



Ottawa, Tuesday, May 18,

**Appeal No. AP-92-121**

IN THE MATTER OF an appeal heard on February 15, 1993, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF three decisions of the Deputy Minister of National Revenue for Customs and Excise dated August 25, 1992, with respect to requests for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**THE MARLEY PUMP COMPANY**

**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

Kathleen E. Macmillan  
Kathleen E. Macmillan  
Member

Charles A. Gracey  
Charles A. Gracey  
Member

Michel P. Granger  
Michel P. Granger  
Secretary



**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-121**

**THE MARLEY PUMP COMPANY**

**Appellant**

**and**

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

**Respondent**

*The goods in issue are steel expansion tanks that form part of a residential water system not connected to a municipal water supply. The tanks in issue are made of steel with a rubber expansion bladder fixed to their inside walls. There is a fitting on the bottom of the tank where water enters and exits. Air is captured under pressure between the bladder and the inside of the tank. When water is pumped into the system, it enters the tank and stretches the bladder, increasing the pressure of the trapped air, thus pressurizing the system.*

*When the goods in issue were imported into Canada, the tariff item proposed by the appellant in this appeal did not exist. Pursuant to Order-in-Council P.C. 1990-319, dated February 22, 1990, a retroactive amendment to the tariff nomenclature of Schedule I to the Customs Tariff occurred, adding the tariff item now proposed by the appellant. Under these circumstances, subsection 72.1(1) of the Customs Act provides that a request, under paragraphs 60(1)(a) and (b) of the Customs Act, for a re-determination of the tariff classification of imported goods may be made before July 1, 1992.*

*Counsel for the respondent argued that the tanks in issue were classifiable under tariff item No. 8479.89.90, although presently classified in heading No. 73.09 or 73.10, and that the Tribunal lacked the jurisdiction to re-classify the goods other than within the nomenclature created by an Order-in-Council. Counsel for the appellant argued that the goods in issue were more properly classified under the nomenclature introduced by Order-in-Council P.C. 1990-319, being either tariff item No. 9032.81.10 or 9032.90.40, and that the Tribunal had the jurisdiction to classify the goods in issue anywhere within the tariff nomenclature. As such, if the goods in issue did not fall within heading No. 90.32, the Tribunal could re-classify them under tariff item No. 8479.89.90.*

**HELD:** *The appeal is dismissed. The tanks in issue are not classifiable in heading No. 90.32. In an appeal of this nature, the Tribunal does not believe that it is appropriate to use it as a forum for re-opening the original re-determination process once further re-determination has been statute barred.*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: February 15, 1993  
Date of Decision: May 18, 1993*

*Tribunal Members: W. Roy Hines, Presiding Member  
Kathleen E. Macmillan, Member  
Charles A. Gracey, Member*

*Counsel for the Tribunal: David M. Attwater*

*Clerk of the Tribunal: Dyna Côté*

*Appearances: Brian J. Barr, for the appellant  
Linda J. Wall, for the respondent*

Appeal No. AP-92-121

**THE MARLEY PUMP COMPANY**

**Appellant**

**and**

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

**Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member  
KATHLEEN E. MACMILLAN, Member  
CHARLES A. GRACEY, Member

**REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> (the Act) from three decisions of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister). Based on requests for re-determination of the tariff classification of the goods in issue, the Deputy Minister cancelled the claims indicating that the goods were properly classified elsewhere.

Mr. Douglas Parsons, the owner of Canmech Agencies, which is the appellant's representative in Ontario, spoke about the goods in issue on behalf of the appellant. The goods in issue are steel expansion tanks that form part of a residential water system not connected to a municipal water supply. The system does not provide heated water. Reading from Exhibit A-2, which was a brochure on the tanks in issue, the witness stated that the function of the tanks in issue was to deliver adequate water under pressure to meet demand, to minimize pump use, thereby extending pump life and saving energy, and to assist the pump in meeting peak demand for water. The system consists of the tank, a pump, a pressure-sensitive device, a pressure gauge, water pipe, wire and fittings. The witness testified that, without the tank, the system would "short cycle," meaning that it would continually turn on and off. Without the tank and pressure-sensitive switch, the system would not be automatic, and the pump would need to be turned on every time water was to be drawn from the system.

The tanks in issue are made of steel with a rubber expansion bladder fixed to their inside walls. There is a fitting on the bottom of the tank where water enters and exits. Air is captured under pressure between the bladder and the inside of the tank. When water is pumped into the system, it enters the tank and stretches the bladder, increasing the pressure of the trapped air, thus pressurizing the system. Water pressure in the system is created by the pump, which draws water from a source. When water is drawn from the system, the pressure decreases. The pump is turned on or off by a switch which is activated by changes in the water pressure in the tank. The switch has two settings, minimum and maximum. When one of these pressure readings is sensed, the switch activates or deactivates the pump via an electric signal. When activated, the pump serves to repressurize the system. In a typical residential application, a tank has a 20- to 30-gal. capacity. When water is being used from the system, 8 to 10 gal. will be drawn from the tank before the pressure-sensitive switch activates the pump.

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

Mr. Douglas Bowering, an import broker with personal knowledge of the various transactions at issue, also appeared on behalf of the appellant. Copies of the import invoices and various re-determination requests and responses for the transactions at issue were introduced through him. The tanks in issue were imported into Canada in three separate transactions on January 20, 21 and 28, 1988, and classified in heading No. 84.81 of Schedule I to the *Customs Tariff*.<sup>2</sup> With respect to the first and third transactions, on April 8, 1988, the appellant requested a re-determination of the tariff classification of the goods in issue under subsection 60(1) of the Act, indicating heading No. 73.10 as the most appropriate. With respect to the second transaction, on April 6, 1988, a similar re-determination was requested, indicating heading No. 73.09 as the most appropriate. Although the Tribunal was not provided with physical evidence of such, counsel for the respondent indicated that the goods in issue were re-classified as requested.

When the goods in issue were imported into Canada, the tariff item proposed by the appellant in this appeal did not exist. Pursuant to Order-in-Council P.C. 1990-319<sup>3</sup> (the Order), a retroactive amendment to the tariff nomenclature of Schedule I to the *Customs Tariff* occurred, adding the tariff item now proposed by the appellant. Under these circumstances, subsection 72.1(1)<sup>4</sup> of the Act provides that a request, under paragraphs 60(1)(a) and (b) of the Act, for a re-determination of the tariff classification of imported goods may be made before July 1, 1992. For each of the three transactions at issue, several requests for re-determination under paragraph 60(1)(b) of the Act were made, to which negative decisions were rendered. With respect to each of the three transactions at issue, two further requests for re-determination of the tariff classification were made under subsection 63(1) of the Act, to which negative decisions were rendered by the respondent. In all cases, it was determined that the Order did not apply to the goods in issue. These decisions were finally appealed to the Tribunal.

At the hearing, counsel for the respondent argued that the tanks in issue were classifiable under tariff item No. 8479.89.90, although presently classified in heading No. 73.09 or 73.10. Counsel for the appellant argued that the goods were more properly classified under the nomenclature introduced by the Order, being either tariff item No. 9032.81.10 or 9032.90.40. For purposes of the arguments raised in this appeal, the relevant nomenclature is as follows:

84.79            *Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.*

*-Other machines and mechanical appliances:*

8479.89        -- *Other*

8479.89.90    --- *Other*

90.32           *Automatic regulating or controlling instruments and apparatus.*

*-Other instruments and apparatus:*

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

3. "Customs Tariff Schedules Amendment Order, No. 5," SOR/90-146, February 22, 1990, Canada Gazette Part II, Vol. 124, No. 6 at 916.

4. Added, S.C. 1990, c. 36, s. 1.

- 9032.81        -- *Hydraulic or pneumatic*
- 9032.81.10    --- *Of a kind used with the goods classified under the tariff items enumerated in Schedule VI to this Act*
- 9032.90        - *Parts and accessories*
- 9032.90.40    --- *Of the goods of tariff item No. ... 9032.81.10*

In the respondent's brief, counsel maintained that the Tribunal lacked the jurisdiction to hear this appeal, on the basis that a decision under section 63 of the Act was not rendered by the respondent. Counsel noted that such a decision was a condition precedent to the Tribunal's jurisdiction under section 67 of the Act. However, at the hearing, counsel abandoned this argument. She argued, however, that the Tribunal lacked its usual jurisdiction to consider alternative tariff classifications to those proposed by the parties. In other words, the only tariff items available to the Tribunal for consideration were those under which the goods were presently classified and those made available by the Order. In support of this proposition, counsel cited the wording of subsection 72.1(2) of the Act, which provides the appellant with a further right to have the tariff classification of the goods in issue re-determined "in order to give effect to a retroactive order of the Governor in Council." Therefore, the question before the Tribunal was whether the goods in issue were more properly classified under the tariff items created by the Order and proposed by the appellant, being tariff item No. 9032.81.10 or 9032.90.40, than under their present classification. In arguing that the goods in issue were not properly classified under the new tariff nomenclature, counsel argued that the goods in issue were more properly classified under tariff item No. 8479.89.90, though this classification was not available for the Tribunal's consideration. She added that the importer of the goods in issue had imported similar goods, since the transactions at issue, in heading No. 84.79 to the satisfaction of all parties.

In contrast, counsel for the appellant argued that the Tribunal maintained its typical jurisdiction to classify goods where they most appropriately belong. The Tribunal was not limited to a consideration of the nomenclature created by the Order and the tariff items under which the goods were actually classified. In support of this proposition, counsel also referred to section 72.1 of the Act, which he argued re-initiated the ordinary process of re-determinations which would culminate in the Tribunal's consideration of the matter, including the proper tariff classification of imported goods. He argued that, if the new nomenclature did not apply, tariff item No. 8479.89.90 would apply and that the Tribunal had the jurisdiction to make that ruling.

Counsel for the appellant reiterated that the function of the tanks in issue was to establish or maintain a working pressure in a water delivery system when the pump was not running. A tank must be used with a pressure-sensitive switch for there to be an automatic system. It does not have a function separate and apart from the switch. Referring to the Explanatory Notes<sup>5</sup> to heading No. 90.32, at page 1534, counsel contended that, together, the tank and switch provide the measurement of pressure, a control device which compares the measured pressure of the system with the desired value, and a starting, stopping or activating device for the system. The tank and switch are connected to the pump by piping which is activated to restore the working pressure of the system. These features, he contended, were

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

those characterizing the goods of heading No. 90.32. He noted that the pumps were goods enumerated in Schedule VI to the *Customs Tariff*, which was not contested by the respondent. Counsel also suggested that the tanks in issue may be classifiable under tariff item No. 9032.90.40, as parts of the goods of tariff item No. 9032.81.10.

Counsel for the respondent referred the Tribunal to section 11 of the *Customs Tariff* which states that:

*In interpreting the headings and subheadings in Schedule I, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System.*

Counsel referred to an opinion on certain goods which were considered to be classified under subheading No. 8479.89. The goods were described as follows:

*Metal chamber, fitted with a diaphragm which is submitted, on one side, to the pressure of a gas and, on the other side, to direct contact with the fluid in the piping on which the chamber is mounted; serves in certain installations (e.g., central heating) as a sealed expansion chamber.*<sup>6</sup>

Counsel for the respondent submitted that this description characterized the goods in issue which should also be classified under subheading No. 8479.89. She added that the tanks in issue had a mechanical function, being the pressure created by the rubber diaphragm compressing the sealed air. She referred to the Explanatory Notes to heading No. 84.79, at page 1314, where examples of goods having individual functions are discussed. She argued that the tanks in issue had a distinct function from the complete water supply system and that, because the system would work without a tank, it did not form an integral and inseparable part of the system.

Counsel for the respondent referred to Note 6 to Chapter 90 of Schedule I to the *Customs Tariff* and submitted that an instrument or apparatus of heading No. 90.32 was for automatically controlling the flow, level, pressure or other variables of liquids or gases. The tanks in issue do not control pressure in their own right. Rather, they serve to store water and pressure. Referring to the Explanatory Notes to Section XVIII, at pages 1533 to 1535, counsel argued that the goods of heading No. 90.32 were "tripartite devices," being composed of (a) a device for measuring the variable to be controlled, (b) a control device which compares the measured value with the desired value, and which actuates, (c) a starting, stopping or operating device. She contended that the tanks in issue included no measuring, controlling, or stopping or starting device.

In considering the proper tariff classification of goods, the Tribunal is initially guided by the principles expressed in Rule 1 of the General Rules for the Interpretation of the Harmonized System.<sup>7</sup> It states that classification shall be determined by the terms of the headings and any relative Section or Chapter Notes. In considering the appellant's arguments, therefore, the Tribunal first considered the terms of heading No. 90.32 and Note 6 to Chapter 90 of Schedule I to the *Customs Tariff*, which describes what applies to this heading. Section 11 of

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6. Compendium of Classification Opinions, Customs Co-operation Council, 1st ed., 1987 at 36E.

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

the *Customs Tariff* instructs the Tribunal that, in interpreting the headings and subheadings, "regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System* and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*."

Note 6 (a) to Chapter 90 of Schedule I to the *Customs Tariff* is the only provision that may apply to the goods in issue. For purposes of this appeal, it indicates that heading No. 90.32 only applies to instruments and apparatus for automatically controlling the pressure of liquids or gases, whether or not their operation depends on an electrical phenomenon which varies according to the pressure to be automatically controlled.

The General Explanatory Notes to Chapter 90, at page 1456, indicate that the instruments and apparatus of this chapter are "characterised by their high finish and high precision." They also indicate that "[m]ost of them are used mainly for scientific purposes ... for specialised technical or industrial purposes ... or for medical purposes." The Tribunal did not see the tanks in issue as being characterised by any of these descriptions.

To understand what was meant by automatic control instruments and apparatus, the Tribunal referred to the Explanatory Notes to heading No. 90.32. They indicate that automatic control apparatus consist of the three devices mentioned by counsel for the appellant. The Explanatory Notes further state that "[a]pparatus for automatically controlling liquids or gases ... within the meaning of Note 6 (a) ... consists of these three devices forming a single entity or ... a functional unit." They also state that "[s]ome instruments and apparatus do not incorporate devices which compare the measured value with the desired value." Based on this description of the goods of heading No. 90.32, the Tribunal cannot agree that the tanks in issue are properly described by the terms of that heading. The tanks themselves do not contain a measuring device, a control device, or a starting, stopping or operating device forming a single entity or functional unit. They contain none of the devices which comprise the goods of heading No. 90.32.

Nor can the Tribunal accept that the tanks in issue are classifiable under tariff item No. 9032.90.40, as parts of the goods of tariff item No. 9032.81.10. The Tribunal recognizes that the goods of heading No. 90.32 must consist of those devices identified in the Explanatory Notes to that heading. It believes that the parts of such instruments and apparatus must include the same devices not more properly classifiable under another heading of Schedule I to the *Customs Tariff*. The Tribunal does not view the tanks in issue as any of these devices.

The Tribunal also recognizes that the classification opinion provided by counsel for the respondent appears to describe the tanks in issue.

In this particular case, an appeal from the original re-determination by the Deputy Minister was statute barred since the appellant did not take advantage of the appeal right that existed under the Act at that time. It was only as a result of a retroactive amendment to the tariff nomenclature pursuant to the Order that the appellant acquired a new right of appeal in respect of the importations. As noted earlier, the appellant argued that the right provided by the Order allowed the Tribunal to classify the goods in issue under the most appropriate tariff item within the tariff nomenclature and did not limit its reconsideration to the items specified in the Order. Counsel for the respondent took the opposite position arguing that both the Deputy Minister and the Tribunal were restricted by the terms of the Order to a reconsideration of whether the goods in issue were classifiable under the new tariff items made available through the Order. In this regard, the Tribunal notes that subsection 72.1(2) of the Act,

the operative provision governing the re-determination by the Deputy Minister in this instance, provides for a re-determination "in order to give effect to a retroactive order of the Governor in Council." The respondent's interpretation of this wording, with which the Tribunal concurs, is that the Deputy Minister must restrict consideration to the question of whether the goods can be properly classified within the terms of the Order. In the Tribunal's view, its jurisdiction in examining an appeal from the Deputy Minister's decision must likewise be limited in scope in order to avoid re-opening the entire original appeal process and creating an opportunity to institute appeals in respect of goods completely unrelated to those covered in the Order.

For the above reasons, the appeal is dismissed.

W. Roy Hines  
W. Roy Hines  
Presiding Member

Kathleen E. Macmillan  
Kathleen E. Macmillan  
Member

Charles A. Gracey  
Charles A. Gracey  
Member