



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-035

Wal-Mart Canada Corporation

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, June 13, 2011*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS 1

 BACKGROUND 1

 PROCEDURAL HISTORY 1

 GOODS IN ISSUE..... 1

 ANALYSIS 2

 Statutory Framework..... 2

 Relevant Provisions of the Customs Tariff, General Rules and Explanatory Notes..... 3

 Tariff Classification of the Goods in Issue 7

 Are the Goods in Issue Classifiable in Heading No. 95.04?..... 10

 Are the Goods in Issue Classifiable in Heading No. 94.01?..... 13

 DECISION 16

IN THE MATTER OF an appeal heard on March 1, 2011, 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 June 15, 2010, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

WAL-MART CANADA CORPORATION

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 1, 2011

Tribunal Member: Stephen A. Leach, Presiding Member

Counsel for the Tribunal: Courtney Fitzpatrick
Nick Covelli

Research Director: Matthew Sreter

Research Officers: Martine Gagnon
Jan Wojcik

Manager, Registrar Office: Michel Parent

Registrar Officer: Cheryl Unitt

PARTICIPANTS:**Appellant**

Wal-Mart Canada Corporation

Counsel/RepresentativesMichael Sherbo
Andrew T. Simkins**Respondent**

President of the Canada Border Services Agency

Counsel/Representative

David Aaron

WITNESS:Matthew Jerabek
Sales Associate
Microplay Inc.

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Wal-Mart Canada Corporation (Wal-Mart) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made by the President of the Canada Border Services Agency (CBSA), dated June 15, 2010, pursuant to subsection 60(4).

2. The issue in this appeal is whether X Rocker II gaming chairs (the goods in issue) are properly classified under tariff item No. 9401.61.10 of the schedule to the *Customs Tariff*² as other upholstered seats, with wooden frames, for domestic purposes, as determined by the CBSA, or should be classified under tariff item No. 9504.10.00 as articles for video games of a kind used with a television receiver, as claimed by Wal-Mart.

PROCEDURAL HISTORY

3. On May 28, 2007, Wal-Mart imported the goods in issue under tariff item No. 9401.61.10 as upholstered seats, with wooden frames, for domestic purposes.

4. On May 11, 2009, Wal-Mart applied for a refund pursuant to paragraph 74(1)(e) of the *Act* and requested that the goods in issue be classified under tariff item No. 9504.10.00 as articles for video games of a kind used with a television receiver and that the goods in issue be entitled to the benefit of tariff item No. 9948.00.00. On May 28, 2009, the CBSA accepted Wal-Mart's request for a refund.

5. On February 8, 2010, the CBSA further re-determined the tariff classification of the goods in issue, pursuant to paragraph 59(1)(b) of the *Act*, classifying them under tariff item No. 9401.61.10 without the benefit of tariff item No. 9948.00.00.

6. On February 11, 2010, Wal-Mart requested a further re-determination of the tariff classification of the goods in issue, pursuant to subsection 60(1) of the *Act*. On June 15, 2010, pursuant to subsection 60(4), the CBSA maintained the classification of the goods in issue, without the benefit of tariff item No. 9948.00.00.

7. On September 8, 2010, Wal-Mart filed an appeal with the Tribunal pursuant to subsection 67(1) of the *Act*. Wal-Mart did not pursue the classification of the goods in issue under tariff item No. 9948.00.00 in its appeal to the Tribunal.

8. The Tribunal held a public hearing in Ottawa, Ontario, on March 1, 2011.

9. Mr. Matthew Jerabek, Sales Associate with Microplay Inc. in Ottawa, testified on behalf of Wal-Mart. The CBSA did not call any witnesses.

GOODS IN ISSUE

10. The goods in issue are X Rocker II gaming chairs. They are vinyl upholstered chairs made of a hardwood frame and brushed aluminum arms. They are designed to be placed directly on the floor and have a convex base which allows them to rock.

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

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

11. The goods in issue are equipped with an internal subwoofer (to simulate rumbling) and internal mid-range and high-range speakers whose volumes are adjustable from a control panel located on the side of the seat.

12. The goods in issue can be connected to video game consoles and DVD, music CD, MP3 and video cassette players, as well as television and satellite receivers.

13. Wal-Mart filed a sample of the goods in issue as a physical exhibit. Wal-Mart also filed the necessary hardware and software (wiring, controller, game console, computer games, DVD and music CD) in order to provide a demonstration of the operation of the goods in issue at the hearing.³

ANALYSIS

Statutory Framework

14. In appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

15. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).⁴ 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. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

16. 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^[5] and the Canadian Rules^[6] set out in the schedule.”

17. 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.⁷ 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.”

3. Exhibit A-01, X Rocker II gaming chair; Exhibit A-01A, Instruction Manual; Exhibit A-01B, miscellaneous wiring; Exhibit A-02, Playstation 3 video game console with accessories; Exhibit A-03, “Uncharted 2” video game; Exhibit A-04, “Motorstorm” video game; Exhibit A-05, IMAX “Deep Sea” Blu-ray movie; and Exhibit A-06, “Booker T. and the MGs” music CD.

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

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

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

7. 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).

18. 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^[8] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[9] published by the Customs Co-operation Council [i.e. the WCO], 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, as they serve as an interpretative guide to tariff classification in Canada.¹⁰

19. The Tribunal notes that section 13 of the *Official Languages Act* 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*, the *Explanatory Notes* and the *Classification Opinions* in interpreting the tariff nomenclature.¹¹

20. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and Rule 1 of the *Canadian Rules* in the case of the latter.

Relevant Provisions of the Customs Tariff, General Rules and Explanatory Notes

21. The relevant provisions of the *Customs Tariff*, which Wal-Mart claimed should apply to the goods in issue, are as follows:

Section XX

MISCELLANEOUS MANUFACTURED ARTICLES

Chapter 95

TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF

...

95.04 **Articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment.**

9504.10.00 **-Video games of a kind used with a television receiver**

22. There are no section notes to Section XX.

23. The relevant chapter note to Chapter 95 provides as follows:

3. Subject to Note 1 above, parts and accessories which are suitable for use solely or principally with articles of this Chapter are to be classified with those articles.

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

9. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

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

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

24. The relevant *Explanatory Notes* to heading No. 95.04 provide as follows:

This heading includes:

...

- (2) Video game consoles and other electronic games which can be used with a television receiver, a video monitor or an automatic data processing machine monitor; video games having a self-contained screen, whether or not portable; and audio visual games with electronic displays (including vertical models on legs) used in the home or in game arcades, sometimes operated, for example, by coins, tokens or credit cards.

...

The heading also includes parts and accessories of video game consoles (for example cases, game cartridges, game controllers, steering wheels), provided they fulfil the conditions of Note 3 to this Chapter. However, optional peripherals (keyboards, mice, storage devices, etc.) which fulfil the conditions of Note 5 (D) to Chapter 84 and which enable video game consoles to be connected to other systems, are **excluded (Section XVI)**.

- (3) Tables of the furniture type specially constructed for games (e.g., tables with a draught-board top).
- (4) Special tables for casino or parlour games (e.g., for roulette or for miniature horse races); croupiers' rakes, etc.
- (5) Table football or similar games.

25. The relevant provisions of the *Customs Tariff*, which the CBSA claimed should apply to the goods in issue, are 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 wooden frames:

9401.61 **--Upholstered**

9401.61.10 -- -For domestic purposes

26. The relevant chapter 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), billiard tables or other furniture specially constructed for games (heading 95.04), furniture for conjuring tricks or decorations (other than electric garlands) such as Chinese lanterns (heading 95.05).

2. The articles (other than parts) referred to in headings 94.01 to 94.03 are to be classified in those headings only if they are designed for placing on the floor or ground.

27. The relevant *Explanatory Notes* to Chapter 94 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).

...

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 characteristics that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists’ surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be “movable” furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

...

Headings 94.01 to 94.03 cover articles of furniture **of any material** (wood, osier, bamboo, cane, plastics, base metals, glass, leather, stone, ceramics, etc.). Such furniture remains in these headings whether or not stuffed or covered, with worked or unworked surfaces, carved, inlaid, decoratively painted, fitted with mirrors or other glass fitments, or on castors, etc.

28. The relevant *Explanatory Notes* to heading No. 94.01 provide as follows:

Subject to the exclusions mentioned below, this heading covers all seats (including those for vehicles, provided that they comply with the conditions prescribed in Note 2 to this Chapter), for example:

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).

Armchairs, couches, settees, etc., remain in this heading even if they are convertible into beds.

The heading **does not**, however, **include**:

- (a) Steps (usually **headings 44.21** and **73.26**).
- (b) Seat-sticks (**heading 66.02**).
- (c) Articles of **heading 87.14** (e.g., saddles).

- (d) Adjustable-speed revolving chairs for reflex-testing (**heading 90.19**).
- (e) Chairs and seats of **heading 94.02**.
- (f) Stools and foot-stools (whether or not rocking) designed to rest the feet, and linen and similar chests having a subsidiary use as seats (**heading 94.03**).

29. The relevant provisions of heading No. 85.18, to which both parties referred in their arguments, are 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 OF SUCH ARTICLES**

...

Chapter 85

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

...

85.18 **Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets.**

...

-Loudspeakers, whether or not mounted in their enclosures:

8518.21.00 **--Single loudspeakers, mounted in their enclosures**

8518.22.00 **--Multiple loudspeakers, mounted in the same enclosure**

8518.29 **--Other**

...

8518.29.90 **---Other**

30. The relevant section notes to Section XVI are as follows:

1. This Section does not cover:

...

(p) Articles of Chapter 95; or

...

31. There are no notes to Chapter 85 that are relevant to this appeal.

32. The relevant *Explanatory Notes* to Section XVI provide as follows:

(I) GENERAL CONTENT OF THE SECTION

(A) Subject to certain **exclusions** provided for in the Notes to this Section and to Chapters 84 and 85 and apart from goods covered more specifically in other Sections, this Section covers all mechanical or electrical machinery, plant, equipment, apparatus and appliances and parts thereof, together with certain apparatus and plant which is neither mechanical nor electrical (such as boilers and boiler house plant, filtering apparatus, etc.) and parts of such apparatus and plant.

The main **exclusions** from the Section are:

...

(h) Machinery and apparatus having the character of toys, games or sports requisites and identifiable parts and accessories thereof (including non-electric motors and engines but **excluding** pumps for liquids and filtering or purifying machinery for liquids or gases, which fall in **heading 84.13** or **84.21**, respectively, and also excluding electric motors, electric transformers and radio remote control apparatus, which fall in heading **85.01**, **85.04** or **85.26**, respectively) which are suitable for use solely or principally with toys, games or sports requisites (**Chapter 95**).

33. There are no *Explanatory Notes* to Chapter 85 that are relevant to this appeal.

34. The relevant *Explanatory Notes* to heading No. 85.18 provide as follows:

This heading covers . . . loudspeakers

...

Loudspeakers may be mounted on frames, chassis or in cabinets of different types (often acoustically designed), or even in articles of furniture. They remain classified in this heading **provided** the main function of the whole is to act as a loudspeaker. Separately presented frames, chassis, cabinets, etc., also fall in this heading **provided** they are identifiable as being mainly designed for mounting loudspeakers; articles of furniture of Chapter 94 designed to receive loudspeakers in addition to their normal function remain classified in **Chapter 94**.

Tariff Classification of the Goods in Issue

35. The Tribunal first notes that, in appeals before the Tribunal, it is the appellant that bears the initial onus of proving that the CBSA's tariff classification of goods is incorrect.¹²

36. As outlined above, in this appeal, the Tribunal must determine whether the goods in issue are properly classified under tariff item No. 9401.61.10 as other upholstered seats, with wooden frames, for domestic purposes, as determined by the CBSA, or should be classified under tariff item No. 9504.10.00 as articles for video games of a kind used with a television receiver, as claimed by Wal-Mart.

37. The parties agree that this appeal can be resolved through the application of Rule 1 of the *General Rules*. The Tribunal notes that Rule 1 provides that the classification of goods shall be determined according to the terms of the headings and any relative section or chapter notes. In accordance with Rules 1 and 6, if goods are described by the terms of one, and only one, heading (having regard to any relevant section or chapter notes, as well as the relevant *Explanatory Notes*), then the next step is to find the appropriate subheading and tariff item.

12. *Unicare Medical Products Inc. v. Deputy M.N.R.C.E.* (21 June 1990), 2437, 2438, 2485, 2591 and 2592 (CITT) at 3.

38. The Tribunal notes that Wal-Mart argued that Note 1(l) to Chapter 94 excludes the goods in issue from classification in Chapter 94,¹³ whereas the CBSA contended that the goods in issue are not furniture specially constructed for games.¹⁴ Note 1(l) to Chapter 94 provides as follows:

1. This Chapter does not cover:

...

(l) ... billiard tables or other furniture specially constructed for games (heading 95.04)

39. The Tribunal notes that the terms of heading No. 95.04 do not refer to “furniture specially constructed for games”. However, the *Explanatory Notes* to heading No. 95.04 provide some guidance as to what may be considered “furniture specially constructed for games”. The *Explanatory Notes* to heading No. 95.04 provide as follows:

This heading includes:

...

- (3) Tables of the furniture type specially constructed for games (e.g., tables with a draught-board top).
- (4) Special tables for casino or parlour games (e.g., for roulette or for miniature horse races); croupiers’ rakes, etc.
- (5) Table football or similar games.

40. On the basis of Note 1(l) to Chapter 94 and the *Explanatory Notes* to heading No. 95.04, the Tribunal is of the view that, in addition to covering video game consoles and parts or accessories thereof, heading No. 95.04 covers furniture specially constructed for games. As it is this description of the goods in issue that Wal-Mart argues excludes them from classification in Chapter 94, the Tribunal will first consider whether the goods in issue are furniture specially constructed for games before moving on to a consideration of whether the goods in issue are accessories to video game consoles.

41. In order for Note 1(l) to Chapter 94 to apply to the goods in issue, they must meet two conditions: (i) they must be furniture; and (ii) they must be specially constructed for games.

42. The Tribunal notes that the *Explanatory Notes* to Chapter 94 provide the following with respect to the definition of “furniture”:

This Chapter covers . . .:

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

...

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 (It should be noted that, for the purposes of this Chapter, articles are considered to be “movable” furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). . . .

13. *Transcript of Public Hearing*, 1 March 2011, at 30-31, 43-47, 72-77.

14. Tribunal Exhibit AP-2010-035-06A at paras. 86-90.

43. Therefore, in order for the goods in issue to be considered furniture, they must meet the following conditions: (i) they must be movable; (ii) they must be articles; (iii) they must have the essential characteristic of being constructed for placing on the floor or ground; (iv) they must be used mainly with a utilitarian purpose; and (v) they must be used to equip private dwellings. The Tribunal also notes that the definition of “furniture” contains the proviso that the article not be included under other more specific headings of the nomenclature.

44. In its brief, the CBSA contended that the goods in issue meet the five conditions of the definition of “furniture” found in the *Explanatory Notes* to Chapter 94.¹⁵ For its part, Wal-Mart did not dispute that the goods in issue are considered furniture. In fact, Wal-Mart admitted, at the hearing, that the goods in issue are considered furniture in the context of its submission that the goods in issue are “furniture specially constructed for games”.¹⁶ This indicates to the Tribunal that Wal-Mart accepts that the goods in issue are considered furniture.

45. On the basis of the evidence and the submissions of the parties, the Tribunal is satisfied that the goods in issue are furniture. They are movable articles¹⁷ which are intended to be placed on the floor of a private dwelling when in use. The Tribunal is also satisfied that the goods in issue are used primarily with a utilitarian purpose. The *Canadian Oxford Dictionary* defines the term “utilitarian” as follows: “**1** designed to be practically useful rather than attractive; functional.”¹⁸ The Tribunal is of the view that the goods in issue are used, mainly, to play video games, watch movies or listen to music, each of which could be considered a utilitarian or functional purpose.

46. As the Tribunal has found that the goods in issue are furniture, the next step is for the Tribunal to determine whether the goods in issue are specially constructed for games.

47. In that regard, the Tribunal notes Wal-Mart’s submissions that the goods in issue are equipped with various inputs, jacks and speakers, which allow them to connect to and interact with a video game controller and console. However, the Tribunal is of the view that neither party submitted evidence with respect to whether the goods in issue have been *specially* constructed for that purpose.

48. In the Tribunal’s view, the adverb “specially” (the definition of which, in the *Shorter Oxford English Dictionary*, includes “particularly” and “expressly”¹⁹) implies a direct, purposeful connection between the construction of the goods in issue and the games for which they were constructed.

49. Turning to the issue of whether the goods in issue have been specially constructed for games, the Tribunal notes the manufacturer’s description of the goods in issue as “multi-functional furniture” and “media-enhancing product[s]” that are suitable for listening to music, watching a movie or playing a video game.²⁰ The Tribunal also notes the diagrams submitted by the CBSA, which demonstrate how to connect the goods in issue to gaming systems, home theatre and satellite systems, and to portable devices such as MP3, CD or DVD players.²¹

15. *Ibid.* at paras. 37-39; *Transcript of Public Hearing*, 1 March 2011, at 65-66.

16. *Transcript of Public Hearing*, 1 March 2011, at 39-40, 43-44.

17. See, for example, Tribunal Exhibit AP-2010-035-04A, tab 3-8, which provides as follows: “The X rocker is built with foldable construction for ease of storage and portability.”

18. Second ed., s.v. “utilitarian”.

19. Fifth ed., s.v. “specially”: “**1** In a special manner; in a degree or to an extent beyond what is usual or customary; particularly; pre-eminently. **2** For a special purpose; expressly.”

20. Tribunal Exhibit AP-2010-035-06A, tabs 2, 3.

21. *Ibid.*, tab 3.

50. The Tribunal finds that the balance of the evidence regarding the suitable uses of the goods in issue does not indicate that they were constructed expressly or particularly for video game consoles. Indeed, the manufacturer's specifications and marketing materials indicate that the goods in issue are multi-functional and appear to give equal weight to a variety of suitable uses to which the parties referred.²² The Tribunal considers that its finding accords with the commercial reality that manufacturers design, construct and market products to appeal to a broad range of consumers, who then decide which of the multiple uses is the best for them.

51. As the Tribunal has found that the goods in issue have not been specially constructed for games, it will next proceed to determine whether the goods in issue are classifiable in heading No. 95.04 as accessories to video game consoles, as contended by Wal-Mart.

Are the Goods in Issue Classifiable in Heading No. 95.04?

52. In addition to its position that the goods in issue are furniture specially constructed for games and therefore excluded from classification in Chapter 94, Wal-Mart argued that the goods in issue may be classified in heading No. 95.04 as accessories to video games of a kind used with a television receiver.

53. Wal-Mart submitted that, on the basis of the *Explanatory Notes* to heading No. 95.04, the heading includes video game consoles from which the image is reproduced on a television receiver, monitor or other external screen or surface.²³ It further submitted that, in accordance with Note (3) to Chapter 95, heading No. 95.04 includes parts and accessories for use solely or principally with those video game consoles.

54. Wal-Mart contended that the goods in issue are accessories. In support of this position, it referred to Memorandum D10-0-1,²⁴ which defines an "accessory" as follows: "... an article which performs a secondary or subordinate role, not essential to the function, which could improve the effectiveness of the host machine, equipment, apparatus or appliance".²⁵ Wal-Mart argued that the goods in issue meet this definition because they are marketed and sold to be used with video games and they enhance the video game experience without being essential to the function of the game.

55. Wal-Mart further argued that the goods in issue meet the condition of being suitable for use principally with video games. In support of this position, Wal-Mart referred to the demonstration, the product literature, and the design, marketing and distribution of the goods in issue, which, in its view, indicated that the best use of the goods in issue is with video games. It argued that none of the literature indicated that the goods in issue are used only as a chair. However, Wal-Mart agreed that the goods in issue may be connected to other devices, such as a DVD player or an iPod.

56. The CBSA submitted that the goods in issue are not classifiable in heading No. 95.04. It argued that the goods in issue are not "furniture specially constructed for games" and that, therefore, they are not excluded from Chapter 94 by virtue of Note 1(l) to Chapter 94. It submitted that the goods in issue are designed for the user to be able to enjoy sound from multiple sources (not only games) and that, thus, have not been specially designed or constructed for games.

22. *Transcript of Public Hearing*, 1 March 2011, at 63-64.

23. The Tribunal notes that this argument is based on language found in the *Explanatory Notes* to heading No. 95.04 which did not appear in the version of the *Explanatory Notes* to that heading that was in force at the time of importation. The relevant portion of the *Explanatory Notes* to heading No. 95.04 that were in force at the time of importation has been reproduced at paragraph 24 of this decision. The Tribunal is of the view that the difference between the current version of the *Explanatory Notes* to heading No. 95.04 and the version that was in force at the time of importation does not affect the decision reached by the Tribunal in this appeal.

24. "Classification of Parts and Accessories in the Customs Tariff" (24 January 1994).

25. *Transcript of Public Hearing*, 1 March 2011, at 33-34.

57. In its brief, the CBSA also argued that the goods in issue are not parts or accessories of a video game console nor are they suitable for use solely or principally with such articles and that, therefore, they do not meet the requirement of Note 3 to Chapter 95 or Note 2 of the *Explanatory Notes* to heading No. 95.04.

58. In support of its argument that the goods in issue are not suitable for use solely or principally with video game consoles, the CBSA referred to the product literature, which illustrates that they are used with other electronic devices, such as DVD, video-cassette, music CD and Blu-ray players, television and satellite receivers, or portable music devices, such as MP3 players or iPods. The CBSA contended that no evidence was presented to demonstrate that the goods in issue are solely or even primarily accessories to a video game console.

59. Heading No. 95.04 covers “[a]rticles for funfair, table or parlour games”

60. Note 3 to Chapter 95 reads as follows:

3. Subject to Note 1 above, parts and accessories which are suitable for use solely or principally with articles of this Chapter are to be classified with those articles.²⁶

61. The Tribunal notes that the *Explanatory Notes* to heading No. 95.04 provide guidance as to what may be considered “[a]rticles for funfair, table or parlour games”. The *Explanatory Notes* to heading No. 95.04 provide as follows:

This heading includes:

...

- (2) Video game consoles and other electronic games which can be used with a television receiver, a video monitor or an automatic data processing machine monitor; video games having a self-contained screen, whether or not portable; and audio visual games with electronic displays (including vertical models on legs) used in the home or in game arcades, sometimes operated, for example, by coins, tokens or credit cards.

...

The heading also includes parts and accessories of video game consoles (for example cases, game cartridges, game controllers, steering wheels), provided they fulfil the conditions of Note 3 to this Chapter. However, optional peripherals (keyboards, mice, storage devices, etc.) which fulfil the conditions of Note 5 (D) to Chapter 84 and which enable video game consoles to be connected to other systems, are excluded (Section XVI).

62. Therefore, in order for the goods in issue to be classified in heading No. 95.04 as “[a]rticles for funfair, table or parlour games”, the Tribunal must find that (i) they are video game consoles or accessories thereof; (ii) they are not excluded from Chapter 95 by virtue of Note 1 to that chapter; (iii) they are suitable for use solely or principally with video game consoles; and (iv) the video game consoles are articles of this chapter.

63. Wal-Mart submitted that an “accessory” is defined as follows: “. . . an article which performs a secondary or subordinate role, not essential to the function, which could improve the effectiveness of the host machine, equipment, apparatus or appliance”.²⁷ As noted above, it further submitted that the goods in issue, while not essential to the functioning of video games, enhance the video gaming experience.

26. *Ibid.* at 32, 66-67.

27. Memorandum D10-0-1.

64. The Tribunal agrees with Wal-Mart's position that the goods in issue are accessories within the ordinary meaning of the term. The Tribunal is satisfied that the goods in issue, when used with a video game console, play a subordinate role to the console and the controller. As agreed to by the witness on cross-examination, "... the chair on its own doesn't allow you to interact with the video gaming system" ²⁸ Therefore, it follows that the video game console can be used without the goods in issue. The Tribunal also finds that, by using the goods in issue, the experience of those playing the video games can be enhanced or improved. The Tribunal notes, in particular, the product literature, which states as follows: "[t]here are many ways to extend the pleasure of playing a video game, and one of these is the gaming chair". ²⁹

65. Turning to the second condition noted above, it is uncontested, and the Tribunal is satisfied, that the goods in issue are not excluded from classification in Chapter 95 by virtue of Note 1 to that chapter.

66. Turning to the third condition, the Tribunal must determine whether the goods in issue are suitable for use *solely or principally* with video game consoles. The Tribunal notes that neither party has argued that the goods in issue are solely for use as accessories of video game consoles. ³⁰ Therefore, the Tribunal must determine whether there is evidence to indicate that the goods in issue are accessories suitable for use principally with articles of Chapter 95, namely, video game consoles of a kind used with a television receiver.

67. The Tribunal heard no direct evidence from the witness as to whether the goods in issue are accessories suitable for use principally with video game consoles. The Tribunal observed the demonstration of the use of the goods in issue with a video game console, a Blu-ray player and a music CD player. ³¹ The Tribunal also heard testimony from the witness that the goods in issue enhanced his personal gaming experience. ³² However, the Tribunal notes the admission by the witness that he has never sold the product. Therefore, the Tribunal concludes that the witness was unable to provide factual evidence, beyond his own experience, about the principal use of the goods in issue. ³³

68. The Tribunal also heard argument from both parties about the uses of the goods in issue. Both parties referred to articles from the Web sites "PCWorld" and "wiseGEEK", which provided a description of the goods in issue. Wal-Mart noted that these Web sites indicated that "[t]here are many ways to extend the pleasure of playing a video game, and one of these is the gaming chair." ³⁴ The CBSA noted that literature from the manufacturer's Web site, "XRocker", made reference to use of the goods in issue to play video games, listen to music and watch movies. ³⁵

69. As noted above, the manufacturer describes the goods in issue as "multi-functional furniture" and "media-enhancing product[s]" that are suitable for listening to music, watching a movie or playing a video game. ³⁶ The Tribunal also notes the diagrams submitted by the CBSA, which demonstrate how to connect the goods in issue to gaming systems, home theatre and satellite systems, and portable devices, such as MP3, CD or DVD players. ³⁷

28. *Transcript of Public Hearing*, 1 March 2011, at 23.

29. Tribunal Exhibit AP-2010-035-04A, tab 3; wiseGEEK, <<http://www.wisegeek.com/what-is-a-gaming-chair.htm>>.

30. *Transcript of Public Hearing*, 1 March 2011, at 37-38, 51.

31. *Ibid.* at 15-16.

32. *Ibid.* at 14, 19-21.

33. *Ibid.* at 25.

34. <http://www.wisegeek.com/what-is-a-gaming-chair.htm>.

35. Tribunal Exhibit AP-2010-035-04A, tab 3.

36. Tribunal Exhibit AP-2010-035-06A, tabs 2, 3.

37. *Ibid.*, tab 3.

70. The CBSA also referred to customer product reviews posted on Wal-Mart USA's Web site in support of its position that the goods in issue are not suitable for use principally with video games. In particular, the CBSA noted that one customer bought the chair for her family to use "[w]hile watching tv, movies, and gaming on [their] Xbox 360." Another customer indicated: "My daughter loves this chair. It puts the sound right at ear level without needing a stereo system."³⁸ In referring to these customer reviews, the Tribunal is aware of the objection raised by Wal-Mart that the veracity of these comments cannot be confirmed, as Wal-Mart was unable to cross-examine the customers who made these comments.³⁹

71. In assessing the above-noted evidence, the Tribunal is of the view that the testimony of the witness did not directly address the issue of whether the goods in issue are accessories suitable for use principally with video game consoles. Similarly, the Tribunal is of the view that the customer comments posted on Wal-Mart USA's Web site should be given little weight, as the persons who posted the comments were not subject to cross-examination in this appeal.

72. On this basis, the Tribunal finds that the balance of the evidence regarding the suitable uses of the goods in issue does not indicate that they are used principally as accessories for video game consoles. The manufacturer's specifications and marketing materials indicate that the goods in issue are multi-functional and appear to give equal weight to a variety of suitable uses to which the parties referred.⁴⁰ In addition, the Tribunal notes that the goods in issue are distributed through Wal-Mart and not just video gaming stores.⁴¹ Furthermore, the Tribunal considers that this finding accords with the commercial reality that manufacturers design and market products to appeal to a broad range of consumers, who then decide which of the multiple uses is the best for them.

73. On the basis of the foregoing, the Tribunal finds that the goods in issue are not suitable for use principally with articles of Chapter 95, namely, video game consoles of a kind used with a television receiver, nor have they been specially constructed for games. Therefore, the goods in issue are not classifiable in heading No. 95.04.

74. The Tribunal is of the view that its conclusion with respect to both aspects of heading No. 95.04 is consistent with its decision in *PartyLite Gifts Ltd. v Commissioner of the Canada Customs and Revenue Agency*,⁴² which was cited by both parties in this appeal. In that decision, the Tribunal found that the appearance, design, best use, marketing and distribution of goods were individual factors that may be useful to consider in classifying goods.

75. The Tribunal will next consider whether the goods in issue are classifiable in heading No. 94.01.

Are the Goods in Issue Classifiable in Heading No. 94.01?

76. The CBSA submitted that the goods in issue are classifiable in heading No. 94.01, which covers "[s]eats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof."

77. The CBSA contended that the goods in issue are properly classified in Chapter 94, as they meet the definition of furniture found in Note 1(A) of the *Explanatory Notes* to that chapter. The CBSA submitted that the goods in issue (i) are movable articles, (ii) are not included in other more specific headings of the nomenclature, (iii) have the essential characteristics of being constructed for placing on the floor or ground and (iv) are used mainly with a utilitarian purpose, to equip private dwellings.

38. *Ibid.*, tab 1.

39. *Transcript of Public Hearing*, 1 March 2011, at 56-61.

40. *Ibid.* at 63-64.

41. *Ibid.* at 26-27.

42. (16 February 2004), AP-2003-008 (CITT).

78. In support of its position, the CBSA referred to the *Explanatory Notes* to Chapter 94, which provide that heading No. 94.01 covers articles of furniture of any material, as well as the *Explanatory Notes* to heading No. 94.01, which indicate that heading No. 94.01 covers all seats.

79. The CBSA also made reference to heading No. 85.18, which covers “. . . loudspeakers, whether or not mounted in their enclosures . . .” It noted that Note B of the *Explanatory Notes* to heading No. 85.18 states that “. . . articles of furniture of Chapter 94 designed to receive loudspeakers in addition to their normal function remain classified in **Chapter 94.**” It argued that the goods in issue are chairs which have been designed to receive loudspeakers (which are built into their wooden frames). It further contended that the possibility of audio input from a variety of sources is a feature which is additional to the normal function of the goods in issue as pieces of furniture.

80. In addition to Wal-Mart’s argument that the goods in issue cannot be classified in heading No. 94.01 as a result of Note 1(l) to Chapter 94, Wal-Mart argued at the hearing that, if the goods in issue are not properly classified in heading No. 95.04, they should be classified in heading No. 85.18. It contended that heading No. 85.18, which covers “. . . loudspeakers, whether or not mounted in their enclosures . . .”, describes the main function of the goods in issue. It submitted that there is no evidence of the goods in issue being used as chairs without being connected to an electrical device, which engages the speakers and subwoofer. In support of its position, Wal-Mart referred to the *Explanatory Notes* to heading No. 85.18, which provide that loudspeakers may be in articles of furniture provided the main function of the whole is to act as a loudspeaker.

81. In light of the arguments raised by Wal-Mart, the Tribunal will first consider whether the goods in issue are classifiable in heading No. 85.18 and will then proceed to consider whether they are classifiable in heading No. 94.01.

82. Heading No. 85.18 covers “. . . loudspeakers, whether or not mounted in their enclosures . . .”

83. The *Explanatory Notes* to heading No. 85.18 provide as follows:

Loudspeakers may be mounted on frames, chassis or in cabinets of different types (often acoustically designed), or even in articles of furniture. They remain classified in this heading **provided** the main function of the whole is to act as a loudspeaker. . . [A]rticles of furniture of Chapter 94 designed to receive loudspeakers in addition to their normal function remain classified in **Chapter 94.**

84. Although it is clear from the evidence that the goods in issue are articles of furniture equipped with internal speakers and an internal subwoofer,⁴³ the Tribunal is of the view that, in order for the goods in issue to be classified in heading No. 85.18, it must find that the main function of the goods in issue is to act as loudspeakers. The Tribunal does not find that to be the case.

85. The Tribunal notes the *Oxford Shorter English Dictionary* definition of the adjective “main”, which provides as follows: “**8b** Greater or more important than others of the same kind . . .”⁴⁴

86. The Tribunal is of the view that the goods in issue have a dual function, that of chairs and that of speakers. In reaching this conclusion, the Tribunal considered Wal-Mart’s argument that there has “. . . not been any talk about the goods used as a chair without being hooked up to an electrical device.”⁴⁵ However,

43. See, for example, Tribunal Exhibit AP-2010-035-04A, tab 3 at 3-2, 3-9.

44. Fifth ed., s.v. “main”.

45. *Transcript of Public Hearing*, 1 March 2011, at 41.

the Tribunal also considers the corollary to be true: there is no evidence that the goods in issue are used as speakers without someone being seated in the chairs to experience the sound and vibrations. With this in mind, and taking into account the descriptive literature, photographs and physical exhibit which demonstrate that the goods in issue are marketed and sold as chairs,⁴⁶ the Tribunal determines that the functioning of the goods in issue as chairs is at least equally important to their functioning as speakers. As such, it cannot be said that the main function of the goods in issue is to act as loudspeakers. Therefore, the Tribunal finds that the goods in issue are not classifiable in heading No. 85.18.

87. Having found that the goods in issue are not classifiable in heading No. 95.04 or heading No. 85.18, the Tribunal will now consider whether the goods in issue are classifiable in heading No. 94.01.

88. As previously discussed, the goods in issue meet the definition of “furniture” contained in the *Explanatory Notes* to Chapter 94.

89. Heading No. 94.01 covers “[s]eats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof.”

90. Note 2 to Chapter 94 reads as follows: “The articles (other than parts) referred to in headings 94.01 to 94.03 are to be classified in those headings only if they are designed for placing on the floor or ground.”

91. Moreover, the *Explanatory Notes* to heading No. 94.01 provide as follows:

... this heading covers all seats ... :

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).

92. In accordance with Rule 1 of the *General Rules*, the Tribunal notes that the goods in issue must meet the terms of the heading. In particular, the goods in issue must be (i) seats; and (ii) not of heading No. 94.02.

93. The Tribunal is satisfied, and the parties do not dispute, that the goods in issue are seats. The *Canadian Oxford Dictionary* defines “seat” as follows: “**1** a thing made or used for sitting on, such as a chair”⁴⁷ The Tribunal finds that, as per the descriptive literature, photographs and physical exhibit, the goods in issue are marketed and sold as seats and, more specifically, as chairs.⁴⁸

94. The Tribunal finds further support for its conclusion in the *Explanatory Notes* to heading No. 94.01, which indicate that the heading “. . . covers all seats . . .” including seats with dual purposes.

95. With respect to the proviso found in the definition of furniture, that the goods in issue not be included in other more specific headings of the nomenclature, the Tribunal finds that, on the basis of the foregoing analysis, the goods in issue are specifically included in heading No. 94.01 as seats and, therefore, are not covered by another more specific heading of the nomenclature.

46. Tribunal Exhibit AP-2010-035-04A, tab 3 at 3-2, 3-8. For example, the “PCWorld” article specifically refers to the goods in issue as the “X-Rocker Pro Gaming Chair”. In addition, the “XRocker” article describes the design of the goods in issue as a chair, and specifically provides as follows: “The X Rocker is oversized for EXTRA comfort and the ergonomic design lends itself to full back support.”

47. Second ed., s.v. “seat”.

48. See, for example, Tribunal Exhibit AP-2010-035-04A, tab 3-8, which provides as follows: “The X Rocker is oversized for EXTRA comfort and the ergonomic design lends itself to full back support.”

96. Therefore, the Tribunal is of the view that the balance of the evidence indicates that the goods in issue are classifiable in heading No. 94.01 as “[s]eats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof.”

97. The Tribunal reaches this conclusion on the basis that Wal-Mart failed to discharge its onus to establish that the CBSA’s tariff classification of the goods in issue was incorrect.

Subheading and Tariff Item

98. Having determined that the goods in issue are properly classified in heading No. 94.01, the Tribunal must next determine the proper classification at the subheading and tariff item levels. The CBSA submitted, and Wal-Mart did not dispute, that the goods in issue have wooden frames and are covered in vinyl.⁴⁹ Therefore, the Tribunal finds that, pursuant to Rule 6 of the *General Rules*, the good in issue are properly classified in subheading No. 9401.61.

99. Subheading No. 9401.61 has two tariff items. As noted above, the Tribunal is satisfied (and the parties did not dispute) that the goods in issue are used to equip private dwellings. In addition, the Tribunal finds that the goods in issue, which are marketed and distributed by retail stores, such as Wal-Mart, are marketed towards individuals for gaming, listening to music and watching movies in their homes. The Tribunal considers these to be for domestic purposes, consistent with the Tribunal’s findings in *Costco Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency*.⁵⁰ Therefore, pursuant to Rule 1 of the *Canadian Rules*, the Tribunal finds that the goods in issue are properly classified under tariff item No. 9401.61.10.

DECISION

100. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 9401.61.10 as other upholstered seats with wooden frames for domestic purposes, as determined by the CBSA.

101. Therefore, the appeal is dismissed.

Stephen A. Leach

Stephen A. Leach
Presiding Member

49. Tribunal Exhibit AP-2010-053-06A at para. 6; *Transcript of Public Hearing*, 1 March 2011, at 65.

50. (11 January 2001), AP-2000-015 (CITT). In this decision, the Tribunal stated as follows: “. . . the term ‘domestic’ . . . should be given a wide enough interpretation to include goods that can be found outside of the house, but which have, as a primary purpose, use by individuals in a domestic setting.”