



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-057

Costco Wholesale Canada Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, September 17, 2013*

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IN THE MATTER OF an appeal heard on August 20, 2013, 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 October 10, 2012, with respect to a request for re-determination 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 dismissed.

Pasquale Michael Saroli
Pasquale Michael Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	August 20, 2013
Tribunal Member:	Pasquale Michael Saroli, Presiding Member
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Costco Wholesale Canada Ltd. (Costco) 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) pursuant to subsection 60(4).

PROCEDURAL HISTORY

2. On or about February 22, 2012, Costco requested an advance ruling under section 43.1 of the *Act*, in respect of Sonoma sun shelters, model No. 172716 (the goods in issue), submitting that they were properly classifiable under tariff item No. 9406.00.90 of the schedule to the *Customs Tariff*² as other prefabricated buildings.

3. On March 14, 2012, the CBSA issued its advance ruling in respect of the goods in issue, determining that they were properly classifiable under tariff item No. 7610.90.90 as other aluminum structures (excluding prefabricated buildings of heading No. 94.06) and parts of structures (for example, bridges and bridge-sections, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, balustrades, pillars and columns).

4. On May 30, 2012, Costco requested a review of the advance ruling under subsection 60(2) of the *Act*.

5. The CBSA issued a decision reaffirming its initial determination that the goods in issue were properly classifiable under tariff item No. 7610.90.90.

6. Costco filed a notice appeal of the CBSA's decision with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Act*.

GOODS IN ISSUE

7. The goods in issue are prefabricated, free-standing and essentially permanent structures designed for on-site assembly. They are designed to offer protection from the sun and rain during outdoor socializing.

8. As presented for importation, the goods in issue consist of an aluminum frame comprised of four columns that form a 10 ft. x 12 ft. rectangle, to the tops of which is affixed a framework of aluminum poles that support polycarbonate roof panels.

9. The goods in issue do not include structural walls; however, textile (olefin/nylon) curtains suspended from upper curtain rods can be drawn to enclose the otherwise open four sides of the assembled sun shelters.³ In addition, they do not come with their own floors and, in this regard, can sit on different surfaces, including concrete or grass.

ANALYSIS

Legal Framework

10. 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)

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

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

3. *Transcript of Public Hearing*, 20 August 2013, at 48-49.

developed by the World Customs Organization (WCO).⁴ 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.

11. 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*⁵ and the *Canadian Rules*⁶ set out in the schedule.

12. 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.

13. 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 Coding System*⁷ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁸ 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.⁹

14. 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* 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.¹⁰

15. 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.¹¹ The final step is to determine the proper tariff item.¹²

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

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

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

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

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

9. 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 the *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 the *Classification Opinions*.

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

11. 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."

12. 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.

Tariff Classification of the Goods in Issue

16. It is well established in law that tariff classification is to be determined on the basis of an examination of the goods in issue, as a whole, as presented at the time of their importation into Canada.¹³ In this respect, the parties agree, and the Tribunal accepts, that the goods in issue are classifiable pursuant to Rule 1 of the *General Rules*.¹⁴

17. Costco contends that the goods in issue are properly classifiable under tariff item No. 9406.00.90 as follows:

Section XX

MISCELLANEOUS MANUFACTURED ARTICLES

Chapter 94

... PREFABRICATED BUILDINGS

...

9406.00 **Prefabricated buildings.**

9406.00.90 - - -Other

18. The CBSA counters that the goods in issue are properly classifiable under tariff item No. 7610.90.90 as follows:

Section XV

BASE METALS AND ARTICLES OF BASE METAL

...

Chapter 76

ALUMINUM AND ARTICLES THEREOF

...

76.10 **Aluminum structures (excluding prefabricated buildings of heading 94.06) and parts of structures (for example, bridges and bridge-sections, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, balustrades, pillars and columns); aluminum plates, rods, profiles, tubes and the like, prepared for use in structures.**

13. See *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366, wherein the Supreme Court of Canada indicated that the time for determining tariff classification was at the time of entry of the goods into Canada. While the Supreme Court of Canada reached its conclusion on the basis of the wording of Canada's customs legislation in 1955, it is the Tribunal's view that the principle set out in that case remains valid today despite various amendments by Parliament to Canada's customs legislation in the intervening years. See, in this regard, *Deputy M.N.R.C.E. v. Ferguson Industries Ltd.*, [1973] S.C.R. 21, wherein the Supreme Court of Canada affirmed its earlier ruling on this point in the above-mentioned case. See, also, *Sealand of the Pacific Ltd. v. Deputy M.N.R.* (11 July 1989), 3042 (CITT); *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21; *Evenflo Canada Inc. v. President of the Canada Border Services Agency* (19 May 2010), AP-2009-049 (CITT) at para. 29; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (29 May 2012), AP-2011-042 (CITT) at para. 29; *Powers Industries Limited v. President of the Canada Border Services Agency* (22 April 2013), AP-2012-010 (CITT) at para. 22.

14. Exhibit AP-2012-057-04 at para. 9; Exhibit AP-2012-057-06A at 19.

7610.90 -Other
 7610.90.90 - - -Other

[Emphasis added]

19. The Tribunal accepts that heading Nos. 76.10 and 94.06 are the only headings of potential relevance to the classification of the goods in issue.

20. The Tribunal notes that Note 1(k) to Section XV (which includes Chapter 76) explicitly excludes prefabricated buildings from the ambit of that section as follows:

1. This Section does not cover:

(k) Articles of Chapter 94 (for example, furniture, mattress supports, lamps and lighting fittings, illuminated signs, *prefabricated buildings*).

[Emphasis added]

21. More directly to the point, heading No. 76.10 explicitly excludes "... prefabricated buildings of heading 94.06". Heading Nos. 94.06 and 76.10 are thereby rendered mutually exclusive, such that the ability to effect *prima facie* classification of the goods in issue in the former precludes their *prima facie* classification in the latter, while the ability to effect *prima facie* classification in the latter presupposes a prior determination that the goods in issue are not *prima facie* classifiable in the former. The Tribunal has previously held that, when there is a single relevant exclusion that precludes the *prima facie* classification of goods in both headings at issue in an appeal, the analysis should begin with the heading to which the exclusionary note does not apply.¹⁵

22. That being the case, the Tribunal considers it appropriate to take, as its analytical point of departure, a consideration of whether the goods in issue are properly classifiable in heading No. 94.06, as submitted by Costco.

23. In this respect, Costco bears the burden of establishing that the CBSA erred in reaffirming its advance ruling that the goods were classifiable in heading No. 76.10 and that they are instead properly classifiable in heading No. 94.06.¹⁶

Are the goods in issue properly classifiable in heading No. 94.06?

24. In discerning the intended meaning of the term "prefabricated buildings" in heading No. 94.06, and for the purposes of the exclusion in heading No. 76.10, it is necessary to consider the relevant legal and *Explanatory Notes*, which form part of the relevant interpretative context.

15. *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-005 (CITT) at paras. 41-74; *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) at paras. 27-28; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) at para. 47.

16. In this regard, paragraph 152(3) of the *Customs Act* provides as follows: "... in any proceeding under this Act, the burden of proof in any question relating to ... (c) the payment of duties on any goods ... lies on the person, other than Her Majesty, who is a party to the proceeding ...". The present appeal is a proceeding under subsection 67(1). Moreover, because duty liability on imported goods depends upon their tariff classification, tariff classification is a question "*relating to*" the payment of duties on goods, within the meaning of paragraph 152(3)(c). With the conditions of paragraph 152(3)(c) having been met, the burden of proof therefore resides with Costco.

25. Note 4 to Chapter 94 provides as follows:

4. For the purposes of heading 94.06, the expression “*prefabricated buildings*” means buildings which are finished in the factory or put up as elements, presented together, to be assembled on site, such as housing or worksite accommodation, offices, schools, shops, sheds, garages or similar buildings.

[Emphasis added]

26. The above list of examples of specific structures that can be prefabricated buildings is replicated in the *Explanatory Notes* to heading No. 94.06, with the addition of greenhouses.¹⁷

27. That the goods in issue are “prefabricated” is not in dispute in these proceedings¹⁸ and is accepted by the Tribunal. The only issue before the Tribunal, upon which the disposition of this appeal ultimately turns, is therefore whether the goods in issue are prefabricated “buildings”.

28. Costco submitted that the term “building” ought to be interpreted broadly, in light of the *Explanatory Notes* to heading No. 94.06 and Note 4 to Chapter 94. In particular, it argued that these notes provide examples of “buildings” and expands the meaning by including the phrase “... or similar buildings.”¹⁹ In its view, the goods in issue fall within the scope of heading No. 94.06 because they are sheds, which are ordinarily defined as “... a slight structure built for shelter or storage; *especially*: a single-storied building with one or more sides unenclosed”.²⁰ In the alternative, Costco submitted that the goods in issue constituted buildings of heading No. 94.06 by virtue of being buildings similar to sheds and greenhouses.²¹

29. Costco relied on the ordinary meaning of the term “building” as “... a usually roofed and walled structure built for permanent use”²² It argued that the goods in issue meet this definition because they are imported with a structural framework and a roof, and designed as a more or less permanent installation.²³

30. On the other hand, the CBSA argued that a structure is not a building simply on the basis that it has a roof and perhaps one or more walls.²⁴ According to the CBSA, goods that are properly classifiable as prefabricated buildings in heading No. 94.06 are of a more substantial and permanent nature than the goods in issue. It submitted that the substantial and permanent nature of prefabricated buildings is supported by Note 4 to Chapter 94 and the *Explanatory Notes* to heading No. 94.06, as well as by dictionary definitions of the terms “prefabricated buildings” and “buildings”.²⁵

17. The *Explanatory Notes* to heading No. 94.06 provide as follows: “This heading covers prefabricated buildings, also known as ‘industrialised buildings’, of all materials. These buildings, which can be designed for a variety of uses, such as housing, worksite accommodation, offices, schools, shops, sheds, garages and greenhouses, are generally presented in the form of: - complete buildings, fully assembled, ready for use; - complete buildings, unassembled; - incomplete buildings, whether or not assembled, having the essential character of prefabricated buildings.”

18. *Transcript of Public Hearing*, 20 August 2013, at 5.

19. *Ibid.* at 17.

20. *Ibid.* at 19-20; Exhibit AP-2012-057-04 at 40.

21. *Transcript of Public Hearing*, 20 August 2013, at 20-21; Exhibit AP-2012-057-04 at 11.

22. *Transcript of Public Hearing*, 20 August 2013, at 22; Exhibit AP-2012-057-04 at 37.

23. *Transcript of Public Hearing*, 20 August 2013, at 22-23.

24. *Ibid.* at 61, 69-70.

25. *Ibid.* at 58-62, 67; Exhibit AP-2012-057-06B at 88, 93, 96, 99.

31. In the Tribunal's view, Note 4 to Chapter 94, while informative as to the meaning of the adjective "prefabricated" in relation to buildings, sheds little light on the meaning of the term "building" itself. The lead-in phrase "... 'prefabricated buildings' means buildings ..." implies a prior determination that the structures are indeed buildings, with the ensuing explanation describing what constitutes prefabricated versions of same. The references to housing, worksite accommodation, offices, schools, shops, sheds and garages are, in the Tribunal's view, merely examples of some of the forms that specific prefabricated structures, which have already been determined to be buildings, might take. However, this is not to say that a structure that is functionally similar to one of the buildings specifically listed in Note 4 is, *ipso facto*, a "building", given the requirement for a prior determination that the structure be in fact a building. On this point, the Tribunal agrees with the CBSA's following argument:

[The] listing of sheds and greenhouses isn't saying that all sheds and greenhouses fall under this category ... not everything that might be called a shed is a building for the purposes of 94.06.²⁶

32. Indeed, to suggest otherwise could lead to counterintuitive, if not absurd, results, given the uncontested fact that structures that are intended to function as sheds or greenhouses, for example, can range from rudimentary to advanced constructions. For instance, and as submitted by the CBSA, a basic bicycle shelter, which consists of two poles with a roof and a bar to which bicycles can be locked up, might be called a "shed" but it clearly would not constitute a building for the purposes of heading No. 94.06.²⁷ Similarly, tents of synthetic fibres classified in heading No. 63.06 are described in the *Explanatory Notes* to that heading as having a roof and walls; however, they are not buildings.²⁸

33. In short, the Tribunal is of the view that, while, for the purposes of heading No. 94.06, all buildings are structures, not all structures are buildings; a view that is shared by the parties.²⁹

34. Recognition of the fact that the kinds of buildings that can be prefabricated extend beyond those specifically listed in Note 4 to Chapter 94 is denoted by the words "such as", which immediately precedes the list. In this regard, and consistent with the focus of note 4, which is on the definition of "prefabricated buildings", it is the Tribunal's view that the basket phrase "... or similar buildings" at the end of the list refers to all other buildings which—like the building structures specifically listed in Note 4—are amenable to industrialized prefabrication (i.e. to being finished in a factory or put up as elements, presented together, to be assembled on site). The similarity is not based on subjective determinations of commonality of utilitarian or functional purpose.

35. The Tribunal considers that the *Explanatory Notes* to heading No. 94.06 provide useful contextual guidance for discerning the difference between a prefabricated "building" on the one hand, and a prefabricated "structure" on the other.³⁰ That the buildings contemplated by heading No. 94.06 are more complex constructions than the structures referred to in heading No. 76.10 becomes evident from a consideration of the elements, equipment and assembly materials commonly associated with the former. The *Explanatory Notes* to heading No. 94.06 provide as follows:

26. *Transcript of Public Hearing*, 20 August 2013, at 69, 70.

27. *Ibid.* at 70, 91.

28. Exhibit AP-2012-057-06A at 16.

29. *Transcript of Public Hearing*, 20 August 2013, at 36, 59.

30. The Federal Court of Appeal, in *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), indicated, at para. 13, that "... the Explanatory Notes are intended by Parliament to be an interpretive guide to tariff classification in Canada and must be considered within that context."

In the case of buildings presented unassembled, the necessary elements may be presented partially assembled (for example, *walls, trusses*) or cut to size (*beams, joists*, in particular) or, in some cases, in indeterminate or random lengths for cutting on the site (*sills, insulation*, etc.).

The buildings of this heading may or may not be equipped. However, only built-in equipment normally supplied is to be classified with the buildings. This includes *electrical fittings* (wiring, sockets, switches, circuit-breakers, bells, etc.), *heating and air conditioning equipment* (boilers, radiators, air conditioners, etc.), *sanitary equipment* (baths, showers, water heaters, etc.), *kitchen equipment* (sinks, hoods, cookers, etc.) and items of *furniture which are built in or designed to be built in* (cupboards, etc.).

Material for the assembly or finishing of prefabricated buildings (e.g., *nails, glues, plaster, mortar, electric wire and cables, tubes and pipes, paints, wallpaper, carpeting*) is to be classified with the buildings, **provided** it is presented therewith in appropriate quantities.

[Emphasis added]

36. Interestingly, in a U.S. customs ruling³¹ involving the tariff classification of greenhouses from the People's Republic of China, the U.S. customs authorities, in assessing the purport of the above *Explanatory Notes* in relation to the intended meaning of the term “building” for the purposes of heading No. 94.06, arrived at essentially the same conclusion, stating as follows:³²

Although the [Explanatory Notes] do list “greenhouses” as a use for which a prefabricated building can be designed, the article must meet the requirements for a prefabricated building before classification under heading 9406, HTSUSA, is possible.

First, the article must be a “building”. The term itself connotes something more substantial and permanent than the subject merchandise. . . . The [Explanatory Notes] shed light upon the type of structure intended to be covered by heading 9406, HTSUSA. . . . The [Explanatory Notes] address substantial articles. . . . [T]he subject merchandise is distinguishable from the types of structures described in the [Explanatory Notes] to heading 9406, HTSUSA. The exemplars of heading 9406, HTSUSA, are permanent, substantial, and long lasting structures. They do not include lesser structures such as the instant metal pole framework with a textile cover.

[Emphasis added]

37. Although the Tribunal is not bound by U.S. customs rulings, it agrees with the above application of the Notes to Chapter 94 and the *Explanatory Notes* to heading No. 94.06 to the interpretation of the term “building” for the purposes of that heading.

38. That the buildings contemplated by heading No. 94.06 are more complex constructions than the structures envisaged in heading No. 76.10 is also consistent with definitions of the term “building” found in generally recognized sources. In particular, the definition of “building” in *Webster's Third New International Dictionary*³³ includes the following:

. . . a constructed edifice designed to stand more or less permanently, covering a space of land usu. covered by a roof and more or less completely enclosed by walls

[Emphasis added]

31. (28 September 2001), HQ 964230 (USCS); Exhibit AP-2012-057-06B, tab 22.

32. Exhibit AP-2012-057-06B at 114-15.

33. S.v. “building”.

39. The *Oxford Dictionary of Construction, Surveying & Civil Engineering*³⁴ defines “prefabricated building” as follows:

Structure with components that have been manufactured in a factory, delivered to site, and assembled. The building may be delivered in flat-pack form with panels lifted up and bolted together, or produced in full volumetric modules *that have walls, roofs, and floors*³⁵

[Emphasis added]

40. By contrast:

- the goods in issue are free-standing structures³⁶ that do not come with floors,³⁷ but rather sit on an existing surface, such as grass, a wooden deck or a concrete patio;
- the goods in issue do not have walls;³⁸
- the goods in issue do not require any assembly/finishing materials or include any equipment, of the kind described in the *Explanatory Notes* to heading No. 94.06; and
- while the record indicates that the goods in issue are designed for more or less permanent installation,³⁹ the fact that they are designed to allow for relative ease of assembly by laypersons without the need for special skills⁴⁰ suggests that, unlike “buildings” (which are characteristically immovable constructions⁴¹), the goods in issue can be readily dismantled for re-assembly at an alternative location (e.g. as part of a backyard re-landscaping project).

41. On the basis of the foregoing analysis, the Tribunal finds that the goods in issue are not properly classifiable in heading No. 94.06 as prefabricated buildings.

Are the goods in issue properly classifiable in heading No. 76.10?

42. The *Explanatory Notes* to heading No. 76.10 state that the provisions of the *Explanatory Notes* to heading No. 73.08 apply, *mutatis mutandis*, to heading No. 76.10. In this context, the Tribunal observes that

34. 2012, s.v. “prefabricated building”.

35. Exhibit AP-2012-057-06B at 88-89.

36. Exhibit AP-2012-057-04 at 16; Exhibit AP-2012-057-06B at 3, 7-12; *Transcript of Public Hearing*, 20 August 2013, at 53-54.

37. Exhibit AP-2012-057-04 at 16; Exhibit AP-2012-057-06B at 3, 7-12.

38. In this respect, the definition of “wall” includes the following: “2: a vertical architectural member used to define and divide space . . . esp: one of the sides of a room or building that connects the floor and ceiling or foundation and roof . . .”, *Webster’s Third International Dictionary*, s.v. “wall”. While the exterior curtains can be drawn to enclose each of the otherwise open sides of the goods in issue, they are not architectural “members” in the sense of architecturally being the following: “4: a constituent part of a whole : as . . . d (2) : an essential part of a framed structure . . .”, *Webster’s Third International Dictionary*, s.v. “member”. Indeed, rather than being integral to the structure of the goods in issue, the curtains, which are suspended from upper rods, represent a dead weight load on the aluminum framework of the goods in issue, as acknowledged by Costco. See *Transcript of Public Hearing*, 20 August 2013, at 48.

39. Exhibit AP-2012-057-06B at 13.

40. *Ibid.* at 5-12.

41. For example, the *McGraw-Hill Dictionary of Scientific and Technical Terms*, 6th ed., defines the word “building” as follows: “. . . a *permanent fixed thing* built for occupation, as a house, school, factory, stable, church, etc.” (emphasis added). See Exhibit AP-2012-057-06B at 93. While not determinative, the Tribunal notes, by way of aside, that, in the *Civil Code of Québec*, LRQ, c. C-1991, at sections 899, 900, a building is considered an immovable good as contrasted with a movable good.

two headings are identical but for the fact that the former refers to aluminum structures whereas the latter refers to those of iron and steel.⁴²

43. The relevant *Explanatory Notes* to heading No. 73.08 provide that the goods of that heading “... are usually made up from bars, rods, tubes, angles, shapes, sections, sheets, plates, wide flats including so-called universal plates, hoop, strip, forgings or castings, by riveting, bolting, welding, etc.” The Tribunal finds that this is also characteristic of the goods in issue, which are made up of aluminum columns, poles, bars and angles that are fastened together using screws, nuts and nails.⁴³

44. The *Explanatory Notes* to heading No. 73.08 further state that structures under that heading “... sometimes incorporate products of other headings such as panels of woven wire or expanded metal of heading 73.14.” In this regard, the goods in issue incorporate products of other headings, including a polycarbonate roof and textile (olefin/nylon) curtains.⁴⁴

45. Finally, the *Explanatory Notes* to heading No. 73.08 indicate that the structures under that heading “... are characterised by the fact that once they are put in position, they generally remain in that position.” In the Tribunal’s view, this describes the goods in issue because the assembled structure, including the roof, usually remains in the same position and location year-round, aside from the curtains, which can be removed for cleaning or during the winter.⁴⁵

46. The Tribunal notes that the marketing literature for the goods in issue also supports their description as aluminum structures. For instance, Costco’s Web site refers to the Sonoma sun shelter as a “Rust Free Aluminum Structure”.⁴⁶

47. The record indicates that sun shelters that appear to be essentially identical to the goods in issue are marketed as “gazebos”.⁴⁷ In this respect, the Tribunal, in *Rona Corporation Inc. v. President of the Canada Border Services Agency*,⁴⁸ determined that certain gazebos comprised mainly of a steel frame and parts, with a synthetic fabric roof and sides, were properly classified in heading No. 73.08 as “... structures (excluding prefabricated buildings of heading 94.06) ... of iron or steel”.⁴⁹ In so finding, the Tribunal stated that “... the term ‘structure’ is a general term which encompasses goods such as gazebos”, noting that its finding was consistent with the following dictionary definition of “gazebo”: “... a small structure in a garden, park, etc., usually open or with screens on all sides to give a wide view.”⁵⁰

48. Costco submitted that the decision in *Rona Corporation* was not relevant to the present appeal because the issue of tariff classification in that case involved different headings—namely, heading No. 63.06 and heading No. 73.08. The Tribunal does not find that assertion to be compelling and notes that it is the Tribunal’s responsibility, in an appeal concerning tariff classification, to ensure that the goods are

42. Also of note in this regard is the following related statement in the *Explanatory Notes* to heading No. 76.10: “In view of their lightness, aluminium and its alloys are sometimes used instead of iron or steel in the manufacture of structural frameworks ...”

43. Exhibit AP-2012-057-06B at 7-9.

44. Exhibit AP-2012-057-04 at 17; Exhibit AP-2012-057-06B at 7-9.

45. Exhibit AP-2012-057-04 at 17; Exhibit AP-2012-057-06B at 7-9; *Transcript of Public Hearing*, 20 August 2013, at 48-49.

46. Exhibit AP-2012-057-06B at 4.

47. *Ibid.* at 83.

48. (29 February 2008), AP-2006-033 (CITT) [*Rona Corporation*].

49. *Ibid.* at para. 2.

50. *Ibid.* at para. 38.

properly classified, with the Tribunal not being constrained by the tariff headings proposed by the parties and with the entire nomenclature being in play. Given the apparent basic similarities between the goods in *Rona Corporation* and the goods in issue,⁵¹ and given that the *Explanatory Notes* to heading No. 73.08 apply, *mutatis mutandis*, to heading No. 76.10, the Tribunal considers its decision in *Rona Corporation* to be of relevance in the present circumstances.

49. In a similar vein, the European Community authorities ruled that a steel-framed octagonal gazebo was properly classified in heading No. 73.08.⁵² The gazebo in that case was described as including “. . . a hardtop enclosed steel roof, with open sides, comprising of eight steel pillars” with no floor.⁵³ While also not binding on the Tribunal, this ruling is nonetheless persuasive.

50. On the basis of the foregoing analysis, the Tribunal finds that the goods in issue are properly classifiable in heading No. 76.10 and, more specifically, in tariff item No. 7610.90.90, as other aluminum structures.

CONCLUSION

51. The appeal is dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

51. Despite minor differences between the goods in issue and the goods in *Rona Corporation*, both are similar outdoor structures that provide shelter from the sun and rain. In *Rona Corporation*, the Tribunal also found that, although the roof and curtains were designed to be removed on a seasonal basis, the structural framework of the gazebos generally remained in place once it was put in position (para. 37), much like the structural framework of the goods in issue.

52. European Commission, European Binding Tariff Information (EBTI) Reference GB121764585 (23 May 2012).

53. Exhibit AP-2012-057-06B at 100; *Transcript of Public Hearing*, 20 August 2013, at 87.