Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-018

KAO Brands Canada Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Thursday, January 16, 2014

Canada

TABLE OF CONTENTS

DECISION ... i

STATEMENT OF REASONS ... 1
- BACKGROUND ... 1
- PROCEDURAL HISTORY ... 1
- GOODS IN ISSUE ... 1
- STATUTORY FRAMEWORK ... 1
- RELEVANT CLASSIFICATION PROVISIONS ... 3
- POSITIONS OF PARTIES ... 4
  - KAO's Position ... 4
  - CBSA's Position ... 4
- TRIBUNAL'S ANALYSIS ... 5
  - Burden of Proof and Insufficiency of Evidence ... 5
  - Legal Notes to Chapter 30 ... 5
  - Analysis of Heading No. 33.04 ... 6
- DECISION ... 10

IN THE MATTER OF an appeal heard on November 19, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF 12 decisions of the President of the Canada Border Services Agency, dated March 5, 2013, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

KAO CANADA INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Date of Hearing:	Ottawa, Ontario November 19, 2013
Tribunal Member:	Stephen A. Leach, Presiding Member
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by KAO Canada Inc. (KAO) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from re-determinations of tariff classifications made by the President of the Canada Border Services Agency (CBSA) on March 5, 2013, pursuant to subsection 60(4).

2. The issue in this appeal is whether Bioré® deep cleansing pore strips (the goods in issue) are properly classified under tariff item No. 3304.99.90 of the schedule to the *Customs Tariff*[2] as other preparations for the care of the skin (other than medicaments) or should be classified under tariff item No. 3005.10.00 as waddings, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

PROCEDURAL HISTORY

3. Between June 30 and December 29, 2008, KAO imported the goods in issue in 12 separate transactions. The goods in issue were classified under tariff item No. 3304.99.90 as other preparations for the care of the skin.

4. Between May and December 2012, KAO applied for refunds, pursuant to section 74 of the *Act*, on the basis of an error in tariff classification of the goods in issue and also submitted requests for re-determination under section 60, stating in both cases that the goods in issue should have been classified under tariff item No. 3005.10.00.

5. On March 5, 2013, the CBSA affirmed its decision classifying the goods in issue under tariff item No. 3304.99.90 as other preparations for the care of the skin. KAO filed this appeal on May 30, 2013. The Tribunal held a public hearing on November 19, 2013. No witnesses were called by either party.

GOODS IN ISSUE

6. The goods in issue are non-woven, polyester strips coated with a substance that includes surfactants, silica, titanium dioxide, witch hazel, menthol and tea tree oil. The strips are used to remove dirt and oil from pores, thereby helping to prevent blackheads and make pores appear smaller. The strips become adhesive when applied to wet skin. When the strip is removed, the dirt and oil that have adhered to the strip are removed from the pores.

STATUTORY FRAMEWORK

7. 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).[3] The schedule is divided into sections and chapters,

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. S.C. 1997, c. 36.
3. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

8. 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*[4] and the *Canadian Rules*[5] set out in the schedule.

9. 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.

10. 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*[6] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[7] 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.[8]

11. 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*. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.[9]

12. 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 use a similar approach to determine the proper subheading.[10] The final step is to determine the proper tariff item.[11]

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4. S.C. 1997, c. 36, schedule [*General Rules*].
5. S.C. 1997, c. 36, schedule.
6. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
7. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
8. 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 the *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*.
9. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
10. 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."
11. 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." The *Classification Opinions* and the *Explanatory Notes* do not apply to classification at the tariff item level.

RELEVANT CLASSIFICATION PROVISIONS

13. The relevant provisions of the *Customs Tariff* provide as follows:

Section VI

PRODUCTS OF THE CHEMICAL OR ALLIED INDUSTRIES

. . .

Chapter 30

PHARMACEUTICAL PRODUCTS

. . .

30.05 **Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.**

3005.10.00 **-Adhesive dressings and other articles having an adhesive layer**

. . .

Chapter 33

ESSENTIAL OILS AND RESINOIDS; PERFUMERY, COSMETIC OR TOILET PREPARATIONS

. . .

33.04 **Beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen or sun tan preparations; manicure or pedicure preparations.**

. . .

3304.99 **- -Other**

. . .

3304.99.90 - - -Other

14. The relevant note to Chapter 30 provides as follows:

1. This Chapter does not cover:

. . .

(e) Preparations of headings 33.03 to 33.07, even if they have therapeutic or prophylactic properties.

15. The relevant explanatory notes to Chapter 33 provide as follows:

(A) BEAUTY AND MAKE-UP PREPARATIONS AND PREPARATIONS FOR THE CARE OF THE SKIN; INCLUDING SUNSCREEN OR SUN TAN PREPARATIONS

This part covers:

. . .

(3) Other beauty or make-up preparations and *preparations for the care of the skin (other than medicaments), such as*: face powders (whether or not compressed), baby powders (including talcum powder, not mixed, not perfumed, put up for retail sale), other powders and grease

> paints; beauty creams, cold creams, make-up creams, cleansing creams, skin foods (including those containing bees' royal jelly) and skin tonics or body lotions; petroleum jelly, put up in packings of a kind sold by retail for the care of the skin; barrier creams to give skin protection against irritants; injectable intracutaneous gels for wrinkle elimination and lip enhancement (including those containing hyaluronic acid); *anti-acne preparations (**other than** soaps of **heading** 34.01) which are designed primarily to cleanse the skin and which do not contain sufficiently high levels of active ingredients to be regarded as having a primary therapeutic or prophylactic effect against acne*; toilet vinegars which are mixtures of vinegars or acetic acid and perfumed alcohol.
>
> [Emphasis added]

POSITIONS OF PARTIES

KAO's Position

16. KAO argues that the CBSA was incorrect in classifying the goods in issue under tariff item No. 3304.99.90 as preparations for the care of the skin. It argues that the goods in issue are not simply a preparation within the meaning of heading No. 33.04 but a strip used in conjunction with a preparation where both the strip and the preparation are necessary in order to provide the prophylactic properties.[12] KAO also argues that the goods in issue, rather than being for the care of the skin, are designed to react to debris in the pores.[13]

17. First, KAO argues that the goods in issue meet the requirements of tariff item No. 3005.10.00. In particular, it was submitted that the goods in issue meet the requirement of being articles having an adhesive layer, as they become adhesive when applied to wet skin.[14] Second, KAO contends that the goods in issue meet the requirement of being impregnated or coated with pharmaceutical substances because they contain tea tree oil, menthol and witch hazel, which have medicinal or prophylactic properties that have an effect against acne,[15] and trichostasis spinulosa.[16] Finally, the goods in issue meet the requirement of being put up in forms or packings for retail sale for medical purposes by being packaged in a box for retail sale[17] and being used to prevent acne or treat trichostasis spinulosa.

CBSA's Position

18. The CBSA argues that this appeal should be dismissed because KAO has not discharged its burden of proving that the goods in issue were improperly classified under tariff item No. 3304.99.90.[18]

19. The CBSA submits that the explanatory notes to heading No. 33.04 require goods (1) to be preparations, (2) to be for the care of the skin and (3) to have properties similar to the examples of preparations listed in the *Explanatory Notes*. The CBSA submits that the goods in issue are preparations, as they contain a mixture of ingredients that allows the goods in issue to adhere to wet skin and to remove

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12. Exhibit AP-2013-018-04A at paras. 35-37, 40, Vol. 1.
13. *Ibid.* at para. 41.
14. *Ibid.* at para. 36.
15. *Ibid.* at paras. 21-28.
16. *Transcript of Public Hearing*, 19 November 2013, at 14.
17. Exhibit AP-2013-018-04A at para. 29, Vol. 1.
18. Exhibit AP-2013-018-06A, tab 1 at para. 22, Vol. 1A.

foreign substances from pores, thereby cleansing the skin.[19] The goods in issue are for the care of the skin, in that they are specifically designed and marketed to help users cleanse and care for their skin.[20] Finally, the goods in issue are similar to the examples listed in the *Explanatory Notes*, and they have the same function as other cleansing products listed in the *Explanatory Notes*, such as cleansing creams and anti-acne preparations designed primarily to cleanse the skin and which do not contain sufficiently high levels of active ingredients to be regarded as having a primary therapeutic or prophylactic effect against acne.[21]

20. The CBSA also argues that the goods in issue are not classifiable in any other tariff heading. In particular, it argued that they are not covered by heading No. 30.05 because the goods in issue cannot be considered similar to wadding, gauze or bandages and they are not for medical, surgical, dental or veterinary purposes.[22]

TRIBUNAL'S ANALYSIS

Burden of Proof and Insufficiency of Evidence

21. Before the Tribunal begins its analysis concerning the merits of this appeal, it is appropriate to discuss the burden of proof in tariff classification proceedings before the Tribunal. In appeals before the Tribunal, the appellant bears the onus of proving that the CBSA's tariff classification is incorrect.[23] In order to discharge this onus, the appellant may rely upon various forms of evidence, including but not limited to physical exhibits, witness testimony and expert reports.

22. In this appeal, the burden of proof is on KAO to establish that the goods in issue were improperly classified under tariff item No. 3304.99.90 as other preparations for the care of the skin. To do so, KAO relied on an examination of previous jurisprudence, dictionary definitions and various written materials found on the Department of Health (Health Canada) Web site, including excerpts from the Natural Health Products Ingredients Database.

23. However, notably absent was evidence corroborating KAO's submissions and arguments. KAO did not call any witnesses. Witnesses could have been of assistance to the Tribunal in its consideration of certain issues, for example, whether certain ingredients, when contained in a preparation, render that preparation a medicament or pharmaceutical. A witness may also have been able to shed some light on how the goods in issue are perceived or used by the medical community.

24. KAO's arguments require the Tribunal to make a number of factual assumptions that the Tribunal is not prepared to make on the basis of the materials presented in this case. Accordingly and for the reasons discussed below, the Tribunal finds that KAO has not discharged its onus of establishing that the goods were improperly classified by the CBSA.

Legal Notes to Chapter 30

25. As indicated above, the goods in issue were classified in heading No. 33.04, which applies, *inter alia*, to preparations for the care of the care of the skin (other than medicaments). KAO argues that the

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19. *Ibid.*, tab 1 at paras. 34-35.
20. *Ibid.*, tab 1 at paras. 36-37.
21. *Ibid.*, tab 1 at paras. 38-44.
22. *Ibid.*, tab 1 at paras. 45-49.
23. *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at paras. 17, 21-22.

proper tariff heading for the goods in issue is heading No. 30.05, which covers, *inter alia*, wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

26. In determining the appropriate tariff classification of the goods in issue, the Tribunal notes that Note 1(d) to Chapter 30 excludes preparations of heading Nos. 33.03 to 33.07 from being classified in Chapter 30, even when those preparations have therapeutic or prophylactic properties. Put another way, if preparations can be classified in heading Nos. 33.03 to 33.07, they cannot be classified in Chapter 30, notwithstanding the fact that they may have therapeutic or prophylactic properties. It is for this reason that the Tribunal will first consider whether heading No. 33.04 applies to the goods in issue. If it does, then it will not be necessary to consider classification in heading No. 30.05.

Analysis of Heading No. 33.04

27. In order to determine whether the goods in issue are classifiable in heading No. 33.04, the Tribunal must consider whether the goods (1) are preparations, (2) are for the care of the skin and (3) are not medicaments. The Tribunal will also take into account the relevant explanatory notes to Chapter 33.

Preparations

28. The goods in issue are non-woven strips coated with various substances, including surfactants (including polyquaternium-37, polysilicone-13 and PEG-12 dimethicone), as well as tea tree oil, witch hazel and menthol.[24] The term “preparation” is not defined in the *Customs Tariff*; however, the parties agreed that the term “preparation” generally means something that is prepared.[25] KAO conceded that a mixture of ingredients would generally be considered a preparation.[26]

29. However, KAO argued that the goods in issue are not *simply* preparations. Rather, although the goods in issue are coated with a preparation, KAO submitted that the preparation is used in conjunction with the non-woven backing and that both are necessary in order for the goods in issue to have their intended effect. KAO referred to an article describing the goods in issue and other cosmetic adhesive pads as potential “mechanical treatments” for the removal of dirt, oil and debris from the skin.[27] A mechanical treatment was described as a treatment that relies on physical forces or motion in order to have the intended effect.[28] KAO argued that the goods in issue are mechanical treatments because they are applied to the user’s wet skin and, once dried, are physically removed from the skin by the user and that it is this physical act of pulling the goods in issue from the skin that removes the debris from the user’s pores.[29]

30. The CBSA submitted that, as long as the preparation comprises a substantial proportion of the goods in issue, the goods in issue are appropriately considered preparations of No. heading 33.04. By weight, not including the plastic backing, which is removed from the product prior to use, the CBSA’s

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24. *Transcript of Public Hearing*, 19 November 2013, at 6-7; Exhibit AP-2013-018-06A, tab 4 at 33-34, Vol. 1A.
25. *Transcript of Public Hearing*, 19 November 2013, at 6-8, 29.
26. *Ibid.* at 12-13, 29.
27. Exhibit AP-2013-018-06A, tab 14 at 138-39, Vol. 1A.
28. *Transcript of Public Hearing*, 19 November 2013, at 13.
29. Exhibit AP-2013-018-04A at para. 36, Vol. 1.

laboratory report indicates that the preparation coating the non-woven strip represents greater than 50 percent of the total weight of the product.[30]

31. At the hearing, the CBSA characterized the non-woven strip as simply the medium used to transport the preparation.[31] In support of this position, the CBSA noted that there is nothing explicit in the relevant provisions of the *Customs Tariff* that would prevent a preparation from being transported on a solid medium, such as the non-woven backing of the goods in issue.[32]

32. The Tribunal concurs with the CBSA's arguments that the goods in issue are preparations. In the Tribunal's view, the fact that the preparation is coated onto a non-woven backing does not preclude its classification as a preparation. The goods in issue are not dissimilar from other products listed in the explanatory notes to heading No. 33.04 which contemplate that a medium may be involved in the application of the preparation. Moreover, although it is necessary for the user to physically remove the goods in issue from the skin using mechanical force, the Tribunal notes that it is the preparation and, in particular, what has been described by KAO as the "primary ingredient" in the preparation, polyquaternium-37,[33] that binds to debris in the pores, making it possible for the goods in issue to perform their intended function.[34]

For the Care of the Skin

33. Regarding the question of whether the goods in issue are for the care of the skin, KAO argued that the goods in issue are designed to react to the debris that blocks the pores, rather than to the skin itself.

34. The CBSA argued that the goods in issue are marketed and used for cleansing the skin and, therefore, are primarily cosmetic skin care products. In support of this argument, the CBSA referred to product literature published by the manufacturer and the packaging of the goods in issue.

35. The Tribunal finds that KAO's argument on this issue is not persuasive. On the basis of the product literature from the manufacturer's Web site and the packaging of the product, the Tribunal finds that the goods in issue are for the care of the skin. In particular, the Tribunal notes that the manufacturer's Web site, in describing the goods in issue, specifically states that they are ". . . the deepest way to clean your pores."[35] Material from the manufacturer also indicates that the goods in issue "remov[e] deep-down dirt that can cause blackheads so you get the deepest clean."[36] Moreover, the manufacturer's Web site claims that the goods in issue can, with regular use, reduce the appearance of the user's pores.[37] Further, as was conceded in KAO's submissions, the goods in issue ultimately benefit the skin.[38]

36. In addition, the goods in issue perform functions similar to other cleansing products listed in the *Explanatory Notes*, which do not contain sufficiently high levels of active ingredients to be regarded as

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30. Exhibit AP-2013-018-06A, tab 4 at 33-34, Vol. 1A.
31. *Transcript of Public Hearing*, 19 November 2013, at 30.
32. *Ibid.*
33. Exhibit AP-2013-018-04A at para. 41, Vol. 1.
34. *Transcript of Public Hearing*, 19 November 2013, at 14; Exhibit AP-2013-018-06A, tab 1 at para. 35, Vol. 1A.
35. Exhibit AP-2013-018-06A, tab 3 at 22, Vol. 1A.
36. *Ibid.*, tab 3 at 27.
37. *Ibid.*, tab 3 at 22.
38. Exhibit AP-2013-018-04A at para. 41, Vol. 1.

having a primary therapeutic or prophylactic effect against acne.[39] Essentially, the goods in issue have a cosmetic purpose with an ancillary prophylactic benefit, which is contemplated by Note 1(d) to Chapter 30. As will be recalled, Note 1(d) to Chapter 30 provides that preparations of heading Nos. 33.03 to 33.07 are not covered by Chapter 30, notwithstanding that those preparations may have therapeutic or prophylactic properties.

Other Than Medicaments

37. Having determined that the goods in issue are preparations and are for the care of the skin, the Tribunal will now consider whether the goods are considered medicaments.

38. At the outset, the Tribunal recognizes that there is some overlap in the arguments and relevant considerations in regard to whether the goods in issue are medicaments of heading No. 33.04 and whether they are considered pharmaceutical substances, which is one of several requirements that must be met in order for the goods in issue to be classified in heading No. 30.05. For the purposes of this part of the analysis, the Tribunal will focus first on whether the goods in issue are considered medicaments of heading No. 33.04. To the extent that the goods in issue are considered medicaments, classification in heading No. 33.04 would not be appropriate, as the terms of that heading specifically exclude preparations for the care of the skin that are considered medicaments. However, to the extent that the goods in issue are not considered medicaments or in the event that the evidence on this point is inconclusive, KAO will not have met its burden of proof under subsection 152(3) of the *Act*.

39. KAO's arguments in regard to the goods in issue being considered medicaments or pharmaceuticals are centred on the ingredients contained within the goods in issue. In particular, KAO submitted that witch hazel alleviates the effects of bruising and localized inflammation,[40] tea tree oil is an antiseptic which inhibits the growth of certain micro-organisms (including bacteria) in the pores,[41] and menthol provides a soothing sensation and anesthetic properties.[42] KAO also made reference to certain documentation found on Health Canada's Web site, in particular two monographs, one that lists witch hazel as a natural health product and the other indicating that menthol has analgesic properties.[43]

40. The Tribunal notes that *The Oxford English Dictionary*[44] defines "medicament" as "[a] substance used in curative treatment", a definition on which the Tribunal has relied in past cases involving medicaments.[45]

41. While it is accepted by both parties that the goods in issue do, in fact, contain the ingredients listed above, the Tribunal is not in a position to assume that the fact that these ingredients are listed as natural health products on a Web site necessarily means that products containing these ingredients constitute medicaments. The jurisprudence referenced by KAO, in which products containing these ingredients were determined by the Tribunal to be medicaments, is distinguishable from the present appeal on the basis of the sufficiency of evidence that was presented in those cases.

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39. Exhibit AP-2013-018-06A, tab 11 at 104, Vol. 1A.
40. Exhibit AP-2013-018-04A at para. 23, Vol. 1.
41. *Ibid.* at para. 22.
42. *Ibid.* at para. 24.
43. *Ibid.* at tabs 10, 11.
44. Second ed., s.v. "medicament".
45. *Pfizer Canada Inc. v. Commissioner of Canada Customs and Revenue Agency* (9 October 2003), AP-2002-038 to AP-2002-090 (CITT) [*Pfizer*] at 6-7.

42. In *Pfizer*, the goods at issue in that case (throat lozenges) not only contained ingredients with medicinal properties but also had a Drug Identification Number (DIN), and the appellant's witness in that case testified as to the contents, including active ingredients, intended usage and therapeutic effect of the products.[46] Also, in *Pfizer*, the menthol and eucalyptus contained in the products at issue in that case were described by the appellant's witness as being the active ingredients in the product. In this case, it is acknowledged by both parties that the primary ingredient of the goods in issue is not the tea tree oil, witch hazel or menthol, but rather the polyquaternium-37 which binds to the dirt, debris and oil in the pores, thereby facilitating extraction.[47]

43. Moreover, the fact that a product contains one or more ingredients that are classified as natural health products by Health Canada for the purposes of the legislation that it administers and enforces does not necessarily mandate that the product ought to be classified as a pharmaceutical or medicament for tariff classification purposes. In other words, it would not be appropriate for the Tribunal to simply find that, because an ingredient is listed by Health Canada as being a natural health ingredient, a product containing such an ingredient is a medicament or pharmaceutical under the *Customs Tariff*. To do so would mean that the Tribunal has disregarded its specialized role as the decision-maker in matters under the *Customs Tariff* and the *Act*.[48]

44. Furthermore, in *Pfizer*, the Tribunal made its determination on the basis that the marketing, packaging and use of the goods at issue in that case indicated that they were for medicinal purposes.[49] In this case, KAO has asked the Tribunal to find that the goods in issue are, for tariff classification purposes, something other than what is indicated by their marketing and use. As described above, the marketing, packaging and use of the goods in issue leave the impression that they are intended primarily for cosmetic use and, in particular, for the beautification of the skin. Nothing about the packaging, marketing and normal use of the goods in issue suggests that it is a medicament. The goods in issue are not marketed as an acne treatment. Indeed, the instructions indicate that the goods in issue are not suitable for use on acne blemishes.[50] The goods do not have a DIN. There was no testimony as to how the medical community views these types of products. The only indication that the goods in issue are something other than cosmetic skin care products are KAO's own arguments and a case study, in which only a single subject was examined, indicating that the goods in issue may have an application in the treatment of trichostatis spiulosa.[51]

45. While it is acknowledged, in previous Tribunal jurisprudence, that it is not strictly necessary to demonstrate that goods have been scientifically proven to be *effective* medicaments in order for them to be classified as such,[52] in this case, the Tribunal is of the view that there is insufficient evidence demonstrating that the goods in issue are used as medicaments at all. No testimony from the medical community was proffered indicating that the goods in issue are prescribed or recommended for the prevention or treatment of a medical condition. Accordingly, the Tribunal gave little weight to the supplemental documents filed by KAO, which included the case study on trichostatis spinulosa.

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46. *Pfizer* at 4.
47. *Transcript of Public Hearing*, 19 November 2013, at 13.
48. *Flora Manufacturing & Distributing Ltd. v. Deputy Canada (Minister of National Revenue)*, 2000 CanLII 15919 (FCA).
49. *Pfizer* at 7.
50. Exhibit AP-2013-018-06A, tab 3 at 28, tab 4 at 39, Vol. 1A.
51. Exhibit AP-2013-018-09A at tab 3, Vol. 1A.
52. *Flora Manufacturing & Distributing Ltd. v. Deputy M.N.R.* (24 September 1998), AP-97-052 (CITT).

46. Even if the goods in issue did have a therapeutic or prophylactic effect, as argued by KAO, this would not mean that they are considered "medicaments" for the purposes of heading No. 33.04. Note 1(d) to Chapter 30 specifically contemplates that some preparations will have a therapeutic or prophylactic effect, but indicates that such preparations are nonetheless excluded from classification in Chapter 30. When questioned about the effect of this note at the hearing, KAO's position was that this note did not apply because, in its view, the goods in issue were not preparations. However, considering that the Tribunal has found that the goods in issue are preparations, the Tribunal is also of the view that Note 1(d) to Chapter 30 is applicable and operates to exclude the goods in issue from classification in Chapter 30.

47. As indicated earlier in these reasons, it was up to the KAO to provide evidence from an appropriate witness that the goods in issue are in fact considered medicaments. KAO has simply not provided sufficient evidence for the Tribunal to reach the conclusion that it seeks. As KAO has not discharged its onus to establish that the tariff classification applied by the CBSA was inappropriate, it is not necessary to consider whether the goods meet the terms of heading No. 30.05, as proposed by KAO.

DECISION

48. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified in heading No. 33.04 pursuant to Rule 1 of the *General Rules* and, more specifically, under tariff item No. 3304.99.90 as other preparations for the care of the skin (other than medicaments), as determined by the CBSA.

49. The appeal is dismissed.

Stephen A. Leach
Stephen A. Leach
Presiding Member