

Ottawa, Friday, February 21, 1997

Appeal No. AP-96-048

IN THE MATTER OF an appeal heard on November 28, 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 April 11 and 25, 1996, with respect to a
request for re-determination under section 63 of the *Customs Act*.

BETWEEN

CANADIAN OPTICAL SUPPLY COMPANY 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

Susanne Grimes

Susanne Grimes
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-96-048

CANADIAN OPTICAL SUPPLY COMPANY 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 made under section 63 of the *Customs Act*. The goods in issue are described as “RXable” sunglasses with frames and mountings of plastic or metal imported complete with non-prescription or demo lenses. The sunglasses can be worn either as is, i.e. with a non-prescription lens, or with a prescription lens. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 9004.10.00 as sunglasses, as determined by the respondent, or should be classified under tariff item Nos. 9003.11.10 and 9003.19.10 as frames of plastic or metal, as claimed by the appellant.

HELD: The appeal is dismissed. In *Centennial Optical Limited v. The Deputy Minister of National Revenue*, the Tribunal stated that “the term ‘[s]unglasses,’ as it appears in the subheading and Explanatory Notes, has not been qualified in any way to refer only to non-prescription sunglasses.” The Tribunal also stated that, in its view, “it is clear from the Explanatory Notes that it was contemplated that the term ‘sunglasses’ include both prescription and non-prescription sunglasses.” The Tribunal adopts this reasoning in the present case. The Tribunal is of the opinion that the evidence clearly shows that, at the time of importation, the goods in issue are not frames, as contended by the appellant. They are sunglasses. It is well established that the time for determining tariff classification of goods is at the time of entry into Canada. Accordingly, the Tribunal finds that the goods in issue are properly classified under tariff item No. 9004.10.00 as sunglasses.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 28, 1996
Date of Decision:	February 21, 1997
Tribunal Member:	Arthur B. Trudeau, Presiding Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Raylene Van Vliet and Michael Sherbo, for the appellant Guy A. Blouin, for the respondent

Appeal No. AP-96-048

CANADIAN OPTICAL SUPPLY COMPANY LTD.

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), heard by one member of the Tribunal,² from decisions of the Deputy Minister of National Revenue dated April 11 and 25, 1996, made under section 63 of the Act.

The goods in issue are described as “RXable” sunglasses with frames and mountings of plastic or metal imported complete with non-prescription or demo lenses. The sunglasses can be worn either as is, i.e. with a non-prescription lens, or with a prescription lens. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 9004.10.00 of Schedule I to the *Customs Tariff*³ as sunglasses, as determined by the respondent, or should be classified under tariff item Nos. 9003.11.10 and 9003.19.10 as frames of plastic or metal, as claimed by the appellant. For purposes of this appeal, the relevant tariff nomenclature reads as follows:

90.03	Frames and mountings for spectacles, goggles or the like, and parts thereof. -Frames and mountings:
9003.11	--Of plastics
9003.11.10	---For safety goggles or safety spectacles designed for use by workers employed in hazardous work; for prismatic eyeglasses for reading
9003.19	--Of other materials
9003.19.10	---For safety goggles or safety spectacles designed for use by workers employed in hazardous work; for prismatic eyeglasses for reading
90.04	Spectacles, goggles and the like, corrective, protective or other.
9004.10.00	-Sunglasses

At the hearing, Mr. Pierre Haw, Controller and General Manager of Canadian Optical Supply Company Ltd., testified on behalf of the appellant. He explained that the appellant is an importer and distributor of optical frames and that the majority of the appellant’s clients are opticians and optometrists.

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.).

Mr. Haw testified that all of the appellant's frames are RXable, which means that they are designed to hold prescription lenses. He explained that the opticians and optometrists who purchase the frames replace the demo lenses or non-prescription lenses with prescription lenses. Mr. Haw also explained that demo lenses, which can be either clear or tinted, are used to hold the frames so they do not bend during shipping and handling or while on display. They are also used for aesthetic purposes and to let the clients see how the sunglasses look on them. The demo lenses can also be used as a pattern to cut prescription lenses to fit in the frames. Mr. Haw explained that RXable frames are built stronger than non-RXable frames so they can hold prescription lenses. They are also more expensive than non-RXable frames.

In cross-examination, Mr. Haw testified that the goods in issue can be worn in the condition in which they are imported. He said that, although the majority of the appellant's clients are optometrists and opticians, the appellant also sells the goods in issue to sporting goods stores.

The appellant's representatives argued that the goods in issue should be classified as frames and mountings for prismatic eyeglasses. More specifically, they should be classified under tariff item No. 9003.11.10, if made of plastic, and under tariff item No. 9003.19.10, if made of metal. They contended that the goods in issue cannot be classified as sunglasses because of their design, marketing, intended use and essential character. Furthermore, only the frames are of a quality that can be made into prescription glasses. The lenses are not of that quality. Only the frames are RXable. The representatives argued that these facts distinguish this case from the Tribunal's decision in *Centennial Optical Limited v. The Deputy Minister of National Revenue*,⁴ where the goods in issue were prescription sunglasses. Not only were the frames RXable, but the lenses were prescription lenses. According to the representatives, the goods in issue cannot be classified as sunglasses because of their intrinsic character or primary use as frames. They argued that RXable frames are marketed differently from non-RXable frames. RXable frames with demo lenses are not sold as complete sunglasses. They are sold mainly to opticians and optometrists who specialize in making prescription eyewear and whose obvious intent is to replace the demo lenses with prescription lenses. They relied on the Tribunal's decisions in *Majestic Industries (Canada) Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*⁵ and in *L&F Canada Inc. v. The Deputy Minister of National Revenue*⁶ in support of their argument that the marketing and use of a product are important in determining its appropriate tariff classification.

Counsel for the respondent argued that the goods in issue are properly classified under tariff item No. 9004.10.00 as sunglasses. He argued that the goods must be classified according to their nature at the time of importation. Counsel noted that the witness for the appellant admitted that the goods in issue were sunglasses. Counsel was of the opinion that the fact that, in certain instances, the imported lenses are removed from the sunglasses in Canada and replaced with prescription lenses does not affect the tariff classification of the goods. To support his argument that the goods in issue are properly classified as sunglasses, counsel relied on the Tribunal's decision in *Centennial Optical*.

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*⁷ (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

4. Appeal No. AP-95-121, May 14, 1996.

5. Appeal No. AP-92-235, January 7, 1994.

6. Appeal No. AP-95-076, August 8, 1996.

7. *Supra* note 3, Schedule I.

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 to the Harmonized Commodity Description and Coding System*.⁸

In *Centennial Optical*, the Tribunal stated that “the term ‘[s]unglasses,’ as it appears in the subheading and Explanatory Notes, has not been qualified in any way to refer only to non-prescription sunglasses.”⁹ The Tribunal also stated that, in its view, “it is clear from the Explanatory Notes that it was contemplated that the term ‘sunglasses’ include both prescription and non-prescription sunglasses.”¹⁰ The Tribunal adopts this reasoning in the present case. The Tribunal is of the opinion that the evidence clearly shows that, at the time of importation, the goods in issue are not frames, as contended by the appellant. They are sunglasses. It is well established that the time for determining tariff classification of goods is at the time of entry into Canada.¹¹

The Tribunal notes that it does not need to consider the argument of the appellant’s representatives relating to the essential character of the goods in issue, as such an argument is only relevant when the Tribunal is classifying goods in accordance with Rule 3 (b) of the General Rules, which the Tribunal only considers if it cannot classify goods in accordance with Rule 1, 2 or 3 (a).¹²

For all of the above reasons, the Tribunal finds that the goods in issue are properly classified under tariff item No. 9004.10.00 as sunglasses.

Accordingly, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

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

9. *Supra* note 4 at 5.

10. *Ibid.*

11. See, for example, *The Deputy Minister of National Revenue for Customs and Excise v. MacMillan & Bloedel (Alberni) Limited*, [1965] S.C.R. 366.

12. See General Rules, *supra* note 7; and *Weil Company Limited v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-92-096, May 10, 1993.