



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2020-003

Withings Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, November 8, 2021*

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IN THE MATTER OF an appeal heard on February 23, 2021, 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 February 20, 2020, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

WITHINGS INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 23, 2021
Tribunal Panel: Randolph W. Heggart, Presiding Member
Tribunal Secretariat Staff: Heidi Lee, Counsel
Stephanie Blondeau, Registry Officer

PARTICIPANTS:**Appellant**

Withings Inc.

Counsel/RepresentativesMichael Sherbo
Andrew Simkins**Respondent**

President of the Canada Border Services Agency

Counsel/Representative

Yusuf Khan

WITNESSES:Antoine Jousain
Product Manager
Withings Inc.Dr. Bruno Rocha
Professor
Algonquin College – Aerospace Engineering

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STATEMENT OF REASONS

OVERVIEW

[1] This is an appeal filed by Withings Inc. (Withings) pursuant to subsection 67(1) of the *Customs Act*¹ of a decision made on February 20, 2020, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4) of the *Act*.

[2] The question in this appeal is whether the goods in issue are properly classified under tariff item No. 8423.10.00 as “[p]ersonal weighing machines, including baby scales; household scales”, as determined by the CBSA, or under tariff item No. 9027.80.00, as “[o]ther instruments and apparatus”, as submitted by Withings.

[3] For the reasons that follow, the Tribunal finds that the goods in issue are classified in tariff item No. 8423.10.00, as determined by the CBSA.

GOODS IN ISSUE

[4] The goods in issue are the Withings Body Cardio Wi-Fi Smart Scale and Body Analyzer.

[5] The goods in issue measure weight, body fat, water percentage, muscle mass, bone mass and other body composition information. The device can recognize up to eight users and stores personal weight histories.

[6] The device is composed of weight sensors and a series of electrodes under a glass plate. The electrodes apply a small electrical current through the user to measure various body composition information through bioelectrical impedance analysis. The device displays data on an LED screen.²

PROCEDURAL HISTORY

[7] On April 25, 2019, pursuant to subsection 43.1(1) of the *Act*, Withings filed an application with the CBSA for an advance ruling on the tariff classification of the goods in issue.

[8] On August 1, 2019, the CBSA issued an advance ruling classifying the goods under tariff item No. 8423.10.00 pursuant to paragraph 43.1(1)(c) of the *Act*.

[9] On October 15, 2019, Withings requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*.

[10] On February 20, 2020, the CBSA affirmed its decision of August 1, 2019, pursuant to paragraph 60(4)(b) of the *Act*. This is the decision under appeal.

[11] On May 13, 2020, Withings filed the present appeal with the Tribunal.

[12] On January 20, 2021, Withings requested that the Tribunal issue a production order requiring the CBSA to provide additional submissions relating to part of its tariff classification arguments.³

¹ R.S.C., 1985, c. 1 (2nd Supp).

² Exhibit AP-2020-003-07 at 28, 78-79; Exhibit AP-2020-003-26 at 5; *Transcript of Public Hearing* at 9.

³ Exhibit AP-2020-003-18.

The CBSA objected to the request, and Withings submitted further arguments in reply.⁴ On January 28, 2021, the Tribunal declined to grant the production order, the reasons for which are set out below.

[13] The appeal was heard by videoconference on February 23, 2021.⁵

[14] At the hearing, Withings called Mr. Antoine Jousain, Product Manager for Withings Inc., as a witness.

[15] The CBSA called Dr. Bruno Rocha and sought to have him qualified as an expert witness. Based on Dr. Rocha's education and experience, the Tribunal qualified Dr. Rocha as an expert in mechanical engineering and mechanical systems.⁶

PRELIMINARY MATTER

[16] The Tribunal will first set out its reasons for rejecting Withings' request for a production order.

[17] In its Respondent's Brief, the CBSA argued that the tariff classification of the goods in issue is subject to Note 3 to Section XVI, which provides:

3. Unless 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.

[18] Withings submitted that the CBSA did not sufficiently explain the application or relevance of Note 3 to the goods in issue. Withings therefore requested that the Tribunal order the CBSA to provide 1) the separate functions performed by the goods in issue; and 2) the heading level classification of each separate function, on the basis that this information was necessary to respond to the CBSA's position. In the alternative, Withings requested that the CBSA be prohibited from arguing that the goods in issue are classified in accordance with Note 3.

[19] The CBSA submitted that there was no legal basis for this request and that the request was contrary to the *General Rules for the Interpretation of the Harmonized System*.⁷ The CBSA also argued that Note 3 does not require the separate functions or their respective tariff classifications to be established, only the identification of the principal function.

⁴ Exhibit AP-2020-003-23; Exhibit AP-2020-003-25.

⁵ The appeal was initially scheduled to be heard on November 17, 2020. On September 29, 2020, with the consent of the CBSA, Withings requested leave to file a supplemental brief in order to respond to arguments raised by the CBSA in its respondent's brief (see Exhibit AP-2020-003-09). The Tribunal granted the request and the hearing was postponed until February 23, 2021.

⁶ Exhibit AP-2020-003-26 at 4, 21-35; *Transcript of Public Hearing* at 28-35.

⁷ S.C. 1997, c. 36, schedule [*General Rules*].

[20] In reply, Withings relied on the following explanatory note to Section XVI regarding Note 3:

Composite machines consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing **separate** functions which are generally complementary and are described in different headings of Section XVI, are also classified according to the principal function of the composite machine.

[21] Based on this explanatory note, Withings argued that machines subject to Note 3 “must perform separate functions (i.e. more than one function) which are classifiable in different headings of Section XVI”.⁸ In its view, the CBSA did not adequately explain how the goods in issue met these criteria for composite machines.

[22] Fundamentally, Withings’ request was tantamount to asking the Tribunal to order the CBSA to detail its argument, which is something that the Tribunal does not do. There was no relevant issue of disclosure of evidence in Withings’ request.

[23] Under subsection 152(3) of the *Act*, the appellant bears the burden of showing that the CBSA incorrectly classified the goods.⁹ In the Tribunal’s view, as explained below, Withings failed to tender sufficient evidence to demonstrate that the good in issue are anything other than multifunctional machines, whose principal function is to measure weight.

LEGAL FRAMEWORK

[24] The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).¹⁰ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

[25] 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* and the *Canadian Rules*¹¹ set out in the schedule.

[26] 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.

⁸ Exhibit AP-2020-003-25 at para. 12.

⁹ Subsection 152(3) of the *Act* provides as follows: “In any proceeding under this Act, the burden of proof in any question relating to . . . (c) the payment of duties of any goods . . . lies on the person, other than Her Majesty, who is a party to the proceeding.” It is well established that as the liability for duties on imported goods depends on their tariff classification, tariff classification is a question “relating” to the payment of duties on the goods under paragraph 152(3)(c). See: *Délices de la Forêt Inc. v. President of the Canada Border Services Agency* (26 May 2016) AP-2015-018 (CIIT) at para. 25 and footnote 13; *Lone Pine Supply Ltd. v. President of the Canada Border Services Agency* (22 August 2018) AP-2017-002 (CIIT) at para. 24; *Digital Canoe Inc. v. President of the Canada Border Services Agency* (22 August 2016) AP-2015-026 (CIIT) at para. 15 and footnote 10.

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

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

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

[28] 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”.¹⁵

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

[30] 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**

...

Chapter 84

**NUCLEAR REACTORS, BOILERS,
MACHINERY AND MECHANICAL**

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**

...

Chapitre 84

**RÉACTEURS NUCLÉAIRES,
CHAUDIÈRES, MACHINES, APPAREILS
ET ENGIN MÉCANIQUES; PARTIES DE**

¹² World Customs Organization, 4th ed., Brussels, 2017.

¹³ World Customs Organization, 6th ed., Brussels, 2017.

¹⁴ 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.

¹⁵ *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

¹⁶ Rule 6 of the *General Rules* provides that “the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to [Rules 1 through 5] . . .” and that “the relative Section and Chapter Notes also apply, unless the context otherwise requires”.

¹⁷ Rule 1 of the *Canadian Rules* provides that “the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [General Rules] . . .” and that “the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires”. Classification opinions and explanatory notes do not apply to classification at the tariff item level.

APPLIANCES, PARTS THEREOF

...

84.23 Weighing machinery (excluding balances of a sensitivity of 5 cg or better), including weight operated counting or checking machines; weighing machine weights of all kinds.

8423.10.00 -Personal weighing machines, including baby scales; household scales

SECTION XVIII

OPTICAL, PHOTOGRAPHIC, CINEMATOGRAPHIC, MEASURING, CHECKING, PRECISION, MEDICAL OR SURGICAL INSTRUMENTS AND APPARATUS; CLOCKS AND WATCHES; MUSICAL INSTRUMENTS; PARTS AND ACCESSORIES THEREOF

...

Chapter 90

OPTICAL, PHOTOGRAPHIC, CINEMATOGRAPHIC, MEASURING, CHECKING, PRECISION, MEDICAL OR SURGICAL INSTRUMENTS AND APPARATUS; PARTS AND ACCESSORIES THEREOF

...

90.27 Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or

CES MACHINES OU APPAREILS

...

84.23 Appareils et instruments de pesage, y compris les balances et balances à vérifier les pièces usinées, mais à l'exclusion des balances sensibles à un poids de 5 cg ou moins; poids pour toutes balances.

8423.10.00 -Pèse-personnes, y compris les pèse-bébés; balances de ménage

SECTION XVIII

INSTRUMENTS ET APPAREILS D'OPTIQUE, DE PHOTOGRAPHIE OU DE CINÉMATOGRAPHIE, DE MESURE, DE CONTRÔLE OU DE PRÉCISION; INSTRUMENTS ET APPAREILS MÉDICO-CHIRURGICAUX; HORLOGERIE; INSTRUMENTS DE MUSIQUE; PARTIES ET ACCESSOIRES DE CES INSTRUMENTS OU APPAREILS

...

Chapitre 90

INSTRUMENTS ET APPAREILS D'OPTIQUE, DE PHOTOGRAPHIE OU DE CINÉMATOGRAPHIE, DE MESURE, DE CONTRÔLE OU DE PRÉCISION; INSTRUMENTS ET APPAREILS MÉDICO-CHIRURGICAUX; PARTIES ET ACCESSOIRES DE CES INSTRUMENTS OU APPAREILS

...

90.27 Instruments et appareils pour analyses physiques ou chimiques (polarimètres, réfractomètres, spectromètres, analyseurs de gaz ou de fumées, par exemple); instruments et appareils pour essais de viscosité, de porosité,

checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes.

de dilation, de tension superficielle ou similaires ou pour mesures calorimétriques, acoustiques ou photométriques (y compris les indicateurs de temps de pose); microtomes.

...

...

9027.80.00 -Other instruments and apparatus

9027.80.00 -Autres instruments et appareils

[31] The following are relevant notes and explanatory notes to these headings:

- notes to Section XVI
- explanatory notes to Section XVI
- notes to Chapter 84
- explanatory notes to heading No. 84.23
- notes to Chapter 90
- explanatory notes to Chapter 90
- explanatory notes to heading No. 90.27

POSITIONS OF THE PARTIES

Withings

[32] Withings submitted that the goods in issue should be classified in tariff item No. 9027.80.00, as “[o]ther instruments and apparatus”. In support of this position, Withings argued that the goods are classifiable in heading No. 90.27 as “instruments and apparatus for physical or chemical analysis”. Withings also argued that the goods are “moisture meters for solids”, which are included in heading No. 90.27 by the explanatory notes to that heading.¹⁸

[33] Withings also submitted that the CBSA erred in determining that the goods fall in heading No. 84.23 by misapplying the relevant notes to Chapter 90 and Section XVI.

CBSA

[34] The CBSA submitted that the goods in issue are properly classified under tariff item No. 8423.10.00 as “personal weighing machines”.

[35] The CBSA argued that the goods do not fall in heading No. 90.27 as they do not meet the criteria for classification in that heading set out in the relevant explanatory notes. The CBSA argued that the explanatory notes provide that goods classified in heading No. 90.27 are characterized by their high precision and high finish, and are mainly used for scientific, specialized technical,

¹⁸ The explanatory notes to heading No. 90.27 provide as follows: “This heading includes: . . . (26) Analytical instruments – sometimes called ‘moisture meters for solids’ – based on the dielectric constant, electrical conductivity, absorption of electromagnetic energy or infrared radiation of substances.”

industrial, or medical purposes, and that the goods in issue, which are marketed and sold as body weight scales for household use, do not meet these requirements.

TRIBUNAL'S ANALYSIS

[36] The tariff classification dispute is at the heading level.

[37] Note 1(m) to Section XVI provides that Section XVI excludes goods of Chapter 90.¹⁹ Based on Tribunal jurisprudence, the parties agreed that the analysis must begin with heading No. 90.27.²⁰ Both parties submitted that, if the Tribunal found that the goods in issue are classified in heading No. 90.27, there would be no need to consider heading No. 84.23.²¹

[38] During its deliberation, the Tribunal identified the following additional exclusionary note in the explanatory notes to heading No. 90.27, which was not addressed by the parties during the proceedings:

This heading also **excludes** machines or apparatus (whether or not electric) of the type classified in **Section XVI**, whether or not, in view of their low output, small size and general structure, they are obviously intended for use in laboratories (e.g., for preparing or treating specimens).

[39] The two headings in issue are therefore mutually exclusive. There is also no indication in the nomenclature that any particular order of analysis is required.²²

[40] The Tribunal will first consider the interpretation and application of the notes and explanatory notes relevant to this classification exercise.

Relevant notes and explanatory notes

[41] The CBSA submitted that the goods in issue are multi-function machines classified *inter alia* in accordance with Note 3 to Section XVI.²³

¹⁹ The relevant note to Section XVI provides as follows: “1. This Section does not cover: . . . (m) Articles of Chapter 90.”

²⁰ Where two or more headings are potentially relevant to a particular good, but one contains an exclusionary note, the Tribunal will begin its analysis by considering whether the goods fall within the terms of the exclusionary note. If they do, that is generally the end of the heading-level analysis. If they do not, the Tribunal then considers the alternative headings, and potentially other general rules to determine the appropriate tariff classification. See *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (31 July 2017) AP-2015-014 (CIIT) at para. 18.

²¹ The parties also agreed that Note 1(g) to Chapter 90, which excludes “weight-operated counting or checking machinery, or separately presented weights for balances (heading No. 84.23)”, does not apply to the goods in issue.

²² *BMW Canada Inc. v. President of the Canada Border Services Agency* (16 September 2014) AP-2013-050 (CIIT) at paras. 52-53 and footnote 38; *LRI Lighting International Inc. v. President of the Canada Border Services Agency* (23 May 2017) AP-2016-007 at para. 33.

²³ *Transcript of Public Hearing* at 84; Exhibit AP-2020-003-07 at paras. 59-64, 72.

[42] Withings disputed the CBSA's application of this note.²⁴ Withings argued that Note 3 only applies to goods with multiple functions where each function is classifiable in the same section or chapter. In addition, Withings argued that note 1(m) to Section XVI, which excludes goods of Chapter 90 from Section XVI, directs the classification exercise to disregard Note 3 to Section XVI.

[43] The Tribunal does not agree with Withings' submissions.

[44] To recall, Note 3 to Section XVI, which applies to both Chapter 84 and Chapter 90,²⁵ provides in relevant part as follows:

Unless the context otherwise requires . . . other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified . . . as being that machine which performs the principal function.

[45] In the Tribunal's view, a plain reading of this note states that multi-function goods are to be classified as being that machine which performs the principal function. There is no limitation in the note to suggest that this rule only applies if the various functions of a good are *prima facie* classified in one section or chapter. In addition, nothing in the explanatory notes to Section XVI or Chapter 90 limits the general rule set out in Note 3 to Section XVI in the manner suggested by Withings.²⁶

[46] Furthermore, Note 1(m) to Section XVI does not preclude the application of Note 3 to Section XVI to classification in Chapter 90. Rather, Note 3 to Section XVI remains relevant as an aid to the assessment of multi-function machines in both Section XVI and Chapter 90.²⁷

[47] The Tribunal will now examine whether the goods in issue are subject to Note 3 to Section XVI.

²⁴ *Transcript of Public Hearing* at 65-66, 87-91; Exhibit AP-2020-003-03 at para. 43. The CBSA also submitted that the goods in issue were classified in accordance with notes 2 and 7 to Chapter 84. Withings also argued that these notes and Note 3 to Section XVI are "mutually exclusive", such that only one of the three notes can be applied. Note 2 to Chapter 84 provides in relevant part as follows: "Subject to the operation of Note 3 to Section XVI and subject to Note 9 to this Chapter, a machine or appliance which answers to a description in one or more of the headings 84.01 to 84.24, or heading 84.86 and at the same time to a description in one or other of the headings 84.25 to 84.80 is to be classified under the appropriate heading of the former group or under heading 84.86, as the case may be, and not the latter group." Note 7 to Chapter 84 provides as follows: "A machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose. Subject to Note 2 to this Chapter and Note 3 to Section XVI, a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, unless the context otherwise requires, to be classified in heading 84.79. Heading 84.79 also covers machines for making rope or cable (for example, stranding, twisting or cabling machines) from metal wire, textile yarn or any other material or from a combination of such materials." A plain reading of these notes does not support Withings' position. The Tribunal also notes that recourse to Note 2 to Chapter 84 is not necessary to classify the goods in issue.

²⁵ Note 3 to Chapter 90 provides that "[t]he provisions of Notes 3 and 4 of Section XVI apply also to this Chapter".

²⁶ In arguing that Note 3 to Section XVI only applies to goods with multiple functions where each function is classifiable in the same section or chapter, Withings relied on the following explanatory notes to Section XVI: "Composite machines consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing separate functions which are generally complementary and are described in different headings of Section XVI, are also classified according to the principal function of the composite machine." Near identical language is also found in the explanatory notes to Chapter 90.

²⁷ *Canada (Attorney General) v. Impex Solutions Inc.*, 2020 FCA 171 at para. 56.

The goods in issue are multi-function machines

[48] As noted above, Note 3 to Section XVI directs the classification of “machines designed for the purpose of performing two or more complementary or alternative functions” (i.e. multi-function machines).²⁸

[49] Part IV of the explanatory notes to Chapter 90 also provide additional guidance, namely that “[m]ulti-function machines are able to carry out different operations”.

[50] The evidence on the record indicates that the goods in issue perform two or more complementary or alternative functions.²⁹

[51] First, the goods in issue are capable of measuring body weight through the four sensors under the glass plate. The goods can also measure heart rate and pulse wave velocity during the weigh-in through patent-pending technology.

[52] Second, the goods are capable of measuring other body composition information, i.e. body fat, water percentage, muscle mass and bone mass, through bioelectrical impedance analysis. When a user stands on the device, electrodes in the device send a small electrical current through the user’s body (i.e. from one foot to the other) to measure the impedance of the body. The device uses this information along with the user’s weight to calculate the other body composition factors.

[53] This was supported by the testimony of Mr. Joussain, who stated that the goods function as a scale and as an analytical instrument that is based on electrical conductivity.³⁰

[54] Finally, the device is also able to track weight and other body composition data for up to eight users. If connected wirelessly to the Internet, the device can automatically upload a user’s data to a smartphone app, link a user’s account to other third-party apps, and provide a localized weather report. The device also has special modes for pregnant users, athletes and babies.

[55] In view of the above, the Tribunal is satisfied that the goods in issue are multi-function machines. Neither party made arguments to the contrary.

[56] As noted, multi-function machines are classified according to their principal function.³¹ Multi-function machines are also classified in accordance with Note 7 to Chapter 84, which provides

²⁸ Neither party argued that the goods were “composite machines” as described in Note 3 to Section XVI.

²⁹ Exhibit AP-2020-003-03 at 14-15; Exhibit AP-2020-07 at 28-29, 56-78, 150; Exhibit AP-2020-003-026 at 5, 8-10; *Transcript of Public Hearing* at 9, 11.

³⁰ *Transcript of Public Hearing* at 17.

³¹ See Note 3 to Section XVI and Note 7 to Chapter 84. See also part VI of the explanatory notes to Section XVI, which provides in relevant part as follows: “In general, multi-function machines are classified according to the principal function of the machine. 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) . . . It should be noted that multi-purpose machines (e.g., machine-tools capable of working metals and other materials or eyeletting machines used equally well in the paper, textile, leather, plastics, etc., industries) are to be classified according to the provisions of Note 7 to Chapter 84.” See also part IV of the explanatory notes to Chapter 90, which provides in relevant part as follows: “Note 3 specifies that the provisions of Notes 3 and 4 to Section XVI apply also to this Chapter (see Parts (VI) and (VII) of the General Explanatory Note to Section XVI). In general, multi-function machines are classified according to the principal function of the machine. Multi-function machines are able to carry out different operations.”

that “a machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose”.³²

[57] The Tribunal will therefore conduct a principle function analysis of the goods in issue to determine in which heading they should be classified.

Principal function of the goods in issue is to measure weight

[58] The determination of principal function involves an assessment of the importance of each function relative to that of each of the other functions performed by a multi-function machine. In this regard, the relative importance of each function is dependent, in large part, upon the demands of the marketplace and the level of technology involved in the performance of that function.³³

[59] The device always measures the user’s weight, and the weight display cannot be turned off or disabled.³⁴ The device also measures weight before calculating any other body composition information. In this regard, the device recognizes users based on their weight, and the device will not display body composition measurements before identifying the user.³⁵

[60] Moreover, the body composition functions can be disabled, and, if they are disabled, the device will function as a scale only. Indeed, pregnant users and users with certain medical conditions (such as pacemakers) are directed to disable the bioelectrical impedance analysis function and use the device only as a body scale.³⁶

[61] In addition, if the bioelectrical impedance analysis function is disabled or the electrodes are defeated by wearing some type of footwear or other barrier, the device will still measure and display the user’s weight.³⁷

[62] Furthermore, Dr. Rocha explained that the user’s weight is a key component of the electrical body impedance analysis.³⁸ In this regard, Mr. Jousain confirmed that while the body composition measurements are not based on weight, the goods will nevertheless use weight to better compute these measurements.³⁹

[63] Moreover, Withings refers to the goods in its user materials as a “scale” or “connected scale”.⁴⁰

[64] The only two functions that are unrelated to weight are heart rate and pulse rate velocity measurements.⁴¹

³² See Part IV of the explanatory notes to Section XVI.

³³ *Tyco Safety Products Canada, Ltd. (formerly Digital Security Controls Ltd.) v. President of the Canada Border Services Agency* (8 September 2011) AP-2010-055 (CITT) at para. 61.

³⁴ Exhibit AP-2020-003-07 at 29; Exhibit AP-2020-003-026 at 17.

³⁵ *Transcript of Public Hearing* at 17-18.

³⁶ *Ibid.* at 21-22.

³⁷ Exhibit AP-2020-003-026 at 12-15; *Transcript of Public Hearing* at 19.

³⁸ Exhibit AP-2020-003-026 at 8-10, 17.

³⁹ *Transcript of Public Hearing* at 13.

⁴⁰ Exhibit AP-2020-003-07 at 28, 30-53.

⁴¹ *Transcript of Public Hearing* at 13.

[65] In view of the above, the Tribunal is satisfied that the evidence demonstrates that the device is first and foremost a device to measure the weight of the user. The Tribunal therefore finds that the principle function of the goods in issue is as a personal weighing device.

The goods in issue are classified in heading No. 84.23

[66] The Tribunal finds that, as a personal weighing device, the goods in issue are classified in heading No. 84.23 as weighing machinery, in accordance with Rule 1 of the *General Rules*. This conclusion is also consistent with the explanatory notes to heading No. 84.23, which include in that heading “personal weighing machines (coin operated or not), including baby scales”.

[67] In accordance with Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, the Tribunal finds that the goods in issue are classified in tariff item No. 8423.10.00 as “personal weighing machines, including baby scales”.

[68] The goods in issue are therefore excluded from heading No. 90.27 by the explanatory notes to that heading, which exclude machines and apparatus of the type classified in Section XVI.

Heading No. 90.27

[69] The Tribunal recalls that the parties’ submissions did not take into consideration the second exclusionary note, and as a result, both parties submitted that the Tribunal must first consider heading No. 90.27. For completeness, the Tribunal will therefore briefly address heading No. 90.27.

[70] Withings submitted that the goods in issue are “instruments and apparatus for physical or chemical analysis” of heading No. 90.27. According to Withings, the following two conditions for classification in heading No. 90.27 apply: 1) the goods must be an instrument or an apparatus, and 2) they must be for physical or chemical analysis. Withings submitted that the goods in issue satisfy both conditions.⁴²

[71] Classification in Chapter 90 is guided by the explanatory notes to that chapter, which provide in relevant part as follows:

This Chapter covers a wide variety of instruments and apparatus which are, as a rule, characterised by their high finish and high precision. Most of them are used mainly for scientific purposes (laboratory research work, analysis, astronomy, etc.), for specialised technical or industrial purposes (measuring or checking, observation, etc.) or for medical purposes.

There are certain exceptions to the general rule that the instruments and apparatus of this Chapter are high precision types. For example, the Chapter also covers ordinary goggles (heading 90.04), simple magnifying glasses and non-magnifying periscopes (heading 90.13), divided scales and school rules (heading 90.17) and fancy hygrometers, irrespective of their accuracy (heading 90.25).

[72] In the Tribunal’s view, the goods in issue are not high precision instruments and apparatus or high precision types as described in the explanatory notes. Dr. Rocha testified that weighing instruments used for scientific purposes are generally more precise than the goods in issue.⁴³ He also

⁴² *Ibid.* at 53.

⁴³ *Ibid.* at 37-38.

stated that the internal systems of the goods cannot be calibrated by the user, which is generally required for high precision instruments.⁴⁴ Furthermore, while the list of examples is not necessarily exhaustive, the goods in issue are not described by any of the exceptions listed in the explanatory notes nor are they comparable or otherwise similar to the listed exceptions. Accordingly, the Tribunal is satisfied that the goods in issue would not have met the conditions of classification for heading No. 90.27.

[73] Withings also submitted that the goods are, or at least are akin to, “[a]nalytical instruments – sometimes called ‘moisture meters for solids’ – based on the dielectric constant, electrical conductivity, absorption of electromagnetic energy or infrared radiation of substances”, which are included in heading No. 90.27 by the explanatory notes to that heading.⁴⁵ Withings argued that the inclusion of moisture meters is an indication that goods that conduct physical analysis through electrical conductivity, such as the goods in issue, fall within heading No. 90.27.

[74] The Tribunal is not convinced by Withings argument that the description of item 26 above means that the goods in issue fall *prima facie* within the scope of heading No. 90.27. Such a finding would ignore its function as a scale. In this regard, the Tribunal recalls that the goods are classifiable according to their principal function, which the Tribunal found above is their use as weighing devices. This function is not described by these explanatory notes. As such, the Tribunal finds that this explanatory note would not have been instructive in the classification of the goods in issue.

CONCLUSION

[75] The goods in issue are classified as weighing machinery of heading No. 84.23 and as personal weighing machines, including baby scales, of tariff item No. 8423.10.00, as determined by the President of the CBSA.

DECISION

[76] The appeal is dismissed.

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

⁴⁴ *Ibid.* at 40.

⁴⁵ *Ibid.* at 56.