

Ottawa, Tuesday, May 14, 1996

Appeal No. AP-95-121

IN THE MATTER OF an appeal heard on January 19, 1996,  
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 10, 1995, with respect to a request  
for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**CENTENNIAL OPTICAL LIMITED**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Lyle M. Russell  
Lyle M. Russell  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Anita Szlajak  
Anita Szlajak  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-95-121**

**CENTENNIAL OPTICAL LIMITED**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

*This is an appeal under section 67 of the Customs Act from a decision of the Deputy Minister of National Revenue under subsection 63(3) of the Customs Act, classifying imported goods described as Serengeti brand “RX Sunglasses with Frame” under tariff item No. 9004.10.00 as “[s]unglasses.” The appellant claims that the goods in issue should be classified under tariff item No. 9004.90.10 as “prismatic eyeglasses for reading.”*

***HELD:** The appeal is dismissed. The Tribunal agrees with counsel for the respondent’s argument that the term “[s]unglasses,” as it appears in subheading No. 9004.10 and the Explanatory Notes to the Harmonized Commodity Description and Coding System (the Explanatory Notes) to heading No. 90.04, has not been qualified in any way to refer only to non-prescription sunglasses. Moreover, in the Tribunal’s view, it is clear from the Explanatory Notes that it was contemplated that the term “sunglasses” include both prescription and non-prescription sunglasses. In particular, the Tribunal notes that the Explanatory Notes provide that “[p]rotective spectacles ... generally consist of plane or curved discs of ordinary glass (whether or not optically worked, or tinted), of safety glass, of plastics.” The Explanatory Notes further provide that these articles include sunglasses.*

*In the Tribunal’s view, the phrase “corrective, protective or other” in heading No. 90.04 indicates that the heading covers corrective and protective eyewear, as well as other types of eyewear, including eyewear that may be both protective and corrective, as are the goods in issue. This view is supported by the Explanatory Notes which specifically contemplate that protective eyewear may consist of optically worked or corrective lenses.*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: January 19, 1996  
Date of Decision: May 14, 1996*

*Tribunal Members: Lyle M. Russell, Presiding Member  
Arthur B. Trudeau, Member  
Anita Szlazak, Member*

*Counsel for the Tribunal: Shelley Rowe*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: John R. Peillard, for the appellant  
Ian McCowan, for the respondent*

**Appeal No. AP-95-121**

**CENTENNIAL OPTICAL LIMITED**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: LYLE M. RUSSELL, Presiding Member  
ARTHUR B. TRUDEAU, Member  
ANITA SZLAZAK, 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 under subsection 63(3) of the Act, classifying imported goods described as Serengeti brand “RX Sunglasses with Frame” under tariff item No. 9004.10.00 of Schedule I to the *Customs Tariff*<sup>2</sup> as “[s]unglasses.” The appellant claims that the goods in issue should be classified under tariff item No. 9004.90.10 as “prismatic eyeglasses for reading.”

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

90.04	<i>Spectacles, goggles and the like, corrective, protective or other.</i>
9004.10.00	<i>-Sunglasses</i>
9004.90	<i>-Other</i>
9004.90.10	<i>---Safety goggles and safety spectacles, designed for use by workers employed in hazardous work; prismatic eyeglasses for reading</i>

The appellant’s representative called four witnesses: Mr. Thomas J. Loomis, Manager, Product Assurance, Optical Products Department of Corning Incorporated of Corning, New York; Dr. Yvon Deslauriers, a biophysicist and Head of the Lasers and Electro-Optic Unit, Non-Ionizing Radiation Section, of the Bureau of Radiation and Medical Devices of the Department of Health; Mr. Brian J. Leach, National Distribution Manager for Centennial Optical Limited; and Dr. Gordon A. Young, a doctor of optometry in private practice in the Ottawa area.

Mr. Loomis manages the product assurance function for the optical or ophthalmic and sunglass businesses of Corning Incorporated. He explained that the ophthalmic business is comprised of the production of corrective lens materials, while the sunglass business is comprised of the production of finished sunglasses. He introduced, as an exhibit, the American National Standard for Ophthalmics -

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

Nonprescription Sunglasses and Fashion Eyewear - Requirements<sup>3</sup> which, he stated, applies to “plano power<sup>4</sup>” or non-corrective lenses and does not cover prescription sunglasses. He also stated that the standard applies to fashion eyewear and that, in his view, all sunglasses are fashion eyewear to some extent.

In his capacity as Technical Director of the Sunglass Association of America, Mr. Loomis participated as a member of the Accredited Standards Committee on Ophthalmic Standards, Z80, that processed and approved the standard for submission to the American National Standards Institute, Inc. (ANSI). When asked why the standard does not pertain to prescription sunglasses, he pointed out that the standard does not include the requirements necessary to make prescription sunglasses, namely, the power and centering requirements. He also pointed out that the standard includes cosmetic sunglasses.

Mr. Loomis also introduced other standards similar in coverage to the U.S. standard: the Canadian standard for “Nonprescription Sunglasses,<sup>5</sup>” the European standard for “Personal eye protection: Sunglasses and sunglare filters for general use<sup>6</sup>” and the International Organization for Standardization (ISO) draft standard entitled “Specifications for Afocal Filters for Daylight.<sup>7</sup>” He participated as a member of the Subcommittee on Nonprescription Sunglasses on behalf of Corning Incorporated which developed the Canadian standard. This subcommittee was comprised of various members of the industry, government officials, opticians and academics.

In Mr. Loomis’s view, there is a distinction between prescription and non-prescription sunglasses. He pointed out that prescription sunglasses have a corrective element to help overcome vision defects. Unlike the production of non-prescription sunglasses, the production of prescription sunglasses is patient-specific and involves the grinding and polishing of lenses to specifically correct that patient’s vision defect, the fitting of the lenses into a frame and the alignment of the lenses for that particular patient. He agreed with counsel for the respondent that the goods in issue were properly described as prescription sunglasses and that there are both prescription and plano sunglasses.

Mr. Loomis explained that the process for the importation of prescription sunglasses, like those in issue, is initiated by an ophthalmologist or optometrist examining a patient and prescribing lenses to correct that patient’s vision defect. The prescription is sent directly or through the appellant’s laboratory to Corning Incorporated’s laboratory. The lenses are then produced to the requirements of that prescription.

Dr. Deslauriers, like Mr. Loomis, participated as a member of the Subcommittee on Nonprescription Sunglasses, which developed the Canadian standard for non-prescription sunglasses. He agreed with Mr. Loomis’s testimony that the standard applies to plano power lenses, including cosmetic lenses, and does not cover industrial eye protection or corrective lenses. He indicated that the standard is voluntary. In cross-examination, he agreed that the goods in issue are described in the trade as prescription sunglasses and that there are two types of sunglasses: prescription and non-prescription. He indicated that he

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3. American National Standards Institute, Inc., ANSI Z80.3-1986, September 25, 1986 (Exhibit A-1).

4. Mr. Loomis indicated that “plano” means “no power.” See Transcript of Hearing and Argument, January 19, 1996, at 14.

5. Canadian Standards Association, CSA Standard Z94.5-95, August 1995 (Exhibit A-2).

6. European Committee for Standardization, CEN/TC 85/WG 1 N 51, April 15, 1994 (Exhibit A-3).

7. Mr. Loomis indicated that “afocal” meant no focus plane and that the reference to “filters for daylight” meant sunglasses (Exhibit A-4).

is not aware of any Canadian standard for prescription eyewear, including prescription sunglasses. However, he stated that such apparatus must be identified as prescription eyewear.

Mr. Leach indicated that the goods in issue, which, he agreed, were properly described as prescription sunglasses, are marketed directly to consumers through an optometrist or through a referral by an optometrist to an optician or a retail operation.

Dr. Young explained that, as a doctor of optometry, he is a primary eye care professional who assesses a patient for ocular health anomalies. Once the ocular health of a patient is determined, a prescription for specific lenses to correct any anomalies may be issued. He stated that, in his view, the standards for prescription eyewear are set by the ophthalmologist or optometrist who prescribes lenses for a particular patient. He indicated that he does, in certain circumstances, prescribe tinted lenses, which are unlike those used in sunglasses. For example, he referred to a condition called retinitis pigmentosa which means, generally, that the receptors in a patient's eyes are deficient. The tint in the lenses enhances the contrast of objects. Dr. Young agreed that, despite the fact that not all tinted lenses are used in sunglasses, tinted lenses are generally referred to in trade parlance as sunglasses. However, he pointed out that there are several other types of tinted lenses not used in sunglasses, for example, lenses used for industrial purposes, such as glassblowing.

In cross-examination, Dr. Young agreed that a patient may have different eyewear for different applications. For example, a patient may have prescription sunglasses for reading signs at a distance while driving in the daytime and may have clear prescription lenses for reading signs at a distance while driving at nighttime.

The appellant's representative referred to various dictionary definitions of "sunglasses,"<sup>8</sup> as well as to the definitions in the various standards for non-prescription sunglasses, which all suggest, in his view, that sunglasses are devices used to reduce the glare from the sun. He submitted that none of the definitions incorporates the word "prescription." It was the position of the appellant's representative that the goods in issue incorporate characteristics of both sunglasses and prismatic eyeglasses for reading.

The appellant's representative submitted that the Summary of Observations on Chapter 90 (Part I) and Comments by the Technical Team,<sup>9</sup> Summary Record of the 19th Session of the Harmonized System Committee and its Working Party,<sup>10</sup> Proposals for the Revision of Chapter 90,<sup>11</sup> and the Report to the Customs Co-operation Council on the Forty-Fifth Session of the Nomenclature Committee,<sup>12</sup> to which

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8. "[F]or protecting the eyes from direct [sun]light or glare," The Concise Oxford Dictionary of Current English, 5th ed. (Oxford: Clarendon Press, 1967) at 1294; "[g]lasses with colored lenses to protect the eyes from the glare of the sun," Funk & Wagnalls Standard College Dictionary, Canadian ed. (Toronto: Fitzhenry & Whiteside, 1974) at 1342; "spectacles with lenses which are tinted to protect the eyes from glare," The New Lexicon Webster's Encyclopedic Dictionary of the English Language, Canadian ed., (New York: Lexicon Publications, 1988) at 992; and "tinted glasses that protect the eyes from sunlight," The New Britannica/Webster Dictionary & Reference Guide (Chicago: Encyclopaedia Britannica, 1986) at 932.

9. Harmonized System Committee, Customs Co-operation Council, Brussels, October 4, 1979.

10. Harmonized System Committee, Customs Co-operation Council, Brussels, December 18, 1979.

11. Nomenclature Committee, Customs Co-operation Council, Brussels, September 26, 1980.

12. Nomenclature Committee, Customs Co-operation Council, Brussels, November 28, 1980.

counsel for the respondent referred, are irrelevant to the issue in this appeal, since Canada was not then a member of the working group and did not participate in the discussions, and the proposals were not adopted by the Customs Co-operation Council or implemented by Canada in Schedule I to the *Customs Tariff*.

Focusing specifically on the words of heading No. 90.04, the appellant's representative submitted that the word "or" in the phrase "[s]pectacles, goggles and the like, corrective, protective or other" is disjunctive. Based on that interpretation of the words of the heading, he submitted that the appliances covered by that heading must perform one of the functions of correction, protection or other, but cannot perform more than one of those functions. He submitted that appliances for the correction of vision would be appliances other than sunglasses, which are used for the protection of the eyes from sunlight.

The appellant's representative referred the Tribunal to section 11 of the *Customs Tariff* which directs the Tribunal to have regard to the Explanatory Notes to the Harmonized Commodity Description and Coding System<sup>13</sup> (the Explanatory Notes). The Explanatory Notes to heading No. 90.04 provide, in part, as follows:

*This heading covers articles (usually comprising a frame or support with lenses or shields of glass or other material), for use in front of the eyes, generally intended either to correct certain defects of vision or to protect the eyes against dust, smoke, gas, etc.*

*Protective spectacles and goggles generally consist of plane or curved discs ... These articles include sun-glasses, spectacles used for mountaineering or winter sports, goggles for airmen, motorists, motor-cyclists, chemists, welders, foundry workers, moulders, sand-blast machine operators, electricians, roadmen, quarrymen, etc.*

The representative submitted that these notes support his contention that heading No. 90.04 distinguishes between corrective and protective eyeglasses. He submitted that prescription sunglasses are more than the usual type of sunglasses and that the tint in prescription sunglasses is secondary to the corrective abilities.

The appellant's representative explained that, in importing the prescription sunglasses, the appellant relied on a memorandum of the Department of National Revenue dated July 15, 1994, entitled "Decision of the CITT in Appeal No. AP-92-385 (Opal Optical Ltd.); tariff classification of certain spectacle frames," which provides that "all prescription eyeglasses will now qualify for entry under tariff item 9004.90.10 as 'prismatic eyeglasses for reading.'"

Counsel for the respondent argued that, since the appellant and respondent agree that the goods in issue are properly classified in heading No. 90.04, the issue in this appeal is whether, in that heading, they should be classified in subheading No. 9004.10 as "[s]unglasses" or in subheading No. 9004.90 as "[o]ther." Counsel submitted that all sunglasses, prescription or otherwise, are to be classified in subheading No. 9004.10 as "[s]unglasses" and pointed out that the term "sunglasses" is not explicitly restricted to non-prescription sunglasses. In addition, counsel referred to the definitions of "sunglasses" set out in the appellant's brief which, he submitted, do not provide that sunglasses must be non-prescription.

In support of this contention, counsel for the respondent referred to the Report to the Customs Co-operation Council on the Forty-Fifth Session of the Nomenclature Committee, which provides that all

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

sunglasses should be classified in subheading No. 9004.10. Counsel also referred to the proposals leading up to this report, which indicate that certain members' representatives were proposing to limit the term "[s]unglasses" in subheading No. 9004.10 only to non-prescription sunglasses.

The Tribunal has reviewed the words of heading No. 90.04 and the subheadings at issue, as well as the Explanatory Notes to the heading and subheadings, and is of the view that the goods in issue are properly classified under tariff item No. 9004.10.00 as sunglasses. The Tribunal agrees with counsel for the respondent's argument that the term "[s]unglasses," as it appears in the subheading and Explanatory Notes, has not been qualified in any way to refer only to non-prescription sunglasses. Moreover, in the Tribunal's view, it is clear from the Explanatory Notes that it was contemplated that the term "sunglasses" include both prescription and non-prescription sunglasses. In particular, the Tribunal notes that the Explanatory Notes provide that "[p]rotective spectacles ... generally consist of plane or curved discs of ordinary glass (**whether or not optically worked, or tinted**) [emphasis added], of safety glass, of plastics." The Explanatory Notes further provide that these articles include sunglasses.

The Tribunal is not persuaded by the argument of the appellant's representative that the phrase "corrective, protective or other" in heading No. 90.04 indicates that all eyewear covered by that heading must be considered as being either corrective or protective and classified as such and that it cannot be both corrective and protective. In the Tribunal's view, this phrase indicates that the heading covers corrective and protective eyewear, as well as other types of eyewear, including eyewear that may be both protective and corrective, as are the goods in issue. In fact, the Tribunal notes that the Explanatory Notes specifically contemplate that protective eyewear may consist of optically worked or corrective lenses.

The Tribunal finds that the goods in issue are properly classified under tariff item No. 9004.10.00 as sunglasses. Accordingly, the appeal is dismissed.

Lyle M. Russell  
Lyle M. Russell  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Anita Szlczak  
Anita Szlczak  
Member