



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2021-027

KMS Tools and Equipment Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, March 2, 2023*

TABLE OF CONTENTS

DECISION.....	i
STATEMENT OF REASONS	1
OVERVIEW	1
GOODS IN ISSUE.....	1
PROCEDURAL HISTORY	1
LEGAL FRAMEWORK	4
RELEVANT CLASSIFICATION PROVISIONS	5
POSITIONS OF THE PARTIES	6
KMS	6
The CBSA.....	6
ANALYSIS.....	7
Preliminary issue: the composition of the goods in issue	7
Classification at the heading level	8
Classification at the subheading level	13
Classification at the tariff item level.....	19
DECISION	19
ANNEX A	20
Relevant chapter and explanatory notes.....	20

IN THE MATTER OF an appeal heard on August 23, 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, dated September 27, 2021, made pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

KMS TOOLS AND EQUIPMENT LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: August 23, 2022

Tribunal Panel: Cheryl Beckett, Presiding Member

Tribunal Secretariat Staff: Sarah Shinder, Counsel
Charlotte Saintonge, Counsel
Jennifer Mulligan, Expert Paralegal
Geneviève Bruneau, Registrar Officer
Kaitlin Fortier, Registrar Officer

PARTICIPANTS:**Appellant**

KMS Tools and Equipment Ltd.

Counsel/RepresentativesMarco Ouellet
Jeffrey Goernert
Kimberley Bullett**Respondent**

President of the Canada Border Services Agency

Counsel/Representative

Taylor Andreas

Please address all communications to:

The Deputy Registrar
Telephone: 613-993-3595
Email: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

OVERVIEW

[1] This appeal was filed by KMS Tools and Equipment Ltd. (KMS) on December 20, 2021, pursuant to subsection 67(1) of the *Customs Act*¹ (Act) from a decision made on September 27, 2021, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4) of the Act.

[2] The issue in this appeal is whether the goods in issue (pen kits and pencil kits) can be classified, as submitted by KMS, as toys under tariff item No. 9503.00.90 or if, instead, they should fall under tariff item No. 9608.10.00 as “ball point pens” and under tariff item No. 9608.40.00 as “propelling or sliding pencils”, as argued by the CBSA.

GOODS IN ISSUE

[3] The goods in issue consist of one model of ballpoint pen kits (model RZ-9#) and one model of pencil kits (model RZ-3#). The pen kits consist of the following ballpoint pen parts: tip, lower tube, upper tube, clip, ink refill with ballpoint, cap, gripper collar, twist mechanism and centre band.² The pencil kit consists of the same parts, with the exception that the ink refill, which is replaced with a lead refill.³

[4] The goods in issue are imported without the outer casing (also referred to as decorative barrels). The upper and lower tubes described above are intended to be inserted into the decorative barrels. The latter are required for the pens and pencils to be complete.

[5] Certain tools (chisels, a pen mandrel, a barrel trimmer, a pen tube insertion tool, a pen press and a lathe) and essential components (pen blanks, glue and sandpaper) are required in order to make a completed pen with the goods in issue.⁴ Other than the glue, these tools and components are not incorporated into the final product.

PROCEDURAL HISTORY

[6] In September 2016 and 2017, KMS imported the goods in issue on two separate import transactions and accounted for the goods as “ball point pens” under tariff item No. 9608.10.00.⁵

[7] In May and June 2020, KMS submitted adjustment requests pursuant to paragraph 74(1)(e) of the Act, claiming that it had erroneously classified the goods in issue and should have instead classified them as “hobbycraft kits” under tariff item No. 9503.00.90.⁶

¹ R.S.C., 1985, c. 1 (2nd Supp.).

² Exhibit AP-2021-027-12 at para. 4.

³ Exhibit AP-2021-027-23 at 2.

⁴ Exhibit AP-2021-027-05 at paras. 9–11.

⁵ Exhibit AP-2021-027-12 at 18, 19.

⁶ *Ibid.* at 20, 21. As will be detailed in the present reasons, the Tribunal notes that tariff item No. 9503.00.90 reads as follows: “Tricycles, scooters, pedal cars and similar wheeled toys; dolls’ carriages; dolls; other toys; reduced-size (‘scale’) models and similar recreational models, working or not; puzzles of all kinds - Other”. Moreover, “hobbycraft kits” refers to the statistical suffix.

[8] In September and November 2020, the CBSA redetermined the tariff classification of the goods in issue, pursuant to subsection 59(1) of the Act, denying KMS's refund claims and maintaining that the goods would remain classified as originally determined.⁷

[9] KMS subsequently requested a further redetermination of the tariff classification of the goods pursuant to subsection 60(1) of the Act, requesting classification of the goods under tariff item No. 9503.00.90 as “---Other, Other toys”.

[10] On September 27, 2021, the CBSA further redetermined the tariff classification of the goods in issue pursuant to subsection 60(4) of the Act, classifying the goods under tariff item No. 9608.10.00 as “ball point pens”.⁸

[11] KMS filed an appeal with the Canadian International Trade Tribunal on December 20, 2021, pursuant to subsection 67(1) of the Act.⁹

[12] On March 15, 2022, KMS filed its brief.¹⁰

[13] On May 11, 2022, KMS requested that this matter be heard via written submissions rather than an in-person hearing.¹¹ The CBSA consented to this request.¹²

[14] On May 18, 2022, the Tribunal advised parties of its decision to hold a file hearing. The Tribunal also granted KMS an opportunity to file a written reply to the CBSA's brief.¹³

[15] The CBSA filed its brief on May 30, 2022.¹⁴

[16] On June 13, 2022, the Tribunal requested written submissions from parties regarding whether the goods in issue should be classified as “parts” under either tariff item No. 9608.99.10 or tariff item No. 9608.99.90. Both parties were provided an opportunity to file reply submissions to each other's respective submissions. The Tribunal also requested that parties confirm there was no dispute as to the components of the goods in issue.¹⁵

[17] The Tribunal also decided that a sample of the goods in issue would be required for the hearing and requested that KMS file physical exhibits with the Tribunal.¹⁶

[18] On June 28, 2022, KMS filed its reply to the CBSA's brief. KMS also confirmed that there was no dispute as to the components of the goods in issue.¹⁷

⁷ Exhibit AP-2021-027-12 at 22–27.

⁸ Exhibit AP-2021-027-01 at 8.

⁹ *Ibid.*; Exhibit AP-2021-027-12 at para. 11.

¹⁰ Exhibit AP-2021-027-05.

¹¹ Exhibit AP-2021-027-09.

¹² Exhibit AP-2021-027-10.

¹³ Exhibit AP-2021-027-11.

¹⁴ Exhibit AP-2021-027-12.

¹⁵ Exhibit AP-2021-027-14.

¹⁶ *Ibid.*

¹⁷ Exhibit AP-2021-027-15 at 10.

[19] On July 11, 2022, the CBSA filed written submissions in response to the Tribunal's request of June 13, 2022, regarding the additional tariff items.¹⁸ KMS's written submissions addressing the Tribunal's request were received by the Tribunal on July 13, 2022.¹⁹

[20] The file hearing took place August 23, 2022.²⁰ During the hearing, the Tribunal examined the samples of the goods in issue, which had been provided by KMS.

[21] Following the file hearing, on August 30, 2022, the Tribunal wrote a letter to KMS enclosing pictures of the goods examined. The Tribunal asked KMS to confirm that both models which were provided (i.e. ballpoint pen kits, models RZ-3# and RZ-9#) constituted the goods in issue and that both physical exhibits were complete.²¹

[22] On September 2, 2022, KMS confirmed that model RZ-9# was complete but indicated that model RZ-3# was missing the pencil mechanism.²² KMS's correspondence enclosed a picture of the missing part, which appeared to the Tribunal to be pencil lead.

[23] On September 26, 2022, the Tribunal wrote to KMS asking it to confirm whether one of the models of the goods in issue (model RZ-3#) is a pencil kit, contrary to its previous submissions.²³

[24] On October 5, 2022, the Tribunal received a letter from KMS explaining that one of the kits (RZ-3#) is a pencil kit but that it did not change KMS's position that both models are toys.²⁴

[25] On October 17, 2022, the Tribunal provided the CBSA the opportunity to file comments in response to the foregoing letter and provided KMS the opportunity to file reply comments.²⁵

[26] On October 25, 2022, the CBSA filed submissions indicating that, in light of KMS's clarification of the goods in issue, its position remained the same for the pen kits (model RZ-9#) but that the pencil kits (model RZ-3#) should be classified under tariff item No. 9608.40.00 as "propelling or sliding pencils".²⁶

[27] KMS did not file any reply comments to the CBSA's submissions of October 25, 2022.

¹⁸ Exhibit AP-2021-027-17.

¹⁹ Exhibit AP-2021-027-18.A.

²⁰ Exhibit AP-2021-027-19.

²¹ Exhibit AP-2021-027-20.

²² Exhibit AP-2021-027-21.

²³ Exhibit AP-2021-027-22.

²⁴ Exhibit AP-2021-027-23.

²⁵ Exhibit AP-2021-027-24.

²⁶ Exhibit AP-2021-027-25.

LEGAL FRAMEWORK

[28] The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,²⁷ which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).²⁸ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in several headings and subheadings and under tariff items.

[29] 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*²⁹ (General Rules) and the *Canadian Rules*³⁰ set out in the schedule.

[30] 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.

[31] Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*³¹ (Classification Opinions) and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*³² (Explanatory Notes), published by the WCO. 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.³³

[32] The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the General Rules as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant Classification Opinions and Explanatory Notes. It is only where Rule 1 does not conclusively determine the classification of the goods that the other General Rules become relevant to the classification process.³⁴

²⁷ S.C. 1997, c. 36.

²⁸ Canada is a signatory of the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

²⁹ S.C. 1997, c. 36, schedule.

³⁰ S.C. 1997, c. 36, schedule.

³¹ WCO, 2nd ed., Brussels, 2003.

³² WCO, 5th ed., Brussels, 2012.

³³ See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the Explanatory Notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the Classification Opinions.

³⁴ *Igloo Vikski Inc. v. President of the Canada Border Services Agency* (16 January 2013), AP-2009-046 (CITT) [*Igloo Vikski*] at para. 21.

[33] 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.³⁵ The final step is to determine the proper tariff item.³⁶

RELEVANT CLASSIFICATION PROVISIONS

[34] The relevant tariff classification provisions for heading 95.03 are as follows:

9503.00 **Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls; other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds.**

9503.00.90 **-- -Other**

-----*Other:*

95 -----*Handicraft and hobbycraft kits*

[35] The relevant tariff classification provisions for heading 96.08 are as follows:

96.08 **Ball point pens; felt tipped and other porous-tipped pens and markers; fountain pens, stylograph pens and other pens; duplicating stylos; propelling or sliding pencils; pen-holders, pencil-holders and similar holders; parts (including caps and clips) of the foregoing articles, other than those of heading 96.09.**

9608.10.00 **-Ball point pens**

...

9608.40.00 **-Propelling or sliding pencils**

...

9608.60 **-Refills for ball point pens, comprising the ball point and ink-reservoir**

9608.60.10 -- -For use in the manufacture of ball point pens

9608.60.90 -- -Other

³⁵ 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."

³⁶ 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.

...

9608.99 - - Other

9608.99.10 - - -Parts other than refills, for use in the manufacture of ball point pens

9608.99.90 - - -Other

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

[37] There are no relevant classification opinions.

POSITIONS OF THE PARTIES

KMS

[38] KMS alleges that the use of these pen and pencil kits fall within the scope of “amusement for adults”, as previously described by the Tribunal. KMS therefore submits that the goods in issue should be classified as “other toys” under tariff item No. 9503.00.90 or as they are specifically mentioned under statistical suffix 95, which covers “handycraft and hobbycraft kits”.

[39] KMS argues that the goods in issue are purchased by consumers for entertainment purposes and not for the immediate and practical use of a pen or pencil. KMS therefore submits that, at the time of importation, the goods in issue have play or amusement value as an identifying aspect.

[40] KMS further submits that the way the goods are marketed, packaged and advertised also supports their classification as a toy. Additionally, it is KMS’s contention that, although not legally binding, the existence of the statistical suffix “95 - - - - - handicraft and hobbycraft kits” supports the classification of the goods in issue as “other toys”.

[41] Finally, KMS claims that the goods in issue do not have the essential character of finished pens or pencils, given that they are missing the decorative barrels, need further manufacturing and that the use of several tools is necessary to produce the finished product. According to KMS, the practicality of the finished product should have no bearing on the tariff classification.

The CBSA

[42] The CBSA submits that, although the goods in issue were unassembled and incomplete at the time of importation, they have the essential character of ballpoint pens and of pencils. Thus, they should be classified under tariff item No. 9608.10.00 and No. 9608.40.00 as “ball point pens” and “propelling or sliding pencils”, respectively, pursuant to Rule 2(a) of the General Rules.

[43] The CBSA argues that the goods in issue are recognizable or identifiable as the complete or finished product and, with the exception of the decorative barrels, they include all the necessary components to assemble a functioning ballpoint pen or pencil. In the CBSA’s submission, neither the complexity of the assembling method nor the functionality of the goods at the time of import are relevant considerations when classifying an incomplete good.

[44] The CBSA further claims that the goods in issue are not classifiable as toys under chapter 95, given that they are intended for a functional purpose rather than for a recreational one. The CBSA

also submits that classification of the goods under chapter 95 on the basis of the statistical suffix “handicraft and hobbycraft kits” is not appropriate, as the Tribunal has held in *North American Tea & Coffee Inc. v. President of the Canada Border Services Agency* that the statistical suffix has no bearing on tariff classification.³⁷

ANALYSIS

Preliminary issue: the composition of the goods in issue

[45] As noted above, at the time of importation, KMS accounted for the two models of goods in issue as “ball point pens” in the customs coding form.³⁸ KMS continued to refer to its original identification of the goods in its adjustment requests.³⁹ The CBSA’s detailed adjustment statements and its notice of decision thus both classified the goods in issue on the understanding that they were two models of pen kits, which are used in the process of crafting a writing pen.⁴⁰

[46] Similarly, in the present proceedings, until the hearing, the documents filed before the Tribunal by both parties identified both models which comprise the goods in issue as ballpoint pen kits, and both parties provided legal argument on that basis. The parties confirmed that the composition of the goods was not at issue.⁴¹

[47] As noted above, subsequently, the Tribunal examined a physical sample of the goods in issue during the file hearing. After careful examination of both models, the Tribunal requested a confirmation from KMS that the physical exhibits constituted what was then described as the goods in issue (i.e. ballpoint pen kits, models RZ-3# and RZ-9#) and that neither kits were missing any parts.⁴²

[48] After further exchanges of correspondence with the Tribunal, KMS explained that the model RZ-3# was missing a lead refill and was thus, in fact, a pencil kit.

[49] This discrepancy was explained by a miscommunication with the importer. Specifically, KMS explained that the miscommunication was due to the Chinese supplier’s command of English, compounded by the fact that, in the pen-turning hobby industry, any writing instrument (ball, fountain or pencil) is considered part of the hobby of “pen-turning”.⁴³

[50] KMS also explained that, while model RZ-3# is a pencil kit, KMS’s position remains the same that these goods, regardless of the finished product, are hobby craft kits. KMS also made some factual adjustments to certain of the statements it made in its brief to account for the fact that the goods in issue are both pen and pencil kits.

[51] In reply, the CBSA indicated that, in light of the clarifications provided by KMS, it continues to rely on the analysis set out in its brief regarding why the goods in issue are not “other toys” and

³⁷ (11 February 2009), AP-2007-017 (CITT) [*North American Tea*] at para. 43.

³⁸ Exhibit AP-2021-027-12 at 18.

³⁹ *Ibid.* at 20–21.

⁴⁰ *Ibid.* at 22–30.

⁴¹ Exhibit AP-2021-027-15 at 10.

⁴² Exhibit AP-2021-027-22.

⁴³ In support of its assertions, KMS further argues that the final product is of no importance when the hobbyist purchases the kits.

therefore not classifiable under chapter 95. Similarly, the CBSA noted that its legal submissions in its brief regarding the essential character test remain applicable.⁴⁴ However, the CBSA contended that, while the pencil kits should be classified in the same heading as the pen kits (i.e. heading 96.08), they should be classified under tariff item No. 9608.40.00 as “propelling or sliding pencils”.

[52] The CBSA did not take issue with the clarifications provided by KMS or otherwise contend that the Tribunal should not conduct a tariff classification exercise for both pen and pencil kits.

[53] On the basis of the above, the Tribunal accepts that the goods in issue are comprised of one model of pen kits (RZ-9#) and one model of pencil kits (RZ-3#). Accordingly, the Tribunal will conduct its analysis on that basis.

[54] In sum, the Tribunal understands that both parties’ positions and legal arguments remain largely unchanged, except for certain necessary adaptations to account for the pencil kits. As such, unless argued otherwise by the parties or circumstances otherwise require, the Tribunal will consider both parties’ arguments as applying to both pen and pencil kits, with the necessary adaptations.

Classification at the heading level

[55] The parties do not agree on the classification of the goods in issue at the heading level. Thus, the Tribunal’s analysis must begin at this level.

[56] Both parties agree that the starting point for the Tribunal’s analysis is Rule 1, which reads as follows:

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, 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].

[57] It is also common ground between the parties, and the Tribunal agrees, that the analysis must begin with a consideration of whether the goods in issue fall within heading 95.03 as “other toys”.

[58] Indeed, note 1(l) to chapter 96 provides that chapter 96 does not cover “articles of chapter 95 (toys, games, sports requisites)”. In this regard, the Tribunal has previously held that, when there is a single relevant exclusionary note that precludes the *prima facie* classification of goods in both headings at issue in an appeal, the Tribunal should begin its analysis with the heading to which the exclusionary note does not apply.⁴⁵

[59] Following the above, the Tribunal will begin its analysis by determining whether the goods in issue can be classified in heading 95.03.

⁴⁴ In this regard, the CBSA specifically referred to paras. 38–46 of its brief.

⁴⁵ *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) at para. 46, referring to *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-005 (CITT) at paras. 41–74; *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) [*Korhani Canada*] at paras. 27–28.

The goods in issue are not classifiable as “other toys” in heading 95.03

[60] As noted above, heading 95.03 specifically lists “other toys”.

[61] According to its explanatory notes, chapter 95 covers toys of all kinds, whether designed for the amusement of children or adults.⁴⁶

[62] The Tribunal has previously interpreted the term “toy” broadly as encompassing a wide range of articles that provide amusement or play value.⁴⁷ Play value has previously been viewed as an “. . . identifying aspect of . . . a toy”.⁴⁸

[63] In determining whether a good should be classified as a toy, the Tribunal has previously considered the good’s intended and actual use, including the manner in which it was marketed, packaged and advertised.⁴⁹ While it is well established that amusement alone does not make an object a toy for the purpose of tariff classification,⁵⁰ the Tribunal has previously held that the fact that the goods in issue may also have a utilitarian function does not preclude them from being classified as toys.⁵¹ Drawing on these principles, the Tribunal more recently held that, if a product is designed with amusement as its essential characteristic, it does qualify as a toy for the purpose of tariff classification.⁵²

[64] KMS takes the position that the goods in issue are designed for the amusement of adults. In particular, KMS argues that the goods in issue are used by hobbyists for the hobby of pen making. KMS explains that the hobbyist will purchase a wood blank to their liking, then use a lathe to manufacture the body of the pen (or pencil) and then use the hobby kit to make a personalized pen (or pencil). The blank, which must be used to manufacture the body of the pen (or pencil), does not form part of the goods in issue and must therefore be procured separately.

[65] More specifically, KMS explains that the hobby of pen making requires various tools and other components, which are not included in the goods in issue, as described at paragraph 5 of these reasons. According to KMS, the process of completing a finished pen or pencil can require between 45 minutes and 3 hours of labour, though most turners can finish a pen in approximately 2 hours.

⁴⁶ The Tribunal has previously held that amusement for adults is different than for children. See *Imagination Hobby & Collection Inc. v. President of the Canada Border Services Agency* (22 October 2019), AP-2018-059 (CITT) [*Imagination Hobby*] at para. 37.

⁴⁷ *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency* (12 April 2012), AP-2011-020 (CITT) [*Canadian Tire*] at para. 32, referring to *Zellers Inc. v. Deputy M.N.R.* (29 July 1998), AP-97-057 (CITT); *Regal Confections Inc. v. Deputy M.N.R.* (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal Confections*] at 8; *Franklin Mint Inc. v. President of the Canada Border Services Agency* (13 June 2006), AP-2004-061 (CITT); *Korhani Canada*.

⁴⁸ *Canadian Tire* and cases cited therein.

⁴⁹ *Canadian Tire* at para. 35.

⁵⁰ *Regal Confections* at 8.

⁵¹ See, e.g., *Korhani Canada* at para. 41.

⁵² *Imagination Hobby* at para. 33.

[66] In support of its assertions, KMS provided an article titled, “Pen Turning 101 - Turning a beautiful writing implement is as easy as 1-2-3”.⁵³ This article explains the steps that are required to complete a finished pen or pencil using the various components and tools outlined above.

[67] Thus, according to KMS, the process of using the goods in issue to create a finished pen or pencil is an activity that hobbyists do for pleasure, which supports the classification of the goods in issue as “other toys”.⁵⁴ While KMS recognizes that the finished product will be a functional pen or pencil, in its submission, it is the process of turning the blanks and assembling the goods in issue that gives them their *raison d’être*.

[68] In the Tribunal’s view, the goods in issue are not designed with “play value” as their essential characteristic. Instead, the Tribunal finds that, based on their actual and intended use, the goods in issue are primarily designed to be used as fully functional writing implements, which precludes their classification as toys.

[69] In this regard, note D of the explanatory notes to heading 95.03 makes clear that the “other toys” of heading 95.03 are generally limited to those which have limited functional capabilities.⁵⁵ KMS does not dispute that the goods in issue, once assembled with the decorative barrels, become fully functional pens or pencils. As such, the Tribunal finds that the utilitarian function of the goods in issue strongly militates against their classification in heading 95.03.

[70] The Tribunal also finds that the ways in which the goods in issue are marketed, packaged, advertised and presented, on balance, do not suggest that the “play value” is their identifying aspect. The marketing and advertising of the goods in issue, by what the Tribunal understands to be KMS’s supplier, describe the pen kits model as “DIY Pen Kits”.⁵⁶ As such, in the Tribunal’s view, the marketing and advertising imply that the purpose of the goods in issue is to serve as writing implements.

[71] Regarding the packaging, the Tribunal observes that the goods in issue are packaged in a simple clear seal top plastic bag, with no further markings except for a bar code and what appears to be their model number.⁵⁷ The packaging therefore contains no indication or suggestion that the goods in issue are designed with amusement as their principal characteristic.

[72] KMS also argues that the way it markets the goods in issue further supports their classification as toys. The Tribunal takes note that, as argued by KMS, its website contains the following description: “Creating unique, eye-catching pens with your wood lathe is fun and

⁵³ Exhibit AP-2021-027-05 at 25–31. The Tribunal understands that this article is an excerpt of the *Wood Craft Magazine*, which is intended for wood craft hobbyists. KMS also provided what the Tribunal understands to be an excerpt of its website, which outlines the same (Exhibit AP-2021-027-05 at 22–24).

⁵⁴ In this regard, KMS relies on a dictionary definition of “toy” as “an object that you have for enjoyment or pleasure rather than for a serious purpose”. KMS also relies on dictionary definitions of the terms “amusement” and “hobby”.

⁵⁵ Note D of the explanatory notes to heading 95.03 is reproduced at Annex A of these reasons.

⁵⁶ Online:

<https://www.aliexpress.com/item/488464141.html?spm=a2g0o.store_pc_home.productList_8185184.pic_0>.

⁵⁷ Exhibit AP-2021-027-20 at 4–9.

rewarding—and getting started is easy. At KMS Tools, we’ve got everything you need to craft one-of-a-kind pens that make memorable gifts and treasured keepsakes...”⁵⁸

[73] While this description indicates that creating pens is “fun and rewarding”, the Tribunal is not persuaded that this description alone, having regard to the totality of the evidence on record, suggests that the goods in issue were designed with amusement as their identifying aspect.

[74] Even if the Tribunal were to accept that the act of assembling any type of good may provide some form of satisfaction or amusement to certain individuals, the evidence, on balance, does not suggest that goods in issue are designed with the primary intent of amusement or play value. Even so, any amusement thus provided would clearly be transient in nature. In other words, this amusement would occur for a very short period of time and would be followed by a permanent utilitarian function. In any event, it is well established that it is not merely because a product provides amusement value that it should necessarily be classified as a toy.⁵⁹

[75] Irrespective, it is clear from the description that the hobby of pen making that is described as “fun and rewarding” by KMS also includes turning a blank on a lathe to create the decorative barrels.⁶⁰ Importantly, as previously explained in these reasons, it is undisputed that the blank does not form part of the goods in issue.

[76] In the Tribunal’s view, the fact that a purchaser of the goods in issue may need to turn the blank, which is procured separately, to complete the writing implement does not in itself suffice to classify the goods in issue as “other toys”.

[77] In this regard, the Tribunal notes in passing that, on the basis of the evidence submitted by KMS, it is possible that a pen turning hobbyist might, instead, find some amusement in the creation of the customizable blank that forms the outer casing of the pen or pencil by turning it on a lathe to alter its look and construction. In addition, as described further in paragraphs 114 and 115 of these reasons, assembling the pieces of the goods in issue accounts for a very small proportion of the total time spent fabricating the finished pen or pencils. Since the blank does not form part of the goods in issue, any amusement that may be derived from it is irrelevant to the Tribunal’s analysis.

[78] Finally, KMS argues that Parliament introduced statistical suffix 95 covering “handicraft and hobbycraft kits” to keep a record of companies that import hobby craft kits. KMS also refers to the statistical note to chapter 95, which further defines the term “set” under tariff item No. 9503.00.90 for statistical purposes.⁶¹ Recognizing that statistical suffixes are not legally binding, KMS appears to suggest that the existence of this statistical suffix nonetheless further supports the classification of the goods in issue as “other toys”.

⁵⁸ Exhibit AP-2021-027-05 at 13.

⁵⁹ *Regal Confections*.

⁶⁰ In this regard, the above description is followed by the following mention: “What you need to get started”, followed by a list of tools and components, which includes the “wood or acrylic pen blank”. Exhibit AP-2021-027-05 at 13.

⁶¹ See Annex A of these reasons.

[79] In this regard, the Tribunal notes that it is well established that it is not appropriate to consider the statistical suffix for the purposes of determining the proper tariff classification.⁶² Moreover, the statistical note to chapter 95 clearly indicates that it does not form part of the *Customs Tariff* legislation and is intended for statistical purposes. The Tribunal therefore finds that KMS's argument regarding the statistical suffix is unpersuasive.

[80] The Tribunal pauses to observe that, in addition to not being legally binding, there is no definitive indication that the statistical suffix "handicraft and hobbycraft kits" covers the goods in issue. For the reasons indicated in the preceding paragraphs, the goods in issue are not designed with "play value" as their essential characteristic. The Tribunal observes that this statistical suffix may cover other hobby craft kits which are primarily designed for the purposes of amusement and meet the necessary requirements for being considered a toy under chapter 95. It therefore follows that, in the Tribunal's view, the existence of this statistical suffix does not suggest that *all* hobby craft kits are to be classified under chapter 95.

[81] In light of the foregoing, the Tribunal finds that the goods in issue are not classifiable as "other toys" in heading 95.03.

The goods in issue are classifiable in heading 96.08

[82] Having found that the goods in issue are not classifiable in heading 95.03, the Tribunal will now continue its analysis at the heading level and consider whether the goods in issue are classifiable in heading 96.08.

[83] Both parties appear to agree that, if the goods are not classifiable in heading 95.03, they are classifiable in heading 96.08.

[84] At the heading level, the CBSA argues that heading 96.08 specifically lists the essential character of the goods and that they should therefore be classified in this heading pursuant to Rule 2(a) of the General Rules.

[85] The Tribunal observes that, in addition to listing "ball point pens" and "propelling or sliding pencils", the terms of heading 96.08 include various other descriptions, including "parts (including caps and clips) of the foregoing articles". Moreover, the explanatory note to heading 96.08 clearly states that the heading includes not only pens and pencils but also all identifiable parts not included elsewhere in the nomenclature, and it sets out certain examples of parts such as pen nibs, clips, refills, holdings, barrels and propelling mechanisms.⁶³

[86] Accordingly, the Tribunal is satisfied that the goods in issue are classifiable in heading 96.08.⁶⁴

⁶² *North American Tea* at para. 43; *J. Cheese Inc. v. President of the Canada Border Services Agency* (13 September 2016), AP-2015-011 (CIIT) at note 13; *BMC Coaters Inc. v. President of the Canada Border Services Agency* (6 December 2010), AP-2009-071 (CIIT) at para. 51.

⁶³ See Annex A of these reasons.

⁶⁴ As there is no competing heading, the Tribunal need not decide whether the goods in issue are classifiable in heading 96.08 on the basis of Rule 1 as "parts ... of the foregoing articles" or Rule 2 as incomplete and unfinished "ball point pens" and "propelling or sliding pencils" respectively. The Tribunal therefore makes no finding in this regard.

Classification at the subheading level

[87] The Tribunal will next consider classification at the subheading level.

[88] Classification at the subheading level commences by, *mutatis mutandis*, the application of Rule 1 of the General Rules (pursuant to Rule 6), i.e. in accordance with the terms of the subheadings and any relative section, chapter or subheading notes.⁶⁵

[89] As the application of Rule 1 of the General Rules does not preclude the application of Rule 2 at the subheading level, the Tribunal will apply Rule 2 in conjunction with Rule 1.

[90] Rule 2(a) reads as follows:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

[91] Item I of the explanatory notes to Rule 2(a) reads as follows:

The first part of Rule 2 (a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.

[Bold in original]

[92] The Tribunal also immediately notes that the one-dash residual subheading “other” is a residual subheading and, therefore, the Tribunal will only consider that subheading if it finds that the goods in issue are not *prima facie* classifiable in a more specific subheading, as explained in more detail below.⁶⁶ The Tribunal will therefore commence the analysis at the subheading level by considering subheadings 9608.10 (ballpoint pens) and 9608.40 (propelling or sliding pencils).

Subheadings 9608.10 and 9608.40

[93] The CBSA argues that, although the goods in issue were unassembled and incomplete at the time of importation, they have the essential character of ballpoint pens (subheading 9608.10) and propelling or sliding pencils (subheading 9608.40), respectively.⁶⁷

[94] The Tribunal previously held that, “given the specific nature of each article that is the subject matter of a classification appeal, it is virtually impossible to establish a universally applicable test in

⁶⁵ *Igloo Vikski* at para. 20.

⁶⁶ The Tribunal notes that the one-dash residual subheading “other” includes two two-dash levels subheadings, including the two-dash residual subheading “other” (9608.99).

⁶⁷ In light of the Tribunal’s reasoning at the heading level, the Tribunal will consider the arguments that were made by the CBSA regarding the application of Rule 2(a) at the subheading level.

assessing the essential character of a good.”⁶⁸ As such, each case must be evidence-driven and determined on its own merit.

[95] The Tribunal has, however, in the past considered the following:

... whether the goods look like the complete or finished article. It has also considered whether the goods possessed the essential features of the complete or finished article. In one instance, the manner in which the article was marketed was a factor taken into consideration. In another, the Tribunal also considered the question of whether the value that is added to the goods in issue after importation is of such a considerable proportion as to render absurd the claim that those goods as imported have the essential character of the finished or complete goods.⁶⁹

[Footnotes omitted]

[96] In the current case, as noted in paragraph 3 of these reasons, the goods in issue are comprised of several parts of pens and parts of pencils. A person viewing the various components stored together in a plastic bag can determine that the components are parts of pens and pencils.

[97] In any event, Tribunal jurisprudence is clear that the physical appearance of the goods is not determinative. As noted above, and as the Tribunal recently reaffirmed in *Lumisave* that the interpretation of Rule 2(a) cannot simply rely on superficial appearance. The goods in issue should possess the essential features of the complete or finished article.⁷⁰ Accordingly, the Tribunal will next consider whether the goods in issue possess the “essential features” of ballpoint pens and propelling or sliding pencils.

[98] According to the *Canadian Oxford Dictionary*, a pen is “an instrument for writing or drawing with ink, consisting of a nib, ball, felt tip, etc., fixed into a metal or plastic holder”;⁷¹ and a pencil is “an instrument for writing or drawing, usu. consisting of a thin rod of graphite etc. enclosed in a wooden cylinder.”⁷²

[99] Based on dictionary definitions and the common sense of the words, the Tribunal is of the view that the application of the concept of “essential character”, as envisioned in Rule 2(a), of a pen or a pencil is provided by its ability to be used as a writing instrument.

⁶⁸ *Lumisave Industrial LED Technologies Ltd. v. President of the Canada Border Services Agency* (14 April 2022), AP-2021-006 (CITT) [*Lumisave*] at para. 78, citing *Alliance Mercantile Inc. v. President of the Canada Border Services Agency* (3 November 2017), AP-2016-038 (CITT) [*Alliance*] at para. 62.

⁶⁹ *Alliance* at para. 65.

⁷⁰ *Lumisave* at para. 83, citing *Alliance* at para. 65.

⁷¹ Online:

<https://www.oxfordreference.com/display/10.1093/acref/9780195418163.001.0001/m_en_ca0051453?rskey=IAdPar&result=6>. The Tribunal notes that it is well established that courts and tribunals may take judicial notice of the common dictionary meaning of words. *R. v. Krymowski*, 2005 SCC 7; *R. v. Find*, 2001 SCC 32; *The Law of Evidence in Canada* (2nd ed. 1999) at 9.13, 19.22; *Rona Inc. v. President of the Canada Border Services Agency* (24 June 2020), AP-2018-010 (CITT) at paras. 165–166.

⁷² Online:

<https://www.oxfordreference.com/display/10.1093/acref/9780195418163.001.0001/m_en_ca0051478?rskey=2B4AKb&result=1>.

[100] The goods in issue contain the ink refill and the lead pencil mechanism. The Tribunal is of the view that these are the main components that permit pens or pencils to operate as writing instruments. Accordingly, the goods in issue contain the essential components or features of pens or pencils.

[101] In support of its contention that the goods in issue do not have the essential character of the finished goods, KMS argues that the goods in issue are not functional as imported, as they require additional pieces. According to KMS, the practicality of a finished pen or pencil should not form the basis of what the goods are at the time of entry.

[102] The Tribunal notes that the only components missing are the decorative barrels that fit over the upper tube and lower tube. Based on the Tribunal's examination of the goods in issue, the Tribunal notes that, without the decorative barrels, it may not be possible to assemble the parts in the kit into a functioning pen or pencil.⁷³ Even if the goods cannot be assembled into a functioning pen or pencil, it is nonetheless possible to apply ink or lead to a surface simply by using the ballpoint pen ink refill or pencil mechanism. Irrespective, in either case, these parts in and of themselves do not qualify as a finished pen or pencil.

[103] Although the goods in issue may not be functional as pens or pencils without the decorative barrels, the Tribunal has repeatedly held that the incomplete goods do not need to be functional or operational in order to retain the essential character of the finished goods.⁷⁴ As the Tribunal explained in *C. Keay Investments Ltd. dba Ocean Trailer Rentals v. President of the Canada Border Services Agency*: "Rule 2(a) still applies even when one or more necessary components are missing".⁷⁵ In fact, Rule 2(a) specifically governs goods that are incomplete or unfinished.

[104] In *C. Keay Investments*, the Tribunal noted that the fact that the goods in issue, which were both incomplete and unassembled, were imported as a bundled package containing most of the components necessary to assemble the finished goods weighed against classifying them merely as parts.⁷⁶ The Tribunal reasoned that:

[The goods in issue] are more like a (unassembled) model of the [complete and finished goods], rather than one or more individual building blocks. Viewed holistically in this manner, their essential character as a [complete and finished good] resolves into focus.⁷⁷

⁷³ While the parties did not allege this, based on the evidence on record, it would appear that the goods in issue could potentially be assembled into a functional pen or pencil without the decorative barrels (see, e.g., assembly instructions, Exhibit AP-2021-027-05 at 23–24). In this case, the user would apply ink or lead to a surface by using the assembled upper and lower tubes. Nonetheless, the Tribunal notes that the tubes are likely difficult to grip because of their narrowness.

⁷⁴ *Renelle Furniture Inc. v. President of the Canada Border Services Agency* (23 March 2007), AP-2005-028 (CITT) at para. 19. See also, e.g., *Viessmann Manufacturing Company Inc. v. the Deputy Minister of National Revenue* (14 November 1997), AP-96-196 to AP-96-198 (CITT) [*Viessmann Manufacturing*] at 6 (holding that the fact that the goods in issue do not form a complete boiler when imported and cannot operate safely is not determinative so long as they have the "essential feature of a boiler, namely, the heat exchanger" as well as "the burner, the manifold, the outer panels and sundry other components").

⁷⁵ (15 May 2018), AP-2017-031 (CITT) [*C. Keay Investments*] at para. 79.

⁷⁶ *C. Keay Investments* at para. 76.

⁷⁷ *Ibid.*

[105] A similar reasoning applies in the present case. Indeed, the goods in issue are comprised of all but one of the necessary parts to assemble a functioning pen or pencil. They thus similarly resemble unassembled pens or pencils.

[106] Moreover, in *Lumisave*, the Tribunal found that, when the missing elements to form a complete good can easily be procured or added by the end user, this argues in favour of the goods having the essential character of the finished product.⁷⁸

[107] In the present case, evidence indicates that the blanks that are necessary to form the decorative barrels can easily be procured or created by the final consumer, which further supports the Tribunal's view that this missing piece does not preclude the classification of the goods in issue as having the essential character of pens or pencils.⁷⁹

[108] KMS further claims that the goods in issue do not have the essential character of finished pens or pencils because they need further manufacturing and that the use of several tools is necessary.

[109] In CBSA's view, the complexity of the assembly method is not a relevant consideration.

[110] In this regard, the CBSA relies on explanatory note VII to Rule 2(a), which reads, in relevant part, as follows:

(VII) For the purposes of this Rule, "articles presented unassembled or disassembled" means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, **provided** only assembly operations are involved.

No account is to be taken in that regard of the complexity of the assembly method. However, the components shall not be subjected to any further working operation for completion into the finished state.

[Bold in original]

[111] The Tribunal thus considered the nature of the transformation that needs to be performed to make the goods into finished products.

[112] As noted above, KMS indicates that the entire process of creating fully functional pens or pencils, which includes the turning of the blank, which is not part of the kits, to make the decorative barrels, can take between 45 minutes and 3 hours.⁸⁰

[113] The evidence on record suggests that the process of pen turning, which includes the creation of the body of the pen, can be summarized as follows: "pen turning boils down to turning a cylinder.

⁷⁸ *Lumisave* at para. 84. See also *Outdoor Gear Canada v. President of Canada Border Services Agency* (21 November 2011), AP-2010-060 (CITT) at para. 39; *Ulextra Inc. v. President of the Canada Border Services Agency* (15 June 2011), AP-2010-024 (CITT) at para. 9.

⁷⁹ Exhibit AP-2021-027-05 at 25.

⁸⁰ *Ibid.* at para. 11.

The body, consisting of one or more blanks, is bored and filled with a brass cylinder, mounted to a lathe, and then turned, finished, and assembled”.⁸¹

[114] More specifically, the evidence on record indicates that the majority of the steps necessary to create the finished pens or pencils relate to the creation of the decorative barrel. Concerning the assembly of the goods in issue specifically, the tubes must first be assembled to the blank using glue. This is followed by the process of turning the blank on the lathe to create the decorative barrel, as well as other related steps such as barrel trimming and squaring the end of the pen blank. The final step to creating the finished product is the assembly of the parts of the pen or pencil kits. The assembly instructions that appear to be included on KMS’s website indicate that most pieces must be “pressed” or “pushed” together using a clamp or vise.⁸²

[115] Thus, the assembly of the goods in issue is a simple process once the decorative barrels are completed. On the basis of the evidence on record, the Tribunal understands that it would only take a matter of minutes to assemble all the parts into a pen or pencil. It is therefore clear that the goods in issue do not require any manufacturing nor further working operation as contemplated by explanatory note VII to Rule 2(a). The fact that certain tools are required for the assembly has no bearing on this determination.

[116] Regarding the marketing of the goods, the CBSA also appears to argue that the way the pen kits were marketed supports their classification as finished goods.⁸³ The Tribunal agrees.

[117] Indeed, in the case at hand, the evidence indicates that the pen kits are marketed by the vendor in a way that confirms that the kits contain all the necessary components to assemble a pen, except for the decorative barrels, which are to be procured by the final consumer.⁸⁴ Accordingly, the Tribunal finds that this is a further indication that the pen kits have the essential character of the finished goods.

[118] The Tribunal will next consider the question of whether the value that is added to the goods in issue after importation is of such considerable proportion as to render absurd the claim that the goods as imported have the essential character of the finished or complete product.⁸⁵ The evidence on record indicates that the decorative barrels can be produced using a lathe and blanks. The blanks can be simple, inexpensive blocks of wood or made of more expensive material.⁸⁶ They can be purchased

⁸¹ *Ibid.* at 25.

⁸² *Ibid.* at 23.

⁸³ *Alliance* at para. 65.

⁸⁴ Online:

<https://www.aliexpress.com/item/488464141.html?spm=a2g0o.store_pc_home.productList_8185184.pic_0>.

The vendor’s website indicates that “[o]ne set could only make one pen by yourself which is not including acrylic tube or wooden tube”.

⁸⁵ The Tribunal had previously examined this factor in *Viessmann Manufacturing*.

⁸⁶ Exhibit AP-2021-027-05 at 25, 30. Of note, the article titled “Pen Turning 101” filed by KMS indicates as follows: “For this exercise, I used an attractive, *inexpensive*, and easy-to-turn olivewood blank (Woodcraft #826211A, \$2.79), pairing it with a Premier Cigar Ballpoint Pen Kit (Woodcraft #828439, \$7.25)” (emphasis added).

ready-made or can be sawed out of larger pieces of wood.⁸⁷ KMS describes the process of pen or pencil making as “a relatively easy and inexpensive hobby”.⁸⁸

[119] Thus, the Tribunal finds that, although the value of the missing decorative barrels may fluctuate, it is not sufficient to negate the claim that the goods in issue have the essential character of the finished goods. In other words, neither the unassembled nature of the goods nor the lack of the decorative barrels can be said to have altered the essential character of the goods in issue.

[120] Lastly, KMS appears to suggest that note 1 of the explanatory notes to heading 96.08, which indicates that ballpoint pens “generally consist of a body enclosing a tube of ink terminated by a ball”, does not permit the goods to be classified as “ball point pens” because the goods do not include a body.

[121] The Tribunal accepts that, as argued by KMS, the pen kits in issue are incomplete and unfinished goods. However, this does not preclude their classification as “ball point pens” in subheading 9608.10.

[122] It is clear that note 1 of the explanatory notes to heading 96.08 describes a *finished* ballpoint pen. However, as noted above at paragraphs 89 to 91 of these reasons, provided that chapter or heading notes do not otherwise require, Rule 2(a) of the General Rules extends the scope of any subheading to include a reference to that article incomplete or unfinished, provided the incomplete or unfinished article, as presented, has the essential character of the complete or finished article. In the Tribunal’s view, this explanatory note does not prevent the Tribunal from extending the scope of subheadings 9608.10 and 9608.40 to include incomplete or unfinished pens or pencils and thus classifying the goods in issue in those subheadings.

[123] In light of the above, the Tribunal finds that the goods in issue, such as they were at the time of importation, had the “essential character of the complete or finished good” and, therefore, are *prima facie* classifiable in subheadings 9608.10 and 9608.40 through the application of Rule 1 in conjunction with Rule 2(a).

Subheading 9608.60

[124] The Tribunal also considered whether the pen kits could be classifiable in subheading 9608.60 as “refills for ball point pens, comprising the ball point and ink-reservoir.”

[125] The Tribunal remarks that the pen kits contain a refill, comprised of the ballpoint and ink reservoir. However, the Tribunal notes that the goods in issue contain more than just a refill and thus cannot be classified in subheading 9608.60 on the basis of Rule 1 alone.

Residual one-dash subheading “other”

[126] The Tribunal also examined whether the goods in issue are classifiable in the residual one-dash subheading “other”, which is subdivided into the following two-dash subheadings: 9608.91 (pen nibs and nib points) and 9608.99 (other).

⁸⁷ Exhibit AP-2021-027-05 at 25.

⁸⁸ *Ibid.* at para. 12.

[127] However, because at the one-dash subheading level, “other” is a residual category, it is only to be considered where the goods in issue are not *prima facie* classifiable in a more specific one-dash subheading.⁸⁹

[128] Having found that the goods in issue are *prima facie* classifiable in one-dash subheadings 9608.10 and 9608.40, which are more specific, it is not open to the Tribunal to consider the residual one-dash subheading “other”. The Tribunal will therefore not address the parties’ arguments regarding the application of tariff item No. 9608.99.10 and tariff item No. 9608.99.90.

Conclusion at the subheading level

[129] In light of the above, the Tribunal finds that the ballpoint pen kits are appropriately classified as “ball point pens” of subheading 9608.10 and the pencil kits are appropriately classified as “propelling or sliding pencils” of subheading 9608.40.

Classification at the tariff item level

[130] Since neither subheading 9608.10 nor subheading 9608.40 is further divided into tariff items, the Tribunal finds, for the reasons above, that the ballpoint pen kits in issue (model RZ-9#) are classified as “ball point pens” under tariff item No. 9608.10.00 and that the pencil kits in issue (model RZ-3#) are classified as “propelling or sliding pencils” under tariff item No. 9608.40.00.

DECISION

[131] The appeal is dismissed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

⁸⁹ *Danby Products Limited v. President of the Canada Border Services Agency* (16 February 2018), AP-2017-009 (CIIT) at para. 35; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (9 October 2019), AP-2018-037 (CIIT) at paras. 38–40; *Cycles Lambert Inc. v. President of the Canada Border Services Agency* (28 November 2013), AP-2012-060 (CIIT) at paras. 28–29; *First Jewelry Ltd. v. President of the Canada Border Services Agency* (25 November 2016), AP-2015-028 (CIIT) at para. 39, at note 18.

ANNEX A

Relevant chapter and explanatory notes

Chapter 95

The general explanatory notes to chapter 95 provides in relevant part as follows:

This Chapter covers toys of all kinds whether designed for the amusement of children or adults...

Each of the headings of this Chapter also covers identifiable parts and accessories of articles of this Chapter which are suitable for use solely or principally therewith, and provided they are not articles excluded by Note 1 of this Chapter.

Heading 95.03

The explanatory notes to heading 95.03 provide, in relevant part, as follows:

(D) **Other toys.**

This group covers toys intended essentially for the amusement of persons (children or adults).

...

Certain toys (e.g., electric irons, sewing machines, musical instruments, etc.) may be capable of a limited “use”; but they are generally distinguishable by their size and limited capacity from real sewing machines, etc.

Heading 96.08

Note 1 of the explanatory notes to heading 96.08 provides as follows:

(1) **Ball point pens.** These generally consist of a body enclosing a tube of ink terminated by a ball.

The “Parts” explanatory notes to heading 96.08 provides as follows:

The heading also covers identifiable parts not more specifically included elsewhere in the Nomenclature. For example:

Pen nibs of any design including unfinished nibs roughly cut to shape; clips; refills for ball point pens, comprising the ball point and the ink reservoir; holders for the ball points or felts of marking stylographs; ink-flow regulators; barrels for pens or pencils of this heading; filling or propelling mechanisms; ink sacs of rubber or other materials; point protectors; interchangeable renew nib units comprising nib, feed and collar; nib points (or pen points) which are small balls made from platinum alloys or from certain tungsten alloys used for pointing the tips of pen nibs to prevent premature wear.

Rule 2 of the General Interpretive Rules

The explanatory notes to Rule 2(a) provide, in relevant part, as follows:

(Incomplete or unfinished articles)

(I) The first part of Rule 2 (a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.

...

(Articles presented unassembled or disassembled)

(V) The second part of Rule 2 (a) provides that complete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packing, handling or transport.

(VI) This Rule also applies to incomplete or unfinished articles presented unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.

(VII) For the purposes of this Rule, “articles presented unassembled or disassembled” means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, **provided** only assembly operations are involved.

No account is to be taken in that regard of the complexity of the assembly method. However, the components shall not be subjected to any further working operation for completion into the finished state.

Unassembled components of an article which are in excess of the number required for that article when complete are to be classified separately.

...