Canadian International Trade Tribunal

Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2020-008

Bed, Bath & Beyond Canada L.P.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Wednesday, August 18, 2021

Canada

TABLE OF CONTENTS

DECISION i

STATEMENT OF REASONS 1
- OVERVIEW 1
- GOODS IN ISSUE 1
- PROCEDURAL HISTORY 1
- LEGAL FRAMEWORK 3
- TRIBUNAL'S ANALYSIS 5
  - Summary 5
  - Burden of proof 5
  - Witnesses 6
  - Heading classification 9
  - Subheading classification 11
  - Tariff item classification 11
  - Conclusion 15
- DECISION 15

IN THE MATTER OF an appeal heard on April 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 June 29, 2020, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

BED, BATH & BEYOND CANADA L.P. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

Place of Hearing:	Via videoconference
Date of Hearing:	April 23, 2021
Tribunal Panel:	Cheryl Beckett, Presiding Member
Support Staff:	Jessye Kilburn, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representative**
Bed, Bath & Beyond Canada L.P.	Michael Kaylor

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Emma Gozdzik

WITNESSES:

Gabriel Minchow
Senior Director of Procurement
Bed, Bath & Beyond Inc.

Julie Fischer
RN, CAHP, RRP, COHN(c)

Bruno Rocha
Professor of Mechanical Engineering Technology
Algonquin College

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 Bed, Bath & Beyond L.P. (BBB), pursuant to subsection 67(1) of the *Customs Act*,[1] of a decision dated June 29, 2020, made by the President of the Canada Border Services Agency (CBSA).

[2] The goods in issue are commonly known as ultrasonic essential oil diffusers. The CBSA determined that the goods should be classified under tariff item No. 8509.80.10 of the schedule to the *Customs Tariff*[2] as "ultrasonic vaporizers", whereas BBB claimed that they should be classified under tariff item No. 8509.80.90 as "other". BBB also suggested that the Tribunal should consider whether the goods could fall in residual heading No. 85.43.

[3] For the reasons below, the Tribunal finds that the goods in issue should be classified under tariff item No. 8509.80.10 as "ultrasonic vaporizers", as argued by the CBSA. The appeal is therefore dismissed.

GOODS IN ISSUE

[4] The goods in issue are fifty different models of ultrasonic aromatic diffusers, designed to diffuse essential oils. The different models of goods all work in the same manner, the main difference being the outer design.[3]

[5] As will be explained in further detail in the analysis below, the goods in issue function by means of a small disk that vibrates rapidly in water infused with essential oils, creating ultrasonic waves. The vibration breaks up the oil and water into molecules that disperse into the air, without using heat. A fan then propels the molecules into the air, spreading the aroma of the essential oils into the room.

PROCEDURAL HISTORY

[6] The CBSA conducted a trade compliance verification of BBB's imports between March 2017 and February 2018. On March 15, 2019, the CBSA found that the goods in issue had been misclassified under tariff item No. 8414.51.90. Instead, the CBSA classified the goods under tariff item No. 8509.80.10 as "ultrasonic vaporizers".

[7] BBB then filed blanket self-corrections and requested a further re-determination. On June 29, 2020, the CBSA determined that the diffusers were correctly classified under tariff item No. 8509.80.10 as "ultrasonic vaporizers".

[8] BBB filed the present appeal on July 22, 2020, and its brief on August 11, 2020. The CBSA filed its brief on October 13, 2020.

[9] On December 1, 2020, BBB requested permission to file a supplemental brief. The CBSA objected on December 3, 2020, and BBB responded the same day. On December 4, 2020, the

---

1 R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2 S.C. 1997, c. 36.
3 Exhibit AP-2020-008-06 at 27.

Tribunal granted BBB's request to file its supplemental brief, and also provided the CBSA with the opportunity to reply.

[10] BBB filed its supplemental brief on December 7, 2020, and the CBSA filed its supplemental brief on December 15, 2020.

[11] On December 14, 2020, the Tribunal notified parties that the hearing would be postponed due to unforeseen circumstances. On December 21, 2020, the Tribunal requested parties' views on rescheduling the hearing. Parties indicated that they were available on February 19, 2021, and the Tribunal rescheduled the hearing for that date.

[12] The parties filed several additional documents, as follows:

a) On January 19, 2021, BBB filed the expert witness report of Ms. Julie Fischer.

b) On January 21, 2021, the CBSA filed the expert witness report of Dr. Bruno Rocha.

c) On January 27, 2021, BBB filed a book of authorities and additional documents.

d) On February 1, 2021, the CBSA filed further documents.

[13] On February 8, 2021, BBB requested that certain phrases in the expert witness report of Dr. Rocha be removed, arguing that they encroached on the authority of the Tribunal to make conclusions on tariff classification issues. On February 10, 2021, the CBSA responded that the report was within Dr. Rocha's expertise. The same day, BBB stated that it maintained its position concerning the scope of Dr. Rocha's evidence, and that it intended to speak to this issue at the beginning of the hearing.

[14] On February 11, 2021, BBB stated that in its argument, it intended to rely on several additional authorities (i.e. Tribunal case law and explanatory notes to heading No. 85.43), and it argued that the Tribunal can take judicial notice of its own decisions and of the law. On February 12, 2021, the Tribunal requested that BBB seek leave to file these additional authorities under section 24.1 of the *Canadian International Trade Tribunal Rules*, which BBB did the same day. On February 15, 2021, the CBSA stated that it did not object to the filing of Tribunal case law, but it did object to the filing of the explanatory notes to heading No. 85.43. The CBSA stated that it had confirmed with counsel for BBB that these explanatory notes were provided because BBB intended to raise heading No. 85.43 as an alternative tariff classification during oral argument. The CBSA requested that BBB not be permitted to raise a new argument only days before the hearing. In the alternative, the CBSA suggested that the hearing be suspended, that BBB be required to amend its written brief, and that the CBSA be provided with an opportunity to respond.

[15] The Tribunal discussed the issue of late filing with counsel for both parties at the videoconference test on February 16, 2021. During the videoconference call, the Tribunal asked counsel for BBB to confirm whether he intended to suggest heading No. 85.43 as an alternative tariff classification for the goods in issue. Counsel responded that he was not intending to raise an alternative legal argument but would be merely pointing to the heading for the Tribunal's consideration at the hearing. Counsel for the CBSA submitted that she did not see a distinction between pointing to heading No. 85.43 and raising an alternative argument, and she expressed procedural fairness concerns about responding to new arguments and evidence that may be raised

only at the hearing. The Tribunal decided that it was interested in receiving written submissions from both parties on the applicability or non-applicability of heading No. 85.43 and therefore postponed the hearing in order to allow the CBSA to respond.

[16] On February 19, 2021, BBB provided its submissions on heading No. 85.43, and the CBSA responded on February 26, 2021.

[17] On March 2, 2021, after seeking the parties' preferred hearing date, the Tribunal rescheduled the hearing for April 23, 2021.

[18] On March 16, 2021, BBB advised that it would, with the CBSA's consent, add to its argument that the goods in issue do not have a self-contained electric motor as required by heading No. 85.09, and that it would make reference to heading No. 84.14, heading No. 84.15, subheading No. 8414.51, and heading No. 85.01, together with the explanatory notes to the foregoing. The CBSA did not object to BBB raising these arguments at a late stage. Nonetheless, given the lengthy procedural history outlined above, the Tribunal wishes to remind BBB that parties are ordinarily expected to put their full case forward in their initial brief and to avoid revising their arguments multiple times before the hearing date, in order to avoid unnecessary delays and postponements.

[19] On April 23, 2021, the Tribunal held a hearing via videoconference.

LEGAL FRAMEWORK

[20] 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.

[21] Section 10(1) of the *Customs Tariff* provides that, subject to section 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*,[5] and the *Canadian Rules*[6] set out in the schedule.

[22] 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.

[23] 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 the *Classification Opinions* and the

---

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 [*Canadian Rules*].
7 WCO, 2d ed., Brussels, 2003 [Classification Opinions].
8 WCO, 5th ed., Brussels, 2012 [Explanatory Notes].

Explanatory Notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[9]

[24] 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.[10]

[25] 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]

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

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**
85.09 Electro-mechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 85.08.	**85.09 Appareils électromécaniques à moteur électrique incorporé, à usage domestique, autres que les aspirateurs du no 85.08.**

---

9 See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the Explanatory Notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the Classification Opinions.

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

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

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.

8509.80 - Other appliances	8509.80 -Autres appareils
8509.80.10 - - - Ultrasonic Vaporizers	8509.80.10 - - -Vaporisateurs aux ultrasons
8509.80.90 - - - Other	8509.80.90 - - -Autres
85.43 Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter.	**85.43 Machines et appareils électriques ayant une fonction propre, non dénommés ni compris ailleurs dans le présent Chapitre.**
8543.70.00 - Other machines and apparatus	8543.70.00 - Autres machines et appareils

TRIBUNAL'S ANALYSIS

Summary

[27] BBB's central argument is that the goods in issue cannot be classified under tariff item No. 8509.80.10 as "ultrasonic vaporizers", because they are ultrasonic *diffusers*, which BBB contends is a different category of good than an ultrasonic vaporizer. As a result, BBB contends that the goods should be classified under residual tariff item No. 8509.80.90 as "other". BBB also argues that the Tribunal should consider whether heading No. 85.43 describes the goods more specifically. Finally, BBB argues that the burden of proof should shift to the CBSA.

[28] The CBSA's central argument is that the goods meet the definition of "ultrasonic vaporizer" because they use ultrasonic technology and their main function is to vaporize water and essential oil. The CBSA accepts that the goods are marketed as ultrasonic diffusers, but it argues that ultrasonic diffusers are a type of ultrasonic vaporizer. The CBSA argues that the burden of proof is on the appellant.

[29] For the reasons below, the Tribunal finds that the goods are properly classified under tariff item No. 8509.80.10 as "ultrasonic vaporizers".

Burden of proof

[30] BBB argued that the burden of proof in this matter ought to shift to the CBSA. According to BBB: "Proof of the non-existence of 'ultrasonic vaporizer' is within the knowledge of [the CBSA], since [the CBSA] alleges that it is the non-existence of an ultrasonic vaporizer that caused [it] to conclude that 'ultrasonic vaporizer' must be understood in a generic sense."[13] BBB cited jurisprudence setting out that the party which substantially asserts the affirmative of an issue must bear the burden of proof, due to the difficulty of proving a negative.[14] The CBSA responded that the *Act* puts the burden of proof on the appellant alone.[15]

---

13 Exhibit AP-2020-008-12 at 5.

14 *Produits Laitiers Advidia Inc. v. Canada (Customs and Revenue)* (8 March 2005), AP-2003-040 (CITT) at para. 13, citing *Smith v. Nevins*, 1924 CanLII 70 (SCC), [1925] S.C.R. 619.

15 Paragraph 152(3)(d) of the *Act*.

[31] The Tribunal finds that the burden of proof is on the appellant, and there is no reason to shift it to the CBSA. It is not clear that the CBSA is in fact asking BBB to prove a negative; the CBSA argued that ultrasonic vaporizers are a category of goods as opposed to a specific good, which is different than arguing that they do not exist. In fact, the CBSA provided concrete evidence on the qualities of ultrasonic vaporizers. In any event, the principle that the burden of proof is on the appellant in customs appeals is well established and clearly legislated in paragraph 152(3)(d) of the *Act*.[16]

Witnesses

[32] At the hearing, the Tribunal heard from one lay witness and two expert witnesses, whose qualifications and evidence are addressed below.

Mr. Gabriel Minchow

[33] Mr. Minchow has worked at BBB for 19 years, and he is currently a senior director of merchandizing who oversees certain categories of goods, including the goods in issue.[17] He testified as a lay witness with a particular knowledge of the goods in issue.

[34] Mr. Minchow stated that the goods in issue are marketed as ultrasonic essential oil diffusers.[18] He testified that these diffusers function by rapid movements of an electrically powered diaphragm, which puts scented oil vapour into the air.[19]

[35] According to Mr. Minchow, an ultrasonic diffuser is a separate category of goods than an ultrasonic humidifier, which typically holds larger amounts of water. He stated that both goods add water into the air, but the purpose of the ultrasonic diffuser is to add oil to the air; the water is simply the transference method.[20] He added that ultrasonic humidifiers are not designed to handle essential oils and would break down if essential oils were added.[21]

[36] He explained that, within BBB's internal structure, responsibility for procuring and marketing goods is broken up based on the physical rooms of the store. Ultrasonic diffusers are in the home décor area, whereas ultrasonic humidifiers are in the area for seasonal electronics.[22]

[37] Mr. Minchow also testified that he was not aware of any goods sold at BBB that were labelled as ultrasonic vaporizers.[23] If a customer came in and asked for an ultrasonic vaporizer, he said that he would ask what the customer was looking for the product to do.[24]

---

16 See also *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 at paras. 21-22.
17 *Transcript of Public Hearing* at 7.
18 *Ibid.* at 8.
19 *Ibid.*
20 *Ibid.* at 10.
21 *Ibid.* at 11.
22 *Ibid.* at 18.
23 *Ibid.* at 16.
24 *Ibid.* at 21.

[38] The Tribunal found Mr. Minchow's testimony to be credible. His testimony was also informative in understanding both the goods in issue and related goods from a marketing and merchandizing perspective.

Ms. Julie Fischer

[39] BBB proposed Ms. Julie Fischer as an expert witness in the use and health benefits of ultrasonic essential oil diffusers, and the CBSA consented to this qualification.[25]

[40] The Tribunal considered Ms. Fischer's résumé and qualifications, which include: Certified Aromatherapy Health Professional, Registered Aromatherapist, Essential Oil Therapist, Registered Nurse, Certified Ontario Health Nurse, and Registered Reflexology Practitioner.[26] The Tribunal found it appropriate to qualify Ms. Fischer as an expert witness in the use and health benefits of ultrasonic essential oil diffusers.[27]

[41] Ms. Fischer did not examine any samples of the goods in issue, but testified based on experience with similar goods, as she recommends essential oil diffusers to her patients and uses them personally.[28]

[42] She testified that the benefits of diffusing and inhaling essential oils are psychological, including reducing stress, improving mental clarity, uplifting the mood, promoting sleep, and purifying the air.[29]

[43] As an aromatherapist, Ms. Fischer educates people on the use of essential oils. She testified that she would never recommend the use of essential oils in an ultrasonic humidifier, which are not designed to handle oils.[30]

[44] The Tribunal found Ms. Fischer's evidence to be credible and informative. However, for reasons set out more fully in the analysis below, the Tribunal found that the scope of Ms. Fischer's evidence was less relevant than that of Dr. Rocha with respect to the classification of the goods in issue.

Dr. Bruno Rocha

[45] The CBSA requested that Dr. Rocha be qualified as an expert witness in mechanical, electronic and mechatronic systems and their components, including systems based on ultrasonics, and BBB confirmed that it did not object to this qualification.[31]

[46] The Tribunal considered Dr. Rocha's résumé and qualifications, which include the following: he holds a PhD in Aerospace Engineering, he is a professor of mechanical engineering technology, and he has experience in systems based on ultrasonics and thermodynamics.[32] The Tribunal qualified

---

25 *Ibid.* at 25.
26 Exhibit AP-2020-008-21 (protected) at 2.
27 *Transcript of Public Hearing* at 26.
28 *Ibid.* at 34.
29 *Ibid.* at 32.
30 *Ibid.* at 28.
31 *Ibid.* at 38.
32 Exhibit AP-2020-008-22 at 31-45.

Dr. Rocha, as requested, as an expert witness in mechanical, electronic and mechatronic systems and their components, including systems based on ultrasonics.[33]

[47] Dr. Rocha prepared an expert witness report in which he tested and analyzed the goods in issue, focusing on their components, operation, and function.[34]

[48] On February 8, 2021, prior to the hearing, BBB objected to certain phrases in Dr. Rocha's report. According to BBB, the terms "main function", "almost as important", "slightly secondary", and "main" should be eliminated as this language encroached on the Tribunal's authority to determine tariff classifications. On February 10, 2021, the CBSA responded that commenting on the main and secondary functions of the goods is within Dr. Rocha's expertise. The same day, BBB stated that it maintained its position concerning the scope of Dr. Rocha's evidence, and that it intended to speak to this issue at the beginning of the hearing.

[49] At the hearing, BBB submitted that the only excerpt of the report to which it still objected was Dr. Rocha's conclusion that "the analyzed goods function as ultrasonic vaporizers."[35] The CBSA responded that it was relying on Dr. Rocha's expertise in mechanical engineering, not as a legal expert or expert in tariff classification. The CBSA suggested that it may be easier to address BBB's objection once Dr. Rocha had testified. After Dr. Rocha's testimony had concluded, BBB indicated that it was withdrawing its objection.[36]

[50] The Tribunal accepts the full report of Dr. Rocha and will give it the weight that it deserves, in light of the scope of Dr. Rocha's expertise and the Tribunal's own authority to determine tariff classifications. The Tribunal does not interpret his report as subverting the Tribunal's own role in interpreting the *Customs Tariff*.

[51] As well as submitting his written report, Dr. Rocha also testified at the hearing.

[52] He testified that an ultrasonic actuator is any type of actuator that is able to generate waves at frequencies that are above the human hearing range.[37] He stated that a vapour, in terms of thermodynamics, is typically a mixture of a liquid and a gas.[38] According to Dr. Rocha, vaporization is the process of creating a vapour, for example by giving some kind of energy to a liquid, which makes at least some of the liquid particles become gas. He testified that, from a mechanical engineering perspective, a vaporizer is any device that generates vapour (i.e. that allows liquid to become a gas or a mixture in between gas and liquid).[39]

[53] He described at length the construction of the goods, including their embedded direct current motor, electronic board, and piezoceramic element (which is the ultrasonic element that is in contact with the water inserted into a bowl inside the device). When the good is turned on, he described that the electrical board sends voltage into the piezoceramic element, which forces it to vibrate at an ultrasonic frequency. The piezoceramic element then imparts this energy into the liquid particles of

---

33 *Transcript of Public Hearing* at 38.
34 Exhibit AP-2020-008-22.
35 *Transcript of Public Hearing* at 5, citing Dr. Rocha's report at page 24, i.e. Exhibit AP-2020-008-22 at 27.
36 *Transcript of Public Hearing* at 81.
37 *Ibid.* at 48.
38 *Ibid.* at 49.
39 *Ibid.* at 50.

the water, making them go from a liquid state to a vapour state.[40] At the same time, the electrical board powers a fan, which pulls air in from the outside, and forces a mixture of air and vapour out of an orifice on the top of the device.

[54] Dr. Rocha concluded that, mechanically, the goods function as ultrasonic vaporizers.[41] He testified that he came to this conclusion by performing several tests. He found that if there is no liquid in contact with the ultrasonic actuator, the device (including the fan) shuts off.[42] However, when he disconnected the fan, he found that the ultrasonic actuator continued to produce vapour, with less dispersion. He therefore concluded that the ultrasonic component, which generated vapour, was more fundamental than the fan.[43]

[55] Dr. Rocha confirmed at the hearing that he did not add any essential oil to the device during the preparation of his report, although he did so later for personal interest.[44] As such, he confirmed that he did not take into account what effect the essential oil would have on his report. The Tribunal would have liked to see Dr. Rocha test the unit using essential oils and provide details regarding how the addition of a few drops of essential oils impacted the overall electromechanical functioning of the goods. Dr. Rocha explained that the addition of a few drops of oil would not change the viscosity of the liquid on top of the ultrasonic actuator, as the main liquid to be used in the goods is water and the impedance of the ultrasonic actuator is tuned for the overall viscosity of water.[45] The Tribunal finds his explanation reasonable and accepts his conclusions outlined in his report and in his testimony, regardless of the absence of a few drops of essential oil in the water.

[56] Overall, the Tribunal found Dr. Rocha's evidence to be credible, informative, and directly relevant to understanding the operation of the goods in issue.

Heading classification

[57] Initially, both parties agreed that the goods fell in heading No. 85.09, as "electro-mechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 85.08." Later, BBB raised the possibility that the goods could fall in heading No. 85.43, a position which the CBSA opposed.

[58] Heading No. 85.43 is for "electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter."

[59] BBB argued that even if the Tribunal agrees with the CBSA and finds that the goods are ultrasonic vaporizers under tariff item No. 8509.80.10, the Tribunal must also answer the question of whether heading No. 85.43 is more specific than heading No. 85.09.[46] According to BBB, heading No. 85.43 is more specific, because it refers to "individual functions".

[60] The Tribunal does not accept this argument; heading No. 85.43 is clearly for goods "not specified or included elsewhere in this Chapter", even if it also requires the goods to have individual

---

40 *Ibid.* at 52.
41 Exhibit AP-2020-008-22 at 27.
42 *Transcript of Public Hearing* at 54.
43 *Ibid.* at 57.
44 *Ibid.* at 66.
45 *Ibid.* at 79-80.
46 Exhibit AP-2020-008-38 at 2.

functions. Based on a simple reading of the heading’s terms, heading No. 85.43 cannot apply if the goods meet the terms of heading No. 85.09.

[61] For the reasons below, the Tribunal finds that the diffusers meet the terms of heading No. 85.09: (1) they are electro-mechanical domestic appliances, (2) they have a self-contained electric motor, and (3) they are not vacuum cleaners.

Electro-mechanical domestic appliances

[62] BBB did not appear to disagree that the goods are electro-mechanical domestic appliances.

[63] Dr. Rocha’s report shows that the goods contain both electrical and mechanical aspects: there is an electrical board at the centre of the diffuser,[47] and this electrical energy is converted to mechanical energy via the piezoceramic disk actuator.[48] The electrical energy also powers the mechanics of a fan.

[64] The instruction manuals and marketing materials for the diffusers indicate that the goods are for use in small spaces and are ideal for use in the home.[49]

[65] The Tribunal therefore finds that the goods are electro-mechanical domestic appliances.

Self-contained electric motor

[66] The CBSA argued that the goods contain an integrated electric motor, which functions to power the fan. BBB argued that this motor should not be considered a motor for the purposes of heading No. 85.09, because the motor drives the fan, as opposed to the ultrasonic actuator which causes the vaporization. BBB also argued that if a motor-driven fan was sufficient to bring goods within the scope of heading No. 85.09, then Parliament would have used words similar to those in heading No. 84.15, which refers to a motor-driven fan.

[67] The Tribunal does not see any requirement that the self-contained electric motor must have any specific correlation to the purpose of the good. Furthermore, the terms of the heading do not need to specify that the motor drives a fan. It is sufficient that the good has a self-contained electric motor.

[68] Dr. Rocha’s report confirms the presence of a direct current motor, which is contained inside the diffuser and powers the fan.[50] He testified that in the goods he examined, the motor was located inside the core of the fan.[51] The Tribunal therefore finds that the goods have a self-contained electric motor within the meaning of heading No. 85.09.

Other than vacuum cleaners

[69] The goods are clearly not vacuum cleaners, and BBB has not argued as such.

---

47 Exhibit AP-2020-008-22 at 10.
48 *Ibid.* at 12.
49 Exhibit AP-2020-008-06 at para. 22; Exhibit AP-2020-008-06 at 31 and 58.
50 Exhibit AP-2020-008-22 at 10 and 24.
51 *Transcript of Public Hearing* at 61.

[70] Therefore, the Tribunal finds that the goods meet all three requirements to be included within heading No. 85.09. They therefore cannot fall in heading No. 85.43.

Subheading classification

[71] The parties agree that the appropriate subheading in heading No. 85.09 is residual subheading No. 8509.80.

[72] The Tribunal agrees. The goods are neither “food grinders and mixers; fruit or vegetable juice extractors” of subheading No. 8509.40, nor are they “parts” of subheading No. 8509.90. Therefore, the goods fall into “other appliances” under subheading No. 8509.80.

Tariff item classification

[73] The central dispute between the parties is whether the diffusers should be classified under tariff item No. 8509.80.10 as “ultrasonic vaporizers”, as the CBSA argues, or under residual tariff item No. 8509.80.90 as “other”, as BBB argues.

[74] The Tribunal recalls that a residual category is used only if the goods cannot be classified under the more specific category.[52] Furthermore, “the fact that there is a residual category does not imply nor should it encourage a narrower reading of a more specific heading or subheading”[53] (or, by extension, tariff item). The Tribunal’s task is therefore to first determine if the goods are “ultrasonic vaporizers” of tariff item No. 8509.80.10.

[75] The Tribunal has previously found that, in the schedule to the *Customs Tariff*, goods may be ordinarily described in one or a combination of ways: by a specific or generic name, by reference to the physical appearance or material composition of the goods, and/or by reference to the use or function of the goods.[54] This principle is central to this case. The term “ultrasonic vaporizer” can be described by a combination of (1) the technological components (i.e. ultrasonic technology) and (2) the generic use or function of the goods (i.e. to vaporize). In other words, a plain reading of the term suggests that an “ultrasonic vaporizer” must use “ultrasonic” technology and must be a “vaporizer”. These two aspects are addressed in greater detail below. First, the Tribunal will address BBB’s counterarguments about the scope of the term “ultrasonic vaporizer”.

BBB’s arguments

[76] BBB submitted, and Mr. Minchow’s testimony confirmed, that the company markets the goods as ultrasonic essential oil diffusers.[55] This much is not controversial. However, BBB further

---

[52] *Cavavin (2000) Inc. v. President of the Canada Border Services Agency* (4 October 2019), AP-2017-021 (CITT) [*Cavavin*] at para. 47, citing *Partylite Gifts Ltd.* (16 February 2004), AP-2003-008 (CITT); *Canac Marquis Grenier Ltée v. President of the Canada Border Services Agency* (28 February 2017), AP-2016-005 (CITT). *Cavavin* was upheld by the Federal Court of Appeal in *Danby Products Limited v. Canada (Border Services Agency)*, 2021 FCA 82.

[53] *Cavavin* at para. 60.

[54] *Rlogistics Limited Partnership v. Canada Border Services Agency* (25 October 2011), AP-2010-057 (CITT) at para. 94.

[55] *Transcript of Public Hearing* at 8.

argued that the fact that the goods are “ultrasonic diffusers” means that the goods cannot be considered “ultrasonic vaporizers”.

[77] BBB argued that an ultrasonic diffuser, an ultrasonic humidifier, and an ultrasonic vaporizer are different goods, and that these terms should be given different legal meanings according to the presumption against tautology (i.e. the principle of statutory interpretation according to which every word in a statute must be given meaning).[56]

[78] BBB argued that tariff item No. 8509.80.10 could have read “ultrasonic vaporizers *and similar devices*” [emphasis added], had Parliament intended to include ultrasonic diffusers within that tariff item. It suggested that Parliament’s choice not to legislate in this way indicates that it did not intend for ultrasonic diffusers to fall within tariff item No. 8509.80.10, as “when the legislature intends to limit the scope of a statutory provision, it usually says so clearly.”[57] It also noted that there is no mention of ultrasonic vaporizers or humidifiers in the explanatory notes to heading No. 85.09, and it argued that the explanatory notes could have been drafted to specify that “air humidifiers” includes ultrasonic diffusers.

[79] BBB cautioned that the Tribunal must follow the statute as it was written, and avoid “tinkering . . . with the plain wording of the Act” in order to speculate about what Parliament must have intended.[58] BBB submitted that curing underinclusive legislation by reading in additional words should only be done “if it can be shown that the error leads to a manifest absurdity, is traceable and is curable by an obvious correction.”[59] BBB also cited a “basic concept in tax law that where the taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer.”[60]

[80] In response to BBB’s statutory interpretation arguments, the CBSA argued that the presumption against tautology is not relevant because it typically applies to words within the same statute. The CBSA pointed out that “diffuser” does not appear in the *Customs Tariff*; rather, it appears only in marketing materials.

[81] The Tribunal rejects BBB’s argument that the term “ultrasonic vaporizer” necessarily excludes goods that may commonly be referred to as “ultrasonic diffusers”. The Tribunal does not agree that an “ultrasonic vaporizer” can be categorized as a good separate from an “ultrasonic diffuser” or an “ultrasonic humidifier”. The evidence given by Mr. Minchow indicates that there is no specific product commonly and widely known to consumers as an ultrasonic vaporizer. Mr. Minchow acknowledged in his testimony that, to his knowledge, BBB does not sell any product labelled as an ultrasonic vaporizer.[61] He stated that if a customer entered the store and asked which aisle the ultrasonic vaporizers are located, he would have had to inquire what the customer wanted the product to do in order to properly direct them.[62] Diffusers and humidifiers are traditionally located in different areas of the store, as they perform very different functions: the diffusers would be

---

56 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis Canada Inc., 2008 at 210, citing *R. v. Proulx,* 2000 SCC 5 [CanLII], [2000] 1 SCR 61 at para. 28.

57 *Pharmascience Inc. v. Binet*, 2006 SCC 48 (CanLII), [2006] 2 SCR 513 at para. 31.

58 *Canada v. Fording Coal Ltd*., 1995 CanLII 3549 (FCA), [1996] 1 FC 518.

59 *Canada (Attorney General) v. Vorobyov*, 2014 FCA 102 (CanLII) at para. 29, citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed, (Markham, Ont.: LexisNexis, 2008).

60 *Johns-Manville Canada v. The Queen*, 1985 CanLII 43 (SCC), [1985] 2 SCR 46 at para. 33.

61 *Transcript of Public Hearing* at 16.

62 *Ibid.* at 21.

located in the home décor section relating to home fragrance and the humidifiers would be in the seasonal electronics section.[63]

[82] As Mr. Minchow's evidence indicates that there is no common trade or consumer understanding of a separate product known as an "ultrasonic vaporizer", the Tribunal must look to other characteristics of a product to determine whether the good should be characterized as such for the purposes of the *Customs Tariff*. Given that "ultrasonic", "vaporizer", and "vapour" have specific technical and scientific meanings, the Tribunal primarily relies on the evidence of Dr. Rocha as to the electromechanical workings of an ultrasonic vaporizer.

[83] As Dr. Rocha explained, the term "vaporizer" is commonly associated with a good that vaporizes a liquid into steam or gas. He testified that ". . . an ultrasonic vaporizer is the effect of the machine itself, [it] is creating vapor using an ultrasonic frequency."[64]

[84] The following excerpt from an article submitted by BBB corroborates Dr. Rocha's observations:

> Ultrasonic vaporizers convert electricity into vibrations by using a component known as a "piezoelectric transducer". Then, the water stored in the vaporizer's reservoir will be agitated by these vibrations, producing water vapor because of the nature of the vibrations and the properties of water.[65]

[85] This description is very similar to the following description of an ultrasonic diffuser in the Appellant's Brief:

> An ultrasonic diffuser will have a small disk that vibrates rapidly in water that has been infused with essential oils. This vibration breaks up the oil and water into tiny molecules that then disperse into the air. While turning liquid into vapor would typically require heat, this method accomplishes the change in state without any heat being required.[66]

[86] While BBB argues that different legal meanings should be given to "ultrasonic diffuser" and "ultrasonic vaporizer", only the latter is used in the *Customs Tariff*. The Tribunal accepts Ms. Fischer's evidence that an ultrasonic diffuser is different than an ultrasonic humidifier: a diffuser's main purpose is to diffuse essential oils whereas a humidifier's main purpose is to add humidity to the air, and both products have different characteristics relating to size and purpose.[67] However, again, the tariff item refers to an ultrasonic *vaporizer*, and that is the term that the Tribunal must interpret. As such, while the Tribunal accepts Ms. Fischer's evidence on the specific use and health benefits of ultrasonic diffusers, it places little weight on this evidence in interpreting the scope of the term "ultrasonic vaporizer".

---

63 *Ibid.* at 18.
64 *Ibid.* at 71.
65 Exhibit AP-2020-008-24 at 35.
66 Exhibit AP-2020-008-03 at 6-7.
67 Ms. Fischer also testified that while a consumer could use a humidifier to diffuse essential oils, this is not recommended, and that while a consumer could use a diffuser to add humidity to a room, this is not very effective. The Tribunal accepts the evidence that this potential secondary use of the products does not make a humidifier a diffuser or a diffuser a humidifier (see *Transcript of Public Hearing* at 31).

[87] Taking the evidence as a whole, it is apparent that a diffuser may diffuse essential oil *by producing vapour ultrasonically*, meaning that the terms "ultrasonic vaporizer" and "ultrasonic diffuser" can overlap.

[88] In coming to this conclusion, the Tribunal is not reading words into the statute, as BBB cautions against. Nor is the statute ambiguous. The Tribunal simply finds that "ultrasonic vaporizer" means a good that produces vapour ultrasonically.

[89] In addition, the Tribunal finds that the term "ultrasonic vaporizer" is not limited to solely the vaporization of distilled water, which may be the liquid used in a humidifier. Rather, the term should be read more broadly to include any liquid that could be placed in a product that otherwise fulfils the requirements of the relevant tariff nomenclature. Furthermore, considering the context of the related provisions of the *Customs Tariff*, there is nothing that limits an "ultrasonic vaporizer" to any particular function, other than the requirement that the goods in heading No. 85.09 be domestic appliances (which has been addressed above). In other words, whether the product vaporizes water, or whether it vaporizes water and essential oil, it is still a vaporizer.

[90] In light of the considerations above, the Tribunal is not swayed by BBB's argument that if the primary purpose of a good is to diffuse essential oils, this purpose ought to trump the fact that a good uses ultrasonic technology to vaporize a liquid.

[91] Rather, the clear language of the tariff item asks the Tribunal to determine (1) whether the good uses ultrasonic technology, and (2) whether the good is a vaporizer. In what follows, the Tribunal will assess the evidence as to whether the goods in issue meet these two criteria.

(1) "Ultrasonic"

[92] Dr. Rocha explained that an ultrasonic actuator generates waves at frequencies above the human hearing range.[68] He confirmed that a piezoceramic ultrasonic actuator was contained within the goods that he examined, and that this actuator vibrated at an ultrasonic frequency, imparting ultrasonic waves into the water and causing the water to vaporize.[69]

[93] He confirmed that the ultrasonic technology was the key component of the system, as the goods would not function if the ultrasonic actuator was disconnected.[70] In contrast, when he disconnected the fan, the ultrasonic actuator continued to function. He concluded, therefore, that the ultrasonic component was a more fundamental component than the fan.[71]

[94] The Tribunal finds that Dr. Rocha's evidence was helpful and directly on point in confirming that the goods contain ultrasonic technology. Dr. Rocha was able to objectively assess the components of the system, the functionality and operation of those components, and how the components contributed to the operation of the entire system of the good in issue.

[95] In light of this evidence, the Tribunal therefore finds that the goods in issue can properly be described as "ultrasonic".

---

68 *Transcript of Public Hearing* at 48.
69 *Ibid.* at 52. See also Exhibit AP-2020-008-22 at 11.
70 *Transcript of Public Hearing* at 55.
71 *Ibid.* at 57.

(2) "Vaporizer"

[96] In the Tribunal's view, Dr. Rocha was also able to objectively confirm that from a mechanical engineering perspective, the goods in issue do in fact vaporize a liquid. He stated that a vapour, in terms of thermodynamics, is typically a mixture of a liquid and a gas, but can also be a "saturated" or "overheated" vapour, meaning that all the liquid particles have been changed into gas.[72] A vapour can be created by putting energy into a liquid, which makes at least some of the liquid particles become gas. Dr. Rocha stated that, from a mechanical engineering perspective, a vaporizer is any device that generates vapour (i.e. that allows a liquid to become a gas or a mixture in between gas and liquid).[73]

[97] From an engineering perspective, Dr. Rocha was clearly able to distinguish the difference between vaporization and humidification: ". . . vaporization is when you generate a vapor; humidification is the amount of particles of water in [the] air."[74]

[98] BBB did not dispute that there has to be a vaporization of liquid in order for the goods to disperse the essential oil into the air.[75] However, BBB argued that the vaporization is just the means through which the objective is realized, the objective being to diffuse the essential oil into the air.

[99] Dr. Rocha made the following statement about the goods in issue:

> The main function of the device is ultrasonic vaporization and they cannot go on to do the other things, diffuse essential oils or humidify if they do not generate the vapour ultrasonically.[76]

[100] The Tribunal accepts Dr. Rocha's evidence that the goods in issue do not generate any diffusion or humidification without first generating vapour ultrasonically.

[101] The Tribunal therefore finds that the goods are "vaporizers" within the meaning of tariff item No. 8509.80.10.

Conclusion

[102] The Tribunal concludes that the goods are properly classified as "ultrasonic vaporizers" under tariff item No. 8509.80.10.

DECISION

[103] The appeal is dismissed.

Cheryl Beckett
Cheryl Beckett
Presiding Member

---

72 *Ibid.* at 49.
73 *Ibid.* at 50.
74 *Ibid.* at 69.
75 *Ibid.* at 90.
76 *Ibid.* at 113.