

Ottawa, Friday, November 14, 1997

Appeal Nos. AP-96-196 to AP-96-198

IN THE MATTER OF appeals heard on June 2, 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 October 9, 1996, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

VIESSMANN MANUFACTURING COMPANY INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-96-196 to AP-96-198

VIESSMANN MANUFACTURING COMPANY INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

These are appeals under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue under subsection 63(3) of the *Customs Act*. The issue in these appeals is whether goods described as heat exchangers, insulation jackets, manifolds, burner tubes and sheet metal vents are properly classified under tariff item No. 8403.10.10 as boilers of a kind used for heating buildings, other than domestic, as determined by the respondent, or should be classified under tariff item No. 8403.90.00 as parts of central heating boilers or, alternatively, under tariff item No. 8419.50.99 as other heat exchange units, as claimed by the appellant.

HELD: The appeals are dismissed. Rule 2 (a) of the *General Rules for the Interpretation of the Harmonized System* extends the scope of the term “boilers” in heading No. 84.03 to include incomplete and unassembled boilers, such that, if the goods in issue, in their incomplete and unassembled state, have the essential character of a complete or finished boiler, they are to be classified in heading No. 84.03 as boilers. Applying Rule 2 (a) to the facts of these appeals, the Tribunal is persuaded that the goods in issue are incomplete or unassembled boilers, as they have the essential character of boilers. The evidence before the Tribunal is that the goods in issue, as imported, require considerable assembly, manufacture and testing, followed by partial disassembly, before they are ready for delivery and installation. There is no doubt that the goods in issue are neither fully assembled nor operational at the time of importation. Indeed, the goods in issue lack several attachments, including, perhaps most importantly, a control panel, the gas train and electrical fittings. However, the main feature of a boiler, namely, the heat exchanger, is present, as are the burner, the manifold, the outer panels and sundry other components. In the Tribunal’s view, neither the assembly of the goods in issue nor the testing of the assembled boiler, which constitute a substantial portion of the value of the assembled boiler, can be said to have altered the essential character of the goods in issue.

With respect to counsel for the appellant’s alternative argument, that the goods in issue be classified under tariff item No. 8419.50.99 as other heat exchange units, the Tribunal considered the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 84.19 and, more particularly, those describing heat exchange units. The Tribunal is not persuaded, based on the evidence, that the goods in issue and, more specifically, the heat exchanger meet the general description provided nor that they fall within the list of goods set out as examples of heating or cooling plant and machinery equipment. Moreover, the *Explanatory Notes to the Harmonized Commodity Description and Coding System* provide, in part, that heading No. 84.19 does not include central heating boilers of heading No. 84.03.

Place of Hearing: Ottawa, Ontario
Date of Hearing: June 2, 1997
Date of Decision: November 14, 1997

Tribunal Member: Charles A. Gracey, Presiding Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Margaret Fisher

Appearances: Richard A. Wagner and Larry N. James, for the appellant
Anne M. Turley, for the respondent

Appeal Nos. AP-96-196 to AP-96-198

VIESSMANN MANUFACTURING COMPANY INC. Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member

REASONS FOR DECISION

These are appeals, 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. The issue in these appeals is whether goods described as heat exchangers, insulation jackets, manifolds, burner tubes and sheet metal vents are properly classified under tariff item No. 8403.10.10 of Schedule I to the *Custom Tariff*³ as boilers of a kind used for heating buildings, other than domestic, as determined by the respondent, or should be classified under tariff item No. 8403.90.00 as parts of central heating boilers or, alternatively, under tariff item No. 8419.50.99 as other heat exchange units, as claimed by the appellant. The following is the relevant tariff nomenclature from Schedule I to the *Customs Tariff*:

84.03	Central heating boilers other than those of heading No. 84.02.
8403.10	-Boilers
8403.10.10	---Of a kind used for heating buildings, other than domestic
8403.90.00	-Parts
84.19	Machinery, plant or laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric.
8419.50	-Heat exchange units
	---Other:
8419.50.99	----Other

The appellant imported certain goods that it describes as “parts that are used in the manufacture of a number of models of natural gas or propane central heating boilers.” The appellant claims that certain series or models of boilers, the AR and RS series, are manufactured from these imported parts and are then sold to

-
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.).

the residential and commercial/industrial sectors in Canada. The goods for the AR series were imported from Viessmann Werke GmbH & Co. in Germany (Viessmann Germany), and the goods for the RS series were imported from Fonderie Sime SPA in Italy.

The first witness for the appellant, Mr. Harald Prell, Vice-President of Marketing and Manufacturing and General Manager of Viessmann Manufacturing Company Inc., testified that he is responsible for the appellant's North American operations, including Canada and the United States, and had been with the organization since 1980. Mr. Prell is an engineer and testified that his responsibilities include manufacture, distribution and sales.

Mr. Prell testified that the appellant's facility in Waterloo, Ontario, employs 24 people, 6 of whom are production staff and the remaining are engineers, who are required for the approval processes in North America, and marketing and administration personnel.

According to Mr. Prell, in order to be able to manufacture the boilers in Canada, the appellant's plant in Waterloo had to be certified by the American Society of Mechanical Engineers (ASME) and also had to meet the codes of the Canadian Gas Association (CGA), now called International Approval Services (IAS). Further, the appellant is required to register the pressure vessels with Canadian registration numbers in each province and territory. Mr. Prell testified that the Waterloo facility is the only such manufacturing facility in North America and that its operations in the United States are merely for warehousing.

In addition to its production plant, the appellant has a training facility where approximately 600 trainees per year are instructed in installation, service and maintenance of the Viessmann products.

Mr. Prell added that the appellant designs and prints much of the product literature in Canada, explaining that it was not suitable to simply use German brochures. He explained that this was done to satisfy different requirements and meet different standards or adapt to different components than might exist in Germany.

As described by Mr. Prell, the main components of a boiler consist of a heat exchanger with a pressure relief valve, a gas train with a burner assembly and all other necessary components. In addition, a boiler has a control system which is required for its safe and efficient operation. Using a series of well annotated photographs taken within the appellant's facility in Waterloo, Mr. Prell explained how a boiler is constructed or assembled from its constituent parts and, in particular, the activities undertaken in the plant between the time that the goods in issue arrive and the time that they are complete and ready for sale and installation.

For example, using the first model presented, the Atola RS-14, the goods in issue arrive in two separate crates. The larger crate contains the "casting," also known as the "heat exchanger." The casting is uncrated and items known as "sensor wells" are installed to control the water temperature. A water pressure test hose is attached to the casting, and a water pressure test is conducted, after which the test hose is disconnected and the casting is drained. The second crate contains a number of accessories, including the burner, burner manifold and pilot burner. Mr. Prell showed the Tribunal pictures of a variety of components used in the construction of the gas train assembly and the electrical and control apparatus. These goods consisted of gas piping, valves, wiring, etc., as well as a control panel. All of these items, except the control panel, are purchased in Canada and all are general plumbing and electrical items commonly used in gas and electrical installations. The control panels, though also imported, arrive in bulk and are not in issue.

With the assistance of a series of photographs, Mr. Prell explained the rather detailed assembly of the gas train, the installation of the burner and the pilot burner assembly. The assembly necessarily included the electrical wiring, junction boxes and the like, as well as gas piping, fittings and, of course, the control panel. It was explained that this assembly is necessary to permit a test burning which is conducted on every boiler assembly before sale. This test burning is necessary in order to comply with various requirements and to affix to the boiler the necessary certificates, labels, rating plates, etc. After a successful test burning, the boiler is dismantled to a degree and recreated for shipment, together with all the parts and fittings purchased locally.

According to Mr. Prell, all of the aforementioned operations performed to complete, assemble, test and dismantle a boiler add between 40 and 45 percent, depending on the model, to the value of the boiler.

When asked why, in placing an order, the appellant cites a particular model number while insisting that it is not ordering a boiler per se, but rather parts thereof, Mr. Prell replied that the model number is intended to indicate the model that is to be fashioned in Canada and the parts that are specific to that model.

Under cross-examination, Mr. Prell agreed that Viessmann Germany puts an ASME stamp on the heat exchanger, while the appellant puts an "H" stamp on after assembly to indicate that the unit has been tested and is safe to operate and that the appellant is responsible for the assembly and the safety certification of the boiler.

Counsel for the respondent introduced into evidence an invoice from Viessmann Germany to the appellant and noted that the invoice specified a particular model of boiler. Mr. Prell agreed, but stated that the item was incomplete and that designating the item by a model number was for sake of convenience. A second document introduced into evidence by counsel was a customer document which also referred to a specific model number. Counsel asked Mr. Prell to confirm that, in the appellant's product literature, such as in installation and service manuals, the items are referred to as boilers of a certain model even in their incomplete state. Mr. Prell agreed that this was the case, but that, at the time of shipment from the appellant to the buyer, the item is complete, but disassembled to the degree necessary to expedite shipment.

In response to questioning from the Tribunal, Mr. Prell testified that the appellant did stock such goods as, for example, burner tubes or castings and that such goods were imported as "parts" without challenge by officials of the Department of National Revenue.

The second witness for the appellant was Mr. F.J. (Ted) Clark, Manager of Customer Relations for International Approval Services. Mr. Clark was accepted as an expert witness in relation to gas standards and equipment. Mr. Clark described the IAS as a testing organization for the American Gas Association and the CGA which tests gas-fired equipment, appliances and accessories. Mr. Clark explained that employees of the IAS are responsible for the certification of boilers and the inspection of plants, such as the appellant's plant in Waterloo. He further explained that the standards lay out various requirements for certification of a boiler in terms of the construction, materials, control systems and performance.

Mr. Clark testified that a burner and a control panel, as well as approved electrical wiring, are essential parts of a boiler and must meet specific standards. He testified that he had seen the goods in issue in their imported state and throughout the various stages of assembly or manufacture and considered the goods, as imported, to be parts of boilers. In his opinion, the goods, as imported, would not comply with the appropriate and requisite standards.

Counsel for the respondent introduced Mr. Thomas C. Rawley, a mechanical engineer and Senior Project Manager with Babcock & Wilcox, as a witness and sought to qualify him as an expert in the design, fabrication, assembly and delivery of power generation. Counsel for the appellant expressed reservations, noting that the goods with which Mr. Rawley is associated are larger devices using steam for power generation. After hearing further about the experience and qualifications of Mr. Rawley, the Tribunal accepted him as an expert witness in the specified field of expertise.

Mr. Rawley defined a boiler as “the assemblage of the parts that accommodate the transfer of heat to water while sustaining the integrity from a material standpoint associated with pressure and temperature.”⁴ He testified that Babcock & Wilcox produces a different type of boiler and that it is not in competition with the appellant. He testified that his firm sells its boilers as boilers without burners, controls, fans, heat traps, blowers and sundry other attachments and that, if the customer wants any or all of these items, they are invoiced separately. He also testified that his firm does not manufacture such goods in Canada, but imports them as boilers without the aforementioned components from its plant in the United States.

Mr. Rawley agreed that, under present standards, one could not operate a boiler that was not equipped with a control panel and other components. However, he testified that such regulatory requirements did not alter his opinion that a boiler is, in essence, a heat exchanger. He also testified that, in the trade, a boiler is understood to be simply the boiler or heat exchanger itself. He opined that the difference between his view and that of the other expert witness, Mr. Clark, was that Mr. Clark had defined a boiler in the context of the criteria of CGA Standard 4.9 for gas-fired steam and hot water boilers effective July 1, 1969.

In argument, counsel for the appellant sought to identify an appropriate definition of “boiler” by referring to dictionary definitions of the term “boiler” as a “a fuel-burning apparatus for heating a hot-water supply”⁵ and “a container in which water can be heated under pressure and converted into steam ... a stove which heats water for conveyance to a hot-water system,”⁶ as well as to CGA Standard 4.9 which speaks of a boiler as a “self-contained gas-burning appliance for supplying hot water or low pressure steam, primarily intended for domestic and commercial space heating application.” In counsel’s view, what is common to these descriptions of a boiler is that it is an appliance for supplying hot water. Counsel then reviewed the relevant evidence that the goods in issue do not include controls, without which, counsel submitted, the goods in issue do not have the capability to heat water. As a result, counsel argued, the goods in issue cannot be classified as boilers.

Counsel for the appellant disputed the application of Rule 2 (a) of the *General Rules for the Interpretation of the Harmonized System*⁷ (General Rules) which provides, in part, that an incomplete or unfinished article may be classified as the complete or finished article if that article has the essential character of the complete or finished article. To support this view, counsel referred to definitions of the term “essential” as “1 absolutely necessary; indispensable. 2 fundamental, basic”⁸ and “necessary, such that one cannot do without it ... of the utmost importance ... relating to, or arising from, the ... nature of a thing or person,

4. *Transcript of Public Hearing*, June 2, 1997, at 143.

5. *The Concise Oxford Dictionary of Current English*, 8th ed. (Oxford: Clarendon Press, 1990) at 123.

6. *The New Lexicon Webster’s Encyclopedic Dictionary of the English Language*, Canadian ed. (New York: Lexicon Publications, 1988) at 108.

7. *Supra* note 3, Schedule I.

8. *Supra* note 5 at 400.

basic, fundamental⁹” and submitted that the controls are essential to the operation of the boiler. Therefore, absent the controls, the goods in issue do not constitute the essential character of a boiler. Counsel submitted that the reference to a machine without a motor in the General Notes of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*¹⁰ (the Explanatory Notes) to Section XVI as having the essential character of the machine only makes sense because the assembly of the motor in that example is a very simple operation. However, the goods in issue require more than simple assembly, as indicated by the fact that 40 to 45 percent of the value of the boilers made using the goods in issue is derived from the operations undertaken subsequent to importation. As further support that the goods in issue, without controls, do not have the essential character of boilers, counsel referred to an analogous decision of the Tribunal in *Shop-Vac Canada Ltd. v. The Deputy Minister of National Revenue*¹¹ that industrial vacuum cleaner head assemblies are not vacuum cleaners until fitted onto a drum or other container, as they do not have the essential character of a vacuum cleaner.

Having argued that the goods in issue cannot be classified as a boiler, counsel for the appellant went on to consider the factors previously used by the Tribunal in determining whether an article is a part¹² and submitted that, since the goods in issue are essential, necessary and integral components of and installed on boilers, they are parts of boilers. Counsel submitted that the goods in issue may be essential and necessary for boilers. However, that does not mean that the goods in issue are essentially boilers.

As an alternative argument in the event that the Tribunal finds that the goods in issue are not parts of boilers, counsel for the appellant submitted that the goods in issue should be classified as other heat exchange units under tariff item No. 8419.50.99.

Counsel for the respondent argued that the goods in issue are properly classified under tariff item No. 8403.10.10, on the basis that they have the essential character of a complete or finished boiler, as provided for by Rule 2 (a) of the General Rules. In support of this contention, counsel submitted that it is clear that the goods in issue are destined to be a boiler and that the goods are invoiced as a boiler at a unit price and are characterized by the manufacturer as an unfinished boiler on the purchase order.

Counsel for the respondent also referred to Part IV of the General Notes of the Explanatory Notes to Section XVI entitled “Incomplete Machines,” which provides, in part, that, in order to be classified in the same heading as an incomplete article, an article must be “an assembly of parts so far advanced that it already has the main essential features of the complete machine” and that, even if a machine is lacking a major component at the time of importation, such as the power source, it is still classified in the same heading as the corresponding complete machine. Relying on the Explanatory Notes, counsel submitted that the goods in issue should be classified as an incomplete boiler, even though they were imported without electronics or controls. In addition, counsel referred to the Explanatory Notes to heading No. 84.03, which provide, in part, that central heating boilers “may be equipped with pressure regulators and gauges, water levels, taps, cocks, burners and similar parts or accessories,” and submitted that what this means is that an article classified as a boiler in that heading may or may not have the listed items.

9. *Supra* note 6 at 322.

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

11. Appeal No. AP-94-353, January 30, 1996.

12. *Simark Controls Ltd. v. The Deputy Minister of National Revenue*, Appeal No. AP-94-329, January 25, 1996.

With respect to the alternative argument put forth by counsel for the appellant, that is, that the goods in issue be classified under tariff item No. 8419.50.99, counsel for the respondent submitted that the goods in issue, as imported, include more than just the heat exchanger. Moreover, counsel for the respondent submitted, there are heat exchangers that have nothing to do with boiling.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the General Rules and the *Canadian Rules*.¹³ 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*.

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 and, provided such headings or Notes do not otherwise require, according to the principles set out in rules 2 through 6, as well as the *Canadian Rules* which follow. Rule 2 (a) of the General Rules extends the scope of any heading to include a reference to that article incomplete or unfinished, provided the incomplete or unfinished article, as presented, has the essential character of the complete or finished article. This includes an incomplete or unfinished article presented unassembled or disassembled.

The Tribunal notes that, although the goods in issue do not form a complete boiler at the time of importation, Rule 2 (a) of the General Rules extends the scope of the term “boilers” in heading No. 84.03 to include incomplete and unassembled boilers, such that, if the goods in issue, in their incomplete and unassembled state, have the essential character of a complete or finished boiler, they are to be classified in heading No. 84.03 as boilers. In the Tribunal’s view, in referring to an article as incomplete, Rule 2 (a) manifestly includes an article that may lack some components and that is, therefore, likely not operational. Thus, the Tribunal is not persuaded that the fact that the goods in issue cannot operate safely, if at all, is determinative of whether or not they may be classified as a boiler.

Applying Rule 2 (a) of the General Rules to the facts of these appeals, the Tribunal is persuaded that the goods in issue are incomplete or unassembled boilers, as they have the essential character of boilers. The evidence before the Tribunal is that the goods in issue, as imported, require considerable assembly, manufacture and testing, followed by partial disassembly, before they are ready for delivery and installation. There is no doubt that the goods in issue are neither fully assembled nor operational at the time of importation. Indeed, the goods in issue lack several attachments, including, perhaps most importantly, a control panel, the gas train and electrical fittings. However, the main essential feature of a boiler, namely, the heat exchanger, as Mr. Clark described it, is present, as are the burner, the manifold, the outer panels and sundry other components.

There remains the question of whether the value that is added to the goods in issue after importation is of such a considerable proportion as to render absurd the claim that those goods, as imported, have the essential character of a boiler. One of the witnesses for the appellant stated that the cost base of the imported item is increased 40 to 45 percent by the labour and “parts” added to the goods in issue after importation. It is first noted that a considerable proportion of this value-added work involves the further assembly of the goods in issue and testing of the assembled boiler, activities unrelated to the installation of the controls. In the Tribunal’s view, neither the assembly of the goods in issue nor the testing of the assembled boiler can be said to have altered the essential character of the goods in issue. Moreover, other parts used in the assembly of an

13. *Supra* note 3, Schedule I.

operational boiler and, in particular, piping and fittings are not, according to the Explanatory Notes to heading No. 84.03, to be classified as parts of boilers per se, but are to be classified in heading Nos. 73.03 to 73.07. Thus, the Tribunal is not persuaded that parts, which are not themselves to be considered parts of boilers, can, whether already installed or not, influence the proper classification of the boiler or heat exchanger itself.

With respect to counsel for the appellant's alternative argument, that the goods in issue be classified under tariff item No. 8419.50.99 as other heat exchange units, the Tribunal considered the Explanatory Notes to heading No. 84.19 and, more particularly, those describing heat exchange units. The Tribunal is not persuaded, based on the evidence, that the goods in issue and, more specifically, the heat exchanger meet the general description provided in the Explanatory Notes nor that they fall within the list of goods set out as examples of heating or cooling plant and machinery equipment. Moreover, the Explanatory Notes provide, in part, that heading No. 84.19 does not include central heating boilers of heading No. 84.03.

Accordingly, the appeals are dismissed, and the goods in issue are properly classified under tariff item No. 8403.10.10 as boilers of a kind used for heating buildings, other than domestic, as determined by the respondent.

Charles A. Gracey

Charles A. Gracey
Presiding Member