



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-038

Canadian Tire Corp. Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, November 2, 2007*

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DECISION8

IN THE MATTER OF an appeal heard on May 16, 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 September 18, 2006, with respect to a request for review of an advance ruling under subsection 60(4) of the *Customs Act*.

BETWEEN

CANADIAN TIRE CORP. LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 16, 2007

Tribunal Members: Pierre Gosselin, Presiding Member
Zdenek Kvarda, Member
Ellen Fry, Member

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Canadian Tire Corp. Ltd. (Canadian Tire) under subsection 67(1) of the *Customs Act*¹ from a decision on a request for review of an advance ruling made on September 18, 2006, by the President of the Canada Border Services Agency (CBSA) under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether Mastercraft[®] heat gun kits, product No. 54-6500-6 (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. 8467.29.90 as other tools for working in the hand, pneumatic, hydraulic or with self-contained electric motor, as claimed by Canadian Tire. Alternatively, should the Tribunal determine that the goods in issue constitute electro-thermic appliances, but *not* of a kind used for domestic purposes, the CBSA suggests that they be classified under tariff item No. 8419.89.90 as other machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading No. 85.14), for the treatment of materials by a process involving a change of temperature such as heating, other than of a kind used for domestic purposes.

3. The goods in issue are sold at Canadian Tire stores. According to the evidence, a kit consists of a heat gun, four nozzle attachments to deflect airflow (air diffusers), a scraper handle, three interchangeable scrapers for various uses and a plastic carrying case. The heat gun is a tubular device with a pistol grip. Inside the tube, a fan powered by an electric motor blows air over a heated electric element and expels it through a nozzle at the working end of the gun. The heat gun can generate temperatures ranging from 250 to 450 degrees Celsius. The heat gun is used for numerous applications, including the following: paint and varnish drying or removal; soldering plumbing joints; removing self-adhesive stickers and trim; thawing frozen metal pipes; and bending plastic pipes.

4. On March 28, 2006, the CBSA issued an advance ruling classifying the goods in issue under tariff item No. 8516.79.90. On May 29, 2006, Canadian Tire requested a review of this decision pursuant to subsection 60(2) of the *Act*. On September 18, 2006, the CBSA confirmed its earlier ruling that the goods in issue were properly classified under tariff item No. 8516.79.90 as other electro-thermic appliances of a kind used for domestic purposes.

5. On November 8, 2006, Canadian Tire appealed this decision to the Tribunal. In an agreed statement of facts filed with the Tribunal on May 8, 2007, Canadian Tire and the CBSA agreed to the following facts in respect of the goods in issue:

- The goods are electro-thermic and electro-mechanical.
- The goods are mechanically operated as defined in the supplementary note of Section XVI of the *Customs Tariff*.

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

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

6. The nomenclature of the *Customs Tariff* which Canadian Tire claims should apply to the goods in issue reads as follows:

...
84.67 Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or non-electric motor.

...
-With self-contained electric motor:

...
8467.29 --Other

...
8467.29.90 ---Other

...

7. The nomenclature which the CBSA ruled applicable to the goods in issue reads as follows:

...
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

...

8. The nomenclature for the alternative classification proposed by the CBSA reads as follows:

...
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.

...
-Other machinery, plant and equipment:

...
8419.89 --Other

...
8419.89.90 ---Other

ANALYSIS

9. For the purposes of this appeal, the Tribunal must follow sections 10 and 11 of the *Customs Tariff*. Section 10 provides that the classification of imported goods shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*³ and the *Canadian Rules*.⁴ Section 11 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

10. The *General Rules* consist of 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.

11. Rules 1 through 5 of the *General Rules* apply to the classification at the heading level. Rule 6 of the *General Rules* makes these rules also applicable for the classification at the subheading level. Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable for the classification at the tariff item level.

12. Rule 1 of the *General Rules* reads 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.

13. Rules 3 (a) and (b) of the *General Rules* read as follows:

3. When by application of Rule 2 (b) or for any other reason, 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. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or 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, even if one of them gives a more complete or precise description of the goods.
 - (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

14. It is common ground between the parties that the goods in issue consist of several components put up in a set for retail sale. The CBSA argued that, according to Rule 3 (b) of the *General Rules*, they must be classified as if they consisted of the component that gives the set its essential character. The CBSA submitted that this component is the heat gun. Canadian Tire agreed that the goods in issue must be classified as if they consisted of the heat gun.⁷

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

4. *Supra* note 2, schedule.

5. World Customs Organization, 2d ed., Brussels, 2003.

6. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

7. *Transcript of Public Hearing*, 16 May 2007, at 87.

15. The Tribunal considers that the goods in issue are “kits” and are therefore put up for retail sale in “sets”. According to Rule 3 (b) of the *General Rules*, such goods must be classified as if they consisted of the component which determines the essential character of the kits when they cannot be classified according to Rule 3 (a). Given that the goods in issue contain a number of articles that have their own classification under two or more headings that are to be regarded as equally specific by virtue of Rule 3 (a), the Tribunal cannot classify them by reference to Rule 3 (a). Consequently, they must be classified by reference to Rule 3 (b), which directs the Tribunal to focus on the classification of the article or component that gives the kits their essential character.

16. It is clear from the evidence that it is the heat gun that plays the most important role in relation to the use of the goods in issue. The other articles in the kit are merely accessories to the heat gun. Users purchase the goods in issue in order to generate heat for different applications, and it is the heat gun component that provides this basic feature.⁸ In view of the above, the Tribunal agrees that it is the heat gun that gives the kit its essential character and, based on Rule 3 (b) of the *General Rules*, will classify the goods in issue as if they consisted of the heat gun.

17. Canadian Tire submitted that, pursuant to Rule 1 of the *General Rules*, the most appropriate classification of the heat gun is under tariff item No. 8467.29.90. Relying also on Rule 1, the CBSA argued that the heat gun is an electro-thermic appliance of a kind used for domestic purposes and, on that basis, is properly classified under tariff item No. 8516.79.90. In the alternative, should the Tribunal determine that the heat gun is also classifiable in heading No. 84.67, the CBSA submitted that, based on Rule 3 (b), the heat gun should still be classified in heading No. 85.16 because it is the electro-thermic property of the heat gun that gives it its essential character. In the further alternative, should the Tribunal determine that the goods in issue constitute electro-thermic appliances, but *not* of a kind used for domestic purposes, the CBSA submitted that the goods in issue should be classified in heading No. 84.19.

18. The Tribunal will first determine whether the goods in issue are classifiable in heading No. 84.67. To the extent that they are, the Tribunal will turn to the issue of whether they are also *prima facie* classifiable in heading No. 85.16. If necessary, the Tribunal will then address the CBSA’s alternative arguments.

Heading No. 84.67

19. According to Rule 1 of the *General Rules*, classification shall be based on the terms of the heading and any relevant Section or Chapter Notes. In interpreting the terms of the headings, section 11 of the *Customs Tariff* directs the Tribunal to have regard to the *Explanatory Notes*. Canadian Tire argues that the terms of heading No. 84.67 contain three conditions that must be met for the goods in issue to be classified in that heading. These are: (i) the goods must be “tools”; (ii) the goods must be “for working in the hand”; and (iii) the goods must be “pneumatic, hydraulic or with self-contained electric or non-electric motor”.

20. The Tribunal notes that there are no relevant Section or Chapter Notes. For this reason, the Tribunal is of the view that goods are *prima facie* classifiable in heading No. 84.67 to the extent that they fulfil these conditions, having regard to the relevant *Explanatory Notes*. Thus, the Tribunal must determine whether the heat gun satisfies the three conditions of heading No. 84.67.

21. With respect to the first condition, the evidence presented clearly indicates that the goods in issue are tools. First, the goods in issue are marketed and sold by Canadian Tire as “tools”, as indicated in the product and marketing literature that was filed with the Tribunal. The product manual, which contains the

8. *Ibid.* at 10-12, 26.

operating and safety instructions for the goods in issue, repeatedly refers to the goods in issue as “tools”.⁹ Second, at the hearing, both the witness for Canadian Tire and the witness for the CBSA described the goods in issue as tools.¹⁰ Finally, while the CBSA argued that a hand-held tool can be an appliance, it did not take issue with Canadian Tire’s categorization of the goods in issue as tools. Consequently, it is clear that the goods in issue are tools within the meaning of the terms of heading No. 84.67.

22. With respect to the second condition, i.e. that the tools be “for working in the hand”, the Tribunal notes that, according to the *Explanatory Notes* to heading No. 84.67, “. . . [t]he heading covers such tools **only** if for working in the hand” It is quite obvious from the documentary evidence that heat guns such as the goods in issue are tools for working in the hand. For example, the respondent’s brief¹¹ includes a picture of a heat gun being used by an individual, which clearly shows that such goods are held in the hand by a handle when they are used. In the Tribunal’s view, all jobs for which the heat gun can be used that are described in the product literature are performed when the heat gun is held in the hand of the user. Moreover, both witnesses testified that a heat gun is a hand tool, since it is designed to be hand-held.¹² On that basis, it is clear that the heat gun is a tool “for working in the hand”.

23. The third condition is that the goods in issue must be “pneumatic, hydraulic or with self-contained electric or non-electric motor”. According to the documentary evidence, the goods in issue are neither pneumatic nor hydraulic, but contain a motor. The heat gun has a fan to drive the heat from the coil to the work area, and the fan is powered by an electric motor. This was also confirmed by both witnesses.¹³ Thus, it is clear that the heat gun has a “self-contained electric motor”.

24. The Tribunal accepts Canadian Tire’s submission that, based on the terms of the heading, the Section or Chapter Notes and the *Explanatory Notes*, there is no limitation or condition on the end use of hand tools (i.e. for domestic versus commercial use) in order for them to be classified in heading No. 84.67. This means that heading No. 84.67 can include tools that can be used or are used for both commercial and domestic purposes.

25. In view of the above, the Tribunal finds that the goods in issue are classifiable in heading No. 84.67.

Heading No. 85.16

26. Given that the Tribunal has determined that the goods in issue are *prima facie* classifiable in heading No. 84.67, the issue becomes whether they are also *prima facie* classifiable in heading No. 85.16. To the extent that they are, the classification will have to be effected by reference to Rule 3 of the *General Rules*.

27. Based on Rule 1 of the *General Rules*, the *Explanatory Notes* and the characteristics of the heat gun component of the goods in issue, the CBSA submitted that they are electro-thermic appliances of a kind used for domestic purposes that should be classified in heading No. 85.16. The CBSA added that, pursuant to section 11 of the *Customs tariff*, regard shall be given to paragraph (3) of Section (A) of the *Explanatory Notes* to Chapter 85, which describes items that are covered by the Chapter as follows:

- (3) Certain machines and appliances which depend for their operation on the properties or effects of electricity, such as its . . . heating properties . . . (headings . . . 85.11 to 85.18 . . .).

9. Tribunal Exhibit AP-2006-038-4A, Tab 1; *Transcript of Public Hearing*, 16 May 2007, at 7-8.

10. *Transcript of Public Hearing*, 16 May 2007, at 8, 34.

11. Tab 10.

12. *Transcript of Public Hearing*, 16 May 2007, at 9, 34.

13. *Ibid.* at 9-10, 32-34.

28. The CBSA also referred to Section (A) of the *Explanatory Notes* to Chapter 84, which provides as follows:

Subject to the provisions of the General Explanatory Note to Section XVI, this Chapter covers all machinery and mechanical appliances, and parts thereof, not *more specifically covered* by **Chapter 85**

[Emphasis added]

29. The Tribunal will need to address the issue of whether heading No. 85.16 describes the goods in issue more specifically than heading No. 84.67 only if it first determines that the goods are classifiable in heading No. 85.16. Based on the terms of heading No. 85.16, in order for the goods in issue to be classified in that heading, the heat gun must meet three conditions, namely, the heat gun must be (i) electro-thermic, (ii) an appliance and (iii) of a kind used for domestic purposes.

30. In the agreed statement of facts filed with the Tribunal, the parties agreed that the goods in issue are electro-thermic. Therefore, the Tribunal considers that the heat gun can be described as electro-thermic within the meaning of heading No. 85.16.

31. The parties held opposing views on the other two conditions. With respect to the issue of whether the heat gun is an appliance, the CBSA relied on definitions of the terms “appliance” and “device” found in the *Canadian Oxford Dictionary* and argued that these definitions “suggest” that the heat gun is an appliance.¹⁴ At the hearing, the CBSA argued that the definition of appliance is very vague and general and that an appliance can be a hand-held tool, as is the case with the heat gun.

32. However, witnesses for both sides, when specifically asked, identified the goods in issue as hand tools and did not consider them to be appliances.¹⁵ In the Tribunal’s view, this indicates that the term “appliance” is not ordinarily used to refer to the heat gun.

33. The Tribunal also notes that the *Explanatory Notes* to heading No. 85.16 do not support the CBSA’s argument that a hand tool like the heat gun is an appliance. While the list of goods included under Section (E), “Other Electro-thermic Appliances of a Kind Used for Domestic Purposes”, is illustrative and not exhaustive, the fact remains that the list does not include any tools or any goods that appear to be for use in the hand. None of the goods listed is similar to the heat gun.

34. Based on the foregoing, the Tribunal does not consider that the goods in issue are appliances and, therefore, concludes that they are not classifiable in heading No. 85.16.

35. The Tribunal is also of the view that the goods in issue are not classifiable in heading No. 85.16 on the basis that they are *not* of a kind used for domestic purposes. On this issue, the Tribunal has previously found that, in order for goods to qualify as goods “for domestic purposes”, the goods must be “primarily for domestic or household use.”¹⁶

14. Second ed., s.v. “appliance”: “an electrical or gas-powered device or piece of equipment used for a specific task, esp. for domestic tasks such as washing dishes etc.”

15. *Transcript of Public Hearing*, 16 May 2007, at 8, 34, 43-44.

16. *Alliance Ro-Na Home Inc. v. Commissioner of the Canada Customs and Revenue Agency* (25 May 2004), AP-2003-020 (CITT) at 2.

36. The CBSA argued that the heat gun is of a kind used for domestic purposes due to its warranty and design. In particular, the CBSA pointed out that the product manual for the heat gun kit states that the tool is not guaranteed for industrial and commercial purposes and that warranties for heat guns of other manufacturers do not contain a similar exclusion. The CBSA submitted that this is evidence that the goods in issue are unattractive for commercial and industrial purposes. Since the warranty exclusion would appear to discourage their purchase for commercial purposes, the CBSA submitted that the goods in issue are of a kind used for domestic purposes.

37. However, the witness for Canadian Tire stated that he uses the goods in issue in his construction business, i.e. for commercial rather than domestic purposes. The fact that such use would nullify the warranty did not seem to concern the witness who treated the goods as disposable if they failed, since they were of low monetary value. The witness for the CBSA seemed to attach a good deal of importance to the warranty, having chosen a more expensive heat gun that was under warranty for commercial use. The evidence showed that for some heat guns, the duration of the warranty depends on whether they are used for domestic or commercial purposes.

38. Accordingly, the evidence on the warranty issue is unclear. The goods in issue do not have a warranty for commercial use and, although other apparently similar goods have warranties, they cover shorter periods. In any event, the evidence is that there is significant use of the goods in issue for commercial purposes and, hence, they are not primarily for domestic purposes. Since the evidence does not establish that the goods in issue are primarily for domestic or household use, the Tribunal is not convinced that the goods are “of a kind used for domestic purposes” within the meaning of heading No. 85.16.

39. In summary, pursuant to Rule 1 of the *General Rules*, the Tribunal finds that heading No. 84.67 describes the goods in issue, whereas heading No. 85.16 does not. Therefore, heading No. 85.16 cannot describe the goods more specifically than heading No. 84.67, as was argued by the CBSA.

40. In view of its determination that the goods in issue are not classifiable in heading No. 85.16, the Tribunal concludes that they are not properly classified under tariff item No. 8516.79.90, as determined by the CBSA.

41. Considering the CBSA’s alternative classification, i.e. tariff item No. 8419.89.90, the Tribunal notes that the CBSA argued that it would apply only if the Tribunal determined that the goods in issue are electro-thermic appliances, but *not* of a kind used for domestic purposes. Since the Tribunal has found that the goods in issue are not appliances, it does not have to address the CBSA’s alternative position. In any event, the Tribunal fails to see how hand tools such as the goods in issue could be considered “machines”, “apparatus” or “plant equipment” within the meaning of the terms of heading No. 84.19.¹⁷

Classification at the Tariff Item Level

42. Having determined, pursuant to Rule 1 of the *General Rules*, that the goods in issue should be classified in heading No. 84.67, the Tribunal must now determine the proper subheading and tariff item. On this issue, based on the terms of the relevant subheadings and tariff items listed in the schedule to the *Customs Tariff*, Canadian Tire submitted that the goods in issue should be classified under tariff item No. 8467.29.90. Pursuant to Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, the Tribunal agrees that the goods should be classified in subheading No. 8467.28 and under tariff item No. 8467.29.90

17. At the hearing, the witness for the CBSA stated that he would not refer to the heat gun as an electric heating apparatus (*Transcript of Public Hearing*, 16 May 2007, at 44).

respectively. Subheading No. 8467.29 includes tools with a self-contained electric motor “other” than certain “drills” and “saws”. Subheading No. 8467.29 is subdivided into two tariff items, namely, tariff item No. 8467.29.10, which covers certain “angle sanders” and “angle grinders”, and tariff item No. 8467.29.90, which includes “other” tools. The goods in issue ultimately fall under tariff item No. 8467.29.90, as they are not “angle sanders” or “angle grinders”.

DECISION

43. Based on the above, the appeal is allowed. Consequently, the Tribunal finds that the goods in issue should be classified under tariff item No. 8467.29.90, as other tools for working in the hand, with a self-contained electric motor.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member