

Ottawa, Wednesday, June 25, 1997

Appeal No. AP-95-190

IN THE MATTER OF an appeal heard on October 7, 1996, under subsection 67(1) 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 July 31, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

R.T. VANDERBILT COMPANY, INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Lyle M. Russell
Lyle M. Russell
Member

Charles A. Gracey
Charles A. Gracey
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-190

R.T. VANDERBILT COMPANY, 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 July 31, 1995. The product in issue is a type of bentonite clay product, referred to by the trade name "Veegum." The issue in this appeal is whether the product in issue is properly classified as other products and preparations of the chemical or allied industries under tariff item No. 3823.90.90, as determined by the respondent, or should be classified as bentonite under tariff item No. 2508.10.00, as claimed by the appellant.

HELD: The appeal is allowed. The Tribunal recognizes that the main point of contention in classifying Veegum in the *Customs Tariff* concerns the fact that it is produced using two sources of bentonite and not a single source. The respondent takes the position, relying primarily on Note 1 to Chapter 25 of Schedule I to the *Customs Tariff* and the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to that chapter, that Veegum is not in a "crude state," nor has it simply undergone any one or more of the processes specifically listed in Note 1 to Chapter 25. In the respondent's view, Veegum has been "obtained by mixing," in particular, by mixing two products classifiable in heading No. 25.08, which would exclude it from classification in that heading.

Having reviewed the evidence and relevant nomenclature, the Tribunal disagrees with the position taken by the respondent. The Tribunal does not accept the argument that Veegum is "obtained by mixing" in the context of Note 1 to Chapter 25. In its view, Veegum is made simply from bentonite, a single mineral or product, classifiable by itself in heading No. 25.08 and, more specifically, under tariff item No. 2508.10.00. It is not relevant that the raw ore is obtained from two different mines and that each source enhances certain physical properties of the end product. In the Tribunal's view, bentonite from one source combined with bentonite from another source is still bentonite.

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

Tribunal Members: Arthur B. Trudeau, Presiding Member
Lyle M. Russell, Member
Charles A. Gracey, Member

Counsel for the Tribunal: Heather A. Grant

Clerk of the Tribunal: Anne Jamieson

Appearances: Rufus E. Jarman Jr., for the appellant
Lyndsay K. Jeanes, for the respondent

Appeal No. AP-95-190

R.T. VANDERBILT COMPANY, INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
LYLE M. RUSSELL, Member
CHARLES A. GRACEY, 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 July 31, 1995. The product in issue is a type of bentonite clay product, referred to by the trade name "Veegum." It should be noted that the appeal was originally in respect of two different grades of Veegum, namely, regular "Veegum" and "Veegum T." At the hearing, counsel for the respondent indicated that the respondent accepted the classification of Veegum T under tariff item No. 2508.10.00 of Schedule I to the *Customs Tariff*,² as claimed by the appellant. Accordingly, Veegum T is no longer an issue in this appeal.

At the time of importation, the product in issue, Veegum, was classified under tariff item No. 3823.90.90 as other products and preparations of the chemical or allied industries. The appellant requested a re-determination of this classification on the basis that the product should be classified under tariff item No. 2508.10.00 as bentonite. The respondent issued a decision pursuant to subsection 63(3) of the Act confirming the classification of the product in issue under tariff item No. 3823.90.90.

The issue in this appeal is whether the product in issue is properly classified under tariff item No. 3823.90.90 as other products and preparations of the chemical or allied industries, as determined by the respondent, or should be classified under tariff item No. 2508.10.00 as bentonite, as claimed by the appellant.

The relevant tariff nomenclature for the purposes of this appeal reads, in part, as follows:

25.08	Other clays (not including expanded clays of heading No. 68.06), andalusite, kyanite and sillimanite, whether or not calcined; mullite; chamotte or dinas earths.
2508.10.00	-Bentonite
38.23	Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included.
3823.90	-Other
3823.90.90	---Other

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

The first witness to appear on behalf of the appellant was Dr. C. Sheldon Thompson, who was recognized by the Tribunal as an expert in mineralogy. Dr. Thompson testified in regard to the preparation of both Veegum and Veegum T. He explained that, in preparing Veegum T, first, bentonite ore is mined, ground and mixed with water to form a slurry. It is then allowed to settle to remove some of the impurities. Subsequently, it is subjected to centrifugation to remove further impurities. The water is then evaporated and the material drum-dried before it is packaged for sale. Dr. Thompson explained that the term “bentonite ore” refers to the mined product, with all of its impurities, while the term “bentonite” refers to the product after it has undergone the process of purification described above.

Dr. Thompson explained that the process for making Veegum is identical to that for making Veegum T, except that Veegum, unlike Veegum T, is not further ground after it is removed from the drum dryer. As a consequence, Veegum is coarser than Veegum T. Beyond that, the sole difference between Veegum and Veegum T is the source of the clays used to make each product. He explained that the clay used to make Veegum T is sourced from one mine, while the clay used to make Veegum is sourced from two different mines. Both clays used to make Veegum are, however, bentonite, but one is high in aluminum, with minor amounts of other metals and alkalis, such as magnesium, while the other is predominantly magnesium, with minor amounts of aluminum. He explained that two different sources of bentonite are used to make Veegum because the clays from each source impart, in combination, different properties to the end product, such as viscosity and compatibility with different acidic or alkaline environments in which the product is used.

Dr. Thompson stated that the various operations used to make Veegum do not involve chemical processing, neither is it normal to analyze Veegum chemically. Rather, the product would be analyzed for its physical properties, such as viscosity and swelling characteristics, since these are key to the value of the product. Dr. Thompson testified that the production of Veegum is part of the mining and minerals industry and not the chemical industry. In his view, Veegum would not be considered a residual product or a by-product of any other product.

Dr. Thompson further explained that bentonite ore used to produce Veegum is not homogeneous and that the blending of ores from different sources is not uncommon in the mining industry, given the need for a homogeneous feed of material into a processing system.³ He further testified that Veegum, leaving aside the trade name, would be generally referred to as purified bentonite clay. He explained that the term “bentonite” depicts normally a material in which the main constituent is bentonite.

Dr. Thompson indicated that the mixture of magnesium bentonite and aluminum bentonite has enhanced properties, but not necessarily different from those that each bentonite has individually. For example, the mixture could be either a little more or a little less viscous than each type of bentonite considered individually, but, in its blended state, the mixture has the properties most beneficial to the appellant in terms of the product’s end use.

In response to questions from the Tribunal, Dr. Thompson indicated that, in order to make Veegum, magnesium bentonite and aluminum bentonite are brought together in predetermined ratios. Specifically, predetermined amounts of stockpiled magnesium bentonite and aluminum bentonite are put onto a conveyor for introduction into a ball mill where water is added to make a slurry. According to Dr. Thompson, it is not the presence of particular oxides in the two bentonite clays, but rather the conditions under which the clays were formed, that give them particular physical properties, such as their swelling characteristics. More particularly, he testified that the ratio of aluminum oxide to magnesium oxide gives a general indication of the likely properties of the mixture, but that the properties are more directly influenced by the electrical

3. In this regard, Dr. Thompson referred to a variety of documents illustrating the various production or “blending” processes of other companies which produce goods similar to Veegum.

charges that exist between the layers of clay. Dr. Thompson explained that Veegum T has a higher gelling characteristic because of the various kaolins present interstitially between each plate of clay and not specifically because of the aluminum or magnesium content in the bentonite clay.

Dr. Thompson testified that the reason that Veegum is produced by blending bentonite from two different sources is that the particular blend of the two bentonites with the desirable properties does not exist, or at least has not been found, in its natural state. He emphasized that the appellant is not making a product based solely on the magnesium and aluminum ratio. Rather, the appellant is basing it on end properties of whatever turns out as the end product. According to Dr. Thompson, Veegum is used as a binding and swelling agent in products as diverse as toothpaste and oven cleaners. In the case of oven cleaners, the rapid expansion characteristic of Veegum allows the release of the active ingredient.

As a result of the respondent's objection to certain statements of fact set out in the appellant's brief, Ms. Lisa Tuck, Senior Nomenclature Specialist for the International Nomenclature Development, Department of National Revenue (Revenue Canada), was asked to testify on behalf of the respondent. Ms. Tuck's evidence was primarily in respect of the nature of various international bodies, as well as the relevance to the current proceedings of certain working documents, reports and opinions issued by these bodies in respect of the classification of bentonite within the *Harmonized Commodity Description and Coding System*⁴ (the Harmonized System). In particular, Ms. Tuck spoke about the differing authority of documents issued by the Harmonized System Committee, a technical committee of the World Customs Organization (WCO), and the European Economic Community, as well as various national rulings. She explained, generally, the existence of several committees and subcommittees of the WCO and their varied roles in dealing with classification issues. Ms. Tuck also addressed the sequence of events leading up to the inclusion in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁵ (the Explanatory Notes) to heading No. 38.23 of wording virtually identical to that set out in a classification opinion of the Nomenclature Committee⁶ (now deleted) in respect of "mixture of various clays," as well as the distinction between products covered by Chapter 25 and those covered by Chapter 38.

The Explanatory Notes to heading No. 38.23 discussed by Ms. Tuck make specific reference to the inclusion in that heading of the following goods: "Mixtures, used as thickeners and emulsion stabilisers in chemical preparations or as binders in the manufacture of abrasive grindstones, consisting of products of either separate headings or the same heading of Chapter 25, whether or not with materials classified in other Chapters and having one of the following compositions: - mixture of various clays."

The second witness to appear on behalf of the respondent was Mr. Richard L. Erdeg, who was acknowledged by the Tribunal as an expert in chemistry. Mr. Erdeg testified that his analysis of the product in issue showed that it was a blend of two bentonite clays and described for the Tribunal the process by which an analysis of the product in issue was conducted. He stated that Veegum is not a chemical preparation because it has not changed from a mineral to a chemical. Furthermore, he suggested that it is not an allied product. Mr. Erdeg testified, however, that, while bentonite itself is a natural clay, Veegum is not a natural clay because two different bentonite clays are blended in order to make it. By contrast, Veegum T is a natural clay because the bentonite originates from one mine. However, he acknowledged that, once the bentonite is processed in order to produce Veegum T, the bentonite is no longer in its natural form. According to Mr. Erdeg, Veegum contains almost equal amounts of magnesium oxide and aluminum oxide, which is indicative of the fact that it does not occur naturally, but results from a blending of two bentonite clays.

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

5. *Ibid.* 1986.

6. *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*, *supra* note 4, Opinion 38.19/28.

Counsel for the appellant submitted that a governing principle in the classification of goods in the *Customs Tariff* is that goods are classified only once and, for the most part, according to their physical characteristics. Although the product in issue is referred to as Veegum, it is simply bentonite, and because there is a specific provision in the *Customs Tariff* for bentonite, specifically at subheading No. 2508.10, Veegum should be classified in that subheading. Counsel argued that Veegum is neither a product of the chemical industry nor of the allied industry and that, therefore, it cannot fall within Chapter 38 and, more specifically, in heading No. 38.23. He submitted that, in order to be in a position to consider whether the product is a “mixture of various clays,” the Tribunal must first find that Veegum is a product of the chemical or allied industries. The relevant terms of heading No. 38.23, moreover, include only products “not elsewhere specified or included.” Therefore, if Veegum is covered by Chapter 25, then it cannot also be considered to fall within Chapter 38.

In reference to the Explanatory Notes to heading No. 25.08, counsel for the appellant submitted that the types of operations employed by the appellant to produce Veegum are clearly permissible operations under Chapter 25 and that the resulting product remains a permissible natural product in accordance with the terms of heading No. 25.08 and Note 1 to Chapter 25. Note 1 to Chapter 25 provides that, “[e]xcept where their context ... otherwise requires, the headings of this Chapter cover only products which are in the crude state or which have been washed ..., crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading.” Counsel submitted that there is no such thing as a homogeneous clay and that any mineralogical operation involves blending for the sake of uniformity, regardless of whether the raw materials are taken from one or more sources.

Furthermore, counsel for the appellant submitted that the opinions and other materials issued by the various international bodies pertaining to the interpretation of the terms of Chapter 38 are not relevant, unless the Tribunal concludes that Veegum does not fall within Chapter 25. Counsel argued that the exclusion of products from heading No. 25.08 that are “obtained by mixing” does not equate to the inclusion of Veegum in heading No. 38.23 as a “mixture of various clays.” He argued that Veegum is not obtained by “mixing”—mixing is simply one of the things which happens and cannot be avoided when Veegum is being prepared. This is regardless of whether the clay comes from one or more than one source. Counsel further submitted that, if the Tribunal were to decide that the threshold test for including products in Chapter 25 is whether they were sourced solely from one mine, it would create a significant administrative burden on Revenue Canada in terms of determining the source of raw materials used to make a particular product.

Lastly, counsel for the appellant argued that, while the drafters of the *Customs Tariff* must have known of the different types of bentonite in existence, they decided to establish a subheading for bentonite itself, thereby suggesting that bentonite, as a whole, is one clay.

Counsel for the respondent submitted, at the outset, that counsel for the appellant’s arguments would be correct if the product in issue were simply bentonite. However, the product in issue is not bentonite, but a mixture of natural clays. It is never referred to as “bentonite” in the product literature, but rather as Veegum. Veegum is a product obtained by the mixing or blending of an aluminum bentonite with a magnesium bentonite to create a blend or mixture of these two bentonite clays that best manifests the desired properties of the end product. It is not a natural clay that is simply pulled out of the ground and marketed as is. Inasmuch as it is admitted that this is how Veegum is produced, the respondent contends that Veegum is not natural bentonite, but was formulated through a precise mixing of two bentonite clays following careful chemical analysis.

In support of his position, counsel for the respondent referred to Note 1 to Chapter 25, as well as to the Explanatory Notes to that chapter, arguing that Veegum is excluded from classification in heading No. 25.08 because it is “obtained by mixing” and, more particularly, by mixing minerals falling in the same

headings of Chapter 25. While Veegum T would be included in heading No. 25.08 because it is not obtained by “mixing,” and the bentonite used to produce Veegum T only undergoes the types of permissible processes listed in Note 1 to Chapter 25 for the inclusion in that chapter of products which are no longer in their crude state, the same cannot be said for Veegum.

In reference to the Explanatory Notes to heading No. 38.23, counsel for the respondent submitted that Veegum is a thickener and/or emulsion stabilizer in chemical preparations. It is used in toothpaste and make-up, as well as in other products that are chemical preparations. The two crude minerals mixed together to make Veegum could, moreover, be classified individually in heading No. 25.08. Accordingly, since Veegum does not fall within the scope of Chapter 25, one must look to Chapter 38, which, according to counsel, would include the product in issue, as it is a preparation of the chemical and allied industries. In conclusion, counsel also referred the Tribunal to Rule 6 of the *General Rules for the Interpretation of the Harmonized System*⁷ (the General Rules), arguing that the Explanatory Notes to Chapters 25 and 38 apply equally to subheading No. 2508.10.

In determining the classification of goods, the Tribunal is cognizant that Rule 1 of the General Rules is of the utmost importance. Rule 1 provides that classification is first determined by the wording of the heading and any relative Section or Chapter Notes. The two headings at issue are heading Nos. 25.08 and 38.23. Heading No. 25.08 includes “Other clays,” while heading No. 38.23 includes “preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.”

With respect to the classification of goods in Chapter 25, Note 1 to Chapter 25 provides that, “[e]xcept where their context ... otherwise requires, the headings of this Chapter cover only products which are in the crude state or which have been washed ..., crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading.” The Explanatory Notes to Chapter 25 elaborate on this note as follows:

As provided in Note 1, this Chapter covers, in general, mineral products **only** in the crude state or washed (including washing with chemical substances to eliminate impurities provided that the structure of the product itself is not changed), crushed, ground, powdered, levigated, sifted, screened or concentrated by flotation, magnetic separation or other mechanical or physical processes (not including crystallisation). The products of this Chapter may contain an added anti-dusting agent, provided that such addition does not render the product particularly suitable for specific use rather than for general use. Minerals which have been **otherwise** processed (e.g., purified by re-crystallisation, obtained by mixing minerals falling in the same or different headings of this Chapter, made up into articles by shaping, carving, etc.) **generally fall in later Chapters** (for example, **Chapter 28** or **68**).

The Tribunal recognizes that the main point of contention in classifying Veegum in the *Customs Tariff* concerns the fact that it is produced using two sources of bentonite and not a single source. Accordingly, the respondent takes the position, relying primarily on Note 1 to Chapter 25 and the Explanatory Notes to that chapter, that Veegum is not in a “crude state,” nor has it simply undergone any one or more of the processes specifically listed in Note 1 to Chapter 25. In fact, in the respondent’s view, Veegum has been “obtained by mixing,” in particular, by mixing two products classifiable in heading No. 25.08, which would exclude it from classification in that heading.

7. *Supra* note 2, Schedule I.

Having reviewed the evidence and relevant nomenclature, the Tribunal disagrees with the position taken by the respondent. The Tribunal does not accept the argument that Veegum is “obtained by mixing” in the context of Note 1 to Chapter 25. In its view, Veegum is made simply from bentonite, a single mineral or product, classifiable by itself in heading No. 25.08 and, more specifically, under tariff item No. 2508.10.00. It is not relevant that the raw ore is obtained from two different mines and that each source enhances certain physical properties of the end product. In the Tribunal’s view, bentonite from one source combined with bentonite from another source is still bentonite.

The Tribunal considers that this position is reinforced by the fact that the term “bentonite,” without qualification, is specified in subheading No. 2508.10.

As the Tribunal finds that Veegum is classifiable in heading No. 25.08, it cannot be classifiable in heading No. 38.23, as it is “elsewhere specified or included.” Nevertheless, the Tribunal believes that it is appropriate to address some of the respondent’s arguments in respect of the applicability of heading No. 38.23. The Tribunal notes that the Explanatory Notes to heading No. 38.23 indicate that “[m]ixtures, used as thickeners and emulsion stabilisers in chemical preparations or as binders in the manufacture of abrasive grindstones, consisting of products of either separate headings or the same heading of Chapter 25,” composed of a “mixture of various clays,” are intended to be classified in heading No. 38.23. However, the Tribunal is not persuaded that this applies where the same type of clay, namely, bentonite, is blended from two different source mines. In the Tribunal’s view, this heading would be applicable where different or “various” types of clay, falling within the same or different headings, were “mixed,” thereby forming a “mixture.”

The Tribunal is also of the view that there was no need or basis upon which to refer to the various international documents submitted by the parties. However, it acknowledges that the classification opinion of the Nomenclature Committee, Opinion 38.19/28, no longer in effect, is relevant to the extent that its wording is reflected in the Explanatory Notes to heading No. 38.23.

In view of the foregoing, the Tribunal finds that Veegum should be classified in heading No. 25.08 and, more specifically, under tariff item No. 2508.10.00 as bentonite.

Accordingly, the appeal is allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Lyle M. Russell
Lyle M. Russell
Member

Charles A. Gracey
Charles A. Gracey
Member