



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-029

Elfe Juvenile Products

v.

President of the Canada Border
Services Agency

*Decision issued
Friday, June 15, 2012*

*Reasons issued
Wednesday, June 20, 2012*

*Corrigendum issued
Tuesday, June 26, 2012*

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IN THE MATTER OF an appeal heard on February 16, 2012, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF five decisions of the President of the Canada Border Services Agency, dated May 24, 2011, with respect to a request for re-determination pursuant to section 67 of the *Customs Act*.

BETWEEN

ELFE JUVENILE PRODUCTS

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued at a later date.

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 16, 2012

Tribunal Member: Diane Vincent, Presiding Member

Counsel for the Tribunal: Ekaterina Pavlova
Eric Wildhaber

Manager, Registrar Programs and Services: Michel Parent

Registrar Officer: Cheryl Unitt

PARTICIPANTS:

Appellant	Counsel/Representative
Elfe Juvenile Products	Michael Sherbo Victor Truong
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Lune Arpin

WITNESS:

Jennifer M. Rosinia
OTR/L
Kids Links Unlimited, Inc.

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Elfe Juvenile Products (Elfe) with the Canadian International Trade Tribunal (the Tribunal) on August 9, 2011, pursuant to subsection 67(1) of the *Customs Act*¹ from five decisions of the President of the Canada Border Services Agency (CBSA), dated May 24, 2011, made pursuant to subsection 60(4).

2. The issue in this appeal is whether Graco Lovin' Hug[™] infant swings (the goods in issue) are properly classified under tariff item No. 9401.71.10 of the schedule to the *Customs Tariff*² as other upholstered seats with metal frames for domestic purposes, as determined by the CBSA, or should be classified under tariff item No. 9503.00.90 as other toys, as claimed by Elfe.

PROCEDURAL HISTORY

3. On May 24, 2011, the CBSA issued five decisions pursuant to subsection 60(4) of the *Act* in which it classified the goods in issue under tariff item No. 9401.71.10.

4. On August 9, 2011, Elfe filed the present appeal in accordance with subsection 67(1) of the *Act*.

5. On February 16, 2012, the Tribunal held a public hearing in Ottawa, Ontario.

6. Elfe asked that Dr. Jennifer M. Rosinia, OTR/L, Kids Links Unlimited, Inc. be qualified as an expert witness. Dr. Rosinia was qualified by the Tribunal as an expert in the area of child development, including infant development, and in the use, design and development of the goods in issue in relation to child development.³

7. No witnesses were called by the CBSA.

GOODS IN ISSUE

8. The goods in issue are Graco Lovin' Hug[™] infant swings. The swing is mounted on a metal frame. It can be placed in four positions of different reclining angles. It is equipped with a head support, an electric motor and an overhead mobile with three soft toys. It is capable of swinging (6 variable speeds), playing music (10 classical melodies or songs) and reproducing nature sounds (5 different sounds).⁴ Mix 'n Move[®] toys, for use with the tray, are sold separately.⁵ The swing is intended for babies weighing from 5.5 to 30 lbs. (2.5 to 13.6 kg),⁶ aged from 0 to 6 months.⁷

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

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

3. *Transcript of Public Hearing*, 16 February 2012, at 18, 25.

4. Exhibit A-01.

5. *Ibid.* at 5, 41.

6. Tribunal Exhibit AP-2011-029-04 at paras. 6-10, tab 1; Tribunal Exhibit AP-2011-029-06A at paras. 2-11, tab 1.

7. Tribunal Exhibit AP-2011-029-04, tab 1.

9. Elfe filed a sample of the goods in issue (assembled), along with its original box and the owner's manual.⁸

STATUTORY FRAMEWORK

10. 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.⁹ 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.

11. Subsection 10(1) of the *Customs Tariff* provides that “. . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System^[10] and the Canadian Rules^[11] set out in the schedule.”

12. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on, until classification is completed.¹²

13. Rule 1 of the *General Rules* provides as follows:

1. . . . 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 following provisions.

14. Section 11 of the *Customs Tariff* provides that, in interpreting headings and subheadings, regard shall be had to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.¹³ While the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods, the Tribunal will apply them, unless there is a sound reason to do otherwise.¹⁴

8. Exhibit A-01. The Tribunal notes that the owner's manual included in tab 2 of Tribunal Exhibit AP-2011-029-06A is not identical to the owner's manual included in the box provided with Exhibit A-01. Given that the parties agree that the Graco Lovin' Hug™ infant swing filed at the hearing represents the goods in issue, the Tribunal will further refer to the owner's manual included with Exhibit A-01.

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

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

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

12. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

13. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*]. Section 11 of the *Customs Tariff* also specifies that regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*, World Customs Organization, 2d ed., Brussels, 2003.

14. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.

15. Once this approach has been used to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading by applying Rule 6 of the *General Rules*.¹⁵ The final step is to determine the tariff item by applying Rule 1 of the *Canadian Rules*.¹⁶

16. The relevant provisions of Chapter 94 of the *Customs Tariff* provide as follows:

Section XX

MISCELLANEOUS MANUFACTURED ARTICLES

...

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**

...

94.01 **Seats (other than those of heading 94.02), whether or not convertible into beds,
and parts thereof.**

...

-Other seats, with metal frames:

9401.71 **--Upholstered**

9401.71.10 -- -For domestic purposes

...

17. The relevant notes to Chapter 94 provide as follows:

1. This Chapter does not cover:

...

(l) Toy furniture or toy lamps or lighting fittings (heading 95.03)

18. The relevant *Explanatory Notes* to Chapter 94 and heading No. 94.01 provide as follows:

GENERAL

This Chapter covers, **subject** to the exclusions listed in the Explanatory Notes to this Chapter:

(1) All furniture and parts thereof (headings 94.01 to 94.03).

...

15. Rule 6 of the *General Rules* provides as follows: "For legal purposes, 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, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."

16. Rule 1 of the *Canadian Rules* provides that the tariff item shall be identified according to the terms of the tariff item and any related supplementary notes and, *mutatis mutandis*, to the *General Rules*, for example, by reading the word "heading" in Rule 1 of the *General Rules* as "tariff item".

For the purposes of this Chapter, the term “furniture” means:

- (A) Any “movable” articles (**not included** under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings

...

Subject to the exclusions mentioned below, [heading No. 94.01] covers all seats (including those for vehicles, provided that they comply with the conditions prescribed in Note 2 to this Chapter), for example:

19. Lounge chairs, arm-chairs, folding chairs, deck chairs, infants’ high chairs and children’s seats designed to be hung on the back of other seats (including vehicle seats) The relevant provisions of Chapter 95 of the *Customs Tariff* provide as follows:

Chapter 95

TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF

9503.00 Tricycles, scooters, pedal cars and similar wheeled toys; dolls’ carriages; dolls; other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds.

...

9503.00.90 ---Other

20. The relevant *Explanatory Notes* to Chapter 95 and heading No. 95.03 provide as follows:

GENERAL

This Chapter covers toys of all kinds whether designed for the amusement of children or adults. . . .

...

[Heading No. 95.03] covers:

...

- (D) **Other toys.**

This group covers toys intended essentially for the amusement of persons (children or adults). . . .

All toys **not included in (A) to (C)**. Many of the toys are mechanically or electrically operated.

...

Certain toys (e.g., electric irons, sewing machines, musical instruments, etc.) may be capable of a limited “use”; but they are generally distinguishable by their size and limited capacity from real sewing machines, etc.

- (E) **Reduced-size (“scale”) models and similar recreational models.**

This includes models of a kind mainly used for recreational purposes

This group also includes life-size or enlarged reproductions of articles **provided** they are for recreational purposes.

POSITIONS OF PARTIES

Elfe

21. Elfe submitted that the goods in issue are classifiable, on the basis of Rule 1 of the *General Rules*, in heading No. 95.03 as other toys.

22. Elfe asserted that note 1(l) to Chapter 94, which provides that “[t]his Chapter does not cover . . . (l) [t]oy furniture or toy lamps or lighting fittings (heading 95.03) . . .” [emphasis added], expressly excludes the goods in issue from the ambit of heading No. 94.01 and directs classification in heading No. 95.03.¹⁷

23. In support of its position that the goods in issue are toys, Elfe relied on the *Explanatory Notes* to Chapter 95, which provide for “. . . toys of all kinds whether designed for the amusement of children or adults” [emphasis added]. It referred to the following dictionary definition of the term “amuse”: “to divert the attention of so as to deceive . . . to entertain or occupy in a light, playful, or pleasant manner”,¹⁸ and argued that the goods in issue fall within the meaning of the term “toy”, as it occupies the attention of the babies that it is designed to hold. Further, Elfe noted that the goods in issue are marketed and sold as toys according to the Babies “R” Us product literature.¹⁹

24. Elfe submitted that the goods in issue are both mechanically and electrically operated, as they produce music and sound, and are designed to be ridden (but not mounted on wheels)²⁰ in the same manner as, for example, rocking horses within the meaning of note (v) of the *Explanatory Notes* to heading No. 95.03, which includes “mechanically or electrically operated” toys.

25. In addition, Elfe argued that the nomenclature clearly differentiates between swings and seats.²¹ In this respect, it refers to the wording of note (B)(12) of the *Explanatory Notes* to heading No. 95.06, which provides for “[e]quipment of a kind used in children’s playgrounds (e.g., swings . . .)” [emphasis added], and to the *Explanatory Notes* to heading No. 95.08,²² which provide for various kinds of swings used in fairgrounds. Elfe took the position that the goods in issue are reduced-size models of swings, capable of limited use, within the meaning of notes (D) and (E) of the *Explanatory Notes* to heading No. 95.03.²³

CBSA

26. The CBSA submitted that the goods in issue are properly classified, on the basis of Rule 1 of the *General Rules*, in heading No. 94.01 as other upholstered seats with metal frames for domestic purposes.

17. Tribunal Exhibit AP-2011-029-04 at paras. 18, 36.

18. *Ibid.* at para. 25, tab 2.

19. *Ibid.* at para. 26, tab 1.

20. *Ibid.* at paras. 27, 28, 29, tab 3. See also Tribunal Exhibit AP-2011-029-10A at 33 for the definition of the word “ride”.

21. *Transcript of Public Hearing*, 16 February 2012, at 86.

22. Tribunal Exhibit AP-2011-029-04 at paras. 41, 42. Heading No. 95.08 provides for “[r]oundabouts, swings, shooting galleries and other fairground amusements; travelling circuses and travelling menageries; travelling theatres” [emphasis added].

23. Tribunal Exhibit AP-2011-029-04 at paras. 30, 31, 32. Elfe also refers to the Tribunal’s decision in *World Famous Sales of Canada Inc. v. Deputy M.N.R.* (31 August 1994), AP-93-263 (CITT) at 6, in which the Tribunal classified the goods in heading No. 95.03 on the basis that they were “. . . things with which children play that are essentially smaller models of camping tents” [emphasis added].

27. According to the CBSA, the terms of heading No. 94.01 name and/or generically describe the goods in issue as “seats”.²⁴ Referring to the *Canadian Oxford Dictionary* definition of the word “seat” as “a thing made or used for sitting on, such as a chair, stool, bench, etc.”,²⁵ the CBSA maintained that the goods in issue are “best used” for a baby to sit in, while buckled and under supervision.²⁶ In support of its position, the CBSA emphasized the wording of the *Explanatory Notes* to heading No. 94.01, which indicates that that heading covers “all seats”, including “. . . infants’ high chairs and children’s seats . . . couches (including those with electrical heating) . . . (. . . and dual purpose stool-steps).”²⁷ Citing the Tribunal’s decision in *Wal-Mart Canada Corporation v. President of the Canada Border Services Agency*,²⁸ the CBSA argued that dual purpose seats²⁹ were classified in heading No. 94.01.³⁰

28. The CBSA submitted that the goods in issue meet all the requirements of the definition of the term “furniture” found in note (A) of the *Explanatory Notes* to Chapter 94, as they are (i) articles that can be moved from one place to another, (ii) placed on the floor or ground when used, (iii) used mainly with a utilitarian purpose (in which to sit babies), (iv) designed to furnish a residence and (v) not specifically included in the terms of other headings of the nomenclature.³¹

29. It is the CBSA’s position that, although the mobile, the vibration mechanism and the music amuse babies in order for them to remain longer in the goods in issue, they do not play a fundamental role and could be substituted by other means.³² For the CBSA, the goods in issue are mainly seats whose function is to hold a baby in a sitting position while the person looking after the baby is doing other tasks.³³ The CBSA also argued that any “amusement” properties are not, in and of themselves, determinative and, therefore, do not necessarily direct classification of the goods in issue as toys.³⁴ The dual purpose of the goods in issue, that is, to seat and amuse (play music, vibrate and rotate an amusement mobile) does not exclude them from classification in heading No. 94.01.³⁵

30. In rebuttal of Elfe’s arguments, the CBSA submitted that, as per Rule 1 of the *General Rules*, heading No. 95.03 does not name or generally describe the goods in issue as other toys. Further, the goods in issue are not “toy furniture” within the meaning of note 1(l) to Chapter 94, because note (D)(xiii) of the *Explanatory Notes* to heading No. 95.03 refers only to furniture designed for doll houses and not furniture with a toy element or furniture for children.³⁶

24. Tribunal Exhibit AP-2011-029-06A at paras. 25-26.

25. *Ibid.* at para. 27, tab 10.

26. *Ibid.* at paras. 28-32.

27. *Ibid.* at para. 33, tab 11.

28. (13 June 2011), AP-2010-035 (CITT) [*Wal-Mart*].

29. In *Wal-Mart*, the goods in issue were gaming chairs equipped with various inputs, jacks and speakers, which allowed them to connect to and interact with video game controllers and consoles.

30. Tribunal Exhibit AP-2011-029-06A at para. 34, tab 12.

31. *Ibid.* at para. 38.

32. *Ibid.* at paras. 39, 40.

33. *Transcript of Public Hearing*, 16 February 2012, at 101.

34. Tribunal Exhibit AP-2011-029-06A at paras. 59, 60, 61. See *Regal Confections Inc. v. Deputy M.N.R* (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal*].

35. Tribunal Exhibit AP-2011-029-06A at para. 35.

36. *Ibid.* at paras. 51, 52, 53 54.

31. With respect to Elfe's submission that the goods in issue are reduced-size models of swings, the CBSA contended that infants cannot "play with" the goods in issue in the same manner as they would play with a plush toy.³⁷

32. Finally, referring to the definition of "ride" provided by the *Canadian Oxford Dictionary*, the CBSA contended that the goods in issue are not intended for riding.³⁸

ANALYSIS

33. As indicated above, the Tribunal must determine whether the goods in issue are properly classified in heading No. 94.01 as seats, as determined by the CBSA, or should be classified in heading No. 95.03 as toys, as claimed by Elfe.

34. The Tribunal observes that Chapter 94 covers all furniture and parts thereof (heading Nos. 94.01 to 94.03), with restrictions contained in note (A) of the *Explanatory Notes* to Chapter 94, which restricts as follows the scope of Chapter 94 to furniture not included in other more specific headings of the nomenclature:

For the purposes of this Chapter, the term "furniture" means:

- (A) Any "movable" articles (**not included** under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings

35. Accordingly, in order to meet the definition of "furniture", the goods in issue must, among other things, be ". . . **not included** under other more specific headings of the Nomenclature . . ." Thus, if the goods in issue are included in a heading that is more specific, they cannot be classified in heading No. 94.01. Indeed, the goods in issue cannot be classified in both headings Nos. 94.01 and 95.03. The Tribunal agrees with the parties that this appeal can be resolved through the application of Rule 1 of the *General Rules*.

36. Therefore, the Tribunal will begin its analysis by determining whether the goods in issue are classifiable in heading No. 95.03 as other toys and whether that heading provides a more specific description of the goods of issue than heading No. 94.01.

Are the goods in issue toys included in heading No. 95.03?

37. In order to decide whether the goods in issue are classifiable in heading No. 95.03, the Tribunal must consider the *Explanatory Notes* to Chapter 95 and note (D) of the *Explanatory Notes* to heading No. 95.03, which states: "This Chapter covers *toys of all kinds* whether *designed for the amusement* of children or adults. . . (D) **Other toys**. This group covers toys intended essentially for the amusement of persons (children or adults)" [emphasis added].

38. The Tribunal notes that the Nomenclature does not define the term "toy". Therefore, in this respect, the Tribunal will refer to its jurisprudence, take judicial notice of the dictionary definitions and review the evidence on the record in order to determine whether the goods in issue are toys included in heading No. 95.03.

37. *Transcript of Public Hearing*, 16 February 2012, at 97.

38. Tribunal Exhibit AP-2011-029-06A at paras. 55, 56, 57, 58.

39. The parties cited Tribunal cases in which, on the basis of dictionary definitions, the term “toy” was interpreted broadly as “. . . something from which one derives amusement or pleasure”³⁹ and “. . . objects that children or adults play with to derive amusement and pleasure.”⁴⁰ The notions of “play value” and “amusement” are viewed as identifying aspects of a toy.⁴¹ In *Regal*, however, the Tribunal nuanced this interpretation by stating that it is not “. . . merely because a product provides amusement value, that it should necessarily be classified as a toy.”⁴² The Tribunal notes that it is clear from these definitions that the term “toy” is associated with amusement and pleasure.

40. In its previous decisions, the Tribunal outlined the factors that the amusement and the play value can be ascertained by examining the actual and intended use of the goods. The factors that may be taken into consideration are the design of the goods in issue and the manner in which they are marketed, packaged and advertised.⁴³ Consequently, the Tribunal will examine below the amusement value of the goods in issue, as well as their intended and actual uses.

41. The Tribunal considered the following dictionary definitions of the term “amuse”:

1 . . . cause (a person) to laugh or smile. **2** . . . interest or occupy; keep (a person) entertained.⁴⁴

1 a . . . : to divert the attention of so as to deceive **b** . . . : to occupy the attention of . . . **c** . . . :
DISTRACT . . . **2 a** : to entertain or occupy in a light, playful or pleasant manner . . . **b** : to appeal to the
sense of humor of . . .⁴⁵

42. As the goods in issue are designed to be used for infants, Dr. Rosinia provided further explanation with respect to the word “amusement”, in the context applied to infants. Dr. Rosinia explained the meaning of the word “amuse” from the perspective of the cognitive and physical development of infants. She outlined that infants do not have, or have very little, body control (motor skills) during the first months of their lives and that, as is well known, their interactions with the world around them are nascent. In her view, infants are not able to amuse themselves by themselves. Rather, they rely on their parents or caregivers for amusement and to help them learn about the world. Therefore, according to Dr. Rosinia, people amuse babies by providing them with different sensory experiences.⁴⁶ Dr. Rosinia stated that she participated in the development of a Graco infant swing similar to the goods in issue⁴⁷ and that she also worked on the design of the goods in issue.⁴⁸ She explained as follows: “The purpose of this product is for the baby to experience

39. *Zellers Inc. v. Deputy M.N.R.* (29 July 1998), AP-97-057 (CITT) [*Zellers*] at 7.

40. *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) [*Korhani*] at para. 29.

41. *Franklin Mint Inc. v. President of the Canada Border Services Agency* (13 June 2006), AP-2004-061 (CITT); *Korhani*.

42. In *Regal* at 8, the Tribunal illustrated this statement with examples of objects, intended for other purposes but from which children may derive play value.

43. *Korhani* at para. 33.

44. *Canadian Oxford Dictionary*, 2d ed., s.v. “amuse”.

45. *Merriam Webster’s Collegiate Dictionary*, 11th ed., s.v. “amuse”.

46. *Transcript of Public Hearing*, 16 February 2012, at 25-30, 56. Dr. Rosinia stated the following: “. . . the way we amuse infants is by making noises and picking them up and talking to them and putting them in various positions that help them to move through the world. . . . We bounce them around. We swing them around. We sing to them. We tickle them. We do little tickle marches. . . . These are the kinds of things, all through the context of sensory experiences that body takes in, processes and then acts upon.” *Transcript of Public Hearing*, 16 February 2012, at 30.

47. *Transcript of Public Hearing*, 16 February 2012, at 14-16, 51, 54.

48. *Ibid.* at 20.

movement. If the baby is moving, then . . . it's a way of playing. Moving through space is a way of playing for babies."⁴⁹ According to Dr. Rosinia's following testimony, the infant swing was created specifically to amuse babies and to allow them to interact with their sensory systems:

The basic design of this particular product . . . is to move a child through space. It's to put a child in a safe position so that [it] can experience this linear forward/backward kind of movement in various speeds. . . . [I]nitially we just had the swinging, but as we began to learn how important the sensory systems were and how babies responded and how parents were very happy that their babies were amused and so forth, we began to add things like visual inputs through mobiles and through toys. We began to add auditory input⁵⁰

43. Dr. Rosinia associated the amusement derived from the goods in issue with the amusement derived from the commonly known game of "peek-a-boo", in the sense that, through the swinging motion, babies get ". . . different visual pictures of [their] space."⁵¹

44. Dr. Rosinia identified the following reasons for which customers use the goods in issue: ". . . to amuse their babies, to keep them happy, to keep them entertained, to provide parents perhaps even a little bit of a break sometimes when your own arms are having difficulty rocking and swinging and swaying a baby."⁵² In her view, the goods in issue provide ". . . a continuum in sensory development, sensory processing, . . . from amusement, stimulation, excitement, alerting . . . to calming, organizing, regulating and soothing"⁵³ [emphasis added].

45. The Tribunal accepts that the swinging motion, the sounds and the plush toys of the goods in issue provide some measure of amusement or distraction for babies.

46. The Tribunal also notes that the product literature, packaging and marketing of the goods in issue emphasize the ways in which babies will purportedly be amused and entertained.⁵⁴ The Tribunal further observes that the goods in issue are distributed mainly in retail toy stores, such as Toys "R" Us and Babies "R" Us, as well as in other general merchandise retail stores, such as Wal-Mart, in their infant and baby gear sections.⁵⁵

49. *Ibid.* at 49.

50. *Ibid.* at 35-36.

51. *Ibid.* at 32. Dr. Rosinia added the following: "So when I am swinging in one direction and perhaps when I am posteriorly or further back, I would have one view of the world and as I come forward through that linear acceleration, I certainly have a different view of the world. . . . When it comes to the peek-a-boo game, if we were to dissect that down, why we play it and why it's so much fun, it really has to do with object permanency, object concept we call it, that something exists and before a baby actually has that cognitive structure that says things still exist when I can't see them. Prior to that, out of sight, out of mind. So very frequently it's humorous to watch a baby who is just now developing that: When I'm swinging backwards, my view of the environment is different, and then all of a sudden I move through space and I am at the front end of the swing and, lo and behold, things look different." *Transcript of Public Hearing*, 16 February 2012, at 32, 52.

52. *Transcript of Public Hearing*, 16 February 2012, at 37.

53. *Ibid.* at 38.

54. Exhibit A-01. The following descriptions appear on the box: "This is more than a swing. It's a reminder for you and baby to make time to relax. It's the chance to enjoy your first game of peek-a-boo and every new song you sing, and we know you'll love every moment", "hug-like design", "curved seat design mimics the way mom cradles baby in her arms", "fun mobile with plush toys for visual stimulation", "10 classical melodies and nature sounds soothe and amuse baby". Tribunal Exhibit AP-2011-0029-04, tab 1; Tribunal Exhibit AP-2011-029-06A, tab 1.

55. Tribunal Exhibit AP-2011-029-06A, tab 18; Tribunal Exhibit AP-2011-029-04, tab 1.

47. The CBSA recognized that the goods in issue provide amusement for babies. However, it insisted that the goods in issue have mainly a practical, utilitarian purpose of providing a “seat” for babies. The CBSA submitted that amusement is not the fundamental element of the essential characteristics and functions of the goods in issue.

48. The Tribunal does not agree with that assertion. Rather, the Tribunal is of the view that it appears that the amusement value is provided not only by the visual and audio inputs but also by the movement of the swing itself. On the basis of the evidence on the record and, more particularly, the testimony of Dr. Rosinia, the Tribunal considers that the vibration mechanism, the swing motion, the mobile and their play value are fundamental elements of the goods in issue.⁵⁶ Dr. Rosinia testified that she may specifically recommend certain swings on the basis of the features that they do or do not possess and that these are the characteristics that customers consider before choosing a specific kind of swing, depending on the baby’s individual needs.⁵⁷

49. Given that the electrical and mechanical components are incorporated in the goods in issue, they are an intrinsic part of them; therefore, in the Tribunal’s opinion, the goods in issue must be viewed as a whole because they interact with the baby in swinging (stimulating the moving sensory system), playing music and making noises (hearing stimulation), moving the toy mobile (visual stimulation), and overall entertaining and amusing the baby. All of these amusements and stimulations may be used alone or in combination with others.

50. As the Tribunal has found in the past, even if goods have some incidental utilitarian functions, classification in heading No. 95.03 as “other toys” is not precluded.⁵⁸ In this instance, the Tribunal finds that the overarching reason for which the goods in issue exist is for the amusement of babies through the stimulation of their sensory systems and that this stimulation provides entertainment to them, in addition to hopefully giving a break to their caregivers. Moreover, the goods in issue are marketed and advertised as toys. As well, Dr. Rosinia testified that the good in issue is not a seat.⁵⁹

51. Having regard to the above considerations, the Tribunal is satisfied that the goods in issue are properly described as toys that are intended essentially for the amusement of infants. Therefore, the Tribunal finds that the goods in issue are classifiable in heading No. 95.03 as other toys.

52. As mentioned above, the definition of the term “furniture” found in *Explanatory Note (A)* to Chapter 94 contains the proviso “... **not included** under other more specific headings of the Nomenclature” In order to determine whether the goods in issue are more specifically described in heading No. 95.03 or in heading No. 94.01, the Tribunal will give further consideration to the position advanced by the CBSA in respect of heading No. 94.01.

Are the goods in issue more specifically described as toys of heading No. 95.03 or as seats of heading No. 94.01?

53. Heading No. 94.01 provides as follows:

94.01 Seats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof.

56. *Transcript of Public Hearing*, 16 February 2012, at 39.

57. *Ibid.* at 40.

58. *Korhani* at para 41.

59. *Transcript of Public Hearing*, 16 February 2012, at 41-49.

54. There are no chapter notes or *Explanatory Notes* that define the term “seat”. Therefore, the Tribunal considered the ordinary meaning of that word. The *Canadian Oxford Dictionary* defines “seat” as follows: “a thing made or used for sitting on, such as a chair, stool, bench, etc.”⁶⁰ Similarly, the *Merriam-Webster’s Collegiate Dictionary* defines a “seat” as follows: “a chair, stool, or bench intended to be sat in or on”⁶¹.

55. The Explanatory Notes to heading No. 94.01 indicate that that heading covers “all seats” and provide a non-exhaustive illustrative list of the goods encompassed therein.⁶² As mentioned above, by virtue of the note (A) of the Explanatory Notes to Chapter 94, in order to be classifiable in heading No. 94.01, the goods in issue must be defined as “furniture”. Among other things, they have to be used “. . . mainly with a utilitarian purpose”

56. The evidence on the record shows that the goods in issue are comprised, among other things, of the following components: a seat, a metal frame (arms, legs and tubes) and a battery-powered mechanism. The powered mechanism operates to make the goods in issue swing and play music and sounds. Certain models contain additional features, such as a toy bar and Mix ’n Move[®] toys, that are not necessary to the functioning of the goods in issue.⁶³

57. In the product literature, the goods in issue are identified and marketed as infant swings.⁶⁴ Dr. Rosinia referred to the goods in issue as swings.⁶⁵ The owner’s manual refers to the word “seat” only when describing the unassembled part of the swing, which is to be hung on the metal frame.⁶⁶ When mounted on the metal frame, the seat becomes a component of the assembled product that is referred to as an infant swing. There is nothing on the record indicating that the “seat” component of the goods in issue can be used alone without being assembled with the other components.

58. On the basis of the evidence on the record, the Tribunal determines that even if the seats are essential parts of the goods in issue, they are more than seats.

59. Dr. Rosinia indicated that the goods in issue are not intended for sleeping purposes,⁶⁷ and she testified that it is not accurate to state that infants can “sit” in them because infants do not have the head and body control required for “sitting”, which is actually dangerous for them. Thus, she clarified that it is more accurate to state that infants are positioned in the goods in issue “. . . in a reclined supported position, *but it’s not sitting*”⁶⁸ [emphasis added].

60. *Canadian Oxford Dictionary*, 2d ed., s.v. “seat”; Tribunal Exhibit AP-2011-029-06A, tab 10.

61. *Merriam-Webster’s Collegiate Dictionary*, 11th ed., s.v. “seat”.

62. “Lounge chairs, arm-chairs, folding chairs, deck chairs, infants’ high chairs and children’s seats designed to be hung on the back of other seats (including vehicle seats), grandfather chairs, benches, couches (including those with electrical heating), settees, sofas, ottomans and the like, stools (such as piano stools, draughtsmen’s stools, typists’ stools, and dual purpose stool-steps).”

63. Tribunal Exhibit AP-2011-029-04 at paras. 6-10, tab 1; Tribunal Exhibit AP-2011-029-06A at paras. 2-11, tab 1; Exhibit A-01.

64. Tribunal Exhibit AP-2011-029-04, tab 1; Tribunal Exhibit AP-2011-029-06A, tab 1.

65. Exhibit A-01 at 6-21; *Transcript of Public Hearing*, 16 February 2012, at 14, 19-22, 32-38, 40-43, 45, 53.

66. Exhibit A-01.

67. Dr. Rosinia stated the following: “I do think that some babies fall asleep. This is not recommended. It’s not medically recommended. The product does not recommend it. It is not a place for babies to sleep. Babies sleep a lot of hours. . . . So babies will fall asleep, but it is not intended for babies to stay in here and sleep.” *Transcript of Public Hearing*, 16 February 2012, at 48-49.

68. *Transcript of Public Hearing*, 16 February, 2012, at 44.

60. The Tribunal is of the view that even if the goods in issue may be used incidentally to hold a baby, without swinging, moving, playing music and making sounds, and rotating the mobile toys, this is not sufficient to qualify the goods as mere infant seats and thereby ignore their inherent swinging properties and amusement value.

61. Therefore, while the goods in issue may have the characteristics to meet part of the definition of “furniture” found in *Explanatory Note (A)* to Chapter 94, heading No. 95.03 more specifically describes the goods in issue as toys because of their amusement value, their intended and actual use, and the manner in which they are marketed, packaged and advertised. All of these factors lead to the conclusion that the goods in issue are more in the nature of toys than seats. Thus, the goods in issue do not meet the proviso included in the definition of “furniture” of Chapter 94 that the goods in issue are “. . . **not included** under other more specific headings of the Nomenclature” Since the goods in issue do not meet all the requirements of the definition of “furniture” found in *Explanatory Note (A)* to Chapter 94, they are not classifiable in heading No. 94.01.

62. Consequently, in accordance with Rule 1 of the *General Rules*, the goods in issue are properly classified in heading No. 95.03.

Classification at the subheading and tariff item levels

63. Pursuant to Rule 6 of the *General Rules*, the goods in issue must be classified in subheading No. 9503.90 as other toys, as no other first-level subheading under heading No. 95.03 describes the goods in issue.

64. By virtue of Rule 1 of the *Canadian Rules*, the goods in issue are properly classified under tariff item No. 9305.90.00 (subheading No. 9503.90 not being otherwise subdivided).

DECISION

65. The appeal is allowed.

Diane Vincent
Diane Vincent
Presiding Member

IN THE MATTER OF an appeal heard on February 16, 2012, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF five decisions of the President of the Canada Border Services Agency, dated May 24, 2011, with respect to a request for re-determination pursuant to section 67 of the *Customs Act*.

BETWEEN

ELFE JUVENILE PRODUCTS

Appellant

AND

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

Respondent

CORRIGENDUM

Paragraphs 63 and 64 should have read as follows:

63. Pursuant to Rule 6 of the *General Rules*, the goods in issue must be classified in subheading No. 9503.00 as other toys, as no other first-level subheading under heading No. 95.03 describes the goods in issue.

64. By virtue of Rule 1 of the *Canadian Rules*, the goods in issue are properly classified under tariff item No. 9503.00.90 (subheading No. 9503.00 not being otherwise subdivided).

By order of the Tribunal,

Gillian Burnett

Gillian Burnett
Acting Secretary