

Ottawa, Monday, May 10, 1993

Appeal No. AP-92-096

IN THE MATTER OF an appeal heard on January 18, 1993,
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 July 13, 1992, with respect to a request for
re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

WEIL COMPANY LIMITED

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

Michèle Blouin
Michèle Blouin
Member

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

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-096

WEIL COMPANY LIMITED

Appellant

and

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

Respondent

The appellant is an importer of automatic bread makers which perform all the functions of the bread-making process, namely, the mixing of ingredients, kneading of dough and baking. The issue in this appeal is whether the appellant's imported automatic bread makers should be classified as "Electro-mechanical domestic appliances, with self-contained electric motor - Other appliances" under tariff item No. 8509.80.00, as claimed by the appellant, or as "other electro-thermic appliances of a kind used for domestic purposes ¼ -- Other" under tariff item No. 8516.79.00, as claimed by the respondent.

HELD: *The appeal is dismissed. In the Tribunal's view, the essential character of the subject goods is the baking or electrothermic function. The goods in issue are, therefore, more properly classified under the heading that mentions that character as stipulated under Rule 3 (b) of the General Rules for the Interpretation of the Harmonized System and in Note 3 to Chapter 85 of the Explanatory Notes to the Harmonized Commodity Description and Coding System.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 18, 1993
Date of Decision: May 10, 1993

Tribunal Members: W. Roy Hines, Presiding Member
Michèle Blouin, Member
Robert C. Coates, Q.C., Member

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Janet Rumball

Appearances: Wayne Learn, for the appellant
Geoffrey S. Lester, for the respondent

Appeal No. AP-92-096

WEIL COMPANY LIMITED

Appellant

and

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

Respondent

TRIBUNAL: W. ROY HINES, Presiding Member
MICHÈLE BLOUIN, Member
ROBERT C. COATES, Q.C., 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 July 13, 1992, pursuant to section 63 of the Act.

The appellant is an importer of the MultiChef Automatic Bread Maker, Model BM-1 (the Bread Maker). The Bread Maker performs all the functions of the bread-making process, namely, the mixing of ingredients, kneading of dough and baking. The baking chamber is heated by an electric heating element. The operating manual accompanying a unit indicates how, in addition to making fully baked bread, the appliance can perform the kneading/rising process for specialty breads and rolls. The kneading blade is driven by a small electric motor. The Bread Maker weighs less than 20 kg and is primarily sold to consumers for use in the home.

The goods in issue were imported in five different shipments during 1990 and 1991 under tariff item No. 8509.80.00 of the *Customs Tariff*.² The respondent first classified the subject goods under tariff item No. 8516.60.00 as "Other ovens; cookers, cooking plates, boiling rings, grillers and roasters." The appellant filed requests for re-determination for each of the shipments and, by decision dated July 13, 1992, the Deputy Minister reclassified the goods under tariff item No. 8516.79.00.

The issue in this appeal is whether the subject goods should be classified as "Electro-mechanical domestic appliances, with self-contained electric motor - Other appliances" under tariff item No. 8509.80.00, as claimed by the appellant, or as "other electro-thermic appliances of a kind used for domestic purposes ... - Other" under tariff item No. 8516.79.00, as claimed by the respondent.

The appellant called one witness, Mrs. Penelope Brown, Vice-President, Administration, Weil Company Limited. Mrs. Brown indicated that she has been employed by the appellant company for almost 20 years and has specific knowledge of how the Bread Maker operates

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

through personal use. She explained how the Bread Maker functions and gave her opinion as to the reasons why consumers would buy the subject goods. In particular, she emphasized the dough-making and kneading functions as of particular importance to purchasers. The witness pointed out the fact that these functions took up a longer portion of the operating time of the machine than did the baking function. She also pointed out that 11 of the 12 recipes set out in the Bread Maker's operating manual require a conventional oven for baking. During cross-examination, Mrs. Brown confirmed that her views as to why consumers purchased the goods in issue were her own and were not supported by any marketing surveys or other sources of market information. In response to questions from the Tribunal, the witness confirmed that other consumer products, e.g. Mix Master, could make dough and knead it, and agreed that what distinguished those appliances from the Bread Maker was the latter's ability to bake.

The representative of the appellant began his argument by setting out four tariff classifications that the Tribunal might consider in the instant case, namely, tariff item Nos. 8509.40.90, 8509.80.00, 8516.79.00 and 8543.80.40. He stated that classification according to the Harmonized Commodity Description and Coding System³ must begin at the heading level, with reference to relative Section and Chapter Notes. He submitted that interpretation of Note 3 to Chapter 85 was central to the eventual classification of the subject goods because the last phrase in the Note states that heading No. 85.09 does not apply to electrothermic appliances and then, in brackets, references heading No. 85.16. This phrase, he argued, does not clearly indicate whether this means that the Note refers to appliances that are only electrothermic or primarily electrothermic. The representative then pointed out examples of goods referenced under heading No. 85.09, such as floor polishers with a heating element for liquefying wax, which had both electrothermic and electromechanical properties. Based on this analysis, he urged the Tribunal not to exclude heading No. 85.09 as a possible heading under which to classify the Bread Maker.

The representative of the appellant then turned to consider heading No. 85.16. He argued that the heading's reference to "other electro-thermic appliances of a kind used for domestic purposes" was very general and that it did not, on its face, require that a product be only or primarily electrothermic to be classified under this heading. He also noted that, in the Explanatory Notes⁴ to this heading, certain goods such as serving trollies equipped with heating elements were excluded from heading No. 85.16 on the basis that they were specifically covered elsewhere. This, he concluded, evidenced that heading No. 85.16 was not as specific as heading No. 85.09 and thus, under Rule 1 of the General Rules for the Interpretation of the Harmonized System⁵ (the General Rules), the subject goods are more properly classified under heading No. 85.09. In reply, the representative suggested that if the Tribunal were to determine that the Bread Maker could not be classified under Rule 1, 3 (a) or 3 (b) of the General Rules and thus used Rule 3 (c), then it should consider classifying the subject goods under tariff item No. 8543.80.40. He also suggested at this stage in the proceedings that the most appropriate tariff item for the subject goods was tariff item No. 8509.40.90 - "Food grinders and mixers; fruit or vegetable juice extractors --- Other."

Counsel for the respondent accepted that the Bread Maker may have a dual or mixed

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

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

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

function. He submitted that Note 3 to Chapter 85 required the Tribunal to determine whether the primary function of the subject goods was electrothermic or electromechanical. He argued that if the Tribunal determined that it was electrothermic, then the goods could not be classified under heading No. 85.09 due to the exclusion in the last phrase in Note 3. Counsel argued that the testimony of the appellant's witness explained only how the goods worked and what they did and did not specify their primary function. Counsel stated that the appellant had thus not discharged its burden of proof and that it was open to the Tribunal to find for the respondent on this basis alone.

In the alternative, counsel submitted that if the Tribunal did find that there was enough evidence to show that the subject goods have both electrothermic and electromechanical properties, and the Tribunal cannot decide which of these gives the goods their essential characteristic, then, under Rule 3 (c) of the General Rules, the Tribunal should find for the respondent because he has submitted the heading that occurs last in numerical order among the headings that should be given serious consideration. Counsel noted that, although the appellant did mention heading No. 85.43 in its brief, the only heading it was putting forward in a serious manner at the hearing was heading No. 85.09, and this heading occurs before heading No. 85.16.

The Tribunal considers that the subject goods are properly classified under tariff item No. 8516.79.00 as "other electro-thermic appliances of a kind used for domestic purposes ... -- 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, 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 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 System. 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.

The Tribunal agrees with the parties that, in the present case, consideration of Rule 1 of the General Rules requires it to consider Note 3 to Chapter 85. The Tribunal is of the view that Note 3 does not exclude mixed or dual function appliances from being classified under heading No. 85.09. The Tribunal is also of the view that the Bread Maker have both electrothermic and electromechanical functions or properties. Therefore, the Tribunal believes that Note 3 is not sufficient, in and of itself, to classify the subject goods, and it must go on to consider Rule 3 of the General Rules.

The first sentence of Rule 3 (a) of the General Rules states that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." As indicated above, the Tribunal is of the view that the subject goods have both electrothermic and electromechanical properties or functions. Because the description in each of the headings under consideration mentions one, but not both of these properties or functions, the Tribunal considers that both headings are equally descriptive for purposes of Rule 3 (a) of the General Rules, and the Tribunal must, therefore, proceed to Rule 3 (b) of the General Rules.

Rule 3 (b) of the General Rules states, in part, that composite goods made up of different components, which cannot be classified by reference to Rule 3 (a) of the General Rules, shall be

6. Appeal No. AP-91-131, March 16, 1992.

classified as if they consisted of the component which gives them their essential character. The Tribunal finds that the essential character of the Bread Maker relates to its baking capability or electrothermic function. It is this ability that distinguishes the subject goods from other appliances, for example a Mix Master that can be used to make dough and knead. As the Tribunal has now determined that the goods can be considered as essentially electrothermic in nature, it is appropriate to use the direction in Note 3 to Chapter 85, that electrothermic appliances are excluded from heading No. 85.09, and to classify the subject goods as indicated in that Note, under heading No. 85.16.

Accordingly, the appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

Michèle Blouin
Michèle Blouin
Member

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