the base was not of woven textile fabric only, and the Tribunal accepts this premise.²² Accordingly, the matter before the Tribunal is at the tariff item level. Tariff item No. 6805.30.10 reads as follows:

6805.30.10 - - Flap wheels and spiral bands of a kind used with power-operated tools

34. Applying Rule 1 of the *Canadian Rules*, the Tribunal must determine if the drums in issue meet the terms of tariff item No. 6805.30.10. The parties agreed that the drums met all the terms of the tariff item. The Tribunal is satisfied that the drums in issue are of a kind used with power-operated tools. Neither party argued that they were spiral bands and, on the basis of a description and a visual inspection of the physical exhibits, the Tribunal is of the opinion that they are not spiral bands. Therefore, the question is whether they are wheels or “other”.

35. In the Tribunal’s view, the construction of the drums is very similar to that of the goods described by the CBSA as flap wheels²³. The flaps are anchored to a cylindrical core, or hub, with the anchor lines lying parallel to its axis of rotation. Also, during use, contact with the material being worked on is typically at right angles to the plane of the circle, around its circumference and parallel to its axis of rotation. Therefore, in this group of goods, the question as to whether there should be a distinction between “wheel” and “disc” does not arise.

36. It is clear from the discussion above that the terms employed in catalogues and other industry usage are not necessarily determinative of tariff classification. The common usage of the term “drums” therefore does not, on its own, preclude their classification as “flap wheels”.

37. The Tribunal is therefore of the opinion that the drums in issue should be classified under tariff item No. 6805.30.10 as flap wheels and spiral bands of a kind used with power-operated tools.

19. Exhibit A-7.

20. Exhibit A-9.

21. Exhibit A-8.

22. *Transcript of Public Hearing*, 15 June 2007, at 22-23, 28-29.

23. Exhibit A-14.

DECISION

38. In light of the foregoing, the appeal is allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Ellen Fry
Ellen Fry
Member

Serge Fréchette
Serge Fréchette
Member