

Ottawa, Monday, June 9, 1997

**Appeal No. AP-96-041**

IN THE MATTER OF an appeal heard on February 13, 1997,  
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 March 11, 1996, with respect to a request  
for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**INTERPROVINCIAL CORROSION CONTROL  
COMPANY LIMITED**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Charles A. Gracey

Charles A. Gracey  
Presiding Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-96-041**

**INTERPROVINCIAL CORROSION CONTROL  
COMPANY LIMITED**

**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 “magnesium anodes consisting of either a steel spring core or steel flat strap core imbedded into a cast magnesium anode” are properly classified under tariff item No. 8104.90.90 as other magnesium and articles thereof, including waste and scrap, as determined by the respondent, or should be classified under tariff item No. 8543.30.90 as other electrical machines and apparatus for electroplating, electrolysis or electrophoresis, having individual functions, as claimed by the appellant.

**HELD:** The appeal is allowed. The Tribunal finds that the goods in issue are named or generically described in heading No. 85.43 or, more particularly, under tariff item No. 8543.30.90 and that they should be classified thereunder. In the Tribunal’s view, the goods in issue are electrical apparatus with individual functions.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 13, 1997
Date of Decision:	June 9, 1997
Tribunal Member:	Charles A. Gracey, Presiding Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Douglas J. Bowering, for the appellant Janet Ozembloski, for the respondent

**Appeal No. AP-96-041**

**INTERPROVINCIAL CORROSION CONTROL  
COMPANY LIMITED**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member

**REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> (the Act), heard by one member of the Tribunal,<sup>2</sup> from a decision of the Deputy Minister of National Revenue dated March 11, 1996, made under section 63 of the Act.

The goods in issue, described as “magnesium anodes consisting of either a steel spring core or steel flat strap core imbedded into a cast magnesium anode” were imported into Canada in several transactions between October 1993 and July 1994. At the time of importation, the goods in issue were classified under tariff item No. 8104.90.90 of Schedule I to the *Customs Tariff*,<sup>3</sup> as other magnesium and articles thereof, including waste and scrap. The appellant sought a re-determination and claimed that the goods in issue should be classified under tariff item No. 8543.90.40 as parts of electrical machines and apparatus having individual functions. The appellant’s request was denied, and the appellant appealed the decision to the Tribunal. In its brief, the appellant argued that the goods in issue should be classified under tariff item No. 8543.80.90 as other electrical machines and apparatus having individual functions. At the hearing, the appellant argued that they should be classified under tariff item No. 8543.30.90 as other electrical machines and apparatus for electroplating, electrolysis or electrophoresis, having individual functions. Counsel for the respondent objected to the change of position by the appellant, arguing that it was prejudicial to the respondent to do so at the time of the hearing without prior notice. The Tribunal noted counsel’s objection; however, it was of the view that, while the appellant was seeking classification under a different tariff item, the heading was the same. As such, there should be no prejudice to the respondent, and the appeal was heard.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8104.90.90, as determined by the respondent, or should be classified under tariff item No. 8543.30.90, as claimed by the appellant. The relevant tariff nomenclature reads as follows:

81.04	Magnesium and articles thereof, including waste and scrap. -Unwrought magnesium:
8104.90	-Other
8104.90.90	---Other

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.).

85.43	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter.
8543.30	-Machines and apparatus for electroplating, electrolysis or electrophoresis
8543.30.10	---Mechanically operated
8543.30.90	---Other

The appellant's first witness, Mr. Michael Hylton, a project engineer employed by the appellant, was qualified by the Tribunal as an expert in the field of cathodic protection systems. Mr. Hylton, using simple diagrams, explained the principles of cathodic protection using goods such as the magnesium anodes in issue. A typical anode was introduced into evidence and consisted of a casting of metallic magnesium around a steel core. Mr. Hylton explained that, when in use, the anode is connected by means of a wire to the device that it protects, for example, a pipeline. The pipeline, in such an application, is referred to as the "cathode." Mr. Hylton explained that, because the anode has a very high negative potential, negatively charged ions flow from the anode to the pipeline, or cathode, through the connecting wire. This phenomenon in turn results in the buildup of a protective alkali layer on the outer surface of the pipeline, thus arresting or reducing the rate of the corrosion of the pipeline. Mr. Hylton referred to this process as cathodic protection. He said that the process can be described as an electro-chemical process, a galvanic process or electrolysis. Since there was no dispute between the parties that the goods in issue are cathodes that are used in galvanic protection, there was no need for further explanation of the principles of operation.

In cross-examination, Mr. Hylton testified that, at the time of importation, the goods in issue are magnesium anodes with a steel core and that, after importation, a wire is attached to the steel core to permit a connection to be made to the pipeline, or cathode. He also testified that the anode is packaged in a tubular cardboard container with plastic caps. The container is packed with a backfill of sodium sulphate and bentonite to ensure a good contact to the connecting wire. The whole tube is then placed in the ground and backfilled with sand, all to ensure enough moisture to support the cathodic protection process. Mr. Hylton testified that, in his view, an apparatus can be defined as "various components put together to form a complete unit." Mr. Hylton then commented on a definition of "apparatus" introduced into evidence by counsel for the respondent, i.e. "materials, tools, etc. for a specific use."<sup>4</sup> He testified that not only were the magnesium anodes in issue designed for the specific purpose of cathodic protection but that a particular type of magnesium was fabricated for such use. Therefore, in his view, the magnesium anodes in issue are electrical apparatus. Mr. Hylton then commented on a second definition introduced into evidence by counsel for the respondent, i.e. "The totality of things provided or necessary for the accomplishment of a particular task or purpose."<sup>5</sup> Mr. Hylton testified that, at the time of importation, the goods in issue cannot accomplish any purpose or function on their own; however, they do have a purpose.

The appellant's representative argued that the goods in issue are electrical apparatus having individual functions. In support of that proposition, he cited the Tribunal's decision in *Bazaar & Novelty Co., A Division of Bingo Press & Specialty Limited v. The Deputy Minister of National Revenue*,<sup>6</sup> where the Tribunal found that a reflective rotating spherical mirror, common in dance halls, has an independent function, even though that function could not be performed without a source of light. The representative also argued that the fact that anodes made of other metals, such as copper, lead and zinc, are classified in the appropriate chapter according to their constituent material is not determinative of the proper classification of magnesium anodes. Furthermore, he contended that the mere fact that the anode is not installed at the time of importation does not diminish its character as an apparatus with an individual function.

---

4. *Webster's New World Dictionary, Compact School & Office Edition* (Cleveland: Collins and World, 1974).

5. *Webster's Illustrated Encyclopedic Dictionary* (Montréal: Tormont Publications, 1990) at 87.

6. Appeal No. AP-95-120, April 10, 1996.

The Tribunal's attention was drawn to Note 1(f) to Section XV of the *Customs Tariff*, which excludes articles of Section XVI (machinery, mechanical appliances and electrical goods). As a result, the goods in issue cannot be classified in Section XV. The appellant's representative referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>7</sup> (the Explanatory Notes) to heading No. 81.04 which provide that "[t]his group comprises all articles of magnesium **not included** in the preceding groups or covered by Note 1 to Section XV" and argued that the goods in issue are clearly excluded from this heading because they are specifically covered elsewhere in the nomenclature, i.e. in heading No. 85.43. The representative argued that the goods in issue, at the time of importation, are electrical apparatus. In the event that the Tribunal does not agree, he argued that the goods in issue, at the time of importation, possess the essential character of electrical apparatus for use in the process of electrolysis and, should, therefore be classified under tariff item No. 8543.30.90.

Counsel for the respondent argued that the goods in issue, at the time of importation, do not fall under any of the three tariff items proposed by the appellant. She argued that, while it is quite acceptable for the appellant to have twice changed its view as to the proper classification, this indicates uncertainty on its part. She pointed out that customs invoices confirm that the goods in issue were sold by weight and that this supports her claim that the goods in issue are articles of magnesium. She indicated that, at the time of importation, the goods in issue were not attached to the electrical wire, which is required in order to allow the anodes to function. In her view, without the attached wire, the goods in issue cannot perform any function. She agreed that the goods in issue may be anodes, but that they cannot be referred to as sacrificial anodes.

On this latter point, the Tribunal notes that the evidence is quite clear that the goods in issue are indeed sacrificial anodes, inasmuch as they are consumed during their serviceable life. However, in the Tribunal's view, the use of the term "sacrificial" is not relevant to the issue of the proper tariff classification in this appeal.

Counsel for the respondent argued that the goods in issue must be classified according to their physical characteristics and not according to their use. She referred to case law which confirms that goods must be classified as they appear at the time of importation, not as they may appear following further manufacture. Counsel conceded that, when in service, the cathodic protection phenomenon involves an electrical process. However, she argued that, in the condition imported, the goods in issue have no function. She referred to the Explanatory Notes to heading Nos. 84.79 and 85.43 in support of her argument. The Explanatory Notes to heading No. 85.43 provide that "[t]he introductory provisions of Explanatory Note to heading 84.79 concerning machines and mechanical appliances having individual functions apply, *mutatis mutandis*, to the appliances and apparatus of this heading." The Explanatory Notes to heading No. 84.79 list two types of machinery which are regarded as having "individual functions." According to counsel, the goods in issue are not described in those explanatory notes. Counsel drew the Tribunal's attention to the way in which anodes of other base metals are classified. She conceded that, while this is not determinative of the proper tariff classification of magnesium anodes, such information could prove helpful. In sum, counsel argued that, at the time of importation, the goods in issue are not "electrical apparatus" and that they have no individual function. Accordingly, the appeal should be dismissed.

In reply, the appellant's representative reasserted that the goods in issue are electrical apparatus inasmuch as they are the "driving force" to the electrolysis process in cathodic protection. He argued that the fact that the goods in issue were sold by weight has no bearing on their proper classification. At the end of his reply argument, the representative requested that the Tribunal consider the "Parts" provision under heading No. 85.43 in the event that it is unable to accept his earlier argument. Counsel for the respondent objected to this request on the basis that it was highly prejudicial to the respondent. She argued that she was not prepared to make submissions on the issue of parts. She, therefore, requested that she be given the

---

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

opportunity to make written submissions, if the Tribunal so wished. The Tribunal indicated that, if it required further submissions on this issue, it would advise the parties.

When classifying goods in Schedule I to the *Customs Tariff*, the application of Rule 1 of the *General Rules for the Interpretation of the Harmonized System*<sup>8</sup> (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 Notes. Section 11 of the *Customs Tariff* provides that, in interpreting the headings or subheadings, the Tribunal shall have regard to the Explanatory Notes.

It is agreed between the parties and the Tribunal is of the opinion that the goods in issue are indeed “magnesium anodes.” Unlike other anodes, which are usually classified in the chapter that covers the appropriate base metal, there is no specific tariff item in the tariff nomenclature or, more particularly, in Chapter 81 which refers to “magnesium anodes.” Hence, the parties find themselves before the Tribunal seeking a decision as to the appropriate tariff classification of the goods in issue.

The appellant’s position is that the goods in issue should be classified in heading No. 85.43 as “[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter.” Neither party claimed that the goods in issue were “machines,” so the issue is whether or not they are “[e]lectrical ... apparatus, having individual functions.” There appears to be no dispute that the goods in issue are associated with an electrical process, namely, that of electrolysis or galvanic protection. This process, according to the evidence of the expert witness, involves the flow of negatively charged ions from the anodes in issue to form a protective alkali coating on the pipeline or vessel to be protected, i.e. the cathode in electrical terms. Accordingly, the Tribunal accepts that the anodes are electrical devices in nature.

The Tribunal must determine, however, whether the goods in issue are electrical apparatus with individual functions in order to find that they are named or generically described in heading No. 85.43. Counsel for the respondent contended that, at the time of importation, the goods in issue are not “apparatus” and that they do not have “individual functions.”

With respect to the latter argument, the Tribunal finds that the goods in issue do, in fact, have “individual functions” at the time of importation. In counsel for the respondent’s view, the goods in issue are incapable of any function unless and until they are installed in the system. In the Tribunal’s view, accepting such an argument would mean that a flashlight battery, for one simple example, could not have a function until it is inserted into a flashlight casing. The Tribunal’s conclusion is supported by the Explanatory Notes to heading No. 84.79, which apply, *mutatis mutandis*, to heading No. 85.43. These notes, in clarifying the meaning to be attributed to “machinery having individual functions,” use words implying the future tense, i.e. “to be mounted” and “wherein they are to be incorporated.” This supports a finding that a device does not only acquire a function when it is put into service. In the Tribunal’s view, the fact that the intended function is apparent in the device itself is sufficient to determine that it has an individual function. The Tribunal is therefore convinced that the magnesium anodes have “individual functions,” i.e. cathodic or galvanic protection. Further, in the Tribunal’s view, the function of cathodic protection is clearly distinct from the intended function of the pipeline to which it is connected. Thus, the requirements in the Explanatory Notes to heading No. 84.79 are met, that is, that the function of the device be distinct from the function which is performed by the machine or appliance whereon it is to be mounted, or by the entity wherein it is to be incorporated and that the function not play an integral and inseparable part in the operation of such machine, appliance or entity.

---

8. *Supra* note 3, Schedule I.

The Tribunal struggled with the issue of whether a simple magnesium anode, as imported, could be considered an “apparatus.” It consists, after all, of a simple casting of a specially prepared magnesium with a high negative ionic potential around a steel core or spring. Previous decisions of the Tribunal and its predecessors have given the term “apparatus” a very broad meaning. A similar issue as the one before the Tribunal in this appeal was addressed by the Tariff Board in *Access Corrosion Services Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*.<sup>9</sup> Although that appeal was decided prior to the coming into force of the *Harmonized Commodity Description and Coding System*,<sup>10</sup> it can still be referred to for guidance in interpreting the term “apparatus.”

The *Access Corrosion* case involved the importation of castings, more particularly, “cast iron rods with a high silicon and chrome content, one and half inches in diameter and 60 inches long.” These castings were imported ready for the attachment of the electrical wire to enable them to perform their role as anodes which, the evidence in that case showed, corrode, while the structure to be protected, acting as a cathode, does not corrode. The Tariff Board’s view was that the anodes were “electrical apparatus” and that the castings were to be regarded, at the time of importation, as complete parts of anodes because, before the attachment of the wire, they were finished and complete and ready for the accomplishment of their purpose and use in the cathodic protection system without requiring any physical change but the addition of the wires. The Tariff Board concluded that the term “apparatus” was broad enough to include the castings at the time of importation.

Based on the Tariff Board’s decision in *Access Corrosion* and the evidence presented in the present case, the Tribunal concludes that “magnesium anodes” are “electrical apparatus” within the broad meaning given to that term. The fact that the connecting wire is not connected at the time of importation does not alter the basic character or intended function of the goods. In this latter regard, the Tribunal makes reference to Rule 2 (a) of the General Rules, which provides, in part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article.”

In light of the foregoing, the Tribunal finds that the goods in issue are named or generically described in heading No. 85.43 or, more particularly, under tariff item No. 8543.30.90 and that they should be classified thereunder. With respect to heading No. 81.04, the Tribunal notes that Note 1(f) to Section XV of the *Customs Tariff* excludes articles of Section XVI (machinery, mechanical appliances and electrical goods). Heading No. 81.04 is part of Section XV. As such, the goods in issue cannot be classified in heading No. 81.04, as determined by the respondent.

Accordingly, the appeal is allowed.

Charles A. Gracey  
Charles A. Gracey  
Presiding Member

---

9. (1984), 9 T.B.R. 184.

10. Customs Co-operation Council, 1st ed., Brussels, 1987.



Ottawa, Wednesday, July 23, 1997

**Appeal No. AP-96-041**

IN THE MATTER OF an appeal heard on February 13, 1997,  
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 March 11, 1996, with respect to a request  
for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**INTERPROVINCIAL CORROSION CONTROL  
COMPANY LIMITED**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**CORRIGENDUM**

The date of importation of the goods in issue cited in the second paragraph on page 1 of the reasons for decision should read as follows:

“The goods in issue ... were imported into Canada on April 21, 1993.”

This corrigendum pertains to the English version of the reasons for decision, as the French version will incorporate this change when published.

Charles A. Gracey \_\_\_\_\_

Charles A. Gracey  
Presiding Member

Michel P. Granger \_\_\_\_\_

Michel P. Granger  
Secretary