

Ottawa, Friday, October 27, 1995

**Appeal No. AP-94-195**

IN THE MATTER OF an appeal heard on April 3, 1995, 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 dated July 20, 1994, with respect to a request for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**BERNARD MONASTESSE INC.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Lise Bergeron  
Lise Bergeron  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Charles A. Gracey  
Charles A. Gracey  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-94-195**

**BERNARD MONASTESSE INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

*The issue in this appeal is whether tanning beds are properly classified under tariff item No. 8543.80.90 as other machines and apparatus, as determined by the respondent, or should be classified under tariff item No. 8543.80.40 as other mechanically operated electrical machines, as claimed by the appellant.*

***HELD:** The appeal is allowed. The Tribunal finds, first of all, that the fans are essential to the tanning process. According to the Tribunal, tanning cannot occur without them, given the risks to the user's health and to the proper operation of the tanning bed. In the Tribunal's view, the fans are, therefore, an essential component of the tanning beds. To determine the proper classification of the goods in issue, the Tribunal considered the definition of the term "mechanically operated," which is used in the Supplementary Note to Section XVI of Schedule I to the Customs Tariff. The Tribunal is of the view that the goods in issue are comprised of a combination of moving parts, such as the rotors, and of stationary parts, such as the fluorescent lamps. Therefore, the Tribunal considers that the goods in issue are comprised of a more or less complex combination of moving and stationary parts and that, consequently, the first part of the definition of the above term applies to the goods in issue.*

*The Tribunal is also of the view that the movement of the rotors in the fans contributes to the production of a force and a motion by exhausting hot air and moving it outside the tanning beds. Given that the fans are essential to the tanning process, the Tribunal considers that the second part of the definition of the above term also applies to the goods in issue. Therefore, the Tribunal finds that the goods in issue should be classified under tariff item No. 8543.80.40 as other mechanically operated electrical machines.*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: April 3, 1995  
Date of Decision: October 27, 1995*

*Tribunal Members: Lise Bergeron, Presiding Member  
Arthur B. Trudeau, Member  
Charles A. Gracey, Member*

*Counsel for the Tribunal: Heather A. Grant*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Ronald Racine, for the appellant  
Anick Pelletier, for the respondent*

Appeal No. AP-94-195

**BERNARD MONASTESSE INC.**

**Appellant**

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: LISE BERGERON, Presiding Member  
ARTHUR B. TRUDEAU, Member  
CHARLES A. GRACEY, Member

**REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> (the Act) from a decision of the Deputy Minister of National Revenue. The issue in this appeal is whether tanning beds are properly classified under tariff item No. 8543.80.90 of Schedule I to the *Customs Tariff*<sup>2</sup> as other machines and apparatus, as determined by the respondent, or should be classified under tariff item No. 8543.80.40 as other mechanically operated electrical machines, as claimed by the appellant.

The following is the relevant tariff nomenclature from Schedule I to the *Customs Tariff*:

85.43 *Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter.*

8543.80 *-Other machines and apparatus*

8543.80.40 *---Other electrical machines, mechanically operated*

8543.80.90 *---Other*

The appellant's only witness was Mr. Jean-Pierre Chalifoux, an engineer who was accepted as an expert. Mr. Chalifoux first described the operation of the goods in issue. He pointed out that the user had to turn the tanning bed on using a timer. The user selects the number of minutes of exposure, raises the upper part of the tanning bed and lies on the tanning bed. As soon as the timer starts, an internal mechanism which operates the fans is also started. These fans remove the hot air from the upper and lower sections of the tanning bed. After having lain down on the tanning bed, the user closes the cover, waits for the exposure time to be over and opens the cover manually. The fans continue to operate for at least three minutes after the timer has shut off.

According to Mr. Chalifoux, the three mechanical components of the tanning bed are: the fans which are located inside the console and exhaust the hot air; the external fans which keep the user cool; and the air cylinders which allow the upper part of the console to move.

Mr. Chalifoux indicated that each tanning bed includes a large number of fluorescent lamps and that these lamps cause an important heat build-up which must be removed using the fans. According to him, the

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

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

fans and the effectiveness of their operation are essential to the very operation of the tanning bed. He added that the surrounding air is exhausted through openings and that the purpose of the fans is to take the hot air trapped between the fluorescent lamps in the upper and lower sections of the console and then channel it to a location where it can be retrieved and evacuated to the outside. According to Mr. Chalifoux, without the fans, the temperature would gradually rise in the internal parts of the console and damage the tanning bed. Moreover, it would be dangerous for the user to use a tanning bed without such a mechanical ventilation system.

As an engineer, Mr. Chalifoux also made observations on the scope of the definition of the term “mechanically operated.” He emphasized that, by definition, the said term implies the presence of mechanisms or mechanical components which are involved in the operation. According to him, the purpose of the fans is the conversion of electrical energy into mechanical energy, and the rotors in the fans act as moving elements which create a force on the stationary parts, that is, the fluorescent lamps.

In addition, Mr. Chalifoux compared the operation of the fans in the tanning beds with the operation of those in the “Incinolets” (electrically heated incinerating toilets), which were the subject of a decision by the Tribunal in *Research Products/Blankenship of Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*.<sup>3</sup>

During cross-examination, Mr. Chalifoux admitted that the purpose of the goods in issue is to ensure a tan and that the fans, as such, do not allow that. In reply to questions by the Tribunal, Mr. Chalifoux explained that the temperature around the fluorescent lamps and in the internal parts of the console where the lamps are located could reach 60°C or more. In addition, as the fans have a motor which rotates and displaces air, this displacement constitutes a transmission of force by a mechanical component.

In argument, the appellant’s representative first dealt with the term “mechanically operated” which is defined in the Supplementary Note to Section XVI of Schedule I to the *Customs Tariff* as “[referring] to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion.”

Based on that definition, the appellant’s representative submitted that the goods in issue are “mechanically operated” because the fans, which produce a rotating force, are essential to the operation of the tanning beds. According to him, the goods in issue are comprised of a complex set of moving parts, that is, the fans, and stationary parts, that is, the fluorescent lamps.

The appellant’s representative submitted that the Tribunal’s decision in *Research Products*, in which the Tribunal decided that the “Incinolets” were not “mechanically operated,” does not apply in this case. He explained that, in *Research Products*, the Tribunal found that the “Incinolets” were not necessarily “mechanically operated,” their essential function being incineration. According to him, the fans in the tanning beds differ from those in the “Incinolets” because, in the first case, their function is essential to the tanning function, while in the second case, their function is not essential to the incinerating function.

The appellant’s representative also submitted that the Tribunal’s decision in *Proctor-Silex Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*<sup>4</sup> does not apply in this case, since that case dealt with the issue of two tariff classifications which are different from those involved in this appeal and the decision criterion between the two tariff items relied on Note 3 to Chapter 85 of the

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3. Appeal No. AP-90-174, January 30, 1992.

4. Appeal No. AP-92-225, January 11, 1994.

Explanatory Notes to the Harmonized Commodity Description and Coding System,<sup>5</sup> which also does not apply in this case. The representative emphasized that it is the scope of the definition of the term “mechanically operated” with which the Tribunal is concerned in this appeal.

In argument, counsel for the respondent submitted that, under Rule 1 of the General Rules for the Interpretation of the Harmonized System<sup>6</sup> (the General Rules), the Tribunal must review the terms of the headings and Section Notes in order to determine the tariff item under which the goods in issue should be classified. She submitted that, according to the definition of the term “mechanically operated,” the work performed by the tanning beds should result from their mechanical component.<sup>7</sup> According to counsel, one should first determine the work or function of the goods in issue and, then, determine whether the work is performed through the production, modification or transmission of force and motion. In her opinion, if the function of the tanning beds is to ensure that the user obtains a tan, this function is not, however, performed by the fans. According to counsel, contrary to the arguments of the appellant’s representative, tanning is possible without the fans, even though that situation is not without risk.

In support of her argument, counsel for the respondent referred to the Tribunal’s decisions in *Research Products* and *Proctor-Silex*. She emphasized that, after studying, in the first decision, the function of a mechanical component in the “Incinolet,” i.e. a foot-operated lever, and despite the importance of this component, the Tribunal did not find that the “Incinolet” should be considered as being “mechanically operated.” In the case of the “Incinolet” and the tanning beds, she submitted that the principal function of these goods is not accomplished by their mechanical components. According to counsel, it is the fluorescent lamps and not the fans that allow tanning. Thus, since the lamps do not constitute a mechanical component, but accomplish the principal function of the tanning beds, the goods in issue taken as a whole cannot, therefore, be considered as being “mechanically operated.”

In the alternative, counsel for the respondent argued that, if the Tribunal finds that the importance of the mechanical component of the tanning beds and the effect of the fluorescent lamps is equal, then it should refer to Rule 3 (b) of the General Rules. According to counsel, it is the lamps and not the fans that give the essential character of the goods in issue, because only the lamps allow the principal function of the tanning beds to be accomplished and, therefore, they are not “mechanically operated.” To support her interpretation of the “essential character” of the fans, counsel subsequently referred to the Tribunal’s decision in *Proctor-Silex*.

In conclusion, counsel for the respondent submitted that the position set out by the appellant’s representative would mean that any product, including the “Incinolet,” which includes a mechanical component, should be classified under the proposed tariff item.

In rebuttal, the appellant’s representative submitted that the important thing is to determine whether the goods in issue are “mechanically operated,” bearing in mind their mode of operation. According to the representative, this is, in fact, the case since the operation of the tanning beds ensures that the fans produce a force and a motion of air and that the tanning cannot occur without the mechanical interaction of the fans on the other components of the tanning bed.

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

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

7. Counsel for the respondent referred to the English version of the definition of the term “mechanically operated” which reads as follows: “‘mechanically operated’ refers to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion.”

The appellant's representative also submitted, in referring again to the Tribunal's decision in *Research Products*, that tanning requires a certain period of continuous exposure combined with the radiation and ventilation, while the mechanical aspect of the "Incinolet" is not continuous during the incineration process, but is sequential.

To determine the proper classification of the tanning beds, the Tribunal relies on section 10 of the *Customs Tariff*, which stipulates that the classification of goods is determined in accordance with the General Rules and the Canadian Rules.<sup>8</sup> Rule 1 of the General Rules stipulates that the classification of goods shall be determined "according to the terms of the headings and any relative Section or Chapter Notes." Similarly, Rule 1 of the Canadian Rules provides that the classification of goods under the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the General Rules. The issue in this appeal does not concern the proper heading or subheading, but the choice of the tariff item in subheading No. 8543.80. Therefore, to determine the classification of the tanning beds, the Tribunal has considered, pursuant to the General Rules, the terms of the tariff items in subheading No. 8543.80.

Before considering the proper classification of the goods in issue under a tariff item, it is important to note that the parties agree on the proper classification of the tanning beds at the heading and subheading levels. The goods in issue are considered to be electrical machines, as they are already classified in heading No. 85.43 and subheading No. 8543.80. The issue in this appeal is, rather, whether the goods in issue are mechanically operated electrical machines (tariff item No. 8543.80.40) or should simply be considered as other electrical machines (tariff item No. 8543.80.90).

First, the Tribunal wishes to assert that it is of the view that the fans are essential to the tanning process, contrary to the arguments of counsel for the respondent. According to the Tribunal, tanning cannot occur without the fans because, without them, the heat would be harmful to the user and the very components of the tanning bed. Thus, in the Tribunal's opinion, the fans are an essential component of the tanning beds.

In order to determine the proper classification of the goods in issue, the Tribunal should consider the definition of the term "mechanically operated," which is used in the Supplementary Note to Section XVI of Schedule I to the *Customs Tariff*, as "[referring] to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion." The Tribunal is of the view that the goods in issue are comprised of a more or less complex combination of moving and stationary parts, as detailed by the appellant's witness, and that, therefore, the goods in issue satisfy the first part of the definition of the term "mechanically operated." More particularly, the Tribunal recognizes that the goods in issue are comprised of a combination of moving parts, such as the rotors, and of stationary parts, such as the fluorescent lamps.

With regard to whether the second part of the definition of the term mentioned above applies, the Tribunal is of the view that the goods in issue contribute to the production of a force and a motion. More specifically, the Tribunal considers that the motion of the rotors in the fans contributes to the production of a force and a motion by exhausting the hot air and by displacing it outside of the tanning beds. Bearing in mind the essential role of the fans in the tanning process, the Tribunal is of the view that the goods in issue satisfy the second part of the definition of the term. Therefore, the Tribunal finds that the goods in issue should be classified as other mechanically operated electrical machines, under tariff item No. 8543.80.40.

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

Moreover, the Tribunal considers that its two decisions in *Research Products* and *Proctor-Silex*, to which both parties referred, do not apply in this case, as the facts are different.

In *Research Products*, the issue before the Tribunal, as submitted by the parties, was whether the proper tariff classification for the “Incinolets” was in Chapter 84 of Schedule I to the *Customs Tariff*, as mechanical machines or apparatus, or in Chapter 85 of the same schedule, as electrical apparatus. The main issue before the Tribunal in *Research Products* was, therefore, much more fundamental than is the case in this appeal. In the case at hand, the parties agree on the proper classification of the goods in issue at the tariff heading and subheading levels and, thus, on the fact that the goods in issue are electrical machines. The issue relates to the classification of the goods in issue at the tariff item level, which means determining whether the tanning beds, being electrical machines, are “mechanically operated.” In the Tribunal’s view, the issue about whether the goods in *Research Products* were mechanically operated is fundamentally different from the issue in this appeal and, consequently, is not relevant to the Tribunal’s analysis of the term “mechanically operated.”

The Tribunal finds that the decision in *Proctor-Silex* is not relevant to this appeal, because the Tribunal can determine the proper classification of the goods in issue by applying Rule 1 of both the General Rules and the Canadian Rules, and it considers that, therefore, there is no reason to take into account other rules, as was the case in *Proctor-Silex*.

Accordingly, the appeal is allowed.

Lise Bergeron  
Lise Bergeron  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Charles A. Gracey  
Charles A. Gracey  
Member