



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-061

Starkey Labs-Canada Co.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, August 29, 2012*

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IN THE MATTER OF an appeal heard on July 19, 2012, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated October 26, 2011, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

STARKEY LABS-CANADA CO.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 19, 2012

Tribunal Member: Stephen A. Leach, Presiding Member

Counsel for the Tribunal: Ekaterina Pavlova
Eric Wildhaber

Manager, Registrar Programs and Services: Michel Parent

Registrar Officer: Cheryl Unitt

PARTICIPANTS:**Appellant**

Starkey Labs Canada Co.

Counsel/RepresentativesBarb Miller
Alfred Chase**Respondent**

President of the Canada Border Services Agency

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Talitha Nabbali

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Starkey Labs-Canada Co. (Starkey) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on October 26, 2011, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to a request for re-determination of tariff classification.

2. The issue in this appeal is whether certain hard plastic hearing-aid cases (the goods in issue) are properly classified under tariff item No. 4202.39.00 of the schedule to the *Customs Tariff*² as other articles of a kind normally carried in the pocket or in the handbag, as determined by the CBSA, or should be classified under tariff item No. 9021.90.00 as accessories of hearing aids, as claimed by Starkey.

PROCEDURAL HISTORY

3. On October 2 and November 28, 2008, Starkey imported into Canada complete shipping boxes, including, among others, the goods in issue. The complete shipping boxes were classified under tariff item No. 3923.90.90.

4. As a result of a compliance verification, on February 17, 2010, the CBSA re-determined the tariff classification of the complete shipping boxes, including the goods in issue, under tariff item No. 4202.32.90, pursuant to section 59 of the *Act*.

5. On December 3, 2010, Starkey requested a review of the tariff classification of the goods in issue pursuant to section 60 of the *Act*. In its request, Starkey claimed that the goods in issue should be classified under tariff item No. 9021.90.00 as accessories of hearing aids or under tariff item No. 9979.00.00 as goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities, and articles or materials for use in such goods.

6. On October 26, 2011, the CBSA issued a decision, pursuant to subsection 60(4) of the *Act*, in which it classified the goods in issue under tariff item No. 4202.92.90.

7. On January 24, 2012, Starkey filed the present appeal with the Tribunal.

8. On July 12, 2012, the Tribunal denied a request to extend the deadline for Starkey to file an expert report under subsection 22(1) of the *Canadian International Trade Tribunal Rules*,³ as Starkey was unable to provide a legitimate reason for the late filing, and there was limited time left, before the hearing, for the CBSA to receive the report and decide whether to call an expert of its own in rebuttal.⁴ In addition, the Tribunal accepted Starkey's late filing on July 10, 2012, of additional documents, which contained written statements from a number of individuals regarding their personal experiences related to the use of the goods in issue and hearing aids.⁵ However, the Tribunal places little weight on such statements because their

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

2. S.C. 1997, c. 36.

3. S.O.R./91-499.

4. Tribunal Exhibit AP-2011-061-18.

5. *Ibid.*

veracity cannot be confirmed, as their authors were not present at the hearing and, thus, were not subject to cross-examination.⁶

9. The Tribunal held a public hearing in Ottawa, Ontario, on July 19, 2012.

10. At the hearing, the Tribunal accepted the filing of additional exhibits by Starkey, as well as additional case law by the CBSA, because neither party objected to the other's late filing and, in the Tribunal's view, neither party would be prejudiced by the late filings.

11. At the beginning of the hearing, Starkey also requested permission to call an additional witness, Mr. Christian Robert Bayerl, Senior Import/Export Manager, Starkey Labs-USA. The CBSA did not object to this request to the extent that the testimony would be limited to the manner in which the goods in issue were imported into Canada. On this basis, the Tribunal allowed Starkey to call Mr. Bayerl to testify on its behalf. Dr. Peter Russell, Regional Manager, Atlantic Canada, Starkey Labs, also testified on behalf of Starkey as a lay witness. No witnesses were called by the CBSA.

GOODS IN ISSUE

12. The goods in issue are hard plastic hearing-aid cases included in 70117-000 "Starkey Destiny" and 70117-500 "Nuear Rhapsody" shipping boxes.⁷ Each shipping box contains two types of hearing-aid cases: hard plastic hearing-aid cases (the goods in issue) and vinyl leatherette hearing-aid cases.⁸ Starkey did not challenge the CBSA's decision with respect of the tariff classification of the vinyl leatherette cases; accordingly, they are not at issue.⁹

13. The goods in issue are composed of a hard plastic exterior and a soft rubber interior. They are 3 1/4 inches long, 3 inches deep, with the thickness tapering back to front from 1 3/8 inches to 7/8 inch.¹⁰ The following samples of the goods in issue were filed by the CBSA on behalf of Starkey:¹¹

A-01 "Starkey Destiny" hard plastic hearing-aid case, included in a shipping box

A-02 "Nuear Rhapsody" hard plastic hearing-aid case, included in a shipping box

14. At the hearing, Starkey filed, as physical exhibits (and the CBSA did not object to it), samples of a remote control for a hearing aid, as well as a new model of hearing-aid case, including cleaning materials, an instruction manual and batteries, none of which are subject to this appeal.¹²

6. *Wal-Mart Canada Corporation v. President of the Canada Border Services Agency* (13 June 2011), AP-2010-035 (CITT) at paras. 70-71 [*Wal-Mart*].

7. Each shipping box consists of the following: a clamshell-type cardboard box; an internal cardboard support insert; two plastic molded inserts designed to hold the hearing aid and two cases; a soft vinyl leatherette case; a hard plastic case with a soft rubber liner allowing for air circulation and to prevent movement of the hearing aid; a thin flexible plastic casing that slides over the inserts to hold all products in place; and an additional thin plastic casing intended to be wrapped over the exterior of the entire shipping box. Tribunal Exhibit AP-2011-061-04 at paras. 10-11.

8. Tribunal Exhibit AP-2011-061-07A at paras. 2-5.

9. Tribunal Exhibit AP-2011-061-04 at para. 13.

10. Tribunal Exhibit AP-2011-061-06A.

11. Exhibits A-01 and A-02. See Tribunal Exhibits AP-2011-061-06 and AP-2011-61-06A.

12. Exhibit A-03, SurfLink remote control, model No. 100; Exhibit A-04, Starkey black case containing five hearing aids, an instruction manual, a brush and two batteries. *Transcript of Public Hearing*, 19 July 2012, at 4.

STATUTORY FRAMEWORK

15. 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).¹³ 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.

16. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*¹⁴ and the *Canadian Rules*¹⁵ set out in the schedule.

17. 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.

18. 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*¹⁶ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,¹⁷ published by the WCO. While *Classification Opinions* and *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁸

19. 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*. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.¹⁹

20. 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.²⁰ The final step is to determine the proper tariff item.²¹

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

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

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

16. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

17. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

18. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) 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*.

19. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.

20. 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."

21. 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." The *Classification Opinions* and the *Explanatory Notes* do not apply to classification at the tariff item level.

RELEVANT CLASSIFICATION PROVISIONS

21. The relevant provisions of the *Customs Tariff* provide as follows:

Section VIII

**RAW HIDES AND SKINS, LEATHER, FURSKINS AND ARTICLES THEREOF;
SADDLERY AND HARNESS; TRAVEL GOODS, HANDBAGS
AND SIMILAR CONTAINERS; ARTICLES OF ANIMAL GUT
(OTHER THAN SILK-WORM GUT)**

Chapter 42

**ARTICLES OF LEATHER; SADDLERY AND HARNESS;
TRAVEL GOODS, HANDBAGS AND SIMILAR CONTAINERS;
ARTICLES OF ANIMAL GUT (OTHER THAN SILK-WORM GUT)**

...

42.02 Trunks, suit-cases, vanity-cases, executive-cases, brief-cases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling-bags, insulated food or beverage bags, toilet bags, rucksacks, handbags, shopping bags, wallets, purses, map-cases, cigarette-cases, tobacco-pouches, tool bags, sports bags, bottle-cases, jewellery boxes, powder-boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fibre or of paperboard, or wholly or mainly covered with such materials or with paper.

...

-Articles of a kind normally carried in the pocket or in the handbag:

...

4202.39.00 -- Other

...

Section XVIII

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

Chapter 90

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

Notes.

...

2. Subject to Note 1 above, parts and accessories for machines, apparatus, instruments or articles of this Chapter are to be classified according to the following rules:

...

- (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 90.10, 90.13 or 90.31) are to be classified with the machines, instruments or apparatus of that kind;

...

90.21 Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability.

...

9021.40.00 -Hearing aids, excluding parts and accessories

...

9021.90.00 -Other

22. The relevant *Explanatory Notes* to heading No. 42.02 provide as follows:

These containers may be rigid or with a rigid foundation, or soft and without foundation.

Subject to Notes 2 and 3 to this Chapter, the articles covered by the first part of the heading may be of any material. The expression “similar containers” in the first part includes hat boxes, camera accessory cases, cartridge pouches, sheaths for hunting or camping knives, portable tool boxes or cases, specially shaped or internally fitted to contain particular tools with or without their accessories, etc.

The articles covered by the second part of the heading must, however, be only of the materials specified therein or must be wholly or mainly covered with such materials or with paper (the foundation may be of wood, metal, etc.). . . . The expression “similar containers” in this second part includes note-cases, writing-cases, pen-cases, ticket-cases, needle-cases, key-cases, cigar-cases, pipe-cases, tool and jewellery rolls, shoe-cases, brush-cases, etc.

...

Subheadings 4202.31, 4202.32 and 4202.39

These subheadings cover articles of a kind normally carried in the pocket or in the handbag and include spectacle cases, note-cases (bill-folds), wallets, purses, key-cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches.

23. The relevant *Explanatory Notes* to Chapter 90 provide as follows:

...

(III) PARTS AND ACCESSORIES

(Chapter Note 2)

Subject to Chapter Note 1, parts or accessories identifiable as suitable for use **solely or principally** with the machines, appliances, instruments or apparatus of this Chapter are classified with those machines, appliances, etc.

This general rule **does not**, however, **apply to**:

- (1) Parts or accessories which in themselves constitute articles falling in any particular heading of this Chapter or of **Chapter 84, 85 or 91 (other than the residual heading 84.87, 85.48 or 90.33)**. For example, a vacuum pump for an electron microscope remains a pump of **heading 84.14**;

transformers, electro-magnets, capacitors, resistors, relays, lamps or valves, etc., remain classified in **Chapter 85**; the optical elements of **heading 90.01** or **90.02** remain in the headings cited regardless of the instruments or apparatus to which they are to be fitted; a clock or watch movement is always classified in **Chapter 91**; a photographic camera falls in **heading 90.06** even if it is of a kind designed for use with another instrument (microscope, stroboscope, etc.).

- (2) Parts or accessories suitable for use with several categories of machines, appliances, instruments or apparatus falling in different headings of this Chapter are classified in **heading 90.33**, unless they are in themselves complete instruments, etc., specified in another heading (see paragraph (1) above).

24. The relevant *Explanatory Notes* to heading No. 90.21 provide as follows:

PARTS AND ACCESSORIES

Subject to the provisions of Notes 1 and 2 to this Chapter (see the General Explanatory Note), parts and accessories of apparatus or appliances of this heading remain classified here.

POSITIONS OF PARTIES

Starkey

25. Starkey submitted that the goods in issue should be classified on the basis of Rule 1 of the *General Rules* under tariff item No. 9021.90.00. It argued that the goods in issue are accessories to hearing aids and, as such, according to Note 2(b) to Chapter 90 and the *Explanatory Notes* to Chapter 90, should be classified with hearing aids in heading No. 90.21. Starkey relied on the Tribunal's previous decision in *Rlogistics Limited Partnership v. President of the Canada Border Services Agency*,²² in which the Tribunal referred to the dictionary definitions of the term "accessories" and to the definition provided by Customs Memorandum D-10-0-1,²³ and held that accessories are goods that "... possess a secondary or subordinate relationship to a host product ... that is not essential to the host product and that improves the convenience and effectiveness of the host product ... in certain circumstances."²⁴

26. Starkey emphasized that the goods in issue are more than mere containers designed to hold, transport or carry and protect hearing aids. Rather, according to Starkey, because the goods in issue provide a controlled and ambient environment for hearing aids, they have a secondary or subordinate function, since they add to the effectiveness, convenience, performance and overall functionality of the hearing aids.²⁵

CBSA

27. The CBSA submitted that the goods in issue should be classified on the basis of Rule 1 of the *General Rules* under tariff item No. 4202.39.00 as other articles of a kind normally carried in the pocket or in the handbag. Relying on the *Explanatory Notes* to heading No. 42.02, the CBSA was of the view that the goods in issue were similar to those items listed in the first part of heading No. 42.02, in particular to "... spectacle cases, binocular cases, camera cases ...", as they achieve the same function as the items, in particular, they hold, protect and carry the goods for which they are designed.²⁶

22. (25 October 2011), AP-2010-057 (CITT) [*Rlogistics*].

23. Tribunal Exhibit AP-2011-061-04 at para. 27; *Rlogistics* at para. 40.

24. *Rlogistics* at para. 102.

25. Tribunal Exhibit AP-2011-061-04 at paras. 29, 30, 33.

26. Tribunal Exhibit AP-2011-061-07A at paras. 24-30, 49; *Explanatory Notes* to heading No. 42.02; Tribunal Exhibit AP-2011-061-07B, tab 10.; *Rlogistics* at paras. 101, 103; Tribunal Exhibit AP-2011-061-07B, tab 19.

28. The CBSA referred to the Tribunal's body of decided cases with respect to the term "accessories"²⁷ and argued that the goods in issue do not perform any additional or subordinate role related to the functioning of the hearing aids. In this respect, the CBSA submitted that the goods in issue cannot be used while the hearing aids are in use and that the function of the goods in issue is limited to holding, carrying and protecting the hearing aids.

29. With respect to the classification at the subheading and tariff item levels, the CBSA submitted that the goods in issue are meant to carry hearing aids, are of a size that allows them to be carried in a pocket or a handbag and should therefore be classified in the third first-level (i.e. one-dash) subheading.²⁸ It further submitted that the goods in issue, being composed of hard plastic, do not have an outer surface of leather nor of sheeting of plastics nor of textile material and, thus, should be classified as "other" articles.²⁹ Therefore, the CBSA was of the view that the goods in issue were properly classified under tariff item No. 4202.39.00 as other articles of a kind normally carried in the pocket or in the handbag.³⁰

ANALYSIS

Preliminary Remarks

30. Before turning to the merit of this appeal, the Tribunal will make the following preliminary observations.

31. The Tribunal first notes that, although the goods in issue are referred to as "containers" or "cases", the parties both submitted, and the Tribunal agrees, that Rule 5 of the *General Rules*³¹ is not applicable in determining the tariff classification of the goods in issue because the goods are imported and presented separately.³²

32. The Tribunal also notes that Mr. Bayerl's testimony seemed to suggest that the goods in issue should benefit from duty-free treatment, as they do in the United States,³³ because they are designed to

27. *Rlogistics; The Stevens Company Limited v. Deputy M.N.R.* (20 December 1999), AP-98-67 (CITT) [*Stevens*]; *Bureau de relations d'affaires internationales Inc. (Busrel Inc.) v. Deputy M.N.R.* (24 August 1999), AP-97-139 and AP-98-042 (CITT) [*Busrel*]; *Karl Hager Limb & Brace (Kelowna) Ltd. v. Deputy M.N.R.C.E.* (19 May 1993), AP-91-183 (CITT); Tribunal Exhibit AP-2011-061-07A at paras. 44-51; Tribunal Exhibit AP-2011-061-07B, tabs 15, 16, 19, 20.

28. Tribunal Exhibit AP-2011-061-07A at paras. 31-34.

29. *Ibid.* at paras. 35-38; Tribunal Exhibit AP-2011-061-07B, tab 28.

30. Prior to this appeal, in its decisions of February 17, 2010, and October 26, 2011, the CBSA classified the goods in issue under tariff item Nos. 4202.32.90 and 4202.92.90 respectively. Tribunal Exhibit AP-2011-061-07A at paras. 7, 9; Tribunal Exhibit AP-2011-061-07B, tabs 32, 30.

31. Rule 5 provides as follows:

In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character.

32. This was also confirmed by Mr. Bayerl who testified that the goods in issue are manufactured and imported from the People's Republic of China to Canada and to the United States and that, at the time of importation, the hearing aids and the tools are not included in the package; rather, they are put into the package after importation for shipment to customers. *Transcript of Public Hearing*, 19 July 2012, at 35-36.

33. Mr. Bayerl testified that, when Starkey imports the goods in issue into the United States, they receive the benefit of duty-free treatment under heading No. 98.17, as per the Nairobi Protocol and its implementation in the *Harmonized Tariff Schedule of the United States*. *Transcript of Public Hearing*, 19 July 2012, at 36-37, 41-42.

assist persons with disabilities.³⁴ However, because this argument was not a ground of the present appeal,³⁵ and was only discussed at the argument phase of the hearing, it would be unfair for the Tribunal to consider the validity of such an argument.³⁶

33. The Tribunal will therefore only consider the issue which is properly before it, that is, whether the goods in issue are properly classified under tariff item No. 4202.39.00 as other articles of a kind normally carried in the pocket or in a handbag, as determined by the CBSA, or should be classified under tariff item No. 9021.90.00 as accessories of hearing aids, as claimed by Starkey.

34. Both parties submitted, and the Tribunal agrees, for the reasons given below, that the goods in issue can be classified through the application of Rule 1 of the *General Rules*.

Are the Goods in Issue Accessories of Hearing Aids of Heading No. 90.21?

35. Hearing aids are specifically included in heading No. 90.21.³⁷ The parties agree, on the basis of Note 2(b) to Chapter 90,³⁸ the *Explanatory Notes* to Chapter 90³⁹ and the *Explanatory Notes* to heading No. 90.21,⁴⁰ that, if the goods in issue were considered “. . . accessories identifiable as suitable for use **solely or principally** with . . .” hearing aids, they would be classified in heading No. 90.21. Therefore, the crux of the issue of this appeal is whether the goods in issue are *accessories* of hearing aids.

34. The equivalent section in Canada is tariff item No. 9979.00.00 as “[g]oods specifically designed to assist persons with disabilities in alleviating the effect of those disabilities, and articles and materials for use in such goods.”

35. The Tribunal observes that, prior to this appeal, in its requests for re-determination of the CBSA’s decisions, Starkey submitted that the goods in issue should be classified under tariff item No. 9979.00.00 as “[g]oods specifically designed to assist persons with disabilities in alleviating the effect of those disabilities, and articles and materials for use in such goods” and, as such, should benefit from duty-free treatment. Tribunal Exhibit AP-2011-061-04 at 17, 30.

36. The Tribunal notes that it has typically not accorded significant weight to U.S. classification. The Tribunal also notes that it has had occasion, in the past, to decide on similar issues concerning the application of Chapter 99. For example, in *Sigvaris Corporation v. President of the Canada Border Services Agency* (23 February 2009), AP-2007-009 (CITT), the Tribunal considered that various styles and models of graduated compression hosiery should be classified under tariff item No. 9979.00.00 as goods specifically designed to assist persons with disabilities to alleviate the effect of those disabilities. In its recent decision in *Curve Distribution Services Inc. v. President of the Canada Border Services Agency* (15 June 2012), AP-2011-023 (CITT) [*Curve*], the Tribunal held that various protective cases for cellular telephones could not benefit from duty-free treatment under tariff item No. 9948.00.00 as articles *for use in* automatic data processing machines. The goods in that case were not “for use in” cellphones, as they did not enhance or complement the function of such devices. The Tribunal has drawn a distinction between goods that were “*accessories*” suitable *for use solely or principally* with a device (heading No. 84.71) and goods that were *for use in* the device (subheading No. 9979.00) and found that the fact that a good was an accessory to another good did not make it destined “for use in” that good.

37. Heading No. 90.21 provides as follows: “. . . hearing aids and other appliances which are worn or carried, or implanted in the body . . .”

38. Note 2(b) to Chapter 90 provides as follows:

“(b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus . . . are to be classified with the machines, instruments or apparatus of that kind”.

39. The *Explanatory Notes* to Chapter 90 provide as follows:

“(III) **PARTS AND ACCESSORIES** (Chapter Note 2) . . . parts or accessories identifiable as suitable for use **solely or principally** with the machines, appliances, instruments or apparatus of this Chapter are classified with those machines, appliances, etc.”

40. The *Explanatory Notes* to heading No. 90.21 reiterate that principle as follows: “**Subject** to the provisions of Notes 1 and 2 to this Chapter (see the General Explanatory Note), parts and accessories of apparatus or appliances of this heading remain classified here.”

36. The term “accessory” is not defined in the tariff nomenclature or in the relevant chapter notes and explanatory notes. However, the Tribunal has had numerous occasions to apply this term in previous decisions.

37. In *Rlogistics*, cited by both parties, the Tribunal defined the term “accessory” as follows: “... something that has a subordinate relationship with another product, that is not essential to the use or function of that other product or that adds beauty, convenience or effectiveness to that other product.”⁴¹ The Tribunal found that the iPod Nano sport armband cases at issue were accessories of an iPod Nano because they “... perform a secondary or subordinate role while such a device [i.e. iPod] is used”⁴² and that “... it is a matter of common knowledge that the goods at issue [i.e. iPod Nano cases] facilitate and improve the use of an iPod Nano while performing certain activities.”⁴³

38. Similarly, in *Stevens*, the Tribunal defined the term “accessory” as “... something which contributes in a subordinate or incidental degree to the general result or effect of a process”⁴⁴ and that “... there is no need for a product to be necessary to the operation of the machine to which it relates to be considered an ‘accessory’.”⁴⁵ The Tribunal concluded that certain bags or pouches used in the sterilization of medical instruments were accessories because they “... enhance the sterilization process by contributing, in a subordinate degree, to the sterilization of medical instruments and that they do improve the effectiveness of sterilizers.”⁴⁶

39. In addition, in *Busrel*, the Tribunal held that the mouse pads in issue were “... designed to perform a particular service relative to the main function of the computer mouse since they offer a particular surface on which the mouse may track.”⁴⁷ In the same vein, in *Winners Only (Canada) Ltd. v. Deputy M.N.R.*,⁴⁸ the Tribunal found that a computer desk is not an “accessory” to a computer because the former does not perform a particular service relative to the main function of the latter.

40. In sum, in the body of the Tribunal’s decided cases, it has been determined that an accessory is something which is not essential to the functioning of the host good, has a secondary or subordinate relationship with another (host) product, performs a particular service relative to the main function of the host good, and adds beauty, convenience or effectiveness to the host product.

41. In this instance, Dr. Russell testified that the function of the hearing aid is “... to compensate for communicative problems ... as a result of the hearing loss ...”⁴⁹ When in use, the hearing aid is normally worn behind the ear, in the ear or in the ear canal, and the goods in issue are obviously not used at the same time as the hearing aid.⁵⁰

41. *Rlogistics* at para. 50.

42. *Ibid.* at para. 58.

43. *Ibid.* at para. 60.

44. *Stevens* at 5.

45. *Ibid.*

46. *Ibid.*

47. *Busrel* at 3.

48. (13 May 1996), AP-94-142 (CITT) at 4.

49. *Transcript of Public Hearing*, 19 July 2012, at 30.

50. *Ibid.* at 30, 32. Dr. Russell also affirmed that it is recommended to turn off the hearing aid when not in use. *Transcript of Public Hearing*, 19 July 2012, at 15.

42. Dr. Russell recognized that the goods in issue have no effect on the hearing aid when it is in use.⁵¹ Indeed, according to Dr. Russell, the purpose of the goods in issue is to “. . . promote the longevity of the hearing aid and reduce the rates of repairs.”⁵² Dr. Russell’s testimony is corroborated by the letters filed by Starkey of various individuals who either provide or use hearing aids, which indicate that hearing aids are fundamental to the daily living of persons who require them and that, without the use of the goods in issue, it is possible that a hearing aid could, over time, become less effective, or stop working altogether, which, in turn, could have a detrimental effect upon a person who relies on his or her hearing aid to communicate.⁵³

43. Further, the instruction manuals included in the whole shipping box to the customer emphasize the importance of cleaning and storing the hearing aids in a proper place in order to maintain optimal functioning.⁵⁴ In particular, when not in use, the hearing aid has to be placed in a temperature-controlled, clean and dry place, and must not be exposed to direct sunlight.⁵⁵

44. In sum, the evidence indicates no relationship between the protective function of the goods in issue in order to promote longevity of the hearing aids and the auditory function of the hearing aids to remediate hearing loss. In other words, the goods in issue do not perform a particular service relative to the main function of the hearing aids and, thus, do not in any way contribute to the beauty, convenience or effective function of the hearing aids.

45. Therefore, the Tribunal finds that the goods in issue are not “accessories” of hearing aids within the meaning of heading No. 90.21 and, consequently, cannot be classified therein.

Are the Goods in Issue “Cases” or “Containers” Covered by Heading No. 42.02?

46. The relevant part of heading No. 42.02 provides the following non-exhaustive list of goods covered by the heading, as well as “similar containers”:

42.02 Trunks, suit-cases, vanity-cases, executive-cases, brief-cases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers

47. As the goods in issue are not specifically enumerated in either heading No. 42.02 or in the relevant chapter notes and explanatory notes,⁵⁶ the Tribunal must consider whether they are “similar containers” to the articles listed in this heading. In previous appeals, the Tribunal has indicated that similar goods must share important physical and functional characteristics, but added that “similar” does not mean “identical”.⁵⁷

51. *Transcript of Public Hearing*, 19 July 2012 at 32-33.

52. *Ibid.* at 33.

53. Tribunal Exhibit AP-2011-061-15; *Transcript of Public Hearing*, 19 July 2012, at 13-17.

54. Tribunal Exhibit AP-2011-061-07B, tabs 22, 23, 24, 25; Tribunal Exhibit AP-2011-061-13A, tab 2.

55. *Transcript of Public Hearing*, 19 July 2012, at 16-20. Dr. Russell also affirmed that, in training and counselling persons using hearing aids, he stresses the importance of the goods in issue and that he would be “shocked” if the persons did not use the cases for hearing aids. *Transcript of Public Hearing*, 19 July 2012, at 26.

56. The *Explanatory Notes* to heading No. 42.02 provide as follows: “The expression ‘similar containers’ in the first part includes hat boxes, camera accessory cases, cartridge pouches, sheaths for hunting or camping knives, portable tool boxes or cases, specially shaped or internally fitted to contain particular tools with or without their accessories, etc.”

57. *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) at para. 82, *Ivan Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT) at paras. 25-26.

48. In *Rlogistics*, the Tribunal held that the word “containers” of heading No. 42.02 “. . . describes the holding and transport use or functional characteristic of a product in relation to any other product that may be held by a container.”⁵⁸ In *Nokia Products Limited and Primecell Communications Inc. v. Commissioner of the Canada Customs and Revenue Agency*,⁵⁹ the Tribunal found that carrying cases for cellular phones were similar in design and function to the cases listed in heading No. 42.02, “in that they are fitted to the article that they are intended to contain and they are used to protect and carry the article.”⁶⁰

49. In this instance, the evidence brought before the Tribunal demonstrates that the goods in issue are hard plastic cases especially designed, shaped and fitted to store, protect and carry hearing aids. Moreover, they are described as “containers” in the instruction manuals.⁶¹ On numerous occasions during the hearing, the witnesses referred to the goods in issue as “cases” or “containers”.⁶² Starkey maintained however that the goods in issue were something more than mere containers or cases. However, as discussed above, in the Tribunal’s opinion the goods in issue do not perform functions beyond storing, protecting or transporting the hearing aids.

50. For the aforementioned reasons, the Tribunal finds that, pursuant to Rule 1 of the *General Rules*, the goods in issue are “similar containers” to the goods listed in heading No. 42.02 and are properly classified therein.

Subheading and Tariff Item Analysis

51. The CBSA argued that the goods in issue are properly classified under tariff item No. 4202.39.00. Starkey did not contest the classification of the goods in issue at the subheading and tariff item levels.

52. The Tribunal agrees with the CBSA that the goods in issue are properly classified under the one-dash division of heading No. 42.02, worded as follows: “**Articles of a kind normally carried in the pocket or in the handbag**”. This division contains the following three subheadings at the two-dash level:

4202.31.00 - -With outer surface of leather, of composition leather or of patent leather

...

4202.32 - -With outer surface of sheeting of plastics or of textile materials

...

4202.39.00 - -Other

58. *Rlogistics* at paras. 77-79, 101.

59. (5 August 2003), AP- 2001-073, AP-2011-074 and AP-2011-084 (CITT) [*Nokia*].

60. *Nokia* at 6. See also *Curve* at para. 35 where the Tribunal stated as follows: “Indeed, in the Tribunal’s view, it is clear that the goods in issue and the spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases and holsters specifically named in the first part of heading No. 42.02 share important features and characteristics. Most notably, they are all cases that are specially shaped or internally fitted to contain a particular good (e.g. a cell phone, camera, musical instrument) and are used to hold, protect and carry that good.”

61. Tribunal Exhibit AP-2011-061-07B, tabs 24, 26.

62. *Transcript of Public Hearing*, 19 July 2012, at 21-23, 26, 35, 37-38, 46-49; Tribunal Exhibit AP-2011-061-04 at para. 29.

53. The goods in issue are composed of a hard plastic material⁶³ and therefore do not fit the description of the first two subheadings. Accordingly, they fall under the residual category of tariff item No. 4202.39.00 for “Other” “Articles of a kind normally carried in the pocket or in the handbag”.

DECISION

54. For the foregoing reasons, the appeal is dismissed.

Stephen A. Leach

Stephen A. Leach
Presiding Member

63. The Tribunal agrees with the CBSA that a hard plastic material is different from “sheeting of plastics”, because it is not as thin as the plastic sheeting and is not in the form of continuous lengths. The International Standard (ISO 472) defines the term “sheeting” as follows: “thin, generally plane product in which the thickness is small in proportion to length and width”. Similarly, the online *Merriam-Webster Dictionary* provides the following definition of “sheeting”: “**1** : material in the form of sheets or suitable for forming into sheets as: . . . **b** : material (as a plastic) in the form of continuous film”. Tribunal Exhibit AP-2011-061-07A at para. 37, Tribunal Exhibit AP-2011-061-07B, tabs 27, 28.