CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, August 12, 1997

Appeal No. AP-96-042

IN THE MATTER OF an appeal heard on November 12, 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 May 23, 1996, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

FUTURE SHOP LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal No. AP-96-042

FUTURE SHOP LTD. **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 under subsection 63(3) of the *Customs Act* dated May 23, 1996, affirming re-determinations of the classification of certain models of surge protectors under tariff item No. 8536.30.90.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8536.30.90 as other apparatus for protecting electric circuits, as determined by the respondent, or should be classified under tariff item No. 8537.10.91 as other boards, 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, of a kind used with goods classified under the tariff items enumerated in Schedule VI to the *Customs Tariff*, as claimed by the appellant.

HELD: The appeal is dismissed. Taking into account Note 4 to Section XVI of Schedule I to the *Customs Tariff*, the Tribunal believes that the surge protection devices, the female receptacles, the on/off switches, the circuit breakers and, in some models, the telephone jacks are individual components wired together, which contribute together in order to provide protection against anomalies in the electric circuits for equipment plugged into the units. Furthermore, the goods in issue may be considered to be equipment or apparatus and, therefore, fall within the definition of "machine" in Note 5 to Section XVI.

In the Tribunal's view, it is by protecting the electric circuits against power surges that the goods in issue ultimately protect the equipment with which they are used. For this reason, the Tribunal considers that the clearly defined function of the goods in issue may be characterized as being for protecting electric circuits and, therefore, it concludes that the goods in issue fall within the terms of heading No. 85.36.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 12, 1996
Date of Decision:	August 12, 1997
Tribunal Member:	Arthur B. Trudeau, Presiding Member
Counsel for the Tribunal:	Heather A. Grant
Clerk of the Tribunal:	Ivy Lai
Appearances:	Douglas J. Bowering, for the appellant Josephine A.L. Palumbo, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-96-042

FUTURE SHOP LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member

REASONS FOR DECISION

This is an appeal, heard by one member of the Tribunal,[1] under section 67 of the *Customs Act*[2] (the Act) from decisions of the Deputy Minister of National Revenue under subsection 63(3) of the Act dated May 23, 1996, affirming re-determinations of the classification of certain models of surge protectors, namely, POWERMAX SIX, POWERMAX TEL, PowerTrax 100 and PowerTrax 500, under tariff item No. 8536.30.90 of Schedule I to the *Customs Tariff*.[3]

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8536.30.90 as other apparatus for protecting electric circuits, as determined by the respondent, or should be classified under tariff item No. 8537.10.91 as other boards, 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, of a kind used with goods classified under the tariff items enumerated in Schedule VI to the *Customs Tariff*, as claimed by the appellant.

The relevant tariff nomenclature reads as follows:

85.36	Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 volts.
8536.30	-Other apparatus for protecting electric circuits
8536.30.90	---Other
85.37	Boards, 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, and numerical control apparatus, other than switching apparatus of heading No. 85.17.
8537.10	-For a voltage not exceeding 1,000 V
	---Other:
8537.10.91	----Of a kind used with the goods classified under the tariff items enumerated in Schedule VI to this Act

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.).

Mr. Ian Habinski, responsible for corporate sales in the National Capital Region for Future Shop Ltd., appeared as a witness on behalf of the appellant. Mr. Habinski began his testimony by focusing on the components in a multiple outlet strip (power strip) and a transient voltage adapter (transient voltage surge suppressor). These two goods were discussed for the sake of comparing the components of the goods in issue with the components of these two goods. With respect to the power strip, Mr. Habinski identified the various components contained in that unit as multiple female receptacles, an on/off switch, a circuit breaker, and a cord to plug into a wall outlet. The transient voltage surge suppressor, in addition to including the same components as those contained in the power strip, also has metal oxide varistors (MOVs) used for surge suppression.

In describing the goods in issue and, more particularly, their components, Mr. Habinski referred to physical exhibits of two of the four models in issue, namely, the PowerTrax 100 and the POWERMAX TEL. He testified that the circuitry in the goods in issue is largely the same as that contained in the transient voltage surge suppressor, except that it is more advanced. He acknowledged that each of the models contains an on/off switch, a circuit breaker and, in the case of three of the models, MOVs. In addition, the POWERMAX SIX and the POWERMAX TEL have at least one receptacle for plugging in a telephone.

Mr. Habinski testified that the goods in issue are marketed not only as power bars but also as power protection devices capable of providing a level of protection for the equipment plugged into them. The models are marketed largely by promoting warranties, with varying dollar values attached to them, covering damage caused by a power surge to the equipment plugged into them. Mr. Habinski agreed that the units could be used to operate a lamp or a fan and that they are designed for use with 110 to 120 V. He further stated that the units would be effective for switching a computer system off or on. If any one of the components within the models were removed, according to Mr. Habinski, the other components would still function in order to distribute power to the equipment or "load."

In cross-examination, Mr. Habinski acknowledged that surge protection is an essential and important feature of the goods in issue and that it is more than a feature of convenience. Further to questions arising from those of the Tribunal, Mr. Habinski indicated that, in his view, included among the definitions of "distribution" of power is the delivery of power through the circuitry.

Mr. Tony Mungham, Chief of the Electronics and Computer Systems Section, Research and Development Division, Department of National Revenue, appeared as an expert witness on behalf of the respondent. Mr. Mungham was qualified as an expert witness with respect to surge protectors and surge suppressors. In describing the concept of surge suppression, Mr. Mungham testified that it is used to limit the flow of electricity in an abnormal situation. Accordingly, its only use is when an anomaly occurs in the power system. The MOVs contained in the models are voltage sensitive resistors, which means that, as the voltage increases beyond a particular threshold, the resistance of the MOV decreases rapidly, eventually redirecting the electricity away from the load. Anomalies on the power line, which the surge suppressors are intended to correct, are high frequency and high energy surges. They could cause either arcing in the system or erroneous operations to be executed, such as in the case of a computer. Mr. Mungham indicated that, in his view, surge protectors are the same as surge suppressors.

Mr. Mungham indicated that one of the models in issue also has a capacitor-coil assembly, which protects against high frequency and low energy surges, which can cause errors in data processing.

According to Mr. Mungham, surge protectors do not control the "distribution" of electricity. He explained that the concept of electrical distribution is based on load balancing. Power bars simply conduct

electricity to one or more devices. Mr. Mungham stated that, in his view, the primary function of the goods in issue is surge protection. He further testified that the difference between "electrical control" and "electrical protection" is that electrical control exists when a device takes action on an electrical apparatus in a normal state of operation, while a device used for electrical protection functions only when an abnormal situation arises. While Mr. Mungham acknowledged that there is an element of control in electrical protection, a protective device is uniquely situated within the context of electrical control because of its nature of detection and control.

Mr. Mungham explained that the difference between a circuit breaker and the MOVs is that, when too much power is drawn, the circuit breaker will release itself and stop the flow of electricity. At this point, everything remains shut down until a manual reset occurs. By contrast, an MOV responds to an anomaly.

In cross-examination, Mr. Mungham explained that, while power distribution necessarily includes power conduction, power conduction does not include power distribution.

In argument, the appellant's representative conceded that the goods in issue provide circuit protection and that they are marketed as surge protectors. However, he questioned the purpose of heading No. 85.37 if not for goods such as those in issue. The representative submitted that the goods in issue fit the terms of heading No. 85.36, in that they are electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits, for a voltage not exceeding 1,000 V. However, heading No. 85.37 refers to boards, 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 and numerical control apparatus, other than switching apparatus of heading No. 85.17. In the representative's view, this heading refers to the goods in issue. He explained that the exclusion for "switching apparatus of heading No. 85.17" would not apply to the POWERMAX TEL model because its on/off switch does not switch off the telephone line.

In distinguishing the goods in issue in this appeal from those in issue in *Asea Brown Boveri Inc.* v. *The Deputy Minister of National Revenue*,[4] the appellant's representative argued that, in that appeal, the product as a unit was a relay, while, in this appeal, the goods in issue have multiple applications, with each component within the models having its own application. He submitted that, if any component were removed, the other components would continue to function. Considered together, the goods in issue form a unit on a common base, as referred to by the terms of heading No. 85.37. A number of the components are, furthermore, classifiable separately within heading No. 85.36, for use with a voltage not exceeding 1,000 V. While the goods in issue may be marketed as surge protectors, the surge protection device within each unit is but one component within the unit as a whole. According to the representative, classification of goods in the *Customs Tariff* should not be dictated by the marketing of the goods, but rather by their character and nature.

The appellant's representative further submitted that the goods in issue are used, and can be used, with the goods of Schedule VI to the *Customs Tariff*, such as fans and pumps. Moreover, in his view, the goods in issue are engaged in the distribution of power. The representative highlighted the following definition of "distribution": "[f]rom the standpoint of the customer's internal system, the area described is between a source or receiving station within the customer's plant and the points of utilization.[5]"

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4. Canadian International Trade Tribunal, Appeal No. AP-93-383, January 18, 1995.
5. *The New IEEE Standard Dictionary of Electrical and Electronics Terms*, 5th ed. (New York: Institute of Electrical and Electronics Engineers, 1992) at 376.

Counsel for the respondent submitted that the goods in issue are properly classified in heading No. 85.36 and relied, in part, upon the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[6] (the Explanatory Notes) to heading No. 85.35, which apply, *mutatis mutandis*, to heading No. 85.36. Note (F) of the Explanatory Notes to heading No. 85.35 describes "surge suppressors" as "assemblies of coils, capacitors, etc., inserted in series or in parallel with a line or electrical apparatus to absorb high frequency surges." In counsel's view, this definition describes the essential features of the goods in issue. The MOVs, considered separately, are classified in heading No. 85.33, but the goods themselves, as a single apparatus, are classifiable in heading No. 85.36. Counsel rejected the submission of the appellant's representative that the surge suppressor component of each model is classified in heading No. 85.36.

In support of Mr. Mungham's opinion that surge suppressors and surge protectors are the same, counsel for the respondent referred to the following definition of a "surge protector": "[a] protective device consisting of one or more surge arresters and a mounting assembly, for limiting surge voltages on low voltage ... electrical and electronic equipment or circuits.[7]" Counsel argued that the primary purpose of the goods in issue is to protect electrical circuits from power surges, as evidenced by product literature and supported by the testimony of Mr. Habinski. Although the goods might be composed of numerous components, these components combine to create a single apparatus classifiable in heading No. 85.36.

With respect to the meaning of "distribution" of electricity, counsel for the respondent referred to the testimony of Mr. Mungham to argue that "distribution" implies load balancing and that load balancing is not a feature of the goods in issue. While electrical protection will always have an element of electrical control, the goods in issue are not designed for electrical control, but rather for electrical protection, which feature places them in a class of their own. In support of the respondent's position, counsel referred to the Tribunal's decision in *Asea Brown Boveri*, in which the Tribunal decided that certain relays, although comprised of various components, were primarily intended to protect generator sets from damaging power surges and, accordingly, were classifiable based on that feature.

Counsel for the respondent emphasized that the goods in issue are not simply devices of convenience, designed for switching multiple corded appliances on and off. That there is some element of electrical control does not, in counsel's view, *prima facie* mean that the goods are classifiable in heading No. 85.37.

In determining the classification of goods, the Tribunal is cognizant that Rule 1 of the *General Rules for the Interpretation of the Harmonized System*[8] is of the utmost importance. Rule 1 provides that classification is first determined according to the terms of the headings and any relative Section or Chapter Notes. Section 11 of the *Customs Tariff* further provides that, in interpreting the headings and subheadings in Schedule I, regard shall be had to the Explanatory Notes.

In the Tribunal's view, Notes 4 and 5 to Section XVI of Schedule I are relevant to this appeal. Note 4 provides the following: "[w]here 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

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6. Customs Co-operation Council, 1st ed., Brussels, 1986.
7. *IEEE Standard Dictionary of Electrical and Electronics Terms*, 3rd ed. (New York: Institute of Electrical and Electronics Engineers, 1984) at 904.
8. *Supra* note 3, Schedule I.

headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function." Note 5 defines the word "machine" to include any equipment or apparatus cited in the headings of Chapter 84 or 85.

Taking into account Note 4 to Section XVI, the Tribunal believes that the surge protection devices, the female receptacles, the on/off switches, the circuit breakers and, in some models, the telephone jacks are individual components wired together, which contribute together in order to provide protection against anomalies in the electrical circuits for equipment plugged into the units. Furthermore, the goods in issue may be considered to be equipment or apparatus and, therefore, fall within the definition of "machine" in Note 5 to Section XVI. In support of these conclusions, the Tribunal notes that the product literature, including the packaging for some of the goods in issue, focuses almost exclusively on this function. For example, the words "SURGE PROTECTOR" are the most prominent on the front of the packaging for the POWERMAX TEL model. The back of the packaging also includes the following: "Panamax [the manufacturer] Means Real Protection ... [w]hen it comes to protecting your expensive telecommunications equipment, don't be misled by inexpensive power strips. Only Panamax offers complete protection from the small surges that can gradually destroy fragile circuitry, as well as catastrophic surges — even lightning."

In the Tribunal's view, it is by protecting the electrical circuits against power surges that the goods in issue ultimately protect the equipment with which they are used. For this reason, the Tribunal considers that the clearly defined function of the goods in issue may be characterized as being for protecting electric circuits and, therefore, it concludes that the goods in issue fall within the terms of heading No. 85.36. The Tribunal notes that it was not persuaded by the evidence that the clearly defined function of the goods in issue is either electrical control or the distribution of electricity.

Accordingly, the Tribunal finds that the goods in issue are properly classified in heading No. 85.36 as electrical apparatus for protecting electrical circuits, for a voltage not exceeding 1,000 V and, more specifically, under tariff item No. 8536.30.90 as other apparatus for protecting electric circuits.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member