



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-004

Wolseley Canada Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, January 18, 2011*

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DECISION 8

IN THE MATTER OF an appeal heard on October 28, 2010, pursuant to 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 February 5, 2009, with respect to a request for review of an advance ruling pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

WOLSELEY CANADA INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: October 28, 2010

Tribunal Member: Serge Fréchette, Presiding Member

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Respondent	Counsel/Representative
President of the Canada Border Services Agency	Brian Harvey

WITNESSES:

Jean Abraham Customer Service Representative, Mechanical HVAC, Hydronics Wolseley Canada Inc.	Atef Fahim Professor, Mechanical Engineering Faculty of Engineering University of Ottawa
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STATEMENT OF REASONS

1. This is an appeal filed by Wolseley Canada Inc. (Wolseley) with the Canadian International Trade Tribunal (the Tribunal) pursuant to section 67 of the *Customs Act*¹ from a decision of the President of the Canada Border Services Agency (CBSA), dated February 5, 2009, made pursuant to subsection 60(4).

2. The issue in this appeal is whether the Buderus G234X atmospheric gas boiler² (the good in issue), in addition to being classified under tariff item No. 8403.10.00 of the schedule to the *Customs Tariff*,³ may also be classified under tariff item No. 9948.00.00 as an article for use in process control apparatus, excluding sensors, which converts analog signals from or to digital signals, thereby benefiting from duty-free treatment.

PROCEDURAL HISTORY

3. On August 7, 2008, Wolseley requested an advance ruling pursuant to subsection 43.1(1) of the *Act* concerning the tariff classification of the good in issue. On September 19, 2008, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(c) and classified the good in issue under tariff item No. 8403.10.00 as a boiler without the benefit of duty-free treatment under tariff item No. 9948.00.00.⁴

4. On October 15, 2008, Wolseley requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*. On February 5, 2009, the CBSA affirmed the advance ruling pursuant to subsection 60(4).⁵

5. On April 21, 2009, Wolseley filed an appeal with the Tribunal pursuant to section 67 of the *Act*.⁶

6. On October 28, 2010, the Tribunal held a public hearing in Ottawa, Ontario.

7. Mr. Jean Abraham, a sales and technical service representative at Wolseley, appeared as a witness for Wolseley. Dr. Atef Fahim, a professor of mechanical engineering at the University of Ottawa, appeared as a witness for the CBSA. The Tribunal qualified Dr. Fahim as an expert in mechanical engineering, control systems and apparatus, and hydronic heating systems.

GOOD IN ISSUE

8. The good in issue is a central heating boiler that uses natural gas or propane to boil water that is circulated through the distribution network of a hot water system to the radiators of a building in order to provide heat.⁷ The good in issue comes equipped with a Honeywell Aquastat L8148A relay.⁸

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

2. Tribunal Exhibit AP-2009-004-03A.

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

4. Tribunal Exhibit AP-2009-004-03A, tab 2.

5. *Ibid.*, tab 1.

6. Tribunal Exhibit AP-2009-004-01.

7. Tribunal Exhibit AP-2009-004-03A at paras. 10, 11, tab 3; Tribunal Exhibit AP-2009-004-05A at paras. 3, 25, 26, tab 10.

8. Tribunal Exhibit AP-2009-004-03A, tab 4.

9. No physical exhibits were filed at the hearing. Photographs and product literature describing the good in issue were filed as evidence in the briefs submitted by Wolseley and the CBSA as well as in Wolseley's Book of Documents.⁹

ANALYSIS

Statutory Framework

10. In appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in issue in accordance with prescribed interpretative rules.

11. The tariff nomenclature is set out in detail in the schedule to the Customs Tariff, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.¹⁰ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

12. Subsection 10(1) of the Customs Tariff provides as follows: "... the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*^[11] and the *Canadian Rules*^[12] set out in the schedule."

13. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.¹³ Classification therefore begins with Rule 1, which provides as follows: "... 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."

14. Section 11 of the *Customs Tariff* provides as follows: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System^[14] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[15] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise.¹⁶

9. *Ibid.*, tabs 3, 4, 5; Tribunal Exhibit AP-2009-004-05A, tab 10; Tribunal Exhibit AP-2009-004-14B, tabs 1, 4.

10. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

11. S.C. 1997, c. 36, schedule [*General Rules*].

12. S.C. 1997, c. 36, schedule.

13. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Under Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

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

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

16. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.

15. Chapter 99 of the *Customs Tariff*, which includes tariff item No. 9948.00.00, provides special classification provisions that allow certain goods to be imported into Canada with tariff relief. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter.¹⁷ Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no *Classification Opinions* or *Explanatory Notes* to consider.

16. There are no section notes to Section XXI, which includes Chapter 99. However, note 3 to Chapter 99 is relevant to the present appeal. It reads as follows:

Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin only after classification under a tariff item in Chapters 1 to 97 has been determined and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.

17. In accordance with the preceding note, the good in issue may only be classified in Chapter 99 after classification under a tariff item in Chapters 1 to 97 has been determined. The parties are in agreement that the good in issue should be classified under tariff item No. 8403.10.00 as a central heating boiler. On the basis of the evidence, the Tribunal accepts this classification. Therefore, for the purposes of this appeal, the Tribunal is of the view that this condition has been met.

18. Consequently, the sole remaining issue before the Tribunal is to determine whether the good in issue is eligible for the benefit of duty-free treatment under tariff item No. 9948.00.00, i.e. whether it is an article for use in process control apparatus, excluding sensors, which converts analog signals from or to digital signals, thereby benefiting from duty-free treatment.

Tariff Classification at Issue

19. The relevant portions of the nomenclature of the *Customs Tariff* provide as follows:

Section XXI

WORKS OF ART, COLLECTORS' PIECES AND ANTIQUES

Chapter 99

Special Classification Provisions – Commercial

...

9948.00.00 Articles for use in the following:

...

Process control apparatus, excluding sensors, which converts analog signals from or to digital signals;

...

17. However, Note 1 to Chapter 99 provides that the rule of specificity in Rule 3 (a) of the *General Rules* does not apply to the provisions of Chapter 99. This reflects the fact that classification in Chapters 1 to 97 and Chapter 99 is not mutually exclusive.

20. The relevant notes to Chapter 99 are as follows:
1. The provisions of this Chapter are not subject to the rule of specificity in General Interpretative Rule 3 (a).
 - ...
 4. The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.

Positions of Parties

21. Wolseley submitted that the good in issue is eligible for the benefit of duty-free treatment under tariff item No. 9948.00.00 because it meets the legal test to qualify for this benefit. According to Wolseley the legal test is that the good must be (a) an article; (b) physically connected; and (c) functionally joined to the items listed in the tariff item.¹⁸ Wolseley submitted that the good in issue is an “article” that is physically connected and functionally joined to a Buderus Logamatic Control device (Logamatic), which, according to Wolseley, is a “process control apparatus”.¹⁹

22. The CBSA submitted that the good in issue is not eligible for the benefit of duty-free treatment under tariff item No. 9948.00.00 because it is not for use in a “process control apparatus” but is merely an actuator or appliance that operates within a home heating system.²⁰

23. The Tribunal notes that, in appeals before the Tribunal, it is the appellant who bears the initial onus of proving that the CBSA’s tariff classification of the goods was incorrect.²¹

24. In the context of this appeal, the Tribunal finds that, in order for the good in issue to qualify for the benefit of duty-free treatment under tariff item No. 9948.00.00, it must be (i) an article (ii) for use in (iii) a “process control apparatus”, excluding sensors, which converts analog signals from or to digital signals.

“Article”

25. While the term “article” is not defined for the purposes of tariff item No. 9948.00.00, Wolseley submitted that “article” means “any finished or semi-finished product, which is not considered to be a material. The term includes goods which are classified as parts, but is not limited to parts.”²² The CBSA did not dispute that the good in issue is considered to be an “article” within the meaning of tariff item No. 9948.00.00.

26. The Tribunal finds that the ordinary meaning of the word “article” is sufficiently broad to encompass the good in issue.

“Process Control Apparatus”

27. The Tribunal will next address whether the good in issue is allegedly for use in is a “process control apparatus” within the meaning of tariff item No. 9948.00.00.

18. Tribunal Exhibit AP-2009-004-03A at paras. 30, 31.

19. *Ibid.* at para. 26.

20. Tribunal Exhibit AP-2009-004-05A at para. 20.

21. See *Deputy M.N.R.C.E. v. Unicare Medical Products Inc.* (21 June 1990), 2437, 2438, 2485, 2591 and 2592 (CITT) at 3.

22. Department of National Revenue, Customs Notice N-879, “Administrative Policy—Tariff Codes 2100 and 2101”, 23 June 1994, at 4.

28. Wolseley submitted that “process control apparatus” is defined in the terms of heading No. 90.32 as well as in the *Explanatory Notes* to heading No. 90.32.²³

29. The CBSA noted that the term “process control apparatus” is not defined in the *Customs Tariff*. The CBSA relied on dictionary definitions of each individual word in the expression “process control apparatus” in order to gain an understanding of the intended meaning.²⁴ The CBSA submitted, based on the definitions that it provided, that “process control apparatus” can be defined as the component parts which direct or control a process.

30. The Tribunal is of the view that either method of defining “process control apparatus” leads to essentially the same conclusion. The Tribunal considers that a “process control apparatus”, for the purposes of tariff item No. 9948.00.00, is an article consisting of three elements: (i) one that measures a variable to be controlled (in this case temperature); (ii) one that compares the measured variable with the desired value and activates an operating device to correct any discrepancies; and (iii) the operating device itself.

31. The Tribunal notes that the type of “process control apparatus” referred to in tariff item No. 9948.00.00 is somewhat limited in that it must convert analog signals from or to digital signals and must not include sensors.

32. The Tribunal finds that it is clear from the evidence that the Logamatic, being a control device that can be used in conjunction with the good in issue, meets the description of “process control apparatus” found in tariff item No. 9948.00.00. Further, the Tribunal is satisfied that the Logamatic is not a sensor.

33. The Tribunal heard evidence from Dr. Fahim, the expert witness for the CBSA, that the Logamatic meets the requirements of an “automatic control apparatus” found in the *Explanatory Notes* to heading No. 90.32.²⁵ The Tribunal also heard evidence from Mr. Abraham that the Logamatic converts analog signals from or to digital signals.²⁶ The Tribunal finds that there is no evidence on the record to contradict these facts.

34. Therefore, the Tribunal finds that the Logamatic is a “process control apparatus” for the purposes of tariff item No. 9948.00.00.

23. Tribunal Exhibit AP-2009-004-03A at paras. 12, 13. Heading No. 90.32 covers the following: “Automatic regulating or controlling instruments and apparatus.” The *Explanatory Notes* to heading No. 90.32 read as follows: “**Automatic control apparatus for liquids or gases and apparatus for automatically controlling temperature** . . . consist essentially of the following devices: (A) **A device for measuring** the variable to be controlled . . . (B) **A control device** . . . (C) **A starting, stopping or operating device**. Apparatus for automatically controlling liquids or gases or temperature . . . consists of these three devices forming a single entity or . . . a functional unit.”

24. Tribunal Exhibit AP-2009-004-05A at para. 21: “**process** **1** n. a course of action or proceeding, esp. a series of stages in manufacture or some other operation. **control** **1** the power of directing, command (*under the control of*). **2** the power of restraining, esp. self-restraint. **3 a** a means of restraint; a check. **b** prevention of the spread or proliferation of something. **apparatus** **1** the equipment needed for a particular purpose or function, esp. scientific or technical.”

25. *Transcript of Public Hearing*, 28 October 2010, at 66.

26. *Ibid.* at 18.

“For Use In”

35. The Tribunal will now address the final condition for the application of tariff item No. 9948.00.00, namely, whether the good in issue is “for use in” the “process control apparatus” defined above.

36. Subsection 2(1) of the *Customs Tariff* defines the phrase “for use in” as follows:

“for use in”, wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.

37. In applying subsection 2(1) of the *Customs Tariff*, the Tribunal has considered whether the good in issue (1) is physically connected and functionally joined to the host good (i.e. the Logamatic) and (2) contributes importantly to the performance of the host good.²⁷ Specifically, the good in issue must be physically connected and functionally joined to the Logamatic and must contribute significantly to its performance.

38. At the hearing, the CBSA argued that Wolseley incorrectly equated the “process control apparatus”, the host good, with the home heating system.²⁸ However, in the context of this case, Wolseley recognized that in order to determine whether or not the legal “for use in” test has been met, it is the relationship between the good in issue and the Logamatic that must be considered and not the relationship between the boiler and the greater heating system of which the boiler and the Logamatic form a part.²⁹

39. The Tribunal finds that there is evidence to suggest that, when used together, the good in issue is physically connected to the Logamatic. Mr. Abraham testified that, when used together, the Logamatic is mounted directly on the good in issue and is connected to it using screws, plastic tabs and wires.³⁰

40. At this stage of the Tribunal’s analysis, the Tribunal is prepared to assume, without reaching a final conclusion, that the degree of attachment is sufficient to meet the physical connection requirement of the “for use in” test.

41. The Tribunal will next address the question of whether the good in issue is functionally joined to the Logamatic. At the hearing, counsel for Wolseley described this part of the legal test as requiring the boiler to complement, enhance and form an integral part with the Logamatic.³¹ The Tribunal accepts that this is a proper application of the “functionally joined” criterion for purposes of this appeal.

27. See *A.M.A. Plastics Ltd. v. President of the Canada Border Services Agency* (23 September 2010), AP-2009-052 (CITT) at para. 46; *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT); *Jam Industries Ltd. v. President of the Canada Border Services Agency* (20 March 2006), AP-2005-006 (CITT); *Sony of Canada Ltd. v. Deputy M.N.R.* (12 December 1996), AP-95-262 (CITT); *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (29 November 2001), AP-2000-047 (CITT); *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT); *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT).

28. *Transcript of Public Hearing*, 28 October 2010, at 79 and 81.

29. *Ibid.* at 76-77.

30. *Ibid.* at 18-19.

31. *Ibid.* at 68.

42. However, the Tribunal finds that the evidence demonstrates the reverse to be the case here; in fact, it is the Logamatic that complements and enhances the performance of the good in issue and the heating system as a whole.

43. Indeed, Mr. Abraham testified that, when connected together, the boiler is controlled by the Logamatic.³² Mr. Abraham also testified that it is possible for the boiler to operate without either a thermostat or a Logamatic. He explained that one of the key benefits in choosing a Logamatic is that a customer could save approximately 30 percent on the cost of fuel used to heat the water in the boiler.³³ This clearly indicates that it is the boiler's performance that is being complemented and enhanced as opposed to that of the Logamatic.

44. While testifying to the functioning of the different components of a hydronic heating system, Dr. Fahim indicated that a boiler acts as a distinct apparatus which forms part of the greater system. He stated that the boiler typically acts on its own in a quasi-continuous mode.³⁴ He explained that a control system typically consists of a plant, which is the item that is being controlled (i.e. the house or building), and the parameters that need to be measured and controlled (i.e. the temperature). It also consists of a set point or a desired value for the parameters, and a comparator to measure the set point against the actual parameter and to send a signal to the controller when the set point and the actual parameter do not match up. The controller then dictates which action needs to be taken and gives the appropriate command to an actuator.³⁵

45. Dr. Fahim further testified that a thermostat, the Logamatic in this case, will measure the temperature in the house and compare it against the set point. He noted that in most systems, the thermostat acts as a controller which sends a signal to correct the temperature. Dr. Fahim indicated that in the simplest form, the signal would be to turn on or off the water flow from the boiler to the radiators. He stated that the boiler acts as the actuator and typically works to keep the water temperature within a certain range.³⁶

46. The evidence shows in this case that the role of the good in issue is to take the necessary action, once it receives a signal from the Logamatic. The good in issue will either increase or decrease the temperature or the flow of the water. These actions are complementary to those of the Logamatic in the sense that, when functioning together, they enhance the performance of the hydronic heating system as a whole. The action taken by the boiler does not contribute to or have a direct effect on the performance of the Logamatic itself. It does not participate in measuring the temperature of the water or sending a signal that triggers the augmentation or reduction in the temperature or the flow of water. At the point where the action of the good in issue is triggered, the role of the Logamatic, as a "process control apparatus", is already completed.

47. On the basis of the evidence presented at the hearing, the Tribunal finds that the good in issue and the Logamatic may work independently of each other. Furthermore, even when connected, the good in issue does not enhance, contribute to or complement the Logamatic in performing its function.

48. In reaching this conclusion, the Tribunal followed a similar approach to the one taken in *Fenwick Automotive Products Ltd. v. President of the Canada Border Services Agency*.³⁷ In that decision, the Tribunal had to determine whether disk brake calipers were considered hydraulic control assemblies or parts

32. *Ibid.* at 38-42.

33. *Ibid.* at 21-22.

34. *Ibid.* at 53.

35. *Ibid.* at 48-49.

36. *Ibid.* at 48-49, 51-53.

37. (11 March 2009) AP-2006-063.

thereof. The parties in that case disagreed as to what was controlling and what was being controlled. The appellant was of the view that through hydraulic pressure, the hydraulic control assembly controlled the speed and force of the brakes, whereas the respondent was of the view that the object of control was the hydraulic fluid itself. The Tribunal analyzed the operation of the hydraulic control assembly and the goods in issue and concluded that the brake calipers controlled neither the brakes and vehicle movement nor the hydraulic pressure. The Tribunal found that the control originated upstream from the brake callipers and therefore the goods in issue were found to be actuators that responded to hydraulic pressure, and not parts of hydraulic control assemblies.

49. Similarly, in the present appeal, the Tribunal finds that the Logamatic is an apparatus that may be added to the good in issue to replace other more basic accessories, such as a thermostat, in order to improve the performance of the boiler as well as the overall performance and efficiency of a hydronic heating system. The Tribunal also finds that the good in issue is an actuator that responds to a signal received from the Logamatic. In this sense, it does not enhance or contribute in any way to the performance or functioning of the Logamatic.³⁸

50. On the basis of the foregoing analysis, the Tribunal finds that the “functionally joined” criterion of the “for use in” test has not been satisfied. As all elements of the “for use in” test must be satisfied in order for the good in issue to be classified under tariff item No. 9948.00.00, the Tribunal finds that the good in issue is not entitled to the benefit of duty-free treatment under this tariff item. Consequently, there is also no need for the Tribunal to reach a definitive conclusion as to whether the physical connection is sufficient for the purposes of the test.

Conclusion

51. For the foregoing reasons, the Tribunal concludes that the good in issue should be classified under tariff item No. 8403.10.00 but is not entitled to the benefit of duty-free treatment under tariff item No. 9948.00.00.

DECISION

52. The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

38. The Tribunal notes that the good in issue may also be used with a thermostat (either analog or digital). For the purposes of this appeal, the Tribunal does not find it necessary to conclude whether a thermostat meets the definition of “process control apparatus”. The Tribunal finds that the same “for use in” analysis as applied to the Logamatic would apply to any applicable thermostats. Namely, the Tribunal would be of the view that the good in issue is not functionally joined to a thermostat. Therefore, even if a thermostat was found to be a “process control apparatus”, the good in issue would not be eligible for the benefit of duty-free treatment under tariff item 9948.00.00.