

Ottawa, Tuesday, February 14, 1995

Appeal No. AP-94-015

IN THE MATTER OF an appeal heard on September 15, 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 January 11, 1994, with respect to a
request for re-determination under section 63 of the *Customs Act*.

BETWEEN

ASHLAND CHEMICAL CANADA LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Raynald Guay
Raynald Guay
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-015

ASHLAND CHEMICAL CANADA LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The appellant is an importer of a chemical called 4-phenylpropylpyridine. At the time of entry, it was classified under tariff item No. 2933.39.00. The appellant does not dispute the tariff classification, but claims that 4-phenylpropylpyridine qualifies for a reduction or removal of duties under Code 7720 of the Chemicals and Plastics Duties Reduction or Removal Order.

The issue in this appeal is whether 4-phenylpropylpyridine is used in the manufacture of a phenolic resin in primary form in heading No. 39.09, and, therefore, qualifies for a reduction or removal of duties under Code 7720 as claimed by the appellant.

HELD: *The appeal is dismissed. In the Tribunal's view, combining 4-phenylpropylpyridine, which has been used in the manufacture of a catalyst, with a phenolic resin blended with solvents does not result in the manufacture of a phenolic resin. Rather, the phenolic resin existed prior to combining the catalyst with the phenolic resin component. In other words, 4-phenylpropylpyridine is not used in the manufacture of a phenolic resin described in heading No. 39.09, as the phenolic resin already existed prior to the addition of the catalyst.*

According to the Tribunal, it is not sufficient that the mixture be classifiable in heading No. 39.09. Rather, it must have been manufactured through the addition of the catalyst. In the Tribunal's view, this does not happen in this case because the catalyst is added to goods which, if imported, would already be classifiable as phenolic resins as described in heading No. 39.09, and the goods presumed to be manufactured are phenolic resins. The addition of the catalyst to the phenolic resin component does not serve to enhance the qualities of the other goods as phenolic resins in primary forms.

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 15, 1994
Date of Decision: February 14, 1995

Tribunal Members: Raynald Guay, Presiding Member
Charles A. Gracey, Member
Desmond Hallissey, Member

Counsel for the Tribunal: Heather A. Grant

Clerk of the Tribunal: Anne Jamieson

Parties: Richard R. Ducharme, for the appellant
Brian Tittlemore, for the respondent

Appeal No. AP-94-015

ASHLAND CHEMICAL CANADA LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: RAYNALD GUAY, Presiding Member
CHARLES A. GRACEY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from three decisions of the Deputy Minister of National Revenue (the Deputy Minister) dated January 11, 1994.

The appellant imported three shipments of a chemical called 4-phenylpropylpyridine between December 7, 1988, and January 24, 1990. At the time of entry, the goods in issue were classified under tariff item No. 2933.39.00 of Schedule I to the *Customs Tariff*.² The appellant requested a re-determination of the tariff classification, claiming that the goods in issue could also be classified under Code 7720 of the *Chemicals and Plastics Duties Reduction or Removal Order* of Schedule II to the *Customs Tariff*, which provides that certain chemicals, used in the manufacture of specific goods, qualify for a reduction or removal of tariff duties. On re-determination, the classification of the goods in issue under tariff item No. 2933.39.00 was upheld, without qualifying for a reduction or removal of duties under Code 7720. At the appellant's request, the Deputy Minister further re-determined the tariff classification and upheld the determination stating that the goods in issue are used "in conjunction with a phenolic resin in the manufacture of foundry moulds and cores of heading 38.23." Manufactured goods classified in heading No. 38.23 do not qualify for a reduction or removal of duties under Code 7720.

Ashland Chemical Canada Ltd. is appealing the Deputy Minister's decisions, claiming that 4-phenylpropylpyridine meets the conditions necessary for classification under Code 7720. The issue in this appeal is whether the goods in issue are used in the manufacture of goods described in heading No. 39.09 and, therefore, qualify for a reduction or removal of duties under Code 7720.

The appeal proceeded by way of written submissions under rule 25 of the *Canadian International Trade Tribunal Rules*,³ on the basis of the Tribunal's record, including an agreed statement of facts and briefs submitted by the parties.

In the agreed statement of facts, the parties described the goods in issue as a pale yellow liquid composed of 4-phenylpropylpyridine. According to the parties, 4-phenylpropylpyridine is a "separate

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912.

chemically defined organic compound of the heterocyclic compounds type with nitrogen hetero-atom only, containing an unfused pyridine ring in the structure.” The goods in issue are used in the manufacture of PEP SET Catalyst 3500 (Catalyst 3500). The parties agreed that, if imported, Catalyst 3500 would be classifiable under tariff item No. 3815.90.00 as a catalytic preparation, which is used in the PEP SET three-part binder system for the manufacture of foundry cores and moulds.

The PEP SET binder system consists of three parts:

- Part I – a phenolic resin blended with solvents;
- Part II – an isocyanate component in solvent; and
- Part III – a liquid catalyst, such as Catalyst 3500.

To make the PEP SET binder system, the following steps are taken. The Catalyst 3500 (Part III) is added to the phenolic resin component (Part I) and then mixed with sand. The isocyanate component (Part II) is also mixed separately with sand. These two premixes are then blended together in specific ratios to yield a complete mix of sand and resin which cures to form the foundry moulds and cores.

In addition, the parties stated that the mixture produced through the addition of the catalyst to the resin component is destined only to be mixed with foundry sand and, ultimately, to be used as a foundry core binder.

Code 7720 provides that duties may be reduced or removed if the following conditions are met:

- (i) the goods are of a particular heading (Code 7720 specifically includes heading No. 29.33);
- (ii) the goods are not expressly excluded from qualification; and
- (iii) the goods are for use in the manufacture of goods described in a variety of headings (Code 7720 specifically includes heading No. 39.09).

As suggested above, there are three conditions that must be met in order for a chemical to qualify for a reduction or removal of duties under Code 7720. In this appeal, the only condition at issue is the third one, namely, whether the goods in issue are for use in the manufacture of goods described in heading No. 39.09. Heading No. 39.09 includes “[a]mino-resins, phenolic resins and polyurethanes, in primary forms.”

The appellant’s representative submitted that, once the catalyst and the phenolic resin component are combined, the catalyst constitutes proportionally 1 percent of the resulting mixture. The representative argued that, at this stage, the binder system is not complete, in that the mixture cannot be used as a binder. In the representative’s view, the mixture that results is classifiable in subheading No. 3909.40 as a phenolic resin in primary form. Therefore, the representative contended that the third condition of Code 7720 is met. In support of his view, the representative relied on Supplementary Note 2(a) to Chapter 39 of Schedule I to the *Customs Tariff*, which provides guidance on the classification of “composition[s]” within a subheading of that Chapter.

The appellant’s representative further submitted that a third step needs to be taken in order for a binder to be produced, specifically, that the mixture must be combined with the isocyanate component (Part II). Therefore, the representative disagreed with the respondent’s reference to the end product in the decisions and submitted that no such reference should be read into the legislation.

The appellant's representative also contended that the *Chemicals and Plastics Duties Reduction or Removal Order* was intended to assist manufacturers in reducing their manufacturing costs and that it applies to chemicals of Chapters 28 and 29 which are not made in Canada and that are used in the manufacture of specific goods. In the representative's view, the goods in issue are such chemicals.

The appellant's representative further argued that it is not necessarily the end product which must be considered in order for goods to obtain tariff relief under the legislation. Rather, the conditions for relief under Code 7720 may be met at any stage of the manufacturing process. According to the representative, in past practice, when a chemical was combined with a resin at any stage of the manufacturing process, the third condition was met where the resulting goods were described in heading Nos. 39.01 to 39.16, as provided by the legislation.

Counsel for the respondent submitted that the goods in issue are used to manufacture Catalyst 3500 and that, since Catalyst 3500 is not a product described in one of the named headings under Code 7720, the goods in issue do not qualify for relief thereunder. In the alternative, counsel submitted that the goods in issue are used to manufacture PEP SET binders which are classified in heading No. 38.23 as "[p]repared binders for foundry moulds or cores."

Counsel for the respondent further submitted that Code 7720 has end-use requirements, in that the goods in issue must be used in the manufacture of the goods described in a named heading, but that it is the policy of the Department of National Revenue to extend the benefits of such end-use codes to goods that meet the conditions of Code 7720 at any stage of the manufacturing process after the addition of the goods in issue. Therefore, in this appeal, each stage of the manufacturing process following the addition of the catalyst must also be examined in order to determine if the goods in issue fall within a named heading at any stage.

In counsel for the respondent's view, the only stage that merits consideration in this appeal is the stage after which the catalyst is added to Part I. Therefore, the classification of the resulting mixture must be determined in accordance with the rules for classifying goods in Schedule I to the *Customs Tariff*. Moreover, the mixture only needs to be classified at the heading level to determine whether it qualifies for a reduction or removal of duties under Code 7720. Therefore, counsel submitted that the reliance of the appellant's representative on Supplementary Note 2(a) to Chapter 39 is not appropriate. Moreover, it is not in accordance with the established rules of classification within Schedule I to the *Customs Tariff*. In counsel's view, the only headings that merit consideration for the purposes of classifying the mixture are heading Nos. 39.09 and 38.23.

In counsel for the respondent's view, based on a review of the terms of the headings and any relevant Chapter Notes alone, the correct classification of the mixture is difficult to determine, as the mixture could be considered to be either a phenolic resin in primary form or a prepared binder for foundry moulds or cores. Accordingly, regard must be had to the Explanatory Notes to the Harmonized Commodity Description and Coding System⁴ (the Explanatory Notes). Upon consideration of the Explanatory Notes to Chapter 39, counsel submitted that, when a primary form of a polymer (in this case, the resin component) contains certain substances which, in counsel's view, include a catalyst necessary for "curing," if the addition of the

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

substances produces goods which are more specifically described in another heading, the goods are excluded from Chapter 39. Counsel submitted that the addition of Catalyst 3500 (Part III) to the phenolic resin component (Part I) creates a mixture which is specifically described in the Explanatory Notes to heading No. 38.23 as:

foundry core binders based on ... polymers of Chapter 39, etc.

These are preparations for mixing with foundry sand to give it a consistency suitable for use in foundry moulds or cores.

Accordingly, in counsel's view, the mixture is excluded from Chapter 39.

In response to the statement of the appellant's representative that the respondent's reference to the end product should not be read into the legislation, counsel for the respondent submitted that, once the catalyst is added to the resin component, the resulting goods are destined only to be mixed with foundry sand for use as a foundry core binder. Therefore, in counsel's view, the mixture is still classifiable in heading No. 38.23 as a preparation "for mixing with foundry sand to give it a consistency suitable for use in foundry moulds or cores," which suggests that a preparation does not have to be complete in order for it to be classified in heading No. 38.23 as a foundry core binder.

In reply, the appellant's representative argued that consideration of Supplementary Note 2(a) to Chapter 39 is appropriate. Furthermore, in his view, resins of Chapter 39 are not excluded from classification in that Chapter if they contain substances such as catalysts.

The appellant's representative also argued that, based on Customs Notice N-670,⁵ pertaining to the tariff classification of multi-part chemical systems (goods put up in sets) incorporating chemical, plastic or rubber components, the goods in issue should not be classified according to the end product (i.e. as a binder), as they do not meet the criteria for such classification. In other words, as individual components imported separately, the goods in issue must be considered as such for classification purposes.

Upon review of the legislation, the evidence and the relevant jurisprudence, the Tribunal is of the view that the goods in issue do not qualify for a reduction or removal of duties under Code 7720.

The Tribunal agrees with the parties that the only condition is that the goods in issue be used in the manufacture of goods named in heading No. 39.09, namely, phenolic resins in primary forms. Moreover, it accepts the parties' arguments that goods manufactured at each stage of the manufacturing process may be examined to determine whether the condition is met. Accordingly, it accepts that the only stage that merits consideration for the purposes of determining whether the resulting goods are classifiable in a named heading under Code 7720 is that of combining the catalyst (Part III) with the phenolic resin component (Part I).

In the agreed statement of facts, the parties described the three-part binder system. They identified the three parts as: (1) a phenolic resin blended with solvents; (2) an isocyanate component in solvent; and (3) a liquid catalyst, such as Catalyst 3500.

5. Department of National Revenue, Customs and Excise, March 9, 1992.

The issue in this appeal is whether the goods in issue are used in the manufacture of phenolic resins as described in heading No. 39.09. According to the appellant's representative, combining the catalyst and the phenolic resin blended with solvents yields a mixture which consists proportionally of only 1 percent catalyst. Therefore, the remainder of the mixture is composed of the phenolic resin component. In the Tribunal's view, combining the two parts does not result in the manufacture of a phenolic resin. Rather, the phenolic resin existed prior to combining the catalyst with the phenolic resin component. In other words, the goods in issue are not used in the manufacture of phenolic resins as described in heading No. 39.09, as the phenolic resins already existed prior to the addition of the catalyst.

According to the Tribunal, it is not sufficient that the mixture be classifiable in heading No. 39.09. Rather, it must have been manufactured through the addition of the catalyst. In the Tribunal's view, this does not happen in this case because the catalyst is added to goods which, if imported, would already be classifiable as phenolic resins as described in heading No. 39.09, and the goods presumed to be manufactured are phenolic resins. The addition of the catalyst to the phenolic resin component does not serve to enhance the qualities of the other goods as phenolic resins in primary forms.

In reaching its decision, the Tribunal took into account the appellant's technical bulletin entitled "PEP SET No-bake Binders," copies of which were submitted by both parties. It contains a number of statements which suggest that combining the catalyst with the phenolic resin component merely disperses the catalyst throughout the phenolic resin prior to the addition of the isocyanate component.

In the Tribunal's view, the statements support the fact that the catalyst is not used in the manufacture of phenolic resins as described in heading No. 39.09. Therefore, the third condition required for the goods in issue to qualify for a reduction or removal of duties under Code 7720 is not met.

Accordingly, the appeal is dismissed.

Raynald Guay
Raynald Guay
Presiding Member

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Member

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