



Ottawa, Wednesday, February 12, 1992

Appeal No. AP-89-214

IN THE MATTER OF an appeal heard on October 30, 1991,
under section 67 of the *Customs Act*, R.S.C., 1985, c. 1
(2nd Supp.), as amended;

AND IN THE MATTER OF six decisions of the Deputy
Minister of National Revenue for Customs and Excise dated
August 11, 1989, made pursuant to subsection 63(3) of the
Customs Act.

BETWEEN

LITTLE BEAR ORGANIC FOODS

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

John C. Coleman
John C. Coleman
Member

Michèle Blouin
Michèle Blouin
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-89-214

LITTLE BEAR ORGANIC FOODS

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

This is an appeal under section 67 of the Customs Act regarding six decisions dated August 11, 1989, by the Deputy Minister of National Revenue for Customs and Excise to the effect that tortilla chips imported into Canada should be classified under tariff item No. 1905.90.90 as "other bakers' wares." The appellant contends that these imported goods should be classified under tariff item No. 1905.90.13 as "other bread."

HELD: *The appeal is dismissed. The Tribunal finds that the subject imported goods are not bread and that they are properly classified under tariff item No. 1905.90.90. as "other bakers' wares."*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: October 30, 1991
Date of Decision: February 12, 1992*

*Tribunal Members: W. Roy Hines, Presiding Member
John C. Coleman, Member
Michèle Blouin, Member*

Counsel for the Tribunal: Robert Desjardins

Clerk of the Tribunal: Janet Rumball

*Appearances: Peter Collins, for the appellant
Gilles Villeneuve, for the respondent*

Appeal No. AP-89-214

LITTLE BEAR ORGANIC FOODS

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

TRIBUNAL: W. ROY HINES, Presiding Member
JOHN C. COLEMAN, Member
MICHÈLE BLOUIN, Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ from six decisions of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) ruling that tortilla chips imported into Canada by the appellant from the United States should be classified under tariff item No. 1905.90.90 as "other bakers' wares" and not under tariff item No. 1905.90.13 as "other bread" as claimed by the appellant. There is no dispute between the parties that the appropriate heading is 19.05 and the appropriate subheading is 1905.90 in the *Customs Tariff*. The issue is whether the goods are a form of bread or something else and their appropriate classification under the *Customs Tariff*.

Counsel for the appellant did not call any witnesses, but relied on a sworn affidavit from Mr. Michael Brown, Controller of the appellant, as to the accuracy of the documents entitled Organic Yellow and Blue Corn Tortilla Chips - Ingredients and Little Bear Organic Foods - Product - Ingredients & Manufacturing Process² and on a written submission.

Counsel for the respondent called two witnesses. The first was Mr. Thomas Asensio, President of Pepe's Mexican Foods, Etobicoke, and a member of the Board of Directors of the Canadian Potato Chip and Snack Food Association. Mr. Asensio testified that the majority of tortilla chips are packaged in small consumer-type packages, are positioned in retail stores in the snack food section along with potato chips and have a 90-day or longer shelf life. He contrasted tortilla chips with tortillas, which he claimed are normally found in another part of a retail store, are sold either in fresh or frozen form and have a short shelf life (about 10 days). He also stated that chips are made with different ingredients than tortillas, such as oil, salt and other seasoning. In response to a question from counsel for the appellant, Mr. Asensio noted that there are many "cross-over" snack products that may be found in more than one area of a retail store, e.g., bagel snacks that are fried or seasoned, or tortilla chips that may be marketed in the deli section of a store. The witness also described the process of making tortilla chips that essentially consists of extruding a corn meal product (massa) through a sheeter, cutting it to a desired shape, baking to reduce moisture content, passing the product through a multi-pass conveyer to equilibrate moisture and temperature, and deep frying it with the appropriate seasoning.

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1. R.S.C., 1985, c. 1 (2nd Supp.), as amended.
 2. The documents are in the appellant's brief.

The respondent's second witness was Dr. Anne Selby of the Ryerson Polytechnical Institute who qualified as an expert witness and was accepted as such by counsel for the appellant. Dr. Selby testified that the common consumer expectation of a bread is that it is a carbohydrate product with small amounts of flavouring and leavening ingredients that is usually baked and is very low in fat content. Dr. Selby stated that she would not consider tortilla chips to be a bread because of their fat content which, according to a document called Bowes and Church's Food Values of Portions Commonly Used,³ shows the fat content of tortilla chips to be about 25 percent. That document also lists tortilla chips under the heading "Chips & Snacks" along with such products as pretzels and potato chips. Dr. Selby referred to a variety of fried and processed products listed in the document that have high fat contents similar to those of tortilla chips.

Counsel for the appellant, in the Tribunal's view, correctly identified the issue as being whether tortilla chips, for the purposes of tariff classification, are a form of bread or whether the frying process alters the final product to such a degree that it can no longer be considered a form of bread. In this connection, counsel for the appellant argued that since tortillas were a form of unleavened bread, tortilla chips, even though further processed than tortillas, must be part of the same product family, i.e., the bread group. As such, following the general rule of tariff classification that goods fall under the tariff item which most specifically describes them, tortilla chips are more properly classified under tariff item No. 1905.90.13 as "other bread" than under the more general tariff item providing for "other bakers' wares."

Counsel for the respondent, on the other hand, argued that the fat content of tortilla chips was so high that it took them out of the bread category. In support of his argument, counsel drew on the evidence provided by Dr. Selby concerning the composition of the tortilla chips, their nutritional characteristics and the ordinary understanding of what is meant by bread and snack foods. He also referred to the evidence of Mr. Asensio concerning the marketing of tortilla chips and their categorization by "Bowes and Church" and the U.S. Department of Agriculture as being snack foods rather than breads.

The Tribunal notes that the parties in this instance are in agreement that the appropriate tariff heading is 19.05 and the appropriate subheading is 1905.90, and that the only issue is the correct eight-digit level classification to be applied. As suggested by counsel for the appellant, the Tribunal must rely on the evidence in making this determination. In this connection, it is interesting to note that subheading No. 1905.90 is itself a basket or residual classification under the bread and pastry category, that the sequence of specificity within that item flows from breads to biscuits, pizza and quiche, pretzels, communion wafers and others, and that the category "snack foods" does not appear under any of these headings. (There is reference to certain foods that one might regard as snack foods, e.g., corn chips, cheese sticks, under the statistical numbering, but this is not relevant to our determination.) Of these various categories, the Tribunal agrees with the parties that there are only two possible classifications that might encompass tortilla chips, namely, tariff item No. 1905.90.13 "other bread" or tariff item No. 1905.90.90 "other."

In making a determination of this kind, the Tribunal must take into account not only the production process involved, but also the nature of the imported product, its ingredients, normal use, the characterization of the product by the trade and the common understanding of what the product is or

3. Pennington, Jean A.T., 1983, Nichols Church, Helen, Philadelphia, J.B. Lippincott Company, 14th edition.

purports to be. The Tribunal does not question the fact that tortilla chips are, by their very nature, an extension of the tortilla, which is an unleavened bread product. This is clearly established by the evidence from both the appellant and the respondent.

Tortilla chips are, however, the product of a manufacturing process which goes well beyond what would be involved in making bread. Indeed, their basic characteristics differ substantially from what one might regard as bread. The evidence before the Tribunal is that tortilla chips are not marketed as bread, are not regarded by the consumer or the trade as bread, incorporate ingredients not normally found in bread, are not regarded by food scientists and nutritionists as bread because of their very high fat content and are regarded by the trade literature as snack foods.

For the reasons set out in the previous paragraph, the Tribunal has concluded that tortilla chips, by any reasonable standard, cannot be considered to be bread. Under the circumstances, given the limited options for classification under subheading No. 1905.90, the Tribunal concurs with the decision of the Deputy Minister that tortilla chips are most properly classified under tariff item No. 1905.90.90.

The appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

John C. Coleman
John C. Coleman
Member

Michèle Blouin
Michèle Blouin
Member