



Ottawa, Wednesday, May 11, 1994

Appeal No. AP-93-047

IN THE MATTER OF an appeal heard on November 30, 1993, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue for Customs and Excise dated February 24, 1993, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

WILBUR-ELLIS COMPANY OF CANADA LIMITED

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lise Bergeron

Lise Bergeron
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Charles A. Gracey

Charles A. Gracey
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-047

WILBUR-ELLIS COMPANY OF CANADA LIMITED

Appellant

and

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

Respondent

The appellant, an importer and supplier of raw materials to the feed and aquaculture industries, imports sardine oil. The issue in this appeal is whether the sardine oil is properly classified under tariff item No. 1504.20.00 as fats and oils and their fractions, of fish, other than liver oils, as determined by the respondent, or should be classified under tariff item No. 2309.90.10 as preparations to be employed in the feeding of trout or salmon and cereal preparations to be employed in the feeding of fur-bearing animals, as claimed by the appellant. According to the appellant, heading No. 1504 excludes sardine oil that is chemically modified. The Tribunal must decide whether the sardine oil in issue is chemically modified by the addition of the antioxidant, ethoxyquin, thus excluding it from heading No. 1504.

HELD: *The appeal is dismissed. Given the absence of any other explanations as to the meaning of the words "not chemically modified" in heading No. 15.04, the Tribunal finds of significant importance the reference made in the Explanatory Notes to the Harmonized Commodity Description and Coding System to heading No. 15.04 to specific chemical transformations, such as hydrogenation, interesterification, etc. The Tribunal is of the view that such reference indicates what is intended to be considered as a chemical modification for the purpose of heading No. 15.04. The Tribunal concludes that the addition of ethoxyquin has "not chemically modified" the sardine oil within the meaning of those words in heading No. 1504. The sardine oil is properly classified under tariff item No. 1504.20.00.*

Place of Hearing: Vancouver, British Columbia

Date of Hearing: November 30, 1993

Date of Decision: May 11, 1994

*Tribunal Members: Lise Bergeron, Presiding Member
Arthur B. Trudeau, Member
Charles A. Gracey, Member*

Counsel for the Tribunal: Gilles B. Legault

Clerk of the Tribunal: Nicole Pelletier

*Appearances: François E.J. Tougas, for the appellant
Linda J. Wall, for the respondent*

Appeal No. AP-93-047

WILBUR-ELLIS COMPANY OF CANADA LIMITED

Appellant

and

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

Respondent

TRIBUNAL: LISE BERGERON, Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ from two decisions of the Deputy Minister of National Revenue for Customs and Excise dated February 24, 1993, who classified the sardine oil imported by the appellant under tariff item No. 1504.20.00 of Schedule I to the *Customs Tariff*² as fats and oils and their fractions, of fish, other than liver oils. The appellant, an importer and supplier of raw materials to the feed and aquaculture industries, claimed that heading No. 15.04 excludes sardine oil that is chemically modified and, therefore, that the sardine oil should be classified under tariff item No. 2309.90.10 as preparations to be employed in the feeding of trout or salmon and cereal preparations to be employed in the feeding of fur-bearing animals.

There are two issues in this appeal. The first issue is whether the sardine oil in issue is chemically modified by the addition of the antioxidant, ethoxyquin, and therefore excluded from heading No. 15.04. If the Tribunal were to agree with the appellant on the first issue, there would remain the issue of whether the sardine oil is a preparation as contemplated in tariff item No. 2309.90.10. However, for the reasons set out below, there is no need to address the second issue.

At the hearing, three witnesses appeared on behalf of the appellant. The appellant's General Manager, Mr. Robert E. Jones, first explained the quality specifications required by users of the sardine oil. Such specifications relate to the fatty acid content, the peroxide value, the moisture content, etc., of the sardine oil. There are other requirements, such as the level of antioxidant and the stage at which it must be added to the sardine oil. Mr. Jones then described a typical fish meal production plant. Oil is extracted from the sardines through cooking, pressing and centrifuging. Ethoxyquin is added to the oil as it is being pumped into a storage tank. Mr. Gregory W. Deacon, a nutritionist for a feed manufacturer which purchases sardine oil from the appellant, also testified as to the quality specifications that are required for oil that is incorporated in the fish diet.

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1. R.S.C. 1985, c. 1 (2nd Supp.).
 2. R.S.C. 1985, c. 41 (3rd Supp.).

Finally, an expert witness, Mrs. Beryl E. March, who has a Master of Science in Agriculture and who has written several publications dealing with, among other things, fish meal, oxidative changes in fish meal and fish oil, as well as oil content in fish meal, explained that fish have a particular requirement for fatty acids or, more precisely, for a particular molecule structure expressed by a double bond in a particular position in the molecule, hence the use of a high proportion of fish oil in the preparation of their diet. Fish oil, she continued, contains a variety of compounds, classified as lipids, the great majority of those being triglycerides. Mrs. March stated that triglycerides are molecules made up of one molecule of glycerol and three molecules of different fatty acids. She mentioned that, in addition to the triglycerides, the fish oil contains free fatty acids that are not bound with the glycerol molecule, some phospholipids, fat soluble vitamins and, possibly, contaminants. Mrs. March also told the Tribunal that the reason that ethoxyquin is added to sardine oil is to block oxidation, which otherwise would increase the level of free fatty acids and affect the digestibility of the product. Oxidation would also increase the peroxide value, which is itself an active pro-oxidant. She affirmed that the nutritive value of fish oil is impaired as rancidity increases. She explained that the statement, "[t]he presence of ethoxyquin in a sardine oil alters the pathways of oxidation that are normally occurring in the oil," in her report, means that ethoxyquin binds onto free radicals of molecules and stops oxidation as it becomes part of those molecules. In Mrs. March's view, this process has the effect of chemically modifying the sardine oil.

The Tribunal then heard the expert witness for the respondent, Mrs. Catherine R. Copeland, a senior chemist in the Organic and Food Products Laboratory at the Laboratory and Scientific Services Directorate of the Department of National Revenue. Mrs. Copeland explained the chemical changes that occur in fish oil during the process of oxidation as well as the chemical changes that occur after the addition of the antioxidant, ethoxyquin. She agreed that fish oil is composed of the variety of compounds indicated by Mrs. March, but pointed out that the components of interest were the triglycerides that make up over 95 percent of the fish oil and a small proportion of free radicals. These free radicals begin to oxidize in the presence of oxygen to form a peroxide radical, which reacts with another triglyceride to form a hydroperoxide radical and another free radical. This process of oxidation will continue until all of the triglycerides have been oxidized. In order to protect the triglycerides from oxidation, an antioxidant such as ethoxyquin is added and interacts with the peroxide radical to create a hydrogen peroxide radical and a stable radical instead of a free radical. Thus, with no new free radicals available to react with oxygen, the process of oxidation is halted.

Mrs. Copeland affirmed that the triglycerides themselves remained unchanged by the antioxidant. She admitted, during cross-examination, that there are chemical reactions that take place when ethoxyquin is added to sardine oil. However, she was of the view that the chemical modification of any fat or oil only occurs when there is a major chemical transformation of most or all of the triglycerides contained in the oil. She testified that the addition of ethoxyquin is to stop the oxidation process which involves some chemical reactions, a process that occurs naturally in the sardine oil before the addition of the ethoxyquin. Mrs. Copeland referred to hydrogenation as an example of a major chemical transformation. For example, the hydrogenation of palm oil and soya bean oil involves the saturation of the double bonds (i.e. the linkage between atoms in a molecule) of the triglycerides contained in these oils. Although she admitted that fats or oils can be partially hydrogenated, she explained that, when an oil is hydrogenated, most, if not all, of its triglycerides are affected. She further referred to elaidinization, interesterification, epoxidation and polymerization as other examples of major chemical transformations. She defined a chemical modification as something that undergoes a

process involving a gross chemical transformation, such as a change in the bond arrangement in space. She concluded that the addition of ethoxyquin to preserve the triglyceride structure does not result in any such changes to the triglyceride structure, but rather preserves it in an unchanged state.

Counsel for the appellant argued that the sardine oil in issue is chemically modified and, consequently, is not properly classified under tariff item No. 1504.20.00. Counsel submitted that even the respondent's expert witness recognized that the sardine oil experienced some chemical reactions. He submitted that, although the addition of ethoxyquin does not affect all the molecules, it nevertheless has an impact on a significant number of them and that such impact is material as it prevents the oil from becoming rancid. Counsel argued that, in accordance with Rule 3 (a) of the General Rules for the Interpretation of the Harmonized System³ (the General Rules), the sardine oil should be classified in heading No. 23.09, as it provides the most specific description. He relied on the Chapter Note to Chapter 23 of the Explanatory Notes to the Harmonized Commodity Description and Coding System⁴ (the Explanatory Notes) which provides that heading No. 23.09 includes products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material, other than vegetable waste, vegetable residues and by-products of such processing. Counsel claimed that there is nothing in heading No. 23.09 or in the Chapter Note that precludes the classification of the sardine oil in that heading.

Counsel for the respondent argued that the sardine oil is specifically described in heading No. 15.04 and that the evidence reveals that it is not chemically modified. Counsel also submitted that Rule 1 of the General Rules applies to this case and, accordingly, that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes.

As mentioned at the outset, the crux of this case is to determine whether the addition of ethoxyquin to the sardine oil chemically modifies the oil so as to exclude it from the application of heading No. 15.04. The Tribunal finds that the sardine oil in issue is not chemically modified and, therefore, is properly classified under tariff item No. 1504.20.00.

The Tribunal accepts the testimony of both expert witnesses as to the chemical processes involved in oxidation and following the addition of the antioxidant, ethoxyquin. Indeed, the Tribunal notes that the experts were in close agreement as to these processes and differed only on the question of whether the addition of ethoxyquin effects chemical modification. However, having heard the evidence, the Tribunal is of the view that the term "chemically modified" can only be understood and applied in the context of the heading and notes. It is not seen by the Tribunal as a precise chemical term.

In this regard, the Tribunal notes that, as a guide to the interpretation of heading No. 15.04 and to the meaning of the words "not chemically modified" therein, section 11 of the *Customs Tariff* provides that regard shall be had to the Explanatory Notes. The Explanatory Notes to heading No. 15.04 read as follows:

3. *Ibid.*, Schedule I.

4. Customs Co-operation Council, 1st ed., Brussels, 1986.

The fats and oils derived from fish or marine mammals remain in this heading when refined, but are excluded if partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised (heading 15.16).

As the last words indicate, although heading No. 15.04 does not itself provide the meaning of the term "not chemically modified," the reference to heading No. 15.16 is quite explicit as to the meaning of that term. Heading No. 15.16 refers, *inter alia*, to animal or vegetable fats and oils partly or wholly hydrogenated, interesterified, re-esterified or elaidinized. The Explanatory Notes to that heading provide, in turn, that it covers animal or vegetable fats and oils that have undergone a specific chemical transformation such as hydrogenation, interesterification, re-esterification or elaidinization. The Explanatory Notes further describe those chemical transformations. The Tribunal points out that they all involve a chemical transformation that seems to go beyond the reaction that Mrs. Copeland described when ethoxyquin is added to the sardine oil. The Tribunal is persuaded by her testimony that the addition of ethoxyquin is to preserve the triglycerides in an unoxidized state. The ethoxyquin does not modify their chemical structure in any substantial way; it only reacts with the free radicals that are present to form a stable molecule and to prevent further oxidation, thus preserving the sardine oil in a state useful for fish feed. While the stable molecule is a new component of the resulting product, the sardine oil itself has not been chemically modified.

Briefly stated, given the absence of any other explanations as to the meaning of the words "not chemically modified" in heading No. 15.04, the Tribunal finds of significant importance the reference made in the Explanatory Notes to this heading to specific chemical transformations, such as hydrogenation, interesterification, etc. The Tribunal is of the view that such reference indicates what is intended to be considered as a chemical modification for the purpose of heading No. 15.04. The Tribunal concludes that the addition of ethoxyquin has "not chemically modified" the sardine oil within the meaning of those words in heading No. 15.04.

Consequently, the sardine oil in issue is properly classified under tariff item No. 1504.20.00, and the appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member