CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, June 25, 1999

Appeal Nos. AP-98-043, AP-98-044 and AP-98-051

IN THE MATTER OF appeals heard on February 19, 1999, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated April 17, June 10 and July 24, 1998, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

REGAL CONFECTIONS INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

Appeal Nos. AP-98-043 and AP-98-051 are dismissed, and Appeal No. AP-98-044 is allowed.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal Nos. AP-98-043, AP-98-044 and AP-98-051

REGAL CONFECTIONS INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

These are three appeals regarding the tariff classification of the following products: candy-filled baby bottles labelled "Dino•Rocks" (Baby Bottles) in Appeal No. AP-98-043; blister cards containing a motorized candy dispenser and two packages of PEZ candy (Power PEZ) in Appeal No. AP-98-044; and clear plastic toy banks in the shape of a duck (Duck Banks) in Appeal No. AP-98-051. Appeal Nos. AP-98-043 and AP-98-044 raise the issue of whether the Baby Bottles and Power PEZ are properly classified under tariff item No. 1704.90.90 as other sugar confectionery not containing cocoa, as determined by the respondent, or should be classified as other toys, reduced-size ("scale") models and similar recreational models under tariff item No. 9503.90.00 for the Baby Bottles, and as other toys, other than of metal, incorporating a motor under tariff item No. 9503.80.90 for the Power PEZ, as claimed by the appellant. Appeal No. AP-98-051 raises the issue of whether the Duck Banks are properly classified under tariff item No. 3923.90.90 as other plastic containers, as determined by the respondent, or should be classified under tariff item No. 9503.90.00 as other toys, as claimed by the appellant.

HELD: Appeal Nos. AP-98-043 and AP-98-051 are dismissed, and Appeal No. AP-98-044 is allowed. Regarding the Baby Bottles, unable to classify the goods according to Rule 1 of the *General Rules for the Interpretation of the Harmonized System* (the General Rules), the Tribunal moves to Rule 3 (b), as these goods consist of more than one product. The Tribunal has, thus, to determine the essential character of the goods as either toys in heading No. 95.03 or candy in heading No. 17.04. On balance, the evidence that the Baby Bottles are, first and foremost, toys was not convincing, rather the bottles provide novelty packaging that contributes to the marketing of the candy. These goods are, thus, properly classified under tariff item No. 1704.90.90 as other sugar confectionery not containing cocoa.

With respect to the Power PEZ, these goods again cannot be classified solely on the basis of Rule 1 of the General Rules. Rule 3 (b) is the one to which the Tribunal is directed, given that the blister card contains the motorized candy dispenser, which could be classified as a toy, and the two packages of candy, which could be classified as confectionery. It is the Tribunal's opinion that, for purposes of classification, novelty packaging is not usually determinative; however, as in the case of the Power PEZ, the novelty is so extensive that it actually transforms the essential character of the product. The play value of the Power PEZ predominates over the candy. It is designed to be played with prior to the candy being eaten and even prior to opening the package. Furthermore, the play value is also durable, as evidenced by the fact that the Power PEZ dispenser has a replaceable battery and is a collectible. The Tribunal, therefore, agrees with the appellant, given the fact that the play value of the Power PEZ not only endures, but precedes any eating of the candy. As a result, the Power PEZ should be classified as other toys, other than of metal, incorporating a motor under tariff item No. 9503.80.90.

Regarding the Duck Banks, the Tribunal is of the view, based on Rule 1 of the General Rules, that these goods are properly classified under tariff item No. 3923.90.90. Although their many features make

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them appealing, the Duck Banks are plastic containers, not toys, at the time of importation. They are used by the appellant as containers to sell all kinds of candy. Their secondary use, as premium products for the retailer, is irrelevant for the purpose of tariff classification. What retailers do with the Duck Banks when they are empty, whether they put something else in them or sell them as toys, is merely circumstantial and has no bearing on the tariff classification of these goods.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 19, 1999
Date of Decision:	June 25, 1999
Tribunal Member:	Patricia M. Close, Presiding Member
Counsel for the Tribunal:	Gilles B. Legault Michèle Hurteau
Clerks of the Tribunal:	Anne Turcotte Margaret Fisher
Appearances:	Darrel H. Pearson, J. Peter Jarosz and Kenneth H. Sorensen, for the appellant Louis Sébastien, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-98-043, AP-98-044 and AP-98-051

REGAL CONFECTIONS INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

REASONS FOR DECISION

These are three appeals under section 67 of the *Customs Act*[1] from decisions of the Deputy Minister of National Revenue with respect to the importation of the following products: candy-filled baby bottles labelled "Dino•Rocks" (Baby Bottles) in Appeal No. AP-98-043; blister cards containing a motorized candy dispenser and two packages of PEZ candy (Power PEZ) in Appeal No. AP-98-044; and clear plastic toy banks in the shape of a duck (Duck Banks) in Appeal No. AP-98-051.

The Baby Bottles are small plastic bottles, approximately 3 in. high and 1 in. in diameter, fashioned to look like real baby bottles. They are filled with candy. At the time of importation, in November 1995, the Baby Bottles were marketed as "Dino•Rocks," the design on their label being that of a baby dinosaur on a bicycle. The Power PEZ, in turn, has an electro-mechanical motorized candy dispenser powered by a replaceable "AAA" battery. The instructions on the package indicate that the dispenser contains 12 cavities into which the PEZ candy, also in the package, can be placed by pushing the power button. To eject the candy, the button is pushed again. As to the Duck Banks, they are made of transparent plastic and have a duck-like shape, as their name indicates. Measuring 14 in. high and 6 in. in diameter and with a capacity of 4.7 L, according to the supplier's catalogue, the Duck Banks have a loop, a hat, eyes, a beak, a buckle and legs made of plastic. The hat contains a slot that can be cut to allow the user to deposit money.

Appeal Nos. AP-98-043 and AP-98-044 raise the issue of whether the Baby Bottles and Power PEZ are properly classified under tariff item No. 1704.90.90 of Schedule I to the *Customs Tariff*[2] as other sugar confectionery not containing cocoa, as determined by the respondent, or should be classified as other toys, reduced-size ("scale") models and similar recreational models under tariff item No. 9503.90.00 for the Baby Bottles, and as other toys, other than of metal, incorporating a motor under tariff item No. 9503.80.90 for the Power PEZ, as claimed by the appellant. Appeal No. AP-98-051 raises the issue of whether the Duck Banks are properly classified under tariff item No. 3923.90.90 as other plastic containers, as determined by the respondent, or should be classified under tariff item No. 9503.90.00 as other toys, as claimed by the appellant.

Mr. Henri Neufeld, Vice-President of Regal Confections Inc., was the only witness who appeared before the Tribunal at the hearing. He described the appellant as a sales and distribution organization. Mr. Neufeld's functions include the design and development of the products imported into and distributed in Canada by the appellant and the negotiations of the prices of the products which the appellant purchases from its suppliers. Mr. Neufeld is also involved in determining the selling prices of the products and, thus, is responsible for the profitability of the company. With respect to the evolution of the appellant's activities,

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).

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Mr. Neufeld said that, at some point in the 1970s and early 1980s, he and his brother became involved in the everyday operation and administration of the company developed by their father as a distributor of candy. Realizing that changes in the confectionery industry offered tremendous opportunities for the sale of novelty and "interactive toys",[3] the brothers decided to get involved in the toy business as well. In this regard, Mr. Neufeld introduced, as Exhibit A-1, three catalogues describing the appellant's lines of novelties and interactive candy toys. Referring to the expression "interactive toys", Mr. Neufeld stated that this type of product is basically a toy with a token amount of candy. It is designed and marketed for its toy value, the candy being an added feature. Mr. Neufeld also introduced as evidence the definition of the word "novelty" contained in *The Concise Oxford Dictionary of Current English*,[4] which reads as follows: "new or unusual thing or occurrence; novel character of something; small decoration or toy of novel design".[5]

With respect to the Baby Bottles, Mr. Neufeld said that the design and image of those products comply exactly with the above definition as toys of "novel design." He also said that the Baby Bottles meet the definition of "toy" in *The Concise Oxford Dictionary of Current English*,[6] which reads: "a plaything, esp. for a child . . . a model or miniature replica of a thing, esp. as a plaything (*toy gun*) . . . a thing, esp. a gadget or instrument regarded as providing amusement or pleasure."[7] He explained that the company which manufactures those products is a manufacturer of toys, toys with candy, toy novelties and interactive toys. He further explained that the shipping documents refer to these products as candy toys and toy baby bottles. He stressed that the Baby Bottles are indeed miniature replicas of real baby bottles, featuring most of their characteristics, and, for comparison's sake, he introduced real baby bottles as evidence. Mr. Neufeld also explained that identical products, albeit marketed now under a slightly different name, have on their packaging the notation "ages three plus" in accordance with *Toys: Age Classification Guidelines*, published in 1998 by the Product Safety Bureau of the Health Protection Branch at the Department of Health.[8] He further explained that the labelling of the products changed from "Dino•Rocks" to "Big Baby" because the appellant had hoped to raise the level of attractiveness of the products as toy baby bottles. Referring to the new graphic of the products which shows the face of a baby wearing a bonnet, Mr. Neufeld testified that the Baby Bottles are, first and foremost, to be used as toy baby bottles by children who play with dolls and use the bottles as replicas for feeding their dolls. He pointed out that they are also used by children as water pistols and even by older ones for mimicking babies. In terms of economic value, Mr. Neufeld testified that the bottles account for over 60 percent of the cost of the products.[9] The products are sold to wholesalers and retailers across Canada, including mass merchandisers such as Wal-Mart, Zellers and Toys "R" Us.

Regarding the Power PEZ, Mr. Neufeld testified that, in addition to the features described at the outset of these reasons, the 12 cavities of the motorized candy dispenser can move in a counterclockwise direction, while the circular caddy rotates clockwise, hence creating a kaleidoscope effect and a whirring noise. The candy dispenser has a belt clip on the back for added fun. He added that the Power PEZ comply with toy standards, as the package refers to "Ages 4 and up." Referring to Exhibit A-1, Mr. Neufeld stressed that the Power PEZ can be found in the catalogues, including at page 10 of the Easter catalogue, in the same

3. Mr. Neufeld referred, at different times, to interactive candies and then corrected himself, calling them interactive toys. In fact, the appellant's 1998 Christmas catalogue, Exhibit A-1, refers to them as "interactive candy toys."
4. Seventh ed. (Oxford: Oxford University Press, 1989).
5. *Ibid.* at 693.
6. Eighth ed. (Oxford: Clarendon Press, 1990).
7. *Ibid.* at 1291.
8. Exhibit A-3.
9. The exact figure was put on the record as confidential information under section 46 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.).

area as "toy telephones and toy cameras".[10] The Power PEZ is manufactured by Hasbro, Inc. (Hasbro) a well-known toy manufacturer. Again, Mr. Neufeld said that the candy in the Power PEZ is a secondary or token part of the products. The dispensers account for over 80 percent of the cost of the products, while the candy represents approximately 5 percent. Also, while the retail price of the 155-g dispenser varies from $4.99 to $5.99, the retail value of the two 17-g packages of candy would be about $0.25 or $0.30. In addition to being distributed to the same retailers and mass merchandisers that sell the Baby Bottles, the Power PEZ is also offered in Ontario in a toy and novelty retail chain called "….it store". Mr. Neufeld entered as evidence, in this regard, a letter from the Vice-President of the "….it store" chain, corroborating Mr. Neufeld's testimony as to the low interest which Power PEZ buyers have in the candy because "[i]t is the toy they want".[11] Referring to pictures of Power PEZ displays in an "….it store", Mr. Neufeld indicated that they can be found next to assorted plush toy dolls. Mr. Neufeld added that the blister card is designed to attract customers, who can play with the item given that the activation button of the Power PEZ is uncovered. Customers can thus realize the play value of the product prior to opening the package. Relying again on the definition of the word "toy" that he introduced into the record while testifying on the Baby Bottles, Mr. Neufeld said that the Power PEZ meet all aspects of that definition.

As to the Duck Banks, Mr. Neufeld testified that these goods are imported as empty toys and only filled with candy when sold by the appellant. The manufacturer of these products is Niagara Giocattoli S.p.A., of Italy.[12] Mr. Neufeld said that he does not consider them containers, since they are imported and offered as a sales incentive to enhance the appellant's sales volumes and because, unlike other candy containers, they are unstable, difficult to open and too high for children and have no designated area for a label describing what they contain. These products are sold principally in convenience stores as a premium, it being understood, according to Mr. Neufeld, that, once the products are empty, the stores will be able to sell them separately as toys, thus realizing a much larger profit. When shipped to retailers, the Duck Banks with the candy inside are individually boxed in shipping cartons on which the design of the products appears without candy in them. Then, referring to a National Customs Ruling that the appellant had sought on a similar product, called "Jumbo Chick Toy Bank," Mr. Neufeld stressed that it was first classified as "banks", but the decision was revoked pending an appeal regarding the Duck Banks.[13]

In cross-examination, Mr. Neufeld confirmed that the appellant only sells products that contain candy. He clarified that the appellant's design function with regard to the Power PEZ was what he called the "Canadianization" of the products, i.e. making them suitable to meet Canadian regulations. The mould for the Baby Bottles is, according to Mr. Neufeld, the appellant's mould, as it worked with the producer, Candy Novelty Works Ltd., which is based in Kowloon, Hong Kong.

As to where the goods in issue are displayed in the appellant's major retail stores and in mass merchandisers' stores, Mr. Neufeld, while reiterating that the appellant is a nationwide sales and distribution organization, claimed that he did not know, nor did he know if any of the appellant's products had ever been tested by the Canadian Toy Testing Council. He stated that, under the Canadian toy labelling guidelines, there are no obligations, to his knowledge, to include an age group on the products. Mr. Neufeld recognized, on the other hand, that there is a legal obligation to list, on the Baby Bottles, the ingredients of the candy that they contain.

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10. Exhibit A-1 (referred to as "Candy Camera" and "Candi Phone" in the appellant's 1999 Easter catalogue at 11 and in the appellant's 1998 Christmas catalogue at 6 and 7).
11. Exhibit A-9.
12. Exhibit A-11.
13. Tribunal Exhibits AP-98-051-23.4 and AP-98-051-24.2.

Mr. Neufeld reiterated that the play value of the Baby Bottles is immediately apparent as they can be used as toys when either full of candy or empty, with a doll or by a child who is just play acting. They are not, however, designed to be used with a specific doll. With respect to the Power PEZ, Mr. Neufeld said that the whirring noise when the button on the dispenser is pushed is part of the play value of a toy, unlike a mechanical device where one would want to hide the sound of the mechanism. Mr. Neufeld confirmed that the appellant does not have a royalty agreement for the use of the PEZ trademark, rather it purchases the product from Hasbro, which would have made arrangements to obtain the licence. The appellant, Mr. Neufeld clarified, sells candy refills offered in a blister card that contains eight packages; however, this represents an insignificant portion of the appellant's business as compared to the sales of the Power PEZ. Again, Mr. Neufeld described the ingredients contained in the candy which, he noted, are listed on the blister card. He stated that only PEZ candy was likely to fit into the dispenser. When asked by counsel for the respondent to fill a Power PEZ with PEZ candy, Mr. Neufeld obviously had some difficulty. As to the Duck Banks, Mr. Neufeld said that they are imported empty and shipped in very large plastic bags that contain 50 or more of them. Once imported into Canada, they have been filled over the last four to five years with candy of a dozen different kinds. Mr. Neufeld said that, sometimes, the coin slot is cut open at the time of importation.

Mr. Neufeld was asked to read a letter that he wrote, an excerpt of which reads as follows:

> The confectionery business today and for the past 30 years has always used plastic toys and other premiums in support of the sale of confectionery products. Sometimes these plastic toys are given away with the purchase of a certain volume of candy. Alternatively such plastic toy premiums are actually filled with the candy.
>
> In both cases, the concept is the same. The retailer buys candy and gets a free toy. It may be more attractive when the candy is inside the premium but in fact the [principle] is the same. We could easily offer the retailer the Plastic Toy Duck empty with a bag of 120 Crazy Fruits [beside] it and then he could decide to temporarily use the Plastic Toy Duck as a display mode or not but either way it is understood that the Plastic Toy Duck is not a display but rather is a separate toy premium.[14]

In response to the Tribunal's question concerning the meaning of the expression "interactive toys" that Mr. Neufeld used during his testimony, he admitted that he did not know what it meant, but that "the word 'interactive' today has a modern panache that is derived from the computer world".[15] He stated, however, that, for the appellant, an interactive toy would have to include candy, albeit as a marginal element. He stated that the appellant always describes its products as "interactive toys with candies".[16] Mr. Neufeld admitted that older children could and do drink from the Baby Bottles. In response to the Tribunal's further query, Mr. Neufeld explained what he perceives as the customers' decision-making process when they purchase the appellant's Baby Bottles. He affirmed that the only justification for the higher selling price was the attractiveness of the products as play items. This is important for young children when deciding whether to buy those products. Regarding the Power PEZ, Mr. Neufeld clarified that his testimony as to the minimal percentage of sales that the PEZ refills represent for the appellant was principally in terms of dollar value rather than volume. The Power PEZ retail for $4.99 to $5.99, and the refills retail for $0.99 to $1.49. As to the Duck Banks, the Tribunal asked Mr. Neufeld to comment regarding an excerpt in the appellant's supplier catalogue that indicates that it "specialises in novelty items: push along toys, promotional gadgets, toy for sweet manufacturers, fun-fair and carnival toys, transparent containers for sweet or any things." While admitting that the Duck Banks could be considered promotional gadgets or toys for sweet

14. Tribunal Exhibit AP-98-051-24.1 at 2.
15. *Transcript of Public Hearing*, February 19, 1999, at 107.
16. *Transcript of Public Hearing*, February 19, 1999, at 109. However, the Tribunal noted previously that, in the appellant's 1998 Christmas catalogue, the expression used is "interactive candy toys."

manufacturers, Mr. Neufeld pointed out that this supplier makes a lot of products, such as small plastic containers which might be filled with toys, candy or soap bubbles, which the consumer buys as a complete package. This, however, is not the case for the Duck Banks supplied by the appellant, as they are not sold directly to consumers.

In argument, counsel for the appellant dealt with the different goods in issue in sequence. With respect to the Baby Bottles, counsel argued that these goods are manufactured by Candy Novelty Works Ltd., a manufacturer of toys. Counsel added that the reference to the word "novelty" in the name of that company reflects its involvement in the manufacture of "toys" of novel design, as that word is defined in the dictionary. Counsel also argued that the definition of the word "toy" includes a replica and that the Baby Bottles are replicas, as established in evidence. Counsel referred to what he thought was the very broad definition given to the word "toy" in *Zellers Inc.* v. *The Deputy Minister of National Revenue*.[17] Counsel also argued that, as provided in section 10 of the *Customs Tariff*, the classification of goods must be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[18] (the General Rules). In this regard, counsel first submitted that Rule 1 of the General Rules applies, since the Baby Bottles, as the evidence shows, meet three tests which, he alleged, determine the application of that rule, namely, the appearance test, the design and best use test and the marketing and distribution test.[19] Furthermore, as the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[20] (the Explanatory Notes) to Chapter 95 state, articles of that chapter may be made of any material; the fact that candy is part of the Baby Bottles does not preclude their classification as toys. In counsel's view, the candy is entirely ancillary. However, if Rule 1 does not apply, Rule 3 (b), which requires consideration of the essential character, is the next one that applies. Again, under Rule 3 (b), the evidence leads, in his view, to the conclusion that the essential character of the Baby Bottles is that of a miniature. Counsel added, in this regard, that the bottles represent 60 percent of the total cost of the products, which is a factor to take into account, pursuant to the Explanatory Notes to Rule 3 (b). Again, if the Tribunal concludes that Rule 3 (b) is not relevant, then Rule 3 (c), which provides for the application of the heading which occurs last in numerical order, is the next applicable one. In such a case, the Baby Bottles are classified as toys, given that Chapter 95 follows Chapter 17. In the alternative, counsel asked the Tribunal to classify the Baby Bottles in heading No. 95.02 as accessories for dolls. This classification, according to counsel, is supported by Mr. Neufeld's testimony and is in keeping with the definition of the word "accessory" contained in a customs memorandum.[21] Once more, counsel relied on the three tests referenced above to submit that the Baby Bottles can be classified as accessories for dolls according to Rule 1. If Rule 1 is not applicable, counsel argued that, because of their essential character, the Baby Bottles can be classified as accessories for dolls according to the relevant rule. However, if the Tribunal forms the impression that neither tariff classification applies, then Rule 3 (c) directs the Tribunal to the last heading in numerical order.

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17. Canadian International Trade Tribunal, Appeal No. AP-97-057, July 29, 1998, at 7, in which the Tribunal stated that, "[i]n essence, a toy is something from which one derives amusement or pleasure. Toys can replicate things or animals or have forms of their own. They can be of hard or stiff construction, or be soft and cuddly. They can be designed for manipulation or for display on a shelf. They can be cute and friendly in presentation, or be fierce and frightening. They can be designed for rough and tumble use or require careful handling. Their value is often small in cash terms, although some toys, such as miniature electric train sets, can easily cost thousands of dollars. This is all to say that toys cover a world of products, some of which are readily identified as toys and some of which are recognizable as toys only upon closer inspection".
18. *Supra* note 2, Schedule I.
19. These are tests that have been used in previous customs appeal cases.
20. Customs Co-operation Council, 1st ed., Brussels, 1986 and 2nd ed., Brussels, 1996.
21. *Classification of Parts and Accessories in the Customs Tariff*, Department of National Revenue, Customs, Excise and Taxation, Memorandum D10-0-1, January 24, 1994.

With respect to the Power PEZ, counsel for the appellant followed a similar path. The Power PEZ are manufactured by a toy manufacturer and they meet the ordinary definition of the word "toy," this time as being a gadget providing amusement or pleasure. They fall within the terms employed by the Tribunal in *Zellers* to determine what constitutes a toy. In addition, counsel added that, in terms of appearance, design and best use, as well as marketing and distribution, the Power PEZ is *prima facie* classifiable as a toy in heading No. 95.03. If Rule 1 of the General Rules is not applicable, counsel argued, the Power PEZ is still a toy on the basis of their essential character in accordance with Rule 3 (b) and the factors set forth in the Explanatory Notes to that rule, e.g. in terms of the nature and value of the components, their bulk and their weight. Counsel stressed, in this regard, that the bright colours of the Power PEZ dispenser and its size are what draw the child's attention, not the two small, light packets of candy. Again, counsel referred to Rule 3 (c), in case Rule 3 (b) does not apply, to conclude that, in the last resort, the Power PEZ must be classified in the heading which occurs last in numerical order among those which equally merit consideration, that is, in heading No. 95.03.

Regarding the Duck Banks, counsel for the appellant referred to the fact that they are manufactured by Niagara Giocattoli S.p.A., of Italy, and that the word "giocattoli" means "toys" in Italian. Counsel stressed that similar translucent plastic piggy banks manufactured by that company are provided for in the nomenclature in Chapter 95[22] and that the Explanatory Notes to heading No. 95.03 specifically include goods, such as the piggy banks, that are toy money boxes. Moreover, counsel said that money boxes are also covered in heading No. 95.03. Counsel added that, in *Zellers*, the Tribunal said that toys can be displayed on a shelf and replicate animals. Again, with respect to Rule 1 of the General Rules, counsel submitted that, based on the evidence, the Duck Banks are toys in terms of appearance, design, best use, marketing and distribution. In this regard, counsel pointed to a modified and revoked ruling of the Department of National Revenue (Revenue Canada) on similar penguin-shaped banks or jumbo chick banks to stress that Revenue Canada and its officials were unsure as to the proper classification of such similar goods. Counsel also argued that the Duck Banks make very poor containers, as they are not square, do not save space on a counter, are not stable and do not accommodate labels. Last, counsel argued that, if Rule 1 is not applicable, then the Duck Banks must be classified, on the basis of Rule 3 (c), in the heading which occurs last in numerical order among those which equally merit consideration.

Counsel for the respondent argued that, nowadays, one needs more imagination to sell candy and, consequently, that the goods in issue constitute novel packaging, not toys. Counsel pointed out, in this regard, that, as showed by the appellant's catalogues of products, none of these products are sold without candy. With respect to the Baby Bottles, counsel submitted that Rule 1 of the General Rules requires the Tribunal to look at the text of the heading and the Explanatory Notes. He maintained that the words "[s]ugar confectionery" in heading No. 17.04 include candy and, therefore, include products of novel packaging, such as the Baby Bottles. Also relying on the three tests cited by the Tribunal in *Zellers*, counsel argued that the Baby Bottles are properly classified as candy, especially since, with respect to marketing and distribution, they are required by law to list the ingredients of the candy. Counsel also referred to the fact that, when asked where, in their stores, the Baby Bottles were sold by the various retailers, Mr. Neufeld replied that he did not know, except in the case of the "…it store" chain with respect to the Power PEZ. Counsel submitted that there is uncontradicted "evidence" in the respondent's brief that the Baby Bottles are usually sold in the confectionery section of Toys "R" Us. Counsel compared the goods in issue with honey sold in a plastic container fashioned as a teddy bear, arguing that, in that case, the purchaser is not buying a plastic teddy bear as a play item, but is buying honey, even though the container could be used as a toy. Counsel also argued that the Baby Bottles are not scale replicas. In a nutshell, counsel submitted that the Baby Bottles are sugar confectionery according to Rule 1, because they are more properly classified as candy with novel packaging,

22. The Tribunal notes, here, that "banks" are provided for in the statistical subdivision of the tariff, which, however, is not part of the law.

Rule 3 (a), because they are more specifically described as sugar confectionery, or Rule 3 (b), because the purchaser is buying, first and foremost, candy, not a toy.

Concerning the Power PEZ, counsel for the respondent argued that, as for the Baby Bottles, the Power PEZ are properly classified in heading No. 17.04 according to Rule 1 of the General Rules and the definition of the words "sugar confectionery" in the Explanatory Notes, which include candy. If Rule 1 does not apply, counsel submitted that Rule 3 (b) is then the next applicable rule and that the PEZ candy, not the candy dispensers, contained in the blister cards gives the Power PEZ their essential character. In support of his arguments, counsel stressed that the dispenser does not have features (e.g. hands, legs, funny face) that would actually make it, in itself, a toy. Counsel also relied upon a decision of the Customs Co-operation Council (CCC) that concluded that the original PEZ dispensers were classifiable in heading No. 17.04 on the basis that "whether [they] can be used as a play item by children after the candy has been consumed are subjective matters and are irrelevant for classification purposes." Asked by the Tribunal if the fact that the Power PEZ were collectibles makes a difference, counsel said that, in this case, it would not, arguing that it is not because something is named a collectible that it is of any interest to collect. Alternatively, counsel indicated that the Power PEZ could be classified under tariff item No. 8543.89.40 as other mechanically operated electrical machines.

Regarding the Duck Banks, counsel for the respondent contended that tariff classification must be determined at the time of importation and that, at that time, the slots on the top of the Duck Banks were not cut. More importantly, he said, these products have no trap doors underneath that banks usually have for releasing the money. Counsel also maintained that the Duck Banks can hold almost anything from beads to blocks. Counsel relied on a ruling by a US tariff administrator, in which it was determined that bear banks serve primarily as receptacles or storage space for coins, not as toys, as they are static, passive child or adult banks. Thus, counsel maintained that, on the basis of Rule 1 of the General Rules and the Explanatory Notes, it is clear that the goods are plastic containers. Again, counsel submitted that the determination of the classification of the goods must be made based on the goods at the time of importation, their subsequent use being irrelevant. Counsel distinguished, in this regard, the Tribunal's decision in *Zellers* from the situation at hand, arguing that *Zellers* involved goods with competing uses, either as toys or as cushions, while, in these appeals, the Duck Banks have subsequent uses, namely, first, as containers for the appellant and second as toy banks for the appellant's customers.

In reply, counsel for the appellant submitted that many arguments made by counsel for the respondent were subjective and/or simply not supported by the evidence on the record.

DECISION

Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the General Rules and the *Canadian Rules*,[23] while section 11 provides that regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[24] and the Explanatory Notes in interpreting the headings and subheadings.

In dealing with the General Rules, the Tribunal must seek to apply Rule 1 first, only moving on to the following rule if the preceding rule does not apply. Rule 1 requires that classification be determined according to the terms of the headings and any relative Section or Chapter Notes. Rule 2 applies with respect to incomplete, unfinished, unassembled or disassembled articles, as well as to mixtures, and, in the case of

23. *Supra* note 2, Schedule I.
24. Customs Co-operation Council, 1st ed., Brussels, 1987.

the latter, it refers to Rule 3 when goods consist of more than one material or substance. In that case, Rule 3 (a) provides for the goods to be classified in the heading that provides the most specific description, albeit it states that, if the headings at issue refer to part only of the goods in issue or part only of a set put up for retail sale, then the two headings are to be considered equally specific. Hence, the application of the next rule, Rule 3 (b), which provides that the classification must be made as if the goods consisted of the component or material that gives them their essential character. Finally, Rule 3 (c) provides that, when goods cannot be classified according to Rule 3 (a) or (b), they shall be classified in the heading which occurs last in numerical order among those which equally merit consideration.

The Tribunal also notes that counsel for the appellant relied on what he referred to as "the" three tests under Rule 1 of the General Rules. However, Rule 1 and the Explanatory Notes are silent with respect to these so-called tests. The Tribunal agrees that it may be relevant and useful to consider the appearance, design and best use of the goods in issue, as well as how they are marketed and distributed (in fact, the respondent appears to do just that in some cases, as evidenced by the respondent's decision that was the subject of the appeal to the Tribunal in *Zellers*) but, insofar as the application of Rule 1 is concerned, the Tribunal is directed to look at what that rule refers to, namely, the terms of the headings and the relevant Section and Chapter Notes. The appearance, design, best use, marketing and distribution referred to by counsel for the respondent are not tests per se, but individual factors that may be useful to consider, from time to time, in classifying goods. In the Tribunal's view, however, none of these factors are decisive and the importance of each will vary according to the product in issue.

Regarding toys generally, and in light of *Zellers*, the Tribunal notes that, in *Zellers*, the Tribunal referred to the essence of a toy as being amusement. That does not mean, however, merely because a product provides amusement value, that it should necessarily be classified as a toy. It is common knowledge that a child will play for hours with an empty cardboard box, a paper bag or a stick. Thus, the Tribunal is of the view that amusement alone does not make an object a toy for the purpose of tariff classification.

The Tribunal will deal with the goods in issue in sequence. First, regarding the Baby Bottles, the Tribunal has no doubt that the appellant makes every effort to replicate real baby bottles, even updating its products as necessary to match innovations in the marketplace. The fact that the Baby Bottles may be miniatures, however, does not necessarily make the products toys. Consideration has to be given to the candy content of the bottles as a confectionery product. Unable to classify the products under Rule 1 of the General Rules, the Tribunal moves to the subsequent rules and finds that Rule 3 (b) applies, as the Baby Bottles are goods that consist of more than one product. The Tribunal, thus, has to determine the essential character of the goods as either toys in heading No. 95.03 or candy in heading No. 17.04. On balance, the evidence that the Baby Bottles are, first and foremost, toys was not convincing. While a child might play with the bottles after some or all of the candy is consumed, in the Tribunal's view, it is unlikely that a child would only play with the Baby Bottles and never consume the candy. Also, even if the child used the Baby Bottles afterwards to drink, or as a pacifier for that matter, that would not make the Baby Bottles toys. The Tribunal also notes that ingredients contained in the candy are listed on the Baby Bottles, which the Tribunal understands is a legal requirement, while the age notation on the package is at the manufacturer's discretion. In addition, the Tribunal is somewhat surprised that the appellant's witness would not know where exactly in their stores the appellant's main retailers and mass merchandisers would sell the Baby Bottles. In the final analysis, the Tribunal concludes, according to Rule 3 (b), that the bottles are innovative packaging and, as such, that the Baby Bottles are properly classified under tariff item No. 1704.90.90. Given this decision, the Tribunal finds it unnecessary to deal with the alternative argument made by counsel for the appellant regarding the Baby Bottles as accessories for dolls.

With respect to the Power PEZ, the Tribunal is of the view that these goods cannot be classified solely on the basis of Rule 1 of the General Rules. Consequently, by applying the subsequent rules,

Rule 3 (b) is the one to which the Tribunal is directed, as there is more than one substance involved and the goods are sold as sets. The Power PEZ consists of at least two different articles which are, *prima facie*, classifiable in two different headings, namely, the candy dispenser as a toy and the two packages of candy as confectionery. It is suitable for sale directly to users without repackaging, in this case, on blister cards.[25]

There are many reasons to classify the Power PEZ as candy. First, the goods in issue contain candy and a candy dispenser. The ingredients of the candy are listed on the package, as required by law. The CCC has already ruled in the case of a PEZ candy dispenser, albeit the more traditional sort, that the candy was the essential part of the set. Moreover, the trademark "PEZ" is that of candy, and it is predominant on the package, appearing nine times on the blister card. Finally, only PEZ candy fits into the candy dispenser. The Power PEZ dispenser can, for the above reasons, be seen as merely an innovative gimmick designed to sell PEZ candy.

If, however, the Tribunal turns to Note VIII of the Explanatory Notes to Rule 3 (b) for guidance in classifying the Power PEZ , the motorized dispenser appears to be more than innovative packaging. Note VIII states that, for sets:

> [t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

At least two of these factors, value and weight, dictate that the Power PEZ should be classified as toys. The motorized dispenser weighs substantially more. In terms of cost of production,[26] it is considerably more valuable than the two packages of candy, an argument that, to a lesser extent, also applied to the Baby Bottles above. In the case of the Power PEZ, as in the case of the Baby Bottles, it is the role played by a constituent material, in relation to the use of the goods, that becomes critical. In the case of the Baby Bottles, the bottles themselves were nothing more, in the Tribunal's view, than innovative packaging to entice customers to buy the candy. In the case of the Power PEZ, however, the Tribunal cannot quite as readily dismiss the role of the motorized dispenser. On one hand, it can be seen merely as a marketing gimmick; on the other hand, there was evidence and argument presented to the Tribunal that customers buy the Power PEZ to obtain the dispenser. The Power PEZ, as the blister card notes, are collectibles. It is the dispenser that is the collectible, not the candy. Its role, moreover, is not merely that of a dispenser of candy; in fact, it is quite problematic to load it with candy, requiring both time and dexterity. Besides being a collectible and a dispenser of candy, it provides play value both before and after the candy in the package is eaten.

There is a button protruding through the packaging that allows the purchaser to play with the dispenser prior to opening the package and thus prior to eating the candy. This feature differentiates the Power PEZ from the PEZ candy dispenser involved in a previous CCC decision, in which a more traditional PEZ candy dispenser filled with candy was classified under the heading of candy. The note prepared by the Secretariat of the CCC for the decision states that: "whether the dispenser is suitable for repeated use and whether it can be used as a play item by children after the candy has been consumed are subjective matters and are irrelevant for classification purposes".[27] In the case of the Power PEZ, however, it is the reverse. The Power PEZ dispenser can, and in all likelihood will, be used as a toy before the separate packages of candy are eaten. What is subjective is whether the candy will or will not be eaten after the button has been pushed and the dispenser made into a whirring kaleidoscope.

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25. See Note X of the Explanatory Notes to Rule 3.
26. Confidential Brief of the Appellant, para. 24.
27. *Classification of "PEZ" Candy*, Customs Co-operation Council, Harmonized System Committee, June 11, 1992, at 3.

The play value of the Power PEZ also differs from the PEZ case before the CCC in that the dispenser in this case is durable.[28] Not only is it a collectible but it has a replaceable battery. It is, therefore, the Tribunal's view that what may very well have started out as a marketing gimmick (the different PEZ dispensers) has, in the case of the Power PEZ, taken over and transformed the essential character of the set. The candy, in the Tribunal's view, is incidental not essential to the Power PEZ.

For the above reasons but, in particular, given the prior play and subsequent collectible roles of the dispensers in relation to the use of the goods, the Tribunal agrees with the appellant that the Power PEZ should be classified as other toys, other than of metal, incorporating a motor under tariff item No. 9503.80.90.

Regarding the Duck Banks, the Tribunal is of the view, based on Rule 1 of the General Rules, that these goods were properly classified as plastic containers under tariff item No. 3923.90.90. Although their many features make them appealing, the Duck Banks are empty plastic containers, not toys, at the time of importation. They are used by the appellant as containers to sell all kinds of candy. Their secondary use, as premium products for the retailer, is irrelevant for the purpose of tariff classification. What retailers do with the Duck Banks when they are empty, whether they put something else in them or sell them as toys, is merely circumstantial and has no bearing on the tariff classification of these goods.

For all these reasons, Appeal Nos. AP-98-043 (regarding the Baby Bottles) and AP-98-051 (regarding the Duck Banks) are dismissed, and Appeal No. AP-98-044 (regarding the Power PEZ) is allowed.

Patricia M. Close

Patricia M. Close
Presiding Member

28. The Secretariat of the Customs Co-operation Council noted that the PEZ candy dispenser did not appear to be durable.