Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Thursday, October 9, 2003

Appeal Nos. AP-2002-038 to AP-2002-090

IN THE MATTER OF appeals heard on April 23, 2003, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, as it read prior to the amendments made by S.C. 1997, c. 36, ss. 166 and 169, and under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, as amended by S.C. 1997, c. 36, ss. 166 and 169;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency made between June 20 and 28, 2002, with respect to requests for re-determination under subsection 63(3) of the former *Customs Act* and subsection 60(4) of the current *Customs Act*.

BETWEEN

PFIZER CANADA INC. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeals are allowed.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Meriel V.M. Bradford
Meriel V.M. Bradford
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal Nos. AP-2002-038 to AP-2002-090

PFIZER CANADA INC. **Appellant**

AND

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

This matter concerns appeals, commenced under subsection 67(1) of the *Customs Act*, from decisions of the Commissioner of the Canada Customs and Revenue Agency made between June 20 and 28, 2002, pursuant to subsection 63(3) of the former *Customs Act* and subsection 60(4) of the current *Customs Act*. The issue in these appeals is whether the goods in issue, Halls Centres cough drops, are properly classified under tariff item No. 1704.90.90 as other sugar confectionery, not containing cocoa, as determined by the Commissioner of the Canada Customs and Revenue Agency, or should be classified under tariff item No. 3004.90.00 as other medicaments for therapeutic or prophylactic uses, as claimed by Pfizer Canada Inc.

HELD: The appeals are allowed. The Tribunal is satisfied that the goods in issue are medicated cough drops that are sold for therapeutic uses. In having regard to the *Explanatory Notes to the Harmonized Commodity Description and Coding System* and the *Compendium of Classification Opinions*, the Tribunal considered that the relevant explanatory notes and classification opinion are ambiguous. The Tribunal considers that, in these circumstances, the goods in issue should be classified in the way that is most consistent with the relevant headings, which remain the prime basis for determining classification. The intent of heading No. 30.04 is essentially to cover goods that are in the nature of medicaments. The intent of heading No. 17.04 is essentially to cover goods that are in the nature of sugar confectionery. It would be inconsistent with the intent of these headings if the goods in issue were classified as sugar confectionery.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 23, 2003
Date of Decision:	October 9, 2003
Tribunal Members:	Ellen Fry, Presiding Member Zdenek Kvarda, Member Meriel V.M. Bradford, Member
Counsel for the Tribunal:	Eric Wildhaber
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Riyaz Dattu, for the appellant Rick Woyiwada, for the respondent

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Appeal Nos. AP-2002-038 to AP-2002-090

PFIZER CANADA INC. **Appellant**

AND

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

TRIBUNAL: ELLEN FRY, Presiding Member
ZDENEK KVARDA, Member
MERIEL V.M. BRADFORD, Member

REASONS FOR DECISION

This matter concerns appeals, commenced under subsection 67(1) of the *Customs Act*,[1] from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) made between June 20 and 28, 2002, pursuant to subsection 63(3) of the former *Act* and subsection 60(4) of the current *Act*. The issue in these appeals is whether the goods in issue, Halls Centres cough drops, are properly classified under tariff item No. 1704.90.90 as other sugar confectionery, not containing cocoa, as determined by the Commissioner, or should be classified under tariff item No. 3004.90.00 as other medicaments for therapeutic or prophylactic uses, as claimed by Pfizer Canada Inc. (Pfizer).[2] The goods in issue were imported between February 19, 1997, and March 31, 1999.[3]

The relevant tariff nomenclature[4] is as follows:

17.04	Sugar confectionery (including white chocolate), not containing cocoa.
1704.90.90	---Other
30.04	Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale.
3004.90.00	-Other

1. R.S.C. 1985 (2d Supp.), c. 1, as it read prior to the amendments made by S.C. 1997, c. 36, ss. 166, 169 [former *Act*] and as amended by S.C. 1997, c. 36., ss. 166, 169 [current *Act*].
2. For goods imported prior to January 1, 1998, see Schedule I, *Customs Tariff*, R.S.C. 1985 (3d Supp.), c. 41. For goods imported on or after January 1, 1998, see schedule, *Customs Tariff*, S.C. 1997, c. 36.
3. The record indicates that, on February 7, 2000, Pfizer Canada Inc. became the successor to the operations of Warner-Lambert Canada Inc. as a result of the world-wide merger of the Warner-Lambert Company with Pfizer Inc. (Appellant's Brief, para. 1). Warner-Lambert Canada Inc. was the importer of record of the goods in issue.
4. The relevant nomenclature is the same under the *Customs Tariff* as it read on all the dates of importation.

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The relevant chapter notes[5] are as follows:

[Chapter 17, Note 1(c)] This Chapter does not cover . . . [m]edicaments or other products of Chapter 30.

[Chapter 30, Note (1)(a)] This Chapter does not cover . . . [f]oods or beverages.

The relevant excerpts from the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[6] are as follows:

17.04 - SUGAR CONFECTIONERY (INCLUDING WHITE CHOCOLATE), NOT CONTAINING COCOA.

1704.90 - Other

This heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and collectively referred to as **sweetmeats**, **confectionery** or **candies**.

It includes, *inter alia*:

(v) Preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances having medicinal properties, such as benzyl alcohol, menthol, eucalyptol and tolu balsam). However, throat pastilles or cough drops which contain substances having medicinal properties, other than flavouring agents, fall in **Chapter 30, provided** that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.

The heading **excludes**:

(e) Medicaments of **Chapter 30**.

30.04 - MEDICAMENTS (EXCLUDING GOODS OF HEADING 30.02, 30.05 OR 30.06) CONSISTING OF MIXED OR UNMIXED PRODUCTS FOR THERAPEUTIC OR PROPHYLACTIC USES, PUT UP IN MEASURED DOSES . . . OR IN FORMS OR PACKINGS FOR RETAIL SALE.

3004.90 - Other

This heading covers medicaments consisting of mixed or unmixed products, **provided they are**:

(a) Put up **in measured doses** or in forms such as tablets, ampoules (for example, re-distilled water, in ampoules of 1.25 to 10 cm^3, for use either for the direct treatment of certain diseases, e.g., alcoholism, diabetic coma or as a solvent for the preparation of injectible medicinal solutions), capsules, cachets, drops or pastilles, or small quantities of powder, ready for taking as single doses for therapeutic or prophylactic use.

However, preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances having medicinal properties, such as benzyl alcohol menthol, eucalyptol and tolu balsam) fall in **heading 17.04**. Throat pastilles or cough drops containing substances having medicinal properties, other than flavouring agents, remain classified in this heading when put up in

5. *Supra* note 2. The relevant chapter notes are found, as the case may be, in Schedule I or the schedule, depending on the date of importation. The chapter notes cited here remained the same under the *Customs Tariff* as it read on all the dates of importation.
6. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

measured doses or in forms or packings for retail sale, **provided** that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.

On the other hand, the heading covers preparations in which the foodstuff or the beverage merely serves as a support, vehicle or sweetening agent for the medicinal substances (e.g., in order to facilitate ingestion).

Finally, Classification Opinion 1704.90(3)[7] is also relevant to these proceedings. That opinion is as follows:

1704.90 3. **Throat pastilles or cough drops** consisting essentially of sugars and flavouring agents, e.g., menthol, eucalyptol or peppermint oil, (without other active ingredients).

EVIDENCE

Dr. Gerry Wright, Director of Research and Development, Pfizer Canada Inc., testified on behalf of Pfizer. He indicated having previously been Associate Director for Regulatory Affairs at Warner-Lambert Canada Inc., in which position he was responsible for preparing submissions to the Department of Health (Health Canada) for drug approvals. He testified that the goods in issue are manufactured in the United Kingdom under conditions that meet Health Canada requirements.

Dr. Wright testified that a Health Canada publication entitled "Category IV Monograph–Throat Lozenges"[8] lays out the requirements that throat lozenges must meet in order to be sold as drugs. According to Dr. Wright, the Health Canada monograph was prepared by an advisory committee of scientific experts that reviewed throat lozenges in light of existing clinical studies and literature. Goods that meet the requirements of the Health Canada monograph are assigned a drug identification number (DIN). When Health Canada reviews drug submissions with a view to issuing a DIN or a notice of compliance, it examines the safety and effectiveness of a product.

Dr. Wright indicated that the Health Canada monograph provides for the acceptable minimum amounts and combinations of medicinal ingredients and presence of non-medicinal ingredients in lozenges.

Dr. Wright testified that the goods in issue act as a cough reliever, a nasal decongestant and an anaesthetic or analgesic. He stated that they are registered as proprietary medicines with Health Canada under food and drug legislation and that Pfizer files an annual drug notification with Health Canada.

Dr. Wright confirmed that the goods in issue contain certain levels of the active ingredients, namely, menthol and eucalyptus oil;[9] these active ingredients are present at levels that are above those required by the Health Canada monograph. Accordingly, the goods in issue can be marketed for their therapeutic or prophylactic uses.

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7. *Compendium of Classification Opinions*, Customs Co-operation Council, 1st ed., Brussels, 1987.
8. Additional Exhibits and Authorities of the Appellant, Tab 1.
9. Submissions made by the parties refer to both "eucalyptus oil" and "eucalyptol oil", apparently interchangeably. The Tribunal has chosen to use the former term.

Dr. Wright confirmed the weights, by percentage of the total, of the menthol, eucalyptus and sugar that make up the goods in issue; in doing so, he confirmed that their main ingredient is sugar (in a percentage of at least 95 percent).

According to Dr. Wright, because the goods in issue have a DIN and are intended to be sold as medicaments, their essential ingredients are their active ingredients, i.e. the menthol and eucalyptus oil. Dr. Wright submitted that the goods in issue do not have a menthol or eucalyptus flavour, but rather that their taste is derived from a combination of all the ingredients. They provide, in his words, a "cooling feeling" or a "cooling sensation" rather than a flavour.

Dr. Wright testified that the packaging of the goods in issue is in accordance with the requirements of the Health Canada monograph.[10] He indicated that the packaging lists the levels of active ingredients found in the goods in issue and, as a warning to diabetics, indicates that they also contain sugar. According to Dr. Wright, the sugar serves as a delivery agent for the active medicinal ingredients.

According to Dr. Wright, there are three indications or directions for use on the packaging of the goods in issue, namely, that they are to be used for the relief of (1) sore throat (2) nasal congestion and (3) cough. Packaging also indicates:"adults and children 5 years and over, dissolve slowly in the mouth as required."

Dr. Wright testified that the words "as required" that are found on the packaging mean that the goods in issue are to be used only as long as the indicated symptoms persist. The packaging also has a warning that indicates that users should consult a doctor if the symptoms are severe or if they persist for more than two days. This statement is intended to warn users of the possible onset of a serious disease.

Dr. Wright further stated that the goods in issue are not intended to be chewed, but to be dissolved slowly in the mouth, so as to allow the active ingredients to have a prolonged topical effect on the throat and the nasal passages. He stated that doing otherwise would not meet the requirements that are set out in the Health Canada monograph. Dr. Wright stated that, in this regard, there is a difference between the goods in issue and candy or confectioneries because the former can only be used to relieve the symptoms of a cold as required.

Dr. Wright contrasted the labelling of the goods in issue with that of confectionery products that has no similar directions or warnings.

Dr. Wright indicated that the goods in issue are neither sweetmeats, confectionery or candies, nor are they suitable for immediate consumption as such. In contrast to the goods in issue, sweetmeats, confectionery or candies can be used at will and in any quantity, and there are no warnings, directions for use or indications of medicinal claims on their packagings.

ARGUMENT

Pfizer stated that its arguments were based on the understanding that the Commissioner has not disputed the medicinal properties of menthol and eucalyptus oil, nor the medicinal efficacy of menthol and eucalyptus oil present in the goods in issue. Pfizer submitted that the goods in issue are classifiable in heading No. 30.04 because they are (1) medicaments for therapeutic or prophylactic uses, as that phrase is

10. Physical Exhibits A-1 and A-2.

commonly and scientifically understood and as that phrase has been consistently interpreted by the Tribunal, and (2) put up in measured doses or in forms or packagings for retail sale. Pfizer cited Tribunal and Federal Court of Appeal case law[11] to the effect that the provisions of heading No. 30.04 and the supporting explanatory notes only require an indication that a product be used for the prevention or treatment of a disease or ailment, not proof of medical efficacy.

In support of its position, Pfizer relied upon Customs Notice N-473[12] regarding cough drops not consisting essentially of sugar. Pfizer argued that Customs Notice N-392[13] improperly interprets the *Customs Tariff* by requiring classification of cough drops in heading No. 17.04 irrespective of the quantity of menthol or eucalyptus oil that they contain. Pfizer submitted that the evidence before the Tribunal in these appeals indicates that the goods in issue meet or exceed the medicinal threshold for menthol and eucalyptus oil, that they are marketed and labelled as medicaments in accordance with the requirements of the Health Canada monograph and that, accordingly, they differ substantially from confectionery.

Pfizer reviewed the relevant chapter and explanatory notes and concluded that, as soon as a product is shown to be a medicament, it cannot be classified in Chapter 17, which applies to products that are marketed for purposes other than to be consumed as medicaments. Indeed, after reviewing dictionary definitions of "confectionery", Pfizer submitted that there has been no evidence in these appeals to suggest that the goods in issue are candy. Contrary to the goods in issue, confectionery of heading No. 17.04 are products that are marketed differently from medicaments, have no directions as to use or dosage requirements, and post no warnings or restrictions as to the manner in which they should be consumed.

Pfizer disagreed with the Commissioner's position that a product would need to contain an active ingredient other than menthol or eucalyptus oil to be classified in heading No. 30.04. Pfizer also summarized the Commissioner's position as meaning that cough drops should be classified in heading No. 17.04 regardless of the levels of menthol or eucalyptus oil that they might contain. In contrast, Pfizer's position is that the Chapter Notes and *Explanatory Notes* are to the effect that the goods in issue should be classified in heading No. 30.04 because menthol or eucalyptus oil are present for medicinal purposes and not for flavouring purposes.

Furthermore, citing various definitions of the word "essential" taken from commonly used dictionaries, Pfizer submitted that the goods in issue do not consist essentially of sugar, but rather of the active ingredients, given that the cough drops are purchased for their medicinal properties. The fact that the goods in issue contain an important amount of sugar does not make them a confectionery. Their essence is that they are medicaments.

The Commissioner argued that the *Explanatory Notes* and *Classification Opinion* 1704.90(3) clearly direct classification of the goods in issue in heading No. 17.04. Indeed, the Commissioner submitted

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11. *Deputy M.N.R. v. Yves Ponroy Canada* (2000), 259 N.R. 38 (FCA); *Hilary's Distribution Ltd. v. Deputy M.N.R.* (25 September 1998), AP-97-010 (CITT); *Flora Manufacturing & Distributing Ltd. v. Deputy M.N.R.* (24 September 1998), AP-97-058 (CITT); *Flora Manufacturing & Distributing Ltd. v. Deputy M.N.R.* (24 July 1998), AP-97-002 (CITT); *Yves Ponroy Canada v. Deputy M.N.R.* (5 December 1997), AP-96-117 (CITT).
12. Canada Customs and Revenue Agency, "Tariff Classification of Throat Pastilles or Cough Drops not Consisting Essentially of Sugar" (18 October 2002).
13. Canada Customs and Revenue Agency, "Tariff Classification of Throat Pastilles or Cough Drops" (16 July 2001).

that *Classification Opinion* 1704.90(3) precisely and completely describe the goods in issue. In support of this position, the Commissioner pointed to the fact that the goods in issue consist almost entirely of sugar, to the order of at least 95 percent of the weight of each cough drop. In the Commissioner's submission, the *Customs Tariff*, the *Explanatory Notes* and *Classification Opinion* 1704.90(3) all clearly treat menthol and eucalyptus oil as flavouring agents, notwithstanding their medicinal properties. The Commissioner submitted that a cough drop would need to contain other ingredients with medicinal properties in order for it to be classified in heading No. 30.04. The Commissioner argued that the Tribunal would have to find a clear and overriding reason for departing from that view.

The Commissioner also argued that in none of the decisions of foreign customs authorities cited by Pfizer was an explanatory note so clearly and precisely directed to the exact product in issue. The Commissioner also submitted initially that *Classification Opinion* 1704.90(3) was drafted with specific regard to goods similar to those in issue. However, when questioned by the Tribunal, the Commissioner indicated that it was unable to divulge the confidential information upon which this submission was based and, consequently, that it no longer relied upon this submission. The Commissioner further submitted that the fact that the goods in issue have a DIN is irrelevant for classification purposes.

DECISION

Subsection 10(1) of the *Customs Tariff*, as it read on all the dates of importation, is as follows:

> 10. (1) . . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule [or Schedule I, as the case may be].

Rule 1 of the *General Rules for the Interpretation of the Harmonized System*[14] is as follows:

> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, 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 [subsequent] provisions.

Note (III) of the *Explanatory Notes* to Rule 1 of the *General Rules* states, in part, that Rule 1 "provides that classification shall be determined: (a) according to the terms of the headings and any relative Section or Chapter Notes, and (b) where appropriate, **provided the headings or Notes do not otherwise require**, according to the provisions of Rules 2, 3, 4, and 5."

Section 11 of the *Customs Tariff*, as it read on all the dates of importation, is as follows: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time."[15]

Heading No. 30.04 provides for the classification of "[m]edicaments . . . for therapeutic . . . uses, put up in measured doses". The Tribunal notes that *The Oxford English Dictionary* defines "medicament" as

14. Schedule, *Customs Tariff*, S.C. 1997, c. 36 [*General Rules*].
15. On the interpretation of section 11 of the *Customs Tariff*, see *Fastco Canada v. Deputy M.N.R.* (29 April 1997), AP-96-078 (CITT); *Reha Enterprises Ltd.* v. *Deputy M.N.R.* (28 October 1999), AP-98-053 and AP-98-054 (CITT).

"[a] substance used in curative treatment"[16] and "therapeutic" as "[a] curative agent" or "[o]f or pertaining to the healing of disease".[17]

The parties agree that menthol and eucalyptus oil have medicinal properties.[18] This conclusion was also supported by the evidence of the witness for Pfizer. Dr. Wright indicated that the goods in issue meet the criteria of the Health Canada monograph and have a DIN number and, hence, can be sold as a drug.[19] He further indicated that they are marketed as a drug and that their packaging clearly indicates that they should be taken according to directions, for the relief of certain specified medical symptoms.[20] The evidence also indicates that the goods are put up in measured doses.[21] Accordingly, the Tribunal is satisfied that the goods in issue are medicaments sold for therapeutic uses and put up in measured doses.

The Notes to Chapter 17 specify that it "does not cover . . . (c) [m]edicaments . . . of Chapter 30." Heading No. 17.04 provides for the classification of "[s]ugar confectionery". The *Explanatory Notes* to heading No. 17.04 specify that "[t]his heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and collectively referred to as **sweetmeats**, **confectionery** or **candies**."

The Oxford English Dictionary defines "confectionery" as "[t]hings made or sold by a confectioner; a collective name for sweetmeats and confections."[22] A "sweetmeat" is defined as "[s]weet food, as sugared cakes or pastry, confectionary . . . ; preserved or candied fruits, sugared nuts, etc.; also, globules, lozenges, 'drops' or 'sticks' made of sugar with fruit or other flavouring or filling".[23] "Confection" is defined as "the making of preserves or confectionery . . . a preparation of fruit, spices, sugar, or the like, used as a relish or dainty; a preserve, sweetmeat, comfit."[24] A "candy" is defined as "[c]rystallized sugar, made by repeated boiling and slow evaporation, more fully called SUGAR CANDY; also any confection made of, or incrusted with this."[25]

Because of their marketing, packaging and use, which is for medicinal purposes, as discussed above, the Tribunal is satisfied that the goods in issue do not fall within the meaning of "confectionery", "sweetmeats" or "candy".

As noted above, section 11 of the *Customs Tariff* provides that, in interpreting the headings, regard shall be had to the applicable classification opinions and explanatory notes.

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16. Second ed., *s.v.* "medicament".
17. *Ibid*., *s.v.* "therapeutic".
18. See *Transcript of Public Hearing*, 23 April 2003 at 5. See, also, Tribunal Exhibit Nos. AP-2002-038 to AP-2002-090-21.
19. See *Transcript of Public Hearing*, 23 April 2003 at 17.
20. The Tribunal notes that the wording of the labelling of the goods in issue filed as exhibits differs slightly from Dr. Wright's evidence. The wording of the labelling is as follows: "For the temporary soothing relief of cough and sore throat. Adults and children 5 years and over, dissolve slowly in the mouth as required. Medicinal Ingredients: Menthol [amount varies depending on the 'flavour' of lozenge] mg; eucalyptus oil [amount varies depending on the 'flavour' of lozenge] mg per lozenge. Non-medicinal ingredient: sugar. Caution: if symptoms are severe, worsen, persist for more than 2 days or are accompanied by a high fever, consult a doctor."
21. Respondent's Brief, Tab 2. *Transcript of Public Hearing*, 23 April 2003 at 11.
22. *Supra* note 20, *s.v.* "confectionery".
23. *Supra* note 20*, s.v.* "sweetmeat".
24. *Supra* note 20*, s.v.* "confection".
25. *Supra* note 20*, s.v.* "candy".

The relevant part of the *Explanatory Notes* to heading No. 30.04 is as follows:

> This heading covers medicaments . . . **provided they are**: (a) Put up **in measured doses** or in forms such as . . . drops or pastilles . . . , ready for taking as single doses for therapeutic or prophylactic use.
>
> However, preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances having medicinal properties, such as benzyl alcohol menthol, eucalyptol and tolu balsam) fall in **heading 17.04**. Throat pastilles or cough drops containing substances having medicinal properties, other than flavouring agents, remain classified in this heading when put up in measured doses or in forms or packings for retail sale, **provided** that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.

Similarly, the *Explanatory Notes* to heading No. 17.04 provide that it includes:

> (v) Preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances having medicinal properties, such as benzyl alcohol, menthol, eucalyptol and tolu balsam). However, throat pastilles or cough drops which contain substances having medicinal properties, other than flavouring agents, fall in **Chapter 30, provided** that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.

Classification Opinion 1704.90(3) reads as follows:

> **1704.90** 3. **Throat pastilles or cough drops** consisting essentially of sugars and flavouring agents, e.g., menthol, eucalyptol or peppermint oil, (without other active ingredients).

The parties do not dispute that the goods in issue are cough drops or pastilles. The physical exhibits confirm that the goods are put up in this form.[26]

The evidence indicates that eucalyptus oil and menthol have been included in the goods in issue primarily for medicinal purposes, rather than for flavouring purposes. In this context, the Tribunal has carefully considered the *Explanatory Notes* and *Classification Opinion* 1704.90(3), in both their English and French versions, and considers that their wording, if read in isolation, would be open to two possible interpretations. As argued by the Commissioner, they could be interpreted to mean that eucalyptus oil and menthol are always considered to be flavouring agents when used in pastilles and cough drops, even in instances where these ingredients are included primarily for medicinal purposes. On the other hand, as argued by Pfizer, they could be interpreted to mean that eucalyptus oil and menthol are considered to be flavouring agents only if they are included primarily for flavouring purposes.

As indicated above, the relevant part of Rule 1 of the *General Rules* provides that tariff classification is to be determined "according to the terms of the headings". Section 11 of the *Customs Tariff* provides that the *Explanatory Notes* and *Classification Opinions* are to be used in interpreting the headings.

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26. The Tribunal notes that, although physical exhibits of all the goods in issue were not filed with the Tribunal, it is satisfied with the evidence that the exhibits are representative of the goods in issue. *Transcript of Public Hearing*, 23 April 2003 at 70-71.

In other words, the headings are the prime basis for determining classification. The *Explanatory Notes* and *Classification Opinions* have a supporting role in assisting in the interpretation of the headings.

Accordingly, in this instance, the Tribunal considers that it should resolve the ambiguity in the *Explanatory Notes* and *Classification Opinion* 1704.90(3) in the manner that is most consistent with the relevant headings and classify the goods in issue accordingly. In the Tribunal's view, the intent of heading No. 30.04 is essentially to cover goods that are in the nature of medicaments. The intent of heading No. 17.04 is essentially to cover goods that are in the nature of sugar confectionery. The Tribunal considers that the goods in issue are in the nature of medicaments and not in the nature of sugar confectionery and that the interpretation of the *Explanatory Notes* and *Classification Opinion* 1704.90(3) argued by Pfizer is more consistent with the intents of heading Nos. 30.04 and 17.04 than the interpretation argued by the Commissioner. In the Tribunal's view, it would be inconsistent with the intent of these headings if the goods were classified in heading No. 17.04 solely because the medicinal ingredients are eucalyptus oil and menthol.

The Tribunal is therefore of the view, in accordance with Rule 1 of the *General Rules*, that the goods in issue should be classified in heading No. 30.04 as medicaments for therapeutic or prophylactic uses put up in measured doses or in forms or packings for retail sale. The goods in issue should, therefore, be classified under tariff item No. 3004.90.00 as other medicaments for therapeutic or prophylactic uses.

For the foregoing reasons, the appeals are allowed.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Meriel V.M. Bradford
Meriel V.M. Bradford
Member