Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-029

Atlantic Owl (PAS) Limited Partnership

v.

The President of the Canada Border Services Agency

Decision and reasons issued
Friday, February 21, 2020

Corrigendum issued
Monday, November 23, 2020

Canada

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IN THE MATTER OF an appeal heard on October 24, 2019, 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 May 18, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

ATLANTIC OWL (PAS) LIMITED PARTNERSHIP **Appellant**

AND

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

DECISION

The appeal is dismissed.

Peter Burn

Peter Burn
Presiding Member

IN THE MATTER OF an appeal heard on October 24, 2019, 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 May 18, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

ATLANTIC OWL (PAS) LIMITED PARTNERSHIP **Appellant**

AND

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

CORRIGENDUM

The second sentence of paragraph 35 of the Statement of Reasons should read as follows:

The parties agreed that, if imported separately, the ROVs would be classified in heading No. 84.79, and that the *Paul A. Sacuta* should be classified in heading No. 89.06.

By order of the Tribunal,

Peter Burn

Peter Burn
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 24, 2019
Tribunal Panel:	Peter Burn, Presiding Member
Support Staff:	Kalyn Eadie, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representative**
Atlantic Owl (PAS) Limited Partnership	Roderick H. Rogers, Q.C.
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Luc Vaillancourt
Intervener	**Counsel/Representative**
Oceaneering Canada Ltd.	Roderick H. Rogers, Q.C.

WITNESS:

Anthony Harwin
Director, Americas Region – Remotely Operated Vehicles
Oceaneering International Inc.

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STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal filed by Atlantic Owl (PAS) Limited Partnership (Atlantic Owl) with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*[1] from a decision of the Canada Border Services Agency (CBSA) dated May 18, 2018, made pursuant to subsection 60(4) of the *Act*.

[2] Atlantic Owl appealed the tariff classification of two remotely operated vehicles (ROVs), which were on board the ship *Paul A. Sacuta* (the vessel) when it was imported into Canada. Atlantic Owl claimed that the ROVs should be classified under tariff item No. 8479.89.90 as "other machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84".

[3] The CBSA's position was that the tariff classification of the ROVs cannot be challenged as they are part of the vessel's equipment and were not presented separately from the vessel. According to the CBSA, the only issue properly before the Tribunal is the tariff classification of the vessel. The CBSA's position is that the vessel should be classified under tariff item No. 8906.90.99 as "other vessels".

[4] The issues in this appeal are therefore the following:

1. Does the Tribunal have jurisdiction to find that the goods in issue are other than what was described on the customs documentation at the time of importation?

2. If the Tribunal has jurisdiction, were the ROVs properly considered part of the vessel at the time of importation?

3. If not, and given that they were not presented separately from the vessel at the time of importation, is it now possible for the Tribunal to determine their tariff classification?

BACKGROUND AND PROCEDURAL HISTORY

[5] This appeal could be entitled *A Comedy of Errors*. Due to the nature of the issues in this appeal, it is necessary to provide some background information on the contractual relationships between the parties involved, as well as the sequence of events leading up to the arrival of the vessel in Canada and the subsequent dealings between the appellant and the CBSA.

[6] The *Paul A. Sacuta* is a multipurpose platform supply vessel that was built for, and is owned by, Atlantic Owl. An affiliate of Atlantic Owl—Atlantic Towing—operates the vessel. Atlantic Towing was contracted by ExxonMobil to provide a vessel to support undersea inspections, maintenance and repair, as well as to provide logistics support to ExxonMobil's oil drilling platforms off the coast of Newfoundland.[2]

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

2 Exhibit AP-2018-029-07B at Tab 26, Vol. 1; Exhibit AP-2018-029-10A at Tabs 5-6, Vol. 1; Exhibit AP-2018-029-10B (protected) at Tab 7, Vol. 2.

[7] Two ROV systems, which are comprised of submersible vehicles as well as the equipment required to operate them, were on board the *Paul A Sacuta* at the time of importation. The ROVs are owned by Marine Production Systems Ltd., a wholly owned subsidiary of Oceaneering International Ltd., and were being leased from them by Oceaneering Canada Ltd. (Oceaneering), another wholly owned subsidiary of Oceaneering International Ltd. Oceaneering was contracted by ExxonMobil to provide ROV services at the Hibernia Oil and Gas Field Project off the coast of Newfoundland. [3]

[8] The *Paul A. Sacuta* was preparing to leave the shipyard in Romania at the time that the ROVs were finishing their previous contracts. ExxonMobil suggested that the *Paul A. Sacuta* pick up the ROVs in Rotterdam, Netherlands, before coming to Canada in order to consolidate transportation efforts.[4] Evidence presented to the Tribunal showed that the ROV systems were sufficiently installed on the vessel in Rotterdam to enable the safe transport of the ROV systems to Canadian waters, but were neither fully installed nor operational when the vessel entered Canada.[5]

[9] The vessel (including the ROVs) arrived in Canada on March 10, 2017. In accordance with the *Act* and the applicable regulations, the arrival date of March 10 meant that the deadline for the importer to provide the customs clearance information was March 24, 2017.[6]

[10] On March 21, 2017, the customs broker acting for Atlantic Owl requested an opinion from the CBSA (which Atlantic Owl referred to as the "quick decision"), regarding whether the ROVs should be accounted for separately from the vessel.[7] The CBSA requested further information regarding the ROVs and the vessel, which was provided on March 23, 2017. The customs broker requested a response before the end of the day on March 24, 2017.[8] On March 24, the CBSA responded as follows:

> If it is imperative that you receive an answer today, then the guidance provided by the tariff policy unit is that *if the ROV has been installed to functionally outfit the vessel*, then the goods should be accounted for under one entry, and classified with the vessel.
>
> If imported separately, then the ROV should be accounted for on another entry, most likely classified under heading 84.79.
>
> Given your requested turnaround time, the complex details below that may require further follow-up, and the fact that the tariff officer originally assigned is not in the office today; this is the most accurate response we can provide at this time.[9]
>
> [Emphasis added]

[11] For reasons unknown, the appellant chose to account for both the vessel and the ROVs under one entry (the vessel), for which tariff classification was declared under tariff item No. 8901.90.90. The value of the ROVs was included in the calculation of the value for duty of the vessel.

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3 Exhibit AP-2018-029-16A, Tab 2 at 35, Vol. 1; Exhibit AP-2018-029-07B at Tab 13, Vol. 1.
4 Exhibit AP-2018-029-16A, Tab 2 at 34; *Transcript of Public Hearing* at 67.
5 Exhibit AP-2018-029-07B at Tab 19, Vol. 1; *Transcript of Public Hearing* at 49-50, 67-68,102-108.
6 Exhibit AP-2018-029-16A, Tab 2 at 38, Vol. 1; *Transcript of Public Hearing* at 132.
7 Exhibit AP-2018-029-16A, Tab 2 at 38-39, Vol. 1.
8 *Ibid.* at 33-37.
9 *Ibid.* at 28, Vol. 1.

[12] On or before March 29, 2017, the customs broker requested further clarification of the CBSA's March 24 response.[10] On April 5, 2017, the CBSA provided its final answer to the question posed by the customs broker prior to importation, stating as follows:

> After some internal discussion our conclusion is that if the ROV is being imported (i.e., remaining in Canada) then it may be declared separately, classified in its own right and assessed duties and taxes as applicable; but if the ROV is simply used while the ship is in Canadian waters and then leaves with the ship it is considered part of the equipment of the ship and cannot be declared separately.[11]

[13] Unfortunately, there is no evidence that the appellant pointed out to the CBSA that neither of the two scenarios described in the April 5 answer matched the facts in this case, where the ROV was being used while the ship is in Canadian waters, but could leave Canada apart from the ship pursuant to a contract termination.

[14] On May 2, 2017, Atlantic Owl filed a refund request pursuant to paragraph 74(1)(e) of the *Act*, which provides (in part) as follows:

> . . . a person who paid duties on any imported goods may, . . . apply for a refund of all or part of those duties, . . . if
>
> . . .
>
> **(e)** the duties were paid or overpaid as a result of an error in the determination under subsection 58(2) of origin . . . , tariff classification or value for duty in respect of the goods and the determination has not been the subject of a decision under any of sections 59 to 61;

[15] The May 2, 2017, refund request involved an alleged error in the determination of *tariff classification*—not of origin, nor of the value for duty. Without questioning the tariff classification of the vessel, Atlantic Owl claimed in its refund request that the ROVs—which, as noted above, had *not* been accounted for separately, but rather as part of the ship—should be classified separately as "industrial robots, not elsewhere specified or included" under tariff item No. 8479.50.00 because they were owned by a different company than the importer and they were not a permanent part of the vessel. (With tariff item No. 8479.50.00 being a duty-free tariff item, Atlantic Owl then requested a refund of the excess duties and taxes that it had paid as a result of the inclusion of the ROVs in the value for duty of the ship.)[12]

[16] On July 10, 2017, the CBSA requested further information from Atlantic Owl. Atlantic Owl provided, via Oceaneering, a copy of the contract between Oceaneering and ExxonMobil. In August 2017, the CBSA requested further information regarding the installation of the ROVs on the vessel. Atlantic Owl provided this information via Oceaneering on August 30, 2017.[13]

[17] On August 31, 2017, the CBSA denied the refund request. The CBSA's decision states that the ROVs were "imported fully installed on vessel Paul A. Sacuta and on [*sic*] customs declaration,

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10 *Ibid.* at 27, Vol. 1.
11 *Ibid.* at 26, Vol. 1.
12 Exhibit AP-2018-029-07B, Tab 2, Vol. 1.
13 *Ibid.*, Tabs 17-19.

vessel and ROV were declared on the same line under 8901.90.99.00" and that "this request is denied because at the time of import, the ROV was fully installed on the vessel and operational. Therefore your request is denied and ROV remains classified with the vessel as declared."[14]

[18] On October 30, 2017, Atlantic Owl requested a further re-determination under subsection 60(1) of the *Act*. Atlantic Owl argued that the function of the ROVs is separate and distinct from the function of the vessel, as found by the Tribunal in *Oceaneering Canada Limited v. President of the Canada Border Services Agency*,[15] and therefore that the classification of the ROVs should also be distinct and reflect the specific function performed by the ROVs. It submitted that the ROVs should accordingly be classified under tariff item No. 8479.89.90 as "other machines".[16]

[19] On May 18, 2018, the CBSA issued a further re-determination pursuant to paragraph 60(4)(b) of the *Act*. In the letter accompanying the decision, the CBSA stated the following:

> The issue under dispute is whether the ROV is classified in 8901.90.99.00 as *Other vessels for the transport of goods and other vessels for the transport of both persons and goods* (Agency Position) or in 8479.89.90.90 as *Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter . . . other . . . other . . . other* (Your Position).
>
> You contend that because the function of the ROV is separate and distinct from the function of the vessel, the classification of the ROV should also be distinct and reflect the specific function performed by the ROV.
>
> . . .
>
> At the time of importation, the ROV was installed on the vessel and fully operational. The ROV and the vessel work together to carry out work the company has been contracted to perform, and therefore cannot be classified separately.
>
> The ROV cannot be considered a distinct importation.
>
> The classification would fall to that of the vessel, which includes the ROV.
>
> Consequently, the ROV remains classified in 8901.90.99.00.
>
> If the ROV had been imported separately, it would be classified in heading 84.79.
>
> Likewise, had the vessel been used only as a means of transportation, the ROV would have been classified in heading 84.79.[17]
>
> [Italics in original]

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14 *Ibid.*, Tab 20 at 176.

15 (19 February 2014), AP-2012-017 (CITT). In that case, the Tribunal considered whether an ROV should be classified as a vessel under heading 89.05 or in heading 84.79. Heading 84.79 refers to "machines having individual functions", therefore the Tribunal had to address whether the ROV in question had a function that was distinct from the vessel upon which it was mounted as part of the tariff classification exercise. However, the ROV in that case was presented separately from the vessel.

16 Exhibit AP-2019-029-07B, Tab 1, Vol. 1.

17 Exhibit AP-2018-029-01 at 38-39, Vol. 1.

[20] On August 15, 2018, Atlantic Owl and Oceaneering jointly filed a notice of appeal with the Tribunal. On October 17, 2018, the Tribunal issued an order changing Oceaneering's appellant status to that of an intervener.[18]

[21] The appellant's brief was filed on October 15, 2019, and the respondent's brief was filed on December 10, 2018. In its brief, the CBSA took the position that the only good that was imported was the vessel and, as such, the Tribunal can only determine whether the tariff classification of the vessel itself was correct.

[22] Upon review of the respondent's brief, the Tribunal cancelled the hearing scheduled for March 2019 and requested additional submissions and evidence from the parties concerning the identity of the goods in issue. The Tribunal also requested submissions on whether it has jurisdiction to determine that the goods in issue in an appeal are other than what was described on the customs documentation at the time of importation. The additional submissions were received in April 2019.

[23] On October 24, 2019, the Tribunal held a public hearing in Ottawa, Ontario. Atlantic Owl called Mr. Anthony Harwin, of Oceaneering International Inc., as a witness. The CBSA called no witnesses.

DESCRIPTION OF THE GOODS IN ISSUE

[24] Atlantic Owl's position is that the goods in issue are two ROV systems, which are unmanned robotic submersible vehicles suited for performing underwater work. Each ROV system includes a tether management system (or "cage"), a launch and recovery system (an A frame/overhead gantry, an active heave-compensated winch, a winch drum and an armoured umbilical), a charge cart, a connection/interface/sea fastening to the hangar deck, high voltage transformers and power distribution cabinets, control room equipment and a communication system.[19]

[25] The CBSA's position is that the good in issue is the *Paul A. Sacuta*, which is described as a multipurpose platform support vessel (PSV) equipped for inspection, maintenance and repair. The vessel has a higher towing capacity than other PSVs, which allows it to provide "tanker support". It is also capable of providing "ice management" and can work in pack ice. It has both a large cargo and passenger capacity. Notably, two ROV hangars were incorporated into the design of the ship.[20]

POSITIONS OF THE PARTIES

Atlantic Owl

[26] Atlantic Owl submitted that the Tribunal has the authority to determine the identity of a good, including whether it is other than what was described in the customs documentation at the time of importation. In the alternative, Atlantic Owl submitted that the Tribunal has the jurisdiction to determine whether the ROVs should be classified separately from, or together with, the vessel. Atlantic Owl submitted that subsection 67(1) of the *Act* and section 16 of the *CITT Act* confer broad jurisdiction on the Tribunal, including the authority to determine the validity of a section 60 decision

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18 Exhibit AP-2018-029-09, Vol. 1.
19 Exhibit AP-2018-029-07B at Tabs 4 and 5, Vol. 1.
20 *Ibid.* at Tab 26; Exhibit AP-2018-029-10A at Tabs 4-6, Vol. 1.

as well as its correctness.[21] Atlantic Owl submitted that this authority extends to determining the validity or correctness of the importer's adjustment of a declaration.

[27] Atlantic Owl further submitted that determining tariff classification often results in determining the identity of a good, and that the Tribunal has jurisdiction to determine if a good is part of another good, or if it should be classified separately. Atlantic Owl referred to Rules 2 and 3 of the *GIR* and submitted that these rules demonstrate that the tariff classification exercise involves determining what a good is made up of, its components, and its essential character. In Atlantic Owl's submission, this involves determining the identity of the goods.

[28] Atlantic Owl also pointed to case law where, in its submission, the Tribunal determined whether something constituted part of an imported good or a good in its own right. In *David F. Howat v. the Deputy Minister of National Revenue for Customs and Excise*, an importer tried to have the engine classified separately from his motorboat even though the engine was installed on the boat prior to importation. The Tribunal found that it was impossible to separate the two goods for tariff classification purposes as the engine was not "presented separately" from the boat as per the explanatory notes to Chapter 89. It further found that, together, the boat and engine comprised a "motorboat" and were classifiable under the tariff item applicable to motorboats.[22] Atlantic Owl also referred to *GL&V/Black Clawson-Kennedy v. the Deputy Minister of National Revenue*, in which the Tribunal determined that aluminum walkway systems imported separately were nevertheless to be classified as parts of the paper-making machines to which they were destined to be attached.[23]

[29] Finally, Atlantic Owl submitted that importers have the ability to self-adjust or correct a declaration and are not bound by the declaration they made at the time of importation, in accordance with section 32.2 of the *Act*; similarly, the CBSA can re-determine the declarations of origin, tariff classification, value for duty or marking under sections 59 to 61 of the *Act*. Atlantic Owl submitted that the CBSA never challenged the importer's ability to correct the declaration, including changing the description of the imported goods. Atlantic Owl pointed to the fact that the President's decision letter referred to the ROVs as the goods in issue and found that they were classified under tariff item No. 8901.90.99 because they were installed on the vessel and fully operational.

CBSA

[30] The CBSA submitted that the Tribunal has no jurisdiction to determine the classification of the ROVs as these were not declared or imported separately from the vessel. Further, the Tribunal has no jurisdiction to split the vessel into parts or accessories.

[31] The CBSA submitted that the ROVs were not separately reported and accounted for at the time of importation; therefore, no declaration of tariff classification, origin or value for duty was made for the ROVs, and no deemed determination of these things took place, in accordance with subsection 58(2) of the *Act*. Accordingly, it was not possible for the CBSA to re-determine or further re-determine the tariff classification of the ROVs since there was no initial determination. The CBSA could only re-determine the classification of the vessel.

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21 *Grodan Inc. v. President of the Canada Border Services Agency* (1 June 2012), AP-2011-031 (CITT).
22 (22 February 1994), AP-92-362 (CITT).
23 (27 September 2000), AP-99-063 (CITT).

[32] The CBSA further submitted that section 67 only allows the Tribunal to grant relief with respect to a re-determination or further re-determination made by the President of the CBSA[24] and again underlined that, as there has been no determination of tariff classification for the ROVs, there was no re-determination or further re-determination. The Tribunal can only confirm whether the tariff classification of the vessel is correct, as that was the only good properly imported.

[33] Further, although the explanatory notes to Chapter 89 provide that parts and accessories of vessels presented separately are classified in their own right and not as parts of vessels, the CBSA argued that the ROV systems were not presented separately and cannot be classified as parts or accessories of a vessel by artificially "dismounting" them from the vessel.

[34] Finally, the CBSA submitted that, in any case, the ROV systems support the vessel in performing undersea inspection, repair and maintenance operations, and must accordingly be examined with the vessel for the purposes of tariff classification. The CBSA noted that significant costs were incurred in mounting the ROVs to the vessel in the Netherlands, and that they were "sufficiently" mounted on the vessel in order to allow them to be safely carried across the Atlantic.

ANALYSIS

Jurisdiction

[35] Fundamentally, this is not a dispute about tariff classification. The parties agreed that, if imported separately, the ROVs would be classified in heading No. 89.74, and that the *Paul A. Sacuta* should be classified in heading No. 89.06.[25] What Atlantic Owl is requesting in this appeal is for the Tribunal to correct the fact that it did not account for the ROVs separately from the vessel at the time of importation. For the following reasons, that request cannot succeed.

[36] Section 12 of the *Act* requires that "[a]ll goods that are imported shall . . . be reported". Section 3 of the *Reporting of Imported Goods Regulations* requires that "all goods that are imported shall be reported under section 12 of the Act without delay after arrival in Canada."[26]

[37] Further, section 32 of the *Act* requires that importers account for all goods that are imported. In the process of accounting for reported goods, a declaration of tariff classification, origin and value for duty is made. If a customs officer does not make a determination when the goods are accounted for, subsection 58(2) provides that:

> . . . the origin, tariff classification and value for duty of the goods are deemed to be determined, for the purposes of this Act, to be as declared by the person accounting for the goods in the form prescribed under paragraph 32(1)(a). That determination is deemed to be made at the time the goods are accounted for under subsection 32(1), (3) or (5).

[38] In other words, the tariff classification, origin and value for duty are deemed to be as declared by the importer at the time of accounting. Duties are charged in accordance with these declarations in accordance with section 17 of the *Act*.

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24 *C.B. Powell Limited v. President of the Canada Border Services Agency* (11 August 2010), AP-2010-007 and AP-2010-008 (CITT) [*C.B. Powell*].

25 Exhibit AP-2018-029-01 at 38-39, Vol. 1; *Transcript of Public Hearing* at 124, 180.

26 SOR/86-873.

[39] The *Act* provides that the CBSA may re-determine and further re-determine the deemed determinations, pursuant to sections 59, 60 and 61. These re-determinations may be made on the CBSA's own motion or in response to requests from importers, including requests for refunds of duties paid, filed pursuant to section 74, or corrections filed pursuant to section 32.2 of the *Act.*

[40] Section 67 of the *Act* allows a person aggrieved by a decision of the President of the CBSA made under section 60 or 61 to appeal the decision to the Tribunal, and provides that the Tribunal "may make such order, finding or declaration as the nature of the matter may require". Although this wording does confer broad jurisdiction on the Tribunal, that jurisdiction is subject to limits. Most notably for the purposes of this case, the Tribunal has previously found that "the Tribunal's authority under subsection 67(1) of the *Act* to hear an appeal is contingent on a prior 'decision' having been made by the President of the CBSA pursuant to subsection 60(1)."[27]

[41] The Tribunal elaborated on this principle as follows:

> . . . the only decisions that the President of the CBSA is authorized to make pursuant to subsection 60(1) of the *Act* are re-determinations and further re-determinations of the tariff classification, origin and value for duty of goods that were the subject of a decision pursuant to subsection 59(2).
>
> It follows from the interrelated and sequential nature of the administrative mechanisms in the *Act* that, without either a prior determination made by a customs officer pursuant to subsection 58(1), or a re-determination under subsection 59(1) of the subsection 58(2) deemed determination of origin, there would be nothing for the President of the CBSA to re-determine or to further re-determine in respect of that issue under the authority conferred upon him by subsection 60(1). A request pursuant to subsection 60(1) in such a situation would therefore necessarily be met with a rejection notice. In the absence of a "decision" pursuant to subsection 60(1), an appeal would not lie to the Tribunal pursuant to subsection 67(1).[28]

[42] The CBSA submitted, and the Tribunal agrees, that it never made a decision under section 60 regarding the tariff classification of the ROVs, because it was precluded from doing so by the fact that the ROVs were never accounted for separately from the vessel. More specifically, since it is through accounting that the original declaration of tariff classification is made, and there was no separate accounting for the ROVs, there was never an initial determination of tariff classification *of the ROVs* under subsection 58(2) which could be the subject of a re-determination. The CBSA's position is that it only ever re-determined the tariff classification of the *vessel*, which was the only good properly imported. In other words, the appellant's declaration had the result that the CBSA could not have made a re-determination with respect to the ROVs even if the CBSA wanted to do so.[29]

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27 *C.B. Powell* at para. 28.

28 *Ibid.* at paras. 29-30.

29 It should be noted that some of the wording employed by the CBSA in its section 60 decision letter suggests that it considered the issue under dispute to be the classification of the ROVs, rather than the classification of the vessel. If that were the case, then according to the CBSA's own argument before the Tribunal, the CBSA did not have jurisdiction to re-determine the classification of the ROVs under sections 59 or 60 due to the fact that there had been no deemed determination of their classification pursuant to subsection 58(2). The CBSA did not address this discrepancy in its argument. However, the fact that the CBSA may not have had jurisdiction to render the section 60 decision that gave rise to this appeal does not give the Tribunal jurisdiction over this matter; in fact, according to the Tribunal's decision in *C.B. Powell*, it has the opposite effect.

[43] Atlantic Owl claimed, in essence, that it can account for the ROVs post-importation by submitting an adjustment request. It may be possible to adjust an accounting after importation; the difficulty for Atlantic Owl lies in the fact that it based its request on paragraph 74(1)(e) of the *Act*, which only applies where there has been an error in the deemed determination of tariff classification, origin and value for duty under subsection 58(2).[30] Again, there was no declaration, and thus no deemed determination, of the tariff classification of the ROVs because they were not accounted for separately.

[44] Atlantic Owl also argued that the error in tariff classification that it sought to correct is the description or identity of the imported goods. The *Act* does not explicitly contemplate a re-determination of the description or identity of imported goods—again, only tariff classification, origin and value for duty are declared and determined pursuant to subsection 58(2).

[45] As to Atlantic Owl's argument that the description of imported goods is implicit in the declaration of tariff classification, the Tribunal disagrees. The starting point of the tariff classification analysis must always be the identity of the goods in issue. Although it is true that the Tribunal subsequently considers the description of the goods in issue and bases its tariff classification on its characteristics, it must first know what was imported before embarking on the tariff classification exercise. This is consistent with the definition of "tariff classification" in subsection 2(1) of the *Act*, which provides that "tariff classification means the classification of imported goods under a tariff item in the List of Tariff Provisions set out in the schedule to the *Customs Tariff*". The Tribunal must know what the "imported goods" are before determining their tariff classification.

[46] Further, the fact that the ROVs were considered part of the ship (which may be factually incorrect, as outlined below) is not an error in the tariff classification of the *Paul A. Sacuta*—the fact that the ROVs were on board the ship has no impact on the classification of the *Paul A. Sacuta* as a vessel.

[47] As a result, the Tribunal (reluctantly) concludes that it does not have jurisdiction to determine the tariff classification of a good that was not *itself* the subject of a re-determination of tariff classification by the CBSA.

[48] In reaching this conclusion, the Tribunal wishes to state that it is not without sympathy for the appellant. It is apparent from the procedural history outlined above, as well as the testimony at the hearing, that this matter has indeed been a comedy of errors, beginning with the decision of the appellant to account for both the vessel and the ROV system under one entry.

[49] It is also apparent that there has been much miscommunication and misapprehensions of the facts. For example, the evidence shows that neither of the two scenarios laid out in the CBSA's April 5, 2017, advice fit the facts in this case. While the CBSA advised that "if the ROV is being imported (i.e., remaining in Canada) then it may be declared separately, classified in its own right

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30 An adjustment request, which is filed on Form B2 – *Canada Customs Adjustment Request*, is the prescribed form for requesting any change to an importer's accounting. Atlantic Owl also argued that section 32.2 allows for importers to make corrections through adjustment requests, including to the description of the imported goods, and that a refund request flows from a correction under section 32.2. This is incorrect. The refund request mechanism under section 74 and the correction mechanism under section 32.2 are mutually exclusive: the former is used where duties have been overpaid and the latter is used where duties are owing or where the correction is revenue-neutral (in accordance with subsection 32.2(5) of the *Act*). Regardless, section 32.2 also only allows for corrections to declarations of origin, tariff classification or value for duty.

and assessed duties and taxes as applicable; but if the ROV is simply used while the ship is in Canadian waters and then leaves with the ship it is considered part of the equipment of the ship and cannot be declared separately",[31] the reality was that the ROVs were being used while the ship is in Canadian waters, but with no guarantee that they will leave Canadian waters with the ship, as they are being used pursuant to a contract between Oceaneering and ExxonMobil that can be terminated at any time (at which time the ROVs would be removed from the vessel).[32]

[50] Furthermore, the CBSA's section 59 and 60 decisions focussed on the issue of whether the ROVs were "fully installed and operational" or "installed and fully operational". The evidence shows that, while the ROV systems were sufficiently installed on the vessel in Rotterdam to enable the safe transport of the ROV systems to Canadian waters, they were neither fully installed nor operational at the time of import and entry on March 10, 2017.[33] Rather, further equipment was installed, calibrated and tested, and test dives were performed after importation. Indeed, according to Mr. Harwin, ExxonMobil was not charged under the ROV service agreement until after the test dives were completed, and the ROVs were not put "on hire" to ExxonMobil until March 26, 2017.[34]

[51] In addition, the letter accompanying the section 60 decision stated that the "ROV and vessel work together to carry out work the company had been contracted to perform, and therefore cannot be classified separately."[35] The evidence shows that there was no contractual relationship between the importer (Atlantic Towing) and the operator/lessee of the ROVs (Oceaneering).[36] Rather, both companies have separate contractual relationships with ExxonMobil, and it was through ExxonMobil's intervention that the decision to place the ROVs on the vessel prior to importation was made.

[52] All these facts support the conclusion that the ROVs should have been accounted for and classified separately from the ship. They also raise questions as to whether the value of the ROVs should in fact have been added to the value of the vessel when the value for duty of the latter was declared. It seems plain to the Tribunal that the ROVs were not part of the sale of the vessel for export to Canada, which occurred between the shipbuilder, Damen Shipyards Gorinchem, and Atlantic Owl. The evidence is that the ownership of the ROVs was never transferred to Atlantic Owl.[37] Further, the invoices issued by the shipbuilder to Atlantic Owl for the construction of the vessel did not include the value of the ROVs.[38] In addition, it is far from clear that all the "installation" costs incurred in Rotterdam actually increased the value of the vessel.[39]

[53] As noted earlier, Atlantic Owl has already filed a refund request under paragraph 74(1)(e). That paragraph allows a refund request to be made where (1) there has been an error in the deemed determination of (a) tariff classification, or (b) value for duty, or (c) origin; and (2) the deemed determination has not yet been the subject of a decision under any of sections 59 to 61. Pursuant to clause 74(3)(b)(i), such refund requests must be filed within four years of the accounting for the goods in issue.

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31 Exhibit AP-2018-029-16A, Tab 2 at 26, Vol. 1.
32 Exhibit AP-2018-029-07B at Tab 13, Vol. 1; *Transcript of Public Hearing* at 51-53.
33 Exhibit AP-2018-029-07B at Tab 19, Vol. 1; *Transcript of Public Hearing* at 49-50, 67-68,102-108.
34 Exhibit AP-2018-029-07B at Tab 13, 22, 23, Vol. 1; *Transcript of Public Hearing* at 77-84, 118.
35 Exhibit AP-2018-029-01 at 38-39, Vol. 1.
36 *Transcript of Public Hearing* at 53.
37 Exhibit AP-2018-029-16A, Tab 2 at 35, Vol. 1.
38 Exhibit AP-2018-029-10B (protected) at Tab 7, Vol. 2.
39 *Transcript of Public Hearing* at 111-117.

[54] Atlantic Owl's refund request of May 2, 2017, was made on the basis that there had been an error in *tariff classification* only, and that the error was that the ROVs had been classified together with the ship.[40] Further, the CBSA's section 59 and 60 decisions pursuant to this request are limited to re-determining the *tariff classification* of the vessel—they do not contain any reference to the issue of value for duty.[41] It follows that there has not yet been a re-determination of the deemed determination of the *value for duty* of the vessel. As four years from the date of accounting (March 24, 2017) have not yet elapsed, it appears that Atlantic Owl is free to request a refund under paragraph 74(1)(e) on the basis that there has been an error in the determination of the value for duty of the vessel.

[55] The Tribunal does not believe it has jurisdiction to address this issue pending such a re-determination (for similar reasons as are outlined above with respect to its jurisdiction over the tariff classification of the ROVs). Hopefully, a refund request pursuant to section 74 of the *Act* based on an error in the determination of value for duty would be an approach that not only respects the language of the *Act*, but produces an outcome where *All's Well that Ends Well*.

Tariff classification of the vessel

[56] The CBSA's position in the decisions underlying this appeal was that the *Paul A. Sacuta* should be classified, as originally declared, in heading No. 89.01. It now submits that the proper classification is in heading No. 89.06, which covers other vessels, including warships and lifeboats other than rowing boats. The CBSA argued that the multiple functions of the *Paul A. Sacuta* are not more specifically described by the headings preceding 89.06 and that it is akin to the types of vessels enumerated in the explanatory notes to heading No. 89.06, such as scientific research vessels, laboratory ships, and ice breakers. Atlantic Owl did not object to the vessel's classification in heading No. 89.06.[42]

[57] With respect to classification at the subheading and tariff item levels, the CBSA submitted that, as the vessel is not a warship, the only applicable provision is subheading No. 8906.90, which provides for "other". Since the vessel is not an open vessel and measures less than 294.13 metres in length and 32.31 metres in width, the only applicable tariff item is 8906.90.99, which also provides for "other".

[58] Although the *Paul A. Sacuta* has a large cargo capacity and crew quarters, there is evidence that the vessel is also capable of performing multiple other functions, such as its ice breaking and towing capabilities. The Tribunal accordingly agrees that this makes it something more than a vessel for the transport of goods and/or persons, as required by heading No. 89.01, and that it further does not fit into any of heading Nos. 89.02 to 89.05. The Tribunal therefore accepts that the *Paul A. Sacuta* should be classified in heading No. 89.06. Further, the Tribunal agrees that the only applicable subheading and tariff item are 8906.90 and 8906.90.99, respectively.

[59] The *Paul. A. Sacuta* is accordingly properly classified in tariff item No. 8906.90.99.

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40 Exhibit AP-2018-029-07B at Tab 2, Vol. 1.
41 *Ibid.* at Tabs 1 and 20, Vol. 1.
42 *Transcript of Public Hearing* at 124.

DECISION

[60] For the foregoing reasons, the appeal is dismissed.

Peter Burn

Peter Burn
Presiding Member

ANNEX I: LEGAL FRAMEWORK

Tariff classification steps

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).[43] 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.

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*,[44] and the *Canadian Rules*[45] set out in the schedule.

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.

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*[46] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[47] 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.[48]

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.[49]

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.[50] The final step is to determine the proper tariff item.[51]

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

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

45 S.C. 1997, c. 36, schedule *[Canadian Rules*].

46 WCO, 4d ed., Brussels, 2017.

47 WCO, 6th ed., Brussels, 2017.

48 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 classification opinions.

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

50 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 the above Rules [i.e. Rules 1 through 5] . . ." and that ". . . the relative Section and Chapter Notes also apply, unless the context otherwise requires."

Relevant tariff nomenclature and notes

SECTION XVI

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

. . .

Chapter 84

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

. . .

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

8479.10 -Machinery for public works, building or the like

8479.20 -Machinery for the extraction or preparation of animal or fixed vegetable fats or oils

8479.30 -Presses for the manufacture of particle board or fibre building board of wood or other ligneous materials and other machinery for treating wood or cork

8479.40 -Rope or cable-making machines

8479.50 -Industrial robots, not elsewhere specified or included

8479.60 -Evaporative air coolers

-Passenger boarding bridges:

8479.71 - -Of a kind used in airports

8479.79 - -Other

-Other machines and mechanical appliances:

8479.81 - -For treating metal, including electric wire coil-winders

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[51] 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.

8479.82 - -Mixing, kneading, crushing, grinding, screening, sifting, homogenising, emulsifying or stirring machines

8479.89 - -Other

8479.90 -Parts

Section XVII

VEHICLES, AIRCRAFT, VESSELS AND ASSOCIATED TRANSPORT EQUIPMENT

. . .

CHAPTER 89

SHIPS, BOATS AND FLOATING STRUCTURES

89.01 Cruise ships, excursion boats, ferry-boats, cargo ships, barges and similar vessels for the transport of persons or goods.

8901.10 -Cruise ships, excursion boats and similar vessels principally designed for the transport of persons; ferry-boats of all kinds

8901.20 -Tankers

8901.30 -Refrigerated vessels, other than those of subheading 8901.20

8901.90 -Other vessels for the transport of goods and other vessels for the transport of both persons and goods

8901.90.10 - - -Open vessels

- - -Other:

8901.90.91 - - - -Of dimensions exceeding a length of 294.13 m and a beam of 32.31 m

8901.90.99 - - - -Other

. . .

89.06 Other vessels, including warships and lifeboats other than rowing boats.

8906.10 -Warships

8906.90 -Other

- - -Open vessels:

. . .

- - -Other

8906.90.91 - - - -Of dimensions exceeding a length of 294.13 m and a beam of 32.31 m

8906.90.99 - - - -Other

The explanatory notes to Section XXII provide, in relevant part, as follows:

> 2. The expressions "parts" and "parts and accessories" do not apply to the following articles, whether or not they are identifiable as for the goods of this Section:
>
> . . .
>
> (e) Machines or apparatus of headings 84.01 to 84.79, or parts thereof, other than the radiators for the articles of this Section; articles of heading 84.81 or 84.82 or, provided they constitute integral parts of engines or motors, articles of heading 84.83;

The explanatory notes to Chapter 89 provide, in relevant part, as follows:

> This Chapter covers ships, boats and other vessels of all kinds (whether or not self-propelled), and also floating structures such as coffer-dams, landing stages and buoys. It also includes air-cushion vehicles (hovercraft) designed to travel over water (sea, estuaries, lakes), whether or not able to land on beaches or landing-stages or also able to travel over ice (see Note 5 to Section XVII).
>
> The Chapter also includes:
>
> (A) Unfinished or incomplete vessels (e.g., those not equipped with their propelling machinery, navigational instruments, lifting or handling machinery or interior furnishings).
>
> (B) Hulls of any material.
>
> Complete vessels presented unassembled or disassembled, and hulls, unfinished or incomplete vessels (whether assembled or not), are classified as vessels of a particular kind, if they have the essential character of that kind of vessel. In other cases, such goods are classified in heading 89.06.
>
> Contrary to the provisions relating to the transport equipment falling in other Chapters of Section XVII, this Chapter **excludes** all separately presented parts (**other than** hulls) and accessories of vessels or floating structures, even if they are clearly identifiable as such. Such parts and accessories are classified in the appropriate headings elsewhere in the Nomenclature, for example:
>
> (1) The parts and accessories specified in Note 2 to Section XVII.

The explanatory notes to heading No. 89.01 provide as follows:

> This heading covers all vessels for the transport of persons or goods, other than vessels of heading 89.03 and lifeboats (other than rowing boats), troop ships and hospital ships (heading

89.06); they may be for sea navigation or inland navigation (e.g., on lakes, canals, rivers, estuaries).

The heading includes :

(1) Cruise ships and excursion boats.

(2) Ferry boats of all kinds, including train ferries, car ferries and small river ferries.

(3) Tankers (petrol, methane, wine, etc.).

(4) Refrigerated vessels for the transport of meat, fruit, etc.

(5) Cargo vessels of all kinds (other than tankers and refrigerated vessels), whether or not specialised for the transport of specific goods. These include ore vessels and other bulk carriers (for the transport of, e.g., grain, coal), container ships, Ro Ro (roll on roll off) ships and LASH type vessels.

(6) Barges of various kinds, lighters and pontoons being flat decked vessels used for the transport of goods and, sometimes, of persons.

(7) Vessels of the hydroglider type, hydrofoils and hovercraft.

The explanatory notes to heading No. 89.06 provide as follows:

This heading covers all vessels not included in the more specific headings 89.01 to 89.05.

It covers :

(1) Warships of all kinds, these include :

(a) Ships designed for warfare, fitted with various offensive weapons and defensive weapons and incorporating protective shields against projectiles (e.g., armour plating or multiple watertight bulkheads), or with underwater devices (anti magnetic mine detectors). They are generally also fitted with detection and listening devices such as radar, sonar, infra red detection apparatus and scrambling equipment for radio transmissions.

Ships of this category may be distinguished from merchant ships by their greater speed and manoeuvrability, by the size of the crew, by bigger fuel tanks and by special magazines for the transport and use of ammunition at sea.

(b) Certain specially fitted ships which do not carry weapons or armour plating but yet are recognisable as wholly or mainly for use in warfare, such as landing craft or certain fleet auxiliaries (for transporting ammunition or mines, etc.), troop ships.

(c) Submarines.

(2) Ships having certain characteristics of warships but which are used by public authorities (e.g., by Customs and police).

(3) Lifeboats for placing on board ships, as well as those which are intended to be placed at certain points around the coast to help ships in distress. However, lifeboats propelled by oars fall in heading 89.03.

(4) Scientific research vessels; laboratory ships; weather ships.

(5) Vessels for the transportation and mooring of buoys; cable ships for laying underwater cables, e.g., for telecommunications.

(6) Pilot boats.

(7) Ice breakers.

(8) Hospital ships.

(9) Hopper barges for the disposal of dredged material, etc.