



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2014-042

EMCO Corporation Westlund

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, December 21, 2015*

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IN THE MATTER OF an appeal heard on September 24, 2015, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF 22 decisions of the President of the Canada Border Services Agency, dated December 9, 2014, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

EMCO CORPORATION WESTLUND

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Jean Bédard
Jean Bédard
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 24, 2015
Tribunal Member: Jean Bédard, Presiding Member
Counsel for the Tribunal: Kalyn Eadie
Senior Registrar Officer: Julie Lescom
Registrar Support Officer: Vedranka Zec

PARTICIPANTS:

Appellant	Counsel/Representative
EMCO Corporation Westlund	Sean Everden
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Max Binnie

WITNESSES:

Matthew Curro Canadian Trainer Navien, Inc.	Mark Williamson Canadian General Manager Navien, Inc.
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STATEMENT OF REASONS

INTRODUCTION

1. This matter involves an appeal filed with the Canadian International Trade Tribunal (the Tribunal) by EMCO Corporation Westlund (EMCO) pursuant to subsection 67(1) of the *Customs Act*¹ from 22 decisions of the President of the Canada Border Services Agency (CBSA), dated December 9, 2014, made pursuant to subsection 60(4).

2. This appeal concerns the tariff classification of Navien CH Series ASME combination boilers (the goods in issue).² The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8419.11.00 of the schedule to the *Customs Tariff*³ as instantaneous gas water heaters, as determined by the CBSA, or should be classified under tariff item No. 8403.10.00 as central heating boilers other than those of heading No. 84.02, as claimed by EMCO.⁴

PROCEDURAL HISTORY

3. Between February 14 and December 2, 2011, the goods in issue were imported via 22 transactions under tariff item No. 8419.11.00.

4. On April 4 and 5, 2013, EMCO filed a refund request under section 74 of the *Act*, claiming that the goods in issue should be classified under tariff item No. 8403.10.00.

5. On October 8, 2013, the CBSA denied EMCO's refund request and found that the goods in issue were properly classified under tariff item No. 8419.11.00.

6. On December 13, 2013, EMCO filed a dispute request with the CBSA under subsection 60(1) of the *Act*.

7. On December 9, 2014, the CBSA issued its further re-determination under subsection 60(4) of the *Act* confirming that the goods in issue were properly classified under tariff item No. 8419.11.00.

8. On February 27, 2015, EMCO filed this appeal.

9. On September 24, 2015, the Tribunal held a public hearing in Ottawa, Ontario. EMCO presented two witnesses, one of whom it attempted to qualify as an expert. The CBSA did not present any witnesses.

DESCRIPTION OF THE GOODS IN ISSUE

10. The goods in issue are referred to as combination boilers or "Combi-boilers". They are described by EMCO as being for use in the home and in small commercial locations.⁵ The goods in issue heat water for use in radiators or radiant floor heating systems, as well as for domestic consumption or other household use.

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

2. There was some confusion between the parties over the exact model types of the goods in issue. This was clarified at the hearing. *Transcript of Public Hearing*, 24 September 2015, at 53.

3. S.C. 1997, c. 36.

4. As discussed later, the Tribunal is not restricted, however, to simply adjudicating between the parties' positions.

5. It should be noted, however, that the Canadian Standards Association certificate produced as evidence certifies the boiler for residential use without any reference to commercial use. Exhibit AP-2014-042-14A, tab 10, Vol. 1C.

11. The boiler portion of the goods in issue circulates water continuously through a closed loop system to distribute heat through a piping distribution system whenever there is a call for heat. The water in this system is separated from the domestic hot water system, which activates whenever there is a call for hot water from the opening of a tap.

PRELIMINARY ISSUES

Motion to Strike Certain Documents

12. On August 28, 2015, EMCO filed a motion to have certain documents and arguments struck from the CBSA's brief on the ground that they did not relate to the goods in issue. EMCO submitted that the product literature on which the CBSA relied did not pertain to the goods in issue, but rather to other models of water heaters and boilers produced by Navien, Inc. (Navien)

13. On August 31, 2015, the CBSA filed a reply to EMCO's motion requesting that the Tribunal deny the motion, as the matters raised therein would more properly be considered at the hearing of the appeal on its merits.

14. On September 4, 2015, the Tribunal denied EMCO's motion on the grounds that the inclusion of the documents caused no prejudice to EMCO and noted that EMCO would have ample opportunity to contest the relevance of these documents and present its own evidence regarding the goods in issue at the hearing.

Expert Qualification

15. EMCO requested that the Tribunal qualify one of its witnesses, Mr. Matthew Curro, as an expert in the installation and troubleshooting/repair of domestic water heaters.

16. Prior to the hearing, the CBSA indicated that it would object to Mr. Curro's qualification as an expert witness on the grounds that he lacked the requisite independence and impartiality due to his vested interest in the outcome of the case as an employee of Navien, that he lacked experience with goods other than those manufactured by Navien and that his expert report offered an opinion on the ultimate legal question at issue, i.e. whether the goods in issue are "boilers" or "water heaters".

17. In *R. v. Mohan*, the Supreme Court of Canada enunciated the following four criteria to consider when assessing the admissibility of expert evidence:

- relevance;
- necessity in assisting the trier of fact;
- absence of any other exclusionary rule of evidence; and
- a properly qualified expert.⁶

18. In the same decision, the Supreme Court of Canada commented that the purpose of expert witness testimony, especially with respect to scientific matters, is to ". . . furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."⁷

6. [1994] 2 S.C.R. 9, 1994 CanLII 80 (SCC) [*Mohan*].

7. *Mohan* at 24.

19. More recently, the Supreme Court of Canada commented on the issue of the impartiality and independence of expert witnesses in *White Burgess Langille Inman v. Abbott and Haliburton Co.*⁸ In sum, the decision holds that, where questions regarding the impartiality or independence of a proposed expert witness are raised, at common law, the witness can be qualified and his or her evidence admitted where the trier of fact is satisfied (1) that the witness is able and willing to provide fair, objective and non-partisan evidence (this is not meant as an onerous threshold) and (2) in the discretion of the trier of fact, that the potential helpfulness of the evidence is not outweighed by the risks associated with it. If the evidence is admitted, the trier of fact assigns it the *weight* appropriate in the circumstances, including in light of impartiality and independence concerns.

20. At the Tribunal's request, and in accordance with the approach suggested by the Supreme Court of Canada in *White Burgess*,⁹ Mr. Curro stated, under oath, that he understood that his duty as an expert witness would be to provide fair, objective and unbiased evidence to assist the Tribunal in rendering its decision and that he was able to discharge this duty.¹⁰ The CBSA was then permitted to challenge the proposed expert on this statement and on his qualifications.

21. With respect to the fact that Mr. Curro is an employee of the manufacturer of the goods in issue, the Tribunal noted that, in *White Burgess*, the Supreme Court of Canada held that "[i]n most cases, a mere employment relationship with the party calling the evidence will be insufficient to [render the evidence of the proposed witness inadmissible]."¹¹ The Supreme Court of Canada then listed other situations that would be of concern, such as a direct financial interest in the outcome of the litigation or where the expert assumes the role of an advocate for one of the parties.

22. Absent evidence of any relationship or interest other than Mr. Curro's employment status, and in light of Mr. Curro's attestation as described above, the Tribunal was satisfied that Mr. Curro could provide the degree of independence and impartiality required by the Tribunal.¹²

23. However, the Tribunal found that it was not necessary for Mr. Curro to be qualified as an expert, as he would be able to address issues of the functioning of the goods in issue, and of similar types of goods, from his personal knowledge. The Tribunal did not consider it necessary for him to offer an expert opinion to assist the Tribunal in forming conclusions regarding the facts. As EMCO did not object to this approach, Mr. Curro was asked to testify as a lay witness, albeit one with recognized experience with and specialized knowledge of the goods in issue.¹³

Request for Additional Submissions

24. On September 22, 2015, the Tribunal requested that the parties address Note 3 to Section XVI of the *Customs Tariff* during closing argument, particularly the following points:

- whether the goods in issue are composite or multi-function machines;
- the impact that Note 3 to Section XVI and the exception to its application found in the general explanatory note to Section XVI have on the proper order of analysis required to resolve this appeal; and
- if the Tribunal were to determine that this appeal is properly resolved through the application of Note 3 to Section XVI, which function of the goods in issue constitutes their principal function.

8. [2015] 2 S.C.R. 182, 2015 SCC 23 (CanLII) [*White Burgess*].

9. At paras. 47-49.

10. *Transcript of Public Hearing*, 24 September 2015, at 19-20.

11. *White Burgess* at para. 49.

12. *Transcript of Public Hearing*, 24 September 2015, at 28.

13. *Ibid.* at 28-29.

25. Also on September 22, 2015, the CBSA sent a letter requesting clarification regarding the third point listed above and expressing concern that the Tribunal had raised this issue only two days prior to the hearing. On September 23, 2015, the Tribunal replied that the matter would be addressed at the hearing.

26. At the hearing, the CBSA again submitted that it had not received sufficient notice that the applicability of Note 3 to Section XVI was at issue. The CBSA further noted that EMCO had not made this argument in any meaningful way.

27. It is well established that appeals to the Tribunal under section 67 of the *Act* proceed *de novo* and that the Tribunal's role is to arrive at the proper tariff classification of the goods in issue. It follows that the Tribunal need not restrict itself to simply adjudicating between the parties' positions. Once it became apparent to the Tribunal that the applicability of Note 3 to Section XVI could be an issue, the Tribunal chose to notify the parties that it intended to seek their views on this matter.

28. However, given the fairness considerations raised, the Tribunal allowed the parties to make further written submissions on this issue after the close of the hearing. The substance of these arguments is considered below.

LEGAL FRAMEWORK

29. 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).¹⁴ 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.

30. 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*¹⁵ and the *Canadian Rules*¹⁶ set out in the schedule.

31. 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.

32. 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*¹⁷ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,¹⁸ published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁹

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

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

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

17. World Customs Organization, 2d ed., Brussels, 2003 [classification opinions].

18. World Customs Organization, 5th ed., Brussels, 2012 [explanatory notes].

19. 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 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 classification opinions.

33. 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.²⁰

34. 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.²¹ The final step is to determine the proper tariff item.²²

TERMS OF RELATIVE HEADINGS AND LEGAL AND EXPLANATORY NOTES

Section XVI

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

...

Chapter 84

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

...

84.03 **Central heating boilers other than those of heading 84.02.**

8403.10.00 -Boilers

...

84.19 **Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 85.14), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric.**

-Instantaneous or storage water heaters, non-electric:

8419.11.00 **- -Instantaneous gas water heaters**

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

21. 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."

22. 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." Classification opinions and explanatory notes do not apply to classification at the tariff item level.

35. Notes 3 and 5 to Section XVI provide as follows:
3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.
 - ...
 5. For the purpose of these Notes, the expression “machine” means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.
36. The explanatory notes to Note 3 to Section XVI provide as follows:

**(VI) MULTI-FUNCTION MACHINES AND
COMPOSITE MACHINES**

(Section Note 3)

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

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

Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c); such is the case, for example, in respect of multi-function machines potentially classifiable in several of the headings 84.25 to 84.30, in several of the headings 84.58 to 84.63 or in several of the headings 84.69 to 84.72.

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

The following are examples of such composite machines: printing machines with a subsidiary machine for holding the paper (heading 84.43); a cardboard box making machine combined with an auxiliary machine for printing a name or simple design (heading 84.41); industrial furnaces combined with lifting or handling machinery (heading 84.17 or 85.14); cigarette making machinery combined with subsidiary packaging machinery (heading 84.78).

For the purposes of the above provisions, machines of different kinds are taken to be **fitted together to form a whole** when incorporated one in the other or mounted one on the other, or mounted on a common base or frame or in a common housing.

Assemblies of machines should not be taken to be fitted together to form a whole unless the machines are designed to be permanently attached either to each other or to a common base, frame, housing, etc. This **excludes** assemblies which are of a temporary nature or are not normally built as a composite machine.

The bases, frames or housings may be provided with wheels so that the composite machine can be moved about as required during use, **provided** it does not thereby acquire the character of an article (e.g., a vehicle) more specifically covered by a particular heading of the Nomenclature.

Floors, concrete bases, walls, partitions, ceilings, etc., even if specially fitted out to accommodate machines or appliances, should not be regarded as a common base joining such machines or appliances to form a whole.

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

It should be noted that multi-purpose machines (e.g., machine-tools capable of working metals and other materials or eyeletting machines used equally well in the paper, textile, leather, plastics, etc., industries) are to be classified according to the provisions of Note 7 to Chapter 84.

37. The explanatory notes to Chapter 84 provide as follows:

(2) Headings 84.02 to 84.24 cover the other machines and apparatus which are classified mainly by reference to their function, and regardless of the field of industry in which they are used.

38. The explanatory notes to heading No. 84.03 provide as follows:

This heading includes **central heating boilers** of any size (**other than** stoves with subsidiary boilers, of **heading 73.21**), using any type of fuel (e.g., wood, coal, coke, gas, fuel oil), for heating houses, flats, factories, workshops, greenhouses, etc., by circulation of water; it also includes electric central heating boilers.

They may be equipped with pressure regulators and gauges, water levels, taps, cocks, burners and similar parts or accessories.

Hot water boilers, even if also capable of producing low pressure steam, are also classified in this heading.

39. The explanatory notes to heading No. 84.19 provide as follows:

It should be noted that this heading **does not include**:

...

(f) Central heating boilers **of heading 84.03**.

TRIBUNAL ANALYSIS

Tariff Heading Classification

40. As stated above, the Tribunal must 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.

Note 3 to Section XVI

41. Both parties initially framed their submissions by noting that the explanatory notes to heading No. 84.19 exclude central heating boilers of heading No. 84.03 from heading No. 84.19 and that, therefore, the Tribunal's classification exercise should begin with a consideration of heading No. 84.03 under Rule 1 of the *General Rules*.

42. However, EMCO also submitted that the goods in issue could be considered composite goods and that, as a result, Note 3 to Section XVI could potentially apply. EMCO then argued that Note 3 does not apply in this instance as a result of the clause in the explanatory notes to Note 3 that provide that, if composite goods are "... covered as such by a particular heading ...", then they do not need to be classified in accordance with their principal function. In EMCO's submission, the goods in issue must be covered "as such" by heading No. 84.03, because of the explanatory notes to heading No. 84.19 that exclude "central heating boilers" of heading No. 84.03 from classification in heading No. 84.19.

43. In response to the Tribunal's request for further argument on this issue, as discussed above, EMCO submitted that the goods in issue are multi-function, rather than composite, machines, because they do not consist of two separate machines.

44. The CBSA's initial submissions did not address Note 3 to Section XVI. In response to the Tribunal's request for argument on this issue, the CBSA submitted that the goods in issue are neither composite nor multi-function machines. The CBSA argued that the goods in issue have one function, which is to heat water, and that the fact that the hot water that they produce can be used in different ways does not make the goods in issue multi-function machines, as that term is used in the explanatory notes to Note 3 to Section XVI.

45. Further, the CBSA rejected EMCO's argument that the goods in issue are covered "as such" by heading No. 84.03 because of the exclusionary note in heading No. 84.19. The CBSA submitted that goods are not covered "as such" by a heading because of an exclusionary note; instead, the exclusionary note simply requires the Tribunal to consider and reject heading No. 84.03 before considering heading No. 84.19.

46. In reply, EMCO submitted that, contrary to the CBSA's position, "function" is defined as "*the special **purpose** or activity for which a thing exists or is **used***",²³ [italics in original, bold added for emphasis] and that, therefore, "function" is interchangeable with "purpose" or "use". EMCO further submitted that the goods in issue heat water in distinct ways for two distinct purposes. EMCO argued that one function of the goods in issue is to heat water for central heating purposes and that the other is to heat water for domestic use. EMCO further submitted that the goods in issue operate differently depending on the function.

Order of Analysis

47. The CBSA is correct that goods are not covered "as such" by a heading simply due to the presence of an exclusionary note. As will be discussed below, the exclusionary note operates to require the Tribunal to consider whether the goods in issue are covered "as such" by heading No. 84.03 before considering whether they are covered "as such" by heading No. 84.19.

48. In addition, as set out above, the Tribunal's analysis should begin with the legally binding section and chapter notes before turning to consideration of the terms of the explanatory notes to the headings in issue. In other words, the parties' initial submissions that the analysis must begin with the consideration of heading No. 84.03 as a result of the exclusionary note in the explanatory notes to heading No. 84.19 is incorrect, because the legally binding Note 3 to Section XVI is potentially applicable.

49. Therefore, the starting point of the Tribunal's analysis is an assessment of whether the goods in issue are in fact multi-function or composite machines that would fall within the ambit of Note 3 to Section XVI.

Are the goods in issue multi-function or composite machines?

50. According to Note 3 to Section XVI and the explanatory notes to Section XVI, composite machines "... [consist] of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing **separate** functions which are generally complementary and are described in different headings of Section XVI"

23. Exhibit AP-2014-042-23 at 1, Vol. 1D.

51. Multi-function machines are unitary machines “. . . designed for the purpose of performing two or more complementary or alternative functions . . .”, “for example, machine-tools for working metal using interchangeable tools, which enable them to carry out different machining operations (e.g. milling, boring, lapping).”

52. In accordance with the above, the Tribunal finds that the goods in issue are multi-function machines. The evidence shows that the energy produced by the goods in issue is used in two separate applications. Briefly, the goods in issue are connected to two separate water supplies, the water supply for a space heating system and the potable water supply for domestic use. The water for the central heating system travels through two heat exchangers that are connected to the natural gas/propane supply, is heated and is then pumped out into the heating system.²⁴

53. However, when there is a demand for domestic hot water, a three-way valve within the goods in issue redirects the space heating water to a third heat exchanger, where it heats the potable water. This water then exits into the plumbing system. The goods in issue are specifically designed so that, although the potable domestic water is heated by the space heating water across the heat exchanger, the space heating water and the potable domestic hot water remain separate, so that the potable water does not become contaminated by other chemicals or debris that may be in the space heating water.²⁵

54. As submitted by EMCO, the evidence outlined above indicates that the goods in issue do not consist of two machines. Instead, the goods in issue are a single machine that is performing two alternative or complementary functions.

55. With respect to this latter point, the Tribunal recognizes that there was much debate between the parties on the meaning of the word “function”. In particular, the CBSA’s position is that the two applications for the hot water produced by the goods in issue do not constitute two separate functions. In order to rebut this position, EMCO provided a dictionary definition of the word “function”, set out above.

56. Before referring to outside sources in order to define a term used in the nomenclature, regard should be had to the nomenclature itself.

57. In this case, the Tribunal notes that Note (B)(2) of the explanatory notes to Chapter 84 provides as follows:

Headings 84.02 to 84.24 cover the other machines and apparatus which are classified mainly by reference to their function, and regardless of the field of industry in which they are used.

58. To paraphrase, the nomenclature indicates that, when it comes to heading Nos. 84.02 to 84.24, the terms of the headings are defined in reference to the *function* of the goods. The two proposed classifications for the goods in issue fall within those headings. Therefore, the terms “boiler” and “water heater” can constitute the “functions” for the purpose of the Tribunal’s analysis pursuant to Note 3 to Section XVI.

59. Consistently with the multi-functional nature of the goods in issue, the certificate of compliance provided by EMCO certifies the goods in issue as both “COMMERCIAL HEATERS (GAS) - Water Heaters” and “BOILERS (GAS) – Steam and Hot Water – Residential”.²⁶ Contrary to the CBSA’s position, this suggests that the industry does not consider that “water heater” describes the function of the goods in issue in their entirety.

24. Exhibit AP-2014-042-12A, tab 1, Vol. 1C; *Transcript of Public Hearing*, 24 September 2015, at 33.

25. Exhibit AP-2014-042-12A, tab 1, Vol. 1C; *Transcript of Public Hearing*, 24 September 2015, at 34.

26. Exhibit AP-2014-042-14A, tab 10, Vol. 1C.

60. As a result, the goods in issue are multi-function machines and should, in accordance with Note 3 to Section XVI, be classified in accordance with their principal function, “[u]nless the context otherwise requires”.

61. The Tribunal has previously commented on the meaning of the phrase “unless the context otherwise requires” in Note 3 to Section XVI, and the exception in the explanatory notes to Section XVI, as follows:

The phrase “unless the context otherwise requires” indicates that there are exceptions to this rule. One such exception arises from the explanatory notes to Section XVI, which expressly provides that “*Note 3 to Section XVI need not be invoked* when the composite machine is covered *as such* by a particular heading . . .” [emphasis added]. As stated by the Tribunal in another case dealing with the same provisions, “. . . to suggest otherwise would result in the anomalous situation of a good being classified as if consisting only of one of its components notwithstanding the presence of a heading which covers the complete product.” In other words, when a composite machine is covered *as such* in a particular heading, it is precluded from being classified as if it consisted only of the component, or as being the machine, that performs its principal function.²⁷

[Footnotes omitted]

62. However, the Tribunal’s previous jurisprudence has required that, in order for goods to be covered “as such” by a heading, the heading must “cover the complete product”. This suggests that this exception only applies if the heading describes the goods *as a whole* or, as found by the Federal Court of Appeal, if the heading provides a *specific* description of the goods.²⁸

63. In this instance, the consideration of whether the goods in issue are covered “as such” by one of the two headings in issue should begin with a consideration of heading No. 84.03, due to the application of the exclusionary note in the explanatory notes to heading No. 84.19. This approach is consistent with previous Tribunal jurisprudence.²⁹

Are the goods in issue covered “as such” by heading No. 84.03?

64. EMCO’s position is that the goods in issue are covered “as such” by heading No. 84.03. EMCO argued that the goods in issue are marketed and sold as boilers, are priced higher than water heaters and conform to the regulatory standards applicable to boilers. In EMCO’s view, this supports its position that the goods in issue should be classified in heading No. 84.03.

65. The CBSA argued that the explanatory notes to heading No. 84.03 set out five criteria that the goods in issue must meet in order to fall within that heading: (1) they must be for central heating; (2) they must be boilers; (3) they can use any type of fuel; (4) they must be for heating houses, flats, factories, etc.; and (5) and they must operate by circulation of water.

66. With respect to the first criterion, the CBSA submitted that the goods in issue are not *for* central heating, as they can also be used to provide hot water for household use. In other words, the CBSA interprets the terms of the heading and the explanatory notes as requiring that the goods in issue be *exclusively* for heating.

27. *Philips Electronics Ltd. and Les Distributions Saeco Canada Ltée v. President of the Canada Border Services Agency* (24 April 2014), AP-2013-019 and AP-2013-020 (CITT) [*Philips*] at para. 41, citing to *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (19 January 2012), AP-2011-009 (CITT) at para. 39.

28. *Canada (Border Services Agency) v. Euro-Line Appliances Inc.*, 2014 FCA 208 (CanLII) at para. 31.

29. *Philips* at para. 43.

67. With respect to the second criterion, the CBSA submitted that the goods in issue are not “boilers”. The CBSA noted that the term “boiler” is not defined in the *Customs Tariff* and that, therefore, it should be given its ordinary meaning. In the CBSA’s submission, according to dictionary definitions, a boiler must include a tank, tub or vessel. The CBSA further submitted that the goods in issue do not contain a tank, tub or vessel; in fact, they are specifically designed not to need one.

68. The CBSA also submitted that the goods in issue function differently from boilers, as they are capable of heating water instantaneously, instead of keeping a reserve in a tank like boilers.

69. Finally, the CBSA submitted that the fact that the goods in issue are marketed as boilers is immaterial.

70. EMCO submitted that the CBSA erred in finding that the goods in issue were not boilers on the grounds that the goods in issue do not include tanks. EMCO submitted that the terms of heading No. 84.03 and the explanatory notes to that heading make no mention of a requirement that boilers must include tanks in order to fall in that heading and that the CBSA has therefore adopted an interpretation of the heading that impermissibly reads in this requirement.

71. EMCO agreed that, since the term “boiler” is not defined in the *Customs Tariff*, this term must be assigned its ordinary meaning. EMCO submitted several different definitions of “boiler”, none of which include any mention of tanks. According to EMCO, if one assumes that there is no requirement for the goods in issue to possess a tank, the goods in issue clearly fall within the ordinary meaning of “boiler”.

72. Upon review, the Tribunal notes that the definitions provided by the parties are inconsistent in including a requirement for a tank, tub or vessel. The definitions on which EMCO relied are as follows:

1 A fuel-burning apparatus or container for heating water, in particular:

1.1 A household device providing a hot-water supply or serving a central heating system.

...

a machine that heats water and provides hot water for a heating system in a house.³⁰

73. The CBSA submitted that a “boiler” is defined as follows:

2 a tank for heating a hot-water supply. **3** a metal tub or other vessel used for boiling.

2 a : a vessel used for boiling . . . **c** : a tank in which water is heated or hot water is stored.³¹

74. The definitions of the corresponding term in the French text of the *Customs Tariff*, “*chaudière*”, are also inconsistent:

générateur de vapeur ou d’eau chaude [...] servant au chauffage [...].³²

réceptacle où l’on transforme de l’eau en vapeur, pour fournir de l’énergie thermique (chauffage) ou mécanique, électrique.³³

30. Exhibit AP-2014-042-04A, tab 9, Vol. 1A.

31. Exhibit AP-2014-042-06A, tab G, Vol. 1B.

32. *Petit Larousse illustré* dictionary, 1991, s.v. “*chaudière*”.

33. *Le Petit Robert* dictionary, 2011, s.v. “*chaudière*”.

75. EMCO also submitted an excerpt from the CSA Group's "Natural gas and propane installation code" B149.1-15 dated August 2015, which defines "boiler" as follows:

... an appliance intended to supply hot liquid or vapour for space-heating, processing, or power purposes; does not include appliances certified as water heaters.³⁴

76. The Tribunal has previously held that, if a term used in the *Customs Tariff* is not defined or is unclear, but has a particular meaning in a trade, then it should be interpreted in that sense; otherwise, it should be interpreted according to its ordinary meaning.³⁵

77. Further, the Tribunal has previously recognized that definitions provided in documents on which the industry commonly relies, such as standards or rules, can constitute evidence of industry usage.³⁶

78. While dictionary definitions are a useful tool to assist in determining the usual meaning of words, technical definitions are an important tool in finding the usual meaning of a technical term and should be accorded significant weight.

79. While it is foreseeable that a good that is certified as a boiler could, for tariff classification purposes, be considered something other than a boiler in the event that the nomenclature or explanatory notes set out a condition that is not met by the goods in issue, this is not one of those situations. None of the additional requirements raised by CBSA are found in the wording of the heading itself or in the explanatory notes.

80. Neither is this a case where the statutory language has not kept pace with new developments in technology. The evidence of EMCO's witnesses was that boilers that do not contain tanks have been on the market for decades and that all of Navien's competitors have such models on the market.³⁷

81. Given the facts of this case, the Tribunal prefers to rely on the technical definition provided by EMCO. The Tribunal also gives considerable weight to the fact that the goods in issue are certified as boilers, as it would be incongruous to classify goods that are certified as boilers when imported into Canada as something other than boilers, except where required by statute, as discussed above. As a result, the fact that the goods in issue do not contain a tank does not preclude them from classification in heading No. 84.03.

82. The CBSA also raised the argument that the goods in issue were not vessels and that this was another requirement in order to qualify the goods in issue as boilers.

83. In this case, the CBSA provided a technical definition of its own, defining a boiler as an "enclosed vessel".³⁸

34. Exhibit AP-2014-042-12A, tab 4, Vol. 1C.

35. *Holland Hitch of Canada Limited v. President of the Canada Border Services Agency* (18 January 2013), AP-2012-004 (CITT) at para. 66, a decision that was upheld by the Federal Court of Appeal in *Canada (Border Services Agency) v. Saf-Holland Canada Ltd.*, 2014 FCA 3 (CanLII) at para. 10; *Outdoor Gear Canada v. President of the Canada Border Services Agency* (21 November 2011), AP-2010-060 (CITT) at para. 25.

36. *Dynamo Industries, Inc. v. President of the Canada Border Services Agency* (1 April 2009), AP-2008-007 (CITT) at para. 36; *G & G Golf Company Inc. v. President of the Canada Border Services Agency* (29 December 2014), AP-2013-061 (CITT) at para. 56.

37. *Transcript of Public Hearing*, 24 September 2015, at 56, 58-59, 68.

38. *Ibid.* at 98.

84. In its rebuttal argument, EMCO attempted to counter the CBSA's argument by suggesting that the goods in issue could be considered vessels because they are regulated as pressure vessels.³⁹

85. However, the Tribunal is of the view that, in this instance, it is not necessary to delve into a discussion of what constitutes a vessel in order to resolve this issue.

86. The requirement that a boiler be a vessel is not found in all the definitions cited above, including and especially the technical definition supplied by EMCO. Given that the Tribunal has already found, absent direct contradiction with the terms of the statute, that the technical definition given by EMCO should be preferred and that the requirement that boilers contain "vessels" is not explicitly included in the terms of heading No. 84.03 and the explanatory notes to that heading, the Tribunal finds that this is also not a requirement for classification of the goods in issue in heading No. 84.03.

87. However, as argued by the CBSA, the domestic hot water function is not for "central heating" nor is it for heating houses, etc. As a result, although the above analysis indicates that there is nothing precluding the classification of the boiler apparatus of the goods in issue in heading No. 84.03, the goods in issue are not covered "as such" by this heading because the domestic hot water heating apparatus is not covered by this heading and, therefore, it does not "cover the complete product".

88. Having determined that the goods in issue are not covered "as such" by heading No. 84.03, the Tribunal will now consider whether they are covered "as such" by heading No. 84.19.

Are the goods in issue covered "as such" by heading No. 84.19?

89. The CBSA submitted that the goods in issue are completely described in heading No. 84.19 and are therefore covered "as such" by this heading.

90. The CBSA submitted that heading No. 84.19 and the explanatory notes to that heading suggest that there are three criteria that the goods in issue must meet in order to fall within that heading: (1) they must function instantaneously; (2) they must be water heaters; and (3) they must be non-electric.

91. There was no disagreement between the parties that the product literature shows that the goods in issue heat water with natural gas or propane and that they are therefore "non-electric".

92. With respect to the requirement that the goods function "instantaneously", the CBSA submitted that "instantaneous" is defined as follows: "1 : done, occurring, or acting without any perceptible duration of time . . . ; 2 : done without any delay . . . ; 3 : occurring or present at a particular instant . . ." ⁴⁰ The product literature indicates that the goods in issue heat and deliver hot water on demand, as soon as a tap is opened (for the domestic hot water application) or as soon as there is a call for heating.⁴¹ According to the CBSA, therefore, both applications of the goods in issue can be said to function "instantaneously".

93. With respect to the requirement that the goods in issue be "for heating water", the CBSA submitted that the purpose of the goods in issue is to heat water, for use both in radiant heating and for domestic use. Therefore, according to the CBSA, heading No. 84.19 describes the goods as a whole.

39. *Ibid.* at 83-84.

40. Exhibit AP-2014-042-06A, tab I, Vol. 1B.

41. Exhibit AP-2014-042-04A, tab 14, Vol. 1A; Exhibit AP-2014-042-14A, tab 9, Vol. 1C.

94. Central to the CBSA's case is the argument that boilers are essentially water heaters by another name and that everything that heats water is a water heater.

95. According to the CBSA, the function of the goods in issue is to heat water and, therefore, in the absence of falling clearly in heading No. 84.03, the goods in issue are covered "as such" by heading No. 84.19 as water heaters, as their sole function is to heat water for various purposes. However, the CBSA did not provide any evidence in support of this far-reaching argument and essentially stated it as a fact.

96. EMCO took exception to the CBSA's far-reaching argument, but did not provide any specific evidence that would assist the Tribunal in determining what a water heater is.

97. Pushing the CBSA's argument to its extreme, anything that heats water, from an aluminum pot heating water on a gas stove to a gas-powered boiler providing heat to a municipal heating plant, is to be considered and classified as a water heater (unless specifically excluded from heading No. 84.19).

98. As previously cited, heading No. 84.19 provides as follows:

Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 85.14), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric.

99. As previously noted, the explanatory notes to heading No. 84.19 exclude several items from the heading, such as central heating boilers of heading No. 84.03.

100. The explanatory notes to heading No. 84.19 further describe a general category of goods that would fall in heading No. 84.19 under the title "(I) HEATING OR COOLING PLANT AND MACHINERY". These include, among others, "(A) [v]essels, vats, etc., of various kinds for heating or cooling" (in French, "[l]es chaudières, cuiseurs et appareils de chauffage similaires"). This is of course subject to the general exclusion for boilers covered under heading No. 84.03.

101. Under the same title, the explanatory notes to heading No. 84.19 also provide that "[t]he apparatus described above is essentially used industrially, but the heading also covers **non-electric instantaneous water heaters and storage water heaters, including solar water heaters, domestic or not.**"⁴²

102. A careful reading of the explanatory notes to heading No. 84.19 suggests that the term "water heater", as used in heading No. 84.19, refers to a specific type of good or machinery within the general category of heating or cooling plant and machinery. It does not have the generic connotation suggested by the CBSA.

103. Therefore, the Tribunal finds that "water heater" ("*chauffe-eau*" or "*chauffe-bain*" in French), as found in heading No. 84.19, refers to a certain apparatus and is not, for the purposes of heading No. 84.19, a generic term covering every type of apparatus that heats water.

104. Furthermore, the Tribunal, for the same reasons set forth regarding the definition of "boiler", gives deference to the fact that a recognized certifying authority considers a part of the goods in issue a water heater and has certified it as such. Therefore, the part of the goods in issue that is certified as a water heater

42. The explanatory notes further provide that "[t]he heading covers **only** non-domestic equipment, **except** for the instantaneous or storage water heaters referred to later in this Explanatory Note."

is a water heater for the purposes of heading No. 84.19, but the boiler part would not be a water heater for the purposes of heading No. 84.19.

105. Finally, as described above, the Tribunal has found that the boiler part of the goods in issue fits the description of a central heating boiler in heading No. 84.03, at least in part. Therefore, the goods in issue cannot be said to be “cover[ed] as such” by heading No. 84.19, because central heating boilers of heading No. 84.03 are excluded from its application by virtue of the explanatory notes to heading No. 84.19.

106. Since the goods in issue are not covered “as such” by either of the headings under consideration, the Tribunal will consider whether the goods in issue can be classified in accordance with their principal function, as directed by Note 3 to Section XVI.

What is the “principal function” of the goods in issue?

107. EMCO argued that the principal function of the goods in issue is as a central heating boiler, for all the same reasons that it argued that the goods in issue are covered “as such” by heading No. 84.03, i.e. that the goods in issue are marketed and sold as boilers, are priced higher than water heaters and conform to the regulatory standards applicable to boilers. In reply to the Tribunal’s request for argument on this issue, EMCO stressed that, according to the evidence, the hot water function is dependent on the operation of the boiler function, but not vice versa.

108. The CBSA argued that the principal function of the goods in issue is as a water heater. The CBSA argued that the “Domestic Hot Water Priority” (or domestic hot water preference) function of the goods in issue,⁴³ where the heater function ceases to operate when domestic hot water is required, demonstrates that the water heater function is prioritized over the heating function of the goods in issue.

109. The CBSA also argued that the principal function of the goods in issue will depend on how they are used in each individual household; for example, the boiler function of the goods in issue could be used only to heat something small, such as a towel rack, whereas a family of six showering each day would create a far larger demand on the water heater than on the boiler.⁴⁴ The CBSA also submitted that the boiler function would not need to actually provide heat in order for the goods in issue to function as a water heater; while there has to be water flowing through the boiler system within the goods in issue in order for the domestic hot water system to function, the boiler system could simply be “looped”, but not attached to anything other than itself.⁴⁵

110. In determining the principal function of goods, the Tribunal will generally assess the “. . . importance of each function relative to that of each of the other functions In this regard, the relative importance of each function is dependent, in large part, upon the demands of the marketplace and the level of technology involved in the performance of that function.”⁴⁶

111. With respect to the importance of the two functions relative to each other, based on the evidence, the default function of the goods in issue is “space heating”. As described above, energy will be diverted to heating water for domestic use only when there is a requirement placed on the goods in issue to produce hot water for domestic use and only for as long as it is required to perform this application. Once the

43. Exhibit AP-2014-042-04A, tab 12; *Transcript of Public Hearing*, 24 September 2015, at 48-49.

44. *Transcript of Public Hearing*, 24 September 2015, at 61.

45. *Ibid.* at 60.

46. *Tyco Safety Products Canada, Ltd. (formerly Digital Security Controls Ltd.) v. President of the Canada Border Services Agency* (8 September 2011), AP-2010-055 (CITT) at para. 61.

requirement to produce hot water for domestic use is finished, the goods in issue return to their default state, and the energy is once again used for the purpose of “space heating”.⁴⁷

112. The evidence also shows that the space heating application can heat a house of up to 2,500 square feet, while the water heating application would only fulfil the needs of a 2.5 bedroom house.⁴⁸ This evidence further points to the fact that the space heating application is the primary function and that the water heating application is an ancillary function.

113. Furthermore, the evidence of the witnesses was that the goods in issue are marketed and sold as boilers and that, in order to do so, it is imperative to have them properly certified as meeting the regulatory standards applicable to boilers.⁴⁹ There was no similar evidence with respect to the importance of having the goods in issue certified as meeting the regulatory standards applicable to water heaters. This indicates that the marketplace places a higher importance on the boiler function than on the water heater function.

114. Concerning the “domestic hot water priority” issue raised by the CBSA, this was an unfortunate choice of terms by Navien in its product literature, which was repeated by Mr. Curro in his testimony, and it has given rise to an unnecessary point of contention.⁵⁰ In the Tribunal’s view, this wording simply reflects the fact that the energy generated by the goods in issue will be applied to the water heater function whenever there is a demand for hot water. As explained by EMCO, the default position is that of a boiler, and the energy is, at all other times, applied to space heating.

115. Similarly, the admission by Mr. Mark Williamson that the goods in issue could theoretically be used only as water heaters, or could be used only to heat a small appliance such as a towel rack, is not determinative.⁵¹ As discussed by both EMCO’s witnesses, both of these potential applications would be an inefficient use of the goods in issue, and it would be far less expensive to purchase a water heater than a combined boiler-water heater if that was the only function required.⁵²

116. The fact that the theoretical possibility exists does not, in the absence of a meaningful probability, change the nature or the principal function. In this regard, it is noteworthy that Mr. Williamson also said that the goods in issue could also be used exclusively as a boiler, but that this would be equally inefficient.⁵³ Instead, the witnesses’ testimony was that the intended and most efficient use of the goods in issue would be as a combination unit, with the boiler function predominant.⁵⁴

117. For these reasons, pursuant to Note 3 to Section XVI, the goods in issue should be classified in accordance with their principal function, which is determined to be as central heating boilers of heading No. 84.03.

Classification at the Subheading and Tariff Item Levels

118. There is only one subheading and tariff item under heading No. 84.03, which is tariff item No. 8403.10.00, “Boilers”.

47. Exhibit AP-2014-042-12A, tab 1, Vol. 1C; *Transcript of Public Hearing*, 24 September 2015, at 33-34.

48. *Transcript of Public Hearing*, 24 September 2015, at 67-68.

49. *Ibid.* at 37-38, 65-67.

50. Exhibit AP-2014-042-04A, tab 12; *Ibid.* at 48-49.

51. *Transcript of Public Hearing*, 24 September 2015, at 73-74.

52. *Ibid.* at 43, 73; Exhibit AP-2014-042-04A, tab 16, Vol. 1A.

53. *Transcript of Public Hearing*, 24 September 2015, at 75.

54. *Ibid.* at 57, 67.

119. Therefore, the goods in issue should be classified under tariff item No. 8403.10.00.

DECISION

120. In light of the foregoing, the appeal is allowed.

Jean Bédard
Jean Bédard
Presiding Member