

Ottawa, Thursday, January 25, 1996

Appeal No. AP-94-073

IN THE MATTER OF an appeal heard on August 28, 1995,
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of
National Revenue dated May 5, 1994, with respect to a request for
re-determination under section 63 of the *Customs Act*.

BETWEEN

BEST BRANDS INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Anita Szlajak
Anita Szlajak
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-073

BEST BRANDS INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The issue in this appeal is whether the goods in issue are properly classified under classification No. 2106.90.90.91 as other food preparations not elsewhere specified or included, as determined by the respondent, or should be classified under classification No. 2008.30.90.21 as other fruits, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included, as claimed by the appellant.

HELD: *The appeal is dismissed. The evidence indicates that the goods in issue contain a small percentage of lemon flavour, whether in the form of lemon purée or lemon juice. In the Tribunal's view, this is not sufficient to classify the goods in issue in heading No. 20.08 as fruits or other edible parts of plants. The evidence shows that the goods in issue are described as a smooth yellow paste that includes ingredients such as corn syrup, sugar, modified corn starch and vegetable shortening. The evidence also clearly shows that the goods in issue are used as fillings for pies. The Tribunal, therefore, concludes that the goods in issue are included in heading No. 21.06 and that they are properly classified under classification No. 2106.90.90.91.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: August 28, 1995
Date of Decision: January 25, 1996

Tribunal Members: Lyle M. Russell, Presiding Member
Anthony T. Eyton, Member
Anita Szlajak, Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Anne Jamieson

Parties: Anthony J. Gurniak, for the appellant
Christopher Rugar, for the respondent

Appeal No. AP-94-073

BEST BRANDS INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LYLE M. RUSSELL, Presiding Member
ANTHONY T. EYTON, Member
ANITA SZLAZAK, Member

REASONS FOR DECISION

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

The goods in issue, described as lemon pie filling, were imported into Canada on September 15, 1992. The issue in this appeal is whether the goods in issue are properly classified under classification No. 2106.90.90.91 of Schedule I to the *Customs Tariff*² as other food preparations not elsewhere specified or included, as determined by the respondent, or should be classified under classification No. 2008.30.90.21 21 as other fruits, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included, as claimed by the appellant. For the purposes of this appeal, the relevant tariff nomenclature reads, in part, as follows:

20.08	<i>Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included.</i>
2008.10	<i>-Nuts, ground-nuts and other seeds, whether or not mixed together:</i>
2008.30	<i>-Citrus fruit</i>
2008.30.90	<i>---Other</i>
2008.30.90.21	<i>-----In air-tight containers</i>
21.06	<i>Food preparations not elsewhere specified or included.</i>
2106.90	<i>-Other</i>
2106.90.90	<i>---Other</i>
2106.90.90.91	<i>-----In air-tight containers</i>

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

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

The ingredients in the goods in issue, which are listed in the appellant's "Ingredient Specification" in descending order by weight, include: water, corn syrup, sugar, modified corn starch, vegetable shortening with added mono and diglycerides (may contain soybean oil and/or cottonseed and palm oil), lemon purée, salt, egg yolk, citric acid, natural and artificial flavour, F D and C Yellow No. 5, less than 0.1 of 1 percent of benzoate of soda and potassium added as preservatives. A "Technical Information Bulletin" issued by the appellant describes the process of creating the lemon purée, one of the ingredients. In short, the fruit is very carefully graded and thoroughly sanitized prior to extraction. After the extraction process, where the fruit is separated into its component parts, those components are re-blended together with citric acid, sugar and lemon oil in the proportions required to maintain the chemical and organoleptic indices established by the appellant.

A sample of the goods in issue was analysed by the Laboratory and Scientific Services Directorate of the Department of National Revenue. It issued a report dated August 30, 1994, which describes the goods in issue as a smooth yellow paste that contains no citrus pulp, but that contains citric acid, which is added separately to the goods in issue. Furthermore, the report states that the goods in issue appear to contain less than 2 percent lemon juice, although the analysis performed could not confirm the presence of any lemon juice.

In the appellant's brief, it is argued that, unlike other fruits used in pie fillings, for example, apples, blueberries, cherries or strawberries, a lemon is extremely strong and bitter. As such, very little lemon purée is required to give the goods in issue their desired flavour. It is also argued that, although lemon purée is the sixth ingredient on the list of ingredients, it is the key ingredient that gives the goods in issue their essential character. The appellant disagrees with the respondent's decision that the goods in issue are more accurately described as fillings to which lemon purée has been added for flavouring. In the appellant's view, without the presence of the lemon purée, the product could not be marketed and sold as lemon pie filling. According to the appellant, the goods in issue should be classified as "[f]ruit ... otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included" in heading No. 20.08.

In its brief, the appellant referred to a dictionary definition to support the argument that lemon that has been puréed is still lemon; it is simply in smaller pieces. As such, in the appellant's view, the goods in issue are covered by the Explanatory Notes to the Harmonized Commodity Description and Coding System⁴ (the Explanatory Notes) to heading No. 20.08, which provide that the heading covers "fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter." It is contended in the appellant's brief that, since the goods in issue are described in heading No. 20.08, they cannot be classified in heading No. 21.06, as the Explanatory Notes to that heading provide that goods will be classified therein "[p]rovided that they are not covered by any other heading of the Nomenclature."

3. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912.

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

In the respondent's brief, reference is made to the Explanatory Notes to heading No. 20.08 to argue that, since the goods in issue only contain lemon purée and no pieces of lemon, crushed lemons or whole lemons, they cannot be classified in that heading. It was submitted in the respondent's brief that the goods in issue are properly classified in heading No. 21.06 as food preparations not elsewhere specified or included.

When classifying goods in Schedule I to the *Customs Tariff*, the application of Rule 1 of the General Rules for the Interpretation of the Harmonized System⁵ (the General Rules) is of the utmost importance. Rule 1 states that classification is first determined according to the terms of the headings and any relative Chapter Notes. Therefore, the Tribunal must determine whether the goods in issue are named or generically described in a particular heading. If they are, then they must be classified therein, subject to any relative Chapter Note. Section 11 of the *Customs Tariff* provides that, in interpreting the headings or subheadings, the Tribunal shall have regard to the Explanatory Notes.

The Explanatory Notes to heading No. 20.08 provide that “[t]his heading covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.” In the Tribunal's view, the goods in issue are not included in this definition. The evidence shows that the goods in issue contain a small percentage of lemon flavour, whether in the form of lemon purée or lemon juice. This is not sufficient to classify the goods in issue in heading No. 20.08 as fruits or other edible parts of plants. Note (4) of the Explanatory Notes to heading No. 21.06 provides that the heading includes “[p]astes based on sugar, containing added fat in a relatively large proportion and, sometimes, milk or nuts, not suitable for transformation directly into sugar confectionery but used as fillings, etc., for chocolates, fancy biscuits, pies, cakes, etc.” The evidence shows that the goods in issue are described as a smooth yellow paste that includes ingredients such as corn syrup, sugar, modified corn starch and vegetable shortening. The evidence also clearly shows that the goods in issue are used as fillings for pies. The Tribunal, therefore, concludes that the goods in issue are included in heading No. 21.06 and that they are properly classified under classification No. 2106.90.90.91.

Accordingly, the appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Anita Szlajak
Anita Szlajak
Member

5. *Supra*, note 2, Schedule I.