

Ottawa, Tuesday, October 24, 2000

**Appeal No. AP-99-086**

IN THE MATTER OF an appeal heard on June 19, 2000, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the Canada Customs and Revenue Agency dated November 3, 1999, with respect to a request for redetermination under section 63 of the *Customs Act*.

**BETWEEN**

**CANADISC INC.**

**Appellant**

**AND**

**THE COMMISSIONER OF THE CANADA CUSTOMS  
AND REVENUE AGENCY**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Peter F. Thalheimer  
Peter F. Thalheimer  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-99-086

CANADISC INC.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS  
AND REVENUE AGENCY

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Commissioner of the Canada Customs and Revenue Agency dated November 3, 1999, regarding goods imported into Canada on May 2, 1996. The goods in issue are Hewlett-Packard data cartridges with a 4-mm wide tape. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8523.11.00 as prepared unrecorded media, as determined by the respondent, or should be classified under tariff item No. 8524.51.90 as other records, tapes and other recorded media, as claimed by the appellant.

**HELD:** The appeal is dismissed. It is the Tribunal's view that the formatting process executed on the cartridges is a method of preparing them for use and not a recording intended for later retrieval. The evidence shows that the goods in issue do not contain any recorded information. Accordingly, the Tribunal finds that the goods in issue are properly classified under tariff item No. 8523.11.00 as prepared unrecorded media.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: June 19, 2000  
Date of Decision: October 24, 2000

Tribunal Members: Patricia M. Close, Presiding Member  
Peter F. Thalheimer, Member  
James A. Ogilvy, Member

Counsel for the Tribunal: Marie-France Dagenais

Clerk of the Tribunal: Anne Turcotte

Appearances: Imalda (Mel) Lawler, for the appellant  
Michael Roach, for the respondent

**Appeal No. AP-99-086**

**CANADISC INC.**

**Appellant**

**AND**

**THE COMMISSIONER OF THE CANADA CUSTOMS  
AND REVENUE AGENCY**

**Respondent**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member  
PETER F. THALHEIMER, Member  
JAMES A. OGILVY, Member

**REASONS FOR DECISION**

**INTRODUCTION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> from a decision of the Commissioner of the Canada Customs and Revenue Agency dated November 3, 1999, made under section 63 of the Act, regarding goods imported into Canada on May 2, 1996. The goods in issue are Hewlett-Packard data cartridges with a 4-mm wide tape. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 8523.11.00 of Schedule I to the *Customs Tariff*<sup>2</sup> as prepared unrecorded media, as determined by the respondent, or should be classified under tariff item No. 8524.51.90 as other records, tapes and other recorded media, as claimed by the appellant.

The relevant tariff nomenclature is as follows:

- 85.23 Prepared unrecorded media for sound recording or similar recording of other phenomena, other than products of Chapter 37.  
-Magnetic tapes:
- 8523.11.00 --Of a width not exceeding 4 mm
- 85.24 Records, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of Chapter 37.  
-Other magnetic tapes:
8524. 51 --Of a width not exceeding 4 mm
- 8524.51.90 ---Other

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

## EVIDENCE

Mr. Danny Levesque, Resource Engineer, Hewlett-Packard (Canada) Ltd., gave evidence on the appellant's behalf.<sup>3</sup> Mr. Levesque described the goods in issue as magnetic data cartridges. He testified that some of these cartridges have to undergo a format compliance test before they are sold. This test, done by the manufacturing group before packaging, consists of placing references and a layout on the tape using formatting marks.

In cross-examination, Mr. Levesque acknowledged that, at the time of sale, the data cartridges are sold as blank tapes, as they do not contain any additional information beyond that of the formatting. Mr. Levesque testified that he would define a blank cartridge as meaning a magnetic tape containing only the formatting marks and ready to be used by the end user. He further testified that blank data cartridges can store all types of files.

Dr. George M. White, Computer Science Department, University of Ottawa, gave evidence on the respondent's behalf. Dr. White was qualified by the Tribunal as an expert in computer science. Dr. White described the goods in issue as digital data storage tapes used to back up information. He explained that users put the data from a computer onto those storage tapes so that they can restore the data at a later time, should the computer go down. Dr. White testified that the process of formatting consists of placing magnetic marks on the magnetic substrates of the tape itself with the help of the magnetic heads within the tape drive. He explained that those marks are recognized by the tape drive and allow for the logical restoration of the data so that, for example, the writing stays in a horizontal position. He further testified that the formatting of the goods in issue does not occur until the user actually uses them, since the formatting marks are placed by the magnetic heads inside the tape drive only when the data is recorded onto the tape.

Dr. White testified that, in his opinion, to "record" data, in the context of computer science and data cartridges, means to place information on a tape so that the user can retrieve it at a later date and that to "record" means something more than to "format". He also testified that, in his opinion, the term "prepared", in the same context, means ready in all respects to record data. He explained that formatting does not constitute recording, since the magnetic marks that are placed on the tapes, i.e. formatting, cannot be retrieved by the user.

Finally, Dr. White testified that a blank cartridge means that a tape does not have information placed on it and that, in his opinion, a data cartridge that has been formatted, but that has no other information on it, should be described as a blank cartridge.

In answer to a Tribunal's question, Dr. White testified that, in his view, the term "pre-formatting" is a term that is erroneously used to mean "formatting" and that it is "formatting" that is done when the user actually uses the tape.

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3. At the outset of the hearing, the respondent objected to the qualification of the appellant's witness as an expert, since no expert report outlining his testimony, as required by the Tribunal's rules, had been filed. As a result, the respondent argued that it would suffer prejudice. In light of this, the Tribunal decided that the appellant's witness could not be allowed to testify as an expert witness, but could testify as to the technical specifications of data cartridges from the viewpoint of an engineer employed by the manufacturer of the goods in issue.

## ARGUMENT

The appellant submitted that the goods in issue should be classified in accordance with Rule 1 of the *General Rules of Interpretation of the Harmonized System*,<sup>4</sup> which provides that classification be based on the terms of the heading. It submitted that the goods in issue should be classified in heading No. 85.24, since it clearly provides a more accurate description of the goods in issue.

The appellant submitted that the goods in issue are magnetic tapes broken down into segments, each segment having specific recorded locations. The appellant argued that the goods in issue are not unrecorded media, since they are pre-formatted, a process that writes a layout on the magnetic tape of a cartridge, which is used to store and retrieve data.

The appellant argued that the cartridges in issue have to undergo this digital data storage process executed by the manufacturer before they can be used. During that process, the retention and the life of the tape are tested, and all the relevant information, such as the layout and references, is placed on the tape using formatting marks before they are packaged. It argued that, without this process, the cartridges would not be able to give back the information in the exact space, size, layout and form. It submitted that this process is referred to as “pre-formatting” and argued that pre-formatting is recording, since, during that process, “data” is written on the tapes. It further argued that pre-formatted cartridges are recorded media, as those terms are used in heading No. 85.24.

The respondent agreed that the goods in issue should be classified in accordance with Rule 1 of the General Rules. However, the respondent argued that the goods in issue are properly classified in heading No. 85.23 as prepared unrecorded media. He submitted that heading No. 85.24 contemplates goods that contain some type of information beyond formatting, such as software, music or some type of text file. He further argued that the goods in issue are prepared, since they are ready for use but are unrecorded, since there is no additional information or content on the cartridges beyond the format, the data cartridges being blank when they are purchased. Accordingly, the respondent submitted that the data cartridges in issue which are assembled, formatted and unrecorded should be classified in heading No. 85.23 as prepared unrecorded media.

The respondent submitted that, to determine the classification of the goods in issue, the Tribunal must examine the meaning of the words “prepared”, “recorded” and “unrecorded” that are found in the competing headings. The respondent referred to the dictionary definition of the verb “record” and suggested that its basic meaning is “register, set down for remembrance or reference, put in writing or other legible shape, represent in some permanent form”.<sup>5</sup> He argued that pre-formatting, that is, formatting, does not constitute recording or setting something down for remembrance and that, as such, formatted tapes cannot be considered recorded tapes. The respondent also referred to the dictionary definition of the verb “prepare”, which is defined as “make (person, oneself, thing) ready . . . or prepare oneself or things”.<sup>6</sup> He suggested that this definition is consistent with the formatting of a data cartridge, which can be defined as preparing the magnetic tape so that the user can later record programs or files. Finally, the respondent made reference to the dictionary<sup>7</sup> definitions of the terms “format” and “formatted”, which emphasize that formatting initializes or prepares the data cartridge for initial use so that the user can record or retrieve data.

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4. *Supra* note 2, Schedule I [hereinafter General Rules].

5. *The Concise Oxford Dictionary*, 7th ed., s.v. “record”.

6. *Ibid.*, s.v. “prepare”.

7. See *Oxford Dictionary of Computing*, 1997 at 198; and *The IEEE Standard Dictionary of Electrical and Electronics Terms*, 6th ed. at 424.

The respondent submitted that, based on the definitions quoted above, the information that is formatted in the form of a header on the data cartridges at the time of sale cannot be considered “recorded” information, as is intended by the terms of heading No. 85.24. Rather, as envisaged by the wording of heading No. 85.23, the format contained on the cartridges is a method of preparing the goods in issue, the unrecorded media, for use.

Finally, the respondent referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>8</sup> to heading No. 85.24 that provide, in part, that the heading covers magnetic tapes on which a recording has been made.

## DECISION

Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the General Rules and the *Canadian Rules*.<sup>9</sup> Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in Schedule I, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>10</sup> and the Explanatory Notes.

The General Rules are structured in cascading form. If the classification of an article cannot be determined in accordance with Rule 1, then regard must be had to the subsequent rules. Rule 1 provides the following:

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the [subsequent rules].

The Tribunal notes that the parties agree that the goods in issue are properly classified in Chapter 85 as parts and accessories suitable for use with sound or other similarly recorded phenomena.

The competing headings in this appeal are as follows:

- 85.23 Prepared unrecorded media for sound recording or similar recording of other phenomena, other than products of Chapter 37.
- 85.24 Records, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of Chapter 37.

The Tribunal accepts the evidence that formatting is a process used to write a layout on the magnetic tape of a cartridge so that data can be stored and retrieved at a later time and that formatting is not meant for later retrieval or reproduction. The Tribunal also accepts the evidence that the goods in issue, at the time of sale, are sold as blank tapes, as they do not contain additional information or data beyond that of the formatting. In the Tribunal’s view, formatting is a method of preparing the cartridges for use and not a recording intended for later retrieval. The Tribunal is also of the view that the formatting marks contained within the cartridge cannot be considered recorded information. In the context of computer science and data cartridges, the Tribunal is persuaded that the term “recorded” means more than “formatted”, since, unlike

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8. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter Explanatory Notes].

9. *Supra* note 2, Schedule I.

10. Customs Co-operation Council, 1st ed., Brussels, 1987.

formatted marks, recorded information can be reproduced or retrieved. In the Tribunal's view, the evidence is clear that the goods in issue have been assembled and formatted, but not yet recorded.

No guidance is provided in the Explanatory Notes or elsewhere in the *Customs Tariff* on how to define the terms "recorded" and "prepared". As recognized by the Tribunal in previous decisions,<sup>11</sup> the Tribunal, therefore, looked to the ordinary meaning of the terms "recorded", "prepared" and "formatted" as found in conventional dictionaries. The Tribunal considered the dictionary definitions of the verbs "record" and "prepare" found in *The Concise Oxford Dictionary*, in which they are defined to mean "register, set down for remembrance" and "make (person, oneself, thing) ready" respectively. The Tribunal also looked to the meaning of the term "formatted" found in *The IEEE Standard Dictionary of Electrical and Electronics Terms*.<sup>12</sup>

The Tribunal also examined Note 6 of the Explanatory Notes to heading No. 85.24 that indicates that the heading covers magnetic tapes on which a recording has been made, which are unlike the cartridges in issue. The Tribunal further notes that heading No. 85.23 more closely relates to the goods in issue, as it refers to "[p]repared unrecorded media".

In light of the foregoing, the Tribunal finds that, as the goods in issue, which can be described as formatted data cartridges, must be considered prepared unrecorded media, they are properly classified in heading No. 85.23.

In conclusion, the Tribunal is of the view that the goods in issue are properly classified, on the basis of Rule 1 of the General Rules, under tariff item No. 8523.11.00. Consequently, the appeal is dismissed.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Peter F. Thalheimer  
Peter F. Thalheimer  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

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11. *The Stevens Company* (20 December 1999), AP-98-067 (CITT); and *Karl Hager* (19 May 1993), AP-91-183 (CITT).
  12. *Supra* note 7, s.v. "formatted": "(A) Pertaining to magnetic media, such as tapes or diskettes, that have been initialized and prepared to accept and store data".