



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-017

Cubex Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, January 31, 2018*

*Corrigenda issued
Wednesday, February 14, 2018*

TABLE OF CONTENTS

DECISION.....	i
CORRIGENDA	ii
STATEMENT OF REASONS	1
INTRODUCTION	1
PROCEDURAL HISTORY	1
DESCRIPTION OF THE GOODS IN ISSUE	2
LEGAL FRAMEWORK	2
Tariff classification steps.....	2
Relevant tariff nomenclature and notes	3
POSITIONS OF THE PARTIES	7
CBSA	7
CUBEX.....	8
ANALYSIS.....	9
Conclusion	12
Classification at the subheading and tariff item levels	12
DECISION	12

IN THE MATTER OF an appeal heard on January 16, 2018, pursuant to subsection 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 April 25, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CUBEX LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

IN THE MATTER OF an appeal heard on January 16, 2018, pursuant to subsection 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 April 25, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CUBEX LTD.

Appellant

AND

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

Respondent

CORRIGENDA

The second sentence of paragraph 41 should read as follows: “The legal and explanatory notes to Section XVI (where heading No. 84.79 appears) expressly exclude articles of Section XVII (where heading No. 87.05 appears).”

Also, paragraph 30 should read “motor vehicle classified under subheading No. 8705.90” and paragraph 49 “motor vehicle under subheading No. 8705.90”.

By order of the Tribunal,

Daniel Petit

Daniel Petit

Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 16, 2018
Tribunal Panel: Daniel Petit, Presiding Member
Support Staff: Dustin Kenall, Counsel
Michael Carfagnini, Student-at-law

PARTICIPANTS:

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed on July 20, 2017, by Cubex Ltd. (Cubex) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*,¹ from a decision rendered by the President of the Canada Border Services Agency (CBSA) dated April 25, 2017.

2. The issue in this appeal is whether two models of road and sidewalk sweepers imported by Cubex (the goods in issue) are properly classified under tariff item No. 8705.90.10 of the schedule to the *Customs Tariff*² as “special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example . . . road sweeper lorries (road sweepers) . . .)” as determined by the CBSA, or should be classified under tariff item No. 8479.10.00 as “machinery for public works, building or the like” as submitted by Cubex.

PROCEDURAL HISTORY

3. On March 20, 2012, Cubex applied for an advance ruling with respect to the tariff classification of the goods in issue pursuant to paragraph 43.1(1)(c) of the *Act*.

4. On July 13, 2012, the CBSA ruled that the goods in issue are properly classified under tariff item No. 8705.90.10 as special purpose motor vehicles other than those principally designed for the transport of persons or goods, namely, combination vacuum and broom-type sweepers.³

5. On July 14, 2016, the CBSA issued a *Trade Compliance Verification Final Report* finding that Cubex had incorrectly classified certain imports of the goods in issue as duty-free under tariff item No. 8705.90.90 (as “other” special purpose motor vehicles) rather than under tariff item No. 8705.90.10.⁴

6. On October 11 and 31, 2016, the CBSA further re-determined the tariff classification of the goods in issue, finding again that they are properly classified under tariff item No. 8705.90.10.

7. On October 28 and November 10, 2016, Cubex filed requests for a further re-determination and for a review of the advance ruling under section 60 of the *Act*, submitting that the goods in issue should be classified under tariff item No. 8479.10.00.

8. On April 25, 2017, the CBSA re-determined the tariff classification of the goods in issue and affirmed its advance ruling, finding that the goods in issue remain properly classified under tariff item No. 8705.90.10.⁵

9. On July 20, 2017, Cubex filed a notice of appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.⁶

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

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

3. Exhibit AP-2017-017-11A at 18, Vol. 1.

4. *Ibid.* at 46.

5. *Ibid.* at 75.

6. *Ibid.* at 77.

10. At the request of Cubex and with the consent of the respondent, the Tribunal decided to hear this appeal by way of a file hearing, which took place on January 16, 2018.

DESCRIPTION OF THE GOODS IN ISSUE

11. The goods in issue are the Ravo 540 STH Tier 3 Street Sweeper (Ravo) and the Aquazura Flex MC210 Sweeper (Aquazura). The goods in issue are driver-operated outdoor sweeping machines, which operate using a revolving brush and vacuum. They contain a diesel engine, drive system and gears, steering and braking systems, and are built on a chassis.⁷ They possess an enclosed cargo compartment to carry the waste material that is gathered. The Ravo and Aquazura can travel on public roads at a speed of up to 80 km/h⁸ and 50 km/h respectively.⁹

LEGAL FRAMEWORK

Tariff classification steps

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).¹⁰ 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, subject to subsection 10(2), the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*¹¹ and the *Canadian Rules*¹² 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*¹³ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,¹⁴ published by the WCO. While the classification opinions and the explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁵

7. Exhibit AP-2017-017-10 at 2, Vol. 1.

8. Exhibit AP-2017-017-11A at 166, Vol. 1.

9. *Ibid.* at 170.

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

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

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

13. WCO, 2nd ed., Brussels, 2003.

14. WCO, 5th ed., Brussels, 2012.

15. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the explanatory notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the classification opinions.

16. The Tribunal must therefore first determine whether the goods 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.¹⁶

17. Once the Tribunal has used this approach to determine the heading in which the goods should be classified, the next step is to use a similar approach to determine the proper subheading.¹⁷ The final step is to determine the proper tariff item.¹⁸

Relevant tariff nomenclature and notes

18. The relevant tariff nomenclature for tariff item No. 8479.10.00, the classification supported by Cubex, reads 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	Section XVI MACHINES ET APPAREILS, MATÉRIEL ÉLECTRIQUE ET LEURS PARTIES; APPAREILS D'ENREGISTREMENT OU DE REPRODUCTION DU SON, APPAREILS D'ENREGISTREMENT OU DE REPRODUCTION DES IMAGES ET DU SON EN TÉLÉVISION, ET PARTIES ET ACCESSOIRES DE CES APPAREILS
Chapter 84 NUCLEAR REACTORS, BOILERS, MACHINERY AND MECHANICAL APPLIANCES; PARTS THEREOF	Chapitre 84 RÉACTEURS NUCLÉAIRES, CHAUDIÈRES, MACHINES, APPAREILS ET ENGINs MÉCANIQUES; PARTIES DE CES MACHINES OU APPAREILS
84.79 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.	84.79 Machines et appareils mécaniques ayant une fonction propre, non dénommés ni compris ailleurs dans le présent Chapitre.
8479.10.00 -Machinery for public works, building or the like	8479.10.00 -Machines et appareils pour les travaux publics, le bâtiment ou les travaux analogues

19. Note 1 to Section XVI specifically excludes articles of Section XVII from classification in Section XVI:

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

20. The explanatory notes to Section XVI reiterate the exclusion of articles of Section XVII:

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

17. Rules 1 through 5 of the *General Rules* apply to classification at the heading level. 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 [Rules 1 through 5] . . .” and that “the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

18. 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.

GENERAL

(I) GENERAL CONTENT OF THE SECTION

- (A) Subject to certain **exclusions** provided for in the Notes to this Section and to Chapters 84 and 85 and apart from goods covered more specifically in other Sections, this Section covers all mechanical or electrical machinery, plant, equipment, apparatus and appliances and parts thereof, together with certain apparatus and plant which is neither mechanical nor electrical (such as boilers and boiler house plant, filtering apparatus, etc.) and parts of such apparatus and plant.

The main **exclusions** from the Section are:

...

- (e) Articles of Section XVII.

...

[Bolding in original]

21. The explanatory notes to Section XVI also refer the reader to the explanatory notes to the chapters and headings of Section XVII with respect to “self-propelled or other mobile machines”:

(VIII) MOBILE MACHINERY

As regards self-propelled or other mobile machines, reference should be made to the Explanatory Notes to the headings for the machines (e.g., lifting and handling machinery, headings 84.25 to 84.28, and excavating machinery, headings 84.29 and 84.30), and to the Explanatory Notes to the Chapters and headings of Section XVII.

22. The explanatory notes to heading No. 84.79 confirm that this heading is limited to machinery not otherwise excluded from Chapter 84 or Section XVI and not covered more specifically in a heading in any other chapter:

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.

...

[Bolding in original]

23. The relevant tariff nomenclature for tariff item No. 8705.90.10, the classification supported by the CBSA, reads as follows:

SECTION XVII VEHICLES, AIRCRAFT, VESSELS AND ASSOCIATED TRANSPORT EQUIPMENT Chapter 87 VEHICLES OTHER THAN RAILWAY OR TRAMWAY ROLLING- STOCK, AND PARTS AND ACCESSORIES THEREOF 87.05 Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries (wreckers), crane lorries (mobile cranes), fire fighting vehicles, concrete mixer lorries	SECTION XVII MATÉRIEL DE TRANSPORT Chapitre 87 VOITURES AUTOMOBILES, TRACTEURS, CYCLES ET AUTRES VÉHICULES TERRESTRES, LEURS PARTIES ET ACCESSOIRES 87.05 Véhicules automobiles à usages spéciaux, autres que ceux principalement conçus pour le transport de personnes ou de marchandises (dépanneuses, camions-grues, voitures de lutte contre l'incendie, camions-bétonnières, voitures
--	--

(concrete-mixers), road sweeper lorries (road sweepers), spraying lorries (spraying vehicles), mobile workshops, mobile radiological units).	balayeuses, voitures épanduses, voitures-ateliers, voitures radiologiques, par exemple).
8705.90 -Other	8705.90 -Autres
8705.90.10 --combination vacuum and broom type sweepers;	8705.90.10 --balayeuses combinées, à aspirateur et à balais;
8705.90.90 --Other	8705.90.90 --Autres

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

(II) SELF-PROPELLED OR OTHER MOBILE MACHINES

Many machines or equipment (in particular of the type falling in Section XVI) can be mounted on the vehicle chassis or on the floating bases of Section XVII; the classification of the resultant mobile machine depends on various factors, in particular on the type of base.

For example, all mobile machines, formed by mounting a machine on a floating base are classified in Chapter 89 (e.g., floating cranes, dredgers, grain elevators, etc.). *For the classification of mobile machines formed by mounting equipment on a vehicle chassis of Chapter 86 or 87, see the Explanatory Notes to heading 86.04, 87.01, 87.05, 87.09 or 87.16.*

[Emphasis added]

25. The relevant explanatory notes to Chapter 87 provide as follows:

This Chapter covers the following vehicles, with the **exception** of certain mobile machines of Section XVI (see the Explanatory Notes to headings 87.01, 87.05 and 87.16):

...

- (2) Motor vehicles designed for the transport of persons (heading 87.02 or 87.03) or goods (heading 87.04) *or for special purposes (heading 87.05).*

...

[Bolding in original, emphasis added]

26. The relevant explanatory notes to heading No. 87.05 provide as follows:

This heading covers a range of motor vehicles, specially constructed or adapted, equipped with various devices that enable them to **perform certain non-transport functions**, i.e., the primary purpose of a vehicle of this heading is **not** the transport of persons or goods.

The heading includes:

...

- (4) Lorries (trucks) used for cleansing streets, gutters, airfield runways, etc., (e.g., sweepers, sprinklers, sprinklersweepers and cesspool emptiers).

...

[Bolding in original]

27. The French version of the above explanatory notes reads as follows:

La présente position comprend un ensemble de véhicules automobiles, spécialement construits ou transformés, équipés de dispositifs ou appareillages divers les rendant propres **à remplir**

certaines fonctions, distinctes du transport proprement dit. Il s'agit donc de véhicules **non** essentiellement conçus en vue du transport de personnes ou de marchandises.

On peut citer comme relevant de cette position :

...

- 4) Les véhicules utilisés pour le nettoyage des rues, places publiques, caniveaux, pistes d'aéroports, etc., tels que balayeuses, arroseuses, arroseuses-balayeuses et voitures pour l'aspiration des boues.

...

[Bolding in original]

28. Crucially, the explanatory notes then continue (in paragraphs 2 and 3 below) to articulate two essential conditions that must be fulfilled for a “self-propelled machine” to be classified as a “special purpose motor vehicle, other than those principally designed for the transport of persons or goods”:

MOTOR VEHICLE CHASSIS OR LORRIES (TRUCKS) COMBINED WITH WORKING MACHINES

It should be noted that to be classified in this heading, a vehicle comprising lifting or handling machinery, earth levelling, excavating or boring machinery, etc., **must** form what is in fact an essentially complete motor vehicle chassis or lorry (truck) in that it comprises at least the following mechanical features: propelling engine, gear box and controls for gear-changing, and steering and braking facilities.

On the other hand, self-propelled machines (e.g., cranes, excavators) in which one or more of the propelling or control elements referred to above are located in the cab of a working machine mounted on a wheeled or track-laying chassis, whether or not the whole can be driven on the road under its own power, remain classified in, for example, **heading 84.26, 84.29 or 84.30.**

Similarly, this heading **excludes** self-propelled wheeled machines in which the chassis and the working machine are specially designed for each other and form an integral mechanical unit (e.g., self-propelled motor graders). In this case, the machine is not simply mounted on a **motor vehicle chassis**, but is completely integrated with a chassis that cannot be used for other purposes and may incorporate the essential automobile features referred to above.

...

[Bolding in original]

29. The French version of the above explanatory notes reads as follows:

CHASSIS DE VEHICULES AUTOMOBILES OU CAMIONS COMBINES AVEC DES ENGINES DE TRAVAIL

Il convient de remarquer que, pour relever de la présente position un véhicule comportant des appareils de levage ou de manutention, des engins de terrassement, d'excavation ou de forage, etc., **doit** consister en un véritable châssis de véhicule automobile ou camion qui réunit donc en lui-même, au minimum, les organes mécaniques suivants : moteur de propulsion, boîte et dispositifs de changement de vitesses, organes de direction et de freinage.

Par contre, restent classés par exemple, sous les n^{os} **84.26, 84.29 et 84.30**, les appareils ou engins simplement autopropulsés (grues, excavateurs, etc.) dans lesquels un ou plusieurs des mécanismes de propulsion ou de commande susvisés se trouvent réunis dans la cabine de l'engin de travail monté sur un châssis à roues ou à chenilles, même si l'ensemble est apte à circuler sur route par ses propres moyens.

De même, seraient **exclus** de cette position les machines autopropulsées à roues dans lesquelles châssis et engins de travail sont spécialement conçus l'un pour l'autre de manière à former un ensemble mécanique homogène (par exemple, certaines niveleuses autopropulsées dites motor-graders). En pareil cas, l'engin de travail n'est pas simplement monté sur un châssis de véhicule **automobile**, mais il est entièrement intégré à un châssis inutilisable à d'autres fins et qui peut comporter les mécanismes automobiles essentiels susvisés.

...

[Bolding in original]

30. The relevant classification opinion for subheading No. 8705.90 provides a picture and description of an example motor vehicle classified under heading No. 8705.90 as follows:

1. **Motor vehicle** constructed on a chassis frame with solid longitudinal rails and four tubular cross members, of steel. It is equipped with two traction axles fitted with two pneumatic tyres each, retractable bogies and differentials, a diesel propelling engine, a hydrostatic automatic transmission by cardan shafts from the engine to the two axles and three braking systems.

The vehicle has a driving cabin with controls, a welding head attached to a double boom mounted on a rotating turret designed for electric rail welding operations, and a generator.

It is capable of being driven on the railway track (with a maximum speed of 47 km/h) as well as on road (with a maximum speed of 32 km/h).

Application of GIRs 1 (Note 4 (a) to Section XVII) and 6.

[Bolding in original]

POSITIONS OF THE PARTIES

CBSA

31. The CBSA submits that, since the legal and the explanatory notes to Section XVI specifically exclude articles of Section XVII from classification in Section XVI and since the explanatory notes to heading No. 84.79 identify it as a residual heading, the Tribunal should begin its analysis by reviewing whether the goods in issue are classifiable under heading No. 87.05. In its reply, Cubex did not oppose proceeding in this manner.

32. The CBSA submits that the goods in issue *prima facie* fit within heading No. 87.05 as “road sweeper lorries” of Section XVII, and are therefore excluded from Section XVI, including heading No. 84.79. It argues that the explanatory notes to heading No. 87.05, which specifically include “[l]orries (trucks) used for cleansing streets . . . (e.g. sweepers . . .)” reinforce this conclusion.

33. In support, the CBSA submitted dictionary definitions of the words “motor vehicle”, “truck” and “lorry”. These indicate that “lorry” is the British term for “truck”, which itself refers to a road vehicle used for a variety of purposes, such as carrying goods and materials. Motor vehicles are defined as vehicles driven by a motor or internal combustion engine, such as an automobile, truck or bus.¹⁹ The CBSA also submitted an excerpt from the *Firefly French/English Visual Dictionary* providing a street sweeper as an example of a “truck”.²⁰ On the basis of these definitions, it submits that the goods in issue are trucks because they are a motor vehicle powered by an engine, used for a purpose, namely, to gather, carry and dispose of refuse.

19. Exhibit AP-2017-017-11A at 205-7, Vol. 1.

20. *Ibid.* at 237.

34. The CBSA argues that the goods in issue also meet the requirements found in the explanatory notes to heading No. 87.05, which require that the goods must form a “complete motor vehicle chassis or lorry” that includes:

- a. a “propelling engine, gear box and controls for gear changing, and steering and braking facilities”, none of which “are located in the cab of a working machine mounted on a wheeled or track-laying chassis”; and
- b. a working machine mounted on, but not completely integrated with, a motor vehicle chassis that is capable of being used for other purposes.

35. In support, the CBSA relies on the evidence that (1) the goods in issue are powered by a diesel engine;²¹ (2) the goods in issue employ a hydrostatic transmission; (3) the goods in issue possess a steering wheel, front and rear brakes;²² and (4) the goods in issue are constructed on a frame or base built by Csaba Metál ZRt., a Hungarian manufacturer of chassis for buses, trailers and other vehicles.²³

36. With respect to the appropriate tariff item number, the CBSA submits that, as the goods in issue are not covered by the terms of subheadings No. 8705.10, 8705.20, 8705.30 or 8705.40, they are classified in the remaining subheading, No. 8705.90, which covers other special purpose motor vehicles not covered by the terms of the preceding subheadings. The CBSA submits that the terms of tariff item No. 8705.90.10 provide for a number of special purpose motor vehicles, including “combination vacuum and broom type sweepers,” and that the goods in issue should be classified under this tariff item number as they are road sweepers with vacuum hose and broom functionality.

CUBEX

37. Cubex submits that the goods in issue are in fact classifiable as machinery for public works under heading No. 84.79, not motor vehicles classifiable as road sweeper lorries under heading No. 87.05.

38. Cubex posits a distinction between road sweeper machines and lorries. Heading No. 87.05 references “road sweeper lorries” and its explanatory notes reference “[l]orries (trucks) used for cleaning streets, gutters, airfield runways, etc.” Cubex argues that the use of the term lorries indicates that the Tribunal cannot merely presume that the goods in issue are *prima facie* covered under heading No. 87.05 but must rather look more closely into the requirements found in the explanatory notes. When this is performed, Cubex submits, it will be apparent that the goods in issue are road sweeper machines not lorries.

39. On the first requirement found in the explanatory notes to heading No. 87.05, Cubex asserts that one or more propelling or control element is found in the cab, but it does not identify which element is found in the cab or cite any evidence in support of this statement.

40. On the second requirement of the explanatory notes, Cubex submits that the working machine portion of the goods in issue is not simply mounted on but is completely integrated with a motor vehicle chassis that is incapable of being used for other purposes. In support, Cubex relies, principally, on distinctions between the manufacture of various competitors’ street sweepers and its own, which, it submits, demonstrate that the goods in issue are completely integrated working machines, not special purpose motor vehicles. This evidence is reviewed in detail below.

21. Exhibit AP-2017-017-11A at 166, Vol. 1.

22. *Ibid.* at 166, 169.

23. *Ibid.* at 195-96, 243-59.

ANALYSIS

41. The Tribunal must begin its analysis by considering whether the goods in issue are classifiable under heading No. 87.05. The legal and explanatory notes to Section XVI (where heading No. 87.05 appears) expressly exclude articles of Section XVII (where heading No. 84.79 appears). The Tribunal's well-settled case law²⁴ directs that, where one section or chapter excludes another, the Tribunal should begin its analysis with the excluded provision. Cubex did not raise any arguments against proceeding in this way in its reply. Therefore, the Tribunal will only consider whether the goods in issue are classifiable under heading No. 84.79 if it concludes that they cannot be classified under heading No. 87.05.

42. The starting point for the Tribunal's analysis is whether the goods in issue meet the requirements²⁵ found in the explanatory notes to heading No. 87.05, which require that the goods include:

- a. a "propelling engine, gear box and controls for gear-changing, and steering and braking facilities", none of which "are located in the cab of a working machine mounted on a wheeled or track-laying chassis"; and
- b. a working machine mounted on, but not completely integrated with, a motor vehicle chassis that is capable of being used for other purposes.

43. As for the first requirement, the parties agree that the goods in issue contain a propelling engine, steering, braking, and a transmission system (i.e., a gearbox).²⁶ Cubex alleges that the goods in issue "have one or more propelling or control elements in the cab", but it does not elaborate any further by, for example, identifying which part or citing any evidence in support.²⁷

44. This is fatal to its case on this requirement. In a customs appeal, the appellant bears the burden of demonstrating that the CBSA's classification of the imported goods was incorrect.²⁸ In a proceeding like this at the Tribunal, appellants have a full opportunity to bring all necessary facts forward to meet their burden of proving any question in dispute. When appellants simply make conclusory statements or ask the Tribunal to infer characteristics of goods without evidence, they have not discharged their burden.²⁹ Therefore, the Tribunal concludes that Cubex has failed to demonstrate that the goods in issue do not meet the first requirement of the explanatory notes to heading No. 87.05.

45. As for the second requirement, Cubex has identified features of the Ravo and Aquazura that allegedly distinguish them from other road sweepers. First, Cubex argues the goods in issue are not simply mounted on a generic vehicle chassis but rather completely integrated with a wheeled base that is designed exclusively for use in the goods in issue. In support, Cubex relies on a video posted by Ravo Fayat Group

24. *LRI Lighting International Inc. v. President of the Canada Border Services Agency* (23 May 2017), AP-2016-007 (CITT) at paras. 30-35.

25. The Tribunal found no case law interpreting or applying these requirements.

26. Exhibit AP-2017-017-10 at para. 3, Vol. 1; Exhibit AP-2017-017-11A at 190, Vol. 1.

27. Exhibit AP-2017-017-14A at para. 13, Vol. 1A.

28. Subsection 152(3) of the *Act*. See also *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (23 May 2014), AP-2011-033 (CITT) at para. 25; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII); *Jakks Pacific Inc. v. President of the Canada Border Services Agency* (30 March 2016), AP-2015-012 (CITT) at para. 33; *J. Cheese Inc. v. President of the Canada Border Services Agency* (13 September 2016), AP-2015-011 (CITT) [J. Cheese] at para. 63.

29. See *Canac Marquis Grenier Ltée v. President of the Canada Border Services Agency* (22 February 2017), AP-2016-005 (CITT) at paras. 27-28.

(the manufacturer) on youtube.com showing the construction of the Ravo.³⁰ Cubex argues that a normal vehicle chassis would have to be cut and drilled to accommodate the special components of the goods in issue.

46. The Tribunal was not convinced by that argument. The mere fact that a generic vehicle chassis has to be modified to accommodate the working parts of a street sweeper does not mean that it is no longer a special purpose motor vehicle. As the CBSA observes, heading No. 87.05 includes several special purpose motor vehicles by name, including wreckers, crane lorries, fire fighting vehicles, concrete mixer lorries, spraying lorries, mobile workshops, and mobile radiological units. The chassis on which the working part of each of these vehicles is mounted will require some unique modification during manufacturing. However, that mere act of modification does not thereby make such vehicles ineligible for classification under heading No. 87.05. To rule otherwise would render the nomenclature and explanatory notes internally contradictory.

47. In support of the uniqueness of its chassis, Cubex also relies on a letter dated January 30, 2017, from the director of Csaba Metál ZRt. (the manufacturer of the chassis of the Ravo) attesting that the chassis is only made for the Ravo, has no other use, and could never be used for a vehicle chassis because it is designed to be a Ravo sweeper and nothing else.³¹ Cubex also filed as an exhibit a letter dated July 8, 2013, from the export sales manager for Ravo Fayat Group certifying that the Ravo sweeper was “designed for and is a purposely built street sweeper not based on any truck chassis or truck type chassis. The complete machine has been designed by and is built by RAVO as a *Street Sweeper* and has no use for any other purpose apart from sweeping”³² [emphasis in original].

48. Even assuming these letters are equally applicable to the Aquazura (which is not mentioned), they suffer from the same defect identified above. The implication of Cubex’s position is that what matters is whether a vehicle chassis was designed for a specific type of special purpose vehicle or designed for any generic vehicle (and then later modified for a specific application). Under this distinction, the former would not be a special purpose motor vehicle but the latter would, even though, when imported, they arrive in the same condition – i.e., atop a modified chassis. However, the wording of the explanatory notes expresses no such distinction; it only requires that the motor vehicle chassis “is capable of being used for other purposes”.

49. Cubex has not brought sufficient evidence to demonstrate that the chassis of the Ravo and Aquazura are incapable of being used for other purposes. Indeed, the Ravo and Aquazura can travel on public roads at a speed of up to 80 km/h³³ and 50 km/h respectively.³⁴ These speeds are higher than those of the good classified as a special purpose motor vehicle under heading No. 8705.90 in the classification opinion. Likewise, the Ravo and Aquazura share relevant characteristics with the good in the classification opinion, including a diesel engine, a hydrostatic transmission and braking system.

50. Cubex relies on an email chain between Transport Canada and GHY International (a customs broker), in which the latter asks if the Ravo 5 Series Sweeper is a “work vehicle” because it “is not constructed on a truck-type chassis”.³⁵ The email does not mention the Aquazura. Transport Canada states in reply that it is a work vehicle but does not provide any reason why or otherwise confirm GHY’s theory.

30. “Street Sweeping Machine – How it’s made”, online at: www.youtube.com/watch?v=LgHRjivzBeQ.

31. Exhibit AP-2017-017-06A at 30-31, Vol. 1.

32. *Ibid.* at 31.

33. Exhibit AP-2017-017-11A at 166, Vol. 1.

34. *Ibid.* at 170.

35. Exhibit AP-2017-017-06A at 38, Vol. 1.

Regardless, the definition of work vehicle applied by Transport Canada is irrelevant to the interpretation of the headings of the tariff, which does not turn on federal or provincial regulations of motor vehicles.³⁶

51. Cubex also relies on distinctions between the goods in issue and other road sweepers to demonstrate that the goods in issue are completely integrated with the chassis and not merely mounted on. In this regard, it has provided:

- a picture of what it alleges is a Schwartze-brand road sweeper cab showing how the special passenger-side wheel is added to the traditional chassis configuration with the driver side steering column;³⁷
- a picture and technical specification for a Mark II road sweeper from Victory Sweepers Inc. showing that it is built on a “standard chassis” made by Isuzu/GMC;³⁸
- a press release from Elgin Sweeper using a Peterbilt Model 220 “cab-over” chassis;³⁹
- a print-out from the Peterbilt Motors Company webpage describing the Peterbilt Model 220 chassis as “Up for Any Application . . . The 220 is ideal for pickup and delivery as well as beverage and refuse applications, and it is now available in a right-hand drive configuration for street sweepers and paint striper operations”;⁴⁰ and
- a photo advertisement of Johnston’s V Range road sweeper, which Johnston describes as “truck mounted”.⁴¹

52. This evidence may be relevant to the classification of these other goods, but it is of little value in determining how specifically the Ravo and Aquazura are manufactured. The only evidence presented on the manufacture of the goods in issue is a brief YouTube video, which does not go into detail as to whether the working machine is mounted on or integrated with the chassis, or even relate to the Aquazura model at all.

53. The proper way for Cubex to carry its burden of proof to show that the chassis is completely integrated with the working part would have been to call a witness to provide testimony as to the design and manufacture of both of the goods in issue.

54. Cubex does assert various other facts relevant to the requirement at issue, but it does not cite to any evidence in support. Cubex asserts that the chassis for the goods in issue is designed to accommodate special axles which are separate for each wheel and could not therefore accommodate the full-length style of axles used on traditional vehicle chassis.⁴² No evidence is provided in support of this statement.

55. It also states that the goods in issue “are designed to accommodate a forklift type steering mechanism unlike the type used with a normal vehicle chassis.”⁴³ No evidence is provided in support of this statement. Regardless, “[f]ork-lift trucks; other work trucks fitted with lifting or handling equipment” are found under heading No. 84.27, i.e., not in Chapter 87.

36. *J. Cheese* at para. 73.

37. Exhibit AP-2017-017-06A at 32, Vol. 1.

38. *Ibid.* at 34.

39. *Ibid.* at 35.

40. *Ibid.* at 36.

41. *Ibid.* at 37.

42. *Ibid.* at para. 27.

43. *Ibid.* at para. 28.

56. Cubex also maintains that the sweepers are designed to accommodate a different drive system (hydrostatic) than a normal vehicle. However, the good referenced in the classification opinion for heading No. 87.05 is a vehicle with a hydrostatic transmission.

57. Cubex states that the hydraulic-powered rear-wheel gear hubs of the goods in issue would be impossible to mount on a normal vehicle chassis, but provides no evidence in support.⁴⁴

58. Cubex also argues that a normal vehicle chassis would be too light to carry the weight of the working parts of the goods in issue.⁴⁵ However, this assertion is not supported by reference to any evidence. Therefore, the Tribunal finds that Cubex has failed to meet its burden of proof to establish this fact.

59. Finally, Cubex states that the transmission, axles and “pto’s” (an undefined term) are those used in agricultural and construction equipment classified in Chapter 84, not vehicles found in Chapter 87.⁴⁶ But, again, it provides no evidence confirming that the goods in issue have such equipment, or in support of the proposition that such equipment is not found in other vehicles.

60. All of the above evidence could have been provided, efficiently and time- and cost-effectively, via a well-informed witness knowledgeable of these matters.

Conclusion

61. On the basis of the foregoing, the Tribunal finds that the goods in issue are properly classified in heading No. 87.05. As such, the Tribunal need not determine whether the goods in issue could also be classified under Chapter 84 as either self-propelled or mobile machines or work trucks, as Cubex claims.

Classification at the subheading and tariff item levels

62. Having found that the goods in issue are properly classified in heading No. 87.05, the Tribunal finds that, as the goods in issue are not covered by the terms of the other subheadings found in heading No. 87.05, they are classified in the residual subheading No. 8705.90 as other special purpose motor vehicles other than those principally designed for the transport of persons or goods.

63. As tariff item No. 8705.90.10 under subheading No. 8705.90 describes exactly the goods in issue, the Tribunal finds that the goods in issue are properly classified under tariff item No. 8705.90.10 as combination vacuum and broom-type sweepers.

DECISION

64. The appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

44. Exhibit AP-2017-017-06A at para. 29, Vol. 1.

45. *Ibid.* at para. 22.

46. *Ibid.* at para. 30.