



Ottawa, Tuesday, May 3, 1994

Appeal Nos. AP-89-181 and AP-89-244

IN THE MATTER OF appeals heard on August 17, 1993,
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister
of National Revenue for Customs and Excise made in 1988 and
1989 with respect to requests for re-determination under
section 63 of the *Customs Act*.

BETWEEN

FISHER SCIENTIFIC LIMITED

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeals are allowed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-89-181 and AP-89-244

FISHER SCIENTIFIC LIMITED

Appellant

and

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

Respondent

The goods in issue are high-precision, high-quality syringes which are different from "normal" medical syringes in that they are larger, reusable and scaled differently and can withstand higher levels of pressure. The appellant's product literature emphasizes that the goods in issue are ideal for use in laboratories, for applications such as chromatography, the handling of corrosive gases and liquids, radioactive materials and sterile solutions and water pollution control analysis. The issue in these appeals is whether the glass Microliter and Gastight syringes imported by the appellant are properly classified under tariff item No. 7017.20.90 as other laboratory, hygienic or pharmaceutical glassware, whether or not graduated or calibrated, as determined by the respondent, or should be classified under tariff item No. 9018.31.00 as instruments and appliances used in medical, surgical, dental or veterinary sciences, syringes, with or without needles, under tariff item No. 9018.90.00 as other instruments and appliances or under tariff item No. 9027.20.10 as instruments and apparatus for physical or chemical analysis, chromatographs and electrophoresis instruments, as claimed by the appellant.

HELD: *The appeals are allowed. The Tribunal considers that the goods in issue should be classified under tariff item No. 9027.20.10. The Tribunal is of the opinion that the evidence shows that, while the goods in issue can be and are used with machines, instruments and apparatus other than chromatographs, their use with chromatographs is sufficiently dedicated to such systems to find that they are, "principally," accessories for use with chromatographs.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: August 17, 1993

Date of Decision: May 3, 1994

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Anthony T. Eyton, Member
Lise Bergeron, Member*

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Anne Jamieson

*Appearances: J.R. (John) Peillard, for the appellant
Ian McCowan, for the respondent*

Appeal Nos. AP-89-181 and AP-89-244

FISHER SCIENTIFIC LIMITED

Appellant

and

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

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ANTHONY T. EYTON, Member
LISE BERGERON, Member

REASONS FOR DECISION

These are appeals under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) made in 1988 and 1989 under section 63 of the Act.

The appellant, among other things, imports medical and scientific instruments and distributes them in Canada. The manufacturer of the syringes in issue is the Hamilton Company in Reno, Nevada. The goods in issue are high-precision, high-quality syringes which are different from "normal" medical syringes in that they are larger, reusable and scaled differently and can withstand higher levels of pressure. The appellant's product literature emphasizes that the goods in issue are ideal for use in laboratories, for applications such as chromatography, the handling of corrosive gases and liquids, radioactive materials and sterile solutions and water pollution control analysis.

The goods in issue were imported under various transaction numbers throughout 1988. They were originally classified under tariff item Nos. 3926.90.90 and 7326.90.90 of Schedule I to the *Customs Tariff*.² The respondent reclassified all the goods in issue, except for the plastic syringes, under tariff item No. 7017.20.90 as other laboratory, hygienic or pharmaceutical glassware, whether or not graduated or calibrated. The appellant filed for re-determinations under tariff item No. 9018.31.00 as instruments and appliances used in medical, surgical, dental or veterinary sciences, syringes, with or without needles. These requests were denied. The appellant subsequently requested further re-determinations and, by decisions made in 1988 and 1989, the Deputy Minister maintained the classification of the goods in issue under tariff item No. 7017.20.90.

The issue in these appeals is whether the glass Microliter and Gastight syringes imported by the appellant are properly classified under tariff item No. 7017.20.90 as other laboratory, hygienic or pharmaceutical glassware, whether or not graduated or calibrated, as determined by the respondent, or should be classified under tariff item No. 9018.31.00 as instruments and appliances used in medical, surgical, dental or veterinary sciences, syringes, with or without

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1. R.S.C. 1985, c. 1 (2nd Supp.).
 2. R.S.C. 1985, c. 41 (3rd Supp.).

needles, under tariff item No. 9018.90.00 as other instruments and appliances or under tariff item No. 9027.20.10 as instruments and apparatus for physical or chemical analysis, chromatographs and electrophoresis instruments, as claimed by the appellant.

The relevant portions of the headings at issue in this case are as follows:

70.17 Laboratory, hygienic or pharmaceutical glassware, whether or not graduated or calibrated.

90.18 Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments.

90.27 Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus).

The appellant's representative called two witnesses. The first witness, Mr. John W. Harris, Technical Support Specialist with Chromatographic Specialties Inc. in Brockville, Ontario, was called as an expert witness. Using different examples of the goods in issue, Mr. Harris explained what the syringes were made of, how they worked, in what particular circumstances they would be used and what characteristics distinguished them one from the other. Mr. Harris confirmed that the principle use of the goods in issue was to introduce a sample into a liquid or gas chromatograph. He then explained how the types of chromatography work. Mr. Harris stated that, while most chromatography is performed in laboratories, he was aware that some chromatography could be, and was, performed in the field.

During cross-examination, Mr. Harris indicated that the goods in issue would not be recommended for human use because they are not sterilized and not designed for that purpose. He noted that, to the best of his knowledge, all of the packaging of Hamilton Company products carried the warning: "For Laboratory Use Only. Not for Human *in vivo* Use." Mr. Harris stated that he had used the goods in issue for purposes of assisting in water pollution control analysis using liquid chromatography. He asserted that he was not familiar with other applications for the goods in issue provided for in the manufacturer's literature.

In response to questions from the Tribunal, Mr. Harris said that, in his everyday work, he would not describe a syringe as a "metal syringe" or a "plastic syringe" based on its components, but would refer to all the goods in issue as syringes. He confirmed that, although the goods in issue may be used for purposes other than liquid or gas chromatography, to the best of his knowledge, these are their essential purpose. Mr. Harris stated that the goods in issue are commonly used in medical research. He also testified that the special property of borosilicate glass, used in most of the goods in issue, was its low coefficient of expansion or ability to resist expansion due to temperature change.

The appellant's second witness was Mr. Bill Bellinger, Customs Specialist for Fisher Scientific Limited since 1976. Mr. Bellinger's responsibilities include the tariff classification of the products that the appellant imports. He indicated that, prior to attending the hearing, he had obtained a recent sales history report for the goods in issue. Mr. Bellinger stated that the report indicated that the majority of sales of the goods in issue were to hospitals.

During cross-examination, Mr. Bellinger confirmed that the report was based on a random sampling of sales and had been prepared for recent sales in 1993. He also confirmed that he did not know the specific time period that the report covered nor the manner in which it was specifically generated and that he had no specific data relating to 1988.

In response to questions from the Tribunal, Mr. Bellinger stated that he would classify the goods in issue on the basis of the primary component or material in a particular syringe. Therefore, he would classify a syringe made primarily of glass, i.e. if it had a barrel made totally of glass, in heading No. 70.17, one made primarily of steel in heading No. 73.26 and one made primarily of plastic in heading No. 39.26. Mr. Bellinger indicated that he believed that this was the same approach used by the respondent. He also stated that, in his opinion, the sales pattern for the goods in issue did not change much from year to year and that the majority of sales in 1988 would have been to hospitals.

Counsel for the respondent called one witness, Mr. Louis L'Heureux, Chief of the Inorganic Products Laboratory and Scientific Services, Department of National Revenue. Mr. L'Heureux, who was brought as an expert witness, indicated that he had held his present position since 1991 and had been with the laboratory since 1972. Mr. L'Heureux first compared one of the syringes in issue, which has a volume of 10 microlitres, with a plastic disposable syringe, which has a volume of 3 cubic centimetres. He stated that the first syringe costs his laboratory approximately CAN\$40, while the second syringe costs CAN\$0.125. Mr. L'Heureux noted that the second syringe was of the same type used by doctors for injections and that it was used for non-medical purposes in the laboratory.

Mr. L'Heureux discussed various applications in which chromatography is used as an analytical technique. He also discussed the distinction between glass with a low coefficient of expansion and glass with a regular coefficient of expansion, as reflected in the language of the *Customs Tariff*.

During cross-examination, Mr. L'Heureux stated that the goods in issue were designed to deliver a fixed volume rather than take in a fixed volume. In response to questions from the Tribunal, Mr. L'Heureux indicated that, under the Harmonized Commodity Description and Coding System³ (the Harmonized System), it was not uncommon for countries to classify the same goods differently, although where such differences had widespread ramifications, efforts would be made to take up the issue on a multilateral basis. With respect to the reference in the appellant's brief to a decision of a Swiss customs authority, Mr. L'Heureux noted that the decision was made in 1988 and that it was not clear whether the decision was one of a national or regional authority. Mr. L'Heureux also stated that, in considering the classification of a particular product, one would look at the function of each component of that product and consider whether the component had a primary or secondary function.

The appellant's representative began his argument by submitting that the essential character of the goods in issue was that of a dispenser and not of laboratory glassware. The representative stated that the goods in issue should be considered as composite goods made of many materials, including glass, and not as glassware. With respect to the suggested classification in heading No. 90.18, he submitted that this heading refers to instruments and appliances used in medical science in a broad sense and should not be limited to human surgery. Further, he submitted that the wording of the Explanatory Notes to the Harmonized Commodity Description and Coding System⁴ (the Explanatory Notes) to this heading, which provide an illustrative list of articles covered by the heading, was not exhaustive and thus did not preclude inclusion of the goods in issue. He also referenced paragraph (A) of Part (I) of the Explanatory Notes to heading No. 90.18, which provides a list of articles included in the heading, and noted that it included, under paragraph 15, "Syringes (glass, metal, glass and metal, plastics, etc.), of all kinds."

3. Customs Co-operation Council, 1st ed., Brussels, 1987.

4. Customs Co-operation Council, 1st ed., Brussels, 1986.

The appellant's representative referenced the Tribunal's decision in *Asea Brown Boveri Inc. v. The Deputy Minister of National Revenue for Customs and Excise*,⁵ in which the Tribunal stated that "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."⁶ He suggested that the characteristic that gives the goods in issue their name is that of a syringe and that, as such, they should be classified on this basis, regardless of the materials of which they are made.

With respect to possible classification in heading No. 90.27, the appellant's representative submitted that it is the function and operation of the goods in issue that make them accessories for use with a chromatograph, in that the goods in issue are necessary for the introduction of a sample into the apparatus.

In submitting why the goods in issue are not properly classified in heading No. 70.17, the appellant's representative again stated that they should be classified on the basis of their essential character. He noted that Mr. L'Heureux indicated that his laboratory ordered the goods in issue as syringes of a specific model number and not as glassware and that the goods in issue were not known, sold or traded as glassware. He also submitted that the various lists of articles included in the Section and Chapter Notes to Chapter 70 did not specifically include syringes. Further, he argued that the reference to the exclusion of glass instruments and appliances of Chapter 90 in the Chapter Notes to Chapter 70 could be read as excluding the goods in issue as well as hypodermic syringes, since it includes the phrase "or other articles."

Counsel for the respondent began his argument by focusing on the two headings suggested by the appellant. He first drew the Tribunal's attention to Note 1 (d) to Chapter 70, which indicates that articles of Chapter 90 are not covered by Chapter 70. Counsel suggested that the Tribunal should understand this to mean that, before a product could be classified in Chapter 90, one would have had to determine that it should not be classified in Chapter 70.

Turning to heading No. 90.18, counsel for the respondent submitted that the wording of the heading is restricted to situations such as the treatment of humans or the medical professional practice between doctor and patient. In other words, it is not meant to cover general laboratory applications. Counsel pointed out that the Section Notes to heading No. 90.18 specifically referenced, for instance, doctors, surgeons, dentists and midwives as examples of the professionals to which the heading refers and indicated that the use of the instruments and apparatus in question was specifically directed to making a diagnosis, preventing or treating an illness or operating, etc. He also pointed out that the title of Part (I) of the Explanatory Notes to heading No. 90.18 is "Instruments and Appliances for Human Medicine or Surgery." Counsel argued that the reference to syringes in paragraph (A) must be read in light of this title and, thus, the suggested classification could not cover the goods in issue since they are not for human medicine or surgery. This conclusion, he argued, is clear when one considers the label on the boxes in which the goods in issue are packaged, which states "For Laboratory Use Only. Not for Human *in vivo* Use." As for Mr. Bellinger's testimony regarding sales of the goods in issue to hospitals, counsel stated that the data used for this purpose were current and not from 1988. He also stated that the Tribunal should keep in mind the fact that the nature of the data and the time period that they covered were not clear.

Counsel for the respondent made four points with respect to heading No. 90.27. First, he repeated his submission that, to be classified in Chapter 90, the possibility that the goods in

5. Appeal No. AP-89-180, September 9, 1991.

6. *Ibid.* at 5.

issue could have been classified in Chapter 70 would have to have been ruled out. Second, counsel argued that the goods in issue are not accessories per se because they are not dedicated for use with chromatographs; they have other uses and a chromatograph is fully functional without them. In this regard, he referred to The Oxford English Dictionary⁷ definition of "accessory," which reads as follows:

something contributing in a subordinate degree to a general result or effect; an adjunct, or accompaniment.

Third, counsel suggested that Note 2 (b) to Chapter 90, referenced in the appellant's brief, did not assist the appellant. Note 2 (b) reads as follows:

2. *Subject to Note 1 above, parts and accessories for machines, apparatus, instruments or articles of this Chapter are to be classified according to the following rules:*
 - (b) *Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading No. 90.10, 90.13 or 90.31) are to be classified with the machines, instruments or apparatus of that kind.*

Counsel suggested that, because the use of the goods in issue was not limited to chromatographs, the goods in issue were not "suitable for use solely or principally with a particular kind of machine, instrument or apparatus." In support of this position, he referenced the product literature relating to the goods in issue, which indicates a wide variety of uses and applications, and concluded that this reflected an insufficient degree of dedication. Finally, counsel referenced the Explanatory Notes which specifically address goods which could potentially be classified in both heading Nos. 90.27 and 70.17. In this respect, the Explanatory Notes to heading No. 90.27 state, in part, that:

- (1) *If an article has the essential character of glassware (whether or not graduated or calibrated ...), it is not to be classified in this heading even if it is normally known as a particular instrument or apparatus.*
- (2) *In general, instruments normally cease to have the essential character of glassware when they consist partly of glass but are mainly of other materials, or if they consist of glass parts incorporated or permanently fixed in frames, mounts, cases or the like.*

Counsel for the respondent submitted that the evidence does not show that the goods in issue are made mainly of other materials, but that borosilicate glass is the basic material of the syringes and that their essential character is defined as such.

Counsel for the respondent then discussed why the goods in issue were properly classified in heading No. 70.17. He submitted that the proper manner for classifying the goods in issue is according to the material of which they are made, that is, borosilicate glass. He directed the Tribunal to a number of instances in the Explanatory Notes to heading No. 70.17 in which reference to borosilicate glass is made. In the alternative, counsel argued that the classification should be based on the material which the Tribunal determined was predominant in a particular model, i.e. glass, plastic or steel. Counsel noted that this approach was consistent with Mr. Bellinger's testimony of the approach that he took.

7. Second ed. (Oxford: Clarendon Press, 1989) at 74.

Before concluding, counsel for the respondent made submissions with respect to the Swiss customs authority ruling filed by the appellant. He first argued that this decision could not bind the Tribunal. Second, he noted that the Tribunal did not have before it an exhaustive list of decisions from other foreign authorities. Finally, he argued that the decision was not clear as to the type of syringes that it covered.

In reply, the appellant's representative first suggested that, with respect to Note 1 (d) to Chapter 70, whether or not the goods in issue are hypodermic syringes is not relevant if they come within the phrase "other articles of Chapter 90." He submitted that, while borosilicate glass is a material used in the goods in issue, it does not give them their essential character. He also submitted that the wording of Part (I) of the Explanatory Notes to heading No. 90.18 does not override the wording of the heading itself, and the *Customs Tariff* uses the phrase "medical sciences" not "human medicine or surgery." With respect to Note 2 (b) to Chapter 90, the representative argued that the evidence shows that the number of goods in issue actually being supplied for uses other than chromatography does not suggest that they are not principally used for chromatography. In response to counsel for the respondent's arguments relating to Mr. Bellinger's testimony, the representative noted that Mr. Bellinger indicated that he took this approach because of directions from the respondent. Finally, the representative submitted that, applying the General Rules for the Interpretation of the Harmonized System⁸ (the General Rules), the Tribunal need not reach the point of comparing two possible classifications. He also noted that the final part of the Explanatory Notes to heading No. 90.27 contemplates the possibility of classification in this heading. This part reads as follows:

- (3) *The combination of glass parts with measuring instruments (e.g., pressure gauges, thermometers) may, in practice, provide grounds for considering such instruments as proper to this heading.*

The Tribunal considers that the goods in issue should be classified under tariff item No. 9027.20.10. The Tribunal comes to this conclusion bearing in mind that it is the legislation and the principles applicable to the interpretation of the legislation, including those set out in the General Rules, that must govern the classification of the goods in issue. The Tribunal is particularly cognizant of Rule 1 of the General Rules. As noted by the Tribunal in *York Barbell Co. Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,⁹ Rule 1 is of the utmost importance when classifying goods under the Harmonized System. Rule 1 states that classification is first determined by the wording of the headings and any relative Section or Chapter Notes.

The Tribunal agrees with the parties that, in the present case, consideration of Rule 1 of the General Rules requires the Tribunal to consider the Section and Chapter Notes to Chapters 70 and 90. The Tribunal is persuaded that the essential characteristic of the syringes is that of a dispenser and not of laboratory glassware. The Tribunal notes that both expert witnesses testified to this effect. Mr. L'Heureux stated this view directly in his evidence, and Mr. Harris stated that he would not describe a syringe as a "metal syringe" or a "plastic syringe" based on the components of a particular syringe, but would refer to all the goods in issue as syringes.

The Tribunal agrees with counsel for the respondent's arguments as to why the goods in issue should not be classified in heading No. 90.18. The Tribunal also agrees that the decision of the Swiss customs authority should not be relied on because, among other reasons, it is not

8. *Supra*, note 2, Schedule I.

9. (1992), 5 T.C.T. 1150, Appeal No. AP-91-131, March 16, 1992.

clear whether the decision covers the goods in issue and whether relevant decisions from other such authorities exist. However, the Tribunal would urge the respondent, in circumstances similar to this case, in the future and in the spirit of adapting to the Harmonized System as it evolves, to make efforts to determine how our trading partners classify similar goods.

The Tribunal is of the opinion that the Section and Chapter Notes to heading No. 90.27 support classification of the goods in issue in this heading. First, the Tribunal accepts counsel for the respondent's definition of "accessory." The Tribunal is of the opinion that the evidence shows that, while the goods in issue can be and are used with machines, instruments and apparatus other than chromatographs, their use with chromatographs is sufficiently dedicated to such systems for purposes of this definition. This conclusion is, in the Tribunal's view, reinforced by consideration of Note 2 (b) to Chapter 90. This note provides that, subject to Note 1, the relevant provision which the Tribunal has considered above, and Note 2 (a), which is not applicable in this case, to be classified in Chapter 90, a part or accessory must be suitable for use "solely or principally" with a particular kind of machine, instrument or apparatus. The evidence shows that, while the goods in issue are used with apparatus other than chromatographs, these uses are significantly less frequent than their use with chromatographs. The Tribunal is of the view that the evidence reveals a sufficient degree of dedication of use of the syringes in association with chromatographs to find that they are "principally" used with chromatographs. The Tribunal notes that the final part of Note 2 (b) to Chapter 90 states that parts and accessories that come within this note are to be classified with the machines, instruments or apparatus in question. Therefore, as chromatographs are classified under tariff item No. 9027.20.10, the Tribunal finds that the goods in issue should be classified under the same tariff item.

Accordingly, the appeals are allowed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Lise Bergeron
Lise Bergeron
Member