Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2003-036

Roche Vitamins Canada Inc.

v.

Commissioner of the Canada Customs and Revenue Agency

Decision and reasons issued
Thursday, January 26, 2006

Corrigendum issued
Tuesday, February 28, 2006

Canada

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on February 14 and 15, 2005, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

ROCHE VITAMINS CANADA INC. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	February 14 and 15, 2005
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member Ellen Fry, Member
Counsel for the Tribunal:	Reagan Walker Michael Keiver
Clerks of the Tribunal:	Karine Turgeon Margaret Fisher
Appearances:	Richard G. Dearden and Maureen L. Murphy, for the appellant Alexandre Kaufman, for the respondent

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: (613) 993-3595
Fax: (613) 990-2439
E-mail: secretary@citt-tcce.gc.ca

REASONS FOR DECISION

1. This is an appeal pursuant to section 67 of the *Customs Act*[1] from decisions of the Commissioner of the Canada Customs and Revenue Agency (CCRA) (now the Canada Border Services Agency [CBSA]), dated April 10, 2001, and March 15, 2002. The decisions concerned four separate products:

- vitamin C-95
- vitamin C-90
- vitamin A palmitate type 250 CWS/F
- vitamin D3 type 100 CWS

2. The issue in the appeal is whether the goods in issue are properly classified under tariff item No. 3003.90.00 of the schedule to the *Customs Tariff*[2] as other medicaments consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale, as determined by the CCRA, or should be classified under heading No. 29.36 as provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent, as claimed by Roche Vitamins Canada Inc. (Roche Vitamins).

3. More precisely, Roche Vitamins claims that the four products should be classified as follows:

- vitamin C-95, under tariff item No. 2936.27.00 as vitamin C and its derivatives
- vitamin C-90, under tariff item No. 2936.27.00 as vitamin C and its derivatives
- vitamin A palmitate type 250 CWS/F, under tariff item No. 2936.21.00 as vitamins A and their derivatives
- vitamin D3 type 100 CWS, under tariff item No. 2936.29.00 as other vitamins and their derivatives

4. The relevant tariff nomenclature reads as follows:

. . .

29.36	Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent.
. . .	
2936.21.00	--Vitamins A and their derivatives
. . .	
2936.27.00	--Vitamin C and its derivatives
. . .	
2936.29.00	--Other vitamins and their derivatives

. . .

1. R.S.C. 1985 (2nd Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.

30.03	Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale.
. . .	
3003.90.00	-Other
. . .	

PRELIMINARY MATTERS

5. Before the hearing took place, the parties brought two motions before the Canadian International Trade Tribunal (the Tribunal): (1) on October 28, 2003, Roche Vitamins filed a motion for early production of the CCRA's records; and (2) on July 13, 2004, the CBSA filed a motion for dismissal of the appeal on the ground that it was moot.

6. On March 10, 2004, the Tribunal dismissed Roche Vitamin's motion, by order with attached statement of reasons.

7. On November 10, 2004, the Tribunal dismissed the CBSA's motion, by order. No statement of reasons was attached. Therefore, the Tribunal will now address the issue raised in the motion, i.e. whether the appeal is moot.

8. Under the Most-Favoured-Nation Tariff, goods classified under tariff item No. 3003.90.00 are duty free. Similarly, goods classified under all the tariff items claimed by Roche Vitamins are duty free. The CBSA argued that Roche Vitamins had therefore ". . . succeeded in obtaining the desired result with respect to the payment of customs duties and cannot obtain a better result from the Tribunal."[3] It alleged that ". . . the question of whether an item is more properly classified under one duty-free heading versus another duty-free heading is purely academic . . . ."[4] According to the CBSA, Roche Vitamins is therefore not an "aggrieved" person within the meaning of subsection 67(1) of the *Act* and has no standing to appeal the CCRA's decision.[5]

9. In support of its contention, the CBSA cited *Newman's Valve Limited v. Deputy M.N.R.*[6] In that case, the Deputy Minister of National Revenue originally assessed the value for duty of imported goods using the "deductive value" method, such that the duty payable was $351,426.55. However, on re-appraisal, the "transaction value" method was applied, which resulted in a refund of the full amount of the duty.

10. The appellant in *Newman's Valve* appealed the re-appraisal, on the basis that the "sale for export" should have been found to be between it and the offshore manufacturer and not, as was found by the Deputy Minister of National Revenue, between it and its U.S. parent company.

11. In dismissing *Newman's Valve*, the Tribunal found that the ". . . appeal is clearly not from the respondent's decision, but from the reasons expressed by the respondent for granting its request for a re-appraisal. The appellant was granted a refund for the full amount of duty. The respondent's decisions

3. CBSA's Motion Record, Tab 3, para. 23.
4. *Ibid*., para. 30.
5. *Ibid*., paras. 34-37.
6. (10 October 1997), AP-96-121 (CITT) [*Newman's Valve*].

were rendered in the appellant's favour. In the Tribunal's view, the appellant has, therefore, not been 'aggrieved' by the respondent's decision . . . ."[7]

12. The Tribunal added that the ". . . appeal is, in effect, an appeal of the customs ruling and not an appeal from the respondent's decisions. As stated earlier, there is no direct appeal to the Tribunal from a customs ruling. The Tribunal therefore finds that it does not have jurisdiction to hear this appeal . . . ."[8]

13. In reply, Roche Vitamins submitted that the proper tariff classification of the goods in issue was a different issue from the rate of duty to be applied and that the former remained in dispute.[9] The Tribunal concurs with this argument.

14. The CBSA submitted that the test to be applied on a motion to dismiss an appeal is an onerous one. The applicant must prove that ". . . it is plain and obvious that the [appeal] discloses no reasonable [cause] of action . . ." and that ". . . the case is beyond doubt."[10] The Tribunal agrees.

15. The CBSA's motion is based on the premise that the issues of proper tariff classification and the imposition of the correct rate of duty involve identical interests. The CBSA submits that the ". . . decision which is subject to appeal under section 67 of the *Customs Act* is the imposition of duty."[11] The Tribunal disagrees with this argument.

16. It is true that the *primary* purpose of tariff classification is to determine the applicable rate of duty. However, there is also a *secondary* purpose: the collection of trade statistics. Roche Vitamins argued the following: "Proper tariff classification of goods is of vital importance to ensuring that Canada's import statistics are accurate. Statistics Canada relies upon the tariff classification declared by importers on import documentation (Form B3). If the tariff classification has been incorrectly declared, Canada's import statistics will reflect the erroneous information."[12] The Tribunal is in complete accord with Roche Vitamins' contention.

17. Section 7.1 of the *Act* requires all declarations of tariff classification be "true, accurate and complete", and subsection 32.2(2) imposes an obligation on importers to correct any declaration of tariff classification within 90 days of having reason to believe that the original declaration was incorrect.

18. Roche Vitamins cited several business reasons for wishing to maintain the accuracy of the classification for the goods in issue, e.g. it is as global vitamin supplier. Customs authorities in other countries might rely in part, to its detriment, on the CCRA's determination that its vitamins should be classified as "medicaments".[13]

19. Moreover, collecting Canada's trade statistics depends on accurate tariff classification. ". . . The information which Statistics Canada extracts from the invoice and Form B3 helps to paint a true picture of Canada's economic situation. This information is used nationally to establish monetary policy and promote Canadian interests abroad, and internationally by foreign investors who are considering Canada for potential

---

7. *Ibid*. at 5.
8. *Ibid*. at 6.
9. Roche Vitamins' Motion Record, Tab 2 at 6.
10. CBSA's Motion Record, Tab 3, para. 14.
11. *Ibid*., para. 39.
12. Roche Vitamins' Motion Record, Tab 2, para. 66.
13. *Ibid*., paras. 27-32.

business . . . ."[14] It is also used in cases where a domestic industry is seeking trade protection against imports. Import statistics include reports on a product basis, such as how concentrated the import market is or the total value for all imports of that specific product.[15] The data are used for a variety of trade and economic reasons, e.g. assessing the size and growth of markets, the type and location of competition and the decisions on investment.

20. Therefore, in the Tribunal's opinion, the CBSA failed to meet the first branch of its test for dismissing an appeal on motion, i.e. establishing that the appeal discloses no reasonable cause of action. As with every other appeal to the Tribunal regarding tariff classification, the issue that Parliament had charged the Tribunal to address in this case was the proper classification of the four goods in issue and not the amount of duties owed on the goods. It was not necessary for the Tribunal to proceed to the second branch of the test (i.e. whether the case was beyond doubt). For this reason, the Tribunal dismissed the motion on November 10, 2004.

EVIDENCE

21. Samples of products identical to the goods in issue were filed as Exhibits A-1 through A-4, as follows:

- Exhibit A-1: "C-95™ Ascorbic Acid 95% Granulation"
- Exhibit A-2: "C-90™ Ascorbic Acid 90% Granulation"
- Exhibit A-3: "Dry Vitamin A Palmitate Type 250 CWS/F"
- Exhibit A-4: "Dry Vitamin D3, Type 100 CWS"

22. Roche Vitamins also filed, as Exhibits A-5 through A-7, other goods manufactured by it, and, as Exhibits A-8 through A-11, other related goods produced by other manufacturers.

23. On behalf of Roche Vitamins, Dr. Jean-Claude Tritsch, Director of Technical Customer Service and Production Support for DSM Nutritional Products Canada Inc. (formerly Roche Vitamins Canada Inc.), gave evidence, as summarized below, on each the above goods in issue, after being qualified as an expert in the field of vitamin formulations and their technical applications. In his opinion, all the goods in issue are vitamins.[16]

C-95™ Ascorbic Acid

24. According to Dr. Tritsch, C-95™ Ascorbic Acid (C-95) is a powder that consists of ascorbic acid (vitamin C) and hydroxypropyl methylcellulose (HPMC) mixed in a ratio of 95 percent to 5 percent, i.e. "[a]scorbic [a]cid 95% [g]ranulation".[17] HPMC is used as a binding agent, i.e. it helps create uniform particles of C-95. It also increases the tableting performance so that Roche Vitamins' customers[18] can use the C-95 ". . . in direct compression to produce Vitamin C tablets . . . ."[19] However, it is not required for the preservation or transport of vitamin C or used as a stabilizer, anti-dusting agent, or colouring or odoriferous

14. http://www.cbsa-asfc.gc.ca/import/b3elements-e.html.
15. http://strategis.ic.gc.ca/sc_mrkti/cid/engdoc/about_product_codes.html.
16. Expert Report of Dr. Jean-Claude Tritsch at 11.
17. *Transcript of Public Hearing*, 14 February 2005, at 34.
18. For example, "Jamieson, Vita Health and Natural Factors". *Transcript of Public Hearing*, 14 February 2005, at 32.
19. *Transcript of Public Hearing*, 14 February 2005, at 30.

substance. Roche Vitamins manufactures, markets and sells its C-95 (in bulk) as vitamin C.[20] The product is found in chewable tablets, extended-release capsules, multivitamin tablets and cereal bars.[21] HPMC is used instead of corn starch and lactose because some customers insist on starch-free and sugar-free products.[22]

C-90™ Ascorbic Acid

25. Dr. Tritsch testified that C-90™ ascorbic acid (C-90) is a powder that consists of ascorbic acid, corn starch and lactose mixed in a ratio of 90 percent to 9 percent to 1 percent. Corn starch is used as the binding agent, and lactose maintains the white colour of the powder. They ". . . increase the compressibility of Vitamin C, which is a non-compressible ingredient . . . ."[23] However, neither ingredient is required for the preservation or transport of vitamin C or used as a stabilizer, anti-dusting agent, or colouring or odoriferous substance. Roche Vitamins manufactures, markets and sells its C-90 (in bulk) as vitamin C.[24]

Vitamin A Palmitate Type 250 CWS/F

26. Dr. Tritsch described vitamin A palmitate type 250 CWS/F (vitamin A formulation) as a powder consisting of tiny oil beadlets of a vitamin A palmitate and "dl-alpha tocopherol"[25] solution stabilized for preservation and transport in a matrix of fish gelatin and sucrose. Vitamin A palmitate[26] is a highly unstable vitamin. If exposed to oxygen, light or moisture, its chemical structure will be destroyed. The amount of fish gelatin, sucrose, corn starch and tocopherol used in Roche Vitamins' manufacturing process is precisely what is necessary in order to stabilize the vitamin A formulation for the time and in the conditions required by the proposed use. The vitamin A formulation has many uses: dry pharmaceutical applications and food products, such as canned foods, nutrition bars, instant drinks and cereals. Roche Vitamins manufactures, markets and sells[27] its vitamin A formulation as vitamin A palmitate.[28] The "250" in the product name indicates a potency of 250,000 international units of vitamin A per gram.[29] The "CWS" means "cold water soluble", a property necessary for vitamin-fortified beverages and effervescent tablets.[30]

Vitamin D3, Type 100 CWS

27. Dr. Tritsch described vitamin D3 type 100CWS (D3 formulation) as a powder that consists of vitamin D3[31] stabilized in a matrix of hydrogenated soybean oil, hydrolyzed bovine gelatin, sucrose, starch and "dl-alpha tocopherol". Vitamin D3 is a highly unstable and toxic vitamin. If exposed to oxygen, light or moisture, its chemical structure will be destroyed. If Vitamin D3 were not dissolved in soybean oil, there

20. Expert Report of Dr. Jean-Claude Tritsch at 4-5.
21. *Transcript of Public Hearing*, 14 February 2005, at 27, 35.
22. *Ibid*. at 106.
23. *Ibid*. at 39.
24. Expert Report of Dr. Jean-Claude Tritsch at 6.
25. An antioxidant.
26. The active ingredient of vitamin A is retinyl, a vitamin A alcohol, which is very unstable. Vitamin A palmitate is a derivative produced from vitamin A alcohol. *Transcript of Public Hearing*, 14 February 2005, at 139.
27. To customers such as "Nestlé" and "Unilever". *Transcript of Public Hearing*, 14 February 2005, at 64.
28. Expert Report of Dr. Jean-Claude Tritsch at 7-8.
29. *Transcript of Public Hearing*, 14 February 2005, at 62.
30. *Ibid*. at 110.
31. Also called cholecalciferol. If administered in uncontrolled doses, vitamin D3 can be associated with hypervitaminosis D in young children, which can lead to calcium buildup in the soft tissues and to irreversible heart and kidney damage, ultimately causing death. Therefore, it is important to ensure that Roche Vitamins' vitamin D3 products contain precisely the amount of vitamin D3 needed and no more or less. *Transcript of Public Hearing*, 14 February 2005, at 74-75.

would be "hot spots" in the D3 formulation, meaning that some parts would have unsafe levels of vitamin D3, as well as "cold spots", i.e. other parts would have no vitamin D3 at all.[32] Roche Vitamins' D3 formulation has many uses: dry pharmaceutical applications, such as effervescent tablets, multivitamin/multimineral tablets, and food products, such as canned foods, nutrition bars, instant drinks and cereals. Roche Vitamins manufactures, markets and sells its D3 formulation as vitamin D3.[33] The "100" in the product name indicates a potency of 100,000 international units per gram.[34] The "CWS" means "cold water soluble"; however, it would be more correct to say "cold water dispersible", since it creates an emulsion, not a solution, in water.[35] These additives are contained only in the amounts required to stabilize the D3 formulation.[36]

28. Roche Vitamins also called Mr. Gary Leong, Vice-President of Scientific and Technical Affairs, Jamieson Laboratories Limited (Jamieson), as a witness. He testified that Jamieson was Canada's largest producer of brand-name vitamin products, occupying a 26 percent market share. Jamieson regularly purchased Roche Vitamins' C-95 and used it in making chewable tablets, "swallow" tablets, timed-release tablets, multimineral vitamin tablets, food products, such as nutritional supplement bars, and a cosmetic formulation called "C Cream".[37] In his opinion, the addition of HPMC did not alter the chemical nature of the vitamin C in the C-95 because it did not chemically interact with it.[38] In some of Jamieson's formulations, HPMC had beneficial properties; in others, it was merely inert.[39] Vitamin C is basically a commodity,[40] but a number of people prefer taking it in food, which is a "... gentler type of presentation . . . ."[41]

29. The CBSA called Dr. Pierre Gélinas, Research Scientist, Food Research and Development Centre, Department of Agriculture and Agri-Food, who was qualified as an expert in the science of breads, dough, yeasts and cereal bars. In his expert report, Dr. Gélinas opined that the goods in issue were not pure vitamin preparations because they contained additives, i.e. ingredients that altered the character of the basic product.[42] On cross-examination, he indicated that he had not however performed a laboratory analysis of the goods.[43]

30. The CBSA also called Mr. Philippe St-Amour, Senior Chemist, Organic and Inorganic Products Section of the CBSA, who was qualified as an expert in inorganic chemicals. Mr. St-Amour opined that the vitamin A formulation and D3 formulation were not pure vitamins because their character had been altered by the addition of other ingredients (sucrose, gelatin, starch, and fats).[44] In his opinion, neither C-95 nor C-90 could be described as ". . . just ascorbic acid because that only describes one of the components in the product. One of them [also] contains a cellulose derivative and one [also] contains starch and lactose . . . ."[45]

---

32. *Transcript of Public Hearing*, 14 February 2005, at 78.
33. Expert Report of Dr. Jean-Claude Tritsch at 9-10.
34. *Transcript of Public Hearing*, 14 February 2005, at 85.
35. *Ibid*. at 103.
36. *Ibid*. at 117, 145.
37. *Ibid*. at 177.
38. *Ibid*. at 180.
39. *Ibid*. at 194.
40. *Ibid*. at 203.
41. *Ibid*. at 207.
42. Expert Report of Dr. Pierre Gélinas at 4.
43. *Transcript of Public Hearing*, 14 February 2005, at 225.
44. Expert Report of Mr. Philippe St-Amour at 3.
45. *Transcript of Public Hearing*, 14 February 2005, at 237.

ARGUMENT

31. For ease of reference, some of the key points in the arguments are summarized for each of the four imported products.

C-95

32. Roche Vitamins submitted that C-95 should be classified under tariff item No. 2936.27.00 as vitamin C and its derivatives. In making the submission, Roche Vitamins relied on *Hilary's Distribution Ltd. v. Deputy M.N.R.*,[46] where the Tribunal stated that it ". . . must determine whether the goods in issue are named or generically described in a particular heading. If they are, then they must be classified therein subject to any relative Chapter Note . . . ."[47]

33. Roche Vitamins submitted that C-95 was named or generically described in heading No. 29.36 (provitamins and vitamins) because it manufactures, markets and sells C-95 as vitamin C, or ascorbic acid; it publishes a product data sheet and material data safety sheet that describe C-95 as Vitamin C; its container and Workplace Hazardous Material Information System labels describe C-95 as vitamin C, or ascorbic acid; and its customers, e.g. "Jamieson", "Vita Health Products" and "Natural Factors",[48] purchase and use the product as vitamin C, or ascorbic acid.

34. Roche Vitamins also submitted that the Chapter Notes confirm the classification of C-95 in heading No. 29.36. Note 1 to Chapter 29 reads as follows: "Except where the context otherwise requires, the headings of this Chapter apply only to: . . . (c) The products of headings 29.36 . . . whether or not chemically defined . . . ." According to Roche Vitamins, the remaining paragraphs of Note 1 are not relevant in this instance.[49]

35. By way of contrast, the CBSA submitted that C-95 cannot be classified in Chapter 29. It is true that ascorbic acid is a separate chemically defined organic compound within the meaning of Note 1(a) to Chapter 29 and synonymous with vitamin C for purposes of heading No. 29.36. However, paragraphs (d) through (g) of the Note 1 provide an exhaustive list of the ingredients permitted in the above goods. Roche Vitamins' C-95 contains an ingredient that is not included in the permitted list, i.e. the binding agent, HPMC.

36. Moreover, HPMC is not a stabilizer within the meaning of Note 1 to Chapter 29. Stabilizers must not alter the character of the basic product. In this case, the additional ingredient does not have the function of stabilizing the substantial nature and dominant characteristics of C-95. Instead, its function is to improve the compressibility of the product, thereby making it easier for customers to manufacture tablets and capsules.

37. In making the above contention, the CBSA relied on: (1) *Stochem Inc. v. Deputy M.N.R.C.E.*;[50] (2) the *Explanatory Notes to the Harmonized Commodity Description and Coding System*;[51] and (3) certain rulings of the U.S. Customs Service. In *Stochem*, the Tribunal relied on a number of dictionary definitions that indicated that a "stabilizer", as used in the chemical context, implied preservation of the physical and chemical properties of the material being stabilized, i.e. of its substantial nature and dominant characteristics.

---

46. (25 September 1998), AP-97-010 (CITT).
47. *Ibid*. at 9.
48. Brief of Roche Vitamins Canada Inc. (Vitamins C-95 & C-90) at 8-9.
49. *Ibid*. at 10-12.
50. (29 January 1990), 2957 and 2989 (CITT) [*Stochem*].
51. Customs Co-operation Council, 2d ed., Brussels, 1986 [*Explanatory Notes*].

38. The *Explanatory Notes* to heading No. 29.36 state the following: ". . . (d) . . . The products of this heading may be stabilised for the purposes of preservation or transport . . . **provided** that the quantity added or the processing in no case exceeds that necessary for their preservation or transport and that the addition or processing does not alter the character of the basic product and render it particularly suitable for specific use rather than for general use."

39. In U.S. Customs Ruling No. HQ 961915,[52] the U.S. Customs Service determined that an imported product did not meet the requirements of heading No. 29.36 because the addition of minerals processed the vitamin far beyond that which was necessary for its preservation or transport. In addition, the precise formula in which the vitamins had been mixed rendered them suitable for specific use as a dietary supplement rather than for general use.

40. The CBSA contended that C-95 is properly classified in heading No. 30.03, as "[m]edicaments . . . consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale." According to the CBSA, ". . . [t]herapeutic is curative, and prophylactic is preventative . . . ."[53] The *Explanatory Notes* to heading No. 30.03 state that the heading "covers medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments. . . . The heading includes: . . . (2) Preparations containing a single pharmaceutical substance together with an excipient . . . (4) Colloidal solutions and suspensions . . . for medicinal purposes . . . ."

41. The CBSA relied on *Flora Manufacturing & Distributing Ltd. v. Deputy M.N.R.*,[54] in which the Tribunal classified St. John's wort oil extract in the above heading, finding that there was no requirement that a product be scientifically proven to be an effective medicament in order to be classified in the heading. It also relied on a case decided by the Federal Court of Appeal[55] that dealt with certain liquid vitamin and iron supplements. In that decision, the Federal Court of Appeal stated the following: "[if] . . . the ingestion of vitamins and minerals prevents or reverses a deficiency that may lead to a disease or an ailment, it must follow that the purpose of ingesting vitamins and minerals is to prevent that disease or ailment . . . ."

42. In short, the CBSA submitted that C-95 is properly classified in heading No. 30.03 because it was a mixture of two or more constituents that have therapeutic or prophylactic uses and meets the remaining criteria of the heading. Specifically, C-95 is properly classified under tariff item No. 3003.90.00, the "basket clause" for heading No. 30.03.

C-90

43. Roche Vitamins repeated the above submissions for C-90, all necessary changes being made. The CBSA did the same.

Vitamin A Formulation

44. Roche Vitamins submitted that its vitamin A formulation is classifiable under tariff item No. 2936.21.00 as vitamins A and their derivatives because it meets the test in *Hillary's* described earlier. In terms of the product being named or generically described in heading No. 29.36, Roche Vitamins repeated, all necessary changes being made, its argument under C-95 above.

45. In terms of Chapter Notes, Roche Vitamins contended that the relevant one is Note 1 to Chapter 29, which reads as follows: "Except where the context otherwise requires, the headings of this Chapter apply

52. Respondent's Brief, Tab 5.
53. *Transcript of Public Argument*, 15 February 2005, at 76.
54. (24 September 1998), AP-97-058 (CITT).
55. [2000] F.C.J. No. 1196 at para. 17 (F.C.A.) (QL).

only to: . . . (f) The products mentioned in . . . (c) [provitamins and vitamins] . . . with an added stabiliser (including and anti-caking agent) necessary for their preservation or transport . . . ." According to Roche Vitamins, the matrix of sugar, fish gelatin and corn starch with "dl-alpha tocopherol" as an antioxidant stabilize the vitamin A formulation by preventing the flow of oxygen through the matrix, thereby preventing the degradation of the active ingredient.

46. In opposing the above argument, the CBSA contended that the above matrix is *not* a stabilizer within the meaning of Note 1(f) to Chapter 29. According to the CBSA, as mentioned above, the Tribunal, in *Stochem*, held that the use of a substance as a "stabilizer" implies preservation of the physical and chemical properties of the material being stabilized. In this appeal, the use of the matrix changes the vitamin A from a fat soluble to a water soluble vitamin, as implied by the initials "CWS" in the name of the product.

47. In addition, argued the CBSA, the change no longer leaves the product suitable for general use and restricts it to a specific use, i.e. ". . . dry pharmaceutical and food preparations which are reconstituted with liquids, especially for effervescent tablets . . . ."[56] According to the CBSA, ". . . when you process it with a particular result in mind and you have a specific market or a specific segment of a market in mind, you are making it for a specific use . . . ."[57]

48. Moreover, submitted the CBSA, the vitamin A formulation has therapeutic and prophylactic uses and is therefore properly classified as a medicament in heading No. 30.03.

D3 Formulation

49. Roche Vitamins submitted that its D3 formulation is classifiable under tariff item No. 2936.29.00 as vitamin D and its derivatives because its meets the test in *Hillary's* described earlier. In terms of the product being named or generically described in heading No. 29.36, Roche Vitamins repeated, all necessary changes being made, its argument under C-95 above.

50. In terms of Chapter Notes, Roche Vitamins again contended that the relevant one is Note 1 to Chapter 29, which reads as follows: "Except where the context otherwise requires, the headings of this Chapter apply only to: . . . (f) The products mentioned in . . . (c) [provitamins and vitamins] . . . with an added stabiliser (including an anti-caking agent) necessary for their preservation or transport . . . ." According to Roche Vitamins, the matrix of sugar, hydrogenated soybean oil, hydrolyzed bovine gelatin and corn starch with "dl-alpha tocopherol" as an antioxidant stabilize the D3 formulation by preventing the flow of oxygen through the matrix, thereby preventing the degradation of the active ingredient.

51. On the other hand, the CBSA repeats, all necessary changes being made, the argument that it submitted above in connection with the vitamin A formulation.

DECISION

52. In appeals under section 67 of the *Act* concerning tariff classification, the Tribunal determines the proper classification of the goods under appeal in accordance with the *General Rules for the Interpretation of the Harmonized Commodity Description and Coding System*[58] and the *Canadian Rules*.[59] Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[60] and the *Explanatory Notes*. The *General Rules* are structured in a cascading form. If the

56. Respondent's Brief at 10.
57. *Transcript of Public Argument*, 15 February 2005, at 82.
58. *Supra* note 2, schedule [*General Rules*].
59. *Supra* note 2, schedule.
60. Customs Co-operation Council, 1st ed., Brussels, 1987 [*Compendium*].

classification of an article cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. The *Canadian Rules* reiterate that the classification of goods under the tariff item of a subheading or heading shall be determined according to the *General Rules*.

53. Roche Vitamins claims that all the goods in issue should be classified in heading No. 29.36. The tariff nomenclature reads as follows:

> . . .
>
> 29.36 Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent.
>
> . . .
>
> 2936.21.00 --Vitamins A and their derivatives
>
> . . .
>
> 2936.27.00 --Vitamin C and its derivatives
>
> . . .
>
> 2936.29.00 --Other vitamins and their derivatives
>
> . . .

54. Heading No. 29.36 is found in Chapter 29 (organic chemicals). The scope of heading No. 29.36 is limited, through the application of Note 1 to Chapter 29, to vitamins that are ". . . [s]eparate chemically defined organic compounds, whether or not containing impurities . . ." or that fall into the other categories outlined in the Chapter Note. A chemically defined compound is one that has a definite, specific, molecular structure.[61]

55. Note 1 to Chapter 29 indicates that vitamin products will be covered by heading No. 29.36 even if they are not chemically defined, if they contain ". . . an added stabiliser (including an anti-caking agent) necessary for their preservation or transport" or ". . . an added anti-dusting agent or a colouring or odoriferous substance added to facilitate their identification or for safety reasons, provided that the additions do not render the product particularly suitable for specific use than for general use".

56. These provisions are described in greater detail in the *Explanatory Notes* to heading No. 29.36, which read as follows:

> . . .
>
> The products of this heading may be stabilised for the purposes of preservation or transport:
>
> - by adding anti-oxidants,
> - by adding anti-caking agents (e.g., carbohydrates),
> - by coating with appropriate substance (e.g., gelatin, waxes or fats), whether or not plasticised, or
> - by absorbing on appropriate substances (e.g., silicic acid),
>
> **provided** that the quantity added or the processing in no case exceeds that necessary for their preservation or transport and that the addition or processing does not alter the character of the basic product and render it particularly suitable for specific use rather than for general use.
>
> . . .

57. In other words, Note 1 to Chapter 29 serves as an interpretative filter for heading No. 29.36. Roche Vitamins must not only prove that its vitamin products fit within the descriptive terms of the heading,

61. *Transcript of Public Hearing*, 14 February 2005, at 143, 229.

but must also prove that any additives to the products are listed in Note 1. This is the effect of Rule 1 of the *General Rules*, which stipulates that ". . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section and Chapter Notes . . . provided such headings or Notes do not otherwise require . . . ."

58. The fact that Note 1 to Chapter 29 only allows certain named additions to the substances contained in Chapter 29 raises an *a contrario* presumption that any other additions are disallowed. Therefore, the issue before the Tribunal is whether, due to the fact that they all contain added substances, the goods in issue are excluded from classification in heading No. 29.36 by the operation of Note 1. Unless the additions fall within one of the permissible categories listed earlier, the goods in issue will be excluded from classification in heading No. 29.36.

59. In the case of Roche Vitamins' C-95 and C-90, both formulations contain ascorbic acid plus one or more additions. Thus, they are not merely ". . . products of headings 29.36 to 29.39 . . ." as referred to in Note 1(c) to Chapter 29. C-95 contains 95 percent ascorbic acid and 5 percent HPMC. C-90 contains 90 percent ascorbic acid, 9 percent corn starch and 1 percent lactose. None of the above additions are stabilizers, solvents or other permissible substances that were added for the purpose of stabilization or transport. Neither are they anti-dusting agents or substances that were added for the purposes of identification or safety. In other words, the additions are not covered by paragraphs (d) through (g) of Note 1.

60. The Tribunal is therefore of the view that Roche Vitamins' C-95 and C-90 should not be classified in heading No. 29.36.

61. The Tribunal will now turn to the issue of whether C-95 and C-90 are *properly* classified.

62. The CCRA determined that C-95 and C-90 were properly classified in heading No. 30.03, which reads as follows: "Medicaments . . . consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale."

63. The *Explanatory Notes* to heading No. 30.03 state that the heading covers ". . . medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments. These preparations are obtained by mixing together two or more substances . . . . The heading includes: (1) Mixed medicinal preparations such as those listed in an official pharmacopoeia . . . (2) Preparations containing a single pharmaceutical substance together with an excipient, sweetening agent, agglomerating agent, support, etc. . . ."

64. There was evidence that vitamin C was listed in the United States Pharmacopoeia.[62] Moreover, there was also evidence that it was a pharmaceutical substance, i.e. a pharmaceutical preparation or medicinal drug. Until January 2004, when it began its natural product pre-market approval regime, the Department of Health required that vitamins receive drug identification numbers,[63] although this fact alone was not conclusive. The expert witnesses who appeared in this case expressed the opinion that vitamins could be either a drug, due to their medicinal properties, or nutritional substances, depending on their application and dosage level.[64] Dr. Tritsch testified that a vitamin deficiency is a disease[65] and that vitamin C is used as a treatment for scurvy[66] and at the start of a flu.[67]

62. *Ibid*. at 26, 95.
63. *Ibid*. at 205-206.
64. *Ibid*. at 125, 131, 132, 138, 150, 250-51.
65. *Ibid*. at 155.
66. *Ibid*. at 132.
67. *Ibid*. at 138.

65. The evidence was clear that C-95 and C-90 were preparations containing an excipient,[68] i.e. HPMC and corn starch respectively. Therefore, C-95 and C-90 would fit squarely within the scope of heading No. 30.03, taking into account the *Explanatory Notes*, under Rule 1 of the *General Rules*. Under Rule 1 of the *Canadian Rules*, the Tribunal is obliged to determine ". . . the classification of goods in the tariff items [of] a subheading or of a heading . . . according to the terms of those tariff items . . . ." There was no evidence that C-95 and C-95 contained any of the substances listed in the other tariff items; therefore, the Tribunal finds that the two products are properly classified under tariff item 3003.90.00

66. By way of contrast to its C-95 and C-90, Roche Vitamins' vitamin A formulation and D3 formulation only contain additions that are described in Note 1 to Chapter 29 and, therefore, should be classified in heading No. 29.36.

67. The vitamin A formulation is stabilized both chemically (by "dl-alpha tocopherol") and physically (the fish gelatin and sucrose act as a barrier against light and moisture).[69] One gram of the formulation contains:

139 mg	vitamin A palmitate
1.25 mg	"dl-alpha tocopherol"
300 mg	fish gelatin
300 mg	sucrose
259.75 mg	corn starch

68. Dr. Tritsch testified that the amounts and ingredients used to stabilize the vitamin A formulation did not exceed what was needed for preservation and transport.

69. The CBSA argued that Roche Vitamins' vitamin A formulation should not be classified in heading No. 29.36 for four reasons:

- the non-vitamin components exceed the amount necessary for preservation and transport of the product;
- there is less vitamin content in the product than in comparable products covered by the *Compendium*;
- the added components were prepared for a specific end use rather than for general use; and
- this classification would be inconsistent with the classification practice of the U.S. Customs and Border Protection.

70. Regarding the first point, the CBSA contended that the vitamin A active ingredient was too low, i.e. that it did not predominate by weight, and that the vitamin A formulation could therefore not be classified as a vitamin. Dr. Tritsch testified that, in his experience, the buyers of the vitamin A formulation want Vitamin A and not the starch or stabilizing agents.[70] The Tribunal accepts the evidence that the consumer is buying the active ingredient and that the amounts of any additives were the amounts necessary for stabilizing and transporting, regardless of the relative weights. Moreover, nothing in the tariff item speaks to the issue of relative weight.

---

68. ". . . 'Excipient' is a very broad name. It could be a binder, it could be a lubricant, could be a disintegrator, could be an anti-dusting agent, could be a flow agent. . . . Excipients are more the inert materials . . . ." *Transcript of Public Hearing*, 14 February 2005, at 130-31.
69. Expert Report of Dr. Jean-Claude Tritsch at 7.
70. Transcript of Public Hearing, 14 February 2005, at 120.

71. Regarding the second point, the CBSA submitted that the vitamin A content of the formulation is too low and does not conform to the percentage content in the *Annex to the Compendium of Classification Opinions*.[71] The CBSA argued that the percentage weight that appears in the right hand column is the minimum active ingredient concentration in order to qualify as a vitamin. Roche Vitamins argued that the 15 percent mentioned therein was merely a part of the description of the goods referred to in the Annex. No CBSA witness had personal knowledge of the significance of the 15 percent figure, and hence no conclusion may be drawn from its being mentioned in the Annex. In addition, the product in that case was not the same product as those being considered in this appeal. In the same vein, the CBSA argued that other formulations of vitamin A, e.g. Rovimix 500,[72] contained a much higher concentration of vitamin A than the goods in issue, implying that Roche Vitamins' vitamin A formulation contained more stabilizers or other ingredients than necessary. Dr. Tritsch testified that Rovimix D3 500, which is used in animal feeds, uses an antioxidant that allowed a higher concentration of active ingredients. However, the antioxidant used to achieve these higher concentrations of vitamin A is not suitable for human consumption.

72. As another example, the CBSA referred to BASF's Lutavit A 500, which is another formulation of vitamin A referred to in the *Compendium*, with a higher concentration of vitamin A than the goods in issue.[73] Again, Dr. Tritsch testified that a different antioxidant was used than in the goods in issue, allowing for a higher concentration. He also indicated that the amount of stabilizer necessary is a relative concept, depending on how long the material is to remain stable, etc. In this case, there was no evidence adduced to prove that the amount of substances in the vitamin A formulation was greater than necessary for stabilization and transport.

73. Regarding the third point, the CBSA argued that the addition of "dl-alpha tocopherol" and the matrix of fish gelatin and sucrose narrowed the range of uses for vitamin A to the point where it was no longer suitable for general use; rather, it was only available for a specific end use, i.e. human, not animal, consumption.[74] In the Tribunal's view, this puts too narrow a spin on the phrase in Note 1 to Chapter 29. Dr. Tritsch testified that the vitamin A formulation could be used in foods (soups, food fortification, cereal bars and beverages), tablets, capsules and effervescent tablets.[75] The Tribunal is satisfied that the wide panoply of uses for which the formulation *is* available rebuts the CBSA's argument.

74. Regarding the fourth point, the CBSA cited three U.S. customs rulings. In the Tribunal's opinion, the rulings are not binding on it and, in any event, are distinguishable from the present case. All three products mentioned in the rulings would have already been excluded from classification in heading No. 29.36 for reasons other than consideration of specific versus general use. The first ruling[76] concerns a mixture of vitamins with minerals formulated as a food additive. Clearly, the addition of minerals, which are not included for the purpose of stabilizing or transporting the vitamin, would remove the product from heading No. 29.36. The second ruling[77] considers another mixture of vitamins, minerals and excipients used in the making of multivitamin tablets. Again, the presence of a mineral, which is not used for stabilizing or transporting the vitamin, disqualifies the product from being classified in heading No. 29.36. The third ruling[78] examines beta-carotene in an oil suspension. There is no claim that the dilution in oil is for stabilization or transport purposes; rather, it is meant to meet the importer's specific end use.

75. Therefore, in the Tribunal's opinion, the vitamin A formulation is classifiable in heading No. 29.36 as a vitamin in an oily solvent that contains an added stabilizer necessary for its preservation or transport,

---

71. CBSA's Additional Authorities, Tab 5.
72. *Transcript of Public Hearing*, 14 February 2005, at 115-16.
73. *Ibid*. at 124.
74. *Transcript of Public Argument*, 15 February 2005, at 61-63.
75. *Transcript of Public Hearing*, 14 February 2005, at 66.
76. CBSA's Additional Authorities, Tab 5.
77. *Ibid*., Tab 6.
78. *Ibid*., Tab 7.

but that does not render the formulation more particularly suitable for specific use than for general use. Since the formulation is readily classifiable, under Rule 1 of the *General Rules*, in this manner, it will not be necessary for the Tribunal to move on to the other *General Rules*, including Rule 3, which deals with "essential character". Under Rule 1 of the *Canadian Rules*, the formulation is readily classifiable under tariff item No. 2936.27.00 as vitamin A and its derivatives.

76. Vitamin D3 (cholecalciferol) deteriorates when exposed to air and is insoluble in water.[79] It must therefore be stabilized for preservation and transport. Roche Vitamins' D3 formulation is stabilized both chemically (by "dl-alpha tocopherol") and physically (the hydrolyzed bovine gelatin and sucrose act as a barrier against light and moisture).[80]

77. The arguments presented by both parties are essentially the same for the D3 formulation and the vitamin A formulation and, therefore, the D3 formulation product should also be classified in heading No. 29.36, under Rule 1 of the *General Rules*. Under Rule 1 of the *Canadian Rules*, the formulation is readily classifiable under tariff item No. 2936.29.00 as other vitamins and their derivatives.

78. In light of the foregoing, the Tribunal finds that C-95 and C-90 are properly classified under tariff item No. 3003.90.00 and that the D3 formulation and the vitamin A formulation should be classified under tariff item No. 2936.29.00.

79. Therefore, the appeal is allowed in part.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

79. Note (K) of the *Explanatory Notes* to heading No. 29.36.
80. Expert Report of Dr. Jean-Claude Tritsch at 9.

IN THE MATTER OF an appeal heard on February 14 and 15, 2005, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency with respect to a request for redetermination under subsection 60(4) of the *Customs Act*.

BETWEEN

ROCHE VITAMINS CANADA INC. **Appellant**

AND

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

CORRIGENDUM

In the last sentence of paragraph 75 of the statement of reasons for the decision of the Canadian International Trade Tribunal in the above matter, the reference to tariff item No. 2936.27.00 should be to tariff item No. 2936.21.00. In addition, paragraph 78 should read as follows:

In light of the foregoing, the Tribunal finds that C-95 and C-90 are properly classified under tariff item No. 3003.90.00 and that the D3 formulation and the vitamin A formulation should be classified under tariff item No. 2936.29.00 and tariff item No. 2936.21.00 respectively.

By order of the Tribunal,

_____

Hélène Nadeau
Secretary