

Ottawa, Friday, February 14, 1997

Appeal No. AP-96-061

IN THE MATTER OF an appeal heard on January 8, 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 June 24, 1996, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

NOMA INDUSTRIES LIMITED

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

AND

ITT BARTON INSTRUMENTS

Intervener

DECISION OF THE TRIBUNAL

The appeal is allowed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Michel P. Granger

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Secretary

UNOFFICIAL SUMMARY

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NOMA INDUSTRIES LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

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The issue in this appeal is the proper classification of several models of “timers” or “time switches” imported by the appellant in several separate transactions. The parties agree that the goods in issue are properly classified in subheading No. 9107.00 as “[t]ime switches with clock or watch movement or with synchronous motor.” The appellant’s representative claimed that the goods should be further classified under tariff item No. 9107.00.20 as time switches “of a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*].” Counsel for the respondent contended that the proper classification is tariff item No. 9107.00.90 as “[o]ther” time switches.

HELD: The appeal is allowed. The goods in issue are timers suitable for, or capable of, use with goods classified under a tariff item enumerated in Schedule VI to the *Customs Tariff*.

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 8, 1997
Date of Decision: February 14, 1997

Tribunal Member: Charles A. Gracey, Presiding Member

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Anne Jamieson

Appearances: Frank McGowan, for the appellant
Frederick B. Woyiwada, for the respondent

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TRIBUNAL: CHARLES A. GRACEY, Presiding Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) of several decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the Act which was heard by one member of the Tribunal.² The respondent decided that the time switches in issue do not qualify for classification under tariff item No. 9107.00.20 as “no evidence [had] been presented to show that the timers at issue have the capability to be used with an article classified under a tariff item in Schedule VI” to the *Customs Tariff*.³

The issue in this appeal is the proper classification of several models of “timers” or “time switches” imported by the appellant in several separate transactions. The parties agree that the goods in issue are properly classified in subheading No. 9107.00 as “[t]ime switches with clock or watch movement or with synchronous motor.” The appellant’s representative claimed that the goods should be further classified under tariff item No. 9107.00.20 as time switches “of a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*].” Counsel for the respondent contended that the proper classification is tariff item No. 9107.00.90 as “[o]ther” time switches.

Counsel for the respondent agreed that the appellant’s representative should be permitted to establish which time switches were imported, present the specific descriptive literature that relates to those timers and present some of the models as exhibits. There was, however, some confusion over which models had been imported and how the models relate to the descriptive literature. A recess was granted during which opposing parties attempted to identify the goods in issue and the corresponding descriptive literature. Following the recess, counsel conceded that six of the models illustrated on Exhibit A-1 were subject to the appeal and that the corresponding descriptive literature applied to these models.

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.).

Counsel for the respondent would not concede on model numbers illustrated on Exhibit A-1, or added by hand writing, that did not correspond to the model numbers provided on the import documents of the goods in issue. It became apparent, however, that much of the confusion was the result of using the catalogue numbers and/or universal product codes (UPC) to describe particular models of time switch. Both of these numbers are provided on Exhibit A-1.

While the appellant's representative said that model Nos. N1541 and 49019 were the same, counsel for the respondent would not concede this point, as the import documents show a separate entry for the two model numbers. However, the Tribunal notes that the hand-written 49019 also appears as part of the UPC corresponding to model No. N1541. Further, the first six digits of the UPC, 0 62964, are common to all of the models illustrated on Exhibit A-1 and the last number, in this case 8, is set apart. Therefore, the Tribunal is satisfied that these two different numbers are a reference to the same goods.

For the same reasons, the Tribunal is satisfied that model Nos. N1540 and 49017 and model Nos. N1504 and 49026 are a reference to the same goods. As such, the Tribunal finds that there are nine goods in issue, identified by the following Noma catalogue numbers as specified on Exhibit A-1: N1546, N1547, N1548, N1552, N1540, N1541, N1438, N1564 and N1504.

It should be noted that the foregoing was raised as a preliminary matter and, once settled, the Tribunal was in a position to address the substantive merits of the case. As such, the Tribunal must determine whether each of the nine models of time switch are goods "of a kind used with the goods classified under the tariff items enumerated in Schedule VI to [the *Customs Tariff*]."

The appellant's representative introduced two physical exhibits: a 24-hour outdoor timer, model No. N1504, and a 7-day 6-event outdoor timer, model No. N1507. It was conceded that model No. N1507 was not imported as part of the goods in issue and was, therefore, not in issue. It was entered merely as representative of a 15-ampere timer.

Using Exhibit A-2, the appellant's representative demonstrated the functionality of a timer when connected between a fan and an ordinary three-prong electrical outlet. He then entered into the record a copy of Schedule VI to indicate that it included the type of fan that had been utilized in the demonstration, specifically fans of tariff item Nos. 8414.51.00 and 8414.59.00.

In argument, the appellant's representative referenced *Ballarat Corporation Ltd. v. The Deputy Minister of National Revenue*⁴ in support of his contention that the goods in issue were of a kind used with the goods classified under a tariff item enumerated in Schedule VI to the *Customs Tariff*. The *Ballarat* case also provided support for the proposition that the goods need only be suitable for, or capable of, use with goods of Schedule VI to the *Customs Tariff* and that it is not necessary to prove that they were actually so used.

Counsel for the respondent argued that the small fan used in the demonstration was not a product of Schedule VI or, at least, that there was no evidence that it was. Nor had the appellant produced any evidence concerning the design or construction of the imported goods that makes them capable of, or suitable for, use with any of the goods classified under a tariff item referenced in Schedule VI. Counsel also argued that there was insufficient evidence to conclude that the models with two different code numbers were the same model.

4. Canadian International Trade Tribunal, Appeal No. AP-93-359, December 19, 1995.

It is relevant to note that this appeal was scheduled to be heard together with another appeal involving very similar goods. In fact, the goods were sufficiently similar that the appellant had gained the consent of counsel for the respondent and of the Tribunal that its brief in respect of the other case would be acceptable for the instant case as well. At the start of the hearing, counsel notified the Tribunal that the classification of the goods in the other case would be re-determined in accordance with the appellant's representations and that, therefore, the appeal need not be heard. However, the respondent was not prepared to accept the reclassification of the goods involved in the present case for want of sufficient evidence.

Part of the missing evidence in the respondent's submission was uncertainty surrounding the use of different model numbers to identify the same goods. This was fully dealt with as a preliminary matter, and the Tribunal is satisfied that the goods are properly and fully described and that, in all cases, the two model numbers used to identify the same goods can be correlated.

As to whether or not the time switches in issue are capable of, or suitable for, use with the goods classified under a tariff item enumerated in Schedule VI to the *Customs Tariff*, the Tribunal is likewise satisfied that this is the case. The appellant's representative demonstrated the use of one of the timers with a small fan, and the Tribunal agrees that a very wide assortment of fans, including the one used in the simple demonstration, fall under tariff item No. 8414.51.00, which tariff item is included in Schedule VI to the *Customs Tariff*.

Accordingly, the appeal is allowed.

Charles A. Gracey
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Presiding Member