



Ottawa, Wednesday, November 12, 1997

Appeal Nos. AP-95-127 and AP-95-191

IN THE MATTER OF appeals heard on July 16, 1997, 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 August 2, 1995, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

ERV PARENT CO. LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member

Michel P. Granger

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-95-127 and AP-95-191

ERV PARENT CO. LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

These are appeals under subsection 67(1) of the *Customs Act* from decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the *Customs Act*. The issue in these appeals is whether various imported products described as hand rails, corner guards and wall guards are properly classified under tariff item No. 7610.90.00 as aluminum profiles prepared for use in structures, as determined by the respondent, or should be classified under tariff item No. 7604.29.12 as aluminum profiles, as claimed by the appellant.

HELD: The appeals are dismissed. The agreed statement of facts provides that there are no other uses for the retainers in issue other than as components in the wall and corner guards. As such, the Tribunal is persuaded that the goods in issue are for use in structures. In considering the issue of whether the goods in issue are “prepared” for use in structures, the Tribunal referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (the Explanatory Notes) to heading No. 73.08 which, as both parties acknowledged, also apply to heading No. 76.10. The Explanatory Notes to heading No. 73.08 provide that the heading includes certain products which “have been prepared (e.g., drilled, bent or notched) for use in structures.” The Tribunal found that the samples of the goods in issue had been bent and drilled. Moreover, the agreed statement of facts indicates that all that is required for installation of the goods in issue is to assemble the components of the wall and corner guards and then to custom fit the wall and corner guards to the wall detail and cut them to size. As stated in the General Explanatory Note to Chapter 72, which also applies to Chapter 76, finishing operations, such as sizing, can be performed on finished products without affecting their classification. Based on these facts, the Tribunal concludes that the goods in issue have been prepared for use in structures.

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 16, 1997
Date of Decision: November 12, 1997

Tribunal Member: Robert C. Coates, Q.C., Presiding Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Anne Jamieson

Parties: A. Gurniak, for the appellant
Ian McCowan, for the respondent

Appeal Nos. AP-95-127 and AP-95-191

ERV PARENT CO. LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member

REASONS FOR DECISION

These are appeals, heard by one member of the Tribunal,¹ under subsection 67(1) of the *Customs Act*² (the Act) from decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the Act. The respondent gave the following reason for the decisions: “Based on the literature and sample provided the handrails and guardrails are made of aluminum and a rigid vinyl cover is snapped on them. The main component of this product is aluminum and as articles used in structures they are provided for in heading 7610. The handrail and guardrail are therefore classified under tariff item 7610.90.00.”

The issue in these appeals is whether various imported products described as hand rails, corner guards and wall guards are properly classified under tariff item No. 7610.90.00 of Schedule I to the *Customs Tariff*³ as aluminum profiles prepared for use in structures, as determined by the respondent, or should be classified under tariff item No. 7604.29.12 as aluminum profiles, as claimed by the appellant.

The following is the relevant tariff nomenclature:

76.04	Aluminum bars, rods and profiles. -Of aluminum alloys:
7604.29	--Other
7604.29.12	----Bars and rods, of a maximum cross-sectional dimension not exceeding 12.7 mm; profiles
76.10	Aluminum structures (excluding prefabricated buildings of heading No. 94.06) and parts of structures (for example, bridges and bridge-sections, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, balustrades, pillars and columns); aluminum plates, rods, profiles, tubes and the like, prepared for use in structures.
7610.90.00	-Other

1. 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 *Customs Act*.

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

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

At the joint request of the appellant and the respondent, the appeal proceeded by way of written submissions under rule 25 of the *Canadian International Trade Tribunal Rules*,⁴ on the basis of the Tribunal's record, including the parties' briefs and the agreed statement of facts.

The agreed statement of facts is as follows:

1. The Appellant carries on business in the City of New Westminster, British Columbia.
2. The Appellant imported wall guards and corner guards of various types (hereinafter the "aluminum retainers"). Specifically, two types of "Pro-Tek Wall Guards" - model numbers WG-4 and WG-8, and two types of "Pro-Tek Corner Guards" - model numbers CG-10 and CG-135. Attachment "A" to this agreement is a 1995 catalogue from Pawling Corporation entitled "Impact Protection Systems - Architectural Interiors" which describes the goods at issue. Attachment "B" is a box which contains samples of the goods at issue. There are no goods of the "BR" model number at issue in this appeal.
3. Pawling is an American manufacturer of architectural products. Pawling sold the goods at issue to the Appellant. Pawling does not specialize in the manufacture of aluminum products.
4. The aluminum retainers are imported into Canada as unassembled parts of aluminum retainers. Attachment "C" is a copy of import documentation for the goods at issue which demonstrates the manner of importation.^[5]
5. The invoices show that the goods are imported in varying models, lengths and quantities.
6. The unassembled parts of [aluminum] retainers then require limited assembly to prepare the aluminum retainers to be affixed to an interior wall of a building to form wall guards, handrails, cornerguards, etc.
7. The parties are in agreement that the goods at issue may be characterized as aluminum profiles. The Appellant seeks to classify the goods as "*aluminum profiles*" while the Respondent maintains that the appropriate classification is "*aluminum profiles prepared for use in structures*".
8. The sole issue then is whether the goods at issue may be characterized as being prepared for use in structures.

The Tribunal requested further information from the appellant concerning the steps involved to assemble the wall guards and corner guards and the types, features and uses of aluminum retainers. The following is the appellant's response, with which the respondent has agreed and which is included as part of the agreed statement of facts:

All aluminum retainers are supplied by Pawling Corp. at a fixed length. Hand rail retainers are in 12' lengths and a limited line of 10' lengths. Wall Guard retainers are supplied in 12' lengths only, including cove base. Corner Guard retainers are supplied in 4', 8' and 9' lengths.

1. All of the retainers are custom fit to the wall detail and cut to size at the job site. The lengths and angles on end retainers must be tied to wall studs or anchored by toggle bolts. Flush mounted corner guard retainers must be set in prior to drywall and custom fit to accept 4" or 6" cove base toe inserts. Once the aluminum retainer has been mounted to the wall it is now ready to accept the vinyl coverings chosen for that specific job. The vinyl covering is then cut to the size of the retainer and attached to it.

4. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912.

5. The invoices from Pawling Corporation list such goods as a wall cover, corner guard aluminum, corner guard vinyl, wall guard aluminum, wall guard vinyl, end cap for wall guard, bumper alignment cushion and a top cap.

2. The aluminum retainers at issue in this appeal are the only type of retainer made by Pawling Corp.
3. There are no other uses for the aluminum retainers made by Pawling Corporation.

In the appellant's brief, it is submitted that the goods in issue should be considered materials and not parts of structures or profiles prepared for use in structures under tariff item No. 7610.90.00. The appellant submits that the reference to parts of structures in heading No. 76.10 is intended to provide for those components of structures which are essential to floors, walls, ceilings, etc., or necessary to reinforce same, and which are punched, drilled, shaped and cut to sizes ready for use.

The appellant submits that the goods in issue imported in various lengths should qualify for entry under tariff item No. 7604.29.12 due to the fact that they do not become finished articles until such time as they are cut to required lengths and have holes drilled for installation purposes on the job sites by contractors or installers. The polyvinyl chloride extrusion is also cut to the required lengths and becomes part of the finished products, hand rails, corner guards and/or wall guards. In the appellant's view, the goods in issue, which are fabricated from the imported materials, are fittings added to structures for cosmetic purposes and/or to protect certain parts of the actual structure. The appellant suggests that the goods in issue, if imported pre-cut, pre-drilled and ready for installation, would be classified under tariff item No. 8302.41.90 which provides for "fittings ... [s]uitable for buildings."

Finally, the appellant refers to the relevant *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁶ (the Explanatory Notes) to heading No. 73.08 which apply *mutatis mutandis* to heading No. 76.10 and which state that the heading covers "parts" which have been prepared for use in structures. The appellant submits that the goods in issue have not been prepared or fabricated in any manner or form at the time of importation.

In the respondent's brief, it is argued that, by the application of Rule 1 of the *General Rules for the Interpretation of the Harmonized System*⁷ and by reference to the relevant Explanatory Notes, it is clear that the goods in issue are properly classified as aluminum profiles prepared for use in structures under tariff item No. 7610.90.00. The respondent argues that the Explanatory Notes to heading No. 73.08 stipulate that metal structures, as well as parts of structures, are characterized by the fact that, once they are put in position, they remain in that position. In the respondent's view, the goods in issue meet this definition. The respondent submits further that among the goods listed as being classified in heading Nos. 73.08 to 76.10 are rails for balconies and verandas. In the respondent's view, the retainers in issue are rails and, therefore, would be classified in the same heading.

It is the respondent's position that the fact that the goods in issue "are cut to required lengths and have holes drilled for installation purposes on the job sites by contractors" demonstrates that the goods have the character of finished products at the time of importation, since there is no further manufacture, machining or fabrication done to them. Moreover, the respondent refers to the General Explanatory Note to Chapter 72, which also applies to Chapter 76, which enumerates finishing operations which can be performed on finished products without affecting their classification. These operations include turning, milling, grinding, perforation or punching, and sizing. The respondent submits, therefore, that the goods in issue can be considered finished products.

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

7. *Supra* note 3, Schedule I.

The respondent disputes the appellant's characterization of the goods in issue as parts and states that the goods in issue are not being classified in heading No. 76.10 as parts of structures. Rather, the goods in issue are being classified in heading No. 76.10 as aluminum plates, rods, profiles, tubes and the like, prepared for use in structures. The respondent submits that the goods in issue constitute a system of protection for walls, the components of which are aluminum retainers, vinyl snap-on covers and end caps. Each model of aluminum retainer is committed for a specific purpose, namely, to attach to a wall. In the respondent's view, since the aluminum retainers are dedicated to a specific use, they cannot be classified under tariff item No. 7604.29.12.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the General Rules and the *Canadian Rules*. Rule 1 of the General Rules provides that classification is to be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the principles set out in Rules 2 through 6, as well as the *Canadian Rules* which follow. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the Explanatory Notes as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*. Thus, the Tribunal must first consider whether the goods in issue fall within either or both of the terms of heading Nos. 76.04 and 76.10, as interpreted with the aid of the relevant Section or Chapter Notes and the Explanatory Notes.

As indicated in the agreed statement of facts, the goods in issue are comprised of various pieces which are cut and fit together to make wall guards, corner guards and retainers. The majority of the pieces are made of aluminum, with corresponding pieces of vinyl to be used as coverings for the aluminum. Rule 2 (a) of the General Rules provides that a reference in a heading to an article shall include a reference to that article complete or finished presented unassembled or disassembled. The Tribunal accepts, based on the description in the agreed statement of facts, that the goods in issue, which include various individual items, such as corner guard aluminum, corner guard vinyl, wall guard aluminum, wall guard vinyl, end caps for wall guard, bumper alignment cushions and retainers, constitute wall guards and corner guards imported in an unassembled form. Moreover, the Tribunal observes that the parties have agreed that the goods in issue are properly classified as base metals and, more particularly, as aluminum profiles, notwithstanding that they also include vinyl components.

The only issue before the Tribunal, therefore, as stated in the agreed statement of facts, is whether the goods in issue are "prepared for use in structures" and are, therefore, to be classified in heading No. 76.10. The agreed statement of facts provides that there are no other uses for the retainers in issue other than as components in the wall and corner guards. As such, the Tribunal is persuaded that the goods in issue are for use in structures.

In considering the issue of whether the goods in issue are "prepared" for use in structures, the Tribunal referred to the Explanatory Notes to heading No. 73.08 which, as both parties acknowledged, also apply to heading No. 76.10. The Explanatory Notes to heading No. 73.08 provide that the heading includes certain products which "have been prepared (e.g., drilled, bent or notched) for use in structures." This suggests, in the Tribunal's view, that a product may be considered to be "prepared for use in structures" for the purposes of heading No. 76.10 if that product has undergone such activities as drilling, bending or notching. The agreed statement of facts indicates that all that is required for installation of the goods in issue is to assemble the components of the wall and corner guards and then to custom fit the wall and corner guards to the wall detail and cut them to size. While the samples provided, which are not representative of all of the goods in issue, are not all "drilled, bent or notched" and some drilling will be required at the time of

installation, the samples provided show that the components of the wall guards and corner guards are bent. The Tribunal recognizes that some drilling will be required at the time of installation of the wall guards and corner guards. However, the Tribunal is of the view that the goods in issue have been “prepared” to the extent contemplated by the Explanatory Notes. In addition, as stated in the General Explanatory Note to Chapter 72, which also applies to Chapter 76, finishing operations, such as sizing, can be performed on finished products without affecting their classification. Based on these facts, the Tribunal is of the view that the goods in issue have been prepared for use in structures.

The appellant suggests that the goods in issue, if imported pre-cut, pre-drilled and ready for installation, would be classified under tariff item No. 8302.41.90 which provides for “fittings ... [s]uitable for buildings.” A review of the Explanatory Notes describing what goods are included as “fittings ... suitable for buildings” indicates that the goods in issue are neither specifically mentioned nor similar to the goods described as being included under that tariff item. The Tribunal is, therefore, not persuaded that the goods in issue should be classified under that tariff item.

Accordingly, the Tribunal finds that the goods in issue are properly classified under tariff item No. 7610.90.00 as aluminum profiles prepared for use in structures. Therefore, the appeals are dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member