



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-006

Jam Industries Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, March 20, 2006*

TABLE OF CONTENTS

DECISION OF THE TRIBUNALi
REASONS FOR DECISION 1
 EVIDENCE..... 2
 ARGUMENT 5
 DECISION 5

IN THE MATTER OF an appeal heard on October 28, 2005, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency dated February 24, 2005, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

JAM INDUSTRIES LTD.

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
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

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: October 28, 2005

Tribunal Members: Pierre Gosselin, Presiding Member
James A. Ogilvy, Member
Ellen Fry, Member

Counsel for the Tribunal: Duane Schippers

Clerk of the Tribunal: Valérie Cannavino

Appearances: Giovanna Pirrera and Florent Clermont, for the appellant
Yannick Landry and Philippe Lacasse, for the respondent

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: (613) 993-3595
Fax: (613) 990-2439
E-mail: secretary@citt-tcce.gc.ca

REASONS FOR DECISION

1. This is an appeal pursuant to subsection 67(1) of the *Customs Act*¹ from 45 decisions of the President of the Canada Border Services Agency (CBSA) dated February 24, 2005, made under subsection 60(4) of the *Act*.

2. The goods in issue are 29 models of keyboard synthesizers, digital pianos and digital organs, 13 models of non-keyboard synthesizers (modules or samplers) and 4 expansion boards for synthesizers. All, except the expansion boards, are enabled by Musical Instrument Digital Interface (MIDI). The goods were imported by Jam Industries Ltd. in 45 separate transactions between November 1999 and January 2004.

3. The CBSA classified the goods in issue under three different tariff items: the 29 models of keyboard synthesizers, digital pianos and digital organs were classified under tariff item No. 9207.10.00 of the schedule of the *Customs Tariff*;² the 4 expansion boards for synthesizers were classified under tariff item No. 9209.94.90; and the 13 models of non-keyboard synthesizers were classified under tariff item No. 8543.89.99.

4. The issue in this appeal is whether the goods in issue can also be classified under tariff item No. 9948.00.00 as goods for use in automatic data processing machines (i.e. computers) and receive the benefits thereof. Jam Industries Ltd. did not contest the CBSA's determination of the classification of the goods in issue under tariff item Nos. 9207.10.00, 9209.94.90 and 8543.89.99, but argued that the goods in issue are entitled to the benefits of classification under tariff item No. 9948.00.00. The CBSA argued that the goods in issue are not "articles for use in" the goods identified in tariff item No. 9948.00.00 and, therefore, cannot be classified thereunder.

5. The relevant nomenclature from the *Customs Tariff* that was in effect at the time that the goods in issue were imported reads as follows:

...

9948.00.00 Articles for use in the following:
Automatic banknote dispensers;
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;
Automatic word-processing machines;
Chart recorders and other instruments for measuring or checking electrical quantities, designed for use with automatic data processing machines;
Electronic calculating machines;
Magnetic discs;
Numerical control panels with built-in automatic data processing machines;
Power supplies of automatic data processing machines and units thereof;
Process control apparatus, excluding sensors, which converts analog signals from or to digital signals;
Video games used with a television receiver, and other electronic games;
Parts and accessories of the foregoing.

...

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

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

EVIDENCE

6. This section is a summary of some of the key testimony by the parties at the hearing. In addition to the testimony, the evidence filed by the parties consists of all exhibits, documents, expert reports and other items in the Tribunal's record.

7. Jam Industries Ltd. called as a witness Mr. Steve Knowles, Product Specialist for Korg Canada (Korg).

8. Mr. Knowles explained his understanding of how MIDI technically functions and enables communication between musical instruments and between musical instruments and personal computers. He described how data were sent between the musical instrument and a personal computer and how the on-board operating system of the goods in issue (excluding the expansion boards) interpret key strikes to generate sound.

9. Mr. Knowles provided evidence as to the types of MIDI cables and sound cards that were commonly and commercially available. He further explained that the required driver software was usually installed with the computer's sound card and that no additional driver software was required. He testified that there was a gamut of commercial software available for use with a computer and MIDI-enabled musical instruments, such as notation software and sequencing software, and indicated that some software could be downloaded from the Internet, either from Korg or from third-party sources. Evidence was presented that, in addition to downloading software from the Internet, the user could update the synthesizer device operating system itself with Internet downloads using PC interface or MIDI cables. Updates could also be obtained on CD-ROM, floppy disk and EPROM³ chips.

10. Mr. Knowles testified that no sound cards or cables accompanied the goods in issue at the time of import. He testified that the reason for not including sound cards or cables was because of the variety of applications for which the goods may be used and the different sound cards and cable preferences of the end user in view of the fact that sound cards and MIDI cables were widely available.

11. In cross-examination, Mr. Knowles described the stand-alone functions of the Triton LE, one of the goods in issue. In addition to generating music, the functions of the Triton LE include recording and playback, sound editing to some extent, combination mode (multiple sounds at once), a built-in arpeggiator (plays back arpeggiated data such as drum beats, bass lines and guitar strumming), a built-in sequencer (allows recording on 16 different tracks, accommodating up to 16 different instruments), an expansion card option (enables sampling), a media function (saves MIDI files and songs on the system or onto a SmartMedia card), and MIDI "IN", "OUT" and "THRU" connections. Mr. Knowles also described the stand-alone functions of the N264 as being similar to those of the Triton LE, except that the N264 has a smaller screen and no facility for sampling or bringing in audio.

12. In response to questions from the Tribunal, Mr. Knowles testified that, except for the expansion boards, all the goods in issue are capable of producing music, as musical instruments, without a computer. Mr. Knowles testified that the computer adds functionality to permit, among other things, notation, recording and mixing-in of real sounds, interactive music lessons, a storage facility for music with editor and librarian software, and enhanced audio with multiple tracks. Mr. Knowles admitted, however, that certain of the goods in issue, such as the Triton LE, can perform many of these functions to some degree when standing alone, with the exception of notation, the addition of real instruments or sounds and

3. Erasable programmable read-only memory.

interactive music lessons. Mr. Knowles indicated that some of these additional enhancements have been incorporated in some manufacturers' synthesizer and keyboard products (e.g. Roland Corporation has a notation program, and Korg's Triton Studio could do linear recording of two tracks, but it has been abandoned in later models).

13. Mr. Knowles further agreed, when questioned by the Tribunal, that, after data are sent from the keyboard to the computer or vice versa, the units could be disconnected and the data worked on independently without any ongoing communication requirement, unless an echo or synchronizing function is used.

14. Mr. Daniel A. Vermette, a composer and sound designer associated with In Extenso, a Montréal-based post-production studio, testified on behalf of Jam Industries Ltd. Mr. Vermette was qualified by the Tribunal as an expert in MIDI-enabled musical instruments and their use in a sound production studio and in sound and musical productions. The Tribunal described Mr. Vermette's scope of expertise as that of an artist, with respect to the conception and use of MIDI-enabled musical instruments, and, therefore, did not qualify Mr. Vermette as a technical expert in MIDI technology.

15. Mr. Vermette testified as to his familiarity with the goods in issue and his use of the goods in issue or similar goods in his professional work.

16. Mr. Vermette explained the history of the development of the MIDI protocol and his involvement as an artist in the development of the protocol. He testified that the protocol had initially been developed for the purpose of enabling and standardizing communications. Mr. Vermette informed the Tribunal that MIDI, in the beginning, was for music, musicians, synthesizers and the mass market. He then described the development of computer technology for the purposes of using the MIDI protocol and ongoing development efforts to make better use of computer technology with MIDI-enabled devices.

17. Mr. Vermette indicated that only a MIDI cable was required in order to connect a MIDI-enabled computer to the synthesizers and keyboards in issue, since all computers now have sound cards. Mr. Vermette also indicated that MIDI cables and software were not included with goods at the time of import because of the variety of different applications that an end user may require (e.g. longer cables and specific software).

18. Mr. Vermette confirmed that key functions for which a computer was required included music notation and memory capacity. He indicated that computers also had advantages with respect to facilitating collaboration among artists, recording different sounds and modifying the sounds. Mr. Vermette testified that the MIDI-enabled computer had become an important complement and was indispensable to the use of the goods in issue. He further testified that, in his work, provided he had a good "workstation"⁴ and depending on the functionality of the particular keyboard, he could do much of his work autonomously without the necessity of connecting the keyboard to a computer.

19. Mr. Vermette described the differences between sound editing software and sequencing software and the expanded capability provided when using the latter on a computer. He testified that on-board sequencers did essentially the same thing as sequencing software on a computer; however, he added that sequencing software was faster and had greater capacity. Similarly, librarian software, which is used to store

4. A "workstation" was defined by Mr. Knowles as an integrated "all-in-one" type of unit incorporating a keyboard, a controller, and sequencing and editing functions.

a multitude of sounds, benefits from the greater memory capacity of a computer, since the on-board sound-storage capacity of the goods in issue is limited.

20. The CBSA called one witness, Mr. Tony Mungham, Chief, Electronics and Computer Services, Laboratory and Scientific Services Directorate, CBSA. Mr. Mungham was qualified by the Tribunal as an expert in electronics, computer systems and music production.

21. Mr. Mungham provided a detailed technical explanation of the MIDI protocol, noting that one sends events, not sounds, using the MIDI protocol. He testified that MIDI was a communications protocol created to allow different manufacturers' musical instruments to communicate with each other. Mr. Mungham indicated that there were three levels to the protocol: physical interconnection of devices, messaging, and standard MIDI file format for storage of information.

22. Mr. Mungham informed the Tribunal that MIDI was not a standard protocol used in computers and that it was not designed for computers. Further, he stated that MIDI sound cards were not standard in any computer. However, he did acknowledge that the Sound Blaster sound card (Exhibit A-1) was a standard sound card found in computers.

23. Mr. Mungham testified that the components required to create a MIDI connection between the goods in issue and a computer were hardware with MIDI, software to control MIDI, application software, and a MIDI cable with the proper electrical specifications to connect to the 5-pin DIN connector on the keyboard. Mr. Mungham further described MIDI as a current-driven interface used to reduce noise.

24. Mr. Mungham also explained the difference between a sequencer and an editor. Using a Korg Triton keyboard (Exhibit B-1), Mr. Mungham demonstrated to the Tribunal the use of an on-board sequencer without any computer connection.

25. Mr. Mungham testified that the goods in issue were independent musical instruments which can be played to create music without the assistance of computers. He further testified that connecting a MIDI-adapted computer to the device (synthesizer with or without keyboard) would extend the functionality of the device for use in a music production setting. He stated that the computer added function to the devices but that the devices did not rely on the computer for their function. He emphasized that the goods in issue were musical instruments as they stand and were ready to play "... out of the box ..." without connection to a computer. He testified that the goods in issue were designed from the outset to be musical instruments.

26. Mr. Mungham also testified that MIDI allows the goods in issue to connect to other musical instruments. He stated that, by adding a MIDI port to a computer, the user makes the computer another MIDI device.

27. The computer, Mr. Mungham submitted, does not even recognize that it is connected to a musical instrument because there is no acknowledgement of the connection or error checking. He described the effect of disconnecting the MIDI cable from the computer while pressing a key on the keyboard to explain that the computer, after disconnection, would still think that the event was occurring (i.e. that the note was still being played).

28. Responding to questions from the Tribunal, Mr. Mungham indicated that, with the right application software (i.e. sequencing software), data could be downloaded from a keyboard to a computer and saved. With an event editor application, an individual could use the computer to work on the data without a keyboard connection, though, for playback through an audible feedback loop, one would probably want the keyboard to be connected, to hear the results of the changes to the data.

ARGUMENT

29. This section is an overview of some of the parties' key arguments. It is not a comprehensive statement of the arguments submitted by the parties in their briefs or at the hearing.

30. Jam Industries Ltd. argued that the goods are "for use in" data processing machines (i.e. computers). Jam Industries Ltd. submitted that the goods are attached to computers when used with computers.

31. Jam Industries Ltd. argued that all the goods can be physically connected to a computer through the use of MIDI cables or connection via a PC interface. Jam Industries Ltd. stated that, provided the computer has a MIDI port, only separately purchased MIDI cables are required to physically connect the goods to a computer. If the PC interface is used, then additional driver software must be purchased and installed on the computer. Jam Industries Ltd. contended that MIDI cables are widely available, as MIDI has been a standard since 1983.

32. Jam Industries Ltd. submitted that the goods are functionally integrated, since the goods using the MIDI protocol are able to communicate with the computer and vice versa. Jam Industries Ltd. stated that MIDI files are not sound, but rather instructions for making sound conveyed to and from electronic instruments. The computer can give instructions to the synthesizers to play certain notes. Further, the computer is able to record and mix music based on information received from the synthesizer, as well as display and print music depending on the particular application software that is installed.

33. Jam Industries Ltd. further argued that the expansion boards in issue are accessories for the other goods in issue (the synthesizers, keyboards and MIDI devices). Therefore, Jam Industries Ltd. submitted, if the Tribunal determines that the other goods in issue should be classified under tariff item No. 9948.00.00, the expansion boards should also be classified under tariff item No. 9948.00.00.

34. The CBSA submitted that the goods, at the time of import, cannot be physically connected to a computer because the goods are not accompanied by the necessary cables and that 26 of the 42 goods in issue do not possess MIDI.

35. The CBSA argued that the goods cannot be functionally integrated with a computer in their condition at the time of import. The CBSA submitted that, in addition to requiring MIDI cables to make a physical connection, a computer can only communicate with MIDI-enabled musical instruments (and thus be functionally integrated) when there is MIDI and the computer is loaded with the appropriate MIDI software and MIDI application software.

36. The CBSA further submitted that the goods in issue produce music without connection to a computer and, since they are musical instruments and devices in their own right, are not "for use in" computers and are not eligible for the benefits of tariff item No. 9948.00.00.

37. The CBSA did not specifically address the issue of the classification of the expansion boards.

DECISION

38. The onus is on Jam Industries Ltd. to demonstrate that the goods in issue are "... [a]rticles for use in ..." data processing machines and units thereof.⁵ Both parties agree that the goods in issue are "articles".

5. *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010, (CITT) [*Agri-Pack*], aff'd [2005] FCA 414.

39. Subsection 2(1) of the *Customs Tariff*⁶ defines “for use in” as follows:

“for use in”, whenever 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.

40. The Tribunal has considered, in several decisions,⁷ the meaning of “for use in” as it is used in tariff item No. 9948.00.00 and in its predecessor, Code 2100.

41. It is the Tribunal’s opinion that the French version of the definition of “for use in” (“*devant servir dans*”) makes it clear that the goods in issue must enter into the composition of the host goods:

« *devant servir dans* » ou « *devant servir à* » Mention dans un numéro tarifaire, applicable aux marchandises qui y sont classées et qui doivent entrer dans la composition d’autres marchandises mentionnées dans ce numéro tarifaire par voie d’ouvroison, de fixation ou d’incorporation. [Emphasis added]

42. Consistent with this requirement, in all of the cases cited above in which the Tribunal considered the meaning of “for use in”, the goods for which the appellants sought the benefits of tariff item No. 9948.00.00 or its predecessor, Code 2100, exhibited a special relationship to the host goods. In each of those cases, the goods “for use in” complemented the function of the host good. In all these cases, it is clear which is the host and which is the complementary good.

43. In this case, that relationship has not been established. The evidence of all the witnesses was consistent that the goods in issue (excluding the expansion boards) could be and are used as musical instruments on their own without any need to be connected to a computer. The witnesses all provided evidence as to how connecting the goods in issue to a MIDI-enabled computer enhanced the capabilities of the goods for use as musical instruments. The Tribunal finds Mr. Vermette’s expert evidence particularly persuasive on this issue. Mr. Vermette testified that he could do much of his work autonomously without the necessity of connecting the goods in issue to a computer, but that the computer had become an important and indispensable complement to the use of the goods in issue.

44. Further, on the evidence, the Tribunal is satisfied that the goods in issue do not contribute to the function of an automated data processing machine and are not required by the computer for its operation or the performance of its functions.⁸ In support of this conclusion, the Tribunal refers to Mr. Mungham’s testimony to the effect that, even once physically connected, the computer does not know that the keyboard is connected. The computer merely receives data at its MIDI port or sends data from that port to the keyboard. There is no acknowledgement or error checking.⁹ Jam Industries Ltd. did not contest these assertions by Mr. Mungham in cross-examination.

45. Accordingly, in this case, the Tribunal is not satisfied that the goods in issue complement the functions of a computer by virtue of their connection to that computer. Rather, the reverse appears to be true, i.e. the connection to a computer enables the goods in issue to acquire additional capability. Through the connection of the MIDI-enabled instrument to a computer, it is the instrument’s functions that are expanded or improved and not those of the computer. Therefore, the Tribunal concludes that the goods in issue

6. S.C. 1997, c. 36.

7. See *Agri-Pack; 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); *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT); *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT) [*Sony II*].

8. See, for example, the discussion in *Sony II* at 12.

9. *Transcript of Public Argument*, 28 October 2005, at 222-24.

(excluding the expansion boards) are not goods “for use in” a data processing machine within the meaning of tariff item No. 9948.00.00.

46. Finally, with respect to the various expansion boards in issue, Jam Industries Ltd. argued that they should be classified under tariff item No. 9948.00.00 as “. . . [p]arts and accessories of the foregoing”. The Tribunal does not agree.

47. As decided in *Sony II*,¹⁰ the reference to “. . . [p]arts and accessories thereof” in tariff item No. 9948.00.00, read in its appropriate grammatical sense, taking into consideration the punctuation used in the description of the tariff item, means parts and accessories of the articles listed in tariff item No. 9948.00.00. For the expansion boards to be classified under tariff item 9948.00.00, Jam Industries Ltd. would have to satisfy the Tribunal that the expansion boards were “for use in” parts and accessories of the articles listed in tariff item No. 9948.00.00 (e.g. a computer). The evidence submitted by Jam Industries Ltd. was that the expansion boards were inserted into the keyboard and non-keyboard synthesizers. There was no evidence that the expansion boards were for use in any of the articles listed in tariff item No. 9948.00.00 or for use in parts and accessories of those listed articles. Accordingly, the Tribunal concludes that the expansion boards in issue cannot be classified under tariff item No. 9948.00.00.

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

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member

10. *Sony II* at 10. The Tribunal concluded that the appropriate interpretation of “. . . [p]arts and accessories of the foregoing”, based on the punctuation used the tariff item, was “articles for use in parts and accessories of an automatic data processing machine” (or the other items enumerated in the tariff item).