Federal Court of Appeal | Cour d'appel fédérale

Date: 20180920

Docket: A-224-17

Citation: 2018 FCA 167

CORAM: **RENNIE J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

RBP IMPORTS INC.

Respondent

Heard at Ottawa, Ontario, on September 5, 2018.

Judgment delivered at Ottawa, Ontario, on September 20, 2018.

REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	RENNIE J.A. WOODS J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

[1] The Attorney General appeals under subsection 68(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), from the decision of the Canadian International Trade Tribunal in Appeal No. AP-2016-017. In its decision, the Tribunal allowed an appeal by RBP Imports Inc. from a re-determination by the President of the Canada Border Services Agency of the tariff classification of goods imported by RBP.

[2] The goods consist of individually packaged components of aluminum railings. They are intended to be combined to form railings that will be attached to buildings in residential and commercial construction, either by contractors or by consumers in the "do-it-yourself" market. They are found in building supply stores, and sold separately to accommodate the purchaser's preferred dimensions and design.

[3] The issue before the Tribunal was whether the goods were properly classified under heading 76.10 of the schedule to the *Customs Tariff*, S.C. 1997, c. 36, as aluminum plates, rods, profiles, tubes and the like, prepared for use in structures, as determined by the CBSA, or under heading 76.04 as aluminum bars, rods and profiles, as submitted by RBP. The Tribunal resolved this issue in favour of RBP.

[4] The parties agree on the legal framework governing this appeal, as set out in the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, and the decision of this Court in *Canada (Attorney General) v. Suzuki Canada Inc*., 2004 FCA 131, 319 N.R. 299.

[5] Thus they agree that the standard of review is reasonableness – the standard that reflects the Tribunal's expertise and the complex and technical nature of customs tariff interpretation (*Igloo Vikski* at paras. 16-17). They agree that, in accordance with subsection 10(1) of the *Customs Tariff* and Rule 1 of the *General Rules for the Interpretation of the Harmonized System* set out in the schedule to the *Customs Tariff*, classification is to be determined, if possible, with reference only to the terms of the headings and any related section or chapter notes (*Igloo Vikski*

at para. 20). They agree that, as provided by section 11 of the *Customs Tariff*, the *Explanatory Notes to the Harmonized Commodity Description and Coding System*, published by the World Customs Organization, must be considered in interpreting the headings and subheadings (*Igloo Vikski* at para. 8). They agree that the Tribunal must consider the Explanatory Notes as written, that it has no authority to rewrite them, and that it should follow them unless there is a good reason to do otherwise (*Suzuki* at paras. 13, 17).

[6] The two headings in issue read as follows:

76.04 Aluminum bars, rods and profiles.	76.04 Barres et profilés en aluminium.
[…]	[…]
76.10 Aluminum 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); aluminum plates, rods, profiles, tubes and the like, prepared for use in structures.	76.10 Constructions et parties de constructions (ponts et éléments de ponts, tours, pylônes, piliers, colonnes, charpentes, toitures, portes et fenêtres et leurs cadres, chambranles et seuils, balustrades, par exemple), en aluminium, à l'exception des constructions préfabriquées du no 94.06; tôles, barres, profilés, tubes et similaires, en aluminium, préparés en vue de leur utilisation dans la construction.

[7] The explanatory note to heading 76.04 states that that heading does not cover, among other things, "[r]ods and profiles, prepared for use in structures (heading 76.10)." The Tribunal therefore proceeded (at para. 28 of its decision) on the basis that heading 76.04 need only be considered if the goods do not come within heading 76.10. The question on appeal is whether the

Tribunal committed a reviewable error in determining that the goods do not come within heading 76.10.

[8] The explanatory note to heading 76.10 states that "[t]he provisions of the Explanatory Note to heading 73.08 [the counterpart to heading 76.10 for goods made of iron and steel] apply, *mutatis mutandis*, to this heading."

[9] As will be seen shortly, the Tribunal's treatment of the explanatory note to heading 73.08, and in particular the reference in the note to "assembled railings," was key to its decision. The explanatory note to heading 73.08 reads as follows (emphasis added):

> 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.

[10] The Tribunal noted (at para. 29) that heading 76.10 includes three categories of goods: (1) structures, (2) parts of structures, and (3) parts prepared for use in structures. It stated that the heading "also includes a list of products that are cited as being 'apart from' those three categories" (emphasis added), and that "[i]ncluded in that list of products are 'assembled railings'."

[11] The Tribunal found (at para. 35) that "the term 'assembled railings' was a purposeful drafting decision." It continued:

> 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.

[12] The Tribunal then commented (at para. 37) on the parties' competing submissions as to whether the goods come within the three categories set out in heading 76.10. It stated that it "found these submissions to be of limited value and not dispositive of [the] appeal."

[13] The Tribunal proceeded to hold (at para. 39) that "the language of 'assembled railings' is specific and entirely dispositive of [the] appeal in accordance with Rule 1." It set out its reasoning in the following terms (at para. 40, Tribunal's italics):

> 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*" 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".

[14] The Tribunal proceeded directly from its conclusion that the goods did not come within heading 76.10 to consider whether the goods were classifiable under heading 76.04. It concluded that they were.

[15] I am mindful of the deference to be afforded the Tribunal under the reasonableness standard of review. But a decision will be unreasonable where the reasoning in support of it fails to show "justification, transparency and intelligibility within the decision-making process" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190; *Igloo Vikski* at para. 18).

[16] In my view, the Tribunal's reasoning leading to its conclusion that the reference to "assembled railings" in the explanatory note excludes the goods from heading 76.10 was unreasonable. While the Tribunal recognized that heading 76.10 includes three categories of goods, it failed to recognize that the portion of the explanatory note that contains the reference to "assembled railings" applies by its terms only to the first two of the three.

[17] The text of the heading is set out above in paragraph 6. On a plain reading, and as the Tribunal noted, the heading includes goods that are (1) structures, (2) parts of structures, or (3) aluminum plates, rods, profiles, tubes and the like, prepared for use in structures.

[18] But the portion of the explanatory note that includes the reference to "assembled railings," set out above in paragraph 9, begins with the words, "[a]part from the structures and parts of structures mentioned in the heading" (emphasis added). The reference to "assembled railings" can therefore apply only to those two categories of goods – structures and parts of structures – and cannot apply to the third category – aluminum plates, rods, profiles, tubes and the like, prepared for use in structures. However, as set out above in paragraph 10, the Tribunal treated the list of "apart from" goods in the explanatory note, including "assembled railings," as applicable to all three categories, and thus to the whole of heading 76.10.

[19] By treating the reference to "assembled railings" in the explanatory note as qualifying all of heading 76.10, the Tribunal in effect rewrote the explanatory note. This rendered its decision unreasonable. It was based on this rewriting that the Tribunal concluded that the reference to "assembled railings" was "entirely dispositive of the appeal." And as a consequence of its treatment of the explanatory note, the Tribunal never addressed, other than by describing the submissions on point as "of limited value" and "not dispositive," the application of the third category in heading 79.10 as required by Rule 1. Nor did it address the portion of the explanatory note that states that the heading "also covers" various parts "which have been prepared (e.g., drilled, bent or notched) for use in structures."

[20] I accept that, as RBP submitted citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16, [2011] 3 S.C.R. 708, a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. But in my view that proposition is not apposite here. Here the potential application of the third category cannot be described as a subordinate issue, and the Tribunal did make a finding on that issue, but did so, without explaining why, on a premise that was unreasonable.

[21] For these reasons, I would allow the appeal and set aside the Tribunal's decision. While this Court is authorized by subsection 68(2) of the *Customs Act* to decide the classification issue itself based on the facts found by the Tribunal, in my view it would be more appropriate having regard to the Tribunal's mandate to refer the matter back to the Tribunal for a re-hearing. In the re-hearing, the Tribunal will be able to consider the potential application of the third category in heading 76.10 on the basis that the reference in the explanatory note to "assembled railings" does not apply to it. In keeping with the parties' submissions on costs, I would award costs to the Attorney General based on the midpoint of Column III of Tariff B.

"J.B. Laskin"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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