

Ottawa, Friday, February 7, 1997

Appeal No. AP-95-047

IN THE MATTER OF an appeal heard on June 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 April 26, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

UPPER 49TH IMPORTS INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

AND

AMWAY OF CANADA, LIMITED

Intervener

DECISION OF THE TRIBUNAL

The appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-047

UPPER 49TH IMPORTS INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

and

AMWAY OF CANADA, LIMITED

Intervener

The appellant carries on business in Winnipeg, Manitoba. The product in issue is called "The Ultimate Whey DESIGNER PROTEIN" and is a food preparation in powder form which is packaged in a container for retail sale. The respondent classified the product in issue under tariff item No. 2106.90.99 as other food preparations not elsewhere specified or included. The appellant contends that the product in issue should be classified under tariff item No. 3502.90.00 as other albumins (including concentrates of two or more whey proteins, containing by weight more than 80 percent whey proteins, calculated on the dry matter) or, in the alternative, under tariff item No. 2106.10.00 as protein concentrates and textured protein substances.

HELD: The appeal is allowed. The Tribunal finds that the product in issue is more specifically described as a protein concentrate than as other food preparations. The Tribunal is of the view that, as subheading No. 2106.10 comes under heading No. 21.06, all products under this subheading must be considered to be food preparations and, more specifically, food preparations containing primarily protein concentrates or protein substances. The product in issue is a food supplement made up primarily of whey protein concentrates and, thus, is more specifically described in this subheading.

Place of Hearing: Ottawa, Ontario
Date of Hearing: June 25, 1996
Date of Decision: February 7, 1997

Tribunal Member: Anthony T. Eyton, Presiding Member

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Anne Jamieson

Parties: Alan Dewar, for the appellant
Josephine A.L. Palumbo, for the respondent
Carol A. McGlennon, for the intervener

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TRIBUNAL: ANTHONY T. EYTON, Presiding Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue dated April 26, 1995, heard by one member of the Tribunal.² The appeal proceeded on the basis of written submissions pursuant to rule 25 of the *Canadian International Trade Tribunal Rules*.³ In this regard, the parties submitted an Agreed Statement of Facts. There is one intervener in this case, Amway of Canada, Limited (Amway). Amway intervened in support of the appellant and filed submissions, which were distributed to the appellant and respondent for comment.

The appellant carries on business in Winnipeg, Manitoba. The product in issue is called “The Ultimate Whey DESIGNER PROTEIN” and is a food preparation in powder form which is packaged in a container for retail sale. At the time of importation, the product in issue was classified under tariff item No. 2106.90.99 of Schedule I to the *Customs Tariff*⁴ as other food preparations not elsewhere specified or included. The appellant subsequently requested a re-determination of the classification under tariff item No. 3502.90.00 as other albumins (including concentrates of two or more whey proteins, containing by weight more than 80 percent whey proteins, calculated on the dry matter) or, in the alternative, under tariff item No. 2106.10.00 as protein concentrates and textured protein substances. The respondent subsequently issued a decision confirming the classification of the product in issue.

The relevant tariff nomenclature in Schedule I to the *Customs Tariff* reads as follows:

21.06 Food preparations not elsewhere specified or included.
2106.10.00 -Protein concentrates and textured protein substances

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. 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 purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to the Act.
3. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912.
4. R.S.C. 1985, c. 41 (3rd Supp.).

2106.90	-Other
2106.90.99	----Other
35.02	Albumins (including concentrates of two or more whey proteins, containing by weight more than 80% whey proteins, calculated on the dry matter), albuminates and other albumin derivatives.
3502.90.00	-Other

The appellant's representative filed certain documents, including laboratory analyses of the product in issue which, he submitted, indicate that the product in issue satisfies the description of a whey protein concentrate,⁵ and noted that the product is marketed in a manner consistent with this statement. Therefore, it should be classified under tariff item No. 2106.10.00.

Counsel for the respondent submitted that, while the product in issue is a powder containing more than 80 percent whey proteins, calculated on the dry matter, it is not hydrolysed and contains colouring and flavouring. As the product contains these additional materials, it cannot be classified as an albumin and, thus, has lost its identity with respect to being a product that should be classified in heading No. 35.02. Furthermore, she submitted that, as the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁶ (the Explanatory Notes) to Chapter 4 provide that whey protein concentrates of heading No. 04.04 must not contain substances such as flavouring and colouring, the product in issue cannot be considered a whey protein concentrate for classification purposes.

As the product in issue is neither a modified whey nor a whey protein concentrate of heading No. 04.04 nor a concentrate of two or more whey proteins of heading No. 35.02, counsel for the respondent submitted that it should be considered to fall in residual heading No. 21.06. In this regard, the product in issue should be considered to be a food preparation and not a protein concentrate not elsewhere specified or included because protein concentrates derived from dairy sources are included in heading Nos. 04.04, 35.01 and 35.02. The Explanatory Notes support this position because they indicate that the protein concentrates of subheading No. 2106.10 are derived from soya bean flour, a vegetable source. Therefore, the product should not be considered to be covered by this subheading, but should be considered to be essentially a preparation made from whey concentrates containing other matter and, thus, classified under tariff item No. 2106.90.99.

In reply, the appellant's representative submitted that the product in issue should not be excluded from heading No. 35.02 because it contains materials in addition to whey proteins. Furthermore, the product should be considered a "food ingredient" not a "food preparation," in that, by itself, it is not suitable for consumption. This is supported by the statement on the product container which states that the product is to be used as a food supplement and mixed with other things before being consumed. With respect to the argument that the product cannot be considered to be an albumin because of the addition of colouring and flavouring, he submitted that there is no basis for this position in the Explanatory Notes.

The intervener's representative noted that both parties agreed that the product in issue should be classified in heading No. 21.06. She submitted that, as the wording of heading No. 21.06 covers food preparations, counsel for the respondent is incorrect in arguing that protein concentrates of subheading No. 2106.10 are not food preparations. Furthermore, subheading No. 2106.10 should be considered to

5. Exhibit AP-95-047-6.1 (protected).

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

include food preparations that are primarily composed of protein substances and used for protein enrichment of foods either by individual consumers or in further manufacture or for consumption in its current form.

The Tribunal considers that the product in issue should be classified under tariff item No. 2106.10.00 as protein concentrates and textured protein substances not elsewhere specified or included. The Tribunal comes to this conclusion bearing in mind that it is the legislation and the principles applicable to the interpretation of the legislation, including those set out in the *General Rules for the Interpretation of the Harmonized System*⁷ (the General Rules) that must govern the classification of the product in issue. The Tribunal is particularly cognizant of Rule 1 of the General Rules. As noted by the Tribunal in *York Barbell Co. Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,⁸ Rule 1 of the General Rules is of the utmost importance when classifying goods under the *Harmonized Commodity Description and Coding System*.⁹ Rule 1 of the General Rules states that classification is first determined by the wording of the tariff headings and any relative Section or Chapter Notes. In this case, the Tribunal must, therefore, first consider the wording of heading Nos. 21.06 and 35.02.

The Tribunal is of the view that the wording of heading No. 21.06 more specifically describes the product in issue than does the wording of heading No. 35.02, since the product is more than an input such as albumin, which is not a food preparation per se. However, in saying this, the Tribunal notes that it cannot find a basis in the Explanatory Notes, particularly the Explanatory Notes to heading No. 04.04, for the respondent's position that the addition of colouring and flavouring in an albumin prevents such a product from being considered an albumin or, more importantly, from being considered a protein concentrate.

Turning, then, to where the product in issue should be classified, the Tribunal finds that it is more specifically described as a protein concentrate than as other food preparations. The Tribunal is of the view that, as subheading No. 2106.10 comes under heading No. 21.06, all products under this subheading must be considered to be food preparations and, more specifically, food preparations containing primarily protein concentrates or protein substances. Furthermore, while it is true that protein concentrates derived from soya bean flour are given as an example of products included in this heading, they are not the only protein concentrates listed in the heading, and the list in which they appear is not an exhaustive list. In addition, the Tribunal notes that the various products referenced in the Explanatory Notes to this heading include products that are derived from not only vegetable sources but also dairy and other sources. The product in issue is a food supplement made up primarily of whey protein concentrates and, thus, is more specifically described in this subheading.

Accordingly, the appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

7. *Supra* note 4, Schedule I.

8. 5 T.C.T. 1150, Appeal No. AP-91-131, March 16, 1992.

9. *Supra* note 6, 1987.