

Ottawa, Tuesday, July 21, 1998

Appeal No. AP-97-013

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**

AND

PAND IMPORT INC. **Intervener**

DECISION OF THE TRIBUNAL

The appeal is allowed.

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

UNOFFICIAL SUMMARY

Appeal No. AP-97-013

GENERAL MILLS CANADA, INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

and

PAND IMPORT INC.

Intervener

The appellant is an importer, manufacturer and distributor of various food products, including the goods in issue, crunchy granola bars. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 1904.10.00 (now tariff item No. 1904.90.19) as prepared foods obtained by the swelling or roasting of cereals or cereal products, as determined by the respondent, or should be classified under tariff item No. 1905.90.29 as other bread, pastry, cakes, biscuits and other bakers' wares, as claimed by the appellant, or under tariff item No. 1905.30.90 as other sweet biscuits, as submitted by the intervener.

HELD: The appeal is allowed. The *Explanatory Notes to the Harmonized Commodity Description and Coding System* (the Explanatory Notes) to heading No. 19.05 provide that the heading is to cover all bakers' wares. Unlike heading No. 19.04, fats are a common ingredient of goods in this heading. Furthermore, the Explanatory Notes indicate that goods of this heading are made from a dough. The evidence indicates that the goods in issue are made from a dough, although this dough does not contain flour. However, the Explanatory Notes do not preclude the use of a dough not containing flour. In the Tribunal's view, once baked, the goods in issue are more in the nature of a biscuit than a cereal product.

Place of Hearing: Ottawa, Ontario

Date of Hearing: March 5, 1998

Date of Decision: July 21, 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: Margaret Fisher

Appearances: James P. Jagger, for the appellant
Edward (Ted) Livingstone, for the respondent
Donald Petersen, for the intervener

Appeal No. AP-97-013

GENERAL MILLS CANADA, INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

and

PAND IMPORT INC.

Intervener

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, crunchy granola bars. The goods in issue were imported in April 1995 and were classified under tariff item No. 1905.30.10 of Schedule I to the *Customs Tariff*² as sweet biscuits valued at not less than 44¢/kg, said value to be based on the net weight and to include the value of the usual retail package. The respondent subsequently reclassified the goods in issue under tariff item No. 1904.90.10 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, in packages of a weight not exceeding 11.34 kg each.

The appellant filed a request for re-determination, and the respondent maintained the classification. The appellant subsequently filed another request for re-determination and, by decision dated March 5, 1997, the respondent reclassified the goods in issue under tariff item No. 1904.10.00 (now tariff item No. 1904.10.90³) as other prepared foods obtained by the swelling or roasting of cereals or cereal products. The appellant appealed this decision to the Tribunal. The appellant first submitted that the goods in issue should be classified under tariff item No. 1905.40.90 (now tariff item No. 1905.40.99) as other bread, pastry, cakes, biscuits and other bakers' wares, such as rusks, toasted bread and similar toasted products.

Prior to the hearing, the appellant changed its position and submitted that the goods in issue should be classified under tariff item No. 1905.90.21 as "biscuits."

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. The tariff items not in parentheses reflect the tariff items at the time of importation. The tariff items in parentheses reflect the current schedule to the *Customs Tariff*.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 1904.10.00 (now tariff item No. 1904.10.90) as other prepared foods obtained by the swelling or roasting of cereals or cereal products, as determined by the respondent, or should be classified under tariff item No. 1905.90.29 as other bread, pastry, cakes, biscuits and other bakers' wares, as claimed by the appellant.

There was one intervener in this case, Pand Import Inc. The intervener appeared in support of the appellant, but submitted that the goods in issue should be classified under tariff item No. 1905.30.90 (now tariff item No. 1905.30.19) as other sweet biscuits.

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

19.04	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.
1904.10.00	-Prepared foods obtained by the swelling or roasting of cereals or cereal products
1904.90	-Other
19.05	Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing coca; 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
1905.90	-Other
1905.90.29	----Other

The appellant's representative called one witness, Mr. John Jenkins, Manager of Technical and Consumer Services at General Mills Canada, Inc. Mr. Jenkins provided both oral and written testimony as to how the goods in issue are made. He stated that the major components of the goods in issue, by weight, are rolled oats (approximately 50 percent), sugar (23 percent) and fat, provided by canola oil (14 percent). Two mixes are made from these and other ingredients. One is a liquid mixture consisting of oil, flavouring and lecithin. This mixture is then blended with flour or rolled oats in a dough mixer. Next, sugar is added and blended. The mix is then spread on an oven band, pressed together in the form of a sheet and baked for approximately 20 minutes. The baked sheet is then cut into bars which are cooled before being packaged.

In cross-examination, Mr. Jenkins agreed that rolled oats are not ground into a fine powder. He also indicated that all crunchy granola bars are made in essentially the same manner.

In argument, the appellant's representative submitted that the goods in issue should be classified in heading No. 19.05, as it covers biscuits. He noted that the characteristics of biscuits are set out in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁴ (the Explanatory Notes) to this heading, in part, as follows:

- (A)(8) **Biscuits.** These are usually made from flour and fat to which may have been added sugar or certain of the substances mentioned in Item (10) below.

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

- (A)(10) **Pastries and cakes**, containing ingredients such as flour, starches, butter or other fats, sugar, milk, cream, eggs, cocoa, chocolate, coffee, honey, fruit, liqueurs, brandy, albumen, cheese, meat, fish, flavourings, yeast or other leavening agents.

The appellant's representative submitted that the evidence shows that the goods in issue meet each of these features except one. Instead of flour for the dough, rolled oats are used, and then that dough is fully baked. He noted that, in the Tribunal's decision in *Readi-Bake Inc. v. The Deputy Minister of National Revenue*,⁵ the Tribunal stated that the phrase "biscuits and other bakers' wares" in heading No. 19.05 "covers goods which have been fully or partially baked."⁶

The appellant's representative submitted that, as heading No. 19.05 covers goods such as meringues, puff cornmeal and cheese snacks, which do not contain flour, it cannot be said to exclude goods which do not contain flour. This, he suggested, raises the question of whether there are any biscuits made from rolled oats instead of flour. In this regard, he referred to the definition of "oats" in *Larousse Gastronomique*⁷ which includes the statement that "[p]orridge oats are ... also used for making biscuits (cookies)." He also referred to *1001 Cookie Recipes*,⁸ which lists rolled oats as a flour substitute in cookie recipes. He noted that a number of the recipes in the book call for the use of rolled oats instead of flour.

Turning to heading No. 19.04, the appellant's representative submitted that the goods in issue could not be classified in this heading as "prepared foods" because dough is neither a cereal nor a cereal product. If dough were a cereal product, then biscuits would have been provided for in both heading Nos. 19.04 and 19.05, where many bakers' wares obtained from baking dough are named.

The appellant's representative submitted that the goods in issue look, feel and taste like most biscuits. Furthermore, like most biscuits, they are baked for a certain period of time to improve shelf life and are put up in sealed packages. Again, like some biscuits, the goods in issue have a water content of less than 12 percent, by weight, and contain less than 35 percent fat, by weight. They should be considered to be "types" of biscuits that are not made from flour and fat.

The intervener's representative first referred to the article from the January 1998 issue of *Consumer Reports* entitled "A cookie for breakfast?"⁹ He noted that the article states that granola bars are often promoted as a healthy snack. However, upon examining a number of chocolate chip granola bars and fruit-filled cereal bars, one can only conclude that these goods more closely resemble oversized cookies than nutritious natural foods. He submitted that the word "cookie" better describes the goods in issue than the word "cereal" and that it is difficult to classify something that is a solid bar as a "cereal." He also submitted that the word "cookie" is a synonym for "sweet biscuits."

Turning to the wording of heading No. 19.04, the intervener's representative agreed that the goods in issue are prepared foods and that, to some extent, they are obtained by the swelling or roasting of cereals or cereal products, in that the oats have been roasted or baked. However, he submitted, the goods in issue are not similar to the type of product identified in the heading, namely, "corn flakes." He also highlighted the fact that the wording of the heading contains a semicolon after the phrase "corn flakes" and submitted that, while

5. Appeal No. AP-95-044, December 2, 1996.

6. *Ibid.* at 3.

7. (New York: Crown Publishers, 1988).

8. (New York: Black Dog & Leventhal, 1995).

9. Tribunal Exhibit AP-97-013-23.

the goods in issue may be pre-cooked, they do not fit into the other wording following the semicolon, namely, that the goods be cereals in grain form. In addition, he submitted that the Explanatory Notes to heading No. 19.04 indicate that the goods in the heading are mainly used as breakfast foods. He submitted that most granola bars are not used as breakfast foods.

Counsel for the respondent agreed that the goods in issue are not identical to corn flakes. He submitted, however, that they are very similar to granola cereal, a type of cereal that had not been discussed much by the other parties. Counsel compared this case to *General Mills Canada Limited v. The Deputy Minister of National Revenue for Customs and Excise*¹⁰ regarding goods similar to the goods in issue. He noted that the witness for the appellant in that case testified that the particular formulation of the goods in issue had only existed since about 1990, but also testified that the appellant had been making granola bars since 1979. In finding that the goods before it were prepared cereal products, the Tariff Board stated: “While the mix of sugar, oil and cereal was altered slightly to make the bar more portable, cereal continues to be the dominant component and the formulation does not depart significantly from that of Granola Cereal.”¹¹ The Tariff Board also found that the goods before it were produced in much the same way by other cereal producers, that they were eaten at breakfast and that they were sold with other cereal foods in grocery stores.¹² Counsel submitted that nothing in the evidence before the Tribunal contradicts these findings and that there is no evidence that the goods in issue have somehow changed over the years so as to make them any less a prepared cereal food today.

Turning to the wording of heading No. 19.04, counsel for the respondent submitted that the evidence is consistent with each of the requirements of the wording of the heading. With respect to the arguments of the intervener’s representative regarding the importance of the words “corn flakes,” counsel submitted that the use of these words does not indicate that the list of goods is limited to traditional breakfast foods. Because the goods in issue fulfil the requirements of the heading, that heading represents the most specific and precise definition of them within the tariff classification scheme.

With respect to the wording of heading No. 19.05, counsel for the respondent submitted that the Explanatory Notes to the heading set out three types of biscuits: plain biscuits, sweet biscuits, and savoury and salted biscuits. The Explanatory Notes indicate that plain biscuits contain little or no sweetening matter and a relatively high proportion of fat. Counsel submitted that the evidence shows that the goods in issue do not have either of these characteristics. Therefore, they are not plain biscuits. He also submitted that the goods in issue do not satisfy the definition of “savory or salted” biscuits. Finally, with respect to “sweet biscuits,” he submitted that the definition specifically provides that sweet biscuits contain flour. It does not say that they “may” contain flour. The evidence is that the goods in issue contain no flour.

In reply, the intervener’s representative submitted that there are types of flour other than wheat flour, such as oat, rice or rye flour. The appellant’s representative submitted that the types of biscuits referred to in the Explanatory Notes are not the only types of biscuits. Furthermore, the types of biscuits set out in the Explanatory Notes are usually made from flour and fats. The list does not refer to other types of biscuits, such as those made from oats. He noted that Note (A)(4) of the Explanatory Notes to heading No. 19.05 provides for crispbread made from a dough of, among other things, oats.

10. 6 T.B.R. 876.

11. *Ibid.* at 885.

12. *Ibid.*

The Tribunal considers that the goods in issue are properly classified under tariff item No. 1905.90.29 as other bread, pastry, cakes, biscuits and other bakers' wares. 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*¹³ (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*,¹⁴ Rule 1 is of the utmost importance when classifying goods under the *Harmonized Commodity Description and Coding System*¹⁵ (the Harmonized System). Rule 1 states that classification is first determined by the wording of the tariff headings and any relative section or chapter notes.

As previously stated by the Tribunal,¹⁶ although cases considered by the Tariff Board may be of interest as background to those heard by the Tribunal, they are not directly applicable because they considered the previous classification system and not the Harmonized System. In this regard, the Tribunal agrees with the parties that, in the instant case, consideration of Rule 1 of the General Rules requires it to consider the Explanatory Notes to heading Nos. 19.04 and 19.05.

The Explanatory Notes to heading No. 19.04 break the heading down into three groups based on the wording of the heading. In the Tribunal's view, the goods in issue are clearly not like the goods provided as examples for the second group, namely, "prepared foods obtained from unroasted cereal flakes or from mixtures of unroasted cereal flakes and roasted cereal flakes or swelled flakes," or for the third group, namely, other "cereals, other than maize (corn) ... pre-cooked or otherwise prepared".

With respect to the first group, "prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, corn flakes)," the Explanatory Notes provide that this group covers a range of food preparations made from cereal grains which have been made crisp by swelling or roasting and which are used mainly as breakfast foods. The Explanatory Notes set out a list of items that may have been added in the manufacture of these food preparations. This non-exhaustive list includes sugar, but does not include fats. The Explanatory Notes also discuss the process by which goods of this group are produced. The evidence indicates that the process by which the goods in issue are produced is not similar to the processes by which corn flakes and other goods in the first group of items in heading No. 19.04 are produced, in that the goods in issue are not softened with steam nor are they roasted in a rotary oven. In the Tribunal's view, the goods in issue are, therefore, not goods described by the wording of heading No. 19.04.

The Explanatory Notes to heading No. 19.05 provide that the heading is to cover all bakers' wares. Unlike heading No. 19.04, fats are a common ingredient of goods in this heading. Furthermore, the Explanatory Notes indicate that goods of this heading are made from a dough. The evidence indicates that the goods in issue are made from a dough, although this dough does not contain flour. However, the Explanatory Notes do not preclude the use of a dough not containing flour. In the Tribunal's view, once baked, the goods in issue are more in the nature of a biscuit than a cereal product. Finally, with respect to the three types of biscuits set out in Note (A)(8) to the Explanatory Notes to heading No. 19.05, the Tribunal

13. *Supra* note 2, Schedule I.

14. , Appeal No. AP-91-131, March 16, 1992.

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

16. For instance, see *Marubeni Canada Ltd. v. The Deputy Minister of National Revenue*, Appeal No. AP-93-311, December 14, 1994.

agrees with counsel for the respondent that the description of “sweet biscuits” provides that sweet biscuits contain flour. However, the heading paragraph to Note (A)(8) makes clear that this is not an exhaustive grouping of all biscuits. Furthermore, Note (A)(8) indicates that, like the goods in issue, biscuits are baked and are generally put up in closed packages. Therefore, the goods in issue can be said to be other “biscuits.”

Accordingly, the appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Raynald Guay

Raynald Guay
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Ottawa, Friday, July 24, 1998

Appeal No. AP-97-013

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

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THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

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PAND IMPORT INC.

Intervener

CORRIGENDUM

The last paragraph on page 1 should read as follows:

Prior to the hearing, the appellant changed its position and submitted that the goods in issue should be classified under tariff item No. 1905.90.21 (later tariff item No. 1905.90.29) as "biscuits." A review of the relevant provisions of the *Customs Tariff* reveals that the wording of tariff item No. 1905.90.29, the classification for other biscuits, has not changed since the time of importation. In these reasons for decision, the Tribunal considers classification of the goods in issue under tariff item No. 1905.90.29 and not tariff item No. 1905.90.21.

This corrigendum pertains only to the English version of the reasons for decision as the French version will incorporate this change when published.

By order of the Tribunal,

Michel P. Granger
Secretary