CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, August 19, 1991 **Appeal No. AP-90-161**

IN THE MATTER OF an appeal heard on May 9, 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 October 25, 1990, with respect to a request for re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

YORK BARBELL COMPANY LIMITED **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the subject rowing machine computers should be classified under tariff item No. 9506.91.20 as "... parts of a kind used in physical exercise machines."

W. Roy Hines
W. Roy Hines
Presiding Member

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Member

Michèle Blouin
Michèle Blouin
Member

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-90-161

YORK BARBELL COMPANY LIMITED **Appellant**

and

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

This is an appeal under section 67 of the Customs Act from a re-determination made by the Deputy Minister of National Revenue for Customs and Excise, classifying rowing machine computers under tariff item No. 9506.91.90 as accessories to rowing machines. The appellant seeks a declaration that the goods be classified under tariff item No. 9506.91.20 as " ... parts of a kind used in physical exercise machines."

HELD: *The appeal is allowed. The Tribunal finds that the subject rowing machine computers should be classified under tariff item No. 9506.91.20 as " ... parts of a kind used in physical exercise machines."*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 9, 1991*
Date of Decision:	*August 19, 1991*
Tribunal Members:	*W. Roy Hines, Presiding Member* *Robert J. Bertrand, Q.C., Member* *Michèle Blouin, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Donald A. Petersen, for the appellant* *Joseph de Pencier, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-90-161

YORK BARBELL COMPANY LIMITED **Appellant**

and

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

TRIBUNAL: W. ROY HINES, Presiding Member
ROBERT J. BERTRAND, Q.C., Member
MICHÈLE BLOUIN, Member

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) from a re-determination made by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister), classifying rowing machine computers under tariff item No. 9506.91.90 as accessories to rowing machines. The appellant, York Barbell Company Limited (York Barbell), seeks a declaration that the goods be classified under tariff item No. 9506.91.20 as "... parts of a kind used in physical exercise machines." Accordingly, it must be determined whether the computers are more properly regarded as "parts" or "accessories" of rowing machines.

For the purposes of this appeal, the relevant provisions of the *Customs Tariff*[2] are:

> *10. The classification of imported goods under a tariff item in Schedule I shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in that Schedule.*
>
> *CANADIAN RULES*
>
> *1. For legal purposes, the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, mutatis mutandis, to the above Rules, on the understanding that only tariff items 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.*

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

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SCHEDULE I

Chapter 95

TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF

Notes.

...

3. Subject to Note 1 above, parts and accessories which are suitable for use solely or principally with articles of this Chapter are to be classified with those articles.

...

9506.91 -- Gymnasium or athletic articles and equipment

9506.91.20 --- Cycling exercise apparatus equipped with electronic monitors; parts of a kind used in physical exercise machines

9506.91.90 --- Other

FACTS

The rowing machine computers were imported by York Barbell from Taiwan under transaction number 12302-01003517-1 dated May 3, 1989. The computers were imported under tariff item No. 9506.91.90.

Pursuant to section 63 of the Act, York Barbell appealed the classification, claiming that the goods were more properly classified under heading No. 84.71 as "Automatic data processing machines and units thereof.... " In a decision dated October 25, 1990, the Deputy Minister confirmed the original classification, stating in part that subject to Note 3 of Chapter 95 of the *Customs Tariff*, parts and accessories that are suitable for use solely or principally with articles of Chapter 95 are to be classified with those articles. On December 13, 1990, the Deputy Minister issued a statement amending the basis of the earlier decision, stating that the computers are not considered to be parts, but rather accessories of rowing machines. On January 10, 1991, York Barbell appealed to this Tribunal.

York Barbell is a manufacturer of various types of exercise machines, specifically, several models of rowing machines as well as several models of weight lifting machines commonly known as home gyms. In addition, it imports complete exercise machines such as exercise bicycles and stair climbing machines. In the course of manufacture, it also imports various parts that are used in the manufacture of rowing machines and gyms.

York Barbell manufactures models "Black Max" and "Silver Streek" rowing machines, using parts manufactured in its own foundry, parts purchased in Canada and imported parts. Both models incorporate the computers in issue.

Both models are designed to function with a computer and have special adaptions for such. The computer is attached by wire to a sensor that acts as a switch and is located in the frame of the machine under the seat. The wire runs down the hollow tubular frame and emerges from a hole that has been drilled into the aluminum tube three inches from the end. The switch is activated when a magnet passes over the sensor, causing a circuit to open. The seat is equipped with a special molded part onto which the magnet is inserted. The magnet must be positioned properly on the mounting at the time of manufacture to come within 3/16 of an inch from the frame. The sensor is supported by two specifically designed plastic parts that are forced inside the aluminum frame by a unique forcing rod. The sensor must be correctly positioned in the frame at the time of manufacture for the computer to function properly. The entire rowing machine is shipped in a knocked-down condition and, at the time of assembly, the purchaser simply connects the wire from the computer to the wire extending through the frame and attaches the computer to the frame by means of double-sided adhesive tape.

The computer at issue is basically a countdown timer and stroke counter. With it, the user knows total lapse time, time remaining in the exercise program, total number of strokes, rowing rate and whether to increase or decrease the rate to conform to a particular exercise program.

ARGUMENTS

As a preliminary matter, counsel for the appellant argued that the statement of December 13, 1990, which amended the basis of the Deputy Minister's decision rendered on October 25, 1990, was *ultra vires*. In this regard, he referred to various subsections of sections 63, 64 and 65 of the Act. Of most significance to his argument is subsection 65(3), which reads:

> *(3) A re-determination or a re-appraisal under section 63 or 64 is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 67.*

Counsel argued that such an amending statement was done without jurisdiction because no appeal under section 67 of the Act had been made to this Tribunal. He submitted that if the Deputy Minister's decision is that of October 25, 1990, and this decision is incorrect on the basis of the first Canadian rule on interpretation, the Tribunal must allow the appeal. Alternatively, if the decision is that of December 13, 1990, the Tribunal must consider the appeal on its merits and determine whether the goods are parts or accessories to the rowing machine.

Counsel argued that certain special installations must be made to the rowing machine at the time of manufacture in order for the computer to operate. He identified these as integral parts to the functioning of the computer that must be pre-assembled in order for the machine to be able to accept the computer and operate properly. He submitted that the computer is a part of the machine rather than an accessory.

Counsel submitted that, to the best of his knowledge, no one in Canada has ever sold a rowing machine computer separately nor has anyone sold a self-adapting kit to enable a

non-computerized machine to be converted into a computerized rowing machine. He suggested that even if a computer were sold separately, it would not function as designed because of the necessary adaptions that must be manufactured into the machine.

Counsel noted that the particular computer is designed for only two models of rowing machines and that the computer has no function other than on the rowing machine. As such, the computer is committed to use with the rowing machine. Furthermore, the particular models that accommodate the computers in issue are never sold without the computers.

Counsel admitted that the rowing machine computer is not essential to the functioning of the rowing machine in the sense that the user can obtain an equal amount of exercise from the machine without turning on the computer. He submitted, however, that when the rowing machine is sold with a computer, the machine is not properly operated if the computer is not employed. He noted that a non-computerized rowing machine does not give the same quality of exercise to the user and that it is performing a function essential to the safe and prudent operation of the machine.

Counsel also challenged the applicability of Note 3 to Chapter 95 that states that parts and accessories suitable for use solely or principally with articles of Chapter 95 are to be classified with those articles. He referred to the first Canadian rule for the interpretation of tariff classification, which reads in part:

> ... *For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires*. [Emphasis added]

Counsel noted certain examples within Chapter 95 where parts and accessories are explicitly identified as separate and apart from the articles that they accompany. It is in situations like this, he argued, that the drafting of the tariff item suggests that Note 3 does not apply. Similarly, tariff item No. 9506.91.20 classifies "... parts of a kind used in physical exercise machines" distinctly from the articles of which they would form a part. Counsel argued that, therefore, in determining which of the two tariff items the goods are more properly situated, Note 3 does not apply.

With regard to the respondent's statement issued on December 13, 1990, counsel for the respondent argued that it was not a decision under section 63 of the Act and is not *ultra vires*. The statement did not amend or otherwise alter the classification decision itself, re-appraise the value for duty of the goods in question or result in any change in the duties levied pursuant to the classification decision. The December statement merely set out reasons for the October classification decision that is being appealed. Counsel submitted that the appellant has not been denied any statutory right of appeal nor has it been otherwise prejudiced by the December statement.

With regard to the merits of the case, counsel for the respondent argued that what constitutes a "part" must be dealt with on a case-by-case basis and there is no single universally applicable test. He referred the Tribunal to *Moore Dry Kiln Company of Canada Limited v. The*

Deputy Minister of National Revenue for Customs and Excise[3] and *Deputy Minister of National Revenue for Customs and Excise v. Androck Inc.*,[4] amongst others, as setting out the basic tests to be applied. He noted that the following tests or criteria have been applied:

(a) the article in question is essential to the operation of the other goods;

(b) the article in question is a necessary and integral component of the other goods; and

(c) the article in question is installed to other goods in the course of manufacture.

In reviewing the evidence, counsel submitted that the computers are designed and manufactured separately, and are themselves complex machines; they were not designed by the manufacturer of the rowing machine. He suggested the goods were initially used by other manufacturers for the same purpose, which is no longer the case; the rowing machine can be used without the computer; rowing machines are still built without computers; the model without the computer otherwise has all the same features, which suggests only those parts could be considered essential; the computer is qualitatively different from the other parts; while the machine essentially has a lifetime guarantee, the computer has only a one-year guarantee; the machine has to be fully assembled before the computer is attached; and the computer provides a mere passive readout and has no interaction with the rowing machine.

Counsel argued that the computers meet none of the established tests. They are not essential to the operation of the rowing machines; they are not an integral or necessary component of the rowing machines; there is a lack of combination of operation and function between the computer and machine so intimate as to make the combination a single entity; the computer does not control or activate other parts of the rowing machine; and the machine can operate perfectly well without the computer, but it could not function without a part. On this basis, counsel argued that the computer must be viewed as an accessory to the rowing machine.

REASONS

The Tribunal has examined the arguments and evidence of both the appellant and the respondent concerning the relevance of the notice issued by the Deputy Minister on December 13, 1990, relating to the tariff classification of the goods at issue. In particular, the Tribunal notes the following comment made in that document: "This does not change the Deputy Minister's decision rendered on the above mentioned transaction but serves as a clarification on the issue of parts versus accessories." The Deputy Minister's decision referred to in that document, issued on October 25, 1990, classified the goods under tariff item No. 9506.91.90 as "parts and accessories which are suitable for use solely or principally with articles of Chapter 95." This decision did not specify whether the goods at issue were, in fact, either parts or accessories, a situation clarified in the December 13 notice that held the goods to be accessories and not parts. This latter notice did not result in a change in tariff classification nor did it affect in any way the

3. (1972), 5 T.B.R. 401.
4. (1987), 74 N.R. 255 (F.C.A.).

rights of the appellant in this instance. In the view of the Tribunal, the December 13 notice merely served to underline the reasoning behind the classification decision that is the subject of this appeal.

As noted above, both the "Black Max" and "Silver Streek" rowing machines manufactured by the appellant incorporate the subject computers that are produced in Taiwan and imported from that source. Mr. W.F. Irvine, President of York Barbell and the only witness called by counsel, explained in detail the manufacturing and assembly processes involved in making rowing machines and the purpose and functioning of the computer feature of these machines. He explained that the rowing machines are designed to operate with a computer and, as such, certain engineering processes must be carried out at the time of manufacture to enable the computer to be mounted and function on the machine. These processes include the drilling of special holes in the aluminum extrusion, installation of a sensor pick-up wire and magnet, and modification of the seat. The magnet and sensor wire, and their location on the machine, are essential to the operation of the computerized rowing machine. Mr. Irvine further explained that while the unit imported from Taiwan consists of the computer, the sensor wire and magnet, it is necessary for his employees to remove the goods from their import package to install both the sensor and magnet on the machine and test the computer prior to the final assembly and packaging of the machine for shipment to his customers. The Tribunal was informed that the computer is not suitable for any other use and is never sold as a replacement part.

In response to questions from counsel and the Tribunal, the witness agreed that one did not require a computer on a rowing machine to exercise and, indeed, his company also produces non-computerized machines. Mr. Irvine further noted that the computerized machine itself could be used to exercise without a functioning computer, but, in his view, the full benefits of the machine would not be utilized. He stated that because it is essential to pre-assemble the sensor and magnet in the machine for the computer to operate, the computer as imported from Taiwan is a part of a complete rowing machine, even though the whole machine is shipped to the consumer in a knocked-down condition.

The question of whether goods are a "part" for the purpose of tariff classification has been an issue in many appeals and counsel cited a variety of previous decisions dealing with this issue. These have been reviewed by the Tribunal and it has concluded that no one case provides a definitive answer as to what constitutes a "part" and what constitutes an "accessory." Counsel for the respondent argued that the criteria or tests established in earlier cases suggest that for goods to be considered a part they must be essential to the operation of the other goods, be a necessary and integral component of the other goods and be installed to the other goods in the course of manufacture. The Tribunal concurs in the validity of these criteria, but notes that they are not mutually exclusive nor must all of these tests be met in each case. The Tribunal attaches considerable weight to the view that there is no one universally applicable test and that each case must be determined on its merits. Further, common trade usage and practice are relevant to any determination of this kind.

Evidence before the Tribunal clearly establishes that rowing machines are a category of physical exercise machines. Rowing machines themselves may be computerized or not. In the present instance, the Tribunal is concerned with an end product that is known in the trade as a

computerized rowing machine, one that must have certain features built into it at the time of manufacture and assembly to accommodate the computer. The sensor and the magnet that are imported as components of the computer unit (the third component is the computer itself) are physically incorporated into the frame of the rowing machine at the time of manufacture by the appellant, and all three components of the imported unit are tested by the manufacturer before the product is shipped to the consumer. All three components of the imported unit are essential and integral to the functioning of the imported unit - the computer - which taken together constitute, in the view of the Tribunal, a part of a computerized rowing machine

CONCLUSION

The appeal is allowed. The Tribunal finds that the subject rowing machine computers should be classified under tariff item No. 9506.91.20 as "... parts of a kind used in physical exercise machines."

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Presiding Member

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