Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-005

HBC Imports c/o Zellers Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, April 6, 2011

Canada

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IN THE MATTER OF an appeal heard on December 7, 2010, 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 February 9, 2010, with respect to a request for review of an advance ruling pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

HBC IMPORTS C/O ZELLERS INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 7, 2010
Tribunal Member:	Diane Vincent, Presiding Member
Counsel for the Tribunal:	Courtney Fitzpatrick
Research Director:	Matthew Sreter
Research Officer:	Jan Wojcik
Manager, Registrar Office:	Michel Parent
Registrar Officer:	Julie Lescom

PARTICIPANTS:

Appellant	**Counsel/Representative**
HBC Imports c/o Zellers Inc.	Andrew T. Simkins
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Helene Robertson

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 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 HBC Imports c/o Zellers Inc. (HBC) 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), pursuant to subsection 60(4), which affirmed an advance ruling on tariff classification made pursuant to paragraph 43.1(1)(*c*).

2. The issue in this appeal is whether two models of pop-up laundry hampers (the goods in issue) are properly classified under tariff item No. 6307.90.99 of the schedule to the *Customs Tariff*[2] as other made-up articles of other textile materials, as determined by the CBSA, or should be classified under tariff item No. 9403.89.19 as furniture of materials other than metal, wood or plastics, for domestic purposes, as claimed by HBC.

PROCEDURAL HISTORY

3. On July 10, 2009, HBC applied for an advance ruling on the tariff classification of the goods in issue. On October 7, 2009, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(*c*) of the *Act*, in which it classified the goods in issue under tariff item No. 6307.90.99 as other made-up articles of textile materials.[3]

4. On October 29, 2009, HBC requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*.[4] On February 9, 2010, the CBSA affirmed the advance ruling pursuant to subsection 60(4).[5]

5. On May 7, 2010, HBC filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.[6]

6. On October 27, 2010, HBC filed a motion pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*[7] for an order dismissing the pleadings of the CBSA and allowing the appeal. On November 5, 2010, the CBSA filed a response to HBC's motion. On November 12, 2010, HBC filed a reply.

7. The Tribunal denied the motion on November 19, 2010, and issued its statement of reasons on December 22, 2010.

8. The Tribunal held a public hearing in Ottawa, Ontario, on December 7, 2010. No witnesses were called upon to testify at the hearing.

GOODS IN ISSUE

9. According to an agreed statement of facts, the goods in issue are round, pop-up laundry hampers, model Nos. 58638396 and 58625047. They are made from nylon fabric with a coiled steel wire frame sewn into the fabric, which allows the goods in issue to stand on the floor when in use or to be collapsed and stored flat when not in use. They are equipped with a zippered lid and handles for carrying, and are used primarily to store laundry in a private dwelling.[8]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. Tribunal Exhibit AP-2010-005-04A, tabs 1, 2; Tribunal Exhibit AP-2010-005-06A, tabs 2, 3.
4. Tribunal Exhibit AP-2010-005-04A, tab 3; Tribunal Exhibit AP-2010-005-06A, tab 4.
5. Tribunal Exhibit AP-2010-005-04A, tab 5; Tribunal Exhibit AP-2010-005-06A, tab 1.
6. Tribunal Exhibit AP-2010-005-01.
7. S.O.R./91-499.
8. Tribunal Exhibit AP-2010-005-016A.

10. HBC filed a sample of each of the goods in issue as physical exhibits with the Tribunal.[9]

ANALYSIS

Statutory Framework

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

12. 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.[10] 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.

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."

14. 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[13] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[14] 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 respected, unless there is a sound reason to do otherwise, as they serve as an interpretative guide to tariff classification in Canada.[15]

15. The Tribunal notes that section 13 of the *Official Languages Act*[16] 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.

16. 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.[17] Classification therefore begins with Rule 1, which provides as follows: "... for

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9. Exhibits A-01 (model No. 58638396) and A-02 (model No. 58625047). For comparison purposes, HBC also filed a heavy-duty mesh laundry bag, model A-05202-006X1-N (Exhibit A-03) and a heavy-load laundry bag, model A-05212-006X1-G (Exhibit A-04).
10. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
11. S.C. 1997, c. 36, schedule [*General Rules*].
12. S.C. 1997, c. 36, schedule.
13. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
14. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
15. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17 [*Suzuki*].
16. R.S.C. 1985 (4th Supp.), c. 31.
17. 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).

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."

17. Thus, the Tribunal must 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, any relevant section or chapter notes in the *Customs Tariff*, and having regard to any relevant *Explanatory Notes* or *Classification Opinions*. 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 heading the goods in issue shall be classified.

18. 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.[18]

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

19. The relevant provisions of the *Customs Tariff*, which HBC 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

. . .

94.03	**Other furniture and parts thereof.**
. . .	
	-Furniture of other materials, including cane, osier, bamboo or similar materials:
. . .	
9403.89	**- -Other**
	- - -For domestic purposes:
. . .	
9403.89.19	- - - -Other

18. Rule 1 of the *Canadian Rules* reads as follows: "For legal purposes, the classification of goods in tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the General Rules for the Interpretation of the Harmonized System, on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires."
Rule 6 of the *General Rules* stipulates as follows: "For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."

20. There are no section notes to Section XX.

21. The relevant chapter note to Chapter 94 provides as follows:

> 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.

22. The relevant *Explanatory Notes* to Chapter 94 provide as follows:

> 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 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, 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.

23. The relevant *Explanatory Notes* to heading No. 94.03 provide as follows:

> This heading covers furniture and parts thereof, **not covered** by the previous headings. It includes furniture for general use (e.g., cupboards, show-cases, tables, telephone stands, writing-desks, escritoires, book-cases, and other shelved furniture, etc.), and also furniture for special uses.
>
> The heading includes furniture for:
>
> (1) **Private dwellings, hotels, etc.**, such as: cabinets, linen chests, bread chests, log chests; chests of drawers, tallboys; pedestals, plant stands; dressing-tables; pedestal tables; wardrobes, linen presses; hall stands, umbrella stands; side-boards, dressers, cupboards; food-safes; bedside tables; beds (including wardrobe beds, camp-beds, folding beds, cots, etc.); needlework tables; foot-stools, fire screens; draught-screens; pedestal ashtrays; music cabinets, music stands or desks; play-pens; serving trolleys (whether or not fitted with a hot plate).

24. The relevant provisions of the *Customs Tariff*, which the CBSA considered applicable to the goods in issue, are as follows:

> **Section XI**
>
> **TEXTILES AND TEXTILE ARTICLES**
>
> . . .
>
> **Chapter 63**
>
> **OTHER MADE UP TEXTILE ARTICLES; SETS;**
> **WORN CLOTHING AND WORN TEXTILE ARTICLES; RAGS**
>
> . . .
>
> **63.07 Other made up articles, including dress patterns.**
>
> . . .

6307.90 **-Other**

. . .

- - -Other:

. . .

6307.90.99 - - - -Of other textile materials

25. The relevant section notes to Section XI provide as follows:

1. This Section does not cover:

. . .

(s) Articles of Chapter 94 (for example, furniture, bedding, lamps and lighting fittings);

. . .

7. For the purpose of this Section, the expression ''made up'' means:

. . .

(e) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded);

. . .

26. The relevant chapter notes to Chapter 63 provide as follows:

1. Sub-Chapter I applies only to made up articles, of any textile fabric.

27. The relevant *Explanatory Notes* to Section XI provide as follows:

Made up articles.

Under Note 7 to this Section, the expression "made up" in Chapters 56 to 63 means:

. . .

(5) **Assembled by sewing, gumming or otherwise.** These articles, which are very numerous, include garments. It should be noted, however, that piece goods consisting of two or more lengths of identical material joined end to end, or composed of two or more textiles assembled in layers, are not regarded as "made-up". Nor are textile products in the piece composed of one or more layers of textile materials assembled with padding by stitching or otherwise.

28. The relevant *Explanatory Notes* to Chapter 63 provide as follows:

This Chapter includes:

(1) Under headings 63.01 to 63.07 (sub-Chapter I) made up textile articles of any textile fabric (woven or knitted fabric, felt, nonwovens, etc.) which are **not** more specifically described in other Chapters of Section XI or elsewhere in the Nomenclature. (The expression "made up textile articles" means articles made up in the sense defined in Note 7 to Section XI (see also Part (II) of the General Explanatory Note to Section XI.)

29. The relevant *Explanatory Notes* to heading No. 63.07 provide as follows:

> This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature.
>
> It includes, in particular:
>
> . . .
>
> (5) Domestic laundry or shoe bags, stocking, handkerchief or slipper sachets, pyjama or nightdress cases and similar articles.

Positions of Parties

HBC

30. HBC submitted that, pursuant to Rule 1 of the *General Rules*, the goods in issue should be classified in heading No. 94.03. In support of this position, it relied upon the CBSA's admission that the goods in issue are *prima facie* classifiable in heading No. 94.03.

31. HBC, referring to the definition of "furniture" set forth in the *Explanatory Notes* to Chapter 94, argued that the goods in issue are movable, intended for placement on the floor or ground and used in private dwellings to serve the utilitarian function of storing laundry and, thus, meet the definition of "furniture" of Chapter 94.[19] It also submitted that, because the goods in issue are intended for placement on the floor or ground, they meet the requirements of Note 2 to Chapter 94, as it applies to articles covered by heading No. 94.03.[20]

32. HBC argued that the goods in issue are not *prima facie* classifiable in both heading Nos. 63.07 and 94.03.[21] It submitted that, by virtue of Note 1(s) to Section XI, the goods in issue are excluded from classification in Section XI if they can be classified in Chapter 94 (which includes heading No. 94.03).

33. HBC further argued that the phrase "**not included** under other more specific headings of the Nomenclature" found in the *Explanatory Notes* to Chapter 94 does not apply to heading No. 63.07 because the *Explanatory Notes* to that heading contain a similar phrase. It argued that the inclusion of this phrase means that heading No. 63.07 is not more specific than heading No. 94.03 and that, therefore, the *Explanatory Notes* to heading No. 94.03 should not be used to override Note 1(s) to Section XI.[22]

34. HBC also submitted that the goods in issue are not similar to domestic laundry bags. HBC referred to the *Explanatory Notes* to heading No. 46.02 in support of its argument that baskets and hampers are distinguishable from bags. HBC also submitted that the coiled wire frame, which forms part of the goods in issue, further distinguishes them from bags, making them articles of furniture.[23]

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19. Tribunal Exhibit AP-2010-005-04A at paras. 21-22; *Transcript of Public Hearing*, 7 December 2010, at 11. The *Explanatory Notes* to Chapter 94 provide the following definition of "furniture": "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 . . . ."
20. 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."
21. Tribunal Exhibit AP-2010-005-04A at paras. 9, 26. 29; *Transcript of Public Hearing*, 7 December 2010, at 15, 19.
22. *Transcript of Public Hearing*, 7 December 2010, at 20-24.
23. *Ibid.* at 24-29.

President of the CBSA

35. The CBSA submitted that the goods in issue are *prima facie* classifiable in both heading Nos. 63.07 and 94.03 and that, pursuant to Rule 3 (b) of the *General Rules*, the goods in issue should be classified in heading No. 63.07.

36. In response to HBC's position that goods of Chapter 94 are excluded from classification in heading No. 63.07 by virtue of Note 1(s) to Section XI, the CBSA argued that the exclusionary language found in the section and chapter notes and the *Explanatory Notes* do not apply at the *prima facie* classification stage. It referred to *Black's Law Dictionary*, where the term "*prima facie*" is defined as follows: "At first sight; on first appearance but subject to further evidence or information . . . ."[24] It contended that, because the goods in issue have not yet been definitively classified in Chapter 94, Note 1(s) to Section XI does not exclude the goods in issue from classification in heading No. 63.07 at the *prima facie* stage of the classification process.[25]

37. By reference to Note 7(e) to Section XI, the CBSA argued that the goods in issue are considered "made-up articles" because the coiled wire frame, the handles, the zippered lid and the nylon fabric shell have been assembled by sewing.

38. In particular, the CBSA argued that the goods in issue are similar to domestic laundry bags, as provided for in the examples of made-up textile articles listed in the *Explanatory Notes* to heading No. 63.07. It submitted that both laundry bags and the goods in issue are used to store dirty laundry and that both are collapsible for storage when not in use.[26]

39. The CBSA also submitted that laundry hampers or baskets and waste paper baskets are classified according to their constituent material (heading Nos. 39.26 [plastics], 46.02 [wicker], or 73.26 or 74.19 [metal]). Thus, it argued that the goods in issue should also be classified according to their constituent material, namely, textile.[27]

40. The CBSA submitted that, although the goods in issue meet a number of the conditions for classification in heading No. 94.03, the definition of "furniture" requires that the article not be included under other more specific headings of the nomenclature.[28] It argued that HBC erroneously suggests that any moveable item that is meant to be placed on the floor of a private dwelling is automatically considered furniture.[29]

Tariff Classification of the Goods in Issue

41. As indicated above, the Tribunal must determine whether the goods in issue are properly classified under tariff item No. 6307.90.99 as other made-up articles of textile materials, as determined by the CBSA, or should be classified under tariff item No. 9403.89.19 as furniture of materials other than metal, wood or plastics, for domestic purposes, as claimed by HBC.

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24. Abridged 8th ed., *s.v.* "*prima facie*"; Tribunal Exhibit AP-2010-005-06A, tab 8.
25. Tribunal Exhibit AP-2010-005-06A at paras. 17-19; *Transcript of Public Hearing*, 7 December 2010, at 30, 31, 35-38.
26. Tribunal Exhibit AP-2010-005-06A at para. 27.
27. *Ibid.* at paras. 30-38.
28. *Ibid.* at paras. 17, 28; *Transcript of Public Hearing*, 7 December 2010, at 31, 32, 34.
29. Tribunal Exhibit AP-2010-005-06A at para. 29; *Transcript of Public Hearing*, 7 December 2010, at 32-35.

42. As a preliminary matter, the Tribunal notes that Note 1(s) to Section XI excludes articles of Chapter 94 from being classified in Section XI (i.e. in Chapters 50 to 63). The Tribunal also notes the absence of any notes in Section XX (which includes Chapter 94) or Chapter 94 that exclude articles of Section XI or Chapter 63 from classification in Section XX. The absence of a corresponding exclusionary note in Section XX or Chapter 94 means that, before considering whether goods are classifiable in a heading of Section XI, the Tribunal must determine whether the goods can be classified in a heading of Chapter 94. On the basis of Note 1(s) to Section XI, goods are excluded from classification in Section XI if they can be classified in a heading of Chapter 94; therefore, if that is the case for the goods in issue, there is no need to determine whether they are classifiable in Section XI.

43. On the basis of the foregoing analysis, the Tribunal determines that, contrary to the CBSA's position, it is not possible for the goods in issue to be *prima facie* classifiable in both heading Nos. 63.07 and 94.03 by virtue of Note 1(s) to Section XI, which is a legally binding exclusionary note directly relevant to the competing headings. The CBSA's reliance on Rule 3 (b) of the *General Rules* suggests that it considers that the goods in issue are *prima facie* classifiable in two competing headings and that the goods cannot be properly classified, at the heading level, through the application of Rule 1 or 2. Otherwise, given the cascading nature of the *General Rules*, it would not have been necessary for it to invoke Rule 3 in order to determine the heading in which the goods in issue should be classified. In support of its position, the CBSA relied on the definition of "*prima facie*" found in *Black's Law Dictionary*, which states the following: "At first sight; on first appearance but subject to further evidence or information . . . ."[30] In the Tribunal's view, this definition does not prevent the Tribunal from considering legally binding section and chapter notes found in the tariff nomenclature or the *General Rules* when making a determination on *prima facie* classification. The CBSA's interpretation of *prima facie* classification suggests an approach to tariff classification that ignores the section and chapter notes. In this instance, the CBSA ignored Note 1(s) to Section XI when it suggested that the goods in issue are *prima facie* classifiable in both heading Nos. 63.07 and 94.03.

44. Furthermore, if the Tribunal were to accept the CBSA's interpretation of the term "*prima facie* classifiable", it would be contrary to subsection 10(1) of the *Customs Tariff* and Rule 1 of the *General Rules*. Rule 1 of the *General Rules* specifically provides that, ". . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes . . . ." Therefore, the Tribunal finds that, before it may have recourse to Rule 3 of the *General Rules* (as a result of the *prima facie* classification of goods in two or more headings), the relevant section and chapter notes must be taken into account under Rule 1 of the *General Rules*; any other approach to classification is contrary to the cascading nature of the *General Rules*.

45. The French version of the *General Rules*, which provides that recourse may be had to Rule 3 "*[l]orsque des marchandises paraissent devoir être classées sous deux ou plusieurs positions . . .*" ("[w]hen . . . goods are, *prima facie*, classifiable under two or more headings . . ."), supports this conclusion. The Tribunal fails to see how goods could "appear classifiable" or "seem classifiable" ("*paraissent devoir être classées*") in two competing headings when, by virtue of a relevant section note, goods that meet the terms of one such heading are expressly excluded from classification in the other heading. A similar conclusion was reached by the Tribunal in *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency*,[31] *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency*,[32] *Dynamic Furniture Corp. v. President of the Canada Border Services Agency*[33] and *Rutherford*

30. Tribunal Exhibit AP-2010-005-06A, tab 8.
31. (10 February 2011), AP-2009-045 (CITT) at para. 39 [*Sher-Wood Hockey*].
32. (2 June 2008), AP-2006-054 (CITT) at para. 24.

Controls International Corp. v. President of the Canada Border Services Agency,[34] although, in these cases, there were mutually exclusive notes found in the competing headings.

46. In finding that the goods in issue cannot be *prima facie* classifiable in both heading Nos. 94.03 and 63.07, by virtue of Note 1(s) to Section XI, the Tribunal is acting consistently with its prior case law. In *Sanus Systems v. President of the Canada Border Services Agency*,[35] the Tribunal found that, by virtue of Note 1(g) to Chapter 94 (which excluded furniture specially designed as parts or apparatus of heading Nos. 85.25 to 85.28 from classification in Chapter 94), the goods in issue were not *prima facie* classifiable in both heading Nos. 85.29 and 94.03. Similarly, in *Korhani Canada Inc. v. President of the Canada Border Services Agency*,[36] the Tribunal found a single relevant exclusionary note, specifically Note 1(t) to Section XI, which precludes the classification of articles of Chapter 95 in Section XI. The Tribunal proceeded to determine whether the goods were articles of Chapter 95 and, in particular, whether they could be classified in heading No. 95.03. The Tribunal determined that the goods were properly classified in heading No. 95.03 and, thus, that they were precluded from classification in Section XI. The Tribunal notes that the CBSA supplied no case law to support its position that goods may be *prima facie* classifiable in two headings despite the existence of a single exclusionary note relevant to the competing sections or chapters under consideration.

47. In this appeal, the Tribunal therefore considers that the terms of Note 1(s) to Section XI make it clear that the goods in issue are not *prima facie* classifiable in both headings proposed by the parties. Thus, the Tribunal will determine, on the basis of the evidence before it, whether the goods in issue meet the terms of heading No. 94.03 in accordance with Rule 1 of the *General Rules*. If the Tribunal determines that the goods in issue are in fact "other furniture" of heading No. 94.03, they will be excluded from classification in Section XI, and the Tribunal will then proceed to determine their proper classification at the subheading and tariff item levels in heading No. 94.03. If the Tribunal determines that the goods in issue do not constitute other furniture, it will then determine whether they can be classified in heading No. 63.07.

Are the Goods in Issue Furniture of Heading No. 94.03?

48. Heading No. 94.03 covers "[o]ther furniture and parts thereof".

49. 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."

50. The *Explanatory Notes* to Chapter 94 provide the following definition of "furniture":

> 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). . . .

33. (31 March 2009), AP-2005-043 (CITT) at para. 31.
34. (26 January 2011), AP-2009-076 (CITT).
35. (8 July 2010), AP-2009-007 (CITT).
36. (18 November 2008), AP-2007-008 (CITT).

51. Therefore, in order for the goods in issue to be considered furniture of heading No. 94.03, the Tribunal must have regard to the definition of "furniture" in the *Explanatory Notes* to Chapter 94. Accordingly, the goods in issue would need to 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; (v) they must be used to equip private dwellings; and (vi) the goods must not be included under another more specific heading of the nomenclature.

52. The Tribunal accepts the agreement reached between the parties that the goods in issue are movable articles, which are intended to be placed on the floor of a private dwelling when in use, and are used primarily to store laundry.[37] They are lightweight, are not packaged with any parts that would suggest that they are to be affixed to the ceiling, wall or floor, and are equipped with handles for carrying, thus allowing them to be picked up and carried. The Tribunal finds that the goods in issue are movable and, thus, meet the first condition.

53. The Tribunal notes that the term "article" is not defined for the purposes of the *Explanatory Notes* to Chapter 94. It was also not disputed by the parties that the goods in issue are considered articles within the meaning of Chapter 94. In *Kverneland Group North America Inc. v. President of the Canada Border Services Agency*[38] and in *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency*,[39] the Tribunal accepted the *Canadian Oxford Dictionary* definition of "article", which reads as follows: "**1** a particular or separate thing, esp. one of a set . . . ." Furthermore, in *Prins Greenhouses Ltd. v. Deputy M.N.R.*,[40] *PHD Canada Distributing Ltd. v. The Commissioner of Customs and Revenue*[41] and *Wolseley Canada Inc. v. President of the Canada Border Services Agency*,[42] the Tribunal accepted the definition of "article" as ". . . any finished or semi-finished product, which is not considered to be a material".[43] The Tribunal is satisfied that these previously accepted definitions of the word "article" are sufficiently broad to encompass the goods in issue; thus, they meet the second condition.

54. There is evidence to indicate that the goods in issue are designed to be placed on the floor when in use.[44] The Tribunal notes that the goods in issue may be collapsed for easy storage (for example, on a shelf or in a closet), as indicated on their packaging, but does not consider that they would be "in use" at that time. Therefore, the Tribunal concludes that the goods in issue have the essential characteristic of being constructed for placing on the floor or ground and, thereby, meet the third condition.

55. The Tribunal is satisfied that the goods in issue are used mainly with a utilitarian purpose to equip private dwellings. The *Canadian Oxford Dictionary* defines the term "utilitarian" as follows: "**1** designed to be practically useful rather than attractive; functional. . . ."[45] On the basis of this definition, the Tribunal concludes that the goods in issue, which are designed to be used practically to store laundry, are used mainly with a utilitarian purpose. On the basis of the agreed statement of facts, the Tribunal also concludes that the goods in issue are designed primarily for use in private dwellings[46] and, thus, meet the fourth condition.

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37. Tribunal Exhibit AP-2010-005-16A at paras 2-5.
38. (30 April 2010), AP-2009-013 (CITT) at para. 35.
39. (16 September 2009), AP-2008-012 (CITT) at para. 28.
40. (April 9, 2001), AP-99-045 (CITT).
41. (25 November 2002), AP-99-116 (CITT).
42. (18 January 2011), AP-2009-004 (CITT).
43. Department of National Revenue, Customs Notice N-879, "Administrative Policy—Tariff Codes 2100 and 2101", 23 June 1994, at 4; Customs Notice N-278, "Administrative Policy Tariff Item No. 9948.00.00", 27 April 1999.
44. Tribunal Exhibit AP-2010-005-16A at paras. 2, 5.
45. Second ed., *s.v.* "utilitarian".
46. Tribunal Exhibit AP-2010-005-16A at paras. 4, 5.

56. Therefore, the Tribunal concludes that the goods in issue meet the following conditions found in the definition of "furniture" in the *Explanatory Notes* to Chapter 94: the goods in issue are movable; they are articles; they have the essential characteristic of being constructed for placing on the floor or ground; they are used mainly with a utilitarian purpose; and they are used to equip private dwellings. However, the *Explanatory Notes* to Chapter 94 do not stipulate that goods meeting all these conditions must be classified in that chapter and nowhere else in the nomenclature.

57. The Tribunal notes that the *Explanatory Notes* to Chapter 94 stipulate that ". . . the term furniture means . . . articles (**not included** under other more specific headings of the Nomenclature) . . . ." The Tribunal interprets this text to mean that, even if the goods in issue were to meet the first five conditions listed in the definition of "furniture", they would not necessarily be classified as furniture of heading No. 94.03 if the Tribunal finds that they are included in a more specific heading of the nomenclature.

58. The Tribunal sees no reason to ignore this proviso included in the definition of "furniture". Section 11 of the *Customs Tariff* provides that, "[i]n interpreting the headings and subheadings, regard shall be had to . . . the Explanatory Notes to the Harmonized Commodity Description and Coding System . . . ." Furthermore, the Federal Court of Appeal's decision in *Suzuki* emphasized that the *Explanatory Notes* should be respected unless there is a sound reason to do otherwise.[47]

59. Therefore, because of the proviso ". . . **not included** under other more specific headings of the Nomenclature . . ." found in the definition of "furniture" in the *Explanatory Notes* to Chapter 94, the Tribunal must consider whether the goods in issue are more specifically described in heading No. 63.07 before making a final determination on the classification of the goods in issue in heading No. 94.03.

Are the Goods in Issue More Specifically Described as Made-Up Articles of Heading No. 63.07?

60. The Tribunal notes that both heading Nos. 63.07 and 94.03 include a proviso that, in order for goods to be classified in either of these headings, they cannot be included in more specific headings of the nomenclature. For example, the first paragraph of the *Explanatory Notes* to heading No. 63.07 reads as follows: "This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature." Therefore, the Tribunal must determine which of the two competing headings more specifically includes the goods in issue.

61. The Tribunal disagrees with HBC's argument that heading No. 63.07 cannot be a more specific heading of the nomenclature (as per the proviso ". . . **not included** under other more specific headings of the Nomenclature . . ." found in the *Explanatory Notes* to Chapter 94) because the *Explanatory Notes* to that heading contain a similar proviso. HBC submitted that, once the goods in issue meet the physical characteristics of the definition of furniture, they are considered to be articles of Chapter 94 and cannot be classified in heading No. 63.07 by virtue of Note 1(s) to Section XI, which excludes articles of Chapter 94 from Section XI.[48] Therefore, HBC argued that the proviso found in the *Explanatory Notes* to heading No. 94.03 should not be used to override Note 1(s) to Section XI. However, the Tribunal considers that, at this stage of its analysis, the proviso found in the *Explanatory Notes* to Chapter 94 must be explored and that Note 1(s) to Section XI does not prevent the Tribunal from reviewing the terms of heading No. 63.07, as the Tribunal has not yet determined whether the goods in issue are classifiable in heading No. 94.03.

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47. *Suzuki* at para. 13: "In the New Shorter Oxford English Dictionary (Oxford: Clarendon Press, 1993) 'regard' means 'to consider, heed, take into account, pay attention to, or take notice of'. Essentially, then, the Explanatory Notes are intended by Parliament to be an interpretive guide to tariff classification in Canada and must be considered within that context. To satisfy their interpretive purpose, and to ensure harmony within the international community, the Explanatory Notes should be respected unless there is a sound reason to do otherwise."

48. *Transcript of Public Hearing*, 7 December 2010, at 23.

62. Note 1 to Chapter 63 states that Sub-chapter I (which includes heading No. 63.07) covers made-up articles of any textile fabric. The terms of heading No. 63.07 and the related chapter note and *Explanatory Notes* indicate to the Tribunal that, in order for the goods in issue to be classified in heading No. 63.07, they must meet the following conditions: (i) they must be articles; (ii) they must be made-up; (iii) they must be composed of a textile fabric; and (iv) they must meet the proviso of not being more specifically described in other chapters of Section XI or elsewhere in the nomenclature. As well, the Tribunal finds Note 5 of the *Explanatory Notes* to heading No. 63.07 to be relevant to its consideration of whether the goods in issue fall in that heading. Note 5 provides that heading No. 63.07 includes, in particular, "[d]omestic laundry or shoe bags . . . and similar articles."

63. The Tribunal has stated that the goods in issue are articles and, thus, meet the first condition.

64. Note 7 to Section XI provides the meaning of "made-up". The Tribunal notes that there are six possible definitions provided for "made-up" and that goods must meet only one of these definitions to be considered "made-up". The Tribunal considers that Note 7(e) is the most relevant to the goods in issue.[49] This note reads as follows:

> 7. For the purpose of this Section, the expression ''made up'' means:
>
> . . .
>
> (e) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded);
>
> . . .

65. The Tribunal notes that the agreed statement of facts filed by the parties describes the goods in issue as having a coiled steel wire frame sewn into the fabric. The Tribunal observed that the handles and lid are also sewn onto the goods in issue and that the zipper is sewn into the lid.[50] The Tribunal concludes from the evidence that the goods in issue meet the definition of "made-up" in Note 7(e) to Section XI, as they have been assembled by sewing and, thus, meet the second condition.

66. Finally, with respect to the third condition, the Tribunal notes that the terms "textile" and "fabric" are not defined in the *Customs Tariff*. The *Explanatory Notes* to Section XI state that the section covers raw materials of the textile industry (silk, wool, cotton, man-made fibres, etc.). The *Explanatory Notes* to Chapter 63 state that the chapter covers made-up textile articles of any textile fabric (woven or knitted fabric, felt, nonwovens, etc.).

67. The *Canadian Oxford Dictionary* defines "textile" as follows:

> • ***noun*** **1** any woven fabric. **2** any of various fabrics which do not require weaving. **3** natural or synthetic fibres or yarns suitable for being spun and woven or manufactured into cloth etc. **4** (in *pl.*) the manufacture or production of woven or unwoven fabrics. • ***adjective*** **1** used in or relating to the production of textiles (*textile mill*). **2** suitable for weaving (*textile materials*). **3** woven.[51]

It also defines "fabric" as ". . . a woven, knitted, or felted material; a textile. . . ."[52]

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49. This interpretation of Note 7 is consistent with previous Tribunal case law. See, for example, *BMC Coaters Inc. v. President of the Canada Border Services Agency* (6 December 2010), AP-2009-071 (CITT); *Sher-Wood*.
50. Tribunal Exhibit AP-2010-005-016A; *Transcript of Public Hearing*, 7 December 2010, at 4, 5, 29.
51. Second ed., *s.v.* "textile".
52. *Ibid.*, *s.v.* "fabric".

68. On the basis of the aforementioned *Explanatory Notes* and dictionary definitions, the Tribunal considers that "textile fabric" means a natural or synthetic material that is manufactured using a process such as weaving or knitting, or otherwise made into a felt or nonwoven, using raw materials, such as silk, wool, cotton, man-made fibres, etc. According to the parties' agreed statement of facts, the goods in issue are described as being made from nylon fabric.[53] The Tribunal notes that, according to the *Explanatory Notes* to Section XI, Note 1 to Chapter 54 and the *Explanatory Notes* to Chapter 54, nylon is a raw material of the textile industry.[54] Therefore, the Tribunal concludes that the goods in issue are made from textile fabric.

69. On the basis of the foregoing analysis, the Tribunal is satisfied that the goods in issue meet the terms of heading No 63.07 and concludes that they are made-up articles of textile fabric.

70. Note 5 of the *Explanatory Notes* to heading No. 63.07 provides that heading No. 63.07 includes, in particular, "[d]omestic laundry or shoe bags . . . and similar articles." Thus, the Tribunal considers that, in order for the goods in issue to be more specifically included in heading No. 63.07 than in heading No. 94.03, it must find that they are articles similar to "[d]omestic laundry . . . bags" ("*sacs à linge sale* . . . à *usages domestiques*") as per Note 5 of the *Explanatory Notes* to heading No. 63.07.

71. In the French version of Note 5 of the *Explanatory Notes* to heading No. 63.07, the goods covered by the heading include "*[l]es sacs à linge sale, sacs et pochettes à chaussures . . . et sacs ou sachets analogues en toile fine à usages domestiques*" ("[l]aundry bags, shoe bags and pouches . . . and similar bags or sachets of fine fabric for household use"). In other words, the Tribunal needs to determine if the pop-up laundry hampers (*panier à linge rond pliant*[55]) are articles similar to domestic laundry bags.

72. Comparing the English and French versions of Note 5 to the *Explanatory Notes* to heading No. 63.07, the Tribunal recognizes that the wording of the French version differs slightly from the English version, with the inclusion of the words "*en toile fine*" (of fine fabric). However, the Tribunal finds that the difference in wording does not contribute to a different interpretation of the *Explanatory Notes*, but rather assists the Tribunal in the determination of their proper meaning.

73. The Tribunal refers to the definition of "*toile*" (fabric) found in *Le Nouveau Petit Robert*, which states as follows: ". . . *Tissu de l'armure la plus simple (armure unie), fait de fils de lin, de coton, de chanvre, etc. . . . Toile fine, serrée . . .*" (Simply woven [plain] fabric made of flax, cotton, hemp, etc. . . . Fine fabric, tight[ly woven]).[56] The Tribunal considers that the ordinary definition of "*toile*" does not explicitly exclude nylon fabric, nor does the *Le Nouveau Petit Robert* limit the definition of "*toile*" to a specific kind of fabric.

74. The Tribunal refers to its previous decisions in which it has interpreted the meaning of the word "similar" for the purposes of tariff classification. It is of the view that the test for determining a "similar article" is not a strict one. For example, in the Tribunal's decision in *Ivan Hoza v. President of the Canada Border Services Agency*, the Tribunal was of the opinion that goods that were similar had to share important characteristics and have common features but that "similar" did not mean "identical".[57]

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53. Tribunal Exhibit AP-2010-005-016A; *Transcript of Public Hearing*, 7 December 2010, at 4, 5, 29.
54. The *Explanatory Notes* to Section XI read as follows: "In general, Section XI covers raw materials of the textile industry (silk, wool, cotton, man-made fibres, etc.), semi-manufactured products (such as yarns and woven fabrics) and the made up articles made from those products. . . ." Note 1 to Chapter 54 reads as follows: "Throughout the Nomenclature, the term 'man-made fibres' means staple fibres and filaments of organic polymers produced by manufacturing processes . . . . The terms 'man-made', 'synthetic' and 'artificial' shall have the same meanings when used in relation to 'textile materials'." The *Explanatory Notes* to Chapter 54 read as follows: "The main **synthetic fibres** are: . . . (4) **Nylon** . . . ."
55. Tribunal Exhibit AP-2010-005-04A, tab 1.
56. 2006, *s.v.* "*toile*".
57. (6 January 2010), AP-2009-002 (CITT) at paras. 25-26.

75. Moreover, in *Nailor Industries Inc. v. Deputy M.N.R.*, the Tribunal was of the opinion that appliances that were similar would have to possess the same general attributes.[58]

76. The Tribunal finds that, for the goods in issue to be similar to domestic laundry bags, the goods in issue must closely resemble, possess the same general attributes and capability of, be of the same nature or kind but not identical to, and have common characteristics with domestic laundry bags.

77. The parties agreed that the goods in issue are used to store laundry,[59] which is the function of laundry bags.

78. The Tribunal is persuaded that the goods in issue are for domestic use. As in its analysis of heading No. 94.03, the Tribunal has already reached the conclusion that the goods in issue are used to equip "private dwellings", which is confirmed by the parties' agreed statement of facts.

79. On the basis of the evidence, the Tribunal finds that the goods in issue share sufficient characteristics with domestic laundry bags to be considered similar items. Both items are used primarily to contain and store domestic laundry, both items are movable, allowing laundry to be easily transported, and both items are collapsible for easy storage.[60] In addition, both items are made of textile fabric. The Tribunal notes that the composition of the textile fabric of each item is not relevant, as heading No. 63.07 covers made-up articles of any textile fabric.

80. In response to HBC's argument that the goods in issue are not similar to laundry bags because of the coiled steel wire that gives the goods in issue their shape and ability to be placed on the floor,[61] the Tribunal considers that the goods in issue need not be identical in shape in order to be similar in composition and use to laundry bags. The Tribunal notes the *Explanatory Notes* to Chapter 63, which state that "[t]he classification of articles in this sub-Chapter is not affected by the presence of minor trimmings or accessories of furskin, metal (including precious metal), leather, plastics, etc." The Tribunal concludes that the steel wire, which is included in the composition of the goods in issue, is a minor trimming or accessory and, therefore, does not affect the classification of the goods in issue in heading No. 63.07. The Tribunal also notes that, although there is some indication that the goods in issue may have other uses, as stated earlier, both parties agreed that the goods in issue are used primarily to store laundry.[62] Therefore, the Tribunal finds that neither argument is sufficient to determine that the goods in issue are not similar to laundry bags or other bags of "*toile fine*" used for domestic purposes, as described in the *Explanatory Notes* to heading No. 63.07.

81. The Tribunal is also not persuaded by the CBSA's argument that the goods in issue should be classified according to their constituent material. To support its argument, the CBSA submitted that laundry hampers, laundry baskets and wastebaskets, composed of wicker, iron or steel, are all classified according to their material of composition. The CBSA supplied dictionary definitions of "hamper" and "basket" to argue that a laundry hamper is also known as a laundry or clothes basket[63] and provided several examples to illustrate this argument. The Tribunal did not find this argument to be relevant, as tariff classification must be determined in accordance with the *General Rules* and not by analogy to other items specifically provided for in the *Customs Tariff*.

58. (13 July 1998), AP-97-083 and AP-97-101 (CITT) at 5.
59. Tribunal Exhibit AP-2010-005-16A.
60. *Ibid.* at para. 27.
61. *Transcript of Public Hearing*, 7 December 2010, at 27.
62. Tribunal Exhibit AP-2010-005-16A.
63. *Ibid.* at paras. 31-33, tabs 9, 10.

82. Therefore, the Tribunal determines that the goods in issue are articles similar to domestic laundry bags, as provided for by Note 5 of the *Explanatory Notes* to heading No. 63.07.

83. As a result, the Tribunal finds that the goods in issue are properly classified in heading No. 63.07 as articles similar to domestic laundry bags, as they are specifically included in the list of articles found in the *Explanatory Notes* to heading No. 63.07, which describe the goods that are classifiable in that heading. The Tribunal is of the view that this description more precisely identifies the goods in issue than "other furniture and parts thereof". The Tribunal finds that Note 1 to Chapter 63 specifically describes their textile composition and that the *Explanatory Notes* describe their primary use and true purpose, which is to contain and store domestic laundry.

84. By contrast, Note 2 to Chapter 94 covers just one characteristic of the goods in issue (namely, that it be designed for placing on the floor or ground), and the definition of "furniture" provided for in the *Explanatory Notes* to Chapter 94 simply describes some of the generic features of the goods in issue. Neither the section or chapter notes nor the relevant *Explanatory Notes* to the chapter or heading provide a more specific description of the character or nature of the goods in issue than does heading No. 63.07, which describes the material composition of the goods, as well as their primary use.

85. Although the goods in issue have the characteristics to meet some part of the definition of "furniture" found in the *Explanatory Notes* to Chapter 94, the determination that heading No. 63.07 more specifically includes the goods in issue means that the goods in issue do not meet the proviso included in the definition of "furniture" of Chapter 94 that the goods in issue are ". . . **not included** under other more specific headings of the Nomenclature". Since, the goods in issue do not meet all the requirements of the definition of "furniture" included in Note 1(A) of the *Explanatory Notes* to Chapter 94, they are not classifiable in heading No. 94.03.

86. In accordance with Rule 1 of the *General Rules*, the goods in issue are properly classified in heading No. 63.07. Pursuant to Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, it follows that the goods in issue are properly classified under tariff item No. 6307.90.99.

DECISION

87. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 6307.90.99 as other made-up articles of other textile materials.

88. Therefore, the appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member