CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, February 19, 1999

Appeal No. AP-95-097

IN THE MATTER OF an appeal heard on September 21, 1998, 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 May 31, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

FLEXTUBE INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-95-097

FLEXTUBE INC. **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. The issue in this appeal is whether the goods in issue, described as coiled steel tubing, are properly classified under tariff item No. 7306.50.00, as determined by the respondent, or should be classified under tariff item No. 7306.20.00, as claimed by the appellant. Also at issue is whether the goods in issue qualify for the benefits of Code 1570, 1551 or 1552 of Schedule II to the *Customs Tariff*.

HELD: The appeal is allowed in part. There are essentially three issues that must be decided by the Tribunal. The first issue is whether the doctrine of *res judicata* applies to prevent the Tribunal from hearing the present appeal. The second issue is the proper tariff classification of the goods in issue, and the third issue deals with the applicability of Codes 1570, 1551 and 1552. The Tribunal finds that the doctrine of *res judicata* does not apply to prevent the Tribunal from hearing this appeal because the question raised in this appeal is different from the question raised in *Canadian Fracmaster Ltd.* v. *The Deputy Minister of National Revenue*. In that appeal, the issue was whether "coiled steel tubing" was properly classified under tariff item No. 7306.50.00 or should be classified under tariff item No. 8307.10.00. In the present appeal, the issue is whether "coiled steel tubing" is properly classified under tariff item No. 7306.50.00 or should be classified under tariff item No. 7306.20.00. Furthermore, the parties to this appeal are not the same parties that were before the Tribunal in *Canadian Fracmaster*. The present appeal also deals with different importations. With respect to the second issue, the Tribunal accepts, on balance, the appellant's evidence and finds that the goods in issue are of a kind used in drilling for oil or gas. As such, they should be classified under tariff item No. 7306.20.00 as casing and tubing of a kind used in drilling for oil and gas. With respect to the third issue, the Tribunal finds that the goods in issue do not qualify for the benefits of Codes 1570, 1551 and 1552. With respect to Code 1570, the Tribunal is of the view that the goods in issue are clearly not materials for use in the manufacture of goods of Chapter 73, nor was it able to conclude, on the basis of the evidence, that the goods in issue were for use in the manufacture of goods of heading No. 87.05. Moreover, the process involved in attaching fittings and cutting the tubing is not, in the Tribunal's view, tantamount to manufacture. As for Codes 1551 and 1552, the Tribunal is of the view that the goods in issue do not qualify as machinery or apparatus. Moreover, the appellant failed, in the Tribunal's view, to demonstrate conclusively that the goods in issue are installed in and are necessary and integral components of well logging or perforating machinery or apparatus, or that they were manufactured to a degree that commits them to a particular application.

Places of Video Conference
Hearing: Hull, Quebec, and Vancouver, British Columbia
Date of Hearing: September 21, 1998
Date of Decision: February 19, 1999

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Tribunal Member:	Richard Lafontaine, Presiding Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerks of the Tribunal:	Anne Turcotte and Margaret Fisher
Appearances:	Kimberley L.D. Cook, for the appellant Jan Brongers, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-95-097

FLEXTUBE INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member

REASONS FOR DECISION

This is an appeal heard under section 67 of the *Customs Act*[1] (the Act), by way of a videoconference, from a decision of the Deputy Minister of National Revenue made under section 63 of the Act and dated May 31, 1995.

The issue in this appeal is whether the goods in issue, described as coiled steel tubing, are properly classified under tariff item No. 7306.50.00 of Schedule I to the *Customs Tariff*,[2] as determined by the respondent, or should be classified under tariff item No. 7306.20.00, as claimed by the appellant. Also at issue is whether the goods in issue qualify for the benefits of Code 1570, 1551 or 1552 of Schedule II to the *Customs Tariff*. For purposes of this appeal, the relevant tariff nomenclature reads as follows:

73.06	Other tubes, pipes and hollow profiles (for example, open seam or welded, riveted or similarly closed), of iron or steel.
7306.20	-Casing and tubing of a kind used in drilling for oil or gas
7306.50.00	-Other, welded, of circular cross-section, of other alloy steel

At the outset, counsel for the appellant informed the Tribunal that she intended to argue that the goods in issue qualify for the benefits of Codes 1551 and 1552. Counsel argued that she should be allowed to raise this issue in order to ensure that the appellant's complete case was put before the Tribunal. Furthermore, she submitted that her arguments with respect to the applicability of these codes would be similar to those that she would be making regarding the applicability of Code 1570. In addition, no additional facts would need to be presented. In order to be fair to counsel for the respondent, she suggested that he be given the opportunity to file additional written submissions addressing this issue. Counsel for the respondent objected and argued that counsel for the appellant should not be allowed to raise this new issue at such a late date. He argued that to allow her to do so would be prejudicial to the respondent who had not had the chance to prepare to deal with this issue. He submitted that, because counsel did not raise this issue in her brief, she should not be allowed to address it at the hearing.

The Tribunal decided to allow counsel for the appellant to raise the issue of the applicability of Codes 1551 and 1552. The Tribunal agreed that the appellant should be given every opportunity to present its full case. However, the Tribunal reminded counsel that there are rules in place that ought to be followed and that, in the future, she should make sure that such matters are brought to the Tribunal's and the respondent's attention at an earlier date. In order to be fair to counsel for the respondent, the Tribunal took a

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

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short recess so that he could consult with his client. He was also told that he would be given the opportunity to file post-hearing submissions addressing the issue, if he so desired. In the event that he chose to do so, counsel for the appellant would be given an opportunity to reply.

One witness, Mr. George Mayette, Manager of Business Development for Coiled Tubing Services with Canadian Fracmaster Ltd. (Fracmaster) and formerly President and General Manager of Flextube Inc., testified on behalf of the appellant. He explained that the appellant was purchased by Fracmaster 1½ years ago. He testified that he has been working in the oil and gas industry for approximately 20 years. He explained that 90 percent of the appellant's business was coiled tubing operations, which involved servicing oil and gas coiled tubing. Mr. Mayette testified that coiled tubing is continuous steel tubing milled in various lengths and sizes. He explained that the goods in issue are 2 inches or less in diameter and were purchased from Precision Tubing and Quality Tubing, in Houston, Texas. He said that 98 percent of this company's business relates to oil and gas.

Mr. Mayette explained that coiled tubing of less than 2 inches is used for drilling operations and for perforating, which consists of running explosive charges on a tool down into a well bore to create holes in existing casing that has been placed into the well bore. He said that, generally, coiled tubing of 1.5 inches is used for such operations. However, 2-inch and 1.25-inch tubing can also be used. Mr. Mayette also testified that coiled tubing is used for logging, which consists of recording pressures, permeability and porosity of the operation and determining where there are various gas, oil or water points within the reservoir.

With the aid of a drawing of a deep horizontal underbalanced drilling rig, Mr. Mayette explained the function of a work reel. He said that, essentially, a work reel holds the coiled tubing. It has a series of controls that can be operated remotely. Its main purpose is to coil the tubing and feed it through the injector and down the well bore. This powers the drilling tools down the hole. He testified that coiled tubing is essential to the operation of the work reel. Mr. Mayette also explained how compression fittings are used to attach the coiled tubing to the work reel and different drilling tools at the end of the coiled tubing. He indicated that the preparation of the ends of the tubing is quite important. The tubing must be carefully cut and cleaned, and all debris must be removed. At that point, a weld is attached, or the welding procedure begins. In some cases, it is important to X-ray the weld. Mr. Mayette testified that the goods are normally shipped on a wooden work spool, usually in lengths of about 5,000 metres. Depending on the size of the coiled tubing unit with which it will be used, as little as 1,000 metres of tubing may be spooled onto another reel. He testified that carrying out the spooling and welding operations could require up to five people. Generally speaking, a standard spooling operation could take three to four hours. The types of machines involved in these procedures include welders and auxiliary reels. He added that they would have access to machining facilities, such as a lathe, and that, in many cases, the work may be subcontracted. Mr. Mayette further testified that the yard spooling facilities of Fracmaster and the appellant represented a capital investment in the range of $300,000. In cross-examination, Mr. Mayette explained that, because of the economies of scale, the goods are shipped on large wooden spools and that the amounts needed to make up a work string on a coiled tubing unit are then spooled off and cut at the appropriate length. The cutting is the simple part, he added. It is making up the connections that requires a certain amount of quality control, he said.

In cross-examination, Mr. Mayette also testified that the effective date of sale of the appellant to Fracmaster was January 1, 1997. The closing date was April 15, 1997. He explained that the appellant was acquired by way of a share purchase and not an assets purchase. As such, Mr. Mayette testified that the appellant still exists as a corporate entity. However, he testified that the appellant and Fracmaster are essentially one and the same. Furthermore, Mr. Mayette confirmed that the only goods which are in issue are

a 1.25-inch tube and a 1.5-inch tube. He testified that such tubing is suitable for well cleanouts, acid treatments, nitrified cleanouts, high grade and scale removal, which are all maintenance and servicing functions. He agreed with counsel for the respondent that the goods in issue are suitable for use in well maintenance. He disagreed with counsel, however, that the goods in issue are not suitable for actually drilling for oil and gas. Mr. Mayette reaffirmed that the appellant has used 1.25- and 1.5-inch "coiled tubing" in such applications for a number of years. He explained that, with the new technology applied by the appellant, there is less torque, which makes the smaller tubing suitable for use in oil and gas drilling. Mr. Mayette said that he did not know the specific dates on which the appellant actually used the 1.25- and 1.5-inch coiled tubing to drill for oil and gas, but he said that it was probably sometime in 1991 or 1992 for the 1.25-inch tubing and many times over the last six or seven years for the 1.5-inch coiled tubing. He explained that he is sure that the 1.25- and 1.5-inch tubing was actually used to drill for oil and gas, based on the fact that he was President and General Manager of Flextube Inc. at the time.

In answering questions from the Tribunal, Mr. Mayette testified that the 1.25- and 1.5-inch coiled tubing was probably used by the appellant in oil and gas drilling in every year subsequent to 1988 at regular intervals. He testified that he was on location in at least three instances where he saw the 1.25-inch coiled tubing being specifically used. One of these occasions was in June 1993. Another would have been in September 1991. He remembered that occasion in particular because the weather was bad when the work was being done. And another occasion would have been in March 1989. He also testified that, because the 1.5-inch coiled tubing was part of the appellant's routine application, he could not remember specific dates on which it was actually used.

One witness, Dr. David R. Budney, Professor of Mechanical Engineering at the University of Alberta, appeared on behalf of the respondent. Counsel for the respondent requested that Dr. Budney be qualified as an expert in the field of advanced strength of piping materials, including tubing. Counsel for the appellant objected to Dr. Budney being qualified as an expert in the application of coiled tubing in the oil and gas industry. After having received evidence on Dr. Budney's expertise relating to tubing, as well as on his lack of field experience in the oil and gas industry, the Tribunal agreed with counsel and qualified Dr. Budney as an expert witness in "coiled tubing," but not in relation to the application of such goods in the oil and gas industry. On this, the Tribunal said that it would consider his evidence to be that of an ordinary witness.

Dr. Budney testified that the goods in issue are used primarily for downhole servicing to increase production or flow. Dr. Budney explained that, based on the dimensions and strength of the goods in issue, they do not even come close to the smallest diameter or lowest strength of the conventional drilling rod needed to drill for oil and gas. To his knowledge, the range of strengths for coiled tubing was 40,000 to 80,000 pounds per square inch until he saw a document provided by the appellant which indicated yield strength of 100,000 pounds per square inch.[3] He testified that drill pipe has outside diameters of between $2\,^{3}/_{8}$ and $6\,^{5}/_{8}$ inches. He explained that there are also different metallurgical requirements because of the different mechanics associated with its use: drill pipe has to be high strength; it has to be fatigue- and impact-resistant; it cannot be bent. He explained that continuous tubing is designed to resist low-cycle fatigue, which leads to differences in torque capacity, which makes it more suitable for such operations as downhole services, well cleanouts, acid treatments, well stimulation and so on.

Counsel for the appellant submitted that the primary use of the goods in issue is for drilling operations, logging operations, perforating operations and servicing operations. She submitted that the

3. Exhibit A-2 at 2.

evidence showed that, after importation, the goods in issue are transformed from pieces of tubing that are used in the gas and oil industry into integral components or parts of the coiled tubing unit, a process which takes three skilled workers and over four hours to complete. Furthermore, she argued that the types of jobs for which the coiled tubing unit is used changes from day to day. This is why the unit itself is remanufactured constantly to accommodate the activity for which the unit is going to be used, whether it be logging, perforating or drilling. In light of the evidence presented, counsel argued that the goods in issue should be classified under tariff item No. 7306.20.00, as they are of a kind used in drilling for oil and gas. Counsel argued that, in *Canadian Fracmaster Ltd.* v. *The Deputy Minister of National Revenue*,[4] the Tribunal considered a different issue, i.e. the tariff classification of coiled tubing in tariff item No. 8307.10.00 or 7306.50.00.

In support of her argument that the goods in issue should be classified under tariff item No. 7306.20.00, counsel for the appellant referred to the Tribunal's decision in *Ballarat Corporation Ltd.* v. *The Deputy Minister of National Revenue*,[5] where it was decided that the expression "of a kind used" means that goods must possess physical characteristics which make them suitable for use with some of the goods that are within the "of a kind used" defined class of goods. She argued that the Tribunal rejected the argument that there must be something inherent in the design, construction or composition of the goods that makes them suitable for a specific use or application or that they must be suitable primarily for one use rather than another. Counsel submitted that the evidence clearly shows that the goods in issue possess the physical characteristics that make them suitable for oil and gas drilling. In any event, counsel submitted that the goods in issue would meet the stricter test, i.e. the inherent quality standard advocated by the respondent. Counsel referred to Rule 3 (a) of the *General Rules for the Interpretation of the Harmonized System*[6] (the General Rules) and Rule 1 of the *Canadian Rules*[7] which require that, where goods are *prima facie* classifiable under two or more tariff items, the tariff item that provides the most specific description shall be preferred to the tariff items providing a more general description. Accordingly, she argued that the goods in issue should be classified under tariff item No. 7306.20.00, which is the more specific tariff item of the two.

Counsel for the appellant argued that, in order to qualify for the benefits of Code 1570, the goods in issue must meet the following four criteria: (1) the goods must be materials; (2) they must be used in the manufacture of goods; (3) the manufacture must be in respect of the goods of heading No. 87.05 or Chapter 73; and (4) the goods must be used in the exploration, discovery, maintenance, depletion or production of oil or natural gas wells. Counsel argued that the goods in issue are materials and that this fact has not been challenged by the respondent. Furthermore, if goods are manufactured, then clearly the manufacture would be in respect of goods of heading No. 87.05 or of Chapter 73. More specifically, they would be in respect of goods of tariff item No. 8705.90.10, i.e. coiled tubing systems for servicing oil wells, or of articles of iron and steel of Chapter 73. The third criterion would, therefore, be met. Counsel argued that the goods in issue are imported and classified as goods of Chapter 73 and that they undergo a manufacturing process to produce other goods of Chapter 73. With respect to the fourth criterion, counsel argued that there is no dispute that the goods in issue are used in relation to the exploration, development, maintenance and production of oil or gas wells. The only issue would, therefore, be whether the goods in issue are used in the manufacture of goods.

4. Appeal No. AP-95-098, October 31, 1996.
5. Appeal No. AP-93-359, December 19, 1995.
6. *Supra* note 2, Schedule I.
7. *Ibid.*

In support of her argument that the goods in issue are indeed used in the manufacture of other goods, counsel for the appellant referred to the decision of the Supreme Court of Canada in *The Deputy Minister of National Revenue for Customs and Excise* v. *Research-Cottrell (Canada) Limited and Joy Manufacturing Company (Canada) Limited*,[8] where it was held that the assembly of parts may, in certain circumstances, constitute manufacture. She argued that, if this is so, then surely the more complex precision-oriented manufacturing process undertaken by the appellant ought certainly to meet the standard of manufacture required by Code 1570. Counsel also referred to the decision of the Supreme Court of Canada in *Her Majesty the Queen* v. *York Marble, Tile and Terrazzo Limited*,[9] where it was held that manufacture is the production of articles from raw or prepared materials by giving to these materials new forms, qualities and properties or combinations, whether by hand or machinery. She submitted that, in the present case, the evidence shows that the goods in issue, after importation, undergo a process which gives them new forms and properties. She argued that the process of cutting and polishing meets the test enunciated in *York Marble*. More specifically, the goods in issue are cut to length, and the end of the tube is precision welded, bevelled and polished in order to ensure that the pressure is maintained in the well. She argued that the goods are transformed from a piece of tubing into an integral part of the coiled tubing unit. Furthermore, the goods in issue are given new qualities and properties, in that they are precision welded at a different length with the ability to have a variety of tools appended in order to facilitate a wide range of oil and gas well-related activities. She submitted that the Tribunal's decision in *Ardel Steel Ltd.* v. *The Minister of National Revenue*[10] can be distinguished from the present case, in that it involved rebar that was simply cut with a bend put in it. She submitted that this process is not nearly as complex as the one performed by the appellant. She made a similar argument with respect to the Tribunal's decision in *Computalog Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise.*[11]

In the alternative, counsel for the appellant argued that the goods in issue qualify for the benefits of Codes 1551 and 1552. She argued that the goods meet the two criteria of these codes, that is, they are used in the exploration, development, servicing and maintenance of oil or natural gas wells, and they are either well logging or perforating machinery or apparatus or a part thereof. She submitted that the goods in issue are parts of the coiled tubing unit, hence, parts of the well logging and/or perforating machinery. Counsel referred to the Tribunal's decision in *SnyderGeneral Inc.* v. *The Deputy Minister of National Revenue*,[12] where the Tribunal held that there is no universal test for determining whether a product is a part and that each case must be determined on its own merits. She argued that, in the past, the Tribunal has considered such factors as whether the product is essential to the operation of another product; whether the product is a necessary and integral component of the other product; whether the product is installed in the other product; and common trade usage and practice. Counsel submitted that the goods in issue are parts of the coiled tubing unit and, hence, are parts of well logging or perforating machinery, as they meet the four tests. She argued that the machinery cannot be operated without the coiled tubing, that the coiled tubing is a necessary and integral component of the coiled tubing unit, that the goods are installed in the coiled tubing unit, and, finally, in the oil and gas sector, the "coiled unit" is commonly referred to, used and thought of as a part of the coiled tubing unit..

8. [1968] S.C.R 684.
9. [1968] S.C.R. 140.
10. Appeal No. AP-92-158, May 5, 1994.
11. Appeal No. AP-92-265, May 12, 1994.
12. Appeal No. AP-92-091, September 19, 1994.

In the event that the Tribunal finds that the goods in issue are not parts of the coiled tubing unit, counsel for the appellant argued that they are parts of the coiled tubing work reel apparatus. First, she argued that the coiled tubing unit meets the definition of "apparatus," i.e. it is a combination of machinery. She referred to Mr. Mayette's testimony to the effect that the coiled tubing unit includes the coiled tubing, the reel itself and some hydraulic mechanical equipment, all of which are put together for the purpose of supplying and feeding the coiled tubing injector onto the coiled tubing heating unit. Further, she submitted that the goods in issue are parts of the coiled tubing work reel apparatus for the same reasons enunciated earlier.

Counsel for the respondent argued that the primary issue is whether the goods in issue are of a kind used for drilling for oil and gas. He acknowledged that they are used in the oil and gas industry, but only for maintaining and servicing wells and not for drilling. Counsel argued that the Tribunal cannot rely on Mr. Mayette's testimony that the 1.25-inch and 1.5-inch tube was actually used in drilling for oil and gas. He stressed that Mr. Mayette could not point to any specific documentary evidence to show that 1.25- and 1.5-inch tubing was actually used to drill for oil or gas. Counsel noted that Mr. Mayette did not explain the characteristics that the tubing must have in order to be suitable for drilling. He argued that Mr. Mayette's testimony with regard to the dates on which the goods in issue were actually put to such use was not reliable. Counsel compared this to the testimony of Dr. Budney, a recognized expert in the field. In particular, counsel referred to Dr. Budney's testimony to the effect that the goods in issue are not used for drilling, but rather for maintenance and servicing. In addition, he established the difference in physical characteristics between coiled tubing and a drill rod. Counsel argued that Dr. Budney's testimony should be preferred to that of Mr. Mayette and to the documentary evidence, which was presented in support of the appellant's case.

Counsel for the respondent argued that the goods in issue are properly classified under tariff item No. 7306.50.00. Counsel referred to the Tribunal's 1996 decision in *Canadian Fracmaster*, where the Tribunal held that the respondent did not err in classifying coiled tubing in subheading No. 7306.50. Counsel argued that this decision is determinative of the present appeal, as the two appeals involved the same goods. He argued that, in deciding that coiled tubing was properly classified in subheading No. 7306.50, the Tribunal necessarily rejected all of the alternative possible classifications. The Tribunal's 1996 decision in *Canadian Fracmaster* not having been appealed, it stands as the Tribunal's final decision. Counsel argued that, although the Tribunal is not bound by its previous decisions, it is trite law that all judicial bodies strive for consistency in their decision making. Therefore, for the sake of consistency, counsel urged the Tribunal to follow its previous decision and decide, once again, that the goods in issue are properly classified in subheading No. 7306.50. Counsel argued that the appellant's argument in the present case was implicitly rejected by the Tribunal when it decided *Canadian Fracmaster* in 1996.

Counsel for the respondent argued that the doctrine of *res judicata* applies in the present case to prevent the appellant from relitigating the issue of the proper tariff classification of the goods in issue. He relied on a 1998 decision of the Tribunal in *Canadian Fracmaster Ltd.* v. *The Deputy Minister of National Revenue*,[13] in which the Tribunal allowed a motion brought by the respondent to dismiss an appeal on the ground that the issue was *res judicata*. Counsel argued that this appeal should be dismissed for the same reasons that the *Canadian Fracmaster* 1998 appeal was dismissed, that is, the goods in issue are the same, the Tribunal's 1996 decision in *Canadian Fracmaster* was final, and the parties are the same. With respect to this latter condition, counsel noted that the evidence showed that, since Flextube was purchased by Fracmaster, they are essentially one and the same.

13. Appeal No. AP-97-059, May 29, 1998.

With respect to the applicability of Code 1570, counsel for the respondent argued that the goods in issue are not used in the manufacture of any of the goods listed in Chapter 73. He argued that, by splitting a pipe in half or attaching a valve at the end of a pipe, the appellant does not manufacture another product. Counsel referred the Tribunal to its decision in *Computalog* in support of his argument. He argued that preparing the tubing for use in the wells does not constitute "manufacturing" for the purposes of Code 1570. As such, counsel argued that the goods in issue cannot benefit from duty free entry under Code 1570.

Counsel for the respondent filed a supplementary brief in which he argued that the goods in issue do not qualify for the benefits of Codes 1551 and 1552. With respect to Code 1551, counsel argued that the goods in issue are not well logging machinery. He referred to the Tribunal's decision in *Schlumberger of Canada, A Division of Schlumberger Canada Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*,[14] in which it was held that an acceptable meaning of the expression "well logging" is "[t]o take and record borehole geophysical measurements.[15]" He noted that, in that case, there was insufficient evidence presented to show that components of a communications network which function as a logging data transmission service were either well logging equipment or parts thereof. Counsel argued that this is the situation in the present case, i.e. there was insufficient evidence presented that the goods in issue were in fact used "[t]o take and record borehole geophysical measurements." Counsel also referred to the Tribunal's decision in *Computalog*, where a similar decision was reached. For similar reasons, counsel submitted that the goods in issue are not well logging apparatus. Counsel added that they are not apparatus, as this term, when used in the *Customs Tariff*, refers to a complex device designed for a special use. He argued that the goods in issue are merely tubes. No evidence was led by the appellant that they were, in any way, complex devices designed for special use, any more than was the electrical wire line cable in *Computalog*.

Counsel for the respondent also argued that the goods in issue are not parts of well logging machinery or apparatus, any more than they are well logging machinery or apparatus for the reasons set out earlier. Counsel noted that it is well established that for an article to be a part of another article for the purposes of the *Customs Tariff*, the first article must be manufactured to a degree that commits it to a particular application,[16] meaning a particular piece of machinery. Parts must also be recognizable articles in themselves and committed by design or manufacture for use with other articles in order to be considered parts of those articles. He argued that the fact that some components are used together does not make them parts of each other. He submitted that no evidence was presented to show that the goods in issue were, in any way, manufactured to be committed to a particular application. Furthermore, no evidence was presented to show that they were truly parts of some machinery rather than mere components of a system. Finally, counsel noted that the Tribunal held, in *Computalog*, that, in order for a "good" to be classified under a code of Schedule II as a part, the "good" must also be initially classified under a tariff item in Schedule I as a part. Counsel argued that this is not the case in the present appeal. Counsel made similar arguments in support of his position that the goods in issue do not qualify for the benefits of Code 1552.

In her reply submissions, counsel for the appellant argued that Mr. Mayette's testimony and Exhibit A-2 provide clear evidence that the coiled tubing unit machine and the coiled tubing unit work reel apparatus are used in well logging and well perforating applications. She noted that he specifically testified

14. Appeal No. 2898, September 10, 1990.
15. *Ibid.* at 14.
16. See *Access Corrosion Services Ltd.* v. *The Deputy Minister of Revenue for Customs and Excise*, 9 TBR 184 at 188.

that the coiled tubing work units are consistently and constantly used in well logging and well perforating applications. Therefore, counsel submitted that the coiled tubing work unit and the coiled tubing work reel apparatus are machinery and apparatus used in well logging and well perforating, as required by Codes 1551 and 1552. She submitted that the coiled tubing work reel apparatus meets the respondent's definition of "apparatus," i.e. a complex device designed for special use. More particularly, it consists of many parts, including hydraulics, measuring devices, a work reel, coiled tubing, etc. She submitted that the coiled tubing is committed by design and manufacture for use with the coiled tubing machine and work reel. She referred to the evidence which showed that it is manufactured by the suppliers for use in the coiled tubing unit and work reel apparatus.

Counsel for the appellant argued that it is not necessary for a "good" to be classified as a part in Schedule I to the *Customs Tariff* in order for it to be considered a part for the purposes of Schedule II. She noted that there are numerous goods in the tariff that are clearly parts of machines or equipment, but are nonetheless correctly classified in a specific heading of the tariff. For example, a valve for a compressor is clearly a part of that compressor, but is nonetheless correctly classified in a heading covering "valves" and not as a part of that compressor. Similarly, counsel argued that the goods in issue are clearly a part of either the coiled tubing unit or the coiled tubing work reel apparatus, but are nonetheless correctly classified in a heading that specifically provides for tubing. Counsel argued that an absurd result would occur if the word "part" for the purposes of Schedule II to the *Customs Tariff* was interpreted to apply only to those items that were classified as a part in Schedule I to the *Customs Tariff*. She reiterated that the proper test for determining whether or not an item is a part was set out in *SnyderGeneral.*.

There are essentially three issues that must be decided by the Tribunal. The first issue is whether the doctrine of *res judicata* applies to prevent the Tribunal from hearing the present appeal. The second issue is the proper tariff classification of the goods in issue, and the third issue deals with the applicability of Codes 1570, 1551 and 1552.

With respect to the first issue, the Tribunal notes that, in *I.D. Foods Superior Corp.* v. *The Deputy Minister of National Revenue*,[17] it conducted a review of the law surrounding the applicability of the doctrine of *res judicata* to administrative tribunals. The Tribunal held that, although it is well-settled law that administrative tribunals are not bound by their previous decisions, the doctrine of *res judicata* can apply to proceedings before administrative tribunals in order to prevent the hearing of a matter that has already been decided. The Tribunal relied on the decision of the Federal Court of Appeal in *O'Brien* v. *Canada (Attorney General)*[18] and the decision of the Federal Court of Canada - Trial Division in *Canada (Attorney General)* v. *Canada (Human Rights Commission)*[19] in making its decision. In *I.D. Foods*, the Tribunal noted that there appeared to be two separate doctrines: the doctrine of *res judicata*/cause of action and the doctrine of *res judicata*/issue estoppel.

The first doctrine, *res judicata*/cause of action, is the one that applies to deny a party's right to a hearing on the merits where another action is brought for the same cause of action as was the subject of previous adjudication, and the second one, *res judicata*/issue estoppel, applies to deny a party's right to a hearing on the merits, where, the cause of action being different, some point or issue of fact has already been

17. Canadian International Trade Tribunal, Appeal No. AP-95-252, December 12, 1996.
18. 12 Admin. L.R. (2d) 287, Court File No. A-291-91, April 16, 1993.
19. (1991), 43 F.T.R. 47, Court File No. T-381-90, April 24, 1991.

decided.[20] As the appeal in *I.D. Foods* dealt with a different importation from the one in the previous appeal, the Tribunal held that the doctrine of *res judicata*/cause of action did not apply to prevent the Tribunal from hearing the appeal. However, the Tribunal held that the doctrine of *res judicata*/issue estoppel did apply to prevent the Tribunal from hearing the merits of the appeal, as the following three requirements had been met: (1) the same question had been decided; (2) the judicial decision which was said to create the estoppel was final; and (3) the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel was raised.

As in *I.D. Foods*, the present appeal deals with different importations from the ones that were in issue in the Tribunal's 1996 decision in *Canadian Fracmaster*. For this reason, the Tribunal is of the view that the doctrine of *res judicata*/cause of action does not apply to prevent the Tribunal from hearing this appeal. The Tribunal is also of the view that the doctrine of *res judicata*/issue estoppel does not apply to prevent it from hearing this appeal because the question raised in this appeal is different from the question raised in its 1996 decision in *Canadian Fracmaster*. In that decision, the issue was whether "coiled tubing" should be classified under tariff item No. 7306.50.00 or 8307.10.00. In the present appeal, the issue is whether "coiled tubing" is properly classified under tariff item No. 7306.50.00 or should be classified under tariff item No. 7306.20.00. Furthermore, the parties to this appeal are not the same parties as the ones in the Tribunal's 1996 decision in *Canadian Fracmaster*.

With respect to the second issue, the Tribunal notes that, when classifying goods in Schedule I to the *Customs Tariff*, the application of Rule 1 of the General Rules is of the utmost importance. Rule 1 states that classification is first determined according to the terms of the headings and any relative Chapter Notes. Therefore, the Tribunal must determine whether the goods in issue are named or generically described in a particular heading. If they are, then they must be classified therein subject to any relative Chapter Note. Section 11 of the *Customs Tariff* provides that, in interpreting the headings or subheadings, the Tribunal shall have regard to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.[21]

To be classified under tariff item No. 7306.20.00, the goods in issue must be of a kind used in drilling for oil or gas. In *Ballarat*, the Tribunal held that the expression "of a kind used in" means that goods must be capable of, or suitable for, use with other goods. On balance, the Tribunal accepts Mr. Mayette's testimony to the effect that 1.25-inch and 1.5-inch tubing was used in drilling applications as early as 1988. Mr. Mayette testified that he was on location in at least three of those instances where the 1.25-inch tubing was used, namely, March 1989, September 1991 and June 1993. He further stated that drilling was performed "many times" with 1.5-inch tubing as well and that such drilling was a routine part of the operation and that these were not isolated incidents. The Tribunal notes that Mr. Mayette was, at the time, President and General Manager of Flextube Inc. and was, therefore, in a position to know the application to which the coiled tubing in issue was being put. Dr. Budney, who was not qualified as an expert in oil and gas applications, was unable to convince the Tribunal that 1.25- and 1.5-inch coiled tubing was not of a kind used in oil and gas drilling. In the Tribunal's view, Dr. Budney appeared to be unaware of recent technology developments in the area and had admittedly no field experience in oil and gas operations. Other than indicating that he was unaware of such use being made of 1.25- and 1.5-inch tubing, summarizing very generally differences between coiled tubing and drill pipe and indicating that there were differences in torque capacity, Dr. Budney was unable to offer helpful guidance to the Tribunal.

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20. *Supra* note 17 at 4-5, where the Tribunal relied on the decision of the Federal Court of Canada - Trial Division in *Musqueam Indian Band* v. *Canada (Minister of Indian and Northern Affairs)*, [1990] 2 F.C. 351.
21. Customs Co-operation Council, 1st ed., Brussels, 1986.

The Tribunal, therefore, finds that the goods in issue are of a kind used in drilling for oil or gas. As such, they should be classified under tariff item No. 7306.20.00 as casing and tubing of a kind used in drilling for oil and gas. The Tribunal relies on Rule 3 (a) of the General Rules, which provides that the heading which provides the most specific description shall be preferred to headings providing a more general description, and Rule 1 of the *Canadian Rules*, which provides that this also applies to the classification of goods under the tariff items or in the subheadings. Accordingly, this part of the appeal is allowed.

The remaining issue with which to deal is the applicability of Codes 1570, 1551 and 1552 to the goods in issue. Code 1570 provides for the duty-free entry of goods meeting the following description:

> Materials for use in the manufacture of goods of Section XVI, of Chapter 40, 73 or 90 or of heading No. 59.10 or 87.05 (excluding the motor vehicle chassis portion and parts thereof), such goods being used in the following operations:
>
> 1570 The exploration, discovery, development, maintenance, testing, depletion or production of oil or natural gas wells up to and including the wellhead assembly or surface oil pumping unit.

The Tribunal is of the view that the goods in issue are clearly not materials for use in the manufacture of goods of Chapter 73. The goods in issue are themselves goods of Chapter 73. Therefore, in the Tribunal's view, they cannot be materials used in the manufacture of such goods, as they are one and the same.

The Tribunal is also of the view that insufficient evidence was introduced to establish that the goods in issue were for use in the manufacture of goods of heading No. 87.05, namely, in this instance, coiled tubing systems for servicing oil wells. The Tribunal notes that section 4 of the *Customs Tariff* provides that the expression "for use in," wherever it occurs in a tariff item in Schedule I or a code in Schedule II in relation to goods, means, unless the context otherwise requires, that the goods must be wrought into, attached to or incorporated into other goods as provided for in that tariff item or code. The appellant testified that the coiled tubing was suitable for a variety of applications, including drilling, which is not a servicing function. The Tribunal is unable to conclude, on the basis of this evidence, that the goods in issue were for use in the manufacture of goods of heading No. 87.05. Moreover, the Tribunal is not satisfied that the process involved in attaching fittings and cutting the tubing, whether welding procedures are involved or not, is tantamount to manufacture. In the Tribunal's view, the coiled tubing does not undergo a transformation such that it changes the nature of the tubing. Therefore, the tests put forth in *York Marble* and applied in *Ardel Steel* are not met. In light of the foregoing, the Tribunal finds that the goods in issue do not qualify for the benefits of Code 1570. This part of the appeal is, therefore, dismissed.

Codes 1551 and 1552 provide for the duty-free entry of goods meeting the following description:

> The following to be employed in the exploration, discovery, development, maintenance, testing depletion or production of oil or natural gas wells or for use in drilling machinery to be employed in the exploration, discovery, development or operation of potash or rock salt deposits, excluding the motor vehicle chassis portion and parts thereof of special purpose motor vehicles of heading No. 87.05, all other motor vehicles of Chapter 87 and geophysical instruments of heading No. 90.15:
>
> 1551 Well logging machinery, apparatus and parts thereof
>
> 1552 Well perforating machinery, apparatus and parts thereof

In the Tribunal's view, the goods in issue do not qualify as well logging or perforating machinery or apparatus. It was not demonstrated that the goods have moving parts in order for them to qualify as machinery, nor was it demonstrated that they are complex devices in order for them to qualify as apparatus.

The Tribunal is also unable to qualify the goods in issue as parts of well logging or perforating machinery or apparatus. The Tribunal has considered the evidence against the factors laid out in *SnyderGeneral* and the principle set down in *Access Corrosion* which states that, in determining whether an article is part of another, the article must be manufactured to a degree that commits it to a particular application.[22] The Tribunal notes that counsel for the appellant argued that the coiled tubing is a necessary and integral component of the coiled tubing unit and that it was installed therein, and that the appellant's witness testified that coiled tubing units were used for "perforating" and for "logging". However, the appellant has not established to the Tribunal's satisfaction that the coiled tubing units or the coiled tubing work reel, with which the goods in issue are used, are in fact well logging or perforating machinery or apparatus, and not drilling machinery or apparatus or other goods. The Tribunal also notes, in this regard, that it has concluded that the goods in issue are of a kind used in drilling for oil and gas. Indeed, counsel for the appellant argued that the types of applications for which the coiled tubing units are used change from day to day and that the units are constantly remanufactured. Consequently, the appellant failed, in the Tribunal's view, to demonstrate that the goods in issue are installed in and are necessary and integral components of well logging or perforating machinery or apparatus, or that they were manufactured to a degree that commits them to a particular application. In light of the foregoing, the Tribunal finds that the goods in issue do not qualify for the benefits of Code 1551 or 1552. This part of the appeal is, therefore, also dismissed.

Accordingly, the appeal is allowed in part.

Richard Lafontaine
Richard Lafontaine
Presiding Member

22. *Supra* note 16.