



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2003-031

Agilent Technologies Canada Inc.

v.

Commissioner of the Canada
Customs and Revenue Agency

*Decision and reasons issued
Wednesday, August 25, 2004*

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IN THE MATTER OF an appeal heard on April 22, 2004, under section 67 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 May 21, 2003, with respect to requests for a further re-determination under subsection 60(1) of the *Customs Act*.

BETWEEN

AGILENT TECHNOLOGIES CANADA INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Richard Lafontaine

Richard Lafontaine
Presiding Member

Zdenek Kvarda

Zdenek Kvarda
Member

Ellen Fry

Ellen Fry
Member

Hélène Nadeau

Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: April 22, 2004

Tribunal Members: Richard Lafontaine, Presiding Member
Zdenek Kvarda, Member
Ellen Fry, Member

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Clerk of the Tribunal: Margaret Fisher

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REASONS FOR DECISION

BACKGROUND

1. This is an appeal under section 67 of the *Customs Act*¹ from decisions of the Commissioner of the Canada Customs and Revenue Agency (CCRA), dated May 21, 2003, made pursuant to subsection 60(4) of the *Act*. The issue in this appeal is whether the Agilent 8664A high-performance radio frequency (RF) signal generator (the product in issue) is properly classified under tariff item No. 8543.20.00 of the schedule to the *Customs Tariff*² as a signal generator, as determined by the CCRA, or should be classified under tariff item No. 9030.40.90 as other instruments and apparatus, specially designed for telecommunications, as claimed by Agilent Technologies Canada Inc. (Agilent). The period of importation was between December 1, 2000, and December 17, 2001, inclusively.

2. The relevant tariff nomenclature is as follows³:

- 85.43 Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter.
- 8543.20.00 --Signal generators
- 90.30 Oscilloscopes, spectrum analyzers and other instruments and apparatus for measuring or checking electrical quantities, excluding meters of heading 90.28; instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionizing radiations.
- 9030.40 -Other instruments and apparatus, specially designed for telecommunications (for example, cross-talk meters, gain measuring instruments, distortion factor meters, psophometers)
- 9030.40.90 ---Other

3. The relevant excerpts from the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁴ are as follows:

[84.79]

For this purpose the following are to be regarded as having “individual functions”:

- (A) Mechanical devices, with or without motors or other driving force, whose function can be performed distinctly from and independently of any other machine or appliance.
- (B) Mechanical devices which cannot perform their function unless they are mounted on another machine or appliance, or are incorporated in a more complex entity, **provided** that this function:
 - (i) is distinct from that which is performed by the machine or appliance whereon they are to be mounted, or by the entity wherein they are to be incorporated, and
 - (ii) does not play an integral and inseparable part in the operation of such machine, appliance or entity.

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.C. 1997, c. 36.

3. All tariff nomenclature remained the same for the course of the period of importation.

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

[85.43]

The electrical appliances and apparatus of this heading must have individual functions. The introductory provisions of Explanatory Note to heading 84.79 concerning machines and mechanical appliances having individual functions apply, *mutatis mutandis*, to the appliances and apparatus of this heading.

The heading includes, *inter alia*:

- (2) **Signal generators.** These are apparatus for the production of electrical signals, of known wave-form and magnitude, at an assignable frequency (high or low frequency, for example). These include, *inter alia*: impulse generators, pattern generators, wobblers (sweep generators).

[90.30]

Apart from the above-mentioned types of instruments or apparatus which generally effect direct measurements, the heading also includes those which supply the operator with certain data from which the quantity to be measured can be calculated (comparative method). This group includes, in particular, **measuring bridges** and **potentiometers**.

4. The product in issue was filed as a physical exhibit with the Tribunal, along with a phase noise test set, a vector signal generator, cables, a personal computer and a monitor.

EVIDENCE

5. Mr. Steve Handy, Manager, Agilent U.S. Customs, testified as to his knowledge of the history of Agilent's various importations of the product in issue in Canada and the United States.

6. Mr. Gary Nichols, Application Specialist, RF and Microwave, at Agilent, testified as an expert witness with specific knowledge of the function and the use of signal generators.

7. Mr. Nichols stated that the product in issue is a signal generator primarily used in the telecommunications industry to provide a reference signal that is used to test whether the phase noise produced by various telecommunications equipment (e.g. a cellular phone) is within an acceptable range.

8. Mr. Nichols described the functioning of an E5501B phase noise test system (the test system), which included the product in issue, a phase noise test set, an E4438C vector signal generator or simulator (the vector signal generator) (Exhibit A-3), a personal computer and a monitor. As a component of the test system, the product in issue produces a reference signal in order to test the phase noise performance of the vector signal generator. Both the product in issue and the vector signal generator are connected to the phase noise test set, which, according to Mr. Nichols, sends data to the personal computer that generates the test results, which are then displayed on the monitor.

9. Mr. Nichols testified that the product in issue is an inseparable component of telecommunications industry test and measuring systems and that it also contains a function generator. He indicated that the function generator gives added functionality to the signal generator, but that the latter is not dependent upon the former. He stated that the product in issue could also be characterized as a sweep generator.

10. Mr. Nichols confirmed to the Tribunal that the product in issue simply emits a signal without measuring anything and that it functions independently and can be purchased separately from the other components of the test system. He further stated that the product in issue can also be used as a local oscillator replacement and has applications outside of communications systems (e.g. as a signal source for

materials testing). He testified that the product in issue serves no function or purpose as a stand-alone device; nevertheless, he agreed that it would indeed generate a signal, albeit useless in his view, if simply plugged into a power source and turned on, but without being connected to any other device. He also explained what a measuring bridge is and how it functions.

11. Dr. Jean-Simon Boulanger, Group Leader, Frequency and Time, Institute for National Measurement Standards, National Research Council of Canada, testified on behalf of the CCRA. He was qualified as an expert witness in the use, purchase and function of signal generators; it was recognized however that he had no direct experience in telecommunications.

12. Dr. Boulanger testified that the function of a signal generator is to generate a signal to which a device under test is compared. In his opinion, signals are not data. In the context of the test system, the signal produced by the device under test, the vector signal generator, is fed into the phase noise test set, as is the reference signal produced by the product in issue. The phase noise test set compares the two signals, and the resulting data (i.e. the residual noise) are fed to the personal computer component of the test system, which displays the test results on the monitor. He testified that the product in issue can also be used in general purpose applications (e.g. to test an amplifier) and as a local oscillator (e.g. to compare two laser lines).

13. Dr. Boulanger stated that the product in issue does not have the built-in capacity to measure anything. He discussed whether it generates data, which, in his opinion, it does not. He gave an overview of the functions and purposes of the following devices: a spectrum analyzer, an oscilloscope, a function generator, a measuring bridge and a potentiometer. In his opinion, the product in issue is a general purpose signal generator that performs an individual function because its purpose is to generate electrical signals at desired frequencies and with specified shapes.

ARGUMENT

14. Agilent submitted that Mr. Nichols' testimony established that the role of the product in issue is to provide data in the checking and measurement function of the test system. It further submitted that this evidence also shows that the product in issue is an integral part of a device that is specific to the telecommunications industry.

15. Agilent relied on Memorandum D11-11-2.⁵ It also cited the Canadian Explanatory Notes⁶ to tariff item No. 9018.90.00⁷ in support of the proposition that not all signal generators (e.g. patient simulators) are

5. Department of National Revenue, D Memorandum, "Policy Content of Classification of National Customs Rulings (NCRs)" (31 January 1995). Appendix B reads, in part, as follows: "The function generators have multiple operation modes such as providing continuous oscillation, generating a complete waveform any number of times".

6. Published by the Nomenclature and Tariff Treatment Policy Division of the Trade Policy and Interpretation Directorate, Department of National Revenue, 1998

7. The Canadian Explanatory Notes to tariff item No. 9018.90.00 are as follows:

Patient simulators have in the past been classified as signal generators. It has been established that the generating of a signal is only one aspect of the patient simulators.

A patient simulator is a dual purpose instrument or apparatus, designed to check and calibrate medical monitors, analyzers, etc. to ensure that such instruments are functioning to specification and also to teach medical practitioners to recognize and diagnose a variety of simulated physiological conditions and initiate the necessary treatment.

Accordingly, the patient simulators being dedicated to be used in the medical sciences, are classified under tariff item No. 9018.90.00, as appliances used in medical sciences.

classifiable in heading No. 85.43. In this respect, it also pointed to lasers, which, according to expert testimony, are a type of signal generator, classifiable in heading No. 90.13 rather than in heading No. 85.43. It also referred to a U.S. customs ruling on purportedly identical or similar goods.⁸

16. Agilent argued that the product in issue does *not* have an “individual function”, as defined in the *Explanatory Notes* to heading No. 85.43,⁹ and submitted that the terms of the *Explanatory Notes* to heading No. 90.30 should be interpreted as providing for the inclusion of certain devices that do not perform measurements, such as transient phenomena recorders.

17. The CCRA submitted that the product in issue is a signal generator of tariff item No. 8543.20.00 because it performs an individual function, that of producing an electrical signal, and because it does not perform, in and of itself, checking or measuring functions. Therefore, it argued, the product in issue cannot be classified in heading No. 90.30. The CCRA noted that Memorandum D-11-11-2 is no longer current administrative policy.

DECISION

18. The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules for the Interpretation of the Harmonized System*¹⁰ and the *Canadian Rules*.¹¹ The *General Rules* are comprised of six rules structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.

19. Rule 1 of the *General Rules* is 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 following provisions.

20. Moreover, 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 *General Rules*.

21. 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*¹² and the *Explanatory Notes*.

22. Pursuant to Rules 1 and 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, the Tribunal finds that the product in issue is properly classified under tariff item No. 8543.20.00 as a signal generator.

8. Appellant’s Brief, para. 31.

9. The definition of “individual function” that is contained in the *Explanatory Notes* to heading No. 84.79 applies to the use of that term in the *Explanatory Notes* to heading No. 85.43.

10. *Supra* note 2, schedule [*General Rules*].

11. *Ibid.*

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

23. The parties did not dispute that the product in issue is a signal generator and that it produces electrical signals.¹³ Rather, each party's expert witness confirmed that the product in issue is indeed an electrical signal generator. The Tribunal notes that both subheading No. 8543.20 and tariff item No. 8543.20.00 specifically mention "signal generators". The Tribunal also notes that the *Explanatory Notes* to heading No. 85.43 define "signal generators", in part, as "apparatus for the production of electrical signals . . . at an assignable frequency". The Tribunal further remarks that Agilent's expert witness indicated that the product in issue could be characterized as a "sweep generator",¹⁴ a product that is specifically mentioned in the *Explanatory Notes* to heading No. 85.43 as an example of "signal generators".

24. The *Explanatory Notes* to heading No. 85.43 further indicate that the apparatus of that heading must have "individual functions", which terms are defined by the *Explanatory Notes* to heading No. 84.79. As previously noted, the parties disagreed on whether the product in issue has an individual function.

25. The Tribunal finds that the product in issue has an individual function, that of producing electrical signals at specific frequencies and with specific shapes.¹⁵ In the Tribunal's view, the evidence shows that the product in issue performs this function distinctly from, and independently of, any other machine or appliance and, to do so, it need not be incorporated in a more complex entity, such as the test system.

26. Accordingly, having regard to the *Explanatory Notes* to heading Nos. 85.43 and 84.79, the Tribunal finds that the product in issue is a signal generator and is properly classifiable under tariff item No. 8543.20.00.

27. The Tribunal also notes that classification of the product in issue in heading No. 90.30 would be precluded because it has no measuring or known checking capability. Heading No. 90.30 covers instruments and apparatus "for measuring or checking electrical quantities". Agilent's expert witness testified that in none of the importations at issue did the product in issue have measuring capability.¹⁶ Furthermore, the evidence did not indicate that the product in issue has any "checking" capability. Moreover, the evidence with respect to various devices named in the *Explanatory Notes* to heading No. 90.30, including measuring bridges and potentiometers, is to the effect that they do indeed perform a measuring function.¹⁷

28. Finally, the Tribunal notes Agilent's argument with respect to "lasers", "patient simulators" and "transient phenomena recorders". In the Tribunal's view, goods must be capable of measuring or checking electrical quantities in order to be classified in heading No. 90.30. Of the three goods mentioned, only transient phenomena recorders were mentioned in the context of heading No. 90.30. However, no evidence was submitted with respect to the functional or operational characteristics of these recorders. Accordingly, the Tribunal is unable to determine whether they are incapable of measuring or checking electrical quantities, in support of Agilent's submission that goods without measuring capability are classifiable in heading No. 90.30.

13. Agilent specified that its position was that the product in issue is a signal generator, but not of the kind that is properly classified under tariff item No. 8543.20.00. See *Transcript of Public Argument*, 22 April 2004 at 28.

14. *Transcript of Public Hearing*, 22 April 2004 at 46, 61.

15. *Ibid.* at 95.

16. *Ibid.* at 48-51.

17. *Ibid.* at 47-48, 114.

29. For the foregoing reasons, the appeal is dismissed.

Richard Lafontaine

Richard Lafontaine
Presiding Member

Zdenek Kvarda

Zdenek Kvarda
Member

Ellen Fry

Ellen Fry
Member