

Ottawa, Friday, February 14, 1997

**Appeal No. AP-96-054**

IN THE MATTER OF an appeal heard on December 10, 1996,  
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 April 10, 1996, with respect to a request  
for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**SUNBEAM CORPORATION (CANADA) LIMITED**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Lyle M. Russell  
Lyle M. Russell  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-96-054**

**SUNBEAM CORPORATION (CANADA) LIMITED**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

At issue in this appeal is the tariff classification of certain heating pads imported in September 1993. At the time of entry, the goods in issue were classified under tariff item No. 6307.90.99 as other made up articles of other textile materials, and this classification was upheld by the respondent on re-determination. The appellant contends that the goods in issue should be classified under tariff item No. 8516.79.99 as other electro-thermic appliances of a kind used for domestic purposes.

**HELD:** The appeal is allowed. The Tribunal is of the view that the goods in issue perform no useful function without the heat-generating ability imparted by their electrical component and, thus, finds that they are more specifically described in heading No. 85.16 than in heading No. 63.07. Accordingly, the goods in issue should be classified under tariff item No. 8516.79.99 as other electro-thermic appliances of a kind used for domestic purposes.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 10, 1996
Date of Decision:	February 14, 1997
Tribunal Member:	Lyle M. Russell, Presiding Member
Counsel for the Tribunal:	Hugh J. Cheetham
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Gregory Kanargelidis, for the appellant Josephine A.L. Palumbo, for the respondent

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**SUNBEAM CORPORATION (CANADA) LIMITED**

**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*<sup>1</sup> (the Act) from a decision of the Deputy Minister of National Revenue dated April 10, 1996, heard by one member of the Tribunal.<sup>2</sup>

At issue in this appeal is the tariff classification of certain heating pads imported in September 1993. At the time of entry, the goods in issue were classified under tariff item No. 6307.90.99 of Schedule I to the *Customs Tariff*<sup>3</sup> as other made up articles of other textile materials, and this classification was upheld by the respondent on re-determination. The appellant contends that the goods in issue should be classified under tariff item No. 8516.79.99 as other electro-thermic appliances of a kind used for domestic purposes. At the root of the dispute is a difference of view as to whether or not the goods in issue are described in Note 1 (a) to Chapter 85 of Schedule I, which excludes from that chapter “[e]lectrically warmed blankets, bed pads, foot-muffs or the like; electrically warmed clothing, footwear or ear pads or other electrically warmed articles worn on or about the person.”

Two witnesses appeared for the appellant. Mr Richard J. Prins, Product Safety Engineer for Sunbeam Corporation in Hattiesburg, Mississippi, explained the composition and method of manufacture of the goods in issue. It was his evidence that a typical heating pad consists of a heating element of nickel chrome alloy to which are attached two thermostats, a 6-foot long electrical supply cord with a control switch, stitched insulating material to cover and hold in place the heating element and a sealed outer covering of vinyl. To prevent discomfort to the user, Sunbeam Corporation recommends and supplies an additional removable outer cover of textile fabric. The goods in issue, model 792, are more advanced than the “typical” pad described above, in that the heating element is made of a “positive temperature coefficient” wire which requires no separate thermostat to avoid overheating. This element is enclosed in a sealed cover of textile fabric which is not removable. The electrical supply cord is detachable, and the pad may be machine washed. The goods in issue also have an electronic control switch to turn the unit on and off and to adjust heat levels, rather than a mechanical switch provided with older 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.).

Mr. Prins testified that the function of both types of heating pad is to generate sufficient heat to provide relief of muscular or arthritic aches and pains. The pads are supplied with a warning card that cautions the user against certain practices that would result in electrical shock or burning to the user or create a fire hazard. In addition, a label affixed to the pad warns the user not to sleep on it. Mr. Prins explained that this warning was necessary because the heating pad produces enough heat to thermally burn a person if left in contact with the skin for an extended period. It is, therefore, advertised for intermittent use only and this, together with differences in size, distinguishes heating pads from electric blankets and mattress pads. Heating pads were originally designed to replace hot water bottles and had little in common with wearing apparel, blankets or mattress pads. In particular, it was his view that, without the heat provided by the electrical element, the goods in issue would have no useful function.

Mr. Gus Marcelino, Director of Operations, Sunbeam Corporation (Canada) Limited, informed the Tribunal that the 10 or 11 models of heating pad, including the goods in issue, which the appellant markets in Canada have all been certified to comply with the Canadian Standards Association standard for heating pads, which is mandatory for the sale of such products in Canada. He noted that this standard does not require the provision of covers of textile fabric. He also confirmed Mr. Prins' testimony that the pads are advertised and sold for use in the home, rather than for commercial use. Finally, he said that all but one of the models of heating pad which the appellant imports come with a textile fabric cover and that the value of the fabric represents about 8.5 to 10.0 percent of the total value of the pad.

In argument, counsel for both parties agreed that central to classification under the *Customs Tariff* is Rule 1 of the *General Rules for the Interpretation of the Harmonized System*<sup>4</sup> (the General Rules). This rule provides that "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes." They also agreed that the goods in issue incorporate an electro-thermic feature, and there was no dispute that the goods are used for domestic purposes. It was also common ground that the goods in issue are not named in the first clause of Note 1 (a) to Chapter 85 ("[e]lectrically warmed blankets, bed pads, foot-muffs or the like"). The main point of disagreement was whether or not the goods might be described as "electrically warmed clothing, footwear or ear pads or other electrically warmed articles worn on or about the person" as specified in the second clause of Note 1 (a) and, thus, whether they should be excluded from Chapter 85 on this basis. Counsel for the appellant argued that the evidence and dictionary definitions of the key words in this clause led inescapably to the conclusion that the goods in issue are not covered by this exclusionary note. Counsel for the respondent took the opposite position on the basis that the pads are worn on or about the person.

In the Tribunal's view, counsel for the respondent's argument on this point is not supported by the facts. When used, the pads are held against that part of the user's body in need of the pad's soothing heat. Although the pad may rest upon a person's shoulder or be wrapped around an arm, it is too small to be wrapped around other parts of the body and, in all cases, the user's ability to move about while using the pad is restricted by the need for the electrical cord to be plugged into an electrical outlet. In the Tribunal's view, this kind of use does not come within the ordinary meaning of "worn on or about the person." As pointed out by counsel for the appellant, dictionary definitions of the verb "wear," as it relates to clothing and articles of personal adornment, incorporate the concept of habitual use as opposed to the intermittent use for which

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4. *Ibid.* Schedule I.

the goods in issue are intended.<sup>5</sup> In short, the Tribunal considers it extremely unlikely that a person using a heating pad would say that he or she was “wearing” the pad. In light of the foregoing, the Tribunal concludes that the goods in issue are not excluded from classification in Chapter 85.

It remains to be determined which of heading Nos. 63.07 and 85.16 most aptly describes the goods in issue. In arguing for the former, counsel for the respondent portrayed the goods as a textile fabric containing an electric heating element. Counsel for the appellant, arguing for classification in heading No. 85.16, urged the Tribunal, in effect, to view the goods as a heating element covered by a textile fabric. Counsel for the appellant conceded, however, that, because the textile fabric cover is an integral component of the goods in issue, it was at least arguable that the goods could be described as other made up articles in heading No. 63.07. For this reason, the Tribunal finds that the goods in issue are *prima facie* classifiable in both heading Nos. 63.07 and 85.16.

In such situations, Rule 3 (a) of the General Rules stipulates that the heading which provides the most specific description shall be preferred. Counsel for the appellant argued that, as the term “electro-thermic appliances” in heading No. 85.16 provides a complete description of the goods in issue by reference to their function, it is more specific than the provision in heading No. 63.07 for “[o]ther made up articles” which refers only to a small part of the materials that make up the heating pad. On the other hand, counsel for the respondent submitted that, as the goods in issue serve the same function as a non-electric heating pad imported by the appellant and since these goods are classified in heading No. 63.07, the goods in issue should also be classified in this heading. In the Tribunal’s view, the classification of non-electric heating pads is not relevant to determining whether heading No. 85.16 more specifically provides for the goods in issue. Counsel for the respondent also argued that, if the goods in issue did not incorporate an electro-thermic device, they would still function as a heating pad. In the Tribunal’s view, this argument is without merit not only because the goods in issue do in fact contain such a device but also because the evidence shows that, without this device, the pads would serve no function.

The Tribunal is of the view that, as the goods in issue would serve no function without the heat-generating ability imparted by their electrical component, they are more specifically described in heading No. 85.16 than in heading No. 63.07. Therefore, the goods in issue should be classified under tariff item No. 8516.79.99 as other electro-thermic appliances of a kind used for domestic purposes.

Accordingly, the appeal is allowed.

Lyle M. Russell  
Lyle M. Russell  
Presiding Member

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5. *Funk & Wagnalls Canadian College Dictionary* (Toronto: Fitzhenry & Whiteside, 1989) at 1520; *The Shorter Oxford English Dictionary on Historical Principles*, 3rd ed., Vol. II (Oxford: Clarendon Press, 1968) at 2399; and *The Random House Dictionary of the English Language*, 2nd ed. (New York: Random House, 1987) at 2153.