



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2018-053

Rona Inc.

v.

President of the Canada Border  
Services Agency

*Decision issued  
Friday, October 18, 2019*

*Reasons issued  
Tuesday, November 5, 2019*

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IN THE MATTER OF an appeal heard on June 20, 2019, 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 September 26, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**RONA INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is dismissed.

Susan D. Beaubien  
\_\_\_\_\_  
Susan D. Beaubien  
Presiding Member

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

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	June 20, 2019
Tribunal Panel:	Susan D. Beaubien, Presiding Member
Support Staff:	Heidi Lee, Counsel

**PARTICIPANTS:****Appellant**

Rona Inc.

**Counsel/Representatives**Marco Ouellet  
Jeffrey Goernert**Respondent**

President of the Canada Border Services Agency

**Counsel/Representatives**Luc Vaillancourt  
David Di Sante**WITNESS:**Bruno Rocha  
Professor  
Algonquin College

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

### OVERVIEW

[1] This is an appeal from a decision of the President of the Canada Border Services Agency (CBSA) with respect to classification of goods pursuant to the *Customs Tariff*.<sup>1</sup>

[2] Rona Inc. (“Rona”) has imported goods which it has described as “Outdoor Kaleidoscope Projection Lightshow”<sup>2</sup> (the goods).

[3] At issue in this appeal is the correct classification of the goods for customs tariff purposes.

[4] The CBSA has classified these goods under heading 94.05 as “Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included”, subheading 9405.40 as “Other electric lamps and lighting fittings” and tariff item 9405.40.90 as “Other”.<sup>3</sup>

[5] Rona contends that the goods should instead be classified under tariff item 9008.50.90 as “Other image projectors” or alternatively under tariff item 9505.10.00 as “Other Christmas decorations”.

### BACKGROUND AND PROCEDURAL HISTORY

[6] Rona began importing the goods in September 2015, and initially declared, for customs purposes, that the goods were classifiable under tariff item 9405.40.90.<sup>4</sup>

[7] Subsequently, between December 2016 and February 2017, Rona sought to have the goods reclassified as “Other electrical machines and apparatus, having individual functions” under tariff item 8543.70.00. Rona also sought refund of the higher duties that it had previously paid as a consequence of its declaration that the goods should be classified under tariff item 9405.40.90.<sup>5</sup>

[8] The CBSA rejected Rona’s request for reclassification. Between December 2017 and March 2018, the CBSA issued redetermination decisions in accordance with subsection 74(4)(b) of the *Customs Act*,<sup>6</sup> finding that the goods were properly classified as “Other electric lamps and lighting fittings” under tariff item 9405.40.90.<sup>7</sup>

[9] Invoking its rights under section 60(1) of the *Act*, Rona requested that the CBSA undertake a redetermination of the tariff classification. These request(s) for redetermination were made during the period spanning February 2018 and May 2018. Rona submitted that the goods are “laser light projectors” and should be consequently reclassified under tariff item 9013.80.00 as “Other optical devices, appliances and instruments”.<sup>8</sup>

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1 S.C. 1997, c. 36.

2 Exhibit AP-2018-053-03, p. 3, para. 8, Vol. 1.

3 Exhibit AP-2018-053-03, p. 22-26, Vol. 1.

4 Exhibit AP-2018-053-07A, p. 5, para. 9, Vol. 1.

5 Exhibit AP-2018-053-07A, p. 6, para. 10, Vol. 1.

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

7 Exhibit AP-2018-053-07A, p. 6, para. 11, Vol. 1.

8 Exhibit AP-2018-053-07A, p. 6, para. 12-13, Vol. 1.

[10] Rona also submitted that the goods should be classified as “Other image projectors” under tariff item 9008.50.30.<sup>9</sup>

[11] The CBSA issued a preliminary decision on September 13, 2018, which maintained that the goods should be classified as “Lamps and lighting fittings including searchlights and spotlights parts thereof, not elsewhere specified or included” under tariff item 9405.40.90.<sup>10</sup>

[12] It appears as if Rona then made additional representations.<sup>11</sup> Pursuant to section 60(4) of the *Act*, the CBSA issued a decision dated September 26, 2018, which maintained that the goods should be classified under tariff item 9405.40.90.<sup>12</sup>

[13] Rona now appeals to the Tribunal from the CBSA’s decision of September 26, 2018.<sup>13</sup>

### **CBSA’s Decision**

[14] The CBSA framed the issue for decision as being whether the goods should be classified under tariff item 9405.40.90 in accordance with its previous determinations, or whether the goods should instead be classified under either of tariff items 9008.50.30 or 8539.50.00, as requested by Rona.<sup>14</sup>

[15] A description of the goods is found on the website of Rona’s supplier ([www.gemmy.com](http://www.gemmy.com)). The CBSA reviewed this online information, together with product information. It characterized the goods as follows:

The goods are referred to on the supplier website [www.Gemmy.com](http://www.Gemmy.com) “LightShow TM Kaleidoscope TM Projection Spotlight” and “LightShow TM Projection TM Snowflurry TM Spotlight.

Based on the submitted product information and in conjunction with various website descriptions, the kaleidoscope lights utilize 3 x 1 W LEDs and a multi-surfaced light cover to project a decorative, kaleidoscopic effect onto a variety of surfaces. These products have the dimensions: 2.9 x 5.9 x 10.2 inches. The projection snowflurry light utilizes 4 x 1 W LEDs to project an image of snowflakes. This lighting product has dimensions of 3.5 x 5.3 x 11.8 inches.

The products feature a stake which allows them to be inserted into the ground. The goods plug into a standard electrical outlet. They are designed for indoor and outdoor use and are not intended for permanent installation or use.<sup>15</sup>

[16] The CBSA began its analysis by reviewing the wording of each of headings 85.39, 90.08 and 94.05. The first question for determination was whether the goods “are more specifically covered by heading 85.39 or heading 90.08.” The CBSA then sought to identify relevant notes and found note 1 to Chapter 94 to be pertinent.<sup>16</sup>

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9 Exhibit AP-2018-053-07A, p. 6, para. 13, Vol. 1.

10 Exhibit AP-2018-053-03, p. 73, Vol. 1.

11 Handwritten note seen at Exhibit AP-2018-053-03, p. 73, Vol. 1.

12 Exhibit AP-2018-053-03, p. 22-26, Vol. 1.

13 Exhibit AP-2018-053-01, Vol. 1.

14 Exhibit AP-2018-053-03, p. 22, Vol. 1.

15 Exhibit AP-2018-053-03, p. 22, Vol. 1.

16 Exhibit AP-2018-053-03, p. 23, Vol. 1.

[17] The wording of note 1 to Chapter 94 excludes “lamps or lighting fittings of Chapter 85”. The CBSA found that the goods “are not specifically named or described in any of the headings of chapter 85” and consequently could not be classified under heading 85.39. As such, it concluded that the goods are not excluded from the ambit of Chapter 94.<sup>17</sup>

[18] The CBSA gave consideration to heading 85.43. Referring to the explanatory notes applicable to heading 85.43, the CBSA noted that it needed to determine whether the goods “are specifically covered under heading 90.08”. If not, consideration is then given to whether the goods are classifiable under heading 90.08. If not, consideration would then be given to heading 94.05.<sup>18</sup>

[19] Relying on the explanatory notes to heading 90.08, the CBSA found that the goods did not fall within heading 90.08 because the goods do not project still images.<sup>19</sup>

[20] The CBSA then turned to heading 94.05. It found that the explanatory notes to heading 94.05 prescribe four criteria, namely, that “(1) the goods must be lamps or lighting fittings; (2) they can be constituted of any material; (3) they can use any source of light; and (4) they must not be elsewhere specified or included.” The CBSA determined that the goods met all of these structural characteristics for classification under heading 94.05, and more particularly fall within the scope of the “specialized lamps” described in section (I) of the explanatory note to heading 94.05.<sup>20</sup>

[21] In completing its analysis, the CBSA concluded that the goods fell within subheading 9405.40 and should be classified under tariff item 9405.40.90.<sup>21</sup>

### **Rona’s Appeal**

[22] Rona filed its appeal from the CBSA’s decision on December 14, 2018.

[23] In support of its appeal, Rona submitted definitions of the words “decoration”, “image”, “kaleidoscope”, “optic”, “optical”, “projection”, and “utilitarian” as determined from an online search using the Google search engine.<sup>22</sup> Rona also filed copies of product literature<sup>23</sup> and instruction manuals for the goods, as well as excerpts from its supplier’s website.<sup>24</sup>

[24] The CBSA submitted copies of its previous classifications for the goods,<sup>25</sup> as well as a printout from the online version of *The Canadian Oxford Dictionary* (2nd ed.) with respect to the word “kaleidoscope”.<sup>26</sup>

[25] The CBSA also filed the expert report of Bruno Rocha, who holds a Ph.D. and B.Sc. in Aerospace Engineering.<sup>27</sup> Dr. Rocha is a professor of mechanical and transportation technology and

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17 Exhibit AP-2018-053-03, p. 23, Vol. 1.

18 Exhibit AP-2018-053-03, p. 24, Vol. 1.

19 Exhibit AP-2018-053-03, p. 24, Vol. 1.

20 Exhibit AP-2018-053-03, p. 24-25, Vol. 1.

21 Exhibit AP-2018-053-03, p. 25, Vol. 1.

22 Exhibit AP-2018-053-03, p. 78-91, Vol. 1.

23 Exhibit AP-2018-053-03, p. 124-135, Vol. 1.

24 Exhibit AP-2018-053-03, p. 136-138, Vol. 1.

25 Exhibit AP-2018-053-07A, p. 95-102, Vol. 1.

26 Exhibit AP-2018-053-07A, p. 110, Vol. 1.

27 Exhibit AP-2018-053-10A, Vol. 1.

mechanical engineering technology at Algonquin College. He asserts expertise in mechanical, electronic and mechatronic systems, including the principles of physics applicable to light<sup>28</sup> and systems based on propagation of light.

[26] Dr. Rocha states that he has been previously qualified by the Tribunal as an expert in electronic and mechanical systems; in machines, mechanical and electro-mechanical systems and components; and with respect to the underlying science pertaining to electro-mechanical and electro-thermic components of espresso machines.<sup>29</sup>

[27] In his report, Dr. Rocha describes his mandate as follows:

3. I was asked to provide my opinion on how the systems in reference, ornamental light and sketch projectors (as described below in the section “The Goods in Issue”), work, with a focus on system compositions-parts/components-included mechanisms and electronics, principle of operation, and quality and precision of manufactured products and their operation; and also when in comparison with kaleidoscopes, their components and principle of operation, considering light reflection, propagation and refraction.<sup>30</sup>

[28] Dr. Rocha was provided with samples of the goods, specifically models described as “Outdoor Kaleidoscope Projection Lightshow” (Model 23035172) and “LightShow Projection SnowFlurry” (Model 23035188). His report describes his inspection and disassembly of the samples. It also provides a description of the individual components comprising the goods, their purpose and the manner in which those components operate in combination to produce a functional device.

[29] Model 23035172 is described by Dr. Rocha’s report as producing “a decorative lighting effect on surfaces, composed of a moving pattern of coloured lights.”<sup>31</sup>

[30] The device comprises a plug with fuse for connection to a conventional 110 V electrical outlet, and an associated power cable which passes through the base of a “durable plastic housing”. The power cable is connected to a rectifier (electric circuit) and to an electric motor. The rectifier serves to transform the inputted alternating current (AC) to direct current (DC) in order to supply electrical current to three light-emitting diodes (LEDs) which serve as light source. Each LED is coloured differently – one of each of the colours red, green and blue.

[31] The axial output of the motor is connected to a plastic disc which rotates when the device is powered by electric current. Dr. Rocha describes the rotating plastic disc as functioning as a “rough rotating optical lens” with a “very low manufacturing precision, with a very rough, low-quality finish”. The outer surface of the disc has “several pyramid-like shapes.”

[32] Coloured light emitted by the LEDs is projected to the inner surface of the plastic disc. The light is propagated through the disk while being refracted. The refraction is enhanced by the rotation of the disk and the pyramid-like shapes on the outer surface of the disc. The coloured light rays travel through the disk and leave its outer surface in multiple, different directions. The light then passes through a plastic cover which serves to close the upper portion of the plastic housing. The cover is

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28 Exhibit AP-2018-053-10A, p. 4, 20-33, Vol. 1; *Transcript of Public Hearing*, p. 8-10.

29 Exhibit AP-2018-053-10A, p. 4, para. 2, Vol. 1; *Transcript of Public Hearing*, p. 10-11

30 Exhibit AP-2018-053-10A, p. 4, para. 3, Vol. 1.

31 Exhibit AP-2018-053-10A, p. 5, paras. 4-5, Vol. 1.



semi-spherical and its surface comprises several angled flat surfaces, which causes further refraction.<sup>32</sup>

[33] Dr. Rocha's structural description of Model 23035188 (LightShow Projection SnowFlurry) generally corresponds to that of Model 23035172 (Outdoor Kaleidoscope Projection Lightshow), with the following differences.

[34] In lieu of three coloured LEDs, Model 23035188 uses four white LEDs. A plastic piece comprising four lens-shaped apertures is mounted to the LED board. This rough plastic lens is spatially aligned with the LEDs. An opaque film having rough stencilled images of four snow flurries (rendered transparent in the opaque film) is mounted on top of the assembly comprising the underlying base, motor, LED board and plastic lens. The axial output passes through a central aperture that runs throughout the assembly. An additional "rough plastic disk" having six lens-like shapes is atop the assembly and is mounted to the motor output axle. The motor drives rotation of this disk when the device is powered.

[35] The housing is closed at its upper portion by a flat cover of partially opaque plastic. When the device is powered, white light emitted from the LED is projected and propagates through the rough plastic lens. The light is refracted and passes through the stencilled images of the snow flurries and are further propagated through the six lens-like shapes in the rough rotating plastic disk. The light rays define an approximate image of the snow flurries of the inner film, being refracted and propagated in multiple directions. The light then passes through the flat plastic cover and projects a lighting effect onto a surface.<sup>33</sup>

[36] Dr. Rocha's report also described experiments that he undertook with the objective of ascertaining the underlying physics responsible for producing the lighting effects during operation of the device. He concluded that propagation of the light generated by the device is attributable to refraction and that there is negligible reflection (at best) occurring within the device, if at all.<sup>34</sup>

[37] The report also includes a brief discussion of the functional and operational characteristics of kaleidoscopes. Dr. Rocha opines that the goods are not kaleidoscopes. He describes kaleidoscopes as follows:

24. A kaleidoscope consists of a longitudinal piece (ex. cylinder) encased with two flat surfaces at the extremities of such longitudinal piece. These flat surfaces have a hole in each one of them to allow light to pass through. In one of these surfaces, the mentioned hole is an eyehole for a user to utilize. The longitudinal piece may contain loose bits of coloured material (such as paper, glass, or plastic) and always contains reflective surfaces, such as mirrors. When light rays pass through the hole in the surface positioned in the other extremity of the longitudinal piece, with respect to the eyehole containing surface, can be reflected by the coloured pieces of material within the longitudinal piece. These light reflections are reflected multiple times by the mentioned mirrors-reflective surfaces-generating light patterns that are visible to the user, through the eyehole. These patterns change and rotate, for instance, when the longitudinal piece is rotated, or in other configurations when the user observes a moving object, or a coloured film or lens within the longitudinal piece is rotated by external actuation [footnotes omitted].<sup>35</sup>

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32 Exhibit AP-2018-053-10A, p. 5-9, Vol. 1.

33 Exhibit AP-2018-053-10A, p. 12-15, Vol. 1.

34 Exhibit AP-2018-053-10A, p. 10-12, Vol. 1.

35 Exhibit AP-2018-053-10A, p. 16, Vol. 1.

[38] With the exception of toy kaleidoscopes, Dr. Rocha testified that high precision and craftsmanship are associated with the manufacture of kaleidoscopes. He distinguishes Rona's goods from kaleidoscopes on several grounds.<sup>36</sup>

[39] Kaleidoscopes are characterized by changing visual patterns generated by movement or rotation of coloured bits of material within the apparatus, typically created by manual rotation or manipulation of the entire apparatus.

[40] Unlike a kaleidoscope, the goods have no mirrors or mirror-like surfaces that generate reflections. The goods produce a lighting effect by propagation (refraction) of light rays using a rough lens or plastic disk that is driven to rotate by means of a motor. Dr. Rocha stated in his report that these lens-like components have "a rough finish – of low manufacturing quality and low precision/accuracy manufacture."<sup>37</sup>

[41] Dr. Rocha's report also attaches excerpts from the online version of the Merriam-Webster dictionary with respect to the terms "project", "refraction", "reflection", and "kaleidoscope".<sup>38</sup> Also appended are copies of what purports to be a kaleidoscope offered for sale<sup>39</sup> and a scientific article entitled "The Scientific Nature of the Kaleidoscope".<sup>40</sup>

[42] Following the service and filing of Dr. Rocha's report, Rona filed additional material. This consisted of a printed Google search page pertaining to kaleidoscopes (including a purported definition);<sup>41</sup> an excerpt from *Merriam-Webster's Collegiate Dictionary* (11th ed.) containing a definition for the word "propagate";<sup>42</sup> excerpts from the website of its supplier (www.gemmy.com) pertaining to the goods at issue;<sup>43</sup> and a copy of an advance ruling secured by a third party from the CBSA for goods identified as "LED Laser Projector Item".<sup>44</sup>

[43] The CBSA tendered physical exhibits that were representative of the goods, including the specimen product that had been dissected and analyzed by Dr. Rocha.

[44] Both parties submitted written argument, together with copies of statutory materials pertaining to the classification headings at issue and supporting jurisprudence.

[45] A public hearing was held on June 20, 2019. Both parties were represented.

[46] At the hearing, Rona called no witnesses.

[47] Dr. Rocha appeared in person to testify for the CBSA and was cross-examined by Rona.

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36 Exhibit AP-2018-053-10A, p. 15-16, para. 23, Vol. 1.

37 Exhibit AP-2018-053-10A, p. 16-17, Vol. 1.

38 Exhibit AP-2018-053-10A, p. 35-40, 43, Vol. 1.

39 Exhibit AP-2018-053-10A, p. 41, Vol. 1.

40 Exhibit AP-2018-053-10A, p. 45-50, Vol. 1.

41 Exhibit AP-2018-053-13, p. 16-18, Vol. 1.

42 Exhibit AP-2018-053-13, p. 20-21, Vol. 1.

43 Exhibit AP-2018-053-13, p. 23-24, Vol. 1.

44 Exhibit AP-2018-053-13, p. 26-36, Vol. 1.

[48] After reviewing the evidence which describes the goods and their method of operation, the Tribunal is satisfied that the goods are relatively simple electro-mechanical devices that operate conventionally in accordance with elementary principles of physics.

[49] Having reviewed his report and curriculum vitae, the Tribunal is satisfied that Dr. Rocha has the requisite academic qualifications and professional expertise to describe and opine upon the construction, function and operation of the goods. Rona did not contest or challenge Dr. Rocha's qualifications as an expert.<sup>45</sup>

[50] The Tribunal accordingly qualifies Dr. Rocha as an expert for this purpose and accepts his evidence as set forth in his report and as given at the hearing.

[51] Dr. Rocha's testimony was directed to, and consistent with, the matters discussed in his expert report. His principal conclusions were undisturbed on cross-examination. The Tribunal found him to be a helpful and forthright witness.

[52] Following Dr. Rocha's testimony at the hearing, both parties submitted oral arguments to the Tribunal.

## **POSITIONS OF THE PARTIES ON APPEAL**

### **Rona**

[53] Rona contends that the goods are classifiable as "kaleidoscopes" under heading 90.13.

[54] In its analysis, Rona notes that Section XVIII covers "optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; clocks and watches; musical instruments; parts and accessories thereof."

[55] Rona submits that the goods use optical lenses and are consequently "optical apparatus" falling within the scope of Section XVIII and more particularly of Chapter 90 which is directed to "optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof."

[56] As there are no notes or explanatory notes to Section XVIII, Rona argues that the headings and notes to Chapter 90 reveal no basis to exclude the goods from the ambit of that chapter. Although note (1)(ij) to Chapter 90 excludes searchlights and spotlights of heading 94.05, Rona also argued that this exclusion from Chapter 90 is inapplicable as the goods do not have the characteristics of a spotlight and are used for decorative purposes.

[57] Accordingly, Rona asserts that the goods fall within Chapter 90 because they are "optical appliances" of heading 90.13. This argument is underpinned by the factual assertion that the goods have optical lenses which create "kaleidoscope effects", thus making the goods "optical appliances" which are not otherwise specified or included elsewhere within Chapter 90.

[58] Rona relies upon the explanatory notes to heading 90.13, which prescribe that "(9) Kaleidoscopes, other than toy kaleidoscopes (Chapter 95)" are included within the scope of

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<sup>45</sup> *Transcript of Public Hearing*, p. 13.

heading 90.13. Given that neither the *Customs Tariff* nor the explanatory notes provide a definition of “kaleidoscope”, Rona submits that the ordinary definition of “kaleidoscope” should prevail.

[59] The online definitions submitted by Rona indicate that a kaleidoscope provides a “constantly changing pattern or sequence of objects or elements”. Rona contends that this description is applicable because the goods use “an optical rotating wheel patterns to project a ‘constantly changing pattern or sequence of events’”.

[60] Rona further submits that subheading 9013.80 “Other devices, appliances and instruments” is applicable and that the goods are properly classified under tariff item 9013.80.00.

[61] In the alternative, Rona says that the goods are classifiable under heading 95.05 as “Articles for Christmas festivities”.

[62] Rona disagrees with the CBSA’s finding that the goods should be classified under tariff item 9405.40.90. Chapter 94 excludes decorations (other than electric garlands), such as Chinese lanterns (heading 95.05). The notes to Chapter 95 exclude electric garlands of all kinds. Rona asserts that the goods are not electric garlands. As the goods are not excluded by either the relevant section notes or notes to Chapter 95 Rona consequently submits that the issue for determination is whether the goods are decorations falling within the scope of heading 95.05.

[63] Having regard to note (A)(1) to heading 95.05, Rona says that the goods are designed for decorative purposes and have no utilitarian function, which means that they are not excluded from heading 95.05. The goods are advertised and sold by both Rona and its supplier as seasonal (Christmas) products. Moreover, the product instruction manual indicates that the product is for seasonal use. Accordingly, Rona asserts that the goods may be properly classified under heading 95.05 as articles for Christmas festivities and under tariff item 9505.10.00.

## **CBSA**

[64] The CBSA says that the goods produce lighting effects but are not festive articles *per se*. Notwithstanding that the goods may produce kaleidoscopic lighting effects and may be used seasonally during the Christmas period, the CBSA contends that the goods are described, marketed and used as “lights” and should be classified as such for the purposes of the *Customs Tariff*.

[65] The CBSA concedes that the goods are advertised by Rona as Christmas lights. However, it also notes that the goods are labelled as “spotlights” by the manufacturer (“LightShow Kaleidoscope Spotlight”) and the instruction manual includes guidance for storage and replacement of fuses.

[66] As the notes to both Chapters 90 and 94 prescribe exclusions, the CBSA submits that the classification analysis must begin with Chapter 95, as that chapter has no exclusionary notes that are relevant or applicable to the goods. If necessary, the analysis should then sequentially consider whether the goods should be classified within Chapter 90 or in the alternative, within Chapter 94.

[67] Turning first to Chapter 95, and more particularly to heading 95.05, the CBSA argues that articles for Christmas festivities are used only for decoration. Such goods are characterized by being constructed of non-durable material; having a “festive design, decoration, emblem or motif; and having no utilitarian function.”

[68] The CBSA contends that the goods are readily distinguishable from those contemplated by heading 95.05. The goods are constructed of materials that are sufficiently durable such that the product may be used and reused and are priced accordingly. No festive design, decoration, emblem or motif appears on the product. The goods produce lighting effects and thus have a utilitarian function.

[69] Although the goods have a plastic lens that transmits light, the CBSA contends that this feature is inadequate to enable the goods to be classified within Chapter 90. It submits that goods classified within Chapter 90 are generally characterized by “high finish and high precision, used mainly for scientific purposes, specialized technical or industrial purposes, or medical purposes.” In contrast, the lenses that are a component of the goods are made of plastic and those goods are sold to the general public for home use.

[70] The CBSA concedes that Chapter 90 is not restricted to “high precision goods”. There are some exceptions including one that is explicitly made for kaleidoscopes, as provided by the explanatory notes to heading 90.13.

[71] Having regard to the construction, operation and function of the goods, the CBSA asserts that the goods do not meet the definition of “kaleidoscope”. The CBSA points out that the goods are not constructed from tubes and do not contain mirrors or pieces of coloured glass or paper. The goods produce lighting effects by means of refraction or projection, as opposed to reflection. As such, the CBSA submits that the production of kaleidoscopic lighting effects does not make a “lamp” into a “kaleidoscope”.

[72] The CBSA contends that the goods are properly classified within Chapter 94. The relevant explanatory notes to Chapter 94 and heading 94.05 prescribe that the goods be lamps or lighting fittings, be made of any material, use any source of light and not be specified or included elsewhere within the *Customs Tariff*. The CBSA further submits that the goods are specialized lamps that fulfill all of the foregoing criteria and should be classified under subheading 9405.40 (“Other electric lamps and lighting fittings”) and as “Other” under tariff item 9405.40.90.

[73] In conclusion, the CBSA asserts that Rona has failed to meet its burden to demonstrate that a classification other than tariff item 9405.40.90 is correct.

## ANALYSIS

### Statutory Framework

[74] The purpose of the *Customs Tariff* is to prescribe tariffs on goods imported into Canada. Tariff rates vary from product to product. Those tariffs are prescribed by the *Customs Tariff* which classifies goods into various classifications.

[75] The *Customs Tariff* is premised on an international system, the Harmonized Commodity Description and Coding System (the Harmonized System). The objective of the classification system is to rationalize and harmonize the classification of goods and commodities which are the subject of international trade.<sup>46</sup>

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46 *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, at paras. 4-5.

[76] Recently, the Supreme Court of Canada provided the following overview of the statutory framework in Canada governing the tariff classification of goods for customs purposes:

[4] The Harmonized System was developed by the World Customs Organization, an intergovernmental body of which Canada is a member. To foster stability and predictability in classification practices internationally, it is used as a standard tariff classification system by all parties to the Convention, including Canada: see *Customs Tariff*, s. 10(1) and the Schedule thereto. At the same time, it permits states parties to set their own rates of duty on those goods in conformance to their individual international trade obligations: M. Prabhu, *Canada's Laws on Import and Export: An Overview* (2014), at p. 79.

[5] The Harmonized System uses an eight-digit classification system for tariff classifications, which is incorporated into the Schedule to the *Customs Tariff*. That system proceeds, within sections of the Schedule, from general to specific classifications via chapters, headings, subheadings and tariff items. For example, within Section I ("Live Animals; Animal Products") is found the eight-digit tariff item No. 0302.13.40, applicable to fresh or chilled sockeye salmon. The first two digits of that tariff item (03) denote the item as falling within Chapter 3 ("Fish and Crustaceans, Molluscs and Other Aquatic Invertebrates"); the first four digits (03.02) denote the heading ("Fish, fresh or chilled, excluding fish fillets . . ."); the first six digits (0302.13) denote the subheading ("Pacific Salmon"); and the full eight-digit tariff item denotes the specific good ("Sockeye").

[6] The Schedule to the *Customs Tariff* also contains "General Rules for the Interpretation of the Harmonized System". Section 10(1) of the *Customs Tariff* directs that "the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules".

[7] The General Rules are comprised of six rules governing the classification of goods under the Harmonized System. According to the jurisprudence of the Federal Court of Appeal and the CITT, these rules are to be applied in a "cascading" fashion. As I explain below, however, the term "cascading" does not quite describe their application. While it is the case that the General Rules are to be applied in a set order, it is more helpful to understand that order as a function of a hierarchy rather than a cascade: Prabhu, at p. 82.

[8] In addition to the Harmonized System and the General Rules, the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (5th ed. 2012) published and amended from time to time by the World Customs Organization also inform the classification of imported goods. Specifically, s. 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings employed by the Harmonized System, "regard shall be had" to the *Explanatory Notes*. While, therefore, the *Explanatory Notes* (unlike the Harmonized System and the General Rules themselves) are not binding,<sup>47</sup> they must be at least considered in determining the classifications of goods imported into Canada.

[77] Rona's appeal is brought pursuant to subsection 67(1) of the *Act*, which provides that a "person aggrieved" by a decision of the CBSA may appeal that decision to the Tribunal by filing a notice of appeal within the prescribed time frame.

[78] It is undisputed that Rona is a "person aggrieved". Its business and financial interests are affected by the CBSA's decision. The amount of tariffs payable by Rona with respect to past, current and future imports of the goods are directly dependent on how the goods are classified.

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47. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII), at paras. 4-8.

[79] The *Canadian International Trade Tribunal Rules*<sup>48</sup> prescribe the procedure to be followed on appeals brought under section 67 of the *Act*. On appeal, both the appellant and respondent may file additional materials, including physical exhibits that were not before the CBSA at first instance. The parties may also present evidence of fact and/or expert witnesses to testify before the Tribunal at an oral hearing. Any witnesses may be cross-examined by the opposing party and questioned by the Tribunal.<sup>49</sup>

[80] Appeals to the Tribunal are determined *de novo*, even though one or both parties may elect to carry forward all or part of the record at first instance, to supplement that record with new evidence, or create a new one. The Tribunal must reach its own decision concerning the correct tariff classification for the goods. In doing so, the Tribunal is free to assess the record before it, up to and including the reweighing of evidence placed before the CBSA and giving new consideration to any new evidence that may be presented on appeal. The Tribunal owes no deference to the CBSA decision.<sup>50</sup>

[81] It is settled law that the Tribunal must assess the goods, for classification purposes, as of the date of importation into Canada.<sup>51</sup> In doing so, the Tribunal must consider the goods in their entirety as an operable product. The Tribunal may not deconstruct the product and effect classification of the product solely with reference to its constituent parts.<sup>52</sup>

[82] Two different models of the goods are in issue. One model (23035172) creates a moving pattern of coloured lights (Outdoor Kaleidoscope Projection Lightshow). The other model (23035188) projects a rotating snowflake pattern (Lightshow Projection SnowFlurry).

[83] The Tribunal accepts Dr. Rocha's description of the goods, their structural composition and mode of operation. Both models share certain essential features, namely, the use of LEDs as a light source in combination with an electrically powered motor which drives rotation of a rough or makeshift lens in order to create a diffuse moving pattern of light.

[84] A stake is also included. It serves to facilitate the placement and anchoring of the apparatus in the ground.<sup>53</sup> However, the stake would appear to be an optional accessory as the instruction manual states that the product is suitable for both indoor and outdoor use.<sup>54</sup>

### Relevant Classifications

[85] The Tribunal must decide whether the goods can be classified according to Rule 1 of the *General Rules*. This requires an assessment of the terms used in relevant headings, together with a consideration of any relevant section or chapter notes in the *Customs Tariff*. If the Tribunal is not

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48 S.O.R./91-499 [Rules].

49 Part II of the Rules.

50 *Danson Décor Inc. v. President of the Canada Border Services Agency* (6 September 2019) AP-2018-043 (CITT) at paras. 82-93.

51. *Komatsu International (Canada) Inc. v. President of the Canada Border Services Agency* (10 April 2012) AP-2010-006 (CITT) at para. 22.

52 *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007) AP 2006-035 (CITT) at para. 21.

53 Exhibit AP-2018-053-03, p. 135, 137, Vol. 1.

54 Exhibit AP-2018-053-03, p. 138, Vol. 1.

satisfied that the goods can be properly classified at the heading level using Rule 1 of the *General Rules*, then subsequent rules must be considered and applied.

[86] Both parties to this appeal limited their arguments to the application of Rule 1.

[87] The parties identified Chapters 90, 94 and 95 as being relevant to a determination of the correct classification for the goods. The relevant provisions, including pertinent headings, are as follows:

#### **Chapter 90**

##### **OPTICAL, PHOTOGRAPHIC, CINEMATOGRAPHIC, MEASURING, CHECKING, PRECISION, MEDICAL OR SURGICAL INSTRUMENTS AND APPARATUS; PARTS AND ACCESSORIES THEREOF**

90.13 Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this Chapter.

9013.80.00 -Other devices, appliances and instruments

#### **Chapter 94**

##### **FURNITURE; BEDDING, MATTRESSES, MATTRESS SUPPORTS, CUSHIONS AND SIMILAR STUFFED FURNISHINGS; LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED; ILLUMINATED SIGNS, ILLUMINATED NAME-PLATES AND THE LIKE; PREFABRICATED BUILDINGS**

94.05 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated name-plates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included.

9405.40 -Other electric lamps and lighting fittings

9405.40.90 - - -Other

#### **Chapter 95**

##### **TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF**

95.05 Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.

9505.10.00 -Articles for Christmas festivities

[88] The Tribunal agrees with the CBSA that the classification analysis should begin with Chapter 95. There are no notes or explanatory notes to Chapter 95 that would potentially exclude the goods, but such exclusionary provisions apply to both Chapters 90 and 94. In such circumstances, the starting point is the headings within the chapter without relevant exclusions.<sup>55</sup>

[89] Rona pointed out that note 1(t) to Chapter 95 excludes “electric garlands of all kinds”. It submits that the goods are not “garlands”. The CBSA does not contest this conclusion, except to observe that electric garlands may produce light and are nonetheless classified as “lamps” under heading 94.05, and thus excluded from being classified as festive articles pursuant to heading 95.05.

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55 *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (6 April 2011) AP-2010-005 (CITT) [*HBC Imports*] at para. 42.



The Tribunal concurs that the goods are not “electric garlands” and that the exclusion defined by note 1(t) to Chapter 95 is not of assistance when determining the classification of the goods.<sup>56</sup>

[90] The issue is whether the goods are “festive or other entertainment articles”, and more particularly “Articles for Christmas festivities”.

[91] The relevant explanatory notes to Chapter 95 are as follows:

This heading covers:

(A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:

- (1) Festive decorations used to decorate rooms, tables, etc. (such as garlands, lanterns, etc.); decorative articles for Christmas trees (tinsel, coloured balls, animals and other figures, etc.); cake decorations which are traditionally associated with a particular festival (e.g., animals, flags).
- (2) Articles traditionally used at Christmas festivities, e.g. artificial Christmas trees, nativity scenes, nativity figures and animals, angels, Christmas crackers, Christmas stockings, imitation yule logs, Father Christmases.
- (3) Articles of fancy dress, e.g. masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche-**heading 67.04**) and paper hats. However, the heading **excludes** fancy dress of textile materials, of **Chapter 61 or 62**.
- (4) Throw-balls of paper or cotton-wool, paper streamers (carnival tape), cardboard trumpets, “blow-outs”, confetti, carnival umbrellas, etc.

The heading **excludes** statuettes, statues and the like of a kind used for decorating places of worship.

The heading also **excludes** articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g. tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, toilet linen, kitchen linen.

[92] The notes provide a non-exhaustive list of goods that are considered to be “festive or other entertainment articles”. Such goods are characterized as being “generally made of non-durable material”, having regard to their intended use. The Tribunal has previously found that non-durability is not a prerequisite for classification within heading 95.05.<sup>57</sup>

[93] Notwithstanding, a purposive reading of the notes reveal that the listed goods share the characteristics of either being intended for either one-time use (i.e. paper throw-balls, confetti, paper streamers, cardboard trumpets, etc.) or being associated with a particular, time-limited festive event (i.e. Christmas) where the articles may either be disposed of or potentially kept and reused in subsequent years (i.e. decorative articles for Christmas trees, artificial Christmas trees, Christmas stockings, etc.).

[94] In the present case, the evidence demonstrates that the goods are of relatively durable construction and are intended for reuse. In this regard, the Tribunal accepts Dr. Rocha’s evidence concerning the structural composition of the goods. Moreover, the product manual includes

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56 3319067 *Canada Inc. (Universal Lites) v. President of the Canada Border Services Agency* (23 March 2006) AP-2004-017 (CITT) [*Universal Lites*].

57 *Wilton Industries Canada Limited v. The Commissioner of the Canada Customs and Revenue Agency* (8 November 2002) AP-2001-088 (CITT).

instructions for fuse replacement and purports to provide a product guarantee or warranty.<sup>58</sup> This indicates that the goods are suitable for either prolonged or repeated use, as opposed to being items that are used once and then discarded.

[95] The Tribunal notes that Rona and its supplier advertise the goods as a Christmas product. Despite this marketing, the Tribunal is not prepared to conclude that the goods and their functions are limited to use during the Christmas season.

[96] Although the goods may be used during the Christmas period, they are not associated with a decorative motif or theme that is uniquely associated with that particular holiday.

[97] Photographs on the product packaging are no more than suggestive of one possible use, namely, outdoor use during the winter or Christmas season. In the case of Model 23035188, the snowflake lighting pattern is generally suggestive of the winter season and may also be aptly used to create thematic lighting in conjunction with other winter events, such as winter carnivals, ice skating shows and the like.

[98] Similarly, the swirling coloured lighting pattern associated with Model 23035172 could also be used to create lighting effects for parties, dances or other celebratory events at any time of the year, especially since the instruction manual indicates that the goods are suitable for both outdoor and indoor use.

[99] Although the goods are not uniquely “Christmas” products, the Tribunal concludes that they may be considered, *prima facie*, as being “festive or other entertainment articles”, given the possible range of likely uses.

[100] The analysis now turns to assessing whether other factors operate to exclude the goods from heading 95.05.

[101] The notes prescribe that:

This heading also **excludes** articles that contain a festive design, decoration, emblem or motif and have a utilitarian function e.g. tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, toilet linen, kitchen linen.

[102] Read grammatically, the exclusion is conjunctive. Two conditions must be met for exclusion – (1) the articles must “contain” a festive design, decoration, emblem or motif *and* (2) have a utilitarian function.<sup>59</sup>

[103] The use of the word “contain” indicates that the design element need not be applied to the exterior surface of the article by way of decoration, but could also be incorporated within the article as a component or functional aspect of the article.

[104] The evidence of Dr. Rocha shows that Model 23035188 includes a component or assembly featuring stencilled images of four snow flurries. Model 23035172 features a sequenced pattern of red, green and blue LED lights.

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58 Exhibit AP-2018-053-03, p. 138, Vol. 1.

59 *Canada (Border Services Agency) v. Decolin Inc.*, 2006 FCA 417 (CanLII), at para. 5.

[105] These components are inherent and integral to the final product and are present at the time of importation. When the goods are used as intended, these components operate, in combination with other parts and components, to create the decorative lighting effects that both parties conceded are characteristic of the goods.

[106] Having regard to the foregoing, the Tribunal concludes that the goods contain a festive design, decoration, emblem or motif.

[107] As such, the Tribunal must now consider whether the goods have a “utilitarian function” and are consequently excluded from being classified under heading 95.05.

[108] Rona has provided the following definition of “utilitarian”, which is of unknown provenance, other than it appears on the printout of a Google search:

u-til-i-tar-i-an

adjective

1. designed to be useful or practical rather than attractive

Synonyms: practical, functional, serviceable, useful, sensible, effective, efficient, (suited) to the purpose, pragmatic, realistic, utility, working, workaday, handy, neat, ordinary, down-to-earth:

2. Philosophy

Relating to or adhering to the doctrine of utilitarianism

“a utilitarian theorist”

Noun – Philosophy

1. an adherent of utilitarianism<sup>60</sup>

[109] Information that is publicly available and easily retrievable from the Internet is not automatically admissible as evidence. Although evidence obtained from the Internet may be admissible, it must still be scrutinized for reliability. Official websites of known organizations may provide reliable information and thus be admitted as evidence. In the case of unofficial websites or those of unknown authorship, the reliability of the information should be assessed by considering the source(s) and its objectivity, the existence of independent corroboration, and whether the information may have been modified or otherwise changed from a previous version.<sup>61</sup>

[110] Even though administrative tribunals are typically less stringent concerning the admissibility of evidence, this does not mean that the rules of evidence are fully obviated or abrogated.

[111] Courts and tribunals may take judicial notice of relevant definitions from dictionaries,<sup>62</sup> which may be published in electronic format and be accessible online.<sup>63</sup> However, the result of a Google search alone does not comprise information that is obtained from an identifiable and

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60 Exhibit AP-2018-053-03, p. 90, Vol. 1.

61 *ITV Technologies Inc. v. WIC Television Ltd.*, 2003 FC 1056 (CanLII), at paras. 12-18; *Envirodrive Inc. v. 836442 Alberta Ltd.*, 2005 ABQB 446 (CanLII) [*Envirodrive*], as cited in *Liverton Hotels International Inc v. Alicorp SAA*, 2007 CanLII 80870.

62 *R. v. Krymowski*, 2005 SCC 7 (CanLII) at paras. 22-24.

63 *Envirodrive* at paras. 53-54.

verifiable source or publication.<sup>64</sup> Purported information delivered by Google alone may be crowd-sourced, variable or otherwise be inherently unreliable.

[112] The definitions supplied by Rona are solely in the form of a Google search result, as opposed to being an excerpt from a dictionary that is published online. This weighs in favour of refusing to admit that evidence. However, the definition of “utilitarian” supplied by Rona is generally consistent with the definition previously adopted by the Tribunal in *HBC Imports*:<sup>65</sup>

The *Canadian Oxford Dictionary* defines the term “utilitarian” as follows: “1 designed to be practically useful rather than attractive; functional. . .” On the basis of this definition, the Tribunal concludes that the goods in issue, which are designed to be used practically to store laundry, are used mainly with a utilitarian purpose . . . [footnotes omitted].

[113] As such, for the purposes of this appeal, the Tribunal accepts the following definition of “utilitarian”:

designed to be practically useful rather than attractive; functional . . .

[114] In assessing whether the goods perform a utilitarian function, the Tribunal should consider whether the utilitarian function is the predominant aspect of the product. Goods that are utilitarian may nonetheless possess other secondary features, such as amusement value, aesthetic properties or decorative effects.<sup>66</sup>

[115] The Tribunal has previously concluded that articles not specifically holiday-related and which may be used year round should be classified in their specific heading and not under heading 95.05.<sup>67</sup>

[116] In *Wilton*,<sup>68</sup> the Tribunal concluded that not every article that may be used for the preparation of Christmas festivities is necessarily classified within heading 95.05. At issue in *Wilton* were baking pans made of durable aluminum featuring an embedded decorative mold pattern. The Tribunal concluded that the articles were not “festive articles” in and of themselves. Rather, they were one step removed in that the articles were used to create festive articles, namely, Christmas cookies and cakes.

[117] It is undisputed that the goods imported by Rona produce light. The illumination of a darkened area with light creates improved visibility. Such a result is both practical and useful.

[118] Dr. Rocha’s testimony and the product manual demonstrates that the goods have only one mode of operation.

[119] Once the device is turned on and the electric circuit is engaged, the same lighting effect is produced, regardless of when (Christmas or other times of the year) and where (indoor or outdoor

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64 *Blistex Inc v. Smiths Medical ASD, Inc.*, 2012 TMOB 184 (CanLII), at para. 17.

65 *HBC Imports* at para. 55.

66 *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (3 March 2014) AP-2013-013 (CITT) at para. 58; *Avon Canada Inc. v. Canada (National Revenue)* (30 August 2000) AP-99-074 (CITT) [Avon].

67 *Avon*.

68 *Wilton*.

venue) the device is being operated. Although the relative intensity and surface area of the projected light is a function of the distance between the device and the projection surface, the light pattern itself is unchanging. It is created as a consequence of light being propagated as the electric motor drives rotation of the plastic lens at a constant speed. As such, the projected decorative light pattern is the *result* of the device being operated.

[120] The Tribunal concludes that the predominant purpose of the goods is to provide illumination, which is a utilitarian function. The goods are thus comparable to the representative articles listed in the explanatory notes as being excluded from the ambit of heading 95.05 (i.e. tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen) and which contain festive or decorative aspects. The common thread is that these articles have a principal use or function, notwithstanding that this functionality is accompanied by festive or decorative theme or surrounding context.

[121] Rona's goods are thus analogous to the baking pans in *Wilton*. By virtue of their inherent properties and function, the goods are not "festive articles" *per se*, but are used to create something else, namely, lighting effects for festive or decorative purposes.

[122] Having regard to the foregoing, the goods are not properly classified under heading 95.05.

[123] The Tribunal now considers whether the goods may be classified under heading 90.13, which reads as follows:

90.13 Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this Chapter.

[124] It is clear from the evidence that the goods are not "liquid crystal devices" or "lasers". If the goods fall within the ambit of heading 90.13, the Tribunal must be able to conclude that they are "other optical appliances and instruments". Even if the goods are found to have the properties of an optical appliance or instrument, they will be excluded from heading 90.13 if they are specified or included elsewhere within Chapter 90.

[125] There are no other relevant headings within Chapter 90 that specify or otherwise include the goods. There was a brief discussion at the hearing about the possible relevance of heading 90.08 which covers "Image projectors, other than cinematographic; photographic (other than cinematographic) enlargers and reducers". However, the explanatory notes to heading 90.08 indicate that goods classified under this heading are instruments designed for projecting still images, such as images of objects or images prepared on slides, films or transparencies.

[126] This exclusion is dispositive. It is undisputed that the goods create patterns of *moving* images. As such, they cannot be classified under a heading (90.08) that is restricted to goods that are used to project still or static images.

[127] As such, the Tribunal's analysis with respect to Chapter 90 will focus on heading 90.13, coupled with a consideration of any relevant and applicable notes.

[128] The following explanatory notes to Chapter 90 are pertinent:

This Chapter covers a wide variety of instruments and apparatus which are, as a rule, characterized by their high finish and high precision. Most of them are used mainly for scientific purposes (laboratory research work, analysis, astronomy, etc.) for specialized technical or industrial purposes (measuring or checking, observations, etc.) or for medical purposes.

The Chapter includes in particular:

(A) A wide group comprising not only simple optical elements of headings 90.01 and 90.02, but also optical instruments and apparatus ranging from spectacles of heading 90.04 to more complex instruments used in astronomy, photography, cinematography or for microscopic observation.

(B) Instruments and apparatus designed for certain specifically defined uses (surveying, meteorology, drawing, calculating, etc.)

(C) Instruments and appliances for medical, surgical, dental, or veterinary uses, or for related purposes (radiology, mechano-therapy, oxygen therapy, orthopaedy, prosthetics, etc.)

(D) Machines, instruments and appliances for testing materials

(E) Laboratory instruments and appliances

(F) A large group of measuring, checking or automatically controlling instruments or apparatus, whether or not optical or electrical and in particular those of heading 90.32 as defined in Note 7 to this Chapter.

Some of these instruments are specified in certain headings, for example, compound optical microscopes (heading 90.11), electron microscopes (heading 90.12), other instruments or apparatus are covered by more general descriptions in headings which refer to a particular science, industry, etc. (e.g. astronomical instruments of heading 90.05, surveying instruments and appliances of heading 90.15, X-ray, etc., apparatus of heading 90.22). This Chapter also includes vacuum apparatus of a kind used in medical, surgical, dental, or veterinary sciences (**heading 90.18**).

There are some exceptions to the general rule that the instruments and apparatus of the Chapter are high precision types. For example, the Chapter also covers ordinary goggles (heading 90.04), simple magnifying glasses and non-magnifying periscopes (heading 90.13), divided scales and school rules (heading 90.17) and fancy hygrometers, irrespective of their accuracy (heading 90.25).

[129] The Tribunal observes that the goods cannot be fairly described as being characterized by “high finish and high precision”, especially when considered relative to the types of articles that are described by the notes. Indeed, Dr. Rocha observed that the stencilled apertures of the plastic lens appeared to be of inexpensive manufacture.<sup>69</sup> His evidence in this regard was unchallenged and undisturbed by cross-examination.

[130] Likewise, the goods are readily distinguishable from the articles referenced by explanatory notes (A) to (F) to Chapter 90, both in terms of function and intended use.

[131] When the wording “other optical appliances and instruments” of heading 90.13 is considered in the overall context of the chapter notes, the Tribunal finds that the goods have little to nothing in common with the articles described by the chapter notes, particularly when the purpose and intended use of the products are compared.

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69 Exhibit AP-2018-053-10A, p. 8, Vol. 1.

[132] According to Rona's argument, the point of overlap with heading 90.13 arises from the word "optical". The goods are said to be "optical" appliances because there is a lens-like component that functions to create a lighting effect. In order to accept Rona's argument, the Tribunal would be required to adopt an unduly broad interpretation of the word "optical". Any device that forms an image or propagates light could be said to be an "optical" appliance falling within the scope of heading 90.13 for classification purposes. As a practical matter, this would render moot many other classification headings within the *Customs Tariff*.

[133] In their essence, the goods are not optical appliances or instruments. The product manual makes no reference to any optical components, nor does it provide instructions for the care, cleaning or maintenance of any optical component, such as a lens. It does, however, refer to "lamps" and provides extensive warnings, cautions and instructions to direct the user in the safe operation of an electrical product, such as the following:

**WARNING:**

ELECTRIC PRODUCT. Keep away from children. Not recommended for children under 3 years of age. As with all electrical products, precautions should be observed during handling and use to reduce the risk of electric shock. If the supply cord is damaged, it must be replaced by the manufacturer, its service agent or similarly qualified persons in order to avoid a hazard. . . .

**READ AND FOLLOW ALL SAFETY INSTRUCTIONS**

1. Do not secure the wiring of the product with staples or nails, or place on sharp hooks or nails.
2. Do not let lamps rest of the supply cord or on any wire. . . .
- . . .
9. This is an electric product-not a toy! To avoid the risk of fire, burns, personal injury and electric shock it should not be played with or placed where small children can reach it. . . .

**USE AND CARE INSTRUCTIONS**

1. Before using and reusing, inspect the product carefully. Discard any products that have cut, damaged or frayed wire insulation cords, cracks, lamp holders or enclosures, loose connections or exposed copper wire. . . .<sup>70</sup>

[134] Based on the record before it, the Tribunal finds the goods to be an electrical product that produces lighting effects. The functional result is electrically generated light that is principally derived from and is dependent upon applied principles of electro-mechanics, as opposed to the science of optics and transmission of natural light.

[135] Rona asserts that the goods are "kaleidoscopes" and should be classified under heading 90.13, having regard to relevant notes pertaining to that heading.

[136] Rona asserts that the moving light pattern generated by the goods is a kaleidoscopic effect which is sufficient to bring the goods within the meaning of the word "kaleidoscope". Rona relies upon aspects of dictionary definitions in support of this argument.

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70 Exhibit AP-2018-053-03, p. 136-138, Vol. 1.

[137] If a term used in the *Customs Tariff* has a particular meaning in a trade, it should be interpreted accordingly. Otherwise, the term should be given its ordinary meaning.<sup>71</sup> In this case, the term “kaleidoscope” is found in a section of the *Customs Tariff* that is principally directed to high-precision scientific and technical equipment. As such, the Tribunal prefers the evidence of Dr. Rocha concerning the definition of “kaleidoscope”, as opposed to ordinary dictionary definitions.

[138] Dr. Rocha testified that the goods are not kaleidoscopes, because they lack the inherent characteristics of a kaleidoscope. More particularly, the goods do not have mirrors or involve use of reflection in creating lighting effects. His evidence on this issue was categorical, probative and was not contradicted.

[139] For the above reasons, the Tribunal finds that the goods are not properly classified under heading 90.13.

[140] The Tribunal now turns to heading 94.05, which covers “Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated name-plates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included”.

[141] The relevant explanatory notes to Chapter 94.05 prescribe that goods must be lamps or lighting fittings, be constructed of any material, use any source of light and not be specified or included elsewhere within the nomenclature.

[142] In previous jurisprudence, the Tribunal has held that heading 94.05 “covers all lamps or lighting fittings, as long as they are not more specifically described elsewhere”,<sup>72</sup> and that the explanatory notes ascribe a wide scope to this heading.<sup>73</sup>

[143] As noted above, the Tribunal concludes that a principal purpose of the goods is to produce illumination. As such, the goods fall within the ambit of the word “lamp”. Articles which produce light, even with an accompanying aesthetic or decorative effect are subject to classification in heading 94.05.<sup>74</sup>

[144] The Tribunal otherwise agrees with the CBSA that all of the criteria, as prescribed by the notes, are satisfied by the goods for classification under heading 94.05. The goods are made of material, have a source of light (LEDs) and are not otherwise more specifically described elsewhere in the *Customs Tariff*.

[145] There appears to be no disagreement, as between the parties, with respect to subheadings. The parties focused their arguments on the identification of the correct heading classification. Having determined that heading 94.05 is the correct one, the Tribunal agrees that the goods are properly classified under subheading 9405.40 as “Other electric lamps and lighting fittings” and in tariff item 9405.40.90 as “Other”.

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71. *Outdoor Gear Canada v. President of the Canada Border Services Agency* (21 November 2011) AP-2010-060 (CITT) at para. 25.

72. *Universal Lites* at para. 39.

73. *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013) AP-2012-041 and AP-2012-042 (CITT) [*Costco Wholesale*] at para. 62.

74. *Costco Wholesale* at paras. 59-60 and 69-70.



## **DECISION**

[146] The appeal is dismissed.

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member