Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-016

Artcraft Company Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Thursday, March 8, 2018

Canada

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IN THE MATTER OF an appeal heard on January 11, 2018, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated April 13, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

ARTCRAFT COMPANY INC. **Appellant**

AND

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

DECISION

The appeal is denied.

Ann Penner
Ann Penner
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 11, 2018
Tribunal Panel:	Ann Penner, Presiding Member
Support Staff:	Rebecca Marshall-Pritchard, Counsel Dustin Kenall, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representative**
Artcraft Company Inc.	Leigh Somerville Taylor

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Kevin Palframan

WITNESS:

Saul Rabinowitz
Director
Artcraft Company Inc.

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Artcraft Company Inc. (Artcraft) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from decisions made on April 13, 2017, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to requests for re-determination of tariff classification.

2. The issue in this appeal is whether various styles of footwear (the goods in issue) made of ethylene vinyl acetate (EVA) are "waterproof footwear" for purposes of heading No. 64.01 or should be classified as other footwear with outer soles and uppers of plastics of heading No. 64.02, as determined by the CBSA.

PROCEDURAL HISTORY

3. The goods in issue were imported during 2011-2013 under tariff item No. 6401.99.11 as sandals solely of rubber.

4. On November 1, 2013, the CBSA issued a Final Verification Report to Artcraft determining that certain styles of footwear (including the styles of the goods in issue) should be classified under tariff item No. 6402.99.90 as other footwear with outer soles and uppers of rubber or plastic.

5. On November 19, 2015, after receiving adjustment requests from Artcraft, the CBSA issued re-determinations under paragraph 59(1)(b) of the *Act* classifying the goods in issue under tariff item No. 6402.99.90.

6. On February 17, 2016, Artcraft requested a further re-determination of the tariff classifications under subsection 60(1) of the *Act*.

7. On April 13, 2017, the CBSA denied the request for further re-determinations, upholding its previous decision classifying the goods in issue under tariff item No. 6402.99.90.

8. On July 12, 2017, Artcraft filed this appeal with the Tribunal. It submitted its brief on September 11, 2017. The CBSA submitted its brief on November 10, 2017.

9. On December 18, 2017, the Tribunal sent the parties a letter requesting that they provide further submissions on the meaning of the term "waterproof footwear", including any known legislative history, and confirm whether EVA is a waterproof material.

10. On January 11, 2018, the Tribunal held an oral hearing. The parties asked and were granted leave to make their submissions on the points raised in the Tribunal's letter dated December 18, 2017, in writing following the hearing. The Tribunal received Artcraft's supplementary submissions on January 23, 2018, and the CBSA's on January 25, 2018.

11. The Tribunal received a further (unsolicited) submission from the CBSA on January 26, 2018, regarding a pending decision of the World Customs Organization (WCO) regarding a classification opinion of footwear involving the same headings at issue in this case. Artcraft filed a response to the CBSA's submission on February 5, 2018.

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

DESCRIPTION OF THE GOODS IN ISSUE

12. The goods in issue are footwear made of EVA. They do not cover the ankle, and their uppers[2] and outer soles[3] are manufactured in a single piece. The goods in issue comprise 17 styles.[4]

13. Eight styles[5] feature numerous ventilation holes on the vamp. They are constructed so as not to cover the heel of the wearer's foot (open heel). Additionally, they feature a pivoting heel strap attached to the upper at the mid foot (arch), capable of providing additional fit at the heel when used.

14. A further eight styles[6] are similar in construction but have no ventilation holes. With the exception of one style,[7] they all have a pivoting heel strap.

15. The final style[8] features an adjustable polyester textile strap across the vamp, and is fitted with both a plastic buckle and Velcro closures. It features numerous ventilation holes located on the vamp as well as on the lower sides of the upper and running the full length of the footwear.

LEGAL FRAMEWORK

Tariff Classification Steps

16. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the WCO.[9] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

17. Subsection 10(1) of the *Customs Tariff* provides that, 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*[10] and the *Canadian Rules*[11] set out in the schedule.

18. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the other rules.

19. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and*

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2. "Upper" is defined as "the part of the shoe or boot above the sole" and "that portion of the shoe which covers the sides and top of the foot." Paragraph D to the general explanatory notes in Chapter 64.
3. "The term 'outer sole' as used in headings 64.01 to 64.05 means that part of the footwear (other than an attached heel) which, when in use, is in contact with the ground." Paragraph C to the general explanatory notes in Chapter 64.
4. The style numbers are: 89173, 89174, 89175, 89180, 89219, 89236, 89240, 89250, 89251, 89264, 89318, 89329, 89330, 8933l, 89332, 89341 and 89369.
5. 89173-89175, 89318 and 89329-89332
6. 89180, 29236, 89240, 89250-89251, 89264, 89341 and 89369.
7. 89240.
8 89219.
9. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.
10. S.C. 1997, c. 36, schedule [*General Rules*].
11. S.C. 1997, c. 36, schedule.

Coding System[12] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[13] published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[14]

20. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. 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.[15]

21. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to use a similar approach to determine the proper subheading.[16] The final step is to determine the proper tariff item.[17]

Relevant Tariff Nomenclature and Notes

22. The parties agree that Section XII and Chapter 64 apply; these read as follows:

Section XII

FOOTWEAR, HEADGEAR, UMBRELLAS, SUN UMBRELLAS, WALKING-STICKS, SEAT-STICKS, WHIPS, RIDING-CROPS AND PARTS THEREOF; PREPARED FEATHERS AND ARTICLES MADE THEREWITH; ARTIFICIAL FLOWERS; ARTICLES OF HUMAN HAIR

Chapter 64

FOOTWEAR, GAITERS AND THE LIKE; PARTS OF SUCH ARTICLES

23. There are no relevant section or chapter notes.

24. According to Artcraft, the goods in issue are waterproof and, as such, the following tariff provisions apply:

> 64.01 *Waterproof* footwear with outer soles and uppers of *rubber* or of *plastics*, the uppers of which are neither *fixed* to the sole nor *assembled by stitching, riveting, nailing, screwing, plugging or similar processes.*

12. WCO, 2nd ed., Brussels, 2003.
13. WCO, 5th ed., Brussels, 2012.
14. 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.
15. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.
16. 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."
17. 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.

-Other footwear:

6401.99 - -Other

- - -Of rubber:

6401.99.11 - - - -Riding boots solely of rubber;
Sandals solely of rubber

[Emphasis added]

25. The explanatory notes to heading No. 64.01 state that the heading includes footwear "constructed to protect against penetration by water"; it reads as follows:

> This heading covers *waterproof* footwear with both the outer soles and the uppers . . . of *rubber . . . plastics* or textile material with an external layer of rubber or plastics being visible to the naked eye . . . provided the uppers are neither fixed to the sole nor assembled *by the processes named in the heading*.
>
> The heading includes footwear *constructed to protect against penetration by water* or other liquids and would include, *inter alia*, certain snow-boots, galoshes, overshoes and ski-boots.
>
> [Emphasis added]

26. The explanatory notes also provide a non-exclusive list of footwear included under the heading by virtue of their production process:

> The heading covers, *inter alia*, footwear obtained by any of the processes described below:
>
> (1) Press moulding
> (2) Injection moulding
> (3) Slush moulding
> (4) Rotational casting
> (5) "Dip moulding"
> (6) Assembly by vulcanising
> (7) Bonding and vulcanising
> (8) High frequency welding
> (9) Cementing
>
> [Internal descriptions omitted]

27. The CBSA submitted that the goods in issue are not waterproof or more specifically described elsewhere and, therefore, the following residual tariff provisions apply:

64.02 Other footwear with outer soles and uppers of rubber or plastics.

-Other footwear:

6402.99 - -Other

6402.99.90 - - -Other

28. The explanatory notes to heading No. 64.02 confirm it is a residual heading:

> This heading covers footwear with outer soles and uppers of rubber or plastics, other than those of heading 64.01.

29. The explanatory notes also provide a non-exclusive list of footwear included under the heading:

The heading covers, *inter alia*:

(a) Ski-boots consisting of several moulded parts hinged on rivets or similar devices;

(b) Clogs without quarter or counter, the uppers of which are produced in one piece usually attached to the base or platform by riveting;

(c) Slippers or mules without quarter or counter, the uppers of which, being produced in one piece or assembled other than by stitching, are attached to the sole by stitching;

(d) Sandals consisting of straps across the instep and of counter or heelstrap attached to the sole by any process;

(e) Thong-type sandals in which the thongs are attached to the sole by plugs which lock into holes in the sole;

(f) Non-waterproof footwear produced in one piece (for example, bathing slippers).

30. There are no relevant classification opinions for either heading at issue, other than the one noted by the CBSA as referenced above. However, it does not come into effect until June 1, 2018, and is in no way binding on the Tribunal in an appeal such as this.

WITNESSES AND EVIDENCE

31. Artcraft filed photographs of the goods in issue, a product catalogue, a two-page printout of Google search results for "waterproof sandals", a printout of the Wikipedia page for EVA, and excerpts of a book titled *Polymer Foams Handbook*.

32. Artcraft called one witness, Saul Rabinowitz, the director of Artcraft, who testified primarily about Artcraft's interactions with the CBSA, as well as on the features Artcraft sought when selecting the goods in issue.

33. The CBSA filed a laboratory report dated September 27, 2016, finding EVA to be a plastic, not a rubber, Internet marketing literature on clogs, catalogue images of the goods in issue, and dictionary definitions of "waterproof", "impervious", "vamp", and "quarter". The CBSA did not call any witnesses.

POSITIONS OF THE PARTIES

34. Artcraft made two principal arguments: first, that the CBSA should be bound by its earlier decisions regarding the goods in issue; and, second, that the goods in issue are in fact waterproof footwear because they are constructed seamlessly with rubber and repel water.

35. On its first argument, Artcraft submitted that the CBSA ought to be "estopped" from taking a position different from that contained in its advance ruling issued on April 6, 2004, in which it classified the goods in issue under tariff item No. 6402.20.11. Artcraft also relied on the CBSA's Final Verification Report which, for three styles[18] of the goods in issue, identified the composite material as rubber, not plastic. It also suggested that if there was any ambiguity in determining whether the goods in issue are waterproof, then the Tribunal should rule in favor of the appellant based on the Supreme Court of Canada's decision in *Morguard* regarding the imposition of taxes.[19]

18. 89151, 89153 and 89154.
19. *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] 2 S.C.R. 493 [*Morguard*].

36. In response, the CBSA argued that, regardless of how the goods in issue should have been classified years ago, the evidence in this case shows that the goods in issue are in fact made of EVA: a plastic and not a rubber, according to its scientific report. The CBSA also submitted that the role of the Tribunal in *de novo* appeals of the CBSA's customs decisions is to determine the correct tariff classification of the goods in issue. In this regard, the past actions or positions of the CBSA are irrelevant, and the burden of proof in a customs appeal rests on the appellant.

37. In regard to its second argument, Artcraft proposed that the goods in issue are in fact waterproof footwear within the meaning of heading No. 64.01 even though they do not protect the entire foot from water. Artcraft relied on the fact that heading No. 64.01 includes tariff item No. 6401.99.11 "[s]andals solely of rubber". In its view, if open-heeled footwear like the goods in issue could not be classified under heading No. 64.01 because they do not protect the entire foot, then rubber sandals would not be included under heading No. 64.01. In further illustration, Artcraft offered a Google search of "waterproof sandal" revealing multiple results, which, it submitted, show that there is a common understanding that sandals can be waterproof even if they do not keep the foot dry so long as their material is waterproof. Artcraft also relied on the Tribunal's decision in *Waterproof footwear and bottoms of plastic or rubber originating in or exported from the People's Republic of China*, an inquiry under the *Special Import Measures Act* that included "moulded clogs" in the product definition.[20]

38. In their post-hearing written submissions, the parties elaborated on their previously submitted arguments. Artcraft inferred from the explanatory notes to heading No. 64.02 that only some of the specifically described sandals in heading No. 64.02 would be waterproof. The CBSA countered that if the tariff intended for only the sole to be waterproof, it would have specifically stated that heading No. 64.01 includes footwear with an outer sole constructed to protect against penetration by water.

39. On legislative history, Artcraft stated that heading No. 64.01 has remained unchanged since 1988. The CBSA noted that tariff item Nos. 6401.92.30 and 6401.99.11 were not present in the *Customs Tariff* prior to 1998. The CBSA believed that the addition of "sandals of rubber" under these tariff item numbers under heading No. 64.01 was an administrative error because a sandal by definition cannot be constructed to prevent the penetration of water.

40. Regarding EVA, Artcraft provided a definition from Wikipedia describing EVA as "an elastomeric polymer that produces materials which are 'rubber-like' in softness and flexibility."[21] It also included excerpts from a chemistry handbook stating that another closed cell foam substance resists water penetration and that EVA is suitable for flotation devices.[22] The CBSA made no comment on the water resistant properties of EVA.

41. Finally, the CBSA alerted the Tribunal to the pending WCO decision that certain footwear should be classified in heading No. 64.02 or 64.01.[23]

42. In response, Artcraft excerpted the WCO's classification ruling at issue, which reads as follows:[24]

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20. Waterproof Footwear and Waterproof Footwear Bottoms (7 January 2003), NQ-2002-002 (CITT) at 3.
21. Exhibit AP-2017-016-16A at para. 14, Vol. 1A.
22. *Ibid*. at para. 15.
23. Exhibit AP-2017-016-18 at 1-2, Vol. 1A.
24. WCO, Classification Rulings – HS Committee 60th Session, online at: http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/classification-decisions/classification-rulings/clhs60en.pdf?db=web.

> Footwear made of plastics known as "sandals for adults" and "sandals for children". The footwear in question consists of outer soles and uppers of plastics; assembled by the injection moulding process; the upper does not cover the toe, heel and/or ankle but covers the whole foot area.
>
> The upper is neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, hence there are no holes in the outer sole part which may cause penetration of water to the foot.

43. Artcraft submitted that the description is consistent with its position, which is that the only requirement to be waterproof is that the water may not penetrate the sole of the footwear.

ANALYSIS

44. While the parties' submissions are lengthy and complex, they distil down to two simple questions.

- First, are equitable considerations relevant to the Tribunal's decision on how goods should be classified under the *Customs Tariff*?
- Second, is ventilated or merely open-heeled footwear "waterproof"?

45. The answer to both questions is "no".

46. On the first question, the Tribunal hears challenges to the CBSA's classification of goods under the *Customs Tariff* as a tribunal of first instance. These are proceedings in which the parties are free to bring new evidence and legal arguments for the purpose of assisting the Tribunal in reaching a correct interpretation of the tariff nomenclature.[25] The proceedings are not for the purpose of determining whether the CBSA followed its own rules, policies, procedures or memoranda, or otherwise proceeded in a fair manner when deciding on a complainant's request(s).[26] It therefore does not matter whether the CBSA's position in this appeal differs from one it may previously have issued, be it in its advance ruling or the Final Verification Report. Further, as this is a well-settled legal principle, the appellant can have no claim of estoppel based on reliance on the CBSA's earlier positions.[27]

47. In regard to the second question, ventilated or open-heeled footwear cannot be considered "waterproof" under either the specific terminology and structure of the *Customs Tariff* or any common-sense understanding of the word. The fact that the material comprising the goods in issue is itself waterproof is not determinative for classification purposes. Both of the headings in contention apply only to "footwear with outer soles and uppers of rubber or of plastics". Neither party disputes that rubber and plastic are water-repellent materials. Therefore, the fact that the goods are composed of waterproof material is not sufficient for determining which heading applies.

48. Neither the *Customs Tariff* nor any of its explanatory notes defines the term "waterproof". Thus, the only way to determine its meaning is to look at the wording of heading No. 64.01 and its related notes.

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25. *Toyota Tsusho America Inc. v. President of the Canada Border Services Agency* (27 April 2011), AP-2010-063 (CITT) at paras. 3-8.
26. *Rutherford Controls International Corp. v. President of the Canada Border Services Agency* (26 January 2011), AP-2009-076 at para. 68.
27. *J. Cheese Inc. v. President of the Canada Border Services Agency* (13 September 2016), AP-2015-011 (CITT) at para. 20. *Scott Arthur v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-052 (CITT) at para. 21 (stating that the Tribunal is "not a court of equity and must apply the law as it is . . . . The administrative action, or inaction, of the CBSA cannot change the law . . .") [internal citations omitted].

49. The wording of heading No. 64.01 mirrors that of heading No. 64.02 but for two differences: the use of "waterproof footwear" instead of "other footwear" and the exclusion from the coverage of the heading of footwear "*assembled* by stitching, riveting, nailing, screwing, plugging or similar processes" [emphasis added].

50. Likewise, the explanatory notes focus on the *construction* process, providing that "[t]he heading includes footwear *constructed* to protect against penetration by water or other liquids . . ." [emphasis added]. They confirm that the heading includes, *inter alia*, "*certain* snow-boots, galoshes, overshoes and ski-boots" [emphasis added]. They then go on to list nine different production "processes" included under the heading, four of which are a type of moulding, two of vulcanising, and one each of casting, welding, and cementing.

51. When these production processes included in the notes are compared to those excluded in the heading, the self-evident distinction is that the former results in a seamless construction and the latter in a threaded construction (of stitches, rivets, nails, screws, etc., inserted into or through holes). The explanatory notes to heading No. 64.02 carry over this distinction, listing as example footwear covered as non-waterproof footwear: ski-boots made of "several moulded parts hinged on rivets or similar devices"; clogs with uppers "attached to the base or platform by riveting"; slippers with uppers "attached to the sole by stitching"; etc.

52. The natural conclusion from the above text and structure of the *Customs Tariff* and its explanatory notes is that waterproof is defined, primarily, by the *construction* of footwear as opposed to the *material* of the footwear itself. Furthermore, the purpose of said construction is to keep the entire foot dry. If there were no related purpose, then the use of the word "waterproof" would be superfluous; the authors of the *Customs Tariff* could have simply rested on the production process alone to determine classification.

53. This conclusion is supported by the type of footwear listed in the explanatory notes. Those of heading No. 64.01 include "snow-boots, galoshes, overshoes and ski-boots". These are all types of footwear designed and constructed to keep the entire foot dry from snow, ice, slush, rain, mud, etc. In fact, their design and construction is what distinguishes them from the examples of footwear identified in the explanatory notes to heading No. 64.02, which include notably footwear matching the description of the goods, i.e., clogs "without quarter or counter",[28] as well as many other types of footwear that do not cover the entire foot (e.g., slippers without quarter or counter; sandals with straps attached by any process; thong-type sandals; etc.).

54. To keep the entire foot dry, footwear must be without holes and must cover, at least to some extent, the top, bottom, sides and front and back of the foot. There is no dispute that many of the goods in issue have ventilation holes in the uppers large enough for water to pass through. There is also no dispute that even the goods in issue without ventilation holes have an open, unprotected heel, leaving the back of the foot exposed. In this sense, they resemble the rubber or plastic bathing slippers included under heading No. 64.02 – they are made of "one piece" but not constructed in a way to keep the foot dry. Artcraft filed no evidence that the goods in issue are designed, constructed, intended, or actually used to keep feet dry.

55. Artcraft argued that to require footwear to enclose the entire foot for it to be considered waterproof ignores the fact that tariff item No. 6401.99.11 specifically includes sandals of rubber. However, this argument fails to capture the terms of the *Customs Tariff*. Tariff item No. 6401.99.11 cannot include the

28. "Quarter" is defined by the *Dictionary of Shoe Industry Terminology* (Footwear Industries of America) as "[t]he complete upper part of the shoe upper above the vamp line and covering the counter and sides." Exhibit AP-2017-016-06A, Appendix 11 at 80, Vol. 1A. The counter is the material at the heel that helps maintain the share of the shoe. *Ibid*. at para. 9.

goods in issue because the goods in issue are not made of rubber. Second, the goods in issue are not sandals. They do not have thongs or uppers attached through stitching or similar processes. Rather, they are footwear made of a single piece and, as such, referred to both commonly and in the *Customs Tariff* as clogs.[29] Thus, none of the arguments relating to rubber sandals are directly on point.

56. Parties' reliance on case law under the *Special Import Measures Act* was not persuasive primarily because trade remedies cases are not concerned with and do not address the classification of goods under the *Act*.

57. Finally, Artcraft's assertion that ambiguities are to be read against the government does not reflect the current law. The Supreme Court of Canada has stated that ambiguity in tax law is "usually resolved openly by reference to legislative intent . . . . [I]t is no longer possible to reduce to rules of interpretation . . . in favour of or against the taxpayer . . . ."[30] Regardless, the principle is inapplicable in a customs appeal where subsection 152(3) of the *Act* expressly places the burden of proof on the appellant.[31]

58. Having found that the goods in issue are not waterproof because each of the styles in issue contains holes, an open heel, or both, the Tribunal finds that they cannot be classified under heading No. 64.01. Instead, they must be classified under heading No. 64.02 as "[o]ther footwear with outer soles and uppers of rubber or plastics".

59. Heading No. 64.02 includes three subheadings: "Sports footwear"; "Footwear with upper straps or thongs assembled to the sole by means of plugs"; and "Other footwear". As neither of the specific subheadings applies, the goods in issue are properly classified in the third, residual subheading.

60. The subheading contains two subcategories: "Covering the Ankle" and "Other". The goods in issue do not cover the ankle; therefore, they are classified under "Other". This subcategory includes two tariff item numbers: 6402.99.10 ("Incorporating a protective metal toe-cap") and 6402.99.90 ("Other"). Because the specific item does not apply, the goods in issue are classified under tariff item No. 6402.99.90.

DECISION

61. The appeal is denied.

Ann Penner

Ann Penner
Presiding Member

29. Exhibit AP-2017-016-06A at paras. 37, 41, Vol. 1A. Part C of general explanatory notes to Chapter 64.
30. *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 SCR 3 at 17.
31. *Les Industries Touch Inc. v. President of the Canada Border Services Agency* (27 March 2017), AP-2016-016 (CITT) at para. 23. *Customs Act*, subs. 152(3); *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at paras. 21-22.