CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, September 28, 1998

Appeal No. AP-97-029

IN THE MATTER OF an appeal heard on February 23 and March 10, 1998, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated March 5, 6, 11, 14, 19, 20, 21 and 27, 1997, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

ENTRELEC INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Peter F. Thalheimer
Peter F. Thalheimer
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
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-97-029

ENTRELEC INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 67 of the *Customs Act* of decisions of the Deputy Minister of National Revenue. At the time of importation, the goods in issue, described as various electrical components, were classified in heading No. 85.48 as electrical parts of machinery or apparatus, not specified or included elsewhere in Chapter 85 or under tariff item No. 8536.90.90 as other electrical apparatus for switching or protecting electrical circuits, for a voltage not exceeding 1,000 volts. The appellant filed requests for re-determination of the tariff classification and submitted that the goods in issue qualified for the benefits of Code 2101 of Schedule II to the *Customs Tariff*. The requests were denied by the respondent. The first issue in this appeal is whether the Tribunal has jurisdiction to address the appellant's claim that the goods in issue qualify for the benefits of Code 2101. In the event that the Tribunal decides that it does have jurisdiction to decide this issue, then the second issue is whether the goods in issue qualify for the benefits of Code 2101, which provides for the duty-free entry of articles (other than goods of the tariff items listed), for use in, among others, the goods of tariff item No. 9032.90.20, but not those of subheading No. 8536.49.

HELD: The appeal is dismissed. In the Tribunal's view, the evidence is clear in the present case that the appellant knew the use to which the goods were going to be put at the time of importation. The witnesses for the appellant testified that they knew so; however, according to them, the appellant failed to claim the benefits of Code 2101 because it was not aware that it existed. The issue is, therefore, not one of diversion, which falls under section 77 of the *Customs Act*, but one of tariff classification, which falls under section 67. As such, the Tribunal finds that it has jurisdiction to determine whether or not the goods in issue qualify for the benefits of Code 2101. With respect to the second issue, there was no dispute between the parties that the goods in issue are capable of being used in process control apparatus of heading No. 90.32. The issue was, therefore, with respect to the interpretation to be given to the expression "for use in" found in Code 2101. In the Tribunal's view, the expression "for use in" in Code 2101 means "actual use." The Tribunal finds that the appellant does not qualify for the benefits of Code 2101 because it did not show that some of the goods in issue were actually used in process control apparatus. Rather, the appellant demonstrated that all of the goods in issue were capable of being used in such goods. However, the evidence also showed that the goods in issue were capable of being used in other goods, in particular, those of heading No. 85.37. Furthermore, the appellant was given every opportunity by the respondent to show actual use, but failed to do so.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	February 23 and March 10, 1998
Date of Decision:	September 28, 1998

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

Tribunal Members:	Charles A. Gracey, Presiding Member Raynald Guay, Member Peter F. Thalheimer, Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerks of the Tribunal:	Anne Jamieson and Margaret Fisher
Appearances:	Michael Kaylor and Michael A. Sherbo, for the appellant Louis Sébastien, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-97-029

ENTRELEC INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
RAYNALD GUAY, Member
PETER F. THALHEIMER, Member

REASONS FOR DECISION

BACKGROUND

This is an appeal under section 67 of the *Customs Act*[1] (the Act) of decisions of the Deputy Minister of National Revenue made pursuant to section 63 of the Act.

At the time of importation, the goods in issue, described as various electrical components,[2] were classified in heading No. 85.48 of Schedule I to the *Customs Tariff*[3] as electrical parts of machinery or apparatus, not specified or included elsewhere in Chapter 85 or under tariff item No. 8536.90.90 as other electrical apparatus for switching or protecting electrical circuits, for a voltage not exceeding 1,000 volts. The appellant filed requests for re-determination of the tariff classification and submitted that the goods in issue qualified for the benefits of Code 2101 of Schedule II to the *Customs Tariff*. The requests were denied by the respondent.

The first issue in this appeal is whether the Tribunal has jurisdiction to address the appellant's claim that the goods in issue qualify for the benefits of Code 2101. The respondent's position is that the issue is one of diversion, which falls under section 77 of the Act, rather than one of tariff classification, which falls under section 67. In the event that the Tribunal decides that it does have jurisdiction to decide this issue, then the second issue is whether the goods in issue qualify for the benefits of Code 2101, which provides for the duty-free entry of articles (other than goods of the tariff items listed), for use in, among others, the goods of tariff item No. 9032.90.20, but not those of subheading No. 8536.49.

The Tribunal notes that, although the issue of the proper tariff classification of the fuse terminal blocks was raised in the parties' briefs, it was not addressed at the hearing. It appeared, at the outset, that counsel for the appellant conceded that they were properly classified under tariff item No. 8536.90.90 as other electrical apparatus for switching or protecting electrical circuits, for a voltage not exceeding 1,000 volts, as determined by the respondent, rather than under tariff item No. 8537.10.91 as boards and panels, for a voltage not exceeding 1,000 volts, of a kind used with the goods classified under the tariff items enumerated in Schedule VI to the *Customs Tariff*, as originally claimed by the appellant. In any event and in

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. A complete listing of the goods in issue is provided in the appendix to this decision.
3. R.S.C. 1985, c. 41 (3rd Supp.).

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

order to avoid any confusion, the Tribunal finds that the fuse terminal blocks are properly classified under tariff item No. 8536.90.90. Accordingly, this part of the appellant's appeal is dismissed.

For the purposes of this appeal, the relevant tariff nomenclature reads as follows:

85.36	Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 volts.
8536.90	-Other apparatus
8536.90.90	---Other
85.37	Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading No. 85.35 or 85.36, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of Chapter 90, and numerical control apparatus, other than switching apparatus of heading No. 85.17.
8537.10	-For a voltage not exceeding 1,000 V
8537.10.91	----Of a kind used with the goods classified under the tariff items enumerated in Schedule VI of this Act
85.48	Waste and scrap of primary cells, primary batteries and electric accumulators; spent primary cells, spent primary batteries and spent electric accumulators; electrical parts of machinery or apparatus, not specified or included elsewhere in this Chapter.
90.32	Automatic regulating or controlling instruments and apparatus.
9032.89	--Other
9032.89.20	---Process control apparatus, excluding sensors, which converts analog signals from or to digital signals
9032.90	-Parts and accessories
9032.90.20	---Of the goods of tariff item No. 9032.89.20 or 9032.89.30

EVIDENCE

At the hearing, three witnesses testified on behalf of the appellant. The first witness, Mr. Marcel G. Roy, General Manager at Entrelec Inc., explained that the appellant's main office is in France and that the goods in issue are manufactured there. The appellant imports them into Canada. Mr. Roy identified the goods in issue by referring to various advertisements from some of the appellant's competitors. He noted that some of them were referred to as "process control modules," namely, the surge protector modules, the terminal blocks, the relay modules, the conversion modules and the analog signal conditioners. He also pointed to different excerpts in these advertisements where the words "process control" could be found. He testified that it is possible to import a complete process control apparatus. He explained that the fact that the duty on a complete process control apparatus is zero and the duty on the goods in issue, which are assembled by the appellant's customers, is 10.3 percent, affects the appellant's business. He testified that, at the time of importation, the appellant knows the use to which the goods in issue are going to be put. He explained that they are manufactured for the process control business.

In cross-examination and in answering questions from the Tribunal, Mr. Roy explained that some of the appellant's customers use the goods in issue, that is, they assemble them and put them into a panel, while approximately 70 percent are resold by authorized distributors. He explained that some of the appellant's customers resell the goods in issue to pulp and paper mills or mines, for example. He testified that, at the time of importation, the appellant knew that the goods in issue were going to be used in the process control business, but did not claim the benefits of Code 2101 because it did not know that it was available. Mr. Roy said that, in his view, the goods in issue are too expensive to be used in something other than process control industrial cabinets. He explained that the products are heavy duty and designed for industrial purposes. He did acknowledge, however, that it is conceivable that they could be used for other purposes. He said that the appellant never knows what a customer will do with its products; however, he reiterated that they are designed for process control. Mr. Roy testified that the appellant does not import the goods in issue pursuant to orders that it receives from its customers. He explained that they are held in inventory at the appellant's plant in Brossard, Quebec.

The appellant's second witness, Mr. Vincent Ménager, Product and Quality Manager at Entrelec Inc., was qualified by the Tribunal as an expert witness in "process control." He explained that the function of a relay in process control is to switch electrical signals off and on. It can be a voltage or a current. He testified that there are different types of relays, namely, relay interface modules or relay interface blocks. Mr. Ménager explained that the difference between the relays in issue and simple relays, which can be bought at Radio Shack, for example, is that the former are specifically designed to be used in industrial process control. More specifically, they have a packaging around them and a foot on the bottom which allow them to be stacked together to make an electrical assembly of different components. They also have terminal blocks which allow them to be connected to the field of application. Mr. Ménager explained that a simple relay cannot be connected directly with the wire. He also noted that the relays in issue have an indication of operations on the top of the module which is very important for the controller. Furthermore, there are numerous protection functions integrated into these relays which are not found in normal relays. The relays in issue cost between $20 and $30, while simple relays cost approximately $2 or $3. Mr. Ménager explained that, as an engineer, he will pay the additional cost for all the reasons outlined above and because it takes only about 10 seconds to install such a relay into a panel. To do the same with a simple relay would take additional work. It would have to be mounted into something like one of the relays in issue in order for it to be used.

Next, Mr. Ménager explained that the function of the platinum resistive temperature detector (RTD) module, which is one of the analog signal conditioners in issue, is to measure temperature. He explained that there is a sensor connected on one side which senses the temperature and then makes a conversion to an electrical signal that can be recognized by the controller. He explained that these goods have the same external physical characteristics as the relays described above, which also makes them suitable for industrial process control. Mr. Ménager testified that all the signal conditioners in issue are basically the same. The only difference is in the type of signal which they convert.

Mr. Ménager explained that the electronic interfaces in issue have similar functions to the relays in issue. Basically, they isolate signals and turn switches on and off. They are electronic switches, while the relays described above are electromechanical switches. He explained that they have the same purpose, but that the concept is different. The important thing is that the electronic interfaces in issue also have characteristics which make them suitable for industrial process control.

Mr. Ménager explained that the industrial terminal blocks in issue are used to connect the wires from the field to the control panel. These products also have unique characteristics, which make them suitable for industrial process control. He explained that they are vibration proof. They have test points to do voltage measurements, for example. They are also "touch proof," which means that one can touch them from any angle without touching any live parts. He explained that all of the goods in issue are "touch proof."

Mr. Ménager explained that the connectors in issue are like small terminal blocks. They also have unique features which make them suitable for process control.

As with the first witness, Mr. Ménager was presented with various advertisements from some of the appellant's competitors, which identified certain of the goods in issue and indicated that they are used in process control. Mr. Ménager agreed with these statements. With the use of overhead projector slides, Mr. Ménager described the three main components of process control. First, there is a device which senses or detects a signal or situation, for example, a temperature. Then, there is a module or a controller, which analyzes the information which has been sent and makes a decision. Finally, there is a device, which takes the decision from the controller and does something to the process. This last one is a start and stop operating device, which is typically a relay. Mr. Ménager then explained, also with the use of overhead projector slides, how the goods in issue fit or are used in process control. He explained that the goods at issue always function to connect the three basic functions of process control, namely sensing, analysis and decision. Mr. Ménager then went through two different applications of process control, namely, controlling the temperature in a dryer and regulating the level of water in a water filtering plant, and explained how the goods in issue are used in those applications.

Finally, Mr. Ménager testified that the goods in issue are sold as components of process control. He testified that are designed for such use. He also explained that, at the time of importation, the appellant knows the final use to which the goods are going to be put. For example, if the appellant sells certain goods to Provost Bus, the appellant knows that there are a number of process control components in a bus. For example, there are controllers for the temperature or the pressure on the brakes. Mr. Ménager explained that the same thing would apply to sales made to Bombardier.

In cross-examination, Mr. Ménager explained that the expressions "programmable logic controller," "PLC," "controller," "industrial controller" and "industrial computer" are all synonyms of "process control apparatus." They all have the same functions, that is, to control, to get inputs and to act on the outputs. He explained that, sometimes, the operation is closed-loop, and, at other times, it is open-loop. He explained that process control is a combination of closed-loop and open-loop operations. For example, the constant control of temperature would be considered a closed-loop operation, while the switching on of a ventilator would be considered an open-loop operation. Therefore, Mr. Ménager testified that the goods in issue are used in process control which sometimes has both closed-loop and open-loop operations. He was shown a document from one of the appellant's competitors which indicated that goods similar to the goods in issue could be used in a wide range of industries, from the computer and telecommunications industries to the medical, machine tool, automotive, utility, process control and consumer industries. He agreed that the appellant's products could be used in most of these industries, but not in the "consumer" industry. He said that this particular competitor may have different products from those of the appellant which can be used in this industry. He acknowledged, however, that anybody could take the appellant's products and do something with them that they are not supposed to do.

The appellant's third witness, Mr. Michel Marcotte, Director General of Contrôles C.E.I. Inc., a company which produces control panels for industrial purposes, was qualified by the Tribunal as an expert in process control. He described how the components of process control operate in a pump to control water level. He then explained how the goods in issue are used in such an application. He agreed with the other witnesses that the goods in issue are designed to be used in process control. He testified that they must be used in industrial process control. He explained that, individually, they do nothing. He said that it is by interconnecting them that they become functional.

In cross-examination, Mr. Marcotte testified that Contrôles C.E.I. Inc. manufactures control panels based on each client's needs. He explained that the company purchases products from the appellant because of its reliability. He testified that the process control application which he described is closed-loop. Mr. Marcotte then gave his view of the difference between a closed-loop and an open-loop application. He agreed with Mr. Ménager that, in process control, there can be both. In answering questions from the Tribunal, he said that he could not guarantee that the products which are used in process control could not be used for anything else. He testified that not even the appellant's representatives could give such a guarantee. He said that the final decision as to what to do with the products rests with the client.

Three witnesses testified on behalf of the respondent. The first witness, Mr. Ignatius Leron, Manager of the Electrical Products and Scientific Instruments Unit, a division of the Trade Policy and Interpretations Directorate at the Department of National Revenue (Revenue Canada), explained that the officer on this case reported to him and that, as such, he had a general knowledge of what had transpired. He explained that Revenue Canada's policy on the administration of the end-use provisions in the *Customs Tariff* is that importers must satisfy Revenue Canada that the imported goods were actually used in accordance with the requirements of the provision. Mr. Leron referred to Memorandum D11-8-1,[4] which sets out Revenue Canada's policy. It provides that Revenue Canada will accept a statement from the end user that the imported goods are being used in a particular application as proof that the importer has met the requirements of the end-use provisions.

Mr. Leron explained that importers who cannot establish end use at the time of importation can enter into various arrangements with Revenue Canada. For instance, there are percentage arrangements, where departmental officials will visit the importer's premises and establish a percentage of goods which meet the requirements of the end-use provision, based on the past sales history of the company. There is also a stocking authorization, which allows an importer that imports goods for stocking purposes to enter the goods under the end-use provision; however, the importer must report any diversion to Revenue Canada and pay the applicable duty. Finally, there are "committed by design" rulings. These apply in cases where Revenue Canada is satisfied that imported goods have only one use, and it will not require any further proof from the importer.

Mr. Leron testified that Revenue Canada explored the possibility of entering into a percentage arrangement with the appellant; however, at the time of the appeal, no such arrangement had been concluded. He also testified that a stocking authorization could have been granted to the appellant provided there were sufficient controls in place to show Revenue Canada that some of the imported goods were actually used in process control apparatus. Mr. Leron testified that he was told that, when departmental officials visited the appellant's premises in an effort to establish a percentage arrangement, its representatives

---

4. *Administrative Policy—End-Use Program*, Department of National Revenue, Customs, Excise and Taxation, March 31, 1994.

were not prepared to put in the extra work involved to prove that the goods in issue were, in fact, used in process control apparatus. He testified that the appellant has filed over 101 claims with Revenue Canada to receive the benefits of Code 2101.

Finally, Mr. Leron explained that there are two different expressions used in the *Customs Tariff*, "for use in," which is defined as "wrought into," "incorporated into" or "attached to," and "of a kind used," which is not defined. However, the latter term has been interpreted by the Tribunal to mean "provided they are capable of being used in a particular application." Mr. Leron explained that, if the importer claims that the imported goods are "for use in" other goods, Revenue Canada asks for proof of actual use, while, if the importer claims that the imported goods are "of a kind used" in other goods, Revenue Canada does not ask for such proof. It will be satisfied with proof that the imported goods are capable of being used in other goods. He explained that, since the legislator has used two different expressions, Revenue has two different interpretations.

The respondent's second witness, Mr. Mark Turnbull, was qualified by the Tribunal as an expert witness in process control apparatus and programmable controllers. He explained that, in his view, the goods in issue are not designed exclusively for use in process control apparatus. He testified that they could be used in other applications. He said that the analog converters in issue could be used in alarm systems, for example. He testified that the platinum RTD modules in issue could be used in a computer room to monitor temperature or, more specifically, to control the cooling system to prevent overheating of equipment. He explained that this would not necessarily be process control. It could be an open-loop system, which means that it has the ability to be programmed by the user. He testified that the terminal blocks in issue can be used anywhere to connect two or more conductors or wires. Mr. Turnbull also went through other possible applications for some of the other goods in issue, including the relay interface modules.

With the use of drawings, Mr. Turnbull explained the difference between an open-loop and a closed-loop system. He explained that, when there is no interaction between the output and the input or, in other words, when there is no interaction between the sensing device and the control device, the system is open-loop. Some examples of an open-loop system would be a bell or a siren. He said that, although such a system could be part of process control apparatus, it is not itself process control apparatus. He explained that a system is closed-loop where there is continual monitoring of a particular situation. An example of a closed-loop system would be temperature control.

In cross-examination, Mr. Turnbull testified that, because the goods in issue are standardized in terms of form and fit, and usually in function, they are interchangeable with other manufacturers' goods. He reiterated that process control is but one application to which the goods in issue can be put. He stated that he has seen some of the appellant's terminal blocks being used in an open-loop alarm system. However, he acknowledged that the alarm system was part of larger closed-loop process control application.

Counsel for the appellant recalled Mr. Ménager. He testified that, in his experience, he had never seen the appellant's goods used in a purely open-loop system, because a system is always a combination of different processes. He explained that, in a process, there are always different parameters to measure, for example, a temperature and a speed. These are closed-loop, and an on-off switch is open-loop. He testified that some of the appellant's products may be found in an alarm system, but that such a system will always be part of an overall process control system. He said that everybody can open the control panel in homes and find fuse blocks and terminal blocks, but never the ones produced by the appellant. He reiterated that such goods are for industrial use only.

The respondent's last witness was Mr. Tony Illuzzi, Section Head of the Compliance Verification Unit at Revenue Canada. At the time that the claims at issue were processed, he was Regional Tariff and Values Administrator. According to Mr. Illuzzi, the appellant claimed the benefit of Code 2101 at the time of importation. He testified, however, that he could not grant the appellant's request because there was not enough evidence to substantiate the "for use in" provision of Code 2101. The appellant did not prove that the goods in issue were actually used in process control apparatus. He testified that he contacted the appellant to try to obtain more evidence. He said that the kind of evidence that he would have accepted was an end-use certificate, purchase orders, sales invoices or other documents that clearly related to the goods in issue. Mr. Illuzzi testified that he did receive end-use certificates from the appellant's customers; however, they covered only a portion of the goods in issue. In addition, some of them indicated that the goods in issue were not being used in process control apparatus. He communicated this information to the appellant and explained that the "committed by design" option was available for consideration.

The appellant, therefore, submitted a request for such a ruling. It was, however, denied by Revenue Canada, because, again, some of the documents indicated that certain of the goods in issue were being used in goods of tariff items other than tariff item No. 9032.90.20. In particular, some of the documents indicated that certain of the good in issue were being used in goods of heading No. 85.37. The appellant was, therefore, advised that the "committed by design" option was no longer available. Mr. Illuzzi, therefore, suggested that they proceed by the percentage arrangement. However, such an arrangement could not be concluded because, at the time, the appellant was not ready to put in the resources or the personnel that was needed to implement such a system. He explained that the appellant submitted information on other projects in which the goods in issue were used, but that none of it proved that the goods in issue were actually used in process control apparatus. Rather, the information provided showed that most of these projects involved goods of heading No. 85.37.

In cross-examination, Mr. Illuzzi explained that, in order to grant the request, he needs to see evidence that the goods in issue are actually used in goods of tariff item No. 9032.90.20. He explained that one way to do this is to present Revenue Canada with a copy of a purchase order from a client that is going to use the goods obtained from the appellant in a process control apparatus. He explained again the different options available to an importer. He reiterated that the evidence provided by the appellant was not sufficient to establish actual use in process control apparatus for the reasons explained above. He explained that, as soon as departmental officials realized that one of the goods in which the goods in issue were being used was not a process control apparatus, they could not accept the appellant's claim that all of the goods in issue always end up in such an application. Mr. Illuzzi testified that, even if all the goods in which the appellant claimed the goods in issue were being used were found to be goods of tariff item No. 9032.90.20, the requests for the benefits of Code 2101 could still not have been granted, because the evidence of actual use was insufficient. Finally, Mr. Illuzzi explained that, if goods were used in goods of heading No. 85.37 and if, in turn, those goods were incorporated into goods of heading No. 90.32, the original goods would qualify for the benefits of Code 2101.

ARGUMENT

Counsel for the appellant submitted that the evidence clearly showed that the goods in issue are designed, marketed and sold for use in process control and that there is no other use for these goods. They argued that they are not used in open-loop systems. Rather, they are used in closed-loop applications. Counsel referred to the documents presented into evidence in support of their argument that the goods in issue are marketed as components of process control, both by the appellant and its competitors. They also

referred to the testimony of Mr. Ménager and his description of project diagrams to prove that the goods into which the appellant's goods are incorporated are process control apparatus. Further, they relied on a letter from a Revenue Canada official which indicated that all of the projects described in the diagrams submitted by the appellant to Revenue Canada appeared to be apparatus of heading No. 90.32. They argued that actual use was, therefore, demonstrated and that the appellant's claims should have been allowed. Counsel also referred to the testimony of Mr. Marcotte and his explanation of how the goods in issue are used in "liquid level control apparatus," which, relying on the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[5] (the Explanatory Notes), they argued are clearly process control apparatus. They also argued that the testimony of the respondent's expert witness supported the appellant's position, namely, that the goods in issue are for use in process control apparatus.

Counsel for the appellant argued that the expression "for use in" found in Code 2101 should be given a broad interpretation. In support of their argument, they referred to more specific expressions found in other tariff codes, for example, "for use in the manufacture of," "exclusively for use in," "designed for use in" and "parts solely or principally for use in." In their view, the fact that such words as "exclusively" or "solely" are not found in Code 2101 means that its coverage is broader than other codes. Referring to the Explanatory Notes, counsel argued that three components make up process control: a measuring device, which can be a converter or a thermocoupler; an electronic control device; and a switch or a stop/start operating device. They argued that all of these can be imported separately, and that is what the appellant has done. He noted that when they are imported separately, they attract duty, yet when process control apparatus is imported as a complete unit, it is duty free. They argued that Code 2101 exists to protect the Canadian industry. They said that, if Code 2101 is not interpreted more broadly, Canadian producers of process control apparatus will be at a disadvantage to foreign producers of such goods. Counsel also referred to the Tribunal's decision in *Kappler Canada Ltd.* v. *The Deputy Minister of National Revenue*,[6] where it was held that clothes which could be used when removing asbestos qualified for the benefits of Code 1001. They argued that the Tribunal found that the clothes in issue were "for use in" "a noxious atmosphere" as provided under Code 1001, despite the fact that they could be used in various applications.

Counsel for the appellant referred to the decision of the Federal Court of Appeal in *The Deputy Minister of National Revenue for Customs and Excise* v. *Steel Company of Canada Limited*[7] which held that the expression "for use" found in paragraph 1(*a*) of Part XIII of Schedule III to the former *Excise Tax Act*[8] envisaged that the question of liability for an exemption of sales tax had to be answered before the goods were utilized. Counsel argued that this is an exact parallel to the present case and that it should be relied on by the Tribunal in determining the meaning to be given to that phrase in Code 2101. Counsel referred to the decision of the Supreme Court of Canada in *Her Majesty the Queen* v. *York Marble, Tile and Terrazzo Limited*,[9] where the Supreme Court of Canada relied on Customs decisions to interpret the words "manufactured" or "produced" in the *Excise Tax Act*. Counsel argued that it is clearly established that the issue of tariff classification must be decided at the time of importation. Since the applicability of a tariff code is an issue of tariff classification, it must also be determined at that time. He argued that it makes no sense to ask the importer to prove actual use when the goods have not yet been used. In counsel's view, this could not have been the intent of the legislator, nonetheless, it remains Revenue Canada's interpretation. They argued

5. Customs Co-operation Council, 1st ed., Brussels, 1986.
6. Appeal No. AP-94-232, October 26, 1995.
7. 5 C.E.R. 438, Court File No. A-239-82, June 13, 1983.
8. R.S.C. 1970, c. E-13.
9. [1968] S.C.R. 140.

that Revenue Canada's administrative policy is inconsistent with the legislation. They referred to several cases which provide that administrative practice can only be invoked when there is some doubt about the meaning of legislation and, even then, can only be used as a tool or a guide, not as a binding authority.

Counsel for the appellant submitted that the Tribunal's decision in *Ballarat Corporation Ltd.* v. *The Deputy Minister of National Revenue*,[10] which found that the words "of a kind used in" did not impose an actual end-use requirement and that it was sufficient to prove that the imported goods were suitable or capable of being used, supports the appellant's position in the present case. Relying on this case, counsel argued that it is not necessary that the goods in issue be shown to have been used in process control. It is sufficient to show that they are capable of being used in such an application. In their view, the appellant has clearly done so in the present case. In addition, counsel argued that the goods in issue are capable of being "attached" to process control apparatus. Therefore, they meet the definition of the expression "for use in" found in section 4 of the *Customs Tariff*. Counsel referred to a number of other cases under the *Excise Tax Act*, where the Federal Court of Canada held that there was no legal obligation on a manufacturer to show actual use to prove that goods are "for use" in other goods.

With respect to the jurisdictional issue, counsel for the appellant argued that, in order to invoke section 77 of the Act, there must have been a change in the use of the goods from their original intended purpose. They argued that this is not the situation in the present appeal. They referred to the evidence which showed that the appellant clearly knew, at the time of importation, that the goods in issue were going to be used in process control. There was merely a lack of knowledge on its part regarding the existence of Code 2101. Accordingly, counsel argued that the issue here is one of tariff classification and that, therefore, the Tribunal has jurisdiction to rule on the issue.

Counsel for the respondent argued that the issue in this appeal is one of diversion, which falls under section 77 of the Act, rather than an issue of tariff classification, which falls under section 67, on the basis that the benefits of Code 2101 were not claimed by the appellant at the time of importation. With respect to the second issue, counsel did not dispute that it is possible that the goods in issue may be used in goods of heading No. 90.32; however, he argued that the evidence presented by the appellant as to whether the goods in issue were actually used in process control was inconclusive. He argued that there was evidence that some of the goods in issue were used in goods of heading No. 85.37, which, he argued, cover open-loop applications rather than closed-loop applications, which, in his view, are the kind of goods covered by heading No. 90.32. He relied on the testimonies of the expert witnesses and the Explanatory Notes in support of his argument.

Relying on the Tariff Board's decision in *Superior Brake & Hydraulic Specialists Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*,[11] counsel for the respondent argued that the onus is on the importer to establish the end-use qualification of the goods in accordance with the well-established principle that the burden of proof lies upon the party that substantially asserts the affirmative of the issue. Referring to the testimony of Mr. Illuzzi, counsel submitted that the respondent did everything possible to accommodate the appellant, but that the evidence of actual end use was never provided. Accordingly, counsel argued that the respondent was correct in denying the appellant its claim for the benefits of Code 2101. Relying on the definition of the expression "for use in" in section 4 of the *Customs Tariff*, counsel argued that the imported goods must be actually "wrought into" goods of tariff item

10. Appeal No. AP-93-359, December 19, 1995.
11. 11 T.B.R. 13.

No. 90.32 in order to qualify for the benefits of Code 2101. In counsel's view, when one finds words like "wrought into," one does not need words like "exclusively" or "solely" to show that what is needed is actual use. He argued that the evidence in this case clearly showed that the goods in issue can be used elsewhere than in process control.

DECISION

As noted earlier, the first issue in this appeal is whether the Tribunal has jurisdiction to address the appellant's claim that the goods in issue qualify for the benefits of Code 2101. The respondent's position is that the issue is one of diversion, which falls under section 77 of the Act, rather than an issue of tariff classification, which falls under section 67 of the Act. A similar issue was raised by the respondent in *Asea Brown Boveri Inc.* v. *The Deputy Minister of National Revenue*;[12] however, it was abandoned by counsel for the respondent at the hearing because, having heard the evidence, he accepted that the appellant knew the end use to which the goods in issue were to be put at the time of importation, but erroneously failed to claim the benefits of Code 2101. In the Tribunal's view, the evidence is clear in the present case that the appellant knew the use to which the goods were going to be put at the time of importation. The witnesses for the appellant testified that they knew so; however, according to them, the appellant failed to claim the benefits of Code 2101 because it was not aware that it existed. The issue is, therefore, not one of diversion, which falls under section 77 of the Act, but one of tariff classification, which falls under section 67. In the Tribunal's view, this situation is the same as the situation which existed in *Asea Brown Boveri* and, as such, finds that it has jurisdiction to determine whether or not the goods in issue qualify for the benefits of Code 2101.

The second issue is, therefore, whether the goods in issue qualify for the benefits of Code 2101, which provides for the duty-free entry of articles (other than goods of the tariff items listed), for use in, among others, the goods of tariff item No. 9032.90.20. There was no dispute between the parties that the goods in issue are capable of being used in process control apparatus of heading No. 90.32. The issue is with respect to the interpretation to be given to the expression "for use in" found in Code 2101. In the Tribunal's view, the expression "for use in" in Code 2101 means "actual use." In *Asea Brown Boveri*, the Tribunal noted that section 4 of the *Customs Tariff* provides that "[t]he expression 'for use in', wherever it occurs in a tariff item in Schedule I or a code of 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." On the basis of this provision, the Tribunal found that some actual use must be shown by the appellant in order for it to be entitled to the benefits of Code 2101. The Tribunal is of the opinion that its decision in *Ballarat*, which held that the expression "of a kind used in" means that goods must be capable of, or suitable for, use with other goods, supports this conclusion. Indeed, the Tribunal is of the view that the expression "for use in" must mean something different from the expression "of a kind used in."

In the Tribunal's view, the appellant, in the present case, does not qualify for the benefits of Code 2101 because it did not show that some of the goods in issue were actually used in process control apparatus. Rather, the appellant demonstrated that all of the goods in issue were capable of being used in such goods. However, the evidence also showed that the goods in issue were capable of being used in other goods, in particular, those of heading No. 85.37. Therefore, the respondent was correct in denying the appellant's claim. The Tribunal notes that the respondent gave every opportunity to the appellant to show that some of the goods in issue were actually used in goods of tariff item No. 9032.90.20. Indeed, the respondent's officials explained to the appellant the kind of evidence that they needed to establish end use.

12. Appeal Nos. AP-93-392 *et al.*, June 10, 1998.

Such evidence could have included end-use certificates, purchase orders, sales invoices or other documents that clearly related to the goods in issue. However, such evidence was never provided and, in fact, the evidence submitted showed that the goods in issue were actually used or capable of being used in goods of other headings. The Tribunal notes that evidence needed was also not provided by the appellant in the context of this appeal.

In addition, the Tribunal notes that, because of the large number of goods imported by the appellant and the difficulty in obtaining proof of actual use for all of these goods, the respondent offered to conclude a "percentage arrangement" with the appellant or the possibility of obtaining a "committed by design" ruling. However, the information provided by the appellant to satisfy the requirements of these options was insufficient or proved that the goods in issue were capable of being used in other goods.

Accordingly, the appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

APPENDIX

1. Fuse Terminal Blocks

2. Analog Signal Conditioning
   - Analog Converters
   - Current/Voltage Converters
   - Voltage/Current Converters
   - Platinum Resistive Temperature Detector (RTD) Modules
   - Thermocouple/Voltage or Current Converters
   - Voltage Amplifiers
   - Current to Current Isolation

3. Electronic Interfaces
   - Relay Interface Modules
   - Opto-coupler Interface Modules

4. Terminal Blocks
   - Terminal Blocks
   - Fuse Holder Terminal Blocks
   - Terminal Blocks for Metering Circuits
   - Terminal Blocks for Circuit Testing
   - PCB Terminal Blocks

5. Relays

6. Connectors

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, June 28, 1999

Appeal No. AP-97-029

IN THE MATTER OF an appeal heard on February 23 and March 10, 1998, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated March 5, 6, 11, 14, 19, 20, 21 and 27, 1997, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

ENTRELEC INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

CORRIGENDUM

All references in the Tribunal's decision dated September 28, 1998, to "tariff item No. 9032.90.20" should read "tariff item No. 9032.89.20".

By order of the Tribunal,

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