



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2020-023

Amcor Flexibles Capsules Canada
Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, November 2, 2021*

*Corrigendum issued
Thursday, November 4, 2021*

*Corrigendum issued
Friday, December 3, 2021*

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DECISION	15

IN THE MATTER OF an appeal heard on June 10, 2021, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated September 15, 2020, and October 14, 2020, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

AMCOR FLEXIBLES CAPSULES CANADA INC.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Frédéric Seppey

Frédéric Seppey
Presiding Member

IN THE MATTER OF an appeal heard on June 10, 2021, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated September 15, 2020, and October 14, 2020, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

AMCOR FLEXIBLES CAPSULES CANADA INC.

Appellant

AND

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

Respondent

CORRIGENDUM

The third sentence of paragraph 53 of the Statement of Reasons should read as follows:

While the Tribunal agrees that the *Customs Tariff* shall be read in its entire context, it is unclear to what extent one could infer the legislator's intention with respect to the term "gasket" or the term "*joint*" in tariff item No. 3926.90.91 by interpreting specific tariff items in other chapters.

Frédéric Seppey

Frédéric Seppey
Presiding Member

IN THE MATTER OF an appeal heard on June 10, 2021, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated September 15, 2020, and October 14, 2020, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

AMCOR FLEXIBLES CAPSULES CANADA INC.

Appellant

AND

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

Respondent

CORRIGENDUM

The first sentence of paragraph 50 of the Statement of Reasons should read as follows:

In the Tribunal's view, the common features across all of these definitions of "gasket" are as follows: (i) a piece of material (with no specificity as to the nature of material); (ii) used at a joint (i.e. in contact with two surfaces); (iii) which serves as a seal to make a joint fluid-tight or leakproof.

Frédéric Seppey

Frédéric Seppey
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: June 10, 2021

Tribunal Panel: Frédéric Seppey, Presiding Member

Tribunal Secretariat Staff: Jessye Kilburn, Counsel
Isaac Turner, Counsel
Lindsay Vincelli, Senior Registrar Officer
Kim Gagnon-Lalonde, Registrar Officer

PARTICIPANTS:**Appellant**

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STATEMENT OF REASONS

OVERVIEW

[1] This is an appeal by Amcor Flexibles Capsules Canada Inc. (Amcor) pursuant to subsection 67(1) of the *Customs Act*¹ from re-determinations by the President of the Canada Border Services Agency (CBSA) dated September 15, 2020 and October 14, 2020.

[2] The goods in issue are seven models of plastic disc-shaped bottle cap liners. Six of these are made exclusively of various types of plastic material. The seventh model, while mainly composed of plastic material, also includes a layer of tin metal and a layer of paper.

[3] The dispute is at the tariff item level. Amcor argues that the goods in issue are properly classified as “gaskets” (“*joints*” in French) under tariff item No. 3926.90.91, while the CBSA argues that they are classified in the residual tariff item No. 3926.90.99 as “other articles of plastics”.

[4] For the reasons below, the Tribunal finds that the goods in issue are properly classified as “gaskets” under tariff item No. 3926.90.91.

GOODS IN ISSUE

[5] The goods in issue are round discs of approximately 2.9 cm in diameter and 2 mm in thickness, composed of several layers. Six of the seven models are composed of two circular thin layers of plastic, with a layer of cellular plastic foam in between (plastic models). The seventh model (Oenoseal® 2520 Tin PVDC) has, in addition to the same three plastic layers, a layer of tin metal and a layer of paper (mixed model). The tin and paper layers are on the inside, and two of the plastic layers are on the outside. The plastic layers comprise 73 percent of the mixed model’s weight.

[6] The goods in issue are inserted into screw-on metal bottle caps for use with wine and other alcoholic beverages (e.g. spirits). When the caps are tightened, they provide a liquid-tight seal between the lip of the bottle and the cap. They line the entire bottle cap and not only the outer edges.

[7] The parties agree that the goods in issue provide a liquid-tight seal to prevent the bottles from leaking, as well as a cover for the mouth of the bottle in order to limit the amount of oxygen that can enter. Another important feature of the goods in issue is their capacity to allow a small amount of oxygen into the bottle in order to enable the wine to age at the proper rate.²

PROCEDURAL HISTORY

[8] Amcor imported the goods in issue between July 2015 and June 2016, declaring them as “*joints en matière plastique*” classified under tariff item No. 3926.90.91.³

[9] On October 2, 2017, pursuant to section 59 of the *Customs Act*, the CBSA re-determined the tariff classification of the goods in issue as “other articles of plastics” under tariff item No. 3926.90.99.

¹ R.S.C. 1985 (2nd Supp.), c. 1.

² Exhibit AP-2020-023-14 at paras. 3-12.

³ Exhibit AP-2020-023-06 at para. 9 and at 149-150, 154-155, 159-160.

[10] On January 22, 2018, Amcor requested a further re-determination under section 60(1) of the *Customs Act*, claiming that the goods in issue should be classified under tariff item No. 3926.90.91 as “gaskets”.

[11] On September 15, 2020, and October 14, 2020, the CBSA issued its further re-determination pursuant to subsection 60(4) of the *Customs Act*, maintaining that the goods in issue were classified in tariff item No. 3926.90.99 as “other articles of plastics”.⁴

[12] Amcor filed this appeal with the Tribunal on December 7, 2020, pursuant to subsection 67(1) of the *Customs Act*.⁵

[13] Amcor filed its brief on February 9, 2021, which was one day late. The CBSA consented to the late filing and, on February 10, 2021, the Tribunal allowed the late filing.⁶

[14] The CBSA filed its brief on April 12, 2021.⁷ As parts of the confidential attachments were redacted, the Tribunal requested an unredacted version on April 14, 2021. The CBSA filed a confidential unredacted version of the brief on April 20, 2021.⁸

[15] On April 14, 2021, the Tribunal requested parties’ views on the type of hearing to conduct. On April 23, 2021, parties requested a videoconference hearing. On April 26, 2021, the Tribunal confirmed that the hearing would proceed on June 10, 2021, by videoconference.

[16] On April 29, 2021, Amcor filed an expert witness report by Mr. Lionel Carré, Director of Development and Innovation at Amcor.⁹

[17] On May 5, 2021, the CBSA filed physical exhibits, which were two models of the goods in issue.¹⁰ The same day, the CBSA filed an agreed statement of facts on behalf of both parties.¹¹

[18] On May 13, 2021, Amcor filed its book of authorities and expert witness documents.¹² On May 21, 2021, the CBSA filed its additional documents and authorities.¹³

[19] On May 14, 2021, the CBSA objected to qualifying Mr. Carré as an expert witness, on the grounds that he is an employee of Amcor and may not be fully objective. On May 17, 2021, the Tribunal requested parties’ comments on this issue. On May 18, 2021, Amcor advised that it was prepared to accept that Mr. Carré would testify as a lay witness. The CBSA indicated that it agreed with this course of action on May 21, 2021. Accordingly, on May 25, 2021, the Tribunal decided that Mr. Carré would testify as a lay witness.

⁴ Exhibit AP-2020-023-01 at 9-30; Exhibit AP-2020-023-04 at 14-35.

⁵ Exhibit AP-2020-023-01.

⁶ Exhibit AP-2020-023-04.

⁷ Exhibit AP-2020-023-06A (protected).

⁸ Exhibit AP-2020-023-06.

⁹ Exhibit AP-2020-023-10A.

¹⁰ Exhibit AP-2020-023-B-01; Exhibit AP-2020-023-B-02.

¹¹ Exhibit AP-2020-023-14.

¹² Exhibit AP-2020-023-16.

¹³ Exhibit AP-2020-023-20.

[20] On June 4, 2021, the CBSA provided a list of additional authorities and enclosed Amcor's consent to this late filing.¹⁴ On June 7, 2021, Amcor provided a list of additional authorities and enclosed CBSA's consent to the late filing.¹⁵ Also on June 7, 2021, with Amcor's consent, the CBSA clarified the source of certain Web site excerpts contained in its brief which had not included Web addresses. On June 8, 2021, the Tribunal notified parties that it would allow both parties' late filings onto the record, given that each party had consented to the other's late filing and that the authorities were not overly voluminous. The Tribunal also accepted the CBSA's clarifications about Web site sources onto the record, indicating that they would be given the weight they deserved.

[21] The Tribunal held a hearing by videoconference on June 10, 2021. Mr. Lionel Carré testified on behalf of Amcor.

[22] On June 25, 2021, the Tribunal requested that Amcor provide citations for the cases that its counsel had mentioned during the hearing (chiefly at pages 106 and 109 of the *Transcript of Public Hearing*) on the subject of bilingual statutory interpretation. On June 28, 2021, Amcor filed its additional citations and, on July 6, 2021, the CBSA filed a response to these citations.¹⁶

LEGAL FRAMEWORK

[23] 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).¹⁷ 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.

[24] 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*,¹⁸ and the *Canadian Rules*¹⁹ set out in the schedule.

[25] 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.

[26] 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*²⁰ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,²¹ published by the WCO. While the *Classification Opinions* and the

¹⁴ Exhibit AP-2020-023-24.

¹⁵ Exhibit AP-2020-023-25.

¹⁶ Exhibit AP-2020-023-28; Exhibit AP-2020-023-29.

¹⁷ Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

¹⁸ S.C. 1997, c. 36, schedule [*General Rules*].

¹⁹ S.C. 1997, c. 36, schedule.

²⁰ WCO, 4th ed., Brussels, 2017 [*Classification Opinions*].

²¹ WCO, 6th ed., Brussels, 2017 [*Explanatory Notes*].

Explanatory Notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.²²

[27] 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 in issue that the other general rules become relevant to the classification process.²³

[28] 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.²⁴ The final step is to determine the proper tariff item.²⁵

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

Section VII
PLASTICS AND ARTICLES THEREOF;
RUBBER AND ARTICLES THEREOF

...

Chapter 39
PLASTICS AND ARTICLES THEREOF

...

39.26 Other articles of plastics and articles of other materials of heading 39.01 to 39.14.

Section VII
MATIÈRES PLASTIQUES OU
OUVRAGES EN CES MATIÈRES;
CAOUTCHOUC ET OUVRAGES EN
CAOUTCHOUC

...

Chapitre 39
MATIÈRES PLASTIQUES ET
OUVRAGES EN CES MATIÈRES

...

39.26 Autres ouvrages en matières plastiques et ouvrages en autres matières des nos 39.01 à 39.14

²² 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*.

²³ *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

²⁴ 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."

²⁵ 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.

...

3926.90 -Other

...

---Other:

3926.90.91 ----Belts and belting for machinery
other than conveyor belts; Bolts,
nuts, screws and washers;
Gaskets

...

3926.90.99 ----Other

...

3926.90 -Autres

...

---Autres :

3926.90.91 ----Courroies pour
machines autres que les
courroies
transporteuses; Écrous,
boulons, vis et
rondelles; Joints

...

3926.90.99 ----Autres

ANALYSIS

1) The goods in issue are classified in Chapter 39

[30] The parties agree that the goods in issue are classified in Chapter 39, “Plastics and articles thereof”. As noted above, the plastic models are composed of three thin layers of plastic sandwiching a thicker layer of cellular plastic foam. The mixed model has the same three plastic layers, with an additional layer of tin metal and a layer of paper.

[31] The explanatory notes to Chapter 39 contemplate goods of plastic combined with paper or metal, if the goods retain the essential character of plastic. They read as follows:

Combinations of plastics and materials other than textiles

This Chapter also covers the following products, whether they have been obtained by a single operation or by a number of successive operations **provided** that they retain the essential character of articles of plastics :

...

- (b) Plates, sheets, etc., of plastics, separated by a layer of another material such as metal foil, paper, paperboard.

Products consisting of paper or paperboard covered with a thin protective sheet of plastics on both faces are **excluded** from this Chapter **provided** they retain the essential character of paper or paperboard (generally **heading 48.11**).²⁶

²⁶ Exhibit AP-2020-023-06 at 131-132.

[32] Given that the plastic layers comprise 73 percent of the mixed model's weight, the Tribunal is of the view that the mixed model retains the essential character of articles of plastic.

[33] In light of the above, the Tribunal agrees with the parties that both the plastic model and the mixed model are properly classified in Chapter 39.

2) The goods in issue are classified in heading No. 39.26

[34] The parties also agree that the goods in issue are classified in heading No. 39.26 as "other articles of plastics".

[35] The CBSA submitted that Rule 1 of the *General Rules* is sufficient to classify the six plastic models in this heading, as they are entirely composed of plastic. However, the CBSA submitted that the mixed model requires resort to Rule 2(b), given the layers of tin metal and paper as well as plastic.²⁷ Rule 2(b) reads as follows:

Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

[36] The Tribunal has previously explained as follows:

The primary effect of Rule 2(b) is to extend any subheading [or in this case, heading] referring to goods of a given material or substance to include goods consisting partly of that material or substance. On that basis, the application of Rule 2(b) means that a subheading covering metal furniture may be broadened to include furniture consisting partly of metal and partly of other materials, and a subheading covering wooden furniture may be broadened to include furniture consisting of partly of wood and partly of other materials.²⁸

[Footnote omitted]

[37] As noted above, the mixed model is composed of five layers, three of which are plastic, with one layer of tin and one of paper. The three plastic layers are 73 percent of the of the mixed model's weight, and they are the outer layers which sandwich and cover the tin and paper layers. The CBSA suggested that, with regard to Rule 2(b), this is sufficient plastic content for the mixed model to be *prima facie* classifiable under heading No. 39.26. The Tribunal agrees.

[38] If there were any other headings in which the goods in issue would also be *prima facie* classifiable, Rule 3 would be used to decide between the headings. Parties have not suggested any other headings. After reviewing the other headings in Chapter 39, the Tribunal is of the view that there are no other applicable headings.

²⁷ Rule 2(a) is not relevant because the goods in issue are not incomplete or unfinished.

²⁸ *Zuo Moderne Canada Inc. v. President of the Canada Border Services Agency* (4 April 2019), AP-2018-013 (CIIT) at para. 44.

[39] The Tribunal is therefore convinced that the goods in issue are properly classified under heading No. 39.26.

3) The goods in issue are classified in subheading No. 3926.90

[40] The parties agree that the goods in issue are described in residual subheading No. 3926.90 (“other”), as they are not described more specifically in any of the other subheadings under heading No. 39.26. The Tribunal concurs.

[41] The Tribunal will now turn to the core issue at dispute, namely whether the goods in issue are gaskets or something else.

4) The goods in issue are classified under tariff item No. 3926.90.91

[42] The main dispute between the parties is whether the goods in issue, declared by Amcor at the time of importation as “joints en matière plastique”, are “gaskets” (“*joints*”), which would place them in tariff item No. 3926.90.91, as Amcor argues. The CBSA argues that they are not gaskets and are therefore classified as “other” under tariff item No. 3926.90.99.

[43] As tariff item No. 3926.90.99 is a residual category, the Tribunal must first consider whether the goods in issue are “gaskets” of tariff item No. 3926.90.91.

[44] The Tribunal will first address the relevant principles of statutory interpretation, before turning to the interpretation of the terms of the tariff item. The Tribunal will then address the parties’ arguments on the functions of the goods in issue, as well as the trade usage of the relevant terms.

Principles of statutory interpretation

[45] Both parties submitted that the Tribunal should look to the ordinary meaning of the terms in the tariff item, as opposed to any technical meaning.²⁹ The Tribunal agrees. As the Tribunal has previously explained:

[T]he Tribunal applies the modern rule of statutory interpretation which 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.” 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.” It has also been described as the “natural meaning which appears when the provision is simply read through”.³⁰

[Footnotes omitted]

²⁹ A principle of statutory interpretation is the presumption in favour of the ordinary, non-technical meaning. See for example, *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (28 February 2017), AP-2016-003 (CITT) at para. 87.

³⁰ *Cavavin (2000) Inc. v. President of the Canada Border Services Agency* (4 October 2019), AP-2017-021 (CITT) at para. 48; appeal to the Federal Court of Appeal dismissed: *Danby Products Limited v. Canada (Border Services Agency)*, 2021 FCA 82.

[46] With regard to bilingual statutory interpretation, the Tribunal has explained its approach as follows:

The Tribunal notes that section 13 of the *Official Languages Act* provides that the English and French versions of any act of Parliament are equally authoritative. Thus, neither the English nor the French version of the schedule to the *Customs Tariff* enjoys priority over the other. If the two versions appear to say different things, as seems to be the case [in *Great West Van Conversions*], the inconsistency cannot be resolved in a way that automatically gives priority to one of the versions.³¹

[Footnote omitted]

[47] The parties made various submissions throughout the proceedings regarding bilingual statutory interpretation, in particular pertaining to the “shared meaning” rule.³² This rule provides that where there is an inconsistency between English and French terms and one language version of a term is capable of a broader meaning than the other, the shared meaning is normally derived from the version with the narrower or more restrictive meaning.³³ While interesting, the Tribunal finds that these submissions are not relevant to the Tribunal’s interpretation of tariff item No. 3926.90.91 because, as discussed below, the Tribunal does not see a *prima facie* discrepancy between the ordinary meanings of the English term “gasket” and the French term “joints” (i.e. the terms are equivalent).

Interpretation of “gaskets” and “joints” of tariff item No. 3926.90.91

[48] The parties provided the following dictionary definitions of the term “gasket” in order to inform its ordinary meaning:³⁴

- i. A material (such as rubber) or a part (such as an O-ring) used to make a joint fluid-tight. (*Merriam-Webster Dictionary*)
- ii. A shaped sheet or ring of rubber or other material sealing the junction between two surfaces in an engine or other device (UK).

A shaped piece or ring of rubber or other material sealing the junction between two surfaces in an engine or other device (US).

(*Lexico Dictionary powered by Oxford*)

³¹ *Great West Van Conversions Inc. v. Canada Border Services Agency* (30 November 2011), AP-2010-037 (CITT) [Great West Van Conversions] at para. 50. See also *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-005 (CITT) at para. 15.

³² Amcor submitted that there were several “decisions which say that if one version more clearly or more accurately describes the product, then you can use that version even if it is different from the other version”. *Transcript of Public Hearing* at 106. Amcor provided several citations in support of this position. See for example, *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 39; *Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 6387 (FCA), [1998] 2 FC 303. The CBSA submitted that Amcor had provided no sound reason as to why the Tribunal should depart from the “shared meaning” rule. Exhibit AP-2020-023-29 at 2.

³³ See *Great West Van Conversions* at paras. 50-51.

³⁴ Exhibit AP-2020-023-04 at 5-6; Exhibit AP-2020-023-06 at 245-268.

- iii. A flat piece of soft material that you put between two joined surfaces in a pipe or engine in order to make sure that gas and oil cannot escape (automotive).

A piece or ring of rubber, metal, paper, etc. placed at a joint to make it leakproof (American).

A compressible packing piece of paper, rubber, asbestos, etc. sandwiched between the faces or flanges of a joint to provide a seal (British).

(*Collins Online English Dictionary*)

- iv. A flat piece of soft material or rubber that is put between two joined metal surfaces to prevent gas, oil, or steam from escaping (British and American). (*Cambridge Dictionary*)
- v. (Mechanical Engineering) a compressible packing piece of paper, rubber, asbestos, etc. sandwiched between the faces or flanges of a joint to provide a seal. (*Free Dictionary*)

[49] The CBSA also provided the following definition of “joint” from the *dictionnaire de français Larousse*: “pièce interposée entre deux surfaces en regard pour y assurer l’étanchéité” (part placed between two facing surfaces in order to ensure seal/watertightness).³⁵ The Tribunal also has judicial knowledge of the following definition of “joint” from *Le Robert*: “Garniture assurant l’étanchéité d’un assemblage”³⁶ (gasket ensuring watertightness of a joining assembly).

[50] In the Tribunal’s view, the common features across all of these definitions of “gasket” and of “joint” are as follows: (i) a piece of material (with no specificity as to the nature of material); (ii) used at a joint (i.e. in contact with two surfaces); (iii) which serves as a seal to make a joint fluid-tight or leakproof. The Tribunal is also of the view that the above definitions of the French term “joint” have the same three common features. As a result, and based on the above examples, the Tribunal does not see a *prima facie* discrepancy in the breadth of the ordinary meaning of “gasket” and “joint”.

[51] In both its submission and in oral arguments, the CBSA argued that the term “gaskets” found in tariff item No. 3926.90.91 is narrower than “joints” and that the Tribunal should therefore focus on the English version of the tariff item.³⁷ The CBSA’s argument is largely based on an assessment of the scope of the term “gaskets” and “joints” found concurrently in other parts of the *Customs Tariff*.³⁸

[52] The Tribunal has considered the instances where the term “gasket” appears elsewhere in the *Customs Tariff*. Heading No. 84.84 refers to “gaskets and similar joints of metal sheeting combined with other material or of two or more layers of metal” in English and “joints métalloplastiques” in French. Subheading No. 4016.93 refers to “gaskets, washers, and other seals” in English and “joints” in French. The CBSA argued that the phrases found alongside “gaskets” elsewhere in the tariff (i.e. “similar joints” and “washers, and other seals”) must be given a meaning; therefore, when tariff item No. 3926.90.91 refers to just “gaskets”, this cannot be interpreted to include goods that are similar to gaskets but not gaskets themselves.

³⁵ Exhibit AP-2020-023-06 at 271.

³⁶ Online: <<https://dictionnaire.lerobert.com/definition/joint>>.

³⁷ Exhibit AP-2020-023-06 at para. 44; *Transcript of Public Hearing* at 87-88.

³⁸ Exhibit AP-2020-023-06 at paras. 37-28; *Transcript of Public Hearing* at 83-88.

[53] To the extent that the CBSA is arguing that an interpretation of tariff item No. 3926.90.91 should limit itself to the meaning of the term “gaskets” (as well as “joints”) and should not go beyond this to include other goods that are similar but do not meet the terms in the tariff item, the Tribunal agrees. But the Tribunal is hesitant to follow the respondent’s line of logic beyond that point. While the Tribunal agrees that the *Customs Tariff* shall be read in its entire context, it is unclear to what extent one could infer the legislator’s intention with respect to the term “gasket” or the term “joint” in tariff item No. 3926.90.91 by interpreting specific tariff items in other chapters. One example of how challenging this approach is stems from a review of tariff item No. 4016.93 where “washers” seems to be included as part of the term “joints” while “bolts, nuts, screws and washers” in tariff item No. 3926.90.91 are shown in the French version as “écrous, boulons, vis et rondelles” (and not “joints”, despite the presence of this term in the description of that tariff item). As the examples provided by the CBSA seem to provide little assistance in defining the scope of the term “gaskets” in the context of tariff item No. 3926.90.91, the Tribunal will rely on the ordinary meaning of the terms “gasket” and “joint”.

[54] The Tribunal concludes that the ordinary meaning of the terms “gasket” and “joint” is encompassed in the following three aspects: (i) a piece of material (with no specificity as to the nature of the material, although of course to fall within tariff item No. 3926.90.91, the goods in issue must be plastic as Chapter 39 is for “plastics and articles thereof”); (ii) used at a joint (i.e. in contact with two surfaces); (iii) which serves as a seal to make a joint fluid-tight or leakproof.

[55] The Tribunal is of the view that the evidence provided in the Agreed Statement of Facts, and further corroborated by the testimony of Amcor’s witness, Mr. Carré, and the Tribunal’s own examination of the physical exhibits, indicate that the goods in issue have these three aspects. The goods in issue are composed of small round layers mostly of plastic, with some models having layers of tin and paper.³⁹ They are used at a joint between the bottle and the bottle cap, and they are in contact with both surfaces. When the bottle cap is screwed on, they are compressed at the joint between the bottle and the bottle cap, thus making the joint fluid-tight.

Function

[56] Parties made extensive arguments on the function of the goods in issue, with the CBSA arguing that the fact that the goods function to allow a certain amount of oxygen into the bottle excludes them from the meaning of “gasket”.

[57] Overall, the goods’ function (or functions) is one among many factors that the Tribunal weighs as questions of fact:

Although an article having multiple uses or functions may be classified on the basis of one of those functions, this conclusion does not automatically apply to all situations. The characteristics of the product in issue, including design, intended use, marketing, and channels of trade are relevant factors to consider when determining tariff classification. These are questions of fact.⁴⁰

³⁹ Exhibit AP-2020-023-14.

⁴⁰ *Instant Brands Inc. v. President of the Canada Border Services Agency* (3 March 2021), AP-2019-039 (CITT) [*Instant Brands*] at para. 56.

[58] The parties agree on several aspects of the goods' function, as set out in the Agreed Statement of Facts:

8. The goods under appeal are used to line the bottom of metal bottle caps used for wine and other alcoholic beverages.
9. The goods under appeal provide a liquid-tight seal to prevent the bottles from leaking between the lip of the bottle and the cap.
10. When the cap is tightened, the goods under appeal provide a seal where the edge of the bottle (i.e. the lip) meets the bottom of the cap. The goods also seal and cover the mouth of the bottle.
11. Since they line the entire bottle cap and not only its outer edges, the goods under appeal maintain the freshness and quality of the bottled beverages and preserve their shelf life by limiting the amount of oxygen that can enter.⁴¹

[59] The evidence further demonstrates that the goods in issue are designed to allow a specific amount of oxygen into the bottle. For example, the CBSA submitted an excerpt of Amcor's Web site advertising certain liners as "a strong oxygen barrier" and others as "enabling greater oxygen exchange".⁴² Amcor's witness, Mr. Carré, testified that when the goods in issue are used with wine, there needs to be an exchange of oxygen to allow the wine to age.⁴³ He testified that the goods in issue are designed to allow a specific "oxygen transmission rate" depending on the amount of oxygen needed for the particular wine. He added that the amount of oxygen is key to the aging of wines but unimportant in the case of spirits, which do not age.⁴⁴

[60] While the parties agree that the goods in issue both seal the cap *and* allow a certain amount of oxygen through, they disagree on the implications of these functions for tariff classification. According to Amcor, the permeability function of the goods in issue is incidental to their sealing function, and it is therefore of secondary importance in classification. According to the CBSA, the goods in issue are more than simply gaskets because their function goes beyond simply sealing the bottle. According to the CBSA, the goods' permeability is a main characteristic, not an incidental one, as they are designed to provide a specific oxygen transmission rate necessary for aging a wine and they are designed to cover the entire mouth of the bottle.

[61] In light of the evidence presented, the Tribunal is of the view that both the sealing function and the oxygen transmission capability are equally important functions of the goods in issue. The marketing materials on record⁴⁵ reveal the importance of the oxygen transmission capability. The oxygen transmission rate required in a liner varies across the type of alcoholic beverages to be bottled, and in some cases the absence of oxygen transmission is either desirable or is not an issue (such as for spirits). The goods in issue are produced by different, highly specialized, manufacturers that offer a wide selection of liners with different oxygen transmission rates, but with no stated differences in their capacity to seal. The oxygen transmission rate is the focus of the marketing materials, as it varies across the different models. The sealing function of the goods in issue is less

⁴¹ Exhibit AP-2020-023-14 at 3.

⁴² Exhibit AP-2020-023-20 at 15.

⁴³ *Transcript of Public Hearing* at 10.

⁴⁴ *Ibid.* at 19-20.

⁴⁵ Exhibit AP-2020-023-06 at 190-227.

prominent in the marketing materials, as it is common to all models of the goods in issue, but it is nonetheless an important aspect of the goods' function.⁴⁶

[62] Hence, the Tribunal is not convinced by Amcor's statement that the permeability function is incidental to the sealing function. Based on a definition of "incidental" cited by Amcor, the Tribunal is of the view that the oxygen transmission capability is not "occurring as something casual or of secondary importance".⁴⁷ Reading the marketing material used in the trade, one would easily consider that both the sealing and the oxygen transmission are, at minimum, equally important.

[63] Nor does the Tribunal agree with the CBSA that the goods in issue are disqualified from being gaskets because of their oxygen transmission function or the fact that they are not designed in a hollow O-ring shape. The CBSA's arguments on these points are summarized below.

[64] The CBSA emphasizes that the goods in issue cover not only the perimeter where the bottle meets the cap, they also cover the mouth of the bottle. According to the CBSA, lining the mouth of the bottle is an important function of the goods in issue because it limits the amount of oxygen that can enter the bottle. While the CBSA recognized that the dictionary definitions on record do not limit a gasket to a hollow or O-ring shape, it argued that if the goods in issue were gaskets, they would have a ring shape as they are meant to seal a circular surface.⁴⁸ It provided Web site excerpts showing the results of internet searches for "gaskets", which it submitted show that "almost all, if not all of the goods, are hollow in the middle".⁴⁹

[65] The CBSA further argued that the goods in issue are not gaskets because they are designed to do more than simply providing a seal, i.e. they are also designed to control the flow of oxygen into the bottle. The CBSA cited *Instant Brands*⁵⁰ in support of its position. The Tribunal does not find *Instant Brands* germane to this matter because the goods in issue in that case were highly sophisticated multi-function electronic goods.

[66] The Tribunal draws two conclusions from the CBSA's evidence that search results for "gasket" typically show images of goods that are hollow in the middle (i.e. have an O-ring shape).

[67] First, while this evidence may indicate that "gaskets" are most commonly shaped like an O-ring, it does not necessarily mean that gaskets *must* be shaped that way. Two of the dictionary definitions above specifically provide for a variation in shapes. the *Lexico Oxford Dictionary* mentions a "sheet or ring" and the *Collins Online Dictionary* mentions a "piece or ring". Furthermore, the *Merriam-Webster Dictionary* states that a gasket can be a "part (such as an O-ring)", which implies that an O-ring is an example of a shape of a gasket rather than a necessary element of a gasket.

[68] Second, the search results provided by the CBSA suggest that even the more common form of a gasket (i.e. the O-ring shape) does not need to be a full seal in order to be a gasket – in fact, from the search results submitted by the CBSA, gaskets do not commonly function as a full seal but only seal around the edges of the circle. The goods in issue function in a similar way: they seal around the

⁴⁶ See, for example, Mr. Carré's testimony. *Transcript of Public Hearing* at 15.

⁴⁷ *Costco Wholesale Canada Ltd v. President of the Canada Border Services Agency* (13 February 2014), AP-2013-003 (CITT) at para. 42.

⁴⁸ *Transcript of Public Hearing* at 76.

⁴⁹ *Ibid.* at 78, referring to Exhibit AP-2020-023-06 at Annex 10.

⁵⁰ *Instant Brands*.

edge of the circle where the bottle is in contact with the lid, which compresses the liner to make a seal.⁵¹

[69] In light of the above, the Tribunal concludes that a gasket need not only be designed to function as a seal, but rather can function to allow a substance to flow through it, and that a gasket need not be designed as an O-ring shape. As such, these elements of the function and design of the goods in issue do not exclude them from being considered gaskets.

Trade usage

[70] The CBSA also argued that the goods in issue should not be considered gaskets for the purposes of tariff classification because they are not referred to as gaskets in the trade.

[71] The trade usage of relevant terms can factor into the evidence that the Tribunal weighs and balances, as the Federal Court of Appeal has previously explained:

Dictionary definitions and evidence of trade usage of words are both relevant in cases such as this [one concerning the tariff classification of certain hair styling products], and it is within the mandate of the [Tribunal] to weigh and balance all such evidence in reaching a conclusion, as they did in this case.⁵²

[72] The parties agree that, in English, the goods in issue “are referred to as “liners”, not “gaskets”, in both the wine and packaging industries”.⁵³

[73] The CBSA emphasized that Amcor’s own marketing materials do not describe the goods in issue as “gaskets” but rather as “liners” or “seals”,⁵⁴ that a patent licensed to Amcor Flexibles Capsules France describes the goods in issue as “inserts” or “seals”,⁵⁵ and that manufacturers’ invoices also describe the goods in issue as “liners”.⁵⁶ The CBSA also argued that Web site excerpts showing the results of a search for “gaskets” (mentioned above) show that gaskets are commonly understood to be hollow or ring-shaped.⁵⁷

[74] Amcor agreed that the goods in issue are not commonly known as gaskets in the trade, but it argued that this does not preclude them from being considered gaskets for the purposes of tariff classification. Amcor cited *B. Erickson*, in which the Tribunal found that “the fact that those who use the goods in issue do not consider or identify them as ‘clamps’ changes nothing to what they are essentially in character: they are like clamps”.⁵⁸

⁵¹ *Transcript of Public Hearing* at 15. See also Exhibit AP-2020-023-06 at 229.

⁵² *Conair Consumer Products Inc. v. Canada (Canada Customs and Revenue Agency)*, 2004 FCA 282 at para. 6.

⁵³ Exhibit AP-2020-023-14 at 3.

⁵⁴ Exhibit AP-2020-023-06 at 190-227.

⁵⁵ *Ibid.* at 229-243.

⁵⁶ *Ibid.* at 151.

⁵⁷ *Ibid.* at 279-285.

⁵⁸ *B. Erickson Manufacturing Ltd. v. President of the Canada Border Services Agency* (13 September 2019), AP-2018-051 (CITT) [*B. Erickson*] at para. 43.

[75] The Tribunal finds that the fact that users of the goods in issue do not typically refer to them as gaskets in English does not necessarily mean that the goods in issue do not meet the definition of a gasket, particularly when weighted against the other factors relevant to classification.

[76] In addition, the Tribunal is of the view that the evidence on trade usage in French is particularly relevant. Amcor's witness, Mr. Carré, stated that, in French, the term used in the trade for the goods in issue is "*joints*" or "*joints d'étanchéité*".⁵⁹ The Tribunal also notes that the French version of the *Oenoseal* Web site referred to by the respondent during the hearing⁶⁰ (which features one of the goods in issue) uses the word "*joint*" as the French equivalent for liner.⁶¹

[77] *Le Grand Robert & Collins* dictionary translates "*joint d'étanchéité*" as "seal".⁶² *Termium* (the Government of Canada's terminology and linguistic data bank) offers the following definitions of "*joint d'étanchéité*":⁶³

- "gasket" (in the context of general use)
- "sealing ring" (in the context of mechanical components)
- "seal ring" (in the context of laboratory equipment)
- "gasket seal" (in the context of scientific research equipment)
- "fluid seal", "pressure seal", "seal" (in the context of coupling mechanical components)
- "lining compound", "sealing compound", "compound" (in the context of packaging in metal)

[78] As such, the French term widely used in the trade, "*joints d'étanchéité*", is best described in English by the terms "seals", "liners" or "gaskets".

[79] Furthermore, the terms "*joint*" and "*joint d'étanchéité*" are found in several French translations of the word "gaskets", as follows:

- *Le Grand Robert & Collins* translates "gasket" as "*joint d'étanchéité*".⁶⁴
- *Le dictionnaire Larousse* translates "gasket" as "*joint (d'étanchéité)*".⁶⁵
- *Termium Plus*®⁶⁶ offers several French equivalents to the word "gasket", for example:
 - "*joint d'étanchéité*" (in a general context)
 - "*joint*" (in the context of machinery)

⁵⁹ *Transcript of Public Hearing* at 45.

⁶⁰ *Ibid.* at 80; Exhibit AP-2020-023-16A at 3.

⁶¹ Online: <http://www.oenoseal.com/fr>.

⁶² Online: <<https://www.lerobert.com/collection-le-grand-robert-collins.html>>.

⁶³ Online:
<https://www.btb.termiumplus.gc.ca/tpv2alpha/alphaeng.html?lang=eng&i=1&srchtxt=joint+d%27%C3%A9tanch%C3%A9it%C3%A9&index=fir&codom2nd_wet=1#resultrecs>.

⁶⁴ Online: <<https://www.lerobert.com/collection-le-grand-robert-collins.html>>.

⁶⁵ Online: <<https://www.larousse.fr/dictionnaires/anglais-francais/gasket/582943>>.

⁶⁶ Online: <<https://www.btb.termiumplus.gc.ca/tpv2alpha/alpha-eng.html?lang=eng>>.

- “*joint d’étanchéité statique*” or “*joint statique*” (in the context of coupling of mechanical components)

[80] Therefore, there appears to be significant cross-over and interconnection between the terms “liner”, “seal”, “gasket”, “*joint*” and “*joint d’étanchéité*” on third party Web sites, in dictionaries, and in terminology databases. The Tribunal finds it reasonable that a good known in the trade as a “*joint*” or “*joint d’étanchéité*” in French and a “liner” in English would fall within the tariff item for “gaskets” and “*joints*”. Together with the factors above, this factor also weighs in favour of the conclusion that the goods in issue can be considered “gaskets” or “*joints*” for the purposes of tariff item No. 3926.90.91.

[81] As a result of this analysis, the Tribunal does not need to conduct further analysis with respect to tariff item No. 3926.90.99.

Conclusion

[82] For the reasons above, the Tribunal concludes that the goods in issue are properly classified in tariff item No. 3926.90.91.

DECISION

[83] The appeal is allowed.

Frédéric Seppey

Frédéric Seppey
Presiding Member