Ottawa, Monday, February 16, 2004

Appeal No. AP-2003-008

IN THE MATTER OF an appeal heard on October 20, 2003, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the Canada Customs and Revenue Agency with respect to a request for re-determination under subsection 60(3) of the *Customs Act*.

BETWEEN

PARTYLITE GIFTS LTD. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

UNOFFICIAL SUMMARY

Appeal No. AP-2003-008

PARTYLITE GIFTS LTD. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

The issue in this appeal is whether three candleholders, i.e. the Orbit, the Tabletop Seville and the Soliloquy, are properly classified under tariff item No. 9405.50.10 as non-electrical lamps and lighting fittings---candlesticks and candelabras, as determined by the Commissioner of the Canada Customs and Revenue Agency, or should be classified under tariff item No. 7013.99.00 as other glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes, as claimed by PartyLite Gifts Ltd.

HELD: The appeal is dismissed. The Tribunal determined that the goods in issue are properly classified under tariff item No. 9405.50.10. It finds that the goods are candlesticks that can be classified in heading No. 94.05. The Tribunal also finds that, as such, they are excluded from heading No. 70.13, pursuant to Note 1(e) to Chapter 70, read in conjunction with Note (f) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 70.13. It finds that, in this case, the design, best usage, marketing and distribution of the goods in issue are indicative of their proper classification.

Place of Hearing: Ottawa, Ontario
Date of Hearing: October 20, 2003
Date of Decision: February 16, 2004

Tribunal Member: Patricia M. Close, Presiding Member

Counsel for the Tribunal: Roger Nassrallah

Clerk of the Tribunal: Anne Turcotte

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Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

Appeal No. AP-2003-008

PARTYLITE GIFTS LTD. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

REASONS FOR DECISION

INTRODUCTION

This is an appeal under subsection 67(1) of the *Customs Act*[1] from a decision of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) pursuant to subsection 60(4) of the *Act*. The glass candleholders in issue, namely, the Orbit, the Tabletop Seville and the Soliloquy, were imported into Canada on February 3, 1998.

The goods in issue were originally classified under tariff item No. 9405.50.10 of the schedule to the *Customs Tariff*[2] as non-electrical lamps and lighting fittings---candlesticks and candelabras. PartyLite Gifts Ltd. (PartyLite Canada) subsequently requested that the goods be classified under tariff item No. 7013.99.00 as other glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading No. 70.10 or 70.18).

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 9405.50.10, as determined by the Commissioner, or should be classified under tariff item No. 7013.99.00, as claimed by PartyLite Canada. The Commissioner has also provided an alternative classification, namely, tariff item No. 9405.50.90 as other non-electrical lamps and lighting fittings.

The relevant sections of the *Customs Tariff* are as follows:

70.13	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading No. 70.10 or 70.18).
7013.99.00	--Other
94.05	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated name-plates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included.
9405.50	-Non-electrical lamps and lighting fittings
9405.50.10	---Candlesticks and candelabras
9405.50.90	---Other

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.

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EVIDENCE

PartyLite Canada called one witness, Mr. Joseph Sweeney, Vice-President of Finance and Administration at PartyLite Canada. Mr. Sweeney provided a general description of each of the goods in issue. He described the Tabletop Seville and the Soliloquy as each having a metal base with a glass component, of somewhat different dimensions. With respect to the Orbit, he described it as a glass bowl that is approximately 11 inches in diameter. He testified that none of the three goods contained a cup or a spike and that none have a permanent light source. Moreover, the glass components are made of ordinary glass with no additional heat-resistant qualities.

Regarding the heat-resistant qualities of the goods in issue, Mr. Sweeney indicated that, from what he was told, the glass component is not heat resistant, but acknowledged that he had no scientific report or expert knowledge upon which he could support this position. He emphasized that his knowledge was based on first-hand experience involving glass that had cracked and exploded. Furthermore, in response to a question from the Tribunal, Mr. Sweeney clarified that he was not sure if the phrase "tested to conform to the highest standards of safety and performance" meant that the glass component is actually heat resistant.

Mr. Sweeney testified that PartyLite Canada purchases the goods in issue from its parent company, PartyLite U.S. In terms of shipping, he testified that the metal base and the glass components are shipped together 90 percent of the time, although both items could be purchased separately from a list of parts for replacement purposes (e.g. if the glass component broke). In terms of pricing, he indicated in reply to a question from the Tribunal that the items are priced both as a unit and separately. He did not have separate costing data regarding the glass component and the metal base and, thus, could not tell the Tribunal which of the two was more expensive.

Mr. Sweeney acknowledged that both glass bowls and wine glasses could be used as candleholders, which was consistent with the description provided in a publication issued by the National Candle Association that was on the record. He also testified that, at the time of importation, the goods in issue do not have any one specific use and that they could have any number of uses, including as white wine chillers or planters. He also testified that they could be filled with marbles, sand or rocks.

He acknowledged that he was intimately involved in the marketing initiatives for PartyLite Canada and has an understanding of how each product is marketed in Canada. Under cross-examination, he acknowledged that, to some extent, the marketing patterns that are used by PartyLite U.S. might be used by PartyLite Canada; however, he noted that PartyLite Canada considered itself quite unique, in that it does not sell certain products that are sold by PartyLite U.S.

Mr. Sweeney acknowledged that the PartyLite® Web site denotes the company as a "premier direct seller of candles & accessories".[3] With respect to PartyLite Canada's candle business, he acknowledged that 60 percent of its imports are candles and that the company sells up to 400 different types of candles. Mr. Sweeney also acknowledged that part of PartyLite Canada's business was the sale of accessories, normally referred to as candles and accessories. In terms of defining a "candle accessory", he confirmed that this term is defined in a document submitted by PartyLite Canada as "[a]n object designed for use with a candle." He agreed that a candleholder or a snuffer would be a candle accessory.

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3. Under cross-examination, Mr. Sweeney acknowledged that he was not sufficiently familiar with the PartyLite® Web site to determine whether the reproduced pages in the Commissioner's brief were specific to PartyLite Canada or PartyLite U.S.

Upon reviewing PartyLite Canada's catalogue, specifically with respect to the Orbit, Mr. Sweeney confirmed that, although it had no cup or spike, the Orbit was characterized as a "candle holder"; however, he also maintained that it had multiple uses. He testified that the Orbit is typically displayed with water and/or marbles. With respect to the Tabletop Seville, he agreed that it definitely consisted of some wrought iron, that it was not exclusively made of glass and that it could be used to house a burning candle, but that it did not have the "candle holder" designation in its title. With respect to the Soliloquy, Mr. Sweeney agreed that it, too, consisted of a glass component and a metal base and that it, too, could be used to house a candle. He again confirmed that, while none of the goods in issue have cups or spikes, they are all capable of holding candles.

The Commissioner did not call any witnesses.

ARGUMENT

PartyLite Canada submitted that the goods in issue fall in heading No. 70.13 as other glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes. With respect to tariff classification, it submitted that the terms of the heading are the most important consideration. It noted that, in order to fall in heading No. 70.13, the goods must be made of glass and decorative in nature. It contended that the testimony and the evidence on the record support this position.

PartyLite Canada emphasized that Note (4) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[4] to heading No. 70.13 provides that both vases and ornamental fruit bowls are covered in heading No. 70.13. In this context, it noted that, even though the Commissioner takes the position that the goods in issue are candleholders, the Commissioner's brief describes the Orbit as a shallow bowl; that the marketing literature describes the Tabletop Seville as a glass container in the shape of a deep bowl; and that the Commissioner describes the Soliloquy as a glass container shaped like a vase.

PartyLite Canada argued that the Tribunal, in a previous decision,[5] interpreted the phrase "of a kind used" to only require that the goods be capable of or suitable for the particular use. In its view, the particular use of the goods in issue is decorative glassware. It stated that, in order to be consistent with the terms of the heading, the only condition that has to be demonstrated for its position to be correct was that the goods, at the time of importation, were capable of being used as decorative glassware and further contended that there is no doubt that the goods were capable of being used in this manner.

PartyLite Canada further argued that the goods in issue are not lamps. It submitted that the dictionary definition requires that a lamp be a "device" and that the goods did not fall within the dictionary definitions of "device" as provided by the Commissioner. It was also of the view the that goods are not lighting fittings because lighting fittings, based on the dictionary definition, are required to have something that has a security or a permanence to it, which, it submitted, the goods did not have. It concluded that, since the goods did not fall under either definition, they could not fall in heading No. 94.05.

PartyLite Canada noted that, to support his argument that heading No. 70.13 does not cover the goods in issue, the Commissioner relied on Note 1(e) to Chapter 70, which states that the chapter does not cover lamps or lighting fittings. In response to this line of argument, PartyLite Canada submitted that, since the goods do not have a permanently fixed light source, this chapter note could not be used to exclude the

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4. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].
5. See *Ballarat Corporation Ltd. v. Deputy M.N.R.* (19 December 1995), AP-93-359 (CITT).

goods from heading No. 70.13. With respect to the Commissioner's position that the goods are properly classified in heading No. 94.05, PartyLite Canada emphasized that heading No. 94.05 included the phrase "not elsewhere specified". In this context, it argued that the use of this phrase implies that heading No. 94.05 is a residual heading and that, if the goods were classifiable in another heading, then they could not be classified in this residual heading. It also submitted that, since the goods are, *prima facie*, classifiable in heading No. 70.13, they cannot be classified in a residual heading.

PartyLite Canada also argued that the goods in issue could not be classified under tariff item No. 9405.50.10, since they do not fall under the definitions of "candelabra" or "candlestick". It emphasized that the definition of "candlestick" requires that the product be able to support the candle and contended that the goods do not support any candle. In this context, it stated that the evidence indicates that, if a candle is placed in any one of the goods in issue, there is usually something inside to support it (e.g. water, rocks).

PartyLite Canada also noted that the Tribunal's decision in *Regal Confections Inc. v. Deputy M.N.R.*[6] suggested that the appearance, design, best use, marketing and distribution of goods is not decisive in classification matters. In this context, it argued that the Commissioner is now asking the Tribunal to classify the goods in issue on the basis of how the importer markets the goods and contended that the Tribunal specifically stated that this factor is not decisive in determining tariff classification.

PartyLite Canada argued that the Commissioner should not be allowed to propose an alternative tariff classification and that his arguments ought to be limited to the classification determination provided by the designated officer pursuant to subsection 60(3) of the *Act*. In response to this argument, the Commissioner submitted previous Tribunal decisions, which, he claimed, indicated that the Tribunal's practice is to allow the Commissioner to propose alternative tariff classifications.

The Commissioner argued that the goods in issue are lamps, specifically non-electrical lamps, that fall in subheading No. 9405.50. He submitted that PartyLite Canada's nature of business is primarily the sale of candles and highlighted that the company sells more than 400 different types of candles. With respect to the marketing literature, he argued that PartyLite Canada does not market the goods as candy bowls, fruit bowls or vases. He submitted that PartyLite Canada's catalogue displays the goods with burning candles in them and contends that this demonstrates their functional use.

The Commissioner drew the Tribunal's attention to the *Explanatory Notes* to heading No. 94.05 and argued that the wording therein provides that a lamp has a very broad definition. In this context, he submitted that an item that uses a candle could be considered a lamp. As support for this point, he referred the Tribunal to a dictionary definition, which provided that a lamp was "[a]ny of various devices for producing light by combustion"[7] and, on this basis, concluded that, if an item produces light by combustion, much like a candle does, and is a device that is intended to house a candle, then it is a lamp.

The Commissioner also agreed with PartyLite Canada that heading No. 94.05 is a residual heading because it included the phrase "not elsewhere specified". However, he clarified that, in his view, the heading was only residual to all other lamps that are in the *Customs Tariff* and that it is not residual to everything else.

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6. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal*].
7. *Funk & Wagnalls Standard College Dictionary*, 1978, *s.v.* "lamp".

With respect to the term "candlestick", the Commissioner cites a dictionary definition that defines it as a "support for . . . candle".[8] He argued that the goods in issue do not require a cup or spike in order to be able to provide support for a candle. He emphasized that he included his alternative classification, i.e. tariff item No. 9405.50.90, in order to compensate for any difficulty that the Tribunal may have in breaking away from the traditional notion of what constitutes a candlestick.

The Commissioner also submitted that, although he conceded that the goods in issue could be put to multiple uses, the intended use of the goods at the time of importation was clearly to house a burning candle. He stressed that the Tribunal should draw a distinction between the dominant purpose of the goods at the time of importation and their possible uses after the time of importation.

With respect to the Tribunal's decision in *Regal*, the Commissioner submitted that the way in which goods are marketed is indicative, as opposed to determinative.

In the context of heading No. 70.13, the Commissioner contended that, even if the goods in issue are decorative, they could still be candleholders. He also submitted that heading No. 70.13 covers glass and that the goods in issue are composite goods, since they include both glass and wrought iron components. Under this line of argument, he submitted that the goods therefore do not *prima facie* fall in heading No. 70.13, at least in respect of two of the goods that come with a wrought iron stand, i.e. the Tabletop Seville and the Soliloquy. With respect to the use of the phrase "of a kind used" as found in heading No. 70.13, the Commissioner submitted that there has to be a similarity between the goods that are imported and the goods that are determined to be "of a kind used". He concluded that, even though the phrase may allow for an expansive interpretation, it certainly does not cover lamps.

With respect to PartyLite Canada's contention that the goods in issue are not heat resistant, the Commissioner submitted that there is no evidence before the Tribunal to suggest that the goods do not have heat resistance qualities other than certain hearsay evidence from Mr. Sweeney. Furthermore, he emphasized that the evidence reproduced from the PartyLite® Web site indicates that the goods are designed for the safe burning of a candle and infers that the goods are heat resistant.

In reply to this argument, PartyLite Canada emphasized that there is no evidence that the goods in issue are heat resistant. It acknowledged that the evidence indicates that the goods are safe and submitted that this did not necessarily mean that they are heat resistant.

DECISION

Based on the evidence, the Tribunal finds the relevant facts to be the following: both sides concede that the goods in issue had, at the time of importation, multiple uses and that PartyLite Canada is a premier direct seller of candles and accessories and, as such, markets the goods primarily as candleholders. It also finds that the goods fall within the dictionary definition of "lamp" and also within the definition of "candlestick" since they provide support for candles. Furthermore, it finds, in this case, that the design, best usage, marketing and distribution of the goods in issue are indicative of the proper tariff classification of the goods.

As mentioned, the issue in this appeal is whether the goods in issue are properly classified under tariff item No. 9405.50.10 as non-electrical lamps and lighting fittings---candlesticks and candelabras, as

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8. *The Concise Oxford Dictionary of Current English*, 6th ed., *s.v.* "candle".

was determined by the Commissioner, or should be classified under tariff item No. 70.13.99.00 as other glassware of a kind used for indoor decoration, as claimed by PartyLite Canada.

The various tariff classifications are set out in the schedule to the *Customs Tariff*. The schedule is divided into sections and chapters, each of which has its own notes, followed by a list of goods categorized in a number of headings and subheadings and under individual tariff items. The *Customs Tariff* contains its own rules for interpreting the schedule, which are found in sections 10 and 11.[9] Section 10 of the *Customs Tariff* instructs the Tribunal that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[10] and the *Canadian Rules*.[11] Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[12] and the *Explanatory Notes*.

The *General Rules*, referred to in section 10 of the *Customs Tariff*, originated in the *International Convention on the Harmonized Commodity Description and Coding System*. They are structured in cascading form so that, if the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2 and so on. Rule 1 reads as follows:

> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; 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 [subsequent rules].

The above legislation requires the Tribunal to follow several steps before arriving at the proper classification of goods on an appeal: first, to examine the schedule to see if the goods fit *prima facie* within the language of a heading; second, to see if there is anything in the chapter or section notes that preclude the heading from being applied to the goods; and third, to examine the *Classification Opinions* and the *Explanatory Notes* for further guidance as to the proper classification.

If this process leads to classification in one, and only one, heading, the next step is to find the appropriate subheading and tariff item that cover the imported goods. If the process leads to classification in more than one heading, the remaining general rules must be applied, in sequence, until the most appropriate heading is found. If necessary, the same process is repeated, at the subheading and tariff item levels, by application of the *Canadian Rules* in the case of the latter.

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9. Sections 10 and 11 of the *Customs Tariff* state, in part:

> 10. (1) Subject to subsection (2), 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 and the Canadian Rules set out in the schedule.
>
> 11. In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.

10. *Supra* note 2, schedule [*General Rules*].
11. *Ibid.*
12. Customs Co-operation Council, 1st ed., Brussels, 1987 [*Classification Opinions*].

In this case, the Tribunal finds that the goods in issue are classifiable according to Rule 1 of the *General Rules* in heading No. 94.05. It finds, based upon the evidence before it and for the reasons below, that the goods are lamps, albeit non-electric, that can be classified in heading No. 94.05 and, as such, are excluded from heading No. 70.13 based upon Note 1(e) to Chapter 70, read in conjunction with Note (f) of the *Explanatory Notes* to heading No. 70.13.

The Tribunal notes that Note 1(e) to Chapter 70 states that the chapter does not cover: "[l]amps or lighting fittings, illuminated signs, illuminated name-plates or the like, having a permanently fixed light source, or parts thereof of heading 94.05". PartyLite Canada argued that the Tribunal should not rely on Note 1(e) to exclude the goods in issue from heading No. 70.13 on the basis that they do not have a "permanently fixed light source". While the grammatical structure of Note 1(e) to Chapter 70 could uphold PartyLite Canada's argument, the Tribunal is also cognizant of Note (f) of the *Explanatory Notes* to heading No. 70.13, which clearly states that "[l]amps and lighting fittings and parts thereof of **heading 94.05**" are excluded from heading No. 70.13. The Tribunal is directed by section 11 of the *Customs Tariff* to have regard to the *Explanatory Notes*. As a result of the *Explanatory Notes*, it finds that lamps, even without a permanent light source, are excluded from heading No. 70.13.

The Tribunal finds that the goods in issue can be classified as lamps without a permanent light source in heading No. 95.04 for the following reasons. The *Explanatory Notes* to heading No. 94.05 state that "[l]amps . . . can be constituted of any material . . . and use any source of light (*candles*, oil, petrol, paraffin (or kerosene), gas, acetylene, electricity, etc.)" and that "[t]his heading covers in particular . . . (6) Candelabra, *candlesticks*, candle brackets, e.g., for pianos" [emphasis added].

The Commissioner provided the Tribunal with a definition of "candlestick" that stated that it was a "support for . . . candle". PartyLite Canada argued that the goods in issue cannot be considered candlesticks because they do not hold candles. Yet, the Orbit, shown in PartyLite Canada's catalogue,[13] is pictured and described as holding "a colourful assortment of tealights." The Soliloquy is described, in the same catalogue, as a "graceful glass holder in an antique brass metal stand" that "makes an elegant presentation for a votive or tealight."[14] Votives and tealights are types of candles. The Tabletop Seville is also displayed holding what appears to be a pillar candle in marbles.[15]

As support for its argument, PartyLite Canada cited the Tribunal's decision in *Regal* and, in particular, the following excerpt from that decision:

> The appearance, design, best use, marketing and distribution referred to by counsel for the respondent are not tests per se, but individual factors that may be useful to consider, from time to time, in classifying goods. In the Tribunal's view, however, none of these factors are decisive and the importance of each will vary according to the product in issue.[16]

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13. Commissioner's Brief, Tab 2 at 3.
14. *Ibid.* at 5.
15. *Ibid.* at 4.
16. *Regal* at 8.

The Tribunal notes that there are some significant differences between the arguments presented in this appeal and *Regal*. With respect to the role of appearance, design, best use, marketing and distribution, which were delineated in *Regal*, it should be noted that the appellant in *Regal* put forward these individual factors as "tests" that had to be met under Rule 1 of the *General Rules*. Specifically, the appellant in *Regal* argued that the appearance test, the design and best usage test, and the marketing and distribution test are determinative under Rule 1. The Tribunal does not agree. *Regal* should be interpreted to mean that, although such tests had been used in previous cases before the Tribunal, they were not determinative, but indicative of the proper classification.

In the case before the Tribunal, the design, best usage, marketing and distribution do shed some light as to the proper classification. The Tribunal notes that the care tips for candles, found on the PartyLite® Web site, state that "PartyLite Tealight holders and Tealight houses have been rigorously tested to conform to the highest standards of safety and performance" and also instruct that one should "[a]lways burn pillar candles in or on a holder designed for such use to maximize candle safety and beauty." It would appear from the marketing material for PartyLite Canada that the goods are designed to hold candles.

Also, the Tribunal notes that PartyLite Canada imports the goods in issue from PartyLite U.S. and that the banner on the PartyLite® Web site describes the company as a "premier direct seller of candles & accessories". It notes that the company began as an outlet for the excess inventory of a candle business. The company's consultants bring "candles and accessories directly to you, so you can see how the color and fragrance of candles enhance your décor."[17]

Furthermore, while the Tribunal is cognizant of PartyLite Canada's position that tariff classification should not be necessarily determined by the business carried on by the importer, in this case, the candle business, the Tribunal nevertheless notes that the boxes that contain the Soliloquy glass holder and the stand, both of which are on the Tribunal's record, have instructions as to how to prevent a fire. The Tribunal finds that these are unusual package instructions for decorative glass bowls. Therefore, even if an importer, other than PartyLite Canada, were to import the glass holder and stand in the same packaging, it would likely be classified in heading No. 94.05 because of the instructions on the package.

Therefore, the Tribunal finds that, pursuant to Rule 1 of the *General Rules*, the goods in issue are properly classified in heading No. 94.05. It agrees with the Commissioner that the correct subheading is No. 9405.50 ("Non-electrical lamps and lighting fittings"). At the tariff item level, tariff item No. 9405.50.10 provides for "[c]andlesticks and candelabras". As the above reasons showed, these goods can be considered candlesticks. Therefore, the Tribunal finds that the goods in issue are properly classified under tariff item No. 9405.50.10.

With respect to the Commissioner's alternative classification, i.e. tariff item No. 9405.50.90, the Tribunal notes that this is a residual tariff item that would only be used if there were no other appropriate tariff items for classification. PartyLite Canada submitted that the Commissioner should not be entitled to propose an alternative third classification, since it would be analogous to a tariff classification determination and that counsel for the Commissioner is not a designated officer *vis-à-vis* the Commissioner's customs decisions. In this regard, the Tribunal notes that the Commissioner's alternative classification was submitted in his brief, thus providing PartyLite Canada with ample opportunity to present arguments on this alternative classification. The Tribunal notes that it is the Tribunal's practice to allow alternative classification

17. Commissioner's supplemental brief, Tab 1.

arguments to be made in order to have, before it, all possible classifications. The Tribunal stresses, nevertheless, that the alternative arguments ought to be made in a manner that allows the opposing party sufficient opportunity to respond.

For the foregoing reasons, the appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member