



Ottawa, Thursday, May 16, 2002

**Appeal Nos. AP-99-064 and AP-99-065**

IN THE MATTER OF appeals heard on January 10, 2002, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated August 11, 1999, with respect to requests for redetermination under subsection 60(4) of the *Customs Act*.

**BETWEEN**

**EUROPEAN ARMS DISTRIBUTOR (1982) LTD.**

**Appellant**

**AND**

**THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeals are allowed in part.

Ellen Fry  
Ellen Fry  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary



UNOFFICIAL SUMMARY

Appeal Nos. AP-99-064 and AP-99-065

EUROPEAN ARMS DISTRIBUTOR (1982) LTD.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY

Respondent

These are appeals under subsection 67(1) of the *Customs Act* from decisions of the Commissioner of the Canada Customs and Revenue Agency made under subsection 60(4) of the *Customs Act* on August 11, 1999. This matter was heard by way of written submissions in accordance with rule 36.1 of the *Canadian International Trade Tribunal Rules*. The issue in these appeals is whether certain CO<sub>2</sub>-powered pellet and blank-firing pistols and revolvers (the goods in issue) were properly classified under tariff item No. 9898.00.00 as prohibited devices, as determined by the respondent. The goods in issue were detained by the respondent at the time of entry into Canada, i.e. on July 15 and 30, 1999. The parties later agreed that the goods in issue should be classified under tariff item No. 9304.00.10.

**HELD:** The appeals are allowed in part. Having reviewed the agreed statement of facts submitted by the parties and the evidence on the record, the Tribunal finds that the devices identified as MA-2 to MA-7 should be classified under tariff item No. 9304.00.10, while the devices identified as MA-8 to MA-10 should be classified under tariff item No. 9303.90.90.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: January 10, 2002  
Date of Decision: May 16, 2002

Tribunal Members: Ellen Fry, Presiding Member

Counsel for the Tribunal: Dominique Laporte  
Eric Wildhaber

Parties: Roberto Fasciana, for the appellant  
Michael Roach, for the respondent



Appeal Nos. AP-99-064 and AP-99-065

EUROPEAN ARMS DISTRIBUTOR (1982) LTD.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY

Respondent

TRIBUNAL: ELLEN FRY, Presiding Member

**REASONS FOR DECISION**

These are appeals under subsection 67(1) of the *Customs Act*<sup>1</sup> from decisions of the Commissioner of the Canada Customs and Revenue Agency made under subsection 60(4) of the Act on August 11, 1999. This matter was heard by way of written submissions in accordance with rule 36.1 of the *Canadian International Trade Tribunal Rules*.<sup>2</sup> The issue in these appeals is whether certain CO<sub>2</sub>-powered pellet and blank-firing pistols and revolvers (the goods in issue) were properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*<sup>3</sup> as prohibited devices, as determined by the respondent. The goods in issue were detained by the respondent at the time of entry into Canada, i.e. on July 15 and 30, 1999.

The parties eventually entered into discussions with a view to narrowing the outstanding issues between them. By November 2001, shortly before the scheduled hearing date, the parties agreed on a statement of facts and issued a joint submission confirming their agreement that all goods in issue should be classified under tariff item No. 9304.00.10. Since the respondent is satisfied that the appellant has the proper licence under Canada's firearms legislation, this classification would allow the respondent to release the goods in issue from detention.

Sections 10 and 136 of the *Customs Tariff* provide the following:

10.(1) Subject to subsection (2), the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.

136.(1) The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.

(2) Subsection 10(1) does not apply in respect of goods referred to in subsection (1).

The relevant tariff nomenclature is, in part, as follows:

93.03 Other firearms and similar devices which operate by the firing of an explosive charge (for example, sporting shotguns and rifles, muzzle-loading firearms, Very pistols and other devices designed to project only signal flares, pistols and revolvers for firing blank ammunition, captive-bolt humane killers, line-throwing guns).

---

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].  
2. S.O.R./91-499.  
3. S.C. 1997, c. 36.

9303.90	-Other
9303.90.90	---Other
9304.00	Other arms (for example, spring, air or gas guns and pistols, truncheons), excluding those of heading No. 93.07.
9304.00.10	---Guns and pistols, spring or gas
9898.00.00	Firearms, prohibited weapons, restricted weapons, prohibited devices, prohibited ammunition and components or parts designed exclusively for use in the manufacture of or assembly into automatic firearms, in this tariff item referred to as prohibited goods, but does not include the following:  (b) prohibited goods imported by a business that holds a licence authorizing it to acquire and possess those goods, or prohibited goods that are being shipped in transit through Canada by a business that does not carry on business in Canada;  For the purpose of this tariff item,  (a) “firearms” and “weapon” have the same meaning as in section 2 of the Criminal Code;  (b) ... “prohibited device”... [has] the same [meaning] as in subsection 84(1) of the Criminal Code;

“Firearm” is defined, in part, under section 2 of the *Criminal Code*<sup>4</sup> as follows:

“firearms” means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person.

Subsection 84(1) of the *Criminal Code* provides that “prohibited device” means, among other things, a replica firearm. A replica firearm is further defined as follows:

“replica firearm” means any device that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and that itself is not a firearm, but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

The text of the agreed statement of facts reads as follows:

The Appellant and the Respondent (the “Parties”), for the purposes of this appeal only, agree to the facts set out in paragraphs 1 to 10 herein, as if those facts had been established in evidence.

1. The Appellant, European Arms Distributor (1982) Ltd., carries on business in the City of North Vancouver, in the province of British Columbia.
2. The Respondent is Her Majesty the Queen in Right of Canada, represented by the Minister of National Revenue (Canada Customs and Revenue Agency since November 1, 1999) in this appeal.
3. On August 11, 1999, pursuant to subsection 60(4) of the *Act*, the Respondent classified the goods at issue under tariff item No. 9898.00.00.
4. On October 4, 1999, the Appellant appealed the decision of the Respondent to the Canadian International Trade Tribunal (the “Tribunal”), pursuant to section 67(1) of the *Act*.

---

4. R.S.C. 1985, c. C-46.

5. For ease of reference, the Parties will refer to the goods at issue as they are described in the Expert Report of Deryk Penk:
  - MA-1: Ten (10) GAMO (brand) carbon dioxide powerlets.
  - MA-2: One (1) .177calibre GAMO, Model P23, carbon dioxide powered pellet pistol bearing serial number 04-4C-022275-99
  - MA-3 One (1) .177 calibre DYNAMIT NOBEL, RWS, Model C225, carbon dioxide powered pellet pistol bearing serial number E9249241.
  - MA-4: One (1) .177 calibre UMAREX, Pietro Beretta, Model 92FS, carbon dioxide powered pellet pistol bearing serial number H9039683.
  - MA-5: One (1) .177 calibre GAMO, “Combat” Model R-77, carbon dioxide powered pellet pistol bearing serial number 04-5C-002675-99.
  - MA-6: One (1) .177 calibre WALTHER, Model CP88, carbon dioxide powered pellet pistol bearing serial number A8374817.
  - MA-7 One (1) .177 calibre COLT, Government 1911A1 Model, carbon dioxide powered pellet pistol bearing serial number F9125613.
  - MA-8: One (1) 9mmK calibre UMAREX, Smith & Wesson, “Combat” Model, blank-firing revolver bearing serial number N9214498.
  - MA-9: One (1) 9mmK calibre COLT, Government 1911A1 Model, blank-firing pistol bearing serial number D8239265.
  - MA-10: One (1) 9mmK calibre UMAREX, Smith & Wesson, Model 5904, blank-firing pistol bearing serial number P9192894.
6. The Parties agree that devices identified as MA-2 to MA-7 should be classified under tariff item 9304.00.10. As stated in the Expert Report of Deryk Penk, the devices identified as MA-2 to MA-7 are not replica firearms, but rather actual firearms.
7. The devices identified as MA-2 to MA-7 are classified under tariff item 9304.00.10. The Respondent is prepared to release these goods to the Appellant.
8. The Parties agree that the devices identified as MA-8, MA-9 and MA-10 should also be classified under tariff item 9304.00.10. As stated in the Expert Report of Deryk Penk, the devices identified as MA-8, MA-9 and MA-10 are replica firearms.
9. The Parties agree the Appellant has obtained the proper license and proper authorization to import the devices identified as MA-8, MA-9 and MA-10.
10. The devices identified as MA-8, MA-9, and MA-10 are classified under tariff item 9304.00.10. The Respondent is prepared to release these goods to the Appellant.

In addition, in a letter dated November 8, 2001, the respondent indicated that the appellant had the proper licence for the devices identified as MA-2 to MA-7.

The Tribunal must first determine whether the goods in issue are, as contended by the parties, excluded from tariff item No. 9898.00.00. When dealing with the classification of goods under this item, subsection 136(2) of the *Customs Tariff* provides that the *General Rules for the Interpretation of the Harmonized System*<sup>5</sup> do not apply. Furthermore, Note 1 of Chapter 98 provides that “[t]he provisions of this Chapter are not subject to the rule of specificity in General Interpretative Rule 3 (a). Goods which are

---

5. *Supra* note 2, schedule [hereinafter General Rules].

described in any provision of this Chapter are classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.”

Based on the above agreed statement of facts, the written submissions and other evidence, the Tribunal is satisfied that the goods identified as MA-2 to MA-10 are excluded from tariff item No. 9898.00.00. Dealing first with the devices identified as MA-2 to MA-7, the Tribunal is satisfied that they meet the definition of “firearms” found in section 2 of the *Criminal Code*, which is adopted by the tariff item. Indeed, Mr. Deryk V.R. Penk, Royal Canadian Mounted Police, indicates in his report<sup>6</sup> that the goods each contain a barrel from which projectiles can be discharged and that each is capable of causing serious bodily harm to a person. Nevertheless, as the appellant had the proper licence for these devices, the Tribunal finds that they are excluded from tariff item No. 9898.00.00 under item (b) of that tariff item.

Regarding the devices identified as MA-8 to MA10, the Tribunal is satisfied that they are also excluded from tariff item No.9898.00.00. In the Tribunal’s view, these devices are replica firearms that are included in the definition of “prohibited device” found in subsection 84(1) of the *Criminal Code*. The Tribunal is of the opinion that they meet all the requirements to be considered as such: they are designed or intended to exactly resemble, or to resemble with near precision, a firearm; they are not themselves firearms,<sup>7</sup> and they are not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.<sup>8</sup> As in the case of the devices identified as MA-2 to MA-7, the devices identified as MA-8 to MA-10 are excluded under item (b) of tariff item No.9898.00.00 since, as indicated in the agreed statement of facts, the appellant had the proper licence and authorization for their importation.

Being satisfied that the goods in issue are not covered under tariff item No. 9898.00.00, the Tribunal can therefore look at other headings in order to determine classification. In doing so, it must apply the General Rules. Section 11 of the *Customs Tariff* also provides, in part, that, in interpreting the headings and the subheadings in the schedule, regard shall be had to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.<sup>9</sup>

The General Rules are structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on. Rule 1 provides the following:

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall 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 [subsequent rules].

6. Expert Witness Report, Exhibit No. AP-99-064-22.1.
7. The Tribunal notes that Mr. Penk’s report indicates that the devices MA-8, MA-9 and MA-10 are not barrelled weapons from which bullets can be discharged. Paragraph 84(3)(d) of the *Criminal Code* reads, in part, as follows:
  - (3) . . . the following weapons are deemed not to be firearms:
  - (d) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge
    - (i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second, or
    - (ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second.
8. Mr. Penk’s report indicates that “All Colt, Model 1911A1, and SMITH & WESSON, Models 36 and 559 firearms were manufactured after 1898.” They consequently do not meet the definition of “antique firearm” of subsection 84(1) of the *Criminal Code*.
9. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter Explanatory Notes].

The parties submitted that the devices identified as MA-2 to MA-10 were classifiable under tariff item 9304.00.10. The applicable heading for this tariff item reads as follows:

9304.00 Other arms (for example, spring, air or gas guns and pistols, truncheons), excluding those of heading No. 93.07.

In addition, the Explanatory Notes to heading No. 93.04 read, in part, as follows:

The heading covers arms **other than** firearms of **headings 93.01 to 93.03** and arms of **heading 93.07**.

It includes the following:

(4) **Air guns, rifles and pistols.** These resemble normal rifles, pistols, etc., but they have provision for compressing a column of air which is released into the barrel of the weapon when the trigger is pulled, thus ejecting the ammunition.

Guns, rifles and pistols operating on the same principle, but with gases other than air, are also included.

Regarding the devices identified as MA-2 to MA-7, the evidence on the record and the agreed statement of facts indicate that they are goods of heading No. 93.04. The Tribunal is of the view that, as they are pistols powered with carbon dioxide pellets, they are properly described in heading No. 93.04. The Tribunal is also satisfied that they are not goods of heading No. 93.07 (Swords, cutlasses, bayonets, lances and similar arms and parts thereof and scabbards and sheaths therefor).

However, in respect of the devices identified as MA-8 to MA-10, the Tribunal disagrees with the parties' contention that they are goods of heading No. 93.04. In the Tribunal's view, these devices are properly classified in heading No. 93.03, which reads as follows:

93.03 Other firearms and similar devices which operate by the firing of an explosive charge (for example, sporting shotguns and rifles, muzzle-loading firearms, Very pistols and other devices designed to project only signal flares, pistols and revolvers for firing blank ammunition, captive-bolt humane killers, line-throwing guns). [Emphasis added.]

The Explanatory Notes to this heading read, in part, as follows:

The heading includes:

(5) **Dummy, imitation or safety pistols and revolvers capable of firing only blank cartridges.** They may have solid or blocked barrels with a vent for the escape of gases. Certain revolvers may have the chambers in the cylinder tapered, while some starters' or stage property pistols have no barrel. When used for starting races, these pistols may be fitted with electrical devices which actuate chronometer equipment. [Emphasis added.]

The agreed statement of facts indicates that the device identified as MA-8 is a blank-firing revolver, while the devices identified as MA-9 and MA-10 are blank-firing pistols. Mr. Penk's report states that the devices MA-8 to MA-10 are not barrelled weapons from which bullets can be discharged and that they each contain a barrel in which a metal transverse bar has been inserted at the breech end. The Tribunal also notes that the appellant's brief states that the devices identified as MA-8 to MA-10 are designed to be used in sport competitions and have certain theatrical applications as well. In light of these facts, the Tribunal is of the view that the devices identified as MA-8 to MA-10 are properly classified in heading No. 93.03 and are at the same time excluded from heading No. 93.04, since the Explanatory Notes to this last heading exclude firearms of heading Nos. 93.01 to 93.03. The Tribunal notes that these devices were described on the

invoice sent to the appellant as goods No. 93039000.<sup>10</sup> The Tribunal considers that the goods fall in subheading No. 9303.90 and is of the view that they should be classified under tariff item No. 9303.90.90.<sup>11</sup>

For the above reasons, the devices identified as MA-2 to MA-7 should be classified under tariff item No. 9304.00.10, while the devices identified as MA-8 to MA-10 should be classified under tariff item No. 9303.90.90.

Consequently, the appeals are allowed in part.

Ellen Fry  
Ellen Fry  
Presiding Member

---

10. Appellant's brief, Exhibit Nos. AP-99-064-24 and AP-99-065-26, tab 4 at 3.

11. In the Tribunal's view, these devices are neither classifiable under tariff item No. 9303.10.00 (Muzzle-loading firearms), nor under tariff items of subheading No. 9303.20 (Other sporting, hunting or target-shooting shotguns, including combination shotgun-rifles) nor under tariff items of subheading No. 93.03.30 (Other sporting, hunting or target-shooting rifles). As they are not goods of tariff item No. 9303.90.10 (Apparatus for the destruction of predatory animals by the discharge of poisonous cartridges; Automatic explosive bird-scaring devices), they can only fall under the residual tariff item No. 9303.90.90 (Other).