CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, June 3, 1992

Appeal No. 2566

IN THE MATTER OF an appeal heard on April 13, 1992, under section 47 of the *Customs Act*, R.S.C., 1970, c. C-40;

AND IN THE MATTER OF a re-determination of the Deputy Minister of National Revenue for Customs and Excise, dated March 26, 1986, under section 46 of the *Customs Act*.

BETWEEN

UNISYS CANADA INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The B7900 Burroughs computer and printers are classified under tariff item 69605-1 of the *Customs Tariff* as apparatus not available from production in Canada which are used directly in teaching and research by a university.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. 2566

UNISYS CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

The goods in issue are data processing machines and apparatus consisting of a B7900 Burroughs computer and printers. The issue is whether these goods should be classified, as contended by the appellant, under tariff item 69605-1 of the Customs Tariff as "Apparatus ... that are not available from production in Canada ... for use directly in teaching or research ..." by a university or, as determined by the respondent, whether the computer, as well as its related equipment, and the printers are properly classified as "Electronic data processing machines and apparatus, peripheral equipment for use therewith ..." and as "matrix printers" under tariff items 41417-1 and 41417-2, respectively. More precisely, and given the parties' admissions, the remaining question to determine in this appeal is whether tariff item 69605-1 applies where a qualified end user uses the goods part of the time for purposes other than the two specific uses provided by the tariff item, namely, teaching and research.

HELD: *The appeal is allowed. Had Parliament intended to limit the exemption to goods used exclusively in research or teaching, the Tribunal is of the view that it would have stated so explicitly. Taking into account that a computer, by nature, can accomplish functions other than those relating to teaching and research, the Tribunal also finds that it would create a financial burden, not intended by Parliament, to institutions such as universities if they were denied the possibility to use, for administrative purposes, a computer purchased first and foremost for use directly in teaching and research in accordance with tariff item 69605-1.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*April 13, 1992*
Date of Decision:	*June 3, 1992*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Arthur B. Trudeau, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Lawrence L. Herman, for the appellant* *Brian Saunders, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 2566

UNISYS CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 47 of the *Customs Act*[1] (the Act) from a re-determination made by the Deputy Minister of National Revenue for Customs and Excise. The goods in issue are data processing machines and apparatus consisting of a B7900 Burroughs computer and printers. The goods were manufactured by Burroughs Corporation, Detroit, Michigan, and sold to Brock University, St. Catharines, Ontario, by Burroughs Canada, the predecessor of Unisys Canada Inc., in July 1984.

The issue is whether these goods should be classified, as contended by the appellant, under tariff item 69605-1 of the *Customs Tariff*[2] as "Apparatus ... that are not available from production in Canada ... for use directly in teaching or research ... " by a university or, as determined by the respondent, whether the computer, as well as its related equipment, and the printers are properly classified as "Electronic data processing machines and apparatus, peripheral equipment for use therewith ... " and as "matrix printers" under tariff items 41417-1 and 41417-2, respectively.

Tariff item 69605-1, which provides a duty-free treatment, reads as follows:

> Apparatus, utensils and instruments ... that are not available from production in Canada; parts of the foregoing
>
> All the foregoing when for use
>
> (a) directly in teaching or research by any of the following organizations, namely:
>
> (i) any elementary or secondary school, school for the handicapped, university, community college or seminary of learning in Canada,

1. R.S.C., 1970, c. C-40.
2. R.S.C., 1970, c. C-41.

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(ii) any educational or research organization named in Schedule II to the *Financial Administration Act* and any similar educational or research organization established by or under the authority of a provincial government,

(iii) any non-governmental organization operating on a non-profit basis that is incorporated or established in Canada solely for educational purposes or solely for the purpose of carrying out research designed to benefit the public at large, and

(iv) any school, either separately incorporated in Canada or, if not incorporated, not related in any manner to non-qualifying organizations, solely established to offer instruction intended to provide individuals with the skills required for a trade or other gainful occupation or to increase skills or proficiency therein; or

(b) in the conservation, restoration, exhibition, circulation or study of artifacts, specimens, records, works of art and library collections by any of the following organizations, namely:

(i) libraries, and

(ii) art galleries, archives, historical houses and sites, zoological gardens, planetaria, botanical gardens, aquaria, nature centres and other museums,

if the organization operates on a non-profit basis and offers its services to the public generally.

Section 105 of the *Customs Act*, chapter C-40 of the Revised Statutes of Canada, 1970, applies in respect of goods imported under this tariff item only during the period ending five years after the later of the date the goods were first acquired by an organization mentioned herein or the date the goods were entered for consumption.

It was admitted by the respondent that the end user of the goods, namely, Brock University (the University), was a qualified end user for the purpose of tariff item 69605-1. It was also admitted by parties in their brief that 77 percent of the running time of the system was used for teaching and research in 1984 and 1985, which is less than the 85.3 percent indicated on the end user's exemption certificate. There is also no question that the goods were not available from production in Canada.

Given the parties' admissions, the sole question is to determine whether tariff item 69605-1 applies where a qualified end user used the goods part of the time for purposes other than the two specific uses provided by the tariff item, namely, teaching and research.

At the hearing, the appellant called as a witness Mr. Donald John Adams. Mr. Adams has been the Director of Computing and Communications Services at Brock University since March 1986, that is, two years after the goods were purchased. The witness described the B7900 computer as a main-frame computer to which various terminals can be attached throughout the University. He explained that the impetus for the purchase of the computer came from the academic community, namely, the students, the faculty members, etc., who felt that their current computing system was inadequate.

Mr. Adams described the methods used to compute the time of utilization of the system. One method uses a machine output that provides a summary of the users who logged onto the system. According to this method, the running time of the system that was used for teaching and research was 77 percent in 1984 and 1985, 69.15 percent in 1986, 67.99 percent in 1987 and, lastly, 70.89 percent in 1988. The balance of time was used for administrative purposes. Mr. Adams introduced Exhibit A-1 entitled Brock University B7900 Academic Usage which illustrated a second method of calculating the average academic use of the computer for the years from 1984 to 1990. This method evaluates the system utilization by indicating the extent to which the total capacity of the system was used for purposes of teaching and research. For the years from 1984 to 1990 inclusive, such utilization varied from 84.65 to 35.63 percent per month. At the time that the computer was phased out in 1991, the percentage of use for teaching and research had declined to approximately 19 percent.

The witness stated that the computer was used in individual research during sabbatical leave or with respect to research contracts with a government agency or corporation and that it was also utilized by graduate students. In addition, the computer was used directly in teaching computer sciences and as an aid in other teaching matters. The remaining percentage of use included administrative functions such as producing a payroll bank deposit, preparing accounts payable cheques to pay the University suppliers, keeping inventories for insurance purposes and registering students. However, according to the witness, the time when the computer was not used for research and teaching also included a portion of time when it was idle, especially from 1989 when both the administrative and the academic users stopped using the B7900 computer. And, in fact, the computer which was state-of-the-art in 1983 is now totally obsolete according to Mr. Adams. In cross-examination, the witness also revealed that a set of internal checks and balances was in place to ensure that the computer was not used for purposes other than teaching and research by the academic community.

In argument, the appellant submitted that Parliament has chosen to use the word "directly" and not the words "only" or "exclusively" in tariff item 69605-1 and that the word "directly" lacks any connotation of exclusivity. The interpretation of the word "directly" in Memorandum D10-11-10,[3] counsel submitted, suggests that the purpose of that condition is to exclude, from the tariff item, goods such as air conditioners or humidifiers that are not used directly in teaching or research. Counsel also affirmed that the word "directly" in the *Excise Tax Act* has not been interpreted as meaning solely or exclusively. According to the decision of the Nova Scotia Court of Appeal in *Michelin Tires Manufacturing (Canada) Ltd.*,[4] the word "directly" indeed does not mean "exclusively." Besides, in *Irving Oil Limited, Foster Wheeler Limited and Canaport Limited v. The Provincial Secretary of the Province of New Brunswick*,[5] a decision that dealt with the issue of whether certain equipment was used directly during the production of goods for sale or use for the purpose of *The Social Services and Education Tax Act*, the Supreme Court of Canada stated that "... the statutory requirement of direct use is fulfilled irrespective of the percentage of use that may be ascribed to the process of manufacture as opposed to other processes such as storage and distribution." Counsel therefore submitted that the percentage of use is irrelevant for purposes of tariff item 69605-1, as long as the goods were used directly in teaching and research.

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3. Tariff Items 69605-1 and 69605-2, Revenue Canada, Customs and Excise, Ottawa, January 1, 1985.
4. (1976), 14 A.P.R. 150.
5. [1980] 1 S.C.R. 787, at 796.

Counsel for the respondent agreed that the word "directly" does not mean "solely" or "exclusively." However, counsel maintained that, in the absence of any other end uses in tariff item 69605-1, no additional uses other than teaching and research are permitted. Counsel also argued that, by providing universities with a specific end-use exemption unlike the total exemption provided to the goods for the use of the Governor General as in tariff item 70700-1, Parliament qualified the exemption only to goods used in teaching and research. Moreover, according to counsel, the *Excise Tax Act* and the *Customs Tariff* differ in both structure and content and, therefore, any use of an interpretation given to a word in the former act does not mean that the interpretation automatically applies to the same word in the latter legislation. In fact, counsel submitted that tariff item 69605-1 must be read in the context of section 105 of the Act, which provides that a person, who diverts goods to a use other than that for which they were imported, become liable to a duty payable upon like goods. According to counsel, section 105 of the Act colours the interpretation to be given to tariff item 69605-1, particularly with respect to the two uses provided by the tariff item, namely, teaching and research. Counsel indeed concluded that the reference to section 105 in tariff item 69605-1 supports a strict interpretation of the two sole uses specifically permitted by Parliament in tariff item 69605-1.

The Tribunal agrees with counsel for the respondent that decisions dealing with the meaning of the word "directly" in other legislation in *pari materia* are not appropriate to determine the meaning of that word in tariff item 69605-1. In the decisions relied upon by the appellant's counsel, the word "directly" was indeed linked to the words "production" and/or "fabrication," which has influenced the interpretation of that word by the courts.

On the other hand, the Tribunal cannot accept the respondent's contention that the reference to section 105 of the Act in tariff item 69605-1 means that Parliament intended to limit the uses of apparatus, as the computers in issue, to teaching and research alone.

The scheme of tariff item 69605-1 clearly shows that its purpose is to provide a duty-free access to goods imported by specific organizations involved in activities such as education, research, development of personal skills, culture and arts. The sole requirement made with respect to the goods in paragraph (*a*) to the tariff item is that they must be used directly in teaching or research. As indicated by the wording of subparagraphs (iii) and (iv) of paragraph (*a*) above, when Parliament intends to limit the scope of the exemption, it is expressly stated. Indeed, Parliament has used the word "solely" in these two subparagraphs in describing the activities in which organizations contemplated by the tariff item should be engaged. Had Parliament intended to limit the exemption to goods exclusively used in research or teaching, the Tribunal is of the view that it would have stated so as well. The Tribunal's interpretation is in keeping with paragraph 23 of Memorandum D10-11-10 which explains that goods related to supportive or peripheral activities such as air conditioners and humidifiers are excluded from the scope of the expression "for use directly in research."

Moreover, the only indication that the Tribunal sees in the reference made to section 105 of the Act by tariff item 69605-1 is that, in interpreting the item and determining whether a diversion occurred, one must take into account the nature of the goods and their utilization by the end user. Taking into account that a computer, by nature, can accomplish functions other than those relating to teaching and research, the Tribunal finds that it would create a financial burden, not intended by Parliament, to institutions such as universities if they were denied the possibility to use, for administrative purposes, a computer purchased first and foremost, as established by the evidence, for use directly in teaching and research in accordance with tariff item 69605-1.

Lastly, the Tribunal finds that, in interpreting tariff item 69605-1, an important factor is the life span of the goods in issue, specially in view of the five-year monitoring period prescribed in the tariff

item's paragraph referring to section 105 of the Act. For instance, the Tribunal received evidence that the users of the computer in issue progressively reduced use of the system commencing in 1989, that is, between four and five years after its importation, and that the system was obsolete by 1991. Therefore, although not determinant in this case, one must not adopt a strict interpretation of tariff item 69605-1 on the sole ground that it makes a reference to section 105 of the Act and to a five-year monitoring period. In the Tribunal's view, each case must be dealt with on its own merits.

For the foregoing reasons, the appeal is allowed.

Sidney A. Fraleigh
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Member