CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, May 7, 1996

IN THE MATTER OF a preliminary issue of jurisdiction in various appeals filed 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 to refuse to entertain requests for re-determination of tariff classifications pursuant to paragraph 60(1)(*b*), 64(*a*) or 64(*d*) or subparagraph 64(*e*)(i) of the *Customs Act*.

## DECISION OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby concludes that it does not have jurisdiction to hear the appeals listed in Appendix A, as the decisions of the Deputy Minister of National Revenue to refuse to entertain requests for re-determination of tariff classifications pursuant to paragraph 60(1)(*b*), 64(*a*) or 64(*d*) or subparagraph 64(*e*)(i) of the *Customs Act* do not constitute decisions for purposes of section 67 of the *Customs Act*. Consequently, the appeals are dismissed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

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

Lyle M. Russell
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Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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IN THE MATTER OF a preliminary issue of jurisdiction in various appeals filed under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

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## REASONS FOR DECISION

Between May 30 and December 20, 1995, various appeals[1] were filed with the Canadian International Trade Tribunal (the Tribunal) pursuant to section 67 of the *Customs Act*[2] (the Act). As the preliminary issue of jurisdiction was raised in respect of all the appeals listed in Appendix A, the Tribunal decided to issue one decision in respect of all those appeals. The appellants requested that certain eyewear material be re-classified under the *Customs Tariff*.[3] They appealed decisions of the Deputy Minister of National Revenue (the respondent) to cancel[4] requests for re-determination of tariff classifications purportedly made pursuant to paragraph 60(1)(*b*),[5] 64(*a*)[6] or 64(*d*)[7] or subparagraph 64(*e*)(i)[8] of the Act. Certain appeals dealt with requests for re-determination under both paragraphs 64(*a*) and 64(*d*) of the Act.[9] One appeal dealt with a request for re-determination under paragraphs 60(1)(*b*) and 64(*d*) of the Act.[10] Finally, certain appeals dealt with requests for re-determination under paragraph 64(*a*) and subparagraph 64(*e*)(i) of the Act.[11] All of the requests for re-determination under section 64 of the Act were

1. See Appendix A.
2. R.S.C. 1985, c. 1 (2nd Supp.).
3. R.S.C. 1985, c. 41 (3rd Supp.).
4. This is the term used by the Department of National Revenue in its correspondence with the appellants to describe the disposition of their requests for re-determination. It is clear from the context that it meant that the Department of National Revenue was simply not prepared to consider the requests on their merits.
5. See Appeal No. AP-94-369.
6. See Appeal Nos. AP-94-371, AP-94-373, AP-94-374, AP-94-383, AP-94-384, AP-95-003, AP-95-004, AP-95-005, AP-95-006, AP-95-027, AP-95-038, AP-95-042, AP-95-053, AP-95-056, AP-95-104 and AP-95-106.
7. See Appeal Nos. AP-94-365, AP-94-370, AP-94-375, AP-94-381, AP-95-024, AP-95-025, AP-95-026, AP-95-029, AP-95-030, AP-95-031, AP-95-032, AP-95-033, AP-95-037, AP-95-041, AP-95-052, AP-95-054, AP-95-055, AP-95-057, AP-95-058, AP-95-059, AP-95-062, AP-95-105, AP-95-107, AP-95-222, AP-95-223 and AP-95-242.
8. See Appeal No. AP-94-382.
9. See Appeal Nos. AP-94-372, AP-94-377, AP-94-378, AP-94-380, AP-95-034, AP-95-035, AP-95-036, AP-95-040, AP-95-043 and AP-95-060.
10. See Appeal No. AP-94-376.
11. See Appeal Nos. AP-95-028, AP-95-039 and AP-95-248.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
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(613) 990-2452 Téléc. (613) 990-2439

filed with the respondent in order to have certain goods re-classified in accordance with a decision of the Tribunal dealing with similar goods.

The respondent refused to entertain a request for re-determination of the tariff classification pursuant to paragraph 60(1)(*b*) of the Act because the Minister of National Revenue (the Minister) did not deem it advisable to extend to two years the deadline for filing the request. The respondent refused to entertain requests for re-determination of tariff classifications under section 64 of the Act, and they were cancelled by the respondent because the Act provides that requests for re-determination must be filed under section 60 or 63 of the Act.

The Tribunal was of the view that these appeals raised the following jurisdictional issues: (1) whether decisions of the respondent to refuse to entertain requests for re-determination of tariff classifications constitute decisions for purposes of section 67 of the Act, i.e. whether the Tribunal has jurisdiction to hear the appeals; and (2) in the event that the Tribunal finds that the decisions do not constitute decisions for purposes of section 67 of the Act, whether it has the jurisdiction to compel the respondent to exercise his statutory duty. By letter dated May 25, 1995, the Tribunal requested both the appellants and the respondent to file written submissions on these issues. Briefs were subsequently filed by both parties. The appellants also filed briefs in reply.

For purposes of clarity, the Tribunal finds it necessary to reproduce, in part, the following provisions of sections 60, 63, 64 and 67 of the Act:

> *60. (1) The importer or any person who is liable to pay duties owing on imported goods may, after any duties thereon have been paid or security satisfactory to the Minister has been given in respect of the duties owing,*
>
> *(a) within ninety days, or*
>
> *(b) where the Minister deems it advisable, within two years*
>
> *after the time the determination or appraisal was made in respect of the goods under section 58, request a re-determination of the tariff classification or a re-appraisal of the value for duty.*
>
> *63. (1) Any person may,*
>
> *(a) within ninety days after the time he was given notice of a decision under section 60 or 61, or*
>
> *(b) where the Minister deems it advisable, within two years after the time a determination or appraisal was made under section 58,*
>
> *request a further re-determination of the tariff classification or a further re-appraisal of the value for duty re-determined or re-appraised under section 60 or 61.*
>
> *64. The Deputy Minister may re-determine the tariff classification or re-appraise the value for duty of imported goods*
>
> *(a) within two years after the time a determination or an appraisal was made under section 58, where the Minister deems it advisable,*
>
> *(b) at any time after a re-determination or re-appraisal was made under subsection 63(3), but before an appeal under section 67 is heard, on the recommendation of the Attorney General for Canada, where the re-determination or re-appraisal would reduce duties payable on the goods,*
>
> ...

> *(d) at any time, where the re-determination or re-appraisal would give effect to a decision of the Canadian International Trade Tribunal, the Federal Court or the Supreme Court of Canada made in respect of the goods, and*
> *(e) at any time, where the re-determination or re-appraisal would give effect in respect of the goods, in this paragraph referred to as the "subsequent goods", to a decision of the Canadian International Trade Tribunal, the Federal Court or the Supreme Court of Canada, or of the Deputy Minister under paragraph (b), made in respect of*
>
> > *(i) other like goods of the same importer or owner imported on or prior to the date of importation of the subsequent goods, where the decision relates to the tariff classification of those other goods.*
>
> *67. (1) A person who deems himself aggrieved by a decision of the Deputy Minister made pursuant to section 63 or 64 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the Deputy Minister and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.*

The appellants' representative argued that the respondent's decisions to cancel the requests for re-determination of tariff classifications pursuant to section 60 or 64 of the Act constitute decisions for purposes of section 67 of the Act. He relied on the following definition of the word "decision" in The Concise Oxford Dictionary of Current English, "settlement (*of* question etc.) conclusion, formal judgement; making up one's mind; resolve,[12]" and the decision of the Tariff Board in *Status Shoe Corp. of Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*[13] in support of his argument. He also argued that any direction to Customs staff to reject a request filed pursuant to section 64 of the Act is a decision subject to appeal. In addition, the Tribunal has the right pursuant to subsection 67(1) of the Act to hear the matter, the mandate pursuant to paragraph 16(*c*) of the *Canadian International Trade Tribunal Act*[14] to decide the matter and the obligation to agree that the matter is within its jurisdiction.

The appellants' representative argued that paragraph 64(*d*) of the Act is broad enough to offer the respondent the flexibility to re-determine the tariff classification of eyeglass or spectacle frames in applying a decision of the Tribunal to those importations effected between the dates of importation at issue and the date of the Tribunal's decision. He argued that the use of section 64 of the Act may be initiated by the respondent, but that this does not preclude an importer from requesting a re-determination pursuant to any subsection that he feels may apply to his circumstances or, in the case of paragraph 64(*a*) of the Act, the respondent when he feels that he meets any criterion listed. The representative also argued that a request is one way of drawing to the respondent's attention a need for reconsideration and that Form B 2 identified in Memorandum D11-6-3[15] is prescribed pursuant to section 8 of the Act for that purpose. He added that any declaration of the tariff classification by the Tribunal should place that category of product within the scope of a particular tariff item. According to the representative, the appropriate tariff classification should be assigned to the product regardless of the importer.

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12. Seventh ed. (Oxford: Clarendon Press, 1982) at 247.
13. 4 T.B.R. 289.
14. R.S.C. 1985, c. 47 (4th Supp.).
15. Administrative Policy Respecting Re-Determinations/Re-Appraisals Made Pursuant to Paragraph 64(*e*) of the *Customs Act*, Department of National Revenue, July 20, 1994.

Counsel for the respondent argued that, unlike sections 60 and 63 of the Act, sections 61 and 64 do not provide importers with a right to make requests for re-determination of tariff classifications under those sections and do not oblige designated officers or the respondent to render decisions in respect of any requests that may be filed. Rather, they grant a discretion to the designated officer or the respondent to re-determine or re-appraise. Moreover, even in the event that the respondent chooses to exercise his discretion under section 64 of the Act to re-determine the tariff classification of goods, in order for the respondent to make a decision, paragraph 64(*d*) of the Act requires a decision of the Tribunal, the Federal Court of Canada (the Federal Court) or the Supreme Court of Canada (the Supreme Court) to have been made in respect of the goods that are the subject of the action under paragraph 64(*d*) of the Act, and paragraph 64(*e*) of the Act requires subsequent imports by the same importer or owner that are the same as or similar to the imports that were the subject of a decision of the Tribunal, the Federal Court or the Supreme Court.

According to counsel for the respondent, the appellants failed to file appeals respecting the tariff classification of the goods pursuant to sections 60 and 63 of the Act and are now statute-barred from filing such requests. In addition, the appellants do not have a right to request re-determinations of the tariff classifications of the goods pursuant to section 64 of the Act, nor does the respondent have an obligation to entertain their requests. Moreover, the goods imported by the appellants were not the subject of a decision of the Tribunal, the Federal Court or the Supreme Court, as required under paragraph 64(*d*) of the Act. As such, counsel submitted that the respondent did not have the statutory authority to re-determine the tariff classification of the goods under paragraph 64(*d*) of the Act and, therefore, correctly rejected the appellants' requests. Counsel argued that the respondent's decisions to cancel the requests for re-determination do not constitute decisions for purposes of section 67 of the Act, and, consequently, the Tribunal has no jurisdiction to hear the appeals.

In *Mueller Canada Inc. v. The Minister of National Revenue and The Deputy Minister of National Revenue*,[16] an application was filed with the Federal Court for a declaration that certain decisions made by the respondent pursuant to subsections 60(3) and 63(3) of the Act were "decisions" under the relevant sections of the Act. Alternatively, the applicant sought an order of *mandamus* compelling the respondent to exercise his statutory duty in respect of the requests for re-determination. On May 1, 1990, certain amendments were made to the *Customs Tariff*. The applicant, being of the opinion that this change affected the classification of the goods imported by it, filed a request for re-determination pursuant to sections 60 and 72.1 of the Act. The request under section 60 was rejected. The respondent found that consideration could not be given to the request, as the goods were not covered by the retroactive tariff amendment and as there was no other criteria for consideration. The applicant filed a request for further re-determination pursuant to section 63 of the Act, which was rejected by the respondent. The request was considered invalid on the basis that the time limit for filing such a request had expired and that no decision had been made in respect of the rejection of the request for re-determination under section 60 of the Act.

The Federal Court found that, in forming the opinion that the retroactive amendment did not apply to the applicant's goods, the respondent had to go through a tariff classification exercise. In the view of the Federal Court, this constituted a disguised decision on the merits. By characterizing the decisions as "no decisions" rather than negative decisions, the respondent thwarted the applicant's rights of appeal under sections 60 and 63 of the Act. The Federal Court, therefore, allowed the application.

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16. Unreported, Federal Court of Canada - Trial Division, Court File No. T-746-93, November 15, 1993.

On the basis of *Mueller*, the Tribunal is of the view that there clearly must be a decision from the respondent with respect to the merits of the tariff classification in order to give the Tribunal jurisdiction under section 67 of the Act. This is not the case in these appeals. Relying on *Mueller*, the Tribunal is of the view that the respondent's refusal to entertain the requests for re-determination under section 60 or 64 of the Act does not constitute decisions for purposes of section 67 of the Act.

The appellants' representative made several arguments in his attempt to convince the Tribunal that the respondent's decisions to cancel the requests for re-determination constitute decisions for purposes of section 67 of the Act and that, as a result, the Tribunal has jurisdiction to hear the appeals. The Tribunal has considered all of the representative's arguments and finds that they are without merit. Two of these arguments deserve special attention from the Tribunal: (1) the argument that Form B 2 has been prescribed to allow requests to be made by importers under section 64 of the Act; and (2) his reliance on the Tribunal's decision in *Walker Exhausts, Division of Tenneco Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*.[17]

The usual procedure by which an importer deals with an unsatisfactory determination is to request a designated officer to make a re-determination under section 60 of the Act. The Act specifically provides for such a request. It must be made within 90 days after the time the determination or appraisal was made under section 58 of the Act. An importer deals with an unsatisfactory re-determination by requesting the respondent to make a further re-determination under section 63 of the Act. The request must be made within 90 days after the time the importer was given notice of a decision under section 60 or 61 of the Act. When the importer complies with these statutory requirements, the respondent must make a further re-determination and must give notice of that decision to the importer.

Where a request under section 60 or 63 of the Act is made after 90 days, but within two years, the respondent must make a re-determination where the Minister deems it advisable. In addition, a determination made under section 58 of the Act may be re-determined by the respondent at his own initiative and where the Minister deems it advisable under section 64 of the Act. There is no statutory provision for the importer to make a request for such a re-determination under section 64 of the Act. The respondent has no duty to make such a re-determination, though, where he does so, he must send notice of that decision to the importer.

The appellants' representative referred to Memorandum D11-6-3 in support of his argument that Form B 2 is a prescribed form which allows an importer to make a request under section 64 of the Act. Memorandum D11-6-3 sets out the procedures by which the respondent may make a re-determination or a re-appraisal pursuant to paragraph 64(*e*) of the Act. It provides that, when an importer has filed an appeal before the Tribunal or the courts concerning tariff classification, that importer need no longer continue to request a re-determination or a re-appraisal under section 60 or 63 of the Act of subsequent importations of other like goods to those under appeal. It allows the respondent to issue decisions covering such goods. The like goods must have been imported by the same importer or owner on or after the date of importation of the goods which are the subject of the appeal. When all the appropriate procedures have been followed by the importer and a decision is issued by the Tribunal in his favour, the Department of National Revenue will consult with him to determine the best manner to resolve outstanding import transactions. Importers may be requested to submit Form B 2 to the Customs office in the region where the goods were released for each

17. Appeal No. AP-93-063, July 6, 1994.

transaction. This practice does not, in the Tribunal's view, confer a right on importers to make requests under section 64 of the Act, as claimed by the appellants.

A decision made under section 63 or 64 of the Act may be appealed to the Tribunal pursuant to section 67 of the Act. However, the Tribunal is of the view, as stated above, that the only appealable decision that the respondent can make under section 64 of the Act is a re-determination or re-appraisal. Other actions taken in relation to section 63 or 64 of the Act, such as a refusal to consider a request for re-determination, may be reviewable by the Federal Court, but not by the Tribunal.

In *Walker Exhausts*, the appellant had filed a request for further re-determination of the origin of goods. Since its request was filed more than 90 days after the decision under section 60 of the Act, the appellant could not request a further re-determination under paragraph 63(1)(*a*) of the Act. The appellant, therefore, requested a further re-determination under paragraph 63(1)(*b*) of the Act. Appendix D to Memorandum D11-6-1[18] sets out the four criteria established by the Minister for determining whether it is deemed advisable for a further re-determination to proceed. A party requesting a further re-determination under paragraph 63(1)(*b*) of the Act must demonstrate that it satisfies one of those criteria. The appellant relied on the third criterion. The respondent advised the appellant that a further re-determination had been deemed not advisable because the third criterion had not been met. Counsel for the respondent raised a preliminary issue concerning the Tribunal's jurisdiction to grant the appellant's request.

The Tribunal concluded that the respondent's preliminary assessment was a decision within the meaning of subsection 67(1) of the Act. In the Tribunal's view, the respondent's decision had the practical effect of bringing the appellant's case to an end and, therefore, constituted a final decision. In reaching this conclusion, the Tribunal first considered the fact that subsection 67(1) of the Act refers to "a decision of the Deputy Minister made pursuant to section 63." The Tribunal noted that the word "decision" in subsection 67(1) of the Act is in no way circumscribed or modified by the other words appearing in that subsection.

The Tribunal went on and found that it may grant relief in respect of a discretionary decision of the respondent if it can be shown that the said discretion was exercised based on a wrong principle of law or if the facts which formed the basis for the exercise of the discretion were misapprehended by the respondent. The Tribunal reviewed the facts and concluded that the respondent's decision not to allow a further re-determination to proceed on the basis that the request could have been filed within the prescribed time limit represented an exercise of discretion based on a misapprehension of the facts. It, therefore, allowed the appeal. The Tribunal's decision was appealed to the Federal Court. However, it was recently withdrawn by the respondent.

It is a recognized principle of administrative law that administrative tribunals are not bound by their previous decisions, although they should strive to be consistent.[19] In any event, the Tribunal is of the view that the facts in *Walker Exhausts* are sufficiently different from those in this case. The decision of the Federal Court in *Mueller* appears to be much more relevant and is relied on in this case.

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18. Determination/Re-Determination and Appraisal/Re-Appraisal of Goods, Department of National Revenue, January 13, 1995.

19. *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

Having found that the respondent's rejections under section 60 or 64 of the Act do not constitute decisions for purposes of section 67 of the Act, the Tribunal must determine whether it has jurisdiction to compel the respondent to exercise his statutory duty with respect to the re-determinations. Any order directing the respondent to make a re-determination would, in the Tribunal's view, be an order of *mandamus*, an equitable relief that the Tribunal has clearly no authority to grant. Section 18 of the *Federal Court Act*[20] clearly provides that only the Federal Court has jurisdiction to make such an order.

The Tribunal, therefore, concludes that it does not have jurisdiction to hear the appeals listed in Appendix A, as the respondent's decisions made pursuant to paragraph 60(1)(*b*), 64(*d*) or 64(*e*)(i) of the Act do not constitute decisions for purposes of section 67 of the Act. Consequently, the appeals are dismissed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

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

Lyle M. Russell
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Member

20. R.S.C. 1985, c. F-7.

**APPENDIX A**

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|---|---|
| AP-94-365 | Vilico Optical Inc. |
| AP-94-369 | Canamalco Inc. |
| AP-94-370 | Neostyle Canada Ltd. |
| AP-94-371 | Nicolet America Inc. |
| AP-95-372 | Carl Zeiss Canada |
| AP-94-373 | Optiq Ltd. |
| AP-94-374 | Alta Vision Laboratories Ltd. |
| AP-94-375 | Vilico Optical Inc. |
| AP-94-376 | Western Optical Co. Inc. |
| AP-94-377 | Viva Optique Canada Inc. |
| AP-94-378 | KDS Optical Company Ltd. |
| AP-94-380 | Anthony Martin Eyewear Inc. |
| AP-94-381 | Opal Optical Ltd. |
| AP-94-382 | Rodenstock Canada Inc. |
| AP-94-383 | Crown Optical Centre Ltd. |
| AP-94-384 | KW Optical Limited |
| AP-95-003 | Savvy Eyewear Canada |
| AP-95-004 | AOCO Limited |
| AP-95-005 | Western Optical Co. Inc. |
| AP-95-006 | Centennial Optical Limited |
| AP-95-024 | Carl Zeiss Optical Inc. |
| AP-95-025 | Neostyle Canada Ltd. |
| AP-95-026 | Optique Forte Ltd. |
| AP-95-027 | AOCO Limited - Limitée |
| AP-95-028 | Centennial Optical Limited |
| AP-95-029 | Diplomat-Ambassador Eyewear Ltd. |
| AP-95-030 | Optique Forte Ltd. |
| AP-95-031 | Optique Forte Ltd. |
| AP-95-032 | Lunettes Renaissance Inc. |

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|---|---|
| AP-95-033 | Compagnie d'Optique Polaire Inc. |
| AP-95-034 | Renaissance Eyewear Inc. |
| AP-95-035 | KDS Optical Company Ltd. |
| AP-95-036 | Carl Zeiss Canada |
| AP-95-037 | Anthony Martin Eyewear Inc. |
| AP-95-038 | Renaissance Eyewear Inc. |
| AP-95-039 | Centennial Optical Limited |
| AP-95-040 | Diplomat-Ambassador Eyewear Ltd. |
| AP-95-041 | Safilo Canada Inc. |
| AP-95-042 | Optiq Ltd. |
| AP-95-043 | Nicolet America Inc. |
| AP-95-052 | Compagnie d'Optique Polaire Inc. |
| AP-95-053 | Laboratoire d'Optique de Hull Inc. |
| AP-95-054 | Anthony Martin Eyewear Inc. |
| AP-95-055 | Hakim Optical Laboratory Ltd. |
| AP-95-056 | Nicolet America Inc. |
| AP-95-057 | KDS Optical Company Ltd. |
| AP-95-058 | Neostyle Canada Ltd. |
| AP-95-059 | Optique Forte |
| AP-95-060 | Carl Zeiss Canada |
| AP-95-062 | Savvy Eyewear Canada |
| AP-95-104 | Centennial Optical Limited |
| AP-95-105 | Carl Zeiss Optical Inc. |
| AP-95-106 | Carl Zeiss Optical Inc. |
| AP-95-107 | Viva Optique Canada Inc. |
| AP-95-222 | Optique Forte Ltd. |
| AP-95-223 | Nicolet Optique Inc. |
| AP-95-242 | Vilico Optical Inc. |
| AP-95-248 | Centennial Optical Limited |