Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-044

AMD Medicom Inc.

v.

President of the Canada Border Services Agency

Decision issued
Friday, February 12, 2021

Reasons issued
Monday, February 22,2021

Canada

TABLE OF CONTENTS

DECISION i

STATEMENT OF REASONS 1
- OVERVIEW 1
- GOODS IN ISSUE 1
- PROCEDURAL HISTORY 1
- EXPERT WITNESS QUALIFICATION 2
- LEGAL FRAMEWORK 2
- POSITIONS OF THE PARTIES 4
  - AMD 4
  - CBSA 4
- TRIBUNAL'S ANALYSIS 5
  - Tariff item No. 4015.19.10 5
  - Conclusion 9
- DECISION 9

IN THE MATTER OF an appeal heard on October 15, 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 August 17, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

AMD MEDICOM INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 15, 2020
Tribunal Panel:	Cheryl Beckett, Presiding Member
Support Staff:	Heidi Lee, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representative**
AMD Medicom Inc.	Michael R. Smith

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Taylor Andreas

WITNESSES:

Stéphanie Peika
Director, Product Lifecycle Management
AMD Medicom Inc.

Judy McCarten
McCarten Infection Prevention Consulting

Please address all communications to:

The Deputy Registrar
Telephone: 613-993-3595
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

OVERVIEW

[1] This is an appeal filed by AMD Medicom Inc. (AMD), pursuant to subsection 67(1) of the *Customs Act*,[1] of a decision made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the *Act*.

[2] The issue in appeal is whether nitrile medical examination gloves (the goods in issue) are properly classified as other gloves for all purposes of tariff item No. 4015.19.90, as determined by the CBSA, or as protective gloves to be employed with protective suits in a noxious atmosphere of tariff item No. 4015.19.10, as claimed by AMD.[2]

[3] For the reasons that follow, the Tribunal finds that the goods in issue are other gloves for all purposes of tariff item No. 4015.19.90, as determined by the CBSA.

GOODS IN ISSUE

[4] The goods in issue are Kirkland Signature brand single-use nitrile examination gloves, which are manufactured and sold in three sizes. They are ambidextrous, latex-free, powder-free, non-sterile and have textured fingertips.

[5] The goods are Class II medical devices licensed by Health Canada.[3]

PROCEDURAL HISTORY

[6] AMD imported the goods in issue between October 2011 and January 2018.

[7] Between December 2016 and February 2018, AMD filed requests for refunds, pursuant to sections 60 and 74 of the *Act*, on the basis that the goods in issue were classified under tariff item No. 4015.90.10. The CBSA rejected these requests.

[8] On August 17, 2018, the CBSA upheld its decisions and maintained that the goods in issue were classified in tariff item No. 4015.19.90.

---

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

2 The President's decision under appeal concerned two separate goods – Kirkland Signature brand nitrile examination gloves, which are presently in issue, and Vital Touch brand latex sterile surgical/procedure gloves (Exhibit AP-2018-004-01). On December 9, 2019, prior to the filing of either party's brief, AMD requested that the Tribunal separate the appeal into two, i.e. into two sets of submissions and two hearing dates, one for each good (Exhibit AP-2018-044-10). AMD argued that the two gloves raised different questions of fact and law, and therefore separation would allow for a more efficient process. The CBSA opposed the request, arguing that a separation would not create procedural efficiencies and that the Tribunal must dispose of the matter in a single decision in order to retain jurisdiction under section 67 over the President's section 60 decision (Exhibit AP-2018-044-12). Without the aid of the parties' briefs, the Tribunal did not have enough information to consider the matter and reserved its decision until both parties filed their briefs (Exhibit AP-2018-044-13). AMD filed the appellant's brief on January 14, 2020. In its brief, AMD advised that it would not be proceeding with the appeal of the Vital Touch brand gloves (Exhibit AP-2018-044-14 at para. 26; see also email confirmation at Exhibit AP-2018-044-17). Accordingly, the scope of the present appeal was limited to the tariff classification of the Kirkland Signature brand gloves. The CBSA filed the respondent's brief on this basis.

3 Exhibit AP-2018-044-14A at 86-93.

[9] AMD filed the present appeal on November 13, 2018, pursuant to subsection 67(1) of the *Act*.

[10] On January 11, 2019, the appeal was placed in abeyance at the request of the parties. The appeal was continued at the request of AMD on November 6, 2019.[4]

[11] Due to the circumstances surrounding the COVID-19 pandemic, the hearing scheduled in this matter underwent several postponements and other delays.[5]

[12] Ultimately, the hearing was held by videoconference on October 15, 2020.

EXPERT WITNESS QUALIFICATION

[13] During the hearing, AMD called Ms. Judy McCarten to be qualified as an expert witness.

[14] Ms. McCarten is an infection prevention and control professional with a background as an intensive care unit nurse. She has over a decade of experience in infection prevention and control, and over 20 years of experience in healthcare.

[15] As the CBSA did not object, and having considered Ms. McCarten's *curriculum vitae* and experience, the Tribunal did not undertake an oral qualification process during the hearing. The Tribunal accepted Ms. McCarten as an expert in the area of infection prevention and control in healthcare settings, including personal protective equipment (PPE) requirements in hospitals.[6]

[16] Overall, the Tribunal found Ms. McCarten to be a helpful and credible witness.

LEGAL FRAMEWORK

[17] The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,[7] which is designed to conform to the Harmonized Commodity Description and Coding System (the

---

4 On January 11, 2019, the Tribunal granted a request by the CBSA, with the consent of AMD, to hold the present appeal in abeyance pending the outcome of another appeal before the Tribunal. On November 6, 2019, AMD advised the Tribunal that it wished to continue the appeal.

5 On March 16, 2020, AMD, without objection from the CBSA, requested that the in-person hearing scheduled for April 21, 2020, be postponed, as a result of the effects of the COVID-19 pandemic. AMD explained that its proposed witnesses were healthcare workers and public health agency employees who were unlikely to be able to travel to Ottawa by air due to the public health measures in place. The Tribunal granted the request and cancelled the hearing. At around the same time (i.e. mid-March 2020), the Tribunal suspended all in-person hearings due to the circumstances surrounding the COVID-19 pandemic. The Tribunal requested that the parties provide an update by April 30, 2020. On April 30, 2020, the parties requested that the hearing be adjourned until such time that the Tribunal opened for in-person hearings. The Tribunal granted the request. Subsequently, the Tribunal canvassed the parties for their availability, in anticipation of holding in-person hearings, and set down the hearing date for October 15, 2020. In the interim, the Tribunal operationalized its videoconferencing hearing system and suspended all in-person hearings until December 31, 2020. As a result, on July 24, 2020, the Tribunal advised the parties that the hearing scheduled for October 15, 2020, would proceed by way of videoconferencing, but invited the parties to raise their concerns, if any. As the parties did not make any representations in this regard, the hearing was held as scheduled by videoconference.

6 *Transcript of Public Hearing* [*Transcript*] at 53-55. See Ms. McCarten's expert witness report at Exhibit AP-2018-044-33.

7 S.C. 1997, c. 36.

Harmonized System) developed by the World Customs Organization (WCO). 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.

[18] 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*[8] and the *Canadian Rules*[9] set out in the schedule.

[19] 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.

[20] 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*[10] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[11] published by the WCO. While the classification opinions and the explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[12]

[21] 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.[13]

[22] 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.[14] The final step is to determine the proper tariff item.[15]

[23] The relevant provisions of the *Customs Tariff* are as follows:

---

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

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

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

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

12 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 (CanLII) at para. 4.

13 *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 RCS 80 at para. 21.

14 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."

15 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.

Section VII: Plastics and Articles Thereof; Rubber and Articles Thereof	**Section VII : Matières plastiques ou ouvrages en ces matières; Caoutchouc et ouvrages en caoutchouc**
Chapter 40 **RUBBER AND ARTICLES THEREOF**	**Chapitre 40** **CAOUTCHOUC ET OUVRAGES EN CAOUTCHOUC**
40.15 Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber.	**40.15 Vêtements et accessoires du vêtement (y compris les gants, mitaines et moufles) en caoutchouc vulcanisé non durci, pour tous usages.**
-Gloves, mittens and mitts:	**-Gants, mitaines et moufles :**
4015.11.00 - -Surgical	**4015.11.00 - -Pour chirurgie**
4015.19 - -Other	**4015.19 - -Autres**
40.15.19.10 - - -Protective gloves to be employed with protective suits in a noxious atmosphere	40.15.19.10 - - -Gants de protection, devant être utilisés avec scaphandres de protection dans l'air empoisonné
40.15.19.90 - - -Other	40.15.19.90 - - -Autres

[24] There are no relevant legal notes or explanatory notes.

POSITIONS OF THE PARTIES

AMD

[25] AMD submitted that the goods in issue were classified in tariff item No. 4015.19.10 as protective gloves to be employed with protective suits in a noxious atmosphere. AMD argued that this tariff item imposes an intended-use test only and does not require evidence of actual use of the goods. Based on this position, AMD argued that the goods in issue were intended (i.e. manufactured and licensed) to be worn with other PPE in order to protect the wearer from contamination and infection in noxious atmospheres.

CBSA

[26] The CBSA submitted that the goods in issue were classified in tariff item No. 4015.19.90 as other rubber gloves.

[27] While the CBSA agreed that the goods were protective gloves, it submitted that they were not goods "to be employed with protective suits in a noxious atmosphere". In this regard, the CBSA argued that, in order to meet the terms of tariff item No. 4015.19.10, it was insufficient that the goods were *intended* to be used with protective suits in a noxious atmosphere. In the CBSA's view, the

terms of the tariff item require *actual use*. The CBSA submitted that AMD did not meet this threshold.

TRIBUNAL'S ANALYSIS

[28] The issue is at the tariff item level.

[29] The tariff item proposed by the CBSA is residual. It is well established that "goods cannot be *prima facie* classifiable in a residual item unless the Tribunal has satisfied itself that the goods cannot be classified in a more specific item."[16] Accordingly, the Tribunal will first consider if the goods in issue are classified in tariff item No. 4015.19.10. The Tribunal will only consider the application of tariff item No. 4015.19.90 if the goods in issue cannot be classified under tariff item No. 4015.19.10.

Tariff item No. 4015.19.10

[30] The parties agreed, and the Tribunal finds, that in order to be classified in tariff item No. 4015.19.10, goods must be (1) protective gloves (2) to be employed with protective suits in a noxious atmosphere.

[31] In the present appeal, the parties agreed that the goods in issue are protective gloves. The only question is therefore whether the goods are "to be employed with protective suits in a noxious atmosphere".

Meaning of "to be employed"

[32] The parties disagreed on the appropriate test required by the phrase "to be employed".

[33] AMD submitted that "to be employed" refers to an intended-use test. AMD relied on the Tribunal's decision in *AMD Ritmed*, in which the Tribunal considered whether single-use isolation gowns were "protective suits, *to be employed* in a noxious atmosphere" [emphasis added] of tariff item No. 6210.10.10.[17] In finding that the isolation gowns were so classified, the Tribunal in stated the following:

> [A]s the evidence confirms that the goods in issue are *intended for use in* hospitals (i.e. noxious atmospheres), they meet the terms ". . . to be employed in a noxious atmosphere" of tariff item No. 6210.10.10.[18]

[Emphasis added]

[34] For its part, the CBSA submitted that tariff item No. 4015.19.10 includes two specific "for-use" conditions, which, in its view, suggests that goods must meet an actual-use threshold in

---

16 *Danby Products Limited v. President of the Canada Border Services Agency* (16 February 2018), AP-2017-009 (CITT) at para. 35; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (9 October 2019), AP-2018-037 (CITT) at 40; *Ratana International Ltd. v. President of the Canada Border Services Agency* (18 March 2020), AP-2019-006 (CITT) at 19; *Noble Drilling Services (Canada) Corporation v. President of the Canada Border Services Agency* (14 May 2019), AP-2018-004 (CITT) at para. 31.

17 *AMD Ritmed Inc. v. President of the Canada Border Services Agency* (24 September 2015), AP-2014-013 and AP-2014-015 (CITT) [*AMD Ritmed*].

18 *AMD Ritmed* at para. 52.

order to be classified in this tariff item. The CBSA relied on the Tribunal's decision in *Cardinal Health*, in which the Tribunal stated the following:

> [H]ad Parliament intended an end-use condition it could or would have expressed itself explicitly as it did elsewhere in heading No. 40.15, and specifically in tariff item No. 4015.19.10. . . . Tariff item No. 4015.19.10 contains, very explicitly, and in no uncertain terms, the double *for-use* conditions of "to be employed [i.e. *for use*] [1] with protective suits [2] in a noxious atmosphere".[19]
>
> [Emphasis added]

[35] The CBSA argued that by using the term "for use", the Tribunal endorsed an actual-use threshold.[20]

[36] The phrase "to be employed" is not defined in the *Customs Tariff*. The modern rule of statutory interpretation requires that "the words of an Act . . . 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."[21]

[37] The Tribunal notes that the "ordinary meaning" of a provision refers "to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context."[22] It has also been described as the "natural meaning which appears when the provision is simply read through".[23]

[38] In considering the ordinary meaning of this phrase, the Tribunal considered relevant dictionary definitions of the term "employ":[24]

> Merriam-Webster Dictionary: "to make use of (someone or something inactive)";[25]

---

19 *Cardinal Health Canada Inc. v. President of the Canada Border Services Agency* (8 July 2019), AP-2018-038 (CITT) [*Cardinal Health*] at para. 36.

20 The CBSA also submitted that the term "for use in" is defined in subsection 2(1) of the *Customs Tariff* and relied on the Federal Court of Appeal's decision in *Entrelec Inc. v. Canada (Minister of National Revenue)*, 2000 CanLII 16268 (FCA), in which the Court held that the statutory definition requires "actual as opposed to an intended connection between the imported components and the goods in which they are used." The Tribunal does not find it necessary to resort to the statutory definition of "for use in" or the guidance provided by the Federal Court of Appeal in *Entrelec*, as suggested by the CBSA. Subsection 2(1) of the *Customs Tariff* explicitly limits the definition of "for use in" to apply "wherever it appears in a tariff item, in respect of goods classified in the tariff item." As this phrase is not found in the terms of tariff item No. 4015.19.10, the Tribunal was not persuaded that its definition, or judicial clarification of the definition, should be relied on to determine the meaning of the phrase "to be employed".

21 *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 at para. 21.

22 R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. at 30.

23 *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 SCR 724, 1993 CanLII 31 (SCC) at 735 (Gonthier J.); see also *Pharmascience Inc. v. Binet*, [2006] 2 SCR 513, 2006 SCC 48 (CanLII) at para. 30.

24 Courts and tribunals may take judicial notice of relevant definitions from dictionaries which may be published in electronic format and be accessible online. See *R. v. Krymowski*, 2005 SCC 7 at paras. 22-24; *Envirodrive Inc. v. 836442 Alberta Ltd.*, 2005 ABQB 446 at para. 53.

25 Online: <https://www.merriam-webster.com/dictionary/employ>.

Cambridge Dictionary: "to use something" or "to use something for a particular purpose".[26]

[39] In the Tribunal's view, the dictionary definitions establish that "to employ" means "to use". This conclusion is also supported by the French version of the tariff item, which covers "gants de protection, *devant être utilisés* avec scaphandres de protection dans l'air empoisonné" [emphasis added]. The French version of the tariff uses the term "utiliser", which translates in English as "to use" and is, according to the Larousse French dictionary, synonymous in French with the French term "employer" (which is, in English, "to employ").[27] Accordingly, the Tribunal is satisfied that "to be employed" means "to be used".

[40] When tariff item No. 4015.19.10 is read in its grammatical and ordinary sense, as discussed above, the Tribunal finds that it conveys a meaning of actual use, namely, that protective gloves that *will be* used with protective suits in a noxious atmosphere are classified in that tariff item. The Tribunal therefore finds it appropriate to adopt the reasoning in *Cardinal Health*, i.e. tariff item No. 4015.19.10 sets out an end-use condition. As a result, the Tribunal finds that the tariff item establishes a threshold that is similar to an actual-use test, and that some evidence of actual use with protective suits in a noxious atmosphere is required for classification in tariff item No. 4015.19.10. At a minimum, the Tribunal considers classification in this tariff item to require some evidence establishing the end users of the goods and how the goods are used in practice.

[41] The Tribunal does not consider this finding to be inconsistent with *AMD Ritmed*. *AMD Ritmed* did not contemplate whether the goods under appeal could – or would – be used in environments other than noxious atmospheres. Though the parties in that appeal disputed the meaning of "noxious atmosphere", there was no dispute as to the meaning of the phrase "to be employed in". The goods were expressly identified as protective suits intentionally made for and marketed to hospitals (i.e. noxious atmospheres).[28]

[42] As a final point, the Tribunal notes that AMD urged the Tribunal to take guidance from the purposeful intent requirements of tariff item No. 9979.00.00, which covers goods "specifically designed to alleviate the specific effects of a disability". AMD relied on the Tribunal's decision in *Wolseley*, in which the Tribunal held that the fact that a good can be used universally (i.e. universal design) does not preclude a finding that the same good was "specifically designed" to alleviate the effects of a disability.[29] In response, the CBSA submitted, and the Tribunal agrees, that the terms of tariff item No. 9979.00.00 are not relevant to the tariff item in issue.

[43] Having found that classification in tariff item No. 4015.19.10 requires some evidence of actual use with protective suits in a noxious atmosphere, the Tribunal will now consider whether AMD has met this threshold.

---

26 Online: <https://dictionary.cambridge.org/dictionary/english/employ>.
27 Online: <https://www.larousse.fr/dictionnaires/francais/utiliser/80815>.
28 *AMD Ritmed* at para. 49.
29 *Wolseley Canada Inc. v. President of the Canada Border Services Agency* (11 December 2013), AP-2012-066 (CITT) [*Wolseley*].

The goods are not to be employed with protective suits in a noxious atmosphere

[44] AMD submitted that the goods in issue were suitable to be used as PPE with protective suits in a noxious atmosphere. The CBSA did not dispute that the goods were of a quality that could be used as PPE, but argued that there was no evidence to establish that the goods would actually be used in accordance with the terms of the tariff item.

[45] Though neither "protective suit" nor "noxious atmosphere" is defined in the *Customs Tariff*, the Tribunal considered the meaning of both terms as set out in *AMD Ritmed.* As noted above, the Tribunal in that case found that single-use isolation gowns, designed for the protection of patients and healthcare providers and for use in hospital settings, were "protective suits to be employed in a noxious atmosphere". In doing so, the Tribunal found that hospitals were noxious atmospheres as infections that are potentially harmful to life, injurious to health or fatal can be transmitted by air.[30]

[46] In the present appeal, the Tribunal was also aided by Ms. McCarten's uncontroverted expert evidence on the use of PPE in healthcare settings, including hospitals.

[47] Ms. McCarten described PPE as items worn to provide a barrier to help prevent potential exposure to infectious disease.[31] She explained that a full complement of PPE would include gloves, gown, isolation gown, surgical or procedure mask, an N95 respirator, a face shield, eye goggles and, if necessary, booties and a head covering.[32] She also stated that protective suits in hospitals should always be used with gloves.[33]

[48] In addition, Ms. McCarten testified that, in respect of protective gloves, medical examination gloves that are licensed Class II medical devices (such as the goods in issue) would be the minimum level of protection used in healthcare settings.[34] In her opinion, the goods in issue were therefore properly described as "good for use in healthcare" and would be appropriate for use as PPE in a healthcare setting for infection control and prevention.[35]

[49] AMD also submitted a technical data sheet, for use by AMD's clients, which outlined the specifications of the goods in issue.[36] The data sheet provided that the goods "are intended to prevent transmission of a wide variety of diseases to both patients and healthcare personnel. Specifically, gloves are intended to act as a barrier between the healthcare provider and patients to prevent contamination between patient and caregiver."[37]

[50] In view of this evidence, the Tribunal is satisfied that the goods in issue *can* be used with protective suits in a noxious atmosphere.

[51] However, as determined above, the appellant must also lead some evidence that the goods under appeal will, on balance, be used with protective suits in a noxious atmosphere. In this case, the Tribunal is not persuaded that this threshold was met.

---

30 *AMD Ritmed* at para. 52.
31 Exhibit AP-2018-044-33 at 10 and 20.
32 *Transcript* at 62.
33 *Transcript* at 69-70.
34 *Transcript* at 69, 73-74, 80.
35 Exhibit AP-2018-044-33 at 16; *Transcript* at 75-76.
36 Exhibit AP-2018-044-36 at 20; *Transcript* at 24-25.
37 Exhibit AP-2018-044-36 at 20.

[52] The only evidence led by AMD in this regard was a contract of sale to Costco Wholesale Canada Ltd. for the supply of white nitrile medical examination gloves, i.e. the goods in issue.[38] The goods were marketed by Costco as "good for use in healthcare, dental, foodservice, sanitation, gardening, automobile and home".[39]

[53] The Tribunal notes that Ms. Peika testified that the gloves sold to Costco are virtually identical to the medical examination gloves sold by AMD to hospital buying groups. She stated that they are made at the same factory under the same standards and are all medical examination gloves covered by the same Health Canada licence.[40]

[54] While the Tribunal accepts that the same goods in issue could be sold to Costco or to hospitals interchangeably, in this appeal, there is only evidence of sales to Costco. Costco is a mass retailer that sells to members, which may be individuals or businesses. There is no evidence to demonstrate that Costco is also a regular supplier of healthcare professionals or other customers that would use the goods with protective suits in a noxious atmosphere. The mere fact that a healthcare professional or business *could* purchase the goods in issue from Costco, as could any other Costco member, is insufficient to meet the requirements of the tariff item.

[55] Moreover, Ms. Peika confirmed in cross-examination that Health Canada's licensing is solely in respect of the intended use of a product.[41] Ms. Peika also confirmed that Health Canada's auditing process to monitor continued compliance does not require AMD to provide information regarding the actual use of the goods.[42]

[56] Altogether, there is no evidence that the Tribunal could rely on to reasonably conclude that the goods in issue, on balance, will be employed with protective suits in a noxious atmosphere.

Conclusion

[57] For the foregoing reasons, the Tribunal finds that the goods in issue are not classified in tariff item No. 4015.19.10.

[58] Accordingly, the Tribunal finds that the goods in issue are properly classified in residual tariff item No. 4015.19.90.

DECISION

[59] The appeal is dismissed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

---

38 Exhibit AP-2018-044-36 at 2-8; *Transcript* at 19-22.

39 Exhibit AP-2018-044-20 at 25. Ms. Peika confirmed that the contract with Costco did not impose any sales or marketing requirements on Costco; Costco was not obligated to sell the gloves alongside any other good (for example, protective suits). The contract also provided that Costco supplied the artwork for the packaging of the goods (see *Transcript* at 19-20). Altogether, AMD submitted that it was not involved in any way in the sales and marketing of the goods in issue beyond their sale to Costco (see *Transcript* at 43-45).

40 *Transcript* at 34.

41 *Transcript* at 39-41.

42 *Transcript* at 41-42.