



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2014-041

Tri-Ed Ltd.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Monday, February 27, 2017*

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IN THE MATTER OF an appeal heard on June 16, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated October 16, 2014, with respect to a dispute pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**TRI-ED LTD.**

**Appellant**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES  
AGENCY**

**Respondent**

**DECISION**

The appeal is allowed in part.

Peter Burn  
Peter Burn  
Presiding Member

Place of Hearing: Ottawa, Ontario  
Date of Hearing: June 16, 2016  
Tribunal Member: Peter Burn, Presiding Member  
Counsel for the Tribunal: Anja Grabundzija  
Student-at-law: Amélie Cournoyer  
Supervisor, Registry Operations: Haley Raynor  
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**PARTICIPANTS:****Appellant**

Tri-Ed Ltd.

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Sean Everden**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

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## STATEMENT OF REASONS

### SUMMARY

1. The appeal was filed by Tri-Ed Distribution Ltd. (Tri-Ed) on January 15 and February 5, 2015, pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup>, from a decision made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the *Act*, dated October 16, 2014, in respect of certain liquid crystal display (LCD) monitors.

2. The appeal first concerns the classification of the goods in issue in a heading of Chapters 1 to 97 of the schedule to the *Customs Tariff*. With the exception of some models in respect of which both parties found agreement since the filing of this appeal, as will be addressed specifically below, the main unresolved question is whether the goods in issue are properly classified under tariff item No. 8528.59.90 as other monitors, as determined by the CBSA, or should be classified under tariff item No. 8528.51.00 as other monitors of a kind solely or principally used in an automatic data processing (ADP) system of heading 84.71, as argued by Tri-Ed.

3. Second, the appeal raises the question whether the goods in issue may also be classified under tariff item No. 9948.00.00 as articles for use in ADP machines and units thereof, and thereby benefit from duty-free treatment.

### PROCEDURAL HISTORY

4. Tri-Ed imported the goods in issue along with other monitors in 2009, 2010 and 2011 under tariff item No. 8528.59.90. Tri-Ed later applied for refunds of duties paid pursuant to paragraph 74(1)(e) of the *Act*, on the basis that the goods were properly classified under tariff item No. 8528.51.00 as other monitors of a kind solely or principally used in ADP systems of heading 84.71.

5. The CBSA denied the claim, prompting Tri-Ed to request further re-determinations pursuant to subsection 60(1) of the *Act*. Tri-Ed claimed that the monitors should be classified under tariff item No. 8528.51.00 or, in the alternative, that they should qualify for duty relief under tariff item No. 9948.00.00 as articles for use in ADP machines and units thereof.

6. On October 16, 2014, the CBSA denied the refunds with respect to some of the monitors imported by Tri-Ed. This appeal concerns the tariff classification of those monitors.

7. The Tribunal held a public hearing in Ottawa, Ontario, on June 16, 2016. Tri-Ed called Mr. Gary Perlin, Vice-President of Strategic Sourcing at Tri-Ed, as an expert witness. The Tribunal was satisfied of Mr. Perlin's extensive experience in the video surveillance industry and accepted his qualification in the technical nature of surveillance equipment for the purposes of these proceedings.<sup>2</sup> The CBSA called Mr. Tony Mungham, Manager, Border Technology Development at the CBSA, as an expert witness, and the Tribunal was satisfied of his qualification in the area of electronics systems in the security field.<sup>3</sup>

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1. R.S.C. 1985, c. 1 (2nd Supp.) [*Act*].

2. *Transcript of Public Hearing*, 16 June 2016, at 14.

3. *Transcript of Public Hearing*, 16 June 2016, at 72-73.

8. Given that one of the issues raised in this appeal—classification in tariff item No. 9948.00.00—closely resembled the main issue raised in three other appeals pending before the Tribunal,<sup>4</sup> the Tribunal advised the parties that it would keep the record of the present appeal open to allow any further questions of law on this issue that arise in the course of the other appeals to be put to the parties in Tri-Ed. The Tribunal did not ultimately consider it necessary to put any further questions to the parties in the present appeal.

## GOODS IN ISSUE

9. The goods in issue are several models of flat-panel LCD monitors fitted with “multi-protocol inputs”.<sup>5</sup> More specifically, the monitors in issue are fitted, on the one hand, with connectors, such as VGA, DVI-D or HDMI, which allow them to receive signals from personal computers (PCs), as well as other devices relying on digital technologies, such as network video recorders (NVRs) or digital video recorders (DVRs). Meanwhile, BNC or S-Video connectors allow the monitors in issue to connect to and receive video signals from devices that rely on analogue technologies (for example, analogue cameras or VCRs)<sup>6</sup>. The latter type of connectors would typically be used to encode and transmit analogue signals that are considered broadcast standards, such as NTSC or PAL.<sup>7</sup>

10. As a result of their various connectors, the goods in issue are capable of receiving signals from a variety of sources. With some exceptions addressed later in these reasons, the monitors in issue can be used with PCs, which are usually recognized to fit the definition of an ADP machine or system of heading 84.71. However, the goods in issue can also be used with other devices (including DVRs, NVRs and cameras),<sup>8</sup> that the CBSA does *not* consider as being ADP machines or systems of heading 84.71.<sup>9</sup>

11. The goods in issue are marketed to the security surveillance industry. Tri-Ed sells the goods in issue to professional installers, or to companies that design surveillance systems and then sell them to installers.<sup>10</sup>

## CLASSIFICATION IN CHAPTERS 1 TO 97

### Legal Framework

12. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).<sup>11</sup> The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

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4. *Best Buy Canada Ltd., P & F USA Inc. and LG Electronics Canada Inc. v. President of the Canada Border Services Agency* (3 March 2017), AP-2015-034, AP-2015-036 and AP-2016-001 (CITT) [*Best Buy et al.*]. These appeals were jointly heard on November 3, 2016.

5. Exhibit AP-2014-041-64B, para. 10; *Transcript of Public Hearing*, 16 June 2016, at 67, 79.

6. *Transcript of Public Hearing*, 16 June 2016, at 77-78.

7. Exhibit AP-2014-041-64B, paras. 10, 12; Exhibit AP-2014-041-64A, paras. 12-13; *Transcript of Public Hearing*, 16 June 2016, at 40-41, 51-53, 74-76, 79, 87.

8. *Transcript of Public Hearing*, 16 June 2016, at 24-25, 41-43, 50-52, 70, 74.

9. Exhibit AP-2014-041-09A, para. 47.

10. *Transcript of Public Hearing*, 16 June 2016, at 59.

11. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

13. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>12</sup> and the *Canadian Rules*<sup>13</sup> set out in the schedule.

14. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that 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 other rules.

15. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>14</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>15</sup> published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.<sup>16</sup>

16. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. It is only where Rule 1 does not conclusively determine the classification of the goods that the other *General Rules* become relevant to the classification process.<sup>17</sup>

17. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading. Rule 6 of the *General Rules* provides that “the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules . . .” (i.e. Rules 1 through 5) and that “the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

18. Finally, the Tribunal must determine the proper tariff item classification. Rule 1 of the *Canadian Rules* provides that “the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . .” and that “the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.” Classification opinions and explanatory notes do not apply to classification at the tariff item level.

### Relevant Classification Provisions

19. Both parties agree that the goods in issue fall under Chapter 85<sup>18</sup> of the *Customs Tariff* as follows:

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12. S.C. 1997, c. 36, schedule [*General Rules*].

13. S.C. 1997, c. 36, schedule.

14. World Customs Organization, 2nd ed., Brussels, 2003.

15. World Customs Organization, 5th ed., Brussels, 2012.

16. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that explanatory notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to classification opinions.

17. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

18. Although the goods in issue were imported at different times in 2009, 2010 and 2011, and the *Customs Tariff* provisions in force at the time of importation apply, the provisions relevant to this appeal (subheadings 8528.51, 8528.59 and 8528.72) were identical through that time period.

**Section XVI****MACHINERY AND MECHANICAL APPLIANCES;  
ELECTRICAL EQUIPMENT; PARTS THEREOF;  
SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE  
AND SOUND RECORDERS AND REPRODUCERS, AND PARTS  
AND ACCESSORIES OF SUCH ARTICLES****Chapter 85****ELECTRICAL MACHINERY AND EQUIPMENT AND PARTS THEREOF;  
SOUND RECORDERS AND REPRODUCERS,  
TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND  
PARTS AND ACCESSORIES OF SUCH ARTICLES**

20. The parties also agree that the goods in issue are properly classified in heading 85.28.

21. The main dispute relates to the subheading level. Tri-Ed argues that the goods in issue should be classified in subheading 8528.51 and under tariff item No. 8528.51.00, while the CBSA maintains that the goods in issue are properly classified in subheading 8528.59 and under tariff item No. 8528.59.90. The relevant provisions read as follows:

<b>85.28</b>	<b>Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus.</b>
	<b>-Other monitors:</b>
<b>8528.51.00</b>	--Of a kind solely or principally used in an automatic data processing system of heading 84.71
<b>8528.59</b>	--Other
8528.59.90	-- -Other

22. The explanatory notes to heading 85.28 provide guidance as to the monitors that are considered to be of a kind solely or principally used in an ADP system of heading 84.71, as well as monitors other than those of a kind solely or principally used in an ADP system of heading 84.71, as follows:

Monitors, projectors and television sets utilize different technologies, such as CRT (cathode-ray tube), LCD (liquid crystal display), DMD (digital micromirror device), OLED (organic light emitting diodes) and plasma, to display images.

Monitors and projectors may be capable of receiving a variety of signals from different sources. However, if they incorporate a television tuner they are considered to be reception apparatus for television.

**(A) MONITORS OF A KIND SOLELY OR PRINCIPALLY USED IN AN AUTOMATIC  
DATA PROCESSING SYSTEM OF HEADING 84.71**

This group includes CRT and non-CRT (e.g., flat panel screen) monitors which provide a graphical presentation of the data processed. These monitors are distinguishable from other types of monitors (see (B) below) and from television receivers. They include:

- (1) Those monitors which are capable of accepting a signal only from the central processing unit of an automatic data processing machine and, therefore, are not able to reproduce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC, etc.). They are fitted with connectors characteristic of data processing systems (e.g., RS-232C interface, DIN or SUB-D



connectors) and do not have an audio circuit. They are controlled by special adaptors (e.g., monochrome or graphics adaptors) which are integrated in the central processing unit of the automatic data processing machine.

- (2) CRT monitors having a display pitch size starting at 0.41 mm for medium resolution, which gets smaller as the resolution increases.
- (3) Those CRT monitors which, in order to accommodate the presentation of small yet well-defined images, utilize smaller dot (pixel) sizes and greater convergence standards than those applicable to the monitors described at (B) below and television receivers. (Convergence is the ability of the electron gun(s) to excite a single spot on the face of the cathode-ray tube without disturbing any of the adjoining spots.)
- (4) CRT monitors whose video frequency (bandwidth), which is the measurement determining how many dots can be transmitted per second to form the image, is generally 15 MHz or greater. Whereas, in the case of the monitors described at (B) below, the bandwidth is generally no greater than 6 MHz. The horizontal scanning frequency of these monitors varies according to the standards for various display modes, generally from 15 kHz to over 155 kHz. Many are capable of multiple horizontal scanning frequencies. The horizontal scanning frequency of the monitors described at (B) below is fixed, usually 15.6 or 15.7 kHz depending on the applicable television standard. Moreover, the monitors of this group do not operate in conformity with national or international broadcast frequency standards for public broadcasting or with frequency standards for closed-circuit television.

The monitors of this group are characterised by low electromagnetic field emissions and they frequently incorporate tilt and swivel adjusting mechanisms, glare-free surfaces, flicker-free display, and other ergonomic design characteristics to facilitate prolonged periods of viewing at close proximity to the monitor.

**(B) MONITORS OTHER THAN THOSE OF A KIND SOLELY OR PRINCIPALLY USED  
IN AN AUTOMATIC DATA PROCESSING SYSTEM OF HEADING 84.71**

This group includes monitors which are receivers connected directly to the video camera or recorder by means of co-axial cables, so that all the radio-frequency circuits are eliminated. They are used by television companies or for closed-circuit television (airports, railway stations, factories, hospitals, etc.). These apparatus consist essentially of devices which can generate a point of light and display it on a screen synchronously with the source signals. They incorporate one or more video amplifiers with which the intensity of the point can be varied. They can, moreover, have separate inputs for red (R), green (G) and blue (B), or be coded in accordance with a particular standard (NTSC, SECAM, PAL, D-MAC, etc.). For reception of coded signals, the monitor must be equipped with a decoding device covering (the separation of) the R, G and B signals. The most common means of image reconstitution is the cathode-ray tube, for direct vision, or a projector with up to three projection cathode-ray tubes; however, other monitors achieve the same objective by different means (e.g., liquid crystal screens, diffraction of light rays on to a film of oil). These may be in the form of CRT monitors or flat panel displays, e.g., LCD, LED, plasma.

23. Furthermore, because subheading 8528.51 refers specifically to ADP systems of heading 84.71,<sup>19</sup> the notes appurtenant to that heading are also relevant. These will be discussed as necessary in the analysis.

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19. Heading 84.71 includes "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."

### Agreement Between the Parties Regarding Particular Monitors

24. Both sides made concessions regarding particular monitors, such that an agreement was reached on the tariff classification of these particular goods. The Tribunal will address these particular goods first.

25. The Tribunal accepts, as agreed by both parties,<sup>20</sup> that model PMCL547F<sup>21</sup> is properly classified under tariff item No. 8528.72.33 as other colour reception apparatus for television, high definition, with a flat-panel screen, pursuant to Rules 1 and 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, as this model incorporates a television tuner.

26. At the hearing, the CBSA conceded that two models of the goods in issue, model CE-VG788 and model CE-VT788, can be classified in subheading 8528.51 on the basis that they “do not accept NTSC- or PAL-style broadcast”.<sup>22</sup> The Tribunal agrees and finds, applying Rules 1 and 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, that these two models of monitors are classified under tariff item No. 8528.51.00 as other monitors of a kind solely or principally used in an ADP system of heading 84.71.

27. At the hearing, Tri-Ed conceded that the “TLM-0271 LCD Hand-Held Test Monitor” does not have the ability to connect directly to a computer and should not be considered a monitor of a kind principally used in ADP systems of heading 84.71.<sup>23</sup> The Tribunal finds that the evidence supports this view,<sup>24</sup> and, applying Rules 1 and 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, this monitor is therefore properly classified under tariff item No. 8528.59.90 as other monitors, as determined by the CBSA.

### Parties’ Positions Regarding the Remaining Goods in Issue

#### Tri-Ed

28. Tri-Ed argued that the goods in issue are classified in subheading 8528.51 as monitors of a kind *principally* used in an ADP system of heading 84.71. While the goods in issue can receive both digital and analogue signals, according to Tri-Ed, the industry has moved towards digital technologies. Tri-Ed argued that the fact that these monitors can receive signals from sources other than an ADP machine does not prevent them from fitting within the scope of subheading 8528.51 by virtue of explanatory note (A) to heading 85.28. Tri-Ed referred to certain classification opinions in support of its position that multi-protocol monitors are classified in subheading 8528.51.

29. Tri-Ed argued that the word “principally” simply means first in rank or importance. Its position was that the monitors in issue are of a kind that, over time, are used principally within a network system consisting of, *inter alia*, cameras, monitors and a unit that processes data. Tri-Ed’s position was that the surveillance system as a whole is a system or network that processes data and, as such, qualifies as an ADP system of heading 84.71.<sup>25</sup>

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20. Exhibit AP-2014-041-09A, paras. 18-19; Exhibit AP-2014-041-18B, para. 1; *Transcript of Public Hearing*, 16 June 2016, at 119-20.

21. Exhibit AP-2014-041-07A at 45.

22. *Transcript of Public Hearing*, 16 June 2016, at 120.

23. *Transcript of Public Hearing*, 16 June 2016, at 96.

24. Exhibit AP-2014-041-07A at 74; Exhibit AP-2014-041-09B at 25-26; *Transcript of Public Hearing*, 16 June 2016, at 54-55.

25. *Transcript of Public Hearing*, at 104-5, 110-11.

### CBSA

30. The CBSA argued that the goods in issue do not fit the description of explanatory note (A) to heading 85.28, and thus cannot be classified in subheading 8528.51. The CBSA argued that, “[w]hat is of particular significance [in] the description of monitors in *Explanatory Note (A)* is the inability of [the] monitors [described in that explanatory note] to produce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC, etc.).”<sup>26</sup> Since the goods in issue are capable of producing composite video signals conforming to such waveforms, they are therefore not consistent with explanatory note (A) for the purposes of classification in subheading 8528.51.

31. The CBSA added that the marketing literature of the goods in issue indicates that they are ideal for use with a variety of machines, and thus does not show that they are of a kind “principally” used in an ADP system of heading 84.71. The CBSA highlighted that an ADP system is defined in note 5 to Chapter 84, and that in accordance with that definition, the ability to process data is not sufficient, as note 5 (E) also provides that machines that incorporate an ADP machine but have a specific function other than data processing are not classified in heading 84.71.<sup>27</sup> As such, the CBSA submitted, for example, that a DVR is not considered an ADP machine of heading 84.71, as its specific function is digital video recording.

32. The CBSA argued that the goods in issue are other monitors of subheading 8528.59, described in explanatory note (B) to heading 85.28.

### **Analysis**

33. There is no dispute between the parties in respect of the classification of the goods in issue at the heading level, and the Tribunal agrees that they are properly classified in heading 85.28.

34. The main classification question is whether the goods in issue are monitors of a kind principally used in an ADP system of heading 84.71 and are thus classified in subheading 8528.51, as argued by Tri-Ed, or are classified in subheading 8528.59 as other monitors, as determined by the CBSA.

35. In accordance with Rules 1 and 6 of the *General Rules*, the Tribunal will begin its analysis by considering the relevant elements of the description of subheading 8528.51 and determining whether, based on the evidence before it, the goods in issue are described by the terms of subheading 8528.51. The Tribunal agrees with the CBSA that goods are to be classified in a residual provision (here, subheading 8528.59) only if they cannot be classified in a more specific provision under consideration.<sup>28</sup>

36. Having considered the parties’ arguments and evidence, the Tribunal finds that the monitors in issue are of a kind used *principally* in ADP systems of heading 84.71. As such, they are classified in subheading 8528.51.

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26. Exhibit AP-2014-041-09A, para. 38.

27. *Transcript of Public Hearing*, 16 June 2016, at 131-32.

28. Exhibit AP-2014-041-09A, para. 31. A residual tariff item and a more specific tariff item are usually mutually exclusive: see *Rimowa North America Inc. v. President of the Canada Border Services Agency* (6 January 2016), AP-2015-004 (CITT) at paras. 25-27; *J. Walter Company Ltd. v. President of the Canada Border Services Agency* (30 May 2008), AP-2006-029 (CITT) at para. 21.

Subheading 8528.51: Monitors of a Kind Solely or Principally Used in an Automatic Data Processing System of Heading 84.71

37. It is not in dispute that the goods in issue are not “solely” used in an ADP system of heading 84.71. The key issue in this appeal is whether they are of a kind “principally used” in such a manner.

38. As the words “of a kind . . . principally used in” are not defined in the nomenclature, they must be given their ordinary meaning consistent with their context. “Principally” is commonly defined as “for the most part; chiefly”. “Principal” is defined as “first in rank or importance; chief. 2 main, leading.”<sup>29</sup>

39. In addition, the words “of a kind . . . used” refer to the kind or type of good suitable or intended for a proposed use, and does not require evidence of the actual use of the goods.<sup>30</sup>

40. Much of the dispute in this case stemmed from the interpretation of the explanatory notes to heading 85.28. The CBSA relied on the following passage of explanatory note (A) to heading 85.28 in arguing that the goods in issue are *not* of a kind principally used in an ADP system of heading 84.71:

**(A) MONITORS OF A KIND SOLELY OR PRINCIPALLY USED IN AN AUTOMATIC DATA PROCESSING SYSTEM OF HEADING 84.71**

. . . They include:

- (1) Those monitors which are *capable of accepting a signal only from the central processing unit of an automatic data processing machine and, therefore, are not able to reproduce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC, etc.)*. They are fitted with connectors characteristic of data processing systems (e.g., RS-232C interface, DIN or SUB-D connectors) and do not have an audio circuit. They are controlled by special adaptors (e.g., monochrome or graphics adaptors) which are integrated in the central processing unit of the automatic data processing machine.

[Emphasis added]

41. The CBSA argued that, “of particular significance [in] the description of monitors in *Explanatory Note (A)* is the inability of those monitors to produce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC, etc.)” It thus takes the view that, “if a monitor is unable to produce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC, etc.), then the *Explanatory*

29. Exhibit AP-2014-041-07A, para. 22; Exhibit AP-2014-041-09C, Tab 41.

30. *Ballarat Corporation Ltd. v. Deputy Minister of National Revenue* (19 December 1995), AP-93-359 (CITT) at 3. This is consistent with the French version of subheading 8528.51, which relates to “-Autres moniteurs : --*Des types exclusivement ou principalement destinés à une machine automatique de traitement de l’information du n° 84.71* » (emphasis added). It is interesting to note that interpreting the words “of a kind” in the context of the notes, as they read at the time, to Chapter 84, the WTO Panel in *EC – Tariff Treatment of Certain Information Technology Products*, WT/DS375R, WT/DS376 and WT/DS377 (16 August 2010), at para. 7.1304, similarly found that “the inclusion of the phrase ‘of a kind’ means that a determination pursuant to Chapter Note 5(B)(a) requires an examination of the design and intended use of a product based on its objective physical characteristics, rather than a simple look at the actual use.” This is further consistent with the Tribunal’s oft-cited view that, as the case may be, “characteristics such as the design, best usage, marketing and distribution of the goods in issue can, in the appropriate circumstances, help describe the goods in issue and shed light on their classification pursuant to Rule 1 of the *General Rules*” (*BMW Canada Inc. v. President of the Canada Border Services Agency* (16 September 2014), AP-2013-050 (CITT) at para. 54). See also *Wal-Mart Canada Corporation v. President of the Canada Border Services Agency* (13 June 2011), AP-2010-035 (CITT) at para. 74.

*Notes* . . . states [*sic*] that it is a ‘monitor of a kind solely or principally used in an automatic data processing system of heading 84.71’.”<sup>31</sup>

42. The Tribunal cannot agree with the CBSA’s position. Consistent with the word “include” at the outset of explanatory note (A), this note essentially describes examples of monitors that are considered of a kind either solely or principally used in an ADP system of heading 84.71.

43. One of those examples concerns monitors capable of accepting a signal only from the central processing unit of an ADP machine and, therefore, not able to reproduce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC, etc.). The Tribunal sees no rationale from the context of this particular example to conclude that explanatory note (A) thereby *limits* the monitors within the scope of subheading 8528.51 to those unable to reproduce a colour image from a composite video signal, or that that characteristic is of “particular significance”. The description of monitors in explanatory note (A), and that are thus covered by subheading 8528.51, is not limited to that particular characteristic.

44. The CBSA’s position essentially restricts the scope of the heading to monitors *solely* used in an ADP system of heading 84.71, to the extent that it implies that monitors within the scope of subheading 8528.51 are therefore limited to those that can *only* accept signals from an automatic data processing machine of heading 84.71.<sup>32</sup> This interpretation is inconsistent with the terms of heading 8528.51, which relate to monitors of a kind “solely or *principally*” used in an ADP system of heading 84.71.<sup>33</sup>

45. Furthermore, while the CBSA agreed that the common meaning of the word “principally” is “for the most part” or “chiefly”, it argued that, in light of explanatory note (A), “if [the monitors] have the ability to be used by something else [i.e. something other than an automatic data processing system of heading 84.71], it’s a very minor ability.”<sup>34</sup> However, this is an unduly narrow understanding of the word “principally” that downplays the relative status of a secondary use to an incidental use. There is no reason in the context of subheading 8528.51 to downgrade the relative importance of those other uses beyond recognizing that they are lesser in importance than the principal use.

46. The example in explanatory note (A) that provides for monitors “capable of accepting a signal *only* from the central processing unit of an automatic data processing machine and, therefore, . . . not able to reproduce a colour image from a composite video signal” is compatible with goods that are of a kind used “solely” in an ADP system of heading 84.71, but it does not imply that subheading 8528.51 excludes goods that are capable of accepting signals from the central processing unit of an ADP machine as well as other types of signals, including composite video, and may thus be of a kind “principally” used in an ADP system of heading 84.71.

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31. Exhibit AP-2014-041-09A, paras. 38, 40.

32. The CBSA appeared to espouse this interpretation at times: Exhibit AP-2014-041-09A, para. 42; Exhibit AP-2014-041-38A, para. 3.

33. Courts in the US and EU having examined similar provisions have reached the conclusion that, to the extent that similar explanatory notes may be read as requiring that goods be only capable of accepting signals from an ADP machine, such explanatory notes are inconsistent with the scope of the binding nomenclature, which expressly includes goods that are “principally” (and thus not solely) used in ADP systems. See Judgment of 19 February 2009, *Staatssecretaris van Financiën v. Kamino International Logistics BV*, C-376/07, EU:C:2009:105 (Court of Justice of the European Union); *BenQ America Corp. v. United States*, 646 F.3d 1371 (Fed. Circ. 2010) (United States Court of Appeals for the Federal Circuit). See also Report of the Panel in *EC – Tariff Treatment of Certain Information Technology Products*, WT/DS375R, WT/DS376 and WT/DS377 (16 August 2010) DS375, at para. 7.666-7.667.

34. *Transcript of Public Hearing*, 16 June 2016, at 124.

47. This interpretation is consistent with classification opinions for subheading 8528.51, that indicate that certain multi-protocol monitors are classified in subheading 8528.51. For instance, classification opinion No. 1 under subheading 8528.51 indicates that a monitor with the following description is classified in that subheading by applying Rules 1 and 6 of the *General Rules*:

1. **Colour monitor** comprising a 22 inch (55.88 cm) TFT LCD (thin film transistor liquid crystal display) panel combined in the same housing with control circuitry, *DVI-D (digital visual interface – for digital signal only) and VGA (Video Graphics Array) input connectors* and adjustment LED (light emitting diode) touch-sensor controls.

The monitor includes the following components and features :

- Colour saturation 72 % (*NTSC*);

...

[Emphasis added]

Similarly, classification opinion No. 2 under subheading 8528.51 provides that the following monitor description is classified in that subheading through Rules 1 and 6 of the *General Rules*:

2. **Colour monitor** comprising a 23.1 inch (58.67 cm) thin film transistor active-matrix liquid crystal display (TFT AMLCD) panel combined with control circuitry, input receptacles and adjustment controls in a case suitable for mounting in place and certified as suitable for installation in a marine environment. It is exclusively designed, tested and type-approved for and used in navigation and automation systems on ships, and is always used in a system configuration with an automatic data processing machine as its primary control and signal source.

The monitor includes the following components and features :

...

- Images supported: VGA (Video Graphics Array), SVGA (Super VGA), XGA (Extended Graphics Array), SXGA (Super XGA), UXGA (Ultra XGA), WUXGA (Wide UXGA);

- *Video standards supported: Interlaced NTSC and PAL/SECAM video, Composite video;*

...

- Signal input/output receptacles: DVI-I (digital visual interface – for both digital and analog signals) Signal IN, RGB Signal IN (HD D-SUB), RGB Signal OUT (HD D-SUB), Multifunction (D-SUB), USB (Universal Serial Bus) I/O (Type B Connector);

...

[Emphasis added]

48. What these classification opinions clearly confirm is that capability to produce composite video or signals conforming to a broadcast standard does *not* preclude a monitor from being classified in subheading 8528.51 if it is otherwise of a kind principally used in an ADP system of heading 84.71.

49. Classification opinion No. 1 was adopted in 2011, and classification opinion No. 2 in 2013. The CBSA argued therefore that the Tribunal should not be guided in its interpretation by classification opinions issued after the time of importation of the goods in issue. It took the view that classification opinions issued at some later time reflect the situation at such later time, especially when dealing with fast-changing technology.

50. The CBSA's position is not supported by the decision of the Federal Court of Appeal in *Decolin*, on which the CBSA relies. The majority of the Court held that "[t]he CIIT's role is to consider any amendment to an Explanatory Note in making its decision."<sup>35</sup> Indeed, the Tribunal's standard practice is to take into account all explanatory notes existing at the time of the appeal, unless there is a good reason to disregard them.<sup>36</sup> The Tribunal has consistently expressed the view that the same principles apply to classification opinions, in accordance with section 11 of the *Customs Tariff*.

51. In this case, there is no apparent reason to deviate from the Tribunal's standard practice. The explanatory notes and the subsequently adopted classification opinions in issue are in no way irreconcilable.<sup>37</sup> The classification opinions merely confirm the interpretation of the explanatory notes that was already apparent when the latter were read in context.<sup>38</sup>

Are the Goods in Issue Monitors of a Kind Principally Used in an ADP System of Heading 84.71?

52. Note 5 to Chapter 84, which includes heading 84.71, contains the following passages relevant to an *ADP system of heading 84.71*:

5. (A) For the purpose of heading 84.71, the expression "automatic data processing machines" means machines capable of:

- (i) Storing the processing program or programs and at least the data immediately necessary for the execution of the program;
- (ii) Being freely programmed in accordance with the requirements of the user;
- (iii) Performing arithmetical computations specified by the user; and,
- (iv) Executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

(B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units.

(C) Subject to paragraphs (D) and (E) below, a unit is to be regarded as being part of an automatic data processing system if it meets all of the following conditions:

- (i) It is of a kind solely or principally used in an automatic data processing system;
- (ii) It is connectable to the central processing unit either directly or through one or more other units; and
- (iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

...

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35. *Canada (Border Services Agency) v. Decolin Inc.*, 2006 FCA 417 (CanLII) [*Decolin*] at paras. 13, 16.

36. *Decolin* at paras. 61, 65.

37. Contrary, for example, to the situation in *Decolin*.

38. The CBSA also objected that some of the classification opinions referred to by Tri-Ed (e.g. opinion No. 1) had not been submitted on the record (*Transcript of Public Hearing*, 16 June 2016, at 129-30). The Tribunal does not consider that the CBSA would thereby have suffered any unfairness in the particular circumstances at hand. The classification opinions, while not an Act of Parliament, are by law a central consideration to the classification exercise and, as such, the Tribunal can take judicial notice of such opinions as part of the classification exercise before it. The classification opinions in issue here related to the very subheading under consideration in these proceedings and the CBSA must be taken to be cognizant of such relevant opinions as part of the CBSA's own evaluation of the case.

(E) Machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function other than data processing are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

53. Furthermore, subheading note 1 provides as follows:

1. For the purpose of subheading 8471.49, the term “systems” means automatic data processing machines whose units satisfy the conditions laid down in Note 5 (B) to Chapter 84 and which comprise at least a central processing unit, one input unit (for example, a keyboard or a scanner), and one output unit (for example, a visual display unit or a printer).

54. The explanatory notes to heading 84.71 provide the following passages that further inform the scope of an ADP system of heading 84.71:

Automatic data processing machines may comprise in the same housing, the central processing unit, an input unit (e.g., a keyboard or a scanner) and an output unit (e.g., a visual display unit), or may consist of a number of interconnected separate units. In the latter case, the units form a “system” when it comprises at least the central processing unit, an input unit and an output unit (see Subheading Note 1 to this Chapter). The interconnections may be made by wired or wireless means.

A complete automatic data processing system must comprise, at least:

- (1) A **central processing unit** which generally incorporates the main storage, the arithmetical and logical elements and the control elements; in some cases, however, these elements may be in the form of separate units.
- (2) An **input unit** which receives input data and converts them into signals which can be processed by the machine.
- (3) An **output unit** which converts the signals provided by the machine into an intelligible form (printed text, graphs, displays, etc.) or into coded data for further use (processing, control, etc.).

Two of these units (input and output units, for example) may be combined in one single unit.

A complete automatic data processing system is classified in this heading, even though one or more units may be classified elsewhere when presented separately (see part (B) **Separately presented units**, below).

These systems may include remote input or output units in the form of data terminals.

Such systems may also include units, apart from the input or output units, designed to increase the capacity of the system for instance, by expanding one or more of the functions of the central unit (see Part (B) below). Such units are inserted between the input or output units (start and end of the system), although adapting and converting units (channel adaptors and signal converters) may occasionally be connected before the input unit or after the output unit.

Automatic data processing machines and systems are put to many uses, for example, in industry, in trade, in scientific research and in public or private administrations. (See Part (E) of the General Explanatory Note to Chapter 84 with respect to the classification of machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function (Note 5 (E) to this Chapter)).

55. A computer is commonly considered to be an ADP machine or system of heading 84.71.<sup>39</sup>

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39. See, for example, *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT) at 10; *Jam Industries v. President of the Canada Border Services Agency* (20 March 2006), AP-2005-006 (CITT).



56. The goods in issue were imported in the years 2009 to 2011. They are fitted with connectors characteristic of ADP machines described in explanatory note (A) (such as SUB-D connectors), but some also include more technologically advanced connectors, such as HDMI, which are characteristic of computer technologies but not expressly mentioned in explanatory note (A).<sup>40</sup> The goods in issue also have features that facilitate prolonged viewing, as described in explanatory note (A).<sup>41</sup> As discussed in the previous section, the fact that the goods in issue are also capable of receiving signals conforming to a broadcast standard does not take them out of the realm of subheading 8528.51.

57. As explained by Mr. Mungham, 2009 to 2011 was a period when the video surveillance industry was in the midst of a transition from analogue to digital platforms. The Tribunal accepts Mr. Mungham's testimony that many installations still relied on analogue technologies for both capturing and viewing video signals.<sup>42</sup> Mr. Mungham testified that in the 2009-2011 time frame, his organization, the CBSA, still had a significant analogue deployment, which included VCR-type media.<sup>43</sup>

58. On the other hand, Mr. Perlin's evidence shows that a common surveillance system in the relevant time frame may have a central processing unit, whether in the DVR, NVR, or a server (i.e. a computer with specialty software).<sup>44</sup> In such a system, the entire surveillance system processes data.<sup>45</sup> As Mr. Perlin testified, "[i]t's all about data. The camera has a scene. The lens looks at the scene, projects it onto the DMOS image sensor, which is digital, and the whole thing at that point is a digital world where it's converting and analyzing and processing that data, enhancing it in many ways, recording it, and putting it out into the Internet."<sup>46</sup>

59. The CBSA argued that Tri-Ed's evidence established, at best, that the goods in issue were of a kind that is "often" used with goods such as DVRs and NVRs, which are not ADP machines of heading 84.71 by virtue of note 5 (E) to Chapter 84.<sup>47</sup> However, the Tribunal understands the evidence to mean that surveillance technology in the relevant time frame was advancing towards IP-based surveillance systems, in which the monitors are used with both ADP machines of heading 84.71 and other "non-84.71" machines with a processing capability that work together to enable the two-way flow of data over the network.

60. Mr. Mungham testified that, following the 2009-2011 time frame, the industry moved towards "much more PC-based software installed video surveillance systems".<sup>48</sup> In a related vein, an excerpt from a paper dating from 2009 shows, and Mr. Perlin testified, that while the earliest DVRs introduced in the mid-1990s did not have Internet connectivity, more advanced DVR models were equipped with Ethernet ports for network connectivity, which enabled remote viewing of video captured and/or recorded using PCs.<sup>49</sup> Further technological advancements as shown by Mr. Perlin's expert report materials show increasingly network- and computer-oriented surveillance set ups, either for recording, viewing, and/or video management, in line with Mr. Mungham's own testimony.<sup>50</sup> Mr. Perlin testified as well that, in his

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40. *Transcript of Public Hearing*, 16 June 2016, at 75; Exhibit AP-2014-041-09B, Tab 1.

41. Exhibit AP-2014-041-64B, para. 10; *Transcript of Public Hearing*, 16 June 2016, at 86-87.

42. *Transcript of Public Hearing*, 16 June 2016, at 66-68, 77-78; Exhibit AP-2014-041-64B, para. 10.

43. *Transcript of Public Hearing*, 16 June 2016, at 77.

44. *Transcript of Public Hearing*, 16 June 2016, at 28-29.

45. *Transcript of Public Hearing*, 16 June 2016, at 45, 82.

46. *Transcript of Public Hearing*, 16 June 2016, at 45.

47. See, for example, Exhibit AP-2014-041-09A, paras. 47, 84-85; *Transcript of Public Hearing*, 16 June 2016, at 131-35.

48. *Transcript of Public Hearing*, 16 June 2016, at 88.

49. Exhibit AP-2014-041-063A, Tab D at 2 of 414 and 3 of 415; *Transcript of Public Hearing*, 16 June 2016, at 32-33.

50. Exhibit AP-2014-041-063A, Tab D at 3 of 415 and 4 of 416; *Transcript of Public Hearing*, 16 June 2016, at 87-88.

experience, the prime demand from users was network connectivity, or the ability to view video remotely, such as on a PC or on a phone, and that he never sees systems installed nowadays that are not on the Internet.<sup>51</sup>

61. The evidence on record in this case confirms that the fact that the goods in issue were equipped with capability for both analogue and digital systems reflects the transitional needs of a market that was evolving towards fully digital systems. The goods in issue were equipped to facilitate, but also withstand this transition to digital systems. In the Tribunal's view, while they allowed users a gradual and controlled upgrade from analogue to digital, the principal intended use and suitability of monitors of this kind was in ADP systems of heading 84.71.

62. The evidence also showed that the pace of the transformation from analogue to digital had accelerated, particularly since 2011.<sup>52</sup> However, the speed and sequence of the transition of any particular surveillance system towards entirely digital systems would be up to the user, depending amongst other things on budgetary constraints.<sup>53</sup>

63. Mr. Mungham testified that the goods in issue served the industry well in this period of transition, as their multi-protocol inputs accommodated hybrid analogue/digital systems. In particular, as Mr. Mungham put it, "as we moved from analogue to digital, those monitors were very useful in order to put in a hybrid infrastructure, not change everything at once, but be able to do it in steps."<sup>54</sup>

64. Evidence was also presented that the warranties for the goods in issue were generally of three to five years, though the equipment usually has a longer useful life.<sup>55</sup> Mr. Perlin also testified that it was "one hundred percent" reasonable to assume that the monitors in issue would be receiving digital signals over their useful life. He highlighted the fact that digital technologies provided better picture quality, and that customers choosing to use purely analogue equipment with LCD monitors, such as the goods in issue, would have done a "disservice" to their companies.<sup>56</sup>

65. The Tribunal finds that, in such a dynamic environment of transition of the surveillance industry towards fully digital systems, the rationale for the design and purchase of monitors with multi-protocol inputs was to enable users to move from analogue to digital surveillance systems in steps, rather than all at once, and at a pace that reflected their own particular security needs, the age of their existing systems and their financial circumstances.<sup>57</sup>

66. Given the relatively long useful life of the monitors in issue, the pace of technological change in the surveillance industry around the time of importation, and the evidence from both experts that surveillance systems were migrating towards PC-based platforms utilizing the Internet, and that the goods in issue served the industry by offering flexibility in such market conditions and the possibility for a staged migration, the Tribunal is satisfied that the goods in issue were suitable and intended principally for ADP systems of heading 84.71, while offering the user the flexibility of a gradual transition towards those systems in line with the user's circumstances.

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51. *Transcript of Public Hearing*, 16 June 2016, at 28, 86, 90, 92.

52. *Transcript of Public Hearing*, 16 June 2016, at 79-80.

53. *Transcript of Public Hearing*, 16 June 2016, at 87-88.

54. *Transcript of Public Hearing*, 16 June 2016, at 77-78. The flexibility of the goods in issue is advertised in some of the product literature submitted by Tri-Ed, for example, Exhibit AP-2014-041-07A at 24, 54, 56, 83.

55. *Transcript of Public Hearing*, 16 June 2016, at 44.

56. *Transcript of public Hearing*, 16 June 2016, at 45, 46, 58.

57. *Transcript of Public Hearing*, 77-78, 82-84.

67. Being monitors of a kind principally used in ADP systems of heading 84.71, the goods in issue are therefore classified in subheading 8528.51.

68. The fact that some of the monitors in issue may have been used in surveillance systems that may not, in whole or in part, qualify as ADP systems of heading 84.71 does not negate that they are monitors *of a kind* principally used in such systems, having regard to their design and intended use. Indeed, as outlined above, the test is not one of actual use of the goods in issue, but rather concerns their principal suitability and intended use.

69. Finally, for similar reasons, the Tribunal notes and agrees with the CBSA's insistence that "classification happens at the time of importation" and that classification is "not about what a user [of a good] is eventually going to do with it as their time and budget allows."<sup>58</sup> The Tribunal reiterates that the test of whether monitors are "of a kind . . . principally used in" ADP systems of heading 84.71 does not relate to the actual use that a user makes of a good, but rather requires looking at the principal suitability and intended use of the good, as they exist at the time of importation.

#### Conclusion on the Tariff Classification of the Remaining Goods in Issue

70. Having regard to explanatory note (A), the relevant classification opinions and the evidence on record, the Tribunal concludes that the goods in issue are of a kind principally used in ADP systems of heading 84.71, and are therefore classified in subheading 8528.51 and tariff item No. 8528.51.00.

## **CLASSIFICATION IN CHAPTER 99**

### **Parties' Positions**

#### Tri-Ed

71. In addition to arguing that the goods in issue should be classified under tariff item No. 8528.51.00, Tri-Ed argued in the alternative that the goods in issue can benefit from duty-free treatment through classification under tariff item No. 9948.00.00, which relates to articles for use in ADP machines or units thereof.

72. Tri-Ed argued that the goods in issue are articles for use in ADP machines or units thereof by reason of being either incorporated into or attached to ADP machines through their DVI, HDMI or VGA connections, the ADP machine or system being the entire security network. It argued that the design of the goods in issue proves that they are actually used in ADP machines.

73. Tri-Ed argued that the *Imported Goods Records Regulations*<sup>59</sup>, contrary to the position taken by the CBSA, do not apply in respect of the goods in issue and in respect of Tri-Ed's claim for classification under tariff item No. 9948.00.00. The *IGRR* require importers who have imported commercial goods that have been released free of duty or at a reduced rate because of their intended use to keep a certificate or other record signed by the user of the commercial goods that shows, *inter alia*, the actual use made of the commercial goods. Tri-Ed takes the view that end-user certification may be one way to provide evidence of use, but that it is not a requirement. Tri-Ed added that the provisions of Chapter 99 should be interpreted liberally in order to achieve the purpose of providing duty relief to specific industries.

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58. *Transcript of Public Hearing*, 16 June 2016, at 138.

59. S.O.R./86-1011 [*IGRR*].

74. Tri-Ed further alleged that it had been treated unfairly by the CBSA with respect to the alleged requirement for certificates signed by the end user. It submitted that the Tribunal should allow this appeal on the basis that there was reasonable apprehension of bias on the part of the CBSA.

### CBSA

75. The CBSA argued that the goods in issue cannot be classified under tariff item No. 9948.00.00. The CBSA submitted that such goods must be (1) articles (2) for use in (3) ADP machines and units thereof, and that the goods in issue do not fulfil these criteria.

76. The CBSA acknowledged that the goods in issue are articles and that they are capable of being “attached to” other machines within the meaning of the definition of “for use in” in section 2 of the *Customs Tariff*. It noted however that not all such machines are ADP machines.

77. It argued further that there is no evidence showing that the goods in issue are *actually* attached to an ADP machine, rather than other kinds of machines such as cameras or DVRs. The CBSA relied on the Federal Court of Appeal’s decision in *Entrelec Inc. v. Canada (Minister of National Revenue)*,<sup>60</sup> for the proposition that evidence of actual use of the goods as opposed to just intended use is required where the term “for use in” occurs in a tariff item. The CBSA also argued that the evidence necessary to demonstrate actual use is certification by the end user of the goods confirming the actual use, in accordance with paragraph 3(a) of the *IGRR*, as it applied at the time of importation, and note 3 to Chapter 99, which provides that goods can be classified in that chapter only after the conditions of any applicable regulations or orders have been met. The CBSA took the view that the *IGRR* are such “applicable regulations”. In oral argument, the CBSA acknowledged that other types of documentation sufficient to establish the actual use of goods could be provided, depending on the circumstances.<sup>61</sup>

78. Regarding Tri-Ed’s allegation that it has been treated unfairly, the CBSA argued, *inter alia*, that the Tribunal does not have the authority to render decisions based on equity or fairness.

### **Analysis**

79. Chapter 99, which includes tariff item No. 9948.00.00, provides for special classification provisions adopted by Canada that are not standardized at the international level. These provisions generally allow certain goods to be imported into Canada duty-free.

80. Notes 3 and 4 to Chapter 99 are relevant to the present appeal. They provide as follows:

3. Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin only after classification under a tariff item in Chapters 1 to 97 has been determined and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.
4. The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.

81. As indicated in the analysis in the preceding sections, the condition in note 3 to Chapter 99 that goods first be classified under a tariff item of Chapters 1 to 97 is met.

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60. 2000 CanLII 16268 (FCA) [*Entrelec*].

61. *Transcript of Public Hearing*, 16 June 2016, at 149-51.

82. In addition, for the reasons given in *Best Buy et al.*, which concerned the same issue and which are being issued concurrently with the present decision, the Tribunal finds that compliance with the *IGRR* is not a condition of an applicable regulation within the meaning of note 3 to Chapter 99 that had to be met in order for the goods in issue to be classified under tariff item No. 9948.00.00. The issue of compliance with the *IGRR* is therefore not relevant *per se* to the tariff classification exercise before the Tribunal.

83. Tariff item No. 9948.00.00 provides as follows in relevant part:

**9948.00.00**      **Articles for use in the following:**  
**Automatic data processing machines and units thereof . . .**

84. Subsection 2(1) of the *Customs Tariff* defines “for use in” as follows:

*for use in*, wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item. (*devant servir dans* ou *devant servir à*)

*devant servir dans* ou *devant servir à* Mention dans un numéro tarifaire, applicable aux marchandises qui y sont classées et qui doivent entrer dans la composition d’autres marchandises mentionnées dans ce numéro tarifaire par voie d’ouvroison, de fixation ou d’incorporation. (*for use in*)

85. With regards to the interpretation of an ADP machine, notes 5 (A) and (B) to Chapter 84, cited above, are relevant to understanding an ADP machine for the purposes of tariff item No. 9948.00.00, in the circumstances of the goods in issue. For the reasons given in *Best Buy et al.*, which also addressed this issue, note 5 (E) to Chapter 84 is *not* relevant to understanding ADP machines for the purposes of tariff item No. 9948.00.00. This is because note 5 (E) directs classification in heading 84.71 specifically, without informing the meaning of the words “automatic data processing machines” *per se*, and because the ADP machines or units thereof referred to in tariff item No. 9948.00.00 are not limited to ADP machines classified in heading 84.71.

86. In order to qualify for the benefits of tariff item No. 9948.00.00, the goods in issue must be shown to be (1) articles (2) for use in (3) ADP machines or units thereof. As the Tribunal also explained in *Best Buy et al.*, evidence capable of showing, on the balance of probabilities, that the goods in issue are *actually or in fact* used in the host devices of tariff item No. 9948.00.00 is required here. As the Federal Court of Appeal stated in *Entrelec*,<sup>62</sup> this is consistent with the specific meaning ascribed to the expression “for use in” in subsection 2(1) of the *Customs Tariff*, which requires an actual as opposed to an intended connection between the imported goods and the host goods.

87. So there is no misunderstanding, the Tribunal is of the view that the analysis pursuant to the “for use in” criterion in tariff item No. 9948.00.00 differs from the analysis conducted in the previous section to determine, under subheading 8528.51, whether goods are “of a kind . . . principally used in” an ADP system, the former analysis being concerned with *actual use*, while the latter test is concerned with *the principal suitability and intended use* of the goods.

88. The Tribunal found above that model PMCL547F<sup>63</sup> is properly classified under tariff item No. 8528.72.33, and that the TLM-0271 LCD Hand-Held Test Monitor was classified under tariff item No. 8528.59.90. These are not duty-free tariff items. As such, the Tribunal will focus on these two models

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62. Para. 4.

63. Exhibit AP-2014-041-07A at 45.

when addressing Tri-Ed's alternative argument that these goods can nevertheless be imported duty-free under tariff item No. 9948.00.00.

89. There is no evidence to support a conclusion that the TLM-0271 LCD Hand-Held Test Monitor is an article for use in ADP machines or units thereof. Mr. Perlin testified that this monitor is made "for setting up, aiming, and focusing a camera" and that this "is really the only use of that particular monitor." He confirmed as well that the only connection of this monitor would be to a camera.<sup>64</sup> Tri-Ed did not argue, and the evidence on record does not establish, that such a camera itself would necessarily qualify as an ADP machine or unit thereof for the purposes of tariff item No. 9948.00.00. Thus, this monitor is not classified under tariff item No. 9948.00.00.

90. With respect to model PMCL547F, Tri-Ed maintained the claim that this good is entitled to duty relief under tariff item No. 9948.00.00.<sup>65</sup> However, there is insufficient evidence to support this claim.

91. The evidence indicates that model PMCL547F is designed to be "attached to"<sup>66</sup> ADP machines *as well as* non-ADP machines.<sup>67</sup> Thus, the design of the good itself is *not* sufficient to demonstrate that model PMCL547F is in fact attached to an ADP machine. Tri-Ed did not present evidence specific to the use of model PMCL547F. While the evidence presented by Tri-Ed in this case generally showed the common design attributes of the multi-protocol monitors in issue and their principal intended use, as well as the fact that the surveillance industry generally was in the midst of a dynamic transition from analogue to digital platforms, this evidence fell short of establishing, on the balance of probabilities, that model PMCL547F was actually attached to an ADP machine as opposed to a non-ADP machine.

92. On this point, the evidence in this case is distinguishable from that presented in *Best Buy et al.*, where the Tribunal reached the conclusion that certain televisions were for use in host goods referred to in tariff item No. 9948.00.00. In those appeals, the evidence included detailed expert evidence on the trends in the use of consumer electronics and televisions, which showed that consumers overwhelmingly use their televisions with a variety of consumer electronics that qualify as ADP machines for the purposes of tariff item No. 9948.00.00. The prevalence of this trend was compelling to a degree that allowed the Tribunal to conclude, on the balance of probabilities, that the particular goods in issue would have been *actually* used with ADP machines. By contrast, in the present case, the evidence regarding surveillance system set-ups and the surveillance industry in a broad sense was insufficiently specific to provide a basis to conclude on the balance of probabilities that the goods in issue, and model PMCL547F in particular, were actually installed in surveillance systems that can be considered in whole or in part ADP machines. Accordingly, model PMCL547F cannot be classified under tariff item No. 9948.00.00.

93. The Tribunal found above that the remaining goods in issue are classified under tariff item No. 8528.51.00, which is a duty-free tariff item. Accordingly, the Tribunal does not need to also determine whether these goods can benefit from duty relief through classification under tariff item No. 9948.00.00. In

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64. *Transcript of Public Hearing*, 16 June 2016, at 55. See also Exhibit AP-2014-041-09B at 25-26; Exhibit AP-2014-041-07A at 74.

65. Exhibit AP-2014-041-18B, para. 2.

66. The relevant element of the definition of "for use in" (subsection 2(1) of the *Customs Tariff*) in the circumstances of the goods in issue is whether the goods are "attached to" the host goods, which criterion requires that the goods be physically connected and functionally joined to the host goods as established in Tribunal case law. The Tribunal is not convinced on the evidence that the goods in issue can be "incorporated into" ADP machines, as argued by Tri-Ed.

67. Exhibit AP-2014-041-07A at 45.

any event, for the same reasons as in the case of model PMCL547F, the Tribunal is not convinced, having regard to the evidence presented, that the goods in issue were, on the balance of probabilities, actually attached to ADP machines.

94. Regarding Tri-Ed's allegations of unfair treatment on the part of the CBSA, and its suggestion that the appeal should be allowed on this basis, the Tribunal recalls that its jurisdiction does not extend to rendering decisions based on equity or fairness.<sup>68</sup> The Tribunal will therefore not address these arguments further.

## DECISION

95. For the foregoing reasons, the appeal is allowed in part. Specifically:

- Model PMCL547F is classified under tariff item No. 8528.72.33, as agreed by both parties. It is not classified under tariff item No. 9948.00.00.
- The "TLM-0271 LCD Hand-Held Test Monitor" remains classified under tariff item No. 8528.59.90, as determined by the CBSA. It is not classified under tariff item No. 9948.00.00.
- The remaining goods in issue are classified under tariff item No. 8528.51.00, as claimed by Tri-Ed. They are not classified under tariff item No. 9948.00.00.

Peter Burn

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Peter Burn

Presiding Member

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68. See, for example, *R. Christie* (15 January 2014), AP-2012-072 (CITT) at para. 63; see also, by analogy, *Robertson Inc.* (25 January 2016), EA-2014-002 (CITT) at para. 12.