



Ottawa, Tuesday, January 11, 1994

Appeal No. AP-92-225

IN THE MATTER OF an appeal heard on June 22, 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 November  
5, 1992, with respect to a request for re-determination under  
section 63 of the *Customs Act*.

**BETWEEN**

**PROCTOR-SILEX CANADA INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Lise Bergeron

Lise Bergeron  
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh  
Member

Charles A. Gracey

Charles A. Gracey  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-225**

**PROCTOR-SILEX CANADA INC.**

**Appellant**

**and**

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

**Respondent**

*The appellant is an importer of goods identified as hot air popcorn pumpers. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8516.79.00 as other electro-thermic appliances of a kind used for domestic purposes, as contended by the respondent, or should be classified under tariff item No. 8509.80.00 as other electro-mechanical domestic appliances, with self-contained electric motor, as claimed by the appellant.*

***HELD:** The appeal is dismissed. In the Tribunal's view, the essential character of the goods in issue is the making of popcorn or their electro-thermic function. The goods in issue are, therefore, properly classified in the heading that mentions the essential 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: June 22, 1993  
Date of Decision: January 11, 1994*

*Tribunal Members: Lise Bergeron, Presiding Member  
Sidney A. Fraleigh, Member  
Charles A. Gracey, Member*

*Counsel for the Tribunal: Joël J. Robichaud*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Michael Kaylor, for the appellant  
Gilles Villeneuve, for the respondent*

Appeal No. AP-92-225

PROCTOR-SILEX CANADA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE  
FOR CUSTOMS AND EXCISE

Respondent

TRIBUNAL: LISE BERGERON, Presiding Member  
SIDNEY A. FRALEIGH, 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 a decision of the Deputy Minister of National Revenue for Customs and Excise dated November 5, 1992, with respect to a request for re-determination under section 63 of the Act.

The appellant imported goods identified as hot air popcorn pumpers. They are made of the following components: a heater, a fan shroud, including an electric motor and a fan, a heater housing and a popping chamber. The fan, which is driven by a small electric motor, blows air to the heater which heats the air to the temperature required to create enough steam pressure inside the kernel to make it pop. The heated air is blown into the popping chamber by the fan, and the heated air blows the popped corn out of the machine into a bowl.

The goods in issue were imported by the appellant on May 23, 1991, and were classified under tariff item No. 8516.79.00 of Schedule I to the *Customs Tariff*.<sup>2</sup> The appellant filed a request for re-determination. By a decision dated November 5, 1992, the respondent maintained the initial classification.

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

Counsel for the appellant called one witness, Mr. Steven W. Ashworth, who has been employed by Hamilton Beach Proctor-Silex, Inc. in the United States as a mechanical engineer responsible for the design of the company's new products for the past six years. Consequently, Mr. Ashworth was familiar with the functions of the hot air popcorn pumpers and knew how they had been assembled. He briefly described their major components: the motor and fan, the heater and the popping chamber. He explained how they work together to obtain the desired effect. Basically, the electric motor powers the fan which blows air into the heater which then

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

heats the air to the temperature required to create enough steam pressure inside the kernel to make it pop. He explained that the goods in issue have two features: an electro-mechanical feature and an electro-thermic feature. The two act simultaneously to create the desired effect. One cannot function without the other. He testified that both are equally important to the performance of the hot air popcorn pumpers.

Mr. Ashworth also gave his opinion as to why consumers would buy the goods in issue. He emphasized the importance of their electro-mechanical feature and explained that this feature is unique to his company's product. This is what distinguishes its product from others on the market. All the other products, he explained, require the use of oil to transfer the heat and to cook the kernel to make it pop. The use of an electric motor and a fan represents an innovation in the popcorn-making process which should satisfy health-conscious consumers by eliminating the need for oil. The hot air process also produces a larger and better popcorn. The hot air popcorn pumpers are also easier to clean since they do not have the greasy residue left in other products that all use oil.

Counsel for the respondent also called one witness, Dr. Edelbert G. Plett, a professor at Carleton University, Department of Mechanical and Aerospace Engineering. He explained the application of certain principles of thermodynamics, which he described briefly as consisting of the conversion of heat into other forms of energy. He was asked by counsel to examine the hot air popcorn pumper and to comment on the functions of its major components and on its overall performance. Dr. Plett explained that the heater is the essential component of the goods in issue and that they could not function properly if the heater were removed. He had verified this through an experiment of his own in which he disconnected the heater. During cross-examination, he stated that he had not attempted the opposite, that is, to remove the electric motor to see if the goods in issue could function properly. Dr. Plett stated, however, that most of the kernels would quite probably burn, therefore not creating the desired combined effect of the two essential features of the goods in issue.

Counsel for the appellant argued that the goods in issue should be classified under tariff item No. 8509.80.00 as other electro-mechanical domestic appliances, with self-contained electric motor. He reiterated Mr. Ashworth's testimony that the goods in issue had two essential features which were equally important and that it was the combined operation of both features that created the desired effect.

Counsel for the appellant discussed one of the Tribunal's most recent decisions on tariff classification, *Weil Company Limited v. The Deputy Minister of National Revenue for Customs and Excise*,<sup>3</sup> which involved the classification of a bread maker. It also had two essential features: an electro-mechanical feature and an electro-thermic feature. In that decision, the Tribunal noted the importance of Rule 1 of the General Rules for the Interpretation of the Harmonized System<sup>4</sup> (the General Rules) which states that "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes."

The Tribunal was of the view that Note 3 to Chapter 85 of the Explanatory Notes,<sup>5</sup> which states that "[t]he heading does not ... apply to ... electrothermic appliances" and which then refers to heading No. 85.16, did not exclude mixed- or dual-function appliances from being

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3. Appeal No. AP-92-096, May 10, 1993.

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

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

classified in heading No. 85.09. Therefore, the Tribunal was of the view that Note 3 was not sufficient, in and of itself, to classify the bread maker, which had both electro-mechanical and electro-thermic functions or properties. It then went on to consider Rule 3 (a) of the General Rules which states that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." Because the description of both headings under consideration mentioned one, but not both, of the functions of the bread maker, the Tribunal considered that both headings were equally descriptive for purposes of Rule 3 (a) of the General Rules and, therefore, proceeded to Rule 3 (b). The latter 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 classified as if they consisted of the ... component which gives them their essential character."

The Tribunal found that the essential character of the bread maker related to its baking capability or electro-thermic function. It was this ability that distinguished the goods in issue in that case from other appliances, for example, a Mix Master that could be used to make and knead dough. The Tribunal determined that it was more appropriate to use the direction in Note 3 to Chapter 85 of the Explanatory Notes — that electro-thermic appliances are excluded from heading No. 85.09 — and to classify the goods in issue, as indicated in that note, in heading No. 85.16.

Counsel for the appellant presented the same argument to the Tribunal. He argued that the essential character of the hot air popcorn pumpers was their electro-mechanical feature and that it was this feature which distinguished the goods in issue from other products in the industry. Therefore, the goods in issue should be classified in the appropriate heading which, he argued, was heading No. 85.09. He explained that the Tribunal had to differentiate between a product's principal function and its essential character. While the hot air popcorn pumper's principal function might be the heating of the kernels to make them pop, its essential character was what distinguished it from other products. In this case, it consisted of the electric motor and fan used to distribute the heat to create the desired effect. Counsel also argued that electro-thermic appliances with an electro-mechanical feature could not be classified in heading No. 85.16. He argued that Parliament's intention was to specifically exclude from this heading all goods which were not purely electro-thermic in nature.

Counsel for the respondent argued that the goods in issue were properly classified in subheading No. 8516.79. He accepted that they had two essential features. He argued, however, that their primary feature was their electro-thermic feature which allowed them to perform their primary function, which was making popcorn with the use of heat. Since Note 3 to Chapter 85 of the Explanatory Notes excludes electro-thermic appliances of heading No. 85.16 from heading No. 85.09, they could not be classified in the latter heading. Since Note (E)(18) of the Explanatory Notes to heading No. 85.16 specifically includes "Popcorn cookers" within that heading, the goods in issue would logically be classified in heading No. 85.16. He argued that all the evidence showed that heat was what was needed for making popcorn and that the electro-thermic feature of the goods in issue should be considered their essential character. Relying on the *Weil* case, counsel argued that goods which are both electro-thermic and electro-mechanical in nature could be classified in heading No. 85.16.

In the alternative, counsel for the respondent submitted that, if the Tribunal found that both features of the goods in issue merit equal consideration, they should still be classified in heading No. 85.16 because this heading occurs last in numerical order. He based his argument on Rule 3 (c) of the General Rules which states that "[w]hen goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

The Tribunal considers that the goods in issue are properly classified under tariff item No. 8516.79.00 as other electro-thermic appliances of a kind used for domestic purposes. The Tribunal adopts its reasons in the *Weil* case discussed above. It bears in mind the importance of Rule 1 of the General Rules that must govern the classification of the goods in issue.

The Tribunal agrees with the parties that, in the present case, the hot air popcorn pumpers have both electro-mechanical and electro-thermic functions or properties. As in the *Weil* case, it is of the view that Note 3 to Chapter 85 of the Explanatory Notes does not exclude mixed- or dual-function appliances from being classified in heading No. 85.09, but that it is not sufficient, in and of itself, to classify the goods in issue, and the Tribunal must go on to consider Rule 3 of the General Rules.

Again, because the description in each of the headings under consideration mentions one, but not both, of the functions or properties of the hot air popcorn pumpers, the Tribunal considers that both headings are equally descriptive for the purposes of Rule 3 (a) of the General Rules and that it must, therefore, proceed to Rule 3 (b).

Relying on Rule 3 (b) of the General Rules, the Tribunal finds that the essential character of the hot air popcorn pumpers relates to their ability to make popcorn or their electro-thermic function. They are distinguished from other popcorn-making machines by the fact that they use electrically heated air; however, all popcorn cookers, including the ones that were mentioned and described by the appellant's witness, have the same essential character, which is the heating of the inside of kernels to make them pop to obtain the desired popcorn. This cannot be done without the electro-thermic feature of the goods in issue. The appellant's goods do the same thing as other goods in the marketplace. They make popcorn.

As it did in the *Weil* case, the Tribunal determines that it is more appropriate to use the direction in Note 3 to Chapter 85 of the Explanatory Notes — that electro-thermic appliances are excluded from heading No. 85.09 — and to classify the hot air popcorn pumpers, as indicated in that note and in Note (E)(18) of the Explanatory Notes to heading No. 85.16, in heading No. 85.16.

Accordingly, the appeal is dismissed.

Lise Bergeron  
Lise Bergeron  
Presiding Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

Charles A. Gracey  
Charles A. Gracey  
Member