Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Tuesday, February 24, 2004

Appeal No. AP-2002-111

IN THE MATTER OF an appeal heard on July 16, 2003, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the Canada Customs and Revenue Agency dated November 14, 2002, with respect to a request for re-determination under subsection 60(1) of the *Customs Act*.

BETWEEN

BIONOVA MEDICAL INC. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-2002-111

BIONOVA MEDICAL INC. **Appellant**

AND

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

This is an appeal pursuant to section 67 of the *Customs Act* from a decision of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), dated November 14, 2002, under subsection 60(1) regarding the classification of 2 kinds of self-adhesive magnets and 11 kinds of magnets with textile supports. BIOnova Medical Inc. (BIOnova) imported the goods on May 31, 2000, as the exclusive Canadian distributor for BIOflex® Medical Magnetics, Inc., the U.S.-based manufacturer.

The issue in this appeal is whether the self-adhesive magnets are properly classified under tariff item No. 8505.19.90 as other permanent magnets, and the magnets with textile supports, under tariff item No. 6307.90.99 as other made up articles of other textile materials, as determined by the Commissioner. BIOnova claimed that all the goods in issue should be classified in heading No. 90.18 as instruments and appliances used in medical, surgical, dental or veterinary sciences or, in the alternative, in heading No. 90.21 as other appliances which are worn or carried to compensate for a defect or disability.

HELD: The appeal is dismissed. The Tribunal finds that the self-adhesive magnets are properly classified under tariff item No. 8505.19.90 as other permanent magnets and that the magnets with textile supports should be classified under the same tariff item.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 16, 2003
Date of Decision:	February 24, 2004
Tribunal Members:	Pierre Gosselin, Presiding Member James A. Ogilvy, Member Ellen Fry, Member
Counsel for the Tribunal:	Reagan Walker
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Gary Moscowitz, for the appellant Richard Casanova, for the respondent

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Appeal No. AP-2002-111

BIONOVA MEDICAL INC. **Appellant**

AND

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

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
JAMES A. OGILVY, Member
ELLEN FRY, Member

REASONS FOR DECISION

This is an appeal pursuant to section 67 of the *Customs Act*[1] from a decision of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), dated November 14, 2002, under subsection 60(1) regarding the classification of 2 kinds of self-adhesive magnets and 11 kinds of magnets with textile supports. BIOnova Medical Inc. (BIOnova) imported the goods on May 31, 2000, as the exclusive Canadian distributor for BIOflex® Medical Magnetics, Inc. (BIOflex®), the U.S.-based manufacturer.

The issue in this appeal is whether the self-adhesive magnets are properly classified under tariff item No. 8505.19.90 of the schedule to the *Customs Tariff*[2] as other permanent magnets, and the magnets with textile supports, under tariff item No. 6307.90.99 as other made up articles of other textile materials, as determined by the Commissioner. BIOnova claimed that all the goods in issue should be classified in heading No. 90.18 as instruments and appliances used in medical, surgical, dental or veterinary sciences or, in the alternative, in heading No. 90.21 as other appliances which are worn or carried to compensate for a defect or disability.

The relevant nomenclature reads as follows:

63.07	Other made up articles, including dress patterns.
6307.90	-Other
6307.90.99	----Of other textile materials
85.05	Electro-magnets; permanent magnets and articles intended to become permanent magnets after magnetization; electro-magnetic or permanent magnet chucks, clamps and similar holding devices; electro-magnetic couplings, clutches and brakes; electro-magnetic lifting heads.
	-Permanent magnets and articles intended to become permanent magnets after magnetization:

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.

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85.05.19 --Other

85.05.19.90 ---Other

90.18 Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments.

[9018.10] -Electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters):

90.21 Orthopaedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability.

9021.10.00 Orthopaedic or fracture appliances

EVIDENCE

A description of the 13 kinds of goods in issue is contained in Part II of the Commissioner's brief. A sample of one of the self-adhesive magnets and of one of the magnets with textile supports was attached to BIOflex®'s information brief. Samples of the remaining goods in issue were not, however, filed in evidence.

In support of its contention that the goods in issue were medical instruments within the meaning of heading No. 90.18, BIOnova tendered evidence of their use by certain physicians and other health care professionals for relieving pain, accelerating the natural healing process and improving circulation.[3] Dr. Ted Zablotsky, President of BIOflex®, testified that the company's magnets use a patented[4] proprietary concentric circle design that brings about the claimed therapeutic effects and that BIOflex®'s magnet was the only one that was clinically proven to manifest therapeutic properties. The textile supports were designed to ensure that the magnets would be lined up correctly with the area to be treated when the user donned the magnets. The elasticity in the fabric is simply to ensure a custom fit.

Mr. Dieter Peschmann, President of BIOnova, testified that the company markets the goods in issue strictly to health care providers, that it possesses a Medical Devices Establishment Licence, which is required under the *Medical Devices Regulations*[5] if an importer intends to bring a medical product into Canada and market it with medical claims, and that the products are considered Class I medical devices by the Department of Health (Health Canada).

BIOnova's expert witness, Dr. Arthur Pilla,[6] explained the science behind using magnets to improve health. He testified that magnetic fields are one of the fundamental forces in physics, as they give off magnetic signals. When muscle tissue undergoes trauma, its cells go through changes that result in

3. BIOnova's evidence of use of magnetic therapy by physicians in Canada consisted of a list of 38 Ontario physicians who, BIOnova claimed, had prescribed BIOflex®'s products for their patients. The remaining health care practitioners on the list were naturopaths, acupuncturists, physical therapists and chiropractors. (See BIOflex®'s information brief, Tab 6[B]). This evidence was corroborated, in part, by copies of invoices to several of the physicians (see BIOnova's additional documents, Tab 6).
4. The magnets in issue are covered by U.S. Patent 4,549,532, entitled "Flexible Magnetic Sheet for Therapeutic Use". The patent is for the design of a series of concentric circles of alternate magnetic poles and describes the design of the magnet. BIOflex®specifies the size, shape and material grade of the magnet.
5. S.O.R./98-282.
6. The Tribunal accepted Dr. Pilla as an expert in electromagnetics and static magnetic fields.

surface charges that serve as "responding pathways" to magnetic fields. Dr. Pilla testified that the magnetic signals stimulate enhanced cellular activity, thereby accelerating healing.

Dr. Pilla submitted that, before 1997, the accepted wisdom was that static magnetic fields (SMFs) had no physiological effect. However, that year, in his laboratory, Dr. Pilla observed that very weak static fields affected chemical processes at the cellular level, i.e. the binding of a calcium ion to a molecule in an enzyme system. That same year, a double-blind scientific study was published by Dr. Carlos Vallbona and colleagues at Baylor College of Medicine, in which they reported significant relief of post-polio pain through the application of SMFs.[7] After its publication, there were other published articles challenging the validity and conclusions of Dr. Vallbona's study. However, some were not peer-reviewed and, therefore, in Dr. Pilla's view, were not credible. There are now at least 10 published studies that show that SMFs, used correctly, reduce pain. In his opinion, the evidence is overwhelming that weak magnetic fields do have a biological effect.[8]

According to Dr. Pilla, SMFs, when applied in the correct dose, will reduce pain and swelling. BIOflex® magnets are ideal for therapeutic use because they apply both fields and field gradients[9] to the targeted area of the body. That does not mean that other magnets cannot do the same, but the industry has not yet provided guidelines for the consumer to know whether or not a given magnet will have the desired therapeutic effect. BIOflex® magnets were used in Dr. Vallbona's study to demonstrate the effectiveness of SMF therapeutics.

The Commissioner called Dr. Philip Neufeld of Health Canada's Medical Devices Bureau as a witness. He explained that, under the *Regulations*, a product is considered a Class I medical device as long as someone makes a representation that it has a medical attribute. A product is designated as a Class I medical device because the manufacturer claims that it has medical benefits, not because Health Canada agrees with the claims or the manufacturer has proven them. All that a manufacturer has to do is supply the required identifying information and declare that its product is safe and effective for the purposes claimed; it is not required to submit any evidence that this is the case.

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7. Vallbona, Carlos "Response of Pain to Static Magnetic Fields in Postpolio Patients: A Double-Blind Pilot Study", Arch Phys Med Rehabil 1997; 78: 1200-3. Reproduced in BIOnova's brief, Tab 3.
8. Dr. Pilla's expert report for BIOnova.
9. According to Dr. Pilla, in the configuration of a magnet, there is typically a north pole, a south pole and another north pole. In normal field penetration, the magnetic field travels from the north pole through the magnet to the south pole, exits the magnet, and comes around and back in. The further away a surface from the magnet, the greater the decay in field strength, i.e. the smaller it becomes. In other words, there is a gradient of field as it decays away from the surface of the magnet. (A gradient is a change in force as a function of distance travelled in a specified direction.) Adding a concentric circle configuration, i.e. adding both north and south poles on one side of the magnet, forces the field to turn sooner and create a steeper gradient in order to provide the field in more directions. Since ions randomly sit inside the cell, or inside tissue, the more field directions one has, the better the dose. See *Transcript of Public Hearing*, 16 July 2003 at 72-73.

Out of concern that static magnets might *not* possess the medical benefits claimed by their manufacturers,[10] Health Canada published a draft policy on the subject in 2001. The point of the policy was to let the industry know that Health Canada regarded SMFs as a technology of "unproven therapeutic benefits" and to solicit feedback.

The Tribunal's findings of fact based on the above evidence are found below under the heading "Decision".

ARGUMENT

BIOnova argues that, since the goods in issue are purchased solely for the medical benefits that they provide, and since their therapeutic benefit has been proven by peer-reviewed scientific studies, they should not all be classified together as other static magnets. Rather, they should be classified in heading No. 90.18 as instruments and appliances used in medical, surgical, dental or veterinary sciences. In the alternative, they should be classified in heading No. 90.21 as other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability.

BIOnova claims that the magnets with textile supports would *not* be excluded from the above headings by Note 1(b) to Chapter 90, which reads as follows: "This Chapter does not cover . . . [s]upporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, maternity belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles (Section XI)". In this case, according to BIOnova, the intended effect on the organ (i.e. muscle) is not derived from the elasticity of the support article, but from magnets embedded within the support article. The articles that provide support to the magnets are merely "anatomical locators", since a textile support is more comfortable and economical than repeated use of tape to hold the magnet in the right place.

BIOnova further argues that the goods in issue should be classified as suggested above, even though they are composite goods. Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System*[11] states, in part, that "composite goods . . . made up of different components . . . which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the . . . component which gives them their essential character". According to Note VIII of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[12] to Rule 3 (b), the factor which determines essential character may be determined "by the role of a constituent material in relation to the use of the goods." In this case, argues BIOnova, the role of the magnets as therapeutic devices constitutes the essential character of the goods in issue.

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10. Health Canada was particularly concerned about an advertisement published by BIOnova that contained the following endorsement: "These are [licensed] medical devices - your assurance they meet Health Canada standards for *safety, effectiveness and quality*." The word "licensed" was removed after Health Canada changed its classification of the magnets from a Class II to a Class I device. Health Canada evaluators had originally classified the magnets and magnetic supports under Class II, under the assumption that SMFs were a power source. When it was pointed out that they were not, they reclassified the devices under Class I. See Commissioner's brief, Tab 2; *Transcript of Public Hearing*, 16 July 2003 at 160, 183-85.
11. *Supra* note 2, schedule [*General Rules*].
12. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

The Commissioner argues that the magnets are properly classified under tariff item No. 8505.19.90, as other permanent magnets. They cannot be classified in heading No. 90.18 because that heading is reserved for specialized and complex medical apparatus, such as dialysis equipment. Neither can they be classified in heading No. 90.21, since they are not "[o]rthopaedic appliances", which are defined by Note I of the *Explanatory Notes* to this heading as "appliances for . . . [p]reventing or correcting bodily deformities; or . . . [s]upporting or holding organs following an illness or operation."

Similarly, the Commissioner argues that the magnets with textile supports are properly classified under tariff item No. 6307.90.99 as other made up articles of other textile materials. The magnets with textile supports are excluded from Chapter 90 by virtue of Note 1 (b) to Chapter 90, which suggests that such items should be classified in Section XI (Textiles and Textile Articles). According to Note 7(e) to Section XI, "made up" means, in part, "[a]ssembled by sewing, gumming or otherwise". The Commissioner notes that, in a similar case, the U.S. Customs Service determined that it was the textile component which represented the essential character of an elbow pad containing magnets.[13] Concerning Health Canada's classification of the goods in issue as medical devices, the Commissioner argues that its classification process is separate from tariff classification and not determinative of the issue.

DECISION

In the Tribunal's view, a product does not need to be proven medically effective for classification in heading No. 90.18 or 90.21.[14] Rather, products are classifiable in these headings if they are proven to be used for the types of medical purposes described in those headings, regardless of whether they have the intended medical effect.

Based on the above evidence, the Tribunal finds that the fact that Health Canada designated the goods in issue as Class I medical devices does not prove that they are actually used in medical science, since anyone can get a Class I designation for a product merely by claiming that it offers a medical benefit.

BIOnova argues that Health Canada's classification of the goods in issue as medical devices should be binding on the Tribunal, since "Health Canada has been given the exclusive and/or paramount mandate to determine what **medical devices** are".[15] The argument is unfounded. The courts have held that the weight to be put on determinations of Health Canada in such instances is a matter that is entirely within the Tribunal's jurisdiction as finder of fact.[16]

The Tribunal, on appeals under section 67 of the *Act* concerning tariff classification matters, hears the matter and then determines the proper classification of the goods under appeal in accordance with the relevant statutory interpretative rules.

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13. U.S. Commercial Rulings Division, Ruling Nos. HQ 963460, HQ 964317 and HQ 962741. See Commissioner's brief, Tab 9.
14. See *Flora Manufacturing & Distributing Ltd. v. Deputy M.N.R.* (24 September 1998), AP-97-058 (CITT), in which the Tribunal concluded that there was no requirement that a product be scientifically proven to be an effective medicament in order for it to be classified in heading No. 30.03, provided that some "curative" properties were demonstrated.
15. BIOnova's brief, para. 107.
16. *Flora Manufacturing & Distributing Ltd v. Deputy M.N.R.* (24 July 2000), A-720-98 (C.A.).

The various tariff classifications are set out in considerable detail in the schedule to the *Customs Tariff*. Each section and chapter of the *Customs Tariff* has its own notes, and sometimes supplementary notes, followed by a list of goods categorized under a number of headings, subheadings and individual tariff items. The *Customs Tariff* contains its own rules for interpreting the schedule, which are found in sections 10 and 11:

> 10. (1) Subject to subsection (2), the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.
>
> . . .
>
> 11. In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.

The *General Rules* referred to in section 10 of the *Customs Tariff* originated in the *International Convention on the Harmonized Commodity Description and Coding System*. They are structured in cascading form so that, if the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on. Rule 1 reads as follows:

> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

If following the above legislation leads to classification in one, and only one, heading, the next step is to find the appropriate subheading and tariff item to cover the goods. If the process leads to classification in more than one heading, the remaining general rules must be applied, in sequence, until the most appropriate heading is found. If necessary, the same process is repeated, all necessary changes being made, at the subheading and tariff item levels, applying the *Canadian Rules* for the latter.

BIOnova contends that the goods in issue should be classified in heading No. 90.18 as instruments and appliances used in medical sciences. The Commissioner argues that the goods in issue are excluded by virtue of Note 1(b) to Chapter 90, which excludes "[s]upporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, . . . supports for joints or muscles)". The evidence does not indicate that any therapeutic effect of the goods in issue should be attributed to the elasticity of the bandages. Therefore, the chapter note does not apply to the magnets with textile supports so as to exclude them from being covered by the above heading. Nevertheless, BIOnova's contention that the goods in issue fall in the heading still fails, for a number of reasons.

First, the Tribunal does not view the goods in issue as being "instruments" or "appliances" within the meaning of heading No. 90.18. In his testimony, Dr. Neufeld said that he would not consider the goods in issue to be instruments and that an instrument is something that is manipulated by a user in order to bring about an effect, e.g. a surgical instrument, a measuring instrument or a diagnostic instrument. In the Tribunal's view, "instrument", as used in this category, suggests a device capable of delicate or precise work, while "appliance" appears to refer to a more complex tool or instrument, e.g. a kidney dialysis apparatus. In the *Merriam-Webster Online Dictionary*, under "implement", the editors state that an

instrument "suggests a device capable of delicate or precise work" and that appliance "refers to a tool or instrument utilizing a power source and suggests portability or temporary attachment".

Second, the wording of heading No. 90.18 refers to "[I]nstruments and appliances used in *medical . . . sciences*" (Emphasis added). The evidence in this appeal does not establish the general use of the goods in issue in medical science. Although Dr. Pilla's evidence regarding the potential benefit of magnetic therapy was extensive, the evidence did not indicate that the research to which he alluded has achieved a level of general acceptance of the goods in issue for use within the medical community. BIOnova could only point to the physicians who, it knows, use magnets in their professional practice in Canada,[17] but provided no evidence that this sample is representative of the total number of physicians in the applicable medical specialties in Canada. Therefore, in the Tribunal's opinion, BIOnova's evidence falls short of proving that the goods in issue are in general use in the science of medicine.

Third, Note I of the *Explanatory Notes* to Chapter 90 states, in part, that "[t]his Chapter covers a wide variety of instruments and apparatus which are, as a rule, characterised by their high finish and high precision." The *Explanatory Notes* to heading No. 90.18 state that "[t]his heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used *only* in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc." (Emphasis added). The reference, in the above explanatory notes, to "the vast majority of cases" does allow for situations other than professional practice where these instruments would be used. However, these situations would be exceptional.[18] In this appeal, the evidence shows that 95 percent of retail sales are to home health care centres.[19]

Fourth, Note I of the *Explanatory Notes* to heading No. 90.18 provides an illustrative list of what the heading includes. The Tribunal does not consider that the goods in issue are covered by any of the items in this list. The *Explanatory Notes* serve as an indicator of the types of goods that are generally intended to be covered by heading No. 90.18, although they do not provide an exhaustive description or list of goods intended to be classified therein. The Tribunal does not accept that the goods in issue are analogous to those listed in the *Explanatory Notes*.

For all the above reasons, the Tribunal finds that the goods in issue cannot be classified in heading No. 90.18 and that BIOnova's appeal on this ground fails.

BIOnova's alternative argument was that the goods in issue should be classified in heading No. 90.21 as "[o]rthopaedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability." The Tribunal notes that the heading is composed of three independent phrases, separated by semi-colons, and that BIOnova need only establish that the goods in issue fall under one such phrase for the appeal to succeed. However, BIOnova's argument with respect to this heading also fails for several reasons.

First, the Tribunal agrees with the Commissioner's argument that the goods in issue are not covered by the first phrase, because they are not "[o]rthopaedic appliances". As discussed above, the evidence does

17. Thirty-eight physicians in Ontario; see BIOflex®'s information brief, Tab 6(B).
18. *Boehringer Mannheim Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (22 February 2001), AP-99-104 (CITT).
19. *Transcript of Public Hearing*, 16 July 2003 at 148.

not indicate that the goods in issue are in general use in any type of medical science. Accordingly, the evidence does not indicate that they are in general use in orthopaedic medicine. In addition, as discussed above, the Tribunal does not consider the goods in issue to be "appliances".

Second, the Tribunal disagrees with BIOnova's argument that the goods in issue would be covered by the last phrase, "hearing aids and other appliances which are worn or carried, or implanted in the body, *to compensate for a defect or disability*" (Emphasis added). The evidence does not indicate that the goods in issue are worn to compensate for a defect or disability. Rather, the evidence is clear that the use of the goods in issue is limited to three things: reducing pain, accelerating healing and increasing circulation.[20]

Third, Note V of the *Explanatory Notes* to heading No. 90.21 gives an illustrative list of items that are covered by the third phrase of the heading, including such things as pacemakers and insulin pumps. The Tribunal does not accept that the goods in issue are analogous to those described or listed in the *Explanatory Notes*.

Rather than simply dismissing the appeal at this point, the Tribunal believes that this is an appropriate case in which to determine a different classification from the ones argued by the parties, with respect to the magnets with textile supports. Subsection 67(3) of the *Act* allows the Tribunal to "make such order, finding or declaration as the nature of the matter may require", and, on occasion, the Tribunal has relied on this legislative authority to reclassify goods under appeal where there is a third option that more correctly characterizes the goods.[21]

The magnets with textile supports, which are fastened by Velcro attachments at each end, consist of proprietary magnetic pads embedded in an elastic fabric that contains a wicking material. The evidence indicates that the textile supports are used to properly position the magnets near the targeted muscle or organ simply by the user's donning the good. The Commissioner classified the magnets with textile supports as other made up articles of textile materials under tariff item No. 6307.90.99. However, the same proprietary magnets as those contained in the supports, when classified separately, were classified under tariff item No. 8505.19.90 as other permanent magnets. The textile material and the magnets are each essential components of the magnets with textile supports, and it is not clear, initially, which heading should apply.

In these circumstances, it is necessary to move on to Rule 2 of the *General Rules*, which reads, in part, as follows: "The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3." Rule 3 reads, in relevant part, as follows: "When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: . . . composite goods . . . made up of different components . . . shall be classified as if they consisted of the . . . component which gives them their essential character".

The Commissioner classified the magnets with textile supports under tariff item No. 6307.90.99 in part because of Note 1(b) to Chapter 90, which reads as follows: "This Chapter does not cover . . .

20. *Ibid.* at 134.
21. *Brecknell, Willis & Co. Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (22 November 2002), AP-2001-071 (CITT); *Reha Enterprises Ltd. v. Deputy M.N.R.* (28 October 1999), AP-98-053 and AP-98-054 (CITT); *Rigel Shipping Canada Inc. v. Deputy M.N.R.* (15 September 1998), AP-97-045 (CITT); *Research Products/Blankenship of Canada Ltd. v. Deputy M.N.R.C.E.* (30 January 1992), AP-90-174 (CITT); *Kenneth Field v. Deputy M.N.R.C.E.* (22 February 1985), 10 T.B.R. 39 (Tariff Board); *Norton Christensen Canada Limited v. Deputy M.N.R.C.E.* (9 December 1985), 10 T.B.R. 280 (Tariff Board).

[s]upporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, . . . supports for joints or muscles) (Section XI)". The effect of the chapter note is to exclude such articles from Chapter 90 and direct the Commissioner to Section XI (Textiles and Textile Articles).

The Commissioner also relied on an administrative ruling of the U.S. Customs Service[22] that found that heading No. 63.07 was the proper heading for an elbow support that also functioned as a magnetic therapy device. In that instance, the U.S. Customs Service had to determine whether the textile component functioned in the ordinary manner, such as by absorbing perspiration, or merely served as a medium through which another component performed its intended function. The U.S. Customs Service found that the rubber and textile component functioned as an elbow support in the ordinary manner and that, therefore, the component, not the magnet, provided the essential character of the article. Rulings of the U.S. Customs Service are not binding on Canada. The Tribunal is not inclined to give the ruling any persuasive weight, since it is distinguishable from this appeal in that the support article in the ruling was found to have a therapeutic effect solely from its elasticity and, therefore, to be subject to the exclusionary clause of Note 1 to Chapter 90.

BIOnova submitted that, from a therapeutic perspective, the embedded magnetic pads constitute the "essential, active and driving element"[23] of the textile supports. This is consistent with the evidence that the magnets in the textile supports were at the core of BIOnova's and BIOflex®'s marketing strategies, and that their channels of distribution led invariably to persons interested in magnetic therapy, not support bandages.

As argued by BIOnova, Rule 3 (b) of the *General Rules* requires composite goods to be classified as if they were made up entirely of the component that gives them their essential character. Note VIII of the *Explanatory Notes* to Rule 3 (b) states that the essential character may be determined by the role of the constituent material in relation to the use of the goods. Therefore, the Tribunal finds that the *magnets* represent the essential character of the magnets with textile supports. The Tribunal is satisfied that the magnets with textile supports and the two kinds of self-adhesive magnets imported by BIOnova are similar and, therefore, should receive the same tariff classification.

The Tribunal agrees with the Commissioner's determination that the proper classification for the self-adhesive magnets is tariff item No. 8505.19.90. Under Rule 1 of the *General Rules*, the self-adhesive magnets clearly fall in heading No. 85.05 as permanent magnets and articles intended to become permanent magnets after magnetization. According to the manufacturer's promotional materials, the "BIOflex® Concentric Circle Magnets are permanent magnets and can be used over and over again without need of a **recharge**."[24] Of the available subheadings (other than those that cover electro-magnets), the Tribunal must determine whether the self-adhesive magnets should be classified under tariff item No. 8505.11.00, "Of metal", or in subheading No. 8505.19, "Other". The Tribunal finds that they are not "[o]f metal" since, as described by the witness for BIOflex®, each magnet is "composed of a polyethylene matrix in which . . . [v]arious barium and strontium ferrite powders have been mixed uniformly through the product",[25] which results in "flexible, magnetic therapeutic pads".[26] At the tariff item level, the Tribunal must determine whether they fall under tariff item No. 8505.19.10, "For use in the manufacture of loudspeakers; [etc.]", or

22. Ruling No. HQ 963460.
23. BIOnova's brief, para. 73.
24. BIOflex®'s information brief, Tab 2.
25. *Transcript of Public Hearing*, 16 July 2003 at 88.
26. *Supra* note 24.

tariff item No. 8505.19.90, "Other". The Tribunal finds that the self-adhesive magnets are not described as or analogous to any items contained in tariff item No. 8505.19.10 and, therefore, fall under tariff item No. 8505.19.90.

Accordingly, the Tribunal determines that the magnets with textile supports should also be classified under tariff item No. 8505.19.90 as other permanent magnets.

In light of the above, the appeal is dismissed. The Tribunal finds that the self-adhesive magnets are properly classified under tariff item No. 8505.19.90 as other permanent magnets and that the magnets with textile supports should be classified under the same tariff item.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member