Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-026

Eastern Division Henry Schein Ash Arcona Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, February 19, 2014

Canada

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IN THE MATTER OF an appeal heard on December 3, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 12, 2013, with respect to a request for review of an advance ruling on tariff classification pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

EASTERN DIVISION HENRY SCHEIN ASH ARCONA INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 3, 2013
Tribunal Member:	Pasquale Michaele Saroli, Presiding Member
Counsel for the Tribunal:	Elysia Van Zeyl
Manager, Registrar Programs and Services:	Sarah MacMillan
Acting Senior Registrar Officer:	Haley Raynor
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PARTICIPANTS:

Appellant	**Counsel/Representative**
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Respondent	**Counsel/Representative**
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Eastern Division Henry Schein Ash Arcona Inc. (Eastern Division) on June 6, 2013, pursuant to subsection 67(1) of the *Customs Act*[1] from a review of an advance ruling of the President of the Canada Border Services Agency (CBSA) dated March 12, 2013, made pursuant to subsection 60(4).

2. The appeal concerns the tariff classification of the Pola™ Day Hydrogen Peroxide Gel Tooth Whitening Kit (the good in issue). Eastern Division describes the good in issue as a tooth whitening kit for distribution to dentists. Dentists provide the kit to end users, along with custom-made mouth trays, to take home and apply to their teeth for cosmetic whitening purposes. The good in issue consists of syringes filled with a solution, the basis of which is composed of the active ingredient, hydrogen peroxide (for bleaching), and other subordinate ingredients.[2]

3. The first issue in this appeal is whether the good in issue is classifiable, as determined by the CBSA, under tariff item No. 3306.90.00 of the schedule to the *Customs Tariff*[3] as other preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages, or, as suggested by Eastern Division, under tariff item No. 3824.90.00 as other chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.

4. The second issue is whether the good in issue qualifies for duty relief under tariff item No. 9977.00.00 as articles for use in instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments, as argued by the Eastern Division.

ANALYSIS

Legal Framework

5. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).[4] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

6. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[5] and the *Canadian Rules*[6] set out in the schedule.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2013-026-06A at para. 11, Vol. 1.
3. S.C. 1997, c. 36.
4. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
5. S.C. 1997, c. 36, schedule [*General Rules*].
6. S.C. 1997, c. 36, schedule.

7. The *General Rules* comprise six rules. The classification process begins with Rule 1, which provides that 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 other rules.

8. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[7] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[8] published by the WCO. While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[9]

9. The Tribunal must therefore first determine whether the good in issue is classifiable at the heading level according to Rule 1 of the *General Rules* based on the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. If the good in issue is not classifiable at the heading level through the application of Rule 1, the Tribunal must then consider the other rules,[10] which are intended to be considered sequentially and applied in a cascading manner.[11]

10. Once the Tribunal has determined the heading in which the good in issue is classifiable, a similar approach is used to determine the proper subheading,[12] with the final step being to determine the proper tariff item.[13]

Tariff Classification of the Good in Issue

11. The CBSA claims that the good in issue is classifiable under tariff item No. 3306.90.00 as other preparations for oral or dental hygiene as follows:

Section VI

PRODUCTS OF THE CHEMICAL OR ALLIED INDUSTRIES

. . .

7. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
8. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
9. Refer to *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this direction is equally applicable to the *Classification Opinions*.
10. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
11. *Helly Hansen Leisure Canada Inc. v. Canada (Border Services Agency)*, 2009 FCA 345 (CanLII) at para. 17.
12. Rule 6 of the *General Rules* provides that ". . . 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 [i.e. Rules 1 through 5] . . ." and that ". . . the relative Section and Chapter Notes also apply, unless the context otherwise requires."
13. Rule 1 of the *Canadian Rules* provides that ". . . the classification of goods in the 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] . . ." and that ". . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires." The *Classification Opinions* and the *Explanatory Notes* do not apply to classification at the tariff item level.

Chapter 33

ESSENTIAL OILS AND RESINOIDS; PERFUMERY, COSMETIC OR TOILET PREPARATIONS

. . .

33.06 **Preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages.**

. . .

3306.90.00 **–Other**

12. Eastern Division counters that the good in issue is classifiable under tariff item No. 3824.90.00 as other chemical products and preparations of the chemical or allied industries, not elsewhere specified or included as follows:

Section VI

PRODUCTS OF THE CHEMICAL OR ALLIED INDUSTRIES

. . .

Chapter 38

MISCELLANEOUS CHEMICAL PRODUCTS

. . .

38.24 **Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.**

. . .

3824.90.00 **–Other**

13. Eastern Division further submits that the good in issue is classifiable, and hence entitled to duty-free treatment, under tariff item No. 9977.00.00 as articles for use in instruments and appliances used in dental sciences as follows:

Section XXI

WORKS OF ART, COLLECTORS' PIECES AND ANTIQUES

. . .

Chapter 99

SPECIAL CLASSIFICATION PROVISIONS – COMMERCIAL

. . .

9977.00.00 ***Articles for use in*** **the following:**

Apparatus based on the use of X-rays or of alpha, beta or gamma radiations, whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus, X-ray tubes and other X-ray generators, high tension generators, control panels and desks, screens, examination or treatment tables, chairs and the like;
Dentists' or chiropodists' chairs and parts thereof;
Electro-mechanical chiropractic tables and parts thereof;

> ***Instruments and appliances used in* medical, surgical, *dental* or veterinary *sciences*, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments;**
> **Medical or surgical sterilizers;**
> **Ozone therapy, aerosol therapy, artificial respiration or other therapeutic respiration apparatus;**
> **Pacemakers for stimulating heart muscles.**
>
> [Emphasis added]

14. In this respect, Eastern Division bears the burden of establishing that the CBSA erred in its advance ruling that the good in issue is classifiable in heading No. 33.06 and, specifically, under tariff item No. 3306.90.00 and that the good in issue is instead classifiable in heading No. 38.24 and, specifically, under tariff item No. 3824.90.00, with eligibility for duty-free benefits under tariff item No. 9977.00.00.[14] In this regard, it is well established in law that tariff classification is to be determined on the basis of an examination of the good in issue, as a whole, as presented at the time of its importation into Canada.[15]

15. The tariff classification of goods begins with the consideration of Rule 1 of the *General Rules*, pursuant to which classification is first determined by the wording of the tariff headings and any relevant legal notes, with the first consideration of the Tribunal being whether the goods are named or generically described in a particular heading of the tariff schedule. If the goods are named in a heading, they must be classified therein, subject to any relevant legal notes.[16]

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14. In this regard, subsection 152(3) of the *Act* provides as follows: ". . . in any proceeding under this Act, the burden of proof in any question relating to . . . (c) the payment of duties on any goods . . . lies on the person, other than Her Majesty, who is a party to the proceeding . . . ." The present appeal is a proceeding under subsection 67(1). Moreover, because duty liability on imported goods depends upon their tariff classification, tariff classification is a question "relating to" the payment of duties on goods, within the meaning of paragraph 152(3)(*c*). With the conditions of paragraph 152(3)(*c*) having been met, the burden of proof therefore resides with Eastern Division.
15. See *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366, wherein the Supreme Court of Canada indicated that the time for determining tariff classification is at the time of entry of the goods into Canada. While the Supreme Court of Canada reached its conclusion on the basis of the wording of Canada's customs legislation in 1955, it is the Tribunal's view that the principle set out in that case remains valid today, despite various amendments by Parliament to Canada's customs legislation in the intervening years. See, in this regard, *Deputy Minister of National Revenue for Customs and Excise v. Ferguson Industries Ltd.*, [1973] S.C.R. 21, wherein the Supreme Court of Canada affirmed its earlier ruling on this point in the above-mentioned case. This principle has been applied by the Tribunal in numerous cases. See, for example, *Sealand of the Pacific Ltd. v. Deputy M.N.R.* (11 July 1989), 3042 (CITT); *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21; *Cobra Anchors Co. Ltd. v. President of the Canada Border Services Agency* (8 May 2009), AP-2008-006 (CITT) at para. 26; *Evenflo Canada Inc. v. President of the Canada Border Services Agency* (19 May 2010), AP-2009-049 (CITT) at para. 29; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (29 May 2012), AP-2011-042 (CITT) [*Philips Electronics*] at para. 29; *Powers Industries Limited v. President of the Canada Border Services Agency* (22 April 2013), AP-2012-010 (CITT) at para. 22; *Salzgitter Mannesmann International (Canada) Inc. and Varsteel Ltd. v. President of the Canada Border Services Agency* (25 September 2013), AP-2012-047 and AP-2012-048 (CITT) at para. 12; *L. Lavoie v. President of the Canada Border Services Agency* (6 September 2013), AP-2012-055 (CITT) at para. 28; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (17 September 2013), AP-2012-057 (CITT) at para. 16.
16. *York Barbell Co. Ltd. v. Deputy M.N.R.C.E.* (16 March 1992), AP-91-131 (CITT).

16. Having regard to Note 2 to Section VI, pursuant to which goods classifiable in heading No. 33.06 by reason of being put up in measured doses or for retail sale are to be classified in that heading and in no other heading of the Nomenclature, and to the fact that heading No. 38.24, by its own terms, operates as a residual classification, as denoted by the fact that its coverage is explicitly limited to goods "not elsewhere specified or included", the Tribunal considers it appropriate to begin its analysis with a consideration of whether the good in issue is classifiable in heading No. 33.06, as submitted by the CBSA.

Is the Good in Issue Classifiable in Heading No. 33.06?

– a) Is the good in issue a preparation?

17. In order to be classifiable in heading No. 33.06, the good in issue must be a "preparation". The definition of the word "preparation" in the *Canadian Oxford Dictionary* includes the following: "3 a specially prepared substance, esp. a food or medicine",[17] while *Webster's New World College Dictionary* defines the term to include the following: "4 something prepared for a special purpose, as a medicine, cosmetic, condiment, etc."[18]

18. The product literature indicates that, by weight, the good in issue is comprised of 3.0 percent to 9.5 percent hydrogen peroxide, less than 47 percent additives, 30 percent glycerol, 20 percent water and 0.1 percent flavouring.[19] In addition, the CBSA's initial laboratory analysis confirms that ". . . this product contains glycerol, water and surfactants, as well as other substances which were not analysed due to safety concerns with peroxide."[20] A supplemental laboratory analysis conducted by the CBSA confirms that ". . . this product [also] contains approximately 0.6% fluoride."[21]

19. The parties agree[22] and, on the basis of the above evidence, the Tribunal accepts that the good in issue is a preparation.

– b) Is the good in issue put up in measured doses or for retail sale?

20. As indicated above, goods classifiable in heading No. 33.06 by reason of being put up in measured doses *or* for retail sale are, by operation of Note 2 to Section VI, to be classified in that heading and in no other heading of the Nomenclature.

21. In the present case, the evidence indicates, and the parties agree,[23] that the good in issue is indeed put up in measured doses, with each package containing four small syringes holding approximately 1.3 grams of clear, thick hydrogen peroxide gel.[24] That the good in issue is put up in measured doses is also confirmed by related promotional literature which indicates that ". . . you are required to purchase your initial whitening treatment *as prescribed* by your dental professional . . ." [emphasis added].[25] The requirement for measured doses reflects the fact that overexposure to hydrogen peroxide is, among other

17. *Canadian Oxford Dictionary*, 2d ed., *s.v.* "preparation".
18. *Webster's New World College Dictionary*, 4th ed., *s.v.* "preparation".
19. Exhibit AP-2013-026-06A, tab 17, Vol. 1.
20. Exhibit AP-2013-026-11A, tab 3, Vol. 1A.
21. *Ibid.*, tab 4.
22. *Transcript of Public Hearing*, 3 December 2013, at 59.
23. *Ibid.*
24. Exhibit AP-2013-026-11A, tab 3, Vol. 1A.
25. Exhibit AP-2013-026-06A, tab 3 at 26, Vol. 1.

things, potentially corrosive to mucous membranes or skin and can cause a burning sensation and tissue damage.[26]

22. The parties further agree and the Tribunal accepts that, by virtue of the use of the disjunctive "or" in Note 2 to Section VI, it is not necessary that the good in issue be both put up "in measured doses" and "for retail sale" in order to trigger the direction that it be classified in that heading and in no other heading of the Nomenclature. In other words, it is sufficient that either one of those conditions is met.[27]

23. On the basis of the foregoing, the parties agree and the Tribunal finds that, if it is determined that the good in issue is *prima facie* classifiable in heading No. 33.06, it must be classified in that heading and in no other heading of the Nomenclature, having regard to the fact that heading No. 33.06 is among the headings listed in Note 2 to Section VI and the fact that the good in issue is put up in measured doses.[28]

24. Finally, the Tribunal notes that, by operation of Note 3 to Chapter 33, heading No. 33.06 "... [applies], *inter alia*, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of [that heading] and put up in packings of a kind sold by retail for such use." In this respect, the use of the expression "*inter alia*" (i.e. "among other things"[29]) implies that, while heading No. 33.06 extends to products put up in packings of a kind sold by retail for such use, this is not a *sine qua non* to a product's inclusion in that heading. This view is supported by the fact that the "in individual retail packages" requirement in heading No. 33.06 is confined to "yarn used to clean between the teeth (dental floss)", which is separated from the prior reference to "preparations for oral or dental hygiene, including denture fixative pastes and powders" by a semicolon, denoting that these are separate and discrete groups of goods within the same description.[30] In short, a finding that the good in issue was not put up in individual retail packages would not necessarily be fatal to the classification of the good in issue in that heading[31]—a point that is not contested by Eastern Division.[32]

– c) Is the good in issue for oral or dental hygiene?

25. As a final requirement of classification in heading No. 33.06, the good in issue must be "for oral or dental hygiene".[33]

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26. *Ibid.*, tab 21.
27. *Transcript of Public Hearing*, 3 December 2013, at 59, 60.
28. *Ibid.* at 58-59.
29. *Black's Law Dictionary*, 6th ed., *s.v.* "*inter alia*".
30. As explained by the Tribunal on previous occasions, the use of a semicolon between descriptors in the text of a heading is generally intended to denote separate and discrete goods or groups of goods within the same description. In this regard, refer, for example, to *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) at para. 45; *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (22 May 2012), AP-2011-024 (CITT) at para. 41; *Bauer Nike Hockey Inc. v. President of the Canada Border Services Agency* (18 May 2006), AP-2005-019 (CITT) at para. 23; *Boss Lubricants v. Deputy M.N.R.* (3 September 1997), AP-95-276 and AP-95-307 (CITT).
31. Indeed, to suggest otherwise would arguably create an inconsistency between Note 3 to Chapter 33 and Note 2 to Section VI (whose application extends to heading No. 33.06), by virtue of the use, in the latter, of the disjunctive "or" between the phrase "in measured doses" and the phrase "for retail sale".
32. *Transcript of Public Hearing*, 3 December 2013, at 60-61.
33. Having conceded that the good in issue is a "preparation" that is put up "in measured doses", Eastern Division confirmed that its case, distilled down to its essence, turns on the question of whether the good in issue is properly described as being for oral or dental hygiene. *Transcript of Public Hearing*, 3 December 2013, at 58, 61.

26. The term "hygiene" is not defined in the *Customs Tariff*. In this connection, both parties subscribe to,[34] and based their respective arguments on, the definition of "hygiene" referred to in *Philips Electronics*, where the Tribunal noted that the dictionary definition of that term "*includes . . . conditions or practices conducive to maintaining health*" [emphasis added].[35] It bears noting, however, that the meaning ascribed to the term "hygiene" in that case, while the most relevant in the circumstances, did not purport to be exhaustive of the definitions of that term.[36]

27. The Tribunal, therefore, considers it appropriate, in the circumstances, to examine the broader definition of the term "hygiene". In this regard, the following sources define that term as follows:

> [*Canadian Oxford Dictionary*, 2d ed.] 1 the branch of knowledge that deals with the maintenance of health, esp. the conditions and practices conducive to it. 2 conditions or practices conducive to maintaining health. 3 cleanliness.
>
> [*The Oxford English Dictionary*, 2d ed.] That department of knowledge or practice which relates to the maintenance of health; a system of principles or rules for promoting or preserving health; sanitary science.
>
> [*Webster's New World College Dictionary*, 4th ed.] 1 the science of health and its maintenance; system of principles for the preservation of health and prevention of disease 2 sanitary practices; cleanliness [personal *hygiene*].
>
> [*Merriam-Webster's Collegiate Dictionary*, 11th ed.] 1: a science of the establishment and maintenance of health 2 : conditions or practices (as of cleanliness) conducive to health.

28. More specifically, the following sources define "dental hygiene" as follows:

> [American Heritage® Dictionary of the English Language] **1.** the practice of keeping the mouth, teeth, and gums clean and healthy to prevent disease, as by regular brushing and flossing and visits to the dentist. **2.** The state of one's oral health, resulting from this practice or its neglect. Also called *oral hygiene*.[37]
>
> [Collins English Dictionary] the maintenance of the teeth and gums in healthy condition, esp. by proper brushing, the removal of plaque, etc. Also called **oral hygiene**.[38]

29. The recurrent theme in all these definitions is the maintenance of health and prevention of disease, including through sanitary practices and personal cleanliness.

30. As already noted, the good in issue is comprised of 3.0 percent to 9.5 percent, by weight, hydrogen peroxide. Scientific evidence on the record indicates that tooth whitening products containing 0.1 percent to 6 percent hydrogen peroxide entail potential health risks for the consumer, with these risks increasing as concentrations of hydrogen peroxide increase and with frequency of application.[39] The use of tooth whitening products containing more than 6 percent hydrogen peroxide is not considered safe for consumers.[40]

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34. Exhibit AP-2013-026-06A at para. 21, Vol. 1; Exhibit AP-2013-026-08A at para. 39, Vol. 1A.
35. *Philips Electronics* at para. 58.
36. In this connection, it was not necessary for the Tribunal, in *Philips Electronics*, to delve too deeply into the broader definition of the terms "hygiene" and "hygienic", as the goods in that case (i.e. teats for baby bottles) were expressly included among the "hygienic and toilet articles" listed in the *Explanatory Notes*.
37. Exhibit AP-2013-026-06A, tab 15, Vol. 1.
38. *Ibid.*
39. *Ibid.*, tab 26.
40. *Ibid.*

31. In this connection, the scientific evidence points to the loss of enamel, enamel hardness and elastic modulus (i.e. the ability of the tooth surface to bounce back in response to applied force) in treated teeth as potential side effects of the bleaching process.[41] That being said, scientific literature does indicate that the risk to tooth enamel can be mitigated with fluoride, which can promote enamel remineralization.[42]

32. According to the American Dental Association, "[a]lthough published studies tend to suggest that bleaching is a relatively safe procedure, investigators continue to report adverse effects on hard tissue, soft tissue, and restorative materials."[43] More specifically, concerns have been raised about the adverse effects of dental whitening or bleaching on pulp tissues and the mucosal tissues of the mouth,[44] as well as with respect to the potential harmful effects of the systemic ingestion[45] of hydrogen peroxide solutions on internal organs.[46] Finally, there is some evidence pointing to the carcinogenicity of the peroxides used in dental bleaching agents,[47] with hydrogen peroxide possibly acting as a weak cancer promoter.[48] As a result, the American Dental Association cautions that ". . . tooth bleaching is not risk-free . . . ."[49]

33. In recognition of the health risks associated with the oral use of peroxide compounds, the Department of Health (Health Canada) directives require teeth whitening systems to carry a cautionary statement to the following effect: "Avoid direct contact of the active surface of the tooth whitening product with the gums and/or salivary flow".[50]

34. Moreover, there do not appear to be any significant redeeming health benefits associated with teeth whitening or bleaching treatments. The Canadian Dental Association explains that, "[i]n most cases, the natural colour of teeth is within a range of light greyish-yellow shades. Teeth naturally darken with age . . . [and] are not naturally meant to be completely white . . . ."[51]

35. The American Dental Association adds the following:

> Bleaching discolored teeth in which the colour change is the only visible indication of an underlying abnormality may change tooth color, but will not remove any underlying abnormality. . . . Dental caries or leaking restorations are two common conditions that may cause teeth to appear dark. Patients should be advised that bleaching treatments will not remove tooth decay that may subsequently progress and result in the need for more extensive and expensive treatments.[52]

41. *Ibid.*, tab 22.
42. Exhibit AP-2013-026-12A, tabs 7, 8, 9, 22, Vol. 1B.
43. Exhibit AP-2013-026-06A, tab 21, Vol. 1.
44. *Ibid.*, American Dental Association Council on Scientific Affairs, "Tooth Whitening/Bleaching: Treatment Considerations for Dentists and Their Patients", September 2009 (revised November 2010).
45. Exhibit AP-2013-026-06A, tab 26, Vol. 1. It is estimated that up to 25 percent of the hydrogen peroxide applied by tooth whitening products is swallowed.
46. Exhibit AP-2013-026-06A, tabs 21, 26, Vol. 1. As an oxidant, hydrogen peroxide has been adversely associated with carcinogenicity, genotoxicity, cytotoxicity, aging and lung injury.
47. Exhibit AP-2013-026-06A, tab 24, Vol. 1.
48. *Ibid.*, tab 26.
49. *Ibid.*, tab 21.
50. *Ibid.*, tab 25, Health Canada, "Cosmetic Ingredient Hotlist" (March 2011).
51. *Ibid.*, tab 8.
52. *Ibid.*, tab 21.

36. In this context, the evidence on the record explains the following:

> Tooth bleaching products contain solutions of various strengths of either hydrogen peroxide or carbamide peroxide, which provide the whitening effect. They bleach teeth by producing unstable free radicals that attack pigment molecules in the organic parts of enamel. The reduction in pigment means the molecules no longer reflect light, so the teeth appear whiter.[53]

37. On the basis of the foregoing explanations, the Tribunal is inclined to agree with Eastern Division's assertion that "... the process of whitening is separate and far different than that of cleaning ...."[54] In particular, unlike the cleaning of the mouth, teeth and gums, the purpose of which is undisputedly hygienic, the whitening or bleaching process is not conducive to, and may indeed carry risks for, the maintenance of good oral and dental health, with its purpose being essentially aesthetic in nature.

38. The CBSA submitted that the high concentration of fluoride in the good in issue relative to that found, for example, in certain toothpaste products supported its position that the good in issue is properly described as a dental hygiene product.[55] Indeed, a chemist from the CBSA testified that, on the basis of tests conducted in the CBSA laboratory which are reflected in a supplementary laboratory report,[56] it was found that the good in issue contains approximately 0.6 percent fluoride.[57] The CBSA also submitted a sample fluoride percentage calculation, based on the percentage of sodium fluoride contained in a popular brand of toothpaste, and concluded that the average percentage of fluoride contained in the brand of toothpaste is equivalent to 0.11 percent.[58] The CBSA further argued that, since the good in issue contains fluoride and fluoride is generally used for the dual purposes of preventing and reducing tooth decay, the addition of fluoride to the good in issue is likewise for the purpose of preventing or reducing tooth decay.[59]

39. It is the Tribunal's view, however, that the presence of fluoride in the good in issue at a relatively high concentration is consistent with the similarly high concentrations of hydrogen peroxide in the preparations. In this respect, the Tribunal is inclined to agree with the Eastern Division's observation that "[w]hat the Respondent has not taken into consideration, is that demineralisation and tooth sensitivity are direct side-effects to the tooth whitening process."[60] That the fluoride was intended to counteract the adverse effects of the hydrogen peroxide is supported by the product literature, which states that "[t]he addition of fluoride remineralises the tooth surface assisting in reducing post-operative sensitivity."[61] Indeed, it would seem rather disingenuous to describe a preparation as a hygiene product simply because it included a substance intended to remediate harmful effects that the preparation itself caused in the first place.

40. In further support of its position, the CBSA noted that, according to Health Canada, teeth whitening systems are cosmetic, unless they contain fluoride,[62] in which case they are considered to fall within the realm of drugs.[63]

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53. *Ibid.*, tab 22.
54. *Ibid.*, tab 3.
55. *Transcript of Public Hearing*, 3 December 2013, at 16, 18, 19, 86.
56. Exhibit AP-2013-026-11A, tab 4, Vol. 1A.
57. *Transcript of Public Hearing*, 3 December 2013, at 16.
58. Exhibit AP-2013-026-11A, tab 5, Vol. 1A.
59. Exhibit AP-2013-026-08A at paras. 40-41, Vol. 1A.
60. Exhibit AP-2013-026-06A at para. 24, Vol. 1.
61. *Ibid.*, tab 20.
62. Exhibit AP-2013-026-12A, tab 13, Vol. 1B.
63. *Transcript of Public Hearing*, 3 December 2013, at 91, 101.

41. In this regard, the Canadian *Food and Drugs Act*[64] defines "cosmetic" as follows:

> **2.** In this Act,
>
> . . .
>
> "cosmetic" includes *any substance or mixture of substances* manufactured, sold or represented *for use in cleansing, improving or altering* the complexion, skin, hair or *teeth*, and includes deodorants and perfumes.
>
> [Emphasis added]

42. However, Health Canada's March 2011 "List of Prohibited and Restricted Cosmetic Ingredients" (commonly referred to as the "Cosmetic Ingredient Hotlist") states as follows with respect to fluoride:

> Section 2 of the *Food and Drugs Act* addresses the definitions of products regulated under the Act. Should an ingredient lack a cosmetic purpose (or functional purpose in a cosmetic formulation) it should not be used in a cosmetic product. For example, *fluoride in oral care products has no cosmetic purpose* to cleanse, improve or alter the appearance of the body. *Its purpose is to prevent dental caries (a disease state), which is therapeutic in nature*. It is subsequently classified as a drug (in this case, a natural health product) ingredient. *Therefore, fluoride is inappropriate in cosmetic oral care products*, and is indicated as such on the Hotlist.[65]
>
> [Emphasis added]

43. The Cosmetic Ingredient Hotlist goes on to explicitly state that "**[f]luoride** . . . containing substances . . . [are] [n]ot permitted in oral products".[66]

44. It is however the Tribunal's view, consistent with prior jurisprudence,[67] that, while directives issued by Health Canada in the regulation of drugs and health products may be relevant, they are not, in and of themselves, dispositive nor necessarily especially probative of the proper tariff classification of the good in issue under the *Customs Tariff*, which, as noted earlier, is based on the description of the good in issue as presented for importation into Canada. Indeed, the CBSA agrees, noting that it was not suggesting that the Tribunal has to follow the rules of the regulator.[68] It further acknowledges that ". . . the Cosmetic Hotlist . . . doesn't have the force of law. . . . [but, rather,] it's an administrative list that indicates which substances are banned in cosmetics and when they have to move into this realm of being a drug."[69]

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64. R.S.C., 1985, c. F-27.
65. Exhibit AP-2013-026-12A, tab 16, Vol. 1B; Exhibit AP-2013-026-06A, tab 25, Vol. 1.
66. Exhibit AP-2013-026-12A, tab 16, Vol. 1B.
67. In *Flora Manufacturing & Distributing Ltd. v. The Deputy Minister of National Revenue*, 2000 CanLII 15919 (FCA), the Federal Court of Appeal rejected the argument that the Tribunal should have considered the existence of drug identification numbers for the good in issue as conclusive evidence that they were medicaments for purposes of classification under *the Customs Tariff*. In so doing, the Court noted that the definition of "drug" in the *Food and Drugs Act* is considerably broader than the meaning of "medicament". Even apart from that, however, the Court opined that it would be wrong to state a categorical rule as to the weight that the Tribunal must give to evidence that a drug identification number has been assigned to a product, noting that, while there may be situations where such evidence would be practically conclusive, there is no reason to suggest that would invariably be so.
68. *Transcript of Public Hearing*, 3 December 2013, at 110.
69. *Ibid.* at 91.

45. The CBSA also submits that the good in issue, being of the same character as goods explicitly identified as covered goods in the explanatory notes to heading No. 33.06, must be taken to fall within that tariff heading. In this regard, the explanatory notes to heading No. 33.06 provide as follows:

> This heading covers preparations for oral or dental hygiene *such as*:
>
> (I) **Dentifrices** of all types:
>
> (1) Toothpastes and other preparations for teeth. These are substances or preparations used with a toothbrush, whether for cleaning or polishing the accessible surfaces of teeth or for other purposes such as anticaries prophylactic treatment.
>
> Toothpastes and *other preparations for teeth remain classified in this heading, whether or not they contain abrasives* and whether or not they are used by dentists.
>
> (2) Denture cleaners, i.e., preparations for cleaning or polishing dentures, *whether or not they contain agents with abrasive properties*.
>
> (II) Mouth washes and *oral perfumes*.
>
> (III) Denture fixative pastes, powders and tablets.
>
> The heading also covers yarn used to clean between the teeth, in individual retail packages (dental floss).
>
> [Emphasis added]

46. In the Tribunal's view, however, the good in issue is not of the same character as the goods listed in the *Explanatory Notes* in that, unlike those goods (which are either patently conducive to oral and dental health or, at worst, essentially benign), the hydrogen peroxide gel preparation in the good in issue carries a risk of harm to both dental and oral health.

47. The reference to "other preparations for teeth" must be considered in the light of the overarching reference in the *Explanatory Notes* to "preparations for oral and dental hygiene". The good in issue falls outside the *Explanatory Notes* based on the meaning of the phrase "oral and dental hygiene" and, in particular, the evidence indicating that the good in issue poses risks to one's health, while providing no specific benefit in regard to the overall health or cleanliness of the teeth.

48. Finally, in *PartyLite Gifts Ltd. v. Commissioner of the Canada Customs and Revenue Agency*, the Tribunal stated that "... the design, best usage, marketing and distribution of the goods in issue are indicative of the proper tariff classification of the goods."[70] The good in issue is marketed and sold as a product to whiten, or bleach, the teeth.[71] In particular, the marketing materials tend to focus on the product's stain removal capabilities, indicating that "[a]ny discolorations within the tooth will be lightened"[72] and that "[o]rganic materials break down to remove staining and create a whiter brighter smile."[73] Nothing in the evidence suggests that the good in issue is marketed or sold for the purpose of maintaining or improving dental or oral health, nor is there any evidence that the good in issue performs any function related to the prevention or treatment of dental caries.[74] Specifically, as indicated by Eastern Division, "[n]owhere does

70. (16 February 2004), AP-2003-008 (CITT) at 5.
71. Exhibit AP-2013-026-06A, tabs 1, 3, Vol. 1; Exhibit AP-2013-026-12A, tab 2, Vol. 1B.
72. Exhibit AP-2013-026-06A, tab 1, Vol. 1.
73. *Ibid.*
74. *Transcript of Public Hearing*, 3 December 2013, at 42.

the marketing advise the patient, or the dentist . . . that this product will make your teeth healthier or that it will prevent cavities."[75]

49. Having regard to the evidence concerning the health risks associated with the use of teeth whitening/bleaching treatments generally, to the lack of evidence pointing to any notable therapeutic benefits associated with teeth whitening/bleaching treatments, to the evidence indicating that the fluoride contained in the good in issue is intended to alleviate post-treatment sensitivity and counteract demineralization caused by the preparations themselves, and to evidence indicating that the good in issue is in fact marketed and sold as a teeth whitening, rather than a dental health care, product, the Tribunal is of the view that the requirement of heading No. 33.06 that the good in issue be "for oral or dental hygiene" has not been met in this case.

50. Given that the requirements for classification in heading No. 33.06 have *not* been satisfied, the Tribunal finds that the good in issue is *not* classifiable in heading No. 33.06, as submitted by the CBSA.

Is the Good in Issue Classifiable in Heading No. 38.24?

51. Classification in heading No. 38.24 requires that the good in issue be a preparation (including that consisting of mixtures of natural products), be of the chemical or allied industries and not be elsewhere specified or included.

52. As already noted, the parties agree,[76] and the Tribunal accepts, that the good in issue is a preparation.

53. That the good in issue is of the chemical or allied industries is also not in dispute and is accepted by the Tribunal, with hydrogen peroxide itself being classified in heading No. 28.47 as a product of the chemical or allied industries.[77]

54. Finally, with the good in issue not being classifiable in heading No. 33.06, and not being specified or included elsewhere in the Nomenclature, the "not elsewhere specified or included" requirement is also met.

55. With all three of the above pre-conditions having been satisfied, the Tribunal finds that the good in issue is classifiable in heading No. 38.24 and, more specifically, under tariff item No. 3824.90.00 as other preparations of the chemical or allied industries, as submitted by Eastern Division.

Is the Good in Issue Classifiable Under Tariff Item No. 9977.00.00?

56. While there are no notes to Section XXI, Note 3 to Chapter 99 provides as follows:

> *Goods may be classified under a tariff item in this Chapter* and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin *only after classification under a tariff item in Chapters 1 to 97* has been determined *and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.*
>
> [Emphasis added]

75. *Ibid.*
76. *Ibid.* at 59.
77. *Ibid.* at 64.

57. Classification of the good in issue under tariff item No. 9977.00.00 can therefore only be effected if the good in issue has first been classified under a tariff item in Chapters 1 to 97 and if the conditions of tariff item No. 9977.00.0 and any regulations or orders in relation thereto have been met.

58. With the good in issue having been found to be classifiable under tariff item No. 3824.90.00, the first requirement is met.

59. As for the second requirement, the conditions of tariff item No. 9977.00.00 require: (a) that the good in issue be an "article", (b) that the article be "for use in" an instrument or appliance, and (c) that the instrument or appliance be used in the dental sciences.

60. While the term "article" is not defined in the *Customs Tariff*, in previous cases, the Tribunal has noted that an "article" is generally considered to be ". . . any finished or semi-finished product which is not considered to be a material."[78] There is no indication that the good in issue is considered a material. Accordingly, the Tribunal finds that the ordinary meaning of the word "article" is sufficiently broad to encompass the good in issue.

61. On the issue of whether the article is "for use in" an instrument or appliance, subsection 2(1) of the *Customs Tariff* provides as follows:

> "for use in", wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be *wrought* or *incorporated into*, or *attached to*, *other goods* referred to in that tariff item.
>
> [Emphasis added]

62. Even assuming, *arguendo*, that the tooth tray is an appliance, it is the Tribunal's view that classification under tariff item No. 9977.00.00 would necessarily fail, as the good in issue would not meet the "for use in" requirement, as that phrase is defined in subsection 2(1) of the *Customs Tariff*. In this respect, the bleaching preparation, which must be re-applied to the tray before each treatment, cannot reasonably be considered to become part of the tray itself, in the sense of being wrought[79] or incorporated into, or attached to it.

63. The Tribunal therefore finds that the good in issue is not classifiable under tariff item No. 9977.00.00, as submitted by Eastern Division.

Conclusion

64. On the basis of the foregoing analysis, the Tribunal finds that the good in issue is classifiable under tariff item No. 3824.90.00, as other preparations of the chemical or allied industries.

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78. *Wolseley Canada Inc. v. President of the Canada Border Services Agency* (18 January 2011), AP-2009-004 (CITT) at para. 25*; Great West Van Conversions Inc. v. President of the Canada Border Services Agency* (30 November 2011), AP-2010-037 (CITT) at para. 34.
79. The Tribunal relies on the following definition of "wrought" in *Merriam-Webster's Collegiate Dictionary*, 11th ed.: "**1** : worked into shape by artistry or effort . . . **2** : elaborately embellished . . . **3** : processed for use . . . **4** : beaten into shape by tools . . . ."

DECISION

65. The appeal is allowed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member