



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-026

Rona Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, June 5, 2018*

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IN THE MATTER OF an appeal heard on April 19, 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 June 1, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

RONA INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: April 19, 2018
Tribunal Panel: Serge Fréchette, Presiding Member
Support Staff: Elysia Van Zeyl, Counsel

PARTICIPANTS:

| | |
|--|--------------------------------|
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STATEMENT OF REASONS

1. This is an appeal filed by Rona Inc. (Rona) on August 29, 2017, pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made by the President of the Canada Border Services Agency (CBSA), dated June 1, 2016, made pursuant to subsection 60(4).

2. The issue in this appeal is whether the goods in issue are classified under heading No. 73.21 of the schedule to the *Customs Tariff*² as “barbecues of iron or steel”, more specifically under tariff item No. 7321.11.90 as “other cooking appliances for gas fuel or for both gas and other fuels”, as determined by the CBSA, or under heading No. 84.79 as “other machines and mechanical appliances having individual functions not specified or included elsewhere in Chapter 84”, more specifically under tariff item No. 8479.89.90, as claimed by Rona.

GOODS IN ISSUE

3. The goods in issue are various models of propane and natural gas grills, commonly referred to as barbecues or barbecue grills.³ These are, for all intents and purposes, standard barbecues.

4. Rona characterizes their mode of ignition as “electric”. The igniter is either a push button or a rotating knob, or in one case a battery, which generates a spark using piezoelectricity.⁴ Piezoelectricity refers to the creation of an electrical charge using certain materials subjected to mechanical stress. In this case, the spark then jumps between two electrodes, causing the gas, which comes either from a propane tank or a natural gas hook-up, to ignite. The propane or natural gas is then used as fuel to cook food. One of the models of the goods in issue also incorporates an electrically operated rotisserie.

PROCEDURAL HISTORY

5. The goods in issue were imported between January 2013 and April 2016.

6. In January 2017, Rona filed nine adjustment requests regarding the tariff classification of the goods in issue and requested refunds pursuant to paragraph 74(1)(e) of the *Act*.

7. On February 8, 2017, the CBSA denied these requests and issued Detailed Adjustment Statements pursuant to subsection 59(2) of the *Act*. As such, these notices of re-determination were forwarded for review pursuant to subsection 60(1) of the *Act*.

8. Between March and April of 2017, Rona filed an additional 154 adjustment requests for similar goods. These requests were also forwarded for review pursuant to subsection 60(1) of the *Act*.

9. On June 1, 2017, the CBSA rendered a further re-determination, classifying the goods under heading No. 73.21, pursuant to subsection 60(4) of the *Act*.

10. On August 28, 2017, Rona filed this appeal with the Tribunal, which concerns 158 of the 163 transactions that were reviewed by the CBSA.

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

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

3. The particular makes and models of the goods in issue can be found at Exhibit AP-2017-027-07B.

4. Piezoelectricity refers to the ability of certain materials to generate an AC voltage when subjected to mechanical stress or vibration.

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).⁵ 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*⁶ and the *Canadian Rules*⁷ 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. 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 System⁸ and the Explanatory Notes to the Harmonized Commodity Description and Coding System,⁹ published by the WCO. While the classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁰

15. The terms of the relevant headings, and the relevant legal and explanatory notes, may be found in the Appendix of this statement of reasons.

POSITIONS OF PARTIES

16. The facts in this case are not in dispute. Further, the parties agree that the tariff classification of the goods in issue can be resolved with the application of Rules 1 and 2(a), given that the goods in issue are imported in an unassembled condition, combined with Rule 6.

17. Rona acknowledged that barbecues are specifically named in heading No. 73.21; however, it argued that the terms of this heading indicate that it only covers *non-electric* barbecues. Rona submitted that, because the goods in issue use a form of electricity to ignite, they cannot be considered “non-electric”. On this basis, Rona submitted that the goods in issue cannot be classified in heading No. 73.21. Instead, Rona submitted that the goods in issue ought to be classified under heading No. 84.79 as other machines and mechanical appliances having individual functions not specified or included elsewhere in Chapter 84.

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

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

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

8. World Customs Organization, 2nd ed., Brussels, 2003.

9. World Customs Organization, 6th ed., Brussels, 2017.

10. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) 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.

18. The CBSA took the position that the goods in issue are unambiguously described in trade and general usage as barbecues. The CBSA pointed out that barbecues are specifically named under heading No. 73.21 and that the goods in issue fall under heading No. 73.21 because they are (1) non-electric; (2) domestic appliances; and (3) made of iron or steel. The CBSA argues that in order to be considered electric, goods need to be operated by electricity, and that since these goods are not, they are properly considered “non-electric”. In addition, the CBSA argues that the goods in issue meet the requirements listed in the explanatory note to heading No. 73.21, in that they are designed for the production and utilization of heat for cooking, they use liquid or gaseous fuel, and they are normally used in the household.

TRIBUNAL ANALYSIS

19. The Tribunal will begin its analysis relying on Rule 1 to consider whether the goods fall under the terms of heading Nos. 73.21 or 84.79. In terms of the order of analysis, the Tribunal is guided by the explanatory note to heading No. 84.79, which indicates that the heading is restricted to machinery having individual functions that is “not covered more specifically by a heading in any other Chapter of the Nomenclature”. Accordingly, the Tribunal will first consider whether the goods in issue are covered more specifically in heading No. 73.21.

20. Heading No. 73.21 refers specifically to “barbecues” and “similar non-electric domestic appliances”. Rona conceded that the goods in issue are appropriately characterized as barbecues, and there is no doubt that the goods in issue are comprised of iron or steel, along with certain components of other materials. However, Rona argued that the goods are not non-electric, as contemplated by the heading. As indicated above, the basis for Rona’s argument is that the ignition mechanism of the goods in issue relies on a form of electricity.

21. Accordingly, for the purposes of this appeal, the Tribunal must consider whether the ignition mechanism renders heading No. 73.21 inapplicable to the goods in issue on the basis that the goods in issue cannot be described as non-electric.

22. To adopt Rona’s interpretation, the Tribunal would be required to give the terms of heading No. 73.21 an *a contrario* reading, in essence, requiring the exclusion of all appliances incorporating any means of electricity when that electricity or electrical charge is used for any purpose whatsoever. The Tribunal is of the view that this broad interpretation cannot be what was intended by the terms of this heading, for the reasons elaborated below.

23. As a general observation, the schedule to the *Customs Tariff* tends to describe goods either by naming them specifically and/or with reference to their characteristics (i.e. physical characteristics, mode(s) by which they function, end uses, etc.). Based on the list of items it includes, heading No. 73.21 clearly captures certain cooking appliances.¹¹ The language used in this heading indicates that the intention is to distinguish between covered and excluded cooking appliances on the basis of the type of energy used to perform the cooking function. The first criteria stated in the explanatory note to heading No. 73.21, which refers to the production and utilization of heat for cooking, is consistent with this interpretation of the scope of the heading.

11. The Tribunal notes that certain other headings, including 85.16 (dealing with thermo-electric appliances), may also cover cooking appliances; however, neither party has suggested that these are relevant to the goods in issue in this appeal.

24. In reaching this conclusion, the Tribunal has also taken into account the definition of “electric” from the *Merriam-Webster’s Collegiate Dictionary*, which is as follows: “of, relating to, or operated by electricity”.¹² By logical extension then, the term “non-electrical” means not of, related to or operated by electricity.

25. While Rona argued, in its reply brief, that the goods in issue are “of” or “related to” electricity as a result of their means of ignition, the Tribunal’s view is that this connection is too tenuous. Once the barbecue is lit, any electrical energy becomes wholly irrelevant to the cooking function of the goods in issue. Moreover, as the CBSA rightly points out, the goods in issue may be lit with a match or a lighter, thus completely bypassing any electrical ignition process or component. Although Rona argued that doing so would circumvent the normal, safer and intended starting procedure for the appliance, the instruction manuals clearly point to manual lighting as an option¹³ and do not suggest that this mode of ignition would be abnormal, unsafe or contrary to the manufacturer’s intention.

26. Accordingly, a more reasonable interpretation of the term “non-electric” in this heading is that proposed by the CBSA, namely, with reference to that which provides the barbecue with the ability to perform its intended function. In this case, it is not electricity that powers the goods in issue. Rather, it is natural gas or propane. The criteria in the explanatory notes, as discussed below, also support this interpretation given their reference to a source of fuel (e.g., solid, liquid or gaseous fuel, or other source of energy) as a requirement.

27. While the spark generated by a battery or mechanical friction may in certain contexts and for certain purposes be considered a form of electricity, it would be absurd to distinguish electrical from non-electrical barbecues exclusively on this basis. Moreover, it would be nonsensical to conclude that, for tariff classification purposes, barbecues that run on propane and natural gas, and not electricity, and that are marketed as propane and natural gas barbecues, not electrical barbecues,¹⁴ could be considered anything other than non-electric gas or propane barbecues.

28. With respect to the model that incorporates a rotisserie operated by electricity, given that this rotisserie is generally viewed as an accessory, the Tribunal finds that its presence does not warrant a departure from the Tribunal’s conclusion that the goods in issue are non-electric, because the rotisserie does not change the operation or functioning of the barbecue itself.

29. On the above basis, the Tribunal finds that the goods in issue are non-electric and, thus, satisfy this criterion of heading No. 73.21.

30. The goods in issue also satisfy the criteria stated in the explanatory notes to heading No. 73.21. Firstly, the goods in issue are designed for the production and utilization of heat for cooking. Secondly, they use liquid or gaseous fuel. And finally, they are normally used in the household.

12. Exhibit AP-2017-026-12A, Tab 5, Vol. 1A.

13. For example, see AP-2017-026-07B at 48, 377.

14. In its supporting materials, the CBSA has included certain portions of Rona’s website wherein it advertises a barbecue that operates with electricity (in particular, see Exhibit AP-2017-026-12A, Tab 6, Vol 1A). The particular model referred to by the CBSA, which is not at issue in this case, is described as an “electric bbq” The advertisement featuring the electric barbecue also states the wattage/voltage of the unit and indicates that it has a grounded cord that plugs into an outlet. Unlike the example of an electrical barbecue referred to in the CBSA’s materials, the goods in issue do not plug into an electrical outlet and do not rely on an electrical current to cook food.

31. Moreover, because the goods in issue meet the criteria under heading No. 73.21, and the Tribunal's view is that this heading of the Nomenclature is more specific than heading No. 84.79, as proposed by Rona, the goods in issue cannot also fall under heading No. 84.79, on the basis of the explanatory note to that heading.

32. Considering that the goods in issue are imported in an unassembled condition, the Tribunal will also rely on Rule 2(a) to classify them as though they are complete barbecues under heading No. 73.21.

33. Subheading No. 7321.11 applies to barbecues "for gas fuel or for both gas and other fuels". There is no dispute about the fact that the barbecues operate using propane or natural gas. On this basis, 7321.11 is the appropriate subheading.

34. Under this subheading, there are only two possible tariff item numbers. Given that the goods in issue are not non-portable stoves or ranges, the Tribunal finds that they fall under tariff item No. 7321.11.90 as "other".

DECISION

35. For the foregoing reasons, the Tribunal finds that tariff item No. 7321.11.90 applies to the goods in issue. Accordingly, the appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

APPENDIX**TERMS OF RELEVANT HEADINGS AND RELEVANT LEGAL AND EXPLANATORY NOTES**

The relevant tariff nomenclature concerning heading No. 73.21 provides as follows:

SECTION XV**BASE METALS AND ARTICLES OF BASE METAL**

...

Chapter 73**ARTICLES OF IRON OR STEEL**

...

73.21 Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, of iron or steel.

- Cooking appliances and plate warmers:

7321.11 -- For gas fuel or both gas and other fuels

...

7321.11.90 -- Other

The relevant legal note for Section XV provides as follows:

1. This Section does not cover:

...

(f) Articles of Section XVI (machinery, mechanical appliances and electrical goods);

The relevant explanatory notes to heading No. 73.21 provide as follows:

This heading covers a group of appliances which meet all of the following requirements:

- (i) be designed for the production and utilisation of heat for space heating, cooking or boiling purposes;
- (ii) use solid, liquid or gaseous fuel, or other source of energy (e.g., solar energy);
- (iii) be normally used in the household or for camping.

These appliances are identifiable, according to type, by one or more characteristic features such as overall dimensions, design, maximum heating capacity, furnace or grate capacity in the case of solid fuel, size of tank where liquid fuel is used. The yardstick for judging these characteristics is that the appliances in question must not operate at a level in excess of household requirements.

This heading includes:

- (1) Stoves, heaters, grates and fires of the type used for space heating, braziers, etc.
- (2) Gas and oil radiators incorporating heating elements, for the same use.
- (3) Kitchen ranges, stoves and cookers.
- (4) Ovens incorporating heating elements (e.g., for roasting, pastry and bread-making).

- (5) Spirit of pressure stoves, camping stoves, travel stoves, etc.; gas rings; plate warmers incorporating provision for heating elements;
- (6) Wash boilers with grates and other heating elements.

The heading also covers stoves incorporating subsidiary boilers for central heating. On the other hand the heading excludes appliances also using electricity for heating purposes, as in the case of combined gas-electric cookers for example (heading 85.16).

The relevant tariff nomenclature concerning heading No. 84.79 provides as follows:

SECTION XVI

**MACHINERY AND MECHANICAL APPLIANCES;
ELECTRICAL EQUIPMENT; PARTS THEREOF;
SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE
AND SOUND RECORDERS AND REPRODUCERS, AND PARTS
AND ACCESSORIES OF SUCH ARTICLES**

...

Chapter 84

**NUCLEAR REACTORS, BOILERS, MACHINERY
AND MECHANICAL APPLIANCES; PARTS THEREOF**

...

84.79 **Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.**

...

8479.89 **-- Other**

...

8479.89.90 --- Other

The legal notes to Chapter 84 provide as follows:

1. This Chapter does not cover:

...

(d) Articles of heading No. 73.21

...

7. . . .

Subject to Note 2 in this Chapter and Note 3 in Section XVI, a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, unless the context otherwise requires, to be classified in heading No. 84.79. . . .

The relevant explanatory notes to Section XVI state the following:

GENERAL

(I) GENERAL CONTENT OF THE SECTION

- (A) Subject to certain **exclusions** provided for in the Notes to this Section and to Chapters 84 and 85 and apart from goods covered more specifically in other Sections, this Section covers all

mechanical or electrical machinery, plant, equipment, apparatus and appliances and parts thereof, together with certain apparatus and plant which is neither mechanical nor electrical (such as boilers and boiler house plant, filtering apparatus, etc.) and parts of such apparatus and plant.

The relevant explanatory notes to Chapter 84 provide as follows:

GENERAL

(A) GENERAL CONTENT OF THE CHAPTER

Subject to the provisions of the General Explanatory Note to Section XVI, this Chapter covers all machinery and mechanical appliances, and parts thereof, not more specifically covered by **Chapter 85**, and not being:

...

- (e) Stoves, central heating radiators and other goods of heading No. 73.21

The relevant explanatory notes to heading No. 84.79 provide as follows:

This heading is **restricted** to machinery having individual functions, which:

- (a) Is not excluded from this Chapter by the operation of any Section or Chapter Note.

and

- (b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.

and

- (c) Cannot be classified in any other particular heading of this Chapter since:

- (i) No other heading covers it by reference to its method of functioning, description or type.

and

- (ii) No other heading covers it by reference to its use or to the industry in which it is employed.

or

- (iii) It could fall equally well into two (or more) other such headings (general purpose machines).