Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Appeals

## DECISION AND REASONS

Appeal No. AP-2019-009

Keurig Canada Inc.

v.

President of the Canada Border Services Agency

*Decision and reasons issued Thursday, December 24, 2020*

Canada

# TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on September 1, 2020, 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 March 8, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**KEURIG CANADA INC.** **Appellant**

**AND**

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

## DECISION

The appeal is dismissed.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member

| | |
|---|---|
| Place of Hearing: | Ottawa, Ontario |
| Date of Hearing: | September 1, 2020 |
| Tribunal Panel: | Jean Bédard, Q.C., Presiding Member |
| Support Staff: | Heidi Lee, Counsel |

**PARTICIPANTS:**

| **Appellant** | **Counsel/Representatives** |
|---|---|
| Keurig Canada Inc. | Michael Sherbo<br>Andrew Simkins |
| **Respondent** | **Counsel/Representative** |
| President of the Canada Border Services Agency | Rigers Alliu |

**WITNESS:**

Christopher Godfrey
Head of the Program Management Office
Keurig Dr Pepper

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## STATEMENT OF REASONS

## OVERVIEW

[1] This is an appeal filed by Keurig Canada Inc. (Keurig) pursuant to subsection 67(1) of the *Customs Act*,[1] from a decision made by the President of the Canada Border Services Agency (CBSA).

[2] The issue in appeal is whether the goods in issue are properly classified under tariff item No. 8516.71.10 as "coffee makers", as determined by the CBSA, or under tariff item No. 8516.79.90 as "other electro-thermic appliances", as submitted by Keurig.

[3] For the reasons that follow, the Tribunal finds that the goods in issue are coffee makers of tariff item No. 8516.71.10.

## GOODS IN ISSUE

[4] The goods in issue are Keurig K40 Elite automatic single-cup brewing systems for home use.

[5] They comprise a housing containing an electro-thermic mechanism that heats water, a lid, a water reservoir, a handle, a K-Cup pod holder/housing, a drip tray assembly, a power cord and a spout to allow brewed beverages to flow out of the machine.[2]

## PROCEDURAL HISTORY

[6] The goods in issue were imported in 10 transactions between December 16 and 23, 2014, under tariff item No. 8516.71.10 as "coffee makers".

[7] On or about July 16, 2018, Keurig requested a refund of duties in accordance with paragraph 74(1)(e) of the *Act*, requesting that the goods in issue be classified under tariff item No. 8516.79.90 as "other electro-thermic appliances".

[8] On September 17, 2018, the CBSA denied the application for refund, determining that the goods in issue should be classified under tariff item No. 8516.71.10 as "coffee makers".

[9] Keurig subsequently appealed the CBSA's decision under section 60 of the *Act*. The CBSA denied the appeal on March 8, 2019.

[10] On May 31, 2019, Keurig filed this appeal with the Tribunal under subsection 67(1) of the *Act*.

[11] At the request of Keurig, the appeal was placed in abeyance on July 30, 2019, and continued on September 9, 2019.[3]

[12] Due to the circumstances surrounding the COVID-19 pandemic, the in-person hearing scheduled in this matter for March 19, 2020, was cancelled.

[13] The appeal was heard by way of videoconference on September 1, 2020.

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1 R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2 Exhibit AP-2019-009-08 at 17.
3 The CBSA did not oppose the request (see Exhibit AP-2019-009-04).

## LEGAL FRAMEWORK

[14] 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).[4] 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.

[15] Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[5] and the *Canadian Rules*[6] set out in the schedule.

[16] 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.

[17] 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*[7] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[8] published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is sound reason to do otherwise.[9]

[18] 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. As the Supreme Court of Canada indicated in *Igloo Vikski*, 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".[10]

[19] 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.[11] The final step is to determine the proper tariff item.[12]

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

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

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

7 World Customs Organization, 4th ed., Brussels, 2017.

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

9 See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, and *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 at para. 4.

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

11 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."

12 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.

[20] The relevant provisions of the *Customs Tariff* are 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 85** | **Chapitre 85** |
| **Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles** | **Machines, appareils et matériels électriques 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** |
| **85.16 Electric instantaneous or storage water heaters and immersion heaters; electric space heating apparatus and soil heating apparatus; electro-thermic hair-dressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric smoothing irons; other electro-thermic appliances of a kind used for domestic purposes; electric heating resistors, other than those of heading 85.45.** | **85.16 Chauffe-eau et thermoplongeurs électriques; appareils électriques pour le chauffage des locaux, du sol ou pour usages similaires; appareils électrothermiques pour la coiffure (sèche-cheveux, appareils à friser, chauffe-fers à friser, par exemple) ou pour sécher les mains; fers à repasser électriques; autres appareils électrothermiques pour usages domestiques; résistances chauffantes, autres que celles du nº 85.45.** |
| . . . | [...] |
| **-Other electro-thermic appliances:** | **-Autres appareils électrothermiques :** |
| **8516.71 - -Coffee or tea makers** | **8516.71 - -Appareils pour la préparation du café ou du thé** |
| 8516.71.10 - - -Coffee makers | 8516.71.10 - - -Appareils pour la préparation du café |
| . . . | [...] |
| **8516.79 - -Other** | **8516.79 - -Autres** |
| . . . | [...] |
| 8516.79.90 - - -Other | 8516.79.90 - - -Autres |

[21] There are no relevant chapter or heading notes, or classification opinions.[13]

[22] The relevant explanatory notes are set out in Appendix A of these reasons.

## POSITIONS OF THE PARTIES

[23] The parties agreed that the goods in issue are classified in heading No. 85.16 under the one-dash level for "other electro-thermic appliances". This dispute is therefore at the subheading level.

### Keurig

[24] Keurig submitted that the use of "or" in the terms of subheading No. 8516.71 is disjunctive and refers to two distinct appliances, i.e. (1) coffee makers, and (2) tea makers. In Keurig's view, the subheading covers therefore only appliances that are designed as coffee makers or appliances that are designed as tea makers.

[25] Keurig argued that the goods in issue are beverage systems that are not limited to any specific drink, including tea or coffee, and therefore are not classifiable in subheading No. 8516.71.

[26] Keurig also argued that the CBSA's classification improperly results in subheading No. 8516.71 applying as an end-use tariff item as it relies on the goods in issue being advertised, marketed and predominantly used to brew coffee. Keurig argued that subheading No. 8516.71 is not an end-use provision. Based on the design and intended use of the goods in issue, Keurig submitted that they are properly classified in subheading No. 8516.79 as other electro-thermic appliances.

### CBSA

[27] The CBSA submitted that subheading No. 8516.71 classifies goods based on the type of beverage they produce, namely, coffee or tea. In the CBSA's view, "or" is used in a conjunctive sense in the terms of the subheading.

[28] The CBSA submitted that the goods in issue are "coffee makers" of subheading No. 8516.71 in accordance with Rules 1 and 6, regardless of the fact that they can be used to brew beverages other than coffee. The CBSA argued that the goods in issue constitute another form of brewers or coffee makers in the coffee industry.

[29] The CBSA submitted that the goods in issue are primarily used to brew coffee, noting that Keurig currently advertises, markets and sells all its brewing appliances as "coffee makers" on its website, all of which are "K-Cup" compatible. In addition, the CBSA noted that the majority of "K-Cup" pods marketed and advertised by Keurig is coffee-based. Customer reviews also indicate a predominant use for coffee.

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13 Note 3 to Section XVI provides that, "[u]nless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function." Neither party argued that note 3 was relevant to the tariff classification of the goods in issue. See *Transcript of Public Hearing* [*Transcript*] at 86 and 112.

## TRIBUNAL'S ANALYSIS

[30] Appeals to the Tribunal are determined *de novo*. The Tribunal must reach its own decision concerning the correct tariff classification for the goods and owes no deference to the CBSA's decision.

[31] It is also well established that the appellant bears the burden of establishing, on a balance of probabilities, that the CBSA's decision was incorrect. To meet this standard of proof, an appellant is expected to submit evidence that provides a solid factual basis for its position.[14]

### Mr. Godfrey's evidence

[32] At the outset of its analysis, the Tribunal will first consider Mr. Godfrey's evidence.

[33] Keurig relied on Mr. Godfrey's testimony, Head of the Program Management Office, who has been with Keurig since 2013.[15] Mr. Godfrey has worked in program and product management to design and develop single-cup brewers.[16] Based on this experience, Mr. Godfrey asserted that he has working knowledge of the design of the goods in issue, though he also acknowledged that they were originally designed prior to his involvement.[17] Overall, the Tribunal finds that Mr. Godfrey was a helpful and credible witness.

[34] Mr. Godfrey explained that the goods in issue comprise two main sections—the brew engine, where water is heated and pumped into the pod, and the puncture mechanism, which pierces the pod to ensure water flows through.[18] The goods can make several different brew sizes and typically come with a water tank to facilitate quick brewing.[19]

[35] The goods in issue can brew a number of different beverages, including coffee, tea, and other specialty drinks, such as hot cocoa, chai tea and cider.[20] The system does not differentiate between the types of beverage being made.[21] The system can also be used without a pod to simply "brew" hot water. Overall, Mr. Godfrey described the goods as versatile machines.

[36] Consumers can purchase Keurig appliances and K-Cup pods directly from Keurig through Keurig's website or from other retailers. K-Cup pods manufactured and approved for sale by Keurig are marked with the Keurig logo; Mr. Godfrey explained that Keurig tests K-Cup pods to ensure they work in the brewing system as envisioned by Keurig.[22] For example, Keurig will ensure that the quantity of coffee or tea inside the K-Cup pod brews the beverage to taste as intended; for powder-based pods, Keurig ensures that the water pressure applied by the brewing system dissolves nearly all the

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14 *Toolway Industries v. President of the Canada Border Services Agency* (22 January 2020), AP-2018-056 (CITT) at para. 35; *Canac Marquis Grenier Ltée v. President of the Canada Border Services Agency* (22 February 2017), AP-2016-005 (CITT) at paras. 27-28.

15 *Transcript* at 18.

16 *Ibid.* at 9.

17 *Ibid.* at 9.

18 *Ibid.* at 12-13.

19 *Ibid.* at 13.

20 *Ibid.* at 13.

21 *Ibid.* at 13.

22 *Ibid.* at 21-22.

powder before the beverage pours into the cup.[23] On its website, Keurig also sells reusable pods as well as bags of ground coffee from different brands.[24]

[37] Mr. Godfrey also explained that the K40/45 Elite system, which includes the goods in issue, was rebranded in name only into the K50/55 Classic Series.[25] Mr. Godfrey's testimony was supported by excerpts of Keurig's website, which provides that "[t]he K40/45 Elite coffee maker was rebranded in 2015 to be name [*sic*] the K50/K55/K-Classic™."[26] Mr. Godfrey testified that the products did not undergo any physical changes as a result of the rebranding.[27] He confirmed that the K50 model has the exact same functionality and features as the K40 model.[28]

[38] In addition, Mr. Godfrey set out Keurig's corporate history. Keurig was founded in the mid-nineties based on the K-Cup pod and delivery system. In 2006, it was acquired by Green Mountain Coffee Roasters Inc. From 2014 to 2018, the company operated as Keurig Green Mountain Inc. Since 2018, it has been known as Keurig Dr Pepper.[29]

[39] Mr. Godfrey provided that Keurig was a well-known leader in the coffee and single-serve beverage industry, including from 2014 to 2018.[30] Mr. Godfrey also agreed that Keurig has, and has always had, more flavours of coffee-based K-Cup pods than any other types of beverages.[31] As a result, the sale of coffee drove Keurig's business more than the sale of any other products; for example, in 2014 the sale of coffee K-Cup pods accounted for most of Keurig's $4.7 billion of revenue.[32]

[40] Mr. Godfrey also confirmed that Keurig referred to the goods in issue as coffee makers in some corporate communications and marketing material.[33] In response to a question from the Tribunal, he also confirmed that Keurig's business model is placing Keurig appliances in households to generate sales of K-Cup pods, and its advertising and marketing are designed to further this model.[34] Mr. Godfrey also stated that while the goods in issue are not limited to brewing coffee, Keurig's marketing for the goods, and indeed their primary use by consumers, is by far for brewing coffee.[35]

[41] Based on Mr. Godfrey's testimony, the Tribunal makes several findings of facts.

[42] First, the K50 model is identical to the K40 system in issue, which has since been discontinued. Accordingly, the marketing and distribution of the K50 systems are relevant to the tariff classification of the goods in issue.

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23 *Ibid.* at 54-55.
24 Exhibit AP-2019-009-12 at 170-188.
25 *Transcript* at 32-35.
26 Exhibit AP-2019-009-12 at 135.
27 *Transcript* at 34.
28 *Ibid.* at 35.
29 *Ibid.* at 20-21.
30 *Ibid.* at 21.
31 Mr. Godfrey estimated that the typical ratio of coffee-based products to other products was 100 to 20. See *Transcript* at 23-24.
32 *Transcript* at 25-26.
33 *Ibid.* at 32.
34 *Ibid.* at 58.
35 *Ibid.* at 58.

[43] Second, Keurig has been involved in the coffee business at all times in its corporate history, either as a company or through its affiliates. The Tribunal finds that coffee is a valuable and integral part of Keurig's business.

[44] Finally, the goods in issue and their successors, as well as other Keurig brewing appliances, are components of a brewing system based on an integrated business model. Consumers purchase Keurig machines, which lead to sales of K-Cup pods, from which Keurig derives significant income. The Tribunal also finds that the vast majority of K-Cup pods contain or are based on coffee. The coffee is roasted and supplied by Keurig or its affiliates and also by competing brands.

[45] The Tribunal will now turn to the tariff provisions at issue.

## Tariff classification

[46] As noted above, the parties agreed that the goods in issue are properly classified under heading No. 85.16, specifically at the one-dash level as "electro-thermic appliances of a kind used for domestic purposes".

[47] The parties also agreed that, as subheading No. 8516.79 is a residual subheading, the Tribunal's analysis must begin by considering whether the goods in issue are properly classified as "coffee or tea makers" under subheading No. 8516.71.[36]

Subheading No. 8516.71

[48] At the outset, the Tribunal must first determine whether the use of the word "or" in the terms of subheading No. 8516.71, i.e. "coffee or tea maker", is conjunctive or disjunctive.

[49] The *Customs Tariff* does not define "coffee or tea maker", and there is no Tribunal jurisprudence on this phrase. Without such guidance, the Tribunal's practice is to adopt the approach to statutory interpretation endorsed by the Supreme Court of Canada, which is the modern contextual approach, pursuant to which the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[37]

[50] Subheading No. 8516.71 is broken down into two tariff items—"coffee makers" of tariff item No. 8516.71.10 and "tea makers" of tariff item No. 8516.71.20. In the Tribunal's view, this breakdown indicates that the word "or" in the terms of the subheading is used disjunctively. Accordingly, the Tribunal finds that goods may be classified in subheading No. 8516.71 if they are "coffee makers" or "tea makers".

[51] In this case, the evidence certainly demonstrates that the goods in issue *can* brew tea, but the Tribunal is satisfied that they are not tea makers. In the Tribunal's view, there is no evidence on the record that would support such a finding. The Tribunal will therefore consider whether the goods in issue are coffee makers that are classified in subheading No. 8516.71.

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36 *PartyLite Gifts Ltd. v. The Commissioner of the Canada Customs and Revenue Agency* (16 February 2004), AP-2003-008 (CITT) [*PartyLite*]; *Cavavin (2000) Inc. v. President of the Canada Border Services Agency* (4 October 2019), AP-2017-021 (CITT) at para. 47.

37 *Medical Mart Supplies Limited v. President of the Canada Border Services Agency* (1 May 2017), AP-2016-013 and AP-2016-028 (CITT) at para. 39.

[52] The term "coffee maker" is not defined in the nomenclature, though the explanatory notes to heading No. 85.16 provide that the heading covers "coffee and tea makers (including percolators)". The Tribunal also notes that in the French version of subheading No. 8516.71, "*appareils pour la préparation du café*" is equivalent to "coffee maker".

[53] In the absence of representations by the parties on the matter, the Tribunal consulted the following dictionary definitions of "coffee maker":[38]

> Merriam-Webster Dictionary: a utensil or appliance in which coffee is brewed;
>
> Cambridge English Dictionary: a machine that makes coffee;
>
> Oxford Advanced Learner's Dictionary: a small machine for making cups of coffee; and
>
> Collins English Dictionary: 1. a domestic appliance that makes coffee (British English); 2. a utensil, as an electrical appliance, for brewing coffee (American English).

[54] The Tribunal notes that all of the dictionary definitions refer to "making coffee" or "brewing coffee".

[55] The Tribunal also considered its previous decision in *Philips Saeco*, which concerned espresso machines.[39] The espresso machines in issue were described as a brewing system that could make a variety of beverages, including tea.[40] The Tribunal found that the goods make coffee, and therefore "the Tribunal is satisfied they fall within the meaning of 'coffee makers' in Note (E)(3) of the explanatory notes to heading No. 85.16 and are classified *as such* in heading No. 85.16 . . . pursuant to Rule 1 of the *General Rules*."[41] The Tribunal went on to find that, "[i]n light of its finding that the goods in issue are 'coffee makers', the Tribunal concludes that they are properly classified in subheading No. 8516.71 as coffee or tea makers and under tariff item No. 85.16.71.10 as coffee makers, in accordance with Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*."[42]

[56] The Tribunal's decision in *Philips Saeco* provides useful guidance in three ways: the Tribunal noted, in reference to the explanatory notes to heading No. 85.16, that percolation could be a more correct term for brewing, such that "percolators could be another form of brewers or coffee makers";[43] goods described as brewing systems can be classified as coffee makers; and they are not precluded from classification as coffee makers because they are capable of brewing beverages other than coffee. In the present case, there were no arguments or evidence that would lead the Tribunal to depart from this reasoning.

[57] The Tribunal also recognizes that the Harmonized System cannot take into consideration each and every innovative product that comes onto the market, such as in the present appeal. Rather, the tariff classification of new products is facilitated by the *General Rules*.

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38 It is recognized that a court or quasi-judicial tribunal may take judicial notice of dictionary definitions. See *R. v. Krymowski*, 2005 SCC 7 at paras. 22-24; *Envirodrive Inc. v. 836442 Alberta Ltd*., 2005 ABQB 446 at para. 53.

39 *Philips Electronics Ltd. and Les Distributions Saeco Canada Ltée v. President of the Canada Border Services Agency* (24 April 2014), AP-2013-019 and AP-2013-020 (CITT) [*Philips Saeco*].

40 *Philips Saeco* at paras. 49 and 56.

41 *Philips Saeco* at para. 59.

42 *Philips Saeco* at para. 65.

43 *Philips Saeco* at para. 57.

[58] In order to assist in the classification of goods pursuant to Rule 1, it is well established that the Tribunal may turn to certain factors. In *Regal Confections*, the Tribunal held that the appearance, design, best use, marketing and distribution of a good are individual factors that may be useful to consider, from time to time, in classifying goods. The Tribunal noted that these factors are not tests nor is any one factor decisive, but that the importance of each will vary according to the product at issue.[44] In *PartyLite*, the Tribunal further clarified that its reasoning in *Regal Confections* should be interpreted to mean that such tests are not determinative, only *indicative* of the proper classification.

[59] With this guidance in hand, the Tribunal now turns to Keurig's case.

[60] Keurig argued that the goods in issue should be classified according to their design and intent. In doing so, Keurig relied on the Tribunal's decision in *Union Tractor*.[45] The Tribunal notes that *Union Tractor* considered the application of a statutory provision that referred to the "repair and replacement parts *designed for* the equipment referred to in paragraphs (a) and (b)" [emphasis added]. Subheading No. 8516.71 does not contain any such requirement, and as a result, the "deliberate intention in the mind of the manufacturer of the system (or goods) as to the nature of its ultimate use or ultimate function" is not central to the determination of this case.[46]

[61] In other words, the Tribunal finds that it is not sufficient to merely consider that the goods in issue have been designed as brewing systems that use K-Cup pods. Rather, the Tribunal finds that the beverage being brewed and the contents of the K-Cup pods are central to the classification exercise. Marketing and distribution of a product are also important factors that can assist classification; they can provide context to the design, intent and best use of goods.

[62] The goods in issue are innovative products focused on the use of K-Cup pods, which are inserted into the machine in order to produce a beverage. K-Cup pods are tested and approved by Keurig for sale.[47] In particular, K-Cup pods must work with the specific amount of water pressure used by Keurig's brewing system.[48] Keurig also produces K-Cup pods and derives income from the sale of these products.[49]

[63] It is not disputed that K-Cup pods can be used to brew beverages other than coffee. However, the evidence is also clear that the significant majority of K-Cup pods sold on the market, between 80 and 90 percent, contain coffee and are used to produce coffee.[50] The evidence also demonstrates that Keurig's business model is focused on placing machines in households in order to drive sales of K-Cup pods.

[64] The CBSA submitted documentary evidence regarding the marketing and distribution of Keurig's brewing systems and K-Cup pods. Keurig's website pages and websites of major distributors all describe the Keurig machines as coffee makers, including the models that Mr. Godfrey identified as being identical to the goods in issue, which have since been

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44 *Regal Confections Inc. v. Deputy Minister of National Revenue* (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal Confections*] at 8.

45 *Union Tractor Ltd. v. The Minister of National Revenue* (8 September 1993), AP-92-213 (CITT) [*Union Tractor*] at 2.

46 *Union Tractor* at 3.

47 *Transcript* at 21-22.

48 *Ibid.* at 28.

49 *Ibid.* at 24-25.

50 *Ibid.* at 56-58.

discontinued.[51]. Keurig's website also sells varieties of K-Cup pods, the vast majority of which contain coffee and would be used to brew a single serving of coffee. Furthermore, the Instagram pages provided as documentary evidence leave no doubt that Keurig's marketing efforts are focused on coffee.[52] While it is clear that the machines can brew beverages other than coffee, the marketing overwhelmingly shows that the best use for the goods being advertised, including models identical to the goods in issue, is as a coffee machine. The Tribunal finds accordingly. The evidence is uncontroverted that the Keurig machines are sold and marketed as coffee makers.

[65] While marketing is not determinative of the appropriate tariff classification, the Tribunal finds that it plays an important role in this case, particularly given Keurig's integrated business model. Keurig sells brewing systems *in order to* drive sales of K-Cup pods, the vast majority of which are coffee-based. Keurig's marketing materials are heavily focused on coffee and the brewing systems are marketed and sold as coffee makers.

[66] The Tribunal also notes that the packaging and merchandising of K-Cup pods is consistent with its marketing efforts. In this regard, the Tribunal also examined two boxes of K-Cup pods submitted as physical exhibits. One box of pods contained tea, while the other contained hot chocolate. Both boxes are marked with the following: "For use in all Keurig K-Cup coffee makers".[53]

[67] Though it is not determinative, the Tribunal also considers that the broader details of Keurig's business provides useful context. At the time of importation, Keurig was, and still is, a key player in the coffee market, and Keurig entered the Canadian market through the acquisition of Van Houtte, a well-known Canadian coffee company.[54]

[68] Keurig argued that the goods in issue are analogous to kettles, which are classified under subheading No. 8516.79.[55] Noting that the goods in issue and kettles both heat water, Keurig argued that the ultimate use of the hot water is not a consideration in the classification of kettles. The Tribunal is not persuaded by this argument. The evidence is clear that Keurig's brewing systems do more than simply heat water; they are designed to bring the water to a certain temperature and to infuse the water at a precise pressure through the K-Cup pods to produce a beverage. While the brewing systems can produce hot water if used without a K-Cup pod, there is no evidence on the record to indicate that this represents the intended or best use of the product. Rather, the evidence demonstrates that Keurig's K-Cup brewing systems are designed and intended to be used with K-Cup pods to brew coffee.

[69] The Tribunal finds that the totality of the evidence shows that the goods in issue are appliances that brew or make coffee, and therefore are "coffee makers" within the meaning of the *Customs Tariff*.

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51 *Ibid.* at 34.

52 Exhibit AP-2019-009-12 at 304-337.

53 See *Transcript* at 49-52.

54 A court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. See *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 (CanLII) at para. 20. In this instance, the Tribunal takes judicial notice that Van Houtte is a well-known Canadian coffee brand.

55 *Transcript* at 106-107.

[70] The Tribunal also concludes, on the basis of its reasoning in *Philips Saeco*, that the goods in issue are not precluded from classification as "coffee makers" in subheading No. 8516.71 because they are capable of brewing beverages other than coffee. In the present case, the Tribunal has not been presented with a convincing reason to depart from its reasoning in *Philips Saeco*. The occasional use of a coffee machine to brew a beverage other than coffee or to produce hot water does not change the purpose and the nature of the goods in issue as coffee makers.

### Conclusion

[71] Based on the foregoing, the Tribunal agrees with the CBSA that the goods in issue are "coffee makers" properly classified in subheading No. 8516.71 and in tariff item No. 8516.71.10.

## DECISION

[72] The appeal is dismissed.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member

## APPENDIX A

[1] The relevant explanatory notes to Section XVI provide as follows:

| | |
|---|---|
| In general, multi-function machines are classified according to the principal function of the machine. | En règle générale, une machine conçue pour assurer plusieurs fonctions différentes est classée suivant la fonction principale qui la caractérise. |
| Multi-function machines are, for example, machine-tools for working metal using interchangeable tools, which enable them to carry out different machining operations (e.g., milling, boring, lapping). | Les machines à fonctions multiples sont, par exemple, les machines-outils pour le travail des métaux utilisant des outils interchangeables leur permettant d'assurer diverses opérations d'usinage (fraisage, alésage, rodage, par exemple). |
| Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c); such is the case, for example, in respect of multi-function machines potentially classifiable in several of the headings 84.25 to 84.30, in several of the headings 84.58 to 84.63 or in several of the headings 84.70 to 84.72. | Dans le cas où il n'est pas possible de déterminer la fonction principale et en l'absence de dispositions contraires visées dans le libellé de la Note 3 de la Section XVI, il y a lieu de faire application de la Règle générale interprétative 3 c); il en est ainsi, par exemple des machines à fonctions multiples susceptibles de relever indifféremment de plusieurs des n$^{os}$ 84.25 à 84.30, de plusieurs des n$^{os}$ 84.58 à 84-63 ou de plusieurs des n$^{os}$ 84.70 à 84.72. |
| . . . | [...] |
| Note 3 to Section XVI **need not be invoked** when the composite machine is covered as such by a particular heading, for example, some types of air conditioning machines (heading 84.15). | Le recours à la Note 3 de la Section XVI **n'est pas nécessaire** lorsque la combinaison de machines est couverte comme telle par une position distincte, ce qui est le cas, par exemple, de certains groupes pour le conditionnement de l'air (n$^{o}$ 84.15). |

[2] The explanatory notes to heading 85.16 read as follows:

| | |
|---|---|
| **(E) OTHER ELECTRO THERMIC APPLIANCES OF A KIND USED FOR DOMESTIC PURPOSES** | **E. AUTRES APPAREILS ELECTROTHERMIQUES POUR USAGES DOMESTIQUES** |
| This group includes all electro thermic machines and appliances provided they are normally used in the household. Certain of these have been referred to in previous parts of this Explanatory Note (e.g., electric fires, geysers, hair dryers, smoothing irons, etc.). Others include: | On entend par là les appareils normalement utilisés dans les ménages. Certains d'entre eux (chauffe-eau, appareils pour le chauffage des locaux, sèche-cheveux et fers à repasser, par exemple) ont été examinés ci-dessus avec les appareils industriels correspondants. Parmi les autres, on peut citer : |
| . . . | [...] |
| (3) Coffee or tea makers (including percolators). | 3) Les appareils pour la préparation du café ou du thé (cafetières, y compris les percolateurs, par exemple). |