Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeals No. AP-2015-034, AP-2015-036 and AP-2016-001

Best Buy Canada Ltd.,
P & F USA Inc. and
LG Electronics Canada Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Monday, February 27, 2017

Canada

TABLE OF CONTENTS

DECISION i

STATEMENT OF REASONS 1
- SUMMARY 1
- GOODS IN ISSUE 1
- PROCEDURAL HISTORY 1
- LEGAL FRAMEWORK 3
- PARTIES' POSITIONS 4
  - Best Buy and LG 4
  - P&F 5
  - CBSA 6
- ANALYSIS 6
  - The *IGRR* Are Not Determinative for the Purposes of Tariff Classification 7
  - The Goods in Issue Meet All the Conditions for Classification Under Tariff Item No. 9948.00.00 10
- DECISION 17

IN THE MATTER OF appeals heard on November 3, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF three decisions of the President of the Canada Border Services Agency, dated December 14, 2015, February 12, 2016, and March 3, 2016, with respect to disputes pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

BEST BUY CANADA LTD., P & F USA INC. AND LG ELECTRONICS CANADA INC. **Appellants**

AND

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

DECISION

The appeals are allowed.

Peter Burn
Peter Burn
Presiding Member

Place of Hearing: Date of Hearing:	Ottawa, Ontario November 3, 2016
Tribunal Member:	Peter Burn, Presiding Member
Counsel for the Tribunal:	Anja Grabundzija
Student-at-law:	Amélie Cournoyer
Senior Registrar Officer:	Sara Pelletier

PARTICIPANTS:

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Best Buy Canada Ltd. LG Electronics Canada Ltd.	Justin Kutyan Thang Trieu
P & F USA Inc.	Michael Kaylor

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Andrew Cameron Daniel Caron

WITNESSES:

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President
Canadian Media Research Inc.

Steven Abrams
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STATEMENT OF REASONS

SUMMARY

1. These are appeals filed with the Canadian International Trade Tribunal (the Tribunal) by Best Buy Canada Ltd. (Best Buy), LG Electronics Canada Inc. (LG) and P & F USA Inc. (P&F) (together, the appellants), pursuant to subsection 67(1) of the *Customs Act*[1] from further re-determinations by the President of the Canada Border Services Agency (CBSA), dated, respectively, December 14, 2015, February 12, 2016, and March 3, 2016, made pursuant to subsection 60(4).

2. The question on appeal is whether certain flat-panel televisions (the goods in issue) can be classified under tariff item No. 9948.00.00 as articles for use in automatic data processing (ADP) machines and units thereof, or for use in one or more of the other host goods listed under tariff item No. 9948.00.00.

3. For the reasons that follow, the Tribunal finds that the goods in issue are classified under tariff item No. 9948.00.00. The appeals are therefore allowed.

GOODS IN ISSUE

4. The goods in issue consist of different models and brands of high-definition flat-panel televisions. They have a wide aspect ratio,[2] high resolution and high refresh rates.[3]

5. The goods in issue are equipped with high-definition multimedia interface (HDMI), digital video interface (DVI), video graphics array (VGA), and component and analog video connectors. Through these connectors, the goods in issue can be attached to multiple devices, ranging from an antenna to personal/digital video recorders, cable/satellite set top boxes, DVD/Blu-ray players, video game consoles, and computers.

6. Some models of the goods in issue have a built-in DVD or Blu-ray player. In addition, some models are so-called “Smart TVs”, that is, televisions with a built-in computer allowing the user to access the Internet directly through the television. These models are otherwise similar to the rest of the goods in issue, as they have connectors allowing them to be attached to the same source devices.

PROCEDURAL HISTORY

7. The goods in issue were imported between June 1, 2009, and June 30, 2013, under tariff item No. 8528.72.33.

8. Between April 2013 and May 2015, the appellants applied for refunds of the duties paid, pursuant to section 74 of the *Customs Act*, on the basis that the goods in issue should have benefited from duty-free treatment under tariff item No. 9948.00.00 as articles for use in ADP machines and units thereof.

9. The CBSA denied the appellants’ refund requests in June and July 2015, following which the appellants filed requests for re-determination pursuant to subsection 60(1) of the *Customs Act*.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Customs Act*].
2. *Transcript of Public Hearing*, 3 November 2016, at 13-14.
3. *Transcript of Public Hearing*, 3 November 2016, at 14-15, 71.

10. Between December 2015 and March 2016, the CBSA issued final decisions pursuant to subsection 60(4) of the *Customs Act*, maintaining its previous decisions that the goods in issue do not meet the conditions for classification under tariff item No. 9948.00.00.

11. The CBSA based its decisions on the grounds that the appellants had not substantiated the actual use of the goods in issue by providing records in accordance with the *Imported Goods Records Regulations*[4] in force at the time of importation of the goods in issue. Specifically, paragraph 3(a) of the *IGRR* provided that "a person who imports or causes to be imported commercial goods that have been released free of duty or at a reduced rate of duty because of their intended use . . . shall keep, for the same period of time referred to in that section, (a) *a certificate or other record signed by the user of the commercial goods that shows the user's name, address and occupation and indicates the actual use made of the commercial goods*" [emphasis added]. As the appellants had not provided such a certificate or other record in support of their refund claims, the CBSA determined that the goods in issue could not be classified under tariff item No. 9948.00.00.

12. As background, it is also useful to note that on April 1, 2015, that is, after the importation of the goods in issue, section 3 of the *IGRR* was amended to introduce paragraph 3(a.1), which provides that, in the case of goods released free of duty under tariff item No. 9948.00.00, the record-keeping requirement is only for an attestation of intended use made by the importer (as opposed to the user of the goods in issue). This amendment was made retroactive to June 28, 2013, the date of the issuance of a notice whereby the CBSA announced its intention to "clarify" that it "will allow the importer of the goods to attest to the intended use to be made of the goods in an article listed under tariff item 9948.00.00, rather than require a certificate or other such record to be signed by the user of the commercial goods attesting their actual use."[5]

13. The present appeals were filed pursuant to subsection 67(1) of the *Customs Act* on March 11, March 23 and April 13, 2016, by Best Buy, P&F and LG, respectively. On May 12, 2016, given the similarity of the issues raised and upon agreement from all parties, the appeals were combined pursuant to section 6.1 of the *Canadian International Trade Tribunal Rules*.[6]

14. The appeals were heard at a public hearing in Ottawa, Ontario, on November 3, 2016. Best Buy and LG called Mr. Barry Kiefl, President of Canadian Media Research Inc., and proposed to qualify him as an expert in the areas of television use patterns and audience research methodologies. The CBSA did not object. Being satisfied of Mr. Kiefl's experience in this area,[7] the Tribunal accepted Mr. Kiefl's qualification as an expert in the proposed area for the purposes of these proceedings.

15. Best Buy and LG also called Mr. Newton Guillen, Senior Director, Global Engineering and Technology Strategy at Best Buy. P&F called Mr. Steven Abrams, National Director of Sales, Canada, P&F. The CBSA did not call any witnesses.

16. At the hearing, the parties agreed that Mr. Guillen would testify about the technical aspects of the goods in issue and their connectable devices, providing evidence common to all three appeals. It was further agreed that Mr. Abrams would testify about the marketing aspects of the goods in issue and that his testimony would also serve as evidence for all three appeals.

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4. SOR/86-1011 [*IGRR*].
5. Exhibits AP-2015-034-09C and AP-2016-001-09C, Vol. 3, Tab H1.
6. SOR/91-499.
7. Exhibit AP-2015-034-15A at 2, 27; *Transcript of Public Hearing*, 3 November 2016, at 76-82.

LEGAL FRAMEWORK

17. 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 each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

18. 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.

19. 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. It is only where Rule 1 does not conclusively determine the classification of the goods that the other general rules become relevant to the classification process.[11]

20. 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*[12] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[13] published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[14]

21. Chapter 99, which includes tariff item No. 9948.00.00, provides for special classification provisions adopted by Canada that generally allow certain goods to be imported duty-free. The provisions of this chapter are not standardized at the international level. 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.

22. Notes 3 and 4 to Chapter 99 are relevant to the present appeal. They provide 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.
>
> 4. The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.

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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. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.
12. World Customs Organization, 2nd ed., Brussels, 2003.
13. World Customs Organization, 5th ed., Brussels, 2012.
14. 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 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 classification opinions.

23. In this case, there is no dispute that the goods in issue are classified under tariff item No. 8528.72.33 (which is included in Chapter 85) as other colour high-definition reception apparatus for television with flat-panel screen. As such, the condition of note 3 to Chapter 99 that goods first be classified under a tariff item of Chapters 1 to 97 is met.

24. However, as will be discussed further below, the parties disagree whether "the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met" with respect to the goods in issue, as required by note 3 to Chapter 99. The CBSA's position is that the goods in issue have not met the record-keeping obligations of the *IGRR*, which in the CBSA's view are "applicable regulations" within the meaning of note 3 to Chapter 99.

25. The appellants argue that the goods in issue meet the conditions of tariff item No. 9948.00.00, which provides as follows, in relevant part:

> **9948.00.00** **Articles for use in the following:**
>
> **Automatic data processing machines and units thereof, magnetic or optical readers . . . ;**
> **Process control apparatus, excluding sensors, which converts analog signals from or to digital signals;**
> **Video games used with a television receiver, and other electronic games;**

26. Subsection 2(1) of the *Customs Tariff* defines "for use in" 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. (*devant servir dans* ou *devant servir à*)

> ***devant servir dans*** ou ***devant servir à*** Mention dans un numéro tarifaire, applicable aux marchandises qui y sont classées et qui doivent entrer dans la composition d'autres marchandises mentionnées dans ce numéro tarifaire par voie d'ouvraison, de fixation ou d'incorporation. (*for use in*)

27. With regard to the interpretation of an ADP machine, the appellants made reference to the following note to Chapter 84:

> 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 a 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.

28. Other relevant provisions or notes will be referred to as necessary throughout the analysis.

PARTIES' POSITIONS

Best Buy and LG

29. Best Buy and LG argued that the goods in issue meet all the conditions for classification under tariff item No. 9948.00.00. They submit that the goods are (1) articles (2) for use in (3) ADP machines or one or more of the other host goods identified in tariff item No. 9948.00.00.

30. With respect to the second criterion, Best Buy and LG submitted that the goods in issue are "attached to" the host goods, being physically connected and functionally joined to the host goods, thus satisfying the test established by the case law. They also submitted that those models having a built-in DVD/Blu-ray device are "incorporated into" the DVD/Blu-ray players.

31. With respect to the third criterion, Best Buy and LG submitted that the devices to which the goods in issue are connected, namely, computers, DVD/Blu-ray players, video game consoles, personal/digital video recorders and cable/satellite set top boxes fit within the meaning of ADP machines in note 5(A) to Chapter 84. As an alternative, Best Buy and LG submitted that DVD/Blu-ray players qualify as optical readers; that DVD/Blu-ray players, video game consoles, personal/digital video recorders and cable/satellite set top boxes are process control apparatus which convert analog signals to and from digital signals; and that video game consoles are video games used with a television receiver, or other electronic games, within the meaning of tariff item No. 9948.00.00.

32. Furthermore, Best Buy and LG submitted that proof of actual use made of each and every imported good cannot be made at the time of importation and is thus inconsistent with the statutory scheme and with Tribunal precedents. They argued that proof of intended use is sufficient, but conceded that, in some instances, more evidence may be needed to demonstrate the intended use.

33. Best Buy and LG argued that the goods in issue are committed by design to be used with the host goods under tariff item No. 9948.00.00, adding that the goods in issue may be used interchangeably with the various host goods and, to a limited extent, with non-qualifying host goods. They submitted that the multi-functional character of the goods in issue does not make them ineligible for the benefits of tariff item No. 9948.00.00.

34. Finally, Best Buy and LG argued that end-use certificates are not required in order for goods to meet the criteria of tariff item No. 9948.00.00. They submit that the CBSA improperly conflates the distinct concepts of tariff classification and record keeping pursuant to the *IGRR*. Alternatively, Best Buy and LG argued that these record-keeping obligations either do not apply in the circumstances of the goods in issue or have been met. Finally, they added that it is unfair as a matter of policy to bar the appellants from qualifying for the benefits of tariff item No. 9948.00.00 where other importers were granted a refund of duties paid or payable on similar goods by way of a remission order from the Governor General in Council pursuant to section 115 of the *Customs Tariff*.[15]

P&F

35. P&F took a position similar to Best Buy and LG, submitting that the goods in issue are articles for use in ADP machines and thus meet all the conditions for classification under tariff item No. 9948.00.00. It submitted that the goods in issue are multi-use goods, one use being as a temporary attachment to a computer (i.e. an ADP machine), as demonstrated by the design of the goods in issue.

36. P&F further argued that paragraph 3(a) of the *IGRR* does not apply to the goods in issue and is not a condition for classification under tariff item No. 9948.00.00. According to P&F, nothing in tariff item No. 9948.00.00 imposes a requirement for end-use certificates as a condition of tariff classification.

37. In the alternative, P&F submitted that, if end-user certificates pursuant to paragraph 3(a) of the *IGRR* are required for tariff classification, that requirement is directory rather than mandatory and, as such, non-compliance does not bar classification under tariff item No. 9948.00.00.

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15. *Certain Televisions Remission Order*, SOR/2014-88.

CBSA

38. The CBSA argued that, in order to benefit from tariff relief under Chapter 99, a good must, *inter alia*, meet the conditions of any applicable regulations, in accordance with note 3 to Chapter 99 and section 12 of the *Customs Tariff*. According to the CBSA, the version of the *IGRR* in force at the time of importation required the appellants to provide evidence, in the form of a certificate or other document signed by the user of the goods, that the goods in issue were actually used in an ADP machine. It submitted that the goods in issue cannot be classified under tariff item No. 9948.00.00 as the appellants have not complied with this requirement of the *IGRR*.

39. The CBSA argued that the question of compliance with the *IGRR* was dispositive of the appeals.[16] However, it also referred to the decision of the Federal Court of Appeal in *Entrelec Inc. v. Canada (Minister of National Revenue)*,[17] for the proposition that evidence of actual use of the goods as opposed to just intended use is required where the term "for use in" occurs in a tariff item.

40. The CBSA also stated in its brief that it "does not contest whether the Appellants can now provide evidence demonstrating that the goods in issue can actually, or potentially, be used in an [ADP machine]" and that whether they can make such demonstration today is "irrelevant". It submitted that the sole issue before the Tribunal is whether the appellants met their obligations under paragraph 3(a) of the *IGRR* at the time they applied for conditional duty relief.[18]

41. At the hearing, the CBSA nuanced its position on this last point, and accepted that the Tribunal can entertain new evidence presented before it, as appeals before the Tribunal proceed *de novo*.[19] The CBSA argued in the alternative that, if the Tribunal concludes that the *IGRR* do not apply as a condition of classification under tariff item No. 9948.00.00, the appellants have not, in any case, shown that the goods may be classified in that tariff item. Specifically, the appellants have not proved that all of the devices with which the goods in issue can be used are ADP machines or other host goods listed under tariff item No. 9948.00.00, and have failed to demonstrate that the goods in issue are actually for use in any of those devices, as opposed to being merely capable of connecting to such devices.[20]

ANALYSIS

42. For the reasons provided below, the Tribunal does not accept the CBSA's argument that, in order to be classified under tariff item No. 9948.00.00, the goods in issue must, as a condition pursuant to note 3 to Chapter 99 and section 12 of the *Customs Tariff*, comply with paragraph 3(a) of the *IGRR*.

43. Classification under tariff item No. 9948.00.00 is an issue distinct from compliance with record-keeping obligations pursuant to the *Customs Act*. As such, the question whether goods can be classified under a tariff item of Chapter 99 does not turn on whether the importer has complied with its record-keeping obligations.

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16. *Transcript of Public Hearing*, 3 November 2016, at 205-206.
17. 2000 CanLII 16268 (FCA).
18. Exhibit AP-2015-034-13A, Vol. 1C, para. 57.
19. *Transcript of Public Hearing*, 3 November 2016, at 229. The fact that appeals before the Tribunal under the *Customs Act* are appeals *de novo* is well established: *Volpak Inc*. (2 February 2012), EP-2011-002 (CITT) at para. 12; *Andritz* (21 June 2013), AP-2012-022 (CITT) at para. 34; see also, by analogy, *Toyota Tsusho America Inc. v. Canada (Canada Border Services Agency*, 2010 FC 78 (CanLII), at para. 24, which concerned appeals to the Tribunal under the similar appeals provisions pursuant to the *Special Import Measures Act*.
20. *Transcript of Public Hearing*, 3 November 2016, at 229-30.

44. As indicated above, in order for the goods in issue to qualify for the benefits of tariff item No. 9948.00.00, they must be (1) articles (2) for use in (3) ADP machines or units thereof, or one of the other host items identified in tariff item No. 9948.00.00. As detailed below, having considered the arguments and evidence before it, the Tribunal is satisfied that the goods in issue comply with all three conditions. In particular, the appellants have adduced sufficient evidence to show on the balance of probabilities that the goods in issue are in fact for use in one or several host goods listed under tariff item No. 9948.00.00.

The *IGRR* Are Not Determinative for the Purposes of Tariff Classification

45. The CBSA's main argument was that compliance with the obligation, pursuant to paragraph 3(a) of the *IGRR*, to keep a certificate or other record signed by the user attesting to the actual use of the goods is a condition of an applicable regulation, within the meaning of note 3 to Chapter 99, that has to be met before goods can be classified under tariff item No. 9948.00.00. It is the position of the CBSA that section 12 of the *Customs Tariff* makes the *IGRR*, which were enacted under the *Customs Act*, applicable to tariff classification under the *Customs Tariff*. The CBSA submitted that the appellants failed to provide certificates in accordance with the *IGRR* and, as such, the goods in issue cannot be classified under tariff item No. 9948.00.00.

46. The *IGRR* set out record-keeping requirements for persons importing "commercial goods", which are defined as "goods imported into Canada for sale or for any industrial, occupational, commercial, institutional or other like use."[21] Paragraph 3(a) of the *IGRR* reads as follows:

> **3.** In addition to the records referred to in section 2, a person who imports or causes to be imported commercial goods *that have been released free of duty or at a reduced rate of duty because of their intended use* or because they were intended to be used by a specific person shall keep, for the same period of time[22] referred to in that section,
>
> **(a)** a *certificate or other record signed by the user* of the commercial goods that shows the user's name, address and occupation *and indicates the actual use made of the commercial goods*;
>
> [Emphasis added].

47. As stated above, note 3 to Chapter 99 provides that goods may be classified under a tariff item of that chapter "only after . . . the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met."[23]

48. The word "regulation" is defined in section 2(1) of the *Customs Tariff* as "a regulation made under this Act"—i.e. under the *Customs Tariff*. The Tribunal finds no textual or contextual element in the *Customs Tariff* indicating that this definition should not apply to the word "regulations" in note 3 to Chapter 99, which is found in the schedule of the *Customs Tariff*.[24] Note 3 to Chapter 99 also refers to "orders", a word that is not defined, and the French version of note 3 to Chapter 99 uses the undefined expression "textes d'application" to refer collectively to the words "regulations" and "orders" appearing in the English version. However, these words do not have the effect of rendering the definition in section 2(1) of the word "regulation" inapplicable in the context of note 3 to Chapter 99.

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21. See definition in section 1.1 of the *IGRR*.
22. Six years following the importation.
23. In French : "Les marchandises peuvent être classées dans un numéro tarifaire du présent Chapitre . . . mais ce classement est subordonné au classement préalable de celles-ci dans un numéro tarifaire des Chapitres 1 à 97 et à l'observation des conditions prévues par les textes d'application qui leurs sont applicables."
24. Subsection 2(1) of the *Customs Tariff* provides that "[t]he definitions in this subsection apply in this Act."

49. Furthermore, the CBSA's reliance on section 12 of the *Customs Tariff* to import regulations made under the authority of the *Customs Act* into the substantive elements of tariff classification pursuant to the *Customs Tariff* is unconvincing. Section 12 provides as follows:

> **12.** The provisions of the *Customs Act* apply, with such modifications as the circumstances require, in respect of the administration and enforcement of this Act and the regulations, and for the purposes thereof, a contravention of this Act or the regulations or a failure to comply with a condition to which relief or a remission, drawback or refund under Part 3 is subject or to which classification under a tariff item is subject is deemed to be a contravention of the *Customs Act*.

50. This section essentially provides that the *Customs Act* applies to the administration and enforcement of the *Customs Tariff*. It also provides that a failure to comply with a condition affecting tariff classification is deemed a contravention of the *Customs Act*. It does *not* state the reverse—that is, it does *not* provide that a failure to comply with the *Customs Act* is a condition for the purposes of a given tariff classification pursuant to the *Customs Tariff*.

51. Therefore, the CBSA's argument based on note 3 to Chapter 99 and section 12 of the *Customs Tariff* does not offer a persuasive basis to conclude that the *IGRR*, which were made pursuant to subsection 40(1) and subparagraph 164(1)(i) of the *Customs Act*, are "applicable regulation[s]" within the meaning of note 3 to Chapter 99 for the purposes of tariff classification under the *Customs Tariff*.

52. Further analysis of the legislative context supports this interpretation.

53. The *IGRR*, in their wording and the authority under which they were enacted, are not directed at tariff classification under a given tariff item of Chapter 99.[25] They concern obligations with respect to the keeping of records.[26] Moreover, while the failure to keep and provide appropriate records may, in a practical sense, impact an importer's ability to support a claim that goods are classified in a given tariff item, nothing in the *Customs Act* or the *Customs Tariff* makes compliance with obligations with respect to records a *sine qua non* condition of tariff classification.

54. Parliament addressed the rules of tariff classification in sections 10 and 11 of the *Customs Tariff*, by providing that classification of goods in the list of tariff provisions is determined in accordance with the *General Rules* and that regard must be had to the classification opinions and explanatory notes in interpreting classification provisions.[27]

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25. This is in contrast to existing examples of regulations made under the authority of the *Customs Tariff* that expressly relate to classification of goods under a tariff item of Chapter 99. See, for example, the *Temporary Importation (Tariff Item No. 9993.00.00) Regulations*, SOR/98-58.
26. While the *Customs Act* and the *Customs Tariff* are related legislation, each Act is complex and addresses a variety of specific areas; the Tribunal has found in other instances that particular provisions under either Act concerning specific subject matters must not be exported and applied out of their specific context to other subject matters addressed by these statutes. See, for example, *Western International Forest Products, Inc*. (25 February 1991), AP-89-282 (CITT) at 7; *ContainerWest Manufacturing Ltd*. (27 July 2015), AP-2014-025 (CITT) at paras. 58-63, affirmed in *Containerwest Manufacturing Ltd. v. Canada (Border Services Agency)*, 2016 FCA 110 (CanLII), leave to appeal to the Supreme Court of Canada denied on November 10, 2016 (*ContainerWest Manufacturing Ltd. v. President of the Canada Border Services Agency*, 2016 CanLII 76800 (SCC)); *Jan K. Overweel Limited* (5 February 2013), AP-2011-075 (CITT) at paras. 37-55.
27. Significantly, subsection 10(1) provides that the classification of goods pursuant to the *General Rules* and the *Canadian Rules* is subject to subsection 10(2), which provides that "[g]oods shall not be classified under a tariff item that contains the phrase 'within access commitment' unless the goods are imported under the authority of a permit issued under section 8.3 of the *Export and Import Permits Act* and in compliance with the conditions of the permit." There is no similar provision making tariff classification subject to compliance with record-keeping obligations pursuant to the *Customs Act*.

55. On the other hand, subsection 40(1) of the *Customs Act*, pursuant to which the *IGRR* were enacted, concerns record-keeping obligations, and provides that such records may be examined by CBSA officers. It reads as follows:

> **40** (1) Every person who imports goods or causes goods to be imported for sale or for any industrial, occupational, commercial, institutional or other like use or any other use that may be prescribed shall keep at the person's place of business in Canada or at any other place that may be designated by the Minister any records in respect of those goods in any manner and for any period of time that may be prescribed and shall, where an officer so requests, make them available to the officer, within the time specified by the officer, and answer truthfully any questions asked by the officer in respect of the records.

The *IGRR* prescribe the records that must be kept and the period of time and the manner in which they must be kept.

56. The *Customs Act* expressly provides that failing to comply with the record-keeping requirements can entail several consequences, none of which concerns the tariff classification of the imported goods.[28]

57. Audits and examinations of records can also trigger re-determinations or further re-determinations of the tariff classification of imported goods.[29] Such re-determinations can be revisited by the President of the CBSA (subsections 60(4) and 61(1)) as well as by appeal to the Tribunal pursuant to section 67 of the *Customs Act*. However, paragraph 57.1(b) of the *Customs Act* confirms that, for the purposes of such re-determinations and appeals, "the tariff classification of imported goods is to be determined in accordance with sections 10 and 11 of the *Customs Tariff*, unless otherwise provided in that Act." As mentioned above, appeals before the Tribunal proceed *de novo*.

58. Neither the *Customs Act* nor the *Customs Tariff* provide a *sine qua non* link between compliance with the record-keeping requirements of importers and the substantive requirements for classification of imported goods in a given tariff item. Classification of goods under a tariff item of Chapter 99 depends on the evidence an importer can adduce to show that the goods correspond to the description of a given tariff item in which classification is sought, in accordance with sections 10 and 11 of the *Customs Tariff*. It does not depend on whether the importer has complied with any record-keeping obligations the *Customs Act* imposes on the importer.

59. As such, the Tribunal finds that the appellants' compliance with the *IGRR* is not a precondition for the classification of the goods in issue under tariff item No. 9948.00.00.

60. Even if the Tribunal had found paragraph 3(a) of the *IGRR* to be an applicable regulation in accordance with note 3 to Chapter 99, the record-keeping obligation laid out in paragraph 3(a) of the *IGRR* does not apply in the circumstances of the goods in issue. By its own words, paragraph 3(a) concerns commercial goods that "have been released free of duty or at a reduced rate of duty because of their intended use." The goods in issue were *not* released free of duty or at a reduced rate of duty because of their intended use. Rather, the goods in issue were released duty-paid, with the importers subsequently claiming a

28. See, for instance, section 41 of the *Customs Act* (detention of subsequent goods of the importer); section 109.1 of the *Customs Act* and section 1 and Schedule 1 of the *Designated Provisions (Customs) Regulations*, SOR/2002-336 (administrative monetary penalties may ensue in case of non-compliance with section 40 of the *Customs Act*); section 160 (a contravention of section 40 of the *Customs Act* is an offence punishable on summary conviction or an indictable offence).
29. Subsections 42(2) and 59(1) of the *Customs Act*.

refund of duties paid under paragraph 74(1)(e) of the *Customs Act*. The CBSA has presented no compelling argument of statutory interpretation by which the specific words of paragraph 3(a) of the *IGRR* could be stretched to apply to such a situation.

61. For reasons of judicial economy, the Tribunal will not address the various other arguments regarding the *IGRR* that were put forward by the appellants.

The Goods in Issue Meet All the Conditions for Classification Under Tariff Item No. 9948.00.00

62. As indicated above, in order for the goods in issue to qualify for the benefits of tariff item No. 9948.00.00, they must be (1) articles (2) for use in (3) ADP machines or units thereof, or one or several of the other host goods identified in tariff item No. 9948.00.00.

63. The first condition is not in issue, as there was no controversy in this case that the goods in issue are "articles". The Tribunal will review the remaining conditions, starting with the third condition.

Condition 3: ADP Machines or Other Host Goods

64. With respect to the third condition, tariff item No. 9948.00.00 provides duty-free treatment for articles for use in the following relevant host goods:

> **9948.00.00** **Articles for use in the following:**
>
> **Automatic data processing machines and units thereof, magnetic or optical readers . . . ;**
> **Process control apparatus, excluding sensors, which converts analog signals from or to digital signals;**
> **Video games used with television receiver, and other electronic games;**

65. As noted above, note 4 to Chapter 99 provides that "words and expressions used in [that] Chapter have the same meaning as in Chapters 1 to 97." In this regard, as the appellants pointed out, note 5(A) to Chapter 84 defines the expression "automatic data processing machines". It is useful to cite note 5 to Chapter 84 in full:

> 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 a 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.
>
> (B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units.
>
> (C) Subject to paragraphs (D) and (E) below, a unit is to be regarded as being part of an automatic data processing system if it meets all of the following conditions:
>
> (i) It is of a kind solely or principally used in an automatic data processing system;
>
> (ii) It is connectable to the central processing unit either directly or through one or more other units; and

(iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

Separately presented units of an automatic data processing machine are to be classified in heading 84.71.

However, keyboards, X-Y co-ordinate input devices and disk storage units which satisfy the conditions of paragraphs (C) (ii) and (C) (iii) above, are in all cases to be classified as units of heading 84.71.

(D) Heading 84.71 does not cover the following when presented separately, even if they meet all of the conditions set forth in Note 5 (C) above:

(i) Printers, copying machines, facsimile machines, whether or not combined;

(ii) Apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network);

(iii) Loudspeakers and microphones;

(iv) Television cameras, digital cameras and video camera recorders;

(iv) Monitors and projectors, not incorporating television reception apparatus.

(E) Machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function other than data processing are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

66. The Tribunal agrees with the appellants that notes 5(B) to (E) to Chapter 84 are not relevant to understanding the expression “automatic data processing machine” for the purposes of tariff item No. 9948.00.00 in the circumstances of this case. Notes 5(B) and (C) are not relevant on the facts. Moreover, notes 5(D) and (E), as is apparent from their wording, direct that some machines having all the characteristics of an ADP machine as defined in note 5(A) or of a unit thereof are nevertheless not *classified* in heading 84.71. As such, these notes geared specifically to directing tariff classification in heading 84.71 do not inform the meaning of the words “automatic data processing machines” *per se* for the purposes of tariff item No. 9948.00.00.[30] Tariff item No. 9948.00.00 refers to “automatic data processing machines and units thereof”, and, contrary to what may be seen in other tariff items of Chapter 99,[31] it is *not* limited to ADP machines *of heading 84.71*.

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30. The Tribunal has previously expressed the view that the fact that certain goods are not classified in heading 84.71 “does not necessarily mean that they are not ‘automatic data processing machines’ within the meaning and for the purposes of tariff item No. 9948.00.00” (*Curve Distribution Services Inc.* (15 June 2012), AP-2011-023 (CITT) at para. 69). The Tribunal adopted a similar reasoning in respect of a different tariff item in *Beckman Coulter Canada Inc.* (17 January 2012), AP-2010-065 (CITT) [*Beckman Coulter*], stating, at para. 35, that “explanatory notes or legal notes may direct a particular tariff classification for purposes of Chapters 1 to 97 without informing the meaning of words and expressions used therein. For example, an explanatory note could simply indicate that a particular product is included in or excluded from a particular heading. To the extent that this may be the case, this note would not be relevant for the purposes of Chapter 99.”

31. Other tariff items of Chapter 99 expressly circumscribe the described goods to those classified under a tariff item of Chapters 1 to 97. For instance, tariff item No. 9904.00.00 includes “Kosher goods of heading 22.04 or 22.05 . . .”; tariff item No. 9908.00.00 refers to “Utility vehicles of heading No. 87.03 . . .”; tariff item No. 9910.00.00 includes “Materials for use in the manufacture of goods of Section XVI, of Chapter 40, 73 or 90, or of heading 59.10 or 87.05 . . .” Other tariff items in Chapter 99, like tariff item No. 9948.00.00, do not refer to goods classified under a specific tariff item of Chapters 1 to 97. This indicates that where Parliament wishes to restrict goods referred to in a tariff item of Chapter 99 to those goods classified in a specific provision of Chapters 1 to 97, it indicates so expressly.

67. Mr. Guillen testified that the goods in issue can be used with several devices, such as computers, DVD/Blu-ray players, video game consoles, personal/digital video recorders, and cable/satellite set top boxes, which is also illustrated in the product literature of the goods in issue. The CBSA did not contest that the goods in issue are capable of connecting to such devices.

68. Furthermore, Mr. Guillen testified that all these devices have central processing units, memory features, software programs, and storage components. Specifically, he testified that all of the source devices referred to are capable of executing each of the four functions characteristic of ADP machines pursuant to note 5(A) to Chapter 84.[32]

69. As such, having regard to note 5(A) to Chapter 84 and note 4 to Chapter 99, the Tribunal is satisfied that all of these devices, i.e. computers, DVD/Blu-ray players, video game consoles, personal/digital video recorders and cable/satellite set top boxes, are ADP machines for the purposes of tariff item No. 9948.00.00.

70. The CBSA appeared to accept that computers or laptops can be considered ADP machines, but argued that the appellants had not adduced compelling evidence with respect to the other source devices. It argued that Mr. Guillen's evidence was insufficient to establish that every one of the potential host devices was an ADP machine, noting in particular that he had not been qualified as an expert in those host goods.[33]

71. In this case, Mr. Guillen's uncontroverted evidence was credible and reliable and, as such, it deserves to be given significant weight. Mr. Guillen is an engineer having held the position of Director of Global Engineering for Best Buy exclusive brands and, as such, was responsible, among other things, for leading the product engineering team responsible for developing the specifications for Best Buy's exclusive brands products, including televisions such as the goods in issue.[34] In his current position as Senior Director of Global Engineering and Technology Strategy, Mr. Guillen is responsible for product engineering for Best Buy exclusive name brands, functional testing and quality assurance.[35] As such, the Tribunal accepts that Mr. Guillen testified to his personal knowledge of the design and specifications of the goods in issue, including their connectors and what source devices the goods in issue connect to.[36] It is also well established that the Tribunal, as an administrative quasi-judicial decision maker, is not strictly bound by common law rules of evidence.[37] In the circumstances, the Tribunal has no trouble concluding that Mr. Guillen was in a position to provide reliable evidence on the common consumer electronics to which the goods in issue are designed to be connected and on the ways in which these consumer electronics work and interact with the goods in issue. Mr. Guillen was not cross-examined on the evidence he provided as to the functionality of the source devices.

72. As such, in accordance with Mr. Guillen's testimony, the Tribunal is satisfied that the source devices with which the goods in issue can be connected (and as discussed later in the reasons, are connected), are ADP machines within the meaning of tariff item No. 9948.00.00.

73. In any event, the Tribunal also notes that video games used with television receivers are listed *per se* as another host good under tariff item No. 9948.00.00. Furthermore, Mr. Guillen gave convincing and

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32. *Transcript of Public Hearing*, 3 November 2016, at 48-53.
33. *Transcript of Public Hearing*, 3 November 2016, at 229-30.
34. *Transcript of Public Hearing*, 3 November 2016, at 9-10.
35. *Transcript of Public Hearing*, 3 November 2016, at 12.
36. *Transcript of Public Hearing*, 3 November 2016, at 10-12.
37. See for instance *MRP Retail Inc.* (27 September 2007), AP-2006-005 (CITT) at para. 49.

uncontroverted evidence that DVD and Blu-ray players are optical readers, very similar to CD players.[38] He also testified that all of the source devices and, namely, cable and satellite set top boxes and personal/digital video recorders, if they have an analog interface, can all implement processes to convert analog signals from or to digital signals, through software and hardware that they include.[39] As such, these devices can alternatively be considered as optical readers and process control apparatus excluding sensors, which convert analog signals from or to digital signals, respectively, and thus qualify as host goods listed under tariff item No. 9948.00.00 on that basis as well.

74. The remaining question is whether the goods in issue are "for use in" such devices, within the meaning of the *Customs Tariff*.

Condition 2: For Use In

75. As stated above, subsection 2(1) of the *Customs Tariff* defines the expression "for use in" as follows: "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." As such, for goods to be classified under tariff item No. 9948.00.00, they "must be wrought or incorporated into, or attached to, other goods referred to in that tariff item."

76. In the circumstances of the goods in issue, the relevant element is whether the goods in issue are "attached to" the host goods listed under tariff item No. 9948.00.00.[40]

77. The Tribunal has long applied a test with two requirements for determining whether goods are "attached to" other goods. First, the goods in issue must be physically connected to the host goods; second, the goods in issue must be "functionally joined" to the host goods. This has been understood to mean that the goods in issue must enhance or complement the function of the host goods, by helping the host goods to execute their functions or allow them to acquire additional capabilities.[41]

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38. *Transcript of Public Hearing*, 3 November 2016, at 34. See also *PHD Canada Distributing Ltd v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT) [*PHD*]; Exhibit AP-2015-09C, Tab H-4.
39. *Transcript of Public Hearing*, 3 November 2016, at 55. See also *Wolseley Canada Inc*. (18 January 2011), AP-2009-004 (CITT).
40. Best Buy and LG also argued that those units incorporating a built-in DVD/Blu-ray player may be considered to be "incorporated" into those DVD/Blu-ray players. Given the overall outcome, it is not necessary to elaborate on this aspect. However, this argument does not appear to be consistent with the definition of "for use in" and tariff item No. 9948.00.00, which relates to the classification of articles (i.e. imported goods) that are for use in other goods. As such, the host goods are *separate goods* from the imported goods themselves. The Tribunal doubts that this tariff item is meant to cover an imported good by reason of the fact that the same good already incorporates another device that may be listed under tariff item No. 9948.00.00.
41. See *Andritz Hydro Canada Inc. and VA Tech Hydro Canada Inc. v. President of the Canada Border Services Agency* (21 June 2013), AP-2012-022 (CITT) at para. 36, affirmed in *Andritz Hydro Canada Inc. v. Canada (Border Services Agency)*, 2014 FCA 217 (CanLII); *Ubisoft Canada Inc. v. President of the Canada Border Services Agency* (1 October 2013), AP-2013-004 (CITT) at para. 59, affirmed in *Ubisoft Canada Inc. v. Canada (Border Services Agency)*, 2014 FCA 254 (CanLII); *Kverneland Group North America Inc. v. President of the Canada Border Services Agency* (30 April 2010), AP-2009-013 (CITT); *Jam Industries Ltd. v. President of the Canada Border Services Agency* (20 March 2006), AP-2005-006 (CITT), affirmed in *Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 FCA 210; *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*; *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT) [*Agri-Pack*], affirmed in *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 (CanLII).

78. It is also well established that, unless otherwise provided in a tariff item, the definition of the phrase "for use in" does not require that goods be for the sole or exclusive use in the host goods,[42] nor is there a requirement for the attachment to be permanent.[43]

79. In this case, it was not contested that the goods in issue are capable of being attached to the source devices, and that when they are so attached, they enhance and complement the function of those devices by providing a necessary or complementary visual display as well as sound output for the source devices. The Tribunal is satisfied that the goods in issue can be physically and functionally joined to ADP machines and other host goods of tariff item No. 9948.00.00.

80. Another disputed issue in these proceedings was whether the appellants have shown that the goods in issue are *actually* used in the source devices and, indeed, whether this is a requirement at all that must be met in order for goods to be classified as articles "for use in" the host goods of tariff item No. 9948.00.00.

81. In the Tribunal's view, it is settled law that some evidence of actual use of a good is required to meet the "for use in" test. In *Entrelec*, the Federal Court of Appeal held that:

> [w]hile it is true that the words "for use in" (in French "devant servir dans" or "devant servir à" rather than "servant à") would normally refer to the intended use of the importer, the definition in s. 4[44] ascribes to them a meaning which is specific and different from the usual one. By stating that the imported goods "must be" (in French "entrent") wrought into, attached to or incorporated into other goods, the definition requires, as the Tribunal properly found, that there be an actual as opposed to an intended connection between the imported components and the goods in which they are used.[45]

82. The Federal Court of Appeal further held that "duality of applications or uses does not prevent the goods from qualifying under Code 2101 as long as *evidence of use in conformity with the requirements of that provision is adduced*"[46] [emphasis added].

83. More recently, the Tribunal reiterated in *Beckman Coulter* as follows:

> As Beckman Coulter pointed out, the CBSA itself treats some goods as being "for use in" other goods referred to elsewhere in Chapter 99 . . .even where they can be used with other goods not referred to in the tariff item, *as long as the importers show that they are actually used in the other goods which are referred to in the tariff item. The Tribunal has previously found this approach appropriate and, in fact, mandatory* when dealing with such provisions.[47]
>
> [Emphasis added]

84. Furthermore, in the Tribunal's view, in order to establish that a good is actually "for use in" other goods referred to in a tariff item, an importer must adduce sufficient evidence to show, *on the balance of probabilities*, that the goods in issue *have been or will in fact be used* in the manner required by the tariff item.

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42. *Beckman Coulter* at para. 27; *Entrelec Inc. v. Canada (Minister of National Revenue)*, 2000 CanLII 16268 (FCA).
43. *Agri-Pack* at paras. 19-20, 33-35.
44. Now, section 2 of the *Customs Tariff*. The wording of the definition found in the former version of the *Customs Tariff* that was before the Federal Court of Appeal differs slightly, but not substantively, from the current wording. The word "entrent" in the French version has been replaced by "doivent entrer".
45. *Entrelec Inc. v. Canada (Minister of National Revenue)*, 2000 CanLII 16268 (FCA), at para. 4.
46. *Entrelec Inc. v. Canada (Minister of National Revenue)*, 2000 CanLII 16268 (FCA), at para. 7.
47. *Beckman Coulter* at para. 28.

85. The case law since *Entrelec* makes clear that proof of actual use for purposes of tariff classification can be made through various types of evidence capable of establishing, on the balance of probabilities, that the goods in issue will or have been in fact used with other goods referred to in a tariff item. This evidence will necessarily depend on the circumstances and the characteristics of the goods in issue. As the Tribunal stated in its decision in *Entrelec Inc.*[48] on remand from the Federal Court of Appeal, "[t]he evidence accepted by the Tribunal in this regard could be of a type that indicates the actual use of every unit of the goods or it could be of a type that does not cover the actual use of every unit of the goods in issue but, in the Tribunal's view, is representative of the actual use of the whole or a portion of the goods in issue." Namely, this case law makes clear that the evidence capable of establishing that goods are in fact used or to be used in other goods is *not* restricted to certificates signed by the user of the goods.

86. For instance, in the *Entrelec* cases, the Tribunal considered such evidence as testimonies from the appellant's executives, end-use certificates, purchase orders, sales invoices, project diagrams, lists of customers.[49] In *Agri-Pack*,[50] the appellant provided end-use certificates as well as oral evidence as to the use to which the goods were put. In *SMS Equipment Inc*.,[51] the Tribunal stated that end-use certificates are one way of proving end use, and accepted testimonial evidence that certain goods were in fact "for use in" other goods, despite the fact that the certificates provided were found to be deficient. In the Tribunal's view, in some instances where goods are by design only capable of one use, their design may itself be sufficient to establish, on the balance of probabilities, the actual use of the goods.

87. In other words, as long as the evidence adduced is reliable and sufficiently specific to establish the link between the imported goods and their use in the manner that qualifies them for classification in a particular tariff item, the importer will have discharged its onus of establishing, on the balance of probabilities, that the imported goods are in fact for use in the manner prescribed in that tariff item.

88. This burden was discharged by the appellants in relation to the goods in issue.

89. It is common knowledge that high-definition televisions are used with one or more of the host goods of tariff item No. 9948.00.00. Mr. Guillen and Mr. Abrams also testified to the importance of the flexible connectivity of the goods in issue from a design and marketing perspective, as that is something consumers are looking for.[52] Mr. Abrams testified that "the purpose is to have all the source devices connected at all times",[53] allowing users to choose through an input button which source device they wish to use at any given time. Furthermore, Mr. Abrams testified that a "big selling feature of these TVs is not only that [they have] HDMI, but how many HDMIs, because [consumers] want to have as much functionality as possible."[54]

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48. (17 March 2003), AP-2000-051 (CITT) at 6-7.
49. *Entrelec Inc.* (28 September 1998), AP-97-029 (CITT) at 11; see also on the point of potentially relevant evidence *Entrelec Inc. v. Canada (Minister of National Revenue)*, 2000 CanLII 16268 (FCA), at para. 8; *Entrelec Inc*., (17 March 2003), AP-2000-051 (CITT), affirmed in *Entrelec Inc. v. Canada (Commissioner of the Canada Customs and Revenue Agency)*, 2004 FCA 159 (CanLII).
50. *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT).
51. *SMS Equipment Inc. v. President of the Canada Border Services Agency* (28 March 2014), AP-2013-006 (CITT) at para. 27.
52. *Transcript of Public Hearing*, 3 November 2016, at 18, 23.
53. *Transcript of Public Hearing*, 3 November 2016, at 19-20, 32-33, 73.
54. *Transcript of Public Hearing*, 3 November 2016, at 72.

90. As Mr. Guillen testified, it is also possible to use the goods in issue with other devices, such as an antenna, a coaxial cable or a USB key,[55] that would not qualify as ADP machines or other host goods of tariff item No. 9948.00.00. Mr. Guillen further testified that Best Buy or the other appellants has no way of knowing for certain how a consumer will *actually* use any given television.[56]

91. Mr. Kiefl's uncontroverted evidence confirmed the ubiquitous use of televisions such as the goods in issue with devices qualifying as ADP machines or other host goods of tariff item No. 9948.00.00. This evidence was so compelling that it allowed the Tribunal to conclude, on the balance of probabilities, that while the goods in issue are capable of being used both in qualifying and non-qualifying ways, the goods in issue were, over their seven-year replacement cycle,[57] actually used with at least one, and likely several, devices that qualify as host goods listed under tariff item No. 9948.00.00.

92. Mr. Kiefl provided evidence showing the usage trends for various television technologies in the Canadian market, including a variety of devices qualifying as host goods listed under tariff item No. 9948.00.00, based on surveys that are, according to Mr. Kiefl's testimony, "the gold standard within the television industry."[58]

93. These trends show the high penetration of various digital technologies, including devices qualifying as host goods of tariff item No. 9948.00.00, in Canadian households. For instance, Mr. Kiefl's expert report shows that subscription to digital cable (i.e. requiring a set top box), satellite and Internet Protocol Television (IPTV) taken together has been estimated at very high levels, ranging from 90 to 93 percent between 2009 and 2016.[59] While the percentages were somewhat lower in prior years, from 2011 to 2015, over 80 percent of Canadians subscribed to digital cable and satellite, taken together.[60]

94. By contrast, according to Mr. Kiefl, analog cable today "represents a very small proportion of the cable universe",[61] as does the proportion of Canadians relying on antennas.[62] In addition, this was already the case from 2011 to 2013, for instance, where only 11 to 13 percent of the Canadian population was using analog cable and 7 percent was relying on antennas.[63] Mr. Kiefl also testified that among the 7-8 percent segment of people relying on antenna transmission, about half likely rely on Internet streaming to supplement their television access.[64]

95. Other figures in Mr. Kiefl's expert report show the high percentage of Canadians using different ADP devices, including computers, game consoles and PVRs, to access online television content.[65] Other data shows for instance that 58 percent of Canadian broadband households had at least one connected consumer electronics device allowing online content to be accessed through a TV set in 2015, up from 48 percent in 2012.[66] Additionally, in 2016, around 56 percent of Canadians 18 years and older have accessed television content online using devices such as computers, laptops, tablets or smartphones, while

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55. *Transcript of Public Hearing*, 3 November 2016, at 58, 63-64.
56. *Transcript of Public Hearing*, 3 November 2016, at 61.
57. *Transcript of Public Hearing*, 3 November 2016, at 56.
58. *Transcript of Public Hearing*, 3 November 2016, at 85.
59. Exhibit AP-2015-034-15A, Figure 6; *Transcript of Public Hearing*, 3 November 2016, at 88.
60. Exhibit AP-2015-034-15A, Figure 7; *Transcript of Public Hearing*, 3 November 2016, at 89-90.
61. *Transcript of Public Hearing*, 3 November 2016, at 88.
62. Exhibit AP-2015-034-15A, Figure 7; *Transcript of Public Hearing*, 3 November 2016, at 89.
63. Exhibit AP-2015-034-15A, Figure 7.
64. *Transcript of Public Hearing*, 3 November 2016, at 106-109.
65. *Transcript of Public Hearing*, 3 November 2016, at 93-95; Exhibit AP-2015-034-15A, Figures 8, 9, 10.
66. Exhibit AP-2015-034-15A, Figure 16.

around 40 percent report having watched over-the-top services (such as Netflix) in a typical week. Other data presented by Mr. Kiefl show computers, tablets, smartphones and Smart TVs being used to watch TV and/or to connect to TV sets, which remain the prevalent type of screen used to watch TV content.[67] According to Mr. Kiefl, about half the population today is streaming the Internet to their TV sets.[68]

96. Furthermore, the data presented by Mr. Kiefl show that between 2011 and 2016, the percentage of respondents having a game console increased from 44 to 48 percent; these devices can be used with televisions to either play video games or access online content.[69] Finally, Mr. Kiefl's evidence shows that DVD/Blu-ray players had a penetration rate of around 55 percent in 2010, although they have likely declined since.[70] PVRs had nearly a 30 percent penetration rate by 2012, and the percentage of persons with a PVR reached approximately 60 percent by 2016.[71]

97. Taken together, this evidence confirms that in the relevant time frame (i.e. from the time of importation of the goods in issue through their typical replacement cycle), most Canadians were taking advantage of the multimedia capabilities of their televisions and were connecting their televisions to computers, cable/satellite set top boxes, game consoles, personal/digital video recorders, and DVD/Blu-Ray players (in addition to other digital devices).

98. Mr. Kiefl was not cross-examined on this evidence. There is no evidence on the record suggesting that the goods in issue would have been used in a way different from the typical way Canadians use televisions.

99. As such, when this evidence is considered as a whole in the context of the goods in issue, the Tribunal finds that the appellants adduced sufficient evidence to show, on the balance of probabilities, that the goods in issue are in fact (or in actuality) physically attached and functionally joined to one or more devices that qualify as host goods listed under tariff item No. 9948.00.00. Thus, they qualify, based on their use, for the benefits of tariff item No. 9948.00.00.

DECISION

100. For the foregoing reasons, the appeals are allowed.

Peter Burn
Peter Burn
Presiding Member

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67. Exhibit AP-2015-034-15A, Figure 12 and 13; *Transcript of Public Hearing*, 3 November 2016, at 95-98.
68. *Transcript of Public Hearing*, 3 November 2016, at 100.
69. Exhibit AP-2015-034-15A, Figure 14; *Transcript of Public Hearing*, 3 November 2016, at 98-99.
70. Exhibit AP-2015-034-15A, Figure 17; *Transcript of Public Hearing*, 3 November 2016, at 101.
71. Exhibit AP-2015-034-15A, Figure 20.