



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2013-004

Ubisoft Canada Inc.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Tuesday, January 28, 2014*

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IN THE MATTER OF an appeal heard on October 1, 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 January 22, 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**

**UBISOFT CANADA INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is dismissed.

Daniel Petit  
Daniel Petit  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: October 1, 2013  
Tribunal Member: Daniel Petit, Presiding Member  
Counsel for the Tribunal: Georges Bujold  
Acting Manager, Registrar Programs and Services: Lindsay Vincelli  
Registrar Officer: Alexis Chénier

**PARTICIPANTS:**

<b>Appellant</b>	<b>Counsel/Representative</b>
Ubisoft Canada Inc.	Jean-Marc Clément
<b>Respondent</b>	<b>Counsel/Representatives</b>
President of the Canada Border Services Agency	Maude Miron-Bilodeau Lune Arpin

**WITNESS:**

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## STATEMENT OF REASONS

1. This is an appeal filed by Ubisoft Canada Inc. (Ubisoft) with the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 67(1) of the *Customs Act*,<sup>1</sup> from a decision made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4), with respect to a request for review of an advance ruling on tariff classification.

2. There are two issues in this appeal. The first is whether a set of components imported in a box ready for retail sale, containing an electric guitar and software burnt on a DVD called “Rocksmith, Authentic Guitar Games” (the good in issue), is properly classified under tariff item No. 9207.90.90 of the schedule to the *Customs Tariff*<sup>2</sup> as musical instruments, the sound of which is produced or must be amplified electrically (for example, organs, guitars, accordions), as determined by the CBSA, or should be classified under tariff item No. 8523.49.10 as other software, as claimed by Ubisoft. The second issue is whether the good in issue is classifiable under tariff item No. 9948.00.00 as articles for use in video games used with a television receiver and is thus eligible for duty-free treatment, as Ubisoft also claimed.

## PROCEDURAL HISTORY

3. On May 14, 2012, Ubisoft requested an advance ruling regarding the tariff classification of the good in issue.

4. On August 21, 2012, the CBSA issued an advance ruling, pursuant to paragraph 43.1(1)(c) of the *Act*, classifying the good in issue under tariff item No. 9207.90.90 as musical instruments, the sound of which is produced or must be amplified electrically.

5. On November 19, 2012, Ubisoft requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*. It submitted that the good in issue should be classified under tariff item No. 8523.49.10 as other software (optical media).

6. On January 22, 2013, the CBSA issued a ruling pursuant to subsection 60(4) of the *Act*, affirming its advance ruling.

7. On April 9, 2013, Ubisoft filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

8. On October 1, 2013, the Tribunal held a public hearing in Ottawa, Ontario. Mr. Vincent Minoué, Production Manager, Third Party Editorial, at Ubisoft, Inc., appeared as a witness for Ubisoft. The CBSA did not call any witness.

## GOOD IN ISSUE

9. The good in issue is a set of components imported in a box ready for retail sale called “Rocksmith, Authentic Guitar Games”, which contains the following articles: game software burnt on a DVD (optical disk), compatible with video game consoles such as Xbox 360 and Playstation 3 or with a personal

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

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

computer;<sup>3</sup> a Les Paul Junior electric guitar; a guitar strap; a USB cable, called “Rocksmith Real Tone Cable”, for converting analog signal into digital data; a cable with two ¼-inch jacks; two picks; two Allen keys; and an instruction booklet.

10. The good in issue is marketed by Ubisoft as a “bundle”, which helps users learn how to play guitar, by connecting it to a video game console using the USB cable supplied, and by inserting the DVD in a video game console. The evidence indicates that the good in issue is used to teach users how to play guitar and that Ubisoft’s target market is composed of people who want to learn how to play guitar or to practice playing that instrument to improve their skills.<sup>4</sup>

11. The DVD is also sold on its own by some retailers. It can be used with an appropriate video game console and any other electric guitar. Thus, the potential users who already have a guitar have the opportunity of buying only the game software and do not have to buy the bundle which is the object of this appeal.<sup>5</sup> Moreover, the electric guitar supplied is not absolutely necessary to use the DVD. Any electric guitar with the appropriate jack can be connected to a console by means of the USB cable.<sup>6</sup>

12. The guitar supplied with the good in issue is a real electric guitar manufactured since 1964 by Epiphone. Therefore, it can be used without the DVD and without a video game console by connecting it to an amplifier by means of the cable with two ¼-inch jacks supplied with the good in issue.

## LEGAL FRAMEWORK

13. 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 developed by the World Customs Organization (WCO).<sup>7</sup> The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation.

14. 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*<sup>8</sup> and the *Canadian Rules*<sup>9</sup> set out in the schedule.

15. The *General Rules* comprise six rules. Classification 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.

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3. According to the evidence, the good in issue are marketed in three versions, each containing a different DVD compatible with a specific type of device, namely, the Xbox 360 or Playstation 3 console, or with a personal computer. *Transcript of Public Hearing*, 1 October 2013, at 5-6, 31.

4. *Ibid.* at 24-26.

5. *Ibid.* at 29.

6. *Ibid.* at 30.

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

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

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

16. 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*<sup>10</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>11</sup> 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.<sup>12</sup>

17. The Tribunal must therefore first determine whether the good in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per 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 cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.<sup>13</sup>

18. Once the Tribunal has used this approach to determine the heading in which the good in issue should be classified, the next step is to use a similar approach to determine the proper subheading.<sup>14</sup> The final step is to determine the proper tariff item.<sup>15</sup>

## RELEVANT CLASSIFICATION PROVISIONS

19. The relevant provisions of the *Customs Tariff* provide as follows:

### Chapter 85

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

...

**85.23 Discs, tapes, solid-state non-volatile storage devices, “smart cards” and other media for the recording of sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs, but excluding products of Chapter 37.**

...

#### **-Optical media**

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10. World Customs Organization, 2nd ed., Brussels, 2003 [*Classification Opinions*].

11. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

12. See *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 interpretation is equally applicable to the *Classification Opinions*.

13. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.

14. 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.”

15. 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.

8523.41 --Unrecorded  
 ...  
 8523.49 --Other  
 8523.49.10 ---... ; Other software  
 ...

### Chapter 92

#### MUSICAL INSTRUMENTS; PARTS AND ACCESSORIES OF SUCH ARTICLES

...  
 92.07 Musical instruments, the sound of which is produced, or must be amplified, electrically (for example, organs, guitars, accordions).  
 9207.10.00 -Keyboard instruments, other than accordions  
 9207.90 -Other  
 9207.90.10 -- -Accordions, orchestral or concert chimes and bells, vibraharp or vibraphones, marimbas and xylophones  
 9207.90.90 -- -Other  
 ...

### Chapter 99

#### SPECIAL CLASSIFICATION PROVISIONS – COMMERCIAL

...  
 9948.00.00 Articles for use in the following:  
 ...  
 Video games used with a television receiver, and other electronic games;  
 ...

20. Note 3 to Chapter 99 provides as follows:

3. 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.

21. The other section and chapter notes and the applicable explanatory notes will be examined in the Tribunal's analysis hereafter, as needed.



## ANALYSIS

22. To dispose of this appeal, the Tribunal must first determine under which tariff item of Chapters 1 to 97 of the schedule to the *Customs Tariff* the good in issue should be classified. Indeed, although Ubisoft submitted that the good in issue is also classifiable under tariff item No. 9948.00.00 and is thus eligible for duty-free treatment, in accordance with note 3 to Chapter 99, which includes tariff item No. 9948.00.00, goods may be classified in Chapter 99 only after they have been classified under a tariff item of Chapters 1 to 97.

23. Therefore, the Tribunal will first determine whether the good in issue is properly classified under tariff item No. 9207.90.90, as determined by the CBSA, or should be classified under tariff item No. 8523.49.10, as claimed by Ubisoft. The Tribunal will then examine whether the good in issue meets the conditions of tariff item No. 9948.00.00.

### **Should the good in issue be classified under tariff item No. 9207.90.90 or under tariff item No. 8523.49.10?**

24. The parties agree that the good in issue consists of a bundle of items in a set put up for retail sale. In view of the evidence, the Tribunal agrees with the parties on this point. Indeed, the good in issue is a set of components that contains several articles put in a single box for retail sale.

25. The parties also agree that, as a matter of law, the tariff classification of goods put up in sets for retail sale, such as the good which is the object of this appeal, must be determined according to Rule 3 of the *General Rules*, more specifically pursuant to Rule 3(b). Rules 3(a) and 3(b) provide as follows:

3. When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
  - (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
  - (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

26. In this instance, classification cannot be effected in application of Rule 3(a), since the two positions proposed by the parties each pertain to only a part of the items included in the bundle in issue (a DVD of heading No. 85.23, in the case of Ubisoft, and a guitar of heading No. 92.07, in the case of the CBSA), such that these headings are to be regarded as equally specific in relation to the good in issue. Consequently, Rule 3(a) does not apply because, in the case at hand, according to the provisions of this Rule, neither of the two competing headings can have priority over the other as the heading providing the most specific description.

27. Therefore, the Tribunal agrees with the parties that the good in issue should be classified at the heading level according to Rule 3(b) of the *General Rules*, i.e. as if it consisted of the component of the set put up for retail sale which gives it its essential character. As to whether it is possible to apply such a determination in this case, even though the parties have divergent opinions regarding the article that gives the good in issue its essential character, they both requested the Tribunal to settle the question by determining whether it is the DVD or the guitar that is contained in the bundle that gives the good in issue

its essential character. This means that the two parties consider it possible to determine whether one of these components gives the good in issue its essential character. This is the core of the dispute between the parties.

28. Therefore, the parties agree, and the Tribunal accepts, that to determine whether the good in issue should be classified in heading No. 92.07 or heading No. 85.23, the Tribunal must rule on the issue of whether it is the guitar or the DVD that gives it its essential character in accordance with Rule 3(b). The Tribunal also notes that there is no dispute between the parties regarding the tariff classification of each of these articles contained in the bundle. Indeed, the parties agree that the DVD is properly classified in heading No. 85.23 and, more specifically, under tariff item No. 8523.49.10, as other software. They also agree that the electric guitar is properly classified in heading No. 92.07 and, more specifically, under tariff item No. 9207.90.90, as musical instruments, the sound of which is produced or must be amplified electrically.

29. In light of the evidence, the Tribunal accepts this classification of the DVD and the guitar, which are part of the bundle constituting the good in issue. Therefore, for the purposes of this appeal and in accordance with Rule 3(b), the Tribunal is of the view that, if it concludes, as claimed by Ubisoft, that the DVD gives the good in issue its essential character, then the good in issue should be classified in heading No. 85.23. However, if the Tribunal concludes, as determined by the CBSA, that the electric guitar gives the good in issue its essential character, then the good in issue should be classified in heading No. 92.07.

30. The parties' submissions on the issue of which article gives the good in issue its essential character can be summarized as follows.

31. According to Ubisoft, the DVD is the article that gives the good in issue its essential character, because it contains the software allowing the Rocksmith game to be played, and the good in issue is primarily an interactive musical game. Ubisoft submitted that the purpose of including a guitar in the set is to allow video game enthusiasts who do not possess such an instrument to have the opportunity to play the game right away upon returning home, and to enjoy the Rocksmith experience immediately.

32. Ubisoft submitted that, without the software and information burnt on the DVD, which is to be inserted in an appropriate game console, the other items in the bundle are useless or have no purpose, because it would then become impossible to play the musical game that the consumer decided to buy. Moreover, Ubisoft noted that the CBSA adopted this interpretation for the purposes of the tariff classification of another musical game similar to the one in issue and for which the advance ruling classifying this other good in heading No. 85.23 was made public.

33. Ubisoft further submitted that, contrary to an electric guitar normally used as a musical instrument producing sounds when amplified, the guitar supplied mainly acts as a source of information for the software, information digitized through the USB cable also supplied in the bundle, and that any guitar could be substituted for the one included in the bundle sold at retail without hindering the game's performance in any way. For that reason, Ubisoft claimed that, although the guitar is useful for the entertainment provided by the game software burnt on the DVD, it does not thereby give the good in issue its essential character.

34. Finally, Ubisoft submitted that the fundamental need fulfilled by the good in issue is to enable users to learn to play guitar and that the DVD contains the educational material or information that allows them to achieve that goal. According to Ubisoft, since the DVD contains the knowledge conveyed to the users for the purposes of learning to play guitar, it follows that it is that article that gives the good in issue its essential character.

35. For its part, the CBSA submitted that the guitar gives the good in issue its essential character and that it should therefore be classified as a guitar according to Rule 3(b) of the *General Rules*. The CBSA submitted that the application of the factor set out in explanatory note VIII to Rule 3(b) demonstrates that it is the guitar that gives the Rocksmith bundle its essential character.

36. That explanatory note provides as follows:

The 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.

37. The CBSA submitted that the guitar occupies the bulk of the Rocksmith bundle, which is obvious, in view of its much greater size relative to the DVD. The same can be said about its weight, which is clearly greater than that of the DVD. Regarding the value of the articles, the CBSA filed evidence that the guitar alone is sold for approximately \$145, while the DVD alone has a lower value.<sup>16</sup>

38. The CBSA also submitted that the utilitarian nature of the Rocksmith bundle is to play the guitar and that the buyers of the bundle acquire it precisely because the guitar is included in the good in issue. According to the CBSA, users who do not want to have the guitar or do not need it will not buy the Rocksmith bundle, but rather the DVD alone, since it is sold on its own or with the USB cable required at a lower cost. The CBSA also noted that, on the packaging of the good in issue and the related promotional documentation, emphasis is put on the presence of a real guitar in the bundle and on learning to play that instrument.

39. Finally, the CBSA submitted that the goal of using the good in issue is to play and learn how to play guitar, according to the information available on Ubisoft's website, and that the guitar is indispensable to allow any interaction with the DVD. In short, the CBSA considers that, since the guitar is of essential importance to use the good in issue and since, to market and sell it, Ubisoft puts the emphasis on the presence of a real guitar in the bundle and on learning to play that instrument, the guitar gives the good in issue its essential character.

40. After a careful examination of the evidence and the arguments of the parties, the Tribunal considers that it is the electric guitar included in the good in issue that gives it its essential character. In this regard, the Tribunal accepts the CBSA's argument that the application of the factors set out in explanatory note VIII to Rule 3(b) of the *General Rules* supports this conclusion.

41. First, according to the criterion of the role of the articles comprising the good in issue in relation to its use, there is no doubt that the presence of the guitar is of essential importance in relation to the sale and use of the bundle. This clearly emerges from the testimony of the witness called by Ubisoft during the hearing. He first confirmed that the people interested in learning to play guitar by using the DVD, but who already have a guitar, have the opportunity of buying the DVD or the game alone without having to acquire the bundle.<sup>17</sup> This fact suggests that the guitar is the most important article included in the bundle, because it was designed and packaged for retail sale to target consumers who do not already have a guitar but who wish to use the Rocksmith game.

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16. Tribunal Exhibit AP-2013-004-08A, Tab 17; *Transcript of Public Hearing*, 1 October 2013, at 57-59.

17. *Ibid.* at 29.

42. On this issue, the witness even stated the following when asked why Ubisoft decided to offer the Rocksmith game as a bundle :

Simply because. . . There are two targets, in fact: people who already play guitar and who want to improve, and people who have never played guitar but who want to learn how to play. If they come to the store, want to buy the game and don't have a guitar, they can't play the game. So we thought: We absolutely need to be able to offer the players the possibility to play this game right away when they get home. This is a constraint, but for us, what is important is the player's experience and the player's experience begins in the store. So we don't necessarily have a lot of control over what happens in the store. But it's important to make it as easy as possible for the player to have access to his game.<sup>18</sup>

[Translation]

43. On the basis of this testimony, the Tribunal finds that the good in issue exists and is available on the market precisely because it contains an electric guitar. In other words, the evidence indicates that one of the means chosen by Ubisoft to boost sales of the DVD on which the Rocksmith game is burnt and to reach its target market is to offer it in a bundle containing a real electric guitar. If it were not for the need identified by Ubisoft to offer consumers the possibility of using the DVD or playing the Rocksmith game right away, the Tribunal doubts that it would have been necessary for Ubisoft to market this product in a set put up for retail sale including a real electric guitar.

44. In the Tribunal's opinion, this means that the guitar is the main component or the indispensable item of the bundle. Indeed, it is reasonable to infer from this evidence that the buyers of the good in issue acquire this bundle because it contains a guitar. In addition, the Tribunal considers that, logically, consumers interested in the Rocksmith game who do not need to buy a guitar to use the game will not acquire the good in issue, but instead the DVD alone, which is also marketed by Ubisoft at a lower cost.

45. Since the good in issue is manifestly intended for consumers who need to acquire a guitar to use the DVD, the Tribunal concludes that the guitar gives the good in issue its essential character. In short, the essential component of the bundle is the electric guitar.

46. An examination of the other factors set out in explanatory note VIII to Rule 3(b) supports this conclusion. Indeed, because the dimensions of the guitar are larger than those of all the other components combined, it occupies the greatest area and the greatest volume in the bundle. Moreover, the guitar clearly weighs more than the DVD and other components. The evidence concerning the retail price of the articles composing the bundle also indicate that the guitar has the greatest monetary value.<sup>19</sup>

47. Regarding Ubisoft's argument that these factors are not conclusive in this instance in view of the special nature of the good in issue and the fact that these components are articles that are very different from one another, the Tribunal notes that it applies the *Explanatory Notes* unless there is a valid reason not to do so. In this case, the Tribunal is not convinced by Ubisoft's arguments that such a reason exists and that it should ignore the aforementioned factors in its analysis. Ultimately, what is important is that the evidence regarding the factors set out in explanatory note VIII to Rule 3(b) supports the conclusion that it is the guitar that gives the good in issue its essential character.

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18. *Ibid.* at 51.

19. Tribunal Exhibit AP-2013-004-08A, Tabs 1, 17.

48. The same goes for the packaging of the good in issue. The emphasis is clearly on the presence of a real guitar in the bundle.<sup>20</sup>

49. Despite this evidence, Ubisoft stressed that the need fulfilled by the good in issue, taken as a whole, is learning to play guitar and that it is the DVD containing the educational material or information which enables the buyers to achieve that objective, such that the DVD gives the good in issue its essential character. The Tribunal is not convinced by this argument. Although the DVD contained in the good in issue is a necessary accessory to allow users to learn to play guitar, it is not the main article of the bundle. In the Tribunal's opinion, the guitar is the essential article in the bundle, because it allows Ubisoft not only to fulfill the need of those interested in learning to play guitar using the DVD, but also the need of consumers who must procure a guitar to satisfy this need.

50. In this regard, the evidence indicates that the marketing of the good in issue focuses on the presence of the guitar. As such, even if it were admitted that the good in issue has the ultimate purpose of teaching users to play guitar by means of the DVD, the fact remains that to sell the good in issue to a segment of its target market, Ubisoft deemed it necessary to include a real guitar and thus propose its DVD in a set set up for retail sale. In view of these facts, the Tribunal cannot accept Ubisoft's argument that it is the DVD and not the guitar that gives the good in issue its essential character.

51. Finally, concerning Ubisoft's allegation that the CBSA classified a product in competition with the good in issue, namely, the Guitar Hero game, in heading No. 85.23, the Tribunal is of the view that the tariff classification of goods other than the good in issue is irrelevant to this appeal. In any case, the evidence indicates that the Guitar Hero game and the good in issue are very different goods. Indeed, Guitar Hero does not include a real guitar, but a video game joystick shaped like a guitar, which is specifically designed to be used with the DVD of the Guitar Hero video game and which is completely unusable in another context. In this instance, the guitar is a real Epiphone guitar, which is not a replica or a toy, but a real musical instrument classifiable in heading No. 92.07. Therefore, the CBSA's advance ruling regarding the Guitar Hero game does not apply to the good in issue.

52. For the foregoing reasons, the Tribunal finds that it is the electric guitar that gives the good in issue its essential character. Therefore, it is properly classified in heading No. 92.07 in application of Rule 3(b) of the *General Rules* and, more specifically, in accordance with Rule 1 of the *Canadian Rules*, under tariff item No. 9207.90.90, as determined by the CBSA.

#### **Is the good in issue classifiable under tariff item No. 9948.00.00?**

53. Chapter 99, which includes tariff item No. 9948.00.00, provides special classification provisions that generally allow certain goods to be imported into Canada duty-free. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter. Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no classification opinions or explanatory notes to consider.

54. However, Rule 3(b) of the *General Rules* applies to classification in Chapter 99. Since the good in issue is a set put up for retail sale, the classification of which must be determined, as was previously established, according to the component that gives it its essential character in application of this Rule, the issue before the Tribunal is whether the guitar, as the component that gives the good in issue its essential

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20. *Ibid.*, Tab 1.

character, meets the conditions of tariff item No. 9948.00.00. As submitted by the CBSA, in applying Rule 3(b), the relevant article, for the purposes of determining whether the good in issue is entitled to the benefit of Chapter 99, is the electric guitar. Therefore, contrary to Ubisoft's claims, to determine whether the good in issue can be classified under tariff item No. 9948.00.00, the Tribunal does not have to consider the other components of the bundle. It must classify the good in issue as if it were an electric guitar.

55. Tariff item No. 9948.00.00 includes, *inter alia*, articles "for use in . . . [v]ideo games used with a television receiver, and other electronic games". For the good in issue to be entitled to the benefit of tariff item No. 9948.00.00, the Tribunal must therefore determine whether an electric guitar classified under tariff item No. 9207.90.90 constitutes (1) an article (2) for use in (3) video games used with a television receiver, and other electronic games. The good in issue is only entitled to the benefit of tariff item No. 9948.00.00 if the electric guitar meets all three conditions.

56. Although the term "article" is not defined for the purposes of tariff item No. 9948.00.00, the parties agree that the good in issue and, in particular, the electric guitar, is an "article". There is no evidence on the record or submission by the parties indicating that the Tribunal should draw a different conclusion.

57. The Tribunal will now examine the question of whether the electric guitar is "for use in" video games used with a television receiver or other electronic games.

58. The expression "for use in" is defined in subsection 2(1) of the *Customs Tariff* 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.

59. In the present case, it is clear that the electric guitar is not wrought or incorporated into video games used with a television receiver or other electronic games. In applying subsection 2(1) of the *Customs Tariff*, the Tribunal applies a test with two requirements for determining whether goods are "attached to" other goods and, hence, "for use in" those other goods. In particular, the goods must be (1) physically connected and (2) functionally joined to the other goods.<sup>21</sup> The Tribunal has also held that goods are functionally joined to other goods (i.e. the host goods) when they enhance or complement the function of those other goods.<sup>22</sup> This has usually been understood to mean that the goods must help, in some measure, the host goods to execute their functions or allow them to acquire additional capabilities.<sup>23</sup>

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21. See *Kverneland Group North American Inc. v. President of the Canada Border Services Agency* (30 April 2010), AP-2009-013 (CITT) [*Kverneland*]; *Jam Industries Ltd. v. President of the Canada Border Services Agency* (20 March 2006), AP-2005-006 (CITT) [*Jam Industries*]; *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT); *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (29 November 2001), AP-2000-047 (CITT); *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT); *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT).

22. See, for example, *Kverneland*; *Jam Industries*; *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency* (4 November 2011), AP-2008-012R (CITT) [*P.L. Light Systems*]; *Curve Distribution Services Inc. v. President of the Canada Border Services Agency* (15 June 2012), AP-2011-023 (CITT) [*Curve Distribution*].

23. See, for example, *Kverneland* at para. 53; *Curve Distribution* at para. 67; *P.L. Light Systems* at para. 26.

60. Ubisoft submitted that the good in issue meets these conditions. According to Ubisoft, there is no doubt that the optical disk is physically attached to the game console (the host good), which in turn is used with a television receiver, because it must be inserted therein. Regarding the guitar, Ubisoft submitted that it is also physically attached to the game console by the USB cable.

61. Ubisoft submitted that the good in issue is functionally joined to the video game console because it “enhances or complements the function of the host good” [translation]. According to Ubisoft, a consumer cannot possess only a game console without the optical disks containing the game software that interests and entertains him. Consequently, a console has no inherent use and only acquires value when an optical disk with game software is inserted. In the present case, the good in issue would enhance or complement the capabilities and functions of the console, allowing it to teach to play guitar, which a video game console could not do alone without the contribution of the good in issue.

62. For its part, the CBSA submitted that the expression “for use in” the host good (the video game console, in this instance) must be interpreted according to the “actual use” of the guitar. In this regard, the CBSA submitted that, to benefit from tariff item No. 9948.00.00, the guitar must be used only to play video games and that Ubisoft submitted no evidence of end use demonstrating that the guitar is used only with a video game used with a television receiver and other electronic games, such as by means of end use certificates.<sup>24</sup>

63. Moreover, the CBSA submitted that the good in issue is not “functionally joined” to the video game console. On this point, the CBSA submitted that the guitar does not enhance the functions of the host good, because it only transmits data to the host good (i.e. to the video game console). According to the CBSA, the situation is similar to the situation in *Andritz Hydro Canada Inc. and VA Tech Hydro Canada Inc. v. President of the Canada Border Services Agency*,<sup>25</sup> where the Tribunal found that the goods in issue in that appeal only transmitted data to the host good (an automatic data processing machine), without thereby enhancing the functions of that good (i.e. to monitor and control). By analogy, the CBSA submitted that Ubisoft did not demonstrate that the guitar would enhance the functions of the video game console, which does not gain new functions and remains the same when the guitar is physically connected to it.

64. The Tribunal considers that it has not been demonstrated that the electric guitar is functionally joined to the video game console, which is the host good in this case. Indeed, the Tribunal concludes that the evidence does not indicate that the guitar enhances or complements the function of a video game console used with a television receiver.

65. In this regard, the Tribunal rejects Ubisoft’s argument that the function of a video game console or a computer, to which the good in issue, including the electric guitar, can be connected, is to teach users to play a musical instrument and that the good in issue enables these host goods to acquire additional capabilities. For the following reasons, contrary to Ubisoft’s claims, the function of the video game consoles and computers is not to teach to play a musical instrument. Therefore, the issue is not whether the good in issue enhances or complements any teaching function attributed by Ubisoft to the video game consoles and computers.

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24. Ubisoft submitted that such evidence is required by section 3 of the *Imported Goods Records Regulations*, SOR/86-1011, when an importer imports goods and wishes to benefit from a reduced rate of duty because of their intended use.

25. (21 June 2013), AP-2012-022 (CITT) [*Andritz*].

66. Video game consoles and machines are classifiable in heading No. 95.04. The explanatory notes of this heading state the function of these goods and indicate that they may have the characteristics of automatic data-processing machines, which are classifiable in Chapter 84:

Video game consoles and machines whose objective characteristics and principal function are such that they are intended for entertainment purposes (game-playing) remain classified in this heading, whether or not they fulfil the conditions of Note 5 (A) to Chapter 84 regarding automatic data processing machines.

67. Note 5(A) to Chapter 84 states the functions and features of automatic data-processing machines, a class of machine that includes computers:

5. (A) For the purpose of heading 84.71, the expression “automatic data processing machines” means machines capable of:
- (i) Storing the processing program or programs and at least the data immediately necessary for the execution of the program;
  - (ii) Being freely programmed in accordance with the requirements of the user;
  - (iii) Performing arithmetical computations specified by the user; and,
  - (iv) Executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

68. Therefore, the main function of video game consoles is entertainment or game-playing. To perform this function, they process information like a computer. The relevant question is therefore whether the electric guitar enhances or complements this function specific to video games used with a television receiver and other electronic games. In the Tribunal’s opinion, the answer to this question is manifestly no, because the electric guitar only provides data to the video game console. The electric guitar does not assist the video game console or the computer (the host good) to perform this data-processing function and does not enable the host good to acquire additional capabilities.

69. As in *Andritz*, the host good in the present case (video game console or computer) does not acquire any increased functionality due to the electric guitar; rather, the guitar enables it to perform its own function, which is to process information intended for entertainment or game-playing. In fact, the electric guitar only provides the information received by the console. Therefore, it cannot be said that the guitar enhances or complements the functions of the video game console. Its functions remain the same when the guitar is physically connected to it.

70. Consequently, the Tribunal finds that the electric guitar neither enhances nor complements the function of video games consoles used with a television receiver (the host good) and that, therefore, it is not functionally joined to it within the meaning of tariff item No. 9948.00.00. In view of this conclusion, it is unnecessary to examine the other conditions of application of this tariff item to dispose of the present appeal.

71. For the foregoing reasons, the Tribunal finds that the good in issue is not entitled to the benefit of duty-free treatment under tariff item No. 9948.00.00.



72. Therefore, the appeal is dismissed.

Daniel Petit  
Daniel Petit  
Presiding Member