Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-042

Philips Electronics Ltd.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Tuesday, May 29, 2012

Canada

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IN THE MATTER OF an appeal heard on May 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 October 18, 2011, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

PHILIPS ELECTRONICS LTD. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Gillian Burnett
Gillian Burnett
Acting Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 8, 2012
Tribunal Member:	Pasquale Michaele Saroli, Presiding Member
Counsel for the Tribunal:	Nick Covelli Alexandra Pietrzak
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Cheryl Unitt

PARTICIPANTS:

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Respondent	**Counsel/Representative**
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Philips Electronics Ltd. (Philips) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] of a re-determination made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4), regarding the tariff classification of Philips AVENT Airflex slow-flow teats (the goods in issue).

2. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3924.90.00 as other hygienic articles of plastic, as determined by the CBSA, or should be classified under tariff item No. 8481.30.00 as check (nonreturn) valves or under tariff item 8481.80.00 as other appliances, as claimed by Philips. In the alternative, Philips submitted that the goods in issue should be classified under tariff item No. 8479.90.90 as parts of machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84.

PROCEDURAL HISTORY

3. On August 30, 2010, Philips requested an advance ruling on the tariff classification of the goods in issue.[2]

4. The CBSA issued an advanced ruling on October 29, 2010, in which the goods were classified under tariff item No. 3926.90.90.[3]

5. On November 29, 2010, pursuant to subsection 60(1) of the *Act*, Philips requested a re-determination of the goods in issue and asked that the goods be classified under tariff item No. 8481.30.00.[4]

6. Pursuant to subsection 60(4) of the *Act*, on October 18, 2011, the CBSA reclassified the goods in issue under tariff item No. 3924.90.00.[5]

7. On November 21, 2011, Philips filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.[6]

8. On May 8, 2012, the Tribunal held a public hearing in Ottawa, Ontario.

9. No witnesses were called by either party.

GOODS IN ISSUE

10. The goods in issue are Philips AVENT Airflex Teats (Model No. SCF632/27), which are clear silicone plastic teats (nipples) intended for use with Philips AVENT baby bottles. The Philips AVENT baby bottles are sold separately.[7]

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1. R.S.C. 1985 (2d Supp.), c. 1. [*Act*].
2. Tribunal Exhibit AP-2011-042-04; Tribunal Exhibit AP-2011-042-06A.
3. Tribunal Exhibit AP-2011-042-06A.
4. *Ibid.*
5. *Ibid.*
6. *Ibid.*
7. Tribunal Exhibit AP-2011-042-04 at paras. 9-11; Tribunal Exhibit AP-2011-042-06A at para. 3.

11. When in use, the goods in issue are attached to the bottle by means of a locking collar. A skirt at the bottom of the goods in issue slides into the neck of the bottle and flexes as the baby sucks, allowing air to flow into the bottle. The goods in issue are suitable for use by babies aged one month or over.[8]

12. Philips filed a sample of the goods in issue as a physical exhibit,[9] as well as a complete feeding system, which consists of an Airflex Teat, a plastic bottle, a screw ring (locking collar), an adapter ring and a cap.[10]

ANALYSIS

Statutory Framework

13. Subsection 10(1) of the *Customs Tariff* provides as follows: ". . . 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[11] and the Canadian Rules[12] set out in the schedule." 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 developed by the World Customs Organization.[13] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation.

14. 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.[14] Classification therefore begins with Rule 1, which provides as follows: ". . . for legal purposes, 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."

15. Section 11 of the *Customs Tariff* provides as follows: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System[15] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[16] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise.[17]

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8. Tribunal Exhibit AP-2011-042-04, tab 2; Tribunal Exhibit AP-2011-042-06A, tab 2.
9. Exhibit A-01.
10. Exhibit A-02.
11. S.C. 1997, c. 36, schedule [*General Rules*].
12. S.C. 1997, c. 36, schedule.
13. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
14. 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).
15. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
16. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
17. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17 [*Suzuki*].

16. Thus, the Tribunal will first determine whether the goods in issue can be classified according to Rule 1 of the *General Rules* as per the terms of the headings and any relevant section or chapter notes in the *Customs Tariff*, having regard to any relevant *Explanatory Notes* or *Classification Opinions*.[18] It is only if the Tribunal is not satisfied that the goods in issue can be properly classified at the heading level through the application of Rule 1 of the *General Rules* that it becomes necessary to consider subsequent rules in order to determine in which tariff heading they should be classified.

17. 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 determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

18. The Tribunal notes that section 13 of the *Official Languages Act*[19] provides that the English and French versions of any Act of Parliament are equally authoritative. Thus, the Tribunal may examine both the English and French versions of the schedule to the *Customs Tariff* in interpreting the tariff nomenclature.

Relevant Classification Provisions and Explanatory Notes

19. The relevant provisions of the *Customs Tariff*, which Philips claims should apply to the goods in issue, provide as follows:

Section XVI

MACHINERY AND MECHANICAL APPLIANCES; ELECTRICAL EQUIPMENT; PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND PARTS, AND ACCESSORIES THEREOF

. . .

Chapter 84

NUCLEAR REACTORS, BOILERS, MACHINERY AND MECHANICAL APPLIANCES; PARTS THEREOF

. . .

84.81	**Taps, cocks, valves and similar appliances for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves.**

. . .

8481.30	**-Check (nonreturn) valves**

. . .

8481.80	**-Other appliances**

20. The relevant *Explanatory Notes* to heading 84.81 provide as follows:

> This heading covers taps, cocks, valves and similar appliances, used on or in pipes, tanks, vats or the like to regulate the flow (for supply, discharge, etc.), of fluids (liquid, viscous or gaseous), or, in certain cases, of solids (e.g., sand). The heading includes such devices designed to regulate the pressure or the flow velocity of a liquid or a gas.

18. In the present case, neither of the parties has argued that any of the *Classification Opinions* applies, and the Tribunal finds that none of the *Classification Opinions* applies.
19. R.S.C. 1985 (4th Supp.), c. 31.

The appliances regulate the flow by opening or closing an aperture (e.g., gate, disc, ball, plug, needle or diaphragm). They may be operated by hand (by means of a key, wheel, press button, etc.), or by a motor, solenoid, clock movement, etc., or by an automatic device such as a spring, counterweight, float lever, thermostatic element or pressure capsule.

. . .

This heading includes *inter alia*:

. . .

(3) Nonreturn valves (e.g., swing check valves and ball valves).

21. Alternatively, Philips considers that the following provisions of the *Customs Tariff* may be applicable to the goods in issue:

84.79 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.

. . .

8479.90 -Parts

- - -Of the goods of tariff item No. 8479.89.41 or 8479.89.49

22. The relevant provisions of the *Customs Tariff*, which the CBSA claims should apply to the goods in issue, provide as follows:

Section VII

PLASTICS AND ARTICLES THEREOF;
RUBBER AND ARTICLES THEREOF

. . .

Chapter 39

PLASTICS AND ARTICLES THEREOF

. . .

39.24 Tableware, kitchenware, other household articles and hygienic or toilet articles of plastics.

. . .

3924.90.00 -Other

23. Note 2 to Chapter 39 provides as follows:

This Chapter does not cover:

. . .

(s) Articles of Section XVI (machines and mechanical or electrical appliances);

. . .

24. The relevant *Explanatory Notes* to heading 39.24 provide as follows:

> This heading covers the following articles of plastics:
>
> . . .
>
> (D) Hygienic and toilet articles (whether for domestic or non-domestic use) such as toilet sets (ewers, bowls, etc.), sanitary pails, bed pans, urinals, chamber-pots, spittoons, douche cans, eye baths; tests for baby bottles (nursing nipples) and finger-stalls; soap dishes, towel rails, tooth-brush holders, toilet paper holders, towel hooks and similar articles for bathrooms, toilets or kitchens, not intended for permanent installation in or on walls. However, such articles intended for permanent installation in or on walls or other parts of buildings (e.g., by screws, nails, bolts or adhesives) are **excluded** (**heading 39.25**).

Tariff Classification of the Goods in Issue

25. As a result of a re-determination under the *Act*, the CBSA classified the goods in issue under tariff item No. 3924.90.00 as other tableware, kitchenware, household articles and hygienic or toilet articles of plastics.

26. Pursuant to note 2(s) to Chapter 39, the chapter does not cover articles of Section XVI (machines and mechanical or electrical appliances). As Section XVI includes Chapter 84, the Tribunal will take, as its analytical point of departure, a consideration of whether the goods in issue are *prima facie* classifiable in heading No. 84.81 or 84.79. If the Tribunal finds that the goods in issue are not classifiable in either of those headings, it will proceed to a consideration of classification in heading 39.24.

Are the Goods in Issue Classifiable in Heading No. 84.81?

27. The parties agreed and the Tribunal accepts that, in order for the goods in issue to be classifiable in heading No. 84.81, they must be (a) taps, cocks, valves or similar appliances *and* (b) for pipes, boiler shells, tanks, vats or the like.

28. As already noted, the complete Philips AVENT baby feeding system consists of a plastic bottle, an AVENT Airflex teat, a screw ring (locking collar), an adapter ring and a cap.[20] The goods in issue, however, are confined to the AVENT Airflex teats (model No. SCF632/27),[21] with Philips having filed the complete feeding system as a physical exhibit only ". . . to show how the Avent Airflex teat works and fits in conjunction with the other components of the baby bottle feeding system."[22]

29. It is well established that the tariff classification of goods is to be determined at the time of their entry into Canada, on the basis of an examination of the goods as a whole in the manner in which they were presented at the time of their importation.[23] The issue, therefore, is whether the goods in issue constitute—in

20. Tribunal Exhibit AP-2011-042-09A; Tribunal Exhibit AP-2012-042-11; Exhibit A-02.
21. Tribunal Exhibit AP-2011-042-04 at para. 9; Tribunal Exhibit. AP-2011-042-06A at para. 3; Exhibit A-01.
22. Tribunal Exhibit AP-2012-042-11.
23. See *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366, wherein the Supreme Court of Canada indicated that the time for determining tariff classification is at the time of entry of the goods into Canada. While the Supreme Court of Canada reached its conclusion on the basis of the wording of Canada's customs legislation in 1955, it is the Tribunal's view that the principle set out in that case remains valid today despite various amendments by Parliament to Canada's customs legislation in the intervening years. See also *Deputy M.N.R.C.E v. Ferguson Industries Ltd.*, [1973] S.C.R. 21, wherein the Supreme Court of Canada affirmed its earlier ruling on this point in the above-mentioned case, and *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21.

and of themselves, and independently of their interplay with any other components of the baby feeding system that were not part of the goods in issue as presented at the time of importation—taps, cocks, valves or similar appliances.

30. This is not the first appeal dealing with heading No. 84.81. The Tribunal, in *Nailor Industries Inc.*,[24] concluded (a) that to be a tap, cock or valve, a device would have to be able to control the flow of fluids passing through it; (b) that "control", in this context, meant the ability to limit, check or regulate the flow of fluids in some substantial manner; and (c) that, in order to constitute a "similar appliance", for purposes of heading No. 84.81, a device would have to possess the same general attributes as those of taps, cocks and valves, that is to say, the device would have to be able to control the flow of fluids:

> In the Tribunal's view, *a valve must, at a minimum, be capable of controlling the flow of fluid which passes through it*. The Tribunal is of the view that *control, in this context, means the ability to limit, check or regulate in some substantial manner*. . . .
>
> . . .
>
> The Tribunal's view that valves (as well as taps, cocks and similar appliances) possess the ability to control fluids is further supported by the Explanatory Notes to heading No. 84.81 which provide, in part, as follows
>
> > This heading covers taps, cocks, valves and similar appliances, used on or in pipes, tanks, vats or the like to regulate the flow (for supply, discharge, etc.), of fluids (liquid, viscous or gaseous), or, in certain cases, of solids (e.g., sand). The heading includes such devices designed to regulate the pressure or the flow velocity of a liquid or a gas.
> >
> > . . .
>
> . . . It is clear from reading heading No. 84.81 and the Explanatory Notes thereto that *similar appliances would have to possess the same general attributes as those of taps, cocks and valves to fall within heading No. 84.81. The Tribunal has already concluded that, to be a tap, cock or valve, a device would have to be able to control the flow of fluids*.[25]
>
> [Emphasis added]

31. Philips indicated that the driving force for milk to flow from the bottle to the baby's mouth is the pressure difference between the inside of the bottle and the outside air.[26] While acknowledging that milk flow is ultimately controlled by the size and number of holes (apertures) and the drinking speed and suction level generated by the baby,[27] Philips claimed that the goods in issue, by allowing air into the bottle while the baby is drinking, facilitate the flow of milk.

32. In explaining the purported valve function of the goods in issue, Philips indicated as follows:

> During assembly, the "skirt" of the teat is pushed outward against the inner wall of the bottle neck (or the adapter ring). *The valve is formed by the combination of the silicone skirt, and the bottle neck*. The point where they touch . . . is where the valve closes in normal circumstances and opens when there is sufficient pressure difference.[28]
>
> [Emphasis added]

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24. (13 July 1998). AP-97-083 and AP-97-101 (CITT) [*Nailor*].
25. *Nailor* at 4-5.
26. Tribunal Exhibit AP-2011-042-09A, tab 1 at 2.
27. *Ibid.* Refer also to Tribunal Exhibit AP-2011-042-04, tab 2, where Philips states that, "[l]ike natural breastfeeding *your baby controls the milk flow*" [emphasis added].
28. Tribunal Exhibit AP-2011-042-09A, tab 1 at 3.

33. More specifically, Philips asserted that "[t]here are airchannels that allow air to reach the skirt edge. When the pressure on the outside of the bottle . . . is higher than the pressure on the inside of the bottle . . . the skirt will be pushed inward. *At a pressure of around 18mmHg, the skirt will move away from the bottle neck, and air will pass through the opening.* This way the pressure difference is limited to 18mmHg" [emphasis added].[29]

34. As noted by the CBSA, while the above suggests that the movement of the skirt is triggered by an air pressure differential, the following further submission by Philips introduces an element of confusion into the mix by suggesting that it is, in fact, the natural suckling action of a baby on the teat that causes the skirt to retract: "The 'anti-colic valve' flexes and draws in air when the body of the teat is compressed and released during the natural suckling action performed by the baby while feeding. *The shape of the teat body and soft pliable material used are both conducive to the body of the teat acting upon 'unique skirt system' to work together to open the aperture in the anti-colic valve*" [emphasis added].[30]

35. In any event, Philips submitted that the purported valve function is achieved by the interaction of the skirt of the teat with the bottle neck and adapter ring.

36. The Tribunal is not, however, persuaded that this interaction gives rise to a valve, in the technical sense of the term. The *Explanatory Notes* to heading No. 84.81 state that "[t]he heading includes such devices designed to regulate the pressure or the flow velocity of a liquid or a gas." In the same vein, and as noted above, Tribunal jurisprudence indicates that ". . . a valve must, at a minimum, be capable of *controlling* the flow of fluid which passes through it, . . . [with] control, in this context, [meaning] the ability to limit, check or regulate [such flow] *in some substantial manner*" [emphasis added].

37. In this regard, it is the Tribunal's view that, while the interaction of the silicone teat with the bottle neck may facilitate the flow of milk by allowing air into the bottle, it is not this interaction but, rather, the drinking speed and suction level generated by the suckling baby that ultimately controls milk flow velocity and volume. Indeed, Philips acknowledged as much by stating in its product literature that "[l]ike natural breastfeeding *your baby controls the milk flow*" [emphasis added].[31]

38. Moreover, the volume of air that is allowed to enter the bottle in response to differential air pressure is not controlled by the interaction of the silicone skirt and bottle neck and adapter ring but, rather, is dictated by the amount of milk drawn from the bottle by the baby. As Philips explained, "[w]hen milk is flowing out of the bottle, an equivalent volume needs to be replaced (by air) to prevent the pressure from dropping."[32]

39. Even assuming, *arguendo*, that the combination of the skirt of the teat, bottle neck and adapter ring constituted a valve or similar appliance, given that neither the bottle nor adapter ring forms part of the goods in issue, the Tribunal does not see how the silicone teat alone could be viewed as a valve or similar appliance in its own right, considering that the purported valve effect is predicated on the interaction of the teat with these other components. Indeed, in asserting that "[t]he valve is formed by the combination of the silicone skirt, *and* the bottle neck" [emphasis added],[33] Philips concedes that the goods in issue must be combined with an additional working part (i.e. the bottle neck) in order for the purported valve to be formed.

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29. *Ibid.* at 4.
30. Tribunal Exhibit AP-2011-042-04 at para. 93.
31. *Ibid.*, tab 2 at 10.
32. Tribunal Exhibit AP-2011-042-09A, tab 1 at 2.
33. *Ibid.* at 3.

40. The Tribunal also does not accept Philips' alternative submission that the aperture on the goods in issue is sufficient to render the goods in issue valves or similar appliances. In this regard, the Tribunal accepts the CBSA's submission that the aperture is simply a hole on the top of the goods in issue which allows liquid to pass through, but does not in itself regulate or control the flow of fluids in any way.[34]

41. During the course of the hearing, Philips also asserted that, if it were determined that the silicone teats in issue were not valves in their own right, they would nonetheless be classifiable in heading No. 84.81 as parts thereof, by operation of Rule 2(a) of the *General Rules*, which provides as follows:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

Specifically, Philips contended that ". . . while maybe they are not exactly a valve, as defined by the jurisprudence, [and while] maybe they are not a 'similar appliance' to a valve, as defined by the jurisprudence, quite frankly, at the time of import to Canada, the goods could be considered part of a similar appliance to a valve, in accordance with Rule 2(a) . . . ."[35]

42. Philips, however, in addition to having failed to establish that the goods in issue possessed the essential character of complete valves, disregarded the fact that the *General Rules* are structured in a sequential manner, with recourse to Rule 2(a) only being available if the tariff classification of goods cannot be effected under Rule 1. Because the goods in issue in this case can indeed be classified in accordance with Rule 1 of the *General Rules* (as will be shown), Rule 2(a) cannot be invoked.

43. For the above reasons, the Tribunal finds that the goods in issue fail to satisfy the first requirement for classification in heading No. 84.81. That being the case, and given the fact that both the requirements identified above must be satisfied for classification of a good in that heading, the Tribunal does not consider it necessary to address the second requirement (i.e. that the goods in issue be for use on or in pipes, boiler shells, tanks, vats or the like).

Are the Goods in Issue Classifiable in Heading No. 84.79?

44. Heading No. 84.79 covers machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84. Accordingly, in order for the goods in issue to fall in that heading, the Tribunal must be satisfied that they are not specified or included elsewhere in Chapter 84 and that they are either machines or mechanical appliances having individual functions.[36]

45. Having already determined that heading Nos. 84.79 and 84.81 are the only Chapter 84 headings of potential relevance in this case and that the goods in issue are not classifiable under heading No. 84.81, the Tribunal is satisfied that they are not specified or included elsewhere in Chapter 84. The first condition for classification in heading No. 84.79 is therefore satisfied.

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34. *Transcript of Public Hearing*, 8 May 2012, at 87-89.
35. *Ibid.* at 132-33.
36. *Bazaar & Novelty Co., A Division of Bingo Press & Specialty Limited v. Deputy M.N.R.* (10 April 1996), AP-95-120 (CITT).

46. Turning to the second issue of whether the goods in issue constitute machines or mechanical appliances having individual functions, the Tribunal has previously stated that the terms "machine" and "mechanical appliance" are interchangeable.[37] In this regard, the definition of the term "mechanical" in the *Shorter Oxford English Dictionary*[38] includes the following: "**2** Of the nature of a machine or machines . . . ." The term "machine" is, in turn, defined to include the following:

> **4** An apparatus, an appliance; a device for applying mechanical power and having a number of interconnected parts, each with a definite function, *esp*. one that does not utilize human strength . . . . Any instrument that transmits force or directs its application.

47. In the same vein, the *Merriam–Webster's Collegiate Dictionary*[39] defines "machine" to include the following: "**e** (1) : an assemblage of parts that transmit forces, motion and energy one to another in a predetermined manner."

48. Consistent with the above dictionary definitions, supplementary note 1 to Section XVI provides as follows: "In this Section the term 'mechanically operated' refers to those goods which [comprise] a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion."

49. Indeed, it is well-established in the Tribunal's jurisprudence that, for goods to be mechanical appliances, (a) ". . . [they] must do work through some combination of moving parts"[40] and must (b) ". . . produce, modify or transmit force to an external body . . . ."[41]

50. With respect to the first requirement, Philips, while effectively conceding that the goods in issue do not comprise a combination of moving parts, contended that the teat is a moving part of a broader baby feeding system that also involves other components. It stated as follows:

> While the goods themselves are not necessarily a combination of multiple moving parts, the teat in itself is a moving part of a baby feeding system (when used in conjunction with the specifically designed bottle and collar) . . . . *When combined with the other components that the teat is designed for, the item has a moving part* (apertures in the teat that "move" to open and close in order to do the intended work).[42]
>
> [Emphasis added]

51. With respect to the second requirement, Philips contended as follows:

> *The teats are combined with stationary parts (collar and bottle) to make an appliance* that is designed [to] control the flow by means of modifying the force and motion of the contained liquid.[43]
>
> [Emphasis added]

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37. *Canadian Tire Corporation Limited v. President of the Canadian Border Services Agency* (29 November 2007), AP-2006-041 (CITT) at para. 26.
38. Fifth ed., *s.v.* "mechanical".
39. Eleventh ed., *s.v.* "machine".
40. *Nailor*.
41. *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency* (29 November 2007), AP-2006-041 (CITT) at para. 27.
42. Tribunal Exhibit AP-2011-042-04 at paras. 92, 94.
43. *Ibid.* at para. 94.

52. The purported fulfillment of each of these requirements is, however, contingent on the goods in issue being combined with the locking collar and bottle, which, as already noted, did not form part of the goods in issue as presented at the time of importation. Even if, *arguendo*, the goods in issue, when combined with these other components, constituted a mechanical appliance, the Tribunal does not see how the goods in issue alone could be considered mechanical appliances in their own right.

53. For the above reasons, the Tribunal finds that the goods in issue are not properly classifiable under heading No. 84.79.

Are the Goods in Issue Classifiable in Heading No. 39.24?

54. Section VII covers both "Plastics and Articles Thereof" and "Rubber and Articles Thereof", with the former falling in Chapter 39 and the latter in Chapter 40.

55. An expressed precondition for classification in heading No. 39.24 is, therefore, that the goods in issue be of plastic. Of relevance, in this regard, is note 1 to Chapter 39, which provides as follows:

> *Throughout the Nomenclature the expression "plastics" means those materials of headings 39.01 to 39.14* which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.
>
> [Emphasis added]

56. The CBSA's laboratory report indicates that "[t]he nipples are composed of a compounded silicone."[44] Given:

(a) that silicone is not a synthetic rubber within the meaning ascribed to that expression by note 4(d) to Chapter 40;

(b) that silicones in primary forms are explicitly included in heading No. 39.10 by virtue of note 3(d) to Chapter 39, and specifically in tariff item No. 3910.00.00; and

(c) that, presented as teats for use with baby bottles, the silicone plastic is no longer in its primary form but, rather, has been transformed into goods of plastic;

the Tribunal finds that the goods in issue are of plastic and that the first precondition for classification in heading No. 39.24 is therefore satisfied. Indeed, Philips, in noting that "[t]he 'Teats' are made from a clear, colourless silicone plastic"[45], is taken to concede this point.

57. Heading No. 39.24 refers to tableware, kitchenware, other household articles and hygienic or toilet articles. The Tribunal is however of the view that only the phrase "hygienic articles" could potentially describe the goods in issue.

58. The definition of the word "hygiene" in the *Canadian Oxford Dictionary*[46] includes the following: "**2** conditions or practices conducive to maintaining health." The adjective "hygienic" is, in turn, defined as follows: "conducive to health; clean and sanitary." In this regard, Philips' product literature indicates that the goods in issue "... [promote] healthy active feeding and [reduce] colic."[47] Being conducive to the maintenance of the good health of nursing babies, the goods in issue can be viewed as hygienic articles.

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44. Tribunal Exhibit AP-2011-042-06A, tab 14.
45. Tribunal Exhibit AP-2011-042-04 at para. 10.
46. Second ed., *s.v.* "hygiene".
47. Tribunal Exhibit AP-2011-042-04, tab 2.

59. Indeed, note (D) to the *Explanatory Notes* to heading No. 39.24 explicitly identifies "teats for baby bottles (nursing nipples)" as being among the articles covered by heading 39.24:

> Hygienic and toilet articles (whether for domestic or non-domestic use) such as toilet sets (ewers, bowls, etc.), sanitary pails, bed pans, urinals, chamber-pots, spittoons, douche cans, eye baths; *teats for baby bottles (nursing nipples)* and finger-stalls; soap dishes, towel rails, tooth-brush holders, toilet paper holders, towel hooks and similar articles for bathrooms, toilets or kitchens, not intended for permanent installation in or on walls. However, such articles intended for permanent installation in or on walls or other parts of buildings (e.g., by screws, nails, bolts or adhesives) are **excluded** (**heading 39.25**).
>
> [Emphasis added]

60. Philips responded that the reference to teats for baby bottles in note (D) of the *Explanatory Notes* to heading No. 39.24 must be taken as referring to ". . . a simpler less enhanced and functional version of baby bottle teat as compared to the goods in question."[48] In so arguing, Philips suggested that its interpretation is supported (a) historically, by the transposition of baby bottle teats to heading No. 39.24 from heading No. 39.26 ("Other articles of plastics . . ."): "Also of note, when the articles were included in the Explanatory Notes (ENs) to 39.24 (were in 39.26 prior to a 2002 WCO decision to move them into 'hygienic' articles of plastic)"[49] and (b), contextually, by the nature of the other articles listed in the *Explanatory Notes*: ". . . none of [which] appear to be similar to teats in form, function or ability to perform work on another substance."[50]

61. With respect to the first point, the Tribunal finds no support in the evidence presented, for Philips' position that the original placement of baby bottle teats in the *Explanatory Notes* to heading No. 39.26 pointed to a less advanced version of the article. In this regard, a review of the record of the Harmonized System Committee's deliberations indicates that the concerns expressed in respect of the classification of baby bottle teats in heading No. 39.24 did not relate to the nature of the teats themselves but, rather, to the non-alignment of the French and English versions of heading No. 39.24, as only the French version of the heading referred to hygienic articles at that time.[51]

62. With respect to the second point, the Tribunal finds the conclusion which Philips attempted to draw from the disparate articles listed in note (D) unconvincing. In this regard, the Tribunal notes that the reference to teats for baby bottles is not qualified in any manner, unlike, for example, the specific exclusion in the *Explanatory Notes* of articles intended for permanent installation in or on walls or other parts of buildings.

63. As already noted, the Federal Court of Appeal, in *Suzuki*, stated that ". . . the Explanatory Notes should be respected unless there is a sound reason to do otherwise." In this regard, the Tribunal finds no sound reason to disregard the guidance afforded by note (D) of the *Explanatory Notes* to heading No. 39.24 as it pertains to the coverage, in that heading, of silicone plastic teats for baby bottles.

64. For the reasons outlined above, and by application of Rule 1 of the *General Rules*, the Tribunal finds that the goods in issue are properly classified in heading No. 39.24.

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48. *Ibid.* at para. 118.
49. *Ibid.* at para. 117.
50. *Ibid.* at para. 119. Philips based this conclusion on the following observation: "It appears that the teats mentioned in the note are the only goods that perform any kind of work. Most do nothing but hold goods or substances." Tribunal Exhibit AP-2011-042-04 at para. 116.
51. Tribunal Exhibit AP-2011-042-04, tab 16.

Classification at the Subheading and Tariff Item Levels

65. Philips did not contest that, should the goods in issue be classified in heading No. 39.24, they would ultimately be classified under tariff item No. 3924.90.00, as determined by the CBSA. The Tribunal concludes that the goods in issue are properly classified under tariff item No. 3924.90.00 as other hygienic articles of plastic, applying Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*.

DECISION

66. The appeal is dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member