



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

Ottawa, Tuesday, February 3, 2004

Appeal No. AP-2001-097

IN THE MATTER OF an appeal heard on May 8, 2003, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated March 4 and 5, 2002, with respect to a request for re-determination under subsection 60(1) of the *Customs Act*.

BETWEEN

SONY OF CANADA LTD.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
Tel.: (613) 990-2452
Fax.: (613) 990-2439
www.citt-tcce.gc.ca

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
Tél. : (613) 990-2452
Fax. : (613) 990-2439
www.tcce-citt.gc.ca



UNOFFICIAL SUMMARY

Appeal No. AP-2001-097

SONY OF CANADA LTD.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

This is an appeal under subsection 67(1) of the *Customs Act* from decisions of the Commissioner of the Canada Customs and Revenue Agency, dated March 4 and 5, 2002, regarding goods imported into Canada during the period from March 1998 to October 2000. The goods in issue are the Integrated circuit recorder and the portable minidisk recorder.

The Tribunal must decide if the goods in issue are properly classified under tariff item No. 8520.90.90 as other magnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device, as determined by the Commissioner of the Canada Customs and Revenue Agency, or should be classified under: (1) tariff item No. 8471.70.00 as storage units of automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included; or (2) tariff item No. 8519.99.10 as compact disc players, as claimed by Sony of Canada Ltd. The Tribunal must also decide if the goods in issue should benefit from tariff relief under tariff item No. 9948.00.00 as articles for use in automatic data processing machines and units thereof or as parts and accessories of the foregoing, as claimed by Sony of Canada Ltd.

HELD: The appeal is allowed in part. The Tribunal finds that the goods in issue are properly classified according to Rule 1 of the *General Rules for the Interpretation of the Harmonized System* in heading No 85.20. The Tribunal is of the view that the goods in issue are sound recording apparatus and that they incorporate sound recording devices. The fact that they may have other functions, such as storing sound, does not, in the Tribunal's view, make them other than, for purposes of classification, articles that fall in heading No. 85.20. As no other subheading or tariff item describes the goods in issue, the Tribunal is of the opinion that the goods can be classified under residual tariff item No. 8520.90.90. Furthermore, the Tribunal finds that models ICD-R100PC and ICD-70 of the IC recorder benefit from tariff relief under tariff item No. 9948.00.00. The Tribunal is of the view that only these two models of the goods in issue are physically connected and functionally joined to a computer and, as such, are "for use in . . . [a]utomatic data processing machines".

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 8, 2003
Date of Decision: February 3, 2004

Tribunal Member: Patricia M. Close, Presiding Member

Counsel for the Tribunal: Michèle Hurteau
Marie-France Dagenais

Clerk of the Tribunal: Anne Turcotte

Appearances: Marco Ouellet and Jeffrey Goernert, for the appellant
Derek Rasmussen, for the respondent



Appeal No. AP-2001-097

SONY OF CANADA LTD.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), dated March 4 and 5, 2002, regarding goods imported into Canada during the period from March 1998 to October 2000. The goods in issue are the integrated circuit (IC) recorder and the portable minidisk (MD) recorder.²

The Tribunal must decide if the goods in issue are properly classified under tariff item No. 8520.90.90 of the schedule to the *Customs Tariff*³ as other magnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device, as determined by the Commissioner, or should be classified under: (1) tariff item No. 8471.70.00 as storage units of automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included; or (2) tariff item No. 8519.99.10 as compact disc (CD) players, as claimed by Sony of Canada Ltd. (Sony). The Tribunal must also decide if the goods in issue should benefit from tariff relief under tariff item No. 9948.00.00 as articles for use in automatic data processing machines and units thereof or as parts and accessories of the foregoing, as claimed by Sony.

The IC recorder is a battery-operated, portable digital recording and playing device with a built-in microphone that records messages on one of two types of media: a built-in IC memory⁴ or a removable memory card⁵ (memory stick). The MD recorder is also a battery-operated, portable music recording and playing device which uses MDs that are similar to 3-1/2-inch floppy discs, but are smaller in diameter, and is used for storing data.

-
1. R.C.S. 1985 (2d Supp.), c. 1.
 2. At times, the Tribunal may refer to the model numbers for ease of reference. The model numbers for the IC recorder are ICD-R100PC, ICD-MS1 and ICD-70. The model numbers for the MD recorder are MZ-R70 and MZ-R90.
 3. S.C. 1997, c. 36.
 4. The ICD-R100PC and the ICD-70.
 5. The ICD-MS1.

For the purposes of this appeal, the relevant tariff nomenclature reads as follows:

84.71	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.
8471.70.00	-Storage units
85.19	Turntables (record-decks), record-players, cassette-players and other sound reproducing apparatus, not incorporating a sound recording device.
8519.99	--Other
8519.99.10	---Compact disc players
85.20	Magnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device.
8520.90.90	---Other
9948.00.00	Articles for use in the following: Automatic data processing machines and units thereof, magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data; Parts and accessories of the foregoing.

EVIDENCE

Mr. Michael Neujahr, National Product Trainer for Sony of Canada Ltd. and Dr. Voicu Groza, professor at the School of Information Technology and Engineering at the University of Ottawa, testified on behalf of Sony.

Mr. Neujahr testified that the IC recorder has an IC that records voice messages, as well as several other functions. The IC recorder is designed for use with a computer, as it has a built-in interface port that allows a direct connection to the computer. He demonstrated how the IC recorder could be used with the computer by sending the recorded audio files from the IC recorder to the computer's hard drive, amending a message and playing it back on the computer, and attaching the message to e-mails.

Mr. Neujahr further testified that the IC recorder records voice audio files and allows the user to play back, fast forward or rewind messages. The ICD-MS1 has a memory stick that can be removed and inserted into a computer. The memory stick allows the creation of a virtual wireless network, which can transfer files from the goods in issue to a computer. Mr. Neujahr demonstrated the use of the memory stick and testified that the software supplied with the ICD-MS1 allows the user to open a voice editor file. The memory stick loads the message files that were recorded and plays them back.

Mr. Neujahr described the MD recorder as a portable device that records music onto a blank MDs, which can be played back. The MD recorder is designed for use in a computer. He also testified that the music is downloaded from the computer and that the audio files are transferred from the computer to the MD recorder, where the music is then ready to be heard. He testified that pre-recorded MDs are not available. Mr. Neujahr explained that, once the play button is selected on the computer, the data stream starts, and so does the recording process.

In cross-examination, Mr. Neujahr testified that the goods in issue record information that is stored as data that are encoded and then converted from an analog to a digital signal. He also testified that the goods in issue can perform basic functions, such as erase or play back a message, without being connected

to a computer, in that they are stand-alone devices. Mr. Neujahr testified that the MD recorder can record from a CD player or a cassette recorder. However, the IC recorder can only record from a microphone, not from any other source. Mr. Neujahr disagreed with the claim made in the service manuals for the IC recorder that it records from a tape recorder, television or radio. He agreed that the goods in issue are sold as portable audio devices, which do not have to be connected to something else for some operations. Concerning the ICD-MS1, Mr. Neujahr agreed that this device was not designed to be physically connected to a computer because the connection is made by way of a memory stick instead of by way of a cable. He also confirmed that the IC recorder can perform a number of functions for which it need not be attached to a computer.

With respect to the MD recorder, Mr. Neujahr testified that it was not supplied with a cable at the point of purchase, but that, in the case of the MZ-R90, a universal serial bus (USB)PC Link⁶ kit was offered in a mail-in rebate offer. In answer to questions from the Tribunal, Mr. Neujahr confirmed that the rebate program ran from December 1, 2000, to January 1, 2001, after the dates of importation of the goods in issue, which were from March 23, 1998, to October 4, 2000.

Dr. Groza was qualified as an expert in computer engineering, computer design, components of computers, and computer hardware and software. Dr. Groza testified that a computer can write and read binary data on peripherals such as CD-rewritable drives (CD-RW). For example, the MZ-R70 qualifies as a storage peripheral, and the storage manipulation, retrieval and conversion of digital data constitute data processing. He also testified that this type of peripheral can move digital files and that other peripherals would include analog to digital conversion modules.

Dr. Groza testified that the block diagram of the MD recorder and that of a CD-RW are similar, in that they are built from the same components, have similar design architecture and both interface with a computer. He testified that the IC recorder is a data acquisition system and that the MD recorder writes data on media, but does not record audio frequency vibrations.

Dr. Groza testified that, with the PC Link cable, the MD recorder could record a digital data music file from a computer. The PC Link retrieves data from the computer and interfaces with the MD recorder. It would be possible to play music on the MD recorder once it was disconnected from the computer. In essence, the music data file is transferred from the computer to the MD recorder. Dr. Groza testified that the data written on the CD became music.

In cross-examination, Dr. Groza admitted that one could speak into all the goods in issue. He stated that the information is converted, first, into digital form and then recorded. He testified that, once the information is recorded onto the goods in issue, it can be played back. The other conversion that takes place is from digital to analog, and sound can be heard. He agreed that sound goes in and sound comes out of the goods in issue. He testified that the ICD-70 can record from a tape recorder, television or radio, which results in noise. He also testified that the MZ-R90 could record sound from a CD player and cassette recorder.

Dr. Groza testified that the goods in issue are portable devices designed to be used without being connected to a computer. He testified that, in the ICD-MS1, the memory stick is physically moved to the computer; there is no cable connection between that IC recorder and the computer. He also testified that there is no physical link between the ICD-MS1 and the computer. Dr. Groza stood by the statement made in

6. The USB PC Link refers to the PC Link software for Windows, which is a registered trademark [PC Link].

his expert report that the main function of the goods in issue was to record and handle audio information.⁷ Finally, he stated that the MZ-R70 cannot transfer data to a computer, but that the computer can transfer data to it.

In re-direct, Dr. Groza stated that the main function of the goods in issue was to record and handle audio information, which can only be fully accomplished if included in a larger processing system developed around a computer. He explained that sound is recorded using analog signals without digital processing, while digital data are expressed in bits or digital numbers. Thus, the goods in issue write data and are dedicated computers.

Dr. George M. White, adjunct professor at the School of Information Technology and Engineering at the University of Ottawa, testified on behalf of the Commissioner. Dr. White was qualified as an expert in computer science, computer design and engineering. He testified that the functions of the goods in issue were to record, store and replay sound. These functions can also be performed when the goods in issue are connected to a computer. He testified that the MZ-R70 does not need to be connected to a computer to operate, but can be used with a computer by using a USB port into which a cable is plugged. He stated that files cannot be transferred from the MD recorder to the computer. However, sound information can be transferred from the computer through the USB port via the cable to the MZ-R70, but the information cannot be transferred from the computer to the goods in issue. The computer, not the MZ-R70, is programmed to control the transfer of the information. Dr. White testified that the ICD-R100PC, MZ-R90 and ICD-MS1 can record sound from various sources, such as a tape recorder, a television, a radio, a CD player, an MD player, a digital amplifier or a portable CD player, from its built-in microphone. These goods in issue can be used with or without a computer, but, in Dr. White's opinion, none of the goods in issue can be reprogrammed by the user, unlike a computer. He stated that the software of the computer controls the transfer of the information between the goods in issue and the computer.

Dr. White testified that the ICD-MS1 is designed to be used without a direct connection (i.e. a cable) to a computer. He stated that the information is stored on the memory stick, which can be removed and installed in a computer. Accordingly, the information that is stored on the memory stick can be accessed by the computer, and once the memory stick is inserted into the computer, it is physically connected to the computer.

With respect to the manner in which sound is recorded, Dr. White testified that a microphone is set up so that a transducer inside vibrates in sympathy with the waves in the air as they approach the IC recorder. The waves are transformed into electrical signals, which can be stored in a variety of ways depending on the medium used to store them. When the sound is played back, the electric storage device is accessed, and the information, in whatever form, is sent to a speaker, which typically activates an electrical voice coil on the speaker, which causes it to vibrate in acoustic waves.

Dr. White stated that there is a difference between recording sound and writing data. Recording sound is the act of accepting sound and recording it on a certain medium, while writing data is the act of storing data in a certain medium. Analog sounds can be stored on a variety of media, for example, a tape cassette. He also testified that the IC recorder stores the information in the memory stick or chip in the form of bits. He testified that using the microphone to record on the IC recorder would not provide a high-fidelity

7. Sony's confidential addendum, Tab 13 at 10.

recording and that one could either get a good quality match or a bad quality match, depending on the specifics of the devices.

In response to the Tribunal's questions, Dr. White confirmed that, when the goods in issue are used in a stand-alone mode, the information from the voice recording, which is in analog form, is then digitized and becomes digital information. It is the digital information which is stored. Any recording necessitates storage in some form or other.

ARGUMENT

Sony argued that the appeal dealt with articles that are designed with use in computers as their primary function. Computers are defined as "data processing apparatus". The goods in issue have evolved into goods that process data and are designed for use with computers. Sony submitted that the IC recorder and the MD recorder are specifically designed for use with computers, since they convert information into digital format and store it as digital data files. Sony argued that, as such, the goods in issue are computers in their own right.

Sony originally did not dispute that the goods in issue could be classified in heading No. 85.20 and submitted that they could be classified more specifically under tariff item No. 8520.90.90 as other tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device. Sony argued that such goods, however, should qualify for tariff relief under tariff item No. 9948.00.00 as articles for use in automatic data processing machines. The evidence, Sony argued, shows that the MD recorder processes and stores digital data from a computer, while the IC recorder can send a digital data file to a computer. According to Sony, both are designed for this purpose and, when joined to a computer, form an integrated system to perform their intended design functions. Sony submitted that the process of converting analog data to digital data, storing digital data and retrieving digital data is digital data processing, which is what a computer does.

In Sony's view, the evidence shows that, when the goods in issue are connected to the computer, the functions and controls are handled by the computer. Thus, Sony argued, the computer and the goods in issue are functionally joined. Sony submitted that the evidence also clearly shows that the function of the computer is linked to the goods in issue, as the instruction to record, erase or edit digital data files originates in the computer and is carried out by the goods in issue. Moreover, Sony submitted, the expert testimony and the evidence clearly demonstrate that the goods in issue are functionally joined with the computer when physically attached to it by a cable or through the memory stick.

Sony argued that the evidence also demonstrates that the synchronized recording feature of the MD recorder allows it to record digital data as soon as the data is transferred from the computer. According to Sony, the data files from the goods in issue can be manipulated by the computer before downloading, and this is data processing. Sony stated that, if the function of a computer is to process digital data files that are music files, the goods in issue are integral to the operation of the computer. Sony submitted that the MD recorder records a digital data file from a computer and does not record sound; rather, it writes digital data.

Sony submitted in its amended brief and in argument that the MD recorder is a storage unit for automatic data processing machines and should be classified under tariff item No. 8471.70.00 as automatic data processing machines and units thereof. According to Sony, the evidence shows that the MD recorder has similar functions to the CD-RW used in computers. Sony submitted that Note 5(C) to Chapter 84 specifically states that separate units for computers should be classified in heading No. 84.71. Moreover, the

*Explanatory Notes to the Harmonized Commodity Description and Coding System*⁸ to heading No. 84.71 provide that additional storage units may be in the form of drives for discs or tapes such as the goods in issue, which are used as units for data processing devices for external use with computers. Sony further argued that the goods in issue function similarly to CD-ROM drives. Sony referred to the expert report which explains the similarity between the MD recorder and a CD-RW and clearly states that the MD technology is designed to store data and that this technology is similar to that of the CD-ROM. Furthermore, Sony computers use internal MD drives which use the same buttons and switches to control both the CD-ROM drive and the MD drive. Consequently, Sony argued that the CD-RW and the MD drive are physically attached and functionally joined to the system.

Sony submitted that the goods in issue should benefit from tariff relief under tariff item No. 9948.00.00 as they are stand-alone units, which are not necessary to the operation of a computer nor designed to be principally used with one. Sony argued that the IC recorder is sold complete with computer software and that the MD recorder is sold with a PC Link cable. According to Sony, the goods in issue are functionally joined to the computer, in that they are “for use in” a computer, and may play an active or passive role in the primary function of the computer, which is data processing. Sony submitted that the goods in issue do not need to be “necessary”, “essential” or “integral” to the operation of the computer for tariff item No. 9948.00.00 to apply.

Sony further argued that tariff item No. 9948.00.00 covers not only articles for use in computers but also parts and accessories of computers. Sony submitted that, in this case, the goods in issue are accessories of automatic data processing machines: the MD recorder stores digital music data from the computer, freeing space from the hard drive, and thus, it is marketed as a storage unit; the IC recorder is used to download, edit and e-mail messages through the computer. Sony further submitted that the goods in issue are accessories within the definition of that term found at Memorandum D10-0-1,⁹ which defines “accessory” as “an article which performs a secondary or subordinate role, not essential to the function, which could improve the effectiveness of the host machine, equipment, apparatus or appliance”.

Sony raised the possibility of a third classification, under tariff item No. 8519.99.10, as CD players. Sony argued that the MD recorder is a storage unit by design for data processing machines and that, therefore, it should be classified under tariff item No. 8471.70.00. Sony also argued that the MD recorder is not excluded from heading No. 85.19 and that it does not fall within the definition of “sound recording apparatus”, as found in the *Explanatory Notes* to heading No. 85.20. Finally, Sony submitted that the definition of “sound recording” includes digital data files.

The Commissioner argued that the goods in issue are “other sound recording apparatus” and properly classified under tariff item No. 8520.90.90. According to the Commissioner, this is supported by Dr. White’s testimony that all the goods in issue record sound, as well as by Dr. Groza’s testimony that the main function of the goods in issue is to record and handle audio information. Therefore, the evidence of both expert witnesses is consistent in that Dr. White says that the goods in issue record sound and Dr. Groza says that they record audio information. The Commissioner submitted that both experts agreed that, in all cases, one presses the record button and speaks into the device, sound goes in and, when one plays back the recording, sound goes out. The Commissioner’s position is that sound is recorded and that the goods in issue

8. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

9. Department of National Revenue, “Classification of parts and accessories in the Customs Tariff” (24 January 1994).

are sound recording apparatus. To support his position further, the Commissioner relied on the definition of the term “recording”,¹⁰ which reads, in part, as follows:

Any process for preserving signals, sounds, data, or other information for future reference or reproduction, such as disk recording, facsimile recording, ink-vapor recording, magnetic tape or wire recording, and photographic recording. **2.** The end product of a recording process, such as the recorded magnetic tape, disk, or record sheet. Also known as record.

The Commissioner argued that the fact that the goods in issue may store information is not inconsistent with their being sound recording apparatus.

For the purposes of classification, the Commissioner argued that goods are to be classified in accordance with the *General Rules for the Interpretation of the Harmonized System*¹¹ and the *Canadian Rules*.¹² Under the *General Rules*, the Tribunal must look at headings, section and chapter notes and related section, chapter and subheading notes. According to the Commissioner, heading No. 85.20 refers to “[m]agnetic tape recorders and other sound recording apparatus”, and the goods in issue fall in that tariff classification, as they are sound recording apparatus. The Commissioner also argued that the fact that the goods in issue can have more than one function, such as storing information or sound, is not relevant and does not make them something other than sound recording apparatus and that, thus, there is not a basis for changing the tariff classification.

Turning to whether the goods in issue should benefit from tariff relief under tariff item No. 9948.00.00 as articles for use in automatic data processing machines, the Commissioner submitted that the goods in issue do not meet the requirement of “for use in”. According to the Commissioner, the goods in issue must first be more than just physically connected to the computer. He submitted that, in the case of the ICD-MS1, which has the memory stick, the evidence of the witnesses shows that this unit is never physically connected to a computer. The Commissioner submitted that the evidence shows that one could insert the memory stick into a computer, but that the actual recorder is never physically connected to the computer. Therefore, the ICD-MS1 does not satisfy the criterion of being physically connected to the computer and cannot benefit from tariff relief under tariff item No. 9948.00.00.

The Commissioner argued that the evidence shows that the other models were not imported with cables and could not be connected to a computer. Therefore, they also do not meet the test of being physically connected to a computer. The Commissioner further argued that the goods in issue are not functionally joined to a computer. According to the Commissioner, the evidence from all the witnesses shows that none of the goods in issue require a computer to function and that they can all operate as stand-alone units and have various functions, such as recording, erasing messages, play back, all of which do not require the use of a computer.

The Commissioner recognized that four of the models could be connected to a computer with a cable; however, as testified by Dr. White, the transfer of files or information is controlled by the computer, and the goods in issue have no involvement in the process. On that basis, the Commissioner argued that the goods in issue are not functionally joined to a computer. Moreover, the goods in issue are not necessary for, or integral to, the operation of a computer, and for many of their basic functions, they need not be used with

10. *McGraw-Hill Dictionary of Scientific and Technical Terms*, 4th ed., s.v. “recording”.

11. *Supra* note 3, schedule [*General Rules*].

12. *Ibid.*

a computer. The Commissioner further argued that only when the goods in issue are connected by cable to a computer is there connection. However, they are not integral or necessary to the computer. In the Commissioner's view, the goods in issue are not functionally joined to a computer, and they do not meet the requirement of "for use in". Consequently, the Commissioner submitted that they cannot benefit from tariff relief under tariff item No. 9948.00.00.

The Commissioner argued that the goods in issue do not satisfy the requirements "of a kind solely or principally used" with a computer under Note 5(B) to Chapter 84. The evidence was that all the goods in issue could be used without a computer. The Commissioner further argued that the goods in issue were advertised and sold as portable audio systems and would not be very portable if they were always connected to a computer. Therefore, the Commissioner submitted that they should not be classified under classification No. 8471.50.00.20.

The Commissioner argued that, for any of the goods in issue to be considered parts or accessories, they must be parts or accessories of articles for use in an automatic data processing machine. The Commissioner submitted that the goods in issue are neither accessories nor articles. To support his point, the Commissioner relied on the *Explanatory Notes* to heading No. 84.73 relating to "parts and accessories suitable for use **solely** or **principally** with the machines of **headings 84.69 to 84.72.**" In the Commissioner's view, the goods in issue do not satisfy the requirement of "solely" or "principally" and ought not to be classified under tariff item No. 9948.00.00 as parts or accessories. He further submitted that the goods in issue are not storage units and were not advertised as such.

Finally, with respect to classifying the goods in issue under tariff item No. 8519.99.10 as CD players, the Commissioner stated that the evidence was clear that all the goods in issue record sound and clearly are not CD players. Finally, the Commissioner argued that the evidence provided by Dr. White was to the effect that the goods in issue cannot be reprogrammed and, thus, would not meet the definition of "automatic data processing machines" of Note 5(A)(a) to Chapter 84.

DECISION

Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules* and the *Canadian Rules*. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*¹³ and the *Explanatory Notes*. The *General Rules* are structured in a cascading form. If the classification of an article cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. The *Canadian Rules* reiterate that the classification of goods under the tariff item of a subheading or heading shall be determined according to the *General Rules*.

The Tribunal's reasoning entailed a process of elimination, starting with the last of the four tariff items presented to it. Sony argued that the goods in issue could be classified in heading No. 85.19 as turntables (record-decks), record-players, cassette-players and other sound reproducing apparatus, not incorporating a sound recording device. The specific tariff item suggested by Sony, No. 8519.99.10, is for CD players.

13. Customs Co-operation Council, 1st ed., Brussels, 1987.

The Tribunal is of the opinion that, under Rule 1 of the *General Rules*, the goods in issue cannot be classified under tariff item No. 8519.99.10. Rule 1 states:

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 [subsequent rules].

According to Rule 1 of the *General Rules*, the goods in issue do not qualify for classification in heading No. 85.19, as the heading refers to “other sound reproducing apparatus” that does not incorporate a sound recording device. The evidence clearly shows that the goods in issue do incorporate a sound recording device in the form of a microphone. In coming to this finding, the Tribunal is not convinced by Sony’s argument that the goods in issue write digital data rather than record sound. Moreover, the expert witnesses testified that the goods in issue record audio or sound and reproduce the audio or sound. The Tribunal finds that the following paragraph in the *Explanatory Notes* to heading No. 85.20 applies:

The term “**sound recording apparatus**” means apparatus which, on receiving a suitable audio-frequency vibration generated by a sound-wave, so modifies a recording medium as to enable it to be used subsequently to reproduce the original sound-wave.

The IC recorder, as its name indicates, records sound (such as a voice) and converts the sound from analog to digital format for storage and retrieval as an analog sound. Based on the above, the Tribunal is of the opinion that the IC recorder incorporates a sound and, therefore, cannot be classified under tariff item No. 8519.99.10.

With respect to the MD *recorder*, its name, the evidence and the testimony also show that it cannot be classified in heading No. 85.19, as it digitally records music via an optical cable from a CD player, MD player, digital amplifier and computer. The Tribunal is of the view that digitally recorded music is sound recording. The *Gage Canadian Dictionary*¹⁴ defines “digital” as “of a method of recording where sounds are stored as binary digits on a magnetic medium.”

The Tribunal also notes that subheading No. 8520.32 deals with sound recording, i.e. “[o]ther magnetic tape recorders incorporating sound reproducing apparatus . . . [d]igital audio type”. The *Explanatory Notes* to heading No. 85.20 define the term “sound recording apparatus” as an “apparatus which, on receiving a suitable audio-frequency vibration generated by a sound-wave, so modifies a recording medium as to enable it to be used subsequently to reproduce the original sound-wave.”

Sony argued, in its addendum brief and before the Tribunal, that the goods in issue should be classified as storage units of automatic data processing machines and units thereof under tariff item No. 8471.70.00. Sony relied on *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue*¹⁵ to argue that the goods in issue are storage units of computers, which are automatic data processing machines. Sony compared the MD recorder to the CD-ROM drive, as the former uses the same technology to read and correct information stored on a MD as does a CD-ROM drive to read and correct information stored on a CD. In *PHD Canada*, the Tribunal found that CDs were “for use in” “units” (CD-ROM drives) of “[a]utomatic data processing machines” (computers). Sony applied this decision by analogy to argue that the MD recorder, like the CD-ROM drive, is a unit of an automatic data processing machine, in this case, a

14. 1997, s.v. “digital”.

15. (25 November 2002), AP-99-116 (CITT) [*PHD Canada*].

computer. In *PHD Canada*, the goods were not the CD-ROM drives, but the CDs themselves. In that appeal, the parties had agreed that the CD-ROM drives were “units” of “[a]utomatic data processing machines”, which were the computers. The Tribunal notes that there is no such agreement in this case and is not persuaded by Sony’s argument.

The Tribunal agrees with the Commissioner that the MD recorder is not a unit of an automatic data processing machine, in that it is not of “a kind solely or principally used in an automatic data processing system”. The MD recorder does not meet the requirements of Note 5(B) to Chapter 84. Specifically, it does not meet the requirement of Note 5(B)(a) that it be “of a kind solely or principally used in an automatic data processing system”. Rather, the Tribunal believes that, for the most part, it is used as advertised, as a portable audio system.

The Tribunal next turns to heading No. 85.20, which covers “[m]agnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device.” The parties did not originally disagree on this tariff classification. The Tribunal has reviewed the testimony and the evidence and is of the opinion that the goods in issue are properly classified in this heading, according to Rule 1 of the *General Rules*. The goods in issue are sound recording apparatus and incorporate sound recording devices. The fact that they may have other functions, such as storing sound, does not, in the Tribunal’s view, make them other than, for purposes of classification, articles that fall in heading No. 85.20. As no other subheading or tariff item describes the goods in issue, the Tribunal is of the opinion that the goods can be classified under residual tariff item No. 8520.90.90.

Chapter 99 provides special classification provisions for commercial goods only after classification under a tariff item in Chapters 1 to 97 has been determined. As there are no headings or subheadings in this chapter, the Tribunal needs to consider, according to Rule 1 of the *Canadian Rules*, whether the goods in issue should benefit from tariff relief under tariff item No. 9948.00.00 as “[a]rticles for use in . . . [a]utomatic data processing machines and units thereof . . . [p]arts and accessories of the foregoing.”

The Tribunal will first deal with the question of whether the phrase “[p]arts and accessories of the foregoing” should be interpreted to mean that the goods in issue can benefit from tariff relief if they are articles for use in parts and accessories of an automatic data processing machine (in this case, a computer) or should be interpreted to mean that the goods in issue can benefit from tariff relief if they, themselves, are parts and accessories of an automatic data processing machine. Sony argued the latter. On this issue, the Tribunal agrees with the Commissioner’s position. The punctuation used in the tariff item leads the Tribunal to interpret the description to mean that articles can benefit from tariff relief if they are articles for use in parts and accessories of an automatic data processing machine and not if they, themselves, are parts and accessories of an automatic data processing machine. In the alternative, Sony did not argue that the goods in issue were for use in parts and accessories of automatic data processing machines, but rather that they, themselves, were parts and accessories of the automatic data processing machines. The Tribunal, therefore, next turns its attention to whether the goods in issue are “for use in” automatic data processing machines or units thereof. Section 2 of the *Customs Tariff* defines the term “for use in” as follows:

wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.

The Tribunal is of the opinion that the goods in issue are not “wrought or incorporated into” the automatic data processing machines, that is, the computers. The evidence before the Tribunal was that the goods in issue are, at times, attached to computers. Therefore, the Tribunal must decide whether the goods

in issue are “attached to” the computers. Previous Tribunal decisions¹⁶ have interpreted the expression “attached to” to mean that the goods are “physically connected and are functionally joined” to, in this case, a computer.

The Tribunal does not consider all the goods in issue to be “physically connected” to computers. For example, the ICD-MS1 uses a memory stick, not a cable, to perform the interface functions with the computer. The memory stick can be physically removed from the IC recorder. It is the Tribunal’s view that, while the argument could be made that the ICD-MS1 may be functionally joined to the computer, the memory stick is not “attached to” a computer, as it does not have a physical connection to the computer either temporarily or directly through a cable. As a result, the Tribunal’s decision is that the ICD-MS1 does not benefit from tariff relief under tariff item No. 9948.00.00, as it does not meet the requirement of “for use in”.

The question remains, however, of whether the goods need to be physically connected permanently in order to meet the requirement of “for use in”. The Commissioner argued that the goods in issue could not be considered “attached to” computers, given that they are portable devices. The Tribunal does not agree. It relies upon Customs Notice N-278, which clearly states that, regarding the interpretation of “for use in”, specifically the interpretation of physical connection, “[p]hysical connection need not be permanent (e.g., cables)”¹⁷.

Nevertheless, it is the Tribunal’s view that the MZ-R70 and MZ-R90 also cannot benefit from tariff relief under tariff item No. 9948.00.00. While both models can be connected to a computer via a USB port and PC Link cable, these models were not sold with the computer cable attachment and, in fact, such a cable attachment may not even have been available when the goods were imported.

The service manuals indicate that music may be downloaded digitally through a supplied optical cable from a “CD player, MD player, digital amplifier, etc.”, in the case of the MZ-R70, and from a “CD player, cassette recorder, etc.”, in the case of the MZ-R90.¹⁸ In the case of the MZ-R90, the cable was not supplied, and the service manual makes no mention of computer downloading. The evidence and testimony were to the effect that the PC Link cable was not included in the packages with the goods in issue at the time of importation and, in fact, was supplied as a mail-in offer on purchases of the goods in issue made between December 1, 2000, and January 31, 2001, to those who wished this option.¹⁹ This purchase offer was for a period after the final importation date of the goods in issue in October 2000. Moreover, the advertisement for the PC Link cable, which Sony relied upon as evidence of the fact that the goods in issue are for use in computers, only appeared three months to over 2 1/2 years after the importations. Classification occurs at the time of importation and does not change if the goods are subsequently adapted to perform different functions after importation. As such, it is the Tribunal’s view that the MD recorder cannot benefit from tariff relief under tariff item No. 9948.00.00.

16. See, for example, *Asea Brown Boveri Inc. v. Deputy M.N.R.* (5 November 1996), AP-95-189 (CITT); *Asea Brown Boveri Inc. v. Deputy M.N.R.* (21 December 1999), AP-97-123 (CITT); *Sony of Canada Ltd. v. Deputy M.N.R.* (12 December 1996), AP-95-262 (CITT); *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (29 November 2001), AP-2000-047 (CITT).

17. Department of National Revenue, “Administrative Policy Tariff Item No. 9948.00.00” (27 April 1999) at para. 9.

18. Sony’s brief, Tabs 7, 8.

19. Sony’s addendum, Tab 12.

This leaves the ICD-R100PC and ICD-70, which were imported with the cables and necessary software to be attached to a computer. This cable and software provide for the downloading of files from the IC recorder to the computer and the transfer of the saved sound files from the computer back to the IC recorder. It is the Tribunal's view that these models pass the first hurdle in the interpretation of "attached to", in that they may be considered "physically connected" to computers via the PC Link cable, even though that physical connection is not permanent.

The question of whether these two models are "functionally joined" to a computer when they are inputting data into or downloading data from a computer still needs to be addressed. The Tribunal is of the view that these models are "functionally joined" to the computer. The testimony and the evidence were that, when sound files are input into or downloaded from a computer to portable recording devices, such as the ICD-R100PC and ICD-70, they are required by the computer for the operation of the software provided. When performing these and similar functions, the computer and these two models could be said to form an integrated system. In the Tribunal's opinion, these models actually contribute to the function of an automated data processing machine, in that they allow the computer to input or download sound files. Based on the testimony and evidence, the Tribunal finds that the ICD-R100PC and ICD-70 are "functionally joined" to the computer.

Furthermore, the Tribunal accepts the argument of Sony that there would be little reason, if any, to purchase an IC recorder *with* a PC Link cable and PC Link software, rather than a normal dictaphone, magnetic or digital, if it is not going to be used with a computer. The evidence before the Tribunal is that these models were more expensive than voice recorders not intended for use with computers.

With respect to the issue of primary function, this was addressed in *PHD Canada*, where "the Tribunal considered the . . . arguments that the music CDs must play a 'primary function' or must be 'actually used' in the CD-ROM drive in order for the goods in issue to be 'for use in' and qualify for tariff relief."²⁰ In that case, the Tribunal found that there was no merit to these arguments, and its decision did not turn on whether the music CDs played a "primary function" or were "actually used" in the CD-ROM drive. The Tribunal finds, in this case, as in *PHD Canada*, that the arguments concerning "primary function" have no merit.

Finally, concerning the arguments made that the goods in issue must be "solely" or "principally" used in automatic data processing machines, the Tribunal is not convinced by these arguments. In the Tribunal's opinion, had tariff item No. 9948.00.00 been meant to be interpreted more narrowly, the terms "solely" or "principally" would have been added to the tariff item.

On the basis of the foregoing analysis, the Tribunal finds that the ICD-R100PC and ICD-70 are "for use in" "automatic data processing machines" and, as a result, should benefit from tariff relief under tariff item No. 9948.00.00.

The Tribunal finds that the MZ-R70, MZ-R90 and ICD-MS1 are properly classified under tariff item No. 8520.90.90 as other magnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device. For the foregoing reasons, these models are not "for use in" "automatic data processing machines" and cannot benefit from tariff relief under tariff item No. 9948.00.00.

20. *PHD Canada* at 10.

Therefore, the appeal is allowed in part.

Patricia M. Close
Patricia M. Close
Presiding Member