CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, July 24, 1998

Appeal No. AP-97-012

IN THE MATTER OF an appeal heard on March 5, 1998, 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 5, 1997, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

GENERAL MILLS CANADA, INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Raynald Guay
Raynald Guay
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal No. AP-97-012

GENERAL MILLS CANADA, INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is an importer, manufacturer and distributor of various food products, including the goods in issue which the appellant described as snack foods called "fruit roll-ups." The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 1704.90.90 as other sugar confectionery (including white chocolate), not containing cocoa, as determined by the respondent, or should be classified under tariff item No. 2007.99.90 as other jams, fruit jellies, marmalades, fruit or nut purée and fruit or nut pastes, being cooked preparations, whether or not containing added sugar or other sweetening matter, as claimed by the appellant.

HELD: The appeal is dismissed. The evidence indicates that, with respect to the goods in issue, the purée is only the third ingredient by weight. The two major ingredients by weight are the malto-dextrin and the sugar. These ingredients allow the goods in issue to be more like a confectionery than a purée and, when combined with the purée, create the end product, which, in the Tribunal's view, is a product marketed and sold as a confectionery, as reflected in their packaging and their description as chewy snacks made with real fruit. Thus, in the Tribunal's view, the evidence establishes that the goods in issue are goods put up in the form of a sugar confectionery, as provided for in the words of heading No. 17.04.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	March 5, 1998
Date of Decision:	July 24, 1998
Tribunal Members:	Arthur B. Trudeau, Presiding Member Raynald Guay, Member Robert C. Coates, Q.C., Member
Counsel for the Tribunal:	Hugh J. Cheetham
Clerk of the Tribunal:	Anne Jamieson
Appearances:	James P. Jagger, for the appellant Edward (Ted) Livingstone, for the respondent

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-97-012

GENERAL MILLS CANADA, INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
RAYNALD GUAY, Member
ROBERT C. COATES, Q.C., 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 March 5, 1997.

The appellant is an importer, manufacturer and distributor of various food products, including the goods in issue which the appellant described as snack foods called "fruit roll-ups." The goods in issue were imported in November 1995 and were classified in subheading No. 1904.90 of Schedule I to the *Customs Tariff*[2] as other prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, corn flakes); cereals, other than maize (corn), in grain form, pre-cooked or otherwise prepared. The appellant filed a request for re-determination of the classification under tariff item No. 2008.99.99 as other 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. In response to the request, the respondent reclassified the goods in issue under tariff item No. 1704.90.90 as other sugar confectionery (including white chocolate), not containing cocoa. The appellant subsequently filed a further request for re-determination and, by decision dated March 5, 1997, the respondent maintained the classification of the goods in issue under tariff item No. 1704.90.90. The appellant appealed this decision to the Tribunal. The appellant first submitted that the goods in issue should be classified in heading No. 20.08. Prior to the hearing, the appellant changed its position and submitted that the goods in issue should be classified in heading No. 20.07.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 1704.90.90 as other sugar confectionery (including white chocolate), not containing cocoa, as determined by the respondent, or should be classified under tariff item No. 2007.99.90 as other jams, fruit jellies, marmalades, fruit or nut purée and fruit or nut pastes, being cooked preparations, whether or not containing added sugar or other sweetening matter, as claimed by the appellant.

The relevant provisions of the *Customs Tariff* read as follows:

17.04	Sugar confectionery (including white chocolate), not containing cocoa.
1704.90	-Other
1704.90.90	---Other

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

333 Laurier Avenue West
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Ottawa (Ontario) K1A 0G7
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20.07	Jams, fruit jellies, marmalades, fruit or nut purée and fruit or nut pastes, being cooked preparations, whether or not containing added sugar or other sweetening matter.
2007.99	--Other
2007.99.90	---Other

The appellant's representative called one witness, Mr. John Jenkins, Manager of Technical and Consumer Services at General Mills Canada, Inc. Mr. Jenkins' responsibilities included overseeing the production and sale of the goods in issue. Mr. Jenkins testified that the major components of the goods in issue by weight are malto-dextrin, fruit ingredients and sugar. Malto-dextrin is a modified starch which provides the soft texture of the goods in issue. Mr. Jenkins described the goods in issue as a purée on the basis that the purée or fruit ingredient was one of the principal ingredients of the finished product. He also stated that he would consider the goods in issue to be a cooked preparation because part of the production process includes cooking.

In cross-examination, Mr. Jenkins agreed with the Department of National Revenue laboratory analysis of the goods in issue which indicated that, by weight, 36 percent of the goods in issue was sugar and 4 percent was fat. He also agreed with the conclusion in the laboratory report that the percentage of pear solids was no more than 21 percent. Finally, he confirmed that, except for a change in the fruit component, the formulation of the goods in issue had not changed significantly in the last 10 years. In response to a question from the Tribunal as to whether the purée retains its identity in the final product, Mr. Jenkins stated that the purée is blended with the other components and that he would call the final product a purée because the purée is a major component of the final product.

In argument, the appellant's representative submitted that the evidence shows that the goods in issue have a significant fruit content. He contrasted the amount of fruit content in the goods in issue with the juice content of the goods considered by the Tribunal in *Best Brands Inc.* v. *The Deputy Minister of National Revenue*[3] and noted that the wording of heading No. 20.07 does not set out any minimum content requirement. The representative submitted that the evidence also shows that the goods in issue are a cooked preparation, as required by this heading. Furthermore, they have an almost solid consistency, and their main ingredients are sweeteners and fruit. Thus, they conform to the wording of the heading.

The appellant's representative noted that there is an exception in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[4] (the Explanatory Notes) to this heading, namely, that goods in the form of sugar confectionery are to be classified in heading No. 17.04. He submitted that this exclusion does not apply to the goods in issue because it has to do with the presentation of the confectionery for sale to customers and has nothing to do with the composition of the product itself. In other words, the exclusion serves only to resolve classification in cases in which, without the exclusion, the product to be classified would belong to a group within heading No. 20.07.

To further explain the reason for the non-application of the exclusion to the goods in issue, the appellant's representative considered the meaning of the term "confectionery" in terms of the word "prepared" and the phrase "put up in the form of," which are found in the Explanatory Notes to heading No. 17.04. The representative suggested, based on the definition of the word "confectionery" in *Larousse Gastronomique*,[5] that such goods are associated with special occasions and that packaging is particularly

3. Appeal No. AP-94-073, January 25, 1996.
4. Customs Co-operation Council, 1st ed., Brussels, 1986.
5. (New York: Crown Publishers, 1988).

important for confectionery. He submitted that there is no evidence indicating that the goods in issue are especially suitable for gifts or special occasions. Rather, their packaging indicates a good, fun snack food suitable for any occasion. He also submitted that references to candy on the packaging must be disregarded for classification purposes. In support of this submission, the representative referenced the fact that the goods in issue submitted in evidence picture fresh fruit on the package and that miniature moulded fruits would not cause anyone to classify them as fresh fruit. The consumer is simply informed that there is a fruit taste to this candy. In other words, the goods in issue are products that borrow appeal from related products in the sugar confectionery group, but are not, therefore, classified with that group.

Counsel for the respondent first compared this case to the appellant's appeal before the Tariff Board in 1987[6] regarding goods similar to the goods in issue. Although the tariff was different at that time, the question before the Tariff Board was essentially the same as the one before the Tribunal, that is, whether the goods in issue are a confectionery or a prepared fruit product. Noting that Mr. Jenkins testified that the goods in issue had not essentially changed in character in the last 10 years, counsel referred the Tribunal to the discussion leading to the Tariff Board's conclusion that the goods before it should be classified as confectionery.[7]

Counsel for the respondent submitted that the wording of heading No. 17.04 makes clear that it applies to non-chocolate confectionery. At the six-digit level, there are two subheadings, "Chewing gum" and "Other." Clearly, the goods in issue are not chewing gum and, therefore, the respondent classified them as "Other." Counsel referred the Tribunal to the Explanatory Notes to heading No. 17.04 which indicate that the heading includes "[f]ruit jellies and fruit pastes put up in the form of sugar confectionery." He noted that this statement parallels the exclusion in Chapter 20 to which the appellant's representative referred. The effect of these mutual exclusions is that, if one is classifying a fruit-based product that is similar to jam or jelly, it can be classified in either heading No. 20.07 or heading No. 17.04. If the product is in the form of a confectionery, then it is classified in heading No. 17.04. If it is not in the form of a confectionery, then it is classified in heading No. 20.07.

Counsel for the respondent submitted that the goods in issue are in the nature of a confectionery. They are put up as snack foods, as indicated by the package and by the wording on the package that they are chewy snacks made with real fruit. Turning to the Explanatory Notes to heading No. 20.07, counsel noted that the description of "fruit or nut purées" includes the statement that "[f]ruit purées differ from jams in having a higher proportion of fruit and a smoother consistency." He did not deny that one of the ingredients of the goods in issue is fruit purée, but submitted that the final product is not a fruit purée, rather it is a sugar confectionery. In this regard, counsel referred to the various components of the goods in issue by weight, noting that the fruit content is approximately 21 percent, while the largest components are the malto-dextrin and then, usually, the sweetening agent. Therefore, the goods in issue cannot be said to be a product that contains a high proportion of fruit.

With respect to the submissions of the appellant's representative regarding the eating of confectioneries primarily on special occasions, counsel for the respondent submitted that the Tribunal could take judicial notice of the fact that confectioneries are eaten in Canada on far more than special occasions.

In reply, the appellant's representative submitted that, unlike the *General Mills* case to which counsel for the respondent referred, this case does not turn on the nature and extent of preparation of the fruit involved in the manufacture of the goods in issue, rather it turns on the form of the goods in issue as

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6. *General Mills Canada Inc.* v. *The Deputy Minister of National Revenue for Customs and Excise*, 12 T.B.R. 256.
7. *Ibid.* at 270-71.

presented for classification. The representative also reminded the Tribunal that the former case was decided under the previous classification system and not under the *Harmonized Commodity Description and Coding System*[8] (the Harmonized System). In particular, the term "purée" was not found in the former tariff.

The Tribunal considers that the goods in issue are properly classified under tariff item No. 1704.90.90 as other sugar confectionery (including white chocolate), not containing cocoa. 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*[9] (the General Rules), that must govern the classification of the goods 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*,[10] Rule 1 is of the utmost importance when classifying goods under the Harmonized System. Rule 1 states that classification is first determined by the wording of the headings and any relative Section or Chapter Notes.

In this case, consideration of Rule 1 of the General Rules requires the Tribunal to consider the Explanatory Notes to Chapter 20. As discussed above, the Explanatory Notes to Chapter 20 provide that a purée is to have a higher proportion of fruit in it than jam. While the appellant's representative is correct to point out that the Explanatory Notes do not set out a minimum content requirement in this regard, the Tribunal still considers that the Explanatory Notes require that a particular product have more than just any amount of purée to be possibly classified as a purée. The evidence indicates that, with respect to the goods in issue, the purée is only the third ingredient by weight. The two major ingredients by weight are the malto-dextrin and the sugar. These ingredients allow the goods in issue to be more like a confectionery than a purée and, when combined with the purée, create the end product, which, in the Tribunal's view, is a product marketed and sold as a confectionery, as reflected in their packaging and their description as chewy snacks made with real fruit. Thus, in the Tribunal's view, the evidence establishes that the goods in issue are goods put up in the form of a sugar confectionery, as provided for in the words of heading No. 17.04.

Accordingly, the appeal is dismissed.

Arthur B. Trudeau
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Presiding Member

Raynald Guay
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Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

8. Customs Co-operation Council, 1st ed., Brussels, 1987.
9. *Supra* note 2, Schedule I.
10. Appeal No. AP-91-131, March 16, 1992.