



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-025

Janicki & Associates Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, August 10, 2017*

*Corrigendum issued
Tuesday, September 5, 2017*

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IN THE MATTER OF an appeal heard on March 23, 2017, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated June 23, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

JANICKI & ASSOCIATES LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey

Jason W. Downey
Presiding Member

IN THE MATTER OF an appeal heard on March 23, 2017, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated June 23, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

JANICKI & ASSOCIATES LTD.

Appellant

AND

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

Respondent

CORRIGENDUM

Paragraph 36 of the statement of reasons should have read as follows:

36. The Tribunal, however, notes that the terms of heading No. 85.16 are much less restrictive than the terms of heading No. 84.19 as they do not use exclusionary language such as “other than”, and its explanatory notes refer to goods which “are *normally* used in the household” [emphasis added], the word “normally” being the defining notion.

By order of the Tribunal,

Jason W. Downey
Jason W. Downey
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 23, 2017

Tribunal Panel: Jason W. Downey, Presiding Member

Support Staff: Amélie Cournoyer, Counsel

PARTICIPANTS:**Appellant**

Janicki & Associates Ltd.

Counsel/Representative

Michael Kaylor

Respondent

President of the Canada Border Services Agency

Counsel/Representative

Aileen Jones

WITNESSES:

Slawek Janicki

CEO

Janicki & Associates Ltd.

Ryan Terry

Owner

Flow Espresso Catering

Arthur Field

Owner

Nexus Coffee Co.

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STATEMENT OF REASONS

INTRODUCTION

1. This appeal is filed by Janicki and Associates Ltd. (Janicki) pursuant to subsection 67(1) of the *Customs Act*¹ from a further re-determination of tariff classification by the President of the Canada Border Services Agency (CBSA) dated June 23, 2016, pursuant to subsection 60(4) of the *Act*.

2. The issue in this appeal is whether various models of espresso machines (the goods in issue) are properly classified under tariff item No. 8516.71.10 of the schedule to the *Customs Tariff*² as other electro-thermic appliances and, more specifically, coffee makers, as determined by the CBSA, or should be classified under tariff item No. 8419.81.00 as other machinery, plant and equipment for making hot drinks, as claimed by Janicki.

PROCEDURAL HISTORY

3. On September 16, 2016, Janicki filed this appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Act*.

4. On March 23, 2017, the Tribunal held a public hearing in Ottawa, Ontario.

5. Three witnesses testified at the hearing. Janicki called Mr. Slawek Janicki, CEO of Janicki, as well as two of its customers: Mr. Ryan Terry, owner of Flow Espresso Catering, and Mr. Arthur Field, owner of Nexus Coffee Company. The CBSA did not call any witnesses.

6. The Tribunal requested post-hearing submissions limited to providing the official La Spaziale espresso machine manual for the Mini Vivaldi model and to filing evidence to substantiate Janicki's claim that the Rocket espresso machines were previously marketed as commercial machines. The former was received on March 29, 2017, but the latter was not filed by Janicki.

GOODS IN ISSUE

7. The appeal concerns the importation of twelve models of espresso machines produced by three manufacturers, as follows:

- Rocket espresso machines – models R58, Cellini Evoluzione V2, Cellini Plus V2, and Giotto Plus V2;
- Bezzera espresso machines – models Magica, BZ10S, BZ07, and Unica;
- La Spaziale espresso machines – models Mini Vivaldi, Vivaldi II, Dream, and Dream T.

8. Janicki filed physical exhibits of the following three models of the goods in issue: the Rocket R58, the Bezzera Magica and the La Spaziale Mini Vivaldi.³ Janicki also filed four additional physical exhibits of goods which were not in issue but were used for comparative purposes, mostly to illustrate the differences between models.⁴

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

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

3. Exhibit AP-2016-025-A-01, exhibit AP-2016-025-A-03 and exhibit AP-2016-025-A-02, respectively.

4. Exhibit AP-2016-025-A-04: the Breville Café Roma; Exhibit AP-2016-025-A-05: the Nespresso Prodigio C70; Exhibit AP-2016-025-A-06: the Ascaso Dream Espresso Machine; Exhibit AP-2016-025-A-07: the Mazzer Mini ETL Grinder.

LEGAL FRAMEWORK

9. 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).⁵ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings, subheadings and tariff items.

10. 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*⁶ and the *Canadian Rules*⁷ set out in the schedule.

11. 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.

12. 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*⁸ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁹ published by the WCO. While the classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁰

13. 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. It is only where Rule 1 does not conclusively determine the classification of the goods that the other General Rules become relevant to the classification process.¹¹

14. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading. 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.”

15. Finally, the Tribunal must determine the proper tariff item classification. 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*

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

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

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

8. World Customs Organization, 2nd ed., Brussels, 2003.

9. World Customs Organization, 5th ed., Brussels, 2012.

10. 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.

11. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

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.

TERMS OF RELATIVE HEADINGS AND LEGAL AND EXPLANATORY NOTES

Relevant Classification Provisions Concerning Heading No. 84.19

16. The relevant tariff nomenclature concerning heading No. 84.19 provides as follows:

Chapter 84

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

...

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.*

...

-Other machinery, plant and equipment:

8419.81.00 *- -For making hot drinks or for cooking or heating food*

[Bold in original, italics added for emphasis]

17. The relevant explanatory notes to heading No. 84.19 provide as follows:¹²

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

...

(r) Electric soil heating apparatus, electric space heating apparatus, and *electro-thermic domestic appliances of heading 85.16.*

...

The heading covers only non-domestic equipment, except for the instantaneous or storage water heaters referred to later in this Explanatory Note.

[Bold in original, italics added for emphasis]

Relevant Classification Provisions Concerning Heading No. 85.16

18. The relevant provisions concerning heading No. 85.16 provide as follows:

Chapter 85

ELECTRICAL MACHINERY AND EQUIPMENT AND PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS,

12. There are no relevant section or chapter notes or classification opinions.

**TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND
PARTS AND ACCESSORIES OF SUCH ARTICLES**

...

85.16 Electric instantaneous or storage water heaters and immersion heaters; electric space heating apparatus and soil heating apparatus; electro-thermic hair-dressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric smoothing irons; *other electro-thermic appliances of a kind used for domestic purposes*; electric heating resistors, other than those of heading 85.45.

...

-Other electro-thermic appliances:

8516.71 - - *Coffee or tea makers*

8516.71.10 - - - *Coffee makers*

[Bold in original, italics added for emphasis]

19. The explanatory notes to heading No. 85.16 contain the following relevant passages:¹³

**(E) OTHER ELECTRO-THERMIC APPLIANCES OF A KIND USED
FOR DOMESTIC PURPOSES**

This group includes all electro-thermic machines and appliances provided they are normally used in the household. Certain of these have been referred to in previous parts of this Explanatory Note (e.g., electric fires, geysers, hair dryers, smoothing irons, etc.). Others include:

...

(3) *Coffee or tea makers* (including percolators).

...

This group excludes:

...

(c) Counter-type coffee percolators, tea or milk urns, sauté pans and chip pans used, for example, in chip shops and *other thermo-electric appliances which are not normally used in the household (heading 84.19, etc.)*.

[Bold in original, italics added for emphasis]

POSITIONS OF PARTIES

Janicki

20. Janicki's position is that since the goods in issue are equally intended for domestic and non-domestic purposes, they are *not of a kind used for domestic purposes*. It submitted that the goods are, therefore, excluded from heading No. 85.16 and are classifiable in heading No. 84.19 as machinery for the treatment of materials by a process involving a change of temperature *other than of a kind used for domestic purposes*.

13. There are no relevant section or chapter notes or classification opinions.

21. Janicki asserted that the goods in issue are typically found and are designed for use in commercial settings. Janicki argued that the goods in issue share similar components which are also found in commercial machines and that they present some differences in features with domestic espresso machines. Moreover, Janicki submitted that the use of the goods in issue by “prosumers”¹⁴ in domestic settings does not alter the fact that they are designed to meet the needs of customers in business environments.

CBSA

22. The CBSA argued that the goods are correctly classified in heading No. 85.16 as other electro-thermic appliances *of a kind used for domestic purposes*, as they meet the terms of that heading.

23. Specifically, it submitted that the three following key elements demonstrate that the goods in issue are of a kind used for domestic purposes: (i) the manufacturers identify them as domestic rather than commercial; (ii) they do not share the typical physical characteristics of commercial espresso machines; and (iii) they are significantly less expensive than commercial espresso machines.

24. The CBSA further argued that Janicki has not discharged its burden of proving that the goods in issue are *not* of a kind used for domestic purposes by establishing either that they are not primarily intended for domestic use, or that they are equally intended for domestic and other purposes.

ANALYSIS

25. As indicated above, the Tribunal must determine whether the goods in issue are properly classified under tariff item No. 8516.71.10 as other electro-thermic appliances and, more specifically, coffee makers, as determined by the CBSA, or should be classified under tariff item No. 8419.81.00 as other machinery, plant and equipment for making hot drinks, as claimed by Janicki. Consequently, the dispute between the parties arises at the heading level.

26. As a preliminary matter, the CBSA argued that the Tribunal should begin its analysis by considering whether the goods in issue are classifiable in heading No. 84.19 because the explanatory notes to heading No. 85.16 specifically exclude “other thermo-electric appliances which are not normally used in the household (**heading 84.19**, etc.)”. Citing the Tribunal’s jurisprudence, the CBSA noted that where such an exclusionary note exists, the analysis begins with the heading to which the exclusionary note does not apply.

27. The Tribunal, however, notes that the explanatory notes to heading No. 84.19 state that this heading “does not include . . . electro-thermic domestic appliances of **heading 85.16**”.

28. By virtue of these explanatory notes, it appears that heading No. 85.16 expressly excludes goods of heading No. 84.19 and vice-versa. Consequently, the two competing headings, namely, headings No. 84.19 and 85.16, are mutually exclusive. Therefore, the goods in issue are not *prima facie* classifiable in both headings.¹⁵

14. The term “prosumers” is a neologism contracting the terms “professional” and “consumers” and meaning consumers with a preference for professional or commercial-grade goods. See Exhibit AP-2016-025-06A at p. 8, Vol. 1; *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 52-53.

15. *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency* (10 February 2011), AP-2009-045 (CITT) at para. 39; *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency*, (2 June 2008), AP-2006-054 (CITT) at para. 24.

29. In these circumstances, unlike in situations where there is only one exclusionary note, the Tribunal need not begin its consideration of the competing headings in any particular order.¹⁶ Accordingly, the Tribunal will determine, on the basis of the evidence before it, whether the goods in issue meet the terms of heading No. 84.19 *or* those of heading No. 85.16.

30. It is well established that, although appeals before the Tribunal proceed *de novo*, the appellant bears the burden of demonstrating that the classification of imported goods was incorrect, in accordance with subsection 152(3) of the *Act*.¹⁷ Thus, since Janicki bears the burden of proving that the goods in issue are classifiable in heading No. 84.19, the Tribunal will first consider whether they are classifiable in that heading.

Are the Goods in Issue Classifiable in Heading No. 84.19?

31. In order for the goods to meet the terms of heading No. 84.19, they must: (i) be machinery, plant or laboratory equipment; (ii) treat materials by a process involving a change in temperature; and (iii) be other than of a kind used for domestic purposes.

32. The CBSA conceded, and the Tribunal sees no reason to disagree, that the goods in issue meet the first two conditions. Therefore, the only issue is whether the goods in issue are *other than of a kind used for domestic purposes*.

33. The parties submitted that criteria in previous Tribunal decisions were applicable here to meet classification requirements of heading No. 84.19 in that (i) the appellant may establish that the goods in issue are equally intended for domestic and other purposes or (ii) the appellant may establish that the goods in issue are primarily intended for non-domestic purposes (e.g. business purposes)¹⁸. Upon a careful reading and appropriate consideration of the terms of heading No. 84.19 and its applicable explanatory notes, the Tribunal is of the view that the appellant's burden of proof is slightly different in the present case.

34. The terms of heading No. 84.19 are directive in that they call for goods to be "*other than of a kind used for domestic purposes*" [emphasis added] whereas the tariff nomenclature in issue in the previous Tribunal cases mentioned by the parties did not specifically use the terms "other than". The explanatory notes to heading No. 84.19 reinforce this test in that they specify that "[t]he heading covers *only* non-domestic equipment" [emphasis added].

35. Therefore, to meet the terms of heading No. 84.19, Janicki needs to demonstrate that the goods in issue are *not of a kind* used for domestic purposes. This is a rigid and directive test which specifically excludes domestic use; the use of the word "only" in the explanatory notes does not allow for domestic use.

36. The Tribunal, however, notes that the terms of heading No. 85.16 are much less restrictive than the terms of heading No. 84.19 as they do not use exclusionary language such as "other than", and its

16. *Rutherford Controls International Corp. v. President of the Canada Border Services Agency* (26 January 2011), AP-2009-076 (CITT) at para. 44.

17. *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at paras. 7, 21.

18. *IKEA Supply AG v. President of the Canada Border Services Agency* (18 September 2014), AP-2013-053 (CITT) [*Ikea*] at para. 18; *Stylus Sofas Inc., Stylus Atlantic, Stylus Ltd. And Terravest (SF Subco) Limited Partnership* (19 August 2015), AP-2013-021, AP-2013-022, AP-2013-023 and AP-2013-024 (CITT) [*Stylus*] at para. 63; *Canac Marquis Grenier Ltée v. President of the Canada Border Services Agency* (22 February 2017), AP-2016-005 (CITT) [*Canac Marquis*] at para. 25.

explanatory notes refer to goods “which are not *normally* used in the household” [emphasis added], the word “normally” being the defining notion.

37. According to the Canadian Oxford Dictionary, the word “normally” is defined as the following: “*adv.* 1. in a normal manner 2. usually.” It also defines its root “normal” as the following: “*adj & n.* 1. constituting or conforming to a standard; regular, usual, typical.”

38. The test of heading No. 84.19, on the other hand, is restrictive and commands a demonstration that the goods do not co-exist in both domestic and non-domestic applications. In fact, it requires that the appellant positively demonstrate that the goods are not used for domestic purposes; the lock doors are watertight here.

39. Janicki did not argue that the goods in issue are primarily intended for non-domestic purposes, but rather that they are *equally* intended for domestic and non-domestic purposes.

40. For the reasons that follow, the Tribunal finds that Janicki has not discharged its burden to demonstrate that the goods in issue are *other than* of a kind used for domestic purposes. Based on the evidence on the record, the Tribunal finds that the goods in issue, i.e. high-end domestic espresso machines, are primarily intended for household purposes, but can incidentally also be used in certain non-domestic settings. This type of purpose does not meet the requirements of heading No. 84.19, but can effectively be covered under heading No. 85.16, as will be discussed below.

41. The Tribunal also notes that, in light of the evidence presented before it, even if it had applied the test Janicki proposed, Janicki would still not have discharged its burden of proving that the goods in issue are equally intended for domestic and non-domestic purposes.

42. The Tribunal will address the factors that it would typically consider when determining a good’s intended use since it considers them to be relevant to the present appeal, such as the design, characteristics, marketing and pricing of the goods in issue,¹⁹ but will first make some observations with respect to some evidence presented before it.

Janicki’s Evidence

43. In support of its assertion that the goods in issue are typically found in commercial settings, where they are used throughout the day, Janicki filed 29 invoices from customers who appear to be commercial entities that have purchased the goods in issue from 2010 to 2016.²⁰ The CBSA pointed out that two of these invoices are for goods other than the goods in issue.²¹ Moreover, the Tribunal notes that two of these invoices were filed twice.²² Janicki did not submit any other financial or sales records. However, when cross-examined by counsel for the CBSA, Mr. Janicki indicated that his company imported, in 2016 only, approximately 150 to 200 machines of the four Rocket models at issue.²³ Therefore, the only documentary evidence of commercial sales is 25 invoices over a four-year period, totalling only a fragmentary picture of its total imported goods.

19. *Ikea* at para. 19; *Stylus* at para. 65; *Canac Marquis* at para. 26.

20. Exhibit AP-2016-025-06A, tab 5, Vol. 1.

21. *Ibid.* at pp. 67, 79.

22. *Ibid.* at pp. 66, 75, 82 and 86.

23. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 94-95.

44. In *Canac Marquis*,²⁴ where the appellant filed 12 invoices of sales made to commercial or institutional accounts over a two-year period, the Tribunal made the following observation:

It is not necessary for an appellant to submit all purchase orders or invoices, but if it is going to submit only a small sample with this little quantity involved over such a wide period, it needs to supplement the submission with additional evidence (e.g. a database summary) to help the Tribunal at least establish a range or rough proportion that shows that the sales to non-domestic customers are significant relative to sales to domestic customers.

45. The Tribunal believes that the same conclusion it reached in *Canac Marquis* applies equally to this appeal: the evidence presented to the Tribunal in the present case is anecdotal. This is especially important in the present case, considering the particular burden that heading No. 84.19 commands.

46. Janicki also called two of its customers to testify as to their use of two of the goods in issue in a commercial setting. Mr. Terry testified that his company, Flow Espresso Catering, uses two Rocket R58 to provide espresso or milk-based espresso services in a variety of locations and events according to its customers' requests.²⁵ As for Mr. Field, he testified that his company, Nexus Coffee Company, is an independent specialty coffeehouse that also offers catering services. Mr. Field explained that the La Spaziale Mini Vivaldi is used for the catering side of the business because of its reliability, speed, consistency and capacity.²⁶ In cross-examination, Mr. Field indicated that the La Spaziale Mini Vivaldi is also occasionally used as backup at the coffee shop (when the other main machine breaks down), but that he would not run the coffee shop using that machine because of its limitations.²⁷

47. Based on the testimony of the witnesses and the documentary evidence submitted by Janicki, all that Janicki has shown is that the goods in issue can sometimes be suitable for commercial purposes involving low-capacity but high-quality espresso machines.²⁸

48. Again, this does not meet the test that heading No. 84.19 commands. Heading No. 84.19 calls for exclusivity in use, i.e. *other than in domestic and only in non-domestic* applications. It does not, in the present case, allow for usage by said "prosumers" and therefore requires a demonstration that these goods are not intended for domestic use.

49. As a note, the Tribunal is not oblivious to market realities and is sensible to potential exceptional crossovers to and from domestic applications and commercial ones. Nothing can stop a simple consumer from buying the biggest, most high-performance commercial machine and for him or her to put it to use in a domestic setting, and vice-versa. The anomaly is not what is at play here. There needs to be a positive demonstration by Janicki that the goods would not and should not normally find themselves in a domestic setting, save the exceptional anomalous purchase which can be discarded as abnormal. To be clear, this is not a sliding-scale of use in either domestic or commercial settings, but a clear demonstration that the goods *do not* belong, at all, in a domestic environment. This burden has not been met.

24. *Canac Marquis* at para. 66.

25. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 104.

26. *Ibid.* at 112.

27. *Ibid.* at 118.

28. An example of a low-capacity requirement would be for catering businesses or mobile food services, where only one coffee, but of high quality, can be produced at a time.

Design and Characteristics

50. On the question of design and characteristics, Janicki submitted that some components of the goods in issue are commercial-grade components.

51. Using the physical exhibits of three models of the goods in issue and of examples of coffee machines allegedly for household use, Mr. Janicki testified as to what these different espresso machines are made of, how they work and what characteristics distinguish them from one another. According to Mr. Janicki, the three main components of an espresso machine are the pump, the group head and the boiler.

52. As concerns the pump, Mr. Janicki submitted that the one used in Rocket models R58 and Cellini Evoluzione V2 is the same as the one used in a commercial model called “the Boxer” that is manufactured by Rocket. He explained that the rotary pump in these two Rocket machines is much more robust than a vibration pump, attesting to their commercial lineage.²⁹

53. In this regard, it is noteworthy that the evidence on the record shows that the Rocket models Cellini Plus V2 and Giotto Plus V2, all Bezzera models, and La Spaziale models Mini Vivaldi and Dream T are all equipped with vibration pumps.³⁰

54. Mr. Janicki further testified that he has “never seen a machine with a vibration pump that was CSA approved to be plumbed in, for safety reasons, for the risk of flood, of leaks.”³¹ This contrasts heavily with the fact that commercial machines are often plumbed (or allow for plumbing) into the water supply in expectation of use of large volumes of water.³²

55. Concerning the group head, Mr. Janicki submitted that all Rocket models and the Bezzera Magica use the Faema E61,³³ which was invented in 1961 for commercial use, at a time when it was not contemplated that espresso could be made at home.³⁴

56. Mr. Janicki further asserted that it is the most widely used commercial group head in the world.³⁵ A physical examination of that group head was sufficient to convince the Tribunal that it was a robust and heavy-duty component.³⁶ However, the Tribunal notes that no indication has been provided to the Tribunal as to the group head used in the other goods in issue.

57. Mr. Janicki additionally indicated that all of the goods in issue have either a heat exchanger or a double boiler system, which can be differentiated from a single boiler or thermoblock system found in typical home machines.³⁷ He asserted that temperature is one of the most important variables in determining

29. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 20.

30. Exhibit AP-2016-025-08A at pp. 141, 147, 148, 150, 151, 155 and 157, Vol. 1A.

31. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 20.

32. See, for example, Exhibit AP-2016-025-08A, tab 8 at p. 136, Vol. 1A.

33. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 16, 24.

34. In this respect, the Tribunal recognizes that certain products which were previously only used in a commercial environment have evolved to also be used in domestic settings, as it is the case for espresso machines. However, the mere fact that some components were designed at a time where the whole product was solely used by professionals is not relevant to determine whether the good is *now* intended for domestic or non-domestic purposes.

35. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 16, 30.

36. Exhibit AP-2016-025-A-01; Exhibit AP-2016-025-A-03.

37. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 16-17, 24.

a specialty grade or a high-end coffee and then explained that a thermoblock system heats up quickly and heats water as it passes through it, resulting in merely acceptable coffee.

58. Mr. Janicki further explained that the characteristics and advantages that set a heat exchanger or double boiler system apart from a single boiler or thermoblock system are the operational control the user secures over the temperature of the espresso, the capacity to produce espresso and steam at the same time, the machine's resulting ability to use steam and water on demand, and the absence of downtime between drinks.³⁸

59. Moreover, Mr. Janicki testified that typical domestic espresso machines use a pressurized basket as opposed to a non-pressurized basket that is "essentially just a filter" as the one found in the goods in issue and commercial machines.³⁹ He further explained that a pressurized basket "cheats; it gives you a fake crema".⁴⁰

60. On the basis of the foregoing, the Tribunal cannot ignore the fact that the goods in issue share some, but not all, of their internal components and characteristics with commercial espresso machines. In fact, the Tribunal insists on stating that it does not dispute that the goods in issue are high-quality espresso machines. However, the integration of some commercial grade or high-quality components does not necessarily render the goods to be exclusively intended for non-domestic or commercial purposes. The Tribunal must take into account all relevant factors, including the marketing and pricing, as will be discussed later.

61. The Tribunal is of the view that the consumers for whom these machines are designed are those "prosumers" mentioned earlier, specifically looking for their top-of-the-line features.

62. Janicki submitted that the use of the goods in issue by "prosumers" does not diminish the reality that they are designed for commercial use. The Tribunal finds that the goods in issue are in fact, on the contrary, specifically designed for these "prosumers", who are willing to spend a fair amount of money to purchase equipment with high-quality components or features, but who are not professionals themselves. In his testimony, Mr. Janicki himself confirmed that, referring to the Rocket R58, "[t]he goal of buying a machine like that for domestic or home use is for quality, not for quantity".⁴¹

63. The Tribunal also acknowledges Mr. Janicki's testimony as to some differences between the goods in issue and the espresso machines for home use filed as physical exhibits, such as the quality of the coffee they produce due to their cheaper and simplistic componentry. On this point, the Tribunal notes that the machines presented by the appellant to emphasize contrast are certainly at the lower-end of the household espresso machines price spectrum, which most certainly explains the differences in quality.⁴² In addition, the Tribunal notes that several goods in issue share some characteristics with the household espresso machines filed for comparison purposes, such as the type of pump, as previously discussed.

64. Janicki also submitted that while espresso machines intended solely for use in domestic settings have a one-year warranty, and are thus effectively treated as "throw-away" items, Janicki offers a two-year warranty on the goods in issue and argued that they are built to last.

38. *Ibid.* at 17-18.

39. *Ibid.* at 11-12.

40. *Ibid.* at 13.

41. *Ibid.* at 101.

42. Mr. Janicki testified that the Breville Café Roma, exhibit AP-2016-025-A-04, is priced between \$149 and \$189 and the Ascaso Dream, exhibit AP-2016-025-A-07, at about \$699; see *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 34, and the "Pricing" section below. Also, a proper comparison could not be conducted between the goods in issue and a single-serve coffee maker using coffee pods or capsules, i.e. exhibit AP-2016-025-A-05.

65. The Tribunal notes that no evidence has been provided regarding the warranty covering neither the goods in issue nor domestic espresso machines. Furthermore, the Tribunal finds that a longer warranty is not immediately indicative of an intended commercial use, but rather that it simply reflects the higher quality of the goods.

66. Moreover, the Tribunal had the opportunity to carefully examine the samples of the goods in issue that were filed as physical exhibits and noticed that some parts do not appear to be designed for repeated use over a long period of time. For example, the Tribunal noticed that the steam knob of the Rocket R58 was already loose and appeared materially unsound.⁴³ Maybe this was a mere defect, yet it certainly did not convey a robust or heavy-duty design.

67. The Tribunal further notes that, as the CBSA pointed out, the goods in issue and commercial espresso machines present notable differences in features. The Tribunal finds that commercial products have specific characteristics—which were not observed in the goods in issue—that set them apart from those intended for domestic purposes.

68. For instance, the goods in issue have significantly less boiler capacity compared to goods designated by the manufacturers for exclusive commercial or professional purposes. For example, the goods in issue of the Rocket line have boiler capacities that range from 1.8 to 2.38 litres,⁴⁴ whereas Rocket commercial models have boiler capacities in the 8.3 to 28 litre range.⁴⁵

69. Similar distinctions exist regarding the Bezzera models. The goods in issue made by Bezzera have boiler capacities ranging from 0.5 to 2 litres, while boiler capacities for Bezzera professional models are in the 5 to 17 litre range.⁴⁶

70. The goods in issue made by La Spaziale for their part have boiler capacities that are comparable with those of the other goods in issue, i.e. ranging from 1.65 to 2.95 litres.⁴⁷

71. The CBSA further noted that the power supply requirements of the goods in issue are lower compared to goods designed by the manufacturers for commercial or professional purposes: while the goods in issue require power supply ranging from 1200 to 2200 watts,⁴⁸ Rocket's commercial models, for example, require a range of 2300 to 8900 watts.⁴⁹

72. The Tribunal also notes that the goods in issue are of a lesser height than commercial or professional espresso machines. The Rocket models at issue are between 360 and 385 millimetres in height,⁵⁰ while Rocket commercial models vary in height from 471 to 521 millimetres.⁵¹

73. Similarly, the Bezzera models at issue are between 375 and 415 millimetres in height,⁵² compared to Bezzera professional machines which are between 515 and 520 millimetres in height.⁵³

43. Exhibit AP-2016-025-A-01.

44. Exhibit AP-2016-025-08A, tab 8 at p. 145, Vol. 1A.

45. *Ibid.* at p. 136.

46. *Ibid.*, tab 9 at pp. 147-154.

47. *Ibid.*, tab 10 at pp. 155-157.

48. *Ibid.*, tabs 8-10.

49. *Ibid.*, tab 8 at p. 136.

50. *Ibid.* at p. 145.

51. *Ibid.* at p. 136.

52. *Ibid.*, tab 9 at pp. 147, 149, 150 and 151.

53. *Ibid.* at p. 153.

74. All La Spaziale models at issue are 415 millimetres in height.⁵⁴

75. In that respect, Mr. Janicki testified that standard cabinet height in Canada is 17.75 inches⁵⁵ (about 451 millimetres). Therefore, all the goods in issue can be put on a counter, whereas the espresso machines designed by the same manufacturers for commercial or professional purposes are too high to fit under standard domestic kitchen cabinets.

76. For the foregoing reasons, the Tribunal considers that the design and characteristics of the goods in issue indicate that, although the espresso machines at issue are high quality products with certain professional components and features, they are still intended for household use.⁵⁶

Marketing

77. In the Tribunal's view, the marketing of the goods in issue is a significant factor that supports a finding that the goods in issue are clearly intended for domestic rather than non-domestic or commercial purposes.

78. At the outset, the Tribunal cannot ignore that two manufacturers' published marketing literature distinguish the goods in issue from "commercial espresso machines" or "professional machines"; Janicki's own website actually did the same up until very recently.

79. Indeed, Bezzera distinguishes "semi-professional" and "professional" models; it classifies the goods in issue as "semi-professional".⁵⁷ This suggests that the goods in issue are not intended for "professional" use.

80. Similarly, the Rocket product literature filed by the CBSA states the following: "Our small team of craftsmen produce both premium domestic and commercial espresso machines, beautifully made with meticulous care and attention to detail."⁵⁸ Rocket further classifies its products into two categories: "commercial espresso machines" and "domestic espresso machines". All Rocket models in issue are classified under "domestic espresso machines".⁵⁹ At the hearing, Mr. Janicki asserted that the Rocket espresso machines at issue were previously marketed as commercial machines.⁶⁰ However, Janicki did not provide evidence to substantiate that claim even though the Tribunal specifically allowed it to file post-hearing submissions on this issue.

81. Furthermore, referring to printouts from Janicki's website (idrinkcoffee.com), the CBSA noted that nine of the twelve goods in issue were available for sale at the time the appeal was filed in September 2016. None of them was listed within the category of "Commercial Espresso Machines". They were rather

54. *Ibid.*, tab 10 at pp. 155-157; Exhibit AP-2016-025-06A, tab 2 at p. 30, Vol. 1A.

55. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 93.

56. To that effect, it is appropriate to reproduce the following passage from the Tribunal's decision in *Canac Marquis* at para. 44: "Even if Canac had conclusively established that the goods in issue are high-end chairs made for domestic purposes, this fact alone would not, in and by itself, lead to a finding that they are also intended for another purpose."

57. Exhibit AP-2016-025-06A, tab 2 at pp. 18-27, Vol. 1A.

58. Exhibit AP-2016-025-08A, tab 8 at p. 130, Vol. 1A.

59. *Ibid.* at pp. 135, 140 and 141.

60. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 79-80.

classified within the residual category “Espresso Machines”.⁶¹ Again, this classification made by the appellant itself is indicative of the target market of the goods in issue, which is not commercial customers.

82. At the hearing, Mr. Janicki testified that since this appeal was filed, more specifically in December 2016, Janicki reclassified the goods in issue both in the “consumer” section and in the “commercial” section of its website.⁶² The Tribunal does not ascribe much weight to this new classification made by the appellant during the course of this proceeding.

83. Moreover, the Tribunal notes that the Rocket Evoluzione V2 product literature filed by Janicki states that the machine has “a redesigned internal layout which delivers a quieter and more refined experience *that is the equal of any commercial espresso machines*”⁶³ [emphasis added], suggesting that this espresso machine is not in itself a commercial machine.

84. Turning to Bezzera’s marketing materials, the Internet page of the Bezzera Magica reads as follows: “It is an [sic] high quality product built with Professional technology components . . .”⁶⁴. Similarly, the Internet page for the Bezzera Unica states that the machine “is an excellent quality product with professional components which allows to get coffee and creamy cappuccino ready in a few seconds.”⁶⁵ The Tribunal is of the view, contrary to what Mr. Janicki opined in his testimony,⁶⁶ that specifying the use of professional components would be redundant or unnecessary if the machines were intended and marketed for professional or commercial purposes.

85. As concerns the manufacturer La Spaziale, the CBSA indicated that the manual for the Mini Vivaldi II model states categorically that “light commercial use . . . is certainly not the target for [that model]”.⁶⁷ At the hearing, it was clarified that this manual was produced by Chris Coffee Service (Chris Coffee), the exclusive importer in North America of the La Spaziale machines in issue, from which Janicki is supplied La Spaziale machines.⁶⁸

86. While the Tribunal takes note that this manual is not the official manufacturer’s manual and that the official La Spaziale manual subsequently filed with the Tribunal does not use the expression “light commercial use”,⁶⁹ the Tribunal considers Chris Coffee’s manual to be relevant to the issue raised in this appeal considering that it is the sole North American importer of La Spaziale machines and that Janicki does provide this manual to its customers.⁷⁰ Moreover, the Tribunal wishes to mention that, based on a visual examination of the physical exhibits, the Mini Vivaldi machine appears to be the most robust of the group, implying that if this one is not intended for even “light commercial use”, it is hard to see how the others could meet even this minimal threshold. Of course, different manufacturers could have different perspectives as to their product.

61. Exhibit AP-2016-025-08A, tab 12 at pp. 186-195, Vol. 1A.

62. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 64-66.

63. Exhibit AP-2016-025-06A, tab 2 at p. 20, Vol. 1.

64. *Ibid.* at p. 25.

65. *Ibid.* at p. 26.

66. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 63-64.

67. Exhibit AP-2016-025-08A, tab 11 at p. 180, Vol. 1A.

68. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 81, 84-88.

69. Exhibit AP-2016-025-18, tab 1, Vol. 1A.

70. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 88.

87. The Tribunal also notes that an Internet printout from Janicki's own website states the following: "Having La Spaziale Mini Vivaldi II *at your home* simply means you own an espresso butler who is ready to brew you the perfect shot of espresso on demand, anytime" [emphasis added].⁷¹

88. Finally, the only indication of marketing directed at non-domestic users that the Tribunal sees is Mr. Janicki's assertion that the goods in issue were promoted in this way at trade shows.⁷²

89. In light of the foregoing, the marketing documentation on the record is highly indicative of the intended use of the goods in issue, that is, for domestic or household use. Accordingly, the Tribunal is of the view that Janicki has failed to demonstrate that the marketing of the goods in issue is exclusively aimed at non-domestic applications.

Pricing

90. Turning to the pricing of the goods in issue, Janicki's website shows that they were priced between \$1,500 and \$3,350.⁷³

91. It is noteworthy that on Janicki's website, the price range of the machines in the "Commercial Espresso Machines" category ranged from \$4,700 to \$17,750, which is higher than the selling price of the goods in issue.⁷⁴ In contrast, the price range of other machines classified in the "Espresso Machines" category was from \$70 to \$4,995.⁷⁵ Without saying that there is a "bright line" between the two categories in and around the \$4,000 mark, the Tribunal cannot help but notice that one category seems to end at that price point and the other begins.

92. The CBSA noted that, on the question of price, the goods in issue, while typically more expensive than the average household coffee maker, are nonetheless lower-priced compared to their counterparts designed for commercial or professional purposes.

93. While the Tribunal acknowledges that the price of the goods in issue is fairly high compared to the price of other coffee machines intended for domestic use and that this could tip the scale in favour of Janicki's contention that the goods are in some way intended for non-domestic purposes, the Tribunal is of the view that these prices reflect the fact that the goods in issue are high-end espresso machines intended to be used by a specific segment of the household market. The price of the goods in issue is indicative of their quality and it is for that reason that the goods in issue are at the upper end of the non-commercial espresso machines price range, while still being lower-priced than actual commercial espresso machines.

Conclusion

94. Upon considering all the evidence submitted by the parties in light of the relevant factors listed above, the Tribunal concludes that Janicki has not discharged its burden of proving that the goods in issue are *other than* of a kind used for domestic purposes. Consequently, the goods in issue are not classifiable in heading No. 84.19.

71. Exhibit AP-2016-025-06A, tab 2 at p. 32, Vol. 1.

72. *Transcript of Public Hearing*, Vol. 1, 23 March 2017, at 53-56.

73. Exhibit AP-2016-025-08A, tab 12 at pp. 192-194, Vol. 1A.

74. *Ibid.* at pp. 186-188.

75. *Ibid.* at pp. 190-194.

Are the Goods in Issue Classifiable in Heading No. 85.16?

95. The CBSA argued that the goods in issue are properly classified in heading No. 85.16 as “other electro-thermic appliances of a kind used for domestic purposes”.

96. Having regard to the terms of heading No. 85.16, in order for the goods in issue to be classified in that heading, the Tribunal must find that (i) they are other electro-thermic appliances (ii) of a kind used for domestic purposes.

97. As indicated above, in light of the evidence presented before it, the Tribunal is of the view that the goods in issue are of a kind used for domestic purposes. There remains the question of whether the goods in issue are other electro-thermic appliances of heading No. 85.16.

98. In this regard, the CBSA submitted that the goods in issue are electro-thermic appliances since they use electricity to generate heat.⁷⁶ Mr. Janicki’s testimony confirmed that fact.

99. The Tribunal also notes that Note (E) of the explanatory notes to heading No. 85.16 provide guidance as to what may be considered other electro-thermic appliances. It provides as follows:

This group includes all electro-thermic machines and appliances provided they are normally used in the household. . . . Others include:

. . .

(3) Coffee or tea makers (including percolators).

100. In the Tribunal’s view, the evidence on the record makes it clear, and the parties did not dispute, that the goods in issue are coffee makers.

101. Both parties also noted that in *Philips* the Tribunal classified espresso machines intended for home use in heading No. 85.16 and further concluded that “espresso is indeed a type of coffee”.⁷⁷

102. On the basis of the foregoing, the Tribunal has no difficulty in concluding that the goods in issue meet the terms of heading No. 85.16.

Classification at the Subheading and Tariff Item Levels

103. Heading No. 85.16 contains eight subheadings at the one-dash level. The Tribunal finds that the goods in issue must be classified in subheading No. 8516.70 as other electro-thermic appliances, as no other one-dash subheading describes the goods in issue.

104. Subheading No. 8516.70 is further divided at the two-dash level into three subheadings, namely “coffee or tea makers”, “toasters” and “other”. As indicated above, the goods in issue are coffee makers.

76. In support of its position, the CBSA cited *S.C. Johnson & Son, Limited v. President of the Canada Border Services Agency* (19 July 2006), AP-2005-015 (CITT) at para. 30, in which the Tribunal found that an electrical heating unit is classifiable in heading No. 85.16 as an electro-thermic appliance because it “uses electricity to generate heat and, hence, is an ‘electro-thermic’ ‘machine’ or ‘appliance’.”

77. *Philips Electronics Ltd. and Les Distributeurs Saeco Canada Ltée v. President of the Canada Border Services Agency* (24 April 2014), AP-2013-019 and AP-2013-020 (CITT) at para. 51.

105. Consequently, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 8516.71.10 as coffee makers.

DECISION

106. The appeal is dismissed.

Jason W. Downey

Jason W. Downey
Presiding Member