Ottawa, Thursday, January 13, 1994

Appeal No. AP-92-262

IN THE MATTER OF an appeal heard on June 1, 1993, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated September 23, 1992, with respect to a request for re-determination under subsection 63(3) of the *Customs Act*.

BETWEEN

    ELECTRONETIC SYSTEMS CORP.   **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed.

W. Roy Hines
W. Roy Hines
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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Appeal No. AP-92-262

ELECTRONETIC SYSTEMS CORP.   **Appellant**

and

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

The appellant imported a "Monolith" DSM Series 2001 Distributed Switch Matrix (the Monolith) into Canada. The issue is whether the Monolith is properly classified under tariff item No. 8517.30.20 as telegraphic switching apparatus or, in the alternative, under tariff item No. 8517.30.19 as other telephonic switching apparatus, as determined by the respondent, or should be classified under either tariff item No. 8471.99.90 as another unit for digital data processing machines or tariff item No. 8471.20.00 as a digital automatic data processing machine, as claimed by the appellant.

HELD: The appeal is allowed. The Monolith meets the criteria set out in the definition of "automatic data processing machines" provided in Note 5(A) to Chapter 84 of Schedule I to the Customs Tariff. The Monolith, in its entirety, should be classified under tariff item No. 8471.20.00.

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*June 1, 1993*
Date of Decision:	*January 13, 1994*
Tribunal Members:	*W. Roy Hines, Presiding Member*
	Michèle Blouin, Member
	Charles A. Gracey, Member
Counsel for the Tribunal:	*Robert Desjardins*
Clerks of the Tribunal:	*Janet Rumball and Anne Jamieson*
Appearances:	*Shane B. Brown, for the appellant*
	Robert P. Hynes, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL | **TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR**

ELECTRONETIC SYSTEMS CORP.   **Appellant**

and

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

TRIBUNAL: W. ROY HINES, Presiding Member
MICHÈLE BLOUIN, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise under subsection 63(3) of the Act.

The appellant imported a "Monolith" DSM Series 2001 Distributed Switch Matrix (the Monolith) into Canada from the United States. The issue in this appeal is whether the Monolith is properly classified under tariff item No. 8517.30.20 of Schedule I to the *Customs Tariff*[2] as telegraphic switching apparatus or, in the alternative, under tariff item No. 8517.30.19 as other telephonic switching apparatus, as determined by the respondent, or should be classified under either tariff item No. 8471.99.90 as another unit for digital data processing machines or tariff item No. 8471.20.00 as a digital automatic data processing machine, as claimed by the appellant.

Mr. Harvey L. Pollock testified on behalf of the appellant, which he founded in 1963. Mr. Pollock explained, in simple terms, that the principal function of the Monolith is to interconnect, in a transparent fashion, front-end ports of a computer to data modems or to interconnect front-end ports of one computer to front-end ports of another computer. In other words, the Monolith functions as an efficient method of transmitting, simultaneously, a large volume of data from many sources to many destinations. The connections in the Monolith must be established prior to its operation, in accordance with a program that is set by the user and which may be reprogrammed by that user. Transparency means that the information or data transmitted through the apparatus remains unchanged.

In reply to questions from counsel for the appellant, Mr. Pollock further indicated that the Monolith (1) has no conversion capability; (2) is capable of storing the data necessary for the execution of the program; (3) is capable of being freely programmed and controlled without a system controller; and (4) is capable of performing arithmetical computations specified by the user. As to the various components of the Monolith, Mr. Pollock mentioned, *inter alia*, the switch interface card. This card, as he explained, carries out the actual mixing of the data within the apparatus.

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1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).

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Mr. Edwin H. Morton, Director of Sales and Applications Engineering with Kylain Inc., and Dr. David T. Gibbons, Associate Professor at the Faculty of Engineering of the University of Ottawa, testified as expert witnesses on behalf of the respondent. Mr. Morton told the Tribunal that, in his opinion, the Monolith is not a device that lends itself to being freely programmable by the user. In discussing the nature of the Monolith as an interconnecting device, he repeated the view laid out in his expert report, namely, that the Monolith could be regarded as a telegraphic switching device or as a telegraphic switch, and not as data processing equipment. Dr. Gibbons also expressed the view that the transmission of unchanged data does not constitute data processing. As does Mr. Morton, he considers that the Monolith is not freely programmable (it has been built to perform a specific task), but is "configurable." Dr. Gibbons' conclusions, as found in his report, are that the Monolith system itself cannot be said to be a computer and that it is properly described as a "switching apparatus" rather than a "digital automatic data processing machine."

After refuting some of the assertions made by counsel for the respondent with regard to the classification of the Monolith in heading No. 85.17, counsel for the appellant made a number of points. He contended that the Monolith should be classified, in its entirety, as a single unit and that the Monolith's hardware clearly establishes that it is an automatic data processing machine within the definition set out in Note 5(A) to Chapter 84 of Schedule I to the *Customs Tariff*. To support the characterization of the Monolith's cabinet as an automatic data processing machine, counsel referred to the Tribunal's decision in *Callpro Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*.[3] Furthermore, he argued that the Monolith's hardware, which performs data processing functions, is not excluded from heading No. 84.71 by virtue of Note 5(B) to Chapter 84 of Schedule I to the *Customs Tariff*. His last contention was to underline that, should the Monolith be covered by both heading Nos. 84.71 and 85.17, the Explanatory Notes[4] to Chapters 84 and 85 make it clear that Chapter 84 should take precedence.

Counsel for the respondent contended that the Tribunal should consider the word "telegraphy" in light of the French version of heading No. 85.17, which uses the broader term "*télécommunication*." He further argued that the attachment of an IBM computer to the Monolith does not have the effect of turning the latter into a computer. In his view, the Monolith is a switching system. Counsel told the Tribunal that the Monolith failed to satisfy one of the criteria set out in Note 5(A) to Chapter 84 of Schedule I to the *Customs Tariff*, namely, that it is not freely programmable. Further, the evidence revealed that the Monolith does not process data, as the output is similar to the input. The Monolith controls and adapts data flow, just like a pipeline controls the flow of oil, but it does not affect the data itself. This does not constitute data manipulation or processing, but data transmission. He also argued that, since the Monolith was designed to perform a specific function, it was excluded from being an automatic data processing machine by virtue of Note 5(B) to Chapter 84 of Schedule I to the *Customs Tariff*.

Having reviewed the evidence and carefully considered the arguments, the Tribunal is of the view that the appeal must be allowed. As stated earlier, the issue in this appeal is whether the imported Monolith should be classified as an automatic data processing machine

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3. Appeal No. AP-91-165, July 29, 1992.
4. Explanatory Notes to the Harmonized Commodity Description and Coding System, Customs Co-operation Council, 1st ed., Brussels, 1986.

under tariff item No. 8471.20.00. Rule 1 of the <u>General Rules for the Interpretation of the Harmonized System</u>[5] provides that, for legal purposes, classification of goods shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Note 5(A) to Chapter 84 of Schedule I to the *Customs Tariff* offers a definition of the expression "automatic data processing machines." These are 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.

After having examined each of these criteria in relation to the adduced evidence, the Tribunal considers that the Monolith meets such criteria. At the hearing, counsel for the respondent laid much stress on the second criterion. In this regard, even if the Tribunal were to accept Dr. Gibbons' view that the Monolith is not freely programmable according to the normal usage of the term, this would not detract from the fact that the Monolith can be freely programmed in accordance with the requirements of the user.

The imported Monolith, in its entirety, should be classified under tariff item No. 8471.20.00. The Tribunal recognizes that the functions of the Monolith cannot be characterized as being completely typical of an automatic data processing machine. However, as rightly stated by counsel for the respondent, technology has outstripped, in some areas, the language used in the customs legislation. Bearing this in mind, the Tribunal is convinced by the evidence before it that the Monolith fits the description of an automatic data processing machine.

In light of the foregoing, the appeal is allowed.

<u>W. Roy Hines</u>
W. Roy Hines
Presiding Member

<u>Michèle Blouin</u>
Michèle Blouin
Member

<u>Charles A. Gracey</u>
Charles A. Gracey
Member

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5. *Supra*, note 2, Schedule I.