

Ottawa, Friday, May 30, 1997

Appeal No. AP-96-059

IN THE MATTER OF an appeal heard on January 7, 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 April 19, 1996, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

**CANADIAN METER, A DIVISION OF SINGER
COMPANY OF CANADA LIMITED**

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-96-059

**CANADIAN METER, A DIVISION OF SINGER
COMPANY OF CANADA LIMITED**

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The appellant is a manufacturer and supplier of measuring and control systems to the natural and processed gas industries. As originally submitted, this appeal, relating to numerous import transactions between 1991 and 1994, covered a broad range of components imported by the appellant for use in the assembly of gas meters in Canada. Prior to the hearing, the respondent re-determined the tariff classification of several components to the appellant's satisfaction, so that the tariff classification of only three components—diaphragm assemblies, flag arms and flag rods—was in dispute at the time of the hearing. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 9028.90.92 as parts and accessories committed solely or principally for use in gas meters, as determined by the respondent, or should be classified under tariff item No. 8414.90.50 as parts of diaphragm pumps, as claimed by the appellant.

HELD: The appeal is dismissed. The goods in issue are not parts of pumps and are not named in any of the headings of Chapter 84. Being specifically designed as parts of gas meters, and used as such by the appellant, the goods in issue are properly classified under tariff item No. 9028.90.92.

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 7, 1997
Date of Decision: May 30, 1997

Tribunal Member: Lyle M. Russell, Presiding Member

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Anne Jamieson

Appearances: Daniel J. Leduc, for the appellant
Anne M. Turley, for the respondent

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**CANADIAN METER, A DIVISION OF SINGER
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Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LYLE M. RUSSELL, Presiding Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue dated April 19, 1996, heard by one member of the Tribunal.²

The appellant, now known as Canadian Meter Company Inc., is a manufacturer and supplier of measuring and control systems to the natural and processed gas industries. At the time that this appeal was filed with the Tribunal, it related to numerous import transactions between 1991 and 1994, covering a broad range of components imported by the appellant for use in the assembly of gas meters in Canada. Prior to the hearing, the respondent re-determined the tariff classification of several components to the appellant's satisfaction, so that the tariff classification of only three components—diaphragm assemblies, flag arms and flag rods—was in dispute at the time of the hearing.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 9028.90.92 of Schedule I to the *Customs Tariff*³ as parts and accessories committed solely or principally for use in gas meters, as determined by the respondent, or should be classified under tariff item No. 8414.90.50 as parts of diaphragm pumps, as claimed by the appellant.

The relevant tariff nomenclature in Schedule I to the *Customs Tariff* reads as follows:

84.14	Air or vacuum pumps....
8414.90	-Parts
8414.90.50	---Of the goods of tariff item No. ... 8414.20.00 ... or 8414.80.00
90.28	Gas, liquid or electricity supply or production meters, including calibrating meters therefor.
9028.10.00	-Gas meters
9028.90	-Parts and accessories
9028.90.92	----Of the goods of tariff item No. 9028.10.00

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 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.).

Counsel for the appellant called one witness, Mr. John H. Poole, Vice-President and General Manager of Canadian Meter Company Inc. With the aid of several physical exhibits, including a modified gas meter in which the moving parts are driven by an electric motor rather than a flow of gas, Mr. Poole demonstrated for the Tribunal how a typical gas meter functions and the role played by the goods in issue. He explained that each meter incorporates two diaphragms which, using a system of valves, expand and contract in sequence as gas, under pressure, enters one side of the meter cavity and exits the other. The lateral movement of the diaphragms, which, in appearance, are similar to the bellows of an accordion, is converted, by means of the flag arm, flag rod, a worm gear and a wheel, into a rotary movement which drives the counters from which the meter reading is taken. The meters are referred to as positive displacement meters because there is positive displacement of gas from either side of the diaphragm equal to the stroke of the diaphragm. The stroke of the diaphragm and the diameter of the cavity in which it operates can be precisely measured so that, with each revolution of the meter, a known volume of gas is dispensed, and this remains constant regardless of wear and the condition of the gas flowing through the meter.

Mr. Poole explained that the energy to drive the meter derives from the difference in the pressure of the gas between the intake and the outlet. When a gas appliance is turned on, the pressure at that end of the gas line is reduced, causing gas to flow through the meter from the upstream end of the line which is under greater pressure. The basic design of positive displacement meters has not changed since they first came into use 150 years ago. However, the materials used to make them have changed. The cases are now made of aluminum rather than cast iron or soldered tin, and the flexible part of the diaphragm, or bellows, is made of synthetic material rather than leather.

Counsel for the respondent called one witness, Dr. Peter R. Frise, an associate professor of mechanical and aerospace engineering at Carleton University, Ottawa, Ontario. Dr. Frise was accepted as an expert in the field of mechanical engineering. He testified that the gas meters, of which the goods in issue are components, are the inverse of a pump. In the delivery of gas to consumers, a type of pump (called a compressor) is used to drive the gas through a pipeline to the meter, but the latter is a machine that is driven by the gas flowing through it. Although certain pumps have diaphragms in them, the presence of a diaphragm in a gas meter does not, according to Dr. Frise, make it a pump. Although the performance of positive displacement pumps, like that of positive displacement meters, is predictable and repeatable regardless of the intake and outlet conditions of the machine, the two are quite distinct. A meter takes energy out of the fluid stream, albeit only a small amount, while a pump adds energy to the stream, transferring it from a prime mover, such as an electric motor or internal combustion engine.

In argument, counsel for the appellant urged the Tribunal to take into account the changes in technology that have occurred since the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁴ (the Explanatory Notes) relating to meters and parts thereof were drafted. In this connection, he pointed to Note 1 of the Explanatory Notes to Chapter 90, which excludes from classification in that chapter leather diaphragms for meters and to Note (I)(B)(2) of the Explanatory Notes to heading No. 90.28 which describes positive diaphragm meters as having cast iron cylinders. He argued that, if parts for more modern meters with aluminum cases are classifiable in this heading, diaphragms for such meters, of any material, should be excluded from the heading.

Counsel for the appellant then argued that the goods in issue constitute articles classifiable in heading No. 84.14 and should, pursuant to Note 2 of the Explanatory Notes to Chapter 90, be classified in that

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

heading rather than in heading No. 90.28. In his view, the fact that the respondent had agreed to classify certain other meter parts, originally covered by the appeal, in Chapter 84 suggested that the three parts in issue should be classified therein as well. Finally, he cited the Tribunal's decision in *McDiarmid Lumber Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*⁵ as authority for considering the diaphragms to be pumps. The turbine ventilators considered to be pumps in that decision were not driven by an external mechanical force, but instead were wind-powered. In the present case, he argued, the power to operate the diaphragm and continuously displace gas within the meter is the differential in the pressure of the gas between the intake and the outlet.

Counsel for the respondent argued that how other meter parts have been classified is irrelevant to deciding how the goods in issue are classified. In her submission, counsel for the appellant had failed to demonstrate that the three parts in issue should be classified as gas pumps, or parts of such pumps, in heading No. 84.14. The evidence of both witnesses was to the effect that the three parts are essential to the operation of a gas meter and that the function of such meters is to measure, not propel, the gas flowing through them. Gas meters are specifically named in heading No. 90.28 and tariff item No. 9028.10.00, while parts of such meters are provided for in tariff item No. 9028.90.92. She argued that both the evidence and the case law⁶ supported classification of the diaphragms, flag arms and flag rods under tariff item No. 9028.90.92; they are necessary and integral parts of the meters and are specifically designed for use in meters. In her submission, Note 1(a) of the Explanatory Notes to Chapter 90 does not apply because the diaphragms are not made of leather and the reference to cast iron meters in the Explanatory Notes to that chapter cannot be taken to exclude from that chapter meters made of other materials.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules for the Interpretation of the Harmonized System*⁷ (the General 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. 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*.

With respect to the relevance of the material out of which the diaphragm is made, the Tribunal notes that articles of textile material are also excluded from Chapter 90 by virtue of Note 1(a) of the Explanatory Notes to that chapter. Although counsel for the appellant referred, in argument, to Code 5860 (textile fabrics for use in the manufacture of diaphragms for gas meters), he introduced no evidence as to the material composition of the diaphragms. Mr. Poole indicated that the bellows were made of synthetic materials, but did not specify which ones. The descriptive brochures filed with the appellant's brief indicate that the meters incorporate "[m]olded Duramic diaphragms" and that "Duramic" is a registered trademark of the American Meter Company. Describing them as "molded" suggests that other materials besides, or in addition to, textile materials may be used. Moreover, it was evident to the Tribunal from a visual examination of Exhibit A-1 that the diaphragm assembly, in the condition in which it is imported, incorporates substantial rigid metal components, as well as the flexible bellows portion. In view of this, the Tribunal sees no basis for excluding

5. Appeal No. AP-93-124, June 21, 1994.

6. Citing *The Deputy Minister of National Revenue for Customs and Excise v. Androck Inc.* (1987), 13 C.E.R. 239, Federal Court of Appeal, Court File No. A-1491-84, January 28, 1987; and *Staub Electronics Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, Canadian International Trade Tribunal, Appeal No. 2764, November 2, 1989.

7. *Supra* note 3, Schedule I.

the diaphragm assemblies from Chapter 90 as either an article of leather or an article of textile material. The exclusions mandated by Note 1(a) of the Explanatory Notes to Chapter 90 are specific to the materials mentioned in the note and do not apply to articles made of other materials.

It is clear from the evidence that meters are not pumps and that none of the goods in issue is a pump in its own right; neither are they parts of pumps. In the Tribunal's view, even if they were capable of being used as pumps, there would be no basis for classifying them in Chapter 84 rather than in Chapter 90. Note 2 of the Explanatory Notes to Chapter 90 refers only to goods, such as pumps, that are named in the headings of Chapter 84, 85 or 91, not to unspecified parts of such named goods. The goods in issue are designed and used as parts of meters and are properly classified under tariff item No. 9028.90.92.

Accordingly, the appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member