Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-023

Curve Distribution Services Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, June 15, 2012

Canada

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IN THE MATTER OF an appeal heard on March 8, 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 March 3, 2011, with respect to a request for review of an advance ruling on tariff classification, pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CURVE DISTRIBUTION SERVICES INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	March 8, 2012
Tribunal Member:	Serge Fréchette, Presiding Member
Counsel for the Tribunal:	Alain Xatruch
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Lindsay Vincelli

PARTICIPANTS:

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Curve Distribution Services Inc.	Marcia L. Kobe
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Orlagh O'Kelly

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Curve Distribution Services Inc. (CDS) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision made on March 3, 2011, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to a request for review of an advance ruling on tariff classification.

2. There are two issues in this appeal. This first issue is whether various protective cases for cell phones (the goods in issue) are properly classified under tariff item No. 4202.32.90 of the schedule to the *Customs Tariff*[2] as articles of a kind normally carried in the pocket or in the handbag with outer surface of sheeting of plastics and under tariff No. 4202.99.90 as other containers, as determined by the CBSA, or should be classified under tariff item No. 4202.12.90 as trunks, suitcases, vanity cases, executive cases, briefcases, school satchels and similar containers with outer surface of plastics, as claimed by CDS.

3. The second issue is whether the goods in issue, in addition to being classified under specific tariff items in Chapter 42, may also be classified under tariff item No. 9948.00.00 as articles for use in automatic data processing machines and thereby benefit from duty-free treatment.

PROCEDURAL HISTORY

4. On December 16, 2009, CDS submitted a request for an advance ruling with respect to the tariff classification of various products, including the goods in issue.

5. On April 22, 2010, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(*c*) of the *Act*, which classified the goods in issue under tariff item No. 4202.99.90.

6. On June 25, 2010, CDS requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*. In its request, CDS contended that the goods in issue should be classified under tariff item No. 9948.00.00 and thereby benefit from duty-free treatment.

7. On March 3, 2011, the CBSA revised the advance ruling pursuant to subsection 60(4) of the *Act*. The CBSA classified the goods in issue under tariff item Nos. 4202.32.90 and 4202.99.90 and determined that they were not eligible for the benefit of tariff item No. 9948.00.00.

8. On June 2, 2011, CDS filed a notice of appeal with the Tribunal pursuant to subsection 67(1) of the *Act* and requested that the appeal be heard by way of written submissions. However, the 90-day statutory time period to file a notice of appeal with respect to the CBSA's decision of March 3, 2011, had expired on June 1, 2011. Therefore, on June 14, 2011, CDS filed, pursuant to section 67.1, an application for an order extending the time to file a notice of appeal.

9. On July 22, 2011, the Tribunal issued an order granting the extension of time and accepting the documents that had already been filed by CDS as a notice of appeal in respect of the CBSA's decision of March 3, 2011.[3]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. See *Curve Distribution Services* (22 July 2011), EP-2011-004 (CITT).

10. On August 5, 2011, the CBSA informed the Tribunal that it agreed with CDS's request to have the appeal heard by way of written submissions. On August 9, 2011, the Tribunal advised the parties of its decision to hear the appeal by way of written submissions, in accordance with rule 25 of the *Canadian International Trade Tribunal Rules*.[4]

11. The Tribunal held a file hearing in Ottawa, Ontario, on March 8, 2012.

GOODS IN ISSUE

12. The goods in issue consist of eight different protective cases that are specifically designed and shaped to accommodate particular models of cell smart phones. They are composed of either a soft plastic material (e.g. silicone) or a hard plastic material (e.g. polycarbonate). Some of the goods in issue also come with plastic belt clips and/or armbands made of a neoprene or elastic material with Velcro® straps, which allow for the cell phones to be carried on a belt or on the arm.[5] However, the parties agree that the goods in issue are primarily used to protect the cell phones, for which they are designed, from dust, knocks and scratches.[6]

13. CDS filed, as physical exhibits, the following eight samples of the goods in issue:[7]

- A-01 Kroo Case, Skin Series, for BlackBerry 9500, model SB95SCP1
- A-02 Kroo Case, Fuze Series, for BlackBerry 9500 Storm, model SB95PUK1
- A-03 Cellular Innovations Silicone Skin Case for Blackberry Storm, model SKN-STORM-BK
- A-04 Cellular Innovations Silicone Skin Case for Blackberry Curve 8900, model SKN-CURVE2-BK
- A-05 Kroo Case, Kroo-Shell Series, for iPhone 3G, model MIP3CKK1 (black)
- A-06 Kroo Case, Kroo-Shell Series, for iPhone 3G, model MIP3CKP1 (pink)
- A-07 **i**essentials Sport Armband for iPhone and iPhone 3G, model IPH-NPA-BK
- A-09 **i**essentials Silicone Skin Case for iPhone 3G , including belt clip and armband, model IPH-SC-BK

14. The CBSA did not file any physical exhibits.

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).[8] 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.

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4. S.O.R./91-499.
5. See Exhibits A-07 and A-09.
6. Tribunal Exhibit AP-2011-023-11A at para. 8; Tribunal Exhibit AP-2011-023-07 at para. 4.
7. The Tribunal notes that Exhibit A-08 did not represent any of the goods in issue and was thus not considered for the purposes of this appeal.
8. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

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*[9] and the *Canadian Rules*[10] 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*[11] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[12] 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.[13]

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.[14]

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.[15] The final step is to determine the proper tariff item. [16]

FIRST ISSUE—TARIFF CLASSIFICATION IN CHAPTER 42

21. As mentioned above, the first issue in this appeal is whether the goods in issue are properly classified under tariff item No. 4202.32.90 as articles of a kind normally carried in the pocket or in the handbag with outer surface of sheeting of plastics and under tariff No. 4202.99.90 as other containers, as determined by the CBSA, or should be classified under tariff item No. 4202.12.90 as trunks, suitcases, vanity cases, executive cases, briefcases, school satchels and similar containers with outer surface of plastics, as claimed by CDS. Consequently, the dispute between the parties arises at the subheading level.

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9. S.C. 1997, c. 36, schedule [*General Rules*].
10. S.C. 1997, c. 36, schedule.
11. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
12. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
13. 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 *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 *Classification Opinions*.
14. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
15. 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."
16. 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.

Relevant Classification Provisions

22. 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 paperboard, or wholly or mainly covered with such materials or with paper.**

-Trunks, suit-cases, vanity-cases, executive-cases, brief-cases, school satchels and similar containers:

. . .

4202.12 **- -With outer surface of plastics or of textile materials**

. . .

4202.12.90 - - -Other

. . .

-Handbags, whether or not with shoulder strap, including those without handle:

. . .

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

. . .

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

. . .

4202.32.90 - - -Other

. . .

-Other:

. . .

4202.92 **- -With outer surface of sheeting of plastics or of textile materials**

. . .

4202.92.90 - - -Other

. . .

4202.99 - -**Other**

. . .

4202.99.90 - - -Other

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

> This heading covers **only** the articles specifically named therein and similar containers.
>
> 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.

24. There are no section, subheading or supplementary notes, and there are no relevant chapter notes or *Classification Opinions*.

Positions of Parties

25. CDS submitted that the *Explanatory Notes* to heading No. 42.02 provide that articles covered by the first part of the heading may be of any material and that the expression "similar containers" in the first part of the heading includes "specially shaped" cases. It therefore submitted that the goods in issue should be classified in the first part of heading No. 42.02—and more specifically under tariff item No. 4202.12.90—rather than the second part because they are all "specially shaped" and composed of plastics. It further submitted that all "specially shaped" plastic cases should be classified under tariff item No. 4202.12.90.

26. The CBSA submitted that, in accordance with the terms of heading No. 42.02 and the related *Explanatory Notes*, only the articles specifically named in the heading and "similar containers" can be classified therein. It submitted that the goods in issue can be classified in heading No. 42.02, as they are "containers" and "similar" to the articles or cases specifically named in the heading.

27. The CBSA submitted that the ordinary meaning of the word "container" is sufficiently broad to encompass the goods in issue. It submitted that the goods in issue are clearly containers, as they have no other purpose than to cover and hold cell phones. It also noted that the goods in issue are known commercially as "cases" and that the words "case" and "container" are synonymous.

28. The CBSA submitted that the goods in issue are similar to the articles listed in heading No. 42.02, as they share the important characteristic of holding particular things. In support of its position, it referred to the Tribunal's decision in *Nokia Products Limited and Primecell Communications Inc. v. Commissioner of the Canada Customs and Revenue Agency*[17] in which the Tribunal found that leather carrying cases designed for use with specified models of cell phones were very similar in design and function to a number of the articles listed in heading No. 42.02.

29. With respect to classification at the subheading and tariff item levels, the CBSA submitted that the goods in issue are not stand-alone cases with a strap, such as binocular cases, but rather, are like spectacle cases, which serve to provide protection while being carried in a pocket or a handbag, for example. It noted however that the goods in issue with armbands are not normally carried in a pocket or a handbag and should therefore be classified accordingly. It further submitted that the goods in issue are composed of silicone and polycarbonate and are therefore made of plastics. It therefore submitted that the goods in issue without armbands are properly classified under tariff item No. 4202.32.90 as articles of a kind normally carried in the pocket or in the handbag with outer surface of sheeting of plastics and that the goods in issue with armbands are properly classified under tariff No. 4202.92.90 as other containers with outer surface of sheeting of plastics.[18]

Tribunal's Analysis

Heading Analysis

30. The terms of heading No. 42.02 and the *Explanatory Notes* thereto make it clear that the heading covers only the articles specifically named therein and "similar containers". As the goods in issue are not specifically named in heading No. 42.02, they can only be classified therein if they are held to be "containers" that are "similar" to the articles specifically named in the heading.

31. The *Canadian Oxford Dictionary* defines "container" as "**1** a vessel, box, etc., for holding particular things."[19] It also defines "case" as "**1** a container or covering serving to enclose, hold, or contain."[20] Considering the fact the goods in issue have been described above as protective "cases" for cell phones and are also marketed as such,[21] the Tribunal is of the view that they are undeniably "containers".

32. The Tribunal notes that heading No. 42.02 is divided by a semi-colon into two distinct parts. Both the first and second parts consist of a list of specific articles followed by the term "similar containers". However, while the first part covers articles of any material, the second part only covers articles of certain specified materials, which include sheeting of plastics and textile materials. It is common ground between the parties that the goods in issue are composed of plastics.[22] Therefore, as long as the goods in issue are found to be similar to the articles specifically named in either the first or second part of the heading, they will be classifiable in heading No. 42.02.

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17. (5 August 2003), AP-2001-073, AP-2001-074 and AP-2001-084 (CITT) [*Nokia*].
18. The CBSA originally submitted that the goods in issue with armbands were properly classified under tariff item No. 4202.99.90 as other containers (see prior references to this tariff item in these reasons). However, further to a request for clarification from the Tribunal, the CBSA took the view that those goods should instead be classified under tariff item No. 4202.92.90 (see Tribunal Exhibit AP-2011-023-18).
19. Second ed., *s.v.* "container".
20. Second ed., *s.v.* "case".
21. The packaging for the goods in issue prominently displays the word "case" (see Physical Exhibits).
22. Tribunal Exhibit AP-2011-023-07A, para. 9; Tribunal Exhibit AP-2011-023-11A, paras. 47, 49.

33. In *Rlogistics Limited Partnership v. President of the Canada Border Services Agency*,[23] the Tribunal interpreted the term "similar containers" in heading No. 42.02 to mean containers that share important characteristics and have significant common features with the articles specifically named in the heading. As for the iPod Nano sport armband cases that were at issue in that appeal, the Tribunal found them to be similar to the articles specifically named in the first part of heading No. 42.02 because the evidence established that they were specifically designed and used for holding and carrying a specific item, namely, an iPod Nano.

34. Moreover, in *Nokia*, the Tribunal found that there were strong similarities between soft leather carrying cases for cell phones and a number of the articles specifically named in heading No. 42.02, in that they were fitted to the article that they were intended to contain and they were used to protect and carry the article.

35. In light of the fact that the goods in issue are very similar in nature to the goods that were at issue in *Rlogistics* and *Nokia*, the Tribunal sees no reason why it should not also conclude, as it did in those cases, that the goods in issue are similar to a number of the articles specifically named in heading No. 42.02. 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.

36. For the above reasons, the Tribunal agrees with the parties that the goods in issue are properly classified in heading No. 42.02.

Subheading Analysis

37. Heading No. 42.02 has the following four first-level (i.e. one-dash) subheadings:

> **-Trunks, suit-cases, vanity-cases, executive-cases, brief-cases, school satchels and similar containers:**
>
> . . .
>
> **-Handbags, whether or not with shoulder strap, including those without handle:**
>
> . . .
>
> **-Articles of a kind normally carried in the pocket or in the handbag:**
>
> . . .
>
> **-Other:**

38. The goods in issue are obviously not handbags. Moreover, the Tribunal is of the view that, while the goods in issue are containers (as found above), they are not "similar" to the articles specifically named in the first of the four first-level subheadings (i.e. trunks, suitcases, vanity cases, executive cases, briefcases and school satchels). The fact that the goods in issue and these articles are all used to hold, protect and/or carry goods does not make them "similar". If that were the case, then all containers, by definition, would be classified in this first-level subheading. Unlike the goods in issue, the articles specifically named in the first of the four first-level subheadings do not appear to be specially shaped or internally fitted to contain a

23. (25 October 2011), AP-2010-057 (CITT) [*Rlogistics*].

particular or specific good. Rather, they appear to be designed to contain varying quantities or sizes of items, such as clothes, binders and documents. As such, the Tribunal if of the view that the goods in issue are not similar to those articles.

39. The Tribunal notes that, although CDS submitted that all "specially shaped" plastic cases should be classified in this first-level subheading, it provided no arguments to support its position. In fact, it appears that CDS may have made this submission on the mistaken belief that classification of the goods in issue in the *first* part of heading No. 42.02 automatically leads to classification in the *first* of the four first-level subheadings. However, the articles specifically named in this first-level subheading are not the only articles named in the first part of heading No. 42.02. As stated above, the Tribunal is of the view that the goods in issue are similar to the spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases and holsters that are specifically named in the first part of heading No. 42.02. These articles are not specifically named in the first of the four first-level subheadings.

40. This leaves the following two first-level subheadings: "Articles of a kind normally carried in the pocket or in the handbag" and "Other". The Tribunal is of the view that the goods in issue without armbands are clearly intended to hold, protect and carry cell phones while in a pocket or handbag and should therefore be classified as such. On the other hand, the goods in issue with armbands would not normally be carried in a pocket or handbag and should therefore be classified as other containers.

41. Both of these first-level subheadings are identically divided into three second-level (i.e. two-dash) subheadings, which pertain to the material composition of the goods. As noted previously, it is common ground between the parties that the goods in issue are composed of plastics. Therefore, the Tribunal finds that the goods in issue are properly classified in subheading Nos. 4202.32 and 4202.92.[24]

Tariff Item Analysis

42. Subheading No. 4202.32 has two tariff items. As the goods in issue without armbands do not have an outer surface of textile materials containing less than 85 percent by weight of silk or silk waste, they must be classified under the only other tariff item, i.e. "Other". Subheading No. 4202.92 has three tariff items. As the first two of those tariff items only cover specifically named containers, none of which describe the goods in issue with armbands, those goods in issue must be classified under the remaining tariff item, i.e. "Other".

43. Therefore, the Tribunal finds that the goods in issue are properly classified under tariff No. 4202.32.90 as articles of a kind normally carried in the pocket or in the handbag with outer surface of sheeting of plastics and under tariff No. 4202.92.90 as other containers with outer surface of sheeting of plastics.

SECOND ISSUE—TARIFF CLASSIFICATION IN CHAPTER 99

44. The second issue in this appeal is whether the goods in issue, in addition to being classified under the above-mentioned tariff items, may also be classified under tariff item No. 9948.00.00 as articles for use in automatic data processing machines and thereby benefit from duty-free treatment.

24. The Tribunal notes that, even if the goods in issue with armbands are considered as having an outer surface that is at least partially composed of textile materials, they would nonetheless remain classified in subheading No. 4202.92, as this subheading also covers other containers with outer surface of textile materials.

Relevant Classification Provisions

45. Chapter 99, which includes tariff item No. 9948.00.00, provides special classification provisions that allow certain goods to be imported into Canada duty-free. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter. Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no *Classification Opinions* or *Explanatory Notes* to consider.

46. There are no notes to Section XXI (which includes Chapter 99). However, the Tribunal considers notes 3 and 4 to Chapter 99 to be relevant to the present appeal. These notes provide as follows:

> 3. Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin only after classification under a tariff item in Chapters 1 to 97 has been determined and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.
>
> 4. The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.

47. In accordance with note 3 to Chapter 99, the goods in issue may only be classified in Chapter 99 after classification under tariff items in Chapters 1 to 97 has been determined. As the Tribunal has already found that the goods in issue are properly classified under tariff item Nos. 4202.32.90 and 4202.92.90, the condition set out in note 3 to Chapter 99 has been met.

48. Consequently, the only remaining issue before the Tribunal is to determine whether the goods in issue meet the conditions of tariff item No. 9948.00.00, which provides as follows:

> **9948.00.00 Articles for use in the following:**
>
> . . .
>
> **Automatic data processing machines and units thereof** . . . .
>
> . . .
>
> **Parts and accessories of the foregoing.**

49. The parties have, with regard to the interpretation of the above tariff item, made reference to the following provisions of the *Customs Tariff*:

> **Chapter 84**
>
> **NUCLEAR REACTORS, BOILERS, MACHINERY AND MECHANICAL APPLIANCES; PARTS THEREOF**
>
> . . .
>
> **84.71 Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.**
>
> . . .

Chapter 85

ELECTRICAL MACHINERY AND EQUIPMENT AND PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND PARTS AND ACCESSORIES OF SUCH ARTICLES

. . .

85.17 **Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28.**

50. The parties also made reference to the following note to Chapter 84:

> 5. (A) For the purpose of heading 84.71, the expression "automatic data processing machines" means machines capable of:
>
> (i) Storing the processing program or programs and a least the data immediately necessary for the execution of the program;
>
> (ii) Being freely programmed in accordance with the requirements of the user;
>
> (iii) Performing arithmetical computations specified by the user; and,
>
> (iv) Executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.
>
> . . .
>
> (D) Heading 84.71 does not cover the following when presented separately, even if they meet all of the conditions set forth in Note 5 (C) above:
>
> . . .
>
> (ii) Apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network);
>
> . . .

Positions of Parties

51. CDS submitted that the goods in issue qualify for the benefit of tariff item No. 9948.00.00 because they are articles that are for use in cell phones or, alternatively, because they are accessories for cell phones, which are for use in a telecommunications networks.

52. CDS submitted that, since tariff item No. 9948.00.00 makes reference to "automatic data processing machines" and not "automatic data processing machines of heading No. 84.71", it should be interpreted in the broadest sense. It submitted that, while cell phones may be excluded from classification in heading No. 84.71 by virtue of Note 5(D) to Chapter 84, this does not preclude them from being considered "automatic data processing machines" for the purpose of tariff item No. 9948.00.00. In this regard, it noted that Note 5 to Chapter 84 defines the expression "automatic data processing machines", but only "[f]or the purpose of heading No. 84.71". It submitted that, if that definition were meant to apply throughout the tariff, as is the case for other definitions,[25] this would have been explicitly stated.

25. CDS provided, as examples, the definitions of the expressions "plastics", in Note 1 to Chapter 39, and "horsehair", in Note 4 Chapter 5, which are both meant to apply "[t]hroughout the Nomenclature".

53. CDS submitted that advancements in technology have resulted in cell phones being considered automatic data processing machines. It submitted that cell smart phones have numerous features, including e-mail and instant messaging, calculator, internet browser, Global Positioning System service, camera, various applications and games. It also provided definitions of the term "smart phone", which state that such phones are ". . . built on a mobile computing platform . . ." and are ". . . able to perform many of the functions of a computer . . . ."[26]

54. CDS also submitted that telecommunications networks can be considered automatic data processing machines. In support of its position, it provided a number of definitions, which, in its view, demonstrate that entire telecommunications networks are automatic data processing machines.[27]

55. Finally, CDS submitted that the goods in issue meet the "for use in" criterion because they are specifically designed for use with particular models of cell phones and are vital to the functioning of the phones, as they protect them while they are being carried or used. It further submitted that the goods in issue also meet the "for use in" criterion, as they are accessories for cell phones, which are attached or connected (wirelessly) to telecommunications networks.

56. For its part, the CBSA submitted that the goods in issue do not qualify for the benefit of tariff item No. 9948.00.00 because cell phones are not automatic data processing machines and, in any event, the goods in issue are not "for use in" cell phones.

57. Relying on Note 4 to Chapter 99, the CBSA submitted that, according to the definitions in the tariff nomenclature, cell phones do not fall within the meaning of "automatic data processing machines" for the purposes of tariff classification. It submitted that cell phones are not listed under tariff item No. 9948.00.00 and heading No. 84.71, which both cover "automatic data processing machines". It added that Note 5 to Chapter 84, which provides a definition of the expression "automatic data processing machines", specifically excludes cell phones from classification in heading No. 84.71. It submitted that cell phones are instead properly classified in heading No. 85.17.

58. The CBSA submitted that, even if cell phones were considered to be automatic data processing machines, CDS has failed to demonstrate that the goods in issue are "for use in" cell phones. Relying on the Tribunal's decisions in *Kverneland Group North American Inc. v. President of the Canada Border Services Agency*[28] and *Jam Industries Ltd. v. President of the Canada Border Services Agency*,[29] it submitted that the meaning of "for use in" is well established and that, in order to fall under tariff item No. 9948.00.00, the goods in issue would have to be physically connected and "functionally joined" to the cell phones, i.e. they would have to complement the function of the cell phones, and not the other way around. It submitted that, in this case, the goods in issue do not complement the function of the cell phones and that, in fact, it is the cell phones which complement the function of the goods in issue.

26. Tribunal Exhibit AP-2011-023-15A at para. 31.
27. Tribunal Exhibit AP-2011-023-15A at paras. 14-16.
28. (30 April 2010), AP-2009-013 (CITT) [*Kverneland*].
29. (20 March 2006) AP-2005-006 (CITT) [*Jam Industries*].

Tribunal's Analysis

59. In order for the goods in issue to qualify for the benefit of tariff item No. 9948.00.00, they must be (1) articles (2) for use in (3) automatic data processing machines and units thereof or parts and accessories of automatic data processing machines.

60. CDS submitted that the goods in issue are articles for use in cell phones, which, it claims, are automatic data processing machines. However, it also submitted that the goods in issue are accessories for cell phones, which it claims are for use in telecommunications networks, which, it further claims, are automatic data processing machines. The Tribunal notes that, according to the terms of tariff item No. 9948.00.00, it is the "articles" that are being classified (i.e. the goods in issue—not the cell phones) that must be "for use in" automatic data processing machines or parts and accessories thereof. Therefore, whether cell phones are "for use in" telecommunications networks is irrelevant in the context of this appeal.

61. The Tribunal further notes that the question as to whether the goods in issue are accessories for cell phones is also irrelevant in the context of this appeal. As the Tribunal has previously stated, the reference to "[p]arts and accessories of the foregoing" in tariff item No. 9948.00.00 means parts and accessories of the items listed in that tariff item (e.g. parts and accessories of automatic data processing machines) and not parts and accessories of articles that are for use in the items listed in that tariff item.[30] Therefore, in consideration of the foregoing, the Tribunal need only consider whether the goods in issue are articles for use in cell phones, which may themselves be automatic data processing machines or, alternatively, which may be parts and accessories of automatic data processing machines.

"Articles"

62. While the term "articles" is not defined for the purposes of tariff item No. 9948.00.00, the CBSA did not appear to take issue with the goods in issue being characterized as "articles".

63. On the basis of the normal usage of the term,[31] the Tribunal agrees that the goods in issue are articles.

"For Use In"

64. Subsection 2(1) of the *Customs Tariff* defines the term "for use in" as follows:

> "for use in", wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.

30. See *Jam Industries* at para. 47; *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT) [*Sony*] at 10.

31 The *Canadian Oxford Dictionary*, 2d ed., defines "article" as follows: "**1** a particular or separate thing, esp. one of a set . . . ."

65. In applying subsection 2(1) of the *Customs Tariff*, the Tribunal applies a test with two requirements for determining whether goods are attached to other goods and, hence, "for use in" those other goods. In particular, the goods must be (1) physically connected and (2) functionally joined to the other goods.[32] The Tribunal has also held that goods are functionally joined to other goods (i.e. the host goods) when they enhance or complement the function of those goods.[33]

66. Turning to the application of the above two-part test, the Tribunal is of the view that the goods in issue can be considered as being physically connected to the cell phones which they are specifically designed and shaped to fit. Indeed, the goods in issue cover, and are in direct contact with, the cell phones. In *Nokia*, the Tribunal found that soft leather carrying cases for cell phones were fitted to the shapes of the cell phones and were physically connected in this manner.[34] The same is true of the goods in issue.

67. However, while the goods in issue are physically connected to the cell phones for which they are designed, the Tribunal is of the view that they do not enhance or complement the function of the cell phones and therefore cannot be considered as being functionally joined to the cell phones. In the Tribunal's opinion, cell phones perform the same functions, regardless of whether they are covered by the goods in issue. In other words, cell phones are equally capable of transmitting or receiving voice, images or other data, or running software applications, with or without being covered by the goods in issue. Moreover, there is no evidence on the record which indicates that the goods in issue are vital to the functioning of the cell phones or that they allow them to better perform the aforementioned functions. Although the goods in issue hold, protect and carry cell phones, the Tribunal is of the view that there is no *functional* interaction between the two.

68. The Tribunal notes that, in *Rlogistics*, it found that iPod Nano sport armband cases added to the convenience and effectiveness of the device (i.e. iPod Nano) by adding to its portability and range of use. However, that appeal dealt with the issue of whether the armband cases were "accessories" suitable for use solely or principally with the device—not whether they were "for use in" the device. As such, the Tribunal never considered whether the cases enhanced or complemented the *function* of the device, which was to play music. As noted above, the Tribunal is of the view that, while the goods in issue serve to hold, protect and carry cell phones, they do not enhance or complement the function of the cell phones. Therefore, the goods in issue are not "for use in" cell phones and cannot be classified under tariff item No. 9948.00.00.

"Automatic Data Processing Machines"

69. Having determined that the goods in issue are not "for use in" cell phones, the Tribunal need not continue with its analysis and determine whether cell phones are automatic data processing machines or parts and accessories of such machines. However, the Tribunal notes that, contrary to the CBSA's assertions, the fact that cell phones are not classified in heading No. 84.71 does not necessarily mean that they are not "automatic data processing machines" within the meaning and for the purposes of tariff item

32. See *Kverneland*; *Jam Industries*; *Sony*; *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (29 November 2001), AP-2000-047 (CITT); *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT); *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT).
33. See, for example, *Kverneland*; *Jam Industries*; *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency* (4 November 2011), AP-2008-012R (CITT).
34. *Nokia* at 6.

No. 9948.00.00.[35] Had Parliament intended that automatic data processing machines in tariff item No. 9948.00.00 be limited to automatic data processing machines of heading No. 84.71, it would have said so.

DECISION

70. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item Nos. 4202.32.90 and 4202.92.90 and that they are not entitled to benefit from the duty-free treatment conferred by tariff item No. 9948.00.00.

71. The appeal is therefore dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

35. See the Tribunal's decision in *Beckman Coulter Canada Inc. v. President of the Canada Border Services Agency* (17 January 2012), AP-2010-065 (CITT) where it adopted a similar reasoning.