

Ottawa, Thursday, October 12, 1995

Appeal No. AP-94-240

IN THE MATTER OF an appeal heard on April 10, 1995, 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 September 23 and 26, 1994, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

WYNNE BIOMEDICAL LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Lyle M. Russell

Lyle M. Russell
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-240

WYNNE BIOMEDICAL LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The issue in this appeal is whether certain air resistance climbers imported by the appellant are properly classified under tariff item No. 9506.91.90 as other articles and equipment for general physical exercise, gymnastics or athletics, as determined by the respondent, or should be classified under tariff item No. 9506.91.20 as cycling exercise apparatus for general physical exercise, gymnastics or athletics, as claimed by the appellant. In support of its position, the appellant maintained that the climbers in issue are “cycling” apparatus by virtue of the fact that a session on the climbers in issue would typically be comprised of a series of exercise cycles. The length of the cycles, the level of resistance offered by the climbers in issue and the number of cycles in the session may be determined by the user.

HELD: *The appeal is dismissed. The Tribunal is not persuaded that the climbers in issue are “cycling exercise apparatus” as contemplated by the relevant tariff item. The Tribunal is of the view that the words “cycling exercise apparatus” must be given their plain and ordinary meaning. Based on the plain meaning of the word “cycling,” in the context of exercise or exercise equipment, the Tribunal is of the view that the words “cycling exercise apparatus” contemplate equipment which, in some manner, has the character of bicycling or a bicycle. The essential feature of that activity is, in the Tribunal’s view, a repetitive circular motion, usually performed with one’s legs. The climbers in issue clearly lack that essential feature.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: April 10, 1995
Date of Decision: October 12, 1995*

*Tribunal Members: Charles A. Gracey, Presiding Member
Arthur B. Trudeau, Member
Lyle M. Russell, Member*

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Nicole Pelletier

*Appearances: John R. Peillard and Daniel St. James, for the appellant
Christopher Rupar, for the respondent*

Appeal No. AP-94-240

WYNNE BIOMEDICAL LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
ARTHUR B. TRUDEAU, Member
LYLE M. RUSSELL, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue made under subsection 63(3) of the Act. The issue in this appeal is whether certain air resistance climbers imported by the appellant are properly classified under tariff item No. 9506.91.90 of Schedule I to the *Customs Tariff*² as other articles and equipment for general physical exercise, gymnastics or athletics, as determined by the respondent, or should be classified under tariff item No. 9506.91.20 as cycling exercise apparatus for general physical exercise, gymnastics or athletics, as claimed by the appellant.

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

95.06	<i>Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this Chapter; swimming pools and paddling pools.</i>
	<i>-Other:</i>
9506.91	<i>--Articles and equipment for general physical exercise, gymnastics or athletics</i>
9506.91.20	<i>---Cycling exercise apparatus equipped with electronic monitors; parts of a kind used in physical exercise machines</i>
9506.91.90	<i>---Other</i>

Mr. John W. Tummon, President of Wynne Biomedical Ltd., served as the appellant's witness. He testified that the appellant is a wholesale distributor of fitness and exercise equipment, specializing in aerobic exercise equipment. Among the goods sold by the appellant are rowing machines, indoor skiers, treadmills, exercise bicycles and the climbers in issue. Mr. Tummon demonstrated, on a unit which he brought to the hearing, how the climbers in issue could be used. In simple terms, the user stands on

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

two parallel platforms or arms and proceeds to move his or her feet in a motion similar to that used in climbing stairs.

Mr. Tummon testified that the climbers in issue are controlled by electronic monitors which are mounted directly on the climbers in issue. The monitors allow the user to vary the resistance offered by the climbers in issue. Mr. Tummon indicated that the monitors also allow the user to go through a series of repetitive exercise “cycles,” which may last from 20 seconds to 90 minutes. The level of resistance, duration of each cycle and number of cycles in a session can be varied to a level appropriate to the goals and physical conditioning of the user. A session on the climbers in issue could, for example, consist of a series of high-intensity cycles, followed by a series of lower-intensity cycles.

During cross-examination, Mr. Tummon testified that the appellant also sold machines called “Dual Action Aircycles” and “Recumbent Cycles.” He agreed that the circular pedalling motion when using these machines would be similar to the motion when riding a bicycle. He also acknowledged that these two pieces of equipment are similar to a bicycle in that each has pedals, a seat and the word “cycle” in its name. Mr. Tummon agreed that the climbers in issue did not share these characteristics.

In argument, the appellant’s representatives referred the Tribunal to several English and French dictionary definitions of the word “cycling.” The representatives submitted that the definitions contained the notion of “recurring events” or “recurring cycles.” They argued that the climbers in issue are cycling equipment by virtue of the fact that one may do exercises on the equipment in a series of cycles. The representatives also submitted that, while the climbers in issue have physical characteristics that are different from conventional exercise bicycles, they require the user to perform a similar up and down motion as would be used with a bicycle or exercise bicycle. Finally, the representatives argued that, where there is an uncertainty as to the appropriate tariff classification of goods, the benefit of the doubt ought to be given to the importer.

Counsel for the respondent submitted that the essential point in this appeal was the meaning to be attributed to the word “cycling.” Counsel submitted that, in the absence of expert evidence, words appearing in the *Customs Tariff* should be given their plain and ordinary meaning. Counsel argued, on the basis of several dictionary definitions which he referred to the Tribunal, that the term “cycling exercise apparatus” refers to equipment that is a bicycle or closely related to a bicycle and that requires an action which is similar to the action required in riding a bicycle. Counsel pointed out that the climbers in issue lacked the essential features of “cycling.” In particular, counsel referred to the fact that the climbers in issue require an up and down motion as opposed to a rotational motion.

The Tribunal is of the view that, as pointed out by counsel for the respondent, this appeal turns on the meaning to be ascribed to the word “cycling” in the relevant tariff item. The appellant’s representatives based their argument on the fact that the climbers in issue could be programmed to take the user through a number of exercise “cycles.” The Tribunal is of the view that, in construing the meaning of “cycling exercise apparatus,” it should ascribe to those words their plain and ordinary meaning. While it is true that the word “cycling” has two or, perhaps, more meanings, the Tribunal is not persuaded that the climbers in issue can be described as cycling exercise apparatus.

The Tribunal does not take issue with the evidence of the appellant’s witness concerning the existence of a method of cardiovascular exercise based on a series of cycles; however, it is not prepared to

accept that that methodology is within the contemplation of tariff item No. 9506.91.20. If that were the case, any piece of exercise equipment which could be programmed to allow the user to go through a series of cycles would be classified under that tariff item. This presumably could include everything from rowing machines to circuit-based weightlifting machines. The Tribunal does not accept that it was intended that tariff item No. 9506.91.20 have that breadth. Moreover, the Tribunal notes that the climbers in issue can be programmed for individual cycles of up to 90 minutes. It is difficult to conceive of cycles of 90 or even 60 minutes in duration. In other words, though the climbers in issue may be capable of taking the user through a “cycle” type of exercise session, it would appear that they may also be employed in an exercise session where the pace and workload are held constant.

Based on the plain meaning of the word “cycling,” in the context of exercise or exercise equipment, the Tribunal is of the view that the words “cycling exercise apparatus” contemplate equipment which, in some manner, has the character of bicycling or a bicycle. The essential feature of that activity is, in the Tribunal’s view, a repetitive circular motion, usually performed with one’s legs. The climbers in issue do not allow the user to perform that motion. Furthermore, the climbers in issue do not have seats, pedals or any of the other physical characteristics commonly associated with a bicycle.

For the foregoing reasons, the appeal is dismissed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Lyle M. Russell

Lyle M. Russell
Member