

Ottawa, Tuesday, November 5, 1996

Appeal No. AP-95-189

IN THE MATTER OF an appeal heard on March 29, 1996, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF eight decisions of the Deputy Minister of National Revenue dated July 27 and September 27, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

ASEA BROWN BOVERI INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Susanne Grimes

Susanne Grimes
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-189

ASEA BROWN BOVERI INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The issues in this appeal are to determine the proper tariff classification of certain goods, being SF₆ gas-insulated double pressure bushings, and to determine whether these goods qualify for the benefits of Code 2101 of Schedule II to the *Customs Tariff*.

HELD: The appeal is allowed. Pursuant to Customs Notice N-010, switchgear imported as a single functional unit is classified in subheading No. 8537.20. When the switchgear is used in a transmission station incorporating a control centre, it qualifies for the benefits of Code 2101. The Tribunal considers the gas-insulated switchgear and bushings to constitute a functional unit for tariff purposes. Therefore, pursuant to Note 4 to Section XVI of Schedule I to the *Customs Tariff*, the Tribunal finds that the bushings are classified under tariff item No. 8537.20.90, similarly to the gas-insulated switchgear, and that they qualify for the benefits of Code 2101.

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|---------------------------|---|
| Place of Hearing: | Ottawa, Ontario |
| Date of Hearing: | March 29, 1996 |
| Date of Decision: | November 5, 1996 |
| Tribunal Member: | Arthur B. Trudeau, Presiding Member |
| Counsel for the Tribunal: | David M. Attwater |
| Clerk of the Tribunal: | Susanne Grimes |
| Appearances: | Michael Sherbo, for the appellant Stéphane Lilkoff, for the respondent |

ASEA BROWN BOVERI INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from eight decisions of the Deputy Minister of National Revenue made under section 63 of the Act, which was heard by one member of the Tribunal.² The issues in this appeal are to determine the proper tariff classification of certain goods, being SF₆ gas-insulated double pressure bushings (the bushings), and to determine whether these goods qualify for the benefits of Code 2101 of Schedule II to the *Customs Tariff*.³

The bushings were imported into Canada in eight separate transactions over the period from December 14, 1992, to May 20, 1993. They are used to connect overhead power lines to gas-insulated switchgear (GIS) in the Ontario Hydro transmission station at Claireville, Ontario. On importation, they were classified under various tariff items. Based on a request for re-determination, the bushings were re-classified under tariff item No. 8544.60.00 as other electric conductors for a voltage exceeding 1,000 V. The respondent made the decision that the bushings did not qualify for the benefits of Code 2101.

For purposes of this appeal, the relevant tariff nomenclature of Schedule I to the *Customs Tariff* is as follows:

- | | |
|------------|--|
| 85.44 | Insulated (including enamelled or anodized) wire, cable (including co-axial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fibre cables, made up of individually sheathed fibres, whether or not assembled with electric conductors or fitted with connectors. |
| 8544.60.00 | -Other electric conductors, for a voltage exceeding 1,000 V |
| 85.37 | Boards, panels (including numerical control panels), consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading No. 85.35 or 85.36, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of Chapter 90, other than switching apparatus of heading No. 85.17. |

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

8537.20 -For a voltage exceeding 1,000 V
8537.20.90 ---Other
90.32 Automatic regulating or controlling instruments and apparatus.
9032.89 --Other
9032.89.20 ---Process control apparatus, excluding sensors, which converts analog signals from
or to digital signals

Code 2101 reads as follows:

Articles (other than goods of the tariff item Nos. enumerated below) for use in:

The goods of tariff item No:

| | |
|-------------|---------------|
| 8471.92.10, | 8523.20.00, |
| 8471.93.10, | 8524.90.20, |
| 8471.99.10, | 9032.89.20, |
| 8473.30.10, | or 9032.90.20 |

The expression “for use in,” as used in Code 2101, is defined in section 4 of the *Customs Tariff*. Section 4 states:

4. 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’s first witness was Mr. Jean-Pierre Haché, an electrical engineer who works as Product Manager for Asea Brown Boveri Inc. Mr. Haché was qualified as an expert witness in the area of high-voltage switchgear for electrical networks.

Mr. Haché explained that the GIS, which includes circuit breakers, disconnect switches, current transformers, voltage transformers and other associated equipment, was supplied from the appellant’s factory in Switzerland. The bushings and bus ducts, which are used to interconnect the various components of a GIS, were supplied from the appellant’s factory in the United States.

The bushings, which were specifically designed for the GIS, serve as an interface between the gas-insulated equipment of the GIS and the air-insulated power lines. They serve as conductors to bring power into and out of the GIS. In addition, they prevent electrical arcs from forming in the confined space of a transmission station. Mr. Haché opined that, together, the bushings and GIS form a functional unit.

Within the electrical distribution network are control centres that monitor the flow of electricity to ensure a steady supply to end users. When a fault occurs in the network, automatic process controls isolate the fault and by-pass it through other substations to reestablish a supply of electricity. It was explained that various components of the GIS, such as the current and voltage transformers, are connected to the process controls to provide information on the flow of electricity through the network.

In addition, the process controls are connected to gas monitors on the gas-insulated equipment, including the bushings, to ensure that an adequate gas pressure is maintained for proper functioning of the equipment. With a loss of gas pressure, the high-voltage electricity would not be adequately insulated and a short circuit could occur. If the process controls detected a pressure change, the circuit breakers of the GIS could interrupt the flow of electricity through that equipment.

In cross-examination, Mr. Haché told the Tribunal that the bushings and core components of the GIS were purchased under separate contracts and shipped separately to the Claireville station. It was clarified, however, that they were purchased through a single tender document.

On questions from the Tribunal, Mr. Haché explained that a process control system is comprised of different types of control panels. A local control panel is used to control the operating mechanism of different components, such as the circuit breakers and disconnect switches. In contrast, relay panels analyze the input from various monitors, such as the gas monitors on the bushings, for faults in the equipment. In effect, they are the intelligence of the process control system. If a fault is detected, the relay panels can have circuit breakers opened to isolate the fault and redirect the power flow. The relay panels can also measure the flow and amount of electricity for invoicing purposes.

The appellant's second witness was Mr. Tim Molony, Supervisor in the switchgear section of the Materiel Management Department of Ontario Hydro. Mr. Molony was qualified as an expert witness in the area of power engineering, including switchgear. He is responsible for writing specifications, selecting vendors, selecting and procuring equipment and ensuring that the equipment meets the specifications.

Mr. Molony confirmed that the GIS and bushings for the Claireville station were purchased through a single tender document (Exhibit A-5), that the bushings were specifically designed for the station and that both the GIS and bushings were shipped directly there. He agreed that the GIS is integral to the functioning of the process control system and that the bushings are integral to the functioning of the GIS and the process control system. He explained that a gas monitor on the bushings is wired back to the process control system.

In cross-examination, Mr. Molony confirmed that there was a single tender document defining the installation needs of the Claireville station, that the appellant bid on and was awarded the entire contract, that the GIS and bushings were purchased through two purchase orders (Exhibit A-4) and that the GIS and bushings were shipped separately to the Claireville station. He explained that two purchase orders were used for the convenience of contract administration.

In explaining how the bushings are "integral" to the functioning of the GIS, Mr. Molony said that they are attached to, and conduct electricity to, the GIS, which would not function without them. He explained that a gas monitor on a bushing is part of the process control system, in that an essential element of control is monitoring. On re-examination, he added that process control also includes signalling or "enunciation" of the problem and action by operation of the circuit breakers.

The appellant's third witness was Mr. Michel LaPalme, a senior engineer for CIMA, a prime consultant to Hydro-Québec. He is a specialist in high-voltage substations and high-voltage equipment. He was recognized by counsel for the respondent as an expert witness. When asked if the bushings are integral to the control of the substation, Mr. LaPalme testified that they are integral "to the system." When asked, "Would the GIS, would the control system function without the bushing?" he answered, "Definitely not."⁴

In cross-examination, Mr. LaPalme clarified that the bushings are integral to the GIS because they are attached to and form part of the GIS. On questions from the Tribunal, he said that the bushings are necessary connections between the high-tension lines and the bus ducts that are connected to the GIS.

4. See *Transcript of Public Hearing*, March 29, 1996, at 82.

The respondent's witness was Mr. Réjean M. Breton, an engineer who specializes in electrical power systems, relays and protection. Mr. Breton was qualified as an expert witness in the field of power systems. Mr. Breton explained that an electrical distribution system is composed of three types of equipment: primary, protection and control equipment. He described and gave examples of each type of equipment.

Mr. Breton told the Tribunal that both the GIS and bushings are primary equipment. However, certain components of the GIS, such as the current and voltage transformers, are considered essential to the basic function of the process control apparatus. This is because part of their role is to measure certain variables in the transmission of electricity and to feed the information into protective relays that control the circuit breakers of the GIS.

In contrast, bushings are not part of the process control system. The gas monitors on the bushings are necessary to supervise the functioning of the bushings themselves and not the transmission of electricity. A bushing is a passive piece of equipment that does not serve a controlling effect. It is essential to the functioning of the GIS, just as every other element in the electrical grid is necessary to bring electricity to the GIS.

The appellant's representative argued that the bushings, together with the GIS, form a functional unit. As such, pursuant to Note 4 to Section XVI of Schedule I to the *Customs Tariff*, the whole should be classified in the heading appropriate to that function.⁵ In support of this proposition, it was submitted that the bushings and GIS are separate machines. In addition, they both contribute to the function of process control and distribution of electricity. According to the testimonies of Messrs. Haché and Molony, the bushings are integral to the operation of the GIS and the automatic process control system. Furthermore, that the bushings and GIS were imported separately should not detract from the two being a functional unit.⁶

The bushings and GIS also qualify as a functional unit according to policy guidelines of the Department of National Revenue contained in Memorandum D10-13-2 (the Memorandum), titled "Administrative Policy — Tariff Interpretation of 'Functional Units'."⁷ The appellant's representative noted Mr. Haché's testimony that the bushings and GIS were a commercial unit and that Mr. Molony agreed that

5. Note 4 to Section XVI states:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

6. See, for example, *Windsor Wafers, Division of Beatrice Foods Inc. v. The Deputy Minister of National Revenue for Customs and Excise*, Canadian International Trade Tribunal, Appeal No. AP-89-281, November 21, 1991.

7. At page 2 of the Memorandum, dated April 3, 1992, under the heading "Guidelines," it is stated:

6. Tariff classification as a functional unit will be affected when an importation satisfies the general description above and the following commercial and technical conditions apply:

- (a) the various components make up a commercial unit which is advertised and sold at a single price;
- (b) the various components were purchased as a unit on one contract or a single purchase order; and
- (c) the sole function of the various components that comprise the integral unit cannot be accomplished if any single component is removed.

7. ... Consequently, a functional unit presented in more than one consignment, regardless of whether or not such consignments originate in different countries, does not preclude classification in accordance with the HS Notes cited under the Legislation section above.

Ontario Hydro purchased them as a commercial unit. They were purchased through a single tender document and, though they were purchased under different purchase orders, this was done for ease of contract administration. Messrs. Haché and Molony also acknowledged that the bushings were integral to the control mechanism of the GIS and the control mechanism of the substation. Furthermore, according to paragraph 7 of the Memorandum, a functional unit may be imported in separate shipments from separate countries, similar to what occurred in this case.

The appellant's representative maintained that, according to "policy papers,"⁸ the GIS is classified under tariff item No. 8537.20.90 and qualifies for the benefits of Code 2101. Therefore, as part of a functional unit with the GIS, the bushings also qualify for the benefits of Code 2101.

In the alternative, the appellant's representative submitted that the bushings are classified under tariff item No. 8544.60.00 and that they are for use in goods of tariff item No. 9032.89.20, being process control apparatus of the Claireville station. Thus, they qualify for the benefits of Code 2101. In support of this proposition, several arguments were made.

First, it was submitted that goods of heading No. 90.32, according to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁹ (the Explanatory Notes) to that heading, have three components: a measuring device, a control device and an operating device. The bushings are for use with process control apparatus of tariff item No. 9032.89.20 in that they include a gas monitor (measuring device) that is wired to the control centre or some other relay (control device) of the Claireville station, which in turn is connected to the circuit breakers (operating device) of the GIS. As such, the bushings are attached to and integral to the basic function of the process control apparatus.

Second, the bushings should qualify for the benefits of Code 2101 by analogy to an example provided in Customs Notice N-879, dated June 23, 1994, titled "Administrative Policy — Tariff Codes 2100 and 2101."¹⁰ The appellant's representative explained that the respondent's policy of providing the benefits of Code 2101 to computer cables is because they connect a power source to the automatic data processing machine. Similarly, the bushings provide a connection between transmission cables and the GIS. He noted that both Messrs. Haché and Molony agreed that this was a good analogy.

Third, it was submitted that Parliament intended Code 2101 to be broadly interpreted. This is provided by the use of the word "[a]rticles" in Codes 2100 and 2101, which has been broadly interpreted. In addition, Parliament excluded only 40 of the approximately 8,000 tariff items of Schedule I to the *Customs Tariff* from qualifying for the benefits of Code 2101, and the Explanatory Notes to heading

8. At page 2 of Customs Notice N-010, dated December 5, 1995, titled "Interpretation of Tariff Code 2101 as it Relates to an Electrical Network," under the heading "General Administrative Guidelines," it is stated:

Switchgear, when imported as a single functional unit in accordance with Legal Note 4 to Section XVI, is classified under sub-heading 8537.20. When switchgear is used in a substation incorporating a control centre, it is considered to be integral to the function of the control centre and eligible for code 2101.

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

10. At paragraph 12 of Customs Notice N-879, it states:

Finished cables (i.e., complete with connectors) integral to the function of an ADP system are considered to be "for use in" the goods of that system. Thus, the cables used to connect units of an ADP system and the cables which run from such units to an electrical source are eligible for the benefits of the Codes.

No. 90.32 imply that Code 2101 should be broadly interpreted.¹¹ Furthermore, it would otherwise create a competitive advantage for foreign competitors that could import, together, the three components of automatic controlling apparatus of heading No. 90.32 and benefit from Code 2101.

In addressing arguments advanced by counsel for the respondent, the appellant's representative submitted that it is improper to read the word "directly" into the definition of "for use in" such that it reads "goods must be [directly] ... attached to ... other goods."¹² Furthermore, there is no basis to conclude that the expression "unless the context otherwise requires," as used in the same definition, requires that a separately housed article be integral to the basic function of the other goods to which they are attached. Rather, this expression means that such references as the Explanatory Notes should be considered in bringing meaning to the expression "for use in," as used in Code 2101.

Counsel for the respondent argued that the bushings are a special type of conductor that, pursuant to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*,¹³ are classified under tariff item No. 8544.60.00 as electric conductors for a voltage exceeding 1,000 V. However, the bushings are not for use in the goods of tariff item No. 9032.89.20, meaning that they are not for use in process control apparatus.

Counsel for the respondent submitted that it is necessary to consider the French version of the expression "for use in" to properly interpret its meaning. Under this version, the bushings must "[*entrer*] *dans la composition*"([translation] enter into the composition) of process control apparatus of tariff item No. 9032.89.20 and not simply be wrought into, attached to or incorporated into these goods to qualify for the benefits of Code 2101. In the respondent's brief, it was argued that the French version requires goods to be directly wrought into, attached to or incorporated into other goods. From examples provided by counsel, it was suggested that being for use in other goods implies that there is an interaction between the two components and that the goods serve a specific function or purpose for the other goods.

Similarly, the expression "unless the context otherwise requires," as used in this definition, means that the goods must be integral to the basic function of the other goods.

Reviewing Mr. Breton's testimony, counsel for the respondent said that an electrical grid is composed of three types of equipment: primary, protection and control equipment. Counsel noted that some components of the GIS are control equipment, while the bushings are primary equipment. These two types of equipment also have distinct functions: the GIS being a switching device and the bushings being an interface between air-insulated, high-tension lines and the GIS. As primary equipment, the bushings are not for use in process control equipment, nor do they enter into the composition of the process control equipment. Therefore, though the bushings may be attached to the GIS, they are not for use in the process control components of the GIS.

11. The Explanatory Notes indicate that, under certain circumstances, actuators, such as solenoid valves, may be classified together with the automatic regulators of heading No. 90.32.

12. See *Ballarat Corporation Ltd. v. The Deputy Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-93-359, December 19, 1995.

13. *Supra* note 3, Schedule I.

With regard to the gas monitors on the bushings, counsel for the respondent submitted that they are protection equipment and not control equipment. Referring to Mr. Breton's testimony, counsel submitted that the monitors are not integral to the basic function of the process control equipment.

Counsel for the respondent also argued that the bushings and GIS do not form a functional unit. These goods do not meet the general description of a functional unit provided in the Memorandum. Counsel noted that, according to this policy statement, a functional unit is "[a]n integral system, specially designed for a particular task, whose various components are designed to contribute together to a single, clearly defined purpose." Though the various components of a GIS meet this definition, the bushings and GIS do not.

Similarly, the GIS and bushings do not meet the policy guidelines for a functional unit found in the Memorandum.¹⁴ Though the entire electrical grid would not function without the bushings, the GIS and bushings are not a commercial unit, but two different goods that were not purchased as a unit through a single purchase order.

Counsel for the respondent submitted that, if the Tribunal found the bushings to be parts of the GIS, it must still have regard to Note 2(a) to Section XVI of Schedule I to the *Customs Tariff*.¹⁵ This is supported by the Explanatory Notes to Section XVI, which state that "component parts not complying with the terms of Note 4 to Section XVI fall in their own appropriate headings." Accordingly, because heading No. 85.44 is dedicated to electric conductors, and the bushings are electric conductors, they must be classified in this heading and not in the heading appropriate to the GIS. Furthermore, whether the bushings qualify for the benefits of Code 2101 is a matter distinct from whether the GIS qualifies therefor.

In reply, the appellant's representative contended that, though Mr. Breton's three classifications of equipment may be relevant from an engineering perspective, it has no support in customs legislation. Thus, such distinctions are not determinative of whether the bushings are for use in process control apparatus.

Based on the evidence tendered, the Tribunal is satisfied that the GIS and bushings constitute a functional unit. The GIS and bushings are separate components bolted together and interconnected by conductors that transmit power from overhead lines into the switchgear. Both components were designed to function together as switching apparatus within the confined space of the Claireville station. Just as the GIS is essential to the basic function of the process control apparatus at the Claireville station, so too are the bushings.

The Tribunal was told that the GIS and bushings were purchased as a single unit from the appellant through a single tender document. The appellant bid on the tender and won the contract to supply the switching apparatus for the Claireville station. That the two components were purchased through separate purchase orders for administrative convenience and shipped separately, though directly, to the Claireville station is not fatal to the finding that they comprise a functional unit for purposes of tariff classification.

14. *Supra* note 7.

15. Note 2(a) states:

2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading No. 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules:
 - (a) Parts which are goods included in any of the headings of Chapters 84 or 85 (other than heading Nos. 84.85 and 85.48) are in all cases to be classified in their respective headings.

Pursuant to Customs Notice N-010, switchgear imported as a single functional unit is classified in subheading No. 8537.20. When the switchgear is used in a transmission station incorporating a control centre, such as the Claireville station, it qualifies for the benefits of Code 2101. As stated above, the Tribunal considers the GIS and bushings to constitute a functional unit for tariff purposes. Therefore, pursuant to Note 4 to Section XVI of Schedule I to the *Customs Tariff*, the Tribunal finds that the bushings are classified under tariff item No. 8537.20.90, similarly to the GIS, and that they qualify for the benefits of Code 2101.

Accordingly, the appeal is allowed.

Arthur B. Trudeau _____

Arthur B. Trudeau
Presiding Member