

Ottawa, Wednesday, July 29, 1992

Appeal No. AP-91-165

IN THE MATTER OF an appeal heard on April 29, 1992,
under section 67 of the *Customs Act*, R.S.C., 1985, c. 1
(2nd Supp.), as amended;

AND IN THE MATTER OF a decision of the
Deputy Minister of National Revenue for Customs and
Excise dated August 10, 1991, with respect to a request for
a re-determination pursuant to section 63 of the
Customs Act.

BETWEEN

CALLPRO CANADA INC.

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed. The VMX/D.I.A.L. system is properly classified under tariff item No. 8471.20.00 as "Digital automatic data processing machines."

Charles A. Gracey

Charles A. Gracey
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Desmond Hallissey

Desmond Hallissey
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-165

CALLPRO CANADA INC.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

At issue in this appeal is whether the VMX/D.I.A.L. system imported by the appellant into Canada on October 20, 1989, is more properly classified under tariff item No. 8520.20.00 as "Telephone answering machines," as claimed by the respondent, or under tariff item No. 8471.20.00 as "Digital automatic data processing machines," as claimed by the appellant.

HELD: *The appeal is allowed. The VMX/D.I.A.L. system is properly classified under tariff item No. 8471.20.00 as "Digital automatic data processing machines."*

Place of Hearing: Ottawa, Ontario

Date of Hearing: April 30, 1992

Date of Decision: July 29, 1992

*Tribunal Members: Charles A. Gracey, Presiding Member
Sidney A. Fraleigh, Member
Desmond Hallissey, Member*

Counsel for the Tribunal: Brenda Swick-Martin

Clerk of the Tribunal: Janet Rumball

*Appearances: John W.R. Day, for the appellant
F.B. Woyiwada, for the respondent*

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Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
SIDNEY A. FRALEIGH, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

At issue in this appeal is whether the VMX/D.I.A.L. system imported by the appellant into Canada on October 20, 1989, is more properly classified under tariff item No. 8520.20.00 as "Telephone answering machines," as claimed by the respondent, or under tariff item No. 8471.20.00 as "Digital automatic data processing machines," as claimed by the appellant.

The goods in issue work in conjunction with telephone sets and process data and voices in digital format. The goods in issue were furnished and installed at the Mississauga office of Royal LePage Limited (Royal LePage) on November 28, 1989, in response to a request for proposal (RFP) for a voice mail system.

The relevant tariff items are:

- 84.71 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, not elsewhere specified or included.
- 8471.20.00 -Digital automatic data processing machines, containing in the same housing at least a central processing unit and an input and output unit, whether or not combined
- 85.20 Magnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device.
- 8520.20.00 -Telephone answering machines

The proper tariff classification of all goods under the *Customs Tariff*¹ requires the systematic consideration of the General Rules for the Interpretation of the Harmonized System² (General Rules) and the Explanatory Notes to the Harmonized Commodity Description and

1. R.S.C., 1985, c. 41 (3rd Supp.).

2. *Ibid.*, Schedule I.

Coding System³ (Explanatory Notes). More specifically, section 10 of the *Customs Tariff* provides that the classification of imported goods is to be determined, unless otherwise provided, in accordance with the General Rules. Section 11 of the *Customs Tariff* also provides that, in interpreting tariff headings and subheadings, regard shall be had to the Explanatory Notes.

General Rules 1 and 6 require classification of goods according to the terms of the headings and subheadings and any relevant notes.⁴

To fall under tariff item No. 8471.20.00, the VMX/D.I.A.L. system must be a "Digital automatic data processing machine" containing in the same housing at least a central processing unit (CPU), an input unit and an output unit. The evidence reveals that the VMX/D.I.A.L. system does contain in the same housing a CPU and input and output capabilities. The CPU assembly contains serial input/output ports and a modem which allows data transmission to and from attached terminal devices or over telephone lines.

Explanatory Note 5(A)(a) to Chapter 84 provides that the expression "automatic data processing machines" means:

- (a) *Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and, (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.*

Accordingly, the goods in issue must be digital machines capable of meeting the four criteria of Explanatory Note 5(A)(a) to be considered automatic data processing machines. On the issue of what constitutes a digital machine, Part I(A) of the Explanatory Notes to heading No. 84.71 provides that "digital machines" process data in coded form. In the Tribunal's opinion, the VMX/D.I.A.L. system is a digital machine because it records an incoming call by converting the electric signal into digital form for further processing with the use of an analog/digital converter.

It is not in dispute that the VMX/D.I.A.L. system can accomplish the first and fourth capabilities listed in Explanatory Note 5(A)(a). Counsel for the respondent argued, however, that the VMX/D.I.A.L. system does not have the capability to meet the second and third requirements, namely "being freely programmed in accordance with the requirements of the user" and "performing arithmetical computations specified by the user."

Much of the evidence and argument during the hearing focused on the interpretation of the requirement "programmed in accordance with the requirements of the user." Counsel for the appellant argued that the phrase "requirements of the user" modifies "freely programmed" in that phrase, and that the goods in issue met the needs of the purchaser, Royal LePage. Counsel for the respondent, on the other hand, argued that the goods in issue are not capable of being freely programmed within the meaning of Explanatory Note 5(A)(a). Counsel relied on

3. Customs Co-operation Council, Brussels, First Edition, 1986.

4. Section and Chapter Notes are in the tariff schedule itself and provide additional rules for interpreting tariff headings and subheadings.

*Esden Limited v. The Deputy Minister of National Revenue for Customs and Excise*⁵ where it was held that, in order for a machine to be freely programmable, the user must be able to introduce or alter the instructions that tell the computer what to do with the data. Counsel submitted that this was not possible with respect to the goods in issue without the use of the VMX Works program which was not available at the time of the importation. Counsel further argued that the ability of the VMX/D.I.A.L. system to choose between a number of fixed programs does not make it an automatic data processing machine because the Explanatory Notes expressly provide that machines which operate only on fixed programs that cannot be modified by the user are excluded even though the user may be able to choose between a number of such fixed programs.

Evidence and argument were offered on the meaning of the term "freely programmed" and as to who the "user" is within the meaning of Explanatory Note 5(A)(a). With respect to the latter issue, argument was advanced during the hearing that the user was the person from outside who accessed the goods through the telephone, and not the owner of the VMX/D.I.A.L. system. The Tribunal has no difficulty in accepting that those who access the system use it; however, it does not agree that the owner of the goods is not the user of the goods as well. The Tribunal is of the view that the purchaser of the goods in issue, Royal LePage, is the user of the goods for the purposes of Explanatory Note 5(A)(a) to Chapter 84.

The Tribunal also finds that the goods in issue have the capability to be freely programmed in accordance with the needs of Royal LePage. As a result of the evidence and testimony presented during the hearing, it became evident to the Tribunal that "programming" could include the writing of a new or modified program by a programmer or the purchase and use of software containing an existing program. It is also clear to the Tribunal that many of the specifications set out by Royal LePage in the RFP required that the goods in issue be capable of being freely programmed in accordance with the requirements of Royal LePage, and that it be able to modify the program being used. For example, the RFP specified that the goods be capable of running "continuous self-diagnostics" and of "automatically initiating a service call (alarm) directly to the successful vendor's service department" if a problem was detected. Evidence was heard that the user could make the necessary alterations to allow the alarm call to be directed to different places. Similarly, the RFP required that the goods "be capable of notifying the vendor's service department when the disk storage reaches a certain pre-determined percentage of capacity." Evidence was heard that the goods in issue met this specification, and that the percentage figure could be modified by the user, Royal LePage, to meet its needs. Finally, the goods in issue had to meet the specification that "[t]he number of messages allowed per User must be programmable according [to] a User's [class of service] from 20 to 100 or more." Testimony was heard that the user could change the number of messages that a particular user would be allowed to receive in a mailbox, depending on the class of service. The programmability of the goods in issue was also evident as a result of testimony that a class of service could be designed to meet the specific requirements of a particular individual, depending on the executive level of the individual and calling environment. The goods in issue have been able to perform all of these functions without the use of the Toolworks software and thus, in the Tribunal's view, are capable of being freely programmed in accordance with the requirements of the user, Royal LePage.

As to the third requirement, counsel for the appellant argued that the goods in issue are capable of performing arithmetical computations specified by Royal LePage. In contrast, counsel

5. Canadian International Trade Tribunal, Appeal No. AP-90-006, January 30, 1992.

for the respondent argued that the goods in issue could not meet this requirement because they are not able to perform specified operations on numbers provided by a user.

The Tribunal is satisfied that the goods in issue are capable of performing arithmetical computations specified by the user, Royal LePage. An expert witness for the respondent, Dr. David T. Gibbons, testified that the VMX/D.I.A.L. system, even without the Toolworks, has a more sophisticated computational capability than the early UNIVAC computer, which dispels all doubt on this issue. In addition, the sample D.I.A.L. Report⁶ generated during the hearing, which presented statistics on the use of the system, is, in the Tribunal's view, clearly the result of arithmetical computations performed by the VMX/D.I.A.L. system. It is also very clear that many of the specifications set out by Royal LePage in the RFP required that the goods be capable of performing arithmetical computations.

In summary, the Tribunal finds that the goods in issue meet all of the requirements of Explanatory Note 5(A)(a) and are therefore more properly classified under tariff item No. 8471.20.00 as "Digital automatic data processing machines."

Concurrently, the Tribunal is not persuaded that the goods in issue are properly classified under tariff item No. 8520.20.00 as "Telephone answering machines." Telephone answering machines are described under paragraph 3 of Part B of the Explanatory Notes to heading No. 85.20 entitled "Combined Sound Recording and Reproducing Apparatus" which provides, in part that:

These apparatus incorporate devices for recording and reproducing sound and are mainly of the magnetic type.

This group includes, ...

- (3) *Telephone answering machines designed to operate in conjunction with a telephone set (but not forming an integral part of the set) to transmit a message previously recorded by the telephone subscriber and to record messages left by the caller (by means of an integral sound recording device).*

Given the use of the conjunctive term "and" in the first sentence of Part B of the Explanatory Notes to heading No. 85.20, it is clear that to be classified as a telephone answering machine the goods must have both sound recording and sound reproducing capabilities. The term "sound recording apparatus" is defined in the Explanatory Notes to heading No. 85.20 to mean "apparatus which, on receiving a suitable audio-frequency vibration generated by a sound-wave, so modifies a recording medium as to enable it to be used subsequently to reproduce the original sound-wave." In the Tribunal's opinion, there is no debate that the goods in issue are sound recording apparatus and have sound recording capabilities. The mere fact that a message can be heard several hours after being uttered settles the matter. The goods in issue convert the analog signals to a binary digital code which is stored in a memory bank and, at a command, the process is reversed and the binary code is converted back to analog signals.

The Tribunal, however, agrees with the appellant that the goods in issue do not incorporate a device for reproducing sound and, for that reason, cannot be classified as a telephone answering machine. The expert evidence presented by the respondent confirmed that

6. Exhibit A-5.

there was nothing to reproduce sound within the VMX/D.I.A.L. unit itself, but rather that the sound reproduction is via the handset of a telephone. While the goods in issue have the capability to convert the binary code back into analog form, the goods cannot by themselves go one step further and convert the analog code back into sound.

Having determined that the goods in issue do not have a sound reproducing capability, it is not necessary, in the Tribunal's opinion, to analyse the remaining elements of Part B of the Explanatory Notes to heading No. 85.20.

The appeal is allowed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
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Desmond Hallissey

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Member