Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-073

Ingram Micro Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Tuesday, January 25, 2011

Canada

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IN THE MATTER OF an appeal heard on October 21, 2010, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 13, 2010, with respect to a request for a further re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

INGRAM MICRO INC. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 21, 2010
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Nick Covelli
Research Director:	Rose Ritcey
Senior Research Officer:	Gary Rourke
Manager, Registrar Office:	Michel Parent
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PARTICIPANTS:

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Respondent	**Counsel/Representative**
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Ingram Micro Inc. (Ingram Micro) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision of the President of the Canada Border Services Agency (CBSA) dated January 13, 2010, with respect to a request for a further re-determination pursuant to subsection 60(4).

2. The issue in this appeal is whether Plantronics Encore® and Encore® NC headphones or headsets[2] (the goods in issue) are properly classified under tariff item No. 8518.30.99 of the schedule to the *Customs Tariff*[3] as other headphones and earphones, whether or not combined with a microphone, as determined by the CBSA, or should be classified under tariff item No. 8518.30.91 as headphones, including earphones, as claimed by Ingram Micro.

PROCEDURAL HISTORY

3. The goods in issue were imported on January 5, 2006, and classified under tariff item No. 8518.30.99.

4. On September 10, 2009, pursuant to paragraph 74(1)(*e*) of the *Act*, Ingram Micro applied for a refund of duties, claiming that the goods in issue should have been classified under tariff item No. 8518.30.91.

5. On September 14, 2009, the CBSA determined that the goods in issue had been properly classified under tariff item No. 8518.30.99 and, therefore, denied Ingram Micro's application for a refund of the duties paid on the goods in issue. Pursuant to subsection 74(4) of the *Act*, this denial was deemed to be a re-determination under paragraph 59(1)(*a*). On the same day, the CBSA forwarded Ingram Micro's request for a further re-determination pursuant to subsection 60(1) to the Recourse Unit.

6. On January 13, 2010, pursuant to subsection 60(4) of the *Act*, the CBSA denied the request for a re-determination of the tariff classification and maintained the classification of the goods in issue under tariff item No. 8518.30.99.[4]

7. On February 15, 2010, pursuant to section 67 of the *Act*, Ingram Micro filed the present appeal with the Tribunal.[5]

8. On June 25, 2010, Ingram Micro requested that the Tribunal hear this appeal by way of written submissions or, alternatively, that an oral hearing be held in Toronto, Ontario. On July 5, 2010, the CBSA indicated that it did not object to a hearing by way of written submissions. On July 14, 2010, after having considered the submissions filed by both parties on this issue, the Tribunal informed them of its decision to proceed by way of written submissions, in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.[6]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. As will be discussed later, the parties were not consistent in their use of the words "headphones" and "headsets".
3. S.C. 1997, c. 36.
4. Tribunal Exhibit AP-2009-073-06A, tab 6.
5. Tribunal Exhibit AP-2009-073-01.
6. S.O.R./91-499.

9. On August 10, 2010, Ingram Micro submitted its response to the CBSA's brief.

10. The file hearing took place on October 21, 2010.

GOODS IN ISSUE

11. The Tribunal notes that the parties described the goods in issue differently in their submissions, using the terms "headsets" and "headphones" interchangeably. In its submissions, Ingram Micro referred to the goods in issue as ". . . headphones combined with a microphone";[7] however, in later correspondence with the Tribunal, it referred to the goods in issue as "headset[s] with [a] Voice Tube".[8] The CBSA referred to the goods in issue as ". . . wired headsets with a microphone" and ". . . wired headphones with microphones . . ."[9] and also inferred that the goods in issue were ". . . headphones combined with a microphone . . . ."[10] According to both parties, the goods in issue are used in call centres and office settings.[11]

12. Both the CBSA's and Ingram Micro's product literature shows diagrams of the two models of the goods in issue, one with a single "receiver" and "ear cushion" (Encore®) and the other with two "receivers" on each end of an "adjustable headband" (Encore® NC).[12]

13. The Encore® model has, at the end of an adjustable headband, a voice tube that extends from the receiver to the wearer's mouth. It appears that the microphone is not located at the end of the voice tube, but rather within the "receiver" itself.[13] The function of the voice tube, therefore, is only to carry the sound to the microphone.

14. The Encore® NC model appears to have a click-stop turret at one end of an adjustable headband, plus a boom, which seems to be designed to extend over the wearer's mouth and is fitted with a noise-cancelling microphone at the end.[14]

15. Both the Encore® and Encore® NC models are equipped with headset cables, Quick Disconnect™ connector and clothing clip.

16. Upon written request by the Tribunal to produce samples of the goods in issue, Ingram Micro only supplied the Encore® model.[15]

17. Due to incomplete evidence, the Tribunal wrote to Ingram Micro after the file hearing to request clarification as to which model constituted the goods in issue.[16] Ingram Micro responded by stating that the goods in issue included both the "one-ear" Encore® and "two-ear" Encore® NC models.[17] No response was received from the CBSA.

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7. Tribunal Exhibit AP-2009-073-04A at para. 12.
8. Tribunal Exhibit AP-2009-073-18.
9. Tribunal Exhibit AP-2009-073-06A at para. 3, tabs 5, 6.
10. *Ibid.* at paras. 41, 50.
11. Tribunal Exhibits AP-2009-073-04A at para. 7 and AP-2009-073-06A at para. 3.
12. Tribunal Exhibits AP-2009-073-04A, Appendix 1, and AP-2009-073-06A, tab 2; Exhibit A-01. The exhibit filed by Ingram Micro on October 15, 2010, contains a user's guide that identifies the two models of the goods in issue.
13. Exhibit A-01.
14. The Encore® NC model was not filed as an exhibit by Ingram Micro; therefore, the Tribunal could only base the present description on accompanying documentation.
15. Tribunal Exhibit AP-2009-073-16; Exhibit A-01.
16. Tribunal Exhibit AP-2009-073-19.
17. Tribunal Exhibit AP-2009-073-20.

ANALYSIS

Statutory Framework

18. On appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

19. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.[18] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

20. Subsection 10(1) of the *Customs Tariff* provides as follows: ". . . 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[19] and the Canadian Rules[20] set out in the schedule."

21. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.[21] Classification therefore begins with Rule 1, which provides as follows: ". . . 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."

22. Section 11 of the *Customs Tariff* provides as follows: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System[22] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[23] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be respected, unless there is a sound reason to do otherwise, as they serve as an interpretive guide to tariff classification in Canada.[24]

23. Once the Tribunal has used this approach to determine the heading in which the goods should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and Rule 1 of the *Canadian Rules* in the case of the latter.

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18. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
19. S.C. 1997, c. 36, schedule [*General Rules*].
20. S.C. 1997, c. 36, schedule.
21. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 are applicable to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).
22. World Customs Organization, 2d ed., Brussels, 2003.
23. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
24. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.

24. The Tribunal notes that section 13 of the *Official Languages Act*[25] provides that the English and French versions of any act of Parliament are equally authoritative. Thus, the Tribunal may examine both the English and French versions of the schedule to the *Customs Tariff* in interpreting the tariff nomenclature.

Relevant Provisions of the Customs Tariff and Explanatory Notes

25. In the present appeal, the parties agreed that the goods in issue are properly classified in heading No. 85.18 as headphones and earphones, whether or not combined with a microphone, pursuant to Rule 1 of the *General Rules*, and in subheading No. 8518.30 as headphones and earphones, whether or not combined with a microphone, pursuant to Rules 1 and 6.

26. The parties' opinions, however, differ as to the applicable tariff item. Ingram Micro is of the view that the goods in issue should be classified under tariff item No. 8518.30.91 as headphones, including earphones, pursuant to Rule 1 of the *General Rules* and Rules 1 and 3 (a) of the *Canadian Rules*. For its part, the CBSA determined that the goods in issue are properly classified under tariff item No. 8518.30.99, as other headphones and earphones, whether or not combined with a microphone, pursuant to Rule 1 of the *General Rules* and Rule 1 of the *Canadian Rules*.

27. The relevant sections of the nomenclature of the schedule to the *Customs Tariff* provide as follows:

> **85.18** **Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets.**
>
> . . .
>
> **8518.30** **-Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers**
>
> . . .
>
> 8518.30.91 - - - -Headphones, including earphones
>
> 8518.30.99 - - - -Other

28. The Tribunal notes that the schedule to the *Customs Tariff* contains no section or chapter notes specific to the goods in issue.

Positions of Parties

Ingram Micro

29. Ingram Micro asserted by implication that the goods in issue are *prima facie* classifiable under both tariff item Nos. 8518.30.91 and 8518.30.99. By application of Rule 1 of the *General Rules* and Rules 1 and 3 (a) of the *Canadian Rules*, Ingram Micro argued that the terms of tariff item No. 8518.30.91, being "[h]eadphones, including earphones", provide the more specific description vis-à-vis tariff item No. 8518.30.99, which, being "[o]ther", provides a more general description.[26]

25. R.S.C. 1985 (4th Supp.), c. 31.
26. Tribunal Exhibit AP-2009-073-04A at para. 28.

30. Ingram Micro argued that the phrase ". . . whether or not combined with a microphone . . .", found in heading No. 85.18 and subheading No. 8518.30 in conjunction with headphones and earphones, forms part of the description of "[h]eadphones, including earphones" in tariff item No. 8518.30.91. Therefore, Ingram Micro was of the view that the terms of tariff item No. 8518.30.91 should be interpreted as headphones, including earphones, without regard to the fact that they are combined, or not, with a microphone.

CBSA

31. The CBSA argued that the goods in issue are not classifiable under tariff item No. 8518.30.91 as "[h]eadphones, including earphones" because they do not conform to the accepted definitions of "headphone" and "earphone". The CBSA referred to dictionary definitions of "headphone" and "earphone" to support this argument.

32. The CBSA submitted that this interpretation is supported by Customs Notice N-546, which explains that the subheading was amended to reflect a World Customs Organization decision that stated that the subheading included prenatal listening kits consisting of a microphone and headphones.[27] As a result of the amendment, the subheading explicitly includes headphones and earphones, whether or not combined with a microphone. However, tariff item Nos. 8518.30.91 and 8518.30.99 remained unchanged, with headphones and earphones that are combined with a microphone remaining classified under tariff item No. 8518.30.99.

33. The CBSA noted that the plain language of tariff item No. 8518.30.91 does not include headphones combined with a microphone and argued that it would be inappropriate to read into the phrase ". . . whether or not combined with a microphone . . ." in light of the clear direction of the Supreme Court of Canada, in *Friesen v. Canada*,[28] to the effect that an interpretation that requires the insertion of extra wording should be rejected where there is another acceptable interpretation which does not require any additional wording.

34. According to the CBSA, the goods in issue are therefore, by default, classifiable under tariff item No. 8518.30.99, as other headphones and earphones, whether or not combined with a microphone, in accordance with Rule 1 of the *General Rules* and Rule 1 of the *Canadian Rules*.

Tariff Classification of the Goods in Issue

35. After much consideration of the facts in the present appeal, the submissions of the parties, the documentation on file and the exhibit itself, the Tribunal agrees with the parties that the goods in issue are properly classified in heading No. 85.18 and, in particular, in subheading No. 8518.30. Consequently, in the Tribunal's view, the key to determining which tariff item applies is to determine whether the goods in issue are "headphones", "earphones" or "other".

36. The parties agree that the goods in issue are not earphones. The Tribunal also believes this to be true.

37. *The Canadian Oxford Dictionary* defines the term "earphone" as follows: "**1** each of a pair of receivers attached to each other so that they fit over the ears, used for listening to a radio, stereo, etc. **2** a similar device with only one receiver that fits inside one ear."[29]

27. Tribunal Exhibit AP-2009-073-06A, tab 10.
28. [1995] 3 S.C.R. 103.
29. Tribunal Exhibit AP-2009-073-06A, tab 12.

38. This definition seems to describe at least part of the goods in issue to which the product literature refers as the "receiver" and perhaps also the "ear cushion"; however, as will be discussed, it does not describe the goods in issue as completely as does the word "headphone".

39. Turning to the question of whether the goods in issue are "headphones", the Tribunal notes a certain difference between the English and French versions of the *Explanatory Notes* to heading No. 85.18. While the following English text refers to both "headphones and earphones", the following French version only refers to a single item named "écouteurs".

> The heading covers headphones and earphones, whether or not combined with a microphone, for telephony or telegraphy . . . .
>
> Cette position couvre les écouteurs, même combinés avec un microphone, pour la téléphonie ou la télégraphie . . . .

40. The English-French section of the *Le Robert & Collins Senior* translates "earphone" (a compound of "ear") as "(*Rad, Telec etc*) écouteurs" and the French-English section translates "écouteurs" as "earphones, headphones".[30] This calls upon a certain interchangeability of the terms. However, it is of little help to the Tribunal in determining whether the goods in issue are "headphones".

41. Note (C) of the *Explanatory Notes* to heading No. 85.18 defines "headphones and earphones" as follows: ". . . electroacoustic receivers used to produce low-intensity sound signals. . . . [T]hey transform an electrical effect into an acoustic effect . . . ." This definition seems to emphasize the acoustic function of headphones.

42. The Tribunal also observes that there are several differing dictionary definitions of "headphone", including the following:

- The *Canadian Oxford Dictionary* (2d ed.) defines "headphone" as follows: "a pair of earphones joined by a band placed over the head . . . for listening to audio equipment etc."
- *Merriam Webster's Collegiate Dictionary* (10th ed.) defines "headphone" as follows: "an earphone held over the ear by a band worn on the head . . . ."
- The *Gage Canadian Dictionary* (1983) defines "headphone" as follows: "a telephone or radio receiver held on the head, against the ears."
- The *ITP Nelson Canadian Dictionary of the English Language* (1997) defines "headphone" as follows: ". . . [a] receiver, as for a telephone, radio, or stereo, held to the ear by a headband."
- *The Oxford English Dictionary* (2d ed.) defines "headphone" as follows: ". . . *phone* of TELEPHONE (see -PHONE).] = *ear-phone* (*a*) and (*c*) . . . ."

Thus, the Tribunal understands a "headphone" to be well defined as either one or two earphones or receivers held to the ear by a band placed over the head, with an audio function.

43. The product literature of the goods in issue shows a "receiver" (Encore®) or "receivers" (Encore® NC) that are worn over the ear at the end of an adjustable headband. The placement of the receivers over the wearer's ears obviously implies an acoustic function. Thus, to this extent, the goods in issue very well fit the defining characteristics of headphones, according to both the *Explanatory Notes* and dictionary definitions.

30. Third ed.

44. However, the Tribunal recognizes that the goods in issue also include a microphone and that this extra element is the reason for which the parties do not agree on whether the goods in issue can be classified as headphones". In other words, the crux of this appeal is whether the goods in issue are headphones despite the fact that they are combined with a microphone.

45. In the Tribunal's view, the presence of the microphone does not change the fact that the goods in issue are headphones.

46. This interpretation of the term "headphones" in tariff item No. 8518.30.91 is supported by the context of the tariff item itself. Both the heading and subheading, of which the tariff item is a constituent part, include the phrase ". . . headphones and earphones, *whether or not combined with a microphone*" [emphasis added].

47. Nowhere in the *Customs Tariff* is the phrase "whether or not" defined or otherwise explained.

48. *The Oxford English Dictionary*, however, defines the phrase "whether or not" as follows:

> . . .
>
> **5.** Introducing a disjunctive clause (usually with correlative *or*) having a qualifying or conditional force, and standing in adverbial relation to the main sentence (cf. WHATEVER 3, WHEREVER 4): ***whether . . or*** = whichever of the alternative possibilities or suppositions be the case; in either of the cases mentioned; if on the one hand . . and likewise if on the other hand.[31]

49. In this instance, the Tribunal believes that, textually, "whether or not" means that consideration must not be given to either alternative in the conclusion sought. Thus, at least for the purposes of tariff classification within the aforementioned heading and subheading, an article may be a headphone (or earphone) even if it is combined with a microphone. Obviously, the same would also be true in the absence of a microphone.

50. The Tribunal believes that goods can be headphones, whether they are combined with a microphone or not. The presence of the microphone calls upon the notion of disregard for the alternate possibility; therefore, all one must consider is whether they present the defining characteristics of headphones (or earphones).

51. That being the case, the Tribunal does not follow the interpretation nor the administrative policy espoused in Customs Notice N-546 and, therefore, gives it no weight in the present proceedings.[32] While Customs Notice N-546, submitted by the CBSA, purports to establish a history that justifies the CBSA's interpretation of the tariff items in question, the Tribunal is of the view that Customs Notice N-546 merely reflects the CBSA's incorrect interpretation of these provisions.

52. As such, the goods in issue meet the terms of tariff item No. 8518.30.91, which expressly refers to "headphones", rather than tariff item No. 8518.30.99. Accordingly, on the basis of Rule 1 of the *General Rules* and Rule 1 of the *Canadian Rules*, the Tribunal finds that the goods in issue should be classified in tariff item No. 8518.30.91.

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31. Second ed., *s.v.* "whether".
32. *Sigvaris Corporation v. President of the Canada Border Services Agency* (23 February 2009), AP-2007-009 (CITT) at para. 30.

DECISION

53. For the foregoing reasons, the Tribunal concludes that the goods in issue should be classified under tariff item No. 8518.30.91 as headphones, including earphones.

54. Therefore, the appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member