



Ottawa, Tuesday, October 8, 1996

Appeal No. AP-94-199

IN THE MATTER OF an appeal heard on February 5, 1996,
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 June 24, 1994, with respect to a request
for re-determination under section 63 of the *Customs Act*.

BETWEEN

FLORA DISTRIBUTORS LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Raynald Guay

Raynald Guay
Member

Desmond Hallissey

Desmond Hallissey
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-199

FLORA DISTRIBUTORS LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue under subsection 63(3) of the *Customs Act*. The issue in this appeal is whether “No-Odour Garlic” capsules by Dr. Dünner AG, imported by the appellant, are properly classified under tariff item No. 2106.90.90 as other food preparations not elsewhere specified or included, as determined by the respondent, or alternatively in heading No. 15.17, or should be classified under tariff item No. 3301.29.90 as other concentrates of essential oils in fixed oils obtained by maceration, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal finds that the goods in issue do not meet the general description of “essential oils” in the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 33.01. First, the Tribunal is not persuaded that the goods in issue serve as raw materials in the perfumery, food and other industries, as they are finished products which are comprised of various raw materials, only one of which is garlic oil. Second, the Tribunal finds that the goods in issue are not, themselves, extracts from concentrates by means of maceration. Rather, the goods in issue contain garlic oil which has been extracted from garlic cloves, in canola oil, by means of maceration. The Tribunal further finds that the goods in issue do not meet the description of concentrates of essential oils in fats, in fixed oils, in waxes or the like, as they do not meet the commonly accepted definition of “pomade.” On that basis, the Tribunal concludes that it was not contemplated that goods, such as those in issue, be classified in heading No. 33.01.

The Tribunal finds that the goods in issue do meet the general description in heading No. 21.06, as well as in the related explanatory notes, as they are food supplements, based on extracts from plants, in this case garlic cloves, put up in packagings. The Tribunal acknowledges that the label for the goods in issue does not indicate that their purpose is to maintain general health or well-being. However, the evidence indicates that the goods in issue are used for that purpose.

Place of Hearing: Vancouver, British Columbia
Date of Hearing: February 5, 1996
Date of Decision: October 8, 1996

Tribunal Members: Arthur B. Trudeau, Presiding Member
Raynald Guay, Member
Desmond Hallissey, Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Anne Jamieson

Appearances: Jens Tonnesen and Bruce Dales, for the appellant
Josephine A.L. Palumbo, for the respondent

Appeal No. AP-94-199

FLORA DISTRIBUTORS LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
RAYNALD GUAY, Member
DESMOND HALLISSEY, 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 under subsection 63(3) of the Act. The issue in this appeal is whether “No-Odour Garlic” capsules by Dr. Dünner AG, imported by the appellant, are properly classified under tariff item No. 2106.90.90 of Schedule I to the *Customs Tariff*² as other food preparations not elsewhere specified or included, as determined by the respondent, or alternatively in heading No. 15.17, or should be classified under tariff item No. 3301.29.90 as other concentrates of essential oils in fixed oils obtained by maceration, as claimed by the appellant. The following is the relevant tariff nomenclature:

21.06	Food preparations not elsewhere specified or included.
2106.90	-Other
2106.90.90	---Other:
33.01	Essential oils (terpeneless or not), including concretes and absolutes; resinoids; concentrates of essential oils in fats, in fixed oils, in waxes or the like, obtained by enfleurage or maceration; terpenic by-products of the deterpenation of essential oils; aqueous distillates and aqueous solutions of essential oils.
	-Essential oils other than those of citrus fruit:
3301.29	--Other
3301.29.90	---Other
15.17	Margarine; edible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of this Chapter, other than edible fats or oils or their fractions of heading No. 15.16.
1517.90	-Other

The appellant’s representatives, Mr. Jens Tonnesen, Operations Manager of Flora Distributors Ltd., and Mr. Bruce Dales, a chemist in the research and development section of Flora Distributors Ltd., also appeared as witnesses for the appellant. They described the goods in issue as odourless garlic oil macerate prepared for retail sale in measured doses as an herbal medicinal product. The goods in issue are comprised of soft gelatin capsules, each containing 270 mg of garlic oil. They submitted that heading No. 33.01 covers the goods in issue, as the essential oil of garlic has been extracted by means of fixed oils (canola) in a

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

maceration process of 1:1 at room temperature. The label for the goods in issue describes the goods as “No-Odour Garlic” and states that the “capsules are enteric coated and bypass the stomach, dissolving only in the small intestine thus preventing breath odour.”

As described by the appellant’s representatives, the garlic oil is extracted from the garlic by way of maceration. Maceration is a process by which a fixed particle is dissolved into a liquid with the use of a solvent, in the case of the goods in issue, canola oil. According to the appellant’s representatives, canola oil is used because it is a healthy oil with some polyunsaturated fats. The canola oil is mixed with garlic cloves that have been crushed and is left to sit for some time at room temperature to enable the canola oil to extract the fat soluble ingredients, the active or essential compounds, from the garlic. The product is then filtered to remove the solid particles, and the leftover oil is put into gelatin capsules. Additional canola oil, approximately 66 percent, is added after maceration to ensure that the product has a standard medicinal effect and is safe and non-toxic. Reference was made to the description of the production process³ provided by the manufacturer, Finzelberg, which confirmed that this was the process used to make the goods in issue.

Mr. Dales, who indicated that he had some training in the field of chemistry, introduced the following definitions of “macerate”:

*To soften by steeping in a liquid preparation at room temperature or slightly higher; to soften and wear away by steeping.*⁴

*To reduce (a solid substance) to a soft mass by soaking in liquid.... to make soft.*⁵

He also introduced the following definitions of “maceration”:

*Process of softening a solid by steeping in a fluid.*⁶

*[T]he softening of a solid by soaking.*⁷

Mr. Dales stated that the goods in issue are 100 percent concentrates of macerated garlic oil. He further stated that garlic capsules are produced in accordance with the *British Herbal Compendium*,⁸ which he described as the traditional reference and best source to use in order to make sure that a product is adequately potent and safe. This source refers to garlic powder tablets, oil-macerated garlic products and steam-distilled garlic oil. In Mr. Dales’ opinion, if the capsules contained pure garlic oil, the product would not be as good or safe. He referred to the gas chromatography test, which is a technique used to analyze a product to make sure that there is a proper amount of active ingredient, in this case, garlic oil.

Ms. Catherine Copeland, a senior chemist in the Organic and Food Products Laboratory of the Laboratory and Scientific Services Directorate of the Department of National Revenue, was called on behalf

3. Exhibit A-1.

4. *Source Book for Food Scientists*, Herbert W. Ockerman, Ph.D. (Westport: The AVI Publishing Company, 1978) at 162.

5. *Funk & Wagnalls Canadian College Dictionary* (Markham: Fitzhenry & Whiteside, 1986) at 810.

6. *Taber’s Cyclopedic Medical Dictionary*, 17th ed. (Philadelphia: F.A. Davis Company, 1993) at 1151.

7. *Dorland’s Illustrated Medical Dictionary*, 28th ed. (Philadelphia: W.B. Saunders Company, 1994) at 975.

8. Vol. 1, “A handbook of scientific information on widely used plant drugs, Companion to Volume 1 of the *British Herbal Pharmacopoeia*,” edited by Peter R. Bradley.

of the respondent as an expert witness in the area of analysis of foodstuffs and related products, organic chemicals and chemical products using a variety of instrumental techniques. Ms. Copeland prepared a report of the Laboratory and Scientific Services Directorate⁹ from her analysis of the goods in issue. She described the goods in issue as consisting of gelatin capsules containing a pale yellow oily liquid which was found to be approximately 90 percent canola oil and 10 percent essential oil of garlic. She stated that, in her opinion, based on her review of the label, the goods in issue have been prepared for a specific use, as a food supplement, as it is being promoted as an alternative to eating garlic itself, which is said to be of some benefit.

Ms. Copeland stated that essential oil of garlic is usually obtained by steamed distillation from the crushed garlic bulbs. In her opinion, under normal circumstances, she would not have said that the canola oil resulted from the manufacturing process to obtain the essential oil of garlic. However, she acknowledged, based on the appellant's evidence, that, in the case of the goods in issue, a certain proportion of the canola oil is obtained in the manufacturing process.

In response to questions concerning the meanings of "maceration" and "enfleurage," Ms. Copeland introduced, as exhibits, excerpts from two publications: *Perfumes Cosmetics & Soaps*¹⁰ and *The New Encyclopædia Britannica*.¹¹ Based on these excerpts, she stated that the terms "enfleurage" and "maceration" have very specific meanings. Enfleurage is the extraction of an essential oil on solid fats at cold temperatures. The solid fats traditionally used are purified lard and tallow, as well as other similar waxy substances or greases. The process involves the laying, for example, of flower petals across the top of the cold fat and leaving them there for one to three days. The flower petals are removed, and the procedure is repeated several times until there is a concentrate of the essential oil in the solid fats. Maceration is the extraction of an essential oil in molten or hot fat. The flower petals are immersed in hot fat for several hours and then removed, and the process is repeated several times, until a concentrate of the essential oil is left in the fat. The resulting product is known and sold, in the trade, as a pomade.

Ms. Copeland also introduced the following definition of "maceration" from the *Webster's Third New International Dictionary*:¹²

an act or the process of macerating something ... a process of extracting fragrant oils that is similar to enfleurage but differs in the use of hot fat in which the flower petals are immersed.¹³

Ms. Copeland submitted that the term "maceration" in the perfumery sense or the sense of extracting essential oils, as is contemplated in heading No. 33.01, is different from the meaning of maceration being put forward by the appellant's representatives. She acknowledged that the garlic oil in the goods in issue is produced by an extraction process. However, she disagreed that the extraction process constituted maceration.

Counsel for the respondent referred Ms. Copeland to the opinion concerning "Dr. Dünner Evening Primrose Oil" with added vitamin E and milkfat, put up in gelatin/glycerol capsules and packaged in blister packs for retail sale, used to supplement the diet with essential fatty acids contained in the oil (in particular,

9. Respondent's Brief, Tab 1.

10. Vol. II, 3rd ed., William A. Poucher, Ph.C. (New York : D. Van Nostrand Company, 1929) at 38-44.

11. Vol. 4, 15th ed. (Toronto : Encyclopædia Britannica, 1987) at 563-65.

12. (Merriam-Webster, 1986).

13. *Ibid.* at 1353.

gamma-linolenic acid) in the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*¹⁴ (the Classification Opinions). The opinion provides that this product should be classified in subheading No. 1517.90, which covers “edible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or ... fractions of heading No. 15.16” other than margarine. When asked how the opinion could potentially be applied to the goods in issue, Ms. Copeland responded that the evening primrose oil and gelatin capsules sometimes contain added milkfat and are, therefore, considered to be edible preparations of vegetable oil.

In argument, the appellant’s representatives challenged several statements made in the respondent’s brief. In particular, it was argued, based on the manufacturer’s description of the production process, that canola oil is used to extract the garlic oil and that the addition of canola oil after the extraction is completed is to dilute the garlic oil to a standard that is acceptable as a medicinal product. The appellant’s representatives also disagreed with the respondent’s conclusion that the goods in issue are similar to the evening primrose oil referred to in the Classification Opinions. The appellant’s representatives submitted that, although they are both oils and are beneficial to your health, the two oils are extracted by different processes.

The appellant’s representatives referred to the *British Herbal Compendium* and submitted that use of the maceration method of extraction at cool temperatures is not uncommon in the area of traditional herbal medicine or traditional chemistry involved in traditional herbal medicine. They further submitted that the language of heading No. 33.01 is not limited to the perfume industry, and they could not see why traditional herbal medicine would not fit into that other industry category in which maceration can take place at both cool or hot temperatures, depending on the product.

Counsel for the respondent submitted that the goods in issue are essentially small capsules made up of gelatin, a high-protein, low-calorie foodstuff containing a combination of 10 percent essential oil of garlic and 90 percent canola oil, an edible vegetable oil. In addition, as confirmed by the appellant’s representatives, 66 percent of canola oil is added after maceration as a diluent or carrier. The goods in issue are intended and prepared for human consumption, as imported, and are promoted as an herbal medicinal product, with a suggested consumption of 1 or 2 capsules daily. The goods in issue are to be eaten, and the gelatin capsules ensure that digestion does not begin in the stomach, thereby eliminating the odour normally associated with eating garlic.

Counsel for the respondent argued that, in order for goods to be classified in heading No. 33.01, they must be “essential oils” or “concentrates of essential oils in fats, in fixed oils, in waxes or the like, obtained by enfleurage or maceration.” She referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*¹⁵ (the Explanatory Notes) to heading No. 33.01 which read, in part, as follows:

(A) **Essential oils, including concretes and absolutes; resinoids.**

Essential oils, which serve as raw materials in the perfumery, food and other industries, are of vegetable origin.

They are obtained by various processes, such as:

- (1) Expression (e.g., lemon oil from lemon peel).
- (2) Steam distillation.

14. Customs Co-operation Council, 1st ed., Brussels, 1987.

15. *Ibid.* 1986.

(3) Extraction from fresh materials of vegetable origin by means of solvents such as petroleum ether, benzene, acetone, toluene.

(4) Extraction from the concentrates obtained by *enfleurage* or maceration (see Part (B) below).

(B) **Concentrates of essential oils in fats, in fixed oils, or in waxes or the like.**

These concentrates are obtained when essential oils are extracted from plants or flowers by means of fats, fixed oils, petroleum jelly, paraffin wax, etc., either in the cold or with the application of heat (*enfleurage*, maceration or digestion). They therefore take the form of concentrates of essential oils in fats, fixed oils, etc. The concentrates in fats are known in trade as “flower pomades”.

Counsel for the respondent submitted that the goods in issue do not “serve as raw materials in the perfumery, food and other industries.” She further submitted that, because the goods in issue consist of three components, namely, gelatin capsules, canola oil and garlic oil, they cannot be said to be essential oils. Moreover, because the canola oil was combined with the garlic oil after the garlic oil was extracted, she submitted that the contents of the gelatin capsules cannot be considered “concentrates of essential oils ... in fixed oils.”

Reference was also made to Explanatory Note (D) entitled “Aqueous distillates and aqueous solutions of essential oils” which provides that heading No. 33.01 excludes “(b) [m]ixtures of essential oils, mixtures of resinoids, mixtures of essential oils with resinoids, and mixtures with a basis of essential oils.” Counsel for the respondent submitted that this express exclusion prevents the goods in issue from being classified in heading No. 33.01.

Finally, counsel for the respondent submitted, based on her reference to the Explanatory Notes to heading No. 21.06, that preparations used for human consumption, based on extracts from plants and put up in packagings with indications that they maintain general health or well-being, are to be classified in heading No. 21.06. In particular, she referred to the Explanatory Notes to heading No. 21.06 which read, in part, as follows:

The heading includes, *inter alia*:

(16) Preparations, often referred to as *food supplements*, based on extracts from plants, fruit concentrates, honey, fructose, etc. and containing added vitamins and sometimes minute quantities of iron compounds. These preparations are often put up in packagings with indications that they maintain general health or well-being. Similar preparations, however, intended for the prevention or treatment of diseases or ailments are **excluded (heading 30.03 or 30.04)**.

She submitted that the goods in issue are packaged in a measured dosage as a diet supplement intended for human consumption and are, therefore, properly classified in heading No. 21.06.

Alternatively, counsel for the respondent submitted that the goods in issue could be classified in subheading No. 1517.90, as is “Dr. Dünner Evening Primrose Oil.” She referred to the opinion concerning “[e]vening primrose oil with added vitamin E and milkfat, put up in gelatin/glycerol capsules and packaged in blister packs for retail sale, used to supplement the diet with essential fatty acids contained in the oil (in particular, gamma-linolenic acid)” contained in the Classification Opinions. The opinion provides that this product should be classified in subheading No. 1517.90, which covers “edible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or ... fractions of heading No. 15.16” other than margarine.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules for the Interpretation of the Harmonized System*¹⁶ (the General Rules) and the *Canadian Rules*.¹⁷ Rule 1 of the General Rules provides that classification is to 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 principles set out in Rules 2 through 6, as well as the *Canadian Rules* which follow. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the Explanatory Notes as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*. Thus, the starting point in classifying the goods in issue is to consider the terms of heading Nos. 33.01, 21.06 and 15.17 and any relative Section or Chapter Notes and the Explanatory Notes which may provide some guidance as to the appropriate interpretation of the terms of those headings.

Heading No. 33.01 covers “[e]ssential oils ... including concretes and absolutes; resinoids; concentrates of essential oils in fats, in fixed oils, in waxes or the like, obtained by enfleurage or maceration; terpenic by-products of the deterpenation of essential oils; aqueous distillates and aqueous solutions of essential oils.”

The description of “essential oils” in the Explanatory Notes provides that they “serve as raw materials in the perfumery, food and other industries” and may be obtained by various processes, such as expression, steam distillation, extraction by means of solvents and extraction from concentrates by means of enfleurage or maceration. In addition, the list of principal essential oils and resinoids in the Annex to the Explanatory Notes to Chapter 33 includes garlic.

In the Tribunal’s view, the goods in issue do not meet this general description. First, the Tribunal is not persuaded that the goods in issue serve as raw materials in the perfumery, food and other industries. The Tribunal accepts that the production of the goods in issue may be covered by the phrase “other industries,” as argued by the appellant’s representatives. However, in the Tribunal’s opinion, the goods in issue cannot be considered to be raw materials. Rather, the goods in issue are finished products which are manufactured or produced using various raw materials,¹⁸ only one of which is garlic oil. Second, the Tribunal finds that the goods in issue are not, themselves, extracts from concentrates by means of maceration. Rather, the goods in issue contain garlic oil which has been extracted from garlic cloves, in canola oil, by means of maceration.

The Tribunal is also of the opinion that the goods in issue do not meet the description of concentrates of essential oils in fats, in fixed oils, in waxes or the like. These concentrates are described in the Explanatory Notes as having been obtained “when essential oils are extracted from plants or flowers by means of fats, fixed oils, petroleum jelly, paraffin wax, etc., either in the cold or with the application of heat (*enfleurage*, maceration or digestion)” and as being known in the trade as “flower pomades.” The Tribunal accepts that the garlic oil contained in the goods in issue has been obtained by a process commonly defined as maceration. However, the Tribunal observes that pomades are commonly defined as scented ointments for

16. *Supra* note 2, Schedule I.

17. *Ibid.*

18. See *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*, [1968] S.C.R. 140, in which manufacturing is described as giving raw materials new forms, qualities and properties or combinations. See, also, *The Minister of National Revenue v. Enseignes Imperial Signs Ltée* (1990), 116 N.R. 235, Federal Court of Appeal, File No. A-264-89, February 28, 1990, in which the Federal Court of Canada states that a thing is produced when it can perform a function that could not be performed by the raw materials.

application to the skin and, more particularly, for application to the scalp and hair.¹⁹ The Tribunal is not persuaded that the goods in issue meet this commonly accepted definition of “pomade,” nor is it of the view that they are of the same character as pomades, and is, therefore, of the view that it was not contemplated that goods, such as those in issue, be classified in heading No. 33.01.

In the Tribunal’s view, the goods in issue do meet the general description of food preparations not elsewhere specified or included in heading No. 21.06, as well as in the related explanatory notes. The Explanatory Notes to heading No. 21.06 provide that it includes “[p]reparations, often referred to as *food supplements*, based on extracts from plants, fruit concentrates, honey, fructose, etc. and containing added vitamins and sometimes minute quantities of iron compounds.” The Explanatory Notes further provide that the “preparations are often put up in packagings with indications that they maintain general health or well-being.” The evidence before the Tribunal indicates that the goods in issue are food supplements, based on extracts from plants, in this case garlic cloves, put up in packagings. The Tribunal acknowledges that the label for the goods in issue does not indicate that their purpose is to maintain general health or well-being. However, the evidence indicates that the goods in issue are used for that purpose.

Accordingly, the appeal is dismissed, and the Tribunal finds that the goods in issue are properly classified under tariff item No. 2106.90.90 as other food preparations not elsewhere specified or included.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Raynald Guay
Raynald Guay
Member

Desmond Hallissey
Desmond Hallissey
Member

19. *The Oxford English Dictionary*, 2nd ed., Vol. XII (Oxford: Clarendon Press, 1989) at 81: “A scented ointment (in which apples are said to have been originally an ingredient) for application to the skin; now used esp. for the skin of the head and for dressing the hair”; *Gage Canadian Dictionary* (Toronto: Gage Publishing, 1983) at 874: “a perfumed ointment for the scalp and hair”; and *Webster’s New World Dictionary*, 3rd College ed. (New York: Simon & Schuster, 1988) at 1048: “a perfumed ointment, esp. for grooming the hair.”