



Ottawa, Monday, March 1, 1993

Appeal No. AP-92-032

IN THE MATTER OF an appeal heard on October 28, 1992,
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy
Minister of National Revenue for Customs and Excise dated
May 20, 1992, with respect to a request for re-determination
pursuant to section 63 of the *Customs Act*.

BETWEEN

R.G. DOBBIN SALES LTD.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-032

R.G. DOBBIN SALES LTD.

Appellant

and

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

Respondent

The appellant imports various types of valves. The goods in issue are models for shower units which have automatic pressure-balancing features. The issue in this appeal is whether the appellant's imported valves are more properly classified under tariff item No. 8481.80.99 as "Other appliances ... Other," as claimed by the appellant, or under tariff item No. 8481.80.91 as "Other appliances ... Hand operated or hand activated," as determined by the respondent.

HELD: *The appeal is allowed.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: October 28, 1992
Date of Decision: March 1, 1993*

*Tribunal Members: Michèle Blouin, Presiding Member
Kathleen E. Macmillan, Member
Sidney A. Fraleigh, Member*

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Dyna Côté

*Appearances: Wayne Learn, for the appellant
Wayne D. Garnons-Williams, for the respondent*

Appeal No. AP-92-032

R.G. DOBBIN SALES LTD.

Appellant

and

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

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
KATHLEEN E. MACMILLAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) dated May 20, 1992, pursuant to section 63 of the Act.

R.G. Dobbin Sales Ltd. is an importer of various types of valves. The goods in issue are models for shower units which have automatic pressure-balancing features. These valves are different from standard shower mixing valves in that they allow the flow of water to be adjusted automatically when water pressure or water temperature, in the case of the "TempControl" valve, changes.

The valves in issue were imported on September 28, 1990. They were classified under tariff item No. 8481.80.99 of the *Customs Tariff*² as "Other appliances ... Other." On the same date, a re-determination concluded that the goods were more properly classified under tariff item No. 8481.80.91. By a decision dated May 20, 1992, the Deputy Minister confirmed the re-determination.

The issue in this appeal is whether the appellant's imported valves are more properly classified under tariff item No. 8481.80.99 as "Other appliances ... Other," as claimed by the appellant, or under tariff item No. 8481.80.91 as "Other appliances ... Hand operated or hand activated," as determined by the respondent.

The appellant began its evidence with the presentation of a short video prepared by Symmons Industries, Inc. (Symmons), the manufacturer of the valves. The video outlined how the valves function.

The appellant's first witness was Mr. Ross G. Dobbin, President of R.G. Dobbin Sales Ltd. Mr. Dobbin stated that he has been importing and selling Symmons products for the last 30 years and, for the last 20 years, has been the sole distributor of the goods in issue in Canada. In his testimony, he provided further explanation as to how the valves work.

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

Mr. Dobbin first discussed the thermostatically controlled valve, the "TempControl" valve, which, he stated, operates by reacting to changes in water temperature. He described how the mechanism, which senses the change in temperature, activates the sliding piston which is the pressure-balancing feature in these valves. Mr. Dobbin testified that this feature, or valve, is not an on-off valve because it is not activated in the same manner as an on-off valve would be activated (i.e. it is not activated by hand).

Mr. Dobbin then testified in respect of the valves which the appellant claimed are activated by changes in water pressure. He stated that, while the valve as a whole is turned on by hand by the user, the pressure-balancing feature is not brought into effect until water pressure makes contact with the piston. The piston then adjusts the flow on either the hot or cold inlet in response to any change in pressure on either side, thus maintaining the mixed flow of water at a constant temperature. Mr. Dobbin contrasted the operation of a valve with the pressure-balancing feature with a standard mixing valve which does not have this feature. He explained how the latter valve is a normal gate or "on-off type" valve which does not protect a bather against pressure imbalances. He added that, in effect, the valve with the pressure-balancing feature is comprised of two valves. As a final point in his direct evidence, Mr. Dobbin stated that the retail sale price of a valve with the pressure-balancing feature is more than double the sale price of a standard mixing valve and that this difference can be attributed to the safety feature in the former product.

In cross-examination, Mr. Dobbin agreed that the pressure-balancing feature becomes deactivated when the water is turned off.

The respondent called two expert witnesses. The first expert was Dr. Edelbert G. Plett of the Department of Mechanical and Aerospace Engineering at Carleton University. Dr. Plett is a specialist in valves. He testified as to the features of the valves in issue as compared to standard mixing valves and how the valves operate. With respect to the "TempControl" valve, Dr. Plett stated that it is a device that one puts in a flow line and that regulates the flow for which the on-off valve is controlled at another point, i.e. it does not have an on-off control. With respect to the valves with the pressure-balancing feature, Dr. Plett testified at various points in examination-in-chief, cross-examination and during questioning by Tribunal members that this feature is both hand activated and not hand activated. He also described the feature (in respect of its ability to maintain a constant temperature) as both a primary and secondary feature of the valve. In cross-examination, Dr. Plett also agreed that a valve with the pressure-balancing feature contains two valves. He also stated, in response to a question from Tribunal members, that his definition of "valve" includes the ability to regulate the flow of water and the ability to stop water flow.

The second expert was Mr. John D. Givler, Manager, New Technology Development for Moen Incorporated, which is located in Elyria, Ohio. Mr. Givler has 51 years of work experience in product engineering, particularly relating to valves. Mr. Givler agreed that the pressure-balancing feature is a distinct valve though, in his view, it contains two valves - one on the hot side and one on the cold side. While Mr. Givler testified that the feature is a secondary feature of the product as a whole, he also stated that the primary function of the goods in issue is to provide a safe shower, which he understood to include being able to turn the shower on and off and having the water temperature of the shower being what the person expected. He also testified that the pressure-balancing feature could not function without the on-off handle being turned into the "on" position. Mr. Givler indicated that his definition of a valve does not require "complete shutoff." During cross-examination, Mr. Givler stated that the piston in the "TempControl" valve is activated by water pressure. He also stated that people

purchasing the product do so for its pressure-balancing feature which allows them to avoid sudden temperature changes during a shower.

Counsel for the appellant began his argument by submitting that the evidence shows that, when dealing with a valve with a pressure-balancing feature, one is really dealing with a product with two valves in it. Counsel submitted that the pressure-balancing feature is the primary, not secondary, feature of such goods.

With respect to the thermostatically controlled valves, counsel for the appellant argued that Section XVI of the Explanatory Notes³ supports the classification claimed by the appellant. He stated that, in the second paragraph of the Explanatory Notes to heading No. 84.81, a distinction is made between valves that are operated by hand and those that are operated by an automatic device such as thermostatic elements or pressure capsules. In addition, he pointed out that paragraph 11 of the Explanatory Notes to the same heading states that:

The heading also covers thermostatically controlled mixing valves incorporating an adjustable tension thermostatic element, which actuates the plugs or stoppers regulating the admission of fluids at different temperatures into the mixing chamber.

Counsel submitted that the word "actuates," in paragraph 11, should be understood as having the same meaning as the word "activates." In this regard, he offered various dictionary definitions. These may be summarized as defining "actuate" as meaning "to put into mechanical action or motion," and defining "activate" as meaning "to make active."

Counsel for the appellant then discussed the valves with the pressure-balancing feature. Counsel acknowledged that, in a certain respect, all valves must initially be activated by hand. He submitted, however, that "hand operated" or "hand activated," as used in the tariff nomenclature, means "directly" hand operated or "directly" hand activated and should not be extended to include indirect hand operation or hand activation. Finally, counsel referred to Note 3 to Section XVI of the Explanatory Notes, which states that:

Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

Counsel submitted that the valves in issue fit the description of composite machines and that the principal function of this "composite machine" is the pressure-balancing feature, because when most consumers buy this valve, they buy it principally for its automatic balancing function.

Counsel for the respondent argued by addressing, and by attempting to rebut, the arguments made by the appellant. Counsel first addressed the appellant's submissions relating to the "TempControl" valve. He submitted that while the thermostatic control may regulate or effect flow, the control itself is regulated by hand, as the temperature desired is set by adjusting the knob to that temperature.

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

Counsel then challenged the appellant's argument that the valves with the pressure-balancing feature are composite machines. Counsel characterized them as "integrated," as opposed to "composite," machines. He supported this position by reference to Mr. Givler's testimony that the piston cannot function outside the housing of the valve and, thus, should not be considered to be "fitted together" with the rest of the valve. Counsel also challenged the appellant's contention that the words "activate" and "actuate" mean the same thing. In this respect, counsel pointed out that the word "actuate" does not appear in the tariff items being considered.

Counsel argued that the Tribunal should be guided by Rule 3 (a) of the General Rules for the Interpretation of the Harmonized System⁴ (the General Rules) which, in conjunction with Rule 1 of the Canadian Rules,⁵ effectively states that where goods may be classified under two tariff items, the tariff item which provides the most specific description is to be preferred. Counsel argued that if the Tribunal considers that the goods may be classified under both tariff items suggested by the parties, then the respondent's tariff item is to be preferred because it is more specific than that of the appellant.

Turning to Note 3 to Section XVI of the Explanatory Notes, counsel submitted that the "principal function" of the valves is that of flow control, i.e. the goods should be characterized as flow-regulating devices whose on-off dial is activated by hand. From this perspective, the pressure-balancing feature is simply a secondary feature that is not essential to the operation of the valve.

The Tribunal considers that the valves in issue are more properly classified under tariff item No. 8481.80.99 as "Other appliances ... Other." 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 and corresponding Canadian Rules, that must govern the interpretation of the goods in issue. The Tribunal is particularly cognizant of Rule 1 of the General Rules and Rule 1 of the Canadian Rules. As noted by this Tribunal in *York Barbell Co. Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,⁶ Rule 1 of the General Rules is of the utmost importance when classifying goods under the Harmonized Commodity Description and Coding System.⁷ Rule 1 of the General Rules states that classification is first determined by the wording of the tariff headings and any relative Section or Chapter Notes. Rule 1 of the Canadian Rules applies the General Rules to classification at the tariff item level *mutatis mutandis*. This fact is of importance in the instant case because there is agreement between the parties with respect to classification at the heading and subheading levels.

With respect to the "TempControl" valves, the Tribunal notes that these valves are physically separated from the on-off control of the unit of which they are a part. Also, once the desired temperature level is set, these valves operate automatically through the activation of the sliding piston in response to changes in water temperature. In addition, the distinction between "hand operated" and "automatic devices" in the second paragraph of the Explanatory Notes to heading No. 84.81 makes it clear that there is a difference between goods which have these

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

5. *Ibid.*

6. [1992] 5 T.C.T. 1150.

7. Customs Co-operation Council, First Edition, Brussels, 1986.

different characteristics. Therefore, the Tribunal finds that these valves are not "hand activated" and are more properly classified as "Other appliances ... Other."

Turning to the remaining valves, the Tribunal considers that the valves with the pressure-balancing feature are composite goods for purposes of Note 3 to Section XVI of the Explanatory Notes. Having determined this, the Tribunal is directed by Note 3 to classify the goods based on their "principal function." This phrase is not defined in the Explanatory Notes. The Concise Oxford Dictionary⁸ defines the word "principal" as meaning "first in rank or importance." The Tribunal finds that the function which is of greatest importance for users of the valves in issue is that which allows users to shower in safety, with the knowledge that they will not be affected by sudden changes in water temperature caused by fluctuating pressure. This function is directly attributable to the pressure-balancing feature. The Tribunal notes that it is not necessarily easy to arrive at this conclusion, and it takes some comfort in the difficulty that both experts had with this point. As indicated above, Dr. Plett described the feature as both a primary and secondary feature and also stated, in response to questions from Tribunal members, that he himself had purchased such a valve because of its ability to balance pressure so that one would not get scalded. In the same vein, Mr. Givler testified that one would likely buy a valve with this feature to avoid sudden temperature change during a shower.

Therefore, in view of its finding that the principal function of these valves is the automatic control of water pressure in a manner that avoids sudden temperature changes during use, the Tribunal finds that these valves are also more properly classified under tariff item No. 8481.80.99 as "Other appliances ... Other."

For the foregoing reasons, the appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

8. Seventh Edition, Oxford: Clarendon Press, 1982 at 817.