CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, February 6, 1997

Appeal Nos. AP-95-020, AP-95-046 and AP-96-069

IN THE MATTER OF appeals heard on December 5, 1996, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated April 21, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

BLACK & DECKER CANADA INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-95-020, AP-95-046 and AP-96-069

BLACK & DECKER CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

These are appeals under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue under section 63 of the *Customs Act*. The issue in these appeals is the proper classification of thermostats imported by the appellant in several transactions for use with electric fry pans. The parties agree that the goods in issue are classifiable in subheading No. 9032.10 as thermostats, but are in contention as to the proper tariff item.

HELD: The appeals are dismissed. These appeals clearly turn on the interpretation to be given to the phrase "Of a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*]" in tariff item No. 9032.10.10. There is, no doubt, some ambiguity attached to the phrase and, more specifically, to the words "Of a kind used." Some clarification is afforded in the text of the Tribunal's decision in *Ballarat Corporation Ltd.* v. *The Deputy Minister of National Revenue,* where the Tribunal appears to have placed more emphasis upon the kind of device than on its actual use. In that case, the Tribunal said that the time switches must be capable of, or suitable for, use with such goods, but need not actually be used with such goods. By contrast, it is evident that the thermostats in issue are specifically designed and configured for use with a particular type of electric fry pan. No evidence was adduced to persuade the Tribunal that the goods, as imported, were suitable for use with any other goods, let alone the goods of Schedule VI.

In effect, the appellant's representative argued that the words "Of a kind" relate to the very basic or fundamental principles of operation of thermostats. As such, he argued that those that operate on the principle of the differential expansion rate of two different metals are all of the same kind. This interpretation goes far beyond the conclusions reached by the Tribunal in *Ballarat* where it declared simply that, though there was no requirement that the goods actually be used, there was a requirement that the goods be suitable for, or capable of, use with the goods of Schedule VI. It was conceded by the appellant that there was no evidence that the thermostats in issue were used for, or capable of, such use. Thus, the appellant sought to qualify the goods in issue on the basis of the fact that they operated on the same principle as thermostats that were actually used or capable of use with the goods of Schedule VI. In the Tribunal's view, that is not the intent of the statement in the *Customs Tariff*. As such, the Tribunal finds that the goods in issue are properly classified under tariff item No. 9032.10.90.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 5, 1996
Date of Decision:	February 6, 1997

Tribunal Member: Charles A. Gracey, Presiding Member

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Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Douglas J. Bowering, for the appellant Frederick B. Woyiwada, for the respondent

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Appeal Nos. AP-95-020, AP-95-046 and AP-96-069

BLACK & DECKER CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member

REASONS FOR DECISION

These are appeals under section 67 of the *Customs Act*[1] (the Act) from decisions of the Deputy Minister of National Revenue under section 63 of the Act. The appeals were heard by one member of the Tribunal.[2]

The issue in these appeals is the proper classification of thermostats imported by the appellant in several transactions for use with electric fry pans. The parties agree that the goods in issue are classifiable in subheading No. 9032.10 of the *Customs Tariff*[3] as thermostats, but are in contention as to the proper tariff item.

Mr. Mark D. Jackson, a senior product engineering specialist with Black & Decker Canada Inc. appeared as a witness and, through his testimony, explained the nature and operating principles of thermostats, in general, and of the goods in issue, in particular.

Mr. Jackson explained that the thermostats in issue have a plug and can be detached from the fry pan so that the fry pan can be cleaned in water. The goods in issue consist of a thermostat attached to and activated by a dial-type switch, with which the user selects the desired temperature, and of a probe which connects the power source to the heating element in the fry pan. The thermostat itself consists of two different metals, namely, nickel and stainless steel. These two metals have differential expansion rates and, when heat is applied by the element in the fry pan, their differential expansion rates cause the switch to open at the desired temperature, thus interrupting the flow of electricity to the element. When the temperature drops, the switch is again closed, completing the power circuit to the element.

Mr. Jackson also explained the operation of two devices which he referred to as "Thermoswitch Temperature Controllers" and "snap-acting thermostats." He stated that they operated on "the same basic concepts" as the goods in issue, inasmuch as they involve the differential expansion rates of different metals

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1. R.S.C. 1985, c. 1 (2nd Supp.).
2. Section 3.2 of the *Canadian International Trade Tribunal Regulations*, added by SOR/95-27, December 22, 1994, *Canada Gazette* Part II, Vol. 129, No. 1 at 96, provides, in part, that the Chairman of the Tribunal may, taking into account the complexity and precedential nature of the matter at issue, determine that one member constitutes a quorum of the Tribunal for the purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to the Act.
3. R.S.C. 1985, c. 41 (3rd Supp.).

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to open and close switches. Mr. Jackson also referred to electronic-type thermostats that used "thermistors," but did not further explain the principles of operation of such devices.

Though considerable evidence was adduced by the appellant's witness to clarify the physical principles at play, there was no dispute between the parties concerning those principles. Thus, the issue of the nature of the goods was not argued. In fact, the parties had agreed that the goods in issue were thermostats and agreed on the appropriate classification up to the six-digit level, namely, that the goods should be classified in subheading No. 9032.10 as thermostats.

The dispute was at the tariff item level, where the appellant claimed that the goods in issue should be classified under tariff item No. 9032.10.10 because they are "[o]f a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*]." The respondent classified the goods under tariff item No. 9032.10.90 as other thermostats, meaning thermostats other than those of tariff item No. 9032.10.10.

There being no dispute as to the principles of operation of the thermostats in issue, the parties were encouraged and agreed to confine their arguments to the meaning that should be given to the words "Of a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*]."

In argument, the appellant's representative conceded, at the outset, that the goods in issue were not used with the goods classified under the tariff items enumerated in Schedule VI. However, the representative contended that actual use with the goods of Schedule VI was not an essential condition and that, whether so used or not, the thermostats in issue were "[o]f a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*]." Thus, the representative argued that the emphasis in the phrase should fall upon the words "[o]f a kind," arguing that, if the thermostats in issue were of the kind used with the goods classified under the tariff items enumerated in Schedule VI to the *Customs Tariff*, they should, therefore, be classified as claimed by the appellant.

In support of his position, the appellant's representative relied partly upon the Tribunal's decision in *Ballarat Corporation Ltd.* v. *The Deputy Minister of National Revenue*.[4] That case involved time switches and the meaning to be given to the statement "Of a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*]." In that case, the Tribunal found that the time switches in issue had "the physical characteristics that make them suitable for use with ... some of the goods classified under the tariff items enumerated in Schedule VI.[5]" The representative pointed out that, in that case, the Tribunal had determined that it was not necessary that the goods be actually used with such goods.

Counsel for the respondent argued that a different interpretation should be applied to the aforementioned statement. Counsel pointed out that, as the appellant had conceded, the goods in issue were not actually used with any of the goods classified under the tariff items enumerated in Schedule VI. This alone distinguishes the present appeals from *Ballarat*. Counsel submitted that, in *Ballarat*, it had been determined that the time switches in issue were suitable for use, or were capable of such use, with several of the goods classified under the tariff items enumerated in Schedule VI.

4. Appeal No. AP-93-359, December 19, 1995.
5. *Ibid*. at 3.

Counsel for the respondent quoted further from *Ballarat* where it was said that "the Tribunal interprets this use condition to mean that the goods must be capable of, or suitable for, use with such goods.[6]" Further, counsel pointed out that the appellant had identified several such goods and that the Tribunal concurred by stating that it "has no doubt that the time switches in issue possess the physical characteristics that make them suitable for use with these goods.[7]"

Counsel for the respondent, in the present appeals, further argued that, in *Ballarat*, the respondent had argued that, for goods to qualify under the phrase "Of a kind used," there should be something inherent in their design, construction or composition that makes them suitable solely or principally for a specific use or application. While the Tribunal had rejected such an argument, counsel argued that, in the present appeals, the goods were not even usable in their present construction for use with any of the goods classified under any of the tariff items enumerated in Schedule VI. Thus, counsel argued that the appellant cannot rely upon *Ballarat*, where the time switches, though not designed for use principally or exclusively with the goods of Schedule VI, were nonetheless suitable for use with those goods.

These appeals clearly turn on the interpretation to be given to the phrase "Of a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*]." There is, no doubt, some ambiguity attached to the phrase and, more specifically, to the words "Of a kind used." Some clarification is afforded in the text of the *Ballarat* decision, where the Tribunal appears to have placed more emphasis upon the kind of device than on its actual use. In that case, the Tribunal said that the time switches must be capable of, or suitable for, use with such goods, but need not actually be used with such goods. By contrast, it is evident that the thermostats in issue are specifically designed and configured for use with a particular type of electric fry pan. No evidence was adduced to persuade the Tribunal that the goods, as imported, were suitable for use with any other goods, let alone the goods of Schedule VI.

In effect, the appellant's representative argued that the words "Of a kind" relate to the very basic or fundamental principles of operation of thermostats. As such, he argued that those that operate on the principle of the differential expansion rate of two different metals are all of the same kind. This interpretation goes far beyond the conclusions reached by the Tribunal in *Ballarat* where it declared simply that, though there was no requirement that the goods actually be used, there was a requirement that the goods be suitable for, or capable of, use with the goods of Schedule VI. It was conceded by the appellant that there was no evidence that the thermostats in issue were used for, or capable of, such use. Thus, the appellant sought to qualify the goods in issue on the basis of the fact that they operated on the same principle as thermostats that were actually used or capable of use with the goods of Schedule VI. In the Tribunal's view, that is not the intent of the statement in the *Customs Tariff*. As such, the Tribunal finds that the goods in issue are properly classified under tariff item No. 9032.10.90.

Accordingly, the appeals are dismissed.

Charles A. Gracey
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Presiding Member

6. *Ibid.*
7. *Ibid.*