

Ottawa, Tuesday, March 19, 1996

Appeal No. AP-92-294

IN THE MATTER OF an appeal heard on August 10, 1995,  
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1  
(2nd Supp.);

AND IN THE MATTER OF a request for re-determination under  
section 63 of the *Customs Act*.

**BETWEEN**

**SHAFER VALVE CO. OF CANADA LTD.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Raynald Guay  
Raynald Guay  
Presiding Member

Desmond Hallissey  
Desmond Hallissey  
Member

Lise Bergeron  
Lise Bergeron  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-294**

**SHAFER VALVE CO. OF CANADA LTD.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

*The issue in this case is whether the appeal is properly before the Tribunal in accordance with the relevant provisions of the Customs Act.*

**HELD:** *The appeal is dismissed. The Tribunal is of the view that section 72.1 of the Customs Act (the Act) does not apply to the circumstances of the present case. Therefore, the appellant cannot take advantage of the exception to the limitation periods set out in sections 60 and 63 of the Act. The appellant has failed to satisfy the preliminary criteria of subsection 60(1) of the Act and, therefore, its request for a re-determination of the tariff classification of the valve operators under section 60 of the Act is statute barred.*

*Place of Hearing: Ottawa, Ontario*

*Date of Hearing: August 10, 1995*

*Date of Decision: March 19, 1996*

*Tribunal Members: Raynald Guay, Presiding Member*

*Desmond Hallissey, Member*

*Lise Bergeron, Member*

*Counsel for the Tribunal: Robert Desjardins*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Douglas J. Bowering, for the appellant*

*Brian Tittlemore, for the respondent*

**Appeal No. AP-92-294**

**SHAFER VALVE CO. OF CANADA LTD.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: RAYNALD GUAY, Presiding Member  
DESMOND HALLISSEY, Member  
LISE BERGERON, Member

**REASONS FOR DECISION**

The facts in this case are not in dispute between the parties.<sup>1</sup> In July 1990, the appellant imported into Canada from the United States a quantity of Shafer linear piston-type operators for mounting on valves (valve operators). On July 27, 1990, the appellant accounted for the valve operators under tariff item No. 8481.80.91 of Schedule I to the *Customs Tariff*<sup>2</sup> as hand operated or hand activated valves. On August 26, 1990, the valve operators were deemed to be classified under tariff item No. 8481.80.91 pursuant to section 58 of the *Customs Act*<sup>3</sup> (the Act).

More than a year later, that is, on October 29, 1991, the appellant filed a request under paragraph 60(1)(b) of the Act for a re-determination of the tariff classification of the valve operators from tariff item No. 8481.80.91 to tariff item No. 8412.21.00 as hydraulic linear valve operators and indicated that Order in Council P.C. 1990-755 dated April 26, 1990,<sup>4</sup> applied to the valve operators. The Order in Council, which was retroactive to January 1, 1988, amended Schedules I, II and VI to the *Customs Tariff* as a consequence of the implementation in Canada of the International Convention on the Harmonized Commodity Description and Coding System (the Harmonized System). This Order in Council created tariff item No. 8481.80.91 and did not create, revoke or otherwise affect tariff item No. 8412.21.00. On September 11, 1992, the appellant's request dated October 21, 1991, was cancelled, on the grounds that the matter was reviewed and there was no provision for considering the appellant's request under paragraph 60(1)(b) of the Act. On October 27, 1992, the appellant submitted a request for re-determination pursuant to paragraph 63(1)(a) of the Act, again requesting that the valve operators be classified under tariff item No. 8412.21.00 as hydraulic linear valve operators. On January 19, 1993, the appellant's request for re-determination under section 63 of the Act was cancelled, on the basis that there had not been a decision under section 60 of the Act and that, therefore, there was no provision for consideration under paragraph 63(1)(a) of the Act.

The issue in this case is whether the appeal is properly before the Tribunal in accordance with the relevant provisions of the Act.

No witnesses were called by the parties.

1. Transcript of Argument, August 10, 1995, at 7.
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. R.S.C. 1985, c.1 (2nd Supp.).
4. *Customs Tariff Schedules Amendment Order, No. 7*, SOR/90-265, May 1, 1990, Canada Gazette Part II, Vol. 124, No. 11 at 1952.

In argument, the appellant's representative relied upon section 72.1 of the Act, which came into force on January 1, 1990.<sup>5</sup> It provides an exception to the limitation periods under sections 60 and 63 of the Act and permits re-determinations and further re-determinations under those sections in respect of certain imported goods. It reads as follows:

*72.1 (1) Notwithstanding paragraphs 60(1)(a) and (b), a request for a re-determination of the tariff classification of imported goods affected by a retroactive order of the Governor in Council made pursuant to sections 68 and 136 or 129 and 136 of the Customs Tariff, may be made under section 60 at any time before July 1, 1992.*

*(2) A designated officer may re-determine under subsection 60(3), and thereafter the Deputy Minister may further re-determine under subsection 63(3), the tariff classification of imported goods in order to give effect to a retroactive order of the Governor in Council referred to in subsection (1), notwithstanding any prior re-determination of the tariff classification of the goods.*

According to the appellant's representative, this section allowed, until July 1, 1992, the filing of claims retroactively to January 1, 1988, on certain affected entries of goods. The representative also underlined Order in Council P.C. 1990-755. In essence, he pointed out that tariff item No. 8481.90.40 had been affected by that particular Order in Council. In his view, there is nothing in section 72.1 of the Act which requires the goods to be imported prior to the introduction of the new tariff item. In addition, the representative relied on *Mueller Canada Inc. v. The Minister of National Revenue and the Deputy Minister of National Revenue*.<sup>6</sup> In his view, the respondent refused to recognize the meaning of the decision of the Federal Court of Canada.

Counsel for the respondent reviewed the provisions that provide the Tribunal with the jurisdiction to hear an appeal under section 67 of the Act. Pursuant to subsection 60(1), an importer may request a re-determination of the tariff classification of imported goods, provided that such a request is made within 90 days or, where the Minister of National Revenue (the Minister) deems it advisable, within two years, after the determination of the tariff classification of the goods under section 58. Section 63 allows a person to make a request for a further re-determination of the tariff classification re-determined under section 60, provided that the request is filed within 90 days after the time the person was given notice of a decision under section 60 or, where the Minister deems it advisable, within two years after the time a determination was made under section 58. As argued by counsel, the appellant filed its request under section 60 on October 29, 1991, approximately one year and two months after the date of the deemed determination of the tariff classification of the valve operators under section 58. In his view, the appellant failed to meet the 90-day period under paragraph 60(1)(a). An extension of the appellant's time for appealing to two years from the date of the determination under section 58 was not deemed advisable according to the criteria prescribed by the Minister for the exercise of discretion under paragraph 60(1)(b). Counsel concluded that, in the case at hand, there was no re-determination or re-appraisal under subsection 60(3). As a result, the request made under section 63 was cancelled. Given the absence of a decision of the respondent under the latter provision, counsel argued that the Tribunal does not have jurisdiction to deal with this appeal under section 67.

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5. S.C. 1990, c. 36, s. 1.

6. Unreported, Federal Court - Trial Division, File No. T-746-93, November 15, 1993.

Furthermore, counsel for the respondent argued that section 72.1 of the Act has to be read as a whole. He also went on to distinguish the present situation from *The Marley Pump Company v. The Deputy Minister of National Revenue for Customs and Excise*.<sup>7</sup> In the case at hand, the importation occurred after the coming into force of the relevant Order in Council, and the tariff item requested by the appellant was one that had not been affected, changed or altered by the retroactive decree. Therefore, in his view, these distinctions combine to render section 72.1 of the Act inapplicable to the circumstances of the appellant's case. Counsel also distinguished the present case from *Mueller* primarily on the basis that, in the latter case, the tariff classification being sought by the appellant was one that had been affected by the retroactive Order in Council.

Having reviewed the file and considered the arguments, the Tribunal has concluded that this appeal should be dismissed. At this juncture, it seems appropriate to recall that the *Customs Tariff*, which came into force on January 1, 1988, gave effect to the Harmonized System. Given the fundamental change to the tariff structure and the complexities of the conversion from the old regime to the Harmonized System, Parliament saw fit to give the Governor in Council broad authority to amend, with retroactivity if necessary, Schedules I, II and IV to VII to the *Customs Tariff* for an 18-month period, until June 30, 1989, following the implementation of the new system.<sup>8</sup> A subsequent amendment to the *Customs Tariff* extended this authority to June 30, 1990.<sup>9</sup> This authority to amend rates of duty could be used to address unforeseen difficulties or problems flowing from the conversion to the Harmonized System. Several orders were subsequently issued by the Governor in Council. As mentioned in Memorandum D12-4-7,<sup>10</sup> these Orders in Council restored the rates of duty in effect prior to the introduction of the Harmonized System.

Subsequently, Parliament amended the Act by adopting Bill C-55 in June 1990.<sup>11</sup> This short piece of legislation, deemed to have come into force on January 1, 1990, added three new sections to the Act, namely, sections 72.1, 74.1 and 80.1. Section 72.1 extends to July 1, 1992, the limitation period for submitting a request for re-determination of the tariff classification of goods affected by a retroactive Order in Council made as a consequence of the implementation of the Harmonized System. It is important that these legislative provisions be read as a whole. In essence, these sections provide for (1) the refund of duties where the Governor in Council has ordered the retroactive application of lower rates of duty, (2) the payment of interest on refunds where there are such orders and (3) an exception to the limitation periods under sections 60 and 63. In the Tribunal's opinion, the intent of Bill C-55 was to deal with situations where importers of certain goods found themselves overpaying customs duties as a result of the operation of the retroactive orders issued by the Governor in Council. The Tribunal believes that this legislation sought to address any problems in implementing the retroactive Orders in Council and the changes in the tariff classification. Indeed, by providing an exception to the time limitations set out in sections 60 and 63, this legislation ensured that the importers of certain goods would not be penalized during the period of retroactivity of these orders. In addition to ensuring a degree of fairness to the importers of goods affected by the Orders in Council, this legislation also brought consistency in the application of the rates of duty during this period.

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7. Canadian International Trade Tribunal, Appeal No. AP-92-121, May 18, 1993.

8. Sections 129 and 136 of the *Customs Tariff*.

9. S.C. 1989, c. 18, ss. 14 and 15.

10. *Customs Tariff Schedule Amendment Order No. 7*, Department of National Revenue, Customs and Excise, August 17, 1990.

11. Assented to on June 27, 1990, S.C. 1990, c. 36.

In the case at hand, the importation of the valve operators occurred after the coming into force of Order in Council P.C. 1990-755. The tariff item selected by the appellant in July 1990 had already been created at the time the importation took place. Indeed, as rightly observed by counsel for the respondent, the valve operators were not affected by a retroactive Order in Council, but were rather classified in accordance with the tariff item as it was in effect at the time of importation. In the Tribunal's view, the Order in Council at issue did not affect the goods imported by the appellant. The Tribunal considers that the appellant's situation is not one where, as a result of the retroactive Order in Council, it overpaid customs duties on the valve operators. This is different from *Mueller* where, as acknowledged by the appellant's representative,<sup>12</sup> the imported goods had been accounted under a tariff item prior to the date where the tariff classification was amended by a retroactive Order in Council.

As to the tariff classification sought by the appellant, namely, tariff item No. 8412.21.00, it is clear, on the basis of Order in Council P.C. 1990-755, that this specific tariff item was not among those revoked and created. Therefore, as argued by counsel for the respondent, this tariff item was not affected by the Order in Council.

In light of the foregoing, the Tribunal agrees with counsel for the respondent that section 72.1 of the Act does not apply to the circumstances of the present case. Therefore, the appellant cannot take advantage of the exception to the limitation periods set out in sections 60 and 63. As to the latter, the Tribunal is of the view that the appellant failed to satisfy the preliminary criteria of subsection 60(1) and, therefore, its request for a re-determination of the tariff classification of the valve operators under section 60 is statute barred. In the absence of a re-determination under section 60, there was no authority for the respondent to issue a decision re-determining the tariff classification of the valve operators pursuant to section 63.

Consequently, the appeal is dismissed.

Raynald Guay  
Raynald Guay  
Presiding Member

Desmond Hallissey  
Desmond Hallissey  
Member

Lise Bergeron  
Lise Bergeron  
Member

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12. Transcript of Argument, August 10, 1995, at 17.