



HARMONIZED SYSTEM
COMMITTEE

-
30th Session
-

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O. Eng.

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DECISION THAT "PHOTOCOPYING" IS LIMITED TO THE PROJECTION OF AN IMAGE
ONTO A PHOTSENSITIVE SURFACE AND THAT PRESENT HEADING 90.09
DOES NOT COVER DIGITAL COPYING, AND THE DECISION TO AMEND
THE EXPLANATORY NOTES ACCORDINGLY

CLASSIFICATION OF THE "HP MOPIER 320" DIGITAL COPIER, THE "XEROX
DOCUMENT CENTRE 340 ST" DIGITAL COPIER WITHOUT FAX FUNCTION AND THE
"XEROX DOCUMENT CENTRE 340 ST" DIGITAL COPIER WITH FAX FUNCTION
(RESERVATIONS BY THE EC AND THE BRAZILIAN ADMINISTRATION)

(Items VII. 3, 4, 5, and 6 on Agenda)

Reference documents :

42.406 (RSC/18)	NC0211E1 (HSC/25)
42.498 (RSC/18)	NC0250E2, Annex H/13 (HSC/25 – Report)
42.500, Annex B/19 (RSC/18 – Report)	NC0300E1 (HSC/26)
42.750, Annex E (HSC/22 – Report)	NC0335E1 (HSC/26)
NR0023E1 (RSC/19)	NC0335E1 (HSC/26)
NR0037E1 (RSC/19)	NC0398E1 (HSC/26)
NC0090E2, Annex IJ/26 (HSC/23 – Report)	NC0430E2, Annex H/4 (HSC/27 – Report)
NC0160E2, Annex H/14 (HSC/24 – Report)	

I. BACKGROUND

1. At its 27th Session, the Committee examined the classification of various multifunctional digital copiers. Before it did so, the Committee, by a vote of 22 to 14, decided that "photocopying" was limited to the projection of an image onto a photosensitive surface and that, therefore, present heading 90.09 did not cover digital copying. The Committee then looked at the classification of each individual machine.

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2. The Committee classified the various machines as follows :

“HP Mopier 320”

By a vote of 21 to 8, the Committee voted in favour of the view that the conditions of Note 5 (B) to Chapter 84 had been fulfilled and, as a consequence, the product was classifiable in subheading 8471.60 as a printer, by application of GIR 1 (Note 3 to Section XVI and Note 5 (B) to Chapter 84).

“Xerox Document Centre 340 ST” without fax function

Twenty-two delegates opted for classification in subheading 8471.60, 12 opted for classification other than in heading 84.71 and there was one abstention. The legal basis was application of Note 3 to Section XVI and Note 5 (B) to Chapter 84.

“Xerox Document Centre 340 ST” with fax function

By a vote of 20 to 14, the Committee classified the “Xerox Document Centre 340 ST” with fax function in subheading 8471.60 by application of Note 3 to Section XVI and Note 5 (B) to Chapter 84.

3. The EC and the Brazilian Administration notified the Secretary General in letters dated 25 and 26 July 2001, respectively, of their requests that the decision of the Committee that heading 90.09 did not cover digital copying, as well as the subsequent decisions to classify the “HP Mopier 320”, the “Xerox Document Centre 340 ST” without fax function and the “Xerox Document Centre 340 ST” with fax function in subheading 8471.60, be referred to the Council under the provisions of paragraph 2 of Article 8 of the Harmonized System Convention.
4. On 17 and 18 September 2002, the Secretariat received Notes from the EC and the Brazilian Administration, respectively, in support of their reservations entered in respect of the decisions at the Harmonized System Committee’s 27th Session to classify the three apparatus mentioned in paragraph 2 above in subheading 8471.60, as well as the decision taken by the Committee that “photocopying” was limited to the projection of an image onto a photosensitive surface and that heading 90.09 did not cover digital copying, and the decision to amend the Explanatory Notes accordingly. These notes are reproduced, in their entirety, below.

II. NOTE FROM THE EUROPEAN COMMUNITY

“Subject : Classification of certain multifunctional copying machines.
EC reservation (Article 8 (2) of the HS Convention)

Ref: Doc. NC0430E2, Annex H/4

Summary of the issue

5. At its 27th meeting the HS Committee examined the classification of the following multifunctional machines :

The "HP Mopier 320"

The "Xerox Document Centre 340 ST", without fax function

The "Xerox Document Centre 340 ST", with fax function

The "Brother MFC-8600"

The "Brother 1970 mc"

6. The HS Committee classified the last two machines in subheading 8517.21, citing Note 3 to Section XVI. The EC agreed with this classification given that the Committee had decided that the fax function was to be considered the principal function of the machine.
7. By contrast, the Committee classified the first three machines in subheading 8471.60, citing Note 3 to Section XVI and Note 5 (B) to Chapter 84. The EC has doubts about this classification and consequently requests that the Committee re-examine the classification in the light of the following arguments.

Description

8. The EC would refer the Committee back to the description of the machines given in Docs. NC0211E1 and NC0300E1.
9. It wishes to highlight three points of fact on which the Committee was unanimous :
- (1) In every case, classification is restricted to those machines presented separately for Customs clearance.
 - (2) In every case, the machines perform several distinct functions.
 - (3) In every case, the machines function :
 - either independently (photocopying, printing, scanning, and in some cases sending and receiving faxes)
 - or linked to a computer (photocopying, printing, scanning, and in some cases sending and receiving faxes).¹

Classification

Heading 84.71

10. Since these machines perform several functions and are presented to Customs individually, the Committee should consider whether the three machines can be classified as simple computer units in heading 84.71.

¹ This was also stated in a declaration by the Committee Chairman reproduced in paragraph 19 of Annex H/4 do Doc. NC0430E2, the Committee Report.

11. The **EC** believes there are two major legal problems with classifying these machines in heading 84.71.
12. The first is the nature of the machines themselves, the only criterion which Customs must consider when deciding on classification in the appropriate HS heading. Because the machines are presented in isolation, at the point of Customs clearance, Customs does not know and should not need to know whether they are destined to be used independently or connected to a computer. This will depend entirely on the needs of any given user at any particular time. One should not confuse the use to which the machine is put with its function or capability.
13. Note 5 (B) (a) restricts the classification of units in heading 84.71 to those used solely or principally in an automatic data processing system. Since these machines, by their nature, can function independently, without the need for a computer, fulfilling this legal condition is difficult.
14. In this connection, the **EC** would cite the “legal” weight of the precedent set by the decision taken by the HS Committee at its 25th meeting (in March 2000) to classify the **Iris 3047** inkjet printer in subheading 8443.51 (rather than heading 84.71) citing Note 5, B, D and (E) to Chapter 84.² The information available to the Committee shows that this printer should be connected to a **Macintosh** computer using **IQ PRO** software; if it is not connected to the computer, it does not work (Doc. NC0048E1, paragraph 9; Doc. NC0196E1, paragraph 9, etc.).³
15. In short, this printer works solely in connection with a computer and yet the Committee cited as legal grounds Note 5 (and in particular 5 (E)) to Chapter 84 in excluding it from heading 84.71 and classifying it in heading 84.43.
16. By contrast, all the multifunctional copying devices under consideration are capable of functioning on their own, independently, even though they can also work connected to a computer.
17. This brings us to the second objection based on upholding the introductory paragraph to Note 5 (B) and, crucially, Note 5 (E), to Chapter 84, which prevent machines which perform functions other than data processing from being classified as a computer unit. These machines perform the functions of a fax (heading 85.17), printer (heading 84.43), scanner (heading 84.71), and photocopier (heading 90.09), among others.
18. For the reasons set out above, the **EC** believes that heading 84.71 should be rejected.

Heading 90.09

19. The Committee’s classification was based on Note 3 to Section XVI, i.e., the principal function characterising as a whole a machine designed to perform several different functions, listed under different headings of Section XVI. Moreover, the Committee decided the

² Classification Opinion 8443.51/1 (HSC/26/Nov. 2000).

³ In this connection, paragraph 8 of Annex H/6 to the report of the HSC, 25th Session, Doc. NC0250E2, contains the following statement : “The Chairman recalled that at its 24th Session the Committee had agreed that paragraph (D) of Note 5 to Chapter 84 was to be considered in the overall context of Note 5. Hence for that paragraph’s application, sub-paragraph (B)(b) and (B)(c) and the introductory part of Note 5 (B) had to be read in conjunction, and the rules laid down therein were applicable, subject to Note 5 (E).”

machines were not photocopiers of heading 90.09 after having decided that this heading did not cover digital copying but was restricted to copying by projecting an image onto a photosensitive surface.

20. The EC cannot find a legal basis in the Committee's decision that would permit such a restrictive interpretation of the legal description of heading 90.09 so as to exclude digital technology from the scope of this heading. The EC would ask the Committee to confine itself to analysing the legal texts of the HS Nomenclature on this point, to determine whether those texts allow such a restriction. The fact that the (non-binding) Explanatory Notes do not refer to this technology does not mean that it is excluded, but merely that they were drafted at a time when it did not exist. At all events, these devices were also designed to make copies, as an essential, not a subsidiary, function, given the performance, quality and speed of copying. This photocopying function is distinct from the printing function which these machines also possess.
21. The EC refers back to the actual description of the heading, which does not limit its scope either directly or via a legal note.
22. The EC conducted a detailed study of the current scope of heading 90.09 and went as far as the Court of Justice of the EC, which declared, in a judgment of 9 October 1997, that, in addition to photocopiers incorporating an optical system and of the direct reproduction type, heading 90.09 included those which incorporate an intermediate for reproduction by the indirect process. The indirect reproduction process consists of converting the image into digital data. It goes without saying that this judgment is binding on the EC and its current Member States. The States joining the EU in the very near future will also be bound by it.
23. Unfortunately, the restrictive interpretation of the description of heading 90.09 adopted in principle by the Committee, by preventing this heading from being considered from the outset, determined the classification adopted. However, the EC is convinced that one of the functions of these machines, their photocopying function, falls within heading 90.09 of the HS and, consequently, since these are multifunctional machines which must be classified according to their principal function, heading 90.09 must also be considered alongside the other functions of those machines.
24. This means that Note 3 to Section XVI cannot be the legal basis for classifying these machines, given that it only applies to articles of Chapters 84 and 85. The classification should be made under General Interpretative Rule 3.
25. If the Committee is agreed on the principal function of the machines, that will determine their classification (under General Rule 3 (b)). If, however, the Committee cannot determine their principal function, they should be classified by applying General Rule 3 (c), in which case they must fall within heading 90.09, this being the last possible heading in numerical order.
26. There may be certain doubts about applying General Rule 3 (b). It could be argued that General Rule 3 (b) only applies to goods in which one of the different materials or components of which they are made gives them their essential character. In that case, it would, rightly, be impossible to apply this criterion to the machines referred to above, which are classified according to their function, because there is only one, single, indivisible device, which is capable of performing different functions.

27. That said, the EC and its 15 Member States take the view that in the case of the three machines in question all the functions (not to be confused with their uses) are important, and none can be considered accessories. This results in classification in heading 90.09, pursuant to General Rule 3 (c).

Conclusion

28. The EC would ask the Committee to decide on the above-mentioned issues, taking into account the technical arguments set out in this memorandum.”

III. NOTE FROM THE BRAZILIAN ADMINISTRATION

29. “As you are well aware, our administration has lodged a request that the following decisions taken by the Harmonized System Committee at its 27th Session be referred to the Council :
- (1) Decision that “photocopying” is limited to the projection of an image onto a photosensitive surface and that present heading 90.09 does not cover digital copying;
 - (2) Classification of the “HP Mopier 320” digital copier;
 - (3) Classification of the “Xerox Document Center 340 ST” digital copier without fax function;
 - (4) Classification of the “Xerox Document Center 340 ST” digital copier with fax function.
30. Regarding our reasons, in fact the main question refers to the first decision listed above. It goes without saying that the other decisions were strongly influenced by the exclusion of heading 90.09 as a viable alternative for the classification of those products. The only reason for which the Committee decided that present heading 90.09 does not cover digital copying was that heading’s Explanatory Note, which describes the electrostatic photocopying apparatus. Some delegates were of the view that digital photocopying is not covered by that description.
31. However, as several delegates pointed out, that Explanatory Note, written many years ago, could not cover products which incorporate modern technologies. The Explanatory Notes are very important as a guide for classification but only the legal texts can limit the scope of HS headings. Nobody denies that those machines can perform several functions, including copying. And, more importantly, the copying function of all those machines can work independently of the computer. Therefore, in order to classify those products, we need to have an answer to the following question : which heading in the HS covers this digital copying function ?
32. The answer to this question is very important and, in fact, if we remember the discussion we had in the Committee at its 27th Session, the question itself was not fully examined by the delegates. The Committee only decided that heading 90.09 does not cover digital copying but, in this case, the question remains : which heading covers digital copying ? The HSC did not address this question properly. Simply, having disregarded heading 90.09 for the classification, it considered heading 84.71 (which covers the scanner and the printer function) and heading 85.17 (which covers the fax function). Following that, some machines were classified in heading 84.71 and the others in heading 85.17.

33. This question is also very important for the classification of the "Xerox 230 DC", which is on the agenda of the next session of the HSC. In fact, in this case, the question is absolutely essential because this machine is not even connectable to an ADP machine : it only performs the digital copying function. We cannot classify it in headings 84.71 or 85.17, so where should it be classified ?
34. Therefore, our first conclusion is that the Committee should firstly decide which heading covers digital copying function. This would not only bring a new element to the classification of all those multifunctional digital copiers classified at Committee's 27th Session but it would also be essential and decisive for the classification of the "Xerox 230 DC".
35. In our view, two headings could contain the digital copying function of those machines : headings 90.09 and 84.72. The text of heading 90.09 reads "Photocopying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus". The question is the scope of the term "optical system" in this context. If we have a new product in front of us, we cannot limit the meaning of the heading text by the strict terms of the Explanatory Notes, which describe only the existing products at the time they were written.
36. Our administration has consistently supported the possibility of classifying these machines in heading 90.09 and we remember our basic reasons for that as follows :
- (1) The laser is, in fact, an optical phenomenon (it is a narrow beam of concentrated light, according the dictionaries);
 - (2) In these machines, there is an optical system which projects, by means of a laser, the optical image of an original document onto a light-sensitive surface for the developing and printing of an image;
 - (3) Therefore, the legal text of heading 90.09 does not exclude the laser printing system, and only the legal texts, not the Explanatory Notes, can limit the scope of a heading;
 - (4) The first sentence of Part B of the Explanatory Note to heading 90.09 gives an indication of the basic difference between photocopiers incorporating an optical system and contact type photocopiers, which do not have an optical system and only make copies of the actual size of the documents to be reproduced;
 - (5) In multifunctional copiers, the optical system (lenses, etc.) enables them to produce copies of variable dimensions; therefore, in this sense, even the Explanatory Notes do not exclude these machines from classification in heading 90.09.
37. If the Committee definitively cannot accept the inclusion of digital technology in heading 90.09, as we have indicated above, we should then look at heading 84.72 as a possibility to cover the digital copying function.
38. Regarding the classification of the "HP Mopier 320" and the two "Xerox 340 ST", on the basis of our aforementioned comments, there would be two possibilities : (a) we choose between headings 84.71, 85.17 and 90.09 and (b) we choose between headings 84.71, 84.72 and 85.17. Of course, the "Xerox 340 ST" without a fax function could not be included in heading 85.17. We will only examine the first possibility because we think that heading 90.09 can cover digital copying. In this case, Note 3 to Section XVI is not applicable because it only covers products of that Section. Therefore, we have to use GIR 3.

39. Evidently, it is not possible to use paragraph (a) of GIR 3. A more difficult question is the possible application of GIR 3 (b) in this case. This rule reads :

“Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.”

40. The question to be answered is whether a machine which performs different functions can be classified by this rule ? The text mentions different materials and different components. As we have indicated, it is not easy but, in our administration today, we have a trend to interpret this rule restrictively. Therefore, we prefer not to use GIR 3 (b) for multifunctional apparatus.

41. Therefore, we conclude that we should apply GIR 3 (c) for classifying these machines. That means that heading 90.09 is the correct heading for the “HP Mopier 320” and the two “Xerox 340 ST”.”

IV. CONCLUSION

42. The Committee is invited to rule on the following points taking into account the Notes from the EC and Brazilian Administration :

- (1) The decision that “photocopying” is limited to the projection of an image onto a photosensitive surface and that present heading 90.09 does not cover digital copying, and the decision to amend the Explanatory Notes accordingly;
- (2) The decisions to classify the “HP Mopier 320”, the “Xerox Document Centre 340 ST”, without fax function and the “Xerox Document Centre 340 ST”, with fax function in HS subheading 8471.60.