

Ottawa, Wednesday, January 18, 1995

**Appeal No. AP-93-383**

IN THE MATTER OF an appeal heard on August 24, 1994,  
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1  
(2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of  
National Revenue dated January 10 and 11 and February 3, 1994,  
with respect to requests for re-determination under section 63 of  
the *Customs Act*.

**BETWEEN**

**ASEA BROWN BOVERI INC.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Presiding Member

Lise Bergeron

Lise Bergeron  
Member

Lyle M. Russell

Lyle M. Russell  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-93-383**

**ASEA BROWN BOVERI INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

*This is an appeal under subsection 67(1) of the Customs Act from decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the Customs Act. The issue in this appeal is whether certain goods described as relays are properly classified in subheading No. 8536.49 as other electrical apparatus for switching or protecting electrical circuits, as determined by the respondent, or should be classified under tariff item No. 8537.10.91 as boards, panels or consoles, equipped with two or more apparatus of heading No. 85.35 or 85.36, for electric control or the distribution of electricity of a kind used with the goods classified in Schedule VI to the Customs Tariff, as claimed by the appellant. The appellant based its position on the fact that, in its view, the relays are complex control apparatus having an incidental protection function. The respondent argued that the primary function of the relays is to protect the electrical systems on which they are installed.*

**HELD:** *The appeal is dismissed. The Tribunal is not persuaded that heading No. 85.36 is intended to cover simple but not complex devices. In the Tribunal's view, the relays in issue both control and protect electrical circuits; however, their primary purpose is to protect. The Tribunal, therefore, finds that the relays are properly classified in heading No. 85.36.*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: August 24, 1994  
Date of Decision: January 18, 1995*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member  
Lise Bergeron, Member  
Lyle M. Russell, Member*

*Counsel for the Tribunal: John L. Syme*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: John R. Peillard, for the appellant  
Stéphane Lilkoff, for the respondent*

**Appeal No. AP-93-383**

**ASEA BROWN BOVERI INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member  
LISE BERGERON, Member  
LYLE M. RUSSELL, Member

**REASONS FOR DECISION**

This is an appeal under subsection 67(1) of the *Customs Act*<sup>1</sup> (the Act) from decisions of the Deputy Minister of National Revenue dated January 10 and 11 and February 3, 1994.

The goods in issue were imported into Canada on four separate occasions between January 22, 1988, and February 27, 1989. Upon importation, the goods in issue were classified by the respondent in subheading No. 8536.49 of Schedule I to the *Customs Tariff*<sup>2</sup> as other electrical apparatus for switching or protecting electrical circuits. The appellant later sought to have the goods reclassified under tariff item No. 8537.10.91 as boards, panels or consoles, equipped with two or more apparatus of heading No. 85.35 or 85.36, for electric control or the distribution of electricity of a kind used with the goods classified in Schedule VI to the *Customs Tariff*. However, pursuant to subsection 63(3) of the Act, the respondent confirmed the classification in subheading No. 8536.49. It is that decision which has now been appealed to the Tribunal.

The Tribunal notes that there are four distinct types of the goods in issue, namely, type RADSB transformer differential relay, type RADHA high impedance differential relay, type TFF frequency relay and type RARIB negative sequence current relay.

For the purposes of this appeal, the relevant tariff nomenclature of Schedule I to the *Customs Tariff* is as follows:

85.36	<i>Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 volts.</i>
8536.30	<i>-Other apparatus for protecting electric circuits</i>
8536.49	<i>--Other</i>

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

85.37 *Boards, panels (including numerical control panels), consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading No. 85.35 or 85.36, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of Chapter 90, other than switching apparatus of heading No. 85.17.*

8537.10 *-For a voltage not exceeding 1,000 V*

*---Other:*

8537.10.91 *----Of a kind used with the goods classified under the tariff items enumerated in Schedule VI to this Act*

The appellant's representative called Mr. John M. Gillies, Senior Protection and Control Specialist for Asea Brown Boveri Inc., to appear on behalf of the appellant. Mr. Gillies testified that each of the four relays in issue is related to the protection of generator sets.

Mr. Gillies distinguished the goods in issue from "normal" electrical protection devices such as ordinary fuses or circuit breakers. Mr. Gillies explained that, in the event of an abnormal condition, such as a power surge, a normal protection device simply switches off the power to prevent damage to the equipment that it is designed to protect. By comparison, when an abnormal condition exists in a generator set, the goods in issue detect that condition and, depending on the precise nature of the abnormality, initiate appropriate measures to ensure that the set is not damaged. This could involve simply cutting the power source or it could involve a more complex series of actions to gradually reduce the flow of the power to the generator set. Mr. Gillies placed significant emphasis upon the fact that a "normal" protection device typically performs a simple function, whereas the goods in issue could initiate a series of relatively complex functions. Mr. Gillies testified that, in his view, it was this essential difference which served to distinguish the goods in issue from normal protection devices and which qualified the goods in issue as control apparatus as opposed to protection apparatus.

During cross-examination, Mr. Gillies agreed that the ultimate purpose of the goods in issue is to protect the generating sets into which they are integrated.

Counsel for the respondent called as an expert witness Mr. Jean Tessier, a power system engineer with extensive experience in the design, testing and operation of protection systems of the sort in issue. Mr. Tessier was asked to distinguish between electrical control apparatus and electrical protection apparatus. Mr. Tessier defined an electrical control apparatus as a device designed to take action on an electrical apparatus. He gave the example of a light switch, which could be used to turn a light on or off. Mr. Tessier indicated that an electrical protection apparatus would be specifically designed to protect an electrical apparatus against faults or an abnormal condition within a given system. When an abnormal condition is detected, the protection apparatus initiates appropriate steps to protect that system. Mr. Tessier stated that, from an engineering point of view, control apparatus and protection apparatus represent two distinct families of products.

During cross-examination, Mr. Tessier acknowledged that, in order for a protective function to be performed by any given piece of apparatus, there must also be an element of control. He also indicated that the appellant's electrical systems for generating sets typically contain a control panel distinct from a protection panel. Control panels control such things as voltage and the speed of various machines within the generator set. Protection panels, the goods in issue, do not control voltage or speed and do not play a role as long as the generator set is functioning normally. The protection panel only plays a role when something goes wrong within the generator set. At that time, the protection panel sends a signal to the control panel indicating an abnormal condition within the system, and protective action is initiated.

In support of classification in heading No. 85.37, the appellant's representative argued that heading No. 85.36 is intended to cover devices of rather simple design and operation, whereas the goods in issue are complex assemblies consisting of several components. Although one of these components is in fact a simple relay which, if imported separately, might be classifiable in heading No. 85.36, he argued that the assembly as a whole was a base "equipped with two or more apparatus of heading No. 85.35 or 85.36," as described in heading No. 85.37, and was designed for the purpose specified in that heading, namely, "electric control or the distribution of electricity." The representative further submitted that the goods in issue perform measuring functions similar to those of the instruments of Chapter 90 which are explicitly brought within the scope of heading No. 85.37 and are unlike the "simple switch assemblies" that are specifically excluded from this heading by the Explanatory Notes to the Harmonized Commodity Description and Coding System<sup>3</sup> (the Explanatory Notes) and relegated to heading No. 85.35 or 85.36. He argued that the term "apparatus" as it appears in the latter heading should be given a narrow interpretation.

Referring to evidence led with respect to the distinction between "control" and "protection" in relation to the operation of the generator sets with which the goods in issue are used, the appellant's representative argued that the two go hand in hand and that protection of the generator set could not be achieved without some degree of control over its operation. In other words, the system would not be protected unless detection of an electrical problem by the relay led inevitably to corrective action. He further argued that the relay assembly could be classified in heading No. 85.37 even if it did not directly control the operation of a generator set; for example, the sending of a signal to an intermediary control device or a human operator would suffice. In the representative's view, it was not even necessary to demonstrate this degree of control since the heading also provided for apparatus for "the distribution of electricity," which function, he argued, was performed by the relays in issue.

Finally, the appellant's representative argued that, while the relay assembly may be called a relay, it is not a relay, but rather part of a bigger panel or control device within the common or ordinary meaning of the words of heading No. 85.37, which, he submitted, were more specific than those of heading No. 85.36.

Counsel for the respondent argued that the central issue was whether the goods in issue are for "electric control" or for "protecting electrical circuits." He argued that, in deciding the meaning of these terms as they appear in the *Customs Tariff*, the Tribunal should be guided by technical definitions rather than by the ordinary meaning of words, as suggested by the appellant's representative. It was, he said, evident from the testimony of the expert witness, Mr. Tessier, that, in the field of electrical engineering, there is a clear distinction between protecting devices and control devices.

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3. Customs Co-operation Council, 1st ed., Brussels, 1986.

Counsel for the respondent said that there was no dispute that the devices are complex systems consisting of many components. Referring to the Notes to Section XVI to the *Customs Tariff*, he argued that the term “apparatus” in heading No. 85.36 is broad enough to encompass the complex devices before the Tribunal and that, since the apparatus as a whole is intended to contribute to a clearly defined function covered by that heading, namely, “protecting electrical circuits,” it is properly classified therein. He contended that the Tribunal should interpret the four-digit tariff headings in the context of rapidly evolving technology in the electrical field. Their coverage, he contended, should not be limited to older technologies described in the Explanatory Notes, but should be extended to cover more modern devices performing the same function. Thus, he argued, the complexity of the device is irrelevant; complex relays, such as those in issue could and should be classified in heading No. 85.36. The main difference between this heading and heading No. 85.37 relates to the function of the devices covered by each heading, that is, “protecting electrical circuits” in the former case and “electric control” in the latter.

Citing the evidence of Mr. Tessier, counsel for the respondent argued that “protection” is detection and control and that control could exist without protection. This led to the conclusion that protection is more specific than control and is a defined function of control. He then cited several dictionary definitions of “protective relay” and “electric protective device” to support the respondent’s view that the function of such devices is not only to detect electrical problems, such as power surges, but also to initiate action to correct the situation or limit damage. Counsel also used various dictionary definitions to argue that “electric control” implies a greater degree of manipulation to meet operational requirements than occurs when a command to execute a control function is sent from a device, such as the relays in issue, whose primary function is to monitor and detect faults in a larger system.

Counsel for the respondent recalled that the appellant’s witness had agreed with Mr. Tessier that, even if the relays in issue send a signal to initiate corrective or controlling action, their basic function is to protect the complex systems of which they are a part from damage due to electrical faults, power surges and the like. He also reminded the Tribunal of testimony from both witnesses to the effect that users and producers of electricity-generating equipment distinguish between generator protection relays and control relays and that the goods in issue, even though complex assemblies, are commonly referred to in the industry simply as “relays.” Moreover, the appellant’s technical literature on the relays in issue, while containing some references to “commands,” is replete with references to “protection.”

In reply argument, the appellant’s representative maintained that “protection” and “control” were the same thing and elaborated on earlier arguments that the devices are, in any event, used in the “distribution of electricity,” which is mentioned in heading No. 85.37, and that this heading is intended to cover more complex goods than is heading No. 85.36. He argued again that heading No. 85.37 is more specific than heading No. 85.36 because it refers to assemblies of goods covered by heading No. 85.36 and contended that, in view of this and the fact that the relays are used for the functions described in heading No. 85.37, they should be classified therein even though they may also perform a function described in heading No. 85.36.

The Tribunal found a good deal of merit in the arguments of both parties. Counsel for the respondent argued the case on the basis of the differences between the four-digit tariff headings, that is, heading Nos. 85.36 and 85.37, and did not lead evidence or argue as to why, in the respondent’s brief, the respondent’s position was that the goods in issue should be classified under tariff item No. 8536.30.90 as other apparatus for protecting electrical circuits rather than being classified in subheading No. 8536.49 as

other electrical apparatus for switching or protecting electrical circuits, as ruled by the respondent on re-determination pursuant to subsection 63(3) of the Act. The Tribunal believes that it is instructive, nonetheless, to review the Explanatory Notes to heading No. 85.36 concerning “relays,” which state, in part, that:

- (C) *Relays are electrical devices by means of which the circuit is automatically controlled by a change in the same or another circuit. They are used, for example, in telecommunication apparatus, road or rail signalling apparatus, for the control or protection of machine-tools, etc.*

*The various types can be distinguished by, for example:*

- (1) *The electrical means of control used: electromagnetic relays, permanent magnet relays, thermo-electric relays, induction relays, electro-static relays, photoelectric relays, electronic relays, etc.*
- (2) *The predetermined conditions on which they operate: maximum current relays, maximum or minimum voltage relays, differential relays, fast acting cut-out relays, time delay relays, etc.*

*Contactors, which are also considered as relays, are devices for making and breaking electrical circuits, which automatically reset without a mechanical locking device or hand operation. They are generally operated and maintained in an active state by an electric current.*

There is nothing in the above to indicate that heading No. 85.36 is intended to cover simple but not complex devices. On the contrary, the references to automatic control and resetting imply a degree of sophistication greater than that suggested by the appellant’s representative. It is also evident that devices which control as well as protect electrical circuits come within the ambit of the provision for “relays.”

Although the relays in issue are sophisticated devices consisting of several components, such as a test switch assembly, a power supply, a transformer, a measuring unit and an output device, the evidence is that the manufacturer describes the complete assembly as a “relay” in its technical manuals, and this is the common terminology used to describe them by suppliers and users alike. It is also evident from the manufacturer’s literature and the oral testimony that the primary purpose of the relays is to protect the generator sets, with which they are used, from damage due to electrical malfunction, power surges, etc. Although communication with another control device or human operator may be necessary to achieve this protective function, the Tribunal does not believe that this is sufficient grounds to classify the relays in heading No. 85.37. Relays are named in subheading No. 8536.49, and the Explanatory Notes make clear that some degree of control may be subsumed within the overall function of protecting electrical circuits which is specified in heading No. 85.36. The Tribunal is of the view, on the evidence and arguments, that heading No. 85.37 envisages a more “pro-active” control function related to operational needs, such as, in the example of an electricity-generating set, variations over time in the demand for electricity, rather than such control as might be initiated by a signal from a relay when it detects an electrical fault in the system.

The Tribunal is unable to accept the argument that, because the relays are sold to the operators of electricity-distributing systems, such as Hydro-Québec, they are eligible for consideration under the provision relating to “distribution of electricity” in heading No. 85.37. No evidence was led on this point, and the context within which these words appear clearly suggests a much narrower interpretation.

In view of the above, the appeal is dismissed.

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

Lise Bergeron  
Lise Bergeron  
Member

Lyle M. Russell  
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