



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

---

## DECISION AND REASONS

Appeal No. AP-2016-050

Gentec International

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Monday, October 2, 2017*

**TABLE OF CONTENTS**

DECISION.....	i
STATEMENT OF REASONS .....	1
INTRODUCTION .....	1
PROCEDURAL HISTORY .....	1
DESCRIPTION OF THE GOOD IN ISSUE .....	2
LEGAL FRAMEWORK .....	2
ANALYSIS.....	3
Is the Good in Issue a “Similar Container” of Heading No. 42.02? .....	3
Subheading and Tariff Item Analysis .....	5
DECISION .....	5
APPENDIX .....	6
TERMS OF HEADINGS, SECTION, CHAPTER AND EXPLANATORY NOTES .....	6
Heading No. 39.26.....	6
Heading No. 42.02.....	6

IN THE MATTER OF an appeal heard on August 31, 2017, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated December 13, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**GENTEC INTERNATIONAL**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is dismissed.

Peter Burn  
Peter Burn  
Presiding Member

Place of Hearing: Ottawa, Ontario  
Date of Hearing: August 31, 2017  
  
Tribunal Panel: Peter Burn, Presiding Member  
  
Support Staff: Courtney Fitzpatrick, Counsel  
Elysia Van Zeyl, Counsel  
Michael Carfagnini, Student-at-law

**PARTICIPANTS:****Appellant**

Gentec International

**Counsel/Representative**

Trent Cosgrove

**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

Abigail Martinez

Please address all communications to:

The Registrar  
Secretariat to the Canadian International Trade Tribunal  
333 Laurier Avenue West  
15th Floor  
Ottawa, Ontario K1A 0G7  
Telephone: 613-993-3595  
Fax: 613-990-2439  
E-mail: [citt-tcce@tribunal.gc.ca](mailto:citt-tcce@tribunal.gc.ca)

## STATEMENT OF REASONS

### INTRODUCTION

1. This is an appeal filed by Gentec International (Gentec) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision made by the President of the Canada Border Services Agency (CBSA). The decision, dated December 13, 2016, was made pursuant to subsection 60(4) and concerns an advance ruling.

2. The issue in this appeal is whether the Ideal Case<sup>TM</sup>, Bubble Series silicone case (the good in issue) should be classified under tariff item No. 3926.90.99 of the schedule to the *Customs Tariff*<sup>2</sup> as an “other article of plastic”, as argued by Gentec, or whether it is properly classified under tariff item No. 4202.99.90 as an “other container”, as determined by the CBSA.

### PROCEDURAL HISTORY

3. Gentec requested an advance ruling with respect to the tariff classification of the good in issue on September 11, 2015. At that time, Gentec suggested that the good was classified under tariff item No. 3926.90.99 as other articles of plastic.

4. On January 14, 2016, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(c) of the *Act*, finding that the good in issue is classified as an “other container” under tariff item No. 4202.99.90.

5. On April 7, 2016, Gentec requested a review of the advance ruling.

6. On December 13, 2016, the CBSA affirmed its previous position that the good in issue is classified as an “other container” under tariff item No. 4202.99.90.

7. On March 6, 2017, Gentec filed a notice of appeal with the Canadian International Trade Tribunal (the Tribunal).

8. On July 26, 2017, the Tribunal sent a letter to the parties requesting that Gentec comment on a number of previous Tribunal decisions that were referenced in the brief filed by the CBSA, including *The Source*,<sup>3</sup> *Curve Distribution*<sup>4</sup> and *Nokia*.<sup>5</sup>

9. On July 27, 2017, Gentec requested that the hearing proceed by way of written submissions, to which the CBSA consented, noting that neither party intended to call any witnesses.

10. On August 10, 2017, Gentec filed a reply to the CBSA’s comments on the previous Tribunal decisions.

11. On August 14, 2017, the CBSA filed a response to Gentec’s letter of August 10, 2017.

---

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

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

3. *The Source (Bell) Electronics Inc. v. President of the Canada Border Services Agency* (20 January 2016), AP-2015-002 (CITT) [*The Source*].

4. *Curve Distribution Services Inc. v. President of the Canada Border Services Agency* (15 June 2012), AP-2011-023 (CITT) [*Curve Distribution*].

5. *Nokia Products Limited and Primecell Communications Inc. v. Commissioner of Canada Customs and Revenue Agency* (5 August 2003), AP-2001-073, AP-2001-074 and AP-2001-084 (CITT) [*Nokia*].

12. The Tribunal held a file hearing on August 31, 2017.

## DESCRIPTION OF THE GOOD IN ISSUE

13. The good in issue is the Ideal Case<sup>TM</sup>, Bubble Series silicone case, which is described as a protective case designed for the iPod Touch 5G. The iPod is inserted into this silicon case in order to protect it from being scratched while in use and while being carried. The case also allows easy access to all of the iPod ports and controls.

## LEGAL FRAMEWORK

14. The tariff classification of goods is determined according to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).<sup>6</sup> The schedule to the *Customs Tariff* sets out the tariff nomenclature and is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheading and under tariff items.

15. 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 of the Interpretation of the Harmonized System*<sup>7</sup> and the *Canadian Rules*<sup>8</sup> set out in the schedule.

16. Section 11 of the Customs Tariff provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>9</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>10</sup> published by the WCO. While the classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.<sup>11</sup>

17. Rules 1 through 5 of the *General Rules* are structured in sequence. Rule 1 provides that “classification shall be determined according to the terms of the heading and any relative section or chapter notes”, provided such headings or notes do not otherwise require, according to the 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.<sup>12</sup>

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

19. The terms of the relevant headings, legal and explanatory notes can be found in the Appendix.

---

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

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

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

9. World Customs Organization, 2nd ed., Brussels, 2003.

10. World Customs Organization, 6th ed., Brussels, 2017.

11. 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.

12. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

## ANALYSIS

20. Legal note 2(m) to Chapter 39 excludes from Chapter 39 goods that are considered to be “containers of 42.02”. Given this exclusionary language, the Tribunal will first consider whether the good in issue is a container of heading No. 42.02. If it is not, then the Tribunal will consider whether the tariff classification proposed by Gentec, under heading No. 39.26, describes the good in issue.

### Is the Good in Issue a “Similar Container” of Heading No. 42.02?

21. As noted by the parties, heading No. 42.02 is divided into two distinct parts by a semicolon. As long as the good is found to be similar to articles specifically named in either the first or second part of the heading, it will be classifiable in heading No. 42.02. As correctly noted by Gentec, each part incorporates the phrase “and similar containers”.

22. The parties’ arguments focussed on the first list of examples under heading No. 42.02. In this first list, there is no requirement for the goods to be comprised of a certain material; they need only be considered “similar containers”. The other containers listed are trunks, suit-cases, vanity-cases, executive-cases, brief-cases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases and holsters.

23. The parties presented differing views as to what would constitute a “similar container”. Gentec pointed to a singular feature which the good in issue does not have in common with the other listed containers, namely the ability to continue to use the good while enclosed within the container. Conversely, the CBSA focussed on the attributes that the good in issue has in common with the other containers listed, including that it is shaped and internally fitted to hold, carry and protect, in this case, an iPod Touch.

24. There are some facts that support Gentec’s argument that the good in issue is dissimilar from the other containers listed, for example: (i) the good in issue only covers three sides of the iPod, making it unlike most containers that wholly envelop a particular good; and (ii) the good remains on the iPod during use, unlike most containers from which the good must be removed in order to be used. However, in order to find in favour of Gentec on this point, the Tribunal would be required to depart from its finding in *Curve Distribution*<sup>13</sup> that similar such goods were “undeniably containers”. As the parties agreed, the Tribunal is not technically bound by its past decisions;<sup>14</sup> however, as the CBSA pointed out,<sup>15</sup> it does generally strive for consistency.

25. In *Rlogistics*,<sup>16</sup> the Tribunal interpreted the term “similar containers” of heading No. 42.02 to mean containers that share important characteristics and have significant common features with the articles specifically named in the heading.

---

13. *Curve Distribution* at para. 31. The goods in issue were silicone protective cases for smart phones.

14. Exhibit AP-2016-050-06A at para. 51, Vol. 1A; Exhibit AP-2015-050-13A at para. 1, Vol. 1B.

15. Exhibit AP-2016-050-06A at para. 51, note 38, Vol. 1A, citing *Fischer Scientific Ltd. v. Canada (National Revenue)* (7 May 1996), AP-94-324 (CITT) at note 8, citing *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 SCR 756.

16. *Rlogistics Limited Partnership v. President of the Canada Border Services Agency* (25 October 2011), AP-2010-057 (CITT), referred to in *Curve Distribution* at para. 33. The goods in issue in that case were iPod Nano sport armband cases which were described as protective cases that allow individuals to carry and use an iPod Nano while exercising or performing other activities that require them to have their hands free.

26. In *The Source*, the Tribunal described the test to determine similarity as not being a strict one. Much like in *Rlogistics*, the Tribunal held that “[i]n order to be considered similar, the goods must share important characteristics and have common features”, though it cautioned that “the requirement for similarity should not be mistaken for a requirement that the goods be identical”.<sup>17</sup>

27. The Tribunal is of the view that the good in issue shares important characteristics and has features in common with the goods listed in the first part of heading No. 42.02. In particular, the good in issue is specially designed and shaped to accommodate a particular good, in this case the iPod Touch. Specifically, the marketing materials indicate that the good in issue is “custom designed for a snug, secure fit”.<sup>18</sup> In addition, the good in issue serves a protective purpose. In fact, it is described in the marketing materials as a “shell” that “protects [an] iPod device from scratches”.<sup>19</sup> The good in issue has these attributes in common with the goods listed in the first part of heading No. 42.02.

28. Gentec focussed on the fact that the iPod Touch can still be used while the good in issue is in use, and argued that this feature sets the good in issue apart from the other containers listed in the first part of heading No. 42.02. The same argument was considered by the Tribunal in *Nokia*. Although the Tribunal in *Nokia* did not outright reject this argument, it was not persuaded that such a distinction was important.<sup>20</sup>

29. In support of its argument that the good in issue should be classified under subheading No. 3926.90, Gentec invoked a decision of the United States Court of International Trade, which found the case for an iPod Touch to be classified under that subheading based on the above-mentioned distinction.<sup>21</sup> While the Tribunal acknowledges the utility of considering rulings from other jurisdictions, it does not find the evidence presented by Gentec in this case sufficiently persuasive to depart from its previous findings in *Curve Distribution* and *Nokia*.

30. In the Tribunal’s view, the fact that the good in issue is specially designed and shaped to accommodate a particular good, for a protective purpose, are important characteristics shared with the goods listed in the first part of heading No. 42.02. Unlike the United States Court of International Trade, the Tribunal remains unpersuaded that the ability to use the protected item while so protected is such an important characteristic as to distinguish the good in issue from those listed goods.

31. In addition to maintaining consistency with prior Tribunal findings, it is hoped that the current finding will promote fair competition in the marketplace by ensuring consistent tariff treatment for the many smartphone protective cases on offer, whether made of plastic, rubber or other materials.

32. For the reasons above, the Tribunal considers the good in issue to be a “similar container” for the purpose of heading No. 42.02.

33. Having found that the good in issue is a “similar container” and properly classified under heading No. 42.02, and given that goods of heading No. 42.02 are expressly excluded from Chapter 39 by operation

---

17. *The Source* at para. 37.

18. Exhibit AP-2016-050-04A, tab 3, Vol. 1; Exhibit AP-2016-050-06A, tab 2, Vol. 1A.

19. Exhibit AP-2016-050-04A, tab 3, Vol. 1; Exhibit AP-2016-050-06A, tab 2, Vol. 1A.

20. *Nokia* at 6. The Tribunal noted that *it was not persuaded* by the argument that there is a difference between the cases in issue and the containers listed on the basis that the cell phone remains and is used in the case, whereas other articles are removed from their cases for use. The goods in issue in that case were leather cell phone carrying cases.

21. Exhibit AP-2016-050-04A at paras. 37-46 and tab 13, Vol. 1.



of legal note 2(m) of that Chapter, it is unnecessary to consider whether the good is described by the terms of heading No. 39.26.

### Subheading and Tariff Item Analysis

34. At the subheading level, the CBSA argued that the good is an article of a kind normally carried in the pocket or in the handbag, and thus falls under subheading No. 4202.39, based on the same reasoning applied in *Curve Distribution*, which dealt with cell phone cases. This is, however, inconsistent with its own re-determination in which it held that the appropriate subheading was No. 4202.99.

35. For the reasons indicated below, the Tribunal finds that the good in issue is an article of a kind normally carried in a pocket or handbag.

36. An “article” is generally considered to be “a particular or separate thing, esp. one of a set . . .”<sup>22</sup> or “any finished or semi-finished product which is not considered to be a material”.<sup>23</sup>

37. As to whether the good in issue is carried in a pocket or handbag, the Tribunal sees no meaningful difference between the good in issue in this case and the good in issue in *Curve Distribution*. In this case, as in *Curve Distribution*, it is clear to the Tribunal that the good in issue is intended to protect the iPod Touch from any scratches, bangs, etc. that it might otherwise suffer while being carried in a handbag or if it were to fall out of one’s pocket onto a hard surface. While the good may not *always* be carried in such a fashion, the Tribunal is satisfied that it normally is, thus meeting the terms of subheading No. 4202.39.

38. There is only one tariff item number under subheading No. 4202.39. Accordingly, the good in issue is classified under tariff item No. 4202.39.00.

### DECISION

39. For the foregoing reasons, the good in issue should be classified under tariff item No. 4202.39.00.

40. The appeal is dismissed.

Peter Burn  
Peter Burn  
Presiding Member

---

22. *P.L. Light Systems v. President of the Canada Border Services Agency* (16 September 2009), AP-2008-012 (CITT) at para. 28.

23. *Eastern Division Henry Schein Ash Arcona Inc. v. President of the Canada Border Services Agency* (19 February 2014), AP-2013-026 (CITT) at para. 60.

## APPENDIX

### TERMS OF HEADINGS, SECTION, CHAPTER AND EXPLANATORY NOTES

#### Heading No. 39.26

##### Section VII

#### PLASTICS AND ARTICLES THEREOF; RUBBER AND ARTICLES THEREOF

##### Chapter 39

#### PLASTICS AND ARTICLES THEREOF

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

...

**3926.90 -Other**

...

3926.90.99 - - - -Other

There are no relevant section notes, but the following legal note to Chapter 39 is relevant:

2.- This Chapter does not cover :

...

(m) Saddlery or harness (heading 42.01) or trunks, suitcases, handbags or other containers of heading 42.02;

#### Heading No. 42.02

##### Section VIII

#### RAW HIDES AND SKINS, LEATHER, FURSKINS AND ARTICLES THEREOF; SADDLERY AND HARNESS; TRAVEL GOODS, HANDBAGS AND SIMILAR CONTAINERS; ARTICLES OF ANIMAL GUT (OTHER THAN SILK-WORM GUT)

##### Chapter 42

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

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

...

-Articles of a kind normally carried in the pocket or in the handbag:

...

**4202.39.00 - -Other**

**-Other:**

...

4202.99.90 -- -Other

There are no relevant section or chapter notes, but the following explanatory notes to heading No. 42.02 are relevant:

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

...

Subject to Notes 2 and 3 to this Chapter, the articles covered by the first part of the heading may be of any material. The expression “similar containers” in the first part includes hat boxes, camera accessory cases, cartridge pouches, sheaths for hunting or camping knives, portable tool boxes or cases, specially shaped or internally fitted to contain particular tools with or without their accessories, etc.

The articles covered by the second part of the heading must, however, be only of the materials specified therein or must be wholly or mainly covered with such materials or with paper (the foundation may be of wood, metal, etc.). The term “leather” includes chamois (including combination chamois) leather, patent leather, patent laminated leather and metallised leather (see Note 1 to this Chapter). The expression “similar containers” in this second part includes note-cases, writing-cases, pen-cases, ticket-cases, needle-cases, key-cases, cigar-cases, pipe-cases, tool and jewellery rolls, shoe-cases, brush-cases, etc.

...

The heading **does not cover** :

...

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

[Bold in original]