



Ottawa, Thursday, April 21, 1994

Appeal No. AP-92-385

IN THE MATTER OF an appeal heard on October 25, 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
March 10, 1993, with respect to a request for re-determination
under section 63 of the *Customs Act*.

BETWEEN

OPAL OPTICAL LTD.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-385

OPAL OPTICAL LTD.

Appellant

and

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

Respondent

The issue in this appeal is whether the metal eyeglass frames imported by the appellant are properly classified under tariff item No. 9003.19.20 as frames made of materials other than plastics "[f]or other spectacles, goggles or the like," as determined by the respondent, or should be classified under tariff item No. 9003.19.10 as frames made of materials other than plastics "for prismatic eyeglasses for reading," as claimed by the appellant.

HELD: *The appeal is allowed. Having acknowledged that the tariff items at issue are ambiguous, the Tribunal notes the fact that all of the expert witnesses, including the respondent's expert witness, agree that eyeglass frames cannot be distinguished on the basis of whether they are to be used for lenses with prismatic effect or for lenses with an additional prismatic correction. In light of this testimony, the Tribunal has difficulty accepting the respondent's position that Parliament intended tariff item No. 9003.19.10 to be limited to the small number of eyeglasses in which an additional prismatic correction is needed when, at the time of importation, there is no way of knowing whether a particular group of frames will be used for this purpose. The evidence also leads the Tribunal to the view that the phrase "for reading" is, to a certain extent, redundant because all eyeglasses with focal power can be used "for reading." Further, the Tribunal is persuaded, based on the evidence of the industry experts, that the association of eyeglasses having an additional prismatic correction with the phrase "for prismatic eyeglasses for reading" has no practical meaning in the trade. In light of these factors, the Tribunal finds it difficult to believe that the residual tariff item in subheading No. 9003.19, i.e. tariff item No. 9003.19.20, was intended, in fact, to be the primary tariff item for the classification of frames for eyeglasses made of materials other than plastics.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: October 25, 1993
Date of Decision: April 21, 1994*

*Tribunal Members: Kathleen E. Macmillan, Presiding Member
Charles A. Gracey, Member
Lise Bergeron, Member*

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Anne Jamieson

*Appearances: Donald G. Grant, Burleigh Trevor-Deutsch and John R. Peillard, for
the appellant
Anne M. Turley, for the respondent*

Appeal No. AP-92-385

OPAL OPTICAL LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE

Respondent

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
CHARLES A. GRACEY, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act).

The appellant imports eyeglass frames, including the metal frames in issue. The goods in issue were imported on July 31, 1991, under tariff item No. 9003.19.20 of Schedule I to the *Customs Tariff*.² The appellant filed a request for a re-determination of the classification under tariff item No. 9003.19.10 on the basis that the frames in issue are not eyeglasses until lenses are installed. This request was denied. The appellant subsequently filed a request for a further re-determination and, by decision dated March 10, 1993, the Deputy Minister of National Revenue for Customs and Excise maintained the classification of the goods in issue under tariff item No. 9003.19.20.

The parties agreed that the goods in issue are properly classified in heading No. 90.03, "Frames and mountings for spectacles, goggles or the like, and parts thereof," and in subheading No. 9003.19, "[frames and mountings] [o]f other materials." The Tribunal sought, as a preliminary matter, to establish whether the parties agreed that any eyeglass lens with focal power has a prismatic effect. As they did agree on this matter, the Tribunal did not require argument on this point.

The issue in this appeal is whether the metal eyeglass frames imported by the appellant are properly classified under tariff item No. 9003.19.20 as frames made of materials other than plastics "[f]or other spectacles, goggles or the like," as determined by the respondent, or should be classified under tariff item No. 9003.19.10 as frames made of materials other than plastics "for prismatic eyeglasses for reading," as claimed by the appellant.

The relevant provisions of the *Customs Tariff* read as follows:

90.03	<i>Frames and mountings for spectacles, goggles or the like, and parts thereof.</i>
9003.19	<i>--Of other materials</i>

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

9003.19.10 ---For safety goggles or safety spectacles designed for use by workers employed in hazardous work; for prismatic eyeglasses for reading

9003.19.20 ---For other spectacles, goggles or the like

Counsel for the appellant called five witnesses representing different parts of the eyeglass industry. These witnesses were Dr. Gordon Young, an optometrist in Nepean, Ontario; Dr. Kenneth Cresswell, an optometrist in Barrie, Ontario; Mr. Ronald W. Adshead, Senior Vice President, Laboratory Operations, KW Optical Limited, a lens-grinding company with five locations in Ontario; Mr. Yvan Bertrand, Manager, Lens Division, Rodenstock Canada Inc., the Canadian distributing arm of Rodenstock, a German manufacturer of lenses; and Mr. Rosaire Francœur, an optician who is co-owner of a lens-grinding laboratory in Ottawa, Ontario, who also dispenses eyeglasses. All of these witnesses were qualified as experts with respect to that part of the eyeglass industry in which they work.

Dr. Young explained the basic optic principles relevant to the case. The purpose of eyeglass lenses with optic power, he testified, is to focus the incoming rays of light on the *fovea* of the eye. Such individual lenses are, of course, ground to correct the specific vision anomalies of the wearer. Another term used to describe such eyeglasses is "prescription eyeglasses" because the optometrist prescribes the exact lens grinding needed to correct the specific vision anomaly in the eyes of a particular patient. He testified that a prism is introduced into a lens by grinding.

In his testimony, Dr. Young explained that he prescribes from 2,000 to 2,500 pairs of eyeglasses per year and that in only about 5 percent of the cases is it necessary to prescribe "additional prismatic effect." He explained that, in most cases, the purpose of the prescribed prismatic effect is simply to focus the incoming rays of light on the *fovea* or optical centre. In a small percentage of cases, however, it is necessary to correct a misalignment of the eyes due to muscular imbalances, and this involves a more complex prescription, requiring additional prism. Dr. Young also stated, as did all the witnesses in this case, that it is not possible to identify frames that are made specifically for lenses with this additional prism.

During cross-examination, Dr. Young agreed with the following definition of a "prismatic lens" from Emsley and Swaine's Ophthalmic Lenses, "a lens incorporating a prescribed prism,"³ and confirmed that this refers to the situation where a prism is introduced into a lens that already has a prismatic effect in it. Dr. Young also agreed with the following definition of "prismatic" in the Dictionary of Visual Science: "A lens with prism power. In a spectacle lens, one with prism power at the major reference point."⁴ He confirmed his view that the reference to "major reference point" would be patient-specific and would relate to an additional prismatic correction.

In response to questions from the Tribunal, Dr. Young indicated that it was his understanding that the tariff description at issue had been associated, in the past, with a pair of eyeglasses designed so that a person lying horizontally in a bed could read without raising the head. A picture of these eyeglasses was entered as part of the witness' response to these questions. Dr. Young agreed that the term "prismatic eyeglasses" is not one that a practitioner

3. A.G. Bennett (London: Hatton Press, 1968) at 131.

4. D. Cline, H.W. Hofstetter & J.R. Griffin, 4th ed. (Radnor, Pa.: Chilton, 1989) at 399.

would normally use in referring to the eyeglasses used to assist the bedridden patient. Dr. Young also stated that there are reading requirements at all distances of vision.

Dr. Cresswell provided the Tribunal with examples of eyeglasses that are not prismatic. These include, for instance, eyeglasses for certain blind patients and certain sports eyeglasses, without ground lenses, to protect athletes' eyes. He indicated that 90 to 95 percent of his prescriptions are for eyeglasses that are prismatic. Dr. Cresswell also made a distinction between "eyeglasses for reading" and "reading eyeglasses," and suggested that the former includes more than reading at short distances.

During cross-examination, Dr. Cresswell agreed that there is a distinction between prismatic quality or effect in a lens and the prescription of an additional prism correction, or what he termed therapeutic prism for oculomotor deviations. Dr. Cresswell agreed that the following definition from Ophthalmic Terminology: Speller and Vocabulary Builder (Ophthalmic Terminology) refers to prismatic correction: "Prismatic lenses are designed to compensate for or aid muscle imbalance in one or both eyes.⁵" He also agreed that the definition of "prismatic lenses" from the Dictionary of Visual Science refers to what he termed "therapeutic prism."

Mr. Adshead indicated that additional prism is prescribed in approximately 5 percent of the orders for eyeglasses received by his company's laboratories. During cross-examination, he confirmed that requests for additional prism would be patient-specific. In response to questions from the Tribunal regarding the eyeglasses for bedridden patients described by Dr. Young, Mr. Adshead indicated that the "frames" of these eyeglasses did not seem to be frames, but appeared to be simply a piece of plastic with two arms and a crosspiece to which two prisms were cemented.

Mr. Bertrand testified that his company does not manufacture frames that are used specifically for lenses to correct oculomotor dysfunction. During cross-examination, he confirmed that prescriptions for additional prism would be patient-specific. Mr. Bertrand also acknowledged that the definition of "prismatic lenses" in the Dictionary of Visual Science is narrower than the definition to which he would ascribe.

Counsel for the appellant entered into evidence certain eyeglasses which Mr. Francoeur had been asked to prepare from hypothetical prescriptions, one of which had therapeutic prism. Mr. Francoeur stated that he received the frames for these exhibits from Mr. John R. Peillard, one of the appellant's representatives. Mr. Peillard was sworn in as a witness and testified that the frames presented as physical exhibits were from the imported models in issue in this case. In response to questions from the Tribunal as to whether he used a specific frame when either grinding a lens to move the optical centre or to add additional prism for reading, Mr. Francoeur stated that all eyeglasses are for reading of some sort, be it near or far.

Counsel for the respondent called one expert witness, Dr. Bernt Ralph Chou, a doctor of optometry who teaches at the University of Waterloo School of Optometry and carries on a part-time private practice. Dr. Chou testified that prismatic eyeglasses are prescription eyeglasses which contain lenses having a prismatic component specifically designed to give them a certain amount of prism power. He stated that, although a prismatic effect may be integral to many lenses, he would not refer to such lenses as prisms because the prismatic effect varies across the face of the lens, whereas a prism implies a fixed amount of prismatic effect across the entire lens.

5. H.A. Stein, B.J. Slatt & R.M. Stein, 3rd ed. (St. Louis: Mosby, 1992) at 100.

Dr. Chou testified that the purpose of prismatic eyeglasses is to provide an optical device which relieves an existing oculomotor imbalance or ocular deviation that is specific to a particular patient. In this regard, he agreed with both the definition of "prismatic lens" in the Dictionary of Visual Science and the statement in Ophthalmic Terminology referenced above. He also testified that, in teaching optometry, he makes a distinction between prismatic eyeglasses and eyeglasses that simply have a prismatic effect. He explained that, from a clinical point of view, a prismatic correction in prismatic eyeglasses is only effected where there is a need for oculomotor coordination to correct an oculomotor imbalance.

With respect to the phrase "for reading," Dr. Chou stated that the most common interpretation of these words would be that one is using spectacles or lenses for looking at an object at a distance of roughly 40 cm or 16 in.

In argument, counsel for the appellant submitted that the Tribunal should apply the common or ordinary meaning of words to interpret the provisions at issue in the *Customs Tariff*. Counsel stated that what is really in dispute in this case is the meaning of the phrases "prismatic eyeglasses" and "for reading." With respect to the first phrase, counsel argued that the common meaning of "prismatic" (prismatic effect as agreed to by the parties at the outset of the hearing) is the tendency for lenses to bend light. Counsel submitted that "for reading" should be interpreted to mean "for the purpose of reading" and that, seen in this context, the phrase did not have a specialized meaning. They also suggested that this understanding of the phrase "for reading" should not be interpreted restrictively; rather, it should be understood to include more than simply reading at a short distance. In other words, it should include "reading" things such as signs at a distance.

With respect to the argument that prismatic eyeglasses should be understood to mean those eyeglasses with additional prescribed prism, counsel for the appellant suggested that the evidence shows that these lenses represent only about 5 percent of the broad range of prismatic eyeglasses and that both types of lenses should be understood as being prismatic. Counsel then submitted that the evidence shows that it is not possible to identify which empty frames would be used for lenses with prescribed prism and which would have normally induced prism. Finally, counsel drew the Tribunal's attention to a decision of the Tariff Board, made prior to the introduction of the Harmonized Commodity Description and Coding System,⁶ which stated that, in cases of serious uncertainty as to the correct classification, the benefit of the doubt ought to be given to the importer.⁷

Counsel for the respondent argued that the onus of proving that the goods in issue should be classified under its proposed classification is on the appellant. She submitted that the best evidence as to the purpose of the frames in issue would be that of the manufacturer. She noted that no such evidence was presented to the Tribunal.

Counsel for the respondent accepted counsel for the appellant's argument that the word "for" in the phrase "for reading" should be interpreted as "for the purpose of." She indicated that the appellant and the respondent are at odds on the meaning of the phrase "prismatic eyeglasses." Counsel submitted that the implication of counsel for the appellant's arguments is that all frames would fall under the tariff item suggested by the appellant because all of the

6. Customs Co-operation Council, 1st ed., Brussels, 1987.

7. *Canadian Housewares Limited v. The Deputy Minister of National Revenue for Customs and Excise* (1949), 1 T.B.R. 8.

eyeglasses of which they are part have a prismatic effect. She argued, however, that the majority of such eyeglasses would not have a prismatic correction, but would have a prismatic quality.

Counsel for the respondent submitted that tariff item No. 9003.19.10 is a very special tariff item. It references two specific types of frames for two specific purposes, eye safety and prismatic correction. The next tariff item, she suggested, is a general item for everything else. Counsel stated that the definition of prismatic eyeglasses that ensues from the testimony of Dr. Chou and from the various textbooks and dictionaries discussed with witnesses on both sides of this case is the narrow or clinical definition relating to prismatic lenses which correct muscular imbalances. She submitted that this clinical meaning should be understood as the trade meaning of "prismatic eyeglasses" and referred to a Tariff Board decision which states that Parliament intended statutory language to be given its normal or usual meaning unless the usage in a particular trade otherwise required.⁸ Counsel argued that the Tribunal had taken a similar approach in its decision in *Diamant Boart Truco Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*.⁹

Following her argument, the Tribunal asked counsel for the respondent how, assuming acceptance of the definition of "prismatic eyeglasses" urged by the respondent, customs officials were to distinguish that small percentage of cases where frames will, in fact, be used in eyeglasses where the lenses have a prism prescribed for them. Counsel stated that, in those circumstances, it would be incumbent upon the importer to prove to customs officials that this is the purpose for which the frames will be used.

In reply, counsel for the appellant returned to the issue of enforcement and submitted that, based on the respondent's definition of "prismatic eyeglasses," it would be impossible to identify which frames should be classified to that effect. Counsel also noted that they had led evidence reflecting a wide spectrum of the industry and that this evidence had included evidence from a manufacturer of frames.

The Tribunal is of the opinion that the goods in issue should be classified under tariff item No. 9003.19.10 as frames made of materials other than plastics "for prismatic eyeglasses for reading." In doing so, the Tribunal acknowledges that there is ambiguity in the tariff items at issue in this case. This ambiguity arises from the fact that the *Customs Tariff* does not clearly provide a tariff item for the bulk of such common goods as eyeglass frames, be they made of plastics or of materials other than plastics.

As noted above, the parties agreed on the classification of the goods in issue in the *Customs Tariff* at the four- and six-digit levels. Thus, the issue before the Tribunal relates to classification at the eight-digit level. In this regard, the Tribunal particularly notes the fact that all the expert witnesses, including the respondent's expert witness, agree that eyeglass frames could not be distinguished on the basis of whether they are to be used for lenses with prismatic effect or for lenses with an additional prismatic correction. In light of this, the Tribunal has difficulty accepting the respondent's submission that, with respect to the phrase "prismatic eyeglasses," Parliament intended tariff item No. 9003.19.10 to be limited to the small number of eyeglasses in which an additional prismatic correction is needed when, at the time of

8. *J.H. Ryder Machinery Company Limited v. The Deputy Minister of National Revenue for Customs and Excise* (1952), 1 T.B.R. 66.

9. Appeal No. AP-90-166, July 27, 1992.

importation, there is no way of knowing whether a particular group of frames will be used for this purpose. The evidence also leads the Tribunal to the view that the phrase "for reading" is, to a certain extent, redundant because all eyeglasses with focal power can be used "for reading."

Further, the Tribunal is persuaded, based on the evidence of the industry experts, that the association of eyeglasses having an additional prismatic correction with the phrase "for prismatic eyeglasses for reading" has no practical meaning in the trade. In light of these factors, the Tribunal finds it difficult to believe that the residual tariff item in subheading No. 9003.19, i.e. tariff item No. 9003.19.20, was intended to be the primary tariff item for the classification of something as common as frames for eyeglasses made of materials other than plastics.

With respect to the arguments relating to "recumbent spectacles," the Tribunal agrees with the witnesses who addressed this issue, particularly Dr. Chou who spoke with much authority on this matter, that these articles are not "frames" in the industry sense of the word, in part because they lack some kind of eye wire or lens-holding unit.

Accordingly, the appeal is allowed.

Kathleen E. Macmillan

Kathleen E. Macmillan
Presiding Member

Charles A. Gracey

Charles A. Gracey
Member

Lise Bergeron

Lise Bergeron
Member