



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-032

Home Depot of Canada Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, April 28, 2014*

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IN THE MATTER OF an appeal heard on January 14, 2014, 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 24, 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

HOME DEPOT OF CANADA INC.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Ann Penner
Ann Penner
Presiding Member

Gillian Burnett
Gillian Burnett
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 14, 2014
Tribunal Member: Ann Penner, Presiding Member
Counsel for the Tribunal: Carrie Vanderveen
Registrar Officer: Haley Raynor

PARTICIPANTS:**Appellant**

Home Depot of Canada Inc.

Counsel/RepresentativesCheryl Murphy Corbeil
Susan Dafoe**Respondent**

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This appeal was filed by Home Depot of Canada Inc. (Home Depot) on July 19, 2013, pursuant to subsection 67(1) of the *Customs Act*¹ from a decision of the President of the Canada Border Services Agency (CBSA).

2. The issue in this appeal is whether Martha Stewart fabric drawers (the goods in issue) are properly classified under tariff item No. 6307.90.99 of the schedule to the *Customs Tariff*² as other made up articles of textiles, as determined by the CBSA, or should be classified under tariff item No. 4819.20.00 as folding cartons, boxes and cases, of non-corrugated paper or paperboard, as claimed by Home Depot, or in heading No. 42.02 as specifically named or similar containers of textile materials or paperboard, as claimed by the intervener, Walmart Canada Corp. (Walmart).

PROCEDURAL HISTORY

3. On September 26, 2011, Home Depot applied for an advance ruling with respect to the tariff classification of the goods in issue and submitted a sample of the goods in issue for analysis by the CBSA.

4. On December 28, 2011, the CBSA issued an advance ruling in which it classified the goods in issue under tariff item 4819.20.00. However, on September 11, 2012, the CBSA revised the advance ruling and determined that the goods in issue were classified under tariff item 6307.90.99 instead.

5. On November 12, 2012, Home Depot requested a review of the revised advance ruling. The CBSA issued a decision affirming its revised advance ruling on April 24, 2013.

6. On July 19, 2013, Home Depot appealed the CBSA's decision.

7. On November 18, 2013, Walmart requested intervener status, which the Tribunal granted on December 2, 2013.

8. The Tribunal held a public hearing in Ottawa, Ontario, on January 14, 2014. Home Depot produced a single witness, Mr. Pat Rotiroti, Senior Manager, Quality Assurance, Product Engineering and Operations, Home Depot, and requested that the Tribunal qualify him as an expert witness. After considering Mr. Rotiroti's education, employment history and experience, the Tribunal concluded that he did not have expertise relevant to the specific issue in dispute beyond what would be considered common knowledge in that field and, therefore, declined to qualify Mr. Rotiroti as an expert.³ However, he was allowed to testify as a fact witness.

GOODS IN ISSUE

9. The goods in issue are lidless boxes that consist of two pieces of non-woven polypropylene fabric that have been placed on top of each other and stitched together at one corner and periodically across the short sides to form six pockets into which six pieces of 1.7-mm thick paperboard have been inserted. They also contain a square removable bottom support panel that consists of a 1.7-mm thick layer of paperboard

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

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

3. *Transcript of Public Hearing*, 14 January 2014, at 17.

that has been covered with polypropylene fabric. The paperboard inserted between the two layers of fabric is fastened by polypropylene fabric binding. The boxes have a label holder and a coordinating handle.

STATUTORY FRAMEWORK

10. 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.

11. 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.

12. 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.

13. 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

14. The Tribunal must therefore first determine whether the goods 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 goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.¹⁰

15. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to use a similar approach to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

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

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

9. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13 and 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*.

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

TARIFF CLASSIFICATIONS AT ISSUE

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

Chapter 42

**ARTICLES OF LEATHER; SADDLERY AND HARNESS;
TRAVEL GOODS, HANDBAGS AND SIMILAR CONTAINERS;
ARTICLES OF ANIMAL GUT (OTHER THAN SILK-WORM GUT)**

...

42.02 Trunks, suit-cases, vanity-cases, executive-cases, brief-cases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling-bags, insulated food or beverage bags, toilet bags, rucksacks, handbags, shopping bags, wallets, purses, map-cases, cigarette-cases, tobacco-pouches, tool bags, sports bags, bottle-cases, jewellery boxes, powder-boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fibre or of paperboard, or wholly or mainly covered with such materials or with paper.

...

Chapter 48

**PAPER AND PAPERBOARD; ARTICLES OF PAPER PULP,
OF PAPER OR OF PAPERBOARD**

...

48.19 Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibres; box files, letter trays, and similar articles, of paper or paperboard of a kind used in offices, shops or the like.

...

4819.20.00 -Folding cartons, boxes and cases, of non-corrugated paper or paperboard
10 - - - -Sanitary food or beverage containers
90 - - - -Other

...

Chapter 63

**OTHER MADE UP TEXTILE ARTICLES; SETS;
WORN CLOTHING AND WORN TEXTILE ARTICLES; RAGS**

...

63.07 Other made up articles, including dress patterns.

...

6307.90 -Other

...

6307.90.99 - - - -Of other textile materials
20 - - - -Face-masks
40 - - - -Sample books of textile products
90 - - - -Other

17. The relevant note to Chapter 48 provides as follows:

2. This Chapter does not cover:

...

(h) Articles of heading 42.02 (for example, travel goods);

...

18. The relevant notes to Section XI (which includes Chapter 63) provide as follows:

1. This Section does not cover:

...

(l) Articles of textile materials of heading 42.01 or 42.02;

(m) Products or articles of Chapter 48 (for example, cellulose wadding);

...

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

...

(e) Cut to size and having undergone a process of drawn thread work;

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

...

19. The relevant explanatory notes to heading No. 42.02 provide as follows:

This heading covers **only** the articles specifically named therein and similar containers.

...

The articles covered by the second part of the heading must, however, be only of the materials specified therein or must be wholly or mainly covered with such materials or with paper (the foundation may be of wood, metal, etc.). . . . The expression “similar containers” in this second part includes note-cases, writing-cases, pen-cases, ticket-cases, needle-cases, key-cases, cigar-cases, pipe-cases, tool and jewellery rolls, shoe-cases, brush-cases, etc.

...

The heading **does not cover**:

(c) Articles which, although they may have the character of containers, are not similar to those enumerated in the heading, for example, book covers and reading jackets, file-covers, document-jackets, blotting pads, photo-frames, sweetmeat boxes, tobacco jars, ashtrays, flasks made of ceramics, glass, etc., and which are wholly or mainly covered with leather, sheeting of plastics, etc. Such articles fall in **heading 42.05** if made of (or covered with) leather or composition leather, and in **other Chapters** if made of (or covered with) other materials.

20. The relevant explanatory notes to heading No. 48.19 provide as follows:

(A) **Cartons, boxes, cases, bags and other packing containers.**

This group covers containers of various kinds and sizes generally used for the packing, transport, storage or sale of merchandise, whether or not also having a decorative value. The

heading includes cartons, boxes, cases, bags, cones, packets, sacks, paperboard drums (containers), whether manufactured by rolling or by any other method, and whether or not fitted with reinforcing circular bands of other materials, tubular containers for posting documents, protective garment bags, jars, pots and the like (e.g., for milk or cream), whether or not waxed. The heading also covers special purpose paper bags such as bags for vacuum cleaners, bags for travel sickness, and record boxes and sleeves.

The heading includes folding cartons, boxes and cases. These are:

- cartons, boxes and cases in the flat in one piece, for assembly by folding and slotting (e.g., cake boxes);
and
- containers assembled or intended to be assembled by means of glue, staples, etc., on one side only, the construction of the container itself providing the means of forming the other sides, although, where appropriate, additional means of fastening, such as adhesive tape or staples may be used to secure the bottom or lid.

...

The articles of this heading may also have reinforcements or accessories of materials other than paper (e.g., textile backings, wooden supports, string handles, corners of metal or plastics).

21. The relevant explanatory notes to Chapter 63 provide as follows:

The classification of articles in this sub-Chapter is not affected by the presence of minor trimmings or accessories of furskin, metal (including precious metal), leather, plastics, etc.

Where, however, the presence of these other materials constitutes **more than** mere trimming or accessories, the articles are classified in accordance with the relative Section or Chapter Notes (General Interpretative Rule 1), or in accordance with the other General Interpretative Rules as the case may be.

22. The relevant explanatory notes to heading No. 63.07 provide as follows:

This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature.

POSITIONS OF PARTIES

Home Depot

23. Home Depot argued that the CBSA incorrectly classified the goods in issue under tariff item No. 6307.90.99 as other made up articles of textiles. It argued that the goods in issue are more specifically described in heading No. 48.19 as boxes and other packing containers of paperboard. Given that the explanatory notes to heading No. 63.07 exclude items more specifically described elsewhere in the nomenclature, it maintained that the goods in issue cannot be classified in heading No. 63.07.¹¹

24. Home Depot submitted that the goods in issue meet the requirements of Note (A) of the explanatory notes to heading No. 48.19, in that they are containers that are assembled at the time of import by means of one seam and the construction of the fabric foundation provides the means of forming the other sides.¹² In Home Depot's view, the "essential character" of the goods in issue is as a sturdy folding storage box of

11. Exhibit AP-2013-032-07A at paras. 33-37, Vol. 1.

12. *Ibid.* at para. 45.

paperboard;¹³ it is not, as the CBSA suggested, imparted by the textile fabric.¹⁴ The textile simply provides the foundation to support and contain the paperboard used to form the box.¹⁵

25. Furthermore, Home Depot argued that nothing excludes a textile-covered box from being classified in heading No. 48.19.¹⁶ In contrast, it submitted that the explanatory notes to Chapter 63 exclude goods that contain materials that constitute “. . . **more than** mere trimming or accessories” In Home Depot’s view, because the paperboard content of the goods in issue constitutes “. . . **more than** mere trimmings or accessories”, they cannot be covered by Chapter 63.¹⁷

26. In addition, Home Depot argued that the goods in issue in this case are very similar to the hanging shelving in *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency*,¹⁸ which the Tribunal found were classifiable as furniture rather than as other textiles of heading No. 63.07.¹⁹

27. In response to Walmart’s position that the goods in issue should be classified in heading No. 42.02, Home Depot argued that the goods in issue are not designed for the storage and transportation of particular goods and, therefore, are not similar to the items specifically named in that heading.²⁰

CBSA

28. The CBSA argued that the goods in issue are properly classified under tariff item No. 6307.90.99 rather than as products of Chapter 48. In its view, the goods in issue are fabric boxes reinforced with paperboard rather than paperboard boxes with fabric trim or backed by fabric.²¹

29. The CBSA submitted that, in order to fall in heading No. 48.19, the goods in issue must be: (1) cartons, boxes, cases or other packing containers; (2) of paper, paperboard, cellulose wadding or webs of cellulose fibres; (3) foldable; and (4) assembled in the flat in one piece, for assembly by fitting and slotting, *or* assembled or intended to be assembled by means of glue, staples, etc., on one side only, the construction of the container itself providing the means of forming the other sides.²²

30. The CBSA maintained that the goods in issue do not meet the second and fourth criteria and therefore cannot be classified in heading No. 48.19. The goods in issue are not “of” paperboard because the paperboard merely provides stability to a textile box.²³ Likewise, they do not meet either of the assembly requirements of the fourth criteria, as they are not simply one piece of creased paperboard that can be assembled by folding, fitting and slotting into a box shape (i.e. like a cake or Tim Hortons box).²⁴

13. *Ibid.* at para. 32; *Transcript of Public Hearing*, 14 January 2014, at 44-45.

14. Exhibit AP-2013-032-07A at para. 39, Vol. 1.

15. *Ibid.* at para. 49.

16. *Ibid.* at para. 50.

17. *Ibid.* at paras. 51-52; *Transcript of Public Hearing*, 14 January 2014, at 53-54, 56.

18. (6 April 2011), AP-2010-019 (CITT) [*Zellers*].

19. Exhibit AP-2013-032-07A at para. 54, Vol. 1; *Transcript of Public Hearing*, 14 January 2014, at 45-46.

20. *Transcript of Public Hearing*, 14 January 2014, at 58.

21. Exhibit AP-2013-032-08 at paras. 24-25, Vol. 1A.

22. *Ibid.* at para. 28.

23. *Ibid.* at para. 30.

24. *Transcript of Public Hearing*, 14 January 2014, at 95-96.

Furthermore, they are not sewn on “one side only”²⁵ and the textiles rather than the paperboard provides the means of forming the other sides.²⁶

31. The CBSA argued that the goods in issue meet all the criteria required to be classified in heading No. 63.07. They meet the definition of “article” as “any finished or semi-finished product”. They meet the definition of “made up” in Note 7 to Section XI, as they are “assembled by sewing”.²⁷ They are constructed of a non-woven textile of polypropylene filaments, which is considered a textile in the explanatory notes to Chapter 63 and heading No. 56.03.²⁸ They are not more specifically described elsewhere in the nomenclature of the *Customs Tariff*.²⁹ Finally, even though the paperboard content of the boxes may constitute more than mere trimming, notes X to XII of the explanatory notes to Rule 2 (b) of the *General Rules* and the Tribunal’s decision in *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency*³⁰ indicate that the goods in issue can still be classified in heading No. 63.07, as long as they retain the character of made up textile articles meeting the terms of heading No. 63.07.³¹

32. The CBSA maintained that the goods in issue retain the character of made up textile articles, as the textile would form the shape of the goods in issue even if the paperboard were removed, only the textile is visible to the consumer, and the textile provides the visual appeal and the basis of their marketing.³²

33. In response to Walmart’s arguments, the CBSA argued that the goods in issue cannot be classified in heading No. 42.02 because they are not similar to the items listed in the heading and the explanatory notes, in that they are not designed for transportation.³³

Walmart

34. Walmart argued that the goods in issue should be classified in heading No. 42.02 as specialty boxes and similar containers of textile materials or paperboard, as this is the only heading that completely describes them.³⁴

35. Walmart submitted that the classification analysis must begin by determining if the goods in issue are *prima facie* classifiable in heading No. 42.02, as Note 2(h) to Chapter 48 and Note 1(i) to Section XI (which includes Chapter 63) explicitly exclude articles of heading No. 42.02.³⁵ If they can be classified in heading No. 42.02, they may not be classified in either Chapter 48 or Chapter 63.³⁶

36. Walmart noted that, to fall within the scope of the second part of heading No. 42.02, the goods in issue must be: (1) specifically named or similar containers; and (2) composed of the specified materials.³⁷ It submitted that the goods in issue are composed of the specified materials, as they are composed of textiles

25. *Ibid.* at 98.

26. Exhibit AP-2013-032-08 at paras. 33-34, Vol. 1A.

27. *Ibid.* at paras. 45-46.

28. *Ibid.* at paras. 47-48.

29. *Ibid.* at para. 74.

30. (10 February 2011), AP-2009-045 (CITT).

31. Exhibit AP-2013-032-08 at para. 60, Vol. 1A; *Transcript of Public Hearing*, 14 January 2014, at 104-108.

32. Exhibit AP-2013-032-08 at paras. 64-71, Vol. 1A; *Transcript of Public Hearing*, 14 January 2014, at 110-11.

33. Exhibit AP-2013-032-18A at 4-6, Vol. 1B; *Transcript of Public Hearing*, 14 January 2014, at 92-93.

34. Exhibit AP-2013-032-10 at 2-3, Vol. 1B.

35. Exhibit AP-2013-032-15 at paras. 17-18, Vol. 1B; *Transcript of Public Hearing*, 14 January 2014, at 68.

36. Exhibit AP-2013-032-15 at paras. 20, 36, Vol. 1B; *Transcript of Public Hearing*, 14 January 2014, at 68-70.

37. Exhibit AP-2013-032-15 at para. 26, Vol. 1B; *Transcript of Public Hearing*, 14 January 2014, at 73.

and paperboard, both of which are specified in the heading.³⁸ Moreover, the goods in issue are “similar containers”, as they share the fundamental characteristic of the specifically named containers of heading No. 42.02, in that they are designed to organize, hold and store goods.³⁹

37. Walmart argued that the CBSA’s position that containers similar to those specifically named must be designed for the storage and transportation of particular goods artificially restricts the scope of heading No. 42.02.⁴⁰ In Walmart’s view, the explanatory notes to heading No. 42.02 do not require containers in the second part of the heading to be specially shaped to fit specific goods.⁴¹ Moreover, the inclusion of specifically named containers that are not meant to hold specific goods, such as rucksacks and travel bags, or to transport goods, such as jewelry cases and cutlery cases, indicates that these characteristics are not common to all the named containers.⁴²

38. Finally, Walmart argued that, as the goods in issue can be classified in heading No. 42.02 using Rule 1 of the *General Rules*, the CBSA erred in proceeding to Rule 2 (b).⁴³

TRIBUNAL ANALYSIS

Framework of Analysis

39. The Tribunal has previously held that goods are not *prima facie* classifiable in two headings if, by virtue of a relevant section or chapter note, the terms of one heading are expressly excluded from the other.⁴⁴ The Tribunal has also held that, if there is a relevant exclusionary note that precludes the *prima facie* classification of goods in both headings at issue in an appeal, the Tribunal should begin its analysis with the heading to which the exclusionary note does not apply.⁴⁵

40. In this case, Note 2(h) to Chapter 48 and Note 1(l) to Section XI explicitly exclude articles of heading No. 42.02 from Chapters 48 and 63. In addition, Note 1(m) to Section XI specifically excludes products or articles of Chapter 48 from Chapter 63.

41. Therefore, the Tribunal will begin its analysis by considering whether the goods in issue are *prima facie* classifiable as articles of heading No. 42.02. If they are classifiable in heading No. 42.02, the Tribunal need not determine whether they are also classifiable in Chapters 48 and 63.⁴⁶

42. If the Tribunal finds that the goods in issue are not classifiable in heading No. 42.02, it will then consider whether they are *prima facie* classifiable as cartons, boxes and cases of paperboard in heading No. 48.19. Only if they are not classifiable in that heading will the Tribunal consider whether they are classifiable in heading No. 63.07.

38. Exhibit AP-2013-032-15 at para. 32, Vol. 1B.

39. *Ibid.* at paras. 30-31; *Transcript of Public Hearing*, 14 January 2014, at 75.

40. *Transcript of Public Hearing*, 14 January 2014, at 77.

41. *Ibid.* at 78.

42. *Ibid.* at 78, 80-81.

43. Exhibit AP-2013-032-15 at paras. 39-43, Vol. 1B.

44. *Sanus Systems v. President of the Canada Border Services Agency* (8 July 2010), AP-2009-007 (CITT) at para. 35; see, also, *Zellers* at para. 49.

45. *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) [*Costco*] at para. 46; *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) [*Korhani*] at paras. 28, 44.

46. *Costco* at para. 72; *Korhani* at paras. 28, 44.

Are the Goods in Issue Articles of Heading No. 42.02?

43. No party has argued that the goods in issue are containers specifically named in the first part of heading No. 42.02. The Tribunal will therefore consider whether they can be classified within the second part of the heading. In order to be classified in the second part, the goods in issue must be: (1) specifically named or similar containers; and (2) of the specified materials, such as textile materials or paperboard.

44. With respect to the second requirement, Home Depot, the CBSA and Walmart agree that the goods in issue are composed of textile materials and paperboard.⁴⁷ The Tribunal agrees with this conclusion and, therefore, finds that the goods in issue meet the composition requirement of the second part of heading No. 42.02.

45. With respect to the first requirement, the explanatory notes to heading No. 42.02 make it very clear that this heading covers “. . . **only** the articles specifically named therein and similar containers”. The explanatory notes provide additional examples of “similar containers”, including “. . . note-cases, writing-cases, pen-cases, ticket-cases, needle-cases, key-cases, cigar-cases, pipe-cases, tool and jewellery rolls, shoe-cases, brush-cases, etc.” Furthermore, the explanatory notes exclude “[a]rticles which, although they may have the character of containers, are not similar to those enumerated in the heading”

46. In previous cases, the Tribunal has determined that goods must share “important characteristics” and have “significant common features” in order to be similar.⁴⁸ However, neither the terms of heading No. 42.02 nor the relevant notes describe the specific characteristics common to all the goods other than describing them as “containers” and indicating that being containers is not sufficient to make goods similar to those specifically named.

47. Home Depot, the CBSA and Walmart agree that the goods in issue are containers and “hold” or “store” things.⁴⁹ They disagree, however, about whether the ability to hold or store things is sufficient to meet the “similarity” requirement of heading No. 42.02. Both the CBSA and Home Depot argued that goods must also be designed to store and transport other particular goods in order to be similar.⁵⁰

48. According to Walmart, interpreting heading No. 42.02 in terms of the ability of goods to store and transport goods artificially restricts the scope of the heading.⁵¹ Walmart pointed to the fact that the heading includes travel bags, shopping bags, sports bags and rucksacks (which are not designed to hold particular goods) as an indication that goods similar to those in the second part of the heading need not be designed to hold particular goods.⁵² Similarly, it also pointed to the inclusion, in the explanatory notes, of jewelry boxes specially designed for *keeping* jewelry as an indication that “similar goods” need not be designed for transportation.⁵³

49. Although the Tribunal agrees with Walmart that nothing in the nomenclature requires the goods to hold particular goods or to transport goods, it finds that there must be a common characteristic beyond

47. *Transcript of Public Hearing*, 14 January 2014, at 5-6.

48. *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) at para. 82; *Rlogistics Limited Partnership v. President of the Canada Border Services Agency* (25 October 2011), AP-2010-057 (CITT) [*Rlogistics*] at para. 76.

49. *Transcript of Public Hearing*, 14 January 2014, at 62, 64, 79-80; Exhibit AP-2012-032-18A at para. 11, Vol. 1B.

50. Exhibit AP-2013-032-18A at para. 11, Vol. 1B; *Transcript of Public Hearing*, 14 January 2014, at 59-60.

51. *Transcript of Public Hearing*, 14 January 2014, at 77.

52. *Ibid.* at 78-79.

53. *Ibid.* at 80-81.

“holding” and “storing” alone that ties together the objects of heading No. 42.02. For the Tribunal, this characteristic is “transportation”.

50. In *Rlogistics*, the Tribunal found transportation to be a defining characteristic of the goods listed in the *first* part of heading No. 42.02.⁵⁴ The Tribunal also finds transportation to be a defining characteristic of the goods listed in the *second* part of the heading. Thus, a characteristic common to all the goods of heading No. 42.02, including those in the first and second parts, is that they are designed to carry or transport objects.

51. The Tribunal observes that the second part of heading No. 42.02 begins with “travelling-bags” and lists other kinds of bags or cases that are designed to enable a person to transport goods easily and effectively on a regular basis. This includes boxes or cases specially designed for keeping or storing jewelry, given that specially designed jewelry cases protect their contents not only during storage but also during transit. Similarly, insulated food or beverage bags are designed to maintain the optimal temperature of their contents during transportation, e.g. from home to school or work.

52. Moreover, the context provided by the heading to Chapter 42, which includes “*travel goods, handbags and similar containers*” [emphasis added], and Note 2(h) of Chapter 48, which lists “travel goods” as an example of the goods included in heading No. 42.02, confirm that transportability is a common characteristic to the specifically named items.

53. In contrast to the containers listed in the second part of the heading, the goods in issue are not designed for transportation. Mr. Rotiroti testified that they are designed to sit on a shelf or in a specially designed cabinet, to store loose items from around the home and to function similar to a cabinet drawer.⁵⁵

54. The physical characteristics of the goods in issue confirm that their intended use is not transportation. They are lidless textile-covered paperboard containers with a single handle on the front that is designed to support only a 10-pound load.⁵⁶ These physical characteristics indicate that, if the front handle were used during transportation, the container would likely tip on its side and its contents would spill. They also indicate that the goods in issue would not be able to support much more than a 10-pound load, which limits the types or amount of contents that they could successfully carry or transport. Finally, the fact that the bottom reinforcement panel is loose suggests that the goods in issue are not ideal for transportation. In contrast, the goods listed in heading No. 42.02 are all made to keep their contents contained and/or secure while stationary or during transportation.

55. Indeed, Mr. Rotiroti testified that the goods in issue would need to be redesigned with two handles that could withstand a load weight greater than 10 pounds in order to be more appropriate for transportation.⁵⁷

56. Similarly, the marketing and merchandising of the goods in issue also confirm that their intended use is not transportation. Mr. Rotiroti testified that the goods in issue are merchandised in Home Depot’s *storage* department with the specially designed storage cabinets and other storage containers.⁵⁸ They are also marketed as “Martha Stewart Living Burl Fabric Drawers”, “Martha Stewart Living Fabric Drawers” and as “Portable Storage Boxes”.⁵⁹ Although Walmart attempted to equate “portable” with

54. *Rlogistics* at para. 78.

55. *Transcript of Public Hearing*, 14 January 2014, at 21-22.

56. Exhibit AP-2013-032-04C, tab 2, Vol. 1; *Transcript of Public Hearing*, 14 January 2014, at 32-33.

57. *Transcript of Public Hearing*, 14 January 2014, at 32-33.

58. *Ibid.* at 22.

59. Exhibit AP-2013-032-04C, tab 2, Vol. 1.

“transportable”,⁶⁰ the Tribunal finds that “portability” in this case relates to the fact that the goods in issue can slide in and out of a cabinet like a drawer and can be moved short distances, e.g. from a shelf to a table, as opposed to longer distances more relevant to transportation.

57. Therefore, the Tribunal concludes that the goods in issue do not share the significant common feature of transportability with the items listed in heading No. 42.02. They thus cannot be classified in heading No. 42.02.

Are the Goods in Issue Cartons, Boxes and Cases of Paperboard in Heading No. 48.19?

58. In order to be classified in heading No. 48.19, the goods in issue must be: (1) cartons, boxes, cases, bags or other packing containers; and (2) of paper, paperboard, cellulose wadding or webs of cellulose fibres. In addition, they must also be foldable in order to be classified under tariff item No. 4819.20.00.

59. The goods in issue have the physical characteristics of a box: the textile and paperboard materials can be unfolded into a rectangular shape with a reinforced bottom. Moreover, Home Depot, the CBSA and Walmart agree that the goods in issue are boxes and/or containers.⁶¹ Therefore, the Tribunal finds that the first requirement is met.

60. The Tribunal finds that the second requirement is also met. The goods in issue contain paperboard, as Home Depot, the CBSA and Walmart agree.⁶²

61. In spite of the fact that the CBSA agrees that the goods in issue contain paperboard, it argued that they are not “of paperboard” because the textile material, rather than the paperboard, forms the box⁶³ and gives it its essential character.⁶⁴

62. The Tribunal cannot accept the CBSA’s argument. Neither the terms of the tariff item nor the chapter, section or explanatory notes contain a requirement that the paperboard be the primary contributor to the shape of the container. Further, they do not contain any requirements regarding the role of the paperboard in the formation of the container. As such, the Tribunal finds the fact that the goods in issue contain paperboard to be sufficient for them to meet this second requirement.

63. Moreover, the Tribunal does not find it necessary to consider the essential character of the goods in issue. The essential character of a good is a consideration to be made under Rule 2 (b) or 3 (b) of the *General Rules*. In this case, the Tribunal finds it possible to classify the goods in issue in accordance with Rule 1. Therefore, resort to the other rules is not necessary.

64. Finally, the Tribunal finds that the goods in issue are also foldable. Note (A) of the explanatory notes to Chapter 48 defines folding boxes in two ways: (1) boxes in the flat in one piece for assembly by folding and slotting (e.g. cake boxes); or (2) containers assembled or intended to be assembled by means of glue, staples, etc., on one side only, the construction of the container itself providing the means of forming the other sides, although, where appropriate, additional means of fastening, such as adhesive tape or staples may be used to secure the bottom or lid.

60. *Transcript of Public Hearing*, 14 January 2014, at 65.

61. *Transcript of Public Hearing*, 14 January 2014, at 65, 97; Exhibit AP-2013-032-07A at para. 10, Vol. 1; Exhibit AP-2013-032-08 at para. 30, Vol. 1A.

62. *Transcript of Public Hearing*, 14 January 2014, at 6, 103-104.

63. Exhibit AP-2013-032-08 at para. 30, Vol. 1A.

64. *Transcript of Public Hearing*, 14 January 2014, at 108.

65. The CBSA argued that the goods in issue do not meet the requirements of the first definition for folding boxes, as they are not in one piece and are not designed to be assembled by folding and slotting like cake boxes or “Tim Hortons doughnut boxes”.⁶⁵ The Tribunal agrees. The goods in issue consist of two pieces, one forming the sides and the other a bottom reinforcement panel, and they are not assembled by folding and slotting.

66. However, the Tribunal finds that the goods in issue meet the second definition. The goods in issue have been assembled by sewing, which the CBSA acknowledged is a form of assembly covered by the “etc.” in the definition.⁶⁶ Although the Tribunal recognizes that sewing has been used to attach the bindings and the handle, it considers that the sewing that actually assembles the materials into the shape of a box is on one side only. In addition, the textile, with its paperboard inserts, provides the means of forming the other sides. In the Tribunal’s view, this is sufficient to meet the requirement in Note (A) of the explanatory notes that the *container* provides the means of forming the other sides. Contrary to the CBSA’s contention,⁶⁷ the reference to “container” in the explanatory notes does not require the *paperboard* content of the container to be providing the means of forming the other sides.

67. On the basis of the foregoing, the Tribunal finds that the goods in issue are *prima facie* classifiable under tariff item No. 4819.20.00 as folding cartons, boxes and cases of non-corrugated paper or paperboard. As such, they are specifically excluded from heading No. 63.07 by virtue of Note 1(m) to Section XI. Therefore, the Tribunal will not consider whether the goods in issue are also classifiable in heading No. 63.07.

DECISION

68. On the basis of the evidence before it, the Tribunal finds that the goods in issue should be classified under tariff item No. 4819.20.00 as folding cartons, boxes and cases of non-corrugated paper or paperboard. The appeal is therefore allowed.

Ann Penner
Ann Penner
Presiding Member

65. *Ibid.* at 95.

66. *Ibid.* at 98.

67. *Ibid.* at 99-100; Exhibit AP-2013-032-08 at paras. 33-34, Vol. 1.