



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-065

Proctor-Silex Canada

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, April 8, 2013*

*Corrigendum issued
Monday, April 15, 2013*

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IN THE MATTER OF an appeal heard on December 13, 2012, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated November 15, 2011, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

PROCTOR-SILEX CANADA

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: December 13, 2012
Tribunal Member: Serge Fréchette, Presiding Member
Counsel for the Tribunal: Courtney Fitzpatrick
Manager, Registrar Programs and Services: Michel Parent
Registrar Officer: Cheryl Unitt

PARTICIPANTS:

Appellant	Counsel/Representative
Proctor -Silex Canada	Michael Sherbo
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Talitha Nabbali

WITNESSES:

Joseph Barnes Senior Quality Engineer Hamilton Beach Branch, Inc.	Ilano Toledano Director of Sales Condex Wattco Inc.
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Proctor-Silex Canada (Proctor-Silex) with the Canadian International Trade Tribunal (the Tribunal) on February 7, 2012, pursuant to subsection 67(1) of the *Customs Act*¹ from a re-determination of tariff classification made by the President of the Canada Border Services Agency (CBSA) on November 15, 2011, pursuant to subsection 60(4).

2. The issue in this appeal is whether certain electric kettles (the goods in issue) are properly classified under tariff item No. 8516.79.90 of the schedule to the *Customs Tariff*² as other electro-thermic appliances, as determined by the CBSA, or should be classified under tariff item No. 8516.10.90 as other electric instantaneous or storage water heaters and immersion heaters, as claimed by Proctor-Silex.

3. Both parties agree that the goods in issue should be classified in heading No. 85.16. The issue in this appeal therefore is classification at the subheading level.

PROCEDURAL HISTORY

4. On November 2, 2007, Proctor-Silex accounted for the goods in issue.

5. On April 19, 2011, Proctor-Silex requested a review of the tariff classification of the goods in issue pursuant to section 60 of the *Act*. In its request, Proctor-Silex claimed that the goods in issue should be classified under tariff item No. 8516.10.90 as other electric instantaneous or storage water heaters and immersion heaters.

6. On November 15, 2011, the CBSA issued a decision, pursuant to subsection 60(4) of the *Act*, in which it classified the goods in issue under tariff item No. 8516.79.90.

7. On February 7, 2012, Proctor-Silex filed the present appeal with the Tribunal.

8. Proctor-Silex filed two physical exhibits with the Tribunal on December 3, 2012. One physical exhibit is an immersion heater made by Lewis n' Clark,³ and the other physical exhibit is a sample of the goods in issue.⁴

9. The Tribunal held a public hearing in Ottawa, Ontario, on December 13, 2012.

10. At the hearing, Proctor-Silex called one witness, Mr. Joseph Barnes, and sought to qualify him as an expert witness. During the qualification process, Mr. Barnes was presented as an expert in electrical engineering, the design and manufacture of small appliances which incorporate immersion heaters, and immersion heaters, on the basis of his education in science and electrical engineering and his experience evaluating, testing and improving the product quality of small appliances.⁵ The CBSA did not object to the qualification of Mr. Barnes as an expert witness. The Tribunal qualified him as an expert in electrical

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

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

3. Exhibit A-01.

4. Exhibit A-02.

5. *Transcript of Public Hearing*, 13 December 2012, at 5-6.

engineering, the design and manufacture of small appliances which incorporate immersion heaters, and immersion heaters.

11. The CBSA also called one witness, Mr. Ilano Toledano. During the qualification process, the CBSA sought to qualify Mr. Toledano as an expert in immersion heaters, on the basis of his experience in the sale, manufacture, distribution, research and development, and certification of commercial and industrial immersion heaters.⁶ Proctor-Silex challenged Mr. Toledano's capacity to give opinion evidence on the grounds that he did not have the required educational background to raise his level of knowledge to that of an expert. The Tribunal qualified Mr. Toledano as an expert in immersion heaters on the basis of his relevant experience with commercial and industrial immersion heaters.

GOODS IN ISSUE

12. The goods in issue are 1.7-litre Proctor-Silex brand automatic cordless electric kettles.⁷

13. The goods in issue consist of a plastic container (kettle) that is oval in shape and used for holding water. The kettle has a closed plastic handle, a hinged flip-back lid and an on/off switch. Inside the base of the kettle is a thermostat which regulates the temperature of the water. The goods in issue also include a low-profile disk base with a power cord that delivers power to the kettle. The kettle can be lifted off the base for cordless use. The goods in issue use a 1500-watt immersed heating element that is permanently affixed to the inside of the kettle. When the lid is open, the heating element is visible inside the kettle.⁸

STATUTORY FRAMEWORK

14. 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).⁹ 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.

15. 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*¹⁰ and the *Canadian Rules*¹¹ set out in the schedule.

16. 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.

17. 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*

6. *Transcript of Public Hearing*, 13 December 2012, at 26-30.

7. Tribunal Exhibit AP-2011-065-001.

8. *Transcript of Public Hearing*, 13 December 2012, at 8; Tribunal Exhibit AP-2011-065-04A, tab 1, Tribunal Exhibit AP-2011-065-06A at paras. 2-3.

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

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

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

*Coding System*¹² and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,¹³ published by the WCO. While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁴

18. 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*¹⁵ 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*. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.¹⁶

19. 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 use a similar approach to determine the proper subheading.¹⁷ The final step is to determine the proper tariff item.¹⁸

20. In the present appeal, there is no disagreement about the classification of the goods in issue at the heading level.¹⁹ Rather, the dispute is focused on the subheading level. Disputes of this nature are governed by Rules 1 and 6 of the *General Rules*.

RELEVANT CLASSIFICATION PROVISIONS

21. The relevant provisions of the *Customs Tariff* provide as follows:

Chapter 85

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

...

12. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

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

14. 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*.

15. Rule 1 of the *General Rules* provides that "... 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."

16. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.

17. Rule 6 of the *General Rules* provides that "... the classification of goods in the subheadings of a heading shall be determined according 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."

18. 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." The *Classification Opinions* and the *Explanatory Notes* do not apply to classification at the tariff item level.

19. Tribunal Exhibit AP-2011-065-04A at paras. 12, 17; Tribunal Exhibit AP-2011-065-06A at para. 22; *Transcript of Public Hearing*, 13 December 2012, at 37, 49.

85.16 Electric instantaneous or storage water heaters and immersion heaters; electric space heating apparatus and soil heating apparatus; electro-thermic hair-dressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric smoothing irons; other electro-thermic appliances of a kind used for domestic purposes; electric heating resistors, other than those of heading 85.45.

8516.10 -Electric instantaneous or storage water heaters and immersion heaters

...

-Other electro-thermic appliances:

...

8516.79 --Other

22. There are no relevant section or chapter notes in this appeal.

23. The relevant *Explanatory Notes* to heading No. 85.16 provide as follows:

**(A) ELECTRIC INSTANTANEOUS OR STORAGE
WATER HEATERS AND IMMERSION HEATERS**

This group includes:

- (1) **Geysers** in which the water is heated as it flows through.
- (2) **Storage water heaters** (whether or not of the pressure type), i.e., heat-insulated tanks with immersion heating elements. In these heaters water is heated gradually.
- (3) **Dual-system heaters** in which the water is heated either electrically or by connection to a fuel-heated hot water system; they are often equipped with a thermostatic control to operate them electrically only when the alternative means is insufficient.
- (4) **Electrode hot water boilers**, in which an AC passes through the water between two electrodes.
- (5) **Immersion heaters** of different shapes and forms depending on their use, are generally used in tanks, vats, etc., for heating liquids, semi-fluid (other than solid) substances or gases. They are also designed to be used in pots, pans, tumblers, cups, baths, beakers, etc., usually with a heat-insulated handle and a hook for hanging the heater in the vessel.

They have a reinforced protective sheath which is highly resistant to mechanical stress and to seepage from liquids, semi-fluid (other than solid) substances and gases. A powder (usually magnesium oxide) with good dielectric and thermal properties holds the wire resistor (resistance) in place within the sheath and insulates it electrically.

Assemblies consisting of immersion heaters permanently incorporated in a tank, vat or other vessel are classified in **heading 84.19** unless they are designed for water heating only or for domestic use, in which case they remain in this heading. Solar water heaters are also classified in heading 84.19.

- (6) **Electric equipment for producing boiling water.**

Electric central heating boilers are classified in heading 84.03.

...

**(E) OTHER ELECTRO-THERMIC APPLIANCES
OF A KIND USED FOR DOMESTIC PURPOSES**

This group includes all electro-thermic machines and appliances **provided** they are **normally used in the household**. Certain of these have been referred to in previous parts of this Explanatory Note (e.g., electric fires, geysers, hair dryers, smoothing irons, etc.). Others include:²⁰

...

(5) Kettles, saucepans, steamers; jacketed urns for heating milk, soup or the like.

24. Finally, classification opinion 8516.10(1) is also relevant to these proceedings and provides as follows:

8516.10 **1. Apparatus for heating liquids and maintaining them at constant temperature**, consisting of an electric immersion heater, controlled by a thermostat, and an agitator operated by an electric motor.

POSITIONS OF PARTIES

Proctor-Silex

25. Proctor-Silex argued that the goods in issue are immersion heaters and should be classified in subheading No. 8516.10. It submitted that the goods in issue are equipped with a permanently installed immersion heating element and that the goods in issue will not boil water unless the heating element is immersed.²¹

26. Proctor-Silex submitted that, by classifying the goods in subheading No. 8516.79, the CBSA failed to have regard to the third paragraph of note A(5) of the *Explanatory Notes* to heading No. 85.16, which, it argued, directs the classification of the goods in issue in subheading No. 8516.10. Proctor-Silex submitted that the goods in issue meet the terms of that note, as they are assemblies consisting of an immersion heater permanently incorporated in a vessel that are designed for water heating *and* for domestic use. Proctor-Silex also provided the Tribunal with dictionary definitions to establish that a kettle is a type of vessel.²²

27. In its brief and at the hearing, Proctor-Silex argued that subheading No. 8516.79 is a residual one because it includes the term “other”. According to Proctor-Silex, this means that, if the goods in issue meet the terms of subheading No. 8516.10, they must be classified in that subheading and not in the residual one. Proctor-Silex argued that its position is supported by the note (E) of the *Explanatory Notes* to heading No. 85.16, which implies that electro-thermic appliances that are normally used in the household and that have been referred to in previous parts of the *Explanatory Notes* are to be classified in the previous subheadings.

28. Proctor-Silex relied on a number of U.S. classification rulings in which goods that are similar to the goods in issue were classified in subheading No. 8516. It also relied on classification opinion 8516.10(1).

29. Proctor-Silex also submitted, without referring to any specific evidence, that the reference to kettles in the illustrative list of other electro-thermic appliances found in note (E) of the *Explanatory Notes* to heading No. 85.16 is a reference to kettles that do not incorporate immersion heaters.

20. For a complete list, see Tribunal Exhibit AP-2011-065-04A, tab 2.

21. Tribunal Exhibit AP-2011-065-04A, tab 1.

22. *Ibid.*, tab 3.

CBSA

30. The CBSA submitted that the goods in issue are properly classified in subheading No. 8516.79 as other electro-thermic appliances.

31. The CBSA relied on note (E) of the *Explanatory Notes* to heading No. 85.16, which states that subheading No. 8516.79 includes "...all electro-thermic machines and appliances **provided** they are **normally used in the household.**"

32. The CBSA submitted that the goods in issue use electricity to heat water and are therefore electro-thermic devices. It also submitted that the goods in issue are used for the specific, domestic task of boiling water. Therefore, the CBSA argued, the goods in issue fit within the definition of electro-thermic appliances and should be classified as such.

33. Lastly, the CBSA contended that the goods cannot be classified in subheading No. 8516.10, as the terms of that subheading do not describe the goods in issue and merely describe one of their components. The CBSA submitted that the goods in issue are not immersion heaters and that they are plastic containers that incorporate an immersed heating element, as well as other parts that work together to boil the water. The CBSA argued that Proctor-Silex's position is an attempt to classify the goods in issue on the basis of a component and that the correct approach is for the Tribunal to consider the goods in issue in their entirety, as it did in *Rutherford Controls International Corp. v. President of the Canada Border Services Agency*.²³

ANALYSIS

34. At the outset, the Tribunal agrees with the CBSA that, in order to determine the proper tariff classification of the goods in issue, it must look at the goods as a whole, not the individual components.²⁴ The Tribunal also notes that, in appeals before it, the appellant is the party that bears the onus of proving that the CBSA's tariff classification of the goods is incorrect.²⁵

35. The Tribunal agrees with the parties that the goods in issue are properly classified in heading No. 85.16. In order to determine the applicable subheading, the Tribunal must determine whether the goods in issue are "immersion heaters" or "other electro-thermic appliances". After much consideration of the facts in the present appeal, the submissions of the parties, the documentation on file and the physical exhibit of the goods in issue, the Tribunal is of the view that the goods in issue are more than just immersion heaters and concludes that the goods in issue are properly classified in subheading No. 8516.79 as other electro-thermic appliances. The reasons for the Tribunal's decision follow.

Subheading No. 8516.10

36. The Tribunal will first address why the goods in issue are not classified as "immersion heaters" in subheading No. 8516.10.

23. (26 January 2011), AP-2009-076 (CITT) [*Rutherford Controls*].

24. *Rutherford Controls* at para. 64; *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency* (29 November 2007), AP-2006-041 (CITT) at para. 26.

25. *Deputy M.N.R.C.E. v. Unicare Medical Products Inc.* (30 April 1990), 2437, 2438, 2485, 2591 and 2592 (CITT); *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII).

37. The wording of subheading No. 8516.10 indicates that it covers three types of goods: electric instantaneous water heaters; storage water heaters; and immersion heaters. Proctor-Silex argued that the goods in issue are immersion heaters.

38. “Immersion heater” is defined in note (A)(5) of the *Explanatory Notes* to heading No. 85.16. The *Explanatory Notes* indicate that immersion heaters (i) can be of different shapes and forms depending on their use, (ii) are used to heat liquids, semi-fluid substances or gases, (iii) are used in tanks, vats, pots, pans, tumblers, cups, baths, beakers, etc., (iv) usually have a heat-insulated handle and a hook for hanging, (v) have a reinforced protective sheath that is highly resistant to mechanical stress and seepage, and (vi) include a powder with good dielectric and thermal properties that holds the wire resistor in place within the sheath and insulates it directly.

39. As part of his testimony, Mr. Barnes explained the construction of the heating element that is affixed to the inside of the kettle. He indicated that a piece of nichrome wire is wound into shape and that a stainless steel sheath is placed over the heating element. He then explained that the sheath is filled with magnesium oxide (a powder) which acts as an electrical insulator so that there is no conductive path from the element to the sheath. Next, he testified, the heating element is rolled out in order to compact the magnesium oxide, and the ends of the element are capped with silicone and rubber stoppers in order to prevent anything from coming into contact with the magnesium oxide or the heating element. The immersion heater is then formed into its final shape (a sort of helix) and immersed in water to ensure that it does not leak. Mr. Barnes also explained that a variety of other safety tests are performed on the immersion heater. Once the testing has been completed, the immersion heater is permanently affixed to the inside of the kettle.²⁶

40. Mr. Toledano testified that an immersion heater is essentially a heating element that is in touch with a liquid base. He also testified that the goods in issue are not immersion heaters because, in his opinion, an immersion heater has to be inserted into a liquid and the goods in issue cannot be immersed in a liquid without causing them to short circuit or possibly start a fire.²⁷

41. The Tribunal is satisfied that the heating element affixed to the inside of the kettle meets the terms of the definition of immersion heater found in note (A)(5) of the *Explanatory Notes* to heading No. 85.16. The evidence clearly demonstrates that the heating element inside the kettle is immersed in water in order to heat water, that it has a reinforced protective sheath and that the wire resistor is insulated with magnesium oxide. However, the question that the Tribunal must ask itself is whether the goods in issue, when considered as a whole, meet the terms of that definition. The Tribunal finds that they do not. As recognized by Mr. Barnes on cross-examination, the subject of this appeal is the entire kettle, not just the heating element inside the kettle.²⁸ The kettle is a container made of plastic that includes a number of components, including a handle, a lid, a power base, and a heating element. On cross-examination, Mr. Barnes also acknowledged that the kettle cannot be placed in water; rather, water is placed inside the kettle.²⁹

42. Proctor-Silex submitted that the wording of the third paragraph of note (A)(5) of the *Explanatory Notes* to heading No. 85.16 directs the Tribunal to classify goods such as the goods in issue in subheading No. 8516.10, even though the goods in their entirety are more than just immersion heaters. The relevant paragraph reads as follows:

26. *Transcript of Public Hearing*, 13 December 2012, at 10-12.

27. *Ibid.* at 33.

28. *Ibid.* at 21.

29. *Ibid.* at 23-24.

Assemblies consisting of immersion heaters permanently incorporated in a tank, vat or other vessel are classified in **heading 84.19** unless they are designed for water heating only or for domestic use, in which case they remain in this heading. Solar water heaters are also classified in heading 84.19.

43. Proctor-Silex argued that the goods in issue are an assembly in which an immersion heater has been permanently incorporated into a tank, vat or vessel, namely, the plastic kettle.³⁰ The testimonies of Mr. Barnes and Mr. Toledano support the position that the goods in issue consist of an immersion heater permanently incorporated into a plastic kettle.³¹ Documentary evidence indicates that the goods in issue are designed for water heating only and are for domestic use.³² Proctor-Silex also argued that the relevant *Explanatory Notes* essentially expand the scope of the term “immersion heater” to include an assembly which incorporates an immersion heater.³³

44. The Tribunal does not agree with Proctor-Silex’s interpretation of the third paragraph of note (A)(5) of the *Explanatory Notes* to heading No. 85.16. While the Tribunal does not dispute the fact that the assembly described in the third paragraph of note (A)(5) may very well describe the goods in issue, the Tribunal finds that, on a plain reading of the *Explanatory Notes*, there is nothing in the relevant paragraph indicating that such an assembly is considered an immersion heater, nor is there anything in the relevant paragraph directing the classification of the assembly in subheading No. 8516.10. The wording of the paragraph only specifies that assemblies meeting the description found in that paragraph should be classified in heading No. 84.19, unless they are designed for water heating only or for domestic use, in which case, they should be classified in *heading No. 85.16*. In other words, the wording of the paragraph only directs classification at the heading level, not at the subheading level. Why the drafters of the *Explanatory Notes* chose to include a direction with respect to the classification of such an assembly in the same *Explanatory Notes* that describe the immersion heater itself is unknown to the Tribunal. However, the Tribunal is not satisfied that the placement of the third paragraph of note (A)(5) is sufficient to establish that the correct classification of the goods in issue at the subheading level is subheading No. 8516.10.

45. With respect to the US classification rulings submitted by Proctor-Silex in support of its position, the Tribunal notes that these are administrative rulings drawn from another jurisdiction and that, as such, they do not constitute binding authority in the Canadian context.³⁴

46. Proctor-Silex also relied on classification opinion 8516.10(1) and argued that it supports Proctor-Silex’s position that an apparatus in which an immersion heater is but one element should be classified in subheading No. 8516.10. The Tribunal acknowledges that section 11 of the *Customs Tariff* directs it to have regard to the *Classification Opinions* in interpreting the headings and subheadings of the *Customs Tariff*. However, there is no indication that classification opinion 8516.10(1) is the result of an application of the third paragraph of note (A)(5) of the *Explanatory Notes* to heading No. 85.16. Moreover,

30. *Ibid.* at 43-45.

31. *Ibid.* at 12, 35-36.

32. Tribunal Exhibit AP-2011-065-04A, tab 1.

33. *Transcript of Public Hearing*, 13 December 2012, at 46; Tribunal Exhibit AP-2011-065-04A at paras. 34-35.

34. *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) at para. 42: “Both parties submitted U.S. classification rulings in support of their positions. The Tribunal notes that these are administrative rulings by government officials and not decisions by an independent quasi-judicial body. Further, even if they were such decisions, since they are drawn from another jurisdiction, they would not constitute valid jurisprudence in the Canadian context. Parties are free to use such rulings to support their positions if they believe that they will be useful in helping to explain their arguments. However, parties should not expect that the Tribunal will give them significant weight in its own decisions.”

the Tribunal is of the view that the goods described in classification opinion 8516.10(1) are different from the goods in issue.

47. First, classification opinion 8516.10(1) does not refer to an assembly³⁵ but rather to an apparatus.³⁶ Second, the classification opinion does not indicate that the immersion heater has been permanently incorporated into some type of tank, vat or other vessel. Third, there is no indication of the purpose of the apparatus, such as whether it is used for heating water only or for domestic use. Lastly, the apparatus described in the classification opinion includes an agitator operated by an electric motor, and the goods in issue do not include such an agitator. According to the description of the apparatus provided in the classification opinion, the classification opinion appears to cover goods that are quite different from the goods in issue. The Tribunal finds that it is also expected that the apparatus meet the terms of subheading No 8516.10 in order to be classified as an immersion heater. The goods covered by the classification opinion are clearly described as an immersion heater with a few additional components, while the goods in issue consist of an immersion heating element housed inside a plastic kettle.

48. Since the Tribunal does not agree with Proctor-Silex that the third paragraph of note (A)(5) of the *Explanatory Notes* to heading No. 85.16 directs the classification of the goods in issue in subheading No. 8516.10, and because the Tribunal has already determined that the goods in issue do not otherwise meet the terms of that subheading, the Tribunal concludes that the goods in issue cannot be classified in subheading No. 8516.10.

Subheading No. 8516.79

49. Having determined that the goods in issue are not classifiable in subheading No. 8516.10, the Tribunal will consider whether the goods in issue should be classified in subheading No 8516.79 as other electro-thermic appliances.

50. The *Canadian Oxford Dictionary* defines the term “electrothermal” as “relating to heat electrically derived”.³⁷ The CBSA submitted that the goods in issue use electricity to heat water and are therefore electro-thermic devices. Mr. Barnes testified that the goods in issue receive power via a base that is plugged into an electrical outlet.³⁸ The product literature, which describes the goods in issue as electric, also supports the conclusion that the goods in issue can be described as electrothermal.³⁹

51. The *Canadian Oxford Dictionary* defines the term “appliance” as “an electrical or gas-powered device or piece of equipment used for a specific task, esp. for domestic tasks such as washing dishes, etc.”⁴⁰ The Tribunal has accepted this definition in the past.⁴¹ The CBSA submitted that the goods in issue are used for the specific, domestic task of boiling water and that they should be considered appliances. Proctor-Silex also submitted that the goods in issue are used to boil water.⁴² In response to questions from the CBSA,

35. *The Canadian Oxford Dictionary*, 2nd ed., s.v. “assembly”: “**5.** a number of component parts fitted together to form a whole”.

36. *The Canadian Oxford Dictionary*, 2nd ed., s.v. “apparatus”: “**1.** the equipment needed for a particular purpose or function, esp. scientific or technical”.

37. Second ed., s.v. “electrothermal”.

38. *Transcript of Public Hearing*, 13 December 2012, at 8.

39. Tribunal Exhibit AP-2011-065-04A, tab 1.

40. Second ed., s.v. “appliance”.

41. *Rona Corporation Inc. v. President of the Canada Border Services Agency*, AP-2009-072 (15 February 2011) (CIIT) at para. 35.

42. Tribunal Exhibit AP-2011-065-04A at para. 9.

Mr. Barnes testified that the goods in issue are considered small household appliances.⁴³ The product literature also indicates that the goods in issue are for household use only.⁴⁴

52. In the Tribunal's view, the evidence on the record makes it clear that the goods in issue are devices, or "things", that use electricity for the specific task of heating water and are therefore electro-thermic appliances. As such, the goods in issue meet the terms of subheading No. 8516.79.

53. The Tribunal also considered note (E) of the *Explanatory Notes* to heading No. 85.16. This note indicates that the term "other electro-thermic appliances" includes all electro-thermic machines and appliances, provided they are normally used in the household. The evidence indicates, and neither party has disputed, that the goods in issue are for household use. Therefore, the Tribunal has no difficulty in concluding that the goods in issue meet the terms of this note.

54. Note (E) of the *Explanatory Notes* to heading No. 85.16 also provides an illustrative list of devices which are considered electro-thermic appliances. Note (E)(5) includes kettles. The Tribunal finds that this note clearly indicates that kettles are to be classified in subheading No. 8516.79.

55. Proctor-Silex submitted, without referring to any specific evidence, that the reference to kettles in the illustrative list of other electro-thermic appliances is actually a reference to kettles that do not incorporate immersion heaters. However, the Tribunal finds that Proctor-Silex has not referred to any evidence that would distinguish the goods in issue from other types of kettles or that would otherwise support this assertion. In any event, the Tribunal has already determined that the goods in issue meet the terms of subheading No. 8516.79, as well as the relevant *Explanatory Notes*; therefore, the inclusion of kettles on the illustrative list in note (E) of the *Explanatory Notes* to heading No. 85.16 is not determinative of this appeal.

DECISION

56. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 8516.79.90 as other electro-thermic appliances.

57. The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

43. *Transcript of Public Hearing*, 13 December 2012, at 21.

44. Tribunal Exhibit AP-2011-065-04A, tab 1.

IN THE MATTER OF an appeal heard on December 13, 2012, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated November 15, 2011, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

PROCTOR-SILEX CANADA

Appellant

AND

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

Respondent

CORRIGENDUM

The name of the respondent's expert witness should have read "Ilan Toledano". In addition, the tariff classification in the first sentence of paragraph 28 should have read "subheading No. 8516.10".

By order of the Tribunal,

Dominique Laporte
Dominique Laporte
Secretary