



Ottawa, Monday, September 9, 1991

Appeal No. AP-89-180

IN THE MATTER OF an appeal heard on May 13, 1991,
under section 67 of the *Customs Act*, R.S.C., 1985, c. 1,
(2nd Supp.) as amended;

AND IN THE MATTER OF a decision of the Deputy Minister
of National Revenue for Customs and Excise dated
July 27, 1989, with respect to a request for a re-determination
pursuant to section 63 of the *Customs Act*.

BETWEEN

ASEA BROWN BOVERI INC.

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal finds that the subject goods, as imported, display the essential character of capacitors and, accordingly, are properly classified under tariff item No. 8532.25.00 as "Other fixed capacitors" composed of a "Dielectric of paper or plastics."

Charles A. Gracey
Charles A. Gracey
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-89-180

ASEA BROWN BOVERI INC.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

This is an appeal under subsection 67(1) of the Customs Act¹ from a re-determination made by the Deputy Minister of National Revenue for Customs and Excise, classifying the goods in issue under tariff item No. 8532.25.00 as other fixed capacitors composed of a dielectric of paper or plastics. The appellant seeks a declaration that the goods should be classified under tariff item No. 8532.90.00 as parts of fixed electrical capacitors. The appellant also contends that tariff code 5405 is applicable as the parts are used in the manufacture of AC capacitors, thus entitling the goods to duty-free entry.

HELD: *The appeal is dismissed. The Tribunal finds that the subject goods, as imported, display the essential character of capacitors and, accordingly, are properly classified under tariff item No. 8532.25.00 as "Other fixed capacitors" composed of a "Dielectric of paper or plastics."*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: May 13, 1991
Date of Decision: September 9, 1991*

*Tribunal Members: Charles A. Gracey, Presiding Member
Kathleen E. Macmillan, Member
Sidney A. Fraleigh, Member*

*Counsel for the Tribunal: David M. Attwater
Clerk of the Tribunal: Nicole Pelletier*

*Appearances: J.R. Peillard, for the appellant
Ian Donahoe, for the respondent*

1. R.S.C., 1985, c. 1 (2nd Supp.) as amended.

Appeal No. AP-89-180

ASEA BROWN BOVERI INC.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
KATHLEEN E. MACMILLAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

This is an appeal under subsection 67(1) of the *Customs Act*² (the Act) from a re-determination made by the Deputy Minister of National Revenue for Customs and Excise, (the Deputy Minister) classifying the goods in issue under tariff item No. 8532.25.00 as other fixed capacitors composed of a dielectric of paper or plastics. The appellant, Asea Brown Boveri Inc., seeks a declaration that the goods should be classified under tariff item No. 8532.90.00 as parts of fixed electrical capacitors. The appellant also contends that tariff code 5405 is applicable as the parts are used in the manufacture of AC capacitors, thus entitling the goods to duty-free entry. The issue in this appeal is which tariff classification is most applicable to the goods and, if the goods are considered parts, is the tariff code applicable.

For the purposes of this appeal, the relevant provisions of the *Customs Tariff*³ are:

SCHEDULE I

85.32 *Electrical capacitors, fixed variable or adjustable (pre-set).*

8532.20 *- Other fixed capacitors:*

8532.25.00 *- - Dielectric of paper or plastics*

8532.90.00 *- Parts*

Code 5405 *Parts of tariff item No. 8532.90.00 for use in the manufacture of AC capacitors*

2. R.S.C., 1985, c. 1 (2nd Supp.) as amended.

3. R.S.C., 1985, c. 41 (3rd Supp.) as amended.

FACTS

The goods in issue were invoiced as fixed capacitors and entered into Canada by the appellant under tariff item No. 8532.29.00 on Montréal entries 12997-17000951-0 and 12997-17003683-1 on February 11, 1988, and May 4, 1988, respectively. The goods were subsequently reclassified by the Deputy Minister under tariff item No. 8532.25.00. On August 17, 1989, through its counsel, Asea Brown Boveri Inc. appealed this classification claiming the goods should be classified under tariff item No. 8532.90.00 and subject to tariff code 5405.

In presenting its case, counsel for the appellant played a video tape which, amongst other things, demonstrated how the goods in issue were manufactured. For purposes of this appeal, it is necessary only to identify that the goods are composed of films of rolled plastic onto which metal vapor has been condensed, the plastic serving as a dielectric that separates the thin metal layer that serves as an electrode.

The appellant's first witness was Mr. Thomas Lovkvist, who is presently the President of ASEA Brown Boveri Jumet (ABB Jumet) in Charleroi, Belgium. He has also served as a production and technical manager at the same factory since 1985. He described what a capacitor is and how it must meet certain national and international standards. He referred to the goods in issue as "capacitor elements" and described how they serve as building blocks in the manufacture of "capacitor units."

The witness described how the goods are sold through a small number of licensees, typically one or two companies in each country, and explained that a long term technical licensing agreement and commercial agreement are entered into for the sale of the goods. The licensing agreement entered into by Asea Brown Boveri Inc. gives it the right to use ABB Jumet's design for the complete capacitor and provides for the obligation to use the specific goods in issue in the construction of that design. The witness noted that a capacitor unit could contain between 3 and 52 of the capacitor elements, though, on average, between 12 and 15 of these. Each of the elements has its particular capacitance, voltage rating, tolerances, dimensions, etc., and when wired in the typical star, delta or parallel configuration, each contributes to give the unit its unique specifications.

The witness stated that the goods as imported could not be used as capacitors because ABB Jumet would not allow it under the licensing agreement, it would be illegal in Canada, it would not be allowed under any international standard and it would be dangerous. He noted that only the capacitor elements provide capacitance, but that the other components of the capacitor unit are necessary for security, safety and ruggedness. Only when assembled in the capacitor unit do they meet Canadian standards.

The appellant's second witness was Mr. Davey Li, who has worked for the Canadian Standards Association (CSA) since 1988 in the certification and testing division. He is presently an engineering project manager and CSA representative on the subcommittee for the CSA standard C22.2, No. 190-M1985, entitled "Capacitors for Power Factor Correction." The witness stated that, according to that CSA standard, the goods are referred to as capacitor elements and cannot be considered a capacitor unit. He noted that, according to the CSA standard, a capacitor unit or capacitor bank would be considered a capacitor.

Mr. Thomas Smy served as witness for the respondent. He holds a Ph.D. in electrical engineering and is presently serving as a professor of electronics at Carleton University. After referring to several definitions of a capacitor, including that provided by the Explanatory Notes to the Harmonized System⁴ (the Explanatory Notes), he stated that, in his opinion, the goods in issue were fixed capacitors. He also noted that the capacitor unit, as that term is employed by the appellant, meets the definition of a capacitor bank as defined in the Institute of Electrical and Electronics Engineers dictionary⁵ (IEEE dictionary), where it is defined as an assembly of capacitors and all necessary accessories. He added that the capacitor bank could also be considered a capacitor because larger capacitors can be made from several smaller ones connected together. With regard to the CSA terminology, he stated that their definitions are prejudiced towards a particular application of the device, but that whether or not the device is a capacitor is not dependent upon the end use, but on the device itself.

ARGUMENTS

After describing how the "capacitor elements" were manufactured, as viewed in the video, counsel for the appellant stressed that it was only the elements that were imported. He referred to tariff code 5405 and argued that if only the elements are imported and the remainder of the goods that are incorporated into the finished product are sourced in Canada, the tariff code, which is a beneficial code for manufacturers, would be redundant. He argued that the tariff code must be of some benefit to the appellant as a manufacturer of capacitors and that it should be applicable to the goods in issue.

Counsel referred to the former *Customs Tariff*⁶ dated June 19, 1986, identifying tariff item 44582-1, which was worded similarly to tariff code 5405. He stated that his client had imported the goods, prior to the introduction of the Harmonized System, under that tariff item duty free. He argued that the transition to the Harmonized System was to be revenue neutral and that the appellant should be allowed to continue importing duty free. He argued that the appellant can only import this way if the goods are classified under tariff item No. 8532.90.00 as parts and tariff code 5405 is found to be applicable.

Counsel made reference to several sections of the *Customs Tariff*, rules 2(a) and 6 of the General Rules for the Interpretation of the Harmonized System⁷ (General Rules) and the Explanatory Notes thereto, and concluded that the Tribunal must determine whether the goods in issue are more properly described by the subheading "Other fixed capacitors" or the subheading contained in the tariff item described as "Parts." Counsel argued that the parts provision most aptly describes the goods, notwithstanding that they are constructed of a dielectric of plastics, are wound and have terminals. Also, the tariff item for parts was at a higher level than the tariff item advocated by the respondent (and presumably, therefore, should take priority). He argued that the Tribunal must compare the tariff item for parts with that of other fixed capacitors and that the goods in issue are more properly classified as parts.

4. Explanatory Notes, Harmonized Commodity Description and Coding System, Customs Co-operation Council, Brussels, First Edition, 1986.

5. IEEE Standard Dictionary of Electrical and Electronics Terms, Fourth Edition, 1988.

6. R.S.C., 1970, c. C-41.

7. *Customs Tariff*, S.C., 1987, c. 49, Schedule I.

Counsel referred to the CSA standard entitled "Capacitors for Power Factor Conversion," noting that the standard has been established by the industry, for the industry and for the protection of users of the particular commodity. He argued that the terminology used by the appellant is consistent with that employed by the CSA, where the goods are described as capacitor elements that represent a necessary part of the finished product described as a capacitor unit.

Counsel reviewed Note 2 to Section XVI of Schedule I to the *Customs Tariff*, considering the three rules contained therein. With regard to rule (a), he argued that there is no dispute as to the proper heading under which the goods should be classified. The other two rules, he argued, are not applicable. He then proceeded to consider the Explanatory Notes, wherein it is stated:

Electrical capacitors (or condensers) consist in principle of two conducting surfaces separated by an insulating material (dielectric), e.g., air, paper, mica, oil, resins, rubber and plastics, ceramics or glass.

Counsel argued that this is a definition of what comprises a capacitor and not of what a capacitor is. He noted that many items would fall within this very general definition notwithstanding other provisions of the *Customs Tariff*. He argued that many definitions of a capacitor have been presented at the hearing, just as many different types of capacitors have been described. As such, he suggested that the Tribunal look to the industry for what constitutes a capacitor. He argued that the capacitor unit assembled in Canada meets the IEEE definition of a series capacitor in that it is "an assembly of one or more capacitor elements in a single container, with one or more insulated terminal brought out."

Counsel for the respondent first reviewed the evidence, noting that the appellant's first witness agreed that the goods in issue meet the definition of a capacitor as used in the Explanatory Notes. He argued that the goods in issue meet the various definitions of a capacitor presented at the hearing. He noted that Mr. Lovkvist listed certain reasons why the goods could not be considered capacitors *per se* and argued that there is no basis for any of those criteria being added to the definition of a capacitor.

Counsel did not dispute that the goods are being imported for the purpose of manufacturing power capacitors or that the goods are described by the manufacturer as capacitor elements. He argued that this does not mean that they are not capacitors *per se*. He argued that the Tribunal must ask itself if the goods in issue are electrical capacitors.

Counsel then referred to General Rule 1 and to Note 2 to Section XVI of Schedule I to the *Customs Tariff*. He argued that, in essence, Note 2 says that when the goods are capacitors themselves, they should be classified as such.

REASONS

The first issue facing the Tribunal is whether the goods at issue are capacitors in their own right or simply parts of a capacitor. If the Tribunal finds the goods constitute parts and, therefore, are entitled to entry under tariff item No. 8532.90.00, it must also consider whether tariff code 5405 is applicable.

It was apparent to the Tribunal that the goods fit the definitions of "capacitors" provided and

discussed at the hearing. In particular, The Illustrated Dictionary of Electronics⁸ defines a capacitor as "[a] passive electronic-circuit component consisting of, in basic form, two metal electrodes or plates separated by a dielectric (insulator)." Obviously, the goods at issue are designed to be components of an electronic circuit. Further, evidence as to their method of manufacture and essential characteristics convinced the Tribunal that the individual capacitor elements are formed from plastic film (the dielectric or insulator) coated with metal.

In the Tribunal's view, the essential characteristic of an article can be defined by the function that gives that article its name. A pump, for example, may readily be identified as a pump wherever it is encountered, but one does not postpone calling it a pump until it is placed in a well or connected to a power source. A pump is a pump because, properly assembled, and connected, it pumps. Similarly, the most basic capacitor element has been designed and manufactured to have a specific and well defined capacitance and properly assembled and connected alone or with others of its kind, it performs the function for which it was designed, namely, to provide capacitance in an electronic circuit. It is further apparent that in assembling several smaller capacitors together, nothing is added to or taken away from the individual capacitors. They are merely combined together in the intended configuration, thus providing certain electrical specifications to the circuit.

The Tribunal also noted that, in response to a question put by counsel for the appellant to his own witness concerning whether capacitor elements were connected in series or in parallel, the witness stated: "If you have two capacitors, putting them in parallel doubles their capacity." The decision of the Tribunal did not turn on this single reference to capacitors, but the Tribunal notes that the witness, in this instance at least, called the goods in issue capacitors as opposed to capacitor elements as asserted by counsel for the appellant.

The Tribunal found that the references to "capacitor elements" as distinct from "capacitor units" or "capacitor banks" were not persuasive in resolving this case. It is noted that the CSA publication number C22.2, No. 190-M1985, contains definitions for each and states in a note that one may refer to either a capacitor unit or a capacitor bank as a capacitor when the distinction is not important. However, the same publication also defines a "self-healing capacitor" as a capacitor, the electrical properties of which, after local breakdown of the dielectrics, are rapidly and essentially restored. This phenomenon was clearly explained to the Tribunal and it is only necessary to add that breakdown and restoration occur within the individual capacitor elements that are the goods at issue.

After determining that the goods at issue were capacitors constructed of a dielectric of plastic, the Tribunal concluded that they were properly classified under tariff item No. 8532.25.00, as urged by the respondent. Having reached this determination, it is not necessary to further consider the appellant's representations in favor of tariff item No. 8532.90.00 and tariff code 5405.

8. Turner, R.P. & S. Gibilisco, The Illustrated Dictionary of Electronics, 5th Edition, Tab Professional and Reference Books, 1991.

CONCLUSION

The appeal is dismissed. The Tribunal finds that the subject goods, as imported, display the essential character of capacitors and, accordingly, are properly classified under tariff item No. 8532.25.00 as "Other fixed capacitors" composed of a "Dielectric of paper or plastics."

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