

Ottawa, Tuesday, December 21, 1999

Appeal No. AP-97-137

IN THE MATTER OF an appeal heard on April 12 and 13, 1999,
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Deputy Minister of
National Revenue dated December 19, 1997, with respect to a
request for re-determination under section 63 of the *Customs Act*.

BETWEEN

ASEA BROWN BOVERI INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Raynald Guay
Raynald Guay
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-97-137

ASEA BROWN BOVERI INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This purports to be an appeal under section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue (now the Commissioner, Canada Customs and Revenue Agency) made under section 63 of the *Customs Act*. The first issue in this appeal is whether the respondent's decision under appeal was made in accordance with section 63 or 64 of the *Customs Act* and, therefore, whether the Tribunal has jurisdiction to hear this appeal. The second issue in this appeal is whether the goods in issue qualify for duty relief under Code 2101 as articles for use in the goods of tariff item No. 9032.89.20.

HELD: The appeal is dismissed. It is the Tribunal's view that only the question of whether the resistors and capacitors qualify for duty relief under Code 2101 is properly before it. The respondent's re-determination of the classification of the resistors and capacitors in the December 19, 1997, decision, as a result of the appellant's request for a re-determination of the classification of the resistors and capacitors pursuant to paragraph 63(1)(a) of the *Customs Act*, is a decision of the respondent made pursuant to section 63. However, the respondent's re-determination of the classification of the other four types of goods (transformers, varistors, circuit breakers and insulators) was neither a re-determination resulting from a request for re-determination by the appellant, pursuant to section 63, nor a re-determination made within two years after the time of the determination under section 58, pursuant to section 64.

It is the Tribunal's view that the resistors and capacitors do not qualify for duty relief under Code 2101 as goods for use in process control apparatus of tariff item No. 9032.89.20. The resistors and capacitors are passive devices which simply sit on the lines and, if electrical current is passed through them, have an effect on that current. The resistors and capacitors, themselves, do not react or respond to any direction from process control apparatus. As the resistors and capacitors do not have an active role in carrying out directions from the process control apparatus, it is the Tribunal's view that they are not functionally joined to that apparatus.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	April 12 and 13, 1999
Date of Decision:	December 21, 1999
Tribunal Members:	Pierre Gosselin, Presiding Member Raynald Guay, Member Peter F. Thalheimer, Member
Counsel for the Tribunal:	Tamra Alexander Marie-France Dagenais
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Peter E. Kirby and Michael Sherbo, for the appellant Stéphane Lilkoff, for the respondent

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Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
RAYNALD GUAY, Member
PETER F. THALHEIMER, Member

REASONS FOR DECISION

INTRODUCTION

This purports to be an appeal under section 67 of the *Customs Act*¹ from a decision of the Deputy Minister of National Revenue (now the Commissioner, Canada Customs and Revenue Agency) made under section 63 of the *Act*. The first issue in this appeal is whether the respondent's decision under appeal was made in accordance with section 63 or 64 of the *Act* and, therefore, whether the Tribunal has jurisdiction to hear this appeal. The second issue in this appeal is whether the goods in issue qualify for duty relief under Code 2101 as articles for use in the goods of tariff item No. 9032.89.20 of Schedule I to the *Customs Tariff*.² The relevant provisions of the *Act* at the time of importation are as follows:

[58] (5) Where an officer does not make a determination or an appraisal under subsection (1) in respect of goods, a determination of the tariff classification and an appraisal of the value for duty of the goods shall, for the purposes of sections 60, 61 and 63, be deemed to have been made thirty days after the time the goods were accounted for under subsection 32(1), (3) or (5) in accordance with any representations made at that time in respect of the tariff classification or value for duty by the person accounting for the goods.

60.(1) The importer or any person who is liable to pay duties owing on imported goods . . . may, after all amounts owing in respect of the goods as duties and interest have been paid or security satisfactory to the Minister has been given in respect of the total amount owing,

(a) within ninety days, or

(b) where the Minister deems it advisable, within two years

after the time the determination or appraisal was made in respect of the goods under section 58, request a re-determination of the tariff classification or a re-appraisal of the value for duty.

[60] (3) On receipt of a request under this section, a designated officer shall, with all due dispatch, re-determine the tariff classification or re-appraise the value for duty, as the case may be, and give notice of his decision to the person who made the request.

63.(1) Any person may

(a) within ninety days after the time the person was given . . . notice of a decision under section 60 or 61 . . .

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter *Act*].
2. R.S.C. 1985 (3d Supp.), c. 41.

request . . . a further re-determination of the tariff classification . . . re-determined . . . under section 60 or 61.

[63] (3) On receipt of a request under this section, the Deputy Minister shall, with all due dispatch . . . re-determine the . . . tariff classification . . . and give notice of that decision to the person who made the request.

64. The Deputy Minister may re-determine the tariff classification . . . of imported goods

(a) in the case of a determination of a tariff classification . . . within two years after the time the determination . . . was made under section 58, where the Minister deems it advisable.

67. A person who deems himself aggrieved by a decision of the Deputy Minister made pursuant to section 63 or 64 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the Deputy Minister and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

The relevant tariff code reads as follows:

Articles (other than goods of the tariff item Nos. enumerated below) for use in:

2101 The goods of tariff item No.: . . . 9032.89.20.

Tariff item No. 9032.89.20 reads as follows:

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.

EVIDENCE

Mr. Jean-Pierre Haché, Marketing Manager, Asea Brown Boveri Inc., testified on behalf of the appellant. Mr. Haché is an engineer and was qualified as an expert in the field of power engineering to give opinion evidence on issues of process control. Mr. Haché testified that the generation, transmission and distribution of electricity is a process. He stated that equipment that measures, interprets a measurement or reacts to an event has a direct impact on regulating and controlling the process and is, therefore, part of process control. Mr. Haché testified that control occurs, first, at the local or substation level. If a line fails, the protection equipment takes action, either trips a breaker or opens a circuit, and, at the same time, sends a signal to the regional control. At the regional level, decisions as to how to bypass the fault are made, and circuits are opened or closed to re-route the power. Similarly, central control is alerted to the problem and, if adjustments are required across regions in order to address the fault, central control ensures that the appropriate action is taken. Mr. Haché stated that all three levels of control are fully interconnected and integrated.

Mr. Haché testified that the transformers, electrical resistors, capacitors, varistors, circuit breakers and insulators in issue were installed at the McLeese substation in the B.C. Hydro network. He stated that the McLeese substation was specifically designed as a series capacitor substation and that it has a control centre. Mr. Haché described the function of the goods in issue as increasing the power transfer capability of the line and reducing transmission system losses. He stated that series capacitors, which are capacitors configured in series, require voltage and current transformers, varistors, a reactor assembly and circuit breakers to function. Mr. Haché testified that the capacitors are the heart of the system and that, when the capacitor bank is connected to the network, the voltage level rises. If the capacitor bank is removed from the network, the voltage level drops. He stated that resistors serve a protective function to prevent overcurrents

from damaging the capacitor bank or other equipment. Mr. Haché testified that the voltage transformers and SF-6 circuit breakers are also found in gas insulated switchgear (GIS). Therefore, he submitted, as GIS qualifies for duty relief under Code 2101, so too should the goods in issue.

Mr. Haché testified that the current and voltage transformers feed information to the control centre. A relay makes the decision as to whether the series capacitor bank needs to be removed from the network. The relay causes the circuit breaker to close if the series capacitor bank must be removed from the network, and the power flows around the series capacitor bank. Mr. Haché testified that the goods in issue are directly connected to a control centre.

Mr. Réjean M. Breton, President of Breton, Banville & Associates, a consulting firm, testified on behalf of the respondent. Mr. Breton was qualified as an expert in the field of power engineering to give opinion evidence on issues of process control. Mr. Breton provided the Tribunal with a diagram of the Hydro-Québec power grid. Mr. Breton explained the various components of the grid, from generation to transmission to distribution. Mr. Breton differentiated between primary equipment, such as the generators, transformers, busbars and transmission lines, and protection and measuring equipment, such as protection relays. Mr. Breton testified that the protection and measuring equipment communicates with the control centre regarding decisions being made. Mr. Breton also stated that actuators are instruments, or equipment, that respond to a control signal and that they are not part of process control.

Mr. Breton testified that local or substation control is not part of process control. He stated that the summation of each local control is process control. He stated that process control only occurs at the regional and central levels. The distinction which Mr. Breton made between local and regional or central control is that local control only controls equipment in the close vicinity of the control room, within the substation. However, regional or central control controls many different remote locations.

Mr. Breton testified that the function of series capacitors is to counteract the adverse effect of reactants. He stated that reactants delay current by 90 degrees and that capacitants advance it by the same amount. He stated that capacitors are designed for a specific line application, installed on the line and then left alone. Once the capacitors are connected to the line, the line has increased transmission capability, but that is all. He stated that there is no active control of the transmission process. Mr. Breton testified that, when an abnormal situation arises, protective relays signal the breakers to act to protect the series capacitor bank by rerouting the current flow. Mr. Breton stated that the breaker in a series capacitor is an actuator. Mr. Breton also stated that series capacitors are not essential to the functioning of the power grid. He stated that, while transmission capability would be degraded without series capacitors, the grid would continue to function. Mr. Breton testified that, when the Hydro-Québec lines were initially commissioned in 1972, there were no series capacitors on the lines.

Ms. Susan Ryan, Compliance and Verification Officer, Department of National Revenue (now Canada Customs and Revenue Agency), also testified on behalf of the respondent. Ms. Ryan testified as to her involvement in the development of Customs Notice N-010.³

ARGUMENT

Counsel for the appellant raised a preliminary issue as to the Tribunal's jurisdiction to make a decision in this appeal with respect to any of the goods in issue other than the resistors and capacitors.

3. Department of National Revenue, "Interpretation of Tariff Code 2101 as it Relates to an Electrical Network" (5 December 1995).

Counsel explained that the goods in issue were originally imported as separate goods, not as a functional unit. They were imported as: (1) transformers; (2) electrical resistors; (3) capacitors; (4) varistors; (5) circuit breakers; and (6) insulators. Counsel explained that a re-determination was requested by the appellant pursuant to paragraph 60(1)(b) of the *Act* in respect of items (1), (2), (3), (5) and (6). A re-determination was not requested for item (4). In that re-determination, counsel stated that the respondent determined that Code 2101 applied to items (1), (5) and (6). Counsel stated that, on March 4, 1996, the appellant filed a request for further re-determination pursuant to paragraph 63(1)(a) in respect of items (2) and (3) only. In the detailed adjustment statement issued by the respondent, counsel stated that the respondent purported to re-determine the tariff classification of all six items, classifying them as a functional unit series capacitor. Counsel submitted that the respondent did not have the authority to go back more than two years after the date of entry to revise the tariff classification of goods which were not subject to re-determination.

Counsel for the appellant submitted that the Tribunal does not have the authority to consider the appeal with respect to those goods other than the resistors and capacitors, items (2) and (3), as the Tribunal's jurisdiction is dependent upon a previous valid decision of the respondent. Counsel referred the Tribunal to *Mueller Canada v. M.N.R. and D.M.N.R.*⁴ and *M & S X-Ray Services v. D.M.N.R.*⁵ Counsel asked the Tribunal to declare the respondent's determination under section 63 a nullity with respect to items (1), (4), (5) and (6) and only concern itself with the resistors and capacitors, items (2) and (3). Counsel stated that considering the resistors and capacitors separately would not change their tariff classification as functional unit series capacitors.⁶

With respect to the main issue in this appeal, whether the goods in issue qualify for duty relief under Code 2101, counsel for the appellant submitted that all parties and their expert witnesses agreed that the generation, transmission and distribution of electricity is a process. Counsel stated that the expert witnesses agreed that the electrical network is made up of various components, all of which are interconnected by wiring or cable. Counsel also stated that the expert witnesses agreed that control of the process occurs throughout the network and is exercised at three levels: central, regional and local. Counsel submitted that the distinction made by Mr. Breton, that only the control exercised at the central and regional levels constituted "process control", was untenable and submitted that Mr. Breton was unable to explain why local control would not constitute "process control". Counsel also submitted that Mr. Breton's distinctions between primary, control and protection equipment and the definition of actuator are inconsistent with uncontested views, in that goods, such as circuit breakers, which all agree are part of process control, are classified as not being part of process control.

Counsel for the appellant submitted that process control occurs at the central, regional and local levels. Counsel submitted that the appellant need only demonstrate that the goods in issue are "for use in" stations or substations which have a control centre⁷ and that those goods are physically connected and functionally joined to the control centre.⁸

4. (1993), 70 F.T.R. 197.

5. (7 May 1996), AP-94-337 (C.I.T.T.).

6. For this proposition, counsel relied on *Windsor Wafers v. D.M.N.R.C.E.* (21 November 1991), AP-89-281 (C.I.T.T.).

7. For this proposition, counsel relied on *Asea Brown Boveri v. D.M.N.R.* (10 June 1998), AP-93-392, AP-93-393, AP-94-001, AP-94-002, AP-94-007, AP-94-019, AP-94-020, AP-94-026, AP-94-028, AP-94-030, AP-94-033, AP-94-043, AP-94-055, AP-94-060, AP-94-064, AP-94-068, AP-94-077, AP-94-079, AP-94-097 and AP-96-118 (C.I.T.T.).

8. For this proposition, counsel relied on *Sony of Canada v. D.M.N.R.* (12 December 1996), AP-95-262 (C.I.T.T.) [hereinafter *Sony*].

Counsel for the appellant submitted that the goods in issue were installed in the McLeese substation, which is equipped with a control centre. Counsel submitted that the appellant demonstrated that the goods in issue are attached to the control centre, send signals to and receive signals from the control centre and are acted upon by the control centre. Counsel submitted that the goods in issue are required for the control of the process of distributing electricity, as they increase the stability and security of the network. Counsel submitted that the goods in issue do not need to be “essential” to process control to qualify for duty relief under Code 2101 and that, therefore, the fact that the network can operate without the goods in issue is not determinative. Counsel submitted that, as the goods in issue are physically connected and functionally joined to a control centre, they qualify for duty relief under Code 2101. Counsel also submitted that, as the goods in issue contain similar goods, such as an SF-6 circuit breaker and a voltage transformer, to GIS and as GIS qualifies for duty relief under Code 2101, so too should the goods in issue.⁹

In respect of the preliminary issue as to the Tribunal’s jurisdiction to make a decision in this appeal in respect of the goods in issue, counsel for the respondent made three submissions. First, counsel submitted that there is before the Tribunal a re-determination pursuant to section 63 of the *Act* in respect of all six items. The Tribunal, therefore, has the jurisdiction to make a decision with respect to all six items. Counsel submitted that, if the appellant wished to challenge the validity of the respondent’s re-determination under section 63, the appellant should have challenged it before the Federal Court of Canada, which has exclusive jurisdiction over that issue. In the alternative, counsel submitted that, if the Tribunal determines that it does not have a valid re-determination under section 63 before it, the Tribunal should decline to rule on all aspects of the present appeal. Counsel submitted that the re-determination could not be divided into its valid and invalid parts, thus enabling the Tribunal to address certain issues on appeal under section 67. In the further alternative, if the Tribunal determines that it can only rule in respect of the resistors and capacitors, the Tribunal should rule on these two items as if they were part of a functional unit and rule as it would on series capacitors as a whole.

In respect of the main issue in this appeal, whether the goods in issue qualify for duty relief under Code 2101, counsel for the respondent submitted that the generation, transmission and distribution of electricity, collectively, constitute a process. Therefore, counsel submitted, in order to have “process control”, control must be exerted over all three elements of the process. Counsel stated that, if equipment deals only with one aspect of the process, for example, transmission, it does not engage in process control. Counsel suggested that the Tribunal agreed with the respondent’s position that process control is only found at the central or “master” control level in Appeal No. AP-93-392.¹⁰ Relying on the *Explanatory Notes to the Harmonized Commodity Description and Coding System*¹¹ to heading No. 90.32, counsel also submitted that actuators are outside of process control and cannot be part of process control.

Counsel for the respondent submitted that as the goods in issue are concerned only with the transmission of electricity and not with its generation and distribution, the goods in issue are not part of process control. Counsel submitted that, while the goods in issue are important to the functioning of the network, they are not “essential” to process control. Counsel emphasized that electrical networks worked for 120 years without series capacitors. Counsel acknowledged that the goods in issue are “joined” to the network so that they can be monitored by process control, but he stated that the goods in issue are not “functionally joined” to process control equipment. Counsel submitted that the goods in issue are passive stabilizers that perform no automatic or varying control function. Counsel also submitted that an analogy

9. Counsel referred the Tribunal to Customs Notice N-010 and *Asea Brown Boveri v. D.M.N.R.* (5 November 1996), AP-95-189 (C.I.T.T.).

10. *Supra* note 7.

11. Customs Co-operation Council, 1st ed., Brussels, 1986 [hereinafter *Explanatory Notes*].

cannot be made to other equipment because the Tribunal is not aware as to how the other equipment and its components are used in relation to process control. For these reasons, it was counsel's submission that the goods in issue do not qualify for duty relief under Code 2101.

DECISION

The first issue which the Tribunal must determine is whether it has jurisdiction to hear the present appeal. The Tribunal's jurisdiction in this matter is derived from section 67 of the *Act* which, at the relevant time, stated that the Tribunal could hear appeals of the respondent's decisions made pursuant to section 63 or 64. If the decision before the Tribunal, or an aspect of the decision before the Tribunal, is not one made pursuant to section 63 or 64, the Tribunal has no jurisdiction to hear an appeal from that decision or aspect of that decision, as the case may be.¹²

Six different types of goods were imported under the same customs invoice on May 15, 1995. Line 1 of the invoice related to transformers; line 2 to electrical resistors; line 3 to capacitors; line 4 to varistors; line 5 to circuit breakers; and line 6 to insulators. Pursuant to subsection 58(5) of the *Act*, the classification of these goods is deemed to have been made 30 days after the time the goods were accounted for, which would be on June 14, 1995. On March 4, 1996, the appellant filed a request for re-determination pursuant to paragraph 63(1)(a) in respect of the goods in lines 2 and 3 of the invoice (resistors and capacitors). On December 19, 1997, the respondent re-determined the tariff classification of the goods in all six lines of the invoice. This appeal concerns that re-determination.

It is the Tribunal's view that only the question of whether the resistors and capacitors (lines 2 and 3 of the invoice) qualify for duty relief under Code 2101 is properly before it. The respondent's re-determination of the classification of the resistors and capacitors in the December 19, 1997, decision as a result of the appellant's request for a re-determination of the classification of the resistors and capacitors pursuant to paragraph 63(1)(a) to the *Act*, is a decision of the respondent made pursuant to section 63. Therefore, the appeal on the classification of these goods is properly before the Tribunal. However, the respondent's re-determination of the classification of the other four types of goods (transformers, varistors, circuit breakers and insulators) was neither a re-determination resulting from a request for re-determination by the appellant, pursuant to section 63, nor a re-determination made within two years after the time of the determination under section 58, pursuant to section 64.¹³ Therefore, as there is no decision of the respondent made under section 63 or 64 relating to transformers, varistors, circuit breakers and insulators before the Tribunal, this aspect of the respondent's December 19, 1997, decision is not properly before the Tribunal.

Given this determination by the Tribunal, the Tribunal cannot grant the appellant's request to declare the respondent's December 19, 1997, decision a nullity with respect to the transformers, varistors, circuit breakers and insulators. As a statutorily created appellate body, the Tribunal's only jurisdiction in this matter is set out in section 67 of the *Act*. Without a decision of the respondent made under section 63 or 64 in respect of these goods, the Tribunal has no jurisdiction to make a pronouncement in relation to their

12. *Douglas Anderson and Creed Evans v. D.M.N.R.C.E.* (6 April 1992), AP-89-234 (C.I.T.T.); and *Richards Packaging and Duopac Packaging v. D.M.N.R.* (10 February 1999), AP-98-007 and AP-98-010 (C.I.T.T.) [hereinafter *Richards Packaging*].

13. There are exceptional circumstances which allow the respondent to make a re-determination pursuant to section 64 beyond the two-year time limit (paragraphs 64(a.1) to (e)). However, neither the appellant nor the respondent suggested that these exceptional circumstances applied in this case.

classification. In any event, the *Act* does not give the Tribunal the jurisdiction to judicially review a decision of the respondent. This is a matter for the Federal Court of Canada.¹⁴

The Tribunal must now determine whether the resistors and capacitors qualify for duty relief under Code 2101, which applies to “[a]rticles (other than goods of the tariff item Nos. enumerated below) for use in . . . [t]he goods of tariff item No. . . . 9032.89.20”. Tariff item No. 9032.89.20 covers process control apparatus, excluding sensors, which converts analog signals from or to digital signals. The *Explanatory Notes* to heading No. 90.32 provide that the heading covers:

automatic regulators . . . intended for use in complete automatic control systems which are designed to bring a quantity, electrical or non-electrical, to, and maintain it at, a desired value, stabilised against any disturbances, by constantly or periodically measuring its actual value. They consist essentially of the following devices:

- (A) **A measuring device** (sensing device, converter, resistance probe, thermocouple, etc.) which determines the actual value of the variable to be controlled and converts it into a proportional electrical signal.
- (B) **An electrical control device** which compares the measured value with the desired value and gives a signal (generally in the form of a modulated current).
- (C) **A starting, stopping or operating device** (generally contacts, switches or circuit breakers, reversing switches or, sometimes, relay switches) which supplies current to an actuator in accordance with the signal received from the control device.

An automatic regulator within the meaning of Note 6 (b) to this Chapter consists of the devices described in (A), (B) and (C) above, whether assembled together as a single entity or in accordance with Note 3 to this Chapter, a functional unit.

An automatic regulator that is also process control apparatus, is classified under tariff item No. 9032.89.20.

The Tribunal must determine whether the resistors and capacitors are “for use in” process control apparatus of tariff item No. 9032.89.20. At the time of importation of the goods in issue, section 4 of the *Customs Tariff* provided that:

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.¹⁵

The Tribunal adopts the interpretation of the term “attached to” as it was used in *Sony* whereby goods are attached to other goods if they are “physically connected and are functionally joined” to the latter.¹⁶ In order for the Tribunal to determine whether the goods in issue are physically connected and functionally joined to process control apparatus, the Tribunal must first determine what constitutes process control apparatus of tariff item No. 9032.89.20.

The *Explanatory Notes* to heading No. 90.32 provide that the automatic regulators of this heading include a measuring device, an electrical control device and a starting, stopping or operating device. The evidence before the Tribunal is that, in the McLeese substation, voltage and current transformers monitor the levels on the transmission lines. These transformers feed information to control relays located in the

14. *Richards Packaging*, *supra* note 12 at 5-6.

15. *Supra* note 2. Due to the tariffication of the tariff codes, the tariff codes and the reference to tariff codes in this definition were eliminated in the new *Customs Tariff*, S.C. 1997, c. 36.

16. *Supra* note 8 at 6.

substation, which interpret the information and send a signal to circuit breakers which take the capacitor bank on or off line, as required. It is the Tribunal's view that these voltage and current transformers, which are measuring devices, the control relays, which are electrical control devices, and the circuit breakers, which are a starting, stopping or operating device, form a functional unit and that this functional unit is an automatic regulator in heading No. 90.32. The Tribunal must, therefore, determine whether this functional unit is "[p]rocess control apparatus, excluding sensors, which converts analog signals from or to digital signals" pursuant to tariff item No. 9032.89.20.

The appellant has taken the position that process control should be interpreted broadly to include any article that modifies the actions, status or components of the electrical network. The respondent takes a narrower view, arguing that process control only exists where control over the three elements of the electrical network (generation, transmission and distribution) is exerted. The respondent takes the position that process control can only occur at the regional and central control levels. In the Tribunal's view, the answer as to what constitutes process control lies somewhere between these two poles.

It is the Tribunal's view that there are two types of decisions being made by the network. The first are decisions to protect the network and its major components from damage due to random or uncontrolled events. The second are decisions relating to ensuring that the network performs according to design and delivers the desired results. The former are protective in nature, while the latter constitute the control or management of the system. It is the Tribunal's view that "process control" includes the functioning of devices that collectively monitor the system, interpret the data received and take action to restore the system to pre-set values. Therefore, devices which participate in control or management decisions engage in process control. In addition, devices which participate in certain protective decisions can also be engaging in process control.

The Tribunal does not accept the respondent's view that, to constitute process control, all three elements of the process (generation, transmission and distribution) must be controlled. It is the Tribunal's view that the control of a single element of the process, or an aspect of a single element of the process, may constitute process control.¹⁷ The Tribunal notes that this position is consistent with the terms of Customs Notice N-010, which provides that sub-transmission substations, which are usually rated at above 44 kV are, for the most part, equipped with a control centre and that, despite the fact that a sub-transmission substation controls the transmission of electricity and is not involved in its generation or distribution, such control centres are classified under tariff item No. 9032.89.20.

The evidence before the Tribunal is that the functional unit, composed of the voltage and current transformers, control relays and circuit breakers, monitors the transmission of electricity to ensure that the voltage and other variables are at appropriate settings. The evidence before the Tribunal is that the control relays interpret the data received from the voltage and current transformers and send a signal to other equipment, such as the circuit breakers or switchgear, to direct that equipment to take action to restore the system to pre-set values. The Tribunal, therefore, finds that this functional unit participates in management and control decisions and is, therefore, engaged in process control. The Tribunal's view is that the functional

17. The Tribunal does not accept the respondent's position that the Tribunal's decision in Appeal No. AP-93-392, *supra* note 4, confirms that process control is only found at the central or master control level. The Tribunal notes that, in its reasons in that case, it simply stated that the evidence of the respondent's first witness, that it must be master control in order to be process control apparatus, coincided with the wording of Customs Notice N-010 and the testimony of the departmental official. The Tribunal did not make a finding as to whether or not it must be master control in order to be process control apparatus.

unit, composed of the voltage and current transformers, control relays and circuit breakers, is process control apparatus under tariff item No. 9032.89.20.

The evidence before the Tribunal is that the resistors and capacitors are physically connected to the control relays and circuit breakers which form part of the process control apparatus. However, physical connection is not sufficient; the goods in issue must also be functionally joined to the process control apparatus.

It is the Tribunal's view that the resistors and capacitors are not functionally joined to the process control apparatus. The resistors and capacitors are passive devices which simply sit on the lines and, if electrical current is passed through them, have an effect on that current. The resistors impede the flow of the electrical current, and the capacitors enhance its flow. It is the action of the circuit breakers connecting or disconnecting the capacitor bank to the line that gives effect to direction from the process control apparatus and results in electrical current passing through or around the resistors or capacitors so that there is the required increase or decrease in voltage levels. The resistors and capacitors, themselves, and the capacitor bank, as a whole, do not react or respond to any direction from process control apparatus. As they do not have an active role in carrying out directions from the process control apparatus, it is the Tribunal's view that they are not functionally joined to that apparatus. Therefore, the resistors and capacitors do not qualify for duty relief under Code 2101 as goods for use in process control apparatus of tariff item No. 9032.89.20.

Accordingly, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Raynald Guay
Raynald Guay
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member



Ottawa, Monday, January 10, 2000

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BETWEEN

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Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

CORRIGENDUM

The third sentence of the last paragraph on page 5 of the Statement of Reasons should read as follows: "Counsel emphasized that electrical networks worked for 20 years without series capacitors".

This corrigendum pertains only to the English version of the reasons for decision as the French version will incorporate this change when published.

By order of the Tribunal,

Michel P. Granger
Secretary