



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-009

Costco Wholesale Canada Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, January 19, 2012*

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IN THE MATTER OF an appeal heard on November 15, 2011, pursuant to subsection 67(1) 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 February 24, 2011, with respect to a request for review of an advance ruling pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

COSTCO WHOLESALE CANADA LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Pasquale Michael Saroli
Pasquale Michael Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 15, 2011
Tribunal Member: Pasquale Michael Saroli, Presiding Member
Counsel for the Tribunal: Georges Bujold
Manager, Registrar Office: Michel Parent
Registrar Officer: Cheryl Unitt

PARTICIPANTS:**Appellant**

Costco Wholesale Canada Ltd.

Counsel/RepresentativesMichael Sherbo
Victor Chong**Respondent**

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Costco Wholesale Canada Ltd. (Costco) with the Canadian International Trade Tribunal (the Tribunal) 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 February 24, 2011, pursuant to subsection 60(4).

2. The issue in this appeal is whether the “Power Boost 2500”, a portable battery booster system that can be used to jumpstart motor vehicles or to power various electronic devices (the good in issue), is properly classified under tariff item No. 8507.20.90 of the schedule to the *Customs Tariff*² as other lead-acid accumulators, other than for use as the primary source of electrical power for electrically powered vehicles of subheading No. 8703.90, as determined by the CBSA, or should be classified under tariff item No. 8504.40.90 as other static converters, as claimed by Costco.

PROCEDURAL HISTORY

3. On July 8, 2009, the CBSA issued an advance ruling, pursuant to section 43.1 of the *Act*, classifying the good in issue under tariff item No. 8507.20.90.

4. On August 31, 2009, Costco requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*.

5. On February 24, 2011, the CBSA issued a decision, pursuant to subsection 60(4) of the *Act*, affirming the advance ruling with respect to the tariff classification of the good in issue.

6. On May 18, 2011, Costco filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

7. On November 15, 2011, the Tribunal held a public hearing in Ottawa, Ontario. Mr. Jean-Pierre Haché, Eng., Professional Practice Manager in the Strategy and Performance Consulting Group of Raymond Chabot Grant Thornton, testified on Costco’s behalf. He was qualified by the Tribunal as an expert in the area of electrical engineering, including static converters and emergency power packs.³ The CBSA did not call any witnesses.

GOOD IN ISSUE

8. It is uncontested, and the Tribunal accepts, that the good in issue is a portable battery booster system used to jumpstart motor vehicles which can also be used as a source of power to charge or operate various 12-volt electronic devices (e.g. cell phones, laptop computers and camcorders) equipped with a direct current (DC) male plug.

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

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

3. *Transcript of Public Hearing*, 15 November 2011, at 6-7.

9. According to the evidence, the good in issue resembles a rectangular box and is equipped with a carrying handle. It includes red and black electric cables that are used to jumpstart motor vehicles, a sealed rechargeable battery, a 12-volt DC power outlet and DC charging port, a 120-volt alternating current (AC) charging port, various indicator lights and gauges, and power cords.⁴

STATUTORY FRAMEWORK

10. Subsection 10(1) of the *Customs Tariff* provides that “. . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System^[5] and the Canadian Rules^[6] set out in the schedule.” 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 developed by the World Customs Organization.⁷ 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. Sections and chapters may include notes concerning their interpretation.

11. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.⁸ Classification therefore begins with Rule 1, which provides as follows: “. . . 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.”

12. Section 11 of the *Customs Tariff* provides as follows: “In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System^[9] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[10] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.” Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise.¹¹

13. Thus, the Tribunal will first determine whether the good in issue can be classified according to Rule 1 of the *General Rules* as per the terms of the headings and any relevant section or chapter notes in the *Customs Tariff*,¹² having regard to any relevant *Explanatory Notes* or *Classification Opinions*. It is only if the Tribunal is not satisfied that the good in issue can be properly classified at the heading level through the application of Rule 1 of the *General Rules* that it becomes necessary to consider subsequent rules in order to determine in which tariff heading it should be classified.

4. Tribunal Exhibit AP-2011-009-03A, tab 2.

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

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

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

8. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

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

10. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

11. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.

12. The parties did not invoke any chapter notes, and the Tribunal finds that there are no relevant chapter notes in this appeal.

14. Once the Tribunal has used this approach to determine the heading in which the good in issue should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

15. The Tribunal notes that section 13 of the *Official Languages Act*¹³ provides that the English and French versions of any act of Parliament are equally authoritative. Thus, the Tribunal may examine both the English and French versions of the schedule to the *Customs Tariff* in interpreting the tariff nomenclature.

RELEVANT PROVISIONS OF THE CUSTOMS TARIFF

16. The relevant provisions of the *Customs Tariff* provide 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 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**

...

85.04 Electrical transformers, static converters (for example, rectifiers) and inductors.

...

8504.40 -Static converters

...

8504.40.90 ---Other

...

85.07 Electric accumulators, including separators therefor, whether or not rectangular (including square).

8507.10.00 -Lead-acid, of a kind used for starting piston engines

...

8507.20 -Other lead-acid accumulators

...

8507.20.90 ---Other

13. R.S.C. 1985 (4th Supp.), c. 31.

17. The relevant notes to Section XVI provide as follows:
3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.
 - ...
 5. For the purpose of these Notes, the expression “machine” means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.
18. The French version of note 3 to Section XVI, which is instructive in this instance, provides as follows:
3. *Sauf dispositions contraires, les combinaisons de machines d'espèces différentes destinées à fonctionner ensemble et ne constituant qu'un seul corps, ainsi que les machines conçues pour assurer deux ou plusieurs fonctions différentes, alternatives ou complémentaires, sont classées suivant la fonction principale qui caractérise l'ensemble.*

19. The *Explanatory Notes* to Section XVI provide as follows:

(VI) MULTI-FUNCTION MACHINES AND COMPOSITE MACHINES

(Section Note 3)

In general, multi-function machines are classified according to the principal function of the machine.

Multi-function machines are, for example, machine-tools for working metal using interchangeable tools, which enable them to carry out different machining operations (e.g., milling, boring, lapping).

...

Composite machines consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing **separate** functions which are generally complementary and are described in different headings of Section XVI, are also classified according to the principal function of the composite machine.

...

Note 3 to Section XVI **need not be invoked** when the composite machine is covered as such by a particular heading, for example, some types of air conditioning machines (heading 84.15).

POSITIONS OF PARTIES

Costco

20. Costco submitted that the good in issue is classifiable in heading No. 85.04 in accordance with Rule 1 of the *General Rules*, as it is a static converter, which is a device that is specifically named in that heading. According to Costco, the good in issue meets the definition of static converter (which is a device that converts AC into DC), since it takes power from a wall socket (i.e. generally 120 volts AC power) and converts it into 12 volts DC power in order to charge a battery.

21. Costco submitted that the *Explanatory Notes* to heading No. 85.04, which indicate that the heading covers rectifiers (i.e. devices that convert AC into DC), support its position. In this regard, Costco claimed that the good in issue is more specifically described as a rectifier and is therefore *prima facie* classifiable in heading No. 85.04.

22. Costco further submitted that the good in issue constitutes a type of emergency power pack, a good that, according to guidance afforded by the *Explanatory Notes*, is clearly covered by heading No. 85.04. It also noted that, in the United States, goods similar to that in issue have always been classified in heading No. 85.04. In this regard, it referred to classification rulings issued by the relevant authorities in that country.¹⁴

23. With respect to the CBSA's decision to classify the good in issue in heading No. 85.07, Costco submitted that this heading covers electric accumulators, goods that are commonly known as rechargeable batteries, and that the good in issue is not marketed or sold as a rechargeable battery, nor can it be used as such.

24. Costco further submitted that the CBSA erred in classifying the good in issue as if it consisted only of the component which, in the CBSA's view, performed its principal function, i.e. the battery. In this regard, it argued that the CBSA erred in concluding that the tariff classification of the good in issue was governed by Note 3 to section XVI, since the CBSA failed to demonstrate the requisite facts necessary to apply this note.

25. In particular, Costco submitted that the good in issue was not a machine, as this term has been interpreted in Tribunal jurisprudence. It also submitted that, even if it was a machine or composite machine, Note 3 to Section XVI, by its own terms, does not apply if "... the context otherwise requires ...". According to Costco, this means that, where a good, including a composite good or machine, is covered *as such* by the terms of a specific heading, there is no legal basis upon which to classify it according to its primary function. In this regard, it claimed that, because the good in issue, as a static converter (which necessarily included a battery) was covered *as such* by heading No. 85.04, the CBSA erred in relying on Note 3 to Section XVI.

CBSA

26. The CBSA submitted that the good in issue was properly classified in heading No. 85.07 in accordance with Rule 1 of the *General Rules*, taking into account the guidance afforded by Note 3 to Section XVI, which, in the CBSA's view, is relevant to this appeal. This note provides that, if a machine is capable of performing more than one function, it should be classified as if it consisted only of the component that performs its principal function.

27. The CBSA argued that it is undisputed that the good in issue falls within the scope of a heading of Chapter 85, which implies that it meets the definition of the term "machine" set out in Note 5 to Section XVI. It also being uncontested that the good in issue performs two or more complementary functions (i.e. jumpstarting vehicles, converting AC into DC, providing power for various electronic devices), the CBSA submitted that it follows that it is a composite machine that, in accordance with Note 3 to Section XVI, must be classified on the basis of the component that performs its principal function.

14. Tribunal Exhibit AP-2011-009-03A at para. 34, tab 4.

28. In this regard, the CBSA submitted that, according to the evidence, the good in issue is marketed primarily as a portable battery booster system used to jumpstart motor vehicles and that the component which allows it to perform its principal function is its sealed battery. The CBSA added that, while the good in issue has the ability to convert AC into DC, this merely represents a means to an end and cannot be described as the fundamental purpose of the good in issue. According to the CBSA, the fact that the battery can be recharged through a process that involves the conversion of AC into DC simply describes the manner in which the battery is made ready for use.

29. Therefore, the CBSA submitted that the good in issue should be classified as if it consisted only of a battery. Noting that rechargeable batteries, such as the battery incorporated in the good in issue, are properly classified as “electric accumulators” within the meaning of the terms of heading No. 85.07, the CBSA submitted that the good in issue is covered by that heading. It further submitted that the battery contained in the good in issue is a lead-acid accumulator, which is a type of battery covered by heading No. 85.07, as confirmed by the *Explanatory Notes*.

30. In response to the arguments made by Costco in support of its position, the CBSA submitted: that the good in issue cannot be classified as a static converter since the definition of that term does not reflect its principal function; that the good in issue is different from an “emergency power pack”, as described in the *Explanatory Notes* to heading No. 85.04; and that the phrase “[u]nless the context otherwise requires . . .” does not render note 3 to Section XVI inapplicable in this appeal. Concerning the latter issue, the CBSA contended that it was not immediately clear that the good in issue met the terms of heading No. 85.04.

ANALYSIS

31. The parties agree, and the Tribunal accepts, that the good in issue is a portable battery booster system used to jumpstart motor vehicles and to power various other 12-volt electronic devices equipped with a DC male plug.¹⁵

32. It is further agreed by the parties, and accepted by the Tribunal, that that the good in issue is properly classified in Section XVI of the nomenclature:

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**

and, in particular, in Chapter 85 thereof:

**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**

15. *Ibid.* at para. 7; Tribunal Exhibit AP-2011-009-05A at para. 1.

33. The difference between the parties arises at the heading level. The competing headings, which the Tribunal agrees are the only ones of potential relevance to the classification of the good in issue, are as follows:

- 85.04: “Electrical transformers, static converters (for example, rectifiers) and inductors.”
- 85.07: “Electric accumulators, including separators therefor, whether or not rectangular (including square).”

34. In this regard, Costco contended that the good in issue should be classified in heading No. 85.04 and, more specifically, under tariff item No. 8504.40.90 as other static converters, while the CBSA claimed that it is properly classified in heading No. 85.07 and, more specifically, under one of the two tariff items in subheading No. 8507.20 that cover other lead-acid electric accumulators,¹⁶ specifically, tariff item No. 8507.20.90, which covers lead-acid accumulators other than those that are for use as the primary source of electrical power for electrically powered vehicles of subheading 8703.90.

35. As a first step, the Tribunal must determine whether the good in issue is covered *as such* in one, and only one, of the competing headings. If so, it must be classified in that heading, in accordance with Rule 1 of the *General Rules*.

36. If, however, the Tribunal determines that the good in issue is not described *as such* in either heading No. 85.04 or heading No. 85.07, with each of these headings referring to only part of the good in issue, the normal application of the *General Rules*, which are applied sequentially, would eventually take one to Rule 3 (which applies when goods are, *prima facie*, classifiable under two or more headings) and, specifically, to Rule 3 (b), which directs that “... composite goods ... made up of different components ... which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.”

37. However, in the present appeal, Note 3 to Section XVI, if determined to be applicable, would preclude the possibility of the good in issue being *prima facie* classifiable in two or more headings, thus allowing it to be classified in accordance with Rule 1 of the *General Rules* and rendering the “essential character” criterion in Rule 3 (b) inapplicable. In this regard, Note 3 directs as follows:

3. *Unless the context otherwise requires*, composite machines consisting of two or more machines fitted together to form a whole and other *machines designed for the purpose of performing two or more complementary or alternative functions* are to be classified as if consisting only of that component or as being that machine which performs the *principal function*.

[Emphasis added]

38. The phrase “[u]nless the context otherwise requires...” makes it clear that, while “composite machines” and non-composite “. . . machines designed for the purpose of performing two or more complementary . . . functions . . .” (i.e. multi-function machines) will generally be classified according to the machine or component which performs the principal function, there are exceptions to this

16. There are two subheadings in heading No. 85.07 that cover lead-acid electric accumulators. Subheading No. 8507.10 covers lead-acid accumulators “. . . of a kind used for starting piston engines”, whereas subheading No. 8507.20 (i.e. the one that the CBSA determined to be applicable) covers “[o]ther lead-acid accumulators”. Those “other” lead-acid accumulators (i.e. lead-acid accumulators that are *not* “. . . of a kind used for starting piston engines”) are further subdivided into two distinct tariff items. Tariff item No. 8507.20.10 covers lead-acid accumulators for use as the primary source of power for electrically powered vehicles of subheading No. 8703.90, while tariff item No. 8507.20.90 (i.e. the one that the CBSA determined to be applicable) covers all other lead-acid accumulators.

rule. In other words, the mere fact that a good is a machine of the type described in Note 3 to Section XVI is not sufficient to render the note applicable. One must determine whether other provisions of the *Customs Tariff*, which form the relevant context, preclude the application of Note 3.

39. In this regard, the Tribunal finds that Note 3 to Section XVI is not applicable when composite machines or multi-function machines are described *as such* in a specific tariff heading of the *Customs Tariff*. Indeed, to suggest otherwise would result in the anomalous situation of a good being classified as if consisting only of one of its components notwithstanding the presence of a heading which covers the complete product.

40. In the Tribunal's view, the phrase "*sauf dispositions contraires . . .*" (except as otherwise provided) in the French version of Note 3 to Section XVI, by suggesting that the note does not apply to goods otherwise fitting the description of the machines referred to in that note if they are covered *as such* under a specific tariff heading, is informative as to the meaning of the corresponding phrase "unless the context otherwise requires . . ." in the English version of same.

41. In this regard, it is the Tribunal's view that classification of a composite or multi-function machine in a tariff heading that covers it, *as such*, constitutes a *disposition contraire* (provision to the contrary) under Note 3 to Section XVI, which would preclude classification of the complete machine as if it consisted only of the component, or as being the machine, that performs its principal function.

42. Accordingly, the Tribunal is of the view that Costco is correct in stating that ". . . if a composite good or a composite machine is classified in a heading, you don't go and use [Note] 3."¹⁷

43. This view is confirmed by Part (VI) of the *Explanatory Notes* to Section XVI, which provides as follows:

(VI) MULTI-FUNCTION MACHINES AND COMPOSITE MACHINES

(Section Note 3)

. . .

*Note 3 to Section XVI need not be invoked when the composite machine is covered as such by a particular heading, for example, some types of air conditioning machines (heading 84.15).*¹⁸

[Emphasis added]

17. *Transcript of Public Hearing*, 15 November 2011, at 79-80.

18. The Tribunal is aware that Part (VI) of the *Explanatory Notes* to Section XVI refers to a composite machine and does not expressly state that Note 3 to Section XVI need not be invoked when the goods in issue are machines "designed for the purpose of performing two or more complementary or alternative functions" (i.e. multi-function machines), which is the other category of machines referred to in Note 3. In the Tribunal's view, the reason that motivated the inclusion of an explicit clarification in the *Explanatory Notes* for composite machines (i.e. the desirability of avoiding the anomalous situation of a machine being simultaneously classifiable, by application of Rule 1 of the *General Rules*, in one heading by virtue of the "principal function" criterion of Note 3, and in another heading by virtue of being described "*as such*" therein), also adheres in the case of multi-function machines. Indeed, as a matter of legal construction, there is nothing in Note 3 to suggest that the application of the phrase "[u]nless the context otherwise requires . . ." is confined to composite machines. The Tribunal therefore concludes that, where a machine is covered, *as such*, in a tariff heading, the phrase applies irrespective of whether the good in issue is a composite or multi-function machine. The Tribunal notes that the CBSA's position in this appeal is that the good in issue is a composite machine which performs two or more complementary functions (see Tribunal Exhibit AP-2011-009-03A at para. 27). The Tribunal takes it that the CBSA, having accepted the good in issue to be a composite machine and given the *Explanatory Notes*, is not disputing that Note 3 to Section XVI "need not be invoked" if the composite machine is covered, *as such*, by a particular heading.

44. Accordingly, the Tribunal will begin by determining whether the good in issue is a “machine” and, in particular, a machine described in Note 3 to Section XVI. If so, it will then determine whether the good in issue is covered, *as such*, by a specific heading, in which case the principal function criterion in Note 3 would be rendered inapplicable, as submitted by Costco.¹⁹ If not, the Tribunal will proceed to a determination of tariff classification on the basis of “principal function”, as advocated by the CBSA.²⁰

Is the Good in Issue a Machine?

45. The Tribunal notes that the definition of “machine” set out in Note 5 to Section XVI extends beyond machines and machinery in the strict sense to also include within its ambit any equipment and apparatus cited in the headings of Chapter 85:

For the purpose of these Notes, the expression “machine” means any machine, machinery, plant, *equipment, apparatus* or appliance cited in the headings of Chapter 84 or 85.

[Emphasis added]

46. In the Tribunal’s view, the issue of whether an article cited in a heading is properly described as “equipment” or as “apparatus” is one of fact that does not depend upon it being specifically referred to as such in that heading itself. In this regard, the Tribunal notes that the dictionary definition of “apparatus” includes “**2.** . . . equipments . . .”,²¹ with the definition of “equipment”, in turn, including “. . . apparatus, necessary for . . . [a] job . . .”²² It being undisputed that the good in issue is applied to (i.e. is necessary for) the job of jumpstarting vehicles and the operation of certain 12-volt electronic devices in certain circumstances, the Tribunal is satisfied that it is properly described as equipment or apparatus and, therefore, as a “machine”, by virtue of Note 5 to Section XVI.²³

47. Regarding Costco’s claim that the good in issue is not a machine within the meaning ascribed to that term in jurisprudence,²⁴ and its specific reliance on the decisions of the Federal Court of Appeal in *Sandvik Tamrock Canada Ltd. v. Canada (Deputy Minister of National Revenue)*²⁵ and of the Tribunal in *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency*²⁶ in support thereof, the Tribunal notes that these cases are contextually different from the present case. In particular, *Sandvik* involved the interpretation of a specific term (i.e. “extracting machinery”), as used in a different tariff item (No. 9908.00.00), found in a different Section (Section XXI), that did not include its own

19. Tribunal Exhibit AP-2011-009-03A at paras. 35, 44-45; *Transcript of Public Hearing*, 15 November 2011, at 47, 61-62, 79-80.

20. Tribunal Exhibit AP-2011-009-05A at paras. 27-32.

21. *The Oxford English Dictionary*, 2d ed., s.v. “apparatus”.

22. *The Concise Oxford Dictionary*, 7th ed., s.v. “equipment”.

23. Indeed, the evidence indicates that the goods in issue include a static converter (*Transcript of Public Hearing*, 15 November 2011, at 14-15), and the *Explanatory Notes* to heading No. 85.04, for instance, explicitly refer to static converters as apparatus: “**(II) ELECTRICAL STATIC CONVERTERS** The *apparatus* of this group are used to convert electrical energy in order to adapt it for further use” [emphasis added]. While the *Explanatory Notes* to heading No. 85.07 do not speak directly to the nature of accumulators, the Tribunal is satisfied that the lead-acid battery, which forms part of the goods in issue, also constitutes equipment or apparatus by virtue of the fact that it is necessary for the performance of a specific job, i.e. the discharging of DC to jumpstart vehicles or to operate certain 12-volt devices.

24. Tribunal Exhibit AP-2011-009-03A at para. 50.

25. 2001 FCA 340 (CanLII) [*Sandvik*].

26. (29 November 2007), AP-2006-041 (CITT) [*Canadian Tire*].

definition of the term “machine”. Similarly, *Canadian Tire* turned on the specific wording of heading No. 84.79 (i.e. “Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter”), read in the light of Supplementary Note 1 to Section XVI (i.e. “In this Section the term ‘mechanically operated’ refers to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion”). In any event, the Tribunal is satisfied that the good in issue, being a complex combination of mechanical parts²⁷ that work to modify electrical force by converting AC into DC and then transmit that electrical force to jumpstart a motor vehicle or to power certain other electronic devices, would satisfy the definitional requirements of the term “machine”. Indeed, being comprised of separate apparatus²⁸, it can be considered a composite machine.

48. Having determined that the good in issue is a machine, within the meaning ascribed to that term by Note 5 to Section XVI, and, more specifically, a composite machine, the Tribunal must next determine whether it is a machine of the kind described in Note 3 to Section XVI. In so doing, it is the Tribunal’s view that a distinction must be drawn between a function on the one hand and the application or applications of that function on the other.²⁹

Is the Good in Issue a Composite Machine Described in Note 3 of Section XVI?

49. The “principal function” criterion in Note 3 to Section XVI necessarily implies the comparison of two or more functions. That being the case, and given that the criterion applies to both types of machines referred to in Note 3, it follows that the composite machines therein described must also perform more than one function.

50. In this regard, the evidence indicates, and the Tribunal finds, that the good in issue converts, stores and supplies electrical power for use in various applications. On this point the Tribunal accepts Mr. Haché’s testimony that “[the device is] more than just a static converter because it also serves other functions like keeping power stored and allowing you to . . . power devices.”³⁰

27. In this regard, the Tribunal notes that the various parts comprising the good in issue are listed in the appellant’s brief. Tribunal Exhibit AP-2011-009-03A at para. 8.

28. The various components of the good in issue are listed in Tribunal Exhibit AP-2011-009-03A at para. 8 and Tribunal Exhibit AP-2011-009-0A at para. 5. While it is not expressly mentioned in the list of components, the uncontested testimony of Mr. Haché clearly indicates that the good in issue also includes a static converter (see note 23). As noted above, at least two of those components are apparatus, namely, the static converter and the lead-acid battery. Each of these apparatus would constitute a machine under the definition of that term in Note 5 to Section XVI.

29. In this regard, the term “function” is defined as the “. . . activity by which a thing fulfills its purpose” (see *Panasonic Canada Inc. v. President of the Canada Border Services Agency* (19 October 2007), AP-2005-035 (CITT) at para. 21), while “application” is defined as the “employment of means; bringing . . . to bear upon particular case” (see *The Concise Oxford Dictionary*, 7th ed., s.v. “application”).

30. *Transcript of Public Hearing*, 15 November 2011, at 15.

51. Specifically, the good in issue functions (a) to convert³¹ electricity derived from an AC source to DC, as the lead-acid battery (electric accumulator) component of the good in issue can only recharge by, and store,³² DC;³³ (b) to store electrical power for portable or emergency use; and (c) to supply portable or emergency power, with the specific applications of this function including the jumpstarting of motor vehicles and the powering of certain electronic devices.³⁴

52. While the complementarity requirement of Note 3 to Section XVI pertains specifically to the other category of machines referred to in the note (i.e. multi-function machines), the *Explanatory Notes* to Section XVI indicate that the separate functions simultaneously or consecutively performed by composite machines are “. . . generally complementary” In this regard, the Tribunal notes that the sequential functions performed by the good in issue, as a composite machine, are related to one another, with the conversion function being complementary to the storage function (by virtue of the fact that the lead-acid battery can only accept and store DC), and the storage function, in turn, being complementary to the power supply function (since the electrical power must be stored until needed for a specific application, i.e. to jumpstart a motor vehicle or to power other devices).

53. The Tribunal therefore finds that the good in issue is a composite machine that performs multiple, complementary functions and that, as such, is a machine described in note 3 to Section XVI.³⁵

Is the Good in Issue Covered “as such” in Heading No. 85.04?

54. Having found that the good in issue is a machine described in Note 3 to Section XVI, the Tribunal must next determine whether it is covered as such by a specific heading.

55. Costco argued that recourse cannot be had to Note 3 to Section XVI because heading No. 85.04 covers the good in issue as a complete entity, that is to say, a static converter with a battery.³⁶

56. Heading No. 85.04 covers “[e]lectrical transformers, static converters (for example, rectifiers) and inductors.” It not being in dispute that the good in issue converts AC into DC with a voltage change, the Tribunal accepts that the good in issue is a static converter and, more specifically, a “rectifier”.³⁷

31. While Costco submitted that the good in issue was a “static converter”, it added that it was more specifically described as a “rectifier” (see Tribunal Exhibit AP-2011-009-03A at para. 28). In this regard, the *Explanatory Notes* to heading No. 85.04 include rectifiers within the group of apparatus described as electrical static converters: “[Electrical static converters include]: (A) **Rectifiers** by which alternating current . . . is converted to direct current, generally accompanied by a voltage change.”

32. Mr. Haché testified that, practically speaking, “[t]here is no way known, statically, to store AC power.” *Transcript of Public Hearing*, 15 November 2011, at 32.

33. In this regard, the *Explanatory Notes* to heading No. 85.07 provide as follows: “A *direct current* is passed through the accumulator producing certain chemical changes (*charging*); when the terminals of the accumulator are subsequently connected to an external circuit these chemical changes reverse and produce a *direct current* in the external circuit (*discharging*)” [emphasis added].

34. Tribunal Exhibit AP-2011-009-03A at para. 9; Tribunal Exhibit AP-2011-009-05A at para. 1.

35. Thus, the good in issue is both a composite and a multi-function machine. As noted above, the Tribunal agrees with the CBSA that the good in issue is a composite machine, since, according to the evidence, it consists of at least two apparatus, a static converter and an electric accumulator (i.e. two “machines” within the meaning of Note 5 to Section XVI) fitted together to form a whole.

36. *Transcript of Public Hearing*, 15 November 2011, at 47, 79-80.

37. Indeed, as previously noted, the *Explanatory Notes* to heading no. 85.04 provide as follows: “This group includes: (A) **Rectifiers** by which alternating current (single or polyphase) is converted to direct current, generally accompanied by a voltage change.”

57. Static converters are specifically covered in subheading No. 8504.40. The Tribunal finds noteworthy that the specific tariff items falling in that subheading cover goods of a similar nature to that in issue, including certain commercial battery chargers (tariff item No. 8504.40.10) and power supplies for specific uses (tariff item Nos. 8504.40.20 and 8504.40.30).

58. The Tribunal also finds particularly useful the guidance afforded by Part (II) of the *Explanatory Notes* to heading No. 85.04, which specifically includes accumulator (i.e. battery) chargers and emergency power packs as being among the different purposes for which electrical static converters can be used:

Electrical static converters may be used for different purposes, e.g.:

...

- (2) Supply converters, such as *accumulator chargers* (which consist essentially of rectifiers with associated transformer and current control apparatus), converters for galvanising and electrolysis, *emergency power packs*, converters for installations which supply high-tension direct current, converters for heating purposes and for the current supply to electro-magnets.

[Emphasis added]

59. The conversion of AC to DC is not without purpose. Rather, and as indicated in the *Explanatory Notes* to heading No. 85.04, electrical static converters “. . . are used to convert electrical energy *in order to adapt it for further use*” [emphasis added]. This necessarily presupposes that the energy, once converted, will be stored. In this regard, the Tribunal accepts Mr. Haché’s uncontested testimony that “. . . electricity can’t be stored in any way, shape or form other than in a battery.”³⁸

60. The Tribunal also accepts Mr. Haché’s description of the good in issue as an emergency power pack³⁹ in view of the uses for which the good in issue was specifically designed (i.e. to jumpstart motor vehicles and to power certain devices in circumstances where access to an electrical distribution network is not available). In this regard, the Tribunal finds the CBSA’s argument that an “. . . emergency power pack in this context must be something that serves primarily to convert energy to adapt it for further use”⁴⁰ strained and unconvincing, as it disregards the emergency applications that constitute the further use for which the electricity has been adapted in the first place and for which the power packs were specifically designed. Indeed, the CBSA conceded that it “. . . [could not] give . . . an example of such an emergency power pack”⁴¹

61. Finally, the Tribunal accepts Mr. Haché’s testimony that an emergency power pack would have to contain a battery and, by definition, always includes a battery since, as explained above, “[t]here is no other way of storing the power.”⁴²

62. In summary, the Tribunal finds that the good in issue is covered *as such* in heading No. 85.04. In this regard the Tribunal is satisfied that, as a rectifier that converts AC into DC with a resulting change in voltage, the good in issue should be classified in subheading No. 8504.40 as a static converter, in accordance with Rule 6 of the *General Rules*. More specifically, in accordance with Rule 1 of the *Canadian Rules*, it falls to be classified under tariff item No. 8504.40.90 as an emergency power pack, the “*as such*” description of which necessarily includes a battery for the purpose of storing the electrical power for the purpose of jumpstarting motor vehicles and powering certain 12-volt devices.

38. *Transcript of Public Hearing*, 15 November 2011, at 10.

39. *Ibid.* at 8, 13.

40. *Ibid.* at 78.

41. *Ibid.*

42. *Ibid.* at 17.

63. Having determined that the good in issue are classifiable as such under tariff item No. 8504.40.90, Note 3 to Section XVI is rendered inapplicable.⁴³

DECISION

64. For the foregoing reasons, the Tribunal finds that the goods in issue should be classified under tariff item No. 8504.40.90.

65. The appeal is therefore allowed.

Pasquale Michael Saroli

Pasquale Michael Saroli

Presiding Member

43. Indeed, and as noted by Costco (see *Transcript of Public Hearing*, 15 November 2011, at 59), to suggest otherwise, with the resulting classification of the good in issue as a lead-acid battery (i.e. as an electric accumulator) by virtue of power supply being determined to be its principal function, would create uncertainty as to when goods would be classifiable as certain commercial battery chargers, power supplies or emergency power packs of tariff items in subheading No. 8504.40, all of which require batteries as one of their components. Moreover, it would result in the anomalous classification of multi-function goods in headings other than those in which they are described *as such*.