Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-027R

Best Buy Canada Ltd.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Thursday, July 4, 2019

Canada

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on April 4, 2017, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a judgment of the Federal Court of Appeal, dated January 29, 2019, which set aside the decision of the Canadian International Trade Tribunal in Appeal No. AP-2016-027, issued on July 26, 2017, and remitted the matter to the Canadian International Trade Tribunal.

BETWEEN

BEST BUY CANADA LTD. **Appellant**

AND

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

DECISION

The appeal is allowed.

Peter Burn

Peter Burn
Presiding Member

Tribunal Panel:	Peter Burn, Presiding Member
Support Staff:	Peter Jarosz, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Best Buy Canada Ltd.	Justin Kutyan Thang Trieu

Respondent	**Counsel/Representatives**
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STATEMENT OF REASONS

INTRODUCTION

1. The Canadian International Trade Tribunal conducted this remand proceeding further to a judgment of the Federal Court of Appeal (the Court),[1] which set aside the Tribunal's decision in *Best Buy Ltd. v. President of the Canada Border Services Agency*.[2]

2. In its original decision, the Tribunal decided that certain "Z-Line Designs" floor stands for flat-panel televisions (the goods in issue) were properly classified under tariff item No. 8529.90.90 as other parts suitable for use solely or principally with the apparatus of headings No. 85.25 to 85.28, as claimed by Best Buy Ltd. (Best Buy), rather than under tariff item No. 9403.20.00 as other metal furniture, and tariff item No. 9403.60.10 as other wooden furniture for domestic purposes, as determined by the CBSA.

3. During the course of the original proceeding, the Tribunal received documentary evidence regarding the goods in issue and, at its public hearing, heard from a lay witness and an expert witness called by Best Buy. The CBSA did not call any witnesses.

REMAND PROCEDURAL HISTORY

4. The Tribunal provided parties with the opportunity to make additional legal submissions on the basis of the existing record as a result of the Court's decision. Submissions were received from the appellant and the respondent.

5. The appellant submitted that the Tribunal's original decision was to be maintained; according to it, there were sound reasons to decline to follow the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*,[3] which contained conclusions previously rejected by the Tribunal and were inconsistent with the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.[4]

6. The respondent submitted that the classification opinions described comparable goods, were correct and should be applied to the goods in issue.

REMAND INSTRUCTIONS

7. The Court remitted the matter back to the Tribunal on the basis of the following:

> In this matter, the Tribunal did not consider the analyses offered in the [Classification] Opinions. Rather, the Tribunal determined that the Opinions were not relevant on the sole basis that the models of flat-panel television stands that the WCO considered were factually distinguishable because they had castor wheels and were not designed for domestic use. However, the addition of castor wheels to the same type of flat-panel television stand is clearly an insignificant distinction which does not change the nature of the Goods. Further, heading 94.03 appears to cover furniture in some instances for use in both private dwellings and public locations. In my view, it is far from clear why the absence of castors and the location of the proposed use of the stands would make the stands in this case a part suitable for use solely or principally with televisions. Although the Opinions were

1. *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2019 FCA 20 [FCA decision].
2. (26 July 2017), AP-2016-027 (CITT) [Original decision].
3. WCO, 4th ed., Brussels, 2017.
4. WCO, 6th ed., Brussels, 2017.

> relevant because they dealt with goods that were materially the same as those before the Tribunal, the Tribunal failed to consider or have regard to the Opinions as required under the *Customs Tariff*.[5]

8. Essentially, the Court directed the Tribunal to re-determine this matter and consider the classification opinions. The Tribunal has done so and the following are its reasons in maintaining its original decision.

TRIBUNAL ANALYSIS

9. In *Mattel Canada Ltd. v. President of the Canada Border Services Agency*, the Tribunal has recently summarized the process of how the World Customs Organization (WCO) arrives at classification opinions and their significance in the Tribunal's analysis:

> The WCO Committee examines issues on the basis of documents prepared by the WCO Secretariat, which in turn incorporate comments and proposals from the customs administrations of the Contracting Parties. *Therefore, the WCO Committee does not engage in an independent fact-finding exercise and relies primarily on the views expressed by the Contracting Parties.*
>
> It also bears mentioning that while the WCO Committee may be involved in the settlement of tariff classification disputes between Contracting Parties, *its terms of reference do not include the review of decisions made by customs administrations of the WCO member countries, much less those of adjudicative bodies like the Tribunal, to ensure their consistency with the explanatory notes, classification opinions or recommendations that it prepares.* Indeed, there are no provisions in the Convention that compel a Contracting Party to adopt and apply any classification opinion.
>
> . . . "Having regard" to a classification opinion should not be interpreted to mean that the Tribunal is obliged to apply it in all circumstances, even when there are, in its view, errors in the description of the characteristics and essential purpose of the product under review or significant flaws in the analysis offered by the WCO.
>
> If that were the case, then the Tribunal would essentially have to defer to the views of the WCO Committee and, by implication, to those of WCO's member states, on the tariff classification of goods subject to a classification opinion. *This would be tantamount to entrusting the WCO Committee with the final authority to determine the proper tariff classification of goods imported into Canada in certain cases. However, in regard to tariff classification matters, Parliament has passed a law, the Act, empowering the Tribunal "to decide certain issues efficiently and once and for all". As such, classification opinions are not decisive. They are one of the many elements that the Tribunal must examine in its tariff classification exercise.*[6]
>
> [Emphasis added; footnotes in original omitted]

10. It should be noted again that a classification opinion is not a product of a dispute or a similar adjudicated proceeding. While the WCO takes in views and information from delegates regarding the classification of goods and votes on such classification, any classification "analysis" (as referred to by the Court) or rationale is not contained in the classification opinions nor is any background information from the WCO proceedings formally incorporated into them. A classification opinion typically contains a brief description of the goods and a listing of the general rules and any relevant explanatory notes which were applied.

11. In the present case, the Canada Border Services Agency's (CBSA) submissions to the WCO, and the WCO Secretariat's summary and interpretation of those submissions, are not analyses. Rather, they are

5. FCA decision at para. 5.
6. (19 June 2019), AP-2018-005 (CITT) at paras. 43-44, 59-60.

more in the nature of party submissions—very similar to the submissions made by the CBSA in the present appeal, which were considered and rejected by the Tribunal.

12. There is certainly no analysis in the classification opinions at issue, whose entire text is as follows:

> 5. **Audio/video floor stand made of aluminum** (dimensions (H x W x D): 195 cm x 89 cm x 69 cm) on castors, also known as a "conference TV cart". The stand is presented unassembled. It is designed to be used in conference rooms, classrooms, meeting rooms, training rooms, trade shows, marketing events, etc.
>
> Adoption: 2016
>
> **Application of GIRs 1 (Note 2 to Chapter 94), 2 (a) and 6.**
>
> 6. **Audio/video floor stand** (overall height: 180 cm) on castors, also known as a "wide body TV cart", constructed mainly of steel. The stand is presented unassembled and without the flat panel display. It is built to accommodate up to a 42-inch (106.7 cm) flat panel display weighing 68 kg.
>
> **Application of GIRs 1 (Note 2 to Chapter 94), 2 (a) and 6.**
>
> Adoption: 2016

13. As noted above, section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the classification opinions. It bears emphasizing that the classification opinions are not binding. Nevertheless, following decisions of the Court, the Tribunal will apply them unless there is a sound reason to do otherwise. In *Suzuki*, the Court found that, in the context of explanatory notes, "[e]xpert evidence can, in some circumstances, provide such a reason".[7] The Tribunal considers that this principle applies to classification opinions. In the present case, the Tribunal is of the view that these classification opinions are not persuasive as to the proper classification of the goods in issue, and there is a sound reason not to apply them.

14. Having had regard to the classification opinions, the Tribunal finds that they cover goods of different form and function than the goods at issue. Their physical distinctions are important because the explanatory notes to heading No. 85.29 direct that, despite any classification to the contrary, "[t]he range of parts classified here includes: (3) Cases and cabinets specialized to receive the apparatus of headings 85.25 to 85.28."

15. The relevant distinctions are not limited to the fact that the goods covered by the classification opinions have wheels, though the presence of wheels is important. It must be underscored that the goods referred to in the classification opinions are less in the nature of "cabinets" than the goods in issue, being wheeled carts that function as transportation or movement devices for various electronic equipment between and within rooms. The goods reviewed by the WCO were also not just used for televisions, which is evidenced by the reference to the term "audio/video" in the classification opinions and the discussion in the background materials. The Tribunal notes that the WCO Secretariat's report assumed that the goods also accommodated computers, monitors, video recorders and television cameras;[8] there was no such evidence tendered in the Tribunal's proceedings. This is significant, as computers and computer monitors are *not* goods of headings No. 85.25 to 85.28 and, therefore, heading No. 85.29 could not apply to the goods covered by the classification opinions.

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7. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 at para. 17.
8. Exhibit AP-2016-027-06A, Tab 30, para. 26.

16. In sharp contrast, the evidence regarding the goods in issue showed that they are stationary and specially designed to only receive televisions, as per the explanatory notes to heading No. 85.29.

17. As well, the Tribunal finds that the perfunctory notation in the classification opinions does not present a reasonable rationale for the classification of the goods.

18. The results of the classification opinions run counter to the explanatory notes to heading No. 85.29, which mandate an opposite conclusion to the results shown in the classification opinions.

19. The CBSA's position, relying on the classification opinions, desires to limit the definition of "parts" of televisions (as compared to accessories) to articles essential to the functionality of televisions in receiving and converting incoming electrical signals. However, the explanatory notes to heading No. 85.29 explicitly state that cases and cabinets specialized to receive televisions are to be classified as "parts" of heading No. 85.29.

20. The Tribunal dealt with these issues and the evidence regarding them at length in its original decision, as follows:

> While conceding that the goods in issue are committed for use with flat-panel televisions, the CBSA argued that this fact alone was not enough to render the goods in issue "parts" of televisions. It contended, as it did in *Sanus Systems*, that since the goods in issue are not essential, necessary or integral to the operation of the televisions, they could not be classified as parts. That the goods in issue require televisions to fulfill their design function is irrelevant, as the question is whether the stand is essential to the functioning of the television and not vice versa.
>
> In *Sanus Systems*, the Tribunal rejected these arguments of the CBSA. It does so again in this case. Echoing its views in *Sanus Systems*, the Tribunal finds that the reference to "parts" in heading No. 85.29 includes furniture committed by design for use solely or principally with flat-screen televisions. This conclusion necessarily follows from a reading of that heading in conjunction with, and in light of, note 1(g) to Chapter 94. In this respect, the Tribunal adopts the reasoning in *Sanus Systems* as set out in paragraphs 53 to 55 of that decision where it found that stands designed to support flat-panel televisions clearly fall within the "[c]ases and cabinets specialised to receive the apparatus of headings 85.25 to 85.28" as described in the explanatory notes to heading No. 85.29.
>
> The Tribunal heard extensive testimony from Mr. Hoglan in respect of the design of each model of stand at issue. It is clear that the stands are specifically designed for the purpose of supporting flat-panel televisions based on a number of considerations: (i) the thickness of the glass; (ii) the amount of weight each stand is designed to hold (which range from 130 to 160 pounds); (iii) the thickness of the metal or wood; (iv) the 15-inch tilt test each stand undergoes to ensure the television will not easily be knocked off the stand; (v) the open architecture of the shelving designed to provide air flow and co-location of assorted components (e.g., a cable box, gaming system, etc.); and (vi) the "spine", which is designed for cable management, but is also integral to the structure of the stand. All of these design characteristics are to accommodate flat-panel televisions.
>
> Moreover, Mr. Hoglan testified in great detail regarding the evolution of the design of the support stand in a relatively short time frame, done to reflect the ever-changing reality of televisions becoming lighter, thinner and larger in size. For example, the length of the stands has increased over time to accommodate 65-inch televisions compared with the 42-inch televisions that they were originally designed to accommodate. This illustrates how the design of these support stands is tailored to the changing market for flat-panel televisions. The goods in issue therefore meet the test

> of heading No. 85.29 of being "for use solely or principally with goods of heading No. 85.28 to 85.28."[9]
>
> [Footnotes in original omitted]

21. The Tribunal notes the Court's decision in *The Deputy Minister of National Revenue for Customs and Excise v. Androck Inc.*, where it stated the following:

> . . . while we think it both unnecessary and undesirable to define the word "parts" in such a way that it might apply in any factual context, we are of the opinion that the goods in issue, to be classified as parts, must be related to the entity with which they will be used to form a necessary and integral part thereof and not simply as an optional accessory, as here.[10]

22. In the present appeal, the term "necessary and integral" must also be interpreted keeping in mind the language of the explanatory notes to heading No. 85.29.

23. Both the designer and the expert witness who testified at the Tribunal's hearing provided specific, uncontroverted evidence regarding the physical attributes and narrow intended use of the goods in issue with flat-screen televisions, such that they were specialized to receive a flat-screen television.[11] In modern living spaces, televisions are situated using a wide range of mounts, stands, tables and combinations thereof, which are in the nature of cabinets and are integral and necessary to the consumer's everyday efficient use of the television.[12]

24. The Tribunal was mindful of the expert's evidence that the limited ability in many open space condominium apartments to wall-mount a screen is making articles such as the goods in issue an increasingly necessary and integral part of a modern infotainment system in such living spaces.[13]

25. On the basis of the above reasons, the Tribunal therefore maintains its original decision.

CONCLUSION

26. The appeal is allowed.

Peter Burn
Peter Burn
Presiding Member

9. Original decision at paras. 25-28.
10. [1987] F.C.J. No. 45.
11. *Transcript of Public Hearing* at 14 *et seq.*, 85-87.
12. *Ibid.* at 88-91.
13. *Ibid.*