

Ottawa, Tuesday, September 29, 1998

**Appeal No. AP-97-122**

IN THE MATTER OF an appeal heard on June 15, 1998, 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 October 30, 1997, with respect to a request for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**CANADIAN TIRE CORPORATION, LIMITED**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Richard Lafontaine  
Richard Lafontaine  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-97-122

CANADIAN TIRE CORPORATION, LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue made under subsection 63(3) of the *Customs Act*. The issue in this appeal is whether the caulking guns imported by the appellant are properly classified under tariff item No. 8205.59.90 as other hand tools not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 8424.20.90 as other spray guns and similar appliances, as claimed by the appellant.

**HELD:** The appeal is dismissed. In the present appeal, the Tribunal is of the view that the caulking guns are properly classified in heading No. 82.05 as hand tools not elsewhere specified or included. Note 1 to Chapter 82 of Schedule I to the *Customs Tariff* requires that the articles covered by that chapter have a blade, working edge, working surface or other working part of, among other possibilities, base metal. The plunger in the caulking gun which forces the caulking material out of the cartridge is, in the Tribunal's view, a working part of base metal, thus satisfying this requirement. In the Tribunal's opinion, caulking guns are also covered by the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (the Explanatory Notes) to Chapter 82, which indicate that the chapter covers tools which can be used independently in the hand, whether or not they incorporate simple mechanisms such as levers or plungers. Moreover, to classify the caulking guns in heading No. 82.05 is consistent with the Explanatory Notes to that heading, which indicate that grease guns, which, in the Tribunal's view, incorporate slightly more complex mechanisms than do caulking guns, fall in heading No. 82.05. The Tribunal notes that the expert witness acknowledged that a hand-operated drill with a mechanical part was a hand tool, thus also confirming that a hand tool may have simple mechanisms.

The Tribunal accepts the respondent's position that the caulking guns cannot be classified in subheading No. 8424.20 as spray guns and similar appliances. The appellant has not persuaded the Tribunal that the caulking guns in issue satisfied, in any respect, the description of spray guns and similar appliances found in the Explanatory Notes to heading No. 84.24. The Tribunal notes in particular that, even if it had accepted the appellant's argument that the cartridge which contains the caulking material is an integral part of the caulking gun, it could not conclude that the caulking gun gives a jet or more or less divergent spray, an important feature in the description of spray guns and similar appliances. The Tribunal also notes that the Explanatory Notes to heading No. 84.24 specifically exclude grease guns, which, in many ways, operate in a manner similar to caulking guns.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 15, 1998
Date of Decision:	September 29, 1998
Tribunal Member:	Richard Lafontaine, Presiding Member
Counsel for the Tribunal:	Philippe Cellard
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael A. Kelen, for the appellant Jocelyn Sigouin, for the respondent

**Appeal No. AP-97-122**

**CANADIAN TIRE CORPORATION, LIMITED**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member

**REASONS FOR DECISION**

This is an appeal, heard by one member of the Tribunal,<sup>1</sup> under section 67 of the *Customs Act*<sup>2</sup> (the Act) from a decision of the Deputy Minister of National Revenue made under subsection 63(3) of the Act.

The issue in this appeal is whether the caulking guns imported by the appellant are properly classified under tariff item No. 8205.59.90 of Schedule I to the *Customs Tariff*<sup>3</sup> as other hand tools not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 8424.20.90 as other spray guns and similar appliances, as claimed by the appellant. In the alternative, the appellant submitted that the caulking guns should be classified under tariff item No. 8479.89.99 as other machines and mechanical appliances having individual functions, not elsewhere specified in Chapter 84.

The relevant provisions of Schedule I to the *Customs Tariff* are the following:

Chapter 82

Notes.

1. ... this Chapter covers only articles with a blade, working edge, working surface or other working part of:
    - (a) Base metal;
    - (b) Metal carbides or cermets;
- 82.05 Hand tools (including glaziers' diamonds), not elsewhere specified or included; blow lamps; vices, clamps and the like, other than accessories for and parts of, machine tools; anvils; portable forges; hand or pedal-operated grinding wheels with frameworks.
- Other hand tools (including glaziers' diamonds):
- 8205.59 --Other
- 8205.59.90 ---Other

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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.).

84.24	Mechanical appliances (whether or not hand-operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines.
8424.20	-Spray guns and similar appliances
8424.20.90	---Other
84.79	Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter. -Other machines and mechanical appliances:
8479.89	--Other ---Other:
8479.89.99	----Other

It is also useful to cite relevant excerpts from the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>4</sup> (the Explanatory Notes):

#### Chapter 82

In general, the Chapter covers tools which can be used independently in the hand, whether or not they incorporate simple mechanisms such as gearing, crank-handles, plungers, screw mechanisms or levers.

[Heading No. 82.05]

It includes a large number of hand tools (including some with simple hand-operated mechanisms such as cranks, ratchets or gearing). This group of tools includes:

(E)

(7) ... grease guns.

[Heading No. 84.24]

Spray guns and similar hand controlled appliances are usually designed for attaching to compressed air or steam lines, and are also connected, either directly or through a conduit, with a reservoir of the material to be projected. They are fitted with triggers or other valves for controlling the flow through the nozzle, which is usually adjustable to give a jet or more or less divergent spray. They are used for spraying paint or distemper, varnishes, oils, plastics, cement, metallic powders, textile dust, etc. They may also be used for projecting a powerful jet of compressed air or steam for cleaning stonework in buildings, statuary, etc.

The heading also excludes:

(a) Hand-powered oil cans and grease guns.

Counsel for the appellant called as a witness Mr. Brian Smith, General Manager of the Canadian Tire store located at the corner of Kent Street and Laurier Avenue in Ottawa, Ontario. Mr. Smith indicated that the caulking guns in issue were found in the decorating section of the appellant's catalogue rather than in the hand tool section. Counsel also called Dr. Kevin Goheen as an expert witness in mechanical engineering. Dr. Goheen described the operation of a caulking gun as follows: the user applies a force to a trigger that, through a lever action, moves a ratchet mechanism; the ratchet, in turn, pushes a plunger that forces the

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4. Customs Co-operation Council, 2nd ed., Brussels, 1996.

caulking material out of the cartridge normally used with a caulking gun; and there is also a spring mechanism that returns the trigger back to the open position between strokes and a spring and ratchet mechanism that acts to hold the plunger between strokes. At the request of counsel for the respondent, the expert witness also described the operation of a grease gun.

According to Dr. Goheen, a caulking gun and a grease gun are mechanical appliances and can be considered as spray guns or similar appliances. In answer to a question from the Tribunal, he indicated that a caulking gun does not spray the caulking material. However, he added, without defining the term, that it projects caulking material. Dr. Goheen did not consider the caulking gun or the grease gun to be hand tools. He further mentioned that they do not have a hard working surface. In answer to a question from counsel for the respondent, Dr. Goheen stated that he would consider a hand-operated drill with a mechanical part to be a hand tool.

Counsel for the appellant submitted that the caulking guns in issue are not properly classified in heading No. 82.05, since they are specifically provided for under tariff item No. 8424.20.90. Counsel also submitted that, pursuant to Note 1 to Chapter 82 of Schedule I to the *Customs Tariff*, a tool must have a hard working surface in order to be classified as a hand tool in heading No. 82.05. According to Dr. Goheen, that requirement would not be fulfilled by a caulking gun. Counsel also noted that a caulking gun is not found in the hand tool section of the appellant's catalogue. As regards the Explanatory Notes to Chapter 82, counsel submitted that they are inconsistent both with Note 1 to Chapter 82 and with the articles covered under that chapter and that, therefore, the Explanatory Notes should be disregarded. Counsel submitted that Note 1 refers only to articles with a blade, working edge, working surface or other working part of "hard metal," not to articles having simple mechanisms as suggested by the Explanatory Notes. Counsel also pointed out that none of the hand tools mentioned under Chapter 82 has simple mechanisms such as those listed in the related Explanatory Notes. It was counsel's position that the mention in the Explanatory Notes to heading No. 82.05 of a grease gun as a hand tool covered by this heading should also be disregarded.

Counsel for the appellant submitted that caulking guns should be classified as spray guns and similar appliances. They do not spray, but counsel submitted that they project and work like spray guns. He argued that caulking guns satisfy the description of spray guns and similar appliances found in the Explanatory Notes to heading No. 84.24. In the alternative, counsel submitted that the caulking guns in issue should be classified under tariff item No. 8479.89.99 as other machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84.

Counsel for the respondent submitted that caulking guns cannot be classified as spray guns and similar appliances. She argued that caulking guns do not satisfy the description of spray guns and similar appliances found in the Explanatory Notes to heading No. 84.24. She submitted that a caulking gun is not designed to be attached to compressed air or steam lines. As to whether the caulking gun is fitted with triggers or other valves for controlling the flow of the caulking material through a nozzle, she submitted that there is no valve on the caulking gun, nor can the trigger be considered to be a valve because it is not possible to stop the flow of the caulking material by operating the trigger. She also mentioned that there is no nozzle on a caulking gun. Rather, the nozzle is found on the cartridge that is inserted into the caulking gun, which nozzle cannot be said to be adjustable to create a more or less divergent spray. Counsel for the appellant responded to the arguments by saying that a caulking gun was incomplete without a cartridge of caulking material and that the valve was formed by the nozzle of the cartridge and the cap that is put over it. Counsel for the respondent submitted that a caulking gun without a tube of caulking material inserted into it is not incomplete any more than a staple gun is incomplete before the staples are inserted. She also underlined the fact that the Explanatory Notes to heading No. 84.24 specifically exclude from classification in that heading grease guns which, in her submission, are similar in function to caulking guns.

Counsel for the respondent submitted that the caulking guns in issue are properly classified in heading No. 82.05. She suggested that they were covered by the Explanatory Notes to Chapter 82, being tools used independently in the hand and incorporating simple mechanisms such as a plunger, lever and spring. She also pointed out that, according to the Explanatory Notes to heading No. 82.05, grease guns are covered by that heading. Counsel also submitted that the requirement in Note 1 to Chapter 82 for a working part of base metal or of metal carbides was satisfied by either the trigger or the plunger.

Section 10 of the *Customs Tariff* directs the Tribunal to classify goods in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>5</sup> (the General Rules). Rule 1 of the General Rules provides that classification shall be 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, regard shall be had to the Explanatory Notes.

In the present appeal, the Tribunal is of the view that the caulking guns are properly classified in heading No. 82.05 as hand tools not elsewhere specified or included.

At the outset, the fact that caulking guns are not listed in the hand tool section of the appellant's catalogue has no bearing on the classification of caulking guns as hand tools. Indeed, a number of hand tools are listed elsewhere in the catalogue. Examples include shovels, rakes and pruners in the gardening section, as well as paint scrapers and wall scrapers on the same page as the caulking guns in issue in the decorating section. The Tribunal also considers that a caulking gun does not need a cartridge of caulking material to constitute a complete article. As suggested by counsel for the respondent, an analogy can be drawn with a staple gun that does not need staples to be considered a complete article. In this context, it should also be noted that the caulking gun is listed as a stand-alone item in the appellant's own catalogue.

Note 1 to Chapter 82 requires that the articles covered by this chapter have a blade, working edge, working surface or other working part of, among other possibilities, base metal.<sup>6</sup> The plunger in the caulking gun which forces the caulking material out of the cartridge is, in the Tribunal's view, a working part of base metal, thus satisfying this requirement. In the Tribunal's opinion, caulking guns are also covered by the Explanatory Notes to Chapter 82, which indicate that the chapter covers tools which can be used independently in the hand, whether or not they incorporate simple mechanisms such as levers or plungers. Moreover, to classify the caulking guns in heading No. 82.05 is consistent with the Explanatory Notes to that heading, which indicate that grease guns, which, in the Tribunal's view, incorporate slightly more complex mechanisms than do caulking guns, fall in heading No. 82.05. The Tribunal notes that Dr. Goheen acknowledged that a hand-operated drill with a mechanical part was a hand tool, thus also confirming that a hand tool may have simple mechanisms.

Counsel for the appellant submitted that the Explanatory Notes to Chapter 82 and heading No. 82.05 were inconsistent with Note 1 to Chapter 82 and that, therefore, the Explanatory Notes should be disregarded. The Tribunal does not consider that the relevant Explanatory Notes are inconsistent with Note 1 to Chapter 82. It seems clear to the Tribunal that, as demonstrated by the goods in issue, a hand tool which includes simple mechanisms can still have a working part of base metal. The Explanatory Notes cannot be said to be inconsistent with their related headings and subheadings either, because those headings and subheadings do not include products with simple mechanisms. On this last point, the Tribunal notes that subheading No. 8205.10 covers drilling tools which would include hand-operated drills referred to above, thus countering counsel for the appellant's submission that the subheadings do not include products with simple mechanisms.

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5. *Supra* note 3, Schedule I.

6. Base metals are listed in Note 3 to Section XV of Schedule I to the *Customs Tariff*.

The Tribunal accepts the respondent's position that the caulking guns cannot be classified in subheading No. 8424.20 as spray guns and similar appliances. The appellant has not persuaded the Tribunal that the caulking guns in issue satisfied, in any respect, the description of spray guns and similar appliances found in the Explanatory Notes to heading No. 84.24. The Tribunal notes in particular that, even if it had accepted the appellant's argument that the cartridge is an integral part of the caulking gun, it could not conclude that the caulking gun gives a jet or more or less divergent spray, an important feature in the description of spray guns and similar appliances. The appellant has conceded that the caulking gun does not spray. Neither does the flow of the caulking material out of the cartridge amount to a jet because, as suggested by counsel for the respondent and accepted by the Tribunal, it lacks sufficient force. The Tribunal also notes that the Explanatory Notes to heading No. 84.24 specifically exclude grease guns, which, in many ways, operate in a manner similar to caulking guns.

The Tribunal does not accept the appellant's alternative submission that the caulking guns should be classified under tariff item No. 8479.89.99 as other machines and mechanical appliances having individual functions not specified or included elsewhere in Chapter 84. In the Tribunal's view, the appellant has not submitted any compelling argument that would persuade the Tribunal to classify the caulking guns in issue in heading No. 84.79 rather than in heading No. 82.05.

For the foregoing reasons, the Tribunal is satisfied that the caulking guns in issue are properly classified under tariff item No. 8205.59.90 as other hand tools not elsewhere specified or included. Consequently, the appeal is dismissed.

Richard Lafontaine  
Richard Lafontaine  
Presiding Member