



Ottawa, Thursday, February 22, 2001

Appeal No. AP-99-104

IN THE MATTER OF an appeal heard on July 24, 2000, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated October 12, 1999, with respect to requests for redetermination under subsection 63(3) of the former *Customs Act* and subsection 60(4) of the current *Customs Act*.

BETWEEN

BOEHRINGER MANNHEIM CANADA LTD.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-99-104

BOEHRINGER MANNHEIM CANADA LTD.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

This is an appeal under subsection 67(1) of the *Customs Act* from decisions of the Commissioner of the Canada Customs and Revenue Agency. The goods in issue are lithium batteries. They are for use in AccuSoft glucose meters. The issue in this appeal is whether the glucose meters are properly classified in heading No. 90.27 as instruments and apparatus for chemical analysis, as contended by the respondent, or should be classified in heading No. 90.18 as instruments and appliances used in medical sciences, as claimed by the appellant. Should the appellant's position prevail, the goods in issue would benefit from Code 2546 or tariff item No. 9977.00.00.

HELD: The appeal is dismissed. The Explanatory Notes to the Harmonized Commodity Description and Coding System (Explanatory Notes) to heading No. 90.18 indicate that the "heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc." In the Tribunal's view, the reference to "the vast majority of cases" allows for situations where these instruments are used other than in professional practice. However, these situations would be exceptional. In this case, it is clear that the glucose meters are not "used only in professional practice". Mostly, they are used by lay persons. In order to determine whether the glucose meters are classifiable in heading No. 90.18, reference should be made to paragraph (o) of the Explanatory Notes to the heading. This paragraph provides that heading No. 90.18 does not cover "[i]nstruments and appliances used in laboratories to test blood, tissue fluids, urine, etc., whether or not such tests serve in diagnosis (generally **heading 90.27**)." In the Tribunal's view, if an instrument used in the laboratory by a technician for the purposes of testing blood is not classifiable in heading No. 90.18 because it is not used by a doctor, surgeon or midwife, it would seem incongruous that, where used mostly by lay persons, it should be classifiable in that heading. Therefore, noting the respondent's argument, the Explanatory Notes to heading No. 90.18 and the exclusion found at paragraph (o) of those same notes, the Tribunal is not persuaded that the glucose meters are classifiable in heading No. 90.18.

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 24, 2000
Date of Decision: February 22, 2001

Tribunal Member: Richard Lafontaine, Presiding Member

Counsel for the Tribunal: Philippe Cellard

Clerk of the Tribunal: Margaret Fisher

Appearances: Raylene Van Vliet, for the appellant
Marie-Josée Bertrand, for the respondent



Appeal No. AP-99-104

BOEHRINGER MANNHEIM CANADA LTD.

Appellant

AND

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

Respondent

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the former *Customs Act*¹ and subsection 67(1) of the current *Customs Act*² from decisions of the Commissioner of the Canada Customs and Revenue Agency made under subsection 63(3) of the former Act and subsection 60(4) of the current Act on October 12, 1999. The goods in issue are lithium batteries of tariff item No. 8506.50.00 of schedule I to the former *Customs Tariff*³ and of the schedule to the current *Customs Tariff*,⁴ imported by the appellant between June 17 and November 27, 1997, and between January 15 and June 29, 1998. The goods in issue are for use in AccuSoft glucose meters. The issue in this appeal is whether the glucose meters are properly classified in heading No. 90.27 as instruments and apparatus for chemical analysis, as contended by the respondent, or should be classified in heading No. 90.18 as instruments and appliances used in medical sciences, as claimed by the appellant. Should the appellant's position prevail, the goods in issue would benefit from Code 2546⁵ or tariff item No. 9977.00.00.⁶

The relevant tariff nomenclature is as follows:^[7]

85.06	Primary cells and primary batteries.
8506.50.00	-Lithium
90.18	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments.
90.27	Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes.

1. R.S.C. 1985 (2d Supp.), c. 1, as it read prior to the amendment referred to in note 2 [hereinafter former Act].
2. R.S.C. 1985 (2d Supp.), c. 1, as amended, notably by *Customs Tariff*, S.C. 1997, c. 36, ss. 166 and 169 [hereinafter current Act].
3. R.S.C. 1985 (3d Supp.), c. 41 [hereinafter former *Customs Tariff*].
4. S.C. 1997, c. 36 [hereinafter current *Customs Tariff*].
5. Schedule II to the former *Customs Tariff*. For goods imported prior to January 1, 1998.
6. Schedule to the current *Customs Tariff*. For goods imported on or after January 1, 1998.
7. Except for Code 2546 and tariff item No. 9977.00.00, the relevant tariff nomenclature is the same under the former *Customs Tariff* and the current *Customs Tariff*.

9977.00.00^[8] Articles for use in the following:

Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments.

[Code] 2546 Articles for use in the goods of heading No. 90.18 or 90.22, or of tariff item No. 8419.20.10, 9019.20.00, 9021.50.00, 9402.10.10 or 9402.90.10.

The following excerpts from the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁹ to heading No. 90.18 are also relevant:

This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc. Instruments and appliances for anatomical or autoptic work, dissection, etc., are also included, as are, under certain conditions, instruments and appliances for dental laboratories (see Part (II) below). The instruments of the heading may be made of any material (including precious metals).

The heading **does not cover**:

- (o) Instruments and appliances used in laboratories to test blood, tissue fluids, urine, etc., whether or not such tests serve in diagnosis (generally **heading 90.27**).

EVIDENCE

Dr. Allan Lane, Director of Scientific and Regulatory Affairs, Roche Diagnostics, testified on behalf of the appellant.¹⁰ Dr. Lane was qualified as an expert in the field of design and use of glucose meters. Dr. Lane described the functioning of the glucose meters. First, a test strip comprising electrodes is introduced into the end of the glucose meter. Second, after a finger has been pricked, the test strip is set against the finger to allow the blood to be sucked into a chamber area by capillary action. In the following 30 seconds, a reaction takes place by which the blood glucose is converted to something else. In the process, it takes ferricyanide and reduces it to ferrocyanide. Then, over the next 8 seconds, the glucose meter passes a charge through the test strip electrodes to convert the ferrocyanide back to ferricyanide. This transformation releases electrons. In the last 2 seconds of the operation, the amount of electrons released is measured. The result displayed at the end relates to the amount of blood glucose that was originally present.

According to Dr. Lane's testimony, the glucose meters are used by diabetics at home. They are also used by health care professionals, either in doctors' offices or in clinics. Finally, glucose meters are used in hospitals. Dr. Lane indicated that 5 to 10 percent of the goods in issue are sold to hospitals. The rest is sold to the retail market that caters to diabetics and clinics.

Asked by counsel for the appellant to differentiate laboratory equipment from glucose meters, Dr. Lane answered that laboratory equipment is very automated, quite expensive and generally capable of performing from 20 to 60 or 70 analyses rather than a single test.

8. Note 3 to Chapter 99 provides, in part, that goods may be classified under a tariff item in Chapter 99 only after classification under a tariff item in Chapters 1 to 97 has been determined. In the present appeal, the parties agreed that the goods in issue are classifiable under tariff item No. 8506.50.00.

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

10. The appellant now carries on business under the name of Roche Diagnostics.

ARGUMENT

The appellant submitted that the goods in issue should benefit from classification under Code 2546 or tariff item No. 9977.00.00, as they are for use in goods of heading No. 90.18. The appellant submitted that the glucose meters should be classified in that heading, as they are electro-medical devices. The appellant suggested that the expression “in the vast majority of cases”, found in the Explanatory Notes to heading No. 90.18, does not mean that the goods of heading No. 90.18 have to be used solely in professional practice. According to the appellant, the Explanatory Notes allow medical devices to be classified in heading No. 90.18, even though they are used outside a doctor’s office, as long as they serve to make a diagnosis, to prevent or treat an illness or to operate, etc. The appellant submitted that the glucose meters serve to make diagnoses.

The appellant also referred to paragraph (o) of the Explanatory Notes to heading No. 90.18, which excludes from that heading instruments and appliances used in laboratories to test blood, tissue fluids, urine, etc., whether or not such tests serve in diagnosis. The appellant contended that, since the glucose meters are not used in laboratories, they should not be excluded from classification in heading No. 90.18.

The appellant referred to a memorandum issued by the respondent, in which glucose meters are considered medical devices.¹¹ The appellant also recalled Dr. Lane’s testimony to the effect that the glucose meters constituted near patient *in vitro* diagnostic devices for near patient testing, as defined in the *Medical Devices Regulations*.¹² The appellant also referred to a National Customs Ruling¹³ supported by a Tariff Board decision,¹⁴ which classified ear-piercing kits under tariff item No. 9018.90.80 as apparatus used in medical sciences. The appellant submitted that it would be paradoxical, on the one hand, to exclude glucose meters from classification in this heading because they are not used exclusively in professional practice and, on the other hand, to classify ear-piercing kits in that heading, even though they are never used in professional practice.

The respondent submitted that, as the glucose meters are used for the chemical analysis of blood, they are classifiable in heading No. 90.27, not in heading No. 90.18. Therefore, the goods in issue cannot benefit from Code 2546 or tariff item No. 9977.00.00.

Referring to the first paragraph of the Explanatory Notes to heading No. 90.18, the respondent submitted that, for goods to be classified in that heading, they must be primarily used in medical practice, even though some use may be made by the general public. Given that the glucose meters are not designed to be used primarily in professional practice, the respondent submitted that they should not be classified in heading No. 90.18. In relation to the exclusion found in paragraph (o) of the Explanatory Notes to that heading, the respondent submitted that it would be illogical to exclude goods that are used in professional practice to test blood, but to include the same goods when they are made for consumer use.

With respect to the appellant’s contention that the glucose meters are electro-medical apparatus, the respondent noted that only one of the three aspects of the glucose meters is electro-diagnostic and that the list of electro-medical apparatus found in the Explanatory Notes to heading No. 90.18 does not comprise goods of the same nature as the glucose meters.

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11. Department of National Revenue, GST/HST Memoranda Series, Section 4.2, “Medical and Assistive Devices” (March 1998) at para. 46.
 12. S.O.R./98-282, s. 1.
 13. Canada Customs and Revenue Agency, Memorandum D-11-11-2, “Policy Content of Tariff Classification National Customs Ruling (NCRs)” (31 March 1999), Appendix B, as amended on June 30, 2000.
 14. *First Lady Coiffures v. DMNR* (1985), 10 T.B.R. 26 [hereinafter *First Lady*].

The respondent submitted that the fact that the glucose meters are classified as medical devices in the *Medical Devices Regulations* and in the GST/HST Memoranda Series is irrelevant for tariff classification purposes. With respect to the Tariff Board decision cited by the appellant, the respondent pointed out that the ear-piercing kits in issue in that appeal were considered to be similar to instruments used in human medicine or surgery.

DECISION

Sections 10 of the former and current *Customs Tariff* provide that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*.¹⁵ Rule 1 provides, in part, that, “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]”. Sections 11 of the former and current *Customs Tariff* provide that, in interpreting the headings and subheadings, regard shall be had to the Explanatory Notes.

The parties in the present appeal have agreed that the goods in issue are articles for use in the AccuSoft glucose meters. In order for the goods in issue to benefit from Code 2546 or tariff item No. 9977.00.00, the glucose meters must be classified in heading No. 90.18 as instruments and appliances used in medical sciences.

The Tribunal is not convinced that the glucose meters in issue are classifiable in heading No. 90.18. The Explanatory Notes to that particular heading indicate that the “heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc.” In the Tribunal’s view, the reference to “the vast majority of cases” allows for situations where these instruments are used other than in professional practice. However, these situations would be exceptional. In this case, it is clear that the glucose meters are not “used only in professional practice”. Mostly, they are used by lay persons.

In order to determine whether the glucose meters are classifiable in heading No. 90.18, reference should be made to paragraph (o) of the Explanatory Notes to the heading. This paragraph provides that heading No. 90.18 does not cover “[i]nstruments and appliances used in laboratories to test blood, tissue fluids, urine, etc., whether or not such tests serve in diagnosis (generally **heading 90.27**)”.

According to the respondent, laboratory instruments to test blood used by technicians are used only in professional practice and, therefore, had it not been for paragraph (o), they would have been classified in heading No. 90.18. On that basis and given paragraph (o), the respondent reasoned that glucose meters, which also test blood but are far from being used only in professional practice, should also be excluded from classification in heading No. 90.18. According to the appellant, given that they are not used by doctors, surgeons, midwives, etc., but rather by technicians, laboratory instruments to test blood are not used in professional practice and, therefore, are not classifiable in heading No. 90.18. Paradoxically, the appellant suggests that glucose meters that are used to test blood, but not in a laboratory setting, should be included in heading No. 90.18, although used mostly by lay persons.

In the Tribunal’s view, if an instrument used in the laboratory by a technician for the purposes of testing blood is not classifiable in heading No. 90.18 because it is not used by a doctor, surgeon or midwife,

15. *Supra* note 3, schedule I and note 4, schedule.

it would seem incongruous that, where used mostly by lay persons, it should be classifiable in that heading. Therefore, noting the respondent's argument, the Explanatory Notes to heading No. 90.18 and the exclusion found at paragraph (o) of those same notes, the Tribunal is not persuaded that the glucose meters are classifiable in heading No. 90.18.

As for the fact that glucose meters are qualified as medical or diagnostic devices in a memorandum issued by the respondent and in the *Medical Devices Regulations*, it is not determinative of their classification. Clearly, given the wording of paragraph (o), not all instruments used for diagnosis are classified in heading No. 90.18.

The appellant also referred to a National Customs Ruling classifying ear-piercing kits in heading No. 90.18 to support its position. The Tribunal does not find this persuasive. The National Customs Ruling relies solely on *First Lady Coiffures*, a Tariff Board decision rendered prior to the incorporation in Canadian law of the *Harmonized Commodity Description and Coding System*. That decision did not deal with heading No. 90.18 or with the Explanatory Notes to that heading. In the case at hand, the Explanatory Notes contemplate that the instruments are to be used in the vast majority of cases in professional practice, which was not a consideration in the Tariff Board decision, as usage was not qualified by the terms of the tariff item.¹⁶

For the foregoing reasons, the Tribunal is not persuaded that the glucose meters are classifiable in heading No. 90.18 as instruments and appliances used in medical sciences. Accordingly, the Tribunal is not persuaded that the goods in issue are for use in goods of that heading. Therefore, the goods in issue cannot benefit from Code 2546 or tariff item No. 9977.00.00. Consequently, the appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

16. *Supra* note 13 at 34.