



Ottawa, Monday, January 18, 1993

Appeal No. AP-92-015

IN THE MATTER OF an appeal heard on October 1, 1992,
under subsection 67(1) 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
March 3, 1992, with respect to a request for
re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

CANADIAN THERMOS PRODUCTS INC.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The gas grill barbecues are properly classified under tariff item No. 7321.11.90 of the *Customs Tariff*.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan

Member

W. Roy Hines

W. Roy Hines

Member

Michel P. Granger

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-015

CANADIAN THERMOS PRODUCTS 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 Act from a decision of the Deputy Minister of National Revenue for Customs and Excise maintaining the classification of the goods in issue under tariff item No. 7321.11.90 of the Customs Tariff. The issue is whether the Thermos brand gas grill barbecues are properly classified under tariff item No. 7321.11.90 as "barbecues ... of iron or steel" or, as claimed by the appellant, whether they are more properly classified under tariff item No. 7615.10.00 as "other household articles ... of aluminum."

HELD: *The appeal is dismissed. The Tribunal finds that the goods in issue are properly classified under tariff item No. 7321.11.90 as barbecues of iron or steel.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: October 1, 1992
Date of Decision: January 18, 1993*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Kathleen E. Macmillan, Member
W. Roy Hines, Member*

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Janet Rumball

*Appearances: Andrew Vanderwal and Kimberley L.D. Cook, for the appellant
Frederick Woyiwada, for the respondent*

Appeal No. AP-92-015

CANADIAN THERMOS PRODUCTS INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
KATHLEEN E. MACMILLAN, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise maintaining the classification of the goods in issue under tariff item No. 7321.11.90 of the *Customs Tariff*.²

The issue is whether the Thermos brand gas grill barbecues (the barbecues) are properly classified under tariff item No. 7321.11.90 as "barbecues ... of iron or steel" or, as claimed by the appellant, whether they are more properly classified under tariff item No. 7615.10.00 as "other household articles ... of aluminum."

The appellant imported the barbecues into Canada, pursuant to section 32 of the Act, under tariff item No. 7321.11.90. This classification was maintained when a re-determination was issued under section 60 of the Act. Further to this re-determination, the appellant requested a further re-determination of the tariff classification of the barbecues pursuant to paragraph 63(1)(b) of the Act. By a notice of decision dated March 3, 1992, the respondent, pursuant to subsection 63(3) of the Act, confirmed that the barbecues are properly classified under tariff item No. 7321.11.90, which decision is now being appealed to the Tribunal.

Mr. James Fitzgerald, Senior Product Manager for The Thermos Company in the United States (Thermos), testified on behalf of the appellant. He described the features of the barbecues, their various components and the materials used in their construction. Mr. Fitzgerald explained that the oven portion of the barbecues is composed of an aluminum top and bottom, but also includes various non-metal parts such as handles and a window. In addition, the oven contains metal components, including steel cooking grids, a heat distribution plate, a window frame and venturi. The barbecue typically sits on a cart composed of either steel or wood and of other materials such as rubber wheels and a metal control panel.

The appellant entered as exhibits three models of barbecues: a tabletop barbecue, a barbecue with a wooden stand and one of the barbecue models that rest on a steel stand and that are the subject of this appeal. Mr. Fitzgerald discussed the weight of the aluminum component of each barbecue relative to the weight of the other materials. For the barbecues in

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

issue, the aluminum oven weighs 15 lbs, while the steel components in the oven portion and stand weigh 31 lbs.

Mr. Fitzgerald explained that aluminum is a critical component in the manufacture of the barbecue ovens since it allows the company to meet the standards for outdoor gas grills as set forth by the Canadian Gas Association. Aluminum is able to withstand very high temperatures and is lightweight, thereby making it portable. Further, it is corrosion resistant, easily styled and moulded, durable, inexpensive and recyclable.

In answer to a question posed by Member Hines, Mr. Fitzgerald stated that, in the trade of barbecues, Thermos refers to its products as "gas barbecue grills."

Counsel for the appellant argued that, as Mr. Fitzgerald demonstrated, aluminum is an essential material in the manufacture of the barbecues and, as such, provides the essential character of the barbecues. As a result, counsel submitted that the barbecues are more properly classified under the aluminum heading of the tariff nomenclature.

Counsel for the appellant referred to sections 10 and 11 of the *Customs Tariff* to support their reliance on the General Rules for the Interpretation of the Harmonized System³ (the General Rules) and on the Section Notes and Explanatory Notes⁴ in determining the correct classification of the barbecues. They suggested that the Tribunal should not rely only on Rule 1 of the General Rules since that would limit its inquiry to the terms, headings and any relative Section or Chapter Notes. In particular, they drew the Tribunal's attention to Note 5 to Section XV, Base Metals and Articles of Base Metal, of Schedule I to the *Customs Tariff* which provides that,

Except where the headings otherwise require, articles of base metal (including articles of mixed materials treated as articles of base metal under the Interpretative Rules) containing two or more base metals are to be treated as articles of the base metal predominating by weight over each of the other metals.

Reliance on this particular Note, counsel argued, would result in a classification based on the amount of metal used in the stand or cart and would result in different classifications for different models of barbecues. Counsel suggested that it did not make sense to classify the barbecues based upon the weight of the ancillary materials that have no bearing on the essential character of the products.

Counsel referred to Rule 1 of the General Rules which provides that classification is to 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.

They argued that headings and Section or Chapter Notes are not the only criteria in determining the tariff classification and suggested that, in this instance, the headings and Notes did not preclude the use of the other General Rules.

3. *Ibid.*, Schedule I.

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

Counsel for the appellant also addressed the application of the other General Rules to the determination of the classification of the barbecues. Counsel argued that, since Rule 1 of the General Rules does not definitively dispose of the classification issue, reference should be made to Rule 2 which ultimately directs one to Rule 3. In applying Rule 3, counsel argued that the barbecues are *prima facie* classifiable under one or more headings.

Relying on the provisions of Rule 3 (b) of the General Rules, counsel argued that the barbecues are either "composite goods consisting of different ... components" or "goods put up in sets for retail sale." It was argued that the barbecues meet the test for composite goods as set out in the Explanatory Notes to Rule 3 (b) of the General Rules in Section I of the Explanatory Notes, which is that the different components are adapted one to the other, are complementary, are put in a common packing and form a whole which would not normally be offered for sale in separate parts.

In the alternative, counsel argued that the oven and stand portions of the barbecues are goods put up in sets for retail sale. In support of this position, counsel referred to the test for a set for retail sale also set out in the Explanatory Notes to Rule 3 (b), which is that the goods consist of at least two different articles which are *prima facie* classifiable in different headings, that the products or articles are put up together to meet a particular need or carry out a specific activity and, finally, that the goods are put up in a manner suitable for sale directly to users without repacking. Counsel submitted that the barbecues are *prima facie* classifiable under two different headings, namely, heading No. 76.15 for the oven portion and heading No. 94.03 for the stand or cart portion, which is "Other furniture and parts thereof." The oven portion and the stand portion of the barbecues have been put together for the purpose of outdoor cooking. Finally, there is no repacking of the barbecues required.

With respect to the final part of Rule 3 (b) of the General Rules which states that the goods "shall be classified as if they consisted of the material or component which gives them their essential character," counsel submitted that it is the oven portion, and hence the aluminum, which gives the barbecues their essential character.

Counsel for the respondent referred to heading No. 73.21 and pointed out that the heading alone refers specifically to "barbecues ... of iron or steel." He argued that this, combined with the fact that the barbecues are known both popularly and in the trade as "gas grill barbecues," supports a determination that the barbecues are properly classified under heading No. 73.21. Counsel further argued that Note 5 to Section XV of Schedule I to the *Customs Tariff* supports this finding based on the relative weights of the base metal.

Counsel addressed the issue of the essential character of the barbecues and argued that the question to be asked was not, as the appellant suggested, whether the steel or the aluminum gives the barbecues their essential character, but whether the metal or non-metal portions give the barbecues their essential character. He argued that the essential character of the barbecues is derived from the metal portions. Since steel predominates by weight over aluminum, counsel argued that the goods are properly classified under heading No. 73.21.

In determining the most appropriate tariff classification for the barbecues, the Tribunal began with the General Rules. Rule 1 states that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Heading No. 73.21 describes the goods specifically as barbecues, but stipulates that they be of iron or steel. Heading No. 76.15 refers to table, kitchen or other household articles of aluminum, a

characterization that is quite general. Neither of these headings describes the goods precisely, based on the Tribunal's plain reading of the *Customs Tariff*.

Rule 1 of the General Rules also refers, however, to Section and Chapter Notes. Note 5 to Section XV of Schedule I to the *Customs Tariff* requires that goods containing two or more base metals be treated as articles of the base metal predominating by weight. In the case of the barbecues in issue, the evidence clearly establishes that steel, not aluminum, is the predominant metal by weight. Therefore, based on the application of Rule 1 of the General Rules, the goods in issue properly fall under heading No. 73.21.

In the Tribunal's view, there is no necessity to proceed to Rule 3 (b) of the General Rules to determine classification in this instance. Even if the Tribunal did consider the barbecues to be composite goods consisting of different materials or goods put up in sets for retail sale, an argument on which the Tribunal passes no judgement, the goods could be classified under Rule 1. The goods are unambiguously described in trade and general usage as barbecues. This specific description, combined with the application of the relative Section Notes, suggests that heading No. 73.21 is the only appropriate heading for the goods in issue.

Having made this determination, the Tribunal recognizes that the result seems to be somewhat arbitrary because goods, namely, barbecues, that serve the same general purpose may be classified under either the aluminum or steel or iron tariff heading, depending upon the relative weights of the metal for the model which is being imported. However, the Tribunal's task is to apply the law as it stands. The appellant pointed out that many barbecues today are no longer composed of iron or steel and that their specific inclusion under the iron or steel heading is misleading. The Tribunal is inclined to agree, but it is not within the Tribunal's mandate to question the reasoning on which classifications are based. Its role is to make determinations based upon the parameters set forth in the legislation that it is interpreting.

The appeal is dismissed. The gas grill barbecues are properly classified under tariff item No. 7321.11.90.

Robert C. Coates, Q.C.
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Presiding Member

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