

Ottawa, Thursday, June 5, 1997

Appeal No. AP-96-044

IN THE MATTER OF an appeal heard on March 19, 1997, 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 20, 1996, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

HUNG GAY ENTERPRISES LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-96-044

HUNG GAY ENTERPRISES 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. The issue in this appeal is whether a Chinese medicated wine, known as Sze Chuan Dah Poo Chiew, imported by the appellant is properly classified under tariff item No. 2208.90.99 as a spirituous beverage, as determined by the respondent, or should be classified under tariff item No. 3004.90.99 as a medicament put up for retail sale, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal is of the view that, according to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*, the product in issue is properly classified as a spirituous beverage. Evidence presented the product as potable, not denatured, manufactured by a brewery and packaged as a wine, albeit a medicated wine. While the Tribunal takes note of the fact that the product in issue could also be described as a pharmaceutical product in Chapter 30 of Schedule I to the *Customs Tariff*, in that it is a traditional Chinese herbal medicament, evidence suggested that it is best described as a “tonic.” Tonic beverages are explicitly excluded from Chapter 30 by virtue of Chapter Note 1(a). Given that correspondence from the appellant to the Department of National Revenue, that the retail box for the product and that several of the detailed descriptions of the effects of the individual herbs all used the word “tonic,” the Tribunal finds that the product in issue is properly classified under tariff item No. 2208.90.99.

Place of Hearing: Vancouver, British Columbia
Date of Hearing: March 19, 1997
Date of Decision: June 5, 1997

Tribunal Member: Patricia M. Close, Presiding Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Susanne Grimes

Appearances: James Warnock, for the appellant
Anne M. Turley, for the respondent

Appeal No. AP-96-044

HUNG GAY ENTERPRISES LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act), heard by one member of the Tribunal,² from a decision of the Deputy Minister of National Revenue made under section 63 of the Act. The issue in this appeal is whether a Chinese medicated wine, known as Sze Chuan Dah Poo Chiew, imported by the appellant is properly classified under tariff item No. 2208.90.99 of Schedule I to the *Customs Tariff*³ as a spirituous beverage, as determined by the respondent, or should be classified under tariff item No. 3004.90.99 as a medicament put up for retail sale, as claimed by the appellant. If the product in issue is properly classified, it is subject to a tax of \$11.066 per litre or less under the *Excise Tax Act*.⁴ The relevant tariff nomenclature reads as follows:

22.08	Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages....
2208.90	-Other
2208.90.99	----Other
30.04	Medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses ... for retail sale.
3004.90	-Other
3004.90.99	----Other

The appellant's first witness, Mr. Frank Ng, General Manager of Hung Gay Enterprises Ltd., a company which imports products from Southeast Asia, testified that the name of the product in issue is translated into English as "a tonic wine with ten herbs." He also testified that the product is manufactured by the Medicated Wine Department of the Hwa Kwang Brewery in Shanghai, People's Republic of China. He testified that the appellant sells the product, which also comes in capsules or in a dry form, to Chinese herbal stores. Although the product has an alcohol content of 24.5 percent, the B.C. Liquor Control Board allows it

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 the purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to the Act.
3. R.S.C. 1985, c. 41 (3rd Supp.).
4. R.S.C. 1985, c. E-15.

to be imported, ruling that the product is exempt as a medicinal preparation. The product in issue is imported for sale only in British Columbia, as other provinces, Mr. Ng surmised, no longer allow it to be sold in herbal stores. On cross-examination, Mr. Ng maintained that he had never seen a letter written by his brother, President of Hung Gay Enterprises Ltd., and sent to the Department of National Revenue (Revenue Canada), nor did he agree with his brother's description of the product as a "tonic beverage." He maintained that it was a problem of translation, where, in Chinese medicine, the term "tonic" may have a different meaning and that the product in issue is not a beverage but a medicament.

The second witness who testified on behalf of the appellant, Dr. Samuel Chiu, was qualified by the Tribunal as an expert witness in the application of herbs within the practice of traditional Chinese medicine. Dr. Chiu, with a bachelor's degree in traditional Chinese medicine, a prior consultant practice in Hong Kong and a medical degree from the University of Toronto, began his testimony by explaining that traditional Chinese medicine and modern western medicine fundamentally differ. He explained that the former attributes illness to an imbalance of the two vital forces, the "yin" and the "yang." The "yin" equates to the tangible aspects of the body and the "yang" to the mind or the spirit. Chinese medicine selects herbs for therapeutic reasons, i.e. to try to restore the balance between these two, when one or more functional systems are affected. He described the product in issue as a medicinal preparation, because it is formulated for the treatment of a specific disharmony or illness of extreme "Qi," translated as energy, and "Xue," loosely translated as blood. He would not advise taking the product in issue unless one suffered from this specific deficiency, which is clinically described in traditional Chinese medicine as "combined Qi and Xue deficiency ... with Yang deficiency with interior coldness." The symptoms include tiredness, pallor, unclear vision, palpitations, insomnia, lack of appetite, weakness and chills. Women may suffer irregular periods, and men may suffer sexual problems. There is no comparison to this syndrome, this compilation of symptoms, in western medicine. It is not a disease as in western medicine, but a disharmony. The product helps you recover from that disharmony. He recommended not drinking it unless you were ill, nor taking it for any one symptom, but only if one had the pattern of symptoms, though not necessarily all of the symptoms.

Dr. Chiu then went on to describe in detail the application of each of the 10 herbs. He relied upon various Chinese textbooks for these descriptions. The first 4 herbs are the classic herbal formation for any "Qi" deficiency of the body. The next 3 herbs are the major ingredients used for any condition of diminished blood. The eighth, "fu pen zi," is used for male sexual dysfunctions. The ninth herb strengthens your "defense energy," and the tenth warms you up. Dr. Chiu added that wine is considered, in Chinese medicine, as a medium used to enhance the reaction and speed up the recovery process. He considered it misleading to the consumer to label the product as a tonic beverage rather than as a medical preparation, in that tonic is too vague a term. In his view, the word "tonic" is a layman's term used to entice the consumer to buy the product. In cross-examination, Dr. Chiu explained that the product in issue has not been tested in a laboratory, as are western medicaments, but has been tested by the fact that it has been used in the People's Republic of China to treat these symptoms since the 10th century AD.

One witness testified on behalf of the respondent, Mr. Ted Leung, Director of the Excise Laboratory Division at Revenue Canada. He was qualified by the Tribunal as an expert in chemical analysis and potability testing of products containing alcohol. Mr. Leung testified that the product in issue was reviewed by the laboratory to determine its composition, whether it was potable and whether it was a spirituous beverage. The chemical analysis showed that the product had the profile of an alcoholic beverage because of the composition of fusel oils or congeners. An alcoholic product would not be considered a beverage if it had none of these congeners or added chemicals, which give the flavour and aroma to the beverage and also produce headaches. The product had an alcohol content of 23.5 percent. Any product with an alcohol content

higher than 14.0 or 15.0 percent requires a process of fortification or rectification. The botanical analysis also indicated the normal component of ethyl esters of an alcoholic beverage. These congeners and botanicals, he testified, were similar to those in a liqueur, as was the sugar content of the product (17.5 percent, where most liqueurs have a sugar content of between 15.0 and 20.0 percent).

With respect to the potability, i.e. whether or not an average individual would drink the product, Mr. Leung testified that 80 percent of panellists in a taste panel of experts said that they would drink it. He further testified that other alcoholic pharmaceutical products, such as cough syrups, are different from the product in issue, in that they have a lower level of alcohol (cough syrups rarely have an alcohol content as high as 12 or 13 percent) and would contain ingredients to discourage individuals from drinking them. Cough syrups have to be non-potable, i.e. denatured before they can be manufactured in Canada. The other alcoholic beverages would not contain the congeners and botanicals of an alcoholic beverage, as does the product in issue. In cross-examination, Mr. Leung confirmed that, although the respondent's brief reported that the product "has not been found to contain any active therapeutic or prophylactic ingredients," the laboratory did not actually test for the presence or absence of such ingredients.

Counsel for the appellant argued that the product in issue is not subject to duties under Schedule I to the *Excise Tax Act* because it is not properly classified as a spirituous beverage in heading No. 22.08. Rather, it should be classified under tariff item No. 3004.90.99 as a medicament. Counsel argued that the evidence showed that fermented rice wine, such as the product in issue, which contains 10 medicinal herbs, is often used to help ingest traditional Chinese remedies. This herbal remedy is intended to be used only for rebalancing certain types of disharmony between the "yin" and the "yang." While there is no direct correlation between a specific disease in modern western medicine and a corresponding harmonic imbalance of the "yin" and "yang" in traditional Chinese medicine, the product in issue is considered a medicament for therapeutic purposes according to the latter. Therefore, in accordance with Rule 1 of the *General Rules for the Interpretation of the Harmonized System*⁵ (the General Rules), which states that "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes," the product in issue, counsel argued, should be classified in heading No. 30.04. The *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁶ (the Explanatory Notes) to heading No. 30.04 provide that the heading covers "medicaments consisting of mixed or unmixed products ... [p]ut up in measured doses or in forms ... [for retail sale]."

According to counsel for the appellant, Chapter Note 1(a) to Chapter 30, which excludes from that chapter "beverages (such as ... tonic beverages ...)," does not apply. Even though the word "tonic" is the translation given to the product in issue on its box, the evidence presented was that not only was there no literal translation for the product in issue but it is not intended for general well-being, as is a tonic. Rather, the product is prescribed for a specific imbalance of the "Qi" (energy) and the "Xue" (blood). Counsel also argued that, because the Explanatory Notes to heading No. 30.03 provide that "preparations in which the foodstuff or the beverage merely serves as a support, vehicle or sweetening agent for the medicinal substances (e.g., in order to facilitate ingestion)" are included, then, the product in issue should be classified in heading No. 30.04, as the evidence showed that the wine component in the product in issue was exactly this, a medium designed to aid the swallowing of the herbal preparation.

5. *Supra* note 3, Schedule I.

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

Counsel for the appellant further argued that the product in issue could not be classified in Chapter 22 because Chapter Note 1(e) to that chapter excludes “[m]edicaments of heading No. 30.03 or 30.04.” Moreover, heading No. 30.04 clearly contemplates that medicaments that have an alcoholic content be classified in that heading, given that tariff item No. 3004.90.91 includes medicaments “[c]ontaining more than 23% of absolute ethyl alcohol by volume.” Counsel quoted from the Tribunal’s decision in *I.D. Foods Superior Corp. v. The Deputy Minister of National Revenue*,⁷ where it was stated that “the term ‘beverage’ ought to be interpreted in its grammatical and ordinary sense.” Counsel argued that Revenue Canada’s test results concerning potability were unreliable, given that the taste panel was not asked how much of the product in issue it would actually drink. He maintained that, because the product in issue is sold in Chinese herbal stores and marketed to a specific ethnic population that is aware of its medicinal qualities, it should not be considered an alcoholic beverage.

Counsel for the respondent argued that the product in issue is properly classified in heading No. 22.08, which provides for the classification of “[u]ndenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol.” The product in issue is specifically covered by Note 14 of the Explanatory Notes to heading No. 22.08, which provides that the heading includes “[s]pirituous beverages, sometimes referred to as ‘food supplements’, designed to maintain general health or well-being.” She dismissed counsel for the appellant’s argument that the potability test results were unreliable because the taste panel was not asked how much of the product in issue it would actually drink, maintaining that the pertinent aspect of the panel’s response is that 8 out of 10 would drink it.

Going through the functions of the various herbs, such as those that tonify the spleen and lung and those that calm the mind, counsel for the respondent argued that the product in issue is more a harmonizing product for general health and well-being than specific to a disease or condition as contemplated by Chapter 30. Counsel referred to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁸ (the Classification Opinions), where ginseng tonic was classified under Chapter 22, even though it only has an alcohol content of 11.5 percent. She maintained that the two products are similar and that the product in issue is a tonic beverage. Counsel also referred to the English translation on the box, which describes the product in issue as “a far-reaching tonic wine ... Regular drinkers ... will find themselves full of spirit.”

Counsel for the respondent argued that the product in issue cannot be classified in heading No. 30.04 because it is a liquid and, as such, is not “put up in measured doses,” as required by the Explanatory Notes to that heading. More particularly, the Explanatory Notes provide that goods of heading No. 30.04 must be “in forms such as tablets, ampoules ..., capsules, cachets, drops or pastilles, or small quantities of powder, ready for taking as single doses for therapeutic or prophylactic use.” Counsel maintained that the product in issue does not meet another condition of the Explanatory Notes. More specifically, it does not come in retail packaging for therapeutic or prophylactic use indicating to the consumer the appropriate disease or condition for which it is intended. According to counsel, the information on the box does not do this. Rather, it merely refers to the general health and well-being of people who use the product and states that drinkers “will find themselves full of spirit and strong in their brainwork.” They will “improve their appetite, enjoy sound sleep and health is insured accordingly.”

7. Appeal No. AP-94-102, June 8, 1995.

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

In light of the foregoing, counsel for the respondent argued that the facts in the present case are not similar to the facts in the Tribunal's decision in *Baxter Corporation v. The Deputy Minister of National Revenue*,⁹ where the evidence showed that the product, Peptamen, was a treatment for Crohn's disease. Furthermore, the product in issue is not prophylactic or therapeutic. It is not prophylactic because the expert witness, Dr. Chiu, said that it would only be used if one were ill and that it is not therapeutic because it has never been tested in a controlled medical environment. According to counsel, the product in issue is not similar to a cough syrup, in that it is not denatured. Hence, counsel argued that the product is more akin to an alcoholic tonic beverage, which is excluded from Chapter 30 by virtue of Chapter Note 1(a) to that chapter and the Explanatory Notes to heading No. 30.04, which provide that liquid supplements that maintain health and well-being "are generally classified in ... Chapter 22." Finally, counsel argued that, as a consequence of being classified in heading No. 22.08, the product in issue is automatically subject to excise duties of \$11.066 per litre.

In reply, counsel for the appellant dismissed the connection drawn by counsel for the respondent to the Classification Opinions and the classification of ginseng tonic, noting that the latter is totally distinct from the product in issue and that it falls in a different heading, i.e. heading No. 22.05, not heading No. 22.08 which is at issue in the present appeal. Counsel reiterated that one cannot make a comparison between modern western medicine and traditional Chinese medicine. Furthermore, counsel maintained that the product in issue is packaged for retail sale, noting that the box does say: "For regular drinking, two small cups taken once or twice daily ... or ... follow your doctor's direction."

Section 10 of the *Customs Tariff* provides that goods must be classified in accordance with the General Rules and the *Canadian Rules*.¹⁰ 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* that follow. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the Classification Opinions and the Explanatory Notes. Thus, the Tribunal must first consider whether the product in issue falls in either of heading Nos. 22.08 and 30.04.

Heading No. 22.08 covers "[u]ndenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages." Evidence from the Revenue Canada laboratory was presented and showed that the product in issue tested as potable, i.e. drinkable or undenatured, and had an alcohol content of 23.5 percent, a level which cannot be obtained by fermentation alone. Moreover, the product proved to have a chemical profile similar to that of a liqueur, with a similar composition of fusel oils, botanicals and sugar. As well, the product is manufactured by a brewery, albeit the medicated wine department of the brewery and, although the product is sold in Chinese herbal stores, it is marketed as a spirituous beverage, or as a "tonic wine" in a liqueur-like bottle. Based on this evidence, the Tribunal finds that the product in issue has the qualities of a product described in heading No. 22.08.

With respect to heading No. 30.04, the Tribunal is of the view that the product in issue can be described as a medicament, given the convincing evidence that the product is a traditional Chinese herbal remedy prescribed to cure a disharmony of the "yin" and the "yang." The Tribunal comes to this view despite the statement in the respondent's brief that the product "has not been found to contain any active

9. Appeal No. AP-93-092, July 26, 1994.

10. *Supra* note 3, Schedule I.

therapeutic or prophylactic ingredients.” The Tribunal notes that there was no evidence presented to indicate that any scientific testing has been carried out on the product in issue to date to prove or disprove its medicinal properties. Moreover, the evidence shows that the product in issue is packaged for retail sale and contains a measuring glass, along with instructions as to dosage, fulfilling other requirements of the heading.

While Chapter 30 clearly contemplates medicaments with an alcoholic content as high as that in the product in issue, Chapter Note 1(a) excludes a particular type of medicament - tonic beverages. Despite, the argument of counsel for the appellant and the testimony of Dr. Chiu that the product in issue is not a tonic but a specific herbal remedy for a specific disharmony, the translation evidence indicates otherwise. One of the witnesses for the appellant testified that the translation for the name of the product in issue is “a tonic wine with ten herbs.” The manufacturer describes the product, on the retail box, as a “far-reaching tonic wine” and states that regular drinkers “will find themselves full of spirit and strong in their brainwork ... enjoy sound sleep and health is insured accordingly.” The evidence also shows that the appellant, in writing to the government, referred to the product as “a tonic beverage.”

In light of the evidence with respect to the use of the word “tonic” to describe the product in issue and the results of the chemical analysis and potability testing conducted by the Revenue Canada laboratory, the Tribunal finds that the product in issue must be considered a “tonic beverage” and, as a result, is properly classified as a spirituous beverage under tariff item No. 2208.90.99. As a consequence, the product in issue is subject to the additional duties under the *Excise Tax Act*.

Accordingly, the appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member