

Ottawa, Tuesday, July 26, 1994

Appeal No. AP-93-092

IN THE MATTER OF an appeal heard on March 8, 1994,
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 dated March 26, 1993, with respect to a
request for re-determination under section 63 of the *Customs
Act*.

BETWEEN

BAXTER CORPORATION

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-092

BAXTER CORPORATION

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The product in issue is Peptamen, a liquid isotonic elemental diet packaged in 250-mL easy-open cans. The issue in this appeal is whether the goods imported by the appellant from the United States between January 14, 1991, and April 20, 1992, are properly classified under tariff item No. 2106.90.90, as determined by the respondent, or should be classified under tariff item No. 3004.50.10, as claimed by the appellant.

***HELD:** The appeal is allowed. The goods in issue are not "dietetic food" within the ordinary meaning of these words. The Tribunal finds that they are a "[m]edicaments ... for therapeutic or prophylactic uses ... specially compounded for persons afflicted with amino acid disorders," and, therefore, the Tribunal finds that the goods in issue should be classified under tariff item No. 3004.50.10.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: March 8, 1994

Date of Decision: July 26, 1994

Tribunal Members: Michèle Blouin, Presiding Member

Sidney A. Fraleigh, Member

Desmond Hallissey, Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Janet Rumball

Appearances: Michael A. Kelen, for the appellant

Geoffrey S. Lester, for the respondent

Appeal No. AP-93-092

BAXTER CORPORATION

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
SIDNEY A. FRALEIGH, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue² (the Deputy Minister) made under subsection 63(3) of the Act.

The product in issue is Peptamen, a liquid isotonic elemental diet packaged in 250-mL easy-open cans. The issue in this appeal is whether the goods imported by the appellant from the United States between January 14, 1991, and April 20, 1992, are properly classified under tariff item No. 2106.90.90 of Schedule I to the *Customs Tariff*,³ as determined by the respondent, or should be classified under tariff item No. 3004.50.10, as claimed by the appellant. The relevant tariff nomenclature reads as follows:

21.06 Food preparations not elsewhere specified or included.

2106.90.90---Other

30.04 Medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale.

3004.50.10 ---Mixtures of amino acids and vitamins, and mixtures of amino acids, protein hydrolysates and vitamins, whether or not containing added minerals, fats or carbohydrates, specially compounded for persons afflicted with amino acid disorders

3004.50.99----Other

Counsel for the appellant called three witnesses: Mr. Lance Stalker, Director of Marketing for Enteral Medical Products in both Canada and the United States and employed

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

2. See *An Act to amend the Department of National Revenue Act and to amend certain other Acts in consequence thereof*, S.C. 1994, c. 13, s. 7.

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

with Clintec Nutrition Company (Clintec), a company of which the appellant owns 50 percent and the exporter of the goods in issue; Dr. Dilip G. Patel, a gastroenterologist and nutritional co-ordinator at the Ottawa Civic Hospital and an associate professor in gastroenterology at the Faculty of Medicine of the University of Ottawa; and Ms. Diana Twyman, a registered dietician, employed with Clintec as Business Unit Manager for Elemental Diet and formerly Product Manager of Enteral Nutrition.

The first witness, Mr. Stalker, described the nature and composition of the goods in issue. He testified that Peptamen is a specially designed diet for enteral use only, to be fed with a tube through the nose or down into the stomach cavity. He explained that the goods in issue are a mixture of amino acids, vitamins, hydrolysed or simplified proteins and simplified fats. He also testified that Peptamen is advertised as an effective treatment or nutritional therapy for patients with severe problems of malabsorption and for several diseases, such as Crohn's disease.

The next witness, Dr. Patel, testified as an expert in the field of gastroenterology. He testified that, as a gastroenterologist at the Ottawa Civic Hospital, he prescribes Peptamen for patients with intestinal disorders, such as Crohn's disease. He testified that Peptamen is a nutritional supplement and an active treatment for patients who cannot tolerate medication for various reasons, such as possible side effects. He explained that Peptamen is particularly effective in treating children. Dr. Patel testified that Peptamen can prevent the growth retardation which may occur as a result of certain conditions. Because the peptides are broken down, they are more easily absorbed by patients with digestive and absorptive disorders caused by diseases of the small bowel, where such functions ordinarily take place. Dr. Patel explained that it had even been suggested that products such as Peptamen could be used as a treatment in helping to heal the inflammation caused by diseases such as Crohn's disease, without having to resort to any standard medications normally used in the treatment of such diseases.

Dr. Patel testified that he considered Peptamen to be a medicament that can be used in the treatment of certain intestinal disorders. He did not consider Peptamen to be a dietetic food, which, he testified, is ordinary food normally bought at a grocery store. He described "amino acid disorders" as specific transport defects or genetic defects which affect the utilization, absorption and other functions of amino acids, which are the building blocks of the final stage of protein digestion. Finally, Dr. Patel was of the opinion that the goods in issue are mixtures of amino acids, protein hydrolysates and vitamins, whether or not containing added minerals, fats or carbohydrates, specially compounded for persons afflicted with amino acid disorders.

The third witness, Ms. Twyman, defined "amino acids" as individual building blocks of protein broken down to their simplest form. She testified that "intact proteins" are proteins that occur naturally in foods or in the diet and which consist of amino acids that are connected together in groups of one hundred or more. She testified that Peptamen, which contains a mixture of small peptides and free amino acids, is pre-digested for individuals that have lost the ability to digest or to absorb intact protein. She explained that Peptamen allows these individuals to be nourished or treated despite the fact they have lost that particular ability. She described dietetic food as "naturally occurring food" normally obtained at a grocery store, which can be bought for a variety of reasons. She testified that dietetic food is most commonly considered to be low-sodium or low-calorie food used for weight reduction purposes. Ms. Twyman also testified that, for a number of reasons, she did not consider Peptamen to be a dietetic food. For example, Peptamen is consumed under medical supervision, it is not a food in the common sense of the term, and its uses are not the same as those that are typically for dietetic purposes. It is more medical in nature.

Ms. Twyman testified that an amino acid disorder is considered to be either an inability to digest, an inability to absorb or an inability to metabolize intact protein or naturally occurring protein. She said that, when individuals have Crohn's disease, their ability to both digest and absorb protein can be affected. Also, they may have some inability to normally metabolize proteins that come from "naturally occurring foods." Ms. Twyman was also of the opinion that the goods in issue met the second part of the definition of the goods described in tariff item No. 3004.50.10. She testified that Peptamen is specifically compounded for the first two types of amino acid disorders, that is, digestion and absorption.

Counsel for the respondent called one witness, Dr. John Patrick, an associate professor in clinical nutrition at the Departments of Biochemistry and Pediatrics at the University of Ottawa. According to Dr. Patrick, food is what an individual, driven by appetite, consumes to sustain the body nutritionally and sometimes spiritually. A dietetic food is what an individual, driven by other needs, consumes, for example, due to the fact that an individual is suffering from a particular disease. Dr. Patrick was of the opinion that the goods in issue are dietetic food, as their consumption is not driven by appetite. He described Peptamen as being a food supplement for people whose normal digestive functions can become impaired as a result of a variety of diseases. Dr. Patrick was also of the opinion that an amino acid disorder does not include problems of digestion or absorption. Rather, he described it as being a protein transport disorder, more commonly known as a metabolic disorder. He explained that mixtures prepared for patients suffering from such disorders are dietetic food, as nobody would eat the mixtures unless told to do so. According to Dr. Patrick, Peptamen, which is specifically compounded for persons afflicted with digestive or absorptive disorders and not amino acid disorders, does not meet the definition of the goods described in tariff item No. 3004.50.10.

Counsel for the appellant argued that the goods in issue are not dietetic food. He contended, rather, that they are medicaments for therapeutic uses specially compounded for persons afflicted with amino acid disorders and that they should, therefore, be classified under tariff item No. 3004.50.10. Counsel submitted that there was a consensus among the witnesses that the goods in issue are medicaments. Dr. Patel, Ms. Twyman and, to a certain extent, Dr. Patrick having agreed that the goods in issue could be categorized as a mixture of amino acids, protein hydrolysates and vitamins, whether or not containing added minerals, fats or carbohydrates, counsel argued that the goods in issue met this part of the definition in tariff item No. 3004.50.10. Counsel submitted that the word "dietetic" must be given its ordinary meaning. Consequently, he submitted that a dietetic food is an ordinary food that has been specially formulated for a person with a special dietetic need, such as a low-sodium, low-calorie or low-fat diet. Therefore, the goods in issue, which are designed to be sold to a hospital and to be given to a person through a tube, are not dietetic food. In support of his arguments, counsel referred the Tribunal to Note 16 of the Explanatory Notes to the Harmonized Commodity Description and Coding System⁴ (Explanatory Notes) to heading No. 21.06 and to Note 3 of the Explanatory Notes to heading No. 30.03. Finally, relying on the definition given by Ms. Twyman in her testimony, counsel argued that the goods in issue were specially compounded for persons afflicted with amino acid disorders, including Crohn's disease. He argued that the goods in issue were specially compounded for persons with such disorders and that, since they did not serve any other purpose, they should be classified under tariff item No. 3004.50.10 and not under tariff item No. 2106.90.90.

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

Counsel for the respondent submitted that the goods in issue are dietetic food within the meaning of Note 1 (a) to Chapter 30 of Schedule I to the *Customs Tariff* and, therefore, that they are excluded from tariff item No. 3004.50.10. In the alternative, counsel argued that, if the Tribunal finds that the goods in issue are not dietetic food, they would not, therefore, meet the definition of the goods described in that particular tariff item. He argued that the goods in issue are designed to offer patients, with digestive or absorptive disorders, appropriate amounts of the nutrients that they require for their survival in conjunction with their medical treatment of a specific disease or condition. He argued that the goods in issue do not contain any medicinal substances. Counsel also submitted that the goods in issue are not used to prevent or treat a disease or ailment, that they are simply used as a nutritional support for patients with a wide variety of clinical conditions and that they are, therefore, not medicaments for therapeutic or prophylactic uses. Relying on the testimony of Dr. Patrick, counsel argued that Peptamen is not specially compounded for persons afflicted with amino acid disorders, as such disorders are restricted to metabolic disorders and not digestive or absorptive disorders. Finally, he contended that, as the goods in issue cannot be classified elsewhere in the *Customs Tariff*, they must be classified in heading No. 21.06 as "[f]ood preparations not elsewhere specified or included."

The Tribunal has to determine whether the goods in issue are excluded from Chapter 30 of Schedule I to the *Customs Tariff* pursuant to Note 1 (a), which provides that "[the] Chapter does not cover: [f]oods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters)." If the Tribunal finds that the goods in issue are not excluded from Chapter 30 pursuant to Note 1 (a), then it must determine whether they should be classified under tariff item No. 3004.50.10.

In deciding the tariff item that best describes the goods in issue, the Tribunal considered the ordinary meaning of the words contained in each tariff item, Note 1(a) and the Explanatory Notes. The Tribunal agrees with the appellant and is of the view that, given its ordinary meaning, "dietetic food" refers to ordinary food that has been specially formulated for persons with a special dietetic need, such as a low-sodium, low-calorie or low-fat diet. It also agrees that the goods in issue, which have been designed to be sold to hospitals to be given to patients through a tube, are not dietetic food.

With regard to heading No. 30.04, the Tribunal interprets this provision as referring to substances used to treat or prevent diseases. This is indicated by the dictionary definitions⁵ of the word "therapeutic," which means "curative; of the healing art" and the word "prophylactic," which means "tending to prevent disease or other misfortune."

The Tribunal accepts Dr. Patel's evidence that Peptamen can be used in the treatment of certain intestinal disorders. Dr. Patel testified that Peptamen is more than a nutritional supplement. It effectively acts as an active treatment for patients with digestive or absorptive disorders caused by diseases of the small bowel, where such functions ordinarily take place. There was also evidence that Peptamen can prevent the growth retardation in children which may occur as a result of certain diseases, such as Crohn's disease.

5. The Concise Oxford Dictionary of Current English, 7th ed. (Oxford: Clarendon Press, 1982) at 1110 and 826. See, also, Canadian International Trade Tribunal, *UpJohn Inter-American Corporation v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-90-197, January 20, 1992.

The Tribunal is of the opinion that the evidence clearly establishes that the goods in issue are mixtures of amino acids, protein hydrolysates and vitamins, whether or not containing added minerals, fats or carbohydrates and, therefore, that they meet this part of the definition of the goods described in tariff item No. 3004.50.10. The Tribunal accepts the broader definitions of "amino acid disorders" given by Dr. Patel and Ms. Twyman and notes that the two appear to be consistent. According to Dr. Patel, amino acid disorders are specific transport defects or genetic defects, which affect the utilization, absorption and other functions of amino acids, which are the building blocks of the final stage of protein digestion. According to Ms. Twyman, amino acid disorders are the inability to digest, absorb or metabolize intact protein or naturally occurring protein. The Tribunal is of the opinion that the evidence clearly establishes that the goods in issue are specially compounded for persons afflicted with such disorders and that they should be classified under tariff item No. 3004.50.10 rather than under tariff item No. 2106.90.90. This interpretation is supported by Note 16 of the Explanatory Notes to heading No. 21.06, which excludes from this heading "[p]reparations, often referred to as food supplements ... intended for the [prevention] or treatment of diseases or ailments ... (Heading 30.03 or 30.04)" and by Note 3 of the Explanatory Notes to heading No. 30.03, which includes in this heading "[n]utritional preparations for ingestion other than by mouth."

The Tribunal notes that Chapter 21 of Schedule I to the *Customs Tariff* appears to provide for the classification of ordinary food or mixtures used in the preparation of such foods. Peptamen clearly cannot be considered to be ordinary food and should, therefore, be classified in Chapter 30 of Schedule I to the *Customs Tariff*.

Accordingly, the appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Desmond Hallissey
Desmond Hallissey
Member