



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-006

Komatsu International (Canada)
Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, April 10, 2012*

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DECISION 19

IN THE MATTER OF an appeal heard on February 14, 2012, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated February 11, 2010, with respect to a request for re-determination pursuant to section 60(4) of the *Customs Act*.

BETWEEN

KOMATSU INTERNATIONAL (CANADA) INC.

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: February 14, 2012
Tribunal Member: Pasquale Michael Saroli, Presiding Member
Counsel for the Tribunal: Nick Covelli
Manager, Registrar Programs and Services: Michel Parent
Registrar Officer: Cheryl Unitt

PARTICIPANTS:**Appellant**

Komatsu International (Canada) Inc.

Counsel/RepresentativesCurtis R. Stewart
Lisa Handfield
Lisa Zajko**Respondent**

President of the Canada Border Services Agency

Counsel/Representative

Maude Breton-Voyer

WITNESSES:Ronald W. Thring
Professor
Department of Environmental Science and Engineering
University of Northern British ColumbiaAlain Chayer
Global Procurement Manager
Komatsu America Corp.John Palmer Clarkson
President
HosePower USAAllan Granville
Senior Chemist
Laboratory and Scientific Services Directorate
Canada Border Services Agency

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. This is an appeal filed by Komatsu International (Canada) Inc. (Komatsu) 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) pursuant to subsection 60(4).

2. The issue in this appeal is whether rubber hydraulic hose assemblies (the goods in issue) are properly classified in heading No. 40.09 of the schedule to the *Customs Tariff*² as hoses of vulcanized rubber other than hard rubber, with or without fittings, as determined by the CBSA, or should be classified in heading No. 84.12 as other engines and motors or, in the alternative, in heading No. 84.31 as parts suitable for use solely or principally with the machinery of heading Nos. 84.25 to 84.30, as claimed by Komatsu.

PROCEDURAL HISTORY

3. The decision under appeal was made in relation to a single import transaction dated May 4, 2004. The goods in issue were classified under tariff item No. 4009.42.90.

4. On April 23, 2009, Komatsu claimed a refund under subsection 74(1) of the *Act*, requesting that the goods in issue be reclassified under tariff item No. 8412.90.00. This request and further requests were denied, culminating in the CBSA's re-determination dated February 11, 2010, made pursuant to subsection 60(4) that the goods in issue were properly classified under tariff item No. 4009.42.90. Komatsu filed its appeal with the Tribunal on May 10, 2010.

5. Komatsu's brief was originally due on July 9, 2010. However, with leave of the Tribunal, Komatsu submitted its brief on August 9, 2010.

6. The CBSA filed its brief on October 5, 2010. On October 25, 2010, Komatsu sought to amend its brief to add tariff item No. 9953.00.00 as a further alternative for the classification of the goods in issue. On November 8, 2010, in order to allow the CBSA a fair opportunity to respond to this amendment, the Tribunal postponed the hearing from December 9, 2010, to January 13, 2011.

7. On December 7, 2010, the CBSA asked that the appeal be held in abeyance until the final disposition of *Wolseley Engineered Pipe Group v. Canada Border Services Agency*³ by the Federal Court of Appeal. This case concerned tariff item No. 9953.00.00. Komatsu did not object to this request, and the Tribunal postponed the hearing indefinitely.

8. On April 15, 2011, the Federal Court of Appeal set aside the classification under tariff item No. 9953.00.00 in *Wolseley*. On May 2, 2011, Komatsu informed the Tribunal that it wished to proceed with its appeal, but dropped its claim relating to tariff item No. 9953.00.00. The Tribunal rescheduled the hearing for September 6, 2011.

9. On July 28, 2011, the CBSA requested an extension of time to file expert reports. This request followed requests from the CBSA to Komatsu between July 2010 and July 2011 for samples of the goods in

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

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

3. 2011 FCA 138 (CanLII) [*Wolseley*].

issue, copies of which were only filed with the Tribunal on July 19, 2011, and not served on the CBSA until July 28, 2011. The Tribunal granted the request on August 2, 2011.

10. On September 2, 2011, the CBSA informed the Tribunal of the sudden death of its expert witness. Considering the unusual circumstances, the Tribunal granted the CBSA an extension of time to find another expert. In addition, the Tribunal postponed the hearing again, this time to December 8, 2011.

11. On November 14, 2011, however, Komatsu requested a further postponement. Its counsel had become ill, and a new counsel had been appointed. To ensure the new counsel had sufficient time to prepare for the hearing, the Tribunal postponed the hearing for the fourth time to February 14, 2012.

12. On January 25, 2012, the CBSA filed an expert report by Mr. Allan Granville of the CBSA's Laboratory and Scientific Services Directorate with supporting reference material. Mr. Granville is an expert in the analysis of polymer and rubber products. On January 30, 2012, Komatsu filed the expert reports of Dr. Ronald W. Thring, professor at the Department of Environmental Science and Engineering of the University of Northern British Columbia, and Mr. John Palmer Clarkson, President of HosePower USA. Dr. Thring is an expert in polymer characterization and processing. Mr. Clarkson's area of expertise is the design, manufacture, assembly and sale of hydraulic hose assemblies.

13. On February 7, 2012, the CBSA filed a notice of motion pursuant to rules 23.1 and 24 of the *Canadian International Trade Tribunal Rules*⁴ to strike portions of Mr. Clarkson's expert report. The Tribunal disposed of this matter at the outset of the hearing, as described in the following section of these reasons.

14. Four days before the hearing, Komatsu informed the Tribunal that it also wished to call a lay witness, Mr. Alain Chayer, Komatsu's global procurement manager. Komatsu had not previously identified Mr. Chayer as a witness. In the interest of a full examination of the factual issues in the appeal, the Tribunal allowed Mr. Chayer to testify.

15. The hearing was held in Ottawa, Ontario, on February 14, 2012.

PRELIMINARY MATTER

16. The CBSA's notice of motion⁵ of February 7, 2012, sought an order:

- striking paragraphs 2, 3, 4, 5 and 6 of Mr. Clarkson's expert report⁶ and all the material to which these paragraphs refer;
- directing that none of the alleged offending paragraphs, or exhibits and reference material mentioned therein, be referred to during the hearing or in argument; and
- for such other relief as the Tribunal considered just and equitable in the circumstances, including an order to disregard the expert report in its entirety.

4. S.O.R./91/499.

5. Tribunal Exhibit AP-2010-006-47A.

6. Tribunal Exhibit AP-2010-006-42B.

17. By way of grounds, the CBSA claimed that these paragraphs provided interpretations of terms and expressions used in the *Customs Tariff* and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁷ relevant to the present case,⁸ which fell outside Mr. Clarkson's area of expertise⁹ and which only the Tribunal was competent to address in establishing the tariff classification of the goods in issue.¹⁰

18. In reply submissions dated February 9, 2012,¹¹ Komatsu argued, among other things, that "... in determining whether the Clarkson report contains 'allegations and opinions on the interpretation to be given on the relevant provisions' one must examine not only the 'questions' in the Clarkson Report but the evidence which Mr. Clarkson proposes to tender"¹². Komatsu further submitted that, by removing the question in each of the paragraphs, "... the Tribunal is left with Mr. Clarkson's opinion on the hydraulic hoses and their assembly and their use in the front-end loaders ..."¹³ In short, Komatsu claimed that "[t]he Clarkson Report provides this Tribunal with Mr. Clarkson's technical knowledge and expertise of hydraulic hose assemblies and their characteristics as well as their application and use in front-end loaders",¹⁴ with such information being logically relevant and of assistance to the Tribunal, as trier of fact.

19. The Tribunal agrees in large part with Komatsu's observations and, in particular, with the view that striking any offending questions themselves would not compromise the substance of the responses, as they pertain to the technical characteristics of hydraulic hose assemblies, with this evidence being probative of the issues before the Tribunal.

20. Having carefully reviewed the matter and considered the views of both parties, the Tribunal, in its disposition of the motion at the outset of the hearing on February 14, 2012, ordered as follows:¹⁵

(a) With respect to paragraph 2:

given that the Tribunal, in deciding whether the goods are properly classifiable in heading No. 40.09, must determine, pursuant to the *Explanatory Notes* to that heading, whether the goods in issue "... retain the essential character of piping or tubing":

- the question "Do hose assemblies retain the essential character of tubing or piping?" will be stricken from the paragraph, as it invites a factual conclusion within the exclusive purview of the Tribunal in establishing the proper tariff classification of the goods in issue;
- the introductory word "No" will be stricken from the response to that question, as it expresses a direct conclusion to the question;
- the remainder of the paragraph, however, being essentially a technical description of the differences between hydraulic hoses, on the one hand, and tubing and piping, on the other, is factually relevant and probative and therefore remains unaffected.

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

8. Tribunal Exhibit AP-2010-006-47A at para. 5.

9. *Ibid.* at paras. 9, 11.

10. *Ibid.* at para. 8.

11. Tribunal Exhibit AP-2010-006-51A.

12. *Ibid.* at para. 10.

13. *Ibid.* at para. 11.

14. *Ibid.* at para. 14.

15. *Transcript of Public Hearing*, 14 February 2012, at 9-12.

(b) With respect to paragraph 4:

given that classification pursuant to note 4 to Section XVI is dependent, among other things, on a determination that the “. . . separate components contribute together to a clearly defined function covered by one of the headings in [Chapter] 84 or Chapter 85”:

- that portion of the question “Does the hose [assembly] in question contribute to a clearly defined function of the hydraulic system?” will be stricken from the paragraph, as it invites a factual conclusion within the exclusive purview of the Tribunal in establishing the proper tariff classification of the goods in issue;
- the introductory word “Yes” will be stricken from the response to that question, as it expresses a direct conclusion to the question;
- the remainder of the paragraph, however, being essentially a technical explanation of the role of hydraulic hoses in hydraulic systems, is factually relevant and probative and therefore remains unaffected.

(c) With respect to paragraph 5:

given that classification in heading No. 84.31 is dependent, among other things, on the Tribunal’s determination that the goods in issue are “[p]arts suitable for use solely or principally with the machinery of headings 84.25 to 84.30”:

- the question “Is the hose assembly in question a part suitable for use solely with or principally with the front end loaders?” will be stricken from the paragraph, as it invites a factual conclusion within the exclusive purview of the Tribunal in establishing the proper tariff classification of the goods in issue;
- the introductory word “Yes” will be stricken from the response to that question, as it expresses a direct conclusion to the question;
- the remainder of the paragraph, however, being essentially a technical description of the physical features and attributes of the goods in issue, is factually relevant and probative and therefore remains unaffected.

(d) With respect to paragraph 6:

given that the question posed in this paragraph bears directly on the issue of whether the goods in issue are properly classified in heading No. 40.09:

- the question “Is the hose assembly in question simply a hose of vulcanized rubber?” will be stricken from the paragraph, as it invites a factual conclusion within the exclusive purview of the Tribunal in establishing the proper tariff classification of the goods in issue;
- the introductory word “No” will be stricken from the response to that question, as it expresses a direct conclusion to the question;
- the remainder of the paragraph, however, being essentially a factual explanation of the manufacturing process for hydraulic hoses, remains unaffected.

(e) With respect to paragraph 3 and related tab 3:

- they are not affected by the Tribunal’s order, as they relate to legitimate factual issues concerning the role of hydraulic hoses in the hydraulic systems of front-end loaders, with such information being both relevant and probative.

21. Finally, the Tribunal ordered that counsel refrain from referring to the struck-out questions both in the examination of Mr. Clarkson and in closing argument.

GOODS IN ISSUE

22. It is well established in Canadian customs law that the tariff classification of goods is to be determined at the time of their entry into Canada, on the basis of an examination of the goods as a whole in the manner in which they were presented at the time of their importation.¹⁶

23. The goods in issue, as presented at the time of their importation, are rubber hydraulic hose assemblies.¹⁷ These hydraulic hose assemblies¹⁸ include customized fittings manufactured to Komatsu's specifications¹⁹ and are specifically committed by design for attachment to other components of the hydraulic systems of front-end wheel loaders, which Komatsu manufactures.²⁰

STATUTORY FRAMEWORK

24. In appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the tariff classification of goods in accordance with prescribed interpretative rules.

25. 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.²¹ 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

16. 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 is 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 also *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, and *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21.

17. Specifically, the hose assemblies consist of three to five main layers of vulcanized rubber, including a high resistance inner hose reinforced with wire braids or spiral wires, which transports a pressurized fluid through to the hydraulic cylinder, and a protective rubber outer cover to prolong the service life of the hose assembly. Tribunal Exhibits AP-2010-006-07A at para. 7 and AP-2010-006-10A at paras. 2, 3.

18. The Tribunal accepts the definition of "hydraulic hose assembly" provided in the expert report of Mr. Clarkson, i.e. "... a specific high pressure hydraulic hose with specific couplings permanently attached." Tribunal Exhibit AP-2010-006-42B at para. 1.

19. The Tribunal accepts Komatsu's uncontested claim that the fittings are specially grooved and engineered to its specifications for later assembly into the hydraulic systems of front-end loaders that it manufactures. Tribunal Exhibit AP-2010-006-07A at para. 5. In this regard, the Tribunal notes that this claim is supported by the expert report of Mr. Clarkson, which states the following: "Each hydraulic hose assembly has been specifically manufactured for an exact application. They are not interchangeable. Each part number has a specific length, a specific inside dimension, a specific outside dimension, a specific working pressure, a specific bend radius, a designed end coupling for each end and orientation which is designed solely for the specific front end loader model. This hose assembly is worthless except in this exact application." Tribunal Exhibit AP-2010-006-42B at para. 5.

20. Tribunal Exhibit AP-2010-006-07A at para. 14 and Appendix 2.

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

items. Sections and chapters may include notes concerning their interpretation. 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.

26. 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^[22] and the Canadian Rules^[23] set out in the schedule.”

27. 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.²⁴ 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.”

28. 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^[25] and the [*Explanatory Notes*], 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.²⁶

29. 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.

ANALYSIS

30. The competing tariff headings in this appeal are the following:

- 40.09 Tubes, pipes and hoses, of vulcanized rubber other than hard rubber, with or without their fittings (for example, joints, elbows, flanges).**
- 84.12 Other engines and motors.**
- 84.31 Parts suitable for use solely or principally with the machinery of headings 84.25 to 84.30.**

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

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

24. 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).

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

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

31. Specifically, the CBSA determined that the goods in issue are properly classified under tariff item No. 4009.42.90 as other tubes, pipes and hoses, of vulcanized rubber other than hard rubber, reinforced or otherwise combined with other materials, with fittings, while Komatsu claimed that they should be classified under tariff item No. 8412.21.00 as linear acting cylinders of hydraulic power engines and motors, under tariff item No. 8412.90.00 as parts of other engines and motors, i.e. of hydraulic systems, or under tariff item No. 8431.49.00 as other parts suitable for use solely or principally with the machinery of heading Nos. 84.25 to 84.30, i.e. with wheel loaders.

Are the Goods in Issue Classifiable in Heading No. 40.09?

32. As already indicated, heading No. 40.09 covers “[t]ubes, pipes and hoses, of vulcanized rubber other than hard rubber, with or without their fittings (for example, joints, elbows, flanges).”

33. The *Explanatory Notes* to heading No. 40.09 clarify that the coverage of the heading extends to hoses consisting wholly of vulcanized rubber other than hard rubber and to certain reinforced vulcanized rubber hoses and provide as follows:

This heading covers tubes, pipes and *hoses consisting wholly of vulcanised rubber (other than hard rubber)*, and vulcanised rubber tubes, pipes and hoses (including hose-piping) reinforced by stratification, consisting, *for example*, of one or more “plies” of textile fabric or one or more layers of parallelised textile threads, or *metal threads, embedded in the rubber*. Such tubes, pipes and hoses may also be covered with a sheath of thin fabric or with gimped or plaited textile yarns; they *may also incorporate an internal or external spiral of wire*.

[Emphasis added]

34. The *Explanatory Notes* to heading No. 40.09 go on to explain that such hoses remain classified in heading No. 40.09 even if presented with fittings, provided they retain their “essential character” as such, and provide as follows:

Tubes, pipes and hoses remain classified in this heading even if presented with fittings (for example, joints, elbows, flanges), *provided. . . they retain the essential character of piping or tubing*.

[Emphasis added]

35. Komatsu conceded that the general description of the goods in issue falls within the *Explanatory Notes* to heading No. 40.09, but submitted that, because the goods in issue were specifically designed to be an integral part of hydraulic systems, they did not retain their essential character as piping or tubing.²⁷

36. In the absence of a statutory definition of “hoses” in the *Customs Tariff*, it is appropriate to consider dictionary definitions of this term. In this regard, a “hose” is defined in the *Merriam-Webster OnLine Dictionary* as “a flexible tube for conveying fluids . . .”,²⁸ in *The Oxford English Dictionary* as “[a] flexible tube or pipe for the conveyance of water or other liquid to a place where it is wanted”²⁹ and in the *Canadian Dictionary of the English Language* as “[a] flexible tube for conveying liquids or gases under pressure.”³⁰ Indeed, Komatsu does not dispute that the purpose of the goods in issue is precisely to transport a pressurized fluid through to the hydraulic cylinder.³¹ The Tribunal is therefore satisfied that the goods in issue fall within generally accepted definitions of “hose”.

27. Tribunal Exhibit AP-2010-006-07A at para. 25.

28. Tribunal Exhibit AP-2010-006-10A, tab 5 at 35.

29. Second ed., s.v. “hose”.

30. Tribunal Exhibit AP-2010-006-10A, tab 5 at 37.

31. Tribunal Exhibit AP-2010-006-07A at para. 7.

37. The fact that the goods in issue were committed by design for eventual incorporation into hydraulic systems as an integral component thereof did not deprive them of their essential character as hoses of vulcanized rubber with fittings, classifiable in heading No. 40.09, at the time of their entry into Canada. Indeed, that it was the ability of the goods in issue to convey pressurized fluid, and not their commitment by design for specific use in hydraulic systems, that conferred upon them their essential character as “hoses” derives from the fact that this ability is a *sine qua non* to their ability to perform their specific function as hydraulic hoses within the hydraulic systems³² of which they would eventually form part.³³ In this regard, the Tribunal does not accept Komatsu’s contention that the goods in issue did not retain the essential character of goods of heading No. 40.09 “. . . since the hoses at issue are formed into assemblies of custom lengths and/or shapes with fittings, for specific use committed by design to [Komatsu’s] specifications solely for use in hydraulic systems of loaders”³⁴ These specific design features are clearly secondary to the ability of the goods in issue to convey pressurized fluid between the different components of the hydraulic system³⁵ in the first place. That being the case, they do not impart to the goods in issue their essential character, which remains that of a rubber hose.³⁶

38. Heading No. 40.09, by its own terms and consistent with both note 2(d) to Chapter 40³⁷ and the *Explanatory Notes* Chapter 40,³⁸ excludes hoses of hard rubber from its ambit.

32. Komatsu does not contest this point and indeed explains that “[t]he pressurized fluid is routed through the hose assemblies to a hydraulic cylinder or actuator where the piston of the cylinder relies on the pressurized fluid to perform linear work and motion” Tribunal Exhibit AP-2010-006-07A at para. 8. The Tribunal found the following explanation provided by Mr. Clarkson in his expert report, on the role of hydraulic hoses, especially persuasive: “Hydraulic hoses connect the high pressure pump to the cylinders. Without these ‘arteries’ that connect components, the hydraulic system would not operate. . . . *Hydraulic hoses provide the means to move high pressure hydraulic fluid between the different components*” [emphasis added]. Tribunal Exhibit AP-2010-006-42B at paras. 3, 4.

33. The Tribunal accepts the CBSA’s contention that nothing in the description in heading No. 40.09 limits its coverage to “general use goods”. Indeed, a review of the specific tariff items falling under that heading confirms that the heading also covers tubes, pipes and hoses used for specific purposes (e.g. tariff item No. 4009.22.10, “For use in the manufacture of hose assemblies for brake and steering systems for motorcycles or all-terrain vehicles”). Accordingly, the Tribunal is of the view that nothing in the terms of heading No. 40.09, as provided by the *Explanatory Notes* thereto, would indicate that the goods in issue would be excluded from classification in that heading by virtue only of the fact that they were specifically designed to work in hydraulic systems.

34. Tribunal Exhibit AP-2010-006-07A at para. 26.

35. In this regard, Mr. Clarkson describes hydraulic hoses as “arteries” that “. . . provide the means to move high pressure hydraulic fluid between the different components [of the hydraulic system].” Tribunal Exhibit AP-2010-006-42B at paras 3, 4.

36. In a somewhat analogous situation, the U.S. customs authorities, in deciding whether windshield wiper tube assemblies were classifiable under HTUS 4009.50.00, which covered other tubes, pipes and hoses of vulcanized rubber other than hard rubber, or under HTUS 8424.90.90, which covered mechanical appliances for projecting, dispersing or spraying liquids or powders and other parts thereof, determined, in Ruling HQ 964214 of September 13, 2001, the following: “There is no question that *the windshield wiper tube assemblies convey wiper fluid from the reservoir to the windshield*. We find that *the rubber tubes perform this function, thereby ‘retaining the essential character of piping or tubing’ The fittings perform a connective function that is ancillary to that of the rubber tubes*” [emphasis added]. Tribunal Exhibit AP-2010-006-10A at 102.

37. Note 2(d) to Chapter 40 provides as follows: “This Chapter does not cover: . . . (d) Mechanical or electrical appliances or parts thereof of Section XVI (including electrical goods of all kinds), *of hard rubber*” [emphasis added].

38. The *Explanatory Notes* Chapter 40 provide as follows: “The general arrangement of the headings is as follows: . . . (e) *Headings 40.07 to 40.16* cover semi-manufactures and articles of vulcanised rubber *other than hard rubber*” [emphasis added].

39. Dr. Thring indicated the following in his expert report: “I am unaware of any clear, distinct definition that is universally accepted of what constitutes a ‘hard rubber’.”³⁹ Indeed, there appears to be some divergence of views, in particular, on the issue of sulphur content. In this regard, for example, *Hawley’s Condensed Chemical Dictionary* defines “hard rubber” as “[a] rubber compounded with 30-50% by weight of sulfur”⁴⁰ The *Dictionary of Rubber*, in distinguishing hard rubber from soft rubber, states that hard rubber “. . . has a sulphur content of 25-47%, whereas soft rubber has a max. of 5%.”⁴¹ Dr. Thring (citing the Collins English Dictionary) indicated that, “[c]onventionally, soft rubber products consist of relatively low amounts of elemental sulfur (about 1-3 phr) combined with a low concentration of accelerator(s). If the amount of sulfur is increased to 25 phr or higher, a hard rubber is formed. [Phr = parts per hundred parts of crude rubber.]”⁴² Finally, the *McGraw-Hill Dictionary of Scientific and Technical Terms* defines “hard rubber” without any reference to sulfur.⁴³

40. The issue of whether the goods in issue are of hard rubber was a major point of contention between the parties, with their respective expert witnesses espousing divergent views.

41. In this regard, Mr. Granville indicated in his laboratory report that the samples of the goods in issue that he had occasion to examine are of vulcanized rubber other than hard rubber with “. . . less than 2 parts of combined sulfur per hundred parts rubber.”⁴⁴

42. On the other hand, Dr. Thring, while not taking issue with the low sulphur content finding of Mr. Granville, indicated in his expert report that, measured on the generally recognized Shore A scale, the hardness value of the tube rubber component of the goods in issue is “. . . a value that can be comfortably considered to be in the ‘hard rubber’ range”,⁴⁵ while the hardness value of the cover rubber component was a “borderline [hard rubber] value”⁴⁶ because, while below 75, (which, in his opinion, represented the Shore A hard rubber cut-off value), it fell within the plus/minus 5 percent margin of error for hardness measurements.⁴⁷ Dr. Thring, however, confirmed during cross-examination that he did not personally examine the goods in issue and that his evidence was based on data obtained from Komatsu.⁴⁸ The Tribunal also notes that, contrary to Dr. Thring’s evidence, Mr. Clarkson testified that it was in fact the cover rubber component, and not the tube component, that was of greater hardness.⁴⁹

43. The *Explanatory Notes* to Chapter 40 afford some guidance as to the properties of hard rubber in the following definition: “**Hard rubber** (for example, ebonite) is obtained by vulcanising rubber with a high proportion of sulphur to the point where it becomes *practically inflexible and inelastic*” [emphasis added]. Indeed, Dr. Thring agrees that “practically inflexible and inelastic” is a good definition of hard rubber.⁵⁰

39. Tribunal Exhibit AP-2010-006-42A at para. 1.

40. Tribunal Exhibit AP-2010-006-41B, tab 1.

41. *Ibid.*, tab 2.

42. Tribunal Exhibit AP-2010-006-42A at para. 1.

43. *Transcript of Public Hearing*, 14 February 2012, at 112-13. Mr. Granville testified that, in his opinion, this definition was both anomalous and incomplete.

44. Tribunal Exhibit AP-2010-006-41A at 7.

45. Tribunal Exhibit AP-2010-006-42A at para. 4.

46. *Ibid.*

47. *Ibid.*

48. *Transcript of Public Hearing*, 14 February 2012, at 31, 33-34.

49. *Ibid.* at 75-76.

50. Tribunal Exhibit AP-2010-006-42A at para. 2.

44. In this regard, Komatsu acknowledges that the hoses are necessarily designed with a degree of flexibility to accommodate the design of the hydraulic systems themselves.⁵¹

45. In the Tribunal's view, that the hydraulic hoses would require a measure of flexibility and elasticity would also seem to follow from evidence that hard rubber tends to be brittle.⁵² The Tribunal is also of the view that the ability of the goods in issue to withstand the significant pressure to which they are exposed derives in large part from their multi-layer and reinforced steel-braided construction, with the evidence indicating that they consist of three layers (five for certain hoses) of vulcanized rubber with sheaths of a single or double braid of steel with values in the range of 1000-8000 psi common.⁵³

46. Having regard to such considerations as:

- the fact that Mr. Granville's expert evidence, as set forth in his laboratory report, was based on a scientific examination of the goods in issue, while that of Dr. Thring, who did not have occasion to examine the goods in issue, was essentially based on data provided by Komatsu;
- the uncontested finding of Mr. Granville that the samples examined contain less than two parts of combined sulphur per hundred parts of crude rubber, which is generally recognized as being within the soft (i.e. other than hard) rubber range;⁵⁴
- the fact that Dr. Thring's application of the standard 5 percent margin of error to achieve a "borderline" Shore A hard rubber value for the rubber cover component of the goods in issue disregards the fact that the plus/minus 5 percent margin of error operates both ways, with the possibility of actual hardness values being lower than those indicated in the measurement data;
- the discrepancy between the evidence of Dr. Thring and Mr. Clarkson as to the comparative hardness of the tube rubber and cover rubber components of the goods in issue;⁵⁵
- the guidance afforded by the *Explanatory Notes* to Chapter 40 that hard rubber is obtained by vulcanizing rubber with a high proportion of sulphur to the point where it becomes practically inflexible and inelastic, and Dr. Thring's evidence that inflexibility and inelasticity represents a good definition of hard rubber; and
- Komatsu's acknowledgement that the goods in issue are necessarily designed with a degree of flexibility to accommodate the design of the hydraulic systems themselves;⁵⁶

the Tribunal finds that Komatsu has not discharged the burden of proof in respect of its specific allegation that the CBSA erred in its determination that the goods in issue were of unhardened rubber.

51. Tribunal Exhibit AP-2010-006-07A at para. 48.

52. See definition of "rubber, hard" in Tribunal Exhibit AP-2010-006-41B at 2; *Transcript of Public Hearing*, 14 February 2012, at 75.

53. Tribunal Exhibit AP-2010-006-07A at paras. 7, 48.

54. *Transcript of Public Hearing*, 14 February 2012, at 85-86, 88-89, 94-95.

55. Dr. Thring indicated that the tube rubber component was harder than the cover rubber component, with the former "... comfortably considered to be in the 'hard rubber' range" and the latter being "... a 'borderline value' to be considered hard rubber." Tribunal Exhibit 2010-006-42A at para. 4. By contrast, Mr. Clarkson testified that the cover rubber was in fact harder than the tube rubber. *Transcript of Public Hearing*, 14 February 2012, at 75-76. This inconsistency is rendered all the more significant by the fact that Dr. Thring's characterization of the cover rubber component as being a "borderline" hard rubber was itself based on the Shore A hardness value of 73 indicated by the measurement data, being adjusted upward (i.e. through the application of the plus/minus 5 percent standard margin of error for rubber hardness measurements) to the 75 Shore A cut-off value for hard rubber. *Transcript of Public Hearing*, 14 February 2012, at 21-23, 31-32.

56. Tribunal Exhibit AP-2010-006-07A at para. 48.

47. The Tribunal therefore finds that the goods in issue are not excluded from Chapter 40 or, more specifically, from the ambit of heading No. 40.09, as being of hard rubber.

48. That being the case, the Tribunal, by application of Rule 1 of the *General Rules*, finds that the goods in issue, being generically described in heading No. 40.09 (hoses with fittings), are *prima facie* classifiable therein. Specifically, by application of Rule 6 of the *General Rules* and the *Canadian Rules*, the goods in issue are described under tariff item No. 4009.42.90 as tubes, pipes and hoses of vulcanized rubber other than hard rubber, reinforced or otherwise combined with other materials, with fittings.⁵⁷

Are the Goods in Issue Classifiable in Heading No. 84.12?

49. Komatsu submitted that hydraulic hose assemblies, imported on their own, should be classified in heading No. 84.12 (“Other engines and motors”) and, more specifically, under either tariff item No. 8412.21.00 or tariff item No. 8412.90.00.⁵⁸

As Parts of Hydraulic Systems

50. Komatsu’s primary position is that the goods in issue are classifiable in heading No. 84.12 on the basis that they are parts of the engines and motors of this heading.

51. Rule 1 of the *General Rules* provides that classification is to be determined “. . . according to the terms of the headings and any relative Section or Chapter Notes . . .” In this regard, because the goods in issue (i.e. hydraulic hose assemblies) are not referred to as such in heading No. 84.12, their coverage in that heading can only occur by direction of a note, with the resulting classification constituting an application of Rule 1.⁵⁹

52. Pursuant to note 2(b) to Section XVI, parts suitable for use solely or principally with a particular kind of machine are to be classified in the same heading as the machine itself. Note 2(b) to Section XVI provides as follows:

2. *Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules:*

...

57. Within heading No. 40.09, subheading No. 4009.42 refers to hoses that are reinforced or otherwise combined with other materials, without fittings. At the tariff item level, the only alternative is No. 4009.42.10, which refers to floating or submarine hoses, hose assemblies for brake and steering systems for motorcycles or all-terrain vehicles, and hoses for scuba tanks.

58. Tribunal Exhibit AP-2010-006-07A at para. 15. Hydraulic power engines and motors are covered under heading No. 84.12 at the one-dash level, with linear acting cylinders covered under two-dash tariff item No. 8412.21.00. In this regard, note (B)(6) of the *Explanatory Notes* to heading No. 84.12 provides as follows:

(B) HYDRAULIC POWER ENGINES AND MOTORS

This group includes:

...

- (6) **Hydraulic systems** consisting of a hydraulic power unit (comprising essentially a hydraulic pump, an **electric** motor, control valves and an oil tank), hydraulic cylinders and the pipes or hoses needed to connect the cylinders to the hydraulic power unit, the whole forming a functional unit within the meaning of Note 4 to Section XVI. . . .

59. See Memorandum D-10-0-1, 24 January 1994, “Classification of Parts and Accessories in the *Customs Tariff*”, Tribunal Exhibit AP-2010-006-10A at 127.

- (b) *Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 84.79 or 85.43) are to be classified with the machines of that kind or in heading 84.09, 84.31, 84.48, 84.66, 84.73, 85.03, 85.22, 85.29 or 85.38 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 85.17 and 85.25 to 85.28 are to be classified in heading 85.17.*

[Emphasis added]

53. Note 2 to Section XVI, however, is, by its own terms, subject to the exclusions in note 1, with paragraph (a) of the latter being of particular relevance. Note provides as follows:

1. This Section does not cover:

- (a) Transmission or conveyor belts or belting, of plastics of Chapter 39, or of vulcanised rubber (*heading 40.10*), or other articles of a kind used in machinery or mechanical or electrical appliances or for other technical uses, of vulcanised rubber other than hard rubber (*heading 40.16*).

[Emphasis added]

54. Turning first to the issue of whether the goods in issue are properly describable as “parts” of machines, while past decisions provide useful guidance on factors that, alone or in combination, may be relevant to the determination of whether a particular article is a “part” of a machine, there is no universal test upon which to base such decisions, with each case requiring a determination on its own merits.⁶⁰

55. In Memorandum D10-0-1, “[a] ‘part’ is defined as ‘an identifiable component of an article, machine, apparatus, equipment, appliance or specific good which is integral to the design and essential to the function of the product in which it is used’.”⁶¹

56. In the case at hand, it is uncontested, and the Tribunal finds, that the goods in issue are identifiable components of hydraulic systems that are committed by design for use therein and fulfill a clearly defined function that is integral to the design and essential to the overall functioning of hydraulic systems. Accordingly, the Tribunal finds that the goods in issue are indeed “parts” of hydraulic systems, which are themselves classifiable in heading No. 84.12.⁶²

57. Turning next to the interpretation of note 1(a) to Section XVI, the parties disagreed on the scope of that exclusionary provision. The CBSA contended that a contextual reading of note 1(a), as provided by the *Explanatory Notes*, calls for a broad interpretation that would capture goods of heading No. 40.09, including those in issue.

58. Note (I)(B)(a) of the *Explanatory Notes* to Section XVI provides as follows:

The Section **does not**, however, **cover**:

- (a) Transmission or conveyor belts or belting, of plastics (**Chapter 39**); articles of unhardened vulcanised rubber (e.g., transmission or conveyor belts or belting) (**heading 40.10**), rubber tyres, tubes, etc. (**headings 40.11 to 40.13**) and washers, etc. (**heading 40.16**).

60. *Jonic International Inc. v. Deputy M.N.R.* (28 September 1998), AP-97-078 (CITT).

61. Tribunal Exhibit AP-2010-006-10A at 124. In *Black & Decker Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (3 November 2004), AP-2002-116 (CITT) at para. 32, the Tribunal stated that Memorandum D10-0-1, though not authoritative, was useful in determining whether or not an article constitutes a part.

62. Indeed, note (B)(6) of the *Explanatory Notes* to heading No. 84.12 specifically recognizes hoses needed to connect cylinders to hydraulic power units as being parts of hydraulic systems.

59. In this regard, the addition in note (B)(6) of the *Explanatory Notes* to heading No. 84.12 of other examples of unhardened vulcanized rubber products covered by note 1(a) to Section XVI (e.g. “rubber tyres, tubes, etc.”) suggests that the parenthetical reference to heading No. 40.16 in note 1(a) to Section XVI is for reference purposes only and not exhaustive of the products of unhardened vulcanized rubber captured by the note. Accordingly, the exclusionary reach of note 1(a) to Section XVI would not be confined to those headings expressly identified in the note, but, rather, would extend to all goods of unhardened vulcanized rubber falling within Section VII, including those in issue.⁶³

60. Komatsu, on the other hand, ascribed a narrow interpretation to note 1(a) to Section XVI, which, on the basis of the fact that heading No. 40.09 is not one of the headings specifically identified in that exclusionary provision, would not exclude the goods in issue from Section XVI.⁶⁴

61. As an initial point, the Tribunal shares Komatsu’s concern that an expansive interpretation would introduce an element of uncertainty to the scope of note 1(a) to Section XVI. Komatsu stated as follows:

If the [*Explanatory Notes*] are interpreted in such a way as to expand the operation of the legal note, there is no clear guidance of where the expanded interpretation should cease. . . . [A]lthough the [*Explanatory Notes*], in their expanded interpretation, make reference to headings 40.11 to 40.13 to clarify which chapter headings need be excluded, the [*Explanatory Notes*] still do not make mention of heading 40.09. Should it be assumed that the exclusion applies to headings 40.07, 40.08, 40.14, etc.?⁶⁵

62. It is also the Tribunal’s view that a contextual reading of note 1(a) to Section XVI favours Komatsu’s narrow interpretation of that note. In this regard, the Tribunal notes, among other things:

- that the text of the note immediately preceding the parenthetical reference to heading No. 40.10, as it pertains to articles of rubber (i.e. “Transmission or conveyor belts or belting . . . of vulcanised rubber”) is virtually identical to the language of heading No. 40.10 itself (i.e. “Conveyor or transmission belts or belting, of vulcanized rubber”);
- that the text of the note immediately preceding the parenthetical reference to heading No. 40.16 (i.e. “other articles . . . of vulcanised rubber other than hard rubber”) is essentially identical to the language of heading No. 40.16 itself (i.e. “Other articles of vulcanized rubber other than hard rubber”);⁶⁶

63. This interpretation of note 1(a) to Section XVI is consistent with that of Ruling HQ 950892 made by U.S. customs authorities. See, in this regard, Tribunal Exhibit AP-2010-006-10A at para. 50. U.S. customs authorities provided the following justification for a liberal reading of note 1(a) to Section XVI: “This view was based on General Explanatory Note I(B)(a), Section XVI, which indicates that the scope of Note 1(a), Section XVI, is broader than a plain reading would otherwise suggest. Thus . . . Note 1(a), Section XVI, operates to exclude articles of heading 4009, as well as articles of those headings expressly referenced.” See Tribunal Exhibit AP-2010-006-10A at 71.

64. Komatsu further argued that “. . . this [note 1(a)] exclusion is not intended to exclude articles (hose assemblies) whose composition is not wholly vulcanized rubber but rather made up of, metal fittings, wire braid, and rubber.” Tribunal Exhibit AP-2010-006-07B at para. 30. The Tribunal rejects this argument out of hand, as the coverage under heading No. 40.09, at the one-dash level, extends, *inter alia*, to tubes, pipes and hoses of vulcanized rubber other than hard rubber “[n]ot reinforced or otherwise combined with other materials”, while at the two-dash level, it extends to goods “with fittings”.

65. Tribunal Exhibit AP-2010-006-07A at 12.

66. The Tribunal agrees with Komatsu’s observation that, “[w]ithin heading 40.16, there are many references to rubber articles used in automotive goods, hydraulic pump motors, or, more generally, for use in the manufacture of goods of Section XVI. Two examples include tariff items 4016.93.10 and 4016.93.91.” Tribunal Exhibit AP-2010-006-07A at 12.

- that elsewhere in the note (i.e. in paragraphs [c], [d] and [o] thereof), the illustrative (i.e. non-exhaustive) nature of a listing is denoted by use of the phrase “for example”;
- that elsewhere in the notes to Section XVI, the drafters did not hesitate to list all of the headings implicated by a provision; and
- that if, as submitted by the CBSA, note 1(a) was intended to cover “. . . all goods made of vulcanized rubber other than hard rubber that are specifically named in Section VII”,⁶⁷ the reference in that note would presumably have been to Section VII itself rather than to specific headings thereunder, in the same manner as the specific section references in paragraph (ij) (“Endless belts of metal wire or strip [Section XV]”) and paragraph (l) (“Articles of Section XVII”) of note 1 or, alternatively, to Chapter 40 (“Rubber and Articles Thereof”), in the same manner as the reference in note 1(a) to Chapter 39 in respect of “[t]ransmission or conveyor belts or belting, of plastics . . .”, and the specific chapter references elsewhere in note 1 (e.g. in paragraphs [c], [d], [g], [n], [o] and [p]).

63. The issue of whether the goods in issue are also *prima facie* classifiable in heading No. 84.12 as parts of other engines and motors does not turn however on the interpretation of the scope of note 1(a) to Section XVI or, more specifically, on whether note 2(b) is rendered inapplicable by operation of note 1(a).

64. In *Canada (Attorney General) v. Suzuki Canada Inc.*, the Federal Court of Appeal stated that “. . . the Explanatory Notes should be respected unless there is a sound reason to do otherwise.”⁶⁸ In this regard, the *Explanatory Notes* to Section XVI indicate that note 2 only applies where the goods in issue are not more specifically included in other headings outside of Chapters 84 and 85. In particular, a joint reading of Parts I and II of the *Explanatory Notes* to Section XVI clearly implies that machinery parts that are covered more specifically in other sections of the nomenclature are to be classifiable in those other sections.

GENERAL

(I) GENERAL CONTENT OF THE SECTION

- (A) Subject to certain **exclusions** provided for in the Notes to this Section and to Chapters 84 and 85 and *apart from goods covered more specifically in other Sections*, this Section covers all mechanical or electrical machinery, plant, equipment, apparatus and appliances and parts thereof

...

(II) PARTS

(Section Note 2)

In general, parts which are suitable for use solely or principally with particular machines or apparatus . . . are classified in the same heading as those machines or apparatus *subject, of course, to the exclusions mentioned in Part (I) above.*

[Emphasis added]

65. In the Tribunal’s view, the above explanatory notes usefully inform the scope of note 2(b) to Section XVI in the context of Rule 1 of the *General Rules* and yield an outcome consistent with that which would have resulted from a subsequent application of Rule 3 (a) of the *General Rules*, i.e. preferring the heading which provides the more specific description of the goods.

67. Tribunal Exhibit AP-2010-006-10A at para. 49.

68. 2004 FCA 131 (CanLII) at para. 13.

66. In this regard, Komatsu contends that tariff item No. 8412.90.00 (parts of other engines and motors) represents a more specific reference to the goods in issue than does the description in heading No. 40.09.⁶⁹ This, however, reflects a misapplication of the *General Rules* and, in particular, Rule 1, which requires that classification begin with the terms of the relevant headings.

67. As a general point, the Supreme Court of Canada stated, in *Accessories Machinery Ltd. v. National Revenue (Deputy Director)*,⁷⁰ that a tariff provision that more specifically describes goods overrides a basket provision in respect of parts.

68. More specifically, the Tribunal, in *York Barbell Co. Ltd. v. Deputy M.N.R.C.E.*,⁷¹ explained as follows:

When classifying goods as either parts of something or as entities in their own right, the application of Rule 1 of the General Rules for the Interpretation of the Harmonized System (General Rules) is of utmost importance. This rule states that classification is first determined by the wording of the tariff headings and any relevant legal note. Therefore, *the first consideration of the Tribunal is whether the goods are named or generically described in a particular heading of the tariff schedule. If the goods are named in the heading, they are classified there, subject to any relevant legal note. If not, the Tribunal would give consideration to the heading of the product for which the goods are claimed to be a part.*

[Emphasis added]

69. The Tribunal therefore finds that the goods in issue are not classifiable in heading No. 84.12 on the basis that they are parts of engines and motors and are more specifically described in heading No. 40.09.

As Components of a Functional Unit

70. While not requesting a specific ruling on the classification of hydraulic systems *per se*,⁷² Komatsu seeks, in the alternative, to have the goods in issue classified in heading No. 84.12 as components of a functional unit.

71. The classification of parts as components of a functional unit is based on note 4 to Section XVI, which provides as follows:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

[Emphasis added]

69. Tribunal Exhibit AP-2010-006-07B at para. 51.

70. [1957] S.C.R. 358.

71. (16 March 1992), AP-91-131 (CITT) at 3.

72. Tribunal Exhibit AP-2010-006-07A at para. 12.

72. The evidence indicates, and the Tribunal accepts, that the hydraulic systems, of which the goods in issue form a part, operate as closed-loop functional units. Mr. Clarkson explained as follows at the hearing.⁷³

MR. CLARKSON: . . . a hydraulic system [is] a closed-loop system where the oil is pumped from the reservoir through the high pressure pump, through a hose, through a valve, through a hose, through a cylinder, and then back to the reservoir so [the] *hydraulic system would be a closed loop system where the hoses would be the connection points between the major components.*

[Emphasis added]

73. Mr. Clarkson's testimony on this point is consistent with the *Explanatory Notes* to Section XVI (in respect of note 4), which provides as follows:

(VII) FUNCTIONAL UNITS

(Section Note 4)

...

The following are examples of functional units of this type within the meaning of Note 4 to this Section:

- (1) *Hydraulic systems* consisting of a hydraulic power unit (comprising essentially a hydraulic pump, an electric motor, control valves and an oil tank), hydraulic cylinders and the pipes or hoses needed to connect the cylinders to the hydraulic power unit (heading 84.12).

[Emphasis added]

74. His testimony is also consistent with the *Explanatory Notes* to heading No. 84.12.

(B) HYDRAULIC POWER ENGINES AND MOTORS

This group includes:

...

- (6) *Hydraulic systems* consisting of a hydraulic power unit (comprising essentially a hydraulic pump, an electric motor, control valves and an oil tank), hydraulic cylinders and the pipes or hoses needed to connect the cylinders to the hydraulic power unit, the whole *forming a functional unit within the meaning of Note 4 to Section XVI* (see the General Explanatory Note to that Section). These systems are used, e.g., to operate civil engineering structures.

[Emphasis added]

75. The Tribunal therefore accepts that hydraulic systems constitute functional units. However, that the hydraulic systems, of which the goods in issue form part, are functional units is not sufficient, in and of itself, for the goods in issue to be classifiable as components of a functional unit, rather than in their own

73. *Transcript of Public Hearing*, 14 February 2012, at 65.

appropriate heading. It must also be determined that the goods in issue are essential to the functioning of the hydraulic system as a whole.⁷⁴

76. In this regard, note VII of the *Explanatory Notes* to Section XVI (in respect of note 4) states the following:

For the purposes of this Note, *the expression “intended to contribute together to a clearly defined function” covers only machines and combinations of machines essential to the performance of the function specific to the functional unit as a whole, and thus excludes machines or appliances fulfilling auxiliary functions and which do not contribute to the function of the whole.*

[Emphasis added]

77. The Tribunal has no doubt that the goods in issue⁷⁵ are essential to the specific function performed by the hydraulic system as a whole. In the words of Mr. Clarkson, “[w]ithout these ‘arteries’ that connect components, the hydraulic system would not operate.”⁷⁶ Again, however, the fact that the goods in issue meet the requirement of essentiality is not dispositive of the classification issue.

78. Note 4 to Section XVI provides that, in functional unit cases, “. . . *the whole falls to be classified in the heading appropriate to that function*” [emphasis added]. In view of the fact that only imported goods are subject to tariff classification, it follows from a reading of note 4, in conjunction with note VII of the *Explanatory Notes* to Section XVI, that classification on a “functional unit” basis can only occur where the

74. In *Prins Greenhouses Ltd. v. Deputy M.N.R.* (9 April 2001), AP-99-045 (CITT) at 8, for example, the Tribunal stated the following:

While the Tribunal is of the opinion that the flue gas condenser would normally be classified under tariff item No. 8421.39.90 as other filtering or purifying machinery and apparatus for gases, the Tribunal determines, based on the evidence and testimony, that *the flue gas condenser is one of the components whose activity is essential to the basic functioning of the integrated greenhouse system.* Therefore, given that the Tribunal has determined that the integrated greenhouse system is a functional unit classified under tariff item No. 8436.80.10, the flue gas condenser, which, as the Tribunal stated, is essential to the functioning of that unit as a whole, must also be classified under the same tariff item as the integrated greenhouse system. [Emphasis added]

75. The Tribunal notes that the following 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 or 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.” In this regard, the dictionary definition of “apparatus” includes “2. . . . equipments . . .” (*The Oxford English Dictionary*, 2d ed., s.v. “apparatus”), with the definition of “equipment”, in turn, including “. . . apparatus, necessary for . . . [a] job . . .” (*The Concise Oxford Dictionary*, 7th ed., s.v. “equipment”). It being undisputed that the goods in issue are necessary for the job of conveying pressurized fluid between the different components of the hydraulic system, the Tribunal is satisfied that they are properly described as equipment or apparatus and, therefore, as a “machine” by virtue of note 5 to Section XVI.

76. Tribunal Exhibit AP-2010-006-42B at para. 3.

complete unit, that is, all essential components thereof, are imported,⁷⁷ although not necessarily in a single consignment or from a single source.⁷⁸

79. Indeed, given that all components, by definition, ultimately contribute to the composition of a whole,⁷⁹ an interpretation that suggested that an isolated component part was classifiable on a functional unit basis, even where the other essential components of the unit were not imported, would confuse the issue of whether components were properly classifiable as the functional units of which they were to form part, or were more appropriately classified in their own headings.

80. It is therefore the Tribunal's view that Memorandum D10-13-2 accurately reflects the law on this matter. It provides as follows:

8. *Separately presented machines, appliances or apparatus, to be integrated or combined with other domestically sourced or supplied components to form a functional unit, are to be classified in their own appropriate heading.* Neither Section XVI, Note 4, nor Chapter 90, Note 3 applies in such cases.

[Emphasis added]

81. In the present case, Komatsu confirmed that some of the parts of its hydraulic systems were domestically produced.⁸⁰ Indeed, Komatsu conceded that note 4 to Section XVI, upon which classification on the basis of a functional unit is founded, is not applicable in this case. It stated as follows:

The remaining section XVI Notes 3 through 5 are considered extraneous in this instance since they refer to the classification of complete machines, which are not the subject of this request.⁸¹

77. In *Windsor Wafers, Division of Beatrice Foods Inc. v. Deputy M.N.R.C.E.* (21 November 1991), AP-89-281 (CITT) at 3, for example, the Tribunal found the following:

[W]hile the 1988 imports taken together do not constitute a complete wafer-baking system, the ovens in question and the other 1988 imports were components of the much larger transaction which involved the importation of a complete wafer-baking system shipped into Canada over the two-year period, 1987 and 1988.

While the issue of whether all essential components of a functional unit had to be imported was not specifically before the Federal Court of Appeal in *Sable Offshore Energy Inc. v. Canada (Customs and Revenue Agency)*, 2003 FCA 220 (CanLII) at para. 24, the Federal Court of Appeal did state, by way of obiter, the following:

... Note 4 to Section XVI of the tariff merely recognizes that a machine (or machines) having a defined function covered by one of the relevant headings may be acquired and imported in individual components, in which case the components are to be considered as part of the whole for classification purposes.

78. In *Asea Brown Boveri Inc. v. Deputy M.N.R.* (5 November 1996), AP-95-189 (CITT) at 2, 8, for example, the Tribunal found as follows:

[T]he GIS, which includes circuit breakers, disconnect switches, current transformers, voltage transformers and other associated equipment, was supplied from the appellant's factory in Switzerland. The bushings and bus ducts, which are used to interconnect the various components of a GIS, were supplied from the appellant's factory in the United States. ... That the two components were purchased through separate purchase orders for administrative convenience and shipped separately, though directly, to the Claireville station is not fatal to the finding that they comprise a functional unit for purposes of tariff classification.

This policy is captured in Memorandum D10-13-2, "Administrative Policy—Tariff Interpretation of 'Functional Units'" (3 April 1992), which provides as follows:

7. The Department recognized that present commercial and engineering practices with respect to sourcing, design, configuration (i.e., prefabricated modules), transportation, handling and on-site assembly of functional units does not affect its classification in one heading. Consequently, a functional unit presented in more than one consignment, regardless of whether or not such consignments originate in different countries, does not preclude classification in accordance with the HS Notes cited under the Legislation section above.

79. Indeed, the definition of the term "component" includes a part "contributing to the composition of the whole" (*The Concise Oxford Dictionary*, 7th ed., s.v. "component").

80. *Transcript of Public Hearing*, 14 February 2012, at 55.

81. Tribunal Exhibit AP-2010-006-07A at para. 33.

82. That being the case, the Tribunal finds that the goods in issue are not classifiable in heading No. 84.12 on a functional unit basis.

Are the Goods in Issue Classifiable in Heading No. 84.31?

83. In the further alternative, Komatsu submitted that the goods in issue should be classified in heading No. 84.31 (and, more specifically, under tariff item No. 8431.49.00) as other parts suitable for use solely or principally with the machinery of heading Nos. 84.25 to 84.30, claiming, in this regard, that the front-end wheel loaders, of which the goods in issue form part, fall under heading No. 84.29.

84. The Tribunal accepts Komatsu's claim that the front-end wheel loaders, of which the goods in issue form part, fall under heading No. 84.29.

85. The *Explanatory Notes* to heading No. 84.31 state that classification in that heading is subject to the general provisions regarding the classification of parts and provide as follows:

*Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), this heading covers parts for use **solely or principally** with the machinery of headings 84.25 to 84.30.*

[Emphasis added]

86. As already discussed, under Part II of the *Explanatory Notes* to Section XVI in respect of the treatment of "Parts", goods covered more specifically in other sections are properly classified in those other sections. More specifically, the *Explanatory Notes* to heading No. 84.31 indicate that ". . . many parts **do not fall** in this heading since they are: (a) *Specified elsewhere in the Nomenclature . . .*" [emphasis added].

87. As in the case of heading No. 84.12, the Tribunal therefore finds that the goods in issue are not *prima facie* classifiable in heading No. 84.31, as they are more specifically described in heading No. 40.09.

DECISION

88. For all of the foregoing reasons, the goods in issue are properly classified in heading No. 40.09 and, in particular, under tariff item No. 4009.42.90.

89. The appeal is dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member