

Ottawa, Thursday, January 7, 1999

**Appeal No. AP-98-006**

IN THE MATTER OF an appeal heard on November 18, 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 May 5, 1998, with respect to a request for  
re-determination under subsection 63(3) of the *Customs Act*.

**BETWEEN**

**BURLODGE CANADA LTD.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Anita Szlajak  
Anita Szlajak  
Presiding Member

Raynald Guay  
Raynald Guay  
Member

Peter F. Thalheimer  
Peter F. Thalheimer  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-98-006**

**BURLODGE CANADA LTD.**

**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. The appellant imported into Canada devices described as Alphagen rethermalization units comprised of a cart fitted with a gas compression refrigeration unit and a heating unit, a transfer rack, trays to fill the transfer rack, each with one divider to separate hot and cold items, as well as a dolly to transport the rack.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8716.80.20 as other vehicles for the transport of goods, as determined by the respondent, or should be classified under tariff item No. 8419.89.40 as other mechanically operated machinery, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, other than machinery of a kind used for domestic purposes, as claimed by the appellant.

**HELD:** The appeal is allowed. The Tribunal is of the view that heading No. 84.19 specifically describes the goods in issue and, accordingly, they should be classified in that heading. The Tribunal is of the view that the goods cannot be classified under the “naming” tariff items within heading No. 84.19, as each such item, in effect, excludes an element of the goods in issue. The Tribunal, therefore, concludes that the goods in issue should be classified in tariff item No. 8419.89.40.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: November 18, 1998  
Date of Decision: January 7, 1999

Tribunal Members: Anita Szlazak, Presiding Member  
Raynald Guay, Member  
Peter F. Thalheimer, Member

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Margaret Fisher

Appearances: Donald Petersen and Jeffrey Goernert, for the appellant  
Anne M. Turley, for the respondent

**Appeal No. AP-98-006**

**BURLODGE CANADA LTD.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ANITA SZLAZAK, Presiding Member  
RAYNALD GUAY, Member  
PETER F. THALHEIMER, Member

**REASONS FOR DECISION**

**INTRODUCTION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> (the Act) from a decision of the Deputy Minister of National Revenue made under section 63 of the Act. The appellant imported into Canada devices described as Alphagen rethermalization units. The goods in issue are used primarily in hospitals for the preparation and delivery of hot and cold food. The goods in issue are comprised of a cart fitted with a gas compression refrigeration unit and a heating unit (the cart is hereinafter referred to as the retherm cart), a transfer rack, trays to fill the transfer rack, each with one divider to separate hot and cold items, as well as a dolly to transport the rack.

The issue in this appeal is whether the subject goods are properly classified under tariff item No. 8716.80.20 of Schedule I to the *Customs Tariff*<sup>2</sup> as other vehicles for the transport of goods, as determined by the respondent,<sup>3</sup> or should be classified under tariff item No. 8419.89.40 as other mechanically operated machinery, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, other than machinery of a kind used for domestic purposes, as claimed by the appellant.

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1. R.S.C. 1985, c. 1 (2nd Supp.).
  2. R.S.C. 1985, c. 41 (3rd Supp.).
  3. The respondent pled, in the alternative, that the goods in issue could be classified under tariff item No. 8418.50.10 as other refrigerating or freezing chests, cabinets and similar refrigerating or freezing furniture. If the Tribunal finds that the goods in issue are not excluded from classification in heading No. 84.19, the respondent pled, as a second alternative, that they could be classified under tariff item No. 8419.81.90 as other machinery, plant and equipment for making hot drinks or for cooking or heating food. The respondent pled, as a third alternative, that certain “transfer modules and trays,” though imported with the goods in issue could be classified on their own: the transfer modules under tariff item No. 8716.80.20 and the trays under tariff item No. 7323.93.00.

## NOMENCLATURE

The following is the relevant tariff nomenclature from Schedule I to the *Customs Tariff*:

- 87.16 Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof.
- 8716.80 -Other vehicles
- 8416.80.20 ---For the transport of goods
- 84.18 Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps other than air conditioning machines of heading No. 84.15.
  - 8418.50 -Other refrigerating or freezing chests, cabinets, display counters, show-cases and similar refrigerating or freezing furniture
  - 8418.50.10 ---Refrigerating or refrigerating-freezing type
- 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.
  - 8419.81 --For making hot drinks or for cooking or heating food
  - 8419.81.90 ---Other
  - 8419.89 --Other
  - 8419.89.40 ---Mechanically operated

## EVIDENCE

Mr. Michael Fagan, Technical Manager at Burlodge Canada Ltd. gave evidence on the appellant's behalf. He testified that, in a hospital, the goods in issue would normally be found in a central kitchen or in small kitchens or serveries located at various points within the hospital. The goods in issue are typically moved only to be cleaned or serviced. Mr. Fagan also indicated that the goods in issue are not designed to be left "plugged in" for an indefinite period of time and that leaving them in that state would lead to an accumulation of condensation in the evaporator coils. Mr. Fagan explained that the goods in issue, unlike a standard refrigerator, are not capable of operating in a continuous cycle and, thus, are intended to store food products for relatively short periods of time.

Mr. Fagan testified that food for hospitals in Ontario and Western Canada normally arrives at the hospital cooked and frozen in bulk portions. In Quebec, hospital personnel normally cook and freeze food in bulk portions on site. Regardless, when food is to be served, it is thawed and then, in Mr. Fagan's words, "portioned, plated and trayed." The trays are stored on racks and dollies in large refrigerators for one or two days prior to use. Between 15 minutes and two hours before the food is to be served, it is placed in the retherm cart. That part of the meal intended to be served hot is then heated to the required temperature. At the same time, the cold portion of the meal (e.g. salad, juice, etc.) is maintained at the required temperature.

Under cross-examination, Mr. Fagan agreed that, when food is put into the goods in issue, it is maintained at below 5°C until the hot portion of the meal is heated. The food is maintained at that temperature to prevent food-borne illness. Prior to being served, the hot portion of the meal is heated to 74°C. Mr. Fagan described the entire process, both the refrigeration of food and the heating of food, as "rethermalization." Mr. Fagan agreed that the refrigeration unit within the goods in issue has a condenser, a compressor and four evaporators. However, he also noted that it contains two solenoid valves and

two direct expansion valves, all of which are necessary for the goods in issue to operate. He also agreed that, when the goods in issue are plugged in and turned on, the refrigeration unit automatically cycles on and off so as to maintain food at the required temperature.

In answering questions from the Tribunal, Mr. Fagan explained the relative importance of the cooling and heating functions of the goods in issue as follows:

If you take that snapshot in time at any point in time during the cycle, the cooling may be more - - have a higher profile, if you want to put it that way, than the heating. But if you take the snapshot 30 seconds later, then it will be the heating. So it is a continuous cycle where both of them are operating independently and simultaneously. Neither of them is more important than the other one in my opinion.<sup>4</sup>

He reiterated that, except for cleaning and servicing, the retherm cart, remains in one location within the hospital. It is not wheeled around in order to serve food. After food is thawed, portioned and plated, it is loaded onto trays, which are then placed on a rack. The rack is moved around on a dolly. Prior to use, the rack is transported on the dolly to the retherm cart. The entire rack is inserted into the retherm cart. When the food is to be served, the rack is removed from the retherm cart and placed on the dolly. It is then transported to the location within the hospital where the food is to be served. The evidence indicated that, to ensure that the food remains at the required temperatures, the rack may be draped with an insulated cover. Mr. Fagan indicated that there is a 20- to 30-minute window from the time that the food is removed from the retherm cart to the time that it must be served.

## ARGUMENT

The appellant's representatives submitted that heading No. 84.19 contemplates objects which are machinery, not used for domestic purposes, which utilize a process involving changes in temperature (i.e. heating and cooling). The representatives submitted that the goods in issue cool food, heat food and are clearly mechanical in nature and, therefore, satisfy those conditions. The appellant's representatives submitted that, pursuant to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*<sup>5</sup> (the General Rules), the goods in issue should be classified in heading No. 84.19.

Counsel for the respondent began her argument by reviewing some of the evidence. She submitted that, the evidence indicated that when the retherm cart is functioning (i.e. when there is food in the unit), it is constantly on, in the sense that, prior to the food being heated, the unit cycles on and off to maintain a constant temperature. She noted that, even when the oven component of the retherm unit is turned on, the refrigeration unit continues to cycle on and off to maintain the cold items at the required temperature.

Counsel for the respondent then referred the Tribunal to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>6</sup> (the Explanatory Notes) and, in particular, to the Explanatory Notes to heading No. 87.16, which provide, in part, as follows:

The classification of units consisting of vehicles with **permanently built-on** machines or appliances is determined according to the **essential character of the whole**. The heading therefore

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4. *Transcript of Public Hearing and Argument*, November 18, 1998, at 43.

5. *Supra* note 2, Schedule I.

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

covers such units which derive their essential character from the vehicle itself. On the other hand, units deriving their essential character from the machine or appliance they incorporate are **excluded**.

Counsel for the respondent submitted that, notwithstanding the respondent's determination that the goods be classified in tariff item No. 8716.80.20, based on the evidence adduced at the hearing in this matter and the referenced explanatory notes, the goods in issue are excluded from heading No. 87.16.

Counsel for the respondent then referred the Tribunal to Explanatory Note (h) to heading No. 84.19 which provides that heading No. 84.19 does not include refrigerating machinery and heat pumps of heading No. 84.18. Counsel submitted that the goods in issue are excluded from heading No. 84.19.

Counsel for the respondent submitted that the goods in issue are properly classified in heading No. 84.18. Counsel submitted that the principal function<sup>7</sup> of the goods in issue is to keep food at a low temperature to eliminate the possibility of food-borne illness. She noted that, prior to the hot portion of a meal being heated, the goods in issue keep all the food cool. Even when the hot portion of a meal is being heated, the goods in issue keep the cold portion of the meal cool. Counsel referred the Tribunal to the Explanatory Notes to heading No. 84.18. which provide, *inter alia*, that the essential elements of compression-type refrigerators are the compressor, the condenser and the evaporator. Counsel reminded the Tribunal that Mr. Fagan indicated that the retherm cart contains each of those devices. Counsel also referred the Tribunal to the Explanatory Notes to heading No. 94.03, which, she submitted, make it clear that all manner of refrigerators are to be classified in heading No. 84.18.

Counsel for the respondent argued, in the alternative, that, if the Tribunal found that the goods in issue are classifiable in heading No. 84.19, they should be classified under tariff item No. 8419.81.90, as that tariff item is more specific than the residual tariff item within heading No. 84.19 sought by the appellant. Counsel submitted that, if the Tribunal did not agree with her submission that the essential character of the goods in issue is as a cooling device, it should find that the essential character of the goods is derived from their heating function.

## **DECISION**

Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the General Rules and the *Canadian Rules* as set out in Schedule I to the *Customs Tariff*. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the referenced schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>8</sup> and the Explanatory Notes.

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7. Note 3 of the Explanatory Notes to Section XVI provides that, “[u]nless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.”

8. Customs Co-operation Council, 1st ed., Brussels, 1987.

The respondent's primary position is that the goods are properly classified in heading No. 84.18. Citing Note 3 to Section XVI, counsel for the respondent argued that the goods in issue have the "principal function" of maintaining food at cool temperatures. However, the Tribunal notes that Section Note 4 provides as follows:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

In the Tribunal's view, Note 4 to Section XVI applies to the goods in issue. In simple terms, the goods in issue consist of a combination of machines which contribute together to a clearly defined function covered by one of the headings in Chapter 84. The function which the goods in issue perform is the preparation of food, specifically, the heating and cooling of food to be served. In the Tribunal's view, heading No. 84.19, which provides for "[m]achinery,... whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting ... or cooling, other than machinery or plant of a kind used for domestic purposes," specifically describes the goods in issue. To choose either the cooling or the heating function as "principal function" would, in the Tribunal's view, be erroneous because both are essential. In this regard, the Tribunal notes that various provincial regulations governing the preparation and handling of food require that food be maintained at certain temperatures. For example, section 33 of *Ontario Regulation 243/84* enacted pursuant to the *Health Protection and Promotion Act, 1983*<sup>9</sup> provides as follows:

Hazardous foods<sup>[10]</sup> other than those hermetically sealed foods that have been subjected to a process sufficient to prevent the production of bacterial toxins or the survival of spore-forming pathogenic bacteria shall be distributed, maintained, stored, transported, displayed or sold or offered for sale such that the internal temperature of the food is,

- (a) 5° Celsius, or lower; or
- (b) 60° Celsius, or higher.

Finally, to choose a heading which describes only one function (i.e. cooling) of the goods in issue, where there is a heading which specifically contemplates both functions, would be contrary to Rule 1 of the General Rules, which provides that "for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes."

Therefore, the Tribunal is of the view that the goods in issue should be classified in heading No. 84.19. For ease of reference, the relevant parts of that heading are as follows:

- 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.
- 8419.81 --For making hot drinks or for cooking or heating food

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9. S.O. 1983.

10. *Ontario Regulation 243/84* defines "hazardous food" as "any food that is capable of supporting the growth of pathogenic organisms or the production of the toxins of such organisms."

8419.81.90 ---Other  
8419.89 --Other  
8419.89.40 ---Mechanically operated

Counsel for the respondent argued that, if the Tribunal were to decide that the goods in issue are classifiable in heading No. 84.19, they should be classified under tariff item No. 8419.81.90, as that item is more specific than tariff item No. 8419.89.40. However, the Tribunal does not find that argument persuasive. Subheading No. 8419.81, which is the subheading under which tariff item No. 8419.81.90 falls, in effect provides for machinery, plant and equipment for making hot drinks or for cooking or heating food. To be classified under tariff item No. 8419.81.90, the Tribunal would have to be satisfied that the goods in issue were “other” machinery, plant and equipment for making hot drinks or for cooking or heating food. Again, while it is true that the goods in issue do perform the function of heating food, they also have the function of cooling food. To classify the goods in issue under tariff item No. 8419.81.90, as advocated by the respondent, would be to ignore what is clearly one of the essential elements of the goods (i.e. refrigeration).

Based on the foregoing, the Tribunal is of the view that the goods in issue should be classified under tariff item No. 8419.89.40. Consequently, the appeal is allowed.

Anita Szlazak  
Anita Szlazak  
Presiding Member

Raynald Guay  
Raynald Guay  
Member

Peter F. Thalheimer  
Peter F. Thalheimer  
Member