

Ottawa, Friday, January 31, 1997

Appeal No. AP-95-230

IN THE MATTER OF an appeal heard on May 30, 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 August 28 and September 7, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

EURO-LINE APPLIANCES

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member

Michel P. Granger

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-230

EURO-LINE APPLIANCES

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue dated August 28 and September 7, 1995, made under section 63 of the *Customs Act*. The goods in issue are washing machines, models 538, 635, Bella 850W, 508W and 600W, imported by the appellant from AEG Hausgerate of Germany. The washing machines are front loading and operate on a horizontal axis.

At the time of importation, the goods in issue were classified under tariff item No. 8450.11.10 as other fully automatic household-type washing machines with a dry linen capacity not exceeding 10 kg. The appellant requested a re-determination of this classification on the basis that the goods in issue should be classified under tariff item No. 8450.11.20 as other fully automatic laundry-type washing machines. Pursuant to subsection 63(3) of the *Customs Act*, the respondent issued decisions confirming the classification of the goods in issue under tariff item No. 8450.11.10, which decisions are the subject of this appeal.

The issue in this appeal is whether the goods in issue are properly classified as household-type washing machines under tariff item No. 8450.11.10, as determined by the respondent, or should be classified as laundry-type washing machines under tariff item No. 8450.11.20, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal is of the view that the goods in issue are properly classified as fully automatic household-type washing machines with a dry linen capacity not exceeding 10 kg. Although the Tribunal recognizes that horizontal-axis and vertical-axis washing machines differ in their design and operation, the Tribunal is not persuaded that the distinction between washing machines classifiable under tariff item No. 8450.11.10 and those classifiable under tariff item No. 8450.11.20 is determinative based on whether the machines are horizontal-axis, front-loading washing machines or vertical-axis, top-loading washing machines.

The evidence in this case shows, in the Tribunal's opinion, that the goods in issue are generally sold for household use. In this respect, the Tribunal refers to the testimony of the witnesses, the commercial invoices and the particular features of the machines. The goods in issue are commonly used as household machines and only rarely for commercial use, as their capacity, combined with the length of time for a wash cycle, would appear to make them unattractive for commercial purposes. Accordingly, the Tribunal is of the view that the goods in issue are household-type washing machines.

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 30, 1996
Date of Decision: January 31, 1997

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

Counsel for the Tribunal: Heather A. Grant

Clerk of the Tribunal: Margaret Fisher

Appearances: Michael Kaylor, for the appellant
Brian Tittlemore, for the respondent

EURO-LINE APPLIANCES

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

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

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue dated August 28 and September 7, 1995, made under section 63 of the Act. The appeal was heard by one member of the Tribunal.²

The appellant is an importer and distributor of a variety of appliances, including washing machines. The goods in issue are washing machines, models 538, 635, Bella 850W, 508W and 600W, imported by the appellant from AEG Hausgerate of Germany. The washing machines are front loading and operate on a horizontal axis.

At the time of importation, the goods in issue were classified under tariff item No. 8450.11.10 as other fully automatic household-type washing machines with a dry linen capacity not exceeding 10 kg. The appellant requested a re-determination of this classification on the basis that the goods in issue should be classified under tariff item No. 8450.11.20 of Schedule I to the *Customs Tariff*³ as other fully automatic laundry-type washing machines. Pursuant to subsection 63(3) of the Act, the respondent issued decisions confirming the classification of the goods in issue under tariff item No. 8450.11.10, which decisions are the subject of this appeal.

The issue in this appeal is whether the goods in issue are properly classified as household-type washing machines under tariff item No. 8450.11.10, as determined by the respondent, or should be classified as laundry-type washing machines under tariff item No. 8450.11.20, as claimed by the appellant.

The relevant tariff nomenclature reads as follows:

84.50	Household or laundry-type washing machines, including machines which both wash and dry.
	-Machines, each of a dry linen capacity not exceeding 10 kg:
8450.11	--Fully-automatic machines
8450.11.10	---Household type
8450.11.20	---Laundry type

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.).

Three witnesses appeared on behalf of the appellant. The first witness to appear was Mr. Douglas Eglington, President of Euro-Line Appliances. Mr. Eglington reviewed the operation and main features of the goods in issue for the benefit of the Tribunal. He explained that the goods in issue are European-style, front-loading machines which operate on a horizontal axis. As they are equipped with an internal water heating capability, the washing machines may be connected either to a hot/cold water hookup or simply to a cold water hookup, thereby contributing to the energy-efficient nature of the machines. Because the machines operate on a horizontal axis, the clothes are tumbled up and out of shallow water in order to wash and rinse them. The user, moreover, is able to select the preferred temperature for washing and rinsing the clothes.

Mr. Eglington explained that the goods in issue are programmable for one wash and three to four rinses and that the machines require between 45 and 100 minutes to complete a full wash cycle depending, in part, upon the selected water temperature and number of rinse cycles. The machines have a spin speed of 800 to 1,100 rpm and eliminate approximately 7 percent more residue water from wet clothes during the final rinse cycle than do top-loading washing machines commonly produced and used in Canada (hereinafter referred to as vertical-axis machines).

Some of the differences between the goods in issue (hereinafter also referred to as horizontal-axis machines) and vertical-axis machines on which Mr. Eglington focused were that vertical-axis machines: (1) do not have internal water heaters and must be hooked up to both a hot and a cold water supply; (2) agitate clothes mechanically while they are completely submerged in water; (3) have a spin speed of approximately 400 to 500 rpm; and (4) require approximately 39 minutes to complete a full wash cycle.

Mr. Eglington testified that some of the advantages of horizontal-axis machines compared with vertical-axis machines are that there is less consumption of detergent, water and, consequently, electricity to heat the water. In addition, the “reverse action tumble wash” in horizontal-axis machines, combined with the use of cold water at the beginning of all cycles, means that the washing operation is gentler on clothes than that of vertical-axis machines.⁴

In cross-examination, Mr. Eglington stated that the appellant generally approaches retail appliance stores, kitchen appliance stores, small nursing homes and guest houses to sell the goods in issue and that the retailers, in turn, sell the goods to consumers. On occasion, the appellant has sold the goods to developers for installation in condominium housing projects. He indicated that the goods in issue are more expensive than vertical-axis machines, with a price tag of \$1,300 to \$1,800. Vertical-axis machines, by contrast, sell for approximately \$500 to \$600.

The second witness to appear on behalf of the appellant was Mr. Geoffrey Hedges, Vice-President and General Manager of Miele Appliances Limited (Miele Appliances). Miele Appliances is a wholly owned subsidiary of Miele & Cie., a manufacturer of appliances. Miele Appliances purchases, distributes and provides after-sales service on its parent company’s product line imported from Germany, which includes horizontal-axis machines. Mr. Hedges explained that there is a fundamental difference in the washing process of horizontal- and vertical-axis machines. Miele & Cie. manufactures washing machines for both household and commercial uses, such as for cruise ships, professional laundromats and doctors’ offices, and the front-loading structure of horizontal-axis machines is consistent with machines designed for both markets. Whereas the machines designed for household use generally have a 4.0-kg or 4.5-kg capacity, machines designed for commercial purposes have capacities from 4.5 kg to 30.0 kg. Mr. Hedges stated that, although the size of the machines, as well as the control, throughput and method of heating, varies among the machines designed for each of these markets, the fundamental structure of the machines, namely, that they operate on a horizontal axis, remains the same.

4. Mr. Eglington explained that a “reverse action tumble wash” means that the clothes are first agitated in a clockwise direction and then tumbled back in a counterclockwise direction.

In cross-examination, Mr. Hedges stated that Miele Appliances sells approximately 99 percent of its horizontal-axis machines to household users in Canada and 1 percent to professional users.

The third and final witness to appear on behalf of the appellant was Mr. Harold Kriewald, President and owner of Stalwart Machinery & Appliance Ltd. (Stalwart). Stalwart is a commercial laundry and dry cleaning equipment distributor across Canada. Mr. Kriewald testified that Stalwart sells horizontal-axis machines to both household and commercial customers. The commercial horizontal-axis machines that it sells have capacities from 10 lbs to 200 lbs. He stated that the 10-lb. "Wascomat" model that Stalwart sells is smaller than machines with a 10-kg capacity and that it operates in the same way as the larger "Wascomat" washing machines, referred to generally as washer-extractors. Mr. Kriewald indicated that some of the smaller "Wascomat" commercial washing machines are sold for domestic purposes under the "Asco" brand label and that the 10-lb. "Asco" washing machine is sometimes sold to small commercial operations.

In cross-examination, Mr. Kriewald indicated that approximately 20 percent of the 10-lb. "Wascomat" washing machines that Stalwart sells are sold to commercial users, such as hotels and nursing homes.

The only witness to appear on behalf of the respondent was Mr. Reg Gemmell, Manager, Market Research, for Inglis Limited (Inglis), a supplier of major appliances to the Canadian market. Mr. Gemmell was qualified as an expert witness by the Tribunal in the operation, features, marketing and sales of major appliances in Canada, including washing machines. Mr. Gemmell indicated that, in his view, the goods in issue are not conducive to operations where there are multiple users, such as group homes, because of the length of time that they take to complete a full wash cycle.

Mr. Gemmell reviewed the market for washing machines in Canada for the benefit of the Tribunal. He explained that, at Inglis, the sales group is divided to sell to two segments: the consumer retailer segment and the builder segment. According to Mr. Gemmell, the market for washing machines in Canada sells about 550,000 to 600,000 units per year. Approximately 45,000 of those units are destined for the builder segment, with the balance destined for the consumer retailer segment. Of the 45,000 units, 15,000 are coin-operated machines with the coin-operating mechanism built into them. Approximately 27,000 of the remaining 30,000 units are sold to housing developers, while the remaining 3,000 are sold for other applications, such as for use in guest houses, group homes and smaller nursing homes.

Mr. Gemmell explained the different attributes desired by these two market segments. The consumer retailer segment will look for a good price, a selection of features that suit the user's laundry practices and control over the amount of water that goes into the machine. The builder segment of the market for coin-operated machines, by comparison, desires simpler machines because of the machines' multiple users.

Mr. Gemmell expressed the view that the goods in issue are household-type washing machines. He explained that certain features of horizontal-axis machines, such as the length of time that they require to complete a full wash cycle and their limited capacity, generally make them unacceptable for the builder segment of the market. He also indicated that their higher price is a comparative disadvantage in both segments of the market.

Mr. Gemmell pointed out that the 1996 Energuide directory, which compares the energy consumption of major household appliances, does not include horizontal-axis machines, as it has been determined that the testing methods designed to assess the energy ratings of vertical-axis machines do not accurately rate the horizontal-axis machines. The Canadian Standards Association committee on washing machines is currently rewriting the standards to take into consideration the different features of horizontal-axis machines.

In cross-examination, Mr. Gemmell acknowledged that the water temperature can be more precisely controlled in horizontal-axis machines than in vertical-axis machines. He acknowledged that horizontal-axis machines with more than a 10-kg capacity are generally referred to as laundry washer-extractors and that their construction and operation are generally the same as those of the goods in issue. Mr. Gemmell also indicated that, if Inglis were to import vertical-axis machines with less than a 10-kg capacity, he would consider them to be household-type washing machines, but that, if it imported them with a coin-operating mechanism, he would consider them to be laundry-type washing machines. Mr. Gemmell further stated that, if a horizontal-axis machine with less than a 10-kg capacity were imported into Canada and sold into a commercial context, such as a nursing home, he would consider it to be a laundry-type washing machine.

In re-examination, Mr. Gemmell indicated that the factory-built, coin-operated washing machines that Inglis sells have certain components that are more heavy-duty than those incorporated into household-type washing machines.

Counsel for the appellant submitted that the determination of the proper tariff classification of the goods in issue is primarily a matter of legal interpretation. He submitted that Parliament intended the goods in issue to be classified as laundry-type washing machines and not as household-type washing machines by emphasizing that it distinguished the goods classifiable in tariff item No. 8450.11.10 and 8450.11.20 based on machine “type.” Had Parliament intended the goods in issue to be classified according to use, it could have done so expressly, which it did not.

Counsel for the appellant further submitted that the goods in issue are similar to larger horizontal-axis washing machines, which are referred to as “commercial laundry washer-extractors” and classifiable under tariff item No. 8450.20.10. In counsel’s view, given the similarity in construction and operation of the goods in issue with larger horizontal-axis machines, Parliament provided for horizontal-axis machines with less than a 10-kg capacity in the tariff nomenclature by referring to them as “laundry-type” washing machines.

In support of the appellant’s contention that the place of use is not determinative of the distinction between laundry-type and household-type washing machines, counsel for the appellant relied on the Federal Court of Appeal decision in *Great Canadian Oil Sands Supply Limited and Wabco Equipment Canada Limited v. Deputy Minister of National Revenue for Customs and Excise*.⁵ Counsel also referred to a variety of *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁶ (the Explanatory Notes) to other headings to suggest that a reference to goods “of the household type” does not make a distinction based on where the goods are used, but rather based on the nature of the goods themselves.⁷

Furthermore, Mr. Gemmell’s opinion that the tariff classification of the machines changes from “household type” to “laundry type” depending on whether it has a coin-operating mechanism installed is, in the view of counsel for the appellant, incorrect. Counsel submitted that this type of distinction is not a proper basis for determining the tariff classification of the goods in issue.

According to counsel for the appellant, the view that horizontal-axis machines are clearly different from vertical-axis machines is supported by the fact that new EnerGuide testing methods have to be developed to measure accurately their energy consumption. Counsel also referred to the difference in price

5. [1976] 2 F.C. 281.

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

7. In this regard, counsel for the appellant referred to sewing machines classifiable in heading No. 84.52, dish washing machines in heading No. 84.22 and centrifuges in heading No. 84.21. Counsel also made reference to the Tribunal’s decision in *Black & Decker Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-90-192, December 16, 1992, in support of his arguments regarding the appropriate interpretation of the *Customs Tariff* in this case.

and the time of a typical wash cycle in further support of his view that horizontal-axis machines are less attractive for household use than vertical-axis machines.

Counsel for the respondent submitted that there is little evidence, if any, to support counsel for the appellant's contention that household-type washing machines are vertical-axis machines and that laundry-type washing machines are horizontal-axis machines. He rejected counsel for the appellant's argument that, given the reference under the subsequent tariff item to commercial laundry washer-extractors (tariff item No. 8450.20.10), it can be inferred that the smaller, yet similar, horizontal-axis machines are classifiable under tariff item No. 8450.20.10 as laundry-type washing machines. He submitted that one could just as easily argue that the fact that Parliament did not refer to commercial laundry washer-extractors in tariff item No. 8450.11.20 indicates that Parliament intended a distinction to be made between such machines and the goods in issue. Counsel made a similar argument in respect of counsel for the appellant's submissions regarding the relevance of the Explanatory Notes to various other headings referring to "household-type" goods.

Counsel for the respondent submitted that, in determining the proper classification of the goods in issue, the Tribunal should not look to the ultimate use of the goods in the same manner as the Federal Court of Appeal did in *Great Canadian Oil Sands*. Rather, the terms "laundry" and "household" import a certain aspect of how the goods are appropriately used that is relevant for the purposes of tariff classification. In other words, in determining the proper classification of the goods in issue, the Tribunal must look, to some extent, at the functions of the machines themselves and how they perform.

In further support of his position, counsel for the respondent noted that the AEG invoices⁸ for the goods in issue refer to the machines as "AEG HOUSEHOLD APPLIANCES" and that the evidence presented in the appeal moreover shows that the industry in general considers the goods to be household-type washing machines. He submitted that the evidence in respect of the price, length of time of a full wash cycle and the capacity of the goods in issue mitigate against the type of uses to which laundry-type washing machines are put.

Counsel for the respondent also noted that the evidence shows that approximately 99 percent of the goods in issue are sold to consumers.

To determine the proper classification of the goods in issue, the Tribunal relies on section 10 of the *Customs Tariff*, which stipulates that the classification of the goods is determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁹ (the General Rules) and the *Canadian Rules*.¹⁰ Rule 1 of the General Rules stipulates that the classification of goods shall be determined "according to the terms of the headings and any relative Section or Chapter Notes." Similarly, Rule 1 of the *Canadian Rules* provides that the classification of goods under the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the General Rules.

The issue in this appeal is, specifically, whether the goods in issue are laundry-type washing machines, as claimed by the appellant, or household-type washing machines, as determined by the respondent, and involves a determination in respect of the proper tariff item under which the goods in issue should be classified.

Having considered the evidence and arguments presented in the appeal, as well as the relevant statutory provisions and case law, the Tribunal is of the view that the goods in issue are properly classified as fully automatic household-type washing machines with a dry linen capacity not exceeding 10 kg.

8. Respondent's brief, tab 5.

9. *Supra* note 3, Schedule I.

10. *Ibid.*

Although the Tribunal recognizes that horizontal-axis and vertical-axis machines differ in their design and operation, the Tribunal is not persuaded that the distinction between washing machines classifiable under tariff item No. 8450.11.10 and those classifiable under tariff item No. 8450.11.20 is determinative based on whether the machines are horizontal-axis, front-loading washing machines or vertical-axis, top-loading washing machines. The Tribunal is of the view that, had Parliament intended such a distinction to be made, it could have done so expressly, which it did not.

The evidence in this case shows, in the Tribunal's opinion, that the goods in issue are generally sold for household use. In this respect, the Tribunal refers to the testimony of the witnesses, the commercial invoices and the particular features of the machines. The goods in issue are commonly used as household machines and only rarely for commercial use, as their capacity, combined with the length of time for a wash cycle, would appear to make them unattractive for commercial purposes. Accordingly, the Tribunal is of the view that the goods in issue are household-type washing machines.

For the foregoing reasons, the appeal is dismissed.

Robert C. Coates, Q.C.
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