CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, February 21, 2002

Appeal No. AP-2000-052

IN THE MATTER OF an appeal heard on June 28, 2001, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a redetermination of the Commissioner of the Canada Customs and Revenue Agency dated September 26, 2000, pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

LES PRODUITS BARIATRIX INTERNATIONAL INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal finds that the goods imported by the appellant are of the same description as the goods to which the findings in Inquiry No. NQ-95-002 apply and are, therefore, subject to anti-dumping duties.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-2000-052

LES PRODUITS BARIATRIX INTERNATIONAL INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

The respondent issued a redetermination in respect of goods imported by the appellant, requiring the payment of anti-dumping duties in accordance with the Tribunal's findings in Inquiry No. NQ-95-002. The redetermination was based on his finding that the product in issue, imported by the appellant from the United States, was refined sugar and of the same description as the goods to which the Tribunal's findings apply. In determining that the product in issue was refined sugar, the respondent relied on results of polarimetric testing done on samples of the product in issue by the laboratory at the Canada Customs and Revenue Agency. According to the subheading note to Chapter 17, a polarimeter reading of less than 99.5 degrees indicates raw sugar.

The appellant argued that criteria for the description of the sugar, other than its polarimeter reading, indicate that the product in issue is not refined sugar. Further, the appellant questioned the accuracy of the polarimetric testing done by the Canada Customs and Revenue Agency.

HELD: The appeal is dismissed. In Inquiry No. NQ-95-002, anti-dumping duties were imposed on "refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form, originating in or exported from the United States of America". The sole issue in this appeal is whether the product in issue is "refined sugar".

The statement of reasons in Inquiry No. NQ-95-002 clearly refers to the classification under the *Harmonized Commodity Description and Coding System* of the goods to which the findings apply. Of relevance, the polarimeter reading of sugar is identified in the subheading note to Chapter 17 as a means of determining whether sugar is "raw sugar". In addition, the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 17.01 state, in part, that "refined cane . . . sugars are produced by the further processing of raw sugar."

The Tribunal is of the view that, since the sucrose content by weight of the product in issue, in the dry state, corresponds to a polarimeter reading of 99.7 degrees, the product in issue is not "raw sugar". The Tribunal is also of the view that some further processing of the "raw cane sugar" has taken place. This satisfies the terms of the Explanatory Notes to heading No. 17.01, which state, in part, that "refined cane . . . sugars are produced by the further processing of raw sugar." Moreover, in light of the extended description of the goods in Inquiry No. NQ-95-002, and specifically the reference to "other" specialty sugars, the Tribunal is of the view that the product in issue may also be characterized as a specialty sugar in granulated form.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 28, 2001
Date of Decision:	February 21, 2002
Tribunal Members:	James A. Ogilvy, Presiding Member Richard Lafontaine, Member Ellen Fry, Member
Counsel for the Tribunal:	John Dodsworth
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Aaron Rodgers, for the appellant Louis Sébastien, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-2000-052

LES PRODUITS BARIATRIX INTERNATIONAL INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

TRIBUNAL: JAMES A. OGILVY, Presiding Member
RICHARD LAFONTAINE, Member
ELLEN FRY, Member

REASONS FOR DECISION

This appeal is made pursuant to section 61 of the *Special Import Measures Act*[1] from a redetermination of the Commissioner of the Canada Customs and Revenue Agency (CCRA), in which he confirmed that goods imported by the appellant from the United States were subject to anti-dumping duties. The product in issue, imported in five shipments in 1999, was described as "evaporated cane juice crystals". Pursuant to section 59 of SIMA, the respondent applied anti-dumping duties to the product in issue, given his view that it was refined sugar imported from the United States and, therefore, of the same description as the goods to which the Tribunal's findings in Inquiry No. NQ-95-002[2] apply.

The issue before the Tribunal is whether the product in issue is of the same description as the goods to which the Tribunal's findings apply.

EVIDENCE

The appellant's witness was Mr. Stephen Massad, Raw Materials Co-ordinator for Les Produits Bariatrix International Inc. The appellant is a privately owned company located in Montréal, Quebec, which manufactures nutritional bars, drinks and shakes for other companies that sell them primarily in the U.S. market. The product in issue was imported from the manufacturer in the United States and was used as an ingredient in the production of nutritional bars.

Mr. Massad testified that the company for which the appellant manufactured the nutritional bars ordered the product in issue directly from the U.S. manufacturer; therefore, he never saw any certificates of analysis of the sugar. Specification sheets provided by the manufacturer indicated that the product in issue had a sucrose content of between 99.0 and 99.5 percent. The appellant did not perform any quality control tests with respect to the sugar; therefore, Mr. Massad did not know whether the sucrose content of the product in issue ever varied from that which was indicated on the specification sheets.

Mr. Massad testified that he sent a sample of the product in issue to the CCRA in November or December 2000 for testing. He stated that the CCRA did not ask him to record or identify the lot from which the sample was taken. The sample was placed in a container that was neither airtight nor watertight.

---

1. R.S.C. 1985, c. S-15 [hereinafter SIMA].
2. *Refined Sugar* (6 November 1995) (CITT) [hereinafter Tribunal's findings].

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Mr. Massad also responded to questions concerning a letter dated September 19, 2000, from a U.S. law firm addressed to the manufacturer of the product in issue, which the appellant submitted as evidence. The letter compares the process involved in manufacturing the product in issue with that involved in manufacturing a more highly refined sugar. He stated that, in his view, the letter indicates that the product in issue is less refined than other kinds of sugar known as "refined" sugar.

The respondent's witness was Mr. Wendell Ward, who is a chemist at the CCRA laboratory. At the hearing, Mr. Ward was qualified as an expert in the chemical analysis of food, with the caveat that he has no expertise with respect to the sugar industry itself. He testified regarding the process of polarimetric testing and analysis. Mr. Ward testified that the testing done on the product in issue imported by the appellant indicated an average polarimeter reading of 99.7 degrees and that the polarimeter reading more or less equates to the percentage of sucrose in a sample. He also testified that he used high-performance liquid chromatography to verify that the sample was sucrose.

Mr. Ward testified that the sucrose content reported on the manufacturer's specification sheet was a manufacturing specification, that variations in manufacture were not uncommon and that the specification was not necessarily at odds with the results of the testing done by the CCRA. He also testified that the specification sheet did not indicate the testing methods used to obtain those results. In addition, he explained that any moisture content or oxidation would only lower, not raise, the polarimeter reading and that oxidation would only take place over a period of years.

Mr. Ward characterized the product in issue as granulated sugar. Mr. Ward testified that traditional, white refined sugar has a reading of 99.99. He accepted that the letter from the U.S. law firm addressed to the manufacturer of the product in issue indicated that the sugar does not undergo as much refining as other products. Mr. Ward also testified that there could be as much as a 0.2-degree error in the results of a polarimetric test. He also confirmed that *Memorandum D10-2-3*[3] indicates that the CCRA and the industry have accepted as the "settlement polarization"[4] that a 0.25-degree margin of error is acceptable.

Mr. Ward testified that the sample of the product in issue provided by the appellant was tested three times. The testing procedures followed by the technologist were those established by the International Commission for Uniform Methods of Sugar Analysis. The testing would have been corrected for moisture, since the polarimeter readings used in the *Harmonized Commodity Description and Coding System*[5] are for dry equivalents.

ARGUMENT

The appellant argued that the product in issue is raw sugar and, therefore, not of the same description as the goods to which the Tribunal's findings apply. The appellant referred to the letter from the U.S. law firm, which indicated that the process by which the product in issue is manufactured involves single crystallization done at a plant that must be located close to the fields in which sugar cane is grown. He contrasted this with Canadian sugar mills' practice of producing refined sugar using a double crystallization process. The appellant argued that, since Canadian refiners cannot produce refined sugar that is identical to the product in issue, the Tribunal could not have intended the findings to apply to them.

---

3. CCRA, "Tariff Classification, Sampling, and Testing of Raw Sugar" (24 May 2000).
4. According to *Memorandum D10-2-3*, the "settlement polarization" is "the industry accepted means of price settlement for all raw sugar transactions. In cases where opposing measurements differ by 0.25°, an independent (third party) measurement is taken and the average of the two closest measurements is accepted. This is an internationally accepted practice."
5. Customs Co-operation Council, 1st ed., Brussels, 1987.

In this regard, the appellant referred to the wording of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[6] to heading No. 17.01, which includes the statement "Raw sugar may, however, be of such a high degree of purity that it is suitable for human consumption without refining." According to this wording, there exists raw sugar that has the purity level required to make it suitable for human consumption. The appellant argued that the product in issue is raw sugar of this nature.

The appellant referred to the fact that the respondent's redetermination of the product in issue as refined sugar was based entirely on the polarimeter readings of the product in issue as measured at the CCRA laboratory. The appellant argued that the description of the goods contained in the Tribunal's findings does not necessarily refer to the polarimeter reading as the defining criterion to be used to describe the goods. While admitting that the polarimeter reading of sugar is a relevant consideration in determining whether it is raw or refined, the appellant argued that the test is not determinative.

The appellant argued that other criteria are also applicable in determining whether the product in issue should be considered as either raw sugar or refined sugar and that such criteria support its position that the product in issue is not refined sugar.

The appellant also referred to the analysis of like goods in the Tribunal's findings, which looks to market considerations in determining what constitute "like goods". The appellant argued that the marketing of the product in issue is very different from that of refined sugar produced by the domestic mills, as it is less refined and attracts a more health-conscious consumer.

The appellant also questioned the integrity of the sampling and testing of the product in issue. The appellant referred to evidence that indicated that the testing procedure has a 0.2 degree margin of error. The appellant also questioned the results of the testing, given evidence that indicated that the sucrose content of the product in issue as measured by the manufacturer was lower than the results reported by the CCRA.

The respondent argued that, in the statement of reasons for the Tribunal's findings, it made explicit reference to the *Harmonized Commodity Description and Coding System*, which refers to a polarimeter reading of less than 99.5 degrees as constituting raw sugar as opposed to refined sugar. In this regard, the CCRA's testing indicated a polarimeter reading of 99.7 degrees.

The respondent argued that the appellant did not provide any convincing evidence of the sucrose content of the product in issue that would controvert the respondent's evidence. Nor did the appellant submit evidence that would establish the polarimeter reading of the product in issue or that proves that the product in issue is "raw" sugar. In this regard, the respondent pointed out that the appellant did not file an expert report, nor did it rebut the respondent's expert report. The respondent argued that the specification sheets and the letter from the U.S. law firm, which were entered into evidence by the appellant to show that the product in issue is raw sugar, are hearsay. While the specification sheets provided by the appellant indicated that the sucrose content was 99.0 to 99.5 percent, the testing methods that were used to obtain that result were not indicated. Further, the respondent argued that the Tribunal's like goods analysis is irrelevant to the present appeal.

6. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter Explanatory Notes].

DECISION

The appellant appeals from the respondent's redetermination that the product in issue was of the same description as the goods to which the Tribunal's findings apply and was, therefore, subject to anti-dumping duties. The Tribunal's findings describe the goods as "refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form, originating in or exported from the United States of America".

There is no dispute that the product in issue was imported from the United States and that it was produced from sugar cane. Further, there was uncontradicted evidence by the respondent's witness that the product in issue was sucrose and could be characterized as granulated sugar. The product in issue was imported from May to July 1999, while the Tribunal's findings were in effect. Therefore, the only issue in this appeal is whether the product in issue is "refined sugar" for the purposes of the Tribunal's findings. The appellant submits that the product in issue is "raw sugar", whereas the respondent is of the view that it is of the same description as "refined sugar" as referred to in the Tribunal's findings.

In its submissions, the appellant argued that the product in issue could not be considered "like goods" to "refined sugar". The Tribunal notes that the term "like goods" is defined in SIMA, but that it is not used in connection with appeals under SIMA to determine whether imported goods are "goods of the same description" as goods to which an order or finding of the Tribunal applies. Therefore, the Tribunal is of the view that an analysis of "like goods" is not appropriate in this appeal.

It is clear from the evidence that several approaches may be used to define the expression "refined sugar". These may lead to different results. Without additional clarification, the expression is ambiguous. In *J.V. Marketing* v. *Canada (Canadian International Trade Tribunal)*,[7] the Federal Court of Appeal found that, where the description of goods in a finding is ambiguous, reference may be made to any "extended description" of the goods that may be found in the statement of reasons to resolve the ambiguity. The "extended description" contained in the statement of reasons for the Tribunal's findings is as follows:

> The products that are the subject of this inquiry are described by the Deputy Minister in the final determination as refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form. Under the Harmonized Commodity Description and Coding System, . . . the subject sugar is classified in subheading Nos. 1701.91 and 1701.99 and under most tariff items of subheading No. 1702.90. . .
>
> Refined sugar is sold as white granulated, liquid and specialty sugars. Granulated sugar comes in a range of grain fractions (e.g. medium, fine and extra fine). Liquid sugar includes invert sugar. Specialty sugars include soft yellow sugar, brown sugar, icing sugar, demerara sugar and others. Specialty sugars may be in granulated, liquid or powdered form. Refined sugar is provided to customers in a broad range of shipping and packaging configurations. These include 2-, 4-, 10-, 20- and 40-kg bags, and in bulk by rail-car, truckload or one metric tonne intermediate bulk containers (tote bags). Liquid sugar is sold by rail-car, truckload, drum and pail.[8]

This "extended definition" indicates that sugar subject to the Tribunal's findings is classified in subheading Nos. 1701.91 and 1701.99 and under most tariff items of subheading No. 1702.90. Subheading Nos. 1701.91 and 1701.99 refer to sugar that is "[o]ther" than "[r]aw sugar not containing added flavouring or colouring matter" classified in subheading No. 1701.11.

---

7. (1994), 178 N.R. 24 (FCA).
8. *Supra* note 2 at 3.

Section 10 of the *Customs Tariff*[9] states that classification is determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[10] and the *Canadian Rules*.[11] Rule 1 of the General Rules and Rule 1 of the *Canadian Rules* indicate that subheading notes are also determinative of classification at the subheading level. Section 11 of the *Customs Tariff* indicates that, in interpreting headings and subheadings, regard shall be had to the Explanatory Notes.

In this regard, the Explanatory Notes to heading No. 17.01 make a clear distinction between refined sugar and raw sugar, stating that "refined cane . . . sugars are produced by the further processing of raw sugar." The subheading note to Chapter 17 indicates a specific test that is to be used to determine whether sugar is raw sugar (and hence not refined sugar):

> 1. For the purpose of subheadings Nos. 1701.11 and 1701.12, "raw sugar" means sugar whose content of sucrose by weight, in the dry state, corresponds to a polarimeter reading of less than 99.5°.

As outlined above, the appellant and respondent introduced conflicting evidence concerning the sucrose content of the product in issue. The appellant submitted that the correct sucrose content was between 99.0 and 99.5 percent, whereas the respondent maintained that the product in issue had a polarimeter reading of 99.7 degrees. The appellant's evidence consisted primarily of specification sheets provided by the manufacturer of the product in issue, unsupported by evidence of the methodology used to test the sucrose content or certificates of analysis. The appellant did not do its own polarimetric testing. While the tribunal accepts that, as stated by the witness for the respondent, a polarimeter reading more of less equates to the percentage of sucrose in a sample, it is nevertheless unclear how exact this relationship is. Given the degree of exactness required to distinguish raw sugar from refined sugar under Chapter 17, the Tribunal is of the view that the appellant was insufficiently clear on this point.

With respect to the letter from the U.S. law firm to the manufacturer of the product in issue, relied upon by the appellant, it was not established that the author had any particular expertise regarding the issue in this appeal. The main purpose of the letter appears to have been principally to address labelling and terminology under U.S. law. Further, the letter deals only incidentally with an analysis of the product in issue. Although the chart attached to this letter suggests that some sugar undergoes more refining than the product in issue, such information does not impugn the respondent's evidence with respect to the polarimetric testing and does not disprove that the product in issue is "refined sugar".

The appellant also challenged the integrity of the testing done by the respondent. The appellant suggested that the length of time that it took to order and process samples and the risk of contamination from the use of a vessel that was not protected against moisture and air were enough to compromise the results of the testing.

However, the Tribunal accepts the respondent's laboratory test results. The respondent's witness indicated that all tests are corrected for the moisture content of samples. In addition, he explained that oxidation from air exposure would take place only over a period of years. In any event, the kind of threats that might exist to the accuracy of the testing in this case (excess moisture and air penetration) would all tend to lower the reading rather than to raise it.

---

9. S.C. 1997, c. 36.
10. *Ibid.*, schedule [hereinafter General Rules].
11. *Ibid.*

The evidence indicated that some time had elapsed between the importation of the product in issue and the testing. The Tribunal accepts the testimony of the respondent's witness who indicated that sugar is relatively inert over a much longer period than the year that it took before the CCRA had the product in issue tested. In the Tribunal's view, accordingly, the passage of time in this matter had very little impact, if any, on the test results.

Therefore, in light of the above, the Tribunal is of view that the product in issue is not "raw sugar". Indeed, the Tribunal is of the view that, since the sucrose content by weight of the product in issue, in the dry state, corresponds to a polarimeter reading of 99.7 degrees, some further processing of the "raw cane sugar" has taken place. The evidence shows that cane sugar intended for human consumption goes through a series of steps that constitute a processing, or refining, continuum from the initial pressing of the cane to the production of sugar in edible form. While this movement through the processing steps results in increasing levels of purity, the product remains classifiable as raw sugar up to, but not including, a polarimeter reading of 99.5 degrees. Therefore, continuation of the processing beyond this point is legitimately regarded as the "further processing" of raw sugar that results in refined sugar. This satisfies the terms of the Explanatory Notes to heading No. 17.01 that state, in part, that "refined cane . . . sugars are produced by the further processing of raw sugar." On this basis, the Tribunal concludes that the product in issue is refined sugar. Moreover, in light of the extended description of the goods in the Tribunal's findings, and specifically the reference to "other" specialty sugars, the Tribunal is of the view that the product in issue may also be characterized as a specialty sugar in granulated form.

Therefore, the Tribunal is satisfied that the product in issue is of the same description as the goods to which the Tribunal's findings apply. Accordingly, the appeal is dismissed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Ellen Fry
Ellen Fry
Member