Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-013

Philips Electronics Ltd.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, March 3, 2014

Canada

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IN THE MATTER OF an appeal heard on November 5, 2013, pursuant to section 67 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 April 3, 2013, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

PHILIPS ELECTRONICS LTD. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Gillian Burnett
Gillian Burnett
Acting Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 5, 2013
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Jidé Afolabi
Manager, Registrar Programs and Services:	Lindsay Vincelli
Registrar Support Officer:	Alexis Chénier

PARTICIPANTS:

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Philips Electronics Ltd.	Robert A. MacDonald

Respondent	**Counsel/Representative**
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Philips Electronics Ltd. (Philips) pursuant to subsection 67(1) of the *Customs Act*[1] with respect to an advance ruling regarding tariff classification, dated April 3, 2013, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).[2]

2. The issue in this appeal is the proper classification of "Philips AVENT Soothers" (the goods in issue). The goods in issue were classified by the CBSA in heading No. 39.26 of the schedule to the *Customs Tariff*.[3] Philips claims that the goods in issue should be classified in heading No. 95.03.

PROCEDURAL HISTORY

3. On July 3, 2012, Philips submitted a request for an advance ruling of tariff classification to the CBSA. Pursuant to this request, the CBSA issued an advance ruling on August 28, 2012, under paragraph 43.1(1)(*c*) of the *Act*,[4] classifying the goods in issue under tariff item No. 3926.90.99 as other articles of plastics and, further, under classification No. 3926.90.99.30 hygienic or pharmaceutical articles, as specified in Statistical Note 2 to Chapter 39.[5]

4. On November 15, 2012, Philips filed a request for review of the CBSA's advance ruling pursuant to subsection 60(2) of *Act*. On March 7, 2013, the CBSA issued a preliminary decision, which did not change the initial determination.[6] On April 3, 2013, the CBSA issued a decision pursuant to subsection 60(4), which confirmed the determination.

5. On May 13, 2013, Philips filed its appeal with the Tribunal. Philips contends that the goods in issue are properly classified under tariff item No. 9503.00.90 as other toys.

6. The Tribunal held a hearing regarding the appeal on November 5, 2013. Philips presented no witnesses at the hearing.

GOODS IN ISSUE

7. The goods in issue are also known as pacifiers. They are made of odour-free and taste-free silicone with a hard plastic base showing child-friendly depictions of various animals and insects. The goods in issue possess a "symmetrical collapsible nipple" and come with a "snap-on protective cap". The goods in issue are specifically designed for babies up to 6 months of age.[7]

LEGAL FRAMEWORK

8. In appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of goods in accordance with prescribed interpretive rules.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2013-013-04A, tab 3, Vol. 1.
3. S.C. 1997, c 36.
4. Exhibit AP-2013-013-04A, tab 1, Vol. 1.
5. *Ibid.* at 1, 2, Vol. 1.
6. *Ibid.*, tab 2, Vol. 1.
7. *Ibid.* at paras. 9-13, tab 4, Vol. 1.

9. 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).[8] The schedule is divided into sections and chapters, with Chapters 1 to 98 containing a list of goods categorized in a number of headings and subheadings, and under tariff items. Chapter 99 is divided into tariff items only.

10. 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*[9] and the *Canadian Rules*[10] set out in the schedule.

11. The *General Rules* comprise six rules structured in sequence so that classification at the heading level must first be attempted through Rule 1, which provides that ". . . classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes . . . ." If classification cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on, until classification is determined.

12. Regarding subheadings, 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). With regard to tariff items, Rule 1 of the *Canadian Rules* states that goods shall be classified according to their terms and ". . . any related Supplementary Notes and, *mutatis mutandis*, to the General Rules . . . ."

13. Section 11 of the *Customs Tariff* provides that, in interpreting headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[11] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[12] published by the WCO. While the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods, the Tribunal will apply them, unless there is a sound reason to do otherwise.[13]

HEADINGS, SECTION AND CHAPTER NOTES

Heading No. 39.26

Terms of Heading No. 39.26

14. As indicated above, the CBSA has taken the position that the correct tariff classification of the goods in issue is in heading No. 39.26. The heading falls in Section VII, which covers plastics and articles thereof, and rubber and articles thereof, and, more particularly, in Chapter 39, which covers plastics and articles thereof. The terms of heading No. 39.26 are as follows:

> **39.26 Other articles of plastics and articles of other materials of headings 39.01 to 39.14.**

8. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
9. S.C. 1997, c. 36, schedule [*General Rules*].
10. S.C. 1997, c. 36, schedule.
11. World Customs Organization, 2d ed., Brussels, 2003. No classification opinion is applicable to the present appeal.
12. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
13. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17. The Federal Court of Appeal in this case interpreted section 11 of the *Customs Tariff* as requiring that *Explanatory Notes* be applied unless there is a sound reason to do otherwise.

Notes to Section VII

15. There are no relevant section notes to Section VII.

Notes to Chapter 39

16. Note 2(y) to Chapter 39 provides as follows:

> 2. This Chapter does not cover:
>
> . . .
>
> (y) Articles of Chapter 95 (for example, toys, games, sports requisites) . . . .

17. In addition, Statistical Note 2 to Chapter 39 provides as follows:

> **Statistical Notes**. (NB These notes do not form part of the Customs Tariff legislation.)
>
> . . .
>
> 2. Classification No. 3926.90.99.30 applies only to the following articles: nursing nipples and pacifiers; ice bags . . . .

Explanatory Notes

18. The relevant portion of the explanatory notes to heading No. 39.26 provide as follows:

> This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.
>
> They include:
>
> . . .
>
> (11) Pacifiers (or "baby's dummies"); ice-bags . . . .

19. Thus, the Note 2(y) to Chapter 39 specifically excludes toys. Further, the explanatory notes to heading No. 39.26 specifically include pacifiers. In addition, Statistical Note 2 to Chapter 39, which the CBSA has included in its submissions, indicates that classification No. 3926.90.99.30 applies to pacifiers.

Heading No. 95.03

Terms of Heading No. 95.03

20. Philips has taken the position that the correct tariff classification of the goods in issue is in heading No. 95.03. The heading falls in Section XX, which covers miscellaneous manufactured articles, and more particularly, in Chapter 95, which covers toys, games and sports requisites, and parts and accessories thereof. The terms of heading No. 9503.00 are as follows:

> **95.03 Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls; other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds.**

Notes to Section XX

21. There are no relevant section notes to Section XX.

Notes to Chapter 95

22. Note 1(v) to Chapter 95 provides as follows:

> 1. This Chapter does not cover:
>
> . . .
>
> (v) Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles *having a utilitarian function* (classified according to their constituent material).
>
> [Emphasis added]

Explanatory Notes

23. The explanatory notes to Chapter 95 provide as follows:

> This Chapter covers toys of all kinds whether designed for the amusement of children or adults. It also includes equipment for indoor or outdoor games . . . .

24. The relevant portion of the explanatory notes to heading No. 95.03 provide as follows:

> This heading covers:
>
> . . .
>
> (D) **Other toys**.
>
> This group covers toys intended essentially for the amusement of persons (children or adults). . . .
>
> . . .
>
> These include:
>
> (xxii) Toy money boxes; babies' rattles, jack-in-the-boxes; toy theatres with or without figures, etc.

25. Thus, the explanatory notes to Chapter 95 specifically include toys, and the explanatory notes to heading No. 95.03 indicate that the heading covers toys ". . . intended essentially for the amusement of persons . . . ."

26. Further, on the basis of the terms of Note 2(y) to Chapter 39 and those of heading No. 95.03, should it be concluded that the goods in issue are toys, classification in heading No. 39.26 is foreclosed, leaving open the conclusion that the goods in issue fall in heading No. 95.03.

POSITIONS OF PARTIES

Philips

27. Relying on the terms of heading No. 95.03, and noting the references to "amusement" in the explanatory notes to Chapter 95 and heading No. 95.03, Philips indicated, in its submissions, that the goods in issue are toys meant to provide amusement of a baby.[14] Noting that the term "toy" is not defined in the *Customs Tariff*, Philips relied, for the purposes of this appeal, on a dictionary definition which similarly references amusement as a fundamental function of toys.[15]

14. Exhibit AP-2013-013-04A at paras. 37-40, 45-48, Vol. 1.
15. *Ibid.* at paras. 43, 44, Vol. 1.

28. Further, with regard to its contention, Philips referred to the Tribunal's decision in *Calego International Inc. v. Deputy M.N.R.*,[16] in which the Tribunal opined that ". . . a toy is something from which one derives pleasure or amusement",[17] as well as the Tribunal's decision in *Zellers Inc. v. Deputy M.N.R.*,[18] in which the Tribunal opined 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."[19] Philips took the position that the goods in issue fall into the latter category described in *Zellers*, in that they may not be generally perceived as toys, but fulfill the rationale for being so considered upon closer inspection.[20]

29. Further along the continuum of its contention, and with regard to the general perception of the goods in issue, Philips referred to dictionary definitions of "amuse", "amusement", "pleasure" and "play", which generally focus on the diversion of attention, entertainment and sensory gratification.[21]

30. Philips then relied on the testimony of an expert witness in the Tribunal's decision in *Elfe Juvenile Products v. President of the Canada Border Services Agency*.[22] In *Elfe*, Dr. Jennifer M. Rosinia, an expert in child development, testified concerning the relationship between amusement and the cognitive capacity of infants that ". . . infants do not have, or have very little, body control (motor skills) during the first months of their lives . . . [and that] infants are not able to amuse themselves by themselves. . . . [P]eople amuse babies by providing them with different sensory experiences."[23]

31. Philips asserted that, similar to the goods in *Elfe*, which were infant swings, the goods in issue are used by people to provide infants with sensory stimulation and, thus, amusement through "non-nutritive sucking", resulting in a fundamental function that may not be generally perceived, but is nonetheless one pursuant to which the goods in issue ought to be classified as toys.[24]

32. Philips also noted the Tribunal's decision in *Regal Confections Inc. v. Deputy M.N.R.*[25] The Tribunal noted in *Regal* as follows:

> Regarding toys generally, . . . 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.

33. Noting the important jurisprudential distinction, as set out in *Regal*, between toys on the one hand, and other amusing articles that possess utilitarian functions on the other, Philips posited that the goods in issue are designed solely to amuse babies and possess no utilitarian function, leaving no bar to their classification as toys.[26]

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16. (29 May 2000), AP-98-102 (CITT) [*Calego*].
17. *Calego* at 6.
18. (29 July 1998), AP-97-057 (CITT) [*Zellers*].
19. *Zellers* at 7.
20. Exhibit AP-2013-013-04A at para. 48, Vol. 1.
21. *Ibid.* at paras. 54-57, Vol. 1.
22. (15 June 2012), AP-2011-029 (CITT) [*Elfe*].
23. *Elfe* at para. 42.
24. Exhibit AP-2013-013-04A at paras. 52, 58-64, Vol. 1.
25. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal*].
26. Exhibit AP-2013-013-04A at paras. 48, 52, Vol. 1.

34. Further, with regard to utilitarian functions, and noting the CBSA's use of classification No. 3926.90.99.30 in further classifying the goods as hygienic or pharmaceutical articles, as specified in Statistical Note 2 to Chapter 39, Philips asserted that the goods in issue are not pharmaceutical, having regard to a dictionary definition of that word, which relates to medicinal substances, and, further, that they are not hygienic, also having regard to a dictionary definition of that word, which pertains to the maintenance of health and the prevention of disease through cleanliness.[27]

35. In making its assertions, Philips noted that the use of pacifiers has been linked to a number of health and developmental problems in babies,[28] that pacifiers are not clean or sanitary in their own right when put to use as intended,[29] that pacifiers have been linked to emotional problems in young boys[30] and that pacifiers are specifically listed in the *Hazardous Products (Pacifiers) Regulations*.[31]

36. In addition, Philips drew a further comparison with regard to the goods in *Zellers*, which were not promoted or labeled as toys but which the Tribunal concluded were in fact toys for the purposes of tariff classification. Philips posited that the goods in issue are also toys, even though they are not promoted as toys or necessarily sold in the toy department.[32]

37. Lastly, Philips asserted that, further to the jurisprudence in *Suzuki*, it has provided a sound basis for the Tribunal to disregard the explanatory notes to heading No. 39.26, which specifically include pacifiers, by showing that ". . . the goods are *prima facie* classifiable as 'Toys' of [Chapter] 95, thereby excluding the goods from [Chapter] 39 by virtue of Chapter Note 2(y) to [Chapter] 39".[33]

CBSA

38. For its part, the CBSA referred to the terms of Note 2(y) to Chapter 39, which specifically excludes toys, and posited that, should the goods in issue fail to be classified in Chapter 95 as toys, classification in Chapter 39 becomes a possibility.[34]

39. The CBSA then argued that the goods in issue are not toys, since they provide a utilitarian function to a baby. Noting literature that indicates that babies are born with a sucking reflex, which delivers a soothing and calming effect, the CBSA posited that the utilitarian function of the goods in issue is to calm and soothe babies, thus helping them sleep, relieving their pain, preventing sudden infant death syndrome, helping them develop and relieving their stress.[35] The CBSA also noted that the packaging of the goods in issue specifies that they are distributed in hospitals, which the CBSA considered to be further confirmation of the utilitarian purpose of the goods in issue.[36]

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27. *Ibid.* at paras. 74-78, Vol. 1.
28. *Ibid.* at para. 79, Vol. 1.
29. *Ibid.* at para. 80, Vol. 1.
30. *Ibid.* at para. 81, Vol. 1.
31. C.R.C., c. 930. In addition, Philips drew a link between the *Hazardous Products (Pacifiers) Regulations* and the *Toys Regulations*, S.O.R./2011-17, pointing out that subsection 5(2) of the former states that "[e]very product . . . shall meet the requirements of section 25 of the *Toys Regulations*." That section sets out conditions for toys that contain toxic substances.
32. Exhibit AP-2013-013-04A at paras. 49, 50, Vol. 1.
33. *Ibid.* at para. 93, Vol. 1.
34. Exhibit AP-2013-06A at para. 18, Vol. 1A.
35. *Ibid.* at paras. 35, 36, tab 19, Vol. 1A.
36. *Ibid.* at para. 37, Vol. 1A.

40. Further, the CBSA referred to the Tribunal's decision in *Franklin Mint Inc. v. President of the Canada Border Services Agency*,[37] in which the Tribunal considered the jurisprudence in *Regal* and indicated that the possession of amusement value is not determinative with regard to the classification of a good as a toy.[38] For the CBSA, the corollary is that, while the goods in issue may possess some amusement value for babies, they are nonetheless not toys, since they do have a utilitarian purpose.

41. In addition, the CBSA argued for classification in line with the classification by Canada's trading partners, noting that countries such as the United States and the United Kingdom classify pacifiers in heading No. 39.26.[39]

42. Arguing for the relevance of promotion and labeling, the CBSA referred to, and relied upon, the decision of the Federal Court of Appeal (the FCA) in *HBC Imports (Zellers Inc.) v. Canada (Border Services Agency)*,[40] in which the FCA upheld the Tribunal's decision regarding the classification of sleds as exercise equipment rather than toys. In that decision, the FCA wrote as follows:

> [12] In this case, the Tribunal provided its reasons for deciding that the Astra Sled should not be included as "other toys" for the purposes of heading 95.03 at paragraphs 41 to 51 of its decision. The Tribunal noted that the use and intended use of the particular product are relevant and that the manner in which the product is marketed is also to be considered. The Tribunal found that "the essential purpose of the good in issue is to enable children (and adults) to partake in the outdoor activity of sledding or sliding on snowy hills". The Tribunal also reviewed how HBC marketed the Astra Sled.
>
> [13] It seems to me that the decision of the Tribunal is within the range of reasonable outcomes.

43. The CBSA noted that a consideration of the manner in which the goods in issue are marketed reveals warnings, such as one pertaining to a strangulation danger and another concerning use under adult supervision, as well as a recommendation that the goods in issue be replaced every four weeks for safety and hygiene reasons. The CBSA juxtaposed those indications against information provided by Philips with regard to other goods which are not in issue and which the CBSA is of the opinion can properly be termed toys, noting an emphasis on play value, including statements such as "totally safe to play with" and "fun for your baby to play with".[41]

44. On the basis of its arguments as outlined above, the CBSA asserted that the goods in issue cannot rightly be classified as toys in Chapter 95. As an alternative, the CBSA argued for reliance upon the terms of heading No. 39.26, read in the context of the explanatory notes to that heading, which specifically include pacifiers.[42]

45. Lastly, and as a counter to Philips' arguments on the issue, the CBSA contended that, since classification No. 3926.90.99.30 refers to hygienic articles, and since Statistical Note 2 to Chapter 39 indicates that pacifiers fall under that classification number, pacifiers are hygienic articles essentially by way of statutory definition. In addition, the CBSA referred to what it considered the hygienic features of the goods in issue, such as those in accompanying materials that indicate the need for sterilization in boiling water and the need to clean after each use, as well as the supply of protective caps for the goods in issue.[43]

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37. (13 June 2006), AP-2004-061 (CITT) [*Franklin Mint*].
38. Exhibit AP-2013-06A at para. 28, Vol. 1A.
39. *Ibid.* at para. 30, tab 16, Vol. 1A.
40. 2013 FCA 167 (CanLII) [*HBC*].
41. Exhibit AP-2013-06A at paras. 31-34, Vol. 1A.
42. *Ibid.* at para. 19, Vol. 1A.
43. *Ibid.* at paras. 45, 47, Vol. 1A.

ANALYSIS

46. Before proceeding with its substantive analysis, it is important for the Tribunal to note that, as is the case generally with regard to appeals, the burden of proof in this appeal rests with Philips. To that end, the Tribunal indicated as follows in *Les Produits Laitiers Advidia Inc. v. Commissioner of the Canada Customs and Revenue Agency and Dairy Farmers of Canada*,[44] referencing the decision of the Supreme Court of Canada in *Smith v. Nevins*:[45]

> 13. As stated by the Supreme Court of Canada, in legal proceedings, the general rule is that *he or she who asserts must prove*, i.e. the burden of proof rests upon the party that substantially asserts the affirmative of an issue. The rule is supportable not only on the ground of fairness but also because of the greater practical difficulty involved in proving a negative. The party on which the burden of proof rests will fail if, when all the evidence is produced, the mind of the trier of fact is in a state of real doubt as to the effect of the evidence. The above rule should be set aside only in the most exceptional cases.
>
> . . .
>
> 18. . . . The remainder of the case centered on the proper interpretation of various headings and tariff items, and it is well settled that "[t]he construction of tariff items is a question of law", not fact. . . . [N]either party ever bears an onus or a burden of proof with respect to the law.
>
> [Emphasis in original, footnotes omitted]

47. In order to discharge its burden, it is incumbent upon Philips to adduce evidence supportive of the conclusion that, pursuant to the methodology set out in the *General Rules*, the goods in issue are properly classifiable in heading No. 95.03.[46] While not a requirement in all instances with regard to the discharge of that burden, in producing no knowledgeable witnesses to explain the characteristics, functions and marketing of the goods in issue, Philips did itself a substantial disservice in this instance.

48. Consequently, the Tribunal's considerations were limited to the documents placed on the record by Philips and to its arguments. It is noteworthy that those documents included very little by way of product information, with the full complement of such information being a two-page document contained in its brief, offering nothing other than the most basic of descriptions.[47] It is also noteworthy that, in attempting to discover whether Philips' arguments are supported by some form of evidence, the Tribunal put the question to Philips at the hearing and received an admission that no such evidence existed in its submissions.[48]

49. With a dearth of factual submissions, the Tribunal was left with Philips' bald assertions regarding the characteristics of the goods in issue, to which factual weight cannot plausibly be ascribed.

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44. (8 March 2005), AP-2003-040 (CITT).
45. [1925] S.C.R. 619.
46. On this point, regard can additionally be had to the Tribunal's decision in *Montecristo Jewellers Inc. v. M.N.R.* (15 March 2002), AP-99-088 (CITT). As an aside, the Tribunal finds it useful to note that appeals filed pursuant to subsection 67(1) of the *Act* are *de novo* processes, granting an appellant the privilege and the burden of establishing a case unfettered by prior submissions made to the CBSA and by the CBSA's decisions in response to those submissions. In this regard, reference can be made to *Volpak Inc.* (2 February 2012), EP-2011-002 (CITT), and to *Smith v. Minister of National Revenue*, [1965] S.C.R. 582. Still, given the types of questions to be answered in such appeals, it is practically difficult for an appellant to make its case without addressing what it perceives to be the deficiencies in the CBSA's case. It is ideal that an appellant consider this contextual reality in making its submissions.
47. Exhibit AP-2013-013-04A, tab 4, Vol. 1.
48. *Transcript of Public Hearing*, 5 November 2013, at 15-19.

50. Further, and as indicated earlier, Philips invited the Tribunal to apply weight in this appeal *mutatis mutandis* to expert testimony presented in a different appeal. While the testimony of Dr. Rosinia in *Elfe* may have been compelling in its own right at that time, its application to this appeal would not be procedurally fair. The testimony rendered in *Elfe* concerned different goods, and, further, with Dr. Rosinia physically absent from the proceedings in this appeal, the CBSA was unable to cross-examine her, and the Tribunal was unable to put questions to her with regard to the goods in issue. Under such circumstances, to allow her testimony in this appeal would be to ignore procedural deficiencies and validate a legally untenable outcome.

51. With regard to submissions made by both the CBSA and Philips, it is important to clarify at the outset that sections 10 and 11 of the *Customs Tariff* make no mention of the use of classification numbers with regard to the classification of goods. Thus, in *Bio Agri Mix Ltd. v. Commissioner of the Canada Customs and Revenue Agency*,[49] the Tribunal indicated as follows:

> The Tribunal notes that the appellant's proposed classification makes reference to the wording of the *Customs Tariff* at the 9th and 10th digit levels. Specifically, the description "containing chlortetracycline" is found at classification No. 2309.90.39.42. The 9th and 10th digits, however, are not part of the classification system, rather they are statistical codes used by Statistics Canada. As such, they do not form part of the schedule to the *Customs Tariff*, having been added by Statistics Canada solely for the purpose of gathering statistical information. The Tribunal has consistently maintained that it is inappropriate to have regard to the 9th and 10th digits in deciding matters of tariff classification. In fact, the General Rules and the *Canadian Rules* do not direct classification at the 9th and 10th digit levels.[50]
>
> [Footnote omitted]

52. As a result, in the Tribunal's analysis, no regard will be had to any submissions pertaining to classification No. 3926.90.99.30 with regard to the erroneous classification of the goods as hygienic or pharmaceutical articles, as specified in Statistical Note 2 to Chapter 39. Pursuant to Rule 1 of the *General Rules*, the task before the Tribunal is to have regard to ". . . the terms of the headings and any relative Section or Chapter Notes . . .", with subsequent rules utilized only in the event that Rule 1 does not suffice for the purposes of classification.

53. Notwithstanding the deficiencies in Philips' case as outlined above, the Tribunal has before it and will consider Philips' submissions with regard to the possible classification of the goods in issue in heading No. 95.03. The submissions were based on dictionary definitions and past Tribunal jurisprudence.

54. By virtue of the exclusionary terms set out in Note 2(y) to Chapter 39, the Tribunal must begin its analysis by examining whether the goods in issue can be classified in Chapter 95 and, specifically, in heading No. 95.03 as toys, as asserted by Philips.

55. As the parties have noted in their submissions, the Tribunal has had the opportunity, in the past, to consider what constitutes a toy according to the terms of the tariff nomenclature. Thus, in *Calego*, the Tribunal indicated as follows:

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49. (28 November 2000), AP-99-085 (CITT) [*Bio Agri Mix*].
50. *Bio Agri Mix* at 6-7.

> . . . In *Zellers* v. *DMNR* and in *Regal Confections* v. *DMNR*, the Tribunal stated that, in essence, a toy is something from which one derives pleasure or amusement. A toy is "an object which is intended to amuse and with which to play".[51]
>
> [Footnotes omitted]

56. Further, in *Franklin Mint*, the Tribunal noted, with regard to the goods in that appeal, as follows:

> 15. . . . The Tribunal acknowledges that, although they may have an amusement value, this factor is not determinative and does not make them toys for the purpose of tariff classification. . . . The goods are not sold as toys, are usually not played with by children and are not designed to be manipulated. . . . Moreover, the testimony of Franklin's witness indicated that the goods were marketed as collector's items rather than toys in order to fetch a higher price in the market.
>
> [Footnote omitted]

57. Also, in its decision in *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency*,[52] the Tribunal opined as follows:

> 41. Tribunal jurisprudence has interpreted the term "toy" broadly as encompassing a wide range of articles that provide amusement or play value.
>
> 42. The Tribunal has previously held that heading No. 95.03 ". . . covers objects that children . . . play with." The play value is viewed as an " . . identifying aspect . . . of a toy."
>
> 43. In *Regal*, the Tribunal, however, affirmed that ". . . amusement alone does not make an object a toy for the purpose of tariff classification."
>
> 44. *The determination of whether an item constitutes a toy is a factual issue to be determined on a case-by-case basis. In order to determine whether a good is a toy, its intended use and its actual use must both be considered, including the manner in which it is marketed, packaged and advertised.*
>
> 45. It is clear that the good in issue provides amusement and play value, as HBC contended. However, this factor, alone, is not sufficient to describe it as a "toy".
>
> . . .
>
> 47. . . . HBC has in fact omitted that the essential purpose of the good in issue is to enable children (and adults) to partake in the outdoor activity of sledding or sliding on snowy hills. It is this same sliding on the snow which, in turn, provides amusement.
>
> [Emphasis added, footnotes omitted]

58. Thus, a consideration of the state of the jurisprudence reveals that, while the provision of amusement is important in the classification of a good as a toy, amusement is not determinative. In essence, all toys provide amusement, but not all amusing goods are toys. Goods with a utilitarian function can nonetheless provide amusement. The issue of whether a good can be classified as a toy is to be determined on a case-by-case basis, with due regard to the actual and intended uses of the good, as well as to the packaging and marketing of the good.

59. With the above statements serving as an analytical guide, the Tribunal will turn its attention to the document in Philips' brief. The document, titled "Philips AVENT Fashion Pacifiers",[53] contains the words "Orthodontic BPA-Free" in large lettering and indicates as follows with regard to the goods in issue:

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51. *Calego* at 6.
52. (11 April 2012), AP-2011-018 (CITT).
53. Exhibit AP-2013-013-04A, tab 4, Vol. 1.

> Philips AVENT orthodontic, collapsible and symmetrical nipples respect the natural development of baby's palate, teeth and gums. All Philips AVENT pacifiers are made of silicone and are taste and odor-free.

60. Thus, the document refers to the goods in issue as pacifiers and, further, makes no claims regarding amusement or the promotion of the goods in issue as toys.

61. Further, Philips' brief contains a document titled "Stages Of Play During Child Development".[54] In the section concerning children aged 0 to 6 months, the document states that such children "[p]ut things into [their] mouth[s] and touch things . . ." with their hands and that they "[play] alone with toys . . . for instance . . . rattles, shakers . . . ." There is no assertion by Philips that the goods in issue are rattles or shakers.

62. Further, as is clear from the analytical guide set out above, not all amusing goods are toys. Thus, the fact that children aged 0 to 6 months play by putting things in their mouths and undertaking the other actions listed is inadequate to ground the conclusion that every object with which such children undertake such actions are toys. It was incumbent upon Philips to show that children play with the goods in issue in the manner described in the document and, further, that the goods in issue are manufactured and marketed for such play, serving no utilitarian purpose. Philips provided nothing upon which such a conclusion can be grounded.

63. In addition, Philips' brief contains another document that provides excerpts that pertain to the use of a pacifier from the "Encyclopedia of Children's Health".[55] The excerpt refers to a pacifier as ". . . an artificial nipple designed for babies to suck on for comfort." Philips specifically drew the Tribunal's attention to a portion stating that "[i]nfants suck when they are tired, bored, or in need of comfort. Some babies have a stronger need to suck than others and – next to eating and being held – sucking may provide the most comfort to an infant. Babies who do not suck their thumbs or fingers often rely on pacifiers."

64. The document goes on to state that professionals ". . . refer to a pacifier as a transitional object that helps children adjust to new situations and relieves stress." The document contains other uses of pacifiers, such as assistance in getting to sleep and calming in instances of fright, which speak volumes regarding utilitarian functions rather than amusement or play value. The statements in the document are echoed by those in another document from the Mayo Clinic's Web site.[56] Even with minimal weight ascribed to the former document due to uncertainties regarding its source or authoritativeness, these documents nonetheless seriously undermine Philips' contention that the goods in issue are toys.

65. Philips also drew a link between the *Hazardous Products (Pacifiers) Regulations* and the *Toys Regulations* in the context of its argument regarding the inaccuracy of classing pacifiers as hygienic or pharmaceutical articles, as contended by the CBSA. The essence of Philips' position was that the *Hazardous Products (Pacifiers) Regulations*, in referring to pacifiers in one of its sections, indicate that pacifiers are to be designed pursuant to the manufacturing requirements that pertain to articles covered by the *Toys Regulations*, which, of course, covers toys.

54. *Ibid.*, tab 21, Vol. 1.
55. *Ibid.*, tab 22, Vol. 1.
56. *Ibid.*, tab 23, Vol. 1.

66. With regard to questions of tariff classification, the Tribunal is unable to rely on references contained in pieces of legislation set out for other purposes, such as the *Canada Consumer Product Safety Act*[57] in this instance. In any event, it is worth noting that, in the discrete context of a legislative scheme, a stipulation that an object meet the requirements applicable to a class of articles cannot, in and of itself, ground the conclusion that the object belongs to the class of articles. Such referential drafting can, for instance, place identical requirements on different types of goods without setting out to associate those goods or to otherwise define them for all intents.

67. Given the lack of evidence in support of Philips' assertions and, in fact, of the submission of documentary evidence by Philips that clearly counters those assertions, the Tribunal is unable to conclude that the goods in issue are, in keeping with the terms of the explanatory notes to Chapter 95 and heading No. 95.03, toys designed for the amusement of babies.

68. Closer inspection premised on the documentary evidence submitted by Philips supports the conclusion that the goods in issue serve utilitarian purposes through non-nutritive sucking, such as comforting, relieving stress, assistance in getting to sleep and calming in instances of fright. Further, available documentary evidence indicates that the goods in issue are not marketed by Philips as toys.

69. The Tribunal will now consider the terms of heading No. 39.26, along with the chapter note and explanatory notes related to that heading. The heading pertains to articles of plastic and articles of other materials of heading Nos. 39.01 to 39.14. Philips presented no evidence regarding the manufacture of the goods in issue with non-plastic materials or materials other than those of heading Nos. 39.01 to 39.14.

70. For its part, the CBSA included, in its brief, a document from the Consumer Reports' Web site, which describes a pacifier as a ". . . latex or silicone nipple mounted on a wide plastic shield . . . ."[58] Further, the CBSA asserted, during the course of the hearing, that the goods in issue are made of silicone, which the CBSA indicated is a plastic.[59] In light of the explanatory notes to heading No. 39.26, which explicitly state that pacifiers are included in the terms of that heading, the Tribunal finds the CBSA's position compelling.

71. Related to the above, the Tribunal is able to rely on Philips' admission, made during the course of the hearing, that the goods in issue are pacifiers.[60] That admission is supported by the document in its brief.[61] Elsewhere, Philips made no attempt to demonstrate that the goods in issue are anything other than pacifiers; instead, Philips' argument was that pacifiers are toys. However, Philips has failed to prove that the goods in issue are toys, and the Tribunal has concluded, on the basis of the available evidence, that the goods in issue are not toys. Based on that conclusion, Note 2(y) to Chapter 39 is no bar to classification of the goods in issue in that chapter.

72. Thus, on the basis of the terms of heading No. 39.26, along with the explanatory notes related to that heading, the Tribunal concludes that the goods in issue are properly classified in heading No. 39.26 as other articles of plastics and articles of other materials of heading Nos. 39.01 to 39.14.

57. S.C. 2010, c. 21.
58. Exhibit AP-2013-06A, tab 5, Vol. 1A.
59. *Transcript of Public Hearing*, 5 November 2013, at 29.
60. *Ibid.* at 11.
61. Exhibit AP-2013-013-04A, tab 4, Vol. 1.

DECISION

73. The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member