



Ottawa, Monday, January 20, 1992

Appeal No. AP-90-197

IN THE MATTER OF an appeal heard on October 18, 1991, under section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.) as amended;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated February 9, 1991, with respect to a request for a re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

UPJOHN INTER-AMERICAN CORPORATION

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the goods should be classified under tariff item No. 2937.92.00 as oestrogens and progestogens.

John C. Coleman
John C. Coleman
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Robert J. Martin
Robert J. Martin
Secretary

Ottawa, Monday, January 20, 1992

Appeal No. AP-90-146

IN THE MATTER OF an appeal heard on October 18, 1991, under section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.) as amended;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated September 21, 1990, with respect to a request for a re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

UPJOHN INTER-AMERICAN CORPORATION

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the goods should be classified under tariff item No. 2937.92.00 as oestrogens and progestogens.

John C. Coleman
John C. Coleman
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-197

Appeal No. AP-90-146

UPJOHN INTER-AMERICAN CORPORATION

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE

Respondent

The appellant is a manufacturer of pharmaceutical products and operates a processing plant in Orangeville, Ontario. On January 19, February 8, May 16, September 11 and December 13, 1989, it imported the product at issue, a melengestrol acetate (MGA) and starch mixture, from an affiliated plant in Kalamazoo, Michigan. At issue in this appeal is whether melengestrol acetate, in mixture with starch, should be classified under tariff item No. 3003.39.99 as other medicaments containing hormones or other products, but not containing antibiotics or, as claimed by the appellant, under tariff item No. 2937.92.00 as oestrogens and progestogens.

HELD: *The Tribunal finds that the goods should be classified under tariff item No. 2937.92.00 as oestrogens and progestogens and, accordingly, allows the appeal.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: October 18, 1991
Date of Decision: January 20, 1992*

*Tribunal Members: John C. Coleman, Presiding Member
Kathleen E. Macmillan, Member
Robert C. Coates, Q.C., Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Janet Rumball

*Appearances: J.G. Hodder and I.D. Rodrigues, for the appellant
L.J. Wall, for the respondent*

Appeal No. AP-90-197

Appeal No. AP-90-146

UPJOHN INTER-AMERICAN CORPORATION

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE

Respondent

TRIBUNAL: JOHN C. COLEMAN, Presiding Member
KATHLEEN E. MACMILLAN, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ following two decisions of the Deputy Minister of National Revenue for Customs and Excise dated September 21, 1990, and February 9, 1991.

The appellant is a manufacturer of pharmaceutical products and operates a processing plant in Orangeville, Ontario. On January 19, February 8, May 16, September 11 and December 13, 1989, it imported the product at issue, a melengestrol acetate (MGA) and starch mixture, from an affiliated plant in Kalamazoo, Michigan. At issue in this appeal is whether MGA, in mixture with starch, should be classified under tariff item No. 3003.39.99 as other medicaments containing hormones or other products, but not containing antibiotics or, as claimed by the appellant, under tariff item No. 2937.92.00 as oestrogens and progestogens. The exact provisions of the two tariff items are as follows:

- 29.37 *Hormones, natural or reproduced by synthesis; derivatives thereof, used primarily as hormones; other steroids used primarily as hormones.*
- 2937.20 - *Adrenal cortical hormones and their derivatives:*
- 2937.92.00 - - *Oestrogens and progestogens*
- 30.03 *Medicaments (excluding goods of heading No. 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.*
- *Containing hormones or other products of heading No. 29.37 but not containing antibiotics:*

1. R.S.C., 1985, c. 1 (2nd Supp.) as amended.

3003.39 -- Other

3003.39.99 - - - - Other

Undisputed evidence characterized MGA as a progestational steroid (progestogen) that suppresses estrus (ovulation) while promoting weight gain in beef heifers being fattened for slaughter. Prior to export to Canada, the appellant mixes the MGA with starch at its Kalamazoo plant in a ratio of approximately 1.46 percent steroid (14,600 parts per million) to 98.54 percent starch. At its Orangeville operations, the appellant uses the MGA and starch mixture as an additive in the production of MGA 100 Premix, a feed additive for heifers. The end product contains approximately 220 parts per million MGA, with the balance consisting of soyabean hulls, mineral oil, and a small amount of starch. The appellant sells the Premix in 25-kg bags. It is mixed into animal feed to obtain concentrations of approximately 0.8 to 1 part per million MGA.

Witnesses testifying at the hearing on behalf of the appellant explained that starch is added to the MGA for three reasons. Firstly, the starch makes the MGA more stable by extending its shelf life from 18-24 months to some 60 months. The appellant introduced various confidential test results indicating the hormone degenerates at a slower pace when mixed with starch. Secondly, because pure MGA is a very potent substance that is readily absorbed through the skin, starch makes the product easier and safer to handle and transport. Finally, according to the witnesses, MGA has a tendency to agglomerate and the addition of starch facilitates the dispersion of the product when it is mixed with feed. The witnesses agreed that starch is an inert substance that does not chemically alter the steroid.

Witnesses appearing for the respondent testified that pure MGA is quite a stable substance and is easily capable of travelling across the border without the addition of starch. According to one witness, the high temperature and narrow range over which it melts and the fact that it remains intact when bombarded by electrons indicate that MGA is inherently very stable.

In deciding which tariff item best describes the product at issue, the Tribunal considered the ordinary meaning of the words contained in each item and the accompanying Explanatory Notes.² Beginning with tariff item No. 3030.39.99, the Tribunal interprets this provision as referring to substances used to treat or prevent disease. This is indicated by the following dictionary definitions for the words therapeutic and prophylactic:

Therapeutic: curative; of the healing art; ...

Prophylactic: tending to prevent disease or other misfortune ...³

Counsel for the respondent argued that because the term prophylactic is used in connection with condoms, it can also mean the prevention of pregnancy, something done by MGA as well. The Tribunal notes, however, that an early use for condoms during wartime was disease

2. Explanatory Notes, Harmonized Commodity Description and Coding System, Customs Co-operation Council, Brussels, First Edition, 1986.

3. The Concise Oxford Dictionary, 7th edition, Oxford 1984, pp. 1110 and 826.

prevention, a purpose to which they have returned in recent years. The common, ordinary meaning of tariff heading No. 30.30, in its entirety, is that it refers to medicinal preparations used to treat or prevent sickness. This interpretation is supported by the Explanatory Notes to heading No. 30.30, which state that the heading covers medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments. MGA is not a medicament in the ordinary sense of the word. Estrus is a purely natural phenomenon and its suppression is not something that could be characterized as the treatment or prevention of disease or ailments.

With regard to tariff heading No. 29.37, the Tribunal accepts that the MGA is a steroid that is used as a hormone. Pursuant to Note 1(f) to Chapter 29 of Schedule I to the Customs Tariff, the MGA and starch mixture may still be classified under heading No. 29.37 as hormones, natural or reproduced by synthesis, provided the starch can be characterized as a stabilizer necessary for the preservation or transport of the steroid. The question facing the Tribunal, therefore, is whether the starch added to the steroid constitutes a stabilizer and not simply a diluent, and whether it is necessary for the transport or preservation of the MGA.

The Tribunal accepts the view of the witnesses for the respondent that the steroid is a relatively stable substance that could travel and survive for months or even years without the addition of starch. However, the evidence clearly establishes that starch extends the life of the steroid by three or more years and eliminates the need for refrigeration. This makes its transport and handling much easier and less expensive. The Tribunal sees nothing in the Explanatory Notes or dictionary definitions of the word stabilizer to restrict its meaning to only substances used in small quantities or for highly unstable elements. The addition of starch makes an already stable product even more stable than it is otherwise.

The evidence also establishes that the starch is an inert substance that does nothing to change the basic properties of the steroid. The addition of starch does not, in the Tribunal's view, make the goods in issue any less a steroid. It simply makes the steroid easier to work with, administer, transport and store.

In conclusion, the Tribunal finds that the goods should be classified under tariff item No. 2937.92.00 as oestrogens and progestogens and, accordingly, allows the appeal.

John C. Coleman
John C. Coleman
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member