



Ottawa, Thursday, September 8, 1994

Appeal No. AP-93-271

IN THE MATTER OF an appeal heard on March 29, 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 August 12 and 26, 1993, with
respect to requests for re-determination under section 63 of the
Customs Act.

BETWEEN

ALLIED COLLOIDS (CANADA) INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member

Charles A. Gracey

Charles A. Gracey
Member

Lise Bergeron

Lise Bergeron
Member

Nicole Pelletier

Nicole Pelletier
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-271

ALLIED COLLOIDS (CANADA) INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the Customs Act from two determinations of the Deputy Minister of National Revenue made under section 63 of the Customs Act. The issue in this appeal is whether Hydrocol O and Hydrocol 2D6 imported by the appellant from the United States are properly classified under tariff item No. 3823.90.90 as other products of the chemical or allied industries, not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 2508.10.00 as bentonite, as claimed by the appellant.

HELD: *The appeal is allowed. The Tribunal is not persuaded that it is precluded by the Explanatory Notes to the Harmonized Commodity Description and Coding System (the Explanatory Notes) from classifying Hydrocol O and Hydrocol 2D6 in Chapter 25. The inclusion of the words "in general" and "generally" in the General Notes to Chapter 25 suggests to the Tribunal that there may be some goods that, although they may not be in their "crude state" or may have been "obtained by mixing," are not necessarily excluded from being classified in Chapter 25. The Explanatory Notes to heading No. 25.08 provide that the heading covers "all natural clayey substances." Furthermore, the Tribunal finds that there is no requirement in the Explanatory Notes that heading No. 25.08 cover only natural clayey substances.*

Tariff item No. 2508.10.00 specifically includes bentonite and the Explanatory Notes to subheading No. 2508.10 specifically provide that the subheading includes sodium bentonites. In the Tribunal's view, at the time of importation, Hydrocol O and Hydrocol 2D6 were bentonites and, more specifically, sodium bentonites, regardless of whether they were mined as sodium bentonites or derived by adding sodium carbonate to calcium bentonite.

*Place of Hearing: Ottawa, Ontario
Date of Hearing: March 29, 1994
Date of Decision: September 8, 1994*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Charles A. Gracey, Member
Lise Bergeron, Member*

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Janet Rumball

*Appearances: John P. Topp, for the appellant
Anne M. Turley, for the respondent*

Appeal No. AP-93-271

ALLIED COLLOIDS (CANADA) INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
CHARLES A. GRACEY, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from two determinations of the Deputy Minister of National Revenue² dated August 12 and 26, 1993, made under section 63 of the Act. The issue in this appeal is whether Hydrocol O and Hydrocol 2D6 imported by the appellant from the United States are properly classified under tariff item No. 3823.90.90 of Schedule I to the *Customs Tariff*³ as other products of the chemical or allied industries, not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 2508.10.00 as bentonite, as claimed by the appellant.

The following is the relevant tariff nomenclature from Schedule I to the *Customs Tariff*:

25.08	<i>Other clays (not including expanded clays of heading No. 68.06), andalusite, kyanite and sillimanite, whether or not calcined; mullite; chamotte or dinas earths.</i>
2508.10.00	<i>-Bentonite</i>
38.23	<i>Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included.</i>
3823.90	<i>-Other</i>
3823.90.90	<i>---Other</i>

The Tribunal qualified Dr. M.I. Knudson as an expert witness for the appellant with respect to bentonites. Dr. Knudson has worked as Technical Director for Southern Clay

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.).

Products, Inc. in the United States, the supplier of Hydrocol 2D6, for 19 years and is involved in the exploration, mining, production, sales and marketing of clays, as well as in the development of new products and support of existing products.

According to Dr. Knudson, Hydrocol 2D6 is derived from calcium bentonite, which is mined in southern Texas. The calcium bentonite is dried at Southern Clay Products, Inc.'s plant and put in a silo. The dried calcium bentonite is removed from the silo on a belt, and an amount of soda ash, or sodium carbonate, is sprinkled on the calcium bentonite so that the resulting product consists of approximately 4 percent soda ash and 96 percent calcium bentonite.

Dr. Knudson explained that there is an ion exchange that occurs between the calcium bentonite and the sodium carbonate. He stated that the calcium bentonite has a high negative charge, so that anything with a positive charge that is proximate to the calcium bentonite will stick to it. The calcium carbonate in the calcium bentonite reacts with the carbonate in the sodium carbonate and becomes calcite. The sodium then takes the place of the calcium, and the calcium bentonite becomes sodium bentonite.

According to Dr. Knudson, if the bentonite is formed in a geographic region where there are predominantly calcium ions, the exchangeable ions will be calcium, and the end product will be calcium bentonite. Alternatively, if the bentonite is formed in a geographic region where there are predominately sodium ions, the exchangeable ions will be sodium, resulting in a sodium bentonite. However, he stated that there is no such thing as pure calcium or pure sodium bentonite. Whether the bentonite is called calcium or sodium bentonite depends upon the amount of either calcium or sodium in it.

As stated in a letter from J.T. Kinsella, Commercial Manager - Bentonite for Redland Minerals Limited in England, the supplier of Hydrocol O, this product is a natural calcium bentonite which is mixed with sodium carbonate. When this mixture is added to water, the sodium carbonate dissolves, and an ion exchange takes place to produce sodium bentonite.

The Tribunal also qualified Mr. Louis J.H. L'Heureux, Chief of the Inorganic Laboratory of the Laboratory and Scientific Services Directorate of the Department of National Revenue, as an expert witness for the respondent in the area of chemical analysis of inorganic and organic products. Mr. L'Heureux stated that the results of his analysis of Hydrocol 2D6 showed that it is a calcium bentonite that contained approximately 1.1 percent sodium carbonate. He stated that it is difficult to determine the exact amount of sodium carbonate since, as soon as water is added to the calcium bentonite and sodium carbonate, there is an ion exchange. In his view, a natural sodium bentonite would not contain any sodium carbonate since it would be either washed away or exchanged with the calcium carbonate.

In argument, the appellant's representative referred to Note 1 of the Explanatory Notes to the Harmonized Commodity Description and Coding System⁴ (the Explanatory Notes) to Chapter 25, which states as follows:

Except where their context or Note 4 to this Chapter otherwise requires, the headings of this Chapter cover only products which are in the crude state or which have been washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by

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

flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading.

The appellant's representative argued that, although Hydrocol O and Hydrocol 2D6 are mixtures of calcium bentonite and sodium carbonate, they are not excluded from Chapter 25 of Schedule I to the *Customs Tariff* by virtue of Note 1 of the Explanatory Notes to that Chapter. Specifically, he focused on the phrase "[e]xcept where their context ... otherwise requires." He submitted, based on that phrase, that it is necessary to look to the specific language of the headings in Chapter 25 in order to determine the goods that may be classified in a heading. In particular, he pointed out that heading No. 25.08 includes "[o]ther clays" without any qualification that the clays be natural. He further pointed out that the Explanatory Notes to subheading No. 2508.10 specifically provide that the subheading includes both sodium bentonites and calcium bentonites. By comparison, he referred to heading No. 25.04 which refers to "[n]atural graphite" and which would not include man-made graphite.

Counsel for the respondent argued that Hydrocol O and Hydrocol 2D6 are excluded from heading No. 25.08 since they are produced by mixing bentonite of heading No. 25.08 and sodium carbonate of heading No. 25.30. To support this position, counsel referred to Note 1 of the Explanatory Notes to Chapter 25, which excludes products that have been "obtained by mixing," and to the General Notes to Chapter 25, which state as follows:

Minerals which have been otherwise processed (e.g., purified by re-crystallisation, obtained by mixing minerals falling in the same or different headings of this Chapter, made up into articles by shaping, carving, etc.) generally fall in later Chapters.

Counsel for the respondent submitted that the appellant could not rely on the phrase "[e]xcept where their context ... otherwise requires" to support its argument that the goods in issue should be classified in Chapter 25. Counsel submitted that the Explanatory Notes to heading No. 25.08 provide that the heading includes "[o]ther clays" and that the Explanatory Notes to subheading No. 2508.10 provide that the subheading includes bentonite. Therefore, the only bentonite properly classified in subheading No. 2508.10 is pure bentonite that is found in the ground. By comparison, counsel referred to subheading No. 2501.00 which covers salt, including table salt and denatured salt, pure sodium chloride, whether or not in aqueous solution, and sea water.

Instead, counsel for the respondent argued that Hydrocol O and Hydrocol 2D6 are properly classified in heading No. 38.23, as they consist of mixtures of natural products, not elsewhere specified or included. Counsel submitted that the Explanatory Notes to heading No. 38.23 support this position. In order to illustrate her point, counsel referred to some examples of goods listed under Section (B) of the Explanatory Notes to heading No. 38.23 entitled "Chemical Products and Chemical or Other Preparations." Counsel referred to example (23), which includes compounded extenders for paints, and, in particular, to the statement in the description that the compounded extenders are preparations consisting "of mixtures of two or more natural products ..., of mixtures of ... natural products with chemical products, or of mixtures of chemical products." Counsel also referred to example (45), which includes mixtures used as thickeners and emulsion stabilisers in chemical preparations or as binders in the manufacture of abrasive grindstones, and, in particular, to the description that the mixtures consist of products of either separate headings or the same heading of Chapter 25.

After having reviewed all of the evidence and considered the parties' arguments, the Tribunal is persuaded that Hydrocol O and Hydrocol 2D6 should be classified in heading No. 25.08 as bentonite, as claimed by the appellant.

Section 10 of the *Customs Tariff* provides that, in classifying goods, reference shall be made to the General Rules for the Interpretation of the Harmonized System⁵ (the General Rules). Rule 1 of the General Rules provides that the classification of goods 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."

In her argument, counsel for the respondent relied, to a large extent, on the exclusion by virtue of Note 1 of the Explanatory Notes to Chapter 25 of "products which have been ... obtained by mixing." However, the Tribunal observes that the General Notes to Chapter 25 provide that Chapter 25 covers "in general, mineral products only in the crude state" and that "[m]ineral products which have been otherwise processed (e.g., ... obtained by mixing ...) generally fall in later Chapters." The inclusion of the words "in general" and "generally" in the General Notes to Chapter 25 suggests to the Tribunal that there may be some goods that, although they may not be in their "crude state" or may have been "obtained by mixing," are not necessarily excluded from being classified in Chapter 25. Thus, the Tribunal is not persuaded that the issue of classification is resolved simply by answering the question of whether Hydrocol O and Hydrocol 2D6 are in their "crude state" or have been "obtained by mixing." The Tribunal finds it necessary to also consider the Explanatory Notes to heading No. 25.08.

Heading No. 25.08 includes "[o]ther clays (not including expanded clays of heading No. 68.06)." The Explanatory Notes to heading No. 25.08 provide that the heading covers "all natural clayey substances." This language is inclusive rather than exclusive and does not indicate, in the Tribunal's view, that goods are excluded from heading No. 25.08 only because they may not be "natural clayey substances." There is no requirement in the Explanatory Notes that heading No. 25.08 cover only natural clayey substances. Heading No. 25.08 includes "[o]ther clays (not including expanded clays of heading No. 68.06)," subheading No. 2508.10 specifically includes bentonites, and the Explanatory Notes to subheading No. 2508.10 specifically provide that the subheading includes sodium bentonites.

In the Tribunal's view, at the time of importation, Hydrocol O and Hydrocol 2D6 were bentonites and, more specifically, sodium bentonites, regardless of whether they were mined as sodium bentonites or derived by adding sodium carbonate to calcium bentonite. The product named in tariff item No. 2508.10.00 is "bentonite." The addition of sodium carbonate neither resulted in the creation of bentonite nor changed the bentonite into something else. The addition of sodium carbonate changed the bentonite from a calcium bentonite to a sodium bentonite. However, the goods in issue remained bentonites.

Of the examples in the Explanatory Notes to heading No. 38.23 to which counsel for the respondent referred, example (45) most closely relates to the goods in issue. This example provides for the inclusion of the following in heading No. 38.23:

Mixtures, used as thickeners and emulsion stabilisers in chemical preparations or as binders in the manufacture of abrasive grindstones, consisting of products of either

5. *Supra*, note 3, Schedule I.

separate headings or the same heading of Chapter 25, whether or not with materials classified in other Chapters and having one of the following compositions:

- *mixture of various clays;*
- *mixture of various clays and felspar;*
- *mixture of clay, powdered felspar and powdered natural borax (tincal);*
- *mixture of clay, felspar and sodium silicate.*

In the Tribunal's view, none of the compositions in example (45) specifically describes Hydrocol O and Hydrocol 2D6, which are composed of calcium bentonite and sodium carbonate.

The Tribunal finds that Hydrocol O and Hydrocol 2D6 should be classified under tariff item No. 2508.10.00 as bentonite and, accordingly, the appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member

Charles A. Gracey

Charles A. Gracey

Member

Lise Bergeron

Lise Bergeron

Member