

Ottawa, Tuesday, December 19, 1995

Appeal No. AP-93-359

IN THE MATTER OF an appeal heard on July 5, 1995, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF eight decisions of the Deputy Minister of National Revenue dated November 19 and December 3 and 7, 1993, and January 20, 1994, with respect to requests for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**BALLARAT CORPORATION LTD.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**AND**

**FISHER SCIENTIFIC LTD., SCHNEIDER CANADA INC.  
AND CARBONE OF AMERICA (LCL) LTD.**

**Intervenors**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Presiding Member

Anthony T. Eyton

Anthony T. Eyton  
Member

Lyle M. Russell

Lyle M. Russell  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-93-359**

**BALLARAT CORPORATION LTD.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**and**

**FISHER SCIENTIFIC LTD., SCHNEIDER CANADA INC.  
AND CARBONE OF AMERICA (LCL) LTD.**

**Interveners**

*The issue in this appeal is whether certain goods are classifiable under tariff item No. 9107.00.20 as time switches “of a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the Customs Tariff],” as claimed by the appellant. In eight decisions, the Deputy Minister of National Revenue classified the goods under tariff item No. 9107.00.90 as time switches “[o]ther” than those specifically named in subheading No. 9107.00, including the tariff item claimed by the appellant.*

***HELD:** The appeal is allowed. The Tribunal has no doubt that the time switches in issue possess the physical characteristics that make them suitable for use with some of the goods classified under the tariff items enumerated in Schedule VI to the Customs Tariff. Thus, they are of a kind used with those goods. The Tribunal does not believe that, for goods to be classified under tariff item No. 9107.00.20, there must be something inherent in their design, construction or composition that makes them suitable solely or principally for a specific use or application, or that they must be suitable primarily for one rather than another use or designed primarily for a specific use.*

*Place of Hearing: Ottawa, Ontario*

*Date of Hearing: July 5, 1995*

*Date of Decision: December 19, 1995*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member  
Anthony T. Eytton, Member  
Lyle M. Russell, Member*

*Counsel for the Tribunal: David M. Attwater*

*Clerk of the Tribunal: Anne Jamieson*

*Parties: Doug Cowell, for the appellant  
Frederick B. Woyiwada, for the respondent  
John R. Peillard, for the intervener, Fisher Scientific Ltd.  
Paul D. Burns, for the intervener, Schneider Canada Inc.  
Douglas J. Bowering, for the intervener, Carbone of America (LCL) Ltd.*

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TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member  
ANTHONY T. EYTON, Member  
LYLE M. RUSSELL, Member

**REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> (the Act) from eight decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the Act. The issue in this appeal is whether certain goods are classifiable under tariff item No. 9107.00.20 of Schedule I to the *Customs Tariff*<sup>2</sup> as time switches “of a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*],” as claimed by the appellant. In the decisions, the respondent classified the goods under tariff item No. 9107.00.90 as time switches “[o]ther” than those specifically named in subheading No. 9107.00, including the tariff item claimed by the appellant. The appeal proceeded by way of written submissions under rule 25 of the *Canadian International Trade Tribunal Rules*<sup>3</sup> on the basis of the Tribunal’s record, as supplemented by an agreed statement of facts and the briefs submitted by the parties.

In the agreed statement of facts, the goods in issue are described as “Intermatic” timers of the “SB,” “TB” and “DT” series. The SB series time switches in issue are model Nos. SB111, SB8C70, SB111C70, SB811C70 and SB911C70. These time switches are socket-mounted, enclosed, motor-operated clock switches. They are intended to control the on/off timing of portable appliances, including lamps.

The TB series time switches in issue are model Nos. TB811C70 and TB111C70. These models are tabletop, enclosed, clock-operated switches. They are intended to control the on/off timing of portable appliances, including lamps.

The DT series time switches in issue are model Nos. DT1C70 and DT1B70. Both models are enclosed, solid-state, clock-operated switches, intended to control the on/off timing of portable appliances. The DT1C is referred to as a “Programmable Heavy-Duty Grounded Digital Timer,” which controls all types of loads, such as lamps (including fluorescent), televisions, stereos and appliances.

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1. R.S.C. 1985, c. 1 (2nd Supp.).
  2. R.S.C. 1985, c. 41 (3rd Supp.).
  3. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912.

The SB and TB series provide for a two-prong power supply only, without a ground pin. They have a synchronous motor timing mechanism rather than the solid state time switch which is used in the DT series. The DT series has a three-prong plug and outlet. The design of all three series utilizes a standard 120-V, 15-A plug connection for attachment to the power supply. A difference in their usage results from their electrical specifications. The SB and TB series are limited to lighter-load appliances with two-prong plugs, while the DT series may be used with light-load appliances or with appliances having three-prong plugs, which generally have a higher power load. Each of the models in issue is of a type customarily purchased by ordinary consumers, at familiar hardware or other retail stores, for normal household use. None of these time switches is intended solely or principally for a specific use or particular application. They are suitable for many different applications, in controlling the on/off timing of a wide variety of electrical items with a 15-A capacity.

With respect to this appeal, the relevant tariff nomenclature of Schedule I to the *Customs Tariff* reads as follows:

- 9107.00            *Time switches with clock or watch movement or with synchronous motor.*
- 9107.00.10.00    ---*For incorporation into cooking or heating apparatus*
- 9107.00.20.00    ---*Other, of a kind used with the goods classified under the tariff items enumerated in Schedule VI to this Act*
- 9107.00.90.00    ---*Other*

The appellant's representative argued that the time switches in issue have the ability to control the on/off function of any item with a 15-A capacity, including table, floor and window fans, household air humidifiers and dehumidifiers, aquarium pumps and window air conditioners. It was submitted that each of these goods is classified under a tariff item enumerated in Schedule VI to the *Customs Tariff*. In support of the various applications of the goods in issue, reference was made to product literature and to a letter from Mr. E.F. Condon, Jr., Vice-President—Engineering of Intermatic Incorporated, which appears to be the manufacturer of the goods in issue.

Counsel for the respondent submitted that the expression "of a kind used with the goods classified under the tariff items enumerated in Schedule VI to this Act" is adjectival or descriptive in nature. This descriptive phrase infers inherent qualities in composition, nature or character in a switch that make it suitable for use in the particular application described. Thus, time switches to which this phrase applies must be physically different from other time switches in general.

Counsel for the respondent submitted that whether a time switch is used with a lamp or an air conditioner is of no consequence to its tariff classification, as goods are classified according to their physical characteristics. This is not so, however, if there is something inherent in the design or nature of the time switch that makes it suitable primarily for one rather than another use. Accordingly, goods can be classified under tariff item No. 9107.00.20 only if they are specifically designed or intended for use with goods classified under a tariff item enumerated in Schedule VI. Goods that may be used with such goods, or that are capable of such use, but which were not designed primarily for that purpose, are excluded from tariff item No. 9107.00.20.

Counsel for the respondent submitted that there is nothing inherent in the design, construction or composition of the goods in issue that makes them suitable solely or principally for any specific use or application and, in particular, with goods classified under a tariff item enumerated in Schedule VI.

Counsel for Schneider Canada Inc. and the representative for Fisher Scientific Ltd. argued that there is no requirement that goods classifiable under tariff item No. 9107.00.20 be specifically designed for use with, or suitable solely or principally for use with, any of the goods classified under a tariff item enumerated in Schedule VI. Where Parliament intended that goods must be “designed for” use in a particular application, explicit language to that effect was contained in the tariff nomenclature.<sup>4</sup> Similarly, where Parliament intended that goods must be “suitable for use solely or principally with” other goods, it used explicit language to that effect.<sup>5</sup> As Parliament did not include this language in tariff item No. 9107.00.20, it must be presumed that Parliament intended a different meaning.

As to the meaning of the expression “of a kind used,” counsel for Schneider Canada Inc. submitted that the provision must be construed so that goods may be classified thereunder where they are of a kind or of a type used with the goods enumerated in Schedule VI, though they need not actually be used for that purpose. This argument was also advanced by the representative for Carbone of America (LCL) Ltd., who submitted that tariff item No. 9107.00.20 has no actual end use requirement. Therefore, the appellant need not demonstrate that the time switches in issue are actually used with the goods classified under the tariff items enumerated in Schedule VI. Rather, they need only be of a kind, that is, a type or class, used or capable of use with such goods. Counsel submitted that the appellant has demonstrated that they are of that type or class.

The representative for Fisher Scientific Ltd. noted that the package description of the goods in issue indicates that they are for use with small appliances. It was submitted that the dictionary definition of appliance is sufficiently broad to include goods classified under a tariff item enumerated in Schedule VI. In addition, the point of sale of these goods is a marketing decision and not relevant to their tariff classification.

In response, counsel for the respondent emphasized that the goods in issue are either ordinary time switches or “of a kind used” for a particular purpose. Goods are classified according to their physical characteristics and not end use. As such, if goods are to be classified as goods “of a kind used” for a particular purpose, their composition, nature, design or character must make them essentially suitable for that particular purpose.

The Tribunal agrees with counsel for the respondent that the time switches in issue should be classified according to their physical characteristics and not end use. To the extent that tariff item No. 9107.00.20 requires that time switches be “used” with certain other goods, the Tribunal interprets this use condition to mean that the goods must be capable of, or suitable for, use with such goods. They need not actually be used with those goods.

The parties are in agreement that the time switches in issue are suitable for use with electrical appliances utilizing a power source rated at 120 V and 15 A with a standard two- or three-prong plug. Amongst the goods enumerated in Schedule VI are household air humidifiers or dehumidifiers, domestic window or wall air conditioning machines and table fans. The Tribunal has no doubt that the time switches in issue possess the physical characteristics that make them suitable for use with these goods. Thus, they are of a kind used with some of the goods classified under the tariff items enumerated in Schedule VI.

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4. See, e.g., tariff item Nos. 3005.90.10, 7017.10.10, 7017.20.10, 8532.10.00, 9001.40.10, 9001.50.10, 9003.11.10, 9003.19.10 and subheading Nos. 4203.21 and 9006.30.

5. See, e.g., heading Nos. 84.09, 84.31, 84.48, 84.66, 84.73, 85.29, 85.38, subheading Nos. 8409.91, 8503.00 and classification Nos. 8483.10.90.11 and 8483.10.90.12.

Counsel for the respondent argued that, for goods to be classified under tariff item No. 9107.00.20, there must be something inherent in their design, construction or composition that makes them suitable solely or principally for a specific use or application. They must be suitable primarily for one rather than another use or designed primarily for a specific use. However, the Tribunal cannot agree with counsel in this regard. The appellant and interveners have clearly illustrated examples within the tariff nomenclature of Schedule I to the *Customs Tariff* where Parliament has imposed such conditions by explicit language. Furthermore, where Parliament intended that goods be of a kind used primarily with other goods, by design or otherwise, to be classified under a certain tariff item, it explicitly imposed that condition.<sup>6</sup> As Parliament has not specified such conditions in the nomenclature of tariff item No. 9107.00.20, the Tribunal cannot read them in as a condition of classification under that tariff item.

Pursuant to Rule 3 (a) of the General Rules for the Interpretation of the Harmonized System<sup>7</sup> and Rule 1 of the Canadian Rules,<sup>8</sup> where goods are *prima facie* classifiable under two or more tariff items, the tariff item which provides the most specific description shall be preferred to tariff items providing a more general description. The Tribunal believes that the time switches in issue are *prima facie* classifiable under both tariff item No. 9107.00.20 and tariff item No. 9107.00.90. The former tariff item is preferred, as it provides a more specific description.

Accordingly, the appeal is allowed.

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

Anthony T. Eyton  
Anthony T. Eyton  
Member

Lyle M. Russell  
Lyle M. Russell  
Member

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6. See, e.g., heading Nos. 12.11, 14.01, 14.02 and 14.04 and tariff item No. 1211.90.00.

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

8. *Ibid.*