



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-039

Worldpac Canada Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, March 13, 2018*

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DECISION 7

IN THE MATTER OF an appeal heard on January 29, 2018, 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 President of the Canada Border Services Agency, dated October 11, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

WORLD PAC CANADA INC.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Ann Penner
Ann Penner
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 29, 2018
Tribunal Panel: Ann Penner, Presiding Member
Support Staff: Elysia Van Zeyl, Counsel

PARTICIPANTS:**Appellant**

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Worldpac Canada Inc. (Worldpac) pursuant to subsection 67(1) of the *Customs Act*,¹ from a decision of the President of the Canada Border Services Agency (CBSA) dated October 11, 2016, made pursuant to subsection 60(4).

2. The sole issue in this appeal is whether certain shock absorbers, strut assemblies and shock suspension kits (the goods in issue) qualify for duty relief under tariff item No. 9961.00.00 of the *Customs Tariff*² as vacuum, hydraulic or air control assemblies for use in the repair of motor vehicles principally designed for the transportation of persons or goods.

PROCEDURAL HISTORY

3. On October 3 and 4, 2013, Worldpac applied for refunds under paragraph 74(1)(e) of the *Act* for its importations of “other suspension shock absorbers” under tariff item No. 8708.80.30, claiming that the goods in issue should be entitled to duty relief under tariff item No. 9961.00.00.

4. Worldpac’s refund request was denied by the CBSA on March 27, 2014, pursuant to subsection 74(4). The CBSA treated the denial as a re-determination pursuant to paragraph 59(1)(a) of the *Act*.

5. Worldpac then requested a further re-determination pursuant to section 60 of the *Act*, which was filed on June 18, 2014. This request was unsuccessful yet again.

6. On October 11, 2016, the CBSA issued a further re-determination, maintaining that the goods in issue were properly classified in tariff item No. 8708.80.30 and were not entitled to the benefit of tariff item No. 9961.00.00, pursuant to subsection 60(4) of the *Act*.

7. On January 9, 2017, Worldpac filed this appeal with the Canadian International Trade Tribunal (the Tribunal). Worldpac submitted its brief on October 23, 2017, and an amended brief on November 2, 2017. The CBSA filed its brief on December 18, 2017. Both parties also proposed expert witnesses: Worldpac proposed Dr. Subhash Rakheja as an expert in vehicle dynamics, vehicle ride vibrations, vehicle suspension analysis and the design and tuning of shock absorber assemblies; the CBSA proposed Mr. Martin Restoule as an expert in automotive technology.

8. On January 29, 2018, the Tribunal held a public hearing. At the start of the hearing, the Tribunal qualified both witnesses in the areas proposed by the parties. Both witnesses then provided expert testimony in their respective fields.

DESCRIPTION OF GOODS IN ISSUE

9. The goods in issue consist of an upper mount, a dust tube, piston rod, seal assembly, oil chamber, piston/valving assembly, diaphragm, pressurized gas chamber and a lower mount.

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

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

10. Worldpac described the goods as falling into three categories:
- (1) hydraulic or gas (air) shock absorbers;
 - (2) hydraulic shock strut assemblies; and
 - (3) hydraulic or gas (air) shock suspension kits consisting of shock absorbers, springs, spring plates, bushings, lock rings, nuts and spacers.

LEGAL FRAMEWORK

11. 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).³ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

12. 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*⁴ and the *Canadian Rules*⁵ set out in the schedule.

13. 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.

14. Chapter 99 provides for special classification provisions adopted by Canada that generally allow certain goods to be imported duty-free. The provisions of this chapter are not standardized at the international level. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter, and tariff item No. 9961.00.00 in particular.

Tariff Item No. 9961.00.00

15. Tariff item No. 9961.00.00 reads as follows:

Chapter 99

SPECIAL CLASSIFICATION PROVISIONS – COMMERCIAL

...

9961.00.00 **The following for use in the repair of road tractors for semi-trailers, motor vehicles principally designed for the transport of persons or goods, or fire fighting vehicles, and parts thereof:**

...

Vacuum, hydraulic or air control assemblies, other than assemblies for spring brakes;

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

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

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

16. There are no section notes to Section XXI (which includes Chapter 99); however, note 3 to Chapter 99 is relevant to the present appeal. It provides as follows:

Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin only after classification under a tariff item in Chapters 1 to 97 has been determined and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.

17. Given that goods in Chapter 99 are not standardized at the international level, there are no WCO classification opinions or explanatory notes to guide the Tribunal in its consideration of this tariff item. Furthermore, there are no applicable regulations or orders respecting the goods in issue.

POSITIONS OF PARTIES

18. The parties agree that the goods in issue are classified in tariff item No. 8708.80.30, and thus the classification in Chapters 1 through 97 is not in dispute. The parties also agree that the goods in issue are for use in the repair of motor vehicles principally designed for the transport of persons. Thus, the only point of disagreement is over the issue of whether the goods should be considered “hydraulic control assemblies” for the purpose of tariff item No. 9961.00.00.

19. In that regard, Worldpac argued that the goods in issue are indeed “hydraulic control assemblies” and thus fall within the terms of tariff item No. 9961.00.00. Worldpac claimed that shock absorbers, which are used in the suspension of vehicles, are designed to provide dampening,⁶ as they limit the up and down movement of the vehicle as it encounters bumps on the road. To do this, the shock absorbers employ hydraulics. As will be discussed below in further detail, the amount of dampening in an oil-type shock absorber is determined by the flow of oil through the orifices and valves built into the piston or base of the shock absorber. With reference to evidence from various publications, Worldpac submitted that there is widespread industry acceptance that shock absorbers serve a control function by limiting the motion of the springs and thus vehicular motion.

20. In contrast, the CBSA argued that the goods in issue are not hydraulic control assemblies. The CBSA relied heavily on the approach taken by the Tribunal in *Fenwick*, using it to suggest that the Tribunal should apply a narrow approach to the concept of control.⁷ The CBSA interpreted *Fenwick* as requiring the goods in issue to direct or command other components in order to be considered hydraulic control assemblies. In its view, as the goods in issue do not direct or command other components, they cannot be considered hydraulic control assemblies.

TRIBUNAL ANALYSIS

21. As indicated above, the sole question to be determined by the Tribunal in this appeal is whether the goods in issue are “hydraulic control assemblies”.

22. Both parties recommended that the Tribunal should decide that question using the framework established in *Fenwick*, even though the goods in issue in that case differ significantly from the goods in issue in this appeal.

6. The Tribunal will use the term “dampening” throughout these reasons, but it notes that the parties have referred to “dampening” and “damping” interchangeably throughout this proceeding.

7. *Fenwick Automotive Products Limited v. President of the Canada Border Services Agency* (11 March 2009), AP-2006-063 (CITT) [*Fenwick*].

23. In *Fenwick*, the Tribunal considered each of the words “hydraulic”, “control” and “assembly” in turn, to assess whether the goods in issue constituted hydraulic control assemblies. The Tribunal will follow the same general approach in this case, albeit in a slightly different order given that two elements of this test are not in dispute, i.e. that the goods in issue are hydraulic in nature and constitute an assembly.

Hydraulic

24. In *Fenwick*, the Tribunal referenced the following definition of “hydraulic”: “. . . **1** (of water, oil, etc.) conveyed through pipes or channels usu. by pressure. **2** (of a mechanism etc.) operated by liquid moving in this manner (*hydraulic brakes; hydraulic lift*)”

25. The parties do not dispute that the goods in issue can be characterized as “hydraulic”.⁸ The Tribunal agrees. The evidence is uncontroverted that the shock absorbers contain hydraulic oil and that a piston separates the hydraulic oil into two chambers. As described by Dr. Rakheja, when the temperature increases, the oil expands and moves from the bottom chamber to the upper chamber through several valves.⁹ Moreover, when the vehicle is subject to a large shock motion, high pressure is created in the lower portion of the cylinder, which in turn deflects a series of shims, creating the additional flow of oil through the valves. The amount of oil flowing through the chambers determines the amount of dampening the shock absorbers will provide.¹⁰

26. On the basis of this evidence, the Tribunal finds that the goods in issue are hydraulic.

Assembly

27. In *Fenwick*, the Tribunal held that an “assembly” is something which “. . . constitutes a number of parts fitted together to form a single device or unit which may, on its own, provide only limited functionality.” Moreover, the Tribunal held that assemblies could be parts of other assemblies and/or components of larger systems.

28. The parties agree, and the Tribunal accepts, that the goods in issue are assemblies and parts of assemblies.¹¹ When fitted together, the goods in issue form an assembly, namely a shock absorber. This assembly ultimately becomes part of the larger suspension system.

Control

29. In *Fenwick*, the Tribunal largely focussed its analysis on one aspect of the definition of “control”, and specifically on the idea that “control” involves the giving of command. It defined “control” as follows: “**1** the power of directing, command (*under the control of*)” and “the function or power of directing and regulating”.

30. In this case, the characteristics of the goods in issue are such that the Tribunal finds it important to consider the latter part of that definition, i.e. the function or power of directing and regulating something. It, therefore, circulated the following (and more complete) definitions of “control” to the parties in advance of the hearing to solicit their views, and will rely on them in its analysis of whether the goods in issue satisfy the meaning of “control”:

8. Exhibit AP-2016-039-26A at para. 48, Vol. 1A.

9. *Transcript of Public Hearing*, 29 January 2018, at 40-45.

10. *Ibid.*, at 44-45.

11. Exhibit AP-2016-039-26A at para. 48, Vol. 1A.

Merriam-Webster's Collegiate Dictionary, 11th ed.: “vb . . . **2 a**: to exercise restraining or directing influence over: regulate **b**: to have power over: rule **c**: to reduce the incidence or severity of . . . n . . . 2: restraint; reserve. . . . **b** : a device or mechanism used to regulate or guide the operation of a machine, apparatus, or system”

Shorter Oxford English Dictionary, 5th ed.: “**1** The act or power of directing or regulating; command, regulation influence. **2** The action of holding in check; restraint; prevention of the spread of something unwanted **3** A means of restraining or regulating; . . . **6** A device or mechanism for controlling the operation of a machine, esp. the direction, speed, etc. of an aircraft or vehicle”

Canadian Oxford Dictionary, 2nd ed.: “**1** The power of directing, command . . . **2** the power of restraining, esp. self-restraint. **3 a** a means of restraint; a check . . . **3 b** prevention of the spread or proliferation of something”

[Bolding and italics in original, underlining added for emphasis]

31. The evidence from both parties demonstrates that the goods in issue do indeed satisfy these definitions of “control”. Both parties provided ample support for the conclusion that a control could be something that restrains or regulates motion in a vehicle. The Tribunal repeatedly heard that the goods in issue work in such a way as to restrain or regulate the springs and, in turn, limit or reduce the bumpiness of the car as it moves down the road. Indeed, the testimony of both experts with regard to the operation and functionality of the goods in issue was, in all material respects, the same on this point.

Evidence from Dr. Rakheja

32. Dr. Rakheja’s expert report included an illustration of a shock absorber¹² to show that a shock absorber is essentially a piston-cylinder device, also referred to as a strut, filled with hydraulic oil. The piston separates the cylinder into two hydraulic oil chambers. The piston contains a number of orifices to permit the flow of hydraulic fluid across these two chambers, facilitated by relatively complex flow-modulating valves which regulate the flow of oil.

33. His report also indicated that shock absorbers, which are sometimes referred to as “dampers”, work together with springs and restraining linkages to constitute the suspension system in a vehicle.¹³ Shock absorbers play a number of roles within that system, including limiting the motion of the springs. In addition, shock absorbers play a role in limiting the roll motion of a vehicle during steering manoeuvres.¹⁴ Further, they limit the amount by which a wheel will bounce during rebound and therefore allow more uniform contact between the wheels and the road, and, consequently, better road handling.¹⁵

34. Without shock absorbers, Dr. Rakheja wrote that the potential energy that builds up in a spring in reaction to a bump in the road will be transferred as kinetic energy to the body of the vehicle. The result in such a scenario would be that the vehicle would oscillate or vibrate uncontrollably. Accordingly, the dampening of this oscillatory motion is one of the primary functions of the shock absorber.¹⁶ During compression (i.e. the downward motion of the vehicle), the fluid flows from the lower to the upper chamber

12. Exhibit AP-2016-039-29A at para. 30, Vol. 1A.

13. *Ibid.* at para. 25.

14. *Ibid.* at para. 27.

15. *Ibid.* at para. 28; *Transcript of Public Hearing*, 29 January 2018, at 38-39, 45, 55, 78.

16. Exhibit AP-2016-039-29A at para. 25, Vol 1A.

of the strut through the piston orifices and the valves. Flows in the opposite direction occur during rebound (i.e. the upward motion of the vehicle).¹⁷

35. In his testimony, Dr. Rakheja explained how shock absorbers control the motion of the vehicle's springs. In particular, he explained that when a wheel jumps up or down, it deflects the springs in the vehicle's suspension system.¹⁸ If left unrestrained, the spring tends to oscillate for a long time. However, the dampening provided by the shock absorber smoothly returns the car back to a static position by dissipating the energy from the spring and the vehicle body or from the road.¹⁹

36. Dr. Rakheja also testified that a vehicle can be affected by a number of different kinds of motion, and, as such, different levels of dampening are required. For example, when a vehicle drives on a smooth highway with only small asperities in the road surface, generally low dampening is required. Under such conditions, high dampening could be detrimental because it would stiffen the suspension system. In contrast, when a vehicle drives on rougher city roads, high dampening is required.²⁰ As such, the shock absorber must regulate, or control, the amount of dampening so that the vehicle can respond effectively to different driving conditions. To accomplish this, the shock absorber relies on its valves which sense how much dampening is required.²¹ In situations where there is a build-up of pressure inside the chamber, the valves will open more than in situations where there is less pressure. The dampening force developed by the shock absorber is directly related to this pressure difference.²²

Evidence from Mr. Restoule

37. In large part, the evidence provided by Mr. Restoule was akin to that provided by Dr. Rakheja. In particular, Mr. Restoule's expert report noted that dampers (or shock absorbers) serve to reduce the car's kinetic energy when it moves over obstacles or holes in the road by controlling the release of the vehicle springs' energy.²³ The report also explained what would happen to the vehicle's springs if they were not restrained by the shock absorbers.²⁴ Moreover, they indicated that a shock absorber "works on the basis of fluid displacement on both its compression (jounce) and extension (rebound) cycles".²⁵ The extension cycle controls the motion of the vehicle body spring weight while the compression cycle controls the same motions of the unsprung weight.²⁶ Further, the report demonstrated that the strut provides the dampening function of the shock absorber.²⁷ As such, his report concurred with that of Dr. Rakheja that a properly functioning shock absorber serves to ensure vehicle stability, handling and rideability.²⁸

38. The supporting materials filed with the respondent's brief also shed some light onto what a shock absorber is and what the controlling role plays in a vehicle. Specifically, in *Modern Automotive Technology*, the definition provided of a shock absorber is as follows: "an oil or gas-filled device used to *control* spring

17. *Ibid.* at para. 35.

18. *Transcript of Public Hearing*, 29 January 2018, at 29.

19. *Ibid.*, at 26-27.

20. *Ibid.*, at 30.

21. *Ibid.*, at 35.

22. *Transcript of Public Hearing*, 29 January 2018, at 48-51.

23. Exhibit AP-2016-039-28A at para. 7, Vol. 1A.

24. *Ibid.* at p. 13; *Transcript of Public Hearing*, 29 January 2018 at 104, 106.

25. Exhibit AP-2016-039-28A at p. 14, Vol. 1A.

26. *Ibid.*

27. *Ibid.* at p. 16.

28. *Ibid.* at p. 33.

oscillation in suspension systems” [emphasis added].²⁹ Corroboration for this definition is found on the Web site of the manufacturer which states the following:

“[t]he shock absorbers *reduce* and slow down the vibrations from the springs, which is why technically they are correctly referred to as vibration dampers . . . This involves the flow of oil being slowed down by the valve passages inside the damper . . .”³⁰

[Emphasis added]

39. *Modern Automotive Technology* also indicates that “shock absorbers limit spring oscillations (compression-extension movements) to smooth the vehicle’s ride. Without shock absorbers, the vehicle would continue to bounce up and down long after striking a dip or hump in the road.” Moreover, it describes a shock absorber as “a piston operating inside an oil-filled cylinder. Valves cause the oil to flow from one side of the piston to the other at a controlled rate. This produces dampening action that restricts spring oscillations.”³¹ The *Shock Absorber Handbook* also indicates that the purpose of a damper is “primarily to control the amplitude of resonant responses [of the springs]” and, in turn, the motions of the car body (i.e. the “sprung mass”).³² This evidence is very much the same as that presented by Mr. Restoule in his testimony, not to mention the evidence of Dr. Rakheja.

40. In his testimony, Mr. Restoule likened the operation of a shock absorber to a drummer who hits a cymbal. Once hit, the cymbal will vibrate, creating sound, but as soon as the drummer puts his finger on the cymbal, the cymbal no longer vibrates and the sound is quieted.³³ Mr. Restoule indicated that this is essentially what the shock absorber does, namely, it stops (and therefore restrains) the vibrations in the vehicle’s springs. Mr. Restoule agreed that this dampening is a control function.³⁴

Summary

41. In summary, there is no question that the goods in issue constitute assemblies, or with respect to certain of the goods, that they are parts of said assemblies. It is beyond dispute that the goods employ hydraulics to accomplish their intended purpose. Moreover, based on the evidence of both expert witnesses, the purpose of the goods in issue is to exert control over the vehicle’s springs, acting as a restraining or regulating force that prevents the vehicle’s springs from rebounding uncontrollably. In light of the above, the Tribunal finds that the goods in issue are considered “hydraulic control assemblies” and parts thereof.

DECISION

42. For the foregoing reasons, the Tribunal finds that the goods in issue fall under the terms of tariff item No. 9961.00.00. The appeal is therefore allowed.

Ann Penner
Ann Penner
Presiding Member

29. Exhibit AP-2016-039-26A, tab 3, p. 62, Vol. 1A.

30. Exhibit AP-2016-039-26A at p. 66, Vol. 1A.

31. *Ibid.* at p. 56.

32. Exhibit AP-2016-039-39A at 84, Vol. 1A.

33. *Transcript of Public Hearing*, 29 January 2018, at 90.

34. *Ibid.*, at 107-108.