



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-026

Canac Marquis Grenier Ltée

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, September 11, 2017*

TABLE OF CONTENTS

DECISION.....	i
STATEMENT OF REASONS	1
INTRODUCTION	1
PROCEDURAL HISTORY	1
DESCRIPTION OF THE GOODS IN ISSUE	1
LEGAL FRAMEWORK	2
TERMS OF RELATIVE HEADINGS AND LEGAL AND EXPLANATORY NOTES	3
Relevant Classification Provisions Concerning Heading No. 73.21	3
Relevant Classification Provisions Concerning Heading No. 84.16	4
Relevant Classification Provisions Concerning Heading No. 84.79	5
ANALYSIS	6
Should the Goods in Issue be Classified in Heading No. 84.79?	7
Should the Goods in Issue be Classified in Heading No. 84.16?	8
Were the Goods in Issue Properly Classified in Heading No. 73.21?	11
Classification at the Subheading and Tariff Item Levels	16
DECISION	16

IN THE MATTER OF an appeal heard on May 24, 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 August 2, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CANAC MARQUIS GRENIER LTÉE

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey

Jason W. Downey
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 24, 2017

Tribunal Panel: Jason W. Downey, Presiding Member

Support Staff: Courtney Fitzpatrick, Counsel
Michael Carfagnini, Student-at-law

PARTICIPANTS:**Appellant**

Canac Marquis Grenier Ltée

Counsel/RepresentativesMarco Ouellet
Jeffrey Goernert**Respondent**

President of the Canada Border Services Agency

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WITNESS:Doug Feltmate
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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Canac Marquis Grenier Ltée (CMG) pursuant to subsection 67(1) of the *Customs Act*¹ in response to a decision of the President of the Canada Border Services Agency (CBSA), dated August 2, 2016, made pursuant to paragraph 60(4)(b) of the *Act*, affirming an advance ruling.

2. The issue in this appeal is the proper tariff classification of certain gas patio heaters (the goods in issue).

3. The CBSA determined that the goods in issue are properly classified under tariff item No. 7321.81.00 of the schedule to the *Customs Tariff*² as non-electric domestic appliances, for gas fuel or for both gas and other fuels, whereas CMG argued that the goods in issue should be classified under tariff item No. 8416.20.00 as other furnace burners or, alternatively, tariff item No. 8479.89.90 as other machines and mechanical appliances having individual functions, not specified or included elsewhere.

PROCEDURAL HISTORY

4. On October 30, 2015, CMG requested an advance ruling on the tariff classification of the goods in issue.

5. On January 27, 2016, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(c) of the *Act*, classifying the goods under tariff item No. 7321.81.00 as non-electric domestic appliance, for gas fuel or for both gas and other fuel.

6. On March 1, 2016, CMG filed a request for a review of an advance ruling pursuant to subsection 60(2) of the *Act*, and asked that the goods be classified under tariff item No. 8416.20.00 as other furnace burners.

7. On August 2, 2016, the CBSA affirmed the advance ruling pursuant to paragraph 60(4)(b) of the *Act*, maintaining its previous decision to classify the goods under tariff item No. 7321.81.00.

8. On September 27, 2016, CMG filed this appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Act*.

9. A hearing was held in Ottawa, Ontario, on May 24, 2017.

10. CMG called one witness, Mr. Doug Feltmate, a food services and hospitality design consultant with Planned Foodservice Solutions Inc. The CBSA did not call any witnesses.

DESCRIPTION OF THE GOODS IN ISSUE

11. The goods in issue are large, upright, radiative gas patio heaters (item No. 7011853, model Nektra) built for use in open, outdoor spaces where heating is not readily available. They consist of a burner on the top of a post, which burns propane and directs the flames onto a perforated metal screen. Heat radiates from the surface of the screen in a circular pattern around the appliance, and a reflector on top of the burner

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

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

reflects heat that would otherwise be lost upwards. The goods in issue measure 87 inches in height and have a base of 18 inches to which wheels are attached to facilitate movement. The goods in issue have an output power of 41 000 BTU, function using a 20 lbs. propane gas tank and have a heating capacity of up to 115 square feet.

LEGAL FRAMEWORK

12. 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).³ 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.

13. 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*⁴ and the *Canadian Rules*⁵ set out in the schedule.

14. 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.

15. 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*⁶ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁷ 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.⁸

16. 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.⁹

17. 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. 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*

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

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

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

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

7. World Customs Organization, 6th ed., Brussels, 2017.

8. 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.

9. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.

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.”

18. 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 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. 73.21

19. The relevant tariff nomenclature concerning heading No. 73.21 provides as follows:

SECTION XV	
BASE METALS AND ARTICLES OF BASE METAL	
. . .	
Chapter 73	
ARTICLES OF IRON OR STEEL	
. . .	
73.21	Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, of iron or steel.
. . .	
-Other appliances:	
7321.81.00	- -For gas fuel or for both gas and other fuels

20. The relevant section notes for section XV provide as follows:

1. This Section does not cover:

. . .

(f) Articles of Section XVI (machinery, mechanical appliances and electrical goods);

21. The relevant explanatory notes to heading No. 73.21 provide as follows:¹⁰

This heading covers a group of appliances which meet all of the following requirements:

- (i) be designed for the production and utilisation of heat for space heating, cooking or boiling purposes;
- (ii) use solid, liquid or gaseous fuel, or other source of energy (e.g., solar energy);
- (iii) be normally used in the household or for camping.

These appliances are identifiable, according to type, by one or more characteristic features such as overall dimensions, design, maximum heating capacity, furnace or grate capacity in the case of solid

10. There are no relevant chapter notes or classification opinions.

fuel, size of tank where liquid fuel is used. The yardstick for judging these characteristics is that the appliances in question must not operate at a level in excess of household requirements.

This heading includes:

- (1) Stoves, heaters, grates and fires of the type used for space heating, braziers, etc.
- (2) Gas and oil radiators incorporating heating elements, for the same use.

Relevant Classification Provisions Concerning Heading No. 84.16

22. The relevant tariff nomenclature concerning heading No. 84.16 provides as follows:

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

...

84.16 **Furnace burners for liquid fuel, for pulverized solid fuel or for gas;
mechanical stokers, including their mechanical grates, mechanical ash
dischargers and similar appliances.**

...

8416.20.00 **-Other furnace burners, including combination burners**

23. The relevant chapter notes to chapter 84 provide as follows:

This Chapter does not cover:

...

(d) Articles of heading 73.21 or 73.22 or similar articles of other base metals (Chapters 74 to 76 or 78 to 81);

...

2. Subject to the operation of Note 3 to Section XVI and subject to Note 9 to this Chapter, a machine or appliance which answers to a description in one or more of the headings 84.01 to 84.24, or heading 84.86 and at the same time to a description in one or other of the headings 84.25 to 84.80 is to be classified under the appropriate heading of the former group or under heading 84.86, as the case may be, and not the latter group.

24. The relevant explanatory notes to chapter 84 provide as follows:

GENERAL

(A) GENERAL CONTENT OF THE CHAPTER

Subject to the provisions of the General Explanatory Note to Section XVI, this Chapter covers all machinery and mechanical appliances, and parts thereof, not more specifically covered by **Chapter 85**, and not being:

...

- (e) Stoves, central heating radiators and other goods of heading 73.21 or 73.22, and similar articles of other base metals.

...

(B) GENERAL ARRANGEMENT OF THE CHAPTER

...

- (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.

...

25. The relevant explanatory notes to heading No. 84.16 provide as follows:

This heading covers a range of apparatus for the mechanical or automatic firing and stoking of furnaces of all kinds, and for evacuating the ash and cinders.

(A) FURNACE BURNERS

These project a flame directly into the furnace, and dispense with the need for a grate and for ash removal. They include the following types:

...

- (3) **Gas Burners.**

These include both high pressure types for use with forced draught, and low pressure types for use with atmospheric air. The air and gas is in either case fed through concentric or converging tubes.

...

Relevant Classification Provisions Concerning Heading No. 84.79

26. The relevant tariff nomenclature concerning heading No. 84.79 provides as follows:¹¹

84.79 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.

...

-Other machines and mechanical appliances:

...

8479.89 - -Other

...

8479.89.90 - - -Other

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

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

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

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

and

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

and

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

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

and

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

or

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

The machinery of this heading is distinguished from the parts of machinery, etc., that fall to be classified in accordance with the general provisions concerning parts, by the fact that it has individual functions.

ANALYSIS

28. The parties agree that the key issue in this appeal is whether the goods in issue are properly classified under tariff item No. 7321.81.00 or should be classified under tariff item No. 8416.20.00 or, alternatively, tariff item No. 8479.89.90. Consequently, the dispute between the parties arises at the heading level. Therefore, the Tribunal will begin by considering the appropriate heading for the goods in issue, taking into account the terms of the headings and the relevant notes as set out above.

29. As a preliminary matter, the parties argued that the Tribunal should begin its analysis with tariff item No. 7321.81.00 because note 1(d) to chapter 84 specifically excludes articles of headings No. 73.21 and 73.22. The parties referred to the Tribunal's past practice and submitted that where such an exclusionary note exists, the analysis begins with the heading excluded by the note, in this case heading No. 73.21.

30. The Tribunal agrees that this is the correct approach where there is a single relevant exclusionary note.¹² However, note 1(f) to section XV (which covers heading No. 73.21) is also applicable. This note states that section XV (which includes heading No. 73.21) does not cover articles of Section XVI (which covers heading Nos. 84.16 and 84.79). By operation of these two exclusionary notes, headings No. 73.21 and 84.16 (or, alternatively, headings No. 73.21 and 84.79) are mutually exclusive. Accordingly, the *prima*

12. See, for example, *Cross Country Parts Distributors Ltd. v. Canada (Border Services Agency)*, 2015 FCA 187 (CanLII) at para. 3; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) at para. 46; *HBC Imports c/o Zellers v. President of the Canada Border Services Agency* (19 November 2010), AP-2010-005 (CITT) at paras. 41-74, *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) at paras. 27-28.

facie classification of the goods in issue in either heading would preclude their *prima facie* classification in the other.¹³

31. 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. Accordingly, the Tribunal will determine, on the basis of the evidence before it, whether the goods in issue meet the terms of headings No. 73.21, 84.16 or 84.79. As CMG bears the burden of demonstrating that the classification of imported goods was incorrect in accordance with subsection 152(3) of the *Act*,¹⁴ the Tribunal will first determine whether CMG has demonstrated that the goods in issue should be classified in either heading No. 84.16 or heading No. 84.79.

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

32. The Tribunal will begin by addressing CMG's alternative argument that the goods in issue should be classified in heading No. 84.79. CMG submitted that if the goods in issue are not classified in heading No. 84.16, then they should be classified in heading No. 84.79 as machines and mechanical appliances having individual functions, not specified or included elsewhere in chapter 84.

33. It submitted that the goods in issue are machines with the single function of heating an outdoor space and that they perform this function independently of any other machine or appliance. The CBSA referred to note 1(d) of chapter 84 and the explanatory notes to heading No. 84.79 and submitted that the goods in issue are excluded from this heading by virtue of being classifiable in heading No. 73.21 and because they are covered more specifically by that heading.

34. Heading No. 84.79 covers "machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter". There are three conditions which must be met for classification in heading No. 84.79: (1) the goods in issue must be "machines" or "mechanical appliances"; (2) they must have "individual functions"; and (3) they must not be more specifically covered by another heading in chapter 84 or elsewhere in the nomenclature.¹⁵ In the event that one of these conditions is not met, the goods in issue cannot be classified in this heading.

35. Regarding the first condition, the terms "machines" and "mechanical appliances" are not defined in the nomenclature. The Tribunal has consistently defined them in accordance with their ordinary and contextual meaning. Most notably, the Tribunal has characterized machines or mechanical appliances as

13. The Tribunal has explained in a line of past cases that, in the presence of mutually exclusive notes in the competing headings, classification must be effected through Rule 1 (and, where applicable, Rule 2) of the *General Rules*, i.e. the terms of the headings and relevant notes, without recourse to the remaining Rules. See, for example, *Kinedyne Canada Limited v. President of the Canada Border Services Agency* (17 December 2013), AP-2012-058 (CITT) [*Kinedyne*] at para. 37; *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency* (10 February 2011), AP-2009-045 (CITT); *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency* (2 June 2008), AP-2006-054 (CITT) at para. 24; *Dynamic Furniture Corp. v. President of the Canada Border Services Agency* (31 March 2009), AP-2005-043 (CITT) at para. 31; *Rutherford Controls International Corp. v. President of the Canada Border Services Agency* (26 January 2011), AP-2009-076 (CITT); *Bauer Hockey Corporation v. President of the Canada Border Services Agency* (26 April 2012), AP-2011-011 (CITT) at para. 33.

14. *Canada (Border Services Agency) v. Miner*, 2012 FCA 82 (CanLII) at paras. 7, 21.

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

articles that “...do work through some combination of moving parts...” and “...produce, modify or transmit force *to an external body*...” [emphasis added].¹⁶

36. On the basis of the evidence on the record of this appeal, the Tribunal is not satisfied that the goods in issue are “machines” and “mechanical appliances” that perform “work through some combination of moving parts”, nor is it satisfied that they “produce, modify or transmit force to an external body”.

37. Determinations of this nature require the Tribunal to make findings of fact about the mechanical function of the goods in issue. CMG made virtually no submissions as to the mechanical nature of the goods in issue in the context of this heading, either in its brief or at the hearing. Instead, CMG focused its arguments with respect to heading No. 84.79 on certain explanatory notes to that heading, which deal primarily with the residual nature of this heading.

38. It is clear from the evidence that the goods in issue have multiple parts, which include a burner, a diffuser cap, a regulator and a reflector.¹⁷ However, CMG has not established, and it is not readily apparent upon examining the goods themselves, that these are moving parts (or a combination thereof). In addition, while it is accepted that the goods in issue produce heat, CMG has not addressed or explained whether or how the generation of heat could translate into the transmission of force on an external body.

39. Absent specific submissions and evidence, and noting the appellant’s burden of proof, the Tribunal is not prepared to conclude that the goods in issue do “work through some combination of moving parts” or that they produce, modify or transmit force *to an external body*. Accordingly, the goods in issue cannot qualify as “machines” or “mechanical appliances”. As this condition has not been met, the goods in issue cannot be classified in heading No. 84.79.

40. Moreover, the Tribunal notes that the goods in issue also fail to meet the third condition for classification in this heading. The explanatory notes to this heading indicate that it is restricted to machinery having individual functions which is *not covered more specifically by a heading in any other chapter*. This note speaks to the residual nature of the heading and directs the Tribunal to consider whether another, more specific heading could apply to the goods in issue before they can be classified here.

41. The Tribunal considers heading No. 73.21 to be more specific than heading No. 84.79.

42. Heading No. 73.21 is not a residual heading but covers named (and similar) non-electric domestic appliances used for the specific purposes of heating and cooking. On the other hand, heading No. 84.79 is a catch-all heading for machines writ large which are not covered elsewhere in the nomenclature. As will be explained below, the Tribunal finds that the goods in issue meet the conditions for classification in heading No. 73.21, a more specific heading, and as such they cannot be classified in heading No. 84.79

Should the Goods in Issue be Classified in Heading No. 84.16?

43. CMG’s primary submission was that the goods in issue are “furnace burners” connected to a gas source, being a propane tank, and that the correct tariff classification is heading No. 84.16. CMG relied on paragraph 2 of general explanatory note B to chapter 84, which indicates that headings No. 84.02 to 84.24 cover other machines and apparatus which are classified mainly by reference to their function regardless of the field of industry in which they are used. It submitted that the function of the goods in issue is to burn gas,

16. *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (29 May 2012), AP-2011-042 (CIIT); *Kinedyne* at paras. 40-44.

17. Exhibit AP-2016-026-04A, tab 2 at 29, Vol. 1.

which makes it a gas burner. The CBSA submitted that the gas patio heaters in their entirety are not furnace burners; they are a complete domestic appliance in their own right. It further submitted that the burner used in the patio heater is not a “furnace burner” as it is not a component of a furnace.

44. According to the terms of the heading, to be classified in heading No. 84.16, the goods in issue must be (1) burners; and (2) for furnaces. For the reasons discussed below, the Tribunal finds that the goods in issue do not meet either of these conditions.

Are the Goods in Issue Burners?

45. The relevant explanatory notes to heading No. 84.16 specify that the goods covered by heading No. 84.16 are apparatus for the mechanical or automatic firing and stoking of furnaces of all kinds. These notes also provide that furnace burners project a flame directly into a furnace and dispense with the need for a grate and for ash removal, and that gas furnace burners include both high pressure types for use with forced draught as well as low-pressure types for use with atmospheric air.

46. It is undisputed that the goods in issue use propane as a fuel source and therefore operate using gas. What is disputed is whether the goods in issue are actual burners for furnaces.

47. In addition to the explanatory notes, CMG filed dictionary definitions of the words “burner” and “furnace” in order to establish their meaning.

48. According to the *Merriam-Webster's Collegiate Dictionary*, “burner” is defined as follows: “*n* 1. One that burns; *esp*: the part of a fuel burning or heat-producing device (as a furnace or stove) where the flame or heat is produced.” It also defines “furnace” as the following: “*n* an enclosed structure in which heat is produced (as for heating a house or reducing ore)”.

49. The Tribunal understands from the relevant notes and dictionary definitions that a burner is a component of a heat-producing device (such as a furnace) where the flame or heat is produced; it is not the device itself.

50. It is undisputed that the goods in issue incorporate such a burner as a component.¹⁸ The product guide for the goods in issue indicates this very clearly. For example, the product guide states that the goods in issue are “. . . equipped with a pilot light that . . . must be lit before main burner can be started”.¹⁹ It also offers troubleshooting tips that can be used when the burner will not light or when the burner flame is low. During his testimony, Mr. Feltmate explained his understanding of how the burner component of the goods in issue operates. In particular, he indicated as follows:

MR. FELTMATE: The difference is a patio heater uses an infrared burner, where that is a particular ported burner. What happens in this type of example here that we have is the gas goes up into the type flue part, where it is mixed with the combustion air and it creates an infrared wall of flame around the small openings that are there.

It isn't a direct -- the mixture takes place within that burner, where this one, the mixture takes place prior to getting to the burner.

MR. GOERNERT: Thank you.

MR. FELTMATE: So that's the main difference, is the style of combustion.

18. *Ibid.* at para. 10, tab 2 at 39; Exhibit AP-2016-026-06A at para. 69, Vol. 1A.

19. Exhibit AP-2016-026-04A, tab 2 at 39, 44, Vol. 1.

MR. GOERNERT: So one is a radiant heater, one is a flame?

MR. FELTMATE: That's correct.

MR. GOERNERT: Okay. And the Canac model you reviewed, Exhibit A-01, works on the same principles you have just described?

MR. FELTMATE: Yes, it does.²⁰

51. Nonetheless, the Tribunal finds that the goods in issue are not the actual burner *per se*; they are a complete assembly in their own right (incorporating a burner as a component) and must be classified on that basis, not as a part of its entire structure. As noted above, the goods in issue include a number of additional features such as a base, wheels, a tank enclosure, an anti-tip mechanism, a post, a gas hose, a regulator, a reflector panel and reflector plate, and various pieces of hardware.²¹ The combination of these components when assembled is an outdoor patio heater, not the burner itself.

52. The Tribunal does not accept CMG's argument that the goods in issue should be classified in heading No. 84.16 because their function is to burn gas. First, that argument ignores the overall function of the goods, which is not to act as a component in a heat-producing apparatus but to heat an outdoor patio. Second, CMG's argument fails to consider the second part of paragraph 2 of general explanatory note B to chapter 84 and therefore misconstrues its meaning. The second part of that note indicates that goods of certain headings are to be classified by reference to their function, *and regardless of the field of industry in which they are used*.

53. The Tribunal understands this to mean that goods are to be classified here if they are furnace burners, regardless of the type of furnace they are used with (e.g. a home furnace or an industrial furnace). It does not mean that any good with a burner as a component, or that has a burning function, can be classified as a furnace burner.

54. Finally, the Tribunal notes that CMG has not demonstrated that the goods in issue project a flame directly into a furnace and dispense with the need for a grate and for ash removal, as required by the explanatory notes to heading No. 84.16.

Are the Goods in Issue Used with Furnaces?

55. Regarding the second condition, the Tribunal finds that the goods in issue are not used to fire or stoke a furnace. They are used to heat outdoor patios, as noted by Mr. Feltmate at the hearing:

... the primary goal, was to extend the shoulder seasons, where you might be at the temperature of 15 to 18 degrees Centigrade, but you wanted it just a little more comfortable so people could use the outdoor function.

...

The intent is just to temper the air slightly, to take it up. It's not a direct heater *per se*, but it is to temper the air and make it a little more comfortable for the people sitting outside.²²

56. Moreover, the Tribunal finds that goods in issue themselves do not meet the definition of "furnace" as they are not enclosed structures. Therefore, even if the Tribunal were to accept that the goods in issue constitute a burner, and not a complete assembly, they are not used as part of a furnace. While CMG

20. *Transcript of Public Hearing*, 24 May 2016, at 18.

21. Exhibit AP-2016-026-04A, tab 2 at 29, Vol. 1.

22. *Transcript of Public Hearing*, 24 May 2016, at 20, 23.

submitted that the goods in issue act in a manner analogous to a furnace, in its brief and at the hearing it acknowledged that the goods in issue were not an enclosed structure and therefore not a furnace. In particular, the Tribunal notes the following exchange:

PRESIDING MEMBER: So what we have here is a gas burner. Is that what you are saying?

MR. GOERNERT: Within the context of 8416, yes. Because it's not part of a furnace, because it's not a furnace. It's -- the witness said that he didn't think it was a furnace.

But from a classification standpoint I think it is an outdoor furnace, because it works on the same principle, the same functioning.

PRESIDING MEMBER: But is it a burner? That's the question, because 8416 speaks of furnace burners.

MR. GOERNERT: It's a gas burner.

PRESIDING MEMBER: Gas burner or a furnace? Please confer, yes.

MR. GOERNERT: It's a gas burner; it's not a furnace. And I believe Mr. Feltmate testified as such.²³

57. The Tribunal is of the view that heading No. 84.16 relates to a limited and specific type of good and is not broad enough to allow for classification on the basis of analogous use. Even if the terms of heading No. 84.16 permitted classification on an analogous basis, the goods in issue are more akin to a complete heater or furnace as opposed to the furnace burner unit itself.

58. As the Tribunal finds that the goods in issue are neither a burner nor used with a furnace, they do not meet the terms of heading No. 84.16 and therefore cannot be classified as such.

Were the Goods in Issue Properly Classified in Heading No. 73.21?

59. Having found that the goods in issue cannot be classified in headings No. 84.79 or 84.16, the Tribunal will consider whether the goods in issue are properly classified in heading No. 73.21.

60. According to the terms of the heading, in order to be classified in heading No. 73.21 the goods in issue must be (1) non-electric; (2) domestic appliances; (3) of iron or steel; and (4) similar to the appliances specified in that heading.

61. It is not disputed, and the Tribunal agrees, that the goods in issue are non-electric and made of iron or steel.²⁴ Therefore, the Tribunal finds that the first and third conditions have been met. What remains to be determined by the Tribunal is whether the goods in issue are *domestic appliances* and, as they are not specifically named in the heading, whether the goods in issue are *similar to the appliances named in that heading*.

Are the Goods in Issue "Domestic Appliances"?

62. The parties disagreed on the correct approach for determining whether the goods in issue are domestic appliances. CMG submitted that they are commercial appliances that can be used in a domestic setting and that using a commercial appliance in that way does not make it a domestic appliance. It argued that the goods were historically conceived and designed with the restaurant patio market in mind and that

23. *Ibid.* at 71, 83. See also Exhibit AP-2016-026-04A at paras. 43 and 51, Vol. 1.

24. *Transcript of Public Hearing*, 24 May 2016, at 58.

the goods are intended to be used as commercial appliances. It further argued that the goods in issue are not normally used in the household because they must be used outdoors only, and that they were not designed for camping as they are not portable and cannot be used on combustible, soft or unlevelled surfaces.

63. By contrast, the CBSA argued that the correct approach is not to examine the purpose or intended use of the goods in issue. The CBSA submitted that the correct test to be applied when assessing if goods are normally used in the household is whether the appliances in question operate at a level in excess of household requirements, as set out in the explanatory notes to heading No. 73.21. The CBSA argued that the goods in issue are domestic appliances that are normally used in the backyard or on a domestic patio, and therefore, are normally used *in* the household.

64. The explanatory notes to heading No. 73.21 provide that this heading covers a group of appliances which meet all of the following requirements: (i) be designed for the production and utilization of heat for space heating, cooking or boiling purposes; (ii) use solid, liquid or gaseous fuel, or other source of energy (e.g. solar energy); and (iii) be normally used in the household or for camping. With respect to the third criterion, the explanatory notes go on to provide the following:

These appliances are identifiable, according to type, by one or more characteristic features such as overall dimensions, design, maximum heating capacity, and furnace or grate capacity in the case of solid fuel, size of tank where liquid fuel is used. The yardstick for judging these characteristics is that the appliances in question must not operate at a level in excess of household requirements.

This heading includes:

(1) Stoves, heaters, grates and fires of the type used for space heating, braziers, etc.

...

65. As discussed above, the Tribunal finds that the goods in issue are designed for space heating and use a gaseous fuel and that the first two conditions set out in the explanatory notes are therefore met. What remains to be determined is whether they are normally used in the household or for camping.

66. In the Tribunal's view, the explanatory notes delineate that goods may normally be used in the household for the purposes of heading No. 73.21 if their characteristics (such as the overall dimensions, design, maximum heating capacity and the size of the liquid fuel tank used) do not exceed household requirements.

67. After considering the explanatory notes, the Tribunal finds that the test for determining a "domestic appliance" of heading No. 73.21 is not the intended use of the goods (either in a commercial or a domestic setting), as argued by CMG, but whether the goods in issue possess the characteristics of a domestic appliance by operating at a level that does not exceed household requirements. By contrast, a good that operates at a level in excess of household requirements could not be classified in heading No. 73.21 as a domestic appliance.

68. The Tribunal also notes that the explanatory notes do not define what is meant by "household requirements". The Tribunal must evaluate these requirements on a case-by-case basis, having regard to the characteristics of the goods in issue and the available evidence as to whether and how those goods are normally used. Where goods possess features which far exceed household requirements, be it the industrial/commercial nature of their design, their size, or the incorporation of a specialized type of fuel tank that cannot be safely operated in a domestic setting, they may be deemed *not* to possess the characteristics of a domestic appliance.

69. Before turning to the characteristics of the goods in issue, the Tribunal will address CMG's argument with respect to the meaning of "household". As mentioned above, the Tribunal notes that the words "domestic" and "household" are not defined in the chapter notes to chapter 73 or the explanatory notes to heading No. 73.21. As such, the Tribunal has considered the ordinary meaning of these words.

70. The *Merriam-Webster's Collegiate Dictionary* defines "domestic" as follows: "*adj* **3.** of or relating to the household or the family". It also defines "household" as follows: "**1.** *n* those who dwell under the same roof and compose a family; also: a social unit composed of those living together in the same dwelling **2.** *adj* **1.** of or relating to a household: domestic".

71. The word "domestic" has been interpreted in a number of previous Tribunal decisions. In one such decision the Tribunal found that goods for domestic or household use must be used in the home or its direct surroundings.²⁵ In another decision, the Tribunal interpreted "domestic" to include goods that can be found outside of the house but which have, as a primary purpose, use by individuals in a domestic setting.²⁶ In addition, the Tribunal has previously interpreted the words "domestic" and "household" as being synonymous for the purposes of the tariff schedule.²⁷

72. These definitions and previous decisions support an interpretation of the terms "domestic" and "household" that includes a backyard or a domestic patio. By extension, the Tribunal finds that goods may be "normally used in the household" even if they are used in a backyard or on a domestic patio. This view is supported by the terms of heading No. 73.21, which specifically lists items such as barbecues and braziers, appliances which must be used outside but may not always be suitable for camping because they are difficult to move rapidly and conveniently in that type of setting, and there may be safety risks associated with using them on soft, combustible ground.²⁸

73. Turning to the specific characteristics of the goods in issue, the Tribunal finds that they do not operate at a level in excess of household requirements. Regarding the overall dimensions, the goods are 87 inches tall with a base diameter of 18 inches. While the goods are rather tall (over seven feet) the Tribunal finds that this height is not in excess of household requirements when it is considered that the goods must be used outdoors (such as on a patio, for example).

74. Turning next to the design of the goods, the Tribunal notes that there was very little evidence filed on this point that relates directly to the goods in issue. CMG submitted that patio heaters were originally designed for outdoor use in bars and restaurants. However, the evidence filed in support of that premise does not necessarily describe the goods in issue, but rather points to *other brands* and models of patio heaters.

25. *Evenflo Canada Inc. v. President of the Canada Border Services Agency* (19 May 2010), AP-2009-049 (CITT) at para. 68 [*Evenflo*].

26. *Costco Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (11 January 2001), AP-2000-015 (CITT) at 4.

27. *Evenflo* at para. 69.

28. At the hearing CMG submitted that barbecues are distinct from gas grills that are commonly used to grill meat in one's backyard. CMG argued that the barbecues referred to in heading No. 73.21 are not normally used in the household but are used for camping. The Tribunal is not persuaded that the meaning of "barbecue" in heading No. 73.21 is limited to portable camping grills to the exclusion of appliances commonly used to grill meat in one's backyard. In particular, both appliances are used to roast meat. As to their portability, the Tribunal notes that "gas grills" are movable in a manner similar to the goods in issue and that, in any event, the definition of "barbecue" submitted by CMG simply indicates that barbecues are often portable, not that they are exclusively portable. See Exhibit AP-2016-026-21A for the definition of "brazier".

75. While the Tribunal is prepared to accept that some patio heaters may be specifically designed for commercial use,²⁹ the Tribunal is not satisfied, on the basis of the evidence presented, that the goods in issue were themselves designed specifically for that purpose (as opposed to being designed for both commercial and domestic use). Although Mr. Feltmate testified as to his use of similar goods in commercial settings, the Tribunal finds this to be of limited use in understanding the overall design of the goods in issue, particularly as Mr. Feltmate's clients are almost exclusively commercial enterprises. In addition, when asked about the durability of the goods in issue as compared to a more expensive commercial model, Mr. Feltmate indicated that he could not answer with accuracy as he had not done life-cycle testing on the goods in issue. In any event, the Tribunal finds that the evidence on the record does not demonstrate that the design of the goods in issue is in excess of household requirements.

76. The goods in issue appear to have a heating capacity of up to 115 square feet, which describes an outdoor area that is slightly larger than 10 feet by 10 feet. This size of patio could logically be found in a residential backyard. In that regard, the Tribunal also recognizes Mr. Feltmate's testimony that there are safety precautions that must be exercised when operating the goods in issue. In particular, certain combustible clearances must be maintained and the goods must be secured to the ground to avoid falling over. The Tribunal notes that there is nothing in the product guide to suggest that the goods in issue are not meant to be safely used on a domestic patio, provided the necessary safety precautions (including clearances) are met.

77. According to the guide, the goods in issue require a clearance of three feet from the sides and two feet from the top. The Tribunal acknowledges that not all households would be able to accommodate these clearances, but finds that many of them would. Similarly, not all commercial patios would have the space to accommodate these clearances either. Moreover, the inability to be used by certain households does not establish that the goods operate in excess of household requirements.

78. The goods in issue produce 41 000 BTUs. This is similar to the BTUs of a residential grade barbecue, which clearly does not operate in excess of household requirements.³⁰ Contrary to this, there is evidence on the record indicating that some large, industrial-strength heaters can produce hundreds of thousands of BTU.³¹ Noting this, the Tribunal finds that producing 41 000 BTUs is not in excess of household requirements.

79. Finally, the goods in issue use a 20 lbs. propane tank, which the Tribunal finds to be the standard size tank used in domestic settings, such as with a barbecue or other domestic devices.³²

80. While not relating to its characteristics *per se*, the Tribunal also finds the pricing and the marketing of the goods to be relevant in the present case.

81. Regarding pricing, the goods in issue appear to cost in the range of \$135.00 to \$198.00, which is relatively affordable for a number of households.³³ This is in contrast to a number of other models of patio heaters which can cost up to \$1,599.00.³⁴ Regarding marketing, there is limited evidence on the record specific to the goods in issue. However, there is nothing to suggest that the goods are not marketed to the public in general (CMG for that matter being a general retail outlet), as opposed to specifically for

29. See, for example, Exhibit AP-2016-026-10A, tab 2 at 67-68, 131, Vol. 1B.

30. Exhibit AP-2016-026-06A, tab 19, Vol. 1A.

31. Exhibit AP-2016-026-10B at 296, Vol. 1C.

32. Exhibit AP-2016-026-06A, tab 15, Vol. 1A; *Transcript of Public Hearing*, 24 May 2016, at 35-36.

33. Exhibit AP-2016-026-04A, tab 2, Vol. 1; Exhibit AP-2016-026-06A, tab 20, Vol. 1A.

34. See, for example, Exhibit AP-2016-026-10A, tab 2, Vol. 1B.

commercial use. There is evidence on the record about the marketing of similar patio heaters, which demonstrates that they are marketed for both domestic and commercial use.³⁵ This suggests that they can be safely used in a household or domestic setting.

82. Mr. Felmate testified that he has seen these patio heaters used as a commercial appliance and would recommend the goods in issue for use in a commercial environment, such as on patios in bars, restaurants and hotels. He also testified that a benefit of using these patio heaters in a commercial setting was to extend the seasonal use of outdoor space. While the Tribunal found Mr. Felmate's testimony on this point to be credible and interesting, applying the test that the Tribunal articulated above, the Tribunal finds that this testimony does not resolve the question of whether the goods in issue are domestic appliances for the purposes of tariff classification in this heading.

83. After considering the evidence and the relevant factors listed above, the Tribunal is satisfied that the goods in issue do not operate at a level in excess of household requirements and, consequently, are normally used in the household. The Tribunal therefore finds the goods in issue to be domestic appliances for the purposes of heading No. 73.21.

Are the Goods in Issue "Similar Appliances"?

84. Next, the Tribunal must determine whether the goods in issue are similar to the appliances named in heading No. 73.21. As the Tribunal has previously explained, the test to determine similarity is not a strict one. Rather, in order to be considered similar, goods must share certain characteristics and have common features, though the requirement for similarity should not be mistaken for a requirement that goods be identical.³⁶ The Tribunal must establish the common features of the appliances listed in heading No. 73.21 and then examine whether the goods in issue also share those common features.

85. Heading No. 73.21 lists the following appliances: stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas-rings and plate warmers. At the hearing, CMG argued that the goods listed by name in heading No. 73.21 are used to cook or prepare food (either in the household or while camping), or to keep food warm. It submitted that the patio heaters cannot cook or heat food, nor were they designed for camping, and that they are therefore not similar to the appliances listed in that heading.

86. The Tribunal considers the explanatory notes to heading No. 73.21 relevant to its assessment of similarity. As noted above, these explanatory notes provide that this heading covers a group of appliances which meet all of the following requirements: (i) be designed for the production and utilization of heat for space heating, cooking or boiling purposes; (ii) use solid, liquid or gaseous fuel, or other source of energy (e.g. solar energy); and (iii) be normally used in the household or for camping. In addition, the explanatory notes to heading No. 73.21 specifically list stoves, heaters, grates and fires of the type used for space heating as appliances covered by this heading.

87. The Tribunal is of the view that goods meeting these requirements, which are not otherwise precluded from classification in this heading, may be similar appliances to those listed in heading No. 73.21. As noted above, it is not disputed that the goods in issue are heaters used for space heating and use gaseous

35. See, for example, Exhibit AP-2016-026-04A, tab 10 at 210, Vol. 1; Exhibit AP-2016-026-10A, tab 2 at 24-25, 27, 67, Vol. 1B; Exhibit AP-2016-026-10B, tab 5 at 350, Vol. 1C.

36. *Ivan Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT) at 5; *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) at para. 82.

fuel as a source of energy. Moreover, the Tribunal has already concluded that the goods in issue are normally used in the household. As such, the Tribunal is satisfied that the goods in issue are similar to the appliances named in heading No. 73.21 and finds accordingly.

Conclusion

88. On the basis of the foregoing, and in accordance with Rule 1 and Rule 2(a)³⁷ of the *General Rules*, the Tribunal finds that the goods in issue are properly classified in heading No. 73.21.

Classification at the Subheading and Tariff Item Levels

89. Having found that the goods in issue are properly classified in heading No. 73.21, the Tribunal finds that, in accordance with Rule 6 of the *General Rules*, the goods in issue are also properly classified in subheading No. 7321.81 as other appliances for gas fuel or for both gas and other fuels. As subheading No. 7321.81 has only one applicable tariff item, on the basis of Rule 1 of the *Canadian Rules*, the goods in issue are properly classified under tariff item No. 7321.81.00 as other appliances for gas fuel or for both gas and other fuels.

DECISION

90. The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

37. Rule 2(a) of the *General Rules* provides, in relevant part, that any reference in a heading to an article shall be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled. As the goods in issue are presented unassembled, the Tribunal has applied this rule in classifying the goods.