



HARMONIZED SYSTEM
COMMITTEE

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O. Eng.

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CLASSIFICATION OF THE "PALM V™" PRESENTED AS A SET
WITH CRADLE AND INSTALLATION SOFTWARE

(RESERVATION BY THE EC)

(Item VI.2 on Agenda)

Reference documents :

NC0310E1 (HSC/26)
NC0340E2, Annex H/6 (HSC/26 - Report)
NC0397E1 (HSC/27)
NC0430E2, Annex H/14 (HSC/27 - Report)
NC0455E1 (HSC/28)

NC0498E1 (HSC/28)
NC0510E2, Annex G/12 (HSC/28 - Report)
NC0545E1 (HSC/29)
NC0585E1 (HSC/29)
NC0590E2, Annex H/9 (HSC/29 – Report)

I. BACKGROUND

1. At its 29th Session, the Committee examined the classification of the "Palm V™" presented as a set with cradle and installation software.
2. The US Delegate began the discussion by describing to the Committee his administration's interpretation of Note 6 to Chapter 85. According to the first paragraph of that Note, "records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended", while in the second paragraph it was clearly stipulated that the Note did not apply when such media were presented with articles other than the apparatus for which they were intended. In this case, given that the installation software (which was intended for use and installation on a personal computer) could not be installed on the Palm V™, it was not media presented with the apparatus for which it was intended. Thus, Note 6 to Chapter 85 was not applicable to the media with the installation software. The set consisting of the Palm V™ organizer, a CD-ROM on which the installation software was recorded, a cradle, a metal stylus, a plastic stylus, a user manual, a getting started guide, a rechargeable battery and a protective cover, met the conditions of GIR 3 (b). In light of the Committee's previous decision to classify the Palm V™ in heading 84.71, his administration therefore believed that the entire set should

Note : Shaded parts will be removed when documents are placed on the WCO documentation database available to the public.

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be classified in heading 84.71 because the **Palm V™** was the article that imparts the essential character to the set.

3. Several delegates supported the view that Note 6 to Chapter 85 was not applicable in this particular case. Among the arguments put forward, one delegate referred to the examples set out in the General Explanatory Note relating to Note 6 to Chapter 85 on page 1619, which implied that the media in question had to be inserted or installed in the other components of the set.
4. The **EC** Delegate, while agreeing with the Committee's unanimous decision to classify the **Palm V™** in heading 84.71, considered that when classifying software and applying the Harmonized System, the legal texts should take precedence over any practical considerations. The provisions of Chapter Note 6 would remain applicable until the implementation of the next version of the Harmonized System (2007). In addition, the provisions of the second paragraph of Note 6 to Chapter 85 were clear and precise regarding the conditions governing the application of the said Note. From a purely legal perspective, the phrase "apparatus for which they are intended" definitely did not mean "apparatus in which they will be installed". It was also obvious that the software at issue was intended for the **Palm V™**, as it was used to optimise the function of the said apparatus by giving it a multitude of applications, and particularly to exchange data with an external computer. The **EC** Delegate therefore felt that proper application of Note 6 to Chapter 85 was necessary for the classification at issue. While accepting the principle that the other components accompanying the **Palm V™** should be classified with it, as the Committee had already done in similar cases by application of GIRs 1 and 6, he still felt that the CD-ROM containing the **Palm V™** application software should be classified separately in heading 85.24 in keeping with a strict legal interpretation of Note 6 to Chapter 85.
5. The Delegate of **Brazil** added that in his administration's opinion, the first sentence of Note 6 to Chapter 85 constituted an exception as regards the implementation of GIR 3 (b) and, consequently, that sentence should be interpreted restrictively.
6. Several delegates supported this interpretation, agreeing that the second paragraph of Note 6 to Chapter 85 did not necessarily require the insertion of media into the apparatus with which it was entered. They pointed out that from a legal perspective, there was undoubtedly a difference between "inserted" and "intended". Application of Note 6 to Chapter 85 therefore seemed obligatory in this case.
7. In response to a question raised by one delegate concerning the possible uses of the software at issue, the Chairman pointed out that according to previous discussions, the software was designed solely to connect the **Palm V™** to a personal computer (PC). Supplementing this information, the **ICC** Representative pointed out that the CD-ROM contained **HotSync™** software which, once loaded onto a PC, made it possible to connect any other peripheral unit that recognised the **HotSync™** programme without having to insert the CD-ROM again. He pointed out that the **HotSync™** software was also commercially available as standalone software.
8. At this point in the discussion, given that opinions were still divided, the Chairperson decided to put the question to a vote.
9. The Committee finally decided, by 23 votes to 21, to classify the set comprising the **Palm V™** and the other components presented with it for retail sale (including the CD-ROM containing the installation software) in subheading 8471.30, by application of GIRs 3 (b) and 6.

10. In the light of this decision, the Committee also decided that there was no longer any need to examine the question raised in part (ii) of paragraph 21 of Doc. NC0545E1 concerning incomplete sets, leaving it to administrations to resubmit this question to the Secretariat if they deemed it necessary.
11. The EC notified the Secretary General in its letter dated the 18 July 2002 of its request that the decision to classify the set comprising the Palm V™ and the other components presented with it for retail sale (including the CD-ROM containing the installation software) in subheading 8471.30, by application of GIRs 3 (b) and 6, be referred to the Council under the provisions of paragraph 2 of Article 8 of the Harmonized System Convention. During the 101st and 102nd Sessions of the Council, held in June 2003, Spain requested that this decision be referred back to the HS Committee for re-examination.
12. On 10 September 2003, the Secretariat received a Note from the EC in support of its reservation entered in respect of the decision at the Harmonized System Committee's 29th Session to classify the set mentioned in paragraph 1 above in subheading 8471.30. This note is reproduced below (the Secretariat has numbered the paragraphs to facilitate the discussions).

II. NOTE FROM THE EC

"BACKGROUND"

13. At its 28th Session in November 2001 the WCO Harmonised System Committee classified the Palm V (presented separately) in heading 84.71 of the Nomenclature annexed to the HS Convention, by application of General Rule 1 (Note 5 (A) to Chapter 84).¹ The EC was in favour of this classification.
14. At its 29th Session the Committee examined the classification of the Palm V presented to Customs together with cradle and installation software for retail sale.
15. The EC has always considered that Note 6 to Chapter 85 should apply to the classification of the software on CD-ROM presented with the Palm V. Legally this means that the software should be classified separately in heading 85.24.
16. However, a small majority of the HS Committee seems to have interpreted (mainly for the sake of expediency and to facilitate the Customs clearance procedure) the term "intended" in the legal note as a synonym of "inserted" and decided by 23 votes to 21, with the conflicting opinion of the EC, to classify the apparatus and CD-ROM as a set in the same heading, 84.71, by application of General Interpretative Rule 3 (b), on the grounds that the CD-ROM cannot be "inserted" into the article with which it is imported (and is therefore not "intended" for the Palm V), but must be inserted into an external computer.

¹ Doc. NC0510, Annex G/12.

CLASSIFICATION

Note 6 to Chapter 85 states :

EN

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings when presented with the apparatus for which they are intended.

This note does not apply to such media when they are presented with articles other than the apparatus for which they are intended.

FR

6. Les disques, bandes et autres supports des nos 85.23 ou 85.24 restent classés dans ces positions lorsqu'ils sont présentés avec les appareils auxquels ils sont destinés.

Cette note ne s'applique pas à ces supports lorsqu'ils sont présentés avec d'autres articles que les appareils auxquels ils sont destinés.

ES

6. Los discos, cintas y demás soportes de las partidas 85.23 u 85.24 se clasificarán en estas partidas cuando se presenten con los aparatos para los que estén destinados.

Esta nota no se aplica cuando estos soportes se presenten con otros artículos distintos a los aparatos para los que estén destinados.

17. The **EC** notes certain points and facts for which it seems to have the agreement of all the Committee delegations :

- This amended version of the note is in force since 1 January 2002.
- The HS Committee has already decided unanimously to remove it from the 2007 version of the HS Nomenclature.
- The Committee must therefore classify the products concerned on the basis of the current text of the Note and see if it applies.
- The **Palm V** comes under heading 84.71 by application of General Rule 1.
- The CD-ROM and **Palm V** are presented to Customs together, packaged for retail sale.
- The CD-ROM cannot be physically "inserted" into the **Palm V**. It is "inserted" into an external computer and enables the **Palm V** to be connected to that computer, exchange data with it and use all its advantages.
- This is the sole use of the software in question.
- The "external" computer is not imported.

18. However, certain other matters generated conflicting views among the delegations :

- The classification of the **Palm V** presented to Customs together with the software on CD-ROM.

- Two different classifications were proposed :
 - (A) joint classification in heading 84.71 (General Interpretative Rule 3 (b)),
 - (B) separate classification of the **Palm V** in heading 84.71 and of the CD-ROM in heading 85.24 (Note 6 to Chapter 85).
 - The interpretation of the term "intended" in the Note. The term is used in both paragraphs of the Note.

19. The HS Committee took three decisions at its 29th Session, namely :

- to classify the set comprising the **Palm V** and the software on CD-ROM in subheading 8471.30 pursuant to General Interpretative Rules 3 (b) (and 6) - decision taken by 23 votes to 21;
- to ask the Secretariat to draw up a draft text amending the general considerations of the Explanatory Note relating to Note 6 of Chapter 85 to specify that in this context, **"intended" means "inserted"**;
- to ask the Secretariat to draw up a draft Classification Opinion.

20. The latter two decisions arise from the first decision on the classification of the set.

21. The **EC** disputes that the term "intended" used in Legal Note 6 to Chapter 85 is synonymous with or could have the same meaning as the term "insert". We consider that this interpretation limits and restricts the scope of the Legal Note, and its consequences risk going much further than the classification of the article in question here.

22. The **Palm V** software was designed for the **Palm V** apparatus and offers it extended possibilities. It is sold with the **Palm V**. As noted by the Chair of the Committee in paragraph 6 of the Report (Doc. NC0590, Annex H/9), its sole purpose is to enable the **Palm V** to be connected to a personal computer.

23. The Larousse French language dictionary defines the French term "destination" (EN : purpose) as "l'emploi prévu pour une chose" (the intended use of something). No-one doubts that the intended use of the CD-ROM in question is to enable the apparatus **Palm V** to be connected to an external computer, exchange data with it and use all its advantages. It goes without saying that to achieve this objective one must have a computer into which the CD must be inserted.

CONCLUSION

24. The **EC** considers that the term "intended" must not be interpreted restrictively as meaning "insertion" into the imported apparatus, but rather as "use" enabling the set of two articles (software + apparatus) presented together to Customs to carry out a specific function or to obtain additional or new capacity. There would be no point in importing software with the apparatus if there were no link between the two articles or if they were not to be used together. For these reasons the **EC and its 15 Member States** consider that Note 6 applies and that the software on CD-ROM accompanying the **Palm V** should be classified separately

in heading 85.24 of the HS. This is confirmed by the ICC expert's statement in paragraph 3 of Annex G/12 to Doc. NC0510 :

"...the charger/connector can be used only with the Palm V, which, supplied with pre-loaded software, can be used directly even without the installation disk (CD-ROM)".

25. While the EC understands the practical reasons in favour of classifying the goods together as a set, it considers that classification must be based on the HS Convention's legal rules still in force. Considering the term "intended" in Note 6 to Chapter 85 as being synonymous with the term "inserted" is a restrictive interpretation of the Note. Similarly, the value of some software on the market should be borne in mind - classifying the two articles together would set a precedent with consequences that would be difficult to verify.
26. The delegations are asked to consider whether the fact that the software in question enables the apparatus with which it is imported to be connected to an external computer means that it is "intended" for that apparatus. If so, the software presented on CD-ROM must be classified in heading 85.24 pursuant to Note 6 of Chapter 85."

III. SECRETARIAT COMMENTS

27. The Secretariat would like to point out simply that, if the Committee decides to classify the CD-ROM separately on the basis of Note 6 to Chapter 85, a decision must still be taken as to whether or not the cradle and the Palm V form a set within the meaning of General Interpretative Rule 3 (b). The EC has not addressed this point in its submission.
28. The following description has been reproduced from paragraph 2 of Doc. NC0545E1 (HSC/29) :

Palm-size electronic organizer : 11.5 cm x 7.7 cm x 1 cm. Weight : 115 g. The front of the devices incorporates a touch screen with a writing area (a stylus is part of the package) and various function keys. The lithium ion battery that powers the device can be recharged by means of a serial connector when dropped into a cradle. If the battery becomes too weak to power the device, the user has a week in which to recharge it before the data are irretrievably lost. The organizer can be connected to a computer and, after the installation of special software (sold separately on CD-ROM), exchange data with it. Similarly, an IR (infrared) port enables it to beam data to other IR-enabled units. Its principal applications are as follows : date book, address book, to-do list, memo pad, calculator and expense record keeper. The device is supplied with a HotSync cradle and battery charger, a metal stylus and spare plastic stylus, data input software, an organizer user manual, a getting started guide, a lithium ion (internal) rechargeable battery, a DB-25 adapter and a protective cover.

IV. CONCLUSION

29. The Committee is invited to rule on the classification of the "Palm V" presented as a set with cradle and installation software, taking into account the Note from the EC when it examines this agenda item.