Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-066

CE Franklin Ltd.

v.

President of Canada Border Services Agency

Decision and reasons issued Thursday, December 22, 2011

Canada

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IN THE MATTER OF an appeal heard on September 22, 2011 pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF eight decisions of the President of the Canada Border Services Agency, dated January 26, 2011, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CE FRANKLIN LTD.

Appellant

AND

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

DECISION

The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 22, 2011
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Eric Wildhaber
Research Director:	Matthew Sreter
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PARTICIPANTS:

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by CE Franklin Ltd. (Franklin) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from eight decisions made by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The issue in this appeal is whether certain polished stainless steel bars or rods (the goods in issue) are properly classified under tariff item No. 8413.91.10 of the schedule to the *Customs Tariff*[2] as polished rods designed for oilfield-related pumps, as determined by the CBSA, or should be classified under tariff item No. 7222.30.00 as other bars and rods of stainless steel, as claimed by Franklin.

3. In addition, the Tribunal is asked to determine whether the goods in issue should be classified under tariff item No. 9910.00.00 as materials for use in the manufacture of goods of Section XVI, of Chapter 40, 73 or 90, or of heading 59.10 or 87.05 (excluding the motor vehicle chassis portion and parts thereof), such goods being used in the exploration, discovery, development, maintenance, testing, depletion or production of oil or natural gas wells up to and including the wellhead assembly or surface oil pumping unit, and thereby benefit from the duty-free treatment provided by that tariff item.

PROCEDURAL HISTORY

4. From May 25, 2006, to December 25, 2008, Franklin imported the goods in issue under tariff item No. 8413.91.10 as parts of pumps for liquids, whether or not fitted with a measuring device.[3]

5. On September 9, 2009, Franklin applied for a refund pursuant to paragraph 74(1)(*e*) of the *Act*, requesting that the goods in issue be classified under tariff item No. 7222.30.00 as other bars and rods of stainless steel and that the goods in issue be allowed the benefit of tariff item No. 9910.00.00.

6. On April 22, 2010, the CBSA issued a National Customs Ruling with respect to the goods in issue, classifying them under tariff item No. 8413.91.10 as polished rods designed for oilfield-related pumps, without the benefit of tariff item No. 9910.00.00.[4]

7. On July 8 and 9, 2010, the CBSA further re-determined the tariff classification of the goods in issue pursuant to paragraph 59(1)(*b*) of the *Act*, classifying them under tariff item No. 8413.91.10, without the benefit of tariff item No. 9910.00.00.[5]

8. On October 6, 2010, Franklin requested a further re-determination of the tariff classification of the goods in issue, pursuant to subsection 60(1) of the *Act*, claiming that the goods in issue should be classified under tariff item No. 7222.30.00 and also be allowed the benefit of tariff item No. 9910.00.00.[6]

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1. R.S.C.1985, c. 1 (2d Supp.) [*Act*].
2. S.C. 1997, c. 36.
3. Tribunal Exhibit AP-2010-066-05A, tab 1.
4. *Ibid.*, tab 4.
5. *Ibid.*
6. *Ibid.*, tab 5.

9. On January 26, 2011, in a decision pursuant to subsection 60(4) of the *Act*, the CBSA maintained the tariff classification of the goods in issue under tariff item No. 8413.91.10, without the benefit of tariff item No. 9910.00.00.[7]

10. On March 8, 2011, Franklin filed an appeal with the Tribunal under subsection 67(1) of the *Act*. Franklin filed a brief on May 2, 2011. The CBSA filed a brief on June 30, 2011.

11. The Tribunal held an oral hearing into this matter on September 22, 2011. Neither party called a witness.

GOODS IN ISSUE

12. At the time of importation, the goods in issue are presented as polished stainless steel bars or rods. They are composed of Cronifer® 1925 hMo – alloy 926 stainless steel, manufactured by ThyssenKrupp in Germany.[8] After importation into Canada, they are shipped to Alberta Oil Tool, which then further processes them by cutting threads into the bars and packaging them in order to protect said threads. That product is then used to ". . . connect to the sucker rod string [several rods screwed together linking to the 'sucker'] of a pump jack at [a] surface oil pumping [site] . . . ."[9]

13. The fact that the goods in issue are of stainless steel is uncontested.

14. Franklin submits that the goods in issue are called "bars" at the time of importation and "rods", only after they have undergone threading in Canada.[10] The CBSA refers to the goods in issue as "rods".[11]

15. No physical exhibits of the goods in issue were submitted. However, the parties submitted photographs of the goods in issue representing both their condition at the time of importation and after being threaded.[12]

STATUTORY FRAMEWORK

16. Subsection 10(1) of the *Customs Tariff* provides that ". . . 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[13] and the Canadian Rules[14] set out in the schedule [to the *Customs Tariff*]." The tariff nomenclature that is set out in the schedule to the *Customs Tariff* is designed to conform to the *Harmonized Commodity Description and Coding System* (the Harmonized System) developed by the World Customs Organization.[15] 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.

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7. *Ibid.*, tab 6.
8. Tribunal Exhibit AP-2010-066-03 at paras. 4, 35, tab 2; Tribunal Exhibit AP-2010-066-05A at para. 4, tab 16.
9. Tribunal Exhibit AP-2010-066-03 at para. 6, tabs 3, 5; Tribunal Exhibit AP-2010-066-05A at para. 6, tabs 3, 20.
10. Tribunal Exhibit AP-2010-066-03 at para. 7, tab 4.
11. Tribunal Exhibit AP-2010-066-05A at paras. 4-6.
12. Tribunal Exhibit AP-2010-066-03 at para. 35; Tribunal Exhibit AP-2010-066-05A, tab 16.
13. S.C. 1997, c. 36, schedule [*General Rules*].
14. S.C. 1997, c. 36, schedule.
15. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

17. 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.[16] 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."

18. 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[17] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[18] 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.[19]

19. The Tribunal must therefore begin by determining whether the goods in issue can be classified according to Rule 1 of the *General Rules* as per the terms of the headings, any relevant Section or Chapter Notes in the *Customs Tariff* and having regard to any relevant *Explanatory Notes* or *Classification Opinions*. It is only if the Tribunal is not satisfied that the goods in issue can be properly classified at the heading level through the application of Rule 1 of the *General Rules* that it becomes necessary to consider subsequent rules in order to determine in which tariff heading the goods in issue should be classified.

20. Once the Tribunal has used this approach to determine the heading in which the good in issue should be classified, the next step is to determine the proper subheading by applying Rule 6 of the *General Rules*, then the proper tariff item number by applying the *Canadian Rules*.[20]

21. Only after having classified the goods under a tariff item in Chapters 1 to 97 must the Tribunal consider, if necessary, the applicability of duty-free treatment under Chapter 99.

ANALYSIS

22. In accordance with Rule 1 of the *General Rules*, the Tribunal began its analysis by considering the terms of the allegedly competing headings, which were argued as being as follows.

23. Franklin argued that the goods in issue should be classified in heading No. 72.22, which provides as follows:

> **72.22 Other bars and rods of stainless steel; angles, shapes and sections of stainless steel.**

16. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to 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).
17. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
18. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
19. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.
20. Rule 6 of the *General Rules* stipulates as follows: "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."

24. The CBSA argued that the goods in issue are properly classified in heading No. 84.13, which provides as follows:

> **84.13 Pumps for liquids, whether or not fitted with a measuring device; liquid elevators.**

25. The CBSA's position is that the composition of the goods in issue, the testing to which they are subjected and their apparently specialized use as sucker rods are determinative of classification.[21] The CBSA does not dispute that the goods in issue undergo further transformation (threading) in Canada.

26. Franklin, for its part, does not dispute that it imports the goods in issue with the sole objective of having them threaded in Canada to become sucker rods, which are *ultimately* used in oil pumps.[22] The evidence does however show that sucker rods can be and have been made of other materials (i.e. carbon steel, painted steel, ceramic coated steel).[23]

27. At its simplest, the CBSA's argument is that the goods in issue are "parts" of goods of heading No. 84.13, namely, oil pumps. Heading No. 84.13 is in Section XVI, which deals with, among other things, "machinery and mechanical appliances; electrical equipment; parts thereof". Heading No. 84.13 does not explicitly mention parts but, by way of application of Note (II) of the *Explanatory Notes* to Section XVI, that heading is to be read as including parts of the goods that are named, but only under certain circumstances. That provision provides as follows:

> **(II) PARTS**
>
> In general, parts which are suitable *for use solely or principally* with particular machines or apparatus (including those of heading 84.79 or heading 85.43), or with a group of machines or apparatus falling in the same heading, are classified in the same heading as those machines or apparatus subject, of course, to the **exclusions** mentioned in Part (I) above. . . .
>
> . . .
>
> Machinery parts remain classified in this Section whether or not finished ready for use. However, rough forgings of iron or steel are classified in **heading 72.07**.
>
> [Emphasis added]

28. As such, were it not for Note (II) of the *Explanatory Notes* to Section XVI, classification of the goods in issue could easily have been directed immediately to heading No. 72.22, because it is that heading which, in the Tribunal's view, in accordance with Rule 1 of the *General Rules*, properly and simply describes what they are, namely, "bars" or "rods" "of stainless steel". But the CBSA is asking the Tribunal, in having "regard" to Note (II), to view the goods in issue as parts of oil pumps and, therefore, to accept classification in heading No. 84.13.[24]

29. The Tribunal is of the view that it cannot rely on Note (II) of the *Explanatory Notes* to Section XVI to conclude that particular goods are "parts" of goods of Section XVI (here, it was argued, of goods of heading No. 84.13), unless Note (II) clearly directs this to be the case. To do so would accord Note (II) too much importance in the classification process as a whole.

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21. Tribunal Exhibit AP-2010-066-05A at paras. 24-28.
22. Tribunal Exhibit AP-2010-066-03 at para. 26. The Tribunal stresses the use of the adverb "ultimately" and will come back to its significance below.
23. Tribunal Exhibit AP-2010-066-03, tab 5 at 92.
24. Tribunal Exhibit AP-2010-066-05A at paras. 29-41.

30. The Tribunal is of the view that the circumstances of this matter do not provide for classification of the goods is issue as "parts" of oil pumps of heading No. 84.13.

31. First, the Tribunal notes that the CBSA did not provide any evidence that the type of oil pump to which it referred could in fact be classified in heading No. 84.13. Neither party, however, raised this issue. Accordingly, the Tribunal is ready to accept that the type of oil pump that was referred to in this proceeding could indeed be classified in heading No. 84.13.

32. Second, the CBSA's position is problematic because it would require the Tribunal to accept that the goods in issue are "for use *solely* or *principally*" with an oil pump of heading No. 84.13, whereas there is no evidence that this is the case. To be sure, the parties agree that the goods in issue are *ultimately* destined for use with a certain oil pump that would fall in heading No. 84.13. But this brings the Tribunal to what is certainly the most fundamentally problematic issue of CBSA's position. While it may be that the goods in issue are eventually for use with an oil pump, such use is *not* possible until they are subjected to further transformation in Canada. As such, it is incorrect to state that the goods in issue are themselves being used with an oil pump.

33. Indeed, it is uncontested that the goods in issue are never used *directly* or *immediately* with an oil pump of heading No. 84.13. Rather, it is admitted that the goods in issue are subjected to further transformation *in* Canada, *after* importation; specifically, imported stainless steel bars are further manufactured in Canada by the addition of threading. Put otherwise, before that transformation occurs, the goods in issue *cannot* be used with an oil pump of heading No. 84.13. As such, it is not the goods in issue *per se* that are used with the oil pumps, but altogether different goods that are threaded. For the foregoing reasons, the Tribunal accepts that it is incorrect to say that, before they are threaded, the goods in issue are "sucker rods". Accordingly, it follows that the goods in issue cannot be viewed as "parts" of oil pumps of heading No. 84.13, but simply as input into what will *eventually* become, through further transformation in Canada, parts of such goods.

34. This affords the Tribunal the opportunity to recall that the first tenet of customs classification is to examine the goods in issue in the state in which they are at the moment of importation, not afterwards.[25] At the moment of importation, the goods in issue are nothing more than "bars" or "rods" of "stainless steel". And this is so independently of whether the goods in issue may be subjected, down the line, to further transformation, which makes them parts of oil pumps. Accordingly, because that transformation occurs after importation, any future property or state of transformation of the goods in issue is of no concern for the purposes of customs classification. On that basis alone, the appeal should be allowed.

35. Third, an equally fundamental point must also be examined. To qualify as "parts" under Note (II) of the *Explanatory Notes* to Section XVI, goods must be *recognizable as such*. This requirement is not readily apparent from the English text of that note, but it is in the French version. Indeed, according to the French version, purported "*parties*" (parts) must be "*. . . reconnaissables comme telles, en l'état*" (. . . recognizable as such, as is). This is logical; otherwise, what input (into a further transformed product) could ever hope to escape being classified as a part? Rather, a part will be recognized as such, if and only if it is recognizable as a part in the state in which it is at the time of importation. As such, the French version is more precise and informative than the English version and cannot be ignored.

25. *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366 (S.C.C.). This principle has been reaffirmed by the Tribunal on countless occasions.

36. With this in mind, the Tribunal is not ready to accept that the goods in issue, in the state in which they are at the time of their importation into Canada (stainless steel rods or bars *without* any threading), can be viewed as recognizable parts of an oil pump, namely, sucker rods, or used as such. For the same reasons as those given above, in application of Rule 1 of the *General Rules*, the Tribunal is of the view that the goods in issue are nothing more than "bars" or "rods" "of stainless steel" of heading No. 72.22.

37. Fourth, the Tribunal noted the CBSA's argument that the threading process was only "simple finishing".[26] The Tribunal disagrees with qualifying this process in that manner. Indeed, it is performed by tradesmen on specialized heavy computer numerical control machinery (as opposed to light hand tools).[27] Invoices also seem to suggest that the threading has certain particularities that require specialized measurements and precision working (i.e. 7/8-in. threading on 1 1/4 in., 3/4-in. threading on 1 1/4 in.). Nevertheless, the CBSA's position here calls up Rule 2 (a) of the *General Rules* whereby "[a]ny reference in a heading to an article shall be taken to include a reference to that article *incomplete* or *unfinished*, provided that, *as presented*, the incomplete or unfinished article has the *essential character* of the *complete* or *finished* article" [emphasis added].[28]

38. In the course of its analysis on this point, it is crucial that the Tribunal be mindful of the importance of *not* introducing words or concepts into the schedule to the *Customs Tariff* that are not found there, such as, in this instance, the word "threaded" or any other word that would convey the concept of "threading". The Tribunal notes that the terms of heading Nos. 72.22 and 84.13 do not contain the word "threaded". As such, in application of Rule 2 (a) of the *General Rules*, heading No. 72.22 could include *unfinished* "bars and rods of stainless steel". Similarly heading No. 84.13 could include *unfinished* oil pumps and parts of oil pumps (by application of Note (II) of the *Explanatory Notes* to Section XVI). The CBSA takes this a step further, essentially asking the Tribunal to accept that heading No. 84.13 could comprise *unfinished* "parts" of an oil pump, because they are unthreaded. This would imply the sequential or simultaneous application of *both* Rule 2 (a) and Note (II).

39. While this may be an acceptable interpretative approach in the absolute, the Tribunal is of the view that, applied here, it would yield an artificial and unacceptable result, given that the Tribunal has before it goods that are, in and of themselves, *complete* and *finished* "bars or rods of stainless steel", and that classification can and therefore should be accomplished by sole reliance on Rule 1 of the *General Rules* because the terms of heading No. 72.22 properly describe the goods in issue. If this were not sufficient to set aside the CBSA's argument on this point, the Tribunal notes that, for classification in heading No. 84.13 to occur, the Tribunal would still have to ask itself, under a Rule 2 (a) analysis, whether such an "unfinished" "part" had the "essential character" of the "finished" part. The CBSA's position fails here as well because the Tribunal is of the view that such an unfinished part could not have the essential character of a finished (and therefore threaded) sucker rod of an oil pump. Indeed, because the goods in issue have *no* threading. i.e. the only essential distinguishing factor between a plain bar or rod of stainless steel and a sucker rod, their essential character can necessarily come only from the fact that they are "bars or rods of stainless steel". Again, those are the precise terms of heading No. 72.22; therefore, the goods in issue should be classified in that heading.

40. In sum, once threaded, the goods in issue become sucker rods. Clearly, if a sucker rod (which is necessarily threaded) were to be imported into Canada, it would be classifiable in heading No. 84.13 as a recognizable part of an oil pump. However, if the threading happens after importation into Canada, as is the

26. Tribunal Exhibit AP-2010-066-05A at para. 51.
27. Tribunal Exhibit AP-2010-066-03 at paras. 6, 26, tab 3 at 74, tab 4 at 76.
28. Tribunal Exhibit AP-2010-066-05A at paras. 44-49.

case here, it cannot be said that the goods in issue are sucker rods upon importation, that they are recognizable as such or that they have the essential character of such products. Rather, at the time of importation, the goods in issue are simply "bars or rods of stainless steel" of heading No. 72.22.

41. Finally, under heading No. 72.22, it follows that further classification at the subheading and tariff item levels, in accordance with Rule 6 of the *General Rules* and the *Canadian Rules*, is directed to tariff item No. 7222.30.00. Because of this conclusion, there is no need to examine the issue of the applicability of tariff item No. 9910.00.00.

DECISION

42. The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member