

Ottawa, Monday, December 2, 1996

Appeal No. AP-95-044

IN THE MATTER OF an appeal heard on July 25, 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 March 14, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

READI-BAKE 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

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-044

READI-BAKE 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 under subsection 63(3) of the *Customs Act*. The issue in this appeal is whether Read-Bake goods, described as frozen cookie dough, imported by the appellant are properly classified under tariff item No. 1901.20.10 of as mixes and doughs for the preparation of bakers' wares of heading No. 19.05, as determined by the respondent, or should be classified under tariff item No. 1905.30.90 as other sweet biscuits, as claimed by the appellant.

HELD: The appeal is dismissed. The goods in issue are properly classified under tariff item No. 1901.20.10. In the Tribunal's view, the goods in issue meet the description "food preparations of flour ... not containing cocoa powder or containing cocoa powder in a proportion by weight of less than 50 %," found in heading No. 19.01. The phrase "biscuits and other bakers' wares" in heading No. 19.05 covers goods which have been fully or partially baked. The Tribunal's finding is supported by the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 19.05 which provide that biscuits are "usually made from flour and fat to which may have been added sugar" and are "baked for a long time to improve the keeping qualities." Furthermore, Rule 2 (a) of the *General Rules for the Interpretation of the Harmonized System* does not apply, since unbaked cookie dough, even if formed into the final shape of a biscuit or cookie, does not have the essential character of a biscuit or cookie.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 25, 1996
Date of Decision:	December 2, 1996
Tribunal Member:	Lyle M. Russell, Presiding Member
Counsel for the Tribunal:	Shelley Rowe
Clerk of the Tribunal:	Anne Jamieson
Parties:	Douglas J. Bowering, for the appellant Ian McCowan, for the respondent

Appeal No. AP-95-044

READI-BAKE INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LYLE M. RUSSELL, Presiding Member

REASONS FOR DECISION

This is an appeal, heard by one member of the Tribunal,¹ under section 67 of the *Customs Act*² (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 Read-Bake goods, described as frozen cookie dough, imported by the appellant are properly classified under tariff item No. 1901.20.10 of Schedule I to the *Customs Tariff*³ as mixes and doughs for the preparation of bakers' wares of heading No. 19.05, as determined by the respondent, or should be classified under tariff item No. 1905.30.90 as other sweet biscuits, as claimed by the appellant. The following is the relevant tariff nomenclature:

- 19.01 Malt extract; food preparations of flour, meal, starch or malt extract, not containing cocoa powder or containing cocoa powder in a proportion by weight of less than 50 %, not elsewhere specified or included; food preparations of goods of heading Nos. 04.01 to 04.04, not containing cocoa powder or containing cocoa powder in a proportion by weight of less than 10 %, not elsewhere specified or included.
- 1901.20 -Mixes and doughs for the preparation of bakers' wares of heading No. 19.05
- 1901.20.10 ---In packages of a weight not exceeding 11.34 kg each
- 19.05 Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products.
- 1905.30 -Sweet biscuits; waffles and wafers
- 1905.30.90 ---Other

At the joint request of the appellant and the respondent, the appeal proceeded by way of written submissions under rule 25 of the *Canadian International Trade Tribunal Rules*,⁴ on the basis of the Tribunal's record, including the parties' briefs and the agreed statement of facts.

1. Section 3.2 of the *Canadian International Trade Tribunal Regulations*, added by SOR/95-27, December 22, 1994, *Canada Gazette* Part II, Vol. 129, No. 1 at 96, provides, in part, that the Chairman of the Tribunal may, taking into account the complexity and precedential nature of the matter at issue, determine that one member constitutes a quorum of the Tribunal for the purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to the *Customs Act*.

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

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

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

The agreed facts, as taken from the respondent's brief, are as follows:

3. The goods at issue in this appeal are frozen cookie batter consisting of whole eggs, brown sugar and enriched flour (the "frozen batter").
4. The frozen batter is cut into a star, heart, or round shapes. It is entirely uncooked.
5. The frozen batter is imported in boxes which have a net weight of 6.8 kg (15 lbs).
6. The frozen batter must be cooked 12-14 minutes to produce a finished biscuit (cookie).

In addition, samples of the labels used for the goods in issue were accepted as part of the agreed statement of facts. The labels indicate that the goods in issue are referred to as "frozen cookie dough" and are available in a variety of sizes and flavours, including jumbo chocolate chip, super jumbo oatmeal raisin and large sugar.

The appellant's representative argued that, in determining the appropriate classification of the goods in issue, the Tribunal should look to the words of the headings, taking into account relevant Chapter and Section Notes, and should refer only to those notes that were in effect at the time of the importation of the goods in issue. Therefore, in the representative's opinion, the Tribunal cannot take into account any amendments to notes which came into effect after the importation of the goods in issue.

Looking at the words of heading No. 19.01 and the relevant notes, the appellant's representative submitted that all articles referred to therein appear in the material form, as opposed to the form of a product or an article. The representative described the goods in issue as dough that has been cut to size or shape, placed on paper sheets, quick frozen and packaged in layers in boxes for sale to bulk users, such as institutions. As such, he submitted that the goods in issue are an identifiable entity in an unfinished form and should, therefore, be classified in heading No. 19.05 in accordance with Rule 2 (a) of the *General Rules for the Interpretation of the Harmonized System*⁵ (the General Rules), which provides that "[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article." Classified in this manner, the goods in issue are specifically excluded from heading No. 19.01 by virtue of the fact that they are specified elsewhere, that is, in heading No. 19.05 as "biscuits."

In the view of the appellant's representative, the prime difference between heading Nos. 19.01 and 19.05 is that the former covers "food preparations," or what he submitted are "materials," while the latter covers "wares," or what he submitted are "articles." He argued that the goods in issue are "articles" and should, therefore, be classified as "wares," as opposed to "food preparations."

Counsel for the respondent argued that the first consideration in determining the appropriate classification is the terms of any relevant headings and Section or Chapter Notes. Referring to the words of heading No. 19.01, counsel submitted that the goods in issue are clearly within the terms of that heading, subject to the limitation that the goods be "not elsewhere specified." Counsel also referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁶ (the Explanatory Notes) to heading No. 19.01, which provide that the heading includes "[r]eady-mixed doughs, consisting essentially of cereal flour with sugar, fat, eggs or fruit (including those put up in moulds or formed into final shape)."

5. *Supra* note 3, Schedule I.

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

The Explanatory Notes specifically exclude “[f]ully or partially cooked bakers’ wares, the latter requiring further cooking before consumption (heading 19.05).”

With respect to heading No. 19.05, counsel for the respondent submitted that it covers “baked” goods and referred, in particular, to the following definition of “biscuits” found in the Explanatory Notes: “They are baked for a long time to improve the keeping qualities and are generally put up in closed packages.” In counsel’s view, the goods in issue are not baked and cannot, therefore, be classified as “biscuits” in heading No. 19.05.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the General Rules and the *Canadian Rules*.⁷ 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. 19.01 and 19.05 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.

The Tribunal is persuaded, based on the words of the heading, that the goods in issue are properly classified in heading No. 19.01. Heading No. 19.01 covers, among other goods, “food preparations of flour ... not containing cocoa powder or containing cocoa powder in a proportion by weight of less than 50 %, not elsewhere specified or included.” In the Tribunal’s view, the goods in issue meet this description. Therefore, unless they are specified or included in another heading, they are properly classified in heading No. 19.01.

The appellant’s representative submitted that the goods in issue are specified or included in heading No. 19.05. However, in the Tribunal’s view, the phrase “biscuits and other bakers’ wares” found in heading No. 19.05 covers goods which have been fully or partially baked. This view is supported by the Explanatory Notes to heading No. 19.05, which provide that biscuits are “usually made from flour and fat to which may have been added sugar” and are “baked for a long time to improve the keeping qualities.” Rule 2 (a) of the General Rules does not apply, since unbaked cookie dough, even if formed into the final shape of a biscuit or cookie, does not have the essential character of a biscuit or cookie.

Since the goods in issue are not covered by heading No. 19.05, the Tribunal is of the view that they are not elsewhere specified or included and are properly classified in heading No. 19.01 and, more specifically, under tariff item No. 1901.20.10.

The appellant’s representative argued that the Tribunal cannot take into account the provisions of the Explanatory Notes which provide that heading No. 19.01 includes such preparations as “[r]eady-mixed doughs ... (including those put up in moulds or formed into final shape),” as they came into effect after the goods in issue were imported. However, as was submitted by counsel for the respondent, section 11 of the *Customs Tariff* provides that regard shall be had to the Explanatory Notes “as amended from time to time.” In the Tribunal’s view, this phrase indicates that it was intended that the Tribunal take into account any amendments to the Explanatory Notes, notwithstanding that amendments may have come into effect after the

7. *Supra* note 3, Schedule I.

particular goods in issue were imported. Moreover, as was also submitted by counsel for the respondent, the Explanatory Notes serve the purpose of clarifying the words of the headings and do not change them. Therefore, the Tribunal is of the view that it is appropriate to take the Explanatory Notes into account and finds that the Explanatory Notes support the Tribunal's decision that the goods in issue are properly classified under tariff item No. 1901.20.10 as mixes and doughs for the preparation of bakers' wares of heading No. 1905, namely, biscuits and other bakers' wares.

Accordingly, the appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member