

Ottawa, Thursday, October 12, 1995

Appeal No. AP-94-159

IN THE MATTER OF an appeal heard on January 20, 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 pursuant to section 63 of the *Customs Act*.

BETWEEN

CALAVO FOODS, INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Raynald Guay
Raynald Guay
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-159

CALAVO FOODS, INC.

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 dated May 5, 1994, made under subsection 63(3) of the Customs Act. The issue in this appeal is whether frozen guacamole is properly classified under tariff item No. 2103.90.20 as other sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard, as determined by the respondent, or should be classified under tariff item No. 2008.99.92 as other mixtures of fruit, otherwise prepared or preserved, not elsewhere specified or included, as claimed by the appellant.

HELD: *The appeal is allowed. To be classified in heading No. 20.08, a product must not be “elsewhere specified or included.” Counsel for the respondent argued that guacamole is specified or included in heading No. 21.03. The Tribunal disagrees. Having considered the evidence, the Tribunal is of the view that guacamole is not a mixed condiment. The evidence shows that guacamole can easily be distinguished from products such as ketchup and mustard, which clearly are “mixed condiments.” The Tribunal is of the opinion that the evidence clearly establishes that guacamole is “[f]ruit ... otherwise prepared or preserved.” It is made up of at least 80 percent avocado, is mixed or prepared with other ingredients, and is frozen or preserved in sealed containers before being exported to Canada. The evidence shows that guacamole is a mixture of avocado. As such, the Tribunal finds that the guacamole should be classified under tariff item No. 2008.99.92.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 20, 1995
Date of Decision: October 12, 1995

Tribunal Members: Raynald Guay, Presiding Member
Charles A. Gracey, Member
Lise Bergeron, Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Anne Jamieson

Appearances: Michael A. Kelen, for the appellant
Frederick B. Woyiwada, for the respondent

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CALAVO FOODS, INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: RAYNALD GUAY, 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 a decision of the Deputy Minister of National Revenue dated May 5, 1994, made under subsection 63(3) of the Act.

Two products, frozen avocado pulp and frozen guacamole, were imported into Canada by the appellant in April 1993. On importation, both products were classified under tariff item No. 2008.99.92 of Schedule I to the *Customs Tariff*² as other mixtures of fruit, otherwise prepared or preserved, not elsewhere specified or included. The products were reclassified following a re-determination pursuant to section 61 of the Act under tariff item No. 2103.90.20 as other sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard. A request for reclassification of the products under classification No. 2008.99.92.10 was denied by the respondent. In the respondent's brief, it was conceded that the frozen avocado pulp should be classified under classification No. 2008.99.92.10, as claimed by the appellant, and the Tribunal agrees.

The issue in this appeal is whether the frozen guacamole is properly classified under tariff item No. 2103.90.20, as determined by the respondent, or should be classified under tariff item No. 2008.99.92, 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>
2008.99	<i>--Other</i>
2008.99.92	<i>---- ... avocados,</i>
2008.99.92.10	<i>-----In air-tight containers</i>
21.03	<i>Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard.</i>
2103.90	<i>-Other</i>
2103.90.20	<i>---Mixed condiments and mixed seasonings</i>

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

Counsel for the appellant called two witnesses: Mr. Alan C. Ahmer, Vice-President, Sales and Marketing at Calavo Foods, Inc., and Ms. Diane Valine, Manager, Food Technology at Calavo Foods, Inc.

Mr. Ahmer gave a brief history of the appellant. He explained that the appellant produces at least three different products: avocado pulp, various flavours of guacamole and avocado sauce. Mr. Ahmer mentioned that the only difference between the first two products is that the guacamole is seasoned, while the avocado pulp is unseasoned. Ingredients such as red bell peppers, dehydrated onions and chillies are added to the avocado pulp to make guacamole. People who buy avocado pulp can add their own ingredients and make their own products. According to Mr. Ahmer, the avocado pulp and the guacamole are virtually identical products. Except for the added seasonings, they have virtually the same content. Both products contain the same amount of avocado. The guacamole is sold in different sizes. All products are frozen when exported to Canada. Mr. Ahmer explained, with the use of physical exhibits, that guacamole can be eaten as an appetizer or a dip. It can also be used as an ingredient in salads, sandwiches, burgers or fajitas. When used in such a way, guacamole becomes a value-added component to the finished product sold in restaurants. Mr. Ahmer also explained that there are advantages to using frozen guacamole instead of fresh guacamole. For instance, there is a consistency of colour, taste and texture because it is basically the same product year round. Finally, Mr. Ahmer testified that, in Spanish, “guacamole” means “mixture of avocado” and that the French translation used for “guacamole” is “*purée d’avocats*.”

During cross-examination, Mr. Ahmer explained that guacamole is not a condiment, such as ketchup or mustard. According to Mr. Ahmer, guacamole can be distinguished from these products by the fact that, when served to customers, it is sold at an extra cost. Condiments are usually free of charge. Furthermore, guacamole may be eaten by itself, while products such as ketchup or mustard would not be, and a person would probably add more guacamole than ketchup or mustard on a hamburger or a sandwich, for example. Mr. Ahmer also explained that avocado pulp is not normally eaten by itself or used as an ingredient. Seasonings are added to the avocado pulp to make guacamole, which is the more popular product.

The next witness, Ms. Valine, testified as an expert with respect to the composition, production, nutritional value and viscosity of guacamole and other products produced by the appellant. She described how guacamole is made. Ms. Valine explained that the avocados are hard when they are delivered to the plant. Any fruit that is soft is culled or thrown out. The rest of the fruit goes into a ripening cycle, which takes from five to seven days. The fruit is then washed and placed on a processing line, where it is cut in half, the stone is removed and the pulp is extracted using perforated reels which separate the avocado away from the peel. The “avocado meat” is then blended with the vegetables, spices and acidulents, which usually include citric acid, erythorbic acid and sodium acid pyrophosphate. The guacamole is then put into containers that are sealed and frozen.

Ms. Valine testified that guacamole is usually made up of at least 80 percent avocado, between 12 and 15 percent vegetables, 2 percent spices and small amounts of acidulents and water. Ms. Valine added that avocado pulp is also made up of at least 80 percent avocado. According to Ms. Valine, guacamole is not a condiment. Normally, condiments are considered to be products such as salt, pepper, spices, mustard, mayonnaise and ketchup, which are typically used in small quantities, while guacamole is a product which is typically used in much larger quantities. For example, a person can be expected to eat 85 to 113 g of guacamole in one serving, while a person would normally only use a few grams of salt or pepper and maybe

14 g of ketchup or mustard on a sandwich or a hamburger. Furthermore, condiments would not normally be eaten by themselves, and they contain very little nutritional value. Guacamole, on the other hand, which is made up of fruit and vegetables, is quite nutritional. It contains approximately eight essential vitamins and minerals and is high in carbohydrates and monounsaturated fat.

Counsel for the appellant argued that guacamole is a preparation of avocado, mixed with seasonings and vegetables and preserved by freezing, and that it should be classified under tariff item No. 2008.99.92. Relying on dictionary definitions and the Explanatory Notes to the Harmonized Commodity Description and Coding System³ (the Explanatory Notes), counsel argued that the guacamole is not properly classified under tariff item No. 2103.90.20 as “[m]ixed condiments.” The word “condiment” is defined as “something used to give a special flavor to food, as mustard, ketchup, salt, or spices.”⁴ According to counsel, the evidence shows that guacamole is not a mixed condiment. Rather, it is a food in itself. Like cheese, guacamole can be eaten as a dip or an appetizer with a cracker or a tortilla chip. The cracker or tortilla chip is used to scoop a generous portion of guacamole. Counsel argued that a person would not eat a mixed condiment in this fashion. Furthermore, the evidence shows that guacamole is used as a major food ingredient in salads, sandwiches and fajitas. Counsel referred to Note (A) of the Explanatory Notes to heading No. 21.03 and argued that guacamole does not fit the description of “mixed condiments,” since it retains the essential character of an avocado. Note (A) also provides examples of mixed condiments such as tomato ketchup and celery salt, none of which, according to counsel, are similar to guacamole. Counsel argued that none of these products would be eaten by themselves or used as a major ingredient, and none of them would be considered the primary focus in an appetizer dish, a salad or a sandwich, as would guacamole.

Counsel for the respondent argued that the onus is on the appellant to show that the respondent did not properly classify the guacamole. He mentioned that the Tribunal is dealing with a new product that has only recently become known to the Canadian food and restaurant industries. Counsel argued that a prepared fruit product can only be classified in heading No. 20.08, if it is not elsewhere specified or included. Thus, according to counsel, the Tribunal must determine that guacamole is excluded from any other heading before it can be classified in heading No. 20.08. Relying on a dictionary definition and the Explanatory Notes, counsel argued that guacamole is properly classified under tariff item No. 2103.90.20 as “[m]ixed condiments.” The word “condiment” is defined as “something usu. pungent, acid, salty, or spicy added to or served with food to enhance its flavor or to give added flavor.”⁵ According to counsel, the evidence shows that guacamole is a mixed condiment, as it is used to enhance the flavour of other food or to give it added flavour. Counsel argued that guacamole would not be eaten by itself. The evidence also shows that it is always accompanied by or added to other food, for example, tortilla chips, hot dogs or sandwiches. Furthermore, according to counsel, there are substantial differences between guacamole and avocado pulp. For example, there are differences in the composition, appearance and function of the two products. Finally, in his brief, counsel argued that guacamole is similar to the products listed in Note (A) of the Explanatory Notes to heading No. 21.03 and that, as such, it is properly classified.

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

4. The Random House Dictionary of the English Language, 2nd ed. (New York: Random House, 1987) at 425.

5. Webster’s Third New International Dictionary of the English Language (Springfield: Merriam-Webster, 1986) at 473.

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 System⁶ (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 guacamole is named or generically described in a particular heading. If it is, then it must be classified therein, subject to any relative Chapter Notes. Section 11 of the *Customs Tariff* provides that, in interpreting the headings or subheadings, the Tribunal shall have regard to the Explanatory Notes.

To be classified in heading No. 20.08, a product must not be “elsewhere specified or included.” Counsel for the respondent argued that guacamole is specified or included in heading No. 21.03. The Tribunal disagrees. Having considered the evidence, the Tribunal is of the view that guacamole is not a mixed condiment. The evidence shows that guacamole can easily be distinguished from products such as ketchup and mustard, which clearly are “mixed condiments.” For example, guacamole is typically eaten in greater quantity, is considered a value-added component to many dishes, contains a fair amount of nutritional value and could arguably be eaten by itself. In the Tribunal’s view, guacamole does more than add flavour to other food. It is usually treated as an important ingredient in a dish, as would be other ingredients, such as meat, cheese, tomatoes or lettuce. When eaten with tortilla chips, for example, guacamole is clearly part of the dish and not simply something which is served with the tortilla chips to add flavour. In the Tribunal’s view, it would be quite extraordinary to eat ketchup, mustard or even mayonnaise in such a way.

The Tribunal is of the opinion that the evidence clearly establishes that guacamole is “[f]ruit ... otherwise prepared or preserved.” It is made up of at least 80 percent avocado, is mixed or prepared with other ingredients, and is frozen or preserved in sealed containers before being exported to Canada. The evidence shows that guacamole is a mixture of avocado. As such, the Tribunal finds that the guacamole should be classified under tariff item No. 2008.99.92.

Accordingly, the appeal is allowed.

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