



Ottawa, Thursday, November 29, 2001

Appeal No. AP-2000-047

IN THE MATTER OF an appeal heard on August 13, 2001,  
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1,  
as it read prior to the amendments made by *Customs Tariff*,  
S.C. 1997, c.36, ss. 166, 169;

AND IN THE MATTER OF decisions of the Commissioner of  
the Canada Customs and Revenue Agency dated August 23, 2000,  
with respect to a request for redetermination under  
subsection 63(3) of the former *Customs Act*.

**BETWEEN**

**IMATION CANADA INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Richard Lafontaine  
Richard Lafontaine  
Member

Ellen Fry  
Ellen Fry  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-2000-047

IMATION CANADA INC.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY

Respondent

This is an appeal under subsection 67(1) of the former *Customs Act* from decisions of the Commissioner of the Canada Customs and Revenue Agency made under subsection 63(3) of the former *Customs Act* on August 23, 2000. The issue in this appeal is whether various laser imaging films imported by the appellant between February 7 and June 12, 1997, qualify for the benefits of Code 2546, as claimed by the appellant.

**HELD:** The appeal is allowed. The Tribunal finds that the laser imaging films are “for use in” the laser imagers, in that the two are functionally joined. The technical functions of the laser imager exist only to make an image on the film and, conversely, the film exists for the exclusive benefit of the laser imager. As a result, Code 2546 applies to the goods in issue.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: August 13, 2001  
Date of Decision: November 29, 2001

Tribunal Members: Patricia M. Close, Presiding Member  
Richard Lafontaine, Member  
Ellen Fry, Member

Counsel for the Tribunal: Eric Wildhaber

Clerk of the Tribunal: Margaret Fisher

Appearances: Michael Sherbo and Tony Fischetti, for the appellant  
Ritu Banerjee, for the respondent



Appeal No. AP-2000-047

IMATION CANADA INC.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY

Respondent

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member  
RICHARD LAFONTAINE, Member  
ELLEN FRY, Member

**REASONS FOR DECISION**

This is an appeal under subsection 67(1) of the former *Customs Act*<sup>1</sup> from decisions of the Commissioner of the Canada Customs and Revenue Agency made under subsection 63(3) of the former Act on August 23, 2000. The issue in this appeal is whether various laser imaging films imported by the appellant between February 7 and June 12, 1997, qualify for the benefits of Code 2546 of Schedule II to the former *Customs Tariff*,<sup>2</sup> as claimed by the appellant.

The relevant tariff nomenclature reads as follows:

37.01	Photographic plates and film in the flat, sensitized, unexposed, of any material other than paper, paperboard or textiles; instant print film in the flat, sensitized, unexposed, whether or not in packs.
3701.30	-Other plates and film, with any side exceeding 255 mm
3701.30.20	---Film
90.18	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments.
[Code] 2546	<b>Articles</b> for use in the goods of heading No. 90.18 or 90.22, or of tariff item No. 8419.20.10, 9019.20.00, 9021.50.00, 9402.10.10 or 9402.90.10.

The parties to this appeal provided the Tribunal with an agreed statement of facts that reads, in part, as follows:<sup>3</sup>

1. Laser imagers are classified under heading 90.18 in Schedule I of the Customs Tariff (Respondent's Brief, paragraph 17).
2. The goods at issue are laser-imaging film cartridges.
3. The laser imaging-film cartridges at issue are physically connected to the laser imagers (Respondent's Brief, paragraphs 24, 25 and 26).
4. The film cartridges can only be used with the laser imagers.
5. The goods at issue fall under tariff item 3701.30.20.

1. R.S.C. 1985 (2d Supp.), c. 1, as it read prior to the amendments made by *Customs Tariff*, S.C. 1997, c.36, ss. 166, 169 [hereinafter Act].
2. R.S.C. 1985 (3d Supp.), c. 41. [hereinafter former *Customs Tariff*].
3. Tribunal Exhibit AP-200-047-22. This agreed statement of facts was accepted as read into the record at the time of the hearing. See *Transcript of Public Hearing*, 13 August 2001, at 3-4.

## EVIDENCE

Mr. Chris A. Austin, Business Manager, Digital Solutions and Services & Corporate Logistics, Imation Canada Inc., testified on behalf of the appellant. He gave an overview of the corporate ownership of the appellant, as well as an overview of its main activities at the time of importation of the goods in issue.

Mr. Darrell L. Berge, Technical Support Manager, Imation Digital Solutions & Services, a division of Imation Canada Inc., also testified on behalf of the appellant. Mr. Berge indicated that his responsibilities pertain to service engineering training and technical support and that, from 1993 to 1997, he acted as a service engineer who dealt with the commercialization of medical laser imagers. The appellant's request that Mr. Berge be qualified as an expert on the subject of the laser imaging film cartridges in issue was not contested and was granted by the Tribunal.

Mr. Berge confirmed that the goods in issue consist of three different types of laser imaging films, namely, DryView blue (DVB) film, high-quality blue (HQB) film (flat and sensitized and greater than 255 mm) and infra-red blue (IRB) film. Mr. Berge indicated that the HQB film comes in an identical cassette to that of the DVB film, but is wet imaged, whereas DVB film is dry-processed. HQB film is for use in a previous model, the HQB laser imager, which functions in essentially the same manner as does the DVB laser imager. While the HQB laser imager has an automatic calibration system identical to that of the DVB laser imager, the laser imager that uses IRB film possesses a manual calibration system that is external to the imager. Mr. Berge also confirmed that the IRB film, like the HQB film, is wet imaged. The IRB film, however, does not come in a cartridge like the DVB and HQB films; instead, it comes in a light-proof box that needs to be opened in a darkroom, where the film is transferred into a metal canister that is then loaded into the laser imager.

Mr. Berge described the physical exhibit, the DVB film, as being a plastic cartridge that is hermetically sealed by a foil pack, which contains a light-sensitive dry silver film. He remarked that the physical exhibit filed with the Tribunal bears a Kodak label because that company acquired the appellant's production of this line in 1998; at the time of importation, the goods in issue would have been manufactured by the appellant and borne its label.

Mr. Berge also indicated that a bar code containing various technical facts, such as film type and lot number, is found on the bottom of the cartridge. He testified that the laser imager into which the cartridge is to be placed is opened by pressing a button that gives access to a supply drawer where the cartridge sits under detents before the drawer is closed. At that point, a bar mechanism grabs onto teeth in the cartridge and folds back the protective foil wrapping. Simultaneously, the laser imager reads the bar code on the cartridge and keeps track of the information that it contains. A calibration routine appropriate for the type of film in the cartridge follows. The film is then thermally processed on a drum; as the film approaches the exit of the machine, a densitometer reads and verifies the density of the processed image to make sure that all the steps followed are correct. Mr. Berge testified that the imager creates a density patch (D-patch) on each piece of film that runs through it; this automatic quality control system allows the imager to ensure that the base density reading does not change.

Mr. Berge stated that the laser imager has no output, such as a viewing screen, other than the laser imaging film and only stores data on the film. As such, he testified that the laser imager is of no practical use without the film. When a calibration routine detects unsatisfactory results, the system will emit a warning message that it is out of closed-loop operation and that it should not be used for making medical diagnostic images. Mr. Berge also testified that the goods in issue and the laser imagers are "functionally joined" by way of various sensors that detect the progression of the film through the imaging process and trigger certain operations, including signalling the densitometer to read the D-patch on a film.

Mr. Berge testified that the laser imager could not function without film; it will not operate without a film cartridge inserted into it. Mr. Berge also testified that the DVB film and DVB laser imager were designed for each other as a system, each being tuned for the other; the physical exhibit filed with the Tribunal will not work in any other imaging system, nor does any other manufacturer produce a cartridge that can fit into that imaging system. Aside from Kodak, which now markets the ex-Imation system, Mr. Berge testified that Konica is the other competing manufacturer of laser imaging technology.

## DECISION

As a preliminary matter, the Tribunal notes that the appellant filed only one type of laser imaging film cartridge as an exhibit, whereas there were three different types of laser imaging film imported, namely, DVB, HQB and IRB films. Based on the evidence, the Tribunal is of the view that the cartridge filed as an exhibit is reasonably representative of the DVB and HQB cartridges actually imported and that the exhibit could be used by the Tribunal to assess the workings of the IRB film, which did not come in a cartridge, but in a light protective box and was then transferred to a canister before being loaded into the laser imager, and required manual calibration. For purposes of its decision, the Tribunal finds that the interaction between the goods in issue and the respective laser imagers into which they are loaded is basically similar.

The sole remaining issue in this appeal is whether the goods in issue qualify for the benefits of Code 2546 of Schedule II to the former *Customs Tariff*, which lists, *inter alia*, “[a]rticles **for use in** the goods of heading No. 90.18” [emphasis added]. In other words, the issue is whether the laser imaging films are “for use in” the laser imagers, as that phrase is defined in the former *Customs Tariff*.

Section 4 of the former *Customs Tariff* states:

The expression “for use in”, wherever it occurs in a tariff item in Schedule I or a code in Schedule II in relation to goods, means, unless the context otherwise requires, that the goods must be wrought into, attached to or incorporated into other goods as provided for in that tariff item or code.

Both parties argued that the expression “for use in” requires that goods be both physically and functionally joined. Because the parties agreed that the goods were physically joined, their sole disagreement was, therefore, with respect to whether the goods in issue were functionally joined to the laser imagers that were described in evidence. In support of their respective positions, the parties referred to pronouncements made by the Tribunal in Appeal Nos. AP-95-262,<sup>4</sup> AP-97-137,<sup>5</sup> and AP-97-124 and AP-97-125.<sup>6</sup>

In the first of these appeals, *Sony*, the Tribunal ruled that the tape cartridges in question were “for use in” tape drives given “[t]he extent to which the tape cartridges become physically connected and are functionally joined to the tape drives”.<sup>7</sup> This case relied on *The Oxford English Dictionary* definition to conclude that the word “attach” or “attached” means “to connect, to fasten or to join, or joined functionally.”

In the other two appeals, *ABB (1999)* and *ABB (2000)*, the Tribunal ruled on whether certain goods were for use in “process control apparatus”. *ABB (1999)* concerned certain resistors and capacitors, while *ABB (2000)* pertained to certain transformers. The Tribunal, in these appeals, adopted “the interpretation of the term ‘attached to’ as it was used in *Sony* whereby goods are attached to other goods if they are ‘physically connected and are functionally joined’ to the latter.”<sup>8</sup> In both cases, the Tribunal found that the

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4. *Sony Canada v. DMNR* (12 December 1996) (CITT) [hereinafter *Sony*].

5. *Asea Brown Boveri v. DMNR* (21 December 1999) (CITT) [hereinafter *ABB (1999)*].

6. *Asea Brown Boveri v. DMNR* (21 February 2000) (CITT) [hereinafter *ABB (2000)*].

7. See *Sony* at 6.

8. *ABB (1999)* at 7; *ABB (2000)* at 4.

goods in issue were physically connected to the process control apparatus, but not functionally joined. Hence, the goods were not “for use in” the process control apparatus.

The Tribunal agrees with the conclusion in the foregoing cases that the expression “for use in” requires that goods be both physically and functionally joined. It is the Tribunal’s opinion that the concept of being joined functionally is an essential element in the interpretation of the term “to attach” in the context of “for use in”. Without the element of being functionally joined, the sense of “for use in” could be incomplete. For example, a boat tied to a pier is physically attached to the pier, but is hardly for use in that pier.<sup>9</sup>

While the Tribunal views the element of functionality in the term “attached to” as being essential, it believes that the concept of “functionally joined” requires some clarification. It agrees with the respondent that *ABB (1999)* and *ABB (2000)* stand for the proposition that something that, from a functional perspective, has only “a very tenuous relationship to a control processing unit cannot be considered functionally joined.”<sup>10</sup> The functional relationship between the goods in question in *ABB (1999)* and *ABB (2000)* and their host goods, the process control apparatus, was so tenuous that the function of one product had virtually nothing to do with the other.

The Tribunal is of the view that the concept of “functionally joined” simply means that the goods “for use in” the host goods have a functional relationship (be it active or passive) with the host goods. In this case, the film is integral to the functioning of the laser imagers. The technical functions of the laser imager exist only to make an image on the film; conversely, as indicated in the agreed statement of facts, the film exists for the exclusive benefit of the laser imager. Further, the Tribunal heard evidence that each has been designed specifically for use with the other. Without being joined, the goods are virtually useless; on one hand, the film remains blank and, on the other, the laser imager cannot produce an image.

For these reasons, the Tribunal finds that the laser imager and the laser imaging film are functionally joined. As a result, the goods in issue are for use in the laser imagers, goods that are classified in heading No. 90.18 and that qualify for duty relief under Code 2546. Consequently, the Tribunal allows the appeal.

Patricia M. Close

Patricia M. Close  
Presiding Member

Richard Lafontaine

Richard Lafontaine  
Member

Ellen Fry

Ellen Fry  
Member

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9. The *Gage Canadian Dictionary*, 1997, gives the following example with respect to this limited sense of “attached”: “she attached the boat to the pier by means of a rope”, *s. v.* “attach”.

10. *Transcript of Public Argument*, 13 August 2001, at 17.