

Ottawa, Monday, January 10, 1994

Appeal No. AP-92-073

IN THE MATTER OF an appeal heard on June 10, 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 dated April 27,
1992, with respect to requests for re-determination under
section 63 of the *Customs Act*.

BETWEEN

SMITH & NEPHEW INC.

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

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-073

SMITH & NEPHEW INC.

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 decisions of the Deputy Minister of National Revenue for Customs and Excise dated April 27, 1992. The issue in this appeal is whether goods described as birthing beds are properly classified under tariff item No. 9402.90.90 as other medical or surgical furniture, as contended by the respondent, or should be classified under tariff item No. 9402.90.10 as operating tables, as claimed by the appellant.

HELD: *The appeal is allowed. Rule 3 (a) of the General Rules for the Interpretation of the Harmonized System provides that the heading which provides the most specific description is to be preferred to headings providing a more general description. In the Tribunal's view, "operating table" is a more specific description of a birthing bed than "other" medical or surgical furniture. The Tribunal, therefore, finds that birthing beds are classified under tariff item No. 9402.90.10 as operating tables.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: June 10, 1993
Date of Decision: January 10, 1994*

*Tribunal Members: Michèle Blouin, Presiding Member
Charles A. Gracey, Member
Desmond Hallissey, Member*

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Janet Rumball

*Appearances: Donald Petersen, for the appellant
Rosemarie Millar, for the respondent*

Appeal No. AP-92-073

SMITH & NEPHEW INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
CHARLES A. GRACEY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue for Customs and Excise dated April 27, 1992. The issue in this appeal is whether goods described as birthing beds are properly classified under tariff item No. 9402.90.90 of Schedule I to the *Customs Tariff*² as other medical or surgical furniture, as contended by the respondent, or should be classified under tariff item No. 9402.90.10 as operating tables, as claimed by the appellant.

For the purposes of this appeal, the following are the relevant provisions from Schedule I to the *Customs Tariff*:

| | |
|------------|---|
| 94.02 | <i>Medical, surgical, dental or veterinary furniture (for example, operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs); barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements; parts of the foregoing articles.</i> |
| 9402.90 | <i>-Other</i> |
| 9402.90.10 | <i>---Operating tables, oscillating beds and electro-mechanical chiropractic tables, and parts thereof</i> |
| 9402.90.90 | <i>---Other</i> |

Two witnesses appeared on behalf of the appellant. The first witness, Mr. Norm Harding, a nurse with extensive practical experience and previously a salesperson for Smith & Nephew Inc., explained the similarities between a birthing bed and an operating table. He stated that both are capable of fitting attachments, such as leg supports, armboards and anesthesia screens, of having the end of the table flip down to put the patient in the delivery position, and of being used for operative deliveries, including operative procedures such as episiotomies, caesarean sections, and forceps or vacuum-suction deliveries. However, he also stated that an operating

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

table offers a number of other functions not necessary for delivering a baby and that the principal function of a birthing bed is not to perform surgical procedures. He explained that birthing beds are a relatively new development intended to serve as an alternative to the more standard type of tables generally used for delivering babies.

The second witness, Dr. André B. Lalonde, a doctor of obstetrics and gynaecology and Executive Vice-President of The Society of Obstetricians and Gynaecologists of Canada, appeared as an expert witness and stated that a birthing bed is a specialized type of operating table, since surgical procedures, such as episiotomies and operative deliveries, are performed on it. He testified concerning his use of birthing beds for deliveries and confirmed that he had frequently performed both minor preparatory and repair surgery and caesarean sections on patients while they were on birthing beds.

Dr. Denis K. Dudley, a doctor of obstetrics and gynaecology in perinatal medicine, appeared as an expert witness for the respondent and expressed certain views that were different from those of Dr. Lalonde. He testified to the effect that birthing was a natural phenomenon and that any surgery required was incidental to an essentially natural process. He stated that he had never performed a caesarean section or forceps delivery on a birthing bed and that, given the choice, he would never do so, since birthing beds are wider than operating tables and do not allow for proper surgical techniques. In his view, the primary use of a birthing bed is to provide a safe, comfortable alternative to the standard operating room table and not to perform surgical procedures.

Dr. Dudley further stated that a birthing bed is a bed used for medical procedures and is, therefore, medical furniture and that, if a birthing bed is an operating table, since minor repairs such as episiotomies are performed on it, then applying the same logic, an examination table in a doctor's office should also be classified as an operating table, since minor operations are performed on it.

The appellant's representative argued that a birthing bed can be inclined, raised and adjusted as can an operating table and that surgical procedures are performed on a birthing bed.

The appellant's representative referred to the Tribunal's decision in *M & S X-Ray Services Limited v. The Deputy Minister of National Revenue [for Customs and Excise]*³ in which the Tribunal considered the issue of the classification of a chiropractic table. As stated by the appellant's representative, the Tribunal found that a chiropractic table could not be easily described as either furniture or a diagnostic instrument, but that it should be classified as the latter where it was most accurately described. Applying this general principle to the facts in this appeal, the appellant's representative submitted that a birthing bed is better described by the words "operating table" than by the word "other."

Counsel for the respondent referred to the Explanatory Notes⁴ to heading No. 94.02 and submitted that, since birthing beds are listed separately from operating tables, the intention was that they not be considered to be synonymous. An operating table is a table unlike a birthing bed, which is a bed defined as a piece of furniture on or in which one may lie or sleep.

3. Appeal No. 3018, September 15, 1989.

4. Explanatory Notes to the Harmonized Commodity Description and Coding System, Customs Co-operation Council, 1st ed., Brussels, 1986.

Counsel for the respondent submitted that a birthing bed is used for the purpose of providing support for a pregnant woman during examination or delivery of a baby in a non-sterile environment, whereas an operating table is for conducting surgical procedures on patients in a sterile environment. Although operations, such as an episiotomy, may be carried out on a birthing bed, its primary purpose is not for use as an operating table. Counsel referred to the product literature introduced by the appellant's representative and submitted that the birthing beds could be distinguished from operating tables, since they are sold with other pieces of furniture, such as armoires, rocking chairs, etc.

Counsel for the respondent further submitted that *M & S X-Ray* can be distinguished from this appeal, since birthing beds are advertised and sold as birthing or confinement beds, not as operating tables. Rather, counsel submitted that the Tribunal should rely on the decision of the Tariff Board in *Waltham Watch Company of Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*.⁵ Counsel stated that, in that decision, the Tariff Board held that the function of the goods defines the essential character. In her view, the essential character or purpose of a birthing bed is to provide support for delivering babies and not to provide support for performing operations.

The Tribunal shares the views of both the appellant and the respondent that birthing beds are properly classified in heading No. 94.02 and subheading No. 9402.90. The only issue, therefore, is the tariff item under which birthing beds should be classified within that tariff heading and subheading.

The Tribunal is directed by section 11 of the *Customs Tariff* to have regard to the Explanatory Notes in interpreting the headings and subheadings. The Explanatory Notes to heading No. 94.02 provide that 12 listed goods are to be included in heading No. 94.02. "Operating tables for general or specialised surgery" and "[c]onfinement beds (sometimes called birthing beds)" are referred to separately in this list. Counsel for the respondent submitted that the fact that two items are listed separately indicates that they were intended to be classified separately. However, the Tribunal disagrees with this submission. "Special orthopaedic tables for complex operations," which, in the Tribunal's view, could be considered to fall into the general category of "[o]perating tables for general or specialised surgery," are also referred to separately. The fact that special orthopaedic tables are referred to separately does not preclude the possibility of their being classified under the general category of operating tables. Further, the separate reference to birthing beds does not preclude their being classified under the general category of operating tables.

The Tribunal finds that the Explanatory Notes do not give any guidance as to how to classify birthing beds beyond the tariff heading level.

Section 10 of the *Customs Tariff* requires that the Tribunal classify goods in accordance with the General Rules for the Interpretation of the Harmonized System⁶ (the General Rules) and the Canadian Rules set out in Schedule I to the *Customs Tariff*. Rule 1 of the Canadian Rules provides that the General Rules apply, *mutatis mutandis*, to the classification of goods at the tariff item level. Since birthing beds are not specifically provided for under any tariff item, the Tribunal cannot classify them according to the terms of the tariff items as stated under Rule 1 of the General Rules. Rule 2 of the General Rules is also not applicable, since birthing beds

5. (1984), 9 T.B.R. 388.

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

are not in an incomplete or unfinished state and are not materials, substances or mixtures, or combinations thereof.

The application of Rule 3 of the General Rules requires that the Tribunal, first, find that birthing beds are *prima facie* classifiable under two or more tariff items. As was indicated in the testimony at the hearing, a birthing bed has characteristics similar to both an operating table and medical furniture. On that basis, the Tribunal finds that birthing beds are *prima facie* classifiable under tariff item No. 9402.90.10 as operating tables and under tariff item No. 9402.90.90 as other medical or surgical furniture.

Having found that birthing beds are *prima facie* classifiable under two or more tariff items as required by Rule 3 of the General Rules, Rule 3 (a) provides that the heading which provides the most specific description is to be preferred to headings providing a more general description. In the Tribunal's view, "operating table" is a more specific description than "other" medical or surgical furniture. The Tribunal, therefore, finds that birthing beds are classified under tariff item No. 9402.90.10 as operating tables.

Accordingly, the appeal is allowed.

Michèle Blouin
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