



Ottawa, Thursday, May 4, 2000

Appeal No. AP-99-061

IN THE MATTER OF an appeal heard on March 9, 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 Deputy Minister of National Revenue dated August 3, 1999, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

SPORT DINACO INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Patricia M. Close
Patricia M. Close
Presiding Member

Raynald Guay
Raynald Guay
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-99-061

SPORT DINACO INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The goods in issue are various models of heart rate monitors (HRM) and related items and kits. The HRMs consist of a wrist receiver and a monitoring belt, with an elastic strap, to be worn around the torso. The related items and kits include monitoring belts, elastic straps, computer interface systems, speed sensor kits, cadence sensor kits, bike mount kits and pulse simulators. The main issue is whether the various models of HRMs are properly classified under tariff item No. 9102.12.00 as wristwatches, electrically operated, whether or not incorporating a stopwatch facility, as determined by the respondent, or should be classified under tariff item No. 9029.20.91 as tachometers, as claimed by the appellant. The second issue relates to the proper classification of the related items and kits.

HELD: The appeal is allowed. Rule 1 of the *General Rules for the Interpretation of the Harmonized System* states that classification shall be determined where possible according to the headings and any relative Section or Chapter Notes. Heading No. 90.29 specifically mentions tachometers. Note (B) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 90.29 describes tachometers as instruments that indicate the number of revolutions, speed, output, etc., per unit of time. A measurement of time is, therefore, inherent in a tachometer and, thus, the mere fact that the HRM receivers also tell the time does not render the HRMs wristwatches. Furthermore, General Note (I) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to Chapter 90 provides, among other things, that this chapter covers a wide variety of instruments and apparatus which are, as a rule, characterized by their high finish and high precision, most of them being used mainly for specialized technical purposes, such as measuring. The HRMs are precision instruments with a level of accuracy comparable to that of electrocardiograms in measuring the rate of heartbeat, and they are used for the specialized technical purpose of monitoring the heart rate during exercise. Consequently, the HRMs are tachometers under tariff item No. 9029.20.91. Given the Tribunal's conclusion and the respondent's acceptance to classify the related items and kits as parts and accessories of tachometers under tariff item No. 9029.90.92, should the Tribunal agree with the appellant on the main issue, these goods are thus so classified.

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 9, 2000
Date of Decision: May 4, 2000

Tribunal Members: Patricia M. Close, Presiding Member
Raynald Guay, Member
James A. Ogilvy, Member

Counsel for the Tribunal: Gilles B. Legault

Clerk of the Tribunal: Margaret Fisher

Appearances: J. Peter Jarosz and Richard S. Gottlieb, for the appellant
Veronica Romagnino and Louis Sébastien, for the respondent

Appeal No. AP-99-061

SPORT DINACO INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member
RAYNALD GUAY, Member
JAMES A. OGILVY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ from a decision of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency), dated August 3, 1999, regarding goods imported into Canada on October 27, 1997.

The goods in issue are various models of heart rate monitors (HRM) and related items and kits. The HRMs are imported in packages, which consist of a wrist receiver and a monitoring belt, with an elastic strap, to be worn around the torso. The related items and kits include monitoring belts and elastic straps, which were imported separately, and computer interface systems, speed sensor kits, cadence sensor kits, bike mount kits and pulse simulators.

There are two issues in this appeal. The issue is whether various models of HRMs, namely the Polar® Vantage NV, X Trainer Plus, Accurex Plus and Protrainer, are properly classified under tariff item No. 9102.12.00 of Schedule I to the *Customs Tariff*² as wristwatches, electrically operated, whether or not incorporating a stopwatch facility, as determined by the respondent, or should be classified under tariff item No. 9029.20.91 as tachometers, as claimed by the appellant.

The second issue relates to the proper classification of the related items and kits. Contrary to the respondent, who classified the goods under specific tariff items, the appellant contends that they constitute parts and accessories of tachometers and should be classified as such under tariff item No. 9029.90.92. At the hearing, the respondent conceded that, should the Tribunal determine that the HRMs are tachometers, not watches, these goods should be classified as parts and accessories under tariff item No. 9029.90.92.

At the hearing, Mr. Burton H. Birnbaum, Vice-Chairman of Polar Electro Inc. (Polar), testified for the appellant. Mr. Birnbaum, who holds a bachelor's degree in electrical engineering, as well as master's degrees in electrical engineering and business administration, is familiar with the goods in issue, having been employed for more than 25 years by the sole distributor for Polar before joining that company. Mr. Birnbaum explained to the Tribunal that the HRMs were invented by a Finnish professor of electrical engineering who foresaw the need for an accurate and visible means of taking a heart rate in an ambulatory condition.

1. R.S.C. 1985 (2d Supp.), c. 1.
2. R.S.C. 1985 (3d Supp.), c. 41.

Mr. Birnbaum also explained that the HRMs in issue constitute wireless systems composed of a transmitter and a receiver. From the documents on file and Mr. Birnbaum's testimony, the following is a brief description of how that system works. The transmitter is in the form of a belt, which is attached with an elastic strap to one's torso, normally beneath the clothing. The belt contains electronic circuitry, a battery and ridged elements, which are, in fact, electrodes. The electrodes pick up, from the chest, the electrical signal that tells the heart to contract. Once that signal is captured, it is shaped as a magnetic pulse to be broadcast at 5 kilohertz to a wrist receiver located approximately three feet away (some transmitters are coded because they require the transmission of two signals to the receiver, that is, one for the heart and another for the cadence of the bipedal speed, as in the case of the X Trainer Plus which is intended to be used by cyclists). The receiver, in turn, works electronically. It utilizes digital filters to filter out noise, calculate and, finally, display the heart rate. The receiver also has a memory that is used to store information that has passed in real time. That memory is used to replay the information back to a third device when interface systems, such as those in issue, are used.

With respect to the time function, Mr. Birnbaum testified that "time is really an incidental" that the producer added for nothing, since the building of a heart rate receiver requires some sort of timing device to assess the time between the heartbeats and to translate it into a rate. Mr. Birnbaum explained that the receiver compares a chain of consecutive heartbeats, based on certain human physiology. For example, he said that the heart rate of a reasonably healthy person cannot change dramatically between any two beats. The HRMs look at maximum change to determine whether noise or a true signal is being obtained. They go through a complete algorithm, which is the aforementioned digital filtering, in order to determine the heart rate. Also, depending on the model involved, the HRMs show high and low limits, storage capacity and recovery rate, all of which require time correlation. Mr. Birnbaum also testified that the majority of the customers' calls for repair and service received by his company concern the heart rate function, not the time display function. Asked about the receivers' different display functions, Mr. Birnbaum explained that the heart rate and time of day can be seen simultaneously on some receivers. However, five minutes after exercising, one's heart rate would show double zero or blank, while if one has the interval time showing, it will just keep going. He added that it is not possible with the units in issue to automatically switch to the time of day after five minutes, as one would have to press buttons to do that.

The appellant's evidence shows that the HRMs are as accurate as electrocardiograms (ECGs), which means that they will typically track the heart rate to within plus or minus one beat; that HRMs are sold in Canada mostly to sporting goods stores, bicycle stores, running stores, health clubs and schools, as only 0.05 percent of Polar's revenues come from sales to watch stores; that their retail selling price in Canada is between \$250 and \$400, compared to approximately \$50 for a watch that displays the same time functions; that the HRM receivers are not sold separately from the transmitters; and, finally, that HRM receivers must be used with HRM transmitters to display the heart rate.

In argument, both the respondent and the appellant agreed that Rule 1 of the *General Rules for the Interpretation of the Harmonized System*³ applies in this case. They both agreed that the HRMs constitute a functional unit and that the monitoring belt, i.e. the transmitter, cannot be of any use alone.

However, in support of his position that the HRMs are watches, the respondent referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁴ to heading No. 91.02, which state, among other things, that the heading covers: watches with simple movements, as well as those with complex systems; fancy or special-feature watches, such as those for skin divers, with built-in depth

3. *Ibid.*, Schedule I [hereinafter General Rules].

4. Customs Co-operation Council, 1st ed., Brussels, 1986, and 2d ed., Brussels, 1996 [hereinafter Explanatory Notes].

indicators; and chronograph watches, which are sometimes equipped with special devices allowing certain parameters, such as the pulse rate, to be determined without calculation. The respondent also argued that the evidence shows that all the HRMs in issue can display time functions of the sort covered in heading No. 91.02. In fact, the respondent added, even the heart rate monitoring function is related to time. Relying on information documents describing the HRMs, including the warranty exclusion regarding commercial use and a caution statement against other electromagnetic signals (e.g. high-voltage power lines, computers, televisions, etc.), the respondent claimed that it is doubtful whether the HRMs have the same accuracy as ECGs or are of a high enough finish and precision to be considered goods of heading No. 90.29.

The Tribunal is of the view that the respondent's position is based on a faulty characterization of the HRMs. Although they contain receivers, which look and keep time like wrist watches, the Tribunal agrees with the appellant that the HRMs should be classified as tachometers in heading No. 90.29 and not as wrist watches in heading No. 91.02, since they also contain a monitoring transmission belt that is essential to achieve the purpose for which the HRMs are made, designed and sold.

The Tribunal relies on Rule 1 of the General Rules to classify these products. Rule 1 states that classification shall be determined, where possible, according to the headings and any relative Section or Chapter Notes. Heading No. 90.29 specifically mentions tachometers. Note (B) of the Explanatory Notes to heading No. 90.29 describes tachometers as instruments that “indicate the number of revolutions, speed, output, etc. **per unit of time**”. Therefore, a measurement of time is inherent in a tachometer. Tachometers measure velocity, speed or rate, things that, by their very nature, must incorporate and rely on a unit of time to be meaningful. Thus, the mere fact that the HRM receivers also tell the time does not, in the Tribunal's view, render HRMs wristwatches under heading No 91.02.

Both parties accepted that the receivers are only one component of the HRMs. Their main function is to receive the magnetic pulse emitted from the transmitter in the monitoring belt, not to tell the time. As to the time-of-day function, the Tribunal accepts that this function was added, virtually cost free, as a marketing extra. For the same reason, the receivers' other time-related functions do not make HRMs watches either.

Furthermore, Note (B) of the Explanatory Notes to heading No. 90.29 states that tachometers can “usually” be mounted on vehicles. The HRM receivers can be mounted on a bicycle via a Polar® bike mount kit.⁵ It is worth noting, however, that dictionary definitions of a tachometer typically include the concept of measuring rate. For example, the definition found in *Stedman's Medical Dictionary*⁶ indicates that a tachometer is an “instrument for measuring speed or rate; e.g., . . . heart rate” [emphasis added].

The Tribunal, moreover, is of the opinion that the General Note (I) of the Explanatory Notes to Chapter 90 applies to the HRMs. While the list appearing in the note is not exhaustive and merely illustrative of the types of products that are covered in Chapter 90, it states:

This Chapter covers a wide variety of instruments and apparatus which are, as a rule, characterised by their high finish and high precision. Most of them are used mainly for scientific purposes (laboratory research work, analysis, astronomy, etc.), for specialised technical or industrial purposes (measuring or checking, observation, etc.) or for medical purposes.

[Emphasis added]

5. Exhibit A-13.

6. Twenty-sixth ed. (Baltimore, Md: Williams & Wilkins, 1995), s.v. “tachometer”.

The Tribunal is convinced, based on the evidence, that HRMs are precision instruments within the ambit of that note. They are not as complex as ECGs, but their level of accuracy is comparable to that of ECGs in measuring the rate of heart beat. Moreover, the HRMs are used for the specialized technical purpose of monitoring the heart rate during exercise.

As to the other goods in issue, as mentioned previously, the respondent agreed that, should the Tribunal classify the HRMs as tachometers and not watches, then the proper classification for the remaining goods would be as parts of tachometers under tariff item No. 9029.90.92. On the basis of this admission, these goods are thus so classified.

The Tribunal, therefore, allows the appeal. The HRMs in issue should be classified under tariff item No. 9029.20.91 as tachometers and the remaining goods in issue under tariff item No. 9029.90.92 as parts and accessories of tachometers.

Patricia M. Close
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Presiding Member

Raynald Guay
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Member