Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-022

Tri-ED Distribution Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Tuesday, December 18, 2018

Canada

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IN THE MATTER OF an appeal heard on August 28, 2018, 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 June 7, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

TRI-ED DISTRIBUTION INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Serge Fréchette

Serge Fréchette
Presiding Member

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	August 28, 2018
Tribunal Panel:	Serge Fréchette, Presiding Member
Support Staff:	Anja Grabundzija, Lead Counsel Sarah Perlman, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Tri-ED Distribution Inc.	Michael R. Smith Robert MacDonald

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Tara DiBenedetto

WITNESSES:

Adrianna Richards
Key Account Manager
Tri-ED Distribution Inc.

Dan Maitland
Field Sales Engineer
Interlogix Canada (division of United Technologies Corporation)

Bruno Rocha
Professor and Coordinator
Algonquin College

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STATEMENT OF REASONS

BACKGROUND

[1] This is an appeal filed on August 15, 2017, by Tri-ED Distribution Inc. (Tri-ED) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision rendered by the President of the Canada Border Services Agency (CBSA) dated June 7, 2017, pursuant to subsection 60(4).

[2] The issue in this appeal is whether 12 V AH lead-sealed batteries (the goods in issue), which the parties agree are classified in tariff item No. 8507.20.90 of the schedule to the *Customs Tariff*[2] as "other lead-acid accumulators", can also be classified in tariff item No. 9948.00.00 as articles for use in either automatic data processing machines (ADP machines) and units thereof, or process control apparatus (PCA), excluding sensors, which convert analog signals from or to digital signals.

PROCEDURAL HISTORY

[3] Tri-ED imported the goods in issue between 2009 and 2012 under tariff item No. 8507.20.90.

[4] The CBSA originally approved blanket refund requests filed by Tri-ED. However, pursuant to subsection 59(2) of the *Act*, the CBSA issued four Detailed Adjustment Statements on August 30, 2016, re-determining that the goods in issue were ineligible for duty relief under tariff item No. 9948.00.00.

[5] On November 16, 2016, Tri-ED requested further re-determination pursuant to subsection 60(1) of the *Act*, arguing that the host goods are PCA.

[6] The CBSA issued a preliminary decision on January 5, 2017, again denying the benefits of tariff item No. 9948.00.00.

[7] In response, Tri-ED submitted additional arguments on March 23 and April 24, 2017, arguing in the alternative that the host goods are ADP machines, and should be eligible for duty relief under tariff item No. 9948.00.00.

[8] The CBSA issued its final decision pursuant to subsection 60(4) of the *Act* on June 7, 2017, where it upheld its previous decision.

[9] On August 15, 2017, Tri-ED filed the present appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Act*.

[10] The Tribunal held a public hearing in Ottawa, Ontario, on August 28, 2018.

[11] Tri-ED called Ms. Adrianna Richards, Key Account Manager for Tri-ED, as a witness. Tri-ED also called Mr. Dan Maitland, Field Sales Engineer for Interlogix Canada, as an expert witness. After considering his qualifications and experience, the Tribunal qualified Mr. Maitland as an expert

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. S.C. 1997, c. 36.

in the area of design, operation, installation, programming and training for intrusion alarm systems, including the control panels and their peripheral devices.[3]

[12] The CBSA called Dr. Bruno Rocha, Professor and Coordinator, Algonquin College, as an expert witness. After considering his qualifications and experience, the Tribunal qualified Dr. Rocha as an expert in the area of electronic and mechanical systems.[4]

DESCRIPTION OF THE GOODS IN ISSUE

[13] The goods in issue are 12 V AH lead-sealed batteries. These batteries can power various commercial and consumer applications. In this case, they are specifically intended to provide uninterrupted power supply to security system control panels (the host goods). The batteries are physically connected to the printed circuit board of the control panels, and are housed within the main cabinet.

LEGAL FRAMEWORK

[14] 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).[5] 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.

[15] 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*[6] and the *Canadian Rules*[7] set out in the schedule.

[16] 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.

[17] 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*[8] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[9] published by the WCO. While classification opinions and

3. Exhibit AP-2017-022-33, Vol. 1C.
4. *Ibid.*
5. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
6. S.C. 1997, c. 36, schedule [*General Rules*].
7. S.C. 1997, c. 36, schedule.
8. World Customs Organization, 4th ed., Brussels, 2017.
9. World Customs Organization, 6th ed., Brussels, 2017 [*Explanatory Notes*].

explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[10]

[18] Chapter 99, which includes tariff item No. 9948.00.00, provides for special classification provisions adopted by Canada that generally allow certain goods to be imported duty-free. The provisions of this chapter are not standardized at the international level. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter.

[19] Notes 3 and 4 to Chapter 99 are relevant. 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.

[20] As the parties agree that the goods in issue are classified under tariff item No. 8507.20.90, the condition of note 3 to Chapter 99 requiring that the good first be classified under a tariff item in Chapters 1 to 97 is met.

[21] Tri-ED argued that the goods in issue meet the requirements of tariff item No. 9948.00.00, which provides as follows in relevant part:

> **9948.00.00 Articles for use in the following:**
>
> **. . .**
>
> **Automatic data processing machines and units thereof . . .**
>
> **. . .**
>
> **Process control apparatus, excluding sensors, which converts analog signals from or to digital signals . . .**

[22] 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.

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10. 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.

[23] With regard to the interpretation of the expression "automatic data processing machines" appearing in tariff item No. 9948.00.00, the following note to Chapter 84 is relevant:

> 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 a 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.

[24] Further guidance is provided by the explanatory notes to heading No. 84.71, of which the following are relevant excerpts:

> This heading covers data processing machines in which the logical sequences of the operations can be changed from one job to another, and in which the operation can be automatic, that is to say with no manual intervention for the duration of the task.
>
> . . .
>
> The automatic data processing machines of this heading must be capable of fulfilling **simultaneously** the conditions laid down in Note 5(A) to this Chapter. . . .
>
> Thus, machines which operate only on fixed programs, i.e. programs which cannot be modified by the user, are **excluded** even though the user may be able to choose between a number of such fixed programs.
>
> These machines have storage capability and also stored programs which can be changed from job to job. . . .[11]
>
> [Emphasis in the original]

[25] With regard to "process control apparatus", this expression is not defined in the *Customs Tariff*. However, the term "process control apparatus" is used in tariff item No. 9032.89.00, which provides as follows:

> **90.32 Automatic regulating or controlling instruments and apparatus**
>
> . . .
>
> 9032.89.00 - -Other

11. *Explanatory Notes*, 84.71 (I) Automatic Data Processing Machines.

. . .

- - - - -Other process control apparatus, excluding sensors, which converts analog signals from or to digital signals:

[26] Note 7(b) to Chapter 90 reads as follows:

7. Heading 90.32 applies only to:

. . .

Automatic regulators of electrical quantities, and instruments or apparatus for automatically controlling non-electrical quantities the operation of which depends on an electrical phenomenon varying according to the factor to be controlled, which are designed to bring this factor to, and maintain it at, a desired value, stabilised against disturbances, by constantly or periodically measuring its actural [*sic*] value.

[27] In sum, in order to qualify for tariff relief under tariff item No. 9948.00.00, the goods in issue must be:

1. an "article";
2. "for use in";
3. ADP machines and units thereof or PCA, excluding sensors, which convert analog signals from or to digital signals.[12]

POSITIONS OF THE PARTIES

[28] With regard to tariff item No. 9948.00.00, the parties agree that the first criterion is met: the goods in issue are "articles". The Tribunal agrees.

[29] As further set out below, in order to determine whether the goods in issue can be classified in tariff item No. 9948.00.00, the Tribunal must determine (1) whether the host goods are ADP machines or PCA within the meaning of those concepts in the context of tariff item No. 9948.00.00, and (2) whether the goods in issue are "for use in" the host goods, as defined in subsection 2(1) of the *Customs Tariff*.

Tri-ED

[30] Tri-ED argued that the goods in issue meet all the conditions for classification under tariff item No. 9948.00.00. It submitted that the goods are (1) articles (2) for use in (3) ADP machines and units thereof and/or PCA, excluding sensors, which convert analog signals from or to digital signals.

12. Federal Court of Appeal and Tribunal cases have also established that "for use in" as defined in s. 2 of the *Customs Tariff* requires some evidence that the good is *actually* used in the host goods (as opposed to being merely intended to be so used): *Entrelec Inc. v. Canada (Minister of National Revenue)*, 2000 CanLII 16268 (FCA); *Best Buy Canada Ltd., P&F USA Inc. and LG Electronics Canada* (27 February 2017), AP-2015-034, AP-2015-036 and AP-2016-001 (CITT) [*Best Buy*].

[31] With respect to the host goods, Tri-ED submitted that the security system control panels are "computers"[13] and meet the four characteristics of ADP machines set out in note 5(A) to Chapter 84. In regard to the second criterion (which provides that an ADP machine must be capable of being freely programmed in accordance with the requirements of the user), Tri-ED submitted that the security system control panels are able to be programmed with "a wide variety of functions . . . such as user codes, schedules, system date and time, multi-alarm event scenarios, and alarm activation time delays."[14]

[32] Tri-ED argued that the expression "freely programmable" is not statutorily defined and should be given its plain and ordinary sense.[15] It further argued that limiting the expression "freely programmable" only to machines that can be coded locally would disregard the Tribunal's decision in *Best Buy* in that it would limit the term "ADP machines" to goods of heading No. 84.71.[16]

[33] Tri-ED submitted that the programming of the security system control panels involves more than just choosing between fixed programs; the programs must be modified to execute their functions in a manner meeting the requirements of the user.[17] If the programs were fixed, there would be no ability to modify how the panels execute the program.[18]

[34] Tri-ED also submitted that the security system control panels can be considered PCA, excluding sensors, which convert analog signals from or to digital signals. Tri-ED referred to the Tribunal's decision in *Best Buy*, where cable and satellite set-top boxes and personal digital video recorders, if they have an analog interface, were considered PCA.[19]

[35] With respect to the requirement that the goods in issue be "for use in" host goods, Tri-ED submitted that "[t]he purpose of the battery being attached to the central security system control panel is to provide backup battery supplied power (enhancement) in the event of a power disruption to (or tampering with) the AC power to the building it is operating in."[20] Tri-ED also submitted that the goods in issue "contribute to the operation of the host goods by ensuring they can be operative under all conditions", as the host goods would otherwise lose their ability to operate.[21]

[36] In order to establish that the goods in issue are actually "for use in" goods listed in tariff item No. 9948.00.00, Tri-ED provided excerpts of sales reports providing sales information between 2009 and 2012, showing that the goods in issue are sold to various security companies. Tri-ED also provided end-use letters from these companies.[22]

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13. Exhibit AP-2017-022-06A at para. 11, Vol. 1.
14. *Ibid.* at 71. [page or para.?]
15. *Transcript of Public Hearing* at 131, 134.
16. *Ibid.* at 133.
17. *Ibid.* at 132.
18. *Ibid.* at 132.
19. *Ibid.* at 135-136. See also *Best Buy* at para. 73.
20. Exhibit AP-2017-022-06A at para. 39, Vol. 1.
21. *Ibid.* at para. 40.
22. *Ibid.* at 118-132, Vol. 1; Exhibit AP-2017-022-34A (protected), Vol. 2.

CBSA

[37] The CBSA submitted that the batteries cannot be classified in tariff item No. 9948.00.00 as they are not (1) "for use in" the host goods, and (2) the host goods are neither ADP machines nor PCA.

[38] With respect to whether the host goods are ADP machines or PCA, the CBSA submitted that the security system control panels do not comply with the definition of either concept. The CBSA submitted that the control panels are not ADP machines because they cannot be "freely programmed" in accordance with the requirements of the user, contrary to what is required by note 5A(ii) to Chapter 84. According to the CBSA, the user can only select options to configure the alarm system, or choose between programs already contained in the control panel. The user cannot modify these programs or create new ones.[23]

[39] The CBSA also submitted that the security system control panels are not PCA because they do not determine the actual value of a variable to be controlled, nor do they convert it into an electrical signal.[24] Rather, the CBSA argued that the sensors connected to the control panel act as PCA because they monitor the change in a variable and send a signal to the control panel. The control panel merely reacts to the signal by triggering an alarm, lights, or cameras.[25] Considering that the type of PCA referred to in tariff item No. 9948.00.00 must convert analog signals from or to digital signals and must not include sensors, the CBSA submitted that the control panels do not meet the criteria for PCA.[26]

[40] With respect to whether the goods are "for use in" host goods listed in tariff item No. 9948.00.00, the CBSA submitted that the batteries are not "for use in" the security system control panel because they do not enhance its function.[27]

ANALYSIS

[41] The Tribunal must determine whether the goods in issue are "for use in" host goods listed in tariff item No. 9948.00.00, namely, ADP machines or PCA.

[42] As detailed below, having considered the arguments and evidence before it, the Tribunal finds that the host goods to the goods in issue are neither ADP machines nor PCA, excluding sensors, which convert analog signals from or to digital signals.

Are the host goods ADP machines or PCA?

<u>The host goods are not ADP machines</u>

23. Exhibit AP-2017-022-13A at paras. 30, 33, Vol. 1.
24. *Ibid.* at para. 26.
25. *Ibid.* at para. 27.
26. *Ibid.* at para. 28.
27. *Ibid.* at para. 36.

Meaning of "capable of . . . [b]eing freely programmed in accordance with the requirements of the user"

[43] As noted above, note 5(A) to Chapter 84 provides four criteria for goods to be considered ADP machines. The CBSA argued that the security system control panels do not meet one of these criteria. The key issue in this appeal, therefore, is the meaning of note 5(A)(ii) requiring that the purported ADP machines be "capable of . . . [b]eing freely programmed in accordance with the requirements of the user." The remaining three criteria are not contested.

[44] Most of the disagreement between the parties pertained to the meaning of the term "programmed" in the context of this criterion. In essence, Tri-ED argued that the term must be given its ordinary meaning, while the CBSA submitted that a technical sense of the word is appropriate in this context.

[45] The Tribunal notes the following definitions for the verb "program" from the *Oxford Dictionary*: "[p]rovide (a computer or other machine) with coded instructions for the automatic performance of a task", "[w]rite computer programs", or "[i]nput (instructions for the automatic performance of a task) into a computer or other machine".[28] The *Cambridge Dictionary* offers the following definitions: "to write a series of instructions that make a computer perform a particular operation", "to instruct a computerized device or system to operate in a particular way at a particular time", "to write a series of instructions, using a computer language, to create or run a computer program", "to use a piece of software to give instructions to a computer or piece of electronic equipment to make it perform one of a range of tasks", or "to tell a device or system to operate in a particular way or at a particular time".[29] Finally, the *Collins Dictionary* also offers the following: "[w]hen you program a computer, you give it a set of instructions to make it able to perform a particular task", "to feed a program into (a computer)", "to arrange (data) into a suitable form so that it can be processed by a computer", "to write a program", "to plan a computer program for (a task, problem, etc.)", "to furnish (a computer, chip, etc.) with a program", "to incorporate in a computer program", or "to set the program of (an electronic device)".[30]

[46] These definitions suggest that the ordinary meaning of the verb "program" is to provide coded instructions to a machine. Some definitions, however, suggest that the verb can also have the broader sense of simply telling a device to operate in a particular way at a particular time.

[47] At the hearing, Dr. Rocha testified that, from the engineering perspective, "programming" is synonymous with "coding" (i.e. putting a set of instructions in a program).[31] His expert report also notes as follows:

> An example of a system, and its running code, developed to query, allow and accept user code, can be based on a code which allows for its user to alter, or eliminate, or introduce new,

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28. Oxford Dictionaries, *sub verbo* "programme", online: English Oxford Living Dictionaries <https://en.oxforddictionaries.com>.
29. Cambridge Dictionary, *sub verbo* "program", online: Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/program>.
30. Collins Dictionary, *sub verbo* "program", online: Collins <https://www.collinsdictionary.com/dictionary/english/program>.
31. *Transcript of Public Hearing* at 99.

> or develop parts of, or an entire code/program and/or its coded instructions. This makes a code, and therefore its system, programmable.[32]

[48] This technical definition offered by Dr. Rocha joins the narrower meaning of the word noted in common dictionaries.

[49] For his part, Mr. Maitland testified to the meaning of "programming" as used in the security industry, specifically as it pertains to the security system control panels.[33] According to Mr. Maitland, such "programming" would involve the installer inputting the phone number of the central station, the account number, the zones, door contact, motion, glass break and smoke sensors, along with the required response.[34] The Tribunal understands Tri-ED's position to be that the meaning of the word "programming" as used in the security industry reflects the ordinary sense of that term. The Tribunal notes that Mr. Maitland's use of the word "programming" is consistent with some of the dictionary entries for the verb "program" that appear to accept a broader meaning for the term.

[50] Having considered the evidence and submissions on this point, the Tribunal finds that the word "programmed", in the context of note 5(A) to Chapter 84, must be given its technical meaning consistent with Dr. Rocha's evidence.

[51] The technical definition is appropriate when considering that "programmed" is used in the expression "freely programmed in accordance with the requirements of the user". Parliament's choice to use the adjective "freely" and the further reference to the requirements of the user must be given meaning. The Tribunal had the opportunity to address this point in *Esden*.[35] In that case, the Tribunal noted that a different heading referred to "programmed switchboards to control apparatus" that were normally used in domestic electrical appliances, such as washing machines and dishwashers, that allowed the user to input data on which the preprogrammed instructions work or to choose between a number of existing programs.[36] The Tribunal highlighted that, "if apparatus with fixed instructions are considered 'programmed,' then 'freely programmed in accordance with the requirements of the user' must mean more than simply inputting basic data or choosing between fixed programs, which is what occurs with a washing machine or other domestic electrical appliances."[37] Accordingly, the Tribunal found that, for a good to be considered "freely programmed", the user should be able to "introduce or alter the instructions that tell the computer what to do with the data being inputted", rather than only inputting data.[38]

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32. Exhibit PR-2017-022-23A at para. 10, Vol. 1A.
33. *Transcript of Public Hearing* at 60-62. Tri-ED pointed Mr. Maitland to the use of the word "program" and its variants in the product literature of the security system control panels submitted by him in his expert report. See Exhibit PR-2017-022-25A, Tab 2 at 11, 13, Vol. 1A.
34. *Transcript of Public Hearing* at 45, 47, 60.
35. *Esden Limited v. The Deputy Minister of National Revenue for Customs and Excise* (30 January 1992), AP-90-006 (CITT) [*Esden*].
36. The explanatory notes to heading No. 85.37 still refer to "programmed switchboards to control apparatus" used in domestic electrical appliances, as noted in *Esden*.
37. *Esden* at 3.
38. See also *Callpro Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise* (29 July 1992), AP-91-165 (CITT), affirmed by the Federal Court in *The Deputy Minister of National Revenue for Customs and Excise v. Callpro Canada Inc.* (11 August 1994), court file No. T-2583-92, where the Tribunal found that "'programming' could include the writing of a new or modified program by a programmer or the

[52] Indeed, this reasoning is consistent with the explanatory notes to heading No. 84.71, which emphasize that a user must be able to modify a machine's programs; it is *not* enough to choose between fixed programs.[39]

[53] Other elements of the context in which note 5(A) to Chapter 84 is found support the view that the word "programmed" is intended to espouse its narrower technical sense. The requirements set out in note 5(A) to Chapter 84 are technical requirements making use of technical language which assumes a certain degree of specialized knowledge. The expression "automatic data processing machines" itself can hardly be found in common parlance. The Tribunal finds on the basis of Dr. Rocha's testimony that the term "programming" has a technical meaning in the field of engineering as it relates to electronic systems. Consistent with the subject matter and terminology of note 5(A) to Chapter 84, the word "programmed" in Note 5(A) to Chapter 84 must be given this technical meaning rather than the broader popular meaning it can assume in other contexts.[40]

[54] At the hearing, Tri-ED argued that limiting "freely programmable" only to those articles that can be coded locally would seemingly disregard the decision in *Best Buy* and limit the term "ADP machine" to the goods of heading No. 84.71.[41] However, the issue is not whether the host goods can be programmed locally, but whether they can be *freely programmed* in accordance with the requirements of the user. Furthermore, it is unclear how interpreting "programming" in accordance with its technical sense would limit the term "ADP machines" to the goods of heading No. 84.71. In fact, in *Best Buy*, the Tribunal confirmed that the definition of "ADP machines" set out in note 5(A) to Chapter 84 informs the meaning of that term in the context of tariff item No. 9948.00.00.[42]

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purchase and use of software containing an existing program." The Tribunal then considered evidence of "programming in accordance with the requirements of the user", such as capability to run continuous self-diagnostics, automatically initiating a service call, etc. In *Electronetic Systems Corp. v. The Deputy Minister of National Revenue for Customs and Excise* (13 January 1994), AP-92-262 (CITT), the Tribunal considered whether a distributed switch matrix qualified as an ADP machine, and found that even if it was to accept the view that the goods were "not freely programmable according to the normal usage of the term, this would not detract from the fact that the [goods] can be freely programmed in accordance with the requirements of the user." The basis for the conclusion in the latter case is unclear. While ADP machines were considered in some more recent cases, such as *Best Buy* at paras. 67-68 and 72, *Apple Canada Inc. v. President of the Canada Border Services Agency* (10 January 2018), AP-2017-013 (CITT) at para. 27 and in *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (24 August 2018), AP-2017-025 (CITT) at paras. 25 and 28, the condition set out in note 5(A) to Chapter 84 was not at issue in those appeals.

39. See also *Esden*.
40. *Olympia Floor and Wall Tile Co. v. Canada (Deputy Minister of National Revenue – M.N.R.)* [1983] F.C.J. No. 814. Conversely, nothing in the text or context of heading No. 84.71 or note 5(A) to Chapter 84 links this heading to the security industry in particular. Mr. Maitland's testimony before the Tribunal pertained to what is considered "programming" in the security industry. See, for example, *Transcript of Public Hearing* at 60-61. To the extent that Mr. Maitland's testimony suggests that the word "programming" has a specific meaning in that industry, the meaning of "programming" proposed by Mr. Maitland cannot be retained in interpreting note 5(A) to Chapter 84.
41. *Transcript of Public Hearing* at 133.
42. In *Best Buy*, the Tribunal stated that "[t]ariff item No. 9948.00.00 refers to 'automatic data processing machines and units thereof' . . . [which] is *not* limited to ADP machines *of heading 84.71*" [emphasis in the original]. The Tribunal explained that "some machines having all the characteristics of an ADP machine as defined in note 5(A) or of a unit thereof are nevertheless not *classified* in heading 84.71" [emphasis in the original] in accordance with all the notes guiding classification in that heading (para. 66). However, *Best Buy* does not stand for the proposition that the definition of ADP machines in note 5(A) to Chapter 84 should not apply to that term in tariff item

[55] Ultimately, whether given goods are capable of being freely programmed in accordance with the requirements of the user within the meaning of note 5(A) to heading No. 84.71 is a fact-specific determination as to the capabilities of the specific goods in issue. The Tribunal will next determine whether Tri-ED has discharged the burden of proving that the host goods in this case meet this criterion.

The security system control panels are not "capable of . . . [b]eing freely programmed in accordance with the requirements of the user"

[56] The Tribunal cannot find, on the evidence in this case, that the host goods are capable of being freely programmed in accordance with the requirements of the user.

[57] Mr. Maitland testified that the salespersons and installers have conversations with the end user, namely, the home or business owner, to set up the system, and that the complexity of this "programming" varies depending on the system.[43] He testified that the installer would access the control panel from the site or remotely, through the keypad or, in more complex cases, a laptop connected to the control panel.[44]

[58] Mr. Maitland testified that the programming code and basic functions are pre-installed in the security system control panels by the manufacturer. The user does not rewrite any of the manufacturer's code.[45] He testified that the user is responsible for its user codes, and to arm and disarm the alarm system. In addition, the user can combine different functions or programs that already exist within the control panel, but Mr. Maitland agreed that neither the user (nor the installer) can change the code.[46]

[59] Mr. Maitland also testified that the system housed in the security system control panel can be updated. However, it will not automatically seek updates. Rather, when an update is available, the technician or home office must retrieve it, locally through the keypad or by reaching out to a website, to proceed with it.[47]

[60] In his expert report, Dr. Rocha relied heavily on the notion that the security system control panels are "configurable" rather than "programmable". More specifically, he noted that code that has been developed previously and uploaded into an automated system, such as the control panels, "can be developed to query, allow and accept user data inputs and/or user code", thereby making the code

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No. 9948.00.00; indeed, such a proposition would be inconsistent with note 4 to Chapter 99, which provides that "words and expressions used in [that] Chapter have the same meaning as in Chapters 1 to 97."

Finally, the appellant highlighted the Tribunal's finding in *Best Buy* that certain goods other than personal computers were found to be ADP machines (see e.g. *Transcript of Public Hearing* at 131). However, and while the Tribunal does not disagree with that general proposition, the general proposition alone is not helpful to the appellant's case. *Best Buy* related to goods different from the ones in issue and was decided on its own evidence as to the capabilities of those goods.

43. *Transcript of Public Hearing* at 53, 61.
44. *Ibid.* at 50, 57.
45. *Ibid.* at 77-78, 85.
46. *Ibid.* at 47, 85-86.
47. *Ibid.* at 58, 92.

and system "configurable".[48] By contrast, he did not consider the control panels to be "programmable", in the sense that they did not allow the user to alter, eliminate, introduce, or develop parts of an entire code or program or its coded instructions.[49] He offered as an example a system that could be coded any way the user wants, with the functionalities it wants.[50] Dr. Rocha's expert report further noted that the keypads connected to the security system control panels allow the user to configure the running embedded program of the alarm system by "inputting or changing user codes, schedules, dates and time, multi-alarm event scenarios and alarm activation time delays."[51] Dr. Rocha also noted that the user may change which parts of the code to run, the order in which the code is executed, run different functions, or tune the execution of the embedded program, but that this falls short of making the control panels "programmable".[52]

[61] Dr. Rocha testified that he considered that the person *sending* a firmware update does "program".[53] In his opinion, a user is not "programming" when he accepts or refuses an update, but would be "programming" if the user or technician could go into the update and decide what kind of programs should be included.[54] Dr. Rocha noted that there is no indication in the current case that the technician can go into the updates to the security system control panels and decide what kinds of programs he wishes to have.[55]

[62] In sum, the witnesses' evidence indicates that the security system control panels have a set of pre-installed programs. These programs are configured by the installer according to the particular needs of the home or business; however, no changes are made to these pre-installed programs. In addition, the user is limited in its use of the control panel to inputting codes and selecting programs.

[63] In light of the evidence, the Tribunal finds that, as submitted by the CBSA, the security system control panels cannot be freely programmed in accordance with the requirements of the user. As noted in *Esden*, goods for which a user can only input data or choose between fixed programs are not freely programmed in accordance with the requirements of the user. In the current case, the control panels come with pre-installed programs, which neither the installer nor the user can modify or add to.[56] The user as well as the installer can only input data and choose between programs. Updates or upgrades can be pushed out by the manufacturer, but such updates and upgrades are not created in accordance with the requirements of the user. Rather, the manufacturer provides updates where it finds new functions or features to make the system operate faster or more reliably.[57] The user or the installer can only choose whether or not to seek and install these updates. This cannot be

48. Exhibit AP-2017-022-23A at para. 10, Vol. 1A.
49. *Ibid.* at para. 11.
50. *Transcript of Public Hearing* at 100.
51. Exhibit AP-2017-022-23A at para. 13, 15, Vol. 1A.
52. *Ibid.* at para. 16, 19.
53. *Transcript of Public Hearing* at 109.
54. *Ibid.* at 114-116.
55. *Ibid.* at 116.
56. See *Transcript of Public Hearing* at 155. Tri-ED argued that the host goods must be "freely programmed" *in accordance with* the requirements of the user, but that the programming need not necessarily be done by the end user himself or herself. It is not necessary to decide this issue conclusively in this case, as the evidence in this case indicates that the security system control panels are not capable of being freely programmed in accordance with the requirements of the user, whether the activities of the end user or the installer are considered.
57. *Ibid.* at 91-92.

interpreted as rendering a system capable of being freely programmed in accordance with the requirements of the user.[58]

[64] In conclusion, Tri-ED having failed to present compelling evidence that the host goods meet the second criterion of note 5(A) to heading No. 84.71, it has not established that the host goods are ADP machines within the meaning of tariff item No. 9948.00.00.

The host goods are not PCA, excluding sensors, which converts analog signals from or to digital signals

[65] Alternatively, Tri-ED submitted that the security system control panels are PCA, stating that they have a strong similarity to the host goods in *Best Buy*.[59]

[66] In *Best Buy*, the Tribunal found, on the basis of the evidence adduced at the hearing, that "cable and satellite set top boxes and personal/digital video recorders, if they have an analog interface, can all implement processes to convert analog signals from or to digital signals, through software or hardware that they include . . . [and could] alternatively be considered as . . . process control apparatus excluding sensors, which convert analog signals from or to digital signals . . . ."[60]

[67] Each case must be decided on its own facts. In this case, Tri-ED has not adduced compelling evidence to convince the Tribunal that the host goods are PCA within the meaning of tariff item No. 9948.00.00.

[68] The Tribunal considered PCA at length in *Wolseley*, where it noted that PCA, "for the purposes of tariff item No. 9948.00.00, is an article consisting of three elements: (i) one that measures a variable to be controlled (in this case temperature); (ii) one that compares the measured variable with the desired value and activates an operating device to correct any discrepancies; and (iii) the operating device itself."[61] In addition, the Tribunal noted that "the type of [PCA] referred to in tariff item No. 9948.00.00 is somewhat limited in that it must convert analog signals from or to digital signals and must not include sensors", meaning that it could not *be* a sensor.[62]

[69] Mr. Maitland testified that the security system control panels constantly monitor resistance changes on all the "zones", namely, door contacts, motion and glass break sensors. When that resistance changes, the control panel would react accordingly, such as with an indication on the keypad, a chime, or an alarm.[63] In certain cases, this could also include triggering a sprinkler system in case of fire.[64]

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58. *Ibid.* at 114-116.
59. *Ibid.* at 136.
60. *Best Buy* at para. 73.
61. *Wolseley Canada Inc. v. President of the Canada Border Services Agency* (18 January 2011), AP-2009-004 (CITT) at para. 30 [*Wolseley*]. In *Wolseley*, the Tribunal considered whether an atmospheric gas boiler was functionally joined to a PCA. The PCA in that case was a device that controls and monitors temperature. This device could be used to adjust the temperature of the boiler. The device was deemed a PCA because it was not a sensor and converted analog signals to digital signals. It thus qualified as a host good of tariff item No. 9948.00.00.
62. *Ibid.* at paras. 31-32.
63. *Transcript of Public Hearing* at 65.
64. *Ibid.* at 74.

[70] Dr. Rocha testified that variables, such as temperature, smoke, carbon monoxide, or motion, were in fact monitored by "sensors", which translate them into some kind of electrical quantity.[65] In his expert report, Dr. Rocha further explained that sensors "may send either analog or digital signals to the alarm control panel."[66] He stated as follows:

> The control panel receives the signals from the sensors and through the execution of an embedded program can potentially trigger an alarm mode, sending digital and/or analog signals: to activate sirens . . .; to activate lights; to trigger cameras and send digital information through internet/phone (and possibly through Radio Frequency – RF) to an alarm central. The control panel does not try to control the variables, properties and/or phenomena sensed by the sensors. It monitors the signals sent to it by the sensors and after receiving the signals, it will make logic based decisions, possibly activating outputs, such as sirens or lights. Nonetheless, such outputs are not activated to directly control or influence the variables, properties and/or phenomena sensed by the sensors or the sensor signals. The outputs/actuators are not trying to set or maintain the monitored sensor signals or sensed variables, properties and/or phenomena at desired levels, against disturbances.[67]

[71] The evidence presented by the parties shows that the security system control panels receive signals from the sensors, which are installed to monitor various variables. The control panel then reacts with a predetermined response, such as with a chime, alarm, or call to a police or fire station.[68]

[72] Accordingly, the Tribunal finds that the security system control panels are not PCA, excluding sensors, which convert analog signals from or to digital signals, because they do not measure or control the variables monitored.

CONCLUSION

[73] For the foregoing reasons, the Tribunal finds that the goods in issue are not articles for use in ADP machines and units thereof or PCA, excluding sensors, which convert analog signals from or to digital signals. For the reasons above, the Tribunal finds that the goods in issue do not qualify for the benefits of tariff item No. 9948.00.00. Having reached this conclusion, the Tribunal does not need to examine whether the goods in issue are "for use in" the host goods listed in tariff item No. 9948.00.00.

DECISION

[74] The appeal is dismissed.

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65. *Ibid.* at 97.
66. Exhibit AP-2017-022-23A at para. 8, Vol. 1A.
67. *Ibid.* at para. 9.
68. The Tribunal notes that none of the security system control panel documentation provided states that sprinkler systems can be triggered by the control panel. However, even if the control panels could control sprinkler systems in case of fire, the sensors remain the devices that monitor the variables. As such, the control panels would still not meet the definition of PCA in tariff item No. 9948.00.00.

Serge Fréchette

Serge Fréchette
Presiding Member