Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-003

Philips Electronics Ltd.

v.

President of the Canada Border Services Agency

Decision issued
Tuesday, February 28, 2017

Reasons issued
Monday, March 13, 2017

Canada

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on October 25, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated January 26 and March 24, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

PHILIPS ELECTRONICS LTD. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 25, 2016
Tribunal Panel:	Jason W. Downey, Presiding Member
Support Staff:	Kalyn Eadie, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Philips Electronics Ltd.	Robert MacDonald Michael Smith
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Sarah Churchill-Joly

WITNESSES:

James McDonald, Ph.D. Assistant Professor University of Ottawa	Ala' Adel Qadi, P. Eng. Professor Algonquin College

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STATEMENT OF REASONS

BACKGROUND

1. This appeal was filed by Philips Electronics Ltd. (Philips) pursuant to subsection 67(1) of the *Customs Act*[1] from decisions made by the President of the Canada Border Services Agency (CBSA) dated January 26 and March 24, 2016, pursuant to subsection 60(4).

2. The issues in this appeal are the following:

- Firstly, whether the Philips AVENT Airflex baby bottles are properly classified under tariff item No. 3924.90.00 as other household articles of plastics, as determined by the CBSA, or should be classified under tariff item No. 8479.89.90 as other machines and mechanical appliances, as claimed by Philips.
- Secondly, whether the Philips AVENT magic cups are properly classified under tariff item No. 3924.10.00 as tableware and kitchenware of plastics, as determined by the CBSA, or should be classified under tariff item No. 8479.89.90 as other machines and mechanical appliances, as claimed by Philips.
- Finally, whether the Philips AVENT soft spouts (used in the Philips AVENT magic cup drinking cups and bottles) are properly classified under tariff item No. 3924.90.00 as hygienic articles of plastics, as determined by the CBSA, or should be classified under tariff item No. 8479.90.90 as other parts of machines and mechanical appliances or under tariff item No. 8481.80.00 as other taps, cocks, valves and similar appliances, as claimed by Philips.

PROCEDURAL HISTORY

3. The Philips AVENT Airflex baby bottles, magic cups and soft spouts (collectively, the goods in issue) were imported via several transactions between February 26, 2008, and December 12, 2012.[2]

4. Philips submitted various refund requests regarding the goods in issue, which were denied by the CBSA.

5. On March 11, 2013, Philips appealed the decisions to deny the refund requests to the CBSA, pursuant to subsections 74(1) and 60(1) of the *Act*.

6. On January 26 and March 24, 2016, the CBSA denied the appeals.

7. On April 21, 2016, Philips appealed the CBSA's decisions to the Canadian International Trade Tribunal (the Tribunal) pursuant to section 67 of the *Act*.

8. On October 25, 2016, the Tribunal held an oral hearing of this appeal. The following witnesses testified at the hearing:

- Dr. James McDonald, Ph.D, an assistant professor of mechanical engineering at the University of Ottawa. Dr. McDonald was qualified as an expert witness in the area of mechanical engineering with expertise in fluid mechanics.[3]

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2016-003-01 at 2, Vol. 1.

- Dr. Ala' Adel Qadi, P. Eng., a professor of mechanical engineering technology at Algonquin College. Dr. Qadi was qualified as an expert witness in the area of mechanical engineering.[4]

9. The Tribunal requested post-hearing submissions on two issues: 1) additional submissions regarding the classification of the soft spouts in heading No. 84.81; and 2) the relevance, if any, of the Tribunal's decision in *Cross Country Parts Distribution Ltd v. President of the Canada Border Services Agency* to the classification of the goods in issue.[5] These submissions were received on November 1 and November 8, 2016.

DESCRIPTION OF THE GOODS IN ISSUE

10. There are three goods in issue in this appeal: a) the Philips AVENT Airflex baby bottle system, b) soft spouts for the Philips magic cup sippy cups and c) the cups themselves.

11. The AVENT Airflex baby bottle system consists of a plastic bottle, a silicone "Airflex" teat with an incorporated anti-colic valve (available in various flow rates), a locking collar and a plastic cap for storing. The valve is located in the skirt of the teat, which connects to the neck of the bottle to form the anti-colic valve system (or to an adaptor ring in some older models).

12. The soft spouts consist of a pliable spout attached to a base, and a removable silicone diaphragm that forms the one-way, or non-spill, valve system ("magic valve"). The flip side of the base has a plastic shaft protruding to which the plastic diaphragm is attached like a record on a record player. According to Philips, the soft spouts are sold separately as replacement parts.

13. The magic cup is a spill-proof sippy cup and consists of a plastic container attached to the soft spout, and a locking collar. The magic cup also comes with removable plastic handles.

14. All of the goods in issue are made of BPA-free plastic.

15. Samples of the goods in issue were filed as physical exhibits for inspection by the Tribunal and the expert witnesses at the hearing.[6]

LEGAL FRAMEWORK

16. 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).[7] 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.

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3. *Transcript of Public Hearing*, 25 October 2016, at 18 and 21.
4. *Ibid.* at 118.
5. (19 August 2016), AP-2012-052R (CITT) [*Cross Country Parts*].
6. Exhibits AP-2016-003-A-01, -A-02, -B-01 and B-02.
7. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

17. 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*[8] and the *Canadian Rules*[9] set out in the schedule.

18. 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.

19. 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*[10] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[11] 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.[12]

20. 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. 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.[13]

21. 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 determine the proper subheading. Rule 6 of the *General Rules* provides that ". . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . ." and that ". . . the relative Section and Chapter Notes also apply, unless the context otherwise requires."

22. Finally, the Tribunal must determine the proper tariff item classification. Rule 1 of the *Canadian Rules* provides that ". . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . ." and that ". . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires." Classification opinions and explanatory notes do not apply to classification at the tariff item level.

TERMS OF RELATIVE HEADINGS AND LEGAL AND EXPLANATORY NOTES

Heading No. 39.24

Section VII

8. S.C. 1997, c. 36, schedule [*General Rules*].
9. S.C. 1997, c. 36, schedule.
10. World Customs Organization, 2nd ed., Brussels, 2003.
11. World Customs Organization, 5th ed., Brussels, 2012.
12. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that 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.
13. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

PLASTICS AND ARTICLES THEREOF;
RUBBER AND ARTICLES THEREOF

. . .

Chapter 39

PLASTICS AND ARTICLES THEREOF

. . .

II. -WASTE, PARINGS AND SCRAP; SEMI-MANUFACTURES; ARTICLES

. . .

39.24	**Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics.**
3924.10.00	**-Tableware and kitchenware**
3924.90.00	**-Other**

23. There are no relevant notes to Section VII. Legal note 2 to Chapter 39 provides, in relevant part, as follows:

> 2.- This Chapter does not cover :
>
> . . .
>
> (s) Articles of Section XVI (machines and mechanical or electrical appliances);

24. The explanatory notes to heading No. 39.24 provide, in relevant part, as follows:

> This heading covers the following articles of plastics :
>
> (A) Tableware such as tea or coffee services, plates, soup tureens, salad bowls, dishes and trays of all kinds, coffee-pots, teapots, sugar bowls, beer mugs, *cups*, sauce-boats, fruit bowls, cruets, salt cellars, mustard pots, egg-cups, teapot stands, table mats, knife rests, serviette rings, knives, forks and spoons.
>
> (B) Kitchenware such as basins, jelly moulds, kitchen jugs, storage jars, bins and boxes (tea caddies, bread bins, etc.), funnels, ladles, kitchen-type capacity measures and rolling-pins.
>
> (C) Other household articles such as ash trays, hot water bottles, matchbox holders, dustbins, buckets, watering cans, food storage containers, curtains, drapes, table covers and fitted furniture dust-covers (slipovers).
>
> (D) Hygienic and toilet articles (whether for domestic or non-domestic use) such as toilet sets (ewers, bowls, etc.), sanitary pails, bed pans, urinals, chamber-pots, spittoons, douche cans, eye baths; *teats for baby bottles (nursing nipples)* and finger-stalls; soap dishes, towel rails, tooth-brush holders, toilet paper holders, towel hooks and similar articles for bathrooms, toilets or kitchens, not intended for permanent installation in or on walls. However, such articles intended for permanent installation in or on walls or other parts of buildings (e.g., by screws, nails, bolts or adhesives) are **excluded** (**heading 39.25**).
>
> *The heading also covers cups (without handles) for table or toilet use*, not having the character of containers for the packing or conveyance of goods, whether or not sometimes used for such purposes. It **excludes**, however, cups without handles having the character of containers used for the packing or conveyance of goods (**heading 39.23**).
>
> [Bold in original, emphasis added]

Heading Nos. 84.79 and 84.81

Section XVI

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

. . .

Chapter 84

NUCLEAR REACTORS, BOILERS, MACHINERY AND MECHANICAL APPLIANCES; PARTS THEREOF

84.79 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.

. . .

-Other machines and mechanical appliances:

. . .

8479.89 - -Other

. . .

8479.89.90 - - - -Other

. . .

8479.90 -Parts

- - -Of the goods of tariff item No. 8479.89.41 or 8479.89.49:

8479.90.90 - - -Other

. . .

84.81 Taps, cocks, valves and similar appliances for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves.

25. The legal notes to Section XVI provide, in relevant part, as follows:

1. This Section does not cover:

. . .

(g) Parts of general use, as defined in Note 2 to Section XV, of base metal (Section XV), or similar goods of plastics (Chapter 39);

. . .

2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules:

(a) Parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 84.09, 84.31, 84.48, 84.66, 84.73, 84.87, 85.03, 85.22, 85.29, 85.38 and 85.48) are in all cases to be classified in their respective headings;

(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of

heading 84.79 or 85.43) are to be classified with the machines of that kind or in heading 84.09, 84.31, 84.48, 84.66, 84.73, 85.03, 85.22, 85.29 or 85.38 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 85.17 and 85.25 to 85.28 are to be classified in heading 85.17;

(c) All other parts are to be classified in heading 84.09, 84.31, 84.48, 84.66, 84.73, 85.03, 85.22, 85.29 or 85.38 as appropriate or, failing that, in heading 84.87 or 85.48.

26. The supplementary note to Section XVI provides as follows:

In this Section the term "mechanically operated" refers to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion.

27. The explanatory notes to Chapter 84 provide, in relevant part, as follows:

(B) GENERAL ARRANGEMENT OF THE CHAPTER

. . .

(4) Heading 84.79 covers machines and mechanical appliances not covered by any preceding heading of the Chapter.

. . .

(6) Headings 84.81 to 84.84 cover certain general-purpose goods suitable for use as machinery parts or as parts of goods of other Chapters.

28. The explanatory notes to heading No. 84.79 provide, in relevant part, as follows:

This heading **is restricted** to machinery having individual functions, which :

(a) Is not excluded from this Chapter by the operation of any Section or Chapter Note.

and (b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.

and (c) Cannot be classified in any other particular heading of this Chapter since:

(i) No other heading covers it by reference to its method of functioning, description or type.

and (ii) No other heading covers it by reference to its use or to the industry in which it is employed.

or (iii) It could fall equally well into two (or more) other such headings (general purpose machines).

The machinery of this heading is distinguished from the parts of machinery, etc., that fall to be classified in accordance with the general provisions concerning parts, by the fact that it has individual functions.

For this purpose the following are to be regarded as having "individual functions" :

(A) Mechanical devices, with or without motors or other driving force, whose function can be performed distinctly from and independently of any other machine or appliance.

Example : Air humidification and dehumidification are individual functions because they can be performed by appliances operating independently of any other machine or appliance.

A separately presented air dehumidifier, even if designed to be mounted on an ozone generator falls, therefore, to be classified in this heading as having an individual function.

(B) Mechanical devices which cannot perform their function unless they are mounted on another machine or appliance, or are incorporated in a more complex entity, **provided** that this function :

(i) is distinct from that which is performed by the machine or appliance whereon they are to be mounted, or by the entity wherein they are to be incorporated, and

(ii) does not play an integral and inseparable part in the operation of such machine, appliance or entity.

Example : A chain cutter is a device which is mounted on an industrial sewing machine and which automatically cuts the thread so that the machine can run without interruption. This device performs an individual function because it plays no part in the "sewing" function of the machine; as there is no other more specific heading, the chain cutter falls to be classified here.

. . .

The many and varied machines covered by this heading include *inter alia* :

(I) MACHINERY OF GENERAL USE

This group includes, for example :

(1) Vats or other receptacles (e.g., vats or tanks for electrolysis), fitted with mechanical devices (agitators, etc.), and which are not identifiable as being for any particular industry and are not heating, cooking, etc., apparatus of **heading 84.19**. Vats or other receptacles simply fitted with taps, level or pressure gauges or the like are classified according to their constituent material.

29. The explanatory notes to heading No. 84.81 provide, in relevant part, as follows:

This heading covers taps, cocks, valves and similar appliances, used on or in pipes, tanks, vats or the like to regulate the flow (for supply, discharge, etc.), of fluids (liquid, viscous or gaseous), or, in certain cases, of solids (e.g., sand). The heading includes such devices designed to regulate the pressure or the flow velocity of a liquid or a gas.

The appliances regulate the flow by opening or closing an aperture (e.g., gate, disc, ball, plug, needle or diaphragm). They may be operated by hand (by means of a key, wheel, press button, etc.), or by a motor, solenoid, clock movement, etc., or by an automatic device such as a spring, counterweight, float lever, thermostatic element or pressure capsule.

. . .

In general, taps, valves, etc., are of base metal or plastics, but those of other materials (**other than** unhardened vulcanised rubber, ceramics or glass) are also covered by the heading.

. . .

The heading includes *inter alia* :

. . .

(16) Soda-water bottle valves.

PRELIMINARY MATTER—ISSUE ESTOPPEL

30. The CBSA submitted that Philips should be estopped from appealing the classification of the baby bottle system because that issue was decided in a previous appeal.

31. According to the CBSA, the question of the tariff classification of the teats for the baby bottles was conclusively resolved by the Tribunal in a previous decision.[14] In that case, the Tribunal found that "Philips AVENT Airflex slow-flow teats" were not classifiable in heading Nos. 84.81 or 84.79, but were instead properly classified in heading No. 39.24. Because the teats are the functional portion of the baby bottle system, the CBSA argued that the addition of the baby bottle does not change the classification of the good as a whole. Accordingly, the CBSA argued that Philips should be barred from making any arguments regarding the classification of the baby bottle that are based on the functioning of the teats alone. However, the CBSA conceded that Philips is entitled to argue that the combination of the teats, locking collar and bottle constitute a machine.

32. The doctrine of issue estoppel has three preconditions:

1) That the same question has been decided;
2) That the judicial decision is said to create the estoppel was final; and
3) That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.[15]

33. Even if the preconditions are met, the decision-maker retains discretion to refuse to apply the doctrine when its application would work an injustice.[16]

34. The CBSA's position is that all of the preconditions are met, by virtue of the following:

1) The issue is the same. In both appeals Philips argued that the goods are properly classified under heading Nos. 84.81 or 84.79, and then, as it does now, the CBSA maintained that the goods are properly classified in heading No. 39.24.
2) The decision of the Tribunal in AP-2011-042 was final. It was never appealed.
3) The appellant in AP-2011-042 was Philips Electronics Ltd., the same appellant as in the case at bar.

35. Philips argued that the goods in issue in AP-2011-042 were the teats alone, whereas the goods at issue in this appeal are the baby bottle system as a whole, the magic cups and the soft spouts for the magic cups, and that, therefore, the doctrine of issue estoppel should not apply. Philips also argued that the AP-2011-042 decision left open the question of the tariff classification of the teats if imported with the other elements of the system, i.e. the locking collar and the bottle.

36. The Tribunal finds that the second and third preconditions set out above are met. However, the same question was not decided in AP-2011-042.

37. Previous Tribunal cases have applied the doctrine of issue estoppel in tariff classification appeals only where the goods in issue are *identical* or where the parties are attempting to re-litigate a question of legal interpretation.[17]

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14. *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (29 May 2012), AP-2011-042 (CITT) [AP-2011-042].
15. *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 25, citing *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at p. 254.
16. *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125 at para. 29.

38. The goods in issue in the present case are not the same as the goods in issue in AP-2011-042. As noted by Philips, AP-2011-042 concerned only the teats for the baby bottles, as these were imported separately. In the present case, one of the goods at issue is the baby bottle system as a whole (being composed of the teats, the collars and the bottles themselves, as a complete unit). There are also two other goods up for consideration, being the magic cups and the soft spouts for the cups (individually).

39. In AP-2011-042, part of the Tribunal's reasoning that the teats alone could not be classified under heading Nos. 84.79 or 84.81 was that the evidence in that case was that the teats had to be combined with the locking collar and bottle neck to form a potential valve.

40. Although the Tribunal did comment on the functioning of the teats when attached to the bottles, it explicitly stated that it could not decide the classification of the teats on the basis of their interaction with elements that were not part of the goods at the time of their importation, and left open the possibility that the complete baby bottles may be classifiable under heading Nos. 84.81 or 84.79:

> 39. *Even assuming,* arguendo, *that the combination of the skirt of the teat, bottle neck and adapter ring constituted a valve or similar appliance,* given that neither the bottle nor adapter ring forms part of the goods in issue, the Tribunal does not see how the silicone teat alone could be viewed as a valve or similar appliance in its own right, *considering that the purported valve effect is predicated on the interaction of the teat with these other components.* Indeed, in asserting that "[t]he valve is formed by the combination of the silicone skirt, *and* the bottle neck" [emphasis added], Philips concedes that the goods in issue must be combined with an additional working part (i.e. the bottle neck) in order for the purported valve to be formed.
>
> . . .
>
> 52. The purported fulfillment of each of these requirements is, however, contingent on the goods in issue being combined with the locking collar and bottle, which, as already noted, did not form part of the goods in issue as presented at the time of importation. *Even if,* arguendo, *the goods in issue, when combined with these other components, constituted a mechanical appliance,* the Tribunal does not see how the goods in issue alone could be considered mechanical appliances in their own right.[18]
>
> [Emphasis added]

41. In addition, the Tribunal does not have actual evidence to determine whether the teats and baby bottles at issue in this appeal are the same model as the teats at issue in AP-2011-042.[19]

42. Further, Philips is not attempting to reargue a question of the legal interpretation of the terms of the *Customs Tariff*. The ruling in AP-2011-042 is based on factual findings made at that time regarding the functioning of the teats at issue and does not turn on a question of legal interpretation.

43. The Tribunal notes that, in later submissions, the CBSA narrowed the focus of its issue estoppel claim and argued that Philips should be estopped from making any arguments regarding the classification of

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17. *I.D. Foods Superior Corp. v. the Deputy Minister of National Revenue* (12 December 1996), AP-95-252 (CITT); *Andritz Hydro Canada Inc. v. President of the Canada Border Services Agency* (13 November 2015), AP-2014-036 (CITT). See also the Tribunal's comments with respect to the doctrine of abuse of process in *Bri-Chem Supply Ltd. v. President of the Canada Border Services Agency* (18 September 2015), AP-2014-017 (CITT).
18. AP-2011-042 at paras. 39, 52.
19. The CBSA submitted that it was its belief that the teats at issue in AP-2011-042 were the same model as those included in the baby bottle system at issue in this appeal; however, this was not confirmed. *Transcript of Public Hearing*, 25 October 2016, at 167.

the baby bottle system that are based on the functioning of the teats alone. The Tribunal understands Philips' arguments in this appeal to be limited by necessity to arguments based on the interaction between the teats, the collar and the bottle, because the interaction between the neck of the bottle and the teat is key to forming the purported mechanism. The comments made by the Tribunal in AP-2011-042 regarding the functioning of the baby bottle system as a whole were made *obiter* and should not bar Philips from raising these arguments in the current appeal.

44. As the preconditions for the application of issue estoppel are not met, the Tribunal need not address the second, discretionary, step of the analysis.

ANALYSIS

45. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

46. As stated above, the Tribunal must first determine whether the good in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes.

47. The parties agreed that, due to note 2(s) to Chapter 39, which excludes goods of Section XVI from classification in that Chapter, the analysis should begin with a consideration of heading Nos. 84.79 and 84.81.

48. Philips advanced two arguments regarding heading Nos. 84.79 and 84.81: 1) that the baby bottles and magic cups as a whole should be classified in heading No. 84.79; and 2) that the replacement soft spouts, imported separately, should be classified as parts of goods of heading No. 84.79 in subheading No. 8479.90, or that the soft spouts, imported separately, should be classified in heading No. 84.81, as the explanatory notes to Chapter 84 allow that goods of heading No. 84.81 can be parts of other goods.

49. The Tribunal will commence the analysis by considering whether the soft spouts, imported separately, are classifiable in heading No. 84.81.

Are the Soft Spouts Classifiable as Valves of Heading No. 84.81?

50. The CBSA submitted that Philips' failure to advance any argument or evidence in support of its position regarding heading No. 84.81 in its initial brief meant that it had effectively abandoned this argument and should not have been permitted to address it at the hearing.

51. At the hearing, the Tribunal ruled that Philips was not barred from making this argument, as it was raised in the brief, albeit not developed.[20] However, in order to ensure fairness to both parties, the Tribunal requested post-hearing submissions on the issue of classification in heading No. 84.81.

52. Philips argued that the soft spouts should be classified in heading No. 84.81 because they are valves. Philips argued that both expert witnesses had characterized the soft spouts as valves during the hearing; specifically, Dr. McDonald described them as containing a set of two check valves that prevent the

20. *Ibid.* at 208-209.

flow of liquid when the good is not in use.[21] Dr. Qadi also conceded that the soft spouts were valves in cross-examination.[22]

53. The terms of heading No. 84.81 require that the taps, cocks, valves, etc. of that heading be "for pipes, boiler shells, tanks, vats or the like". The explanatory notes to heading No. 84.81 similarly stipulate that the valves, etc. of the heading are "used on or in pipes, tanks, vats or the like".

54. Philips submitted that the cups that the soft spouts are mounted on are "like" pipes, boiler shells, tanks or vats because they are all receptacles. In response to the suggestion by the CBSA that the cups are not "like" pipes, etc. because these are all industrial-type goods, Philips noted that the list of goods included in the heading found in the explanatory notes includes soda-water bottle valves, and that soda-water bottle valves are not for industrial use.[23] Philips also referred to a classification opinion concerning the classification of tire inflation valves under subheading No. 8481.80 and argued that this indicated that tires had been considered as "like" pipes, etc. by the WCO.

55. The CBSA for its part submitted that the soft spouts cannot be classifiable in heading No. 84.81 because they do not meet all of the criteria identified by the Tribunal in past cases for classification in that heading, namely that they

- must be taps, cocks, valves or similar appliances;
- are used on or in pipes, boiler shells, tanks, vats or the like;
- must regulate the flow of fluids, gas or solids; and
- must regulate the flow by opening or closing an aperture manually, by means of a machine or mechanism, or automatically.[24]

56. While the CBSA essentially conceded that the soft spouts contain a valve, it submitted that the soft spouts are not the type of valve contemplated by heading No. 84.81. The CBSA submitted that the soft spouts are not used on or in pipes, boiler shells, tanks or vats, and that the cups that they are used on are not like any of the listed items because they do not share any important physical or functional characteristics.

57. Specifically, the CBSA argued the following:

- the cups that the goods are used on are not like tanks or vats, because they do not contain large volumes, nor are they for industrial use;
- they are not like boiler shells, because the contents are not under pressure; and
- they are not like pipes, because they are not tubes or cylinders.

58. The CBSA also submitted that the third criterion is not met, as the soft spouts do not regulate the flow of liquid out of the sippy cup. The child him or herself, and not the valve, regulates the flow of liquid out of the cups.

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21. Exhibit AP-2016-003-13A at 4; *Transcript of Public Hearing*, 25 October 2016, at 49.
22. *Transcript of Public Hearing*, 25 October 2016, at 158.
23. *Ibid.* at 179-182.
24. *Nailor Industries Inc. v. the Deputy Minister of National Revenue* (13 July 1998), AP-97-083 and AP-97-101 (CITT).

59. In reply to Philips' argument that the sippy cups are "like" soda-water bottles and should, therefore, be considered "like" pipes, boiler shells, tanks or vats, the CBSA submitted that soda-water bottles can be interpreted as being similar to boiler shells, in that the contents of both are pressurized, and that soda-water bottle valves are pressure-reducing valves, which are explicitly included in heading No. 84.81.

60. The CBSA argued that the question is not whether sippy cups are "like" soda-water bottles, but whether they are "like" the pipes, boiler shells, tanks or vats named in the heading. Finally, it submitted that adopting Philips' approach would lead to an overly broad interpretation of the heading, as it would now include any goods that were somewhat similar to the items listed in the explanatory notes even if these did not meet the terms of the heading itself.

61. Following the expert testimony and the evidence on file, the Tribunal accepts that the soft spouts contain a type of valve. It is a most basic design that includes the open and closed position of an incision in the soft material used for the spout. When it is open, it lets fluid through; when it is closed, such fluid is prevented from escaping. According to both experts, such is the very basic concept of a valve. However, the analysis does not end here—the Tribunal must determine whether the valves at issue are of a type contemplated by the heading.

62. The cups that the soft spouts are used on are plainly not pipes, vats, tanks or boiler shells, in accordance with the definitions of those terms:

> *Pipe:*
>
> 1 a tube of metal, plastic, wood, etc. used to convey water, gas, exhaust, etc.[25]
>
> 2 a : a long tube or hollow body for conducting a liquid, gas or finely divided solid or for structural purposes[26]
>
> *Vat:*
>
> 1 a large tank or other vessel, esp. for holding liquids or something in liquid in the process of brewing, tanning, dyeing, etc.[27]
>
> 1 : a large vessel (as a cistern, tub or barrel) esp. for holding liquors in an immature state or preparations for dyeing or tanning[28]
>
> *Tank:*
>
> 1 a large receptacle or storage chamber usu. for liquid or gas.[29]
>
> 2 : a usu. large receptacle for holding, transporting, or storing liquids (as water of fuel)[30]
>
> *Boiler shell:*
>
> Boiler – 1 a strong vessel for generating steam under pressure, used to power a locomotive, ship, etc. 2 a tank for heating a hot-water supply. 3 a metal tub or other vessel used for boiling;[31]
>
> **2 a :** a vessel used for boiling b : the part of a steam generator in which water is converted into steam and which consists usu. of metal shells and tubes c : a tank in which water is heated or hot water is stored.[32]

25. *Canadian Oxford Dictionary*, 2nd ed., *s.v.* "pipe".
26. *Merriam-Webster's Collegiate Dictionary*, 11th ed., *s.v.* "pipe".
27. *Canadian Oxford Dictionary*, 2nd ed., *s.v.* "vat".
28. *Merriam-Webster's Collegiate Dictionary*, 11th ed., *s.v.* "vat".
29. *Canadian Oxford Dictionary*, 2nd ed., *s.v.* "tank".
30. *Merriam-Webster's Collegiate Dictionary*, 11th ed., *s.v.* "tank".
31. *Canadian Oxford Dictionary*, 2nd ed., *s.v.* "boiler".

> Shell – **4** any of several things resembling a shell in being an outer case;[33]
>
> **4 :** something that resembles a shell; as **a :** a framework or exterior structure; **b** (1) : an external case or outside covering[34]

63. The sippy cups are small receptacles made of plastic, to be used by an infant or toddler to drink from, primarily in a domestic setting.[35] They are not tubes, i.e. open at both ends, like pipes. They are not large containers such as a vat or a tank, which are used primarily in an industrial context or for storing liquids. Nor are they used to heat or contain boiling liquids or steam under pressure. Accordingly, the sippy cups are not "like" pipes, tanks, vats or boiler shells in that they do not share the principal function or characteristic of any of these items.

64. As to Philips' argument regarding the inclusion of soda-water bottle valves in the heading, the Tribunal agrees with the CBSA that the relevant question is not whether the sippy cups are "like" soda-water bottles, but whether they meet the requirements of the heading. The fact that soda-water bottle valves are explicitly included in the heading by virtue of the explanatory note does not mean that any domestic receptacle potentially analogous to a soda-water bottle becomes "like" a pipe, vat, tank or boiler shell.

65. As a result, the Tribunal finds that the soft spouts, presented separately, are not classifiable in heading No. 84.81.

Are the Magic Cups and the Baby Bottles Classifiable as "Machines and Mechanical Appliances Having Individual Functions, not Specified or Included Elsewhere in This Chapter" of Heading No. 84.79?

66. In this section, the Tribunal will restrict its analysis to the baby bottles and the magic cups as a whole, as Philips' argument with respect to the classification of the soft spouts in heading No. 84.79 depends on them being *parts* of goods of that heading. Any reference to "the goods in issue" in this section should, therefore, be taken to mean the magic cups and the baby bottles as a whole; the *parts* analysis would only come after a positive finding that the magic cups are classifiable in the heading.

67. Upon review of the other headings of Chapter 84, the Tribunal is satisfied that the goods in issue are not specified or included elsewhere in the chapter.

68. The parties largely agreed on the analytical framework that must be applied to assess whether the goods in issue can be classified in heading No. 84.79, as set out in the Tribunal's previous jurisprudence:

1) The goods must be a "device, apparatus or instrument";
2) The goods must be comprised of a more or less complex combination of moving and stationary parts;
3) The parts of the goods must do work through the production, modification or transmission of force and motion;
4) The goods must perform an individual function distinctly from and independently of any other machine or appliance; and

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32. *Merriam-Webster's Collegiate Dictionary*, 11th ed., *s.v.* "boiler".
33. *Canadian Oxford Dictionary*, 2nd ed., *s.v.* "shell".
34. *Merriam-Webster's Collegiate Dictionary*, 11th ed., *s.v.* "shell".
35. Exhibit AP-2016-003-04A, tab 2 at 86, 97, 106, 109-110, Vol. 1.

5) The goods must act on something extraneous to themselves.[36]

69. The CBSA additionally submitted that, in accordance with prior Tribunal jurisprudence, for a good to be considered to be a machine, the movement of one part of the machine must have an effect on another part of the machine.[37]

Are the Goods in Issue a "Device, Apparatus or Instrument"?

70. Previous Tribunal cases have concluded that the terms "machine" and "mechanical appliance" are largely synonymous[38] and that a "mechanical appliance" is "an instrument, device or apparatus, in the nature of a machine, which is designed to fulfill a particular use or function."[39] Accordingly, the Tribunal has determined that a good must be an "instrument, device or apparatus" in order to be a machine or mechanical appliance.

71. Philips submitted that all of the goods in issue meet the dictionary definition of "device", because they contain mechanical devices that serve a special purpose or perform a special function.

72. Further, Philips relied on the following part of the explanatory notes to heading No. 84.79, which provides that goods that are included in the heading include the following:

> (1) Vats or other receptacles (e.g., vats or tanks for electrolysis), fitted with mechanical devices (agitators, etc.), and which are not identifiable as being for any particular industry and are not heating, cooking, etc., apparatus of heading 84.19. Vats or other receptacles simply fitted with taps, level or pressure gauges or the like are classified according to their constituent material.

73. According to Philips, the cups and bottles are "other receptacles" that are fitted with mechanical devices (the valves), making the whole a mechanical appliance.

74. Dr. McDonald concluded that both the baby bottle system and magic cup meet the engineering definition of a mechanical device or appliance, which he defined as a device whose design and operation is based on the principles of mechanics.[40]

75. As discussed above in the context of the classification of the soft spouts in heading No. 84.81, the cups are not similar to tanks and vats and are, therefore, not similar to the examples of "other receptacles" listed in the explanatory note cited above. The same analysis applies to the bottles that form part of the baby bottle system.

76. However, the fact that they do not meet the description in this explanatory note does not prevent them from being classified in the heading. As discussed above, the Tribunal accepts that the soft spouts for the magic cups contain a form of valve, although not a valve of heading No. 84.81. The Tribunal further

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36. *Kinedyne Canada Limited v. President of the Canada Border Services Agency* (17 December 2013), AP-2012-058 (CITT) at para. 46 [*Kinedyne*].
37. *Classic Chef Corp. v. The Deputy Minister of National Revenue* (17 December 1999), AP-98-078 (CITT).
38. *Kinedyne* at para. 39; *Canadian Tire Corporation Limited v. President of the Canadian Border Services Agency* (29 November 2007), AP-2006-041 (CITT) at para. 26. See, also, *Canper Industrial Products Ltd. v. Deputy M.N.R.* (24 January 1995), AP-94-034 (CITT) at 4 where the Tribunal stated that ". . . the words 'machines' and 'mechanical appliances' are closely related in terms of the nature of the goods falling within their ambit and, therefore, falling in heading No. 84.79."
39. *Kinedyne* at para. 42.
40. Exhibit AP-2016-003-13A at 8-9, Vol. 1B; *Transcript of Public Hearing*, 25 October 2016, at 40.

accepts that this characteristic is sufficient to render the magic cups a "device", in accordance with both the dictionary definition of the word and with the definition put forward by Dr. McDonald.

77. Similarly, Dr. McDonald's evidence was that the baby bottles form a differential pressure regulator (the Airflex or anti-colic valve).[41] The Tribunal accepts that the baby bottles are also a "device", in accordance with the ordinary meaning of that word and Dr. McDonald's definition.

Are the Goods in Issue Comprised of a More or Less Complex Combination of Moving and Stationary Parts?

78. Supplementary note 1 to Section XVI states in part that, in order to be considered "mechanically operated", goods should be "comprised of a more or less complex combination of moving and stationary parts." The Tribunal has incorporated this requirement into the criteria for determining whether a good is a machine or mechanical appliance, as it is plain that a machine or mechanical appliance would be mechanically operated.

79. Philips submitted that the expression "more or less" should be understood as being synonymous with "somewhat", and that "complex" should be understood as being synonymous with "interrelated".

80. Therefore, according to Philips, a relatively simple mechanism that results from the combination of moving and stationary parts that are interrelated in some way is sufficient to fulfill this criterion. Philips pointed out that the Tribunal's jurisprudence establishes that there is no need for the individual parts to be simple machines in their own right.[42]

81. According to Philips, the baby bottles meet this criterion because the Airflex valve in the skirt of the teat moves automatically in response to changes in atmospheric pressure and acts in conjunction with the stationary neck of the bottle and locking collar. Dr. McDonald's report confirmed that this is how the baby bottles function.[43]

82. Philips further submitted that the magic cup meets this criterion because the silicone diaphragm moves in response to pressure and acts in conjunction with the stationary parts (valve body, spout, receptacle and locking ring).

83. In addition, Philips argued that the design traits, choice of materials and physical characteristics of the parts themselves, as well as how they interact, show complexity. The mechanical functions of these goods differentiate the goods in issue from other types of baby bottles and sippy cups.

84. The CBSA submitted that the goods in issue contain no moving parts. This is based on Dr. Qadi's expert report, which differentiates between rigid body motion (which occurs when all the particles of a rigid body move along paths which are equidistant from a fixed plane) and deformation (changes in a body's shape and size as a result of applied forces). Dr. Qadi opined that the teats do not move, but rather deform in response to the force exerted by the child's mouth.[44]

41. Exhibit AP-2016-003-13A at 4, Vol. 1B; *Transcript of Public Hearing*, 25 October 2016, at 64.
42. *Kinedyne* at para. 58.
43. Exhibit AP-2016-003-13A at 5, Vol. 1B.
44. Exhibit AP-2016-003-12A at 6, Vol. 1B.

85. With respect to the magic cups and soft spouts, the CBSA conceded that these contain a moving part, i.e. the diaphragm in the spout that moves in response to the suction on the spout.[45]

86. Dr. McDonald disagreed with Dr. Qadi that the goods in issue do not move. While he agreed that the nipples and soft spouts undergo deformation, and used the term deformation rather than motion in his report, he testified that deformation and motion are not mutually exclusive, and that deformation is a form of motion.[46]

87. The Tribunal does not agree that the expression "moving parts" should be interpreted as being restricted to parts that move through rigid body motion alone. In interpreting a word, such as "moving", that has both an ordinary and a technical meaning, there is a presumption in favour of the ordinary meaning, unless it is clearly established that the drafters intended the technical meaning to prevail.[47] While there is a certain logic in considering mechanical engineering concepts when dealing with the classification of mechanical appliances, the tariff is not a mechanical engineering document and is meant to be read and understood by a wide variety of audiences (the importing community being the most important). In addition, Dr. McDonald did not agree that the term "motion", in an engineering context, meant only rigid body motion and not deformation, which suggests that the definition proposed by Dr. Qadi is not necessarily one that is held by consensus in the engineering community.[48]

88. Accordingly, the Tribunal accepts that the deformation of the teats and the diaphragm within the soft spouts qualifies them as moving parts. Further, as the teats interact with the side of the bottle, and the diaphragm interacts with the stationary components of the soft spouts, the Tribunal accepts that there is a combination of moving and stationary parts within the goods in issue.

89. The supplementary note further requires that this combination be "*more or less complex*." The Tribunal has held in the past that a relatively simple mechanism can be considered complex enough to meet this criterion.[49] While the Tribunal does not necessarily agree that "interrelated" is an appropriate synonym for "complex",[50] the Tribunal nevertheless finds that the combination of moving and stationary parts present in the goods in issue is sufficiently complex to meet this (admittedly low) threshold.

> Do the Parts of Which the Goods are Comprised Do Work Through the Production, Modification or Transmission of Force and Motion; and Do the Goods Act on Something Extraneous to Themselves (i.e. on an External Body)?

90. According to Philips, the Airflex valve and the soft spout valve do work on an external body by regulating the flow of liquids and the pressure inside the bottle or cup.

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45. Exhibit AP-2016-003-06A at para. 32, Vol. 1A; *Transcript of Public Hearing*, 25 October 2016, at 135.
46. *Transcript of Public Hearing*, 25 October 2016, at 88.
47. Sullivan, R., *Sullivan on the Construction of Statutes*, 5th ed., LexisNexis Canada Inc. 2008 at p. 49-55.
48. *Transcript of Public Hearing*, 25 October 2016, at 73.
49. *Cross Country Parts* at paras. 35-36.
50. "Complex" is defined as follows: "*adjective* 1 consisting of related parts; composite. 2 complicated (a complex problem) (*Canadian Oxford Dictionary*, 2nd ed.); 1 a : composed of two or more parts : COMPOSITE . . . 2 : hard to separate, analyze, or solve (*Merriam-Webster's Collegiate Dictionary*, 11th ed.).

91. Dr. McDonald's report defines "work", from an engineering perspective, as "a transfer of energy that is caused by a force acting over a distance."[51] According to Dr. McDonald, the goods in issue "do work" in accordance with this definition.[52]

92. The CBSA submitted that none of the goods in issue "do work" through the production, modification or transmission of force and motion because the baby or child does all of the work.

93. The CBSA submitted that the goods in issue do not produce force themselves, i.e. they do not pump the liquid into the baby's mouth. Rather, it is the action of the sucking by the baby that causes the movement of the liquid out of the bottle. In turn, the movement of the liquid causes air to enter the bottle through the apertures. Neither do the goods in issue modify force; they simply react to the force provided by the child.

94. Finally, the CBSA argued that the goods in issue do not transmit force. In closing arguments, the CBSA argued that the criterion that it had initially identified as a sixth factor in the analysis (i.e. that the movement of one part of the machine must have an effect on another part of the machine) should not be considered as a separate factor, but should be used to inform the Tribunal's understanding of the transmission of force.[53]

95. The CBSA's position is supported by Dr. Qadi's expert opinion. Dr. Qadi defined "machine" as "a system of elements arranged to transmit motion and energy in a pre-determined fashion". He also provided a second definition that differentiated a machine from a mechanism in two ways: 1) that the forces or energy levels in a machine are significant, and 2) that a mechanism does not involve the transmission of energy.[54] Therefore, Dr. Qadi concluded that the spouts, the magic cups and the baby bottles are not machines because the forces and energy levels involved are not significant and there is no energy transmission, e.g. from kinetic to another form of energy.[55]

96. Dr. Qadi also concluded that the goods in issue do not do work, which he defined as "a measure of the energy transfer that occurs when an object is moved over a distance by an external force, at least part of which is applied in the direction of the displacement."[56] Specifically, he concluded that there is no energy conversion or transmission in either system (the baby bottle or the magic cup) and that all of the work done in the systems is done by the child, through suction and the effects of gravity caused by the child tilting the bottle or cup.[57]

97. The CBSA further submitted that the goods do not act on an external body. The only action is that of the baby or child sucking on the teat or spout. The goods themselves do not act on anything. In post-hearing submissions, the CBSA argued that the Tribunal's decision in *Cross Country Parts* supports its position that the goods in issue in this case do not act on an external body. Similarly to the shower cabins at issue in that case, they simply provide a conduit for the liquid to flow through and do not apply any mechanical power to the liquid.

98. In response to the CBSA's position that the goods in issue do not do work because all of the work is done by the child sucking on the teat or spout, Philips argued that the fact that the child controls the flow

51. Exhibit AP-2016-003-13A at 6 and tab 5, Vol. 1B.
52. *Ibid.* at 6.
53. *Transcript of Public Hearing*, 25 October 2016, at 191.
54. Exhibit AP-2016-003-12A at 4, Vol. 1B.
55. *Ibid.* at 7, 9 and 11.
56. Exhibit AP-2016-003-12A at 4, Vol. 1B.
57. *Ibid.* at 7, 9 and 11.

velocity and volume does not mean that the goods in issue do not do work on an external body. Philips contended that previous Tribunal jurisprudence establishes that the user can control the operation of a mechanical device without depriving it of its character as a mechanical device.[58] With respect to the decision in *Cross Country Parts*, Philips submitted that that case is distinguishable because the valves in the goods in issue clearly have a direct effect on the flow of the liquid and are not merely a conduit for it.

99. Supplementary note 1 to Section XVI provides a definition of what it is to "do work", which is "the production, modification, or transmission of force and motion." As the term "work" is defined in the nomenclature, it is not necessary for the Tribunal to adopt the definitions proposed by the expert witnesses, which both additionally make reference to a transfer of energy.

100. Accordingly, the Tribunal will assess whether the parts of the goods in issue produce, modify or transmit force and motion, as required by the terms of the supplementary note.

101. Both of the goods in issue are essentially designed to harness the pressure difference created by the child's sucking on the spout or teat. The suction lowers the pressure within the mouth, creating a pressure difference between the spout or teat and the cup or bottle, as air within the latter remains at atmospheric pressure. This pressure difference forces the liquid in the bottle or cup up into the child's mouth. However, the outflow of liquid also reduces the pressure within the bottle or cup, making it increasingly difficult for the child to maintain the pressure difference. As a result, the child will eventually have to release the teat or spout and allow atmospheric air to re-enter the bottle or cup through the outflow holes.[59]

102. According to Philips, the distinguishing feature of the goods in issue, as compared to other baby bottles or sippy cups, is the fact that both contain mechanisms that continually adjust the internal pressure of the bottle or cup. In the magic cups, the difference in pressure above and below the diaphragm causes it to deform, which opens a channel on the side of the spout and allows atmospheric air to enter the cup to replace the volume of the exiting liquid and maintain the pressure within the cup at the atmospheric level. In its resting position, the diaphragm also prevents liquid from leaking through either the feed hole or the air channel.[60]

103. In the baby bottles, once the pressure in the bottle drops below 18 mmHg, the channel formed by the skirt and the side of the bottle (the Airflex valve) will open as the result of the force exerted by the higher atmospheric pressure outside the bottle, and will similarly allow atmospheric air to enter the bottle.[61] In both cases, the maintenance of the atmospheric pressure within the bottle or cup makes it easier for the child to drink, as he or she does not have to continue lowering the pressure in its mouth to maintain the pressure difference.

104. As outlined above, the CBSA's key argument in this appeal was that, as the Tribunal suggested in AP-2011-042, the goods in issue do not "do work" because all of the work in the system is done by the baby or child sucking on the teat. This was also Dr. Qadi's evidence.

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58. *Canadian Tire Corporation Ltd. v. the Deputy Minister of National Revenue* (12 October 1995), AP-94-157 (CITT); *Jascor Home Products Inc. v. the Deputy Minister of National Revenue* (3 December 1996), AP-95-277 (CITT).
59. Exhibit AP-2016-003-04A, tab 8 at 2, Vol. 1; Exhibit AP-2016-003-13A at 3-4, Vol. 1B.
60. Exhibit AP-2016-003-04A, tab 8 at 174, Vol. 1; Exhibit AP-2016-003-13A at 4, Vol. 1B.
61. Exhibit AP-2016-003-04A, tab 8 at 2-4, Vol. 1; Exhibit AP-2016-003-13A at 4, Vol. 1B.

105. Dr. McDonald testified that this represents a misunderstanding of the mechanical principles involved.[62] According to him, the child's sucking does not exert any force on the liquid within the bottle or cup. It is instead the atmospheric pressure that creates the force that pushes the liquid up into the child's mouth. The unbalanced force resulting from the pressure differential is also what causes the deformation of the silicone diaphragm in the magic cups and of the Airflex valve in the baby bottles.[63]

106. The Tribunal finds Dr. McDonald's testimony enlightening and convincing in proving that that work is *actually done by the child*, in that he acknowledged that the child generates the pressure difference that initiates the process.[64] It is true that the child's sucking does not exert a specific force on the liquid itself, but it is also clear that the child is in fact producing the force that creates the pressure differential which initiates the motion of the valves contained in the goods in issue. The Tribunal cannot accept Dr. McDonald's absolute contention that, because suction is actually the removal of an opposing force, the application of suction does not involve any work.[65] Dr. Qadi's clearer evidence was cogent and compelling to the effect that there is such a thing as a "suction force" and that the child was doing work through that suction.[66] It is noteworthy that both experts are essentially saying the same thing here, with the differences only appearing only in the presentation of the idea of work involved. When both expert testimonies are considered together, they are confirmatory and complete one another in that way.

107. The Tribunal cannot exclude the possibility that the goods in issue are capable of at least *modifying or transmitting* force and motion within them; nor does it deny that atmospheric pressure clearly plays a role in the functioning of the goods in issue. However, even if the Tribunal were to accept that the goods in issue actually do work in and of themselves, the goods in issue would not meet the last of the defining criteria of a "machine or mechanical appliance" because they do not act on an external body.

108. Here, the evidence presented by Dr. McDonald with regard to the atmospheric pressure differential and its effect on the liquid is determinative: it is not the cup, or any of its components, that actually causes the liquid to move by acting on that external body. The atmospheric pressure (and the differential initiated by the child) is what provides the work that causes the liquid to move.[67]

109. The goods in issue effectively adjust the pressure inside the cup or bottle; yet, this does not mean that the goods themselves are specifically acting on the liquid; a distinction must be made between the fact that the atmosphere is acting on the liquid and not the physical components of the goods. This is clear from the expert testimony. Although there may be a transmission or modification of the force by the goods, the goods themselves do not functionally and physically act upon the external body (liquid). However ingeniously they may be designed to harness natural physical forces, the goods themselves do not in and of themselves act on the liquid. It is the pressure difference between the inside environment and the outside environment that actually applies the force to the external body (liquid), not the plastic components themselves. The distinction is subtle, but it is determinative in this case.

110. Neither the spouts, the collars, nor the containers themselves dynamically act on the liquid. Rather, they create an environment which is conducive to the modulation of forces (pressure differentials) that separately and distinctively act on the liquid. Of course, one does not exist without the other, yet the goods

62. *Transcript of Public Hearing*, 25 October 2016, at 87.
63. Exhibit AP-2016-003-13A at 5-6, Vol. 1B.
64. *Transcript of Public Hearing*, 25 October 2016, at 44, 93.
65. *Ibid.* at 73-74.
66. *Ibid.* at 138-139, 142-144, 159.
67. Exhibit AP-2016-003-13A at 7-8, Vol. 1B; *Transcript of Public Hearing*, 25 October 2016, at 58.

at issue cannot be said to independently act on something extraneous to themselves. The mechanics involved are in fact very similar to those detailed by Dr. McDonald in his explanation of the functioning of a straw.[68] Here again, the straw does not specifically act on the liquid; it is the pressure differential which is at the source of the movement of that liquid.

111. As the Tribunal has determined that the goods in issue do not act on an external body, it is not necessary for it to consider the remaining factor in the test, namely whether the goods in issue perform individual functions.

112. As a result, the Tribunal finds that neither the magic cups nor the baby bottles are machines or mechanical appliances of heading No. 84.79.

113. As the Tribunal has determined that the magic cups as a whole are not classifiable in heading No. 84.79, it will not consider whether the soft spouts, presented separately, are classifiable as parts of goods of heading No. 84.79.

Are the Goods in Issue Tableware, Kitchenware, Other Household Articles and Hygienic or Toilet Articles, of Plastics, of Heading No. 39.24?

114. To be classified in heading No. 39.24, the goods in issue must be "of plastics" and must be "tableware, kitchenware, other household articles and hygienic or toilet articles".

115. At the hearing, Philips conceded that if the goods in issue were not classifiable in Chapter 84, then they would be classified in heading No. 39.24.[69]

116. The CBSA submitted that it is not contested that the goods in issue are made of BPA-free plastic.

117. Further, the CBSA submitted that plastic cups and plastic teats for baby bottles (nursing nipples) are specifically included in heading No. 39.24 by the relevant explanatory notes, which provide as follows:

> This heading covers the following articles of plastics :
>
> (A) Tableware such as tea or coffee services, plates, soup tureens, salad bowls, dishes and trays of all kinds, coffee-pots, teapots, sugar bowls, beer mugs, *cups*, sauce-boats, fruit bowls, cruets, salt cellars, mustard pots, egg-cups, teapot stands, table mats, knife rests, serviette rings, knives, forks and spoons.
>
> (B) Kitchenware such as basins, jelly moulds, kitchen jugs, storage jars, bins and boxes (tea caddies, bread bins, etc.), funnels, ladles, kitchen-type capacity measures and rolling-pins.
>
> . . .
>
> (D) Hygienic and toilet articles (whether for domestic or non-domestic use) such as toilet sets (ewers, bowls, etc.), sanitary pails, bed pans, urinals, chamber-pots, spittoons, douche cans, eye baths; *teats for baby bottles (nursing nipples)* and finger-stalls; soap dishes, towel rails, tooth-brush holders, toilet paper holders, towel hooks and similar articles for bathrooms, toilets or kitchens, not intended for permanent installation in or on walls. However, such articles intended for permanent installation in or on walls or other parts of buildings (e.g., by screws, nails, bolts or adhesives) are **excluded** (**heading 39.25**).

68. *Transcript of Public Hearing*, 25 October 2016, at 33-35.
69. *Ibid.* at 14-15.

> *The heading also covers cups (without handles) for table or toilet use*, not having the character of containers for the packing or conveyance of goods, whether or not sometimes used for such purposes. It **excludes**, however, cups without handles having the character of containers used for the packing or conveyance of goods (**heading 39.23**).
>
> [Bold in original, emphasis added]

118. Specifically, the CBSA submitted that the magic cups should be considered as tableware, in accordance with paragraph (A) of the explanatory notes, and the soft spouts should be considered "hygienic and toilet articles", as they are analogous to the teats for baby bottles included in paragraph (D).

119. Finally, the CBSA pointed to several classification opinions concerning drinking bottles of plastics that were classified in heading No. 39.24. Since the baby bottles can be characterized as drinking bottles with nursing nipples attached, and the latter are explicitly included in paragraph (D) of the explanatory notes to the heading, the CBSA submitted that the baby bottles should also be considered to fall within this heading.

120. As noted by the CBSA, the uncontested evidence is that the goods in issue are all made of BPA-free plastic.[70]

121. The Tribunal agrees that the magic cups should be classified in heading No. 39.24 as "tableware". Cups are explicitly included in the explanatory notes as "tableware"; further, the other items listed in paragraph (A) share the general characteristic of being for the service of food or liquids, as are the magic cups. The fact that the magic cups have certain special features, which have been extensively discussed in these reasons, does not detract from the fact that they are cups.

122. The fact that the explanatory notes also provide for "cups (without handles) for table or toilet use" does not take away from the fact that paragraph (A) contains the stand-alone mention of cups without any mention of a handle component, which, therefore, includes cups with removable handles such as the magic cups at issue. It is to be otherwise noted that the handles are in this case an integral component of the collar portion of the cups.

123. The Tribunal also agrees that the soft spouts for the magic cups, presented separately, are analogous in their function to teats or nursing nipples for baby bottles and should be classified in heading No. 39.24 as "hygienic articles".

124. Finally, the Tribunal agrees that the baby bottles as a whole, while not specifically described in the explanatory notes to heading No. 39.24, are also generally described by the terms of the heading, as they are for the service of food (like the goods included in paragraph (A)) and incorporate a good (the teat) that is explicitly included in paragraph (D).

125. Therefore, the Tribunal finds that all of the goods in issue are properly classified in heading No. 39.24.

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70. Exhibit AP-2016-003-04A, tab 2, Vol. 1.

Subheading and Tariff Item Classification

126. Classification at the subheading level commences by *mutatis mutandis* application (pursuant to Rule 6) of Rule 1 of the *General Rules*, i.e. in accordance with the terms of the subheadings and any relative section, chapter or subheading notes.

127. With respect to classification at the subheading level, the CBSA noted that there are only two subheadings within heading No. 39.24: subheading No. 3924.10, which covers tableware and kitchenware, and subheading No. 3924.90, "other". The CBSA submitted that subheading No. 3924.90 should be read to cover "other household articles and hygienic or toilet articles", in accordance with the terms of the heading and the explanatory notes.

128. There is only one tariff item under each of these subheadings: 3924.10.00 and 3924.90.00.

129. As the Tribunal has already found that the magic cups are "tableware", it stands to reason that they should be classified in subheading No. 3924.10 and, by extension, in tariff item No. 3924.10.00.

130. Since the soft spouts do not match the description of tableware or kitchenware in the explanatory notes to heading No. 39.24, and the Tribunal has already determined that they are "hygienic articles" of that heading, the Tribunal agrees that they should be classified as "other" in subheading No. 3924.90 and, by extension, in tariff item No. 3924.90.00.

131. The baby bottles share elements in common with items described as "tableware" and as "hygienic articles" in the explanatory notes to the heading, but are not specifically described by either paragraph (A) or (D). Further, they do not meet the description of "kitchenware" in paragraph (B) of the explanatory notes to the heading. As a result, the Tribunal agrees that they should be classified as "other" in subheading No. 3924.90 and, by extension, in tariff item No. 3924.90.00.

DECISION

132. The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member