



Ottawa, Monday, November 25, 2002

Appeal No. AP-99-116

IN THE MATTER OF an appeal heard on November 7 and 8, 2001,
under subsection 67(1) of the *Customs Act*, R.S.C. 1985
(2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of
Customs and Revenue dated December 9, 1999, with respect to a
request for redetermination under subsection 60(4) of the *Customs
Act*.

BETWEEN

PHD CANADA DISTRIBUTING LTD.

Appellant

AND

THE COMMISSIONER OF CUSTOMS AND REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary



UNOFFICIAL SUMMARY

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PHD CANADA DISTRIBUTING LTD.

Appellant

AND

THE COMMISSIONER OF CUSTOMS AND REVENUE

Respondent

This is an appeal under subsection 67(1) of the *Customs Act* from decisions of the Commissioner of Customs and Revenue, dated December 9, 1999, regarding goods imported into Canada during the period from November 1997 to July 1998. The goods in issue are audio music compact discs.

The Tribunal must first decide the classification of the goods in issue. The Tribunal must then decide whether the goods in issue imported prior to January 1, 1998, and classified by the respondent under tariff item No. 8524.99.91 as other software should benefit from tariff relief under Code 2101 as articles for use in goods of tariff item No. 8471.70.10, that is, units of automatic data processing machines, as claimed by the appellant. The Tribunal must also decide whether the goods in issue imported from January 1, 1998, and classified by the respondent under tariff item No. 8524.32.90 as other discs for laser reading systems for sound only should benefit from tariff relief under tariff item No. 9948.00.00 as articles for use in automatic data processing machines and units thereof, as claimed by the appellant.

HELD: The appeal is allowed. With respect to the classification of the goods in issue, there is no evidence that would indicate that the goods in issue imported prior to January 1, 1998, differ in appearance or other essential characteristics from those imported from that date. Therefore, the Tribunal finds that the goods in issue, imported both prior to and from January 1, 1998, should be classified under tariff item No. 8524.32.90 as other discs for laser reading systems for reproducing sound only.

With respect to whether the goods in issue qualify for tariff relief, the Tribunal notes that the parties have agreed that CD-ROM drives fall within the meaning of “[a]utomatic data processing machines and units thereof”. It finds that the CD-ROM drives are classified as “units” of “automatic data processing machines” under tariff item No. 8471.70.10. The only issue is whether the goods in issue are “for use in” a “unit” of an “automatic data processing machine”, that is, the CD-ROM drive. The Tribunal is of the view that there is interaction between the goods in issue and the CD-ROM drive and that information processing takes place. It finds that, when played on a CD-ROM drive, the goods in issue are both “physically connected and functionally joined” to the CD-ROM drive and satisfy the condition that they are “for use in” the CD-ROM drive. The Tribunal finds that the goods in issue are “articles for use in” “units” of “automatic data processing machines” and should benefit from tariff relief under Code 2101 and tariff item No. 9948.00.00 during the relevant periods.

Places of Videoconference

Hearing: Hull, Quebec, and Vancouver, British Columbia
Dates of Hearing: November 7 and 8, 2001
Date of Decision: November 25, 2002

Tribunal Member: James A. Ogilvy, Presiding Member

Counsel for the Tribunal: Michèle Hurteau

Clerks of the Tribunal: Anne Turcotte in
Margaret Fisher

Appearances: Michael A. Sherbo and Michael Kaylor, for the appellant
Susanne Pereira, for the respondent



Appeal No. AP-99-116

PHD CANADA DISTRIBUTING LTD.

Appellant

AND

THE COMMISSIONER OF CUSTOMS AND REVENUE

Respondent

TRIBUNAL: JAMES A. OGILVY, Presiding Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ from decisions of the Commissioner of Customs and Revenue, dated December 9, 1999, regarding goods imported into Canada during the period from November 1997 to July 1998. The goods in issue are audio music compact discs [hereinafter music CDs].

The Tribunal must first decide the classification of the goods in issue. The Tribunal must then decide whether the goods in issue imported prior to January 1, 1998, and classified by the respondent under tariff item No. 8524.99.91 of Schedule I to the *Customs Tariff*² as other software should benefit from tariff relief under Code 2101 as articles for use in goods of tariff item No. 8471.70.10, that is, units of automatic data processing machines, as claimed by the appellant. The Tribunal must also decide whether the goods in issue imported from January 1, 1998, and classified by the respondent under tariff item No. 8524.32.90 as other discs for laser reading systems for sound only should benefit from tariff relief under tariff item No. 9948.00.00 as articles for use in automatic data processing machines and units thereof, as claimed by the appellant.

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

- 84.71 Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.
- 8471.70 -Storage units
- 8471.70.10 ---Disc drives; drum storage memories
- 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.
 - Discs for laser reading systems:
- 8524.32 --For reproducing sound only
- 8524.32.90 ---Other
- 8524.99 --Other
- 8524.99.91 ----Software
- 9948.00.00 Articles for use in the following goods (but not including the goods themselves):

1. R.C.S. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. R.S.C. 1985 (3d Supp.), c. 41, as amended by S.C 1997, c. 36.

Automatic data processing machines and units thereof, magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data;

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

2101 The goods of tariff item No.: . . . 8471.70.10.

The parties agreed that CD-ROM³ drives fall within the meaning of “[a]utomatic data processing machines and units thereof”, as contemplated by Code 2101 and tariff item No. 9948.00.00.

EVIDENCE

Mr. Steve Dickson, Managing Director of PHD Canada Distributing Ltd., Mr. James Smith, a computer engineer, and Mr. Greg Knobloch testified on behalf of the appellant. Mr. Tony Mungham, Chief of Electronics and Computer Systems Section, Laboratory and Scientific Services Directorate, Canada Customs and Revenue Agency, testified on behalf of the respondent. Messrs. Smith, Knobloch and Mungham were qualified as experts.

Mr. Dickson testified that the main focus of the appellant’s business is importing music CDs. He testified that the appellant pays duty on the music CDs, and he submitted that this has had a negative effect on the appellant’s business. He also indicated that the appellant competes with the duty-free importation of music via the Internet. Mr. Dickson further testified that it is common knowledge that a music CD can be played in a CD-ROM drive.

Each expert witness testified that a CD is inserted into a tray of the CD-ROM drive where a spindle engages the CD and spins it. A laser shines on the CD and reads the information to interpret the data. Each testified that the CD-ROM drive cannot function without a CD in it. The witnesses acknowledged that there is no basis to distinguish a music CD from a data CD-ROM with respect to the functioning of the drive.

Mr. Smith was qualified as an expert in computers generally, with no specific expertise in CD-ROM technology. He testified that a CD-ROM drive is a unit that retrieves stored information from a CD. He indicated that a CD-ROM drive cannot function without a CD in it and that a CD plays an active role in the functioning of the drive. Mr. Smith testified that a CD-ROM drive automatically goes to the beginning of a CD, reads the information and passes it on to the computer. The computer then interprets the information and tells the CD-ROM drive what to do with it and whether it is a music, data or graphics CD.

In response to the Tribunal’s questions, Mr. Smith testified that, if the CD-ROM drive were taken out of the computer, it would not function, as it needs to interact with the computer. He testified that no digital-to-analog conversion takes place in the CD-ROM drive. All the data are passed digitally to the computer’s processor, which interprets the data. In the case of music, the data are converted to analog signals, which are passed on to the speakers. Mr. Smith acknowledged that the jack for earphones does not work unless the signal has been processed from digital to analog. He explained that the computer interprets the data as a music file and sends the data to the CD-ROM drive.

3. CD-ROM refers to “compact disc read-only memory”. The parties used the terms “software CD-ROM”, “data CD-ROM” and “CD-ROM” interchangeably. For the purposes of this statement of reasons, the Tribunal uses “data CD-ROM” to mean all of the above and to distinguish them from “audio” or “music” CDs.

Mr. Knobloch was recognized as an expert in the design and construction of computer systems from components. He explained that a CD sends a signal to the computer to start a software product known as a media player. The media player recognizes the tracks on the music CD and gives the user the option of playing, pausing or stopping the music CD, as in a music CD player.

Mr. Knobloch testified that, when a music CD is being played in the CD-ROM drive, it is physically connected to the drive and plays an active role in the functioning of the drive. Further, there is no basis for distinguishing between a music CD and a data CD-ROM, with respect to the functioning of the drive.

In cross-examination, Mr. Knobloch testified that the media player is a software product that resides in the computer and provides a user interface, in the same manner as the front panel of a music CD player, in that it displays the number of tracks and the amount of time on the music CD. Mr. Knobloch testified that he did not think that a CD-ROM drive could be hooked up directly to speakers because there must be some way of interpreting the signal from the music CD to the speakers. He indicated that the CD-ROM drive sends a signal to the processing unit in the sound card, which amplifies the information and sends it to the speakers.

Mr. Knobloch agreed with the respondent that a CD-ROM drive can play a music CD and also be used to retrieve information from a data CD-ROM. However, he did not agree that the primary function of a CD-ROM drive is to retrieve information from a data CD-ROM. In his view, the primary use of the CD-ROM drive is not based on the function of the drive itself, but on user choice.

In response to the Tribunal's questions, Mr. Knobloch testified that the range of activities that the computer undertakes to read a music CD is as complex as the activities that it undertakes to read a data CD-ROM. However, he made it clear that the software required to read a data CD-ROM differs from that required to read a music CD.

Mr. Mungham was recognized as an expert in electronics and computer systems, including the interaction of CD-ROM drives with computers. He stated that, on a music CD, there is subchannel information indicating the track number and the length of time of the track. He indicated that, on music CDs, one level of information is for a basic level of error correction, while the extra information, such as the track information, is added. The data CD-ROM also stores digital information, with a requirement for a higher level of error correction. Mr. Mungham testified that a data CD-ROM is based on the same principles as a music CD. However, a data CD-ROM cannot be played on a music CD player because that player is unable to handle the higher level of error correction; there is more information to decode, and the information is in a different format. Mr. Mungham testified that a music CD can be played in a CD-ROM drive because the standard is based upon music CDs, which have a simpler technology than data CDs. The manufacturer of CD-ROM drives adds the ability to decode the music independently. The CD-ROM drive uses only a part of its circuitry to decode a music CD. It performs a lower level of error correction and passes on the audio information, not to the computer, but to an analog system, such as speakers or an amplifier.

In describing the operation of a CD-ROM drive when playing a music CD, Mr. Mungham explained that the drive itself determines that what is placed in the drive is a music CD. The drive sets up its decoding path to handle the audio standard. The digital information is demodulated off the music CD and goes through the basic error correction that exists for a music CD. The digital signal is converted to an analog signal that leaves the CD-ROM drive as an analog signal. This signal goes either to the sound card, the speakers or the headphones. Mr. Mungham testified that software, such as a media player, is required to

play one or more tracks. The media player starts the music CD, and the CD-ROM drive recognizes the music CD and is ready to decode. Mr. Mungham indicated that the computer must be turned on to provide power to the CD-ROM drive and to a user interface to enable the user to control the CD-ROM drive.

In describing the operation of a CD-ROM drive when it has a data CD-ROM in it, Mr. Mungham explained that the drive demodulates the information from the data CD-ROM and performs a basic error correction, similar to the one that exists for music CDs, as well as an enhanced error correction that exists for a data CD-ROM. The drive addresses the digital information and passes it on to the computer.

Mr. Mungham testified that a CD-ROM drive does not read the information at the same speed for a data CD-ROM as for a music CD because of the degree of sophistication and complexity of today's circuitry. He testified that, given the high level of complexity in the CD-ROM drive, which accesses the data CD-ROM faster, and of the enhanced error detection and addressability for data CD-ROMs, the prime function that a designer or a manufacturer assembling a CD-ROM drive must consider is the ability to read and take information from data CD-ROMs. The music CD interacts with the drive, but not with the more complex circuits of the drive. He indicated that the information on the music CD does not interact directly with the computer, whereas there is an enormous amount of interaction between the information on a data CD-ROM and the computer. Mr. Mungham testified that the technical specifications in CD-ROM drives have specific circuits to handle the standard for data CD-ROMs and specific circuits to handle the standard for music CDs. He testified that, when introducing a CD in a drive, the simpler circuits are used for the music CDs. In the case of data CD-ROMs, the more complex and the higher level circuits, as well as the simpler circuits, are accessed.

In cross-examination, Mr. Mungham acknowledged that, while the music CDs and the data CD-ROMs are identical in the way in which the information is modulated, the way in which the information is obtained in and out of the modulation is not the same. The information on both types of CDs is in digital format. In response to the Tribunal's questions, Mr. Mungham indicated that the signal of a music CD played on a CD-ROM drive can bypass the sound card. He testified that a data CD-ROM that has sound files would be routed through the microprocessor of the computer, which makes use of the sound card. The audio signal goes through a digital-to-analog converter and would not go to the speakers in digital form.

In contradiction of the appellant's testimony, Mr. Mungham stated that the information from the data CD-ROM is converted to an analog signal inside the CD-ROM drive and is never touched by any processing mechanism within the computer. It is only a wiring path that has been established by the sound card. He acknowledged that, to play a music CD, there is interaction with the computer in terms of choosing tracks. He explained that a music CD player has one chip that controls and accesses all the parts of its drive, while a CD-ROM drive has a chip set. When the data CD-ROM interacts with the CD-ROM drive, it uses only a small portion of the chip set. In the case of the interaction between a music CD and the CD-ROM drive, some 25 percent of the CD-ROM drive's functionality is used, while, in the case of a data CD-ROM, some 75 percent of the CD-ROM drive's functionality is used.

ARGUMENT

The appellant recalled that all the experts testified that a CD-ROM drive does not function without a CD in it. The experts also agreed that music CDs are "physically connected" to the CD-ROM drive and play an active role in the functioning of the drive. The appellant also recalled Mr. Mungham's testimony that music CDs interact with CD-ROM drives and the computer. Mr. Mungham also confirmed that music CDs and data CD-ROMs are physically the same and that the information on both is stored in digital format. According to the evidence, the CD-ROM drive performs the same function regardless of the CD in the

drive, in that it clasps the CD, spins it, reads it and sets up the decoding and error detection. The expert testimony was to the effect that there was no distinction between music CDs and data CD-ROMs with respect to retrieving the signal.

The appellant submitted that Code 2101 includes tariff item No. 8471.70.10, under which CD-ROM drives are classified, and tariff item No. 9032.89.20, under which process control apparatus is classified. The appellant also relied on tariff item No. 9948.00.00, which allows tariff relief for “[a]rticles for use in . . . [a]utomatic data processing machines and units thereof” and includes “[p]rocess control apparatus, excluding sensors, which converts analog signals from or to digital signals”. It argued that a CD-ROM drive is a unit of an automatic data processing machine.

According to the appellant, the issues are: (1) whether a music CD is “for use in” a CD-ROM drive of tariff item No. 8471.70.10 and whether Code 2101 applies to music CDs imported prior to January 1, 1998; and (2) whether tariff item No. 9948.00.00 applies to the goods in issue imported from January 1, 1998.

The appellant’s argument was divided into two parts: the applicability of Code 2101 prior to January 1, 1998, and the applicability of tariff item No. 9948.00.00 from that date. The appellant argued that three conditions must be met for the application of Code 2101: (1) the goods in issue must be articles; (2) they must be articles “for use in”; and (3) they must be “for use in” goods enumerated in Code 2101 or listed in the tariff item. The appellant contended that music CDs are “finished goods” and, therefore, “articles” as that term is defined in Customs Notice N-278.⁴ It also contended that the goods are “for use in” CD-ROM drives, which are classified under tariff item No. 8471.70.10 and enumerated in Code 2101. The appellant submitted that these two contentions were accepted by the respondent. With respect to the criterion that the goods in issue must be “for use in” a CD-ROM drive, the appellant submitted that, according to the testimony and evidence, it is common knowledge that music CDs are actually played in CD-ROM drives. The appellant argued that, for the goods in issue to be “for use in”, they must be “physically connected” and “functionally joined” to the goods enumerated in Code 2101. The expert testimony was clear that the music CDs were “physically connected” to the CD-ROM drives. Moreover, the respondent did not dispute this fact.

The appellant argued that, therefore, the issue is whether music CDs are “functionally joined” to the CD-ROM drives. It submitted that music CDs do satisfy the meaning of “functionally joined”. According to the evidence, the CD-ROM drive would not function without a CD, whether it be a data CD-ROM or a music CD. The appellant also relied on the expert testimony and on *Sony of Canada v. DMNR*⁵ to argue that a music CD performs the same function in a CD-ROM drive as a tape cartridge does in a tape drive. The appellant also referred to the definition of “functionally joined” in the Customs Notice, which includes a reference to “software CD-ROMs”. It argued that, given that a data CD-ROM is “functionally joined” to a CD-ROM drive and given the expert testimony that a CD-ROM drive performs the same functions on a data CD-ROM as on a music CD, there is no basis to conclude that one would be “functionally joined” to a CD-ROM drive when the other would not.

4. Department of National Revenue, “Administrative Policy Tariff Item No. 9948.00.00” (27 April 1999) [hereinafter Customs Notice].

5. (12 December 1996), AP-95-262 (CITT) [hereinafter *Sony*].

With respect to the goods in issue imported from January 1, 1998, the appellant referred to the terms “articles for use in” in the Customs Notice, which are similar to those found in Code 2101. The appellant submitted that the Customs Notice concludes that tariff item No. 9948.00.00 represents the conversion of Codes 2100 and 2101. As in the case of Code 2101, the same three conditions must be met, i.e. the goods must be articles; they must be for use in; and they must be for use in items listed in tariff item No. 9948.00.00. In the case of the first two conditions, the appellant reiterated its arguments regarding Code 2101. With respect to the words “[a]rticles for use in the following” in the Customs Notice, the appellant submitted that the “articles” are for use in “[a]utomatic data processing machines and units thereof” and that the CD-ROM drive is a unit of an automatic data processing machine. The appellant submitted that this was not disputed by the respondent. The appellant concluded that, under both Code 2101 and tariff item No. 9948.00.00, the appeal should be allowed.

The appellant argued that, contrary to the position taken by the respondent, there is no support in law or on the facts that Code 2101 and tariff item No. 9948.00.00 should be read as “articles for use in the primary function of” and that there is no issue of primary function in this case. Moreover, the appellant provided a number of examples where the *Customs Tariff* clearly restricts the application of “for use in” by using such words as “principally”, “solely”, “primarily” and “designed for” and pointed out that no such limiting language appears here. With respect to the respondent’s argument that, for the goods in issue to qualify for a benefit, they must be related to a computer, the appellant argued that there is no basis in the context of Code 2101 or tariff item No. 9948.00.00 to provide for such a relationship. Moreover, this would be setting a new condition for goods to qualify for benefit under Code 2101.

With respect to the issue of “actual use”, the appellant submitted that nothing in Code 2101 or tariff item No. 9948.00.00 speaks of exclusive use, sole use or primary use, nor does it set out any other restrictions. The only thing that must be shown for the goods in issue to qualify for the benefit of Code 2101 or tariff item No. 9948.00.00 is that there be “actual use” of the music CDs in the CD-ROM drives. This test was satisfied in this case.

In response to the Tribunal’s question as to whether the phrase “for use in” implies intent on the part of either the manufacturer or the user, the appellant submitted that it did not believe this to be the case. In its view, the only time where intent of the manufacturer is of relevance is where a tariff item reads “designed for use” or “designed especially for use”. In those cases, a manufacturer’s design becomes important to determine the use of a product. The appellant indicated that the use intended by the user is not relevant because the user may intend a multiplicity of uses.

In reply, the appellant submitted that there was no basis in Code 2101 to create a new contextual relationship between the CD-ROM drives and the computer, including a new test that the goods would “play an active role in the primary function of the [CD-ROM] drives”. Moreover, the fact that the CD-ROM drive is a sophisticated device that can handle an unsophisticated music CD or sophisticated data CD-ROM is irrelevant. The appellant argued that, as the respondent has already accepted that data CD-ROMs qualify for the benefit of Code 2101, as the evidence is clear that the drive functions in the same way as with music CDs and as both CDs play an active role in the function of the drive, there is no distinction to be made between the two for classification purposes.

The respondent argued that the only issue before the Tribunal was whether music CDs are for use in CD-ROM drives. To do this, the appellant must prove that music CDs are “functionally joined” to CD-ROM drives. The respondent submitted that the interpretation of “functionally joined” in the present case requires the examination of the basic functioning of CD-ROM drives within the context of an overall computer system.

The respondent submitted that automatic data processing machines and units thereof, in this instance, CD-ROM drives, are found under both the code and the tariff item in question. The definition of “for use in”⁶ means that the goods must be “wrought into”, “attached to” or “incorporated into” goods that are enumerated in the code or the tariff item. Of those, the term “attached to” is the only one relevant to this case. The respondent referred to *Sony*, where the Tribunal found that goods must be “physically connected and functionally joined”⁷ to the goods for them to be “for use in”. In *Asea Brown Boveri v. DMNR*,⁸ the Tribunal found that “physical connection” was not enough. In the respondent’s submission, the starting point for determining whether a music CD is “functionally joined” to a CD-ROM drive is to look at the basic function of the drive.

The respondent submitted that the basic function of a CD-ROM drive is to act as a conduit for retrieving information from a CD, converting and transferring it to the computer for it to be used. CD-ROM drives have features, such as enhanced error correction, addressability and the capability of quickly retrieving information, that are essential to the drive’s basic function.

The respondent’s expert witness testified that the technology of a CD-ROM drive has become increasingly complex, while that of a music CD player has not. While a music CD may be played in a CD-ROM drive, a data CD-ROM cannot be used in a music CD player because it is not sufficiently complex. He also testified that the music CD contains only music and uses only 25 percent of the capability of the CD-ROM drive. Therefore, the majority of the CD-ROM drive functionality is not engaged. The expert also testified that there is limited communication between the computer and the music CD when it is played in a CD-ROM drive.

The respondent submitted that the audio information does not interact with the computer, but goes through a sound card and comes out of the speakers without engaging the computer. Thus, the basic function of the CD-ROM drive is to retrieve information from the data CD-ROM and transfer the information to the computer so that the user can access and search the data. There is no transfer of data or other exchange of information between the music CD and the computer. In determining whether a music CD is “functionally joined” to a CD-ROM drive, the latter can only function with a computer. Without the computer, the drive would have nowhere to send information to and could not access information. The respondent further submitted that a CD-ROM drive cannot be examined in terms of its function in isolation from a computer. A music CD does not need a computer or a CD-ROM drive and, therefore, is not “functionally joined” to the CD-ROM drive. The respondent argued that the capability of playing a music CD on a CD-ROM drive is residual and too remote from the basic functioning of a CD-ROM drive to be essential to the drive. He also relied on *ABB* in arguing that a music CD does not play an active role in the functioning of the CD-ROM drive and that it is not essential to the functioning of the CD-ROM drive. In conclusion, the respondent submitted that the appellant had not met the test of “functionally joined” in this case.

6. The definition of “for use in” was amended in 1998, but remains essentially the same as it was prior to the amendment. See section 4 of the *Customs Tariff, 1997* and subsection 2(1) of the *Customs Tariff, 1998*.

7. *Supra* note 7 at 5.

8. (21 December 1999), AP-97-123 (CITT); (21 February 2000) AP-97-124 and AP-97-125 (CITT); (21 December 1999), AP-97-137 (CITT) [collectively *ABB*].

With respect to the argument of “actual use”, the respondent argued that, while there was evidence that music CDs are used in CD-ROM drives and that this is common knowledge, the evidence does not satisfy the “actual use” test as found in *Entrelec v. DMNR*.⁹ The test is that there must be “actual use” of the goods in issue, not “actual use” of like goods. The respondent argued that the Tribunal does not have the jurisdiction to deal with like goods and can only deal with the goods in issue. In response to the Tribunal’s question concerning the meaning of “for use in”, the respondent submitted that the phrase would refer to the intent of the importer as to the use of the goods in issue. The respondent submitted that the appeal should be dismissed.

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 for the Interpretation of the Harmonized System*¹⁰ and the *Canadian Rules*.¹¹ Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*¹² and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.¹³

The General Rules are structured in a cascading form. If the classification of an article cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. 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].

Moreover, Rule 1 of the *Canadian Rules* reiterates that the classification of goods under the tariff item of a subheading or heading shall be determined according to the General Rules.

The Tribunal must first decide the classification of the music CDs. The respondent’s expert testified that a music CD is a CD that holds audio information stored in digital format. He also testified that a data CD-ROM is based on the same principles as a music CD and that the CDs are physically identical. The experts testified that a laser shines on the CD and reads the information to interpret it. The Tribunal notes that the music CDs imported from January 1, 1998, were imported as CDs for laser reading systems for reproducing sound only. As there is no evidence before the Tribunal that would indicate that music CDs imported prior to January 1, 1998, differ in appearance or other essential characteristics from those imported from that date, there is a fundamental question as to why the music CDs imported in 1997 were classified differently from those imported in 1998. The Tribunal is of the view that music CDs should be classified under the same tariff item, whether the goods in issue were imported prior to January 1, 1998, or from that date. The Tribunal finds that music CDs hold audio information in digital format and that, when a laser reads information from a music CD, that information can be converted into analog information and interpreted as sound. It also finds that, although software in the form of a media player is required to play the music CD, music CDs themselves are not software. Therefore, the Tribunal finds that music CDs, imported

9. (28 September 1998), AP-97-029 (CITT) [hereinafter *Entrelec*].

10. *Supra* note 2, schedule [hereinafter General Rules].

11. *Ibid.*

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

13. Customs Co-operation Council, 2d ed., Brussels, 1996.

prior to January 1, 1998, and from that date, should be classified under tariff item No. 8524.32.90 as other discs for laser reading systems for reproducing sound only, not as other software.

Having found that the goods in issue are to be classified in this manner, the Tribunal must now determine whether the goods in issue qualify for tariff relief under the code and tariff item in existence when the importation of the goods in issue took place. It notes that the parties agree that CD-ROM drives fall within the meaning of “automatic data processing machines and units thereof”. The Tribunal agrees with the parties that CD-ROM drives are “units” of “automatic data processing machines” and that they are correctly classified under tariff item No. 8471.70.10.

In order to benefit from tariff relief, the goods in issue must, in turn, be “articles for use in” “automatic data processing machines or units thereof” as contemplated in Code 2101 and tariff item No. 9948.00.00. The appellant argued that three conditions must be met for the application of Code 2101 and tariff item No. 9948.00.00. The goods in issue must be “articles”, they must be articles “for use in”, and the articles must be for use in goods enumerated in the code or listed in the tariff item. There is no dispute between the parties that the goods in issue are “articles”, as they are finished goods within the meaning of that term in the Customs Notice. The issue is whether the goods in issue are “for use in” “units” of “automatic data processing machines”, that is the CD-ROM drives.

At the time of importation of the goods in issue, section 4 of the *Customs Tariff*¹⁴ provided that the following:

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

The Tribunal agrees with the respondent that music CDs are not “wrought into” a CD-ROM drive. Similarly, while a music CD may be temporarily placed in a CD-ROM drive for the purposes of being played, it is of the view that the music CD is not “incorporated into” a CD-ROM drive or, for that matter, a music CD player. Therefore, the Tribunal must determine whether a music CD is “attached to” the CD-ROM drive.

In *Sony* and *ABB*, the Tribunal held that, for goods to be “attached to” other goods, they must be physically connected and functionally joined to the latter. It adopts the interpretation of the term “attached to” as defined in those cases. The testimony and the evidence in this case clearly indicate that music CDs are placed on a spindle in the CD-ROM drive and are clamped into place in order to be played. The testimony and the evidence also indicate that music CDs can be easily inserted in or removed from the drive. Further, the expert witnesses testified that a CD-ROM drive cannot function without a CD in it. The Tribunal is satisfied, in this instance, that a music CD is “physically connected” to the CD-ROM drive, whether or not the physical connection is temporary. The question is whether the music CD is “functionally joined” to the CD-ROM drive.

To answer this question, the Tribunal first examined the question of the kind of data found on a music CD. On the basis of the testimony, it is of the opinion that both audio data and information data are present. With respect to the audio data, the expert witnesses agreed that the CD-ROM drive “reads” the information on the CD by retrieving the information via a laser beam. It is clear from testimony that audio signals in digital format would be unintelligible if they were sent directly to speakers or earphones; such digital information requires conversion to analog format. The parties were in disagreement on where that

14. S.C. 1997, c. 36.

conversion takes place; whereas the respondent stated that the conversion takes place within the CD-ROM drive, the appellant submitted that all the data must be passed in digital format to a processor in the computer where the conversion occurs. However, in the Tribunal's view, for the purposes of this case, no aspect of the decision turns on that distinction. It has already been stated that a CD-ROM drive is a unit of an automatic data processing machine, that is, a computer. Whether the conversion takes place in the drive or in another part of the computer, in the Tribunal's opinion, it is taking place in a computer.

Further, the respondent's expert witness testified that some level of error correction is required for all CDs. He testified that a music CD can be played on a CD-ROM drive because the standard is based upon music CDs, which have a simpler technology than do data CD-ROMs. The CD-ROM drive uses only a part of its circuitry to decode a music CD. In that case, the witness testified, the CD-ROM drive will do a lower level of error correction with respect to the audio information that it passes on, not to the computer processor, but to an analog system, such as speakers or an amplifier. Nevertheless, it is clear to the Tribunal that the error correction required for both types of CDs is accomplished in a unit of an automated data processing machine. Hence, with respect to the audio data on a CD, it is the Tribunal's view that the CD is functionally joined to the CD-ROM drive.

The Tribunal then considered whether the remaining data on the music CD, for example, the data that allow for control of the CD in the drive, functionally join the CD to the CD-ROM drive. The testimony indicated that the computer, of which the CD-ROM drive is a unit, receives data from the drive indicating basic information about the music CD in the drive, such as the number of tracks and the length of time of each track. The Tribunal is of the view that there is interaction between music CDs and the CD-ROM drive and that information processing takes place. It is also of the view that this information is distinct from the audio content of a music CD and that the computer acts as the link, or interface, between the music CD and the user. The testimony indicates that, while the processing demand placed on the computer is minimal, the information that must be processed is critical to the operation of the CD-ROM drive. At a very basic level, the information read from the music CD and processed through the CD-ROM drive allows the user to control the tracks to be played, as well as to choose the start and stop times and the order in which tracks are played. In the Tribunal's view, the music CD plays an active role in the operation of the CD-ROM drive.

For these reasons, the Tribunal finds that, when played in a CD-ROM drive, a music CD is "functionally joined" to a "unit" of an "automatic data processing machine". Therefore, the music CD satisfies the condition that it be "for use in" a CD-ROM drive, since it is both physically connected and functionally joined to the CD-ROM drive.

The Tribunal has considered the respondent's argument that the function of a CD-ROM drive cannot be examined in isolation from the computer and, as noted above, has accepted that the drive is to be considered part of a computer. The respondent further argued that, when a music CD is being played on a CD-ROM drive, the majority of the drive's functionality is not engaged. The Tribunal is of the opinion that, even though the majority of the functionality of the drive is not engaged, the respondent's evidence was that 25 percent of the drive's capability is used when a music CD interacts with the drive. There was also expert testimony that a CD-ROM drive cannot function without a CD in place. It is clear from the evidence and the testimony that this is a necessary condition and that the music CD, like the data CD-ROM, meets this condition and renders the CD-ROM drive operational.

Finally, the Tribunal considered the respondent's arguments that the music CDs must play a "primary function" or must be "actually used" in the CD-ROM drive in order for the goods in issue to be "for use in" and qualify for tariff relief. It finds that there is no merit to these arguments. Consequently, the

Tribunal's decision does not turn on whether the music CDs play a "primary function" or are "actually used" in the CD-ROM drive.

For the foregoing reasons, the Tribunal finds that the goods in issue, imported both prior to January 1, 1998, and from that date, should be classified under tariff item No. 8524.32.90 as discs for laser reading systems for reproducing sound only. Moreover, it finds that the goods in issue are "articles for use in" "units" of "automatic data processing machines" under Code 2101 and tariff item No. 9948.00.00 and should benefit from tariff relief during the relevant periods.

Consequently, the appeal is allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member



Ottawa, Friday, February 7, 2003

Appeal No. AP-99-116

IN THE MATTER OF an appeal heard on November 7 and 8, 2001,
under subsection 67(1) of the *Customs Act*, R.S.C. 1985
(2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of
Customs and Revenue dated December 9, 1999, with respect to a
request for redetermination under subsection 60(4) of the *Customs
Act*.

BETWEEN

PHD CANADA DISTRIBUTING LTD.

Appellant

AND

THE COMMISSIONER OF CUSTOMS AND REVENUE

Respondent

CORRIGENDUM

The last sentence of the third paragraph of the Unofficial Summary should read: "Therefore, the Tribunal finds that the goods in issue imported prior to January 1, 1998, should be classified under tariff item No. 8524.32.00 as discs for laser reading systems for reproducing sound only. The goods in issue imported after January 1, 1998, should be classified under tariff item No. 8524.32.90 as other discs for laser reading systems for reproducing sound only."

In the third paragraph of the Reasons for Decision, the following tariff item number should be added below subheading No. 8524.32 :

8524.32.00 --For reproducing sound only

The last sentence of the fourth paragraph of the section entitled "Decision" should read: "Therefore, the Tribunal finds that music CDs imported prior to January 1, 1998, should be classified under tariff item No. 8524.32.00 as discs for laser reading systems for reproducing sound only, and music CDs imported from that date should be classified under tariff item No. 8524.32.90 as other discs for laser reading systems for reproducing sound only, not as other software."

The first sentence of the second to last paragraph of the section entitled "Decision" should read: "For the foregoing reasons, the Tribunal finds that the goods in issue imported prior to January 1, 1998, should be classified under tariff item No. 8524.32.00 as discs for laser reading systems for reproducing sound only, and the goods in issue imported from that date should be classified under tariff item No. 8524.32.90 as other discs for laser reading systems for reproducing sound only."

By order of the Tribunal,

Michel P. Granger
Secretary