



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeals No. AP-2012-041 and  
AP-2012-042

Costco Wholesale Canada Ltd.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Monday, July 29, 2013*

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IN THE MATTER OF appeals heard on April 16, 2013, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF two decisions of the President of the Canada Border Services Agency, dated August 9 and August 16, 2012, with respect to requests for review of advance rulings on tariff classification, pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**COSTCO WHOLESALE CANADA LTD.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeals are dismissed.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: April 16, 2013  
  
Tribunal Member: Pasquale Michael Saroli, Presiding Member  
  
Counsel for the Tribunal: Courtney Fitzpatrick  
  
Manager, Registrar Programs and Services: Michel Parent  
  
Senior Registrar Officer: Lindsay Vincelli  
  
Registrar Support Officer: Rosemary Hong

**PARTICIPANTS:****Appellant**

Costco Wholesale Canada Ltd.

**Counsel/Representatives**Michael Sherbo  
Andrew Simkins**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

Peter Nostbakken

**WITNESS:**Daniel Evans  
President  
Supplierpipeline Inc.

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## STATEMENT OF REASONS

### BACKGROUND

1. These are appeals filed by Costco Wholesale Canada Ltd. (Costco), pursuant to subsection 67(1) of the *Customs Act*,<sup>1</sup> from two decisions of the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4) of the *Act*, dated August 9 and August 16, 2012. These decisions reaffirmed two advance rulings made by the CBSA on June 29 and October 12, 2011, pursuant to paragraph 43.1(1)(c) of the *Act*, that the goods in issue were properly classified under tariff item No. 9405.40.90 of the schedule to the *Customs Tariff*<sup>2</sup> as other electric lamps and lighting fittings, including searchlights and spotlights, and parts thereof, not elsewhere specified or included.

2. In this regard, Costco contends that the goods in issue should be classified under tariff item No. 7013.99.00 as other glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading No. 70.10 or 70.18).

### PROCEDURAL HISTORY

3. On June 3 and August 31, 2011, Costco, pursuant to section 43.1 of the *Act*, applied for advance rulings in respect of the goods in issue, requesting that they be classified under tariff item No. 7013.99.00.

4. On June 29 and October 12, 2011, the CBSA issued advance rulings, pursuant to paragraph 43.1(1)(c) of the *Act*, which classified the goods in issue under tariff item No. 9405.40.90.

5. On August 4, 2011, and January 6, 2012, Costco requested reviews of the advance rulings, pursuant to subsection 60(2) of the *Act*.

6. On August 9 and August 16, 2012, the CBSA, pursuant to subsection 60(4) of the *Act*, affirmed the advanced rulings, having determined that the goods in issue were properly classified under tariff item No. 9405.40.90.

7. On October 31 and November 8, 2012, Costco, pursuant to section 67 of the *Act*, filed notices of appeal with the Tribunal, claiming that the goods in issue should be classified under tariff item No. 7013.99.00.

8. In its notice of appeal dated November 8, 2012, Costco requested that the two appeals be joined and heard together, noting that the goods in issue, as well as the issues to be resolved, were the same and that it would provide for a more expeditious disposition of both matters. On December 3, 2012, the CBSA indicated that it did not oppose Costco's request. The Tribunal granted the request to join the two appeals on December 11, 2012.

9. On April 16, 2013, the Tribunal heard the appeals.

10. At the hearing, Mr. Daniel Evans, President of Supplierpipeline Inc., testified on behalf of Costco as a lay witness. The CBSA did not call any witnesses.

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

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

## GOODS IN ISSUE

11. The goods in issue consist of two models of decorative solar-powered garden lights (Item Nos. 733333 and 686833), described in the product literature as “Solar Cattail Garden Lights” and “Solar Hand-Blown Glass Mushroom Light Set”.

12. Each model includes hand-crafted non-transparent glass shades in the shape of either cattails or mushroom caps, light-emitting diode (LED) bulbs, solar panels, rechargeable nickel-metal hydride (NiMH) batteries, bronze stalks and ground stakes. The literature explains that, “[d]uring daylight hours, the sun will charge the batteries in the solar panel and the lights will turn on at dusk. . . . The photocell must sense darkness to operate.”<sup>3</sup>

## STATUTORY FRAMEWORK

13. 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).<sup>4</sup> 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.

14. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods, unless otherwise provided, shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>5</sup> and the *Canadian Rules*<sup>6</sup> set out in the schedule.

15. 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.

16. 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*<sup>7</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>8</sup> published by the WCO. While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.<sup>9</sup>

17. 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 the *Classification Opinions* and the *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.<sup>10</sup>

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3. Tribunal Exhibit AP-2012-041-09B, tab 2 at 011, 032.

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.

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

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

9. 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*.

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

18. 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.<sup>11</sup> The final step is to determine the proper tariff item.<sup>12</sup>

## RELEVANT CLASSIFICATION PROVISIONS

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

### Chapter 70

#### GLASS AND GLASSWARE

**70.13** Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 70.10 or 70.18).

**7013.99.00** - -Other

### Chapter 94

#### FURNITURE; BEDDING, MATTRESSES, MATTRESS SUPPORTS, CUSHIONS AND SIMILAR STUFFED FURNISHINGS; LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED; ILLUMINATED SIGNS, ILLUMINATED NAME-PLATES AND THE LIKE; PREFABRICATED BUILDINGS

**94.05** Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated name-plates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included.

**9405.40** -Other electric lamps and lighting fittings

9405.40.90 - - -Other

20. Note 1 to Chapter 70 provides as follows:

1. This Chapter does not cover:

...

(e) Lamps or lighting fittings, illuminated signs, illuminated name-plates or the like, having a permanently fixed light source, or parts thereof of heading 94.05;

...

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

21. Note 1 to Chapter 94 provides as follows:

1. This Chapter does not cover:

...

- (l) Toy furniture or toy lamps or lighting fittings (heading 95.03), billiard tables or other furniture specially constructed for games (heading 95.04), furniture for conjuring tricks or decorations (other than electric garlands) such as Chinese lanterns (heading 95.05).

22. The relevant portion of the explanatory notes to Chapter 70 reads as follows:

#### GENERAL

This Chapter covers glass in all forms and articles of glass (**other than** goods excluded by Note 1 to this Chapter or covered more specifically by other headings of the Nomenclature).

23. The relevant explanatory notes to heading No. 70.13 read as follows:

This heading covers the following types of articles, most of which are obtained by pressing or blowing in moulds:

...

- (4) **Glassware for indoor decoration** and other glassware (including that for churches and the like), such as vases, ornamental fruit bowls, statuettes, fancy articles (animals, flowers, foliage, fruit, etc.), table-centres (**other than** those of **heading 70.09**), aquaria, incense burners, etc., and souvenirs bearing views.

These articles may be e.g., of ordinary glass, lead crystal, glass having a low coefficient of expansion (e.g., borosilicate glass) or of glass ceramics (the latter two in particular, for kitchen glassware). They may also be colourless, coloured or of flashed glass, and may be cut, frosted, etched or engraved, or otherwise decorated, or of plated glass (for example, certain trays fitted with handles). . . .

...

Articles of glass combined with other materials (base metal, wood, etc.), are classified in this heading **only** if the glass gives the whole the character of glass articles. . . .

The heading also **excludes**:

...

- (f) Lamps and lighting fittings and parts thereof of **heading 94.05**.

...

24. The relevant explanatory notes to heading No. 94.05 state as follows:

#### (I) LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED

Lamps and lighting fittings of this group can be constituted of any material (**excluding** those materials described in Note 1 to Chapter 71) and use any source of light (candles, oil, petrol, paraffin (or kerosene), gas, acetylene, electricity, etc.). Electrical lamps and lighting fittings of this heading may be equipped with lamp-holders, switches, flex and plugs, transformers, etc., or, as in the case of fluorescent strip fixtures, a starter or a ballast.



This heading covers in particular:

...

- (2) **Lamps for exterior lighting**, e.g.: street lamps; porch and gate lamps; special illumination lamps for public buildings, monuments, parks.

...

This heading also **excludes**:

...

- (m) Decorations, such as Chinese lanterns (**heading 95.05**).

25. The relevant portion of the French explanatory notes to heading No. 94.05 reads as follows:

**I.- APPAREILS D'ÉCLAIRAGE NON DENOMMES NI COMPRIS AILLEURS**

...

Les principaux types d'appareils d'éclairage repris ici sont :

...

- 2) Les **lampes pour l'éclairage extérieur** : lanternes-réverbères, lampes-conssoles, lampes de jardins et de parcs, réflecteurs pour l'illumination des édifices, monuments, parcs.

...

## **POSITIONS OF PARTIES**

### **Costco**

26. Costco submitted that the goods in issue, as decorations, cannot be classified in heading No. 94.05 because the explanatory notes to that heading exclude decorations from its ambit.

27. Costco also argued that heading No. 94.05 is residual in nature and does not include lamps or lighting fittings that are elsewhere specified or included in the nomenclature. In this regard, Costco submitted that the goods in issue are specified and included in heading No. 70.13.

28. Costco asserted that lamps are not decorative items but utilitarian devices. In this respect, Costco contended that the goods in issue are not lamps, as they have a decorative, not a utilitarian function.

29. Costco contended that the goods in issue are used to decorate gardens, and the fact that they illuminate at night does not detract from their decorative purpose. Costco submitted that the CBSA acknowledges, in its own policy documents (i.e. Customs Notice N-179 and previous CBSA classification decisions), that decorations can be made of various materials and can be lighted.

30. At the hearing, Costco, as an additional line of argumentation, submitted that decorations (with some exceptions) are classified according to material. In support of its position, Costco referred to a number of headings where ornamental and decorative items are provided for according to the material of which they are composed. For example, Costco noted that heading No. 69.13 includes statuettes and other ornamental ceramic articles and that heading No. 83.06 includes statuettes and ornaments of base metal.

31. Costco also referred to heading No. 67.02, which covers artificial flowers, foliage and fruit, and parts thereof, as well as articles made of artificial flowers, foliage or fruit. Costco submitted that heading No. 67.02 would be the correct heading in which to classify the goods in issue except that the explanatory notes to heading No. 67.02 specifically exclude articles of glass and direct classification to Chapter 70. On this basis, Costco argued that the goods in issue, as decorative items made of glass, are properly classified in Chapter 70 as glassware of a kind used for indoor decoration or similar purposes.

32. Costco submitted that the fact that the goods in issue can be lighted does not detract from their classification as glassware of a kind used for indoor decoration or similar purposes. It noted that in previous Tribunal decisions, certain decorative items were classified in heading No. 95.05 as festive articles even though they included lights or illumination. Costco submitted that once it is acknowledged that festive articles or decorations can be lighted, it must be accepted that all decorations can be lighted, including decorations made of glass such as the goods in issue.

33. Finally, Costco cited certain U.S. classification rulings in which goods purported to be similar to those in issue were classified in heading No. 70.13.

### **CBSA**

34. The CBSA countered that, based on the following considerations, the goods in issue are properly classified in heading No. 94.05:

- the goods in issue are designed to produce light, with the product literature indicating that, “[d]uring daylight hours, the sun will charge the batteries in the solar panel and the lights will turn on at dusk”;
- the product literature, marketing materials and retail packaging repeatedly refer to the goods in issue as lights, garden lights, solar products and solar lights;
- the goods in issue meet generally accepted definitions of the word “lamp”, e.g. “any of various devices for producing light or sometimes heat”, “a decorative appliance housing a lamp that is usually covered by a shade” and “a device that produces light, such as an electric lamp”;<sup>13</sup>
- the goods in issue also meet generally accepted definitions of the word “lighting”, e.g. “equipment on a street or in a room etc. for producing light”;<sup>14</sup>
- the explanatory notes to heading No. 94.05 suggest that the terms “lamp” and “lighting fittings” should be broadly interpreted (e.g. lamps of this group may be of any material and use any source of light); and
- the French version of the explanatory notes explicitly includes “lampes de jardins” (garden lights) in the scope of heading No. 94.05, with the result being that the goods in issue would not be elsewhere specified or included in the nomenclature.

35. The CBSA also noted that heading No. 94.05 includes lights and lamps with a decorative element, such as chandeliers and candleholders.

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13. Tribunal Exhibit AP-2012-041-09A at paras. 33, 72.

14. *Ibid.* at para. 33.

36. The CBSA further submitted that the explanatory notes to heading No. 70.13 provide that articles of glass combined with other materials are to be classified in heading No. 70.13 only if the glass gives the whole character of the articles. In this regard, it contended that the goods in issue consist of many components and that the glass shade does not impart to the goods in issue the character of a glass article.

37. Finally, the CBSA submitted that the goods in issue are not excluded from classification in heading No. 94.05 as they are not similar to Chinese lanterns or other articles of heading No. 95.05, as that heading covers festive articles, which the goods in issue are not.

38. In response to Costco's additional line of argumentation, the CBSA noted that the nomenclature does not include a separate heading for "decorations". The CBSA also noted that lamps or lighting fittings, or articles of Chapter 94, are specifically excluded from many of the additional headings referred to by Costco at the hearing.<sup>15</sup>

## ANALYSIS

39. Both parties agree that this appeal can be disposed of by application of Rule 1 of the *General Rules* pursuant to which classification is determined according to the terms of the headings and any relative section or chapter notes and, provided that such headings or legal notes do not otherwise require, according to the provisions that follow it.<sup>16</sup>

40. The first consideration of the Tribunal in the application of Rule 1 of the *General Rules* is whether the goods in issue are named or generically described in a particular heading of the tariff schedule. If the goods are named in a heading, they are classified there, subject to any relevant legal notes.

41. The competing headings provide as follows:

**94.05 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated name-plates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included.**

**70.13 Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 70.10 or 70.18).**

42. Specifically, the CBSA claims that the goods in issue fall under tariff item No. 9405.40.90 as other electric lamps and lighting fittings, while Costco counters that they are properly classified under tariff item No. 7013.99.00 as other glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes.

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15. At the hearing, the CBSA objected to the introduction of Costco's additional line of argumentation. However, the Tribunal accepted Costco's additional arguments as a response (albeit an elaborate one) to arguments that appeared in the CBSA's brief. See *Transcript of Public Hearing*, 16 April 2013, at 44.

16. Tribunal Exhibits AP-2012-041-07 at para. 17 and AP-2012-041-09A at para. 26.

43. The Tribunal notes that, in the appeals before it, Costco, by operation of law, bears the burden of demonstrating that the CBSA incorrectly classified the goods in issue.<sup>17</sup> The parties do not dispute that the initial onus of proof resides with Costco.<sup>18</sup>

### Analytical Point of Departure

44. In identifying the appropriate starting point for its tariff classification analysis, the Tribunal considers it useful to begin with an assessment of the implications of note 1(e) to Chapter 70, which provides that Chapter 70 does not cover “[l]amps or lighting fittings, illuminated signs, illuminated name-plates or the like, having a permanently fixed light source, or parts thereof of heading 94.05”, and the “not elsewhere specified or included” clause contained in heading No. 94.05.

45. As correctly noted by Costco, the semicolon separating the phrase “Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included” from the phrase “illuminated signs, illuminated name-plates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included” in heading No. 94.05 denotes two separate and discrete product descriptions, with the words “having a permanently fixed light source” only qualifying the latter.<sup>19</sup> Accordingly, while illuminated signs, illuminated name-plates and the like are only covered by heading No. 94.05 if they have a permanently fixed light source, lamps and lighting fittings, by virtue of the fact that they are not similarly qualified, are covered by that heading regardless of whether or not they have a permanently fixed light source.

46. The absence, however, of a similarly placed semicolon in note 1(e) to Chapter 70 arguably indicates that, from a grammatical perspective, the adjectival phrase “having a permanently fixed light source” modifies the entire description of excluded goods such that only lamps and lighting fittings having a permanently fixed light source are excluded from classification in Chapter 70. In this regard, the Tribunal has previously held that, when there is a single relevant exclusionary note that precludes the *prima facie* classification of goods in both of the headings at issue in an appeal, the Tribunal should begin its analysis with the heading to which the exclusionary note does not apply.<sup>20</sup>

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17. Paragraph 152(3)(c) of the *Act* provides as follows: “[I]n any proceeding under this Act, the burden of proof in any question relating to . . . the payment of duties on any goods . . . lies on the person, other than Her Majesty, who is a party to the proceeding . . .” [emphasis added]. The present appeal is a proceeding under subsection 67(1) of the *Act*. Moreover, because liability for the payment of duties on imported goods ultimately depends upon their tariff classification, tariff classification is a question “relating to” the payment of duties on goods, within the meaning of paragraph 152(3)(c) of the *Act*. With both of the conditions of paragraph 152(3)(c) having been satisfied, the burden of proof resides with Costco. See, for example, *Unicare Medical Products Inc. v. Deputy M.N.R.C.E.* (21 June 1990), 2437, 2438, 2485, 2591 and 2592 (CITT) at 3; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII).

18. Tribunal Exhibits AP-2012-041-07 at paras. 12-14 and AP-2012-041-09A at paras. 14, 15.

19. That semicolon usage can have the grammatical effect of creating independent product descriptions has been previously recognized by the Tribunal. See, for example, *Boss Lubricants v. Deputy M.N.R.* (3 September 1997), AP-95-276 and AP-95-307 (CITT); *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (23 November 2011), AP-2010-069 (CITT) at para. 40 and footnote 31.

20. *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-005 (CITT) [*HBC Imports*] at paras. 41-74; *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) at paras. 27-28.

47. Based on the foregoing, the Tribunal considers it appropriate in the present case to begin the tariff classification exercise with a consideration of whether or not the goods in issue are properly classified in heading No. 94.05.

48. In this regard, it is the Tribunal's view that, if the goods in issue are determined to be lamps or lighting fittings having a permanently fixed light source, they would be excluded from the coverage of heading No. 70.13 by operation of note 1(e) and would be properly classified in heading No. 94.05, unless it is determined that they fall outside the ambit of that heading by virtue of the fact that they are lamps or lighting fittings of a kind specified or included elsewhere.<sup>21</sup>

### **Are the Goods in Issue Properly Classified in Heading No. 94.05?**

49. In order for the goods in issue to be classified in heading No. 94.05, they must (1) be lamps or lighting fittings, (2) be of any material, (3) use any source of light and (4) not be elsewhere specified or included.

50. The terms "lamps" and "lighting fittings" are not defined for the purposes of heading No. 94.05. In support of its view that the goods in issue are lamps or lighting fittings, the CBSA referred to a number of relevant dictionary definitions. The CBSA also observed that the Tribunal has treated the terms "lamp" and "light" as being essentially synonymous in previous decisions involving heading No. 94.05.<sup>22</sup>

51. The *Merriam-Webster's Collegiate Dictionary* defines "lamp" as "**1 a** : any of various devices for producing light or sometimes heat . . . **b** : a decorative appliance housing a lamp that is [usually] covered by a shade."<sup>23</sup>

52. The *McGraw-Hill Dictionary of Scientific and Technical Terms* defines "lamp" as "a device that produces light, such as an electric lamp."<sup>24</sup>

53. The *Canadian Oxford Dictionary* defines "lighting" as "**1** equipment on a street or in a room etc. for producing light."<sup>25</sup>

54. The online *Oxford English Dictionary* defines "fitting" as "**1** (often **fittings**) a small part on or attached to a piece of furniture or equipment . . . "<sup>26</sup>

55. The online *Merriam-Webster's Dictionary* defines "fitting" as "**3** : a small often standardized part <an electrical *fitting*>."<sup>27</sup>

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21. In 3319067 *Canada Inc. (Universal Lites) v. President of the Canada Border Services Agency* (23 March 2006), AP-2004-017 (CITT) [*Universal Lites*], the Tribunal considered the phrase "not elsewhere specified or included" found in heading No. 94.05 and indicated that that heading is a "not elsewhere specified" heading, which covers all lamps or lighting fittings, as long as they are not more specifically described elsewhere in the nomenclature. In *Universal Lites*, the Tribunal noted that, "... as 'lights', the goods [were] neither specified nor included elsewhere, given that . . . they are excluded from classification in heading No. 95.05 as festive articles."

22. See, for example, *Universal Lites* at paras. 39-40; *Globe Electric Company Inc. v. President of the Canada Border Services Agency* (16 April 2010), AP-2008-022 (CITT) at para. 29.

23. Eleventh ed., s.v. "lamp".

24. Sixth ed., s.v. "lamp".

25. Second ed., s.v. "lighting".

26. <http://oxforddictionaries.com/definition/english/fitting>.

27. [www.merriam-webster.com/dictionary/fitting](http://www.merriam-webster.com/dictionary/fitting).

56. Costco also referred to the definition of “device” found in the online *Merriam-Webster’s Dictionary*, which defines “device” as “**1** : . . . **f** : a piece of equipment or a mechanism designed to serve a special purpose or perform a special function . . . .”<sup>28</sup>

57. In terms of the physical description of the goods in issue, it is not disputed, and the Tribunal accepts, that the goods in issue produce light. In addition to having a hand-crafted non-transparent shade made of blown glass, each of the goods in issue includes an LED light bulb as a permanently fixed light source, as well as a solar panel and a NiMH battery. Mr. Evans confirmed that, during daylight hours, the sun charges the battery through the solar panel and, at dusk, the battery is used to power the LED light bulb.<sup>29</sup>

58. The Tribunal notes that the goods in issue include an on/off switch. In this regard, while the witness testified that the switch was only intended to protect the battery during shipping, Costco acknowledged that the switch could be engaged, post-installation, to cut the circuit and turn off the light at night.<sup>30</sup>

59. The Tribunal has no difficulty in concluding that the goods in issue are devices that produce light and, as such, are lamps or lighting in accordance with the ordinary meaning of those terms, as set out in generally accepted dictionary sources. The Tribunal further finds that the meaning of the term “device” is very broad and would encompass goods such as those in issue. In addition, the evidence clearly demonstrates that the goods in issue produce light at dusk and that the light is powered by a solar-charged NiMH battery.

60. Costco argued that the goods in issue are not classifiable in heading No. 94.05 because they are not devices that emit *usable* light but, rather, simply illuminate themselves. The Tribunal notes, however, that the packaging for the solar cattail garden lights specifically indicates as follows: “LED bulbs included – *LED technology is the brightest available . . .*” [emphasis added].<sup>31</sup> In any event, the Tribunal has reviewed heading No. 94.05, as well as the relevant explanatory notes bearing upon its interpretation, and finds nothing specifying the minimum amount of light that must be emitted in order for a good to be classified as a lamp or lighting fitting of that heading.<sup>32</sup>

61. Turning next to a consideration of the product literature and marketing of the goods in issue, the Tribunal finds, in this case, that these materials support the classification of the goods in issue as lamps or lighting fittings.<sup>33</sup> In particular, the retail packaging of the goods in issue market the goods as “Solar Cattail Bullrush Garden Lights” (“Luminaires”<sup>34</sup> Solaires de Jardin en forme de roseau et quenouille”) and “Woodland Garden Lights” (“Luminaires de Jardin en Bois”).<sup>35</sup> The retail packaging of the solar cattail

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28. [www.merriam-webster.com/dictionary/device](http://www.merriam-webster.com/dictionary/device).

29. *Transcript of Public Hearing*, 16 April 2013, at 14-16, 20.

30. *Ibid.* at 18, 62-64.

31. Tribunal Exhibit AP-2012-041-B-02.

32. The absence of any minimum light or other specific technical requirements in the terms of heading No. 94.05 or the accompanying explanatory notes can be contrasted with the terms of, for example, heading No. 85.36, which covers certain electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits, for a voltage not exceeding 1,000 volts.

33. In *PartyLite Gifts Ltd. v. The Commissioner of the Canada Customs and Revenue Agency* (16 February 2004) AP-2003-008 (CITT), the Tribunal found that, while not determinative, the design, best usage, marketing and distribution of goods can be indicative of their proper tariff classification.

34. The Tribunal notes that in *Ulextra Inc. v. President of the Canada Border Services Agency* (15 June 2011) AP-2010-024 (CITT) at para. 75, the Tribunal determined that the term “luminaire” referred to a complete lighting unit.

35. Tribunal Exhibits AP-2012-041-B-01 and AP-2012-041-B-02.

garden lights also specifically provides that the box contains a three-lamp set.<sup>36</sup> In addition, the product literature consistently refers to the goods in issue as “solar products”, “fixtures” and “solar lights”.<sup>37</sup>

62. The Tribunal agrees with the CBSA’s assertion that the explanatory notes to heading No. 94.05 ascribe a wide scope to that heading.<sup>38</sup> The relevant explanatory notes are as follows:

**(I) LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED**

Lamps and lighting fittings of this group can be *constituted of any material* (**excluding** those materials described in Note 1 to Chapter 71) and *use any source of light* (candles, oil, petrol, paraffin (or kerosene), gas, acetylene, electricity, etc.). Electrical lamps and lighting fittings of this heading may be equipped with lamp-holders, switches, flex and plugs, transformers, etc., or, as in the case of fluorescent strip fixtures, a starter or a ballast.

[Emphasis added]

63. In addition, the explanatory notes to heading No. 94.05 specifically include lamps for exterior lighting and provide a non-exhaustive list of lamps which are considered to be for exterior lighting for the purposes of heading No. 94.05 (e.g. street lamps, porch and gate lamps, special illumination lamps for public buildings, monuments, parks). As this list is non-exhaustive, the fact that the goods in issue (i.e. garden lights) are not explicitly included in the list does not prevent them from being classified in heading No. 94.05. The Tribunal is of the view that the goods in issue, being lamps for exterior lighting similar in nature to those specified (e.g. porch, gate and park lamps), fall within the coverage of heading No. 94.05.

64. Indeed, this view is supported by paragraph (I)(2) of the French version of the explanatory notes, which explicitly includes “lampes de jardins” (garden lamps<sup>39</sup>) within the non-exhaustive itemized list of lamps for exterior lighting covered by this heading. In this regard, section 13 of the *Official Languages Act*<sup>40</sup> provides that the French and English versions of any Act of Parliament are equally authoritative, thus allowing the Tribunal to examine both the English and French versions of the schedule to the *Customs Tariff*, the *Explanatory Notes* and the *Classification Opinions* in interpreting the tariff nomenclature. In fact, the Tribunal has on several past occasions consulted the French version of an enactment to clarify the interpretation of the English version of same, and with a view to confirming the scope of the enactment.<sup>41</sup>

65. On the basis of the foregoing, the Tribunal is satisfied that the goods in issue—as lamps or lighting fittings, with decorative glass shades and bronze stalks, utilizing a solar-powered battery and LED bulb as a source of light—satisfy the first three criteria identified above for classification in heading No. 94.05 within the meaning of Rule 1 of the *General Rules*.

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36. Tribunal Exhibit AP-2012-041-B-02.

37. Tribunal Exhibits AP-2012-041-09A at para. 41 and AP-2012-041-09B, tab 2.

38. Tribunal Exhibit AP-2012-041-09A at para. 35.

39. As already noted, the Tribunal has treated “lamps” and “lights” as being essentially synonymous.

40. R.S.C. 1985 (4th Supp.), c. 31.

41. See, for example, *BMC Coaters Inc. v. President of the Canada Border Services Agency* (6 December 2010), AP-2009-071 (CITT) at para. 51; *HBC Imports* at para. 72; *H. A. Kidd and Company Limited v. President of the Canada Border Services Agency* (1 September 2011), AP-2010-052 (CITT) at para. 76; *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (23 November 2011), AP-2010-069 (CITT) at paras. 48, 53. In *Tupper v. R.*, [1967] SCR 589, the Supreme Court of Canada stated that, where one linguistic version is more precise, it should be preferred over the broader version.

66. There remains, of course, the final issue of whether the goods in issue, having been found to be lamps or lighting fittings with a permanently fixed light source, are elsewhere specified or included in the nomenclature. In that respect, the Tribunal notes that such lamps and lighting fittings are specifically excluded from the heading proposed by Costco, namely, heading No. 70.13. The goods in issue cannot therefore be viewed as being specified or included in that heading. Nor, as acknowledged by Costco, are the goods in issue classifiable in heading No. 67.02 because, among other things, articles of glass are excluded from its ambit.

67. Finally, the Tribunal also examined other tariff provisions bearing upon the classification of lamps and lighting fittings, in particular those of Chapter 85,<sup>42</sup> in order to determine whether the goods in issue are “elsewhere specified or included”. The Tribunal finds that the goods in issue are clearly not described by the terms of heading No. 85.12 (“Electrical lighting or signalling equipment (excluding articles of heading 85.39) . . .”), heading No. 85.13 (“Portable electric lamps designed to function by their own source of energy (for example, dry batteries, accumulators, magnetos), other than lighting equipment of heading 85.12”) or heading No. 85.39 (“Electric filament or discharge lamps, including sealed beam lamp units and ultra-violet or infra-red lamps; arc-lamps”). On the basis of this review, the Tribunal is satisfied that the goods in issue are not elsewhere specified or included.

68. Therefore, the Tribunal determines that the goods in issue are lamps or lighting fittings that are not elsewhere specified or included.

69. Regarding the suggestion that the goods in issue are excluded from classification in heading No. 94.05 by virtue of explanatory note (m) to that heading, which excludes decorations, such as Chinese lanterns, from classification in that heading, as noted above, the Tribunal found that the goods in issue are lamps or lighting fittings, albeit with a decorative element. In this respect, it is the Tribunal’s view that the character of the goods in issue as lamps or lighting fittings does not preclude a decorative or aesthetic design component and, in this regard, notes the definition of “lamp” in the *Merriam-Webster’s Collegiate Dictionary*, which includes “a decorative appliance housing a lamp that is [usually] covered by a shade.” Indeed, heading No. 94.05 includes a number of lamps and lighting fittings which are decorative in nature, including chandeliers, electric garlands for decorating Christmas trees, candelabra and candlesticks. As such, the Tribunal is satisfied that, even though the goods in issue have a decorative element, they are not excluded from classification in that heading.<sup>43</sup>

70. While there was much discussion at the hearing about the relevance of heading No. 95.05, the Tribunal is satisfied that the goods in issue are not festive, carnival or other entertainment articles of that heading.

71. With respect to Costco’s argument that similar goods have been classified in heading No. 70.13 by the United States Customs Service, the Tribunal is not convinced of the relevance of these rulings. The Tribunal agrees with the CBSA that these rulings are distinguishable from the present appeals as the glass goods covered by HQ964619 did not incorporate any illumination or lighting elements, and N127835, which considered goods that are substantially the same as the goods in issue, did not consider heading No. 94.05 as a classification option.

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42. The Tribunal notes that legal note 1(f) to Chapter 94 and the explanatory notes to that chapter exclude “[l]amps or lighting fittings of Chapter 85” from the coverage of Chapter 94.

43. In *Universal Lites*, the Tribunal found that Christmas lights, which are clearly decorative, were not excluded from classification in heading No. 94.05.



72. With the goods in issue having been found by the Tribunal to have been properly classified in heading No. 94.05 as lamps or lighting fittings, and with the Tribunal being satisfied that the goods in issue have a permanently fixed light source, it does not find it necessary to consider whether the goods in issue are classifiable in Chapter 70, given that note 1(e) to Chapter 70 excludes “[l]amps or lighting fittings . . . having a permanently fixed light source . . . of heading 94.05” from the coverage of that chapter.

73. Based on the foregoing, the Tribunal finds that the goods in issue are properly classified in heading No. 94.05 as lamps and lighting fittings.

### **Subheading and Tariff Item**

74. Having determined that the goods in issue are properly classified in heading No. 94.05, the Tribunal must next determine the proper classification at the subheading and tariff item levels. Of the six possible subheadings related to lamps or lighting fittings, the Tribunal finds that, pursuant to Rule 6 of the *General Rules*, the goods in issue are properly classified in subheading No. 9405.40 as other electric lamps and lighting fittings.

75. Subheading No. 9405.40 has three tariff items. As there is no evidence on the record indicating that the goods in issue are xenon-type electric lamps and lighting fittings, and there can be no question that the goods in issue are not motion picture or theatrical spotlights, the Tribunal finds, pursuant to Rule 1 of the *Canadian Rules*, that the goods in issue are properly classified under tariff item No. 9405.40.90.

### **DECISION**

76. The appeals are dismissed.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member