Canadian International Trade Tribunal

Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-013

KSB Pumps Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Thursday, March 29, 2012

Canada

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IN THE MATTER OF an appeal heard on November 24, 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 March 3, 2011, with respect to a request for review of an advance ruling on tariff classification, pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

KSB PUMPS INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 24, 2011
Tribunal Member:	Diane Vincent, Presiding Member
Counsel for the Tribunal:	Alain Xatruch
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Cheryl Unitt

PARTICIPANTS:

Appellant	**Counsel/Representatives**
KSB Pumps Inc.	Victor Truong Michael Sherbo
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Leah Garvin

WITNESSES:

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by KSB Pumps Inc. (KSB) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision made on March 3, 2011, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to a request for review of an advance ruling on tariff classification.

2. The issue in this appeal is whether Amaprop® submersible mixers (the goods in issue) are properly classified under tariff item No. 8479.82.00 of the schedule to the *Customs Tariff*[2] as mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines, as determined by the CBSA, or should be classified under tariff item No. 8479.10.00 as machinery for public works, building or the like, as claimed by KSB.

PROCEDURAL HISTORY

3. On July 23, 2010, KSB submitted a request for an advance ruling with respect to the tariff classification of the goods in issue. In its request, KSB suggested that the goods in issue should be classified under tariff item No. 8479.10.00.

4. On August 12, 2010, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(*c*) of the *Act*, in which it classified the goods in issue under tariff item No. 8479.82.00.

5. On November 9, 2010, KSB requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*.

6. On March 3, 2011, the CBSA issued its decision pursuant to subsection 60(4) of the *Act*. The CBSA held that the goods in issue were properly classified under tariff item No. 8479.82.00, thereby affirming its advance ruling.

7. On May 30, 2011, KSB filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

8. The Tribunal held a public hearing in Ottawa, Ontario, on November 24, 2011. Mr. Majid Hadavi, Engineering Manager of Strategic Projects at KSB, appeared as a witness for KSB. Mr. Hadavi was qualified by the Tribunal as an expert in machinery applications for the treatment of sewage and waste water.[3] Mr. Michael Gundry, a consulting engineer with AECOM Canada Limited, appeared as a witness for the CBSA. Mr. Gundry was qualified by the Tribunal as an expert in industrial and waste water treatment processes.[4]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. *Transcript of Public Hearing*, 24 November 2011, at 7-8.
4. *Ibid.* at 28.

GOODS IN ISSUE

9. The goods in issue are Amaprop® submersible mixers,[5] which are imported by KSB from KSB Aktiengesellschaft, a related German company. According to the manufacturer's product literature, the goods in issue are generally described as "[s]ubmersible mixer[s] with self-cleaning propeller[s] for handling municipal or industrial waste water and sludges, as well as for use in biogas applications."[6] The main components of the goods in issue are the motor, the housing, the propeller, the gear unit and the gear shaft.[7]

10. The manufacturer's product literature also provides the following details regarding the possible applications for the goods in issue:[8]

> **Applications**
>
> In environmental engineering, particularly for circulating, keeping in suspension and inducing flow in municipal and industrial waste water and sludges.
>
> - In nitrification and denitrification tanks
> - In activated sludge tanks
> - In mixing tanks
> - In final storage tanks
> - In biological phosphate elimination tanks
> - In flocculation tanks
> - In biogas applications

11. No physical exhibits were filed by the parties.

STATUTORY FRAMEWORK

12. In appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of goods in accordance with prescribed interpretative rules.

13. 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.[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. Sections and chapters may include notes concerning their interpretation.[10] Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

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5. In its brief, KSB refers to the goods in issue as "submersible agitators". However, the Tribunal notes that the manufacturer's product literature clearly describes the goods in issue as "submersible mixers". Tribunal Exhibit AP-2011-013-03A, tab 1.
6. Tribunal Exhibit AP-2011-013-03A, tab 1 at 3.
7. *Ibid.* at 1, 3-5; Tribunal Exhibit AP-2011-013-05A at 60.
8. Tribunal Exhibit AP-2011-013-05A at 60.
9. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
10. The Tribunal notes that section 13 of the *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31, 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.

14. Subsection 10(1) of the *Customs Tariff* provides as follows: ". . . 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[11] and the Canadian Rules[12] set out in the schedule."

15. 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, until classification is completed.[13]

16. Classification therefore begins with Rule 1 of the *General Rules*, which provides as follows:

> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; 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.

17. 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[14] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[15] 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 respected, unless there is a sound reason to do otherwise, as they serve as an interpretative guide to tariff classification in Canada.[16]

18. The Tribunal must therefore first determine whether the goods in issue can be classified according to Rule 1 of the *General Rules* 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*. It is only if the Tribunal is not satisfied that the goods 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 the goods in issue should be classified.

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 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.[17]

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11. S.C. 1997, c. 36, schedule [*General Rules*].
12. S.C. 1997, c. 36, schedule.
13. 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).
14. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
15. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
16. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.
17. Rule 6 of the *General Rules* stipulates as follows: "For legal purposes, 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, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."

RELEVANT CLASSIFICATION PROVISIONS

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

Section XVI

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

. . .

Chapter 84

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

. . .

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

8479.10.00 **-Machinery for public works, building or the like**

. . .

-Other machines and mechanical appliances:

. . .

8479.82.00 **- -Mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines**

21. The relevant *Explanatory Notes* to heading No. 84.79 provide as follows:

The many and varied machines covered by this heading include *inter alia*:

(I) MACHINERY OF GENERAL USE

This group includes, for example:

. . .

(2) Presses, crushers, grinders, mixers, etc., not designed for particular goods or industries.

. . .

(II) MACHINERY FOR CERTAIN INDUSTRIES

This group includes:

(A) **Machinery for public works, building or the like**, e.g.:

(1) Machines for spreading mortar or concrete (**excluding** mixers for preparing concrete or mortar **-heading 84.74** or **87.05**).

(2) Road making machines which vibrate the concrete to consolidate it and to camber the surface, sometimes also spreading the concrete.

However this heading **does not include** levellers of **heading 84.29**.

(3) Machines, whether or not self-propelled, for spraying gravel on road or similar surfaces and self-propelled machines for spreading and tamping bituminous

road-surfacing materials. Gravel sprayers mounted on a motor vehicle chassis are **excluded** (**heading 87.05**).

(4) Machinery and mechanical appliances for smoothing, grooving, checkering, etc., fresh concrete, bitumen or other similar soft surfaces.

Heating apparatus for bitumen, etc., are **excluded (heading 84.19)**.

(5) Small pedestrian directed motorised apparatus for the maintenance of roads (e.g., sweepers and white line painters).

Mechanical rotating brooms, which may be mounted with a dirt hopper and a sprinkler system on a wheeled chassis powered by a tractor of **heading 87.01**, are also classified in this heading as interchangeable equipment, even if they are presented with the tractor.

(6) Salt and sand spreaders for clearing snow, designed to be mounted on a lorry, consisting of a tank for storing sand and salt, equipped with a lump-breaking agitator, a system for crushing/grinding the lumps of salt, and a hydraulic projection system with spreading disk. The machines' various functions are operated from the cab of the lorry, by remote control.

. . .

(III) MISCELLANEOUS MACHINERY

. . .

POSITIONS OF PARTIES

KSB

22. KSB submitted that the goods in issue should be classified under tariff item No. 8479.10.00 as machinery for public works, building or the like because they are incontestably machinery and they are for sewage and waste water treatment plants, which fall within the ordinary meaning of the term "public works". In support of its position, it referred to decisions of the Supreme Court of Canada in which it alleged that the term "public works" had been interpreted broadly.[18]

23. KSB submitted that Mr. Hadavi's testimony indicated that the construction of sewage and waste water treatment plants are projects that are typically undertaken by municipalities (i.e. the public sector). It added that the goods in issue were for a sewage and waste water treatment plant located in, and owned by, the municipality of Muskoka in Ontario.

24. KSB submitted that the CBSA's characterization of sewage and waste water treatment plants as public utilities rather than public works is erroneous, as public utilities are actually a subset of public works. In support of this proposition, it referred to the Ontario *Public Works Protection Act*,[19] which defines the term "public works" as including any ". . . water works, public utility or other work, owned, operated or carried on by the Government of Ontario or by any board or commission thereof, or by any municipal corporation, public utility commission or by private enterprises . . . ." It therefore submitted that, although sewage and waste water treatment plants may be considered public utilities, they are nevertheless public works or, at the very least, something "like" public works.

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18. See *Salmo Investments Ltd. v. The King*, [1940] S.C.R. 263; *Wolfe Co. v. R.* [1921] 63 Can. S.C.R. 141.
19. R.S.O. 1990, c. P.55.

25. As for the CBSA's argument that, because the goods in issue can be utilized in a variety of industries, they are not dedicated to a public works function, KSB submitted that the terms of subheading No. 8479.10 do not impose specific restrictions, i.e. that the machinery be "solely" for public works. It submitted that, if the intention had been to restrict the application of subheading No. 8479.10 to machinery solely for public works, the word "solely" would have been included, as it has been included elsewhere in the tariff (e.g. heading No. 84.73). It added that the testimony adduced at the hearing clearly indicates that the vast majority of goods that are similar to the goods in issue are used for public works (i.e. in municipalities).

26. KSB submitted that, although the goods in issue are not named or included in the non-exhaustive list of examples of machinery for public works, building or the like in section (II)(A) of the *Explanatory Notes* to heading No. 84.79, they are analogous to the listed salt and sand spreaders, insofar as they incorporate an agitator to break materials down. It further submitted that, if the intention had been to restrict the application of subheading No. 8479.10 to machinery for road building, as suggested by the CBSA, those words would have been used instead of "public works".

27. KSB also submitted that, while the U.S. classification ruling[20] provided by the CBSA did classify a general purpose mixer in subheading No. 8479.82, the same ruling also found that another mixer was specifically designed for the pulp and paper industry. It submitted that the goods in issue have motors constructed specifically to withstand high temperatures and be submersible, which are characteristics that are specific to the sewage and waste water treatment industry.

28. Finally, KSB submitted that, if the Tribunal determines that the goods in issue are for the sewage and waste water treatment industry (i.e. for public works), it cannot also determine that they are "other machines and mechanical appliances" (at the first-level subheading) and ultimately classifiable in subheading No. 8479.82 (at the second-level subheading). It submitted that section (I) of the *Explanatory Notes* to heading No. 84.79 provides that machinery of general use cannot be ". . . designed for particular goods or industries", which confirms that the subheadings at issue are mutually exclusive. It added that, given this mutual exclusivity, the goods in issue cannot be *prima facie* classifiable in both subheadings and recourse to Rule 3 of the *General Rules* is therefore not possible.

CBSA

29. The CBSA submitted that the goods in issue are properly classified under tariff item No. 8479.82.00 as mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines. It submitted that the goods in issue are mixers that are best described and classified in accordance with their individual function of mixing rather than by their anticipated use in sewage and waste water treatment plants, as argued by KSB. In this regard, it submitted that, since this tariff item is not an end-use provision, the focus should be on the applications, characteristics and functions of the goods in issue rather than where they ultimately end up in the context of a particular transaction.

30. The CBSA submitted that subheading No. 8479.82 provides for machines whose individual function is to mix, knead, crush, grind, screen, sift, homogenize, emulsify or stir and that, in this case, the principal function of the goods in issue is to mix. It added that the goods in issue also satisfy two other design functions of subheading No. 8479.82, namely, stirring and emulsifying. In support of its position, it referred to various dictionary definitions related to the terms "mixing", "stirring" and "emulsifying", as well as to the manufacturer's product literature, which indicates that the goods in issue are used to mix and disperse municipal or industrial waste water and sludge.[21]

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20. Tribunal Exhibit AP-2011-013-05A at 226.
21. Tribunal Exhibit AP-2011-013-05A at paras. 30, 32-33.

31. The CBSA further submitted that the goods in issue are general use items that are designed for multiple applications and can be utilized in a variety of industries. It submitted that, indeed, the manufacturer's product literature and testimony from Messrs. Hadavi and Gundry indicate that the goods in issue may be used in a number of applications, including biological treatment of municipal and industrial waste water and biogas applications. It submitted that waste water treatment as a whole (i.e. municipal and industrial) is not a particular industry. With respect to biogas, it submitted that the evidence demonstrates that its production is not limited to publicly owned and industrial waste water treatment plants, but also exists within farming operations. It submitted that, by virtue of these multiple applications, the goods in issue are machinery of general use ". . . not designed for particular goods or industries" and are therefore properly classified in subheading No. 8479.82 in accordance with section (I) of the *Explanatory Notes* to heading No. 84.79.

32. The CBSA submitted that the goods in issue cannot be classified in subheading No. 8479.10 as machinery for public works, since municipal sewage and waste water treatment plants are public utilities rather than public works. In this regard, it referred to the Ontario *Municipal Act, 2001*,[22] which defines a "public utility" as a system that is used to provide water or sewage services for the public. It also submitted that, on the basis of the definition of the term "utility" found in *Black's Law Dictionary*,[23] both municipal and industrial waste water facilities could be considered public utilities, as they benefit society by controlling pollution and are regulated by various levels of government.

33. The CBSA submitted that, while the list of examples of machinery for public works, building or the like in section (II)(A) of the *Explanatory Notes* to heading No. 84.79 is non-exhaustive, the Tribunal has previously stated that such examples provide an indication of the types of goods that are generally intended to be covered by a heading.[24] It submitted that the goods in issue are not analogous to any of these examples, which only involve machinery that is committed by design for the construction, maintenance and repair of roads and sidewalks, and make no reference to any type of facility or plant. As for KSB's contention that the goods in issue are analogous to the listed salt and sand spreaders, it submitted that such machines are small and solely designed and used for road maintenance, whereas the goods in issue are large and find their use in public utilities and biogas production industries and are not committed by design to carry out a public works function.

34. The CBSA also provided a U.S. classification ruling in which it claims that a mixer was classified as being for general use because it was not committed by design to the pulp and paper industry's needs. It submitted that, in the present appeal, KSB failed to demonstrate that the goods in issue are committed by design for municipal waste water treatment plants.

35. Finally, the CBSA submitted that, if the Tribunal finds that the goods in issue are *prima facie* classifiable in both subheading Nos. 8479.10 and 8479.82, they would still be properly classified in subheading No. 8479.82 in accordance with Rule 3 (a) of the *General Rules* because that subheading provides the most specific description of the goods in issue.

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22. S.O. 2001, c. 25.
23. Seventh ed.
24. The CBSA referred to the Tribunal's decision in *BIOnova Medical Inc. v. Commissioner of the Canada Customs and Revenue Agency* (24 February 2004), AP-2002-111 (CITT).

TRIBUNAL'S ANALYSIS

36. As mentioned above, the issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8479.82.00 as mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines, as determined by the CBSA, or should be classified under tariff item No. 8479.10.00 as machinery for public works, building or the like, as claimed by KSB. Consequently, the dispute between the parties arises at the subheading level.

37. The Tribunal agrees with the parties that the goods in issue are properly classified in heading No. 84.79 as machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84. Accordingly, the Tribunal will begin its analysis by determining, on the basis of the evidence before it, whether the goods in issue are classifiable in each of the two competing subheadings by examining the terms of the subheadings in accordance with Rules 1 and 6 of the *General Rules*, while also having regard to the relevant *Explanatory Notes*. If this exercise leads to the classification of the goods in issue in one, and only one, subheading, the Tribunal will then proceed to determine the classification of the goods in issue at the tariff item level.

Are the Goods in Issue Classifiable in Subheading No. 8479.82 as Mixing, Kneading, Crushing, Grinding, Screening, Sifting, Homogenizing, Emulsifying or Stirring Machines?

38. The goods in issue are Amaprop® submersible *mixers* and are described in the manufacturer's product literature as being for ". . . *mixing* and keeping in suspension municipal or industrial waste water and sludges" [emphasis added].[25] Moreover, both Messrs. Hadavi and Gundry testified that the goods in issue are used for mixing.[26]

39. Subheading No. 8479.82 covers mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines. Therefore, since the goods in issue can clearly be considered "mixing. . . machines", they would appear to be classifiable in this particular subheading. However, in interpreting headings and subheadings, the Tribunal must, pursuant to section 11 of the *Customs Tariff*, have regard to the *Explanatory Notes*. In this case, the *Explanatory Notes* to heading No. 84.79 provide that the machines covered by the heading include machines falling within three groups, namely, "machinery of general use", "machinery for certain industries" and "miscellaneous machinery". The *Explanatory Notes* further provide that "machinery of general use" includes ". . . mixers . . . not designed for particular goods or industries."

40. Additionally, the Tribunal notes that subheading No. 8479.82 is found at the second (i.e. two-dash) level under the first-level (i.e. one-dash) subheading, "**Other machines and mechanical appliances**". This, together with the *Explanatory Notes*, makes it clear that mixers can only be classified in subheading No. 8479.82 if they are for general use and not designed for particular industries. The Tribunal must therefore determine whether the goods in issue are for general use and not designed for particular industries.

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25. Tribunal Exhibit AP-2011-013-03A, tab 1 at 5.
26. *Transcript of Public Hearing*, 24 November 2011, at 9, 18, 28, 35, 40.

41. According to the evidence on the record, the goods in issue possess a number of specific design features, which appear to make them particularly suited for handling waste water and sludge. For example:[27]

- they are fully submersible;
- they have self-cleaning and fracture-proof propellers;
- they have a gear box to provide lower speed rotation; and
- they have temperature sensors to monitor any heat build-up in the motor.

42. The Tribunal notes that the manufacturer's product literature indicates that the goods in issue are ". . . for handling municipal or industrial waste water and sludges, as well as for use in biogas applications."[28] Therefore, it follows that the design features listed above must necessarily be intended to allow the goods in issue to be used, and to function effectively, in such applications. Indeed, testimony from Messrs. Hadavi and Gundry indicates that the design features listed above allow the goods in issue to be submerged in tanks, have a long service life, provide a fairly slow general bulk movement of liquid and be protected from overheating caused by a drop in the level, or an increase in the temperature, of the liquid.[29]

43. Thus, the Tribunal is satisfied that the goods in issue are specifically *designed* for handling municipal or industrial waste water and sludge, as well as for use in related biogas applications. At the hearing, Mr. Gundry explained that waste water is a by-product of human activities, of industrial processes such as treating pulp and paper or producing pharmaceuticals, of animal activity such as on a farm and of high intensity agricultural processes, which is typically treated biologically.[30] Mr. Gundry further explained that sludge, which is the by-product of the biological treatment of waste water, and manure produced in farming and agricultural operations, can serve to produce methane (i.e. biogas), which is then utilized to produce electricity.[31] Therefore, the production of biogas is a process that is additional and related to the treatment of waste water and sludge.[32] Moreover, the Tribunal understands from the evidence given by Messrs. Hadavi and Gundry that the treatment of waste water and sludge, and the related production of biogas, whether in a municipal, industrial or agricultural context, essentially involves the same processes.[33]

44. In light of the foregoing, the Tribunal is of the view that the production of biogas generally pertains to, or is associated with, the treatment and management of waste water and sludge. The source or origin of the waste water and sludge is without importance, as the processes involved in their treatment and management are the same. The Tribunal is also of the view that the treatment and management of waste water and sludge constitute a particular area of activity and can thus be considered a particular industry.

45. The Tribunal notes that the evidence on the record indicates that goods that are similar to the goods in issue have been, or can be, used in other applications for which they are particularly suited, such as the treatment of drinking water, the prevention of ice in lakes and rivers and other industrial applications.[34] This

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27. Tribunal Exhibit AP-2011-013-03A, tab 1; Tribunal Exhibit AP-2011-013-05A, tab 1; *Transcript of Public Hearing*, 24 November 2011, at 9-10.
28. Tribunal Exhibit AP-2011-013-03A, tab 1. The Tribunal notes that the manufacturer's product literature lists biogas as part of a list of applications related to the handling of waste water and sludge. Tribunal Exhibit AP-2011-013-05A at 60.
29. *Transcript of Public Hearing*, 24 November 2011, at 9-10, 34, 45.
30. *Ibid.* at 29, 53.
31. *Ibid.* at 35-37.
32. *Ibid.* at 61.
33. *Ibid.* at 11, 17, 32, 36-37, 51-53, 62; Tribunal Exhibit AP-2011-013-09A at 3.
34. *Transcript of Public Hearing*, 24 November 2011, at 54, 56-57, 60-61; Tribunal Exhibit AP-2011-013-09A at 4, 6; Tribunal Exhibit AP-2011-013-11A at 54.

would appear to indicate that the goods in issue may be designed for other industries. However, the evidence indicates that the goods in issue, and goods that are similar to the goods in issue, are primarily used in the treatment of waste water and sludge and biogas production.[35] Therefore, the Tribunal remains satisfied that the goods in issue are specifically designed for the treatment and management of waste water and sludge (including related biogas production).

46. In any event, the Tribunal does not interpret the *Explanatory Notes* to heading No. 84.79 as requiring that mixers that are designed for more than one industry be considered for general use. In fact, the *Explanatory Notes* speak of mixers not designed for particular "industries" in the plural form. Furthermore, the French version of those same *Explanatory Notes* speak of mixers ". . . *sans application spécifique*" (i.e. without a specific application). As has been demonstrated above, the goods in issue have certain design features which are intended to allow them to be used in very specific applications. This constitutes strong evidence that they are not intended for general use.

47. Accordingly, the Tribunal is satisfied that the goods in issue are not for general use and are designed for particular industries or have specific applications. The goods in issue are therefore not classifiable in subheading No. 8479.82.

Are the Goods in Issue Classifiable in Subheading No. 8479.10 as Machinery for Public Works, Building or the Like?

48. Subheading No. 8479.10 covers machinery for public works, building or the like. Therefore, in order to be classified in this subheading, the goods in issue must be (1) "machinery" (2) "for public works, building or the like".

"Machinery"

49. The CBSA did not suggest that the goods in issue are not machinery.

50. The *Canadian Oxford Dictionary* defines "machinery" as "**1** machines collectively or in general."[36] It further defines "machine" as "**1** an apparatus using or applying mechanical power, having several parts, each with a definite function which together perform certain kinds of work."[37] On the basis of these definitions, the Tribunal is satisfied that the goods in issue can indeed be considered "machinery".

"Public Works, Building or the Like"

51. The *Merriam-Webster's Collegiate Dictionary* defines the term "public works" as "works (such as schools, highways, docks) constructed for public use or enjoyment esp. when financed and owned by the government."[38] It also defines the term "public utility" as "a business organization (as an electric company) performing a public service and subject to special governmental regulation."[39] Moreover, as noted by KSB, the Ontario *Public Works Protection Act* defines the term "public works" as including any ". . . *water works*, *public utility* or other work owned, operated or carried on by the Government of Ontario or by any board or commission thereof, or by any municipal corporation, public utility commission or by private enterprises" [emphasis added].

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35. *Transcript of Public Hearing*, 24 November 2011, at 11-12, 16, 42, 49-51, 60-61.
36. Second ed., *s.v.* "machinery".
37. *Ibid.*, *s.v.* "machine".
38. Eleventh ed., *s.v.* "public works".
39. *Ibid.*, *s.v.* "public utility".

52. These definitions show that, while a public utility is an organization that performs a public service and is subject to governmental regulation, this does not prevent it from also being considered a public work. In other terms, public utilities and public works are not mutually exclusive.

53. As discussed above, the goods in issue are used, or could be used, for the treatment of municipal drinking water, the treatment and management of municipal and industrial waste water and sludge, the production of biogas and the prevention of ice. The Tribunal is of the view that plants for the treatment of municipal drinking water and for the treatment and management of municipal waste water and sludge (which can include biogas production) can be considered as "public works" within the ordinary meaning of that term. While the goods in issue can also be used for the treatment and management of industrial waste water and sludge, for the production of biogas outside of the municipal sphere (i.e. in the industrial and agricultural context) and for the prevention of ice, the evidence on the record indicates that the goods in issue, and goods similar to the goods in issue, are primarily for the aforementioned "public works" (i.e. for municipal projects).[40]

54. In this regard, the Tribunal agrees with KSB that the terms of subheading No. 8479.10 do not require that machinery be *solely* for public works, building or the like. Had Parliament intended to impose such a restriction on subheading No. 8479.10, it would have done so expressly.[41]

55. The Tribunal further notes that subheading No. 8479.10 covers ". . . public works, building or the *like*" [emphasis added]. The French version of the subheading uses the term ". . . *travaux analogues*" (i.e. analogous works). This clearly indicates that goods which are for things similar to public works may also be covered. The Tribunal is of the view that plants for the treatment and management of industrial waste water and sludge (which can include biogas production) are arguably similar to public works. They accomplish a similar function, they benefit society and the public in general by controlling pollution (i.e. preventing the discharge of contaminants into the environment), and they are likely regulated by various levels of government.

56. As for the CBSA's argument that the goods in issue are not analogous to any of the goods listed in section (II)(A) of the *Explanatory Notes* to heading No. 84.79, the Tribunal notes that this list is not intended to be exhaustive. Furthermore, while such lists may provide an indication of the types of goods that are generally intended to be covered by a heading or subheading, the Tribunal must be mindful of other elements which may indicate that a less strict interpretation is warranted. The CBSA submitted that the goods listed in the *Explanatory Notes* pertain solely to the construction, maintenance and repair of roads and sidewalks. It is clear from the definition cited above that "public works" include more than just roads and sidewalks. Indeed, it would appear unlikely for a subheading that covers public works, building or the like, which is quite broad in scope, to be limited to activities related to roads and sidewalks. Again, had Parliament intended to restrict subheading No. 8479.10 to machinery for roads and sidewalks, it could have done so expressly.

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40. *Transcript of Public Hearing*, 24 November 2011, at 11-12, 42, 49-50.
41. *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT) at para 34; *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT) at 12.

57. Finally, with respect to the U.S. classification ruling submitted by the CBSA in support of its position, the Tribunal notes that it is an administrative ruling drawn from another jurisdiction and that, as such, it does not constitute binding authority in the Canadian context.[42] In any event, the Tribunal examined the ruling but found that it was quite brief, contained very little detail regarding the goods that were the subject of the ruling and gave no indication that an in-depth analysis similar to what has been done in the current appeal was undertaken. As such, the Tribunal did not find the ruling persuasive.

58. On the basis of the foregoing, the Tribunal considers that the goods in issue are "machinery for public works, building or the like" and should therefore be classified in subheading No. 8479.10.[43] As this subheading is not further divided at the tariff item level, the appropriate tariff item is 8479.10.00.

DECISION

59. For the foregoing reasons, the Tribunal concludes that the goods in issue should be classified under tariff item No. 8479.10.00 as machinery for public works, building or the like, as claimed by KSB.

60. The appeal is therefore allowed.

Diane Vincent
Diane Vincent
Presiding Member

42. *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) at para. 42.
43. This effectively confirms that the goods in issue cannot be classified in subheading No. 8479.82, which, at the first-level (i.e. one-dash) subheading, covers "other machines and mechanical appliances". As the goods in issue are machinery for public works, building or the like, they cannot be *other* machines and mechanical appliances.