



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-017

RBP Imports Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, May 2, 2017*

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DECISION 8

IN THE MATTER OF an appeal heard on January 31, 2017, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Canada Border Services Agency, dated May 12, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

RBP IMPORTS INC.

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 31, 2017
Tribunal Panel: Serge Fréchette, Presiding Member
Support Staff: Rebecca Marshall-Pritchard, Counsel

PARTICIPANTS:

Appellant **Counsel/Representative**
RBP Imports Inc. Gordon LaFortune

Respondent **Counsel/Representative**
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WITNESS:

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STATEMENT OF REASONS

INTRODUCTION

1. RBP Imports Inc. (RBP) filed this appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a re-determination of tariff classification by the President of the Canadian Border Services Agency (CBSA) dated May 12, 2016, made pursuant to subsection 60(4) of the *Act*.

2. The issue in this appeal is whether individually packaged components of aluminum railings (the goods in issue) are properly classified under tariff item No. 7610.90.90 of the schedule to the *Customs Tariff*² as aluminum plates, rods, profiles, tubes and the like, prepared for use in structures, as determined by the CBSA, or should be classified under tariff item No. 7604.21.00 as other aluminum bars, rods and profiles, as claimed by RBP.

PROCEDURAL HISTORY

3. The goods in issue were imported on March 11, 2014, and July 25, 2014, under tariff item No. 7604.21.00 as other aluminum bars, rods and profiles.

4. On November 10, 2015, the CBSA issued a decision with respect to those importations, flowing from a verification audit, pursuant to section 59 of the *Act*. In that decision, the CBSA found that the goods in issue had been incorrectly classified under tariff item No. 7604.21.00 and that they are instead properly classified under tariff item No. 7610.90.90.³ On January 6, 2016, RBP challenged the CBSA's decision under section 60 of the *Act*.⁴ The CBSA confirmed its decision on May 12, 2016.⁵

5. On July 19, 2016, RBP appealed the CBSA's decision to the Tribunal, pursuant to section 67 of the *Act*.

6. Both parties filed submissions, and on October 1, 2017, RBP filed physical exhibits including aluminum posts, aluminum pickets and aluminum railings.

7. On January 31, 2017, the Tribunal held a public hearing. RBP called Mr. Norm Liefke, President of RBP, as a witness.

DESCRIPTION OF THE GOODS IN ISSUE

8. The goods in issue are individually packaged components of aluminum railings, including top and bottom rails, posts, pickets, gates, brackets, spacers and bracers. The goods are intended to be combined to form railings attached to buildings in residential and commercial construction by contractors or consumers in the "do-it-yourself" market. The standard railings are 42 inches in height and are compliant with

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

2. S.C. 1997, c. 36.

3. Exhibit AP-2016-017-4B (protected), tab 2 at 102-7, Vol. 2.

4. Neither RBP nor the CBSA filed RBP's appeal to the CBSA under subsection 59(2) of the *Act*, but RBP's brief does mention that it was made on January 6, 2016. See exhibit AP-2016-017-4A at paras. 5-6, Vol. 1.

5. Exhibit AP-2016-017-8A, tab 3 at 18-19, Vol. 1A.

international building code requirements. The parts are found in building supply stores in Canada and are sold separately as finished products to accommodate the preferred design and dimensions of the purchaser.

9. The goods are produced via an extrusion process, are drilled, bent or notched and are cut to length and powder-coated.

LEGAL FRAMEWORK

10. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).⁶ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings, subheadings and under tariff items.

11. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁷ and the *Canadian Rules*⁸ set out in the schedule.

12. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that 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 other rules. It is only where Rule 1 does not conclusively determine the classification of the goods that the other general rules become relevant to the classification process.⁹

13. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*¹⁰ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,¹¹ published by the WCO. While *Classification Opinions* and *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹²

14. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant *Classification Opinions* and *Explanatory Notes*.

15. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading. Rule 6 of the *General Rules* provides that “. . . the classification of goods in the subheadings of a heading shall be determined according

6. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

7. S.C. 1997, c. 36, schedule [*General Rules*].

8. S.C. 1997, c. 36, schedule.

9. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

10. World Customs Organization, 2nd ed., Brussels, 2003 [*Classification Opinions*].

11. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

12. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that explanatory notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to classification opinions.

to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

16. Finally, the Tribunal must determine the proper tariff item classification. Rule 1 of the *Canadian Rules* provides that “. . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [General Rules] . . .” and that “. . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.” Classification opinions and explanatory notes do not apply to classification at the tariff item level.

RELEVANT TARIFF CLASSIFICATION PROVISIONS

17. Both parties agree that the goods in issue fall under Chapter 76 of the *Customs Tariff* as follows:

SECTION XV

BASE METALS AND ARTICLES OF BASE METAL

Chapter 76

ALUMINIUM AND ARTICLES THEREOF

18. The relevant legal notes for Chapter 76 provide as follows:

1. In this Chapter the following expressions have the meanings hereby assigned to them:

(a) **Bars and rods**

Rolled, extruded, drawn or forged products, not in coils, which have a uniform solid cross-section along their whole length in the shape of circles, ovals, rectangles (including squares), equilateral triangles or regular convex polygons (including “flattened circles” and “modified rectangles”, of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel). Products with a rectangular (including square), triangular or polygonal cross-section may have corners rounded along their whole length. The thickness of such products which have a rectangular (including “modified rectangular”) cross-section exceeds one-tenth of the width. The expression also covers cast or sintered products, of the same forms and dimensions, which have been subsequently worked after production (otherwise than by simple trimming or de-scaling), provided that they have not thereby assumed the character of articles or products of other headings.

(b) **Profiles**

Rolled, extruded, drawn, forged or formed products, coiled or not, of a uniform cross-section along their whole length, which do not conform to any of the definitions of bars, rods, wire, plates, sheets, strip, foil, tubes or pipes. The expression also covers cast or sintered products, of the same forms, which have been subsequently worked after production (otherwise than by simple trimming or de-scaling), provided that they have not thereby assumed the character of articles or products of other headings.

19. The relevant subheading note for Chapter 76 provides as follows:

1. In this Chapter the following expressions have the meanings hereby assigned to them:

...

(b) **Aluminium alloys**

Metallic substances in which aluminium predominates by weight over each of the other elements, provided that:

- (i) the content by weight of at least one of the other elements or of iron plus silicon taken together is greater than the limit specified in the foregoing table; or
- (ii) the total content by weight of such other elements exceeds 1%.

20. The supplementary note to Chapter 76 provides in part as follows:

1. In this Chapter the expression “unworked” means:

(a) when referring to bars, rods and profiles, products which have not been subsequently worked after production (for example, not machined, drilled, punched, twisted or crimped);

21. RBP submits that the goods in issue are properly classified under tariff item No. 7604.21.00, which provides as follows:

76.04 **Aluminum bars, rods and profiles.**

...

7604.21.00 **- -Hollow profiles**

22. The relevant explanatory notes to heading No. 76.04 provide as follows:

The heading **does not cover**:

- (a) Rods and profiles, prepared for use in structures (**heading 76.10**).

23. The explanatory notes to heading No. 74.07 apply *mutatis mutandis* to heading No. 76.04. The relevant explanatory notes of heading No. 74.07 are as follows:

The products of this heading are usually obtained by rolling, extrusion or drawing, but may also be obtained by forging (whether with the press or hammer). They may subsequently be cold-finished (if necessary after annealing) by cold-drawing, straightening, or other processes which give the products a finish of higher precision. They may also be worked (e.g., drilled, punched, twisted or crimped), **provided** that they do not thereby assume the character of articles or of products of other headings. The heading also covers hollow profiles including finned or gilled tubes and pipes obtained by extrusion. . . .

24. The CBSA submits that the goods in issue should be classified under tariff item No. 7610.90.90, which provides as follows:

76.10 **Aluminium structures (excluding prefabricated buildings of heading 94.06) and parts of structures (for example, bridges and bridge-sections, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, balustrades, pillars and columns); aluminium plates, rods, profiles, tubes and the like, prepared for use in structures.**

...

7610.90 **-Other**

...

7610.90.90 - - -Other

25. The relevant explanatory notes to heading No. 76.10 provide as follows:

The provisions of the Explanatory Note to heading 73.08 apply, *mutatis mutandis*, to this heading.

In the case of aluminium, structural parts are sometimes bonded together with synthetic resins or rubber compounds instead of being fixed by the ordinary methods of riveting, bolting, etc.

In view of their lightness, aluminium and its alloys are sometimes used instead of iron or steel in the manufacture of structural frameworks, ships' superstructures, bridges, sliding doors, electric grid or radio pylons, telescopic pit props, door or window frames, railings, etc.

26. The relevant explanatory notes to heading No. 73.08 provide as follows:

This heading covers complete or incomplete metal structures, as well as parts of structures. For the purpose of this heading, these structures are characterised by the fact that once they are put in position, they generally remain in that position. They are usually made up from bars, rods, tubes, angles, shapes, sections, sheets, plates, wide flats including so-called universal plates, hoop, strip, forgings or castings, by riveting, bolting, welding, etc. Such structures sometimes incorporate products of other headings such as panels of woven wire or expanded metal of heading 73.14. Parts of structures include clamps and other devices specially designed for assembling metal structural elements of round cross-section (tubular or other). These devices usually have protuberances with tapped holes in which screws are inserted, at the time of assembly, to fix the clamps to the tubing.

Apart from the structures and parts of structures mentioned in the heading, the heading also includes products such as:

Pit head frames and superstructures; adjustable or telescopic props, tubular props, extensible coffering beams, tubular scaffolding and similar equipment; sluice-gates, piers, jetties and marine moles; lighthouse superstructures; masts, gangways, rails, bulkheads, etc., for ships; balconies and verandahs; shutters, gates, sliding doors; assembled railings and fencing; level-crossing gates and similar barriers; frameworks for greenhouses and forcing frames; large-scale shelving for assembly and permanent installation in shops, workshops, storehouses, etc.; stalls and racks; certain protective barriers for motorways, made from sheet metal or from angles, shapes or sections.

The heading also covers parts such as flat-rolled products, "wide flats" including so-called universal plates, strip, rods, angles, shapes, sections and tubes, which have been prepared (e.g., drilled, bent or notched) for use in structures.

The heading further covers products consisting of separate rolled bars twisted together, which are also used for reinforced or pre-stressed concrete work.

TRIBUNAL ANALYSIS

27. The issue in this appeal is whether the goods in issue are properly classified in heading No. 76.10 as aluminum plates, rods, profiles, tubes and the like, prepared for use in structures, as determined by the CBSA, or should be classified in heading No. 76.04 as hollow aluminum profiles, as claimed by RBP.

28. To decide that issue, the Tribunal will begin its analysis by considering the applicability of heading No. 76.10, since heading No. 76.04 excludes goods classifiable in heading No. 76.10. Only if the goods are found not to fall in heading No. 76.10 will the Tribunal turn to heading No. 76.04.

The Goods in Issue Are Not Assembled Railings of Heading No. 76.10

29. In order to be classified in heading No. 76.10, the goods in issue must fall within one of three categories: (1) structures; (2) parts of structures; and (3) parts prepared for use in structures.¹³ Heading No. 76.10 also includes a list of products that are cited as being “apart from” those three categories. Included in that list of products are “assembled railings”.

30. RBP argued that the term “assembled railings” was a purposeful drafting decision to qualify the word “railings”. The logical extension of RBP’s argument is that the phrase “assembled railings” excludes any reference to unassembled or disassembled railings. In RBP’s view, interpreting the term “assembled railings” to include all railings would necessitate reading down the qualifier “assembled” and would not accord with the Federal Court of Appeal’s decision in *Suzuki*.

31. According to RBP, when examining the list of products in the third paragraph of the above-mentioned relevant explanatory notes to heading No. 73.08, which includes tubular scaffolding, lighthouse superstructures, level-crossing gates and barriers and frameworks for greenhouses, none of those goods are qualified in any manner, except the railings. As such, RBP submits that when Rule 2(a) is applied to the other items in the list of products, which holds that any reference to those goods includes them in their unassembled or disassembled form, those goods remain unqualified. However, in RBP’s view, because the explanatory notes to heading No. 73.08 speak only of “assembled railings” rather than simply “railings”, it precludes the possibility of classifying parts of railings under the same heading because the railings classified in heading No. 76.10 must be “assembled”.

32. For its part, the CBSA submits that the “assembled railings” referred to in the explanatory notes to heading No. 73.08 and the “railings” referred to in heading No. 76.04 are similar and that a reference to assembled railings includes those railings that are also unassembled upon importation. The CBSA argues that the reference to both headings confirms that railings are a common component of structures.

33. The *Merriam-Webster* online dictionary defines “assemble” as

- 1 : To bring together as in a particular place or for a particular purpose
- 2 : To fit together the parts of¹⁴

34. The *English Oxford Living Dictionaries* defines “assemble” as

...

- 2 [*with object*] Fit together the separate component parts of (a machine or other object)

‘my new machine is being assembled and my old one dismantled’¹⁵

35. The goods in issue are designed to fit together post-importation to form an assembled railing in accordance with a customer’s design specifications and needs. The Tribunal finds that the term “assembled railings” was a purposeful drafting decision. The drafters intended to qualify the railings with the word “assembled”. This means that the railings must be assembled upon importation in order to come within the scope of heading No. 76.10.

13. The explanatory notes to heading No. 76.03 apply *mutatis mutandis* to heading No. 76.10.

14. Available online at: <https://www.merriam-webster.com/dictionary/assemble>.

15. Available online at: <https://en.oxforddictionaries.com/definition/assemble>.

36. The evidence indicates that the goods in issue are a loose assortment of parts designed to be used by customers to customize and assemble railings post-importation. The Tribunal heard testimony from Mr. Liefke of RBP that, at the time of importation, he has no knowledge of how many of each part of the goods in issue a given customer will use in their railing design.¹⁶ Mr. Liefke testified that the goods in issue are neither unassembled railings, nor are they railing kits.

37. The parties devoted considerable written and oral submissions to *Toys “R” Us (Canada) Ltd. v. President of the Canada Border Services Agency*¹⁷ in arguing whether the goods in issue are structures, parts of structures, or parts prepared for use in structures within heading No. 76.10. RBP argued that the goods in issue are outside the scope of heading No. 76.10 because they are not parts of structures or parts prepared for use in structures, and that, therefore, they are ultimately used to assemble a product listed in the third paragraph of the relevant explanatory notes to heading No. 76.10 (e.g. “assembled railings”).¹⁸ Conversely, the CBSA argued that the goods in issue are classified in heading No. 76.10 as parts prepared for use in structures: in its view, the goods in issue are parts of assembled railings which are affixed to structures such as residential and commercial buildings.¹⁹ The Tribunal found these submissions to be of limited value and not dispositive of this appeal.

38. Rather, the Tribunal finds that this appeal can be disposed of by application of Rule 1.

39. Rule 1 qualifies the application of the other rules and states that “[t]he 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 following provisions*” [emphasis added]. That is, regard need only be given to the subsequent rules if Rule 1 does not determine the tariff classification. In this case the explanatory notes, which define the scope of heading No. 76.10, specifically reference “*assembled railings*” [emphasis added]. Accordingly, there is no need to consider Rule 2(a) since the language of “*assembled railings*” is specific and entirely dispositive of this appeal in accordance with Rule 1.

40. In order to classify the goods in issue in heading No. 76.10, the Tribunal would have to find that the “*assembled railings*” included parts thereof. Such an interpretation would require the Tribunal to ignore the word “*assembled*”. This approach would be contrary to Rule 1 and the Court’s decision in *Suzuki*. The Tribunal does not see any sound reason to depart from the explanatory notes in this case. It is clear that by using the word “*assembled*” to qualify the term “*railings*”, the drafters intended to exclude the possibility of including anything other than “*assembled railings*” [emphasis added] in heading No. 76.10. As such *disassembled* railings, or parts of railings—such as the goods in issue—cannot be included in that heading. Any other interpretation would render meaningless the word “*assembled*”.

The Goods in Issue Meet the Conditions Required to be Classified in Heading No. 76.04

41. As discussed above, heading No. 76.04 excludes items prepared for use in structures of heading No. 76.10. Having found that the goods in issue are not classifiable in heading No. 76.10, the Tribunal will now examine whether they are classifiable in heading No. 76.04.

16. *Transcript of Public Hearing*, Vol. 1, 31 January 2017, at 23-26.

17. (22 July 2016), AP-2015-024 (CITT) [*Toys “R” Us*].

18. Recall that the explanatory notes to heading No. 73.08 apply *mutatis mutandis* to heading No. 76.10.

19. Indeed, during the hearing, the CBSA went further and stated that that once something is attached to a structure, it becomes part of that structure. See *Transcript of Public Hearing*, Vol. 1, 31 January 2017, at 60.

42. The goods in issue comprise aluminum alloy. There is no dispute about this fact.
43. “Profiles” are defined in the notes to Chapter 76. In this case, the goods in issue meet that definition.
44. As noted above, the explanatory notes to heading No. 74.07 apply *mutatis mutandis* to heading No. 76.04 and state that the heading is not intended to encompass profiles made of copper. Specifically, they state that “[the products covered by the heading] may also be worked, **provided** that they do not thereby assume the character of articles or of products of other headings.” The goods in issue do not assume the character of a railing at the time of importation. They may be used to varying degrees to assemble a railing post-importation in accordance with the customer’s needs. Accordingly, the goods in issue are not excluded from heading No. 76.04 by virtue of the explanatory notes to heading No. 74.07. Consequently, they are properly classified in heading No. 76.04.
45. As the goods in issue are hollow products, they are properly classifiable under subheading No. 7604.21.
46. Finally, as the parties agree that the goods are worked, they are properly classified under tariff item No. 7604.21.00.

DECISION

47. The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member