



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-042

New Asia (Brampton) Food Centre
(2002) Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, July 31, 2007*

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IN THE MATTER OF an appeal heard on May 24, 2007, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency dated October 19 and November 6, 2006, with respect to requests for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

NEW ASIA (BRAMPTON) FOOD CENTRE (2002) INC.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Serge Fréchette
Serge Fréchette
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 24, 2007
Tribunal Members:	Ellen Fry, Presiding Member Zdenek Kvarda, Member Serge Fréchette, Member
Counsel for the Tribunal:	Alain Xatruch
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal under subsection 67(1) of the *Customs Act*¹ from decisions made on October 19 and November 6, 2006, by the President of the Canada Border Services Agency (CBSA), under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the goods known as “Bánh Pho’Thu’O’Ng Hạng – Chantaboon Rice Stick” (the goods in issue) are properly classified under tariff item No. 1902.30.40 of the schedule to the *Customs Tariff*² as other pasta without meat, as determined by the CBSA, or should be classified under tariff item No. 1902.19.29 as other uncooked pasta, not stuffed or otherwise prepared, containing flour and water only, as claimed by New Asia (Brampton) Food Centre (2002) Inc. (New Asia).

3. The goods in issue are rice stick noodles made of rice flour and water. They are manufactured in the shape of long flat noodles in 1-mm, 3-mm and 5-mm widths and are packaged in clear cellophane.

4. The goods in issue were imported between July and December 2005.

5. The relevant nomenclature of the *Customs Tariff* that was in effect when the goods in issue were imported reads as follows:

...

19.02 **Pasta, whether or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagna, gnocchi, ravioli, cannelloni; couscous, whether or not prepared.**
-Uncooked pasta, not stuffed or otherwise prepared:

...

1902.19 **- -Other**

...

- - -Other, containing flour and water only:

...

1902.19.29 - - - -Other

...

1902.30 **-Other pasta**

...

1902.30.40 - - -Other, without meat

...

1. R.S.C. 1985 (2d Supp.), c. 1 [Act].

2. S.C. 1997, c. 36.

6. At the hearing, the CBSA raised three preliminary issues. First, it objected to the filing by New Asia of certain instant rice noodles as evidence, on the grounds that they were not the goods in issue and that they were irrelevant to the case. Counsel asked that, if the Tribunal were to accept the evidence, it give appropriate weight to the evidence, considering that the instant rice noodles were not the goods in issue. Second, counsel asked the Tribunal to take into consideration the fact that the CBSA only received notice the day before the hearing that New Asia would be testifying and that this was prejudicial, considering the time left to prepare. Third, counsel requested that an excerpt from Chapter 20 of the *Customs Tariff*, which was not included in the CBSA's brief, be entered as evidence.

7. The Tribunal responded to the first issue by deciding to admit the instant rice noodles into evidence and, as it does with all evidence, by giving it the weight that it deserved. New Asia explained how the instant rice noodles were relevant to its position. With respect to the second issue, the Tribunal noted that New Asia had written and circulated a letter on May 12, 2007, which gave advance notice of the main content of New Asia's testimony and indicated that there would be a demonstration involving two types of noodles at the hearing. As the Tribunal received this letter on May 14, 2007, New Asia satisfied the requirement set out in subsection 34(3) of the *Canadian International Trade Tribunal Rules*³ that any additional material, upon which an appellant intends to rely at the hearing, be filed with the Tribunal at least 10 days before the hearing. The Tribunal allowed New Asia's representative, Ms. Linda Hua, to act as a witness, while also indicating that she would be open to cross-examination by the CBSA, which would not necessarily be limited to the demonstration of the two types of noodles. Concerning the third issue, the Tribunal agreed to add the excerpt from Chapter 20 of the *Customs Tariff* to the record, given that the Tribunal could, in any event, take judicial notice of this material.

8. Ms. Hua, Manager at New Asia, gave testimony which consisted primarily of a physical demonstration involving the goods in issue and a brand of instant rice noodles.⁴ Both types of noodles were first shown to the Tribunal in their original dry state and then soaked in warm water for a period of exactly 20 minutes. Afterwards, Ms. Hua placed samples of both types of noodles in labelled cups and plates for comparison purposes. Ms. Hua submitted that the goods in issue had not changed colour much and, although somewhat pliable, were quite hard and could not be eaten or digested. In comparison, she submitted that the instant rice noodles had changed colour, were much more pliable and, with a bit more soaking, could be eaten. Ms. Hua concluded that there was a big difference between the goods in issue and instant rice noodles and that, after soaking for 20 minutes, the goods in issue should not be considered cooked, as their appearance, texture and other attributes indicated that they were uncooked.

ANALYSIS

9. For the purposes of this appeal, the Tribunal must follow sections 10 and 11 of the *Customs Tariff*. Section 10 provides that the classification of imported goods shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁵ and the *Canadian Rules*.⁶ Section 11 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*⁷ and to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.⁸

10. The *General Rules* consist of six rules structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2 and so on, until classification is completed.

3. S.O.R./91-499.

4. Vifon[®] Phở Bò, Vietnamese style instant rice noodles.

5. *Supra* note 2, schedule [*General Rules*].

6. *Supra* note 2, schedule.

7. World Customs Organization, 2d ed., Brussels, 2003.

8. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

11. Rule 1 of the *General Rules* reads as follows:
 1. 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 following provisions.
12. Rule 6 of the *General Rules* reads as follows:
 6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.
13. In addition, Rule 1 of the *Canadian Rules* reads as follows:
 1. For legal purposes, the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the General Rules for the Interpretation of the Harmonized System, on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.
14. The Tribunal notes that the parties agree that the goods in issue are pasta and that they should be classified in heading No. 19.02. The dispute between the parties arises only at the subheading level. The issue at this level is whether the goods in issue are properly classified as other pasta or should be classified as other uncooked pasta, not stuffed or otherwise prepared. In other words, the issue is whether the rice noodles are “uncooked”.
15. The parties also agree that some steaming is required in the manufacturing process to make rice noodles and that the goods in issue were steamed less than instant rice noodles when they were manufactured. The literature contained in the CBSA’s brief indicates that, unlike wheat, rice does not contain gluten and that steaming is therefore required to gelatinize the rice starch in order to obtain cohesive dough. Once extruded, the noodles can also be steamed to improve their stability and texture.
16. New Asia argued that, in order to be considered “cooked”, food must be cooked to the point where it is ready-to-eat. New Asia used the example of a potato that, when merely cooked for one minute, would not be considered to have been “cooked” because it would not be ready-to-eat. New Asia stated that, since the goods in issue are not ready-to-eat, they cannot be considered to be “cooked”.
17. New Asia also argued that steaming is not always used as a form of cooking, giving the examples of paper and textiles, which are steamed as part of the manufacturing process, but are not considered to have been cooked.
18. New Asia stated that instant rice noodles are “cooked” because they can be eaten after merely being soaked in warm water, whereas the goods in issue are not ready-to-eat after merely being soaked.

19. The CBSA argued that steaming is a form of cooking and that, therefore, because the noodles were steamed during the manufacturing process, the noodles are not “uncooked”. The CBSA also provided a ruling⁹ by the World Customs Organization (WCO) to indicate how a rice noodle product should be classified.

20. As submitted by the CBSA, the *Larousse Gastronomique* defines “cooking” as “[t]he process of heating food so as to render it safe and palatable”¹⁰ This is consistent with New Asia’s view of the meaning of “cooking”. The Tribunal accepts this definition. Food that has been “cooked” is food that has undergone the process of “cooking”. “Uncooked” means something that is “not cooked”. In other words, the rice noodles should be considered “uncooked” if they have not undergone a process of heating that renders them safe and palatable.

21. The Tribunal notes that the *Explanatory Notes* to heading No. 19.02 seem to be consistent with this definition of the term “cooking”. The relevant portion of the *Explanatory Notes* reads as follows: “The pasta of this heading may be cooked *Cooking serves to soften the pasta without changing its basic original form*” [emphasis added]. Therefore, it could be said that “cooking” serves to render the pasta palatable.

22. The Tribunal agrees with New Asia that, when a product has been steamed, it does not necessarily mean that it has been cooked. The evidence is clear that rice noodles cannot be manufactured without being steamed. The rice flour and water will not hold together to form noodles unless they are steamed. The purpose of the steaming is to enable the rice flour and water to hold together, not to soften the pasta or otherwise render it safe and palatable. Therefore, in the Tribunal’s view, the steaming that has occurred is part of the manufacturing process; it is akin to the steaming that occurs for paper and textiles rather than a cooking process. The Tribunal notes that, if the CBSA’s position were accepted, it would mean that rice pasta could never be classified in subheading No. 1902.11 or 1902.19, because it could never be considered to be uncooked.

23. Furthermore, the physical demonstration conducted by New Asia clearly established that, even after having been soaked in warm water for 20 minutes, the goods in issue were not palatable, i.e. based on the definition discussed above, they were not cooked.

24. Section 11 of the *Customs Tariff* requires that the Tribunal have regard to the WCO classification advice. Although a WCO ruling was provided by the CBSA in support of its case, the evidence did not indicate whether the product that was the subject of this advice was the same as the goods in issue, or to what extent it was similar. The WCO advice refers to “. . . dried rice noodles packed in a plastic bag . . .” and states that the “. . . products have been pre-cooked” However, it is not clear whether the nature of the “pre-cooking” is comparable to the steaming of the goods in issue. Accordingly, the Tribunal is not convinced that the WCO classification advice applies to the goods in issue.

9. Respondent’s brief, Tab 25, Classification advice provided by the Secretariat to Member administrations, file reference L07794A (letter 01.NL.0394), 5 July 2001.

10. Respondent’s brief, Tab 20.

DECISION

25. In light of the foregoing and in accordance with Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, the Tribunal finds that the goods in issue should be classified under tariff item No. 1902.19.29 as other uncooked pasta, not stuffed or otherwise prepared, containing flour and water only. The Tribunal notes that, although New Asia drew a comparison between the degree of steaming applied to the goods in issue and to instant rice noodles, the Tribunal has not drawn any conclusion about the tariff classification of instant rice noodles.

26. Consequently, the appeal is allowed.

Ellen Fry

Ellen Fry
Presiding Member

Zdenek Kvarda

Zdenek Kvarda
Member

Serge Fréchette

Serge Fréchette
Member