Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-050

BMW Canada Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Tuesday, September 16, 2014

Canada

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IN THE MATTER OF an appeal heard on May 29, 2014, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF eight decisions of the President of the Canada Border Services Agency, dated September 30 and October 1, 2013, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

BMW CANADA INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Ann Penner
Ann Penner
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 29, 2014
Tribunal Member:	Ann Penner, Presiding Member
Counsel for the Tribunal:	Anja Grabundzija
Acting Senior Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representatives**
BMW Canada Inc.	Robert A. MacDonald Michael R. Smith
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Craig Collins-Williams

WITNESSES:

Marko Misura Aftersales Systems Specialist BMW Group Canada	Bruno Rocha Professor, Mechanical and Transportation TechnologyAlgonquin College

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
15th Floor
333 Laurier Avenue West
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. This is an appeal filed by BMW Canada Inc. (BMW), pursuant to subsection 67(1) of the *Customs Act*[1] in response to eight decisions issued by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4), dated September 30 and October 1, 2013.

2. At issue in this appeal is the proper tariff classification of side-view mirror housings with stems[2] (the goods in issue) designed for use in BMW X5 series vehicles.[3]

3. The CBSA determined that the goods in issue were properly classified under tariff item No. 8708.99.99 of the schedule to the *Customs Tariff*[4] as other parts and accessories of the motor vehicles of heading Nos. 87.01 to 87.05. BMW argued that they should be classified under tariff item No. 8479.89.90 as other machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84. In the alternative, BMW argued that the goods in issue could be classified under tariff item No. 8543.70.00 as other electrical machines and apparatus, having individual functions, not specified or included elsewhere in Chapter 85.

PROCEDURAL HISTORY

4. The goods in issue were imported in eight shipments between January 2 and February 27, 2009. The CBSA classified them under tariff item No. 8708.29.99 as other parts and accessories of bodies of the motor vehicles of heading Nos. 87.01 to 87.05 pursuant to section 59 of the *Act*.[5]

5. BMW requested a re-determination pursuant to subsection 60(1) of the *Act*, claiming that the goods in issue should be classified under tariff item No. 8708.29.20 as door assemblies. In response, the CBSA issued an amended preliminary decision, dated March 11, 2013, indicating that the goods in issue were properly classified under tariff item No. 8708.99.99 as other parts and accessories of the motor vehicles of heading Nos. 87.01 to 87.05.

6. On September 30 and October 1, 2013, the CBSA issued eight final decisions pursuant to subsection 60(4) of the *Act*, confirming the classification of the goods in issue under tariff item No. 8708.99.99.

7. On November 21, 2013, BMW filed this appeal.

8. A hearing was held in Ottawa, Ontario, on May 29, 2014.

9. BMW proposed Mr. Marko Misura as an expert witness in the areas of (i) automotive engineering—vehicles and components, (ii) mechanical and electrical operation of motor vehicle systems, (iii) Department of Transport requirements—motor vehicle safety regulations, (iv) BMW-specific product functions and (v) general engineering definitions and principles,[6] given his qualifications as a professional engineer and experience as a quality and technical manager at BMW. The CBSA objected, suggesting that

1. R.S.C. 1985, c. 1 (2nd Supp.) [*Act*].
2. Part numbers 51167039909, 51167039910, 51167039926 and 51167189977, Exhibit AP-2013-050-08A at para. 3, Vol. 1; Exhibit AP-2013-050-06A at para. 7, Vol. 1.
3. Exhibit AP-2013-050-08A, tab 1, Vol. 1; Exhibit AP-2013-050-06A, tab 3, Vol. 1; *Transcript of Public Hearing*, 29 May 2014, at 84-85.
4. S.C. 1997, c. 36.
5. Exhibit AP-2013-050-06A, tab 1, Vol. 1.
6. Exhibit AP-2013-050-15, Vol. 1B.

he lacked the independence and relevant experience outside his employment with BMW to testify in such a capacity.[7]

10. After considering Mr. Misura's accreditation as a professional engineer for 15 years and the various positions that he has held both at BMW and other companies in the automotive engineering field, the Tribunal qualified Mr. Misura as an expert in the areas of (i) automotive engineering—vehicles and components, (ii) mechanical and electrical operation of motor vehicle systems, (iii) BMW-specific product functions and (iv) general engineering definitions and principles.[8] However, the Tribunal did not find that Mr. Misura had the necessary credentials to be qualified as an expert in the proposed area of the Department of Transport requirements—motor vehicle safety regulations. In response to the CBSA's concerns about potential bias[9] and in a manner consistent with its approach in previous cases,[10] the Tribunal took the fact that Mr. Misura was employed with BMW into account when weighing his testimony during the hearing and in its deliberations of the issues in this appeal.

11. The CBSA also proposed one expert witness, Dr. Bruno Rocha, to testify in the areas of machines, mechanical and electro-mechanical systems and components and, in particular, their operation, results and limitations, specifically in regard to automobile components, structures, electro-mechanical systems, such as electrical motors, and mechanical systems, such as gears.[11] Given his PhD in aerospace engineering and position as a full-time professor at Algonquin College, BMW accepted Dr. Rocha's education and expertise in some of the proposed areas, but suggested that he did not have sufficient qualifications as an expert in automobile components.

12. In light of his extensive academic and professional experience in the general area of mechanical engineering, as well as experience in the specific area of automotive engineering, namely, through his work on the development of a new off-road vehicle, the Tribunal qualified Dr. Rocha as an expert in machines, mechanical and electro-mechanical systems and components and, in particular, their operation, results and limitations, specifically in regard to automobile components, structures, electro-mechanical systems, such as electrical motors, and mechanical systems such as gears.[12]

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7. *Transcript of Public Hearing*, 29 May 2014, at 40-43. In support of its argument, the CBSA relied on *Home Depot of Canada Inc. v. President of the Canada Border Services Agency* (28 April 2014), AP-2013-032 (CITT) [*Home Depot*] at para. 8, and *Siemens Enterprise Communications Inc., formerly Enterasys Networks of Canada Ltd. v. Department of Public Works and Government Services* (23 December 2010), PR-2010-049, PR-2010-050 and PR-2010-056 to PR-2010-058 (CITT) [*Siemens*] at paras. 45-78.
8. *Transcript of Public Hearing*, 29 May 2014, at 48-50.
9. The CBSA pointed to two cases to substantiate its argument that Mr. Misura should not be qualified as an expert witness, given the potential for bias: *Home Depot* and *Siemens*. However, the Tribunal finds that those cases are distinguishable from the case at hand. In *Home Depot*, the Tribunal found that the proposed expert did not have expertise relevant to the specific issue in dispute beyond what would be considered common knowledge in that field. In *Siemens*, the Tribunal refused to allow into evidence the opinions of a witness on the basis of his lack of independence in exceptional circumstances where the proposed witness himself had drafted and filed the complaint before the Tribunal, represented the complainant as counsel at an earlier phase of the proceedings and in many related proceedings, attempted to obtain leave to intervene in right of his own company and personally stood to profit from the outcome of the case. In this case, however, Mr. Misura had expertise relevant to the specific issues and no personal interest in the outcome of this case. Furthermore, nothing in his testimony indicated that he had any involvement in this proceeding beyond preparing his expert report and testifying at the hearing on that basis. *Transcript of Public Hearing*, 29 May 2014, at 34, 40.
10. *Toyota Tsusho America, Inc. v. President of the Canada Border Services Agency* (18 November 2011), AP-2010-063 (CITT) at paras. 28-29.
11. Exhibit AP-2013-050-16, Vol. 1B.
12. *Transcript of Public Hearing*, 29 May 2014, at 105-106.

GOODS IN ISSUE

13. As stated above, the goods in issue are side-view mirror housings with stems, designed to be mounted on the exterior of the front doors of BMW X5 series motor vehicles.[13]

14. Parties agreed on the features of the goods in issue at the time of importation, the most important of which, in the case at hand, is the fact that the goods in issue were not imported with mirrors. Instead, the goods in issue simply included "mirror-supporting disc plates", on which the mirrors would be mounted at a later date.[14] As such, the parties agreed that, at the time of importation, the goods in issue could be defined as "mirror housings", in that they would "house" or hold mirrors, which are attached to the vehicle.

15. Parties also agreed that the goods in issue included three electric motors and related sets of gears at the time of importation.[15] Both expert witnesses described the combination of these motors and gears as an "electro-mechanical" system that enabled the driver to adjust the mirror and/or fold in the entire housing once attached to the vehicle (for example, for protection when the vehicle is parked). By using a touch pad (sold and imported separately from the goods in issue), the driver activates the system so that it transforms electrical power into mechanical energy and moves the mirror or the entire housing as desired.[16] Dr. Rocha also noted that it was possible for the driver to adjust the mirror manually, for example, if the system were to break down, although the goods in issue were not designed to be adjusted by hand.[17]

STATUTORY FRAMEWORK

16. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).[18] 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.

17. 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*[19] and the *Canadian Rules*[20] set out in the schedule.

18. 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.

19. 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*[21] and the *Explanatory Notes to the Harmonized Commodity Description and Coding*

13. *Ibid.* at 83-84; Exhibit AP-2013-050-08A, tab 1, Vol. 1; Exhibit AP-2013-050-06A, tab 3, Vol. 1.
14. *Transcript of Public Hearing*, 29 May 2014, at 76; Exhibit AP-2013-050-11A at 25, Vol. 1B; Exhibit AP-2013-050-08A at para. 4, Vol. 1.
15. Exhibit AP-2013-050-11A at 11-12, Vol. 1B; *Transcript of Public Hearing*, 29 May 2014, at 71, 75-77, 83.
16. *Transcript of Public Hearing*, 29 May 2014, at 53, 75-77, 108-110.
17. *Ibid.* at 111-12, 123.
18. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.
19. S.C. 1997, c. 36, schedule [*General Rules*].
20. S.C. 1997, c. 36, schedule.
21. World Customs Organization, 2nd ed., Brussels, 2003 [*Classification Opinions*].

System,[22] 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.[23]

20. 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.[24]

21. 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.[25] The final step is to determine the proper tariff item.[26]

RELEVANT CLASSIFICATION PROVISIONS

22. Given that the Tribunal must begin its analysis with Rule 1 of the *General Rules*, the following sets out the tariff items proposed by the parties, as well as the notes relevant to the classification of the goods in issue.

23. BMW argued that the goods in issue should be classified under tariff item No. 8479.89.90. It reads as follows:

> **84.79** **Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.**
>
> . . .
>
> **8479.89** **- -Other**
>
> . . .
>
> 8479.89.90 - - -Other

24. Tariff item No. 8479.89.90 falls within Section XVI. The relevant legal notes to Section XVI provide as follows:

> 1. This Section does not cover:
>
> . . .
>
> (l) Articles of Section XVII;

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22. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
23. 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*.
24. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
25. 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."
26. 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 *Explanatory Notes* do not apply to classification at the tariff item level.

. . .

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

Supplementary Note.

1. In this Section the term ‘‘mechanically operated’’ refers to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion.

25. Furthermore, the applicable legal notes to Chapter 84 provide as follows:

7. A machine which is used for more than one purpose is, for the purpose of classification, to be treated as if its principal purpose were its sole purpose.

Subject to Note 2 to this Chapter and Note 3 to Section XVI, a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, unless the context otherwise requires, to be classified in heading 84.79.

26. In addition, the explanatory notes to Chapter 84 provide as follows:

GENERAL

(A) GENERAL CONTENT OF THE CHAPTER

. . .

It should also be noted that machinery and apparatus of a kind covered by Chapter 84 remain in this Chapter even if electric, for example:

(1) Machinery powered by electric motor.

27. The explanatory notes to heading No. 84.79 provide as follows:

This heading is **restricted** to machinery having individual functions, which:

(a) Is not excluded from this Chapter by the operation of any Section or Chapter Note.

and (b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.

and (c) Cannot be classified in any other particular heading of this Chapter since:

(i) No other heading covers it by reference to its method of functioning, description or type.

and (ii) No other heading covers it by reference to its use or to the industry in which is employed.

or (iii) It could fall equally well into two (or more) other such headings (general purpose machines).

. . .

For this purpose the following are to be regarded as having “individual functions”:

. . .

(B) Mechanical devices which cannot perform their function unless they are mounted on another machine or appliance, or are incorporated in a more complex entity, **provided** that this function:

(i) is distinct from that which is performed by the machine or appliance whereon they are to be mounted, or by the entity wherein they are to be incorporated, and

(ii) does not play an integral and inseparable part in the operation of such machine, appliance or entity.

28. In contrast, the CBSA determined that the goods in issue were properly classified under tariff item No. 8708.99.99, which provides as follows:

87.08 Parts and accessories of the motor vehicles of headings 87.01 to 87.05.

. . .

8708.99 - -Other

. . .

8708.99.99 - - - -Other

29. Tariff item No. 8708.99.99 falls within Section XVII. The relevant legal notes to Section XVII provide as follows:

2. The expressions ''parts'' and ''parts and accessories'' do not apply to the following articles, whether or not they are identifiable as for the goods of this Section:

. . .

(e) Machines or apparatus of headings 84.01 to 84.79, or parts thereof; articles of heading 84.81 or 84.82 . . . ;

. . .

3. References in Chapters 86 to 88 to ''parts'' or ''accessories'' do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those Chapters.

30. The relevant explanatory notes to Section XVII provide as follows:

(III) PARTS AND ACCESSORIES

. . .

It should, however, be noted that these headings apply **only** to those parts or accessories which comply with **all three** of the following conditions:

(a) They must not be excluded by the terms of Note 2 to this Section (see paragraph (A) below).

and (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88 (see paragraph (B) below).

and (c) They must not be more specifically included elsewhere in the Nomenclature (see paragraph (C) below).[27]

31. Similarly, the explanatory notes to heading No. 87.08 provide as follows:

This heading covers parts and accessories of the motor vehicles of headings 87.01 to 87.05, **provided** the parts and accessories fulfil **both** the following conditions:

(i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles;

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27. In this regard, the Tribunal notes that heading No. 70.09 covers glass mirrors, whether or not framed, including rear-view mirrors, and that tariff item No. 7009.10.00 covers rear-view mirrors for vehicles. However, the Tribunal agrees with the parties that the goods in issue do not include glass mirrors and cannot be classified under this tariff item.

and (ii) They must not be excluded by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Note).

POSITIONS OF PARTIES

BMW

32. BMW argued that the goods in issue should be classified under tariff item No. 8479.89.90 as other machines or mechanical appliances having individual functions, not specified or included elsewhere, by application of Rule 1 of the *General Rules*.

33. According to BMW, the goods in issue meet the definition of a "machine" or "mechanical appliance" as found in the relevant legal and explanatory notes and the Tribunal's case law in three ways.

34. First, the wording of the Supplementary Note to Section XVI applies to the goods in issue because they include a ". . . combination of moving and stationary parts and do work through the production, modification or transmission of force and motion."

35. Second, the goods in issue have individual functions within the meaning of Note (B) of the explanatory notes to heading No. 84.79. For BMW, while the goods in issue are designed to be mounted on a motor vehicle, their function—to house the mirror and to be attached to the vehicle—is independent of the primary function of the motor vehicle itself, which is to transport people and goods from point A to point B. BMW admitted that the goods in issue could contribute to the safety of the vehicle's operation, but argued that this function is neither integral nor essential to the operation of the vehicle. Further, referring to Tribunal case law, BMW added that the fact that the mirror was not fitted in the goods in issue at the time of importation, and the fact that the goods in issue can only function once they are installed on the vehicle, does not preclude a finding that the goods in issue have individual functions. At the hearing, BMW added that the electro-mechanical function of the goods in issue is not simply ancillary, because side-view mirrors are required by law to be adjustable and need to be appropriately adjusted to the driver for the mirror to serve any use at all.[28]

36. Third, BMW argued that the goods in issue are not provided for elsewhere in Chapter 84. On this basis, BMW concluded that, by virtue of Note 2(e) to Section XVII, which excludes machines or apparatus of heading No. 84.79, the goods in issue could not be classified in heading No. 87.08 as "car parts". BMW agreed that the goods in issue are identifiable as being principally used on specific vehicles falling within Section XVII. However, it emphasized that this fact is not determinative, as the legal notes to Section XVII exclude machines and mechanical appliances of heading No. 84.79 "*. . . whether or not they are identifiable as for the goods of . . . Section [XVII]*" [emphasis added]. At the hearing, BMW also argued that the goods in issue could not be described as "parts", because they are not essential to the operation of the vehicles on which they are fitted.[29]

37. In the alternative, BMW argued that the goods in issue could be classified under tariff item No. 8543.70.00 as other electrical machines and apparatus, having individual functions, not specified or included elsewhere in Chapter 85. As will be discussed more fully below, BMW put forward this alternative argument in a supplementary brief for the first time on May 20, 2014.[30] In its view, tariff item No. 8543.70.00 could be used to classify the goods in issue in the event that the Tribunal determined, on the basis of the expert evidence, that the goods in issue were classifiable in either Chapter 84 or Chapter 85. BMW stated that the same arguments for classification of the goods in issue in heading No. 84.79 would apply in the context of heading No. 85.43.

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28. *Transcript of Public Hearing*, 29 May 2014, at 136-37.
29. *Ibid.* at 146-47.
30. Exhibit AP-2013-050-17A, Vol. 1B.

CBSA

38. The CBSA submitted that BMW did not discharge its burden of proof, as it did not demonstrate that the mirror housings were not properly classified under tariff item No. 8708.99.99 as other parts of motor vehicles. The CBSA, therefore, maintained that the goods in issue were properly classified under that tariff item, through the application of Rule 1 of the *General Rules*.

39. In support of its position, the CBSA noted that the words "parts" and "accessories" are not defined in the Nomenclature and submitted that the test for determining whether a good is an automotive part in heading No. 87.08 was established by the Tribunal in *Les Pièces d'Auto Transit Inc. v. President of the Canada Border Services Agency*.[31] In that case, the Tribunal stated that, for goods to be classified as automotive parts, the goods in issue had to be (a) essential to the functioning of a motor vehicle, (b) specially designed for use therein, (c) not designed for other applications and (d) considered parts in common trade usage and practice.[32]

40. Moreover, the CBSA submitted that the goods in issue meet all four of these conditions and are therefore properly classified as parts in heading No. 87.08. In particular, the goods in issue were designed to be mounted on specific types of BMW motor vehicles, are an essential element for the safe operation of a motor vehicle as mandated by federal and provincial statutes, cannot be used for any other applications and are marketed and commonly referred to as automotive parts.

41. The CBSA added that its position is supported by the jurisprudential definitions of the words "parts" and "accessories", namely, as articles committed exclusively, by design, for use in particular models of vehicles and essential for their safe operation. The goods in issue meet the definition of "parts".

42. As such, having regard to Note 1(l) to Section XVI, which provides that Section XVI excludes articles of Section XVII, the goods in issue could not be classified in heading No. 84.79.

43. In reply to BMW's position, the CBSA added that, while the goods in issue do have some electro-mechanical functions (i.e. the adjustment and folding functions), they are not machines, because the electro-mechanical functions of the goods in issue are only ancillary in nature and merely enhance the primary function of the goods in issue, which is to house the side rear-view mirror and to be attached to the vehicle. The CBSA argued that the ancillary function of the goods in issue does not alter their essential nature.

44. Further, the goods in issue do not have "individual functions", because the ancillary electro-mechanical components of the goods in issue are integral to and inseparable from the overall design of the goods in issue, which are themselves essential parts of motor vehicles.

45. In the alternative, the CBSA submitted that, even if consideration were given to the mechanical features of the goods in issue, they would be more specifically described as gears and gearing of heading No. 84.82, which heading is not excluded in Note 2(e) to Section XVII.

46. Therefore, the CBSA maintained that the goods in issue were properly classified under tariff item No. 8708.99.99.

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31. (28 July 2010), AP-2009-005 (CITT) [*Pièces d'Auto Transit*].
32. *Ibid.* at para. 50. That decision was upheld on appeal by the Federal Court of Appeal in *Pièces d'auto Transit Inc. v. Canada (Border Services Agency)*, 2011 FCA 279 (CanLII).

PRELIMINARY MATTER REGARDING BMW'S ALTERNATIVE ARGUMENT

47. As noted above, BMW proposed an alternative argument for the first time in a supplementary brief filed on May 20, 2014.[33] The CBSA, by letter dated May 27, 2014, objected to the lateness of this argument and requested that the supplementary brief be stricken from the record.[34]

48. The Tribunal addressed this issue at the hearing. It accepted BMW's supplementary brief on the record, but indicated that it would allow the CBSA an opportunity to file written reply submissions pending views from the parties and its own deliberations about whether further submissions were indeed required.[35]

49. On June 3, 2104, the Tribunal indicated to the parties that it would not need further submissions on the alternative argument raised by BMW.[36] Indeed, the Tribunal found that, on the basis of the evidence, the goods in issue could not be classified in heading No. 85.43. In particular, the explanatory notes to heading No. 85.43 specify that it includes electrical goods incorporating mechanical features, *provided* the latter are subsidiary to the electrical functions of the goods in issue. In contrast, both expert witnesses agreed that the electrical and the mechanical features of the goods in issue were of equal importance.[37]

50. Therefore, having determined and communicated that heading No. 85.43 could not apply to the goods in issue, the Tribunal will not give further consideration to BMW's alternative argument in this statement of reasons.

ANALYSIS

51. Parties agree that the key issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8708.99.99 or should be classified under tariff item No. 8479.89.90. Parties also agree that the issue can be resolved according to Rule 1 of the *General Rules*. Therefore, the Tribunal will begin by considering the appropriate heading for the goods in issue at the time of importation, taking into account the terms of the headings and the relevant notes as set out above.

52. In this regard, as noted by both parties, headings Nos. 84.79 and 87.08 are mutually exclusive by operation of Note 1(l) to Section XVI, which includes Chapter 84, and of Note 2(e) to Section XVII, which includes Chapter 87. Accordingly, the *prima facie* classification of the goods in issue in either heading would preclude their *prima facie* classification in the other.[38]

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33. Exhibit AP-2013-050-17A at paras. 7-12, Vol. 1B.
34. Exhibit AP-2013-050-23, Vol. 1B; Exhibit AP-2013-050-25, Vol. 1B.
35. *Transcript of Public Hearing*, 29 May 2014, at 18-20, 160, 190.
36. Exhibit AP-2013-050-26, Vol. 1B.
37. *Transcript of Public Hearing*, 29 May 2014, at 91, 132.
38. The Tribunal has explained in a line of past cases that, in the presence of mutually exclusive notes in the competing headings, classification must be effected through Rule 1 of the *General Rules*, i.e. the terms of the headings and relevant notes, and without recourse to the remaining Rules. See, for example, *Kinedyne Canada Limited v. President of the Canada Border Services Agency* (17 December 2013), AP-2012-058 (CITT) [*Kinedyne*] at para. 37; *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency* (10 February 2011), AP-2009-045 (CITT); *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency* (2 June 2008), AP-2006-054 (CITT) at para. 24; *Dynamic Furniture Corp. v. President of the Canada Border Services* Agency (31 March 2009), AP-2005-043 (CITT) at para. 31; *Rutherford Controls International Corp. v. President of the Canada Border Services Agency* (26 January 2011), AP-2009-076 (CITT); *Bauer Hockey Corporation v. President of the Canada Border Services Agency* (26 April 2012), AP-2011-011 (CITT) [*Bauer*] at para. 33.

53. As the terms of the headings and the relative notes do not ascribe any particular order of analysis, the Tribunal will first determine whether BMW has demonstrated that the goods in issue should be classified in heading No. 84.79.

54. In so doing, the Tribunal is mindful that it must consider the characteristics of the goods in issue at the time of importation, a well-established principle in the Tribunal's jurisprudence.[39] In this regard, characteristics such as the design, best usage, marketing and distribution of the goods in issue can, in the appropriate circumstances, help describe the goods in issue and shed light on their classification pursuant to Rule 1 of the *General Rules*.[40]

Should the Goods in Issue be Classified in Heading No. 84.79

55. According to the terms and relevant notes of heading No. 84.79, the goods in issue must meet three conditions in order to be classified therein: (1) they must be "machines" or "mechanical appliances", (2) they must have "individual functions" and (3) they must not be more specifically covered by another heading in Chapter 84 or, indeed, the Nomenclature.[41] The Tribunal will consider each of these conditions in turn to determine whether they apply to the goods in issue at the time of importation. In the event that one condition does not apply, the Tribunal will then conclude that the goods in issue cannot be classified in heading No. 84.79 and will therefore turn its analysis to the appropriateness of heading No. 87.08.

Are the Goods in Issue "machines" or "mechanical appliances"?

56. The terms "machines" and "mechanical appliances" are not defined in the Nomenclature. However, the Tribunal has stated in many cases that these terms are interchangeable[42] and has consistently defined them in accordance with their ordinary and contextual meaning. Most notably, the Tribunal has characterized machines or mechanical appliances as articles that ". . . do work through some combination of

39. See *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366, wherein the Supreme Court of Canada explained 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 Minister of National Revenue for Customs and Excise 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) [*Philips*] at para. 29; *Powers Industries Limited v. President of the Canada Border Services Agency* (22 April 2013), AP-2012-010 (CITT) at para. 22; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (17 September 2013), AP-2012-057 (CITT) at para. 16; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (23 May 2014), AP-2011-033 (CITT), at para. 9.

40. See for example, *Partylite Gifts Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (16 February 2004), AP-2003-008 (CITT) [*Partylite CITT*] at 8 (affirmed in *Partylite Gifts Ltd. v. Canada (Customs & Revenue Agency)*, 2005 FCA 157 [CanLII]) [*Partylite FCA*]; *Bauer* at para. 43; *Eastern Division Henry Schein Ash Arcona Inc. v. President of the Canada Border Services Agency* (19 February 2014), AP-2013-026 (CITT) at para. 48.

41. See the terms of heading No. 84.79 and the explanatory notes to heading No. 84.79.

42. See, for example, *Kinedyne* at para. 39. *Canper Industrial Products Ltd. v. Deputy M.N.R.* (24 January 1995), AP-94-034 (CITT) at 4.

moving parts . . .” and “. . . produce, modify or transmit force *to an external body* . . .”[43] [emphasis in original].

57. Applying that characterization to the case at hand, the Tribunal notes that both expert witnesses testified that the mirror housings include mechanical systems that perform “work” by producing, modifying or transmitting force. Specifically, the witnesses explained that the combinations of electrical motors and gears transform electrical power into mechanical energy and, thus, enable the driver to adjust and/or fold the mirrors or the entire mirror housing as desired.[44]

58. Nevertheless, according to the expert testimony, the goods in issue cannot perform “work” *at the time of importation* because they were not imported with mirrors. Mr. Misura testified that the goods in issue could only perform work *after* the mirrors were fitted into the housings and the housings were attached to the vehicle. He stated that the goods in issue “. . . without the mirror cannot . . . do the work [they are] intended to do . . . .”[45]

59. Furthermore, both expert witnesses stated that, at the time of importation, the primary purpose of the goods in issue was to house mirrors and then be attached to the vehicle. Dr. Rocha testified that the “. . . main function [of the goods in issue] would be to hold the mirror and attach it to the car.”[46] Likewise, when asked about the primary purpose of the goods in issue, Mr. Misura repeatedly noted that the primary purpose of the goods in issue is to house mirrors and “. . . to affix a mirror to the vehicle and to allow it to be adjusted; to allow the mirror to be used for its purpose, which is to view the side of the vehicle to the rear.”[47]

60. Mr. Misura went on to explain that the goods in issue can perform other functions beyond their primary purpose alone. For example, by virtue of their electro-mechanical components, the goods in issue allow the driver to position the mirror by using a touch pad inside the vehicle, so that the driver can see the side and rear of the vehicle while driving, or to fold in the entire housing when the vehicle is parked.[48] Mr. Misura also noted that the goods in issue serve to house the wiring that comes through the driver’s door control module, as well as the heating and electro-chromatic (i.e. dimming) elements and related wiring that may be installed.[49] Dr. Rocha agreed, but stressed that these other functions are of secondary or ancillary importance to their primary purpose.[50]

61. While the Tribunal recognizes the additional functions of the goods in issue and given that it must consider the characteristics of the goods in issue at the time of importation, the Tribunal must therefore distinguish between the primary and secondary (or ancillary) uses and features of the mirror housings in order to determine whether it is appropriate to classify them in heading No. 84.79. In this regard, the Tribunal notes that the Federal Court of Appeal has recognized that the fact that goods can be put to more than one use does not preclude a finding, on the evidence, that they are primarily designed for one of those uses, which may in turn be determinative of their tariff classification.[51]

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43. *Philips*. See, also, *Kinedyne* at paras. 40-44.
44. *Transcript of Public Hearing*, 29 May 2014, at 53, 75-77, 108-110.
45. *Ibid.* at 72, 89-90.
46. *Ibid.* at 112-13, 125-26, 129-30.
47. *Ibid.* at 56. See, also, *Transcript of Public Hearing*, 29 May 2014, at 56, 77 where Mr. Misura again links the primary purpose of the goods in issue to housing the mirror in the appropriate position to allow the driver to see the rear of the vehicle.
48. *Transcript of Public Hearing*, 29 May 2014, at 75-77.
49. *Ibid.* at 76.
50. *Ibid.* at 112.
51. See *Partylite FCA*. In the case underlying that appeal, the Tribunal had found that, while the goods had multiple uses, they were primarily designed to hold candles (based on their design, best usage, marketing and distribution) and, as such, were appropriately classified as candlesticks and candelabra. See *Partylite CITT*.

62. In the Tribunal's view, it is clear from the evidence that the primary function of the goods in issue when imported into Canada is to hold or house mirrors and then be attached to the vehicle. All the other functions that they perform are secondary in importance for tariff classification purposes. In fact, even if the electro-mechanical components were completely removed, the goods in issue could still perform their primary purpose of housing the mirrors and being attached to the vehicle in the position required by the driver.[52] Conversely, if the goods in issue did not have the capacity to house the mirrors and be attached to a vehicle, they would serve no useful purpose at all.[53]

63. As such, the Tribunal finds that the goods in issue are first and foremost articles designed and sold to hold a load (i.e. the mirrors). To borrow the terminology used by Dr. Rocha, the goods in issue are therefore first and foremost *structures*, not machines.[54] As Mr. Misura himself underscored, at the time of importation, the goods in issue are immediately recognizable for what they are (i.e. mirror housings), even without the mirrors fitted into them or without the housing and mirror being attached to the vehicle.[55]

64. Therefore, while the goods in issue do have electro-mechanical components, which, when taken *separately*, could be described as machines in their own right as they can perform "work" in certain respects,[56] their ancillary functions are insufficient to change their fundamental nature. Furthermore, their ancillary functions are insufficient to treat them as machines for classification purposes, given that the goods in issue are not machines at the time of importation.[57] Put another way, in light of the evidence that the goods in issue are primarily structures that house mirrors, to classify the goods in issue as suggested by BMW would effectively mean classifying them on the basis of some of their internal components and secondary features. In the Tribunal's view, such reasoning would be contrary to the basic principle that tariff classification requires considering the goods in issue as presented for importation into Canada.

65. Accordingly, the Tribunal finds that the goods in issue do not meet the first condition of heading No. 84.79 and cannot be classified therein as a result.

Were the Goods in Issue Properly Classified in Heading No. 87.08

66. Having found that the goods in issue cannot be classified in heading No. 84.79, the Tribunal will consider whether the CBSA properly classified them in heading No. 87.08 as parts and accessories of motor vehicles.

52. *Transcript of Public Hearing*, 29 May 2014, at 113.
53. *Ibid.* at 72, 89-90, 125-26.
54. *Ibid.* at 129-30.
55. *Ibid.* at 61-62.
56. *Ibid.* 128, 131.
57. See *Komatsu International (Canada) Inc. v. President of the Canada Border Services Agency* (10 April 2012), AP-2010-006 (CITT) at para. 37; *EEV Canada Limited v. Deputy M.N.R.C.E.* (25 September 1991), 2372 (CITT); *Hospital & Kitchen Equipment Limited v. Deputy M.N.R.* (6 May 1994), AP-93-026 (CITT), where the Tribunal similarly held that the addition of ancillary parts that may enhance the main function of a good did not alter its essential character for classification purposes. See also *Royal Telecom Inc. v. Deputy M.N.R.C.E.* (5 April 1991), AP-90-027 (CITT) at 7, where the Tribunal found that cordless telephones were classified as telephone sets, not as transmission apparatus for radio-telephony, because "[t]hough the cordless telephone employs a radio component, it is merely an ancillary and peripheral component to the unit . . . . While the radio component has increased the utility and convenience of the goods, nevertheless the goods are sold, essentially, to interface with and to effect line-telephony."

67. According to the relevant legal and explanatory notes, in order to be classified in heading No. 87.08, the goods in issue must:

- be "parts" or "accessories";
- must not be machines of heading No. 84.79;[58]
- be suitable for use solely or principally with the articles of heading Nos. 87.01 to 87.05;[59] and
- not be more specifically included elsewhere in the Nomenclature.[60]

68. As the Tribunal has already found that the goods in issue are not classifiable as machines in heading No. 84.79, it will therefore consider whether the goods in issue meet the remaining three conditions for classification in heading No. 87.08.

69. BMW admitted that the goods in issue are suitable for use solely with BMW X5 series vehicles, which are motor vehicles covered by heading No. 87.03.[61] In addition, aside from claiming that they are more appropriately classified in heading No. 84.79, BMW did not argue that the goods in issue are more specifically included elsewhere in the Nomenclature. In this way, BMW acknowledges that two of the remaining conditions of heading No. 87.08 are met. However, at the hearing, BMW argued that the goods in issue are not "parts", because they are not "essential" to the main function of the vehicles to which they are attached (i.e. to transport people and goods from point A to point B).[62] In this regard, BMW distinguished the goods in issue from other "parts" such as the engine, transmission and brakes.[63] The Tribunal must therefore consider whether this last condition of heading No. 87.08 is indeed applicable to the goods in issue.

Are the Goods in Issue "parts"?

70. As noted above, the CBSA suggested that the goods in issue met the test set out by the Tribunal for automotive parts in *Pièces d'Auto Transit*. In particular, the CBSA argued that the goods in issue were "parts" because they were (1) essential to the functioning of a motor vehicle, (2) specifically designed for use therein, (3) not designed for other applications and (4) considered parts in common trade usage and practice.

71. The Tribunal notes that the term "parts" is not defined in the Nomenclature or the notes relative to heading No. 87.08. Accordingly, the term has been described in Tribunal case law in accordance with its ordinary meaning, as an article committed to and necessary for the operation of another good.[64] The Tribunal also accepts the argument put forward by the CBSA that the test of *Pièces d'Auto Transit* is relevant to the case at hand and will therefore apply its four components to the goods in issue.

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58. Note 2(e) to Section XVII; Note (III)(a) of the explanatory notes to Section XVII.
59. Note (III)(b) of the explanatory notes to Section XVII; terms of heading No. 87.08.
60. Note (III)(c) of the explanatory notes to Section XVII.
61. *Transcript of Public Hearing*, 29 May 2014, at 83-85. Heading No. 87.03 provides as follows: "Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02 [*for ten persons or more*]), including station wagons and racing cars."
62. *Transcript of Public Hearing*, 29 May 2014, at 146-47.
63. *Ibid.* at 59-60.
64. See, for example, *Hoover Canada, a Division of MH Canadian Holdings Limited v. Deputy M.N.R.* (14 July 1994), AP-93-128 (CITT). The *Canadian Oxford Dictionary*, 2nd ed. defines the word "part" as ". . . 2. an essential member or constituent of anything . . . 3. a component of a machine etc. . . . ."

72. In that regard, the evidence clearly leads the Tribunal to conclude that the goods in issue are "parts" within the parameters of heading No. 87.08.

73. Indeed, BMW itself admitted that the goods in issue are specifically designed for use with certain BMW vehicles and are not designed for other applications. Moreover, the goods in issue are considered "parts" in common trade and practice and marketed and sold as such.[65]

74. In addition, the evidence establishes that the goods in issue are essential to the safe operation of a vehicle, in compliance with regulatory requirements. This is sufficient, in the Tribunal's view, to make them "parts" of motor vehicles, despite the fact that a vehicle can move from point A to point B without them. As is expressly indicated in the Nomenclature, the items of heading No. 87.08 include such articles as safety air bags of subheading No. 8708.99, silencers or mufflers of subheading No. 8708.92 or safety seat belts of tariff item No. 8708.21.00, all of which are examples of articles that are not strictly necessary for the vehicle to move from point A to point B. The goods in issue are akin to these items, in that they are standard features of modern vehicles and contribute to the safety and comfort of the passengers of the vehicle as it moves.

75. Therefore, as the goods in issue meet the test set by the Tribunal in *Pièces d'Auto Transit*, the Tribunal finds that they are properly classified in heading No. 87.08 as parts, as determined by the CBSA.

Classification at the Subheading and Tariff Item Levels

76. Having found that the goods in issue are properly classified in heading No. 87.08, the Tribunal finds that, in accordance with Rule 6 of the *General Rules*, the goods in issue are also properly classified in subheading No. 8708.99, as other parts of the motor vehicles of heading Nos. 87.01 to 87.05. Likewise, on the basis of Rule 1 of the *Canadian Rules*, the goods in issue are properly classified under tariff item No. 8708.99.99 as other parts.

DECISION

77. The appeal is dismissed.

Ann Penner
Ann Penner
Presiding Member

65. This was admitted by BMW; see *Transcript of Public Hearing*, 29 May 2014, at 146. See, also, BMW's product literature and online parts catalogue, which include the goods in issue, specifically referring to them as "parts", and also attribute them specific BMW part numbers: Exhibit AP-2013-050-08A, tabs 1, 9, Vol. 1.