CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, December 12, 1996

**Appeal No. AP-95-262**

IN THE MATTER OF an appeal heard on October 10, 1996, 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 dated December 12, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**SONY OF CANADA LTD.** **Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE** **Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
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**UNOFFICIAL SUMMARY**

**Appeal No. AP-95-262**

**SONY OF CANADA LTD.** **Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE** **Respondent**

The issue in this appeal is whether certain tape cartridges qualify for duty relief under Code 2100. The tape cartridges are a form of digital data storage media used to store large amounts of information. To qualify for duty relief, the tape cartridges must be "[a]rticles ... for use in: [t]he goods of tariff item No.: ... 8471.93.90," which includes magnetic tape drives. At its simplest, the issue is whether tape cartridges are "for use in" tape drives.

**HELD:** The appeal is allowed. The extent to which the tape cartridges become physically connected and are functionally joined to the tape drives satisfies the Tribunal that they become "attached to" the tape drives as provided for in Code 2100. The Tribunal is of the view, therefore, that the tape cartridges are "for use in" tape drives.

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| Place of Hearing: | Ottawa, Ontario |
| Date of Hearing: | October 10, 1996 |
| Date of Decision: | December 12, 1996 |
| Tribunal Members: | Robert C. Coates, Q.C., Presiding Member<br>Anthony T. Eyton, Member<br>Lyle M. Russell, Member |
| Counsel for the Tribunal: | David M. Attwater |
| Clerk of the Tribunal: | Anne Jamieson |
| Appearances: | Riyaz Dattu, for the appellant<br>Anne M. Turley, for the respondent |

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

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(613) 990-2452 Téléc. (613) 990-2439

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

**Appeal No. AP-95-262**

**SONY OF CANADA LTD.** **Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE** **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ANTHONY T. EYTON, Member
LYLE M. RUSSELL, 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 made under subsection 63(3) of the Act. The respondent's decision was, in part, that certain magnetic tape data cartridges (the tape cartridges) did not qualify for duty relief under Code 2100 of Schedule II to the *Customs Tariff*.[2] This was because the tape cartridges "are not integrated into the physical structure of tape drives nor are they integral to the function of the drives." For this reason, the respondent was of the view that the tapes "are not considered to be 'for use in' the [tape] drives as specified in Customs Notice N-879.[3]"

The tape cartridges are a form of digital data storage (DDS) media used to store large amounts of information. There are two types of tape cartridges in issue, namely, the DDS data cartridge and the QD series data cartridge. Generally, magnetic tape data cartridges are comprised of an external cover, internal operating mechanisms (supply and take-up hubs) and magnetic tape, being the medium on which information is stored.

To store information onto or retrieve information from a tape cartridge, the tape cartridge must be inserted into a tape drive. The tape drive may be internal or external to a computer system. A tape drive converts data encoded on a magnetic tape to a form useable by the computer or vice versa.

The issue in this appeal is whether the tape cartridges qualify for duty relief under Code 2100. If they qualify, the duties otherwise payable on the tape cartridges[4] will be reduced or removed as specified in Schedule II.[5] To qualify, the tape cartridges must be "[a]rticles ... for use in: [t]he goods of tariff item No.: ... 8471.93.90," which includes magnetic tape drives. At its simplest, the issue is whether tape cartridges are "for use in" tape drives.

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1. R.S.C. 1985, c. 1 (2nd Supp.)
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. Customs Notice N-879, *Administrative Policy — Tariff Codes 2100 and 2101*, Department of National Revenue, June 23, 1994.
4. Pursuant to subsection 19(1) of the *Customs Tariff*.
5. Pursuant to subsection 68(2) of the *Customs Tariff*.

333 Laurier Avenue West
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Ottawa (Ontario) K1A 0G7
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The expression "for use in," as used in Code 2100, is defined in section 4 of the *Customs Tariff*. The English version of section 4 states:

> 4. The expression "for use in", wherever it occurs in a tariff item in Schedule I or a code in Schedule II in relation to goods, means, unless the context otherwise requires, that the goods must be wrought into, attached to or incorporated into other goods as provided for in that tariff item or code.

The French version of section 4 states:

> *4. Les expressions «devant servir dans» et «devant servir à», mentionnées en regard d'un numéro tarifaire de l'annexe I ou d'un code de l'annexe II, signifient que, sauf indication contraire du contexte, les marchandises en cause entrent dans la composition d'autres marchandises par voie d'ouvraison, de fixation ou d'incorporation, selon ce qui est indiqué en regard de ce numéro ou code.*

The appellant first introduced evidence through a panel of witnesses comprising Mr. Ian Chan, National Systems Engineer, and Mr. Michael James Argier, Product Manager for Data Media, at Sony of Canada Ltd. The Tribunal was told that a series of gears, rollers and other mechanisms are used to bring a tape cartridge into a compatible tape drive. When in position, the supply and take-up hubs of the tape cartridge are "attached to or locked into place" on the supply and take-up reels of the tape drive. In addition, the magnetic tape is brought out of the tape cartridge by pins and rollers and into contact with a read/write rotational head drum of the tape drive.

A tape cartridge must be properly inserted into a tape drive and the magnetic tape properly in contact with the read/write head drum for the read and write functions to work. Mr. Chan explained that three sensors must confirm certain conditions before the read or write function will work. There is a mechanical sensor to confirm that a tape cartridge is properly locked into place, a tension sensor to detect the presence and proper alignment of the magnetic tape and an optical sensor to sense the beginning of the magnetic tape. If a tape cartridge is not in the tape drive, the magnetic tape is not properly mounted or the magnetic tape is full, the read/write head will not generate a magnetic field. An error message will be displayed on the computer screen if a user attempts to perform a read or write function under any of these circumstances. For this reason, Mr. Chan agreed that the presence of a properly mounted tape cartridge is an operational requirement of a tape drive.

Mr. Argier explained that the write head produces a magnetic effect that realigns metal particles on the magnetic tape. This way, information is stored on the magnetic tape. Mr. Chan added that, with a DDS tape drive,[6] there are two write heads and two read heads on the read/write head drum. For every rotation of the drum, two tracks of data are laid, one by each write head. In the next rotation of the drum, the two tracks will be read by the two read heads. This way, the data can be compared and its integrity verified. If the data have not been laid or there is a problem with the integrity of the data, the tape drive will attempt to write the data again. This sequence will be repeated up to 128 times, after which the user will receive a message indicating problems with the writing function.

In cross-examination, Mr. Chan agreed that, though both may be used to store information, a tape cartridge is removable while a hard drive is not.

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6. Used with a DDS data cartridge.

The appellant's last witness was Mr. Peter Edward McConkey, Assistant Professor in the Department of French Studies, Faculty of Arts, York University, in Toronto, Ontario. Professor McConkey was qualified as an expert witness in matters of translation. He spoke to the grammatical differences between the English and French versions of section 4 of the *Customs Tariff*.

As to the expression "the goods must be wrought into, attached to or incorporated into," found in section 4, Professor McConkey explained that the English text uses the verb form to express the three ideas, wrought, attached and incorporated. In contrast, the corresponding French text, "*les marchandises en cause entrent dans la composition d'autres marchandises par voie d'ouvraison, de fixation ou d'incorporation*" uses the noun form to express the three ideas. Both are equally valid, he said, but exert different influences on the way the rest of the sentence is structured.

It was explained that section 4 describes a situation of certain goods coming into contact with other goods. The English version makes this clear by using the words "into" and "to" with the words "wrought," "attached" and "incorporated." In the French version, this is accomplished by the words "*entrent dans*."

Professor McConkey told the Tribunal that the words "*la composition*" in the expression "*entrent dans la composition d'autres marchandises*" is an *étoffement*. He explained that an *étoffement* is the addition of words in the translation of prose so that both language versions respect the syntax or sentence structure of their language and say the same thing. The *étoffement*, "*la composition*," allows the sentence to move from the verb "*entrent dans*" to the words "*d'autres marchandises*." In his opinion, the words "the composition" need not be read into the English version for both versions to have the same meaning. To do so would give meaning or significance to these words that the French version does not intend them to have. The French version, with this *étoffement*, is no more precise than the English version. In summary, he opined that both the English and French versions of section 4 are saying the same thing, but in different ways, using different sentence structures.

In argument, counsel for the appellant acknowledged that the statutory definition of "for use in" must be satisfied for the tape cartridges to qualify for duty relief under Code 2100. It was submitted that, on a plain reading, the tape cartridges are "attached to" the tape drives. Referring to *The Oxford English Dictionary*,[7] counsel contended that the words "attach" or "attached" are interpreted to mean to connect, to fasten or to join, or joined functionally. On the evidence, a tape cartridge becomes physically joined to a tape drive and is necessary for the functioning of the tape drive.

Customs Notice N-879 states that "[t]he term 'attached to' is considered to provide for goods ... which can be easily inserted or removed; however, it is not held to provide for separately housed goods connected by wire(s).[8]" Counsel for the appellant submitted that the tape cartridges, which can be easily inserted into and removed from a tape drive, satisfy the requirements of "attached to," as this term has been interpreted by the Department of National Revenue (Revenue Canada). Furthermore, there is no requirement that the tape cartridges be permanently fastened to the tape drives to meet the statutory definition of "for use in."

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7. Second ed., Vol. I (Oxford: Clarendon Press, 1989) at 758-59.
8. *Supra* note 3, para. 3 at 3.

In addition, Customs Notice N-879 states that, "[t]o be 'for use in', [an] article must be integrated into the physical structure of the other good; however, this does not mean that the article must qualify as a 'part' under Schedule I to the *Customs Tariff*.[9]" Counsel for the appellant submitted that, when a tape cartridge is drawn into a tape drive and is secured into place, it becomes physically integrated with the tape drive. Furthermore, when the tape cartridge is removed, the tape drive does not function.

Counsel for the appellant also submitted that there is a strong analogy between the examples provided of depletable goods that qualify for duty relief under Code 2100 and the tape cartridges.[10] For instance, "printer ribbon presented on spools," "batteries presented individually or in 'packs'" and "toner cartridges" are all considered by Revenue Canada to qualify for duty relief.

Counsel for the respondent noted that, under the *Official Languages Act*,[11] both the English and French versions of section 4 are equally authoritative.[12] The French version requires that goods must "*entrent dans la composition*" (enter into the composition) of other goods to qualify for duty relief under Code 2100. As such, the tape cartridges must be involved in the make-up or composition or construction of the tape drives to qualify for duty relief.

Furthermore, the tape cartridges are not "attached to" tape drives. For goods to be attached to other goods, there must be more than a mere association between them; rather, one must be a component of the other. In contrast, tape cartridges are stored separately and are merely inserted into tape drives. A tape cartridge is not a component of a tape drive nor integral to the functioning of a tape drive. They are distinct entities that perform distinct functions.

Counsel for the respondent drew an analogy between a tape cartridge for a tape drive and paper for a typewriter. Paper is the medium on which words are written, but it does not become attached to a typewriter. Similarly, a tape cartridge is the medium on which information is stored and is not attached to a tape drive.

The Tribunal disagrees with the argument advanced by counsel for the respondent that the English version of section 4 is ambiguous or that the French version more clearly denotes the meaning of section 4. To the contrary, a reading of this provision satisfies the Tribunal that both versions convey the same meaning of the expression "for use in." It means that, unless the context otherwise requires, goods must be wrought into, attached to or incorporated into certain other goods. The Tribunal does not accept that the goods must necessarily enter into the composition of the other goods to satisfy the definition of "for use in." The Tribunal finds support for its conclusion in the testimony of Professor McConkey.

The extent to which the two classes of goods must become associated through any of the three means will depend, in part, on the context within which the expression is used. For instance, Code 2240, like many others, requires that certain goods be "for use in the manufacture" of other goods. In other instances, the expression is used on its own, as in Code 2100. The Tribunal believes that counsel for the respondent's argument, to the effect that the goods must be involved in the make-up or composition or construction of the other goods, is more appropriately directed to the former context. However, in the latter context, such

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9. *Ibid.*, para. 2 under "Guidelines and General Information" at 2.
10. *Ibid.*, para. 11 at 4.
11. R.S.C. 1985, c. 31 (4th Supp.).
12. *Ibid.* s. 13.

imperative qualifications are without support. As such, the Tribunal believes that the terms "wrought into," "attached to" and "incorporated into" should be given their grammatical and ordinary meaning, without further qualification, in the context of Code 2100.

Counsel for the appellant argued that the tape cartridges satisfy the "attached to" requirement in section 4 and, thus, are "for use in" tape drives. Counsel submitted that the term "attached to," as used in section 4, includes both physical and functional aspects. Thus, for goods to be "for use in" other goods by being "attached to" those goods, the two classes of goods must be physically connected and functionally joined. Counsel referred to the evidence that the tape cartridges become locked into the tape drives, although not on a permanent basis, and are necessary for the functioning of the tape drives.

Customs Notice N-879 interprets the expression "unless the context otherwise requires," as used in section 4. It states that "[s]uch context can either expand or restrict the terms of the legislative definition and will be provided either by the language of the Tariff or by the specific relationship between the article and the listed goods.[13]" It goes on to state that "[c]ontext based upon the relationship of the goods is considered to provide for separately housed articles which are either components of a system that is a listed good, or are integral to the basic function of a listed good. However, articles that provide complementary, supplementary or adaptive functions or services are not considered to create a context that qualifies under the Codes.[14]" These policy statements spawned arguments on behalf of both parties.

The Tribunal found these arguments without merit, as it cannot accept the proposition that the reference to "context" in section 4 includes consideration of the "relationship between the article and the listed goods." A fair reading of section 4 clarifies that the reference to "context" is the context within which the expression "for use in" is found in "a tariff item in Schedule I or a code in Schedule II." For instance, Code 1001 provides duty relief for certain protective suits, provided they are for use in a noxious atmosphere.[15] Clearly, the context of this code implies that the expression "for use in" does not have the meaning provided in section 4.[16]

By extending the meaning of "context" to encompass the relationship between goods, a discretion has been created to provide or deny duty relief under a code where unwarranted. Furthermore, this discretion appears unfettered, except to the extent specified in policy statements. Customs Notice N-879 suggests that "context" provides duty relief under a code for goods that are considered integral to the basic function of the goods listed in the code or for components of a system that is "a listed good." However, goods that merely "provide complementary, supplementary or adaptive functions or services" to the goods listed in a code will not benefit from the available duty relief.[17]

As the context of Code 2100 did not require otherwise than the expression "for use in" having the meaning provided in section 4, the issue in this appeal was whether the tape cartridges were "wrought into, attached to or incorporated into" the tape drives. The issue was not, and could not be, whether a "context

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13. *Supra* note 3, para. 5 at 3.
14. *Ibid*. para. 6 at 3.
15. See *Kappler Canada Ltd.* v. *The Deputy Minister of National Revenue*, [1995] 4558 E.T.C., Canadian International Trade Tribunal, Appeal No. AP-94-232, October 26, 1995.
16. See, also, Codes 1365, 1698, 2548, 2557, 2960 and 2998.
17. *Supra* note 14.

was created" between the tape cartridges and tape drives that qualifies under Code 2100,[18] whatever that means, or whether the tape cartridges merely provide complementary, supplementary or adaptive functions or services to the tape drives. The extent to which the tape cartridges become physically connected and are functionally joined to the tape drives satisfies the Tribunal that they become "attached to" the tape drives as provided for in Code 2100. The Tribunal is of the view, therefore, that the tape cartridges are "for use in" tape drives.

Accordingly, the appeal is allowed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

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Lyle M. Russell
Member

18. *Ibid.*