



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2022-008

Rona Inc. d.b.a. Lowe's Canada

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, April 12, 2023*

TABLE OF CONTENTS

DECISION.....	i
STATEMENT OF REASONS	1
OVERVIEW	1
GOODS IN ISSUE.....	1
PROCEDURAL HISTORY	2
LEGAL FRAMEWORK	3
POSITIONS OF THE PARTIES	5
ANALYSIS.....	6
Products 1, 2, 5, 6, 7, 8 and 9 are classified in heading 95.05	7
Product 3 (LED Disney wreath) and product 4 (Disney projection lamp with bow) are classified in heading 94.05	12
CONCLUSION	13
DECISION.....	13
ANNEX A	14

IN THE MATTER OF an appeal heard on November 24, 2022, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency pursuant to subsection 60(4) of the *Customs Act*, dated February 22, 2022, with respect to a request for further re-determination.

BETWEEN

RONA INC. D.B.A. LOWE'S CANADA

Appellant

AND

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

Respondent

DECISION

The appeal is allowed in part.

Randolph W. Heggart

Randolph W. Heggart

Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 24, 2022
Tribunal Panel: Randolph W. Heggart, Presiding Member
Tribunal Secretariat Staff: Emilie Audy, Counsel
Lindsay Vincelli, Registry Officer

PARTICIPANTS:**Appellant**

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STATEMENT OF REASONS

OVERVIEW

[1] This is an appeal filed by Rona Inc. d.b.a. Lowe’s Canada (Rona), pursuant to subsection 67(1) of the *Customs Act* (the Act),¹ of a decision dated February 22, 2022, made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the Act.

[2] The question in appeal is whether the goods in issue are properly classified under tariff item No. 9405.40.90 of the schedule to the *Custom Tariff*² as “lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; other electric lamps and lighting fittings”, as determined by the CBSA, or under tariff item No. 9505.10.00 as “festive, carnival or other entertainment articles; articles for Christmas festivities” and tariff item No. 9505.90.00 as “festive, carnival or other entertainment articles; other”, as claimed by Rona.

GOODS IN ISSUE

[3] There are nine goods in issue in this appeal, namely the following:³

	Product name	Description
Product 1	Santa’s Workshop light ⁴ Article #23035794 Item #000292536 Model #116800	Transforms any room with a colourful rotation of images from Santa’s workshop; tabletop light casts images in all directions; featuring “Color Changing”™ technology and energy-efficient LED lights; indoor holiday decoration; includes static and rotation settings; battery-operated, requires two AA batteries (included); includes on/off switch; red, green, blue colours; colour changing; light show.
Product 2	Disney lighted artificial topiary ⁵ Article #23035492 Item #000257202 Model # 111287	Timeless holiday decoration for indoor or outdoor. The soft, fade and glow lights produce a shimmering magic effect. The topiary is completed with a glossy red Christmas bow. LED bulb type, white light colour, replacement bulbs and fuses included; single plug, PVC material.
Product 3	LED Disney wreath ⁶ Article #41536594 Item #000277437 Model #114528	LED Mickey Mouse wreath, featuring a red bow and multicolour LED lights. The wreath is made of a garland in the shape of Mickey’s head and ears. Multicolour lights blink on and off intermittently.

¹ R.S.C., 1985, c. 1 (2nd Supp.).

² S.C. 1997, c. 36.

³ Exhibit AP-2022-008-03 at 4–8.

⁴ *Ibid.* at 4, 36–37.

⁵ *Ibid.* at 4, 27–29; Exhibit AP-2022-008-05 at 197–201.

⁶ Exhibit AP-2022-008-03 at 5, 26; Exhibit AP-2022-008-05 at 177–180; 182–189.

Product 4	Disney projection lamp with bow ⁷ Article #41536907 Item #000279737 Model #114530	Disney Mickey Santa hat lamp post, featuring IllumiFlame technology, bright, energy-efficient LED lighting. Lighted items from the collection include six built-in holiday songs. LED bulb type, warm white, multicolour lights, twinkling light pattern, power source by electrical outlet, plastic as primary material.
Product 5	Gemmy Merry Christmas projector - wreath ⁸ Article #23035790 Item #000292532 Model #116149	Displays two lighting effects; projects up to 15 ft of coverage; creates magical holiday lighting instantly; stakes easily into the ground; projects onto exterior or interior walls, living spaces, front doors, porches, garage doors and fences; features bright, energy-efficient LED Christmas lights; projector features a decorative holiday casing; swivels for perfect placement; Christmas lighting for indoor or outdoor use; electrical outlet power source, light show.
Product 6	Reindeer projector light ⁹ Article #23035356 Item #000212200 Model #36629	The stake light projector illuminates surface with multicoloured reindeers. The LED lighting covers an area of 15 ft when the projector is placed at a 10–15 ft distance. Swivels for precise placement; for outdoor, LED bulb type.
Product 7	Spider projector light ¹⁰ Article #23035368 Model #72506 SKU #1001696946	Projects Halloween images with the advanced light show projector; stakes into the ground; uses ultra-bright LED technology; projects up to 15 ft.
Product 8	White ghost projector light ¹¹ Article #23035372 Model #59460	The spotlight projects images of ghosts onto any wall or flat surface; LED light show; turning swirling light.
Product 9	White bats projector light ¹² Article #23035373 Model #72823	The spotlight projects images of bats onto any wall or flat surface; LED light show.

PROCEDURAL HISTORY

[4] Between January 2017 and July 2022, Rona imported the goods under appeal via six transactions and classified them under tariff item No. 9405.40.90 as “other lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; other electric lamps and lighting fittings” and under tariff item No. 9008.50.30 as “image projectors, other

⁷ Exhibit AP-2022-008-03 at 5, 30–32; Exhibit AP-2022-008-05 at 165–170; 203–211.

⁸ Exhibit AP-2022-008-03 at 6, 33–34; Exhibit AP-2022-008-05 at 131–135.

⁹ Exhibit AP-2022-008-03 at 6, 35; Exhibit AP-2022-008-05 at 125–128.

¹⁰ Exhibit AP-2022-008-03 at 7, 24–25; Exhibit AP-2022-008-05 at 125–128.

¹¹ Exhibit AP-2022-008-03 at 7; Exhibit AP-2022-008-05 at 120–123; 125–128.

¹² Exhibit AP-2022-008-03 at 8; Exhibit AP-2022-008-05 at 125–128.

than cinematographic; photographic (other than cinematographic) enlargers and reducers; projectors, enlargers and reducers; other image projectors”.¹³

[5] Rona requested a refund of duties under paragraph 74(1)(e) of the Act, seeking the reclassification of the goods as articles for Christmas festivities under tariff item Nos. 9505.10.00 and 9505.90.00 as “festive, carnival or other entertainment articles; other”.¹⁴

[6] On February 15, 2021, the CBSA issued a re-determination under subsection 59(1) of the Act, classifying all the goods under tariff item No. 9405.40.90.¹⁵

[7] On March 12, 2021, Rona requested a further re-determination under subsection 60(1) of the Act.¹⁶ The CBSA issued a further re-determination pursuant to subsection 60(4) of the Act, on February 22, 2022, maintaining the classification of the goods as “other lamps and lighting fittings” under tariff item No. 9405.40.90.¹⁷

[8] Rona filed this appeal with the Tribunal on May 13, 2022, pursuant to subsection 67(1) of the Act, and the Tribunal held a file hearing on November 25, 2022.

LEGAL FRAMEWORK

[9] The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,¹⁸ which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.¹⁹ 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.

[10] Subsection 10(1) of the *Customs Tariff* provides that, subject to subsection 10(2), the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System* (General Rules)²⁰ and the *Canadian Rules*²¹ set out in the schedule.

[11] 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.

[12] 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*

¹³ Exhibit AP-2022-008-03 at para. 2; Exhibit AP-2022-008-05 at para. 27.

¹⁴ Exhibit AP-2022-008-03 at para. 3; Exhibit AP-2022-008-05 at para. 28.

¹⁵ Exhibit AP-2022-008-05A (protected) at 86–112.

¹⁶ Exhibit AP-2022-008-03 at para. 5; Exhibit AP-2022-008-05 at para. 30.

¹⁷ Exhibit AP-2022-008-03 at 18–23.

¹⁸ S.C. 1997, c. 36.

¹⁹ Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

²⁰ S.C. 1997, c. 36, schedule.

²¹ *Ibid.*

Description and Coding System (Classification Opinions)²² and the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (Explanatory Notes),²³ published by the World Customs Organization. While the Classification Opinions and the Explanatory Notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.²⁴

[13] 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. As the Supreme Court of Canada indicated in *Canada (Attorney General) v. Igloo Vikski*, 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”.²⁵

[14] 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.²⁶ Finally, the Tribunal must determine the proper tariff item classification.²⁷

[15] The relevant provisions of the *Customs Tariff* are as follows:

Section XX: Miscellaneous Manufactured Articles

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

Section XX: Marchandises et produits divers

Chapitre 94

MEUBLES; MOBILIER MÉDICO-CHIRURGICAL; ARTICLES DE LITERIE ET SIMILAIRES; APPAREILS D'ÉCLAIRAGE NON DÉNOMMÉS NI COMPRIS AILLEURS; LAMPES-RÉCLAMES, ENSEIGNES LUMINEUSES, PLAQUES INDICATRICES LUMINEUSES ET ARTICLES SIMILAIRES; CONSTRUCTIONS PRÉFABRIQUÉES

²² World Customs Organization, 4th ed., Brussels, 2017.

²³ World Customs Organization, 6th ed., Brussels, 2017.

²⁴ See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17; *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 (CanLII) at para. 4.

²⁵ *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

²⁶ Rules 1 through 5 of the General Rules apply to classification at the heading level. 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.”

²⁷ 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.

...	...
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.	94.05 Appareils d'éclairage (y compris les projecteurs) et leurs parties, non dénommés ni compris ailleurs; lampes-réclames, enseignes lumineuses, plaques indicatrices lumineuses et articles similaires, possédant une source d'éclairage fixée à demeure, et leurs parties non dénommées ni comprises ailleurs.
...	...

9405.40 -Other electric lamps and lighting fittings	9405.40 -Autres appareils d'éclairage électriques
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9405.40.90 - - -Other

9405.40.90 - - -Autres

...

...

Chapter 95

Chapitre 95

TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF

JOUETS, JEUX, ARTICLES POUR DIVERTISSEMENT OU POUR SPORTS; LEURS PARTIES ET ACCESSOIRES

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

95.05 Articles pour fêtes, carnaval ou autres divertissements, y compris les articles de magie et articles-surprises.

9505.10.00 -Articles for Christmas festivities

9505.10.00 -Articles pour fêtes de Noël

9505.90.00 -Other

9505.90.00 -Autres

[16] The relevant section notes, chapter notes and explanatory notes can be found at Annex A.

POSITIONS OF THE PARTIES

[17] Rona submits that, pursuant to Rule 1 of the General Rules, the goods in issue are festive, carnival or other entertainment articles of heading 95.05. The goods are festive decoration and have no utilitarian function other than to decorate.²⁸ The supplier's website advertised the goods as seasonal decorations, whereas Rona advertises and catalogues the goods as seasonal articles, for the festive season of Christmas or Halloween.

[18] The CBSA submits that the goods are properly classified in heading 94.05 pursuant to Rule 1 and Rule 6 of the General Rules, as well as Rule 1 of the *Canadian Rules*. The CBSA further submits

²⁸ Exhibit AP-2022-008-03 at paras. 25–26, 30.

that the goods in issue are not described by the terms of heading 95.05, as they are made of durable material and, most importantly, their predominant feature is to produce light or lighting effects, which is a utilitarian function.²⁹

ANALYSIS

[19] As indicated earlier, the issue in this appeal is whether the goods in issue are properly classified in heading 94.05 as lamps and lighting fittings, as determined by the CBSA, or should be classified in heading 95.05 as festive articles, as argued by Rona. This dispute is therefore at the heading level.

[20] In appeals filed pursuant to section 67 of the Act, it is the appellant that bears the burden of demonstrating that the CBSA incorrectly classified the goods.³⁰

[21] The Tribunal has examined similar matters in *Costco Wholesale Canada v. President of the Canada Border Services Agency*³¹ and in *Rona Inc. v. President of the Canada Border Services Agency*,³² in which the goods in issue were respectively decorative solar-powered garden lights and projector lights (light show projection).

[22] In this case, the competing headings provide as follows:

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

[23] The two headings in issue are mutually exclusive: Note 1(l) to Chapter 94 excludes from that chapter “furniture for conjuring tricks or decorations (other than electric garlands) such as Chinese lanterns (heading 95.05)” and note 1(t) to Chapter 95 excludes from that chapter “electric garlands of all kinds (heading 94.05)”.

[24] The parties agree that the classification analysis should begin with heading 95.05.³³ Rona submits that the goods in issue are not electric garlands.³⁴

²⁹ Exhibit AP-2022-008-05 at para. 46.

³⁰ In appeals under subsection 67(1) of the Act, the burden of proof is well established pursuant to subsection 152(3) of the Act. See *Aexos Inc. v. President of the Canada Border Services Agency* (6 December 2021), AP-2020-011 (CITT) at para. 31; *Noble Drilling Services (Canada) Corporation v. President of the Canada Border Services Agency* (14 May 2019), AP-2018-004 (CITT) at para. 28; *Canada (Border Services Agency) v. Miner*, 2012 FCA 82 (CanLII) at paras. 7, 21.

³¹ *Costco Wholesale Canada v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) [*Costco Wholesale*].

³² (18 October 2019), AP-2018-053 (CITT) [*Rona Inc.* 2019].

³³ Exhibit AP-2022-008-03 at para. 29; Exhibit AP-2022-008-05 at para. 44.

³⁴ Exhibit AP-2022-008-03 at paras. 25, 28.

[25] However, the Tribunal notes that product 3 is a Mickey Mouse wreath made of a garland. It is also advertised as “Disney Garland Wreath – Mickey Mouse – 30-in.”³⁵ The parties described this product as follows: “... [f]eaturing a big red bow and multicolor LED lights, the wreath is made of a garland in the shape of Mickey’s head and ears” and “... [t]he lighted wreath is constructed of garlands in the shape of a head and ears ...”.³⁶

[26] Note 1(1) to Chapter 94 provides that Chapter 94 does not cover decorations other than electric garlands, whereas note 1(t) to Chapter 95 provides that Chapter 95 does not cover electric garlands of *all kinds*. However, the explanatory notes to heading 95.05 state that this heading covers festive decorations such as garlands. It appears, therefore, that only “electric garlands” are excluded from heading 95.05 and not garlands in general.³⁷

[27] Since product 3 is made of a garland and is also “lighted”, the only reasonable conclusion is that it is made of an electric garland. The Tribunal also notes that the inclusion of “all kinds” in note 1(t) to Chapter 95 is sufficient to exclude product 3 from heading 95.05.³⁸

[28] Accordingly, for all products except product 3, the Tribunal will start the classification analysis with heading 95.05.³⁹ If the goods are classifiable in heading 95.05, then it will be unnecessary for the Tribunal to consider whether they could fall in heading 94.05, in accordance with exclusionary note 1(l) to Chapter 94.

Products 1, 2, 5, 6, 7, 8 and 9 are classified in heading 95.05

[29] Heading 95.05 includes “festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes”. Note (A) to the explanatory notes to heading 95.05 provides that the heading covers festive, carnival or other entertainment articles that are generally made of nondurable material. Note (A) also provides that this heading excludes articles that, while containing a festive design, decoration, emblem or motif, have a utilitarian function.

[30] Rona argues that the goods in issue are articles of heading 95.05, as they are festive decorations and have no utilitarian function, while the CBSA argues that the goods are excluded from heading 95.05, as they are made of durable material and have the utilitarian function of producing light or lighting effects.

[31] There is no dispute between the parties that the goods are festive articles or decorations, in the general sense. However, the issue is whether they are *excluded* from classification in heading 95.05 due to having a utilitarian function.

[32] In *Rona Inc.* 2019, the Tribunal applied a two-prong test to determine whether the *exclusion* from heading 95.05 applies: the goods must contain a festive design, decoration, emblem or motif;

³⁵ *Ibid.* at 26.

³⁶ *Ibid.* at para. 10; Exhibit AP-2022-008-05 at para. 17. Rona’s webpage for the product also describes it as a wreath made of garlands: See Exhibit AP-2022-008-03 at 26 and Exhibit AP-2022-008-05 at 183.

³⁷ The Tribunal came to the same conclusion in *3319067 Canada Inc. (Universal Lites) v. President of the Canada Border Services Agency* (23 March 2006), AP-2004-017 (CITT) [*Universal Lites*] at para. 43.

³⁸ The Tribunal came to a similar conclusion in *Universal Lites* at para. 43.

³⁹ This is consistent with the Tribunal’s approach in *Rona Inc.* 2019 at paras. 88–89.

and they must have a utilitarian function.⁴⁰ Consistent with the Tribunal's past decisions, the two-prong test will be applied in this case to the various goods in issue.

Products 1, 5, 6, 7, 8, and 9: Santa's Workshop light; Gemmy Merry Christmas projector - wreath; reindeer projector light; spider projector light; white ghost projector light; white bats projector light

[33] All the above-noted goods are projector lights.

[34] The Santa's Workshop light (product 1) is also referred to as "Gemmy Projector – Santa's Workshop". Rona's catalogue states that the "Gemmy projector can transform any room with a colourful rotation of images from Santa's workshop." The product is a tabletop projector for indoor use that requires three AA batteries that are included. It features the "Color Changing™ technology" and energy-efficient LED lights.

[35] The other goods (products 5, 6, 7, 8, and 9) are referred to as a "LightShow projector" or "stake light projector" for indoor or outdoor use. The LED light bulbs project lighting effects onto surfaces and cover an area of 15 ft when the projector is placed at a 10–15 ft distance. According to the supplier's instruction manual,⁴¹ the light is very bright, and each model has a "Projection™ light", a stake, a power cord that connects to an electrical outlet, and a 5 amp/125 V fuse. There is also a warning that "strobe lights have been known to trigger seizures in people with photosensitive epilepsy". The manual further states that the projectors are for seasonal use and recommends inspecting the product before using or reusing. It also recommends storing in a cool, dry location protected from sunlight. The projector lights are for temporary installation and use (90 days maximum), and they all feature a black case, except product 5, which features a decorative holiday casing.

Festive articles

[36] The Tribunal must first determine whether the goods in issue that are projector lights (products 1, 5, 6, 7, 8, and 9) are festive articles.

[37] The evidence on the record indicates that all the projector lights contain festive designs or decorations associated with Christmas or Halloween, as they produce lighting effects, such as the Santa's Workshop light (product 1), Christmas wreath (product 5), a reindeer (product 6), a spider (product 7), white ghosts (product 8) or bats (product 9). The CBSA also recognizes that the goods in issue contain festive designs or decorations associated with Christmas or Halloween, as required by the explanatory notes to heading 95.05.⁴²

[38] By their physical characteristics and/or their functions and descriptions (the way they are advertised), the Tribunal concludes that all of these products in issue can be considered to be festive in nature and related to either the celebration of Christmas or Halloween.

⁴⁰ *Rona Inc.* 2019 at para. 102.

⁴¹ Exhibit AP-2022-008-05 at 120–134.

⁴² *Ibid.* at para. 53.

[39] The Tribunal agrees with Rona that these projector lights have as their purpose to decorate with projected festive motifs or themes. The Tribunal determines that this falls within the ambit of “festive decorations used to decorate rooms, tables, etc. (such as garlands, lanterns, etc.)” as required by the explanatory notes to heading 95.05. This is consistent with the same conclusion reached in *Rona Inc.* 2019 on this part of the test.⁴³

Utilitarian function

[40] The Tribunal must now consider whether these goods in issue that are projectors lights (products 1, 5, 6, 7, 8, and 9) have a “utilitarian function” and are consequently excluded from being classified in heading 95.05.

[41] In *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency*, the Tribunal defined the term “utilitarian” as “designed to be practically useful rather than attractive; functional.”⁴⁴ In assessing whether the goods perform a utilitarian function, the Tribunal has previously stated that it 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.⁴⁵

[42] Rona submits that the projector lights have no purpose at all other than to decorate with projected festive motifs or themes; they are not searchlights or spotlights nor are they used for illumination.⁴⁶ For its part, the CBSA submits that it is the lighting effects that give the goods their decorative element and that the goods contain a festive decoration as a functional aspect of the products, and they are not in and of themselves decorative.⁴⁷ The CBSA relies on the Tribunal’s decision in *Rona Inc.* 2019, which concluded the following:⁴⁸

... 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.

[43] However, in this case, the Tribunal is unable to adopt the above interpretation.⁴⁹ The Tribunal is of the opinion that the products in issue are designed primarily to produce a festive decoration

⁴³ See *Rona Inc.* 2019 at para. 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.”

⁴⁴ (6 April 2011), AP-2010-005 (CITT) at para. 55.

⁴⁵ *Rona Inc.* 2019 at para. 114; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (3 March 2014), AP-2013-013 (CITT) at para. 58.

⁴⁶ Exhibit AP-2022-008-03 at para. 26.

⁴⁷ Exhibit AP-2022-008-05 at para. 55.

⁴⁸ *Rona Inc.* 2019 at para. 120.

⁴⁹ Administrative tribunals are not bound by the rule of *stare decisis*. Therefore, the Tribunal is not bound by its decision in *Rona Inc.* 2019. See *Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 FCA 210

either in a room or on an outdoor wall. Their primary function is not to be utilitarian⁵⁰ but, rather, to be celebratory and decorative. In other words, these projector lights are not *designed to be practically useful*. The Tribunal cannot come to the same conclusion as in *Rona Inc.* 2019—the conclusion that, just because the goods illuminate an otherwise dark area, they are utilitarian.⁵¹

[44] 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 in heading 95.05.⁵² In this case, the projector lights are holiday related and would not be used year-round.

[45] In this regard, the relevant explanatory notes to heading 95.05 provides that the heading covers “articles, which in view of their intended use are generally made of non-durable material”, such as decorative articles for Christmas trees (tinsel, coloured balls, animals and other figures, etc.), “artificial Christmas trees, nativity scenes, nativity figures and animals, angels, Christmas crackers, Christmas stocking[s], imitation yule logs [and] Father Christmases”.

[46] The Tribunal notes that all the examples listed in this passage of the explanatory notes to heading 95.05 (with the exception, perhaps, of the tinsel and Christmas crackers) can often be used over multiple seasons and would have a durable construction. The explanatory notes also refer to the examples as *generally* made of non-durable material. The Tribunal interprets this to mean that durability alone is not determinative that an article is not to be included in heading 95.05. Indeed, this is consistent with past Tribunal decisions, such as in *Loblaws Companies Ltd. v. President of the Canada Border Services Agency*, where the Tribunal found that the durability is important but not determinative of the classification of the goods in this heading.⁵³

[47] As such, the Tribunal finds that the goods in issue fall within the ambit of heading 95.05 and are *not* excluded by the explanatory notes to heading 95.05. The Tribunal further concludes that products 1, 5 and 6 are classifiable under tariff item No. 9505.10.00 as “festive, carnival or other entertainment articles; articles for Christmas festivities” and products 7, 8 and 9 are classifiable under tariff item No. 9505.90.00 as “festive, carnival or other entertainment articles; other”.

Product 2: Disney lighted artificial topiary

Festive articles

[48] Product 2 is a Disney Mickey Mouse head-shaped topiary. The parties agree that this good has a festive design, decoration, emblem or motif.⁵⁴

(CanLII) at paras. 20–21; *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at para. 94.

⁵⁰ The counterexample to these products under consideration that the Tribunal could think of is a night light that has a Christmas or Halloween motif. A night light is primarily used to soothe a child who is afraid of the dark or to illuminate a pathway or room during the night. These are all clear utilitarian functions for which a night light is designed, and the decorative motif would be clearly secondary in nature.

⁵¹ In *Rona Inc.* 2019, the Tribunal found that the principal purpose of the goods (the outdoor kaleidoscope projection light show) was to provide illumination, which is a utilitarian function.

⁵² *Avon Canada Inc. v. Canada (National Revenue)* (30 August 2000), AP-99-074 (CITT) at 3.

⁵³ *Loblaws Companies Ltd. v. President of the Canada Border Services Agency* (3 August 2011), AP-2010-022 (CITT) at para. 68–70.

⁵⁴ Exhibit AP-2022-008-03 at para. 32; Exhibit AP-2022-008-05 at para. 53.

[49] By its physical characteristics and/or its functions and descriptions (the way it is advertised), the Tribunal concludes that product 2 can be considered festive in nature and related to the celebration of Christmas. The Tribunal determines that this falls within the ambit of “festive decorations used to decorate rooms, tables, etc. (such as garlands, lanterns, etc.)”, as required by the explanatory notes to heading 95.05.

Utilitarian function

[50] The Tribunal must next consider whether product 2 has a utilitarian function and whether such function is the predominant aspect of the product. As mentioned above, the Tribunal has defined “utilitarian” as “designed to be practically useful rather than attractive; functional.”

[51] Rona submits that the good is used to decorate regardless of whether the electric circuit is engaged and that it is not electrical garlands to decorate Christmas trees. As such, the good should be classified as an article for Christmas festivities of heading 95.05.⁵⁵

[52] The CBSA recognizes that the good has decorative elements that could be associated with Christmas but submits that it produces light effects as its predominant function and, consequently, has a utilitarian function.⁵⁶

[53] The Tribunal finds that product 2 is designed primarily to be a festive decoration. Its primary function is to be celebratory and decorative, and it can be used as such regardless of whether it is lighted. Therefore, the Tribunal is of the opinion that it is not utilitarian.

[54] For similar reasons as described above relating to “articles, which in view of their intended use are generally made of non-durable material”, the Tribunal interprets this to mean that durability alone is not determinative that an article is not to be included in heading 95.05.

[55] As such, product 2 is not excluded by the explanatory notes to heading 95.05 and falls within the ambit of that heading. Further, product 2 is classifiable under tariff item No. 9505.10.00 as “festive, carnival or other entertainment articles; articles for Christmas festivities”.

Product 4: Disney projection lamp with bow

Festive article

[56] Product 4 is a lamp post in the shape of a Mickey Mouse head with a Santa Claus hat and a Christmas red bow.

[57] By its physical characteristics and/or its description (the way it is advertised), the Tribunal concludes that product 4 can be considered to be festive in nature and related to the celebration of Christmas. Therefore, this product falls within the ambit of “festive decorations used to decorate” of the explanatory notes to heading 95.05.

⁵⁵ Exhibit AP-2022-008-03 at para. 25.

⁵⁶ Exhibit AP-2022-008-05 at paras. 56–57.

Utilitarian function

[58] Product 4, while festive in nature, is a 60-inch lamp post, as per the descriptive literature.⁵⁷ The *Merriam-Webster Dictionary* defines *lamp post* as “a post supporting a usually outdoor lamp or lantern”,⁵⁸ whereas the *Oxford Learner’s Dictionary* defines it as “a tall post in the street with a lamp at the top” and compares it to a street light.⁵⁹ Lamps and lamp posts (or street lights) are designed primarily to guide or to illuminate a pathway during the night; that is their primary function. As such, they have a utilitarian function.

[59] While the Tribunal has concluded above that products 1, 2, 5, 6, 7, 8 and 9 are designed primarily to be festive decorations or to produce a festive decoration, it cannot make the same conclusion regarding product 4. This good (a lamp post) has a primary function to guide or illuminate a pathway and, therefore, has a utilitarian function, notwithstanding that this functionality is accompanied by a festive or decorative theme or surrounding context.

[60] As such, product 4 is excluded by the explanatory notes to heading 95.05 and must therefore be classified in another heading.

Product 3 (LED Disney wreath) and product 4 (Disney projection lamp with bow) are classified in heading 94.05

[61] The Tribunal has concluded above that product 3 is made of an electric garland and, therefore, is specifically excluded from Chapter 95. Consequently, the Tribunal must start the classification analysis for product 3 with heading 94.05.

[62] The Tribunal has further concluded above that product 4 is excluded by the explanatory notes to heading 95.05, as it has a primarily utilitarian function. Since the good is not classifiable in heading 95.05, the Tribunal must now consider whether it falls in heading 94.05.

[63] In previous cases, the Tribunal has held that heading 94.05 covers all lamps or lighting fittings, as long as they are not more specifically described elsewhere, and that the explanatory notes ascribe a wide scope to this heading.⁶⁰

[64] In *Costco Wholesale*, the Tribunal found that there was no minimum amount of light required in order for goods to be classified as lamps or lighting fittings of heading 94.05 and that the goods were lamps or lighting fittings despite their decorative element, because they produced light and were advertised as such.⁶¹ The Tribunal further determined that, in order for the goods to be classified in heading 94.05, they must meet the following four criteria: (1) be lamps or lighting fittings or parts

⁵⁷ Exhibit AP-2022-008-03 at 31.

⁵⁸ Online: <<https://www.merriam-webster.com/dictionary/lamppost>>.

⁵⁹ Online: <<https://www.oxfordlearnersdictionaries.com/definition/english/lamp-post?q=lamp+post>>.

⁶⁰ *Rona Inc.* 2019 at para. 142; *Costco Wholesale* at para. 62; *Universal Lites* at para. 39.

⁶¹ *Costco Wholesale* at paras. 59–61, 69.

thereof, (2) be of any material, (3) use any source of light and (4) not be elsewhere specified or included.⁶²

[65] Applying these four conditions to products 3 and 4, the Tribunal finds that the goods produce light and, as such, are lamps or lighting in accordance with the ordinary meaning of those terms;⁶³ the goods are made of mixed material; the goods use a source of light powered by electricity; and the goods are not elsewhere specified or included.

[66] Accordingly, the LED Disney wreath (product 3) and the Disney projection lamp with bow (product 4) are correctly classified as argued by the CBSA in heading 94.05 as “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 permanently fixed light source, and parts thereof not elsewhere specified or included.” Further, they are classifiable under tariff item No. 9405.40.90 as “other electric lamps and lighting fittings; other”.

CONCLUSION

[67] For the above reasons, the Tribunal concludes the following:

- Products 1, 2, 5 and 6 are properly classified in heading 95.05, and specifically under tariff item No. 9505.10.00 as “festive, carnival or other entertainment articles; articles for Christmas festivities”;
- Products 7, 8 and 9 are properly classified in heading 95.05, and specifically under tariff item No. 9505.90.00 as “festive, carnival or other entertainment articles; other”;
- Products 3 and 4 are properly classified in heading 94.05, and specifically under tariff item No. 9405.40.90 as “lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; other electric lamps and lighting fittings”.

DECISION

[68] The appeal is allowed in part.

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

⁶² *Costco Wholesale* at para. 49. See also *Nanoleaf v. President of the Canada Border Services Agency* (18 January 2022), AP-2020-032 (CITT) at paras. 47–50; *LRI Lighting International Inc. v. President of the Canada Border Services Agency* (23 May 2017), AP-2016-007 (CITT) at para. 36.

ANNEX A

The relevant notes to Chapter 94 provide as follows:

Notes.

1. This Chapter does not cover:

...

(1) Toy furniture or toy lamps or lighting fittings (heading 95.03), billiard tables or other furniture specially constructed for games (heading 95.04), furniture for conjuring tricks or decorations (other than electric garlands) such as Chinese lanterns (heading 95.05).

The relevant explanatory notes to Chapter 94 provide as follows:

GENERAL

This Chapter covers, **subject** to the exclusions listed in the Explanatory Notes to this Chapter:

...

(3) Lamps and lighting fittings and parts thereof, not elsewhere specified or included, of any material (**excluding** those of material described in Note 1 to Chapter 71), and illuminated signs, illuminated name-plates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included (heading 94.05).

...

The relevant explanatory notes to heading 94.05 provide as follows:

(I) LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED

Lamps and lighting fittings of this group can be constituted of any material (excluding those materials described in Note 1 to Chapter 71) and use any source of light (candles, oil, petrol, paraffin (or kerosene), gas, acetylene, electricity, etc.). Electrical lamps and lighting fittings of this heading may be equipped with lamp-holders, switches, flex and plugs, transformers, etc., or, as in the case of fluorescent strip fixtures, a starter or a ballast.

This heading covers in particular:

(1) **Lamps and lighting fittings normally used for the illumination of rooms**, e.g.: hanging lamps; bowl lamps; ceiling lamps; chandeliers; wall lamps; standard lamps; table lamps; bedside lamps; desk lamps; night lamps; water-tight lamps.

(2) **Lamps for exterior lighting**, e.g.: street lamps; porch and gate lamps; special illumination lamps for public buildings, monuments, parks.

(3) **Specialised lamps**, e.g.: darkroom lamps; machine lamps (presented separately); photographic studio lamps; inspection lamps (**other than** those of **heading 85.12**); non-flashing beacons for aerodromes; shop window lamps; electric garlands (including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees).

...

The relevant notes to Chapter 95 provide as follows:

Notes.

1. This Chapter does not cover:

...

(t) Electric garlands of all kinds (heading 94.05).

The relevant explanatory notes to heading 95.05 provide 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 stocking, imitation yule logs, Father Christmases.

...

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.

...

This heading also **excludes**:

...

(f) Electric garlands of all kinds (**heading 94.05**).