CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, December 5, 1997

Appeal No. AP-96-117

IN THE MATTER OF an appeal heard on April 30, 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 September 23, 1996, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

YVES PONROY CANADA **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-96-117

YVES PONROY CANADA **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 made under section 63 of the *Customs Act*. The issue in this appeal is whether the goods in issue described by the appellant as "various biological preparations" and by the respondent as "various food supplements" are properly classified under tariff item No. 2106.90.99 as other food preparations not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 3004.90.99 as other medicaments consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale, as claimed by the appellant.

HELD: The appeal is allowed. While the Tribunal is of the view that the goods in issue are generally not included in the common understanding given to the term "food," it acknowledges that "food supplements" may be considered "food preparations" for the purposes of classification within the *Customs Tariff*. The Tribunal considers the goods in issue to be food supplements. Having said this, the Tribunal is of the view that the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 30.04 mean that food supplements which have an "indication as to use for the prevention or treatment of any disease or ailment" may be classified in heading No. 30.04, provided they are "put up in measured doses or in forms or packings for retail sale," which conditions are met by the goods in issue.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 30, 1997
Date of Decision:	December 5, 1997
Tribunal Member:	Charles A. Gracey, Presiding Member
Counsel for the Tribunal:	Heather A. Grant
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael A. Sherbo, for the appellant Guy A. Blouin, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-96-117

YVES PONROY CANADA **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, 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 and dated September 23, 1996.

The goods in issue are described by the appellant as "various biological preparations," specifically named Arterodiet, Buccozyme, Cyclobiol, Leritone Junior, Leritone "Magnésium" Vitamine E, Leritone Senior, Leritone Vitality, Nutricap, Optibiol, Osteomineral, Pectibran and Effidigest. The "Leritone" products appear to be collectively referred to as the Leritone group of products. The respondent refers to the goods in issue as "various food supplements." The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 2106.90.99 of Schedule I to the *Customs Tariff*[3] as other food preparations not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 3004.90.99 as other medicaments consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale, as claimed by the appellant. For purposes of this appeal, the relevant tariff nomenclature reads as follows:

21.06	Food preparations not elsewhere specified or included.
2106.90	-Other
2106.90.99	----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 or in forms or packings for retail sale.
3004.90	-Other
3004.90.99	----Other

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.).

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Two witnesses appeared on behalf of the appellant. The first witness, Ms. Lise Lefebvre, Director of the Institut de Recherche Biologique, a division of Yves Ponroy Canada, explained that Dr. Yves Ponroy is a biochemist with a doctorate in science. She explained that the appellant, which has been active in Europe for 25 years, now exports its products to almost 30 countries. She testified that the Leritone products are the appellant's main line. Ms. Lefebvre explained that, in Canada, 60 percent of sales are to pharmacists, while the remainder are to health practitioners and health food stores. She testified that each product is marketed for use as a treatment for a specific disease, illness or ailment, such as a sleep disorder, memory or concentration disorders in older people and menopause. Ms. Lefebvre explained that the appellant's employees, including Dr. Ponroy himself, conduct seminars to explain to pharmacists and health practitioners the benefits of using the goods in issue.

Ms. Lefebvre confirmed that research is conducted at the head office in France, but that some clinical research is done in Canada. She explained that approximately 10 percent of sales revenue is devoted to research. She testified that the results of certain of the appellant's clinical trials have been published in medical journals. Clinical studies for Pectibran and the Leritone products were introduced into evidence. She explained that some of the goods in issue come in capsules or tablets with the directions for use found on the labels, while others come in powdered form. In such cases, the contents of the package or sachet constitute the appropriate dose. Pectibran, by contrast, is added to such foods as soups or ground beef in spoon-sized doses.

The appellant's second witness was Mr. Magued A. Wasfy, a pharmacist who works as a consultant for the pharmaceutical industry and who is familiar with some of the goods in issue. He testified that, in his view, only one product, Pectibran, fits the definition of the term "food supplement" in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[4] (the Explanatory Notes) to heading No. 21.06, i.e. that it is "based on extracts from plants, fruit concentrates, honey, fructose, etc." He explained that most of the other products, particularly the Leritone products, are based on phospholipids and either minerals or vitamins. Optibiol, for example, contains fish extract, which does not fall within the definition of "food supplements." Mr. Wasfy indicated that all of the goods in issue are marketed for use as a treatment for a particular illness or condition. The Leritone products, for example, are sold as a treatment for sleep disorders. Mr. Wasfy then explained that "cerebral phospholipids" consist of long-chain fatty acids derived from a pig brain extract and used in the Leritone products. The essential difference between "cerebral phospholipids" and "vegetable phospholipids," according to Mr. Wasfy, is that the former cross the brain barriers and access the central nervous system.

It was explained that, for ease of presentation, the goods in issue could essentially be divided into three groups: the first would comprise seven items, namely, Arterodiet, Buccozyme, Cyclobiol, Effidigest, Optibiol, Osteomineral and Pectibran; the second would comprise only a single product, Nutricap; and the third would comprise the Leritone products.

Examples of packagings and descriptive literature for the various products in issue were introduced into evidence, which included the following statements about the products: Optobiol "has been extensively tested for effectiveness and tolerance, which makes it an unequalled product for promoting visual comfort and fighting against eye fatigue due to aging[5]"; Arterodiet, "an association of [polyunsaturated fatty acids EPA and DHA, garlic and vitamin E], is an equilibrium factor which is necessary for our balance diet and

4. Customs Co-operation Council, 1st ed., Brussels, 1986.
5. Exhibit A-2.

recommended to hypertensive patient (high blood pressure)[6]"; Nutricap "[has] been especially designed to fight against hair loss, seborrhea, and dandruff[7]"; Osteomineral "is a nutritional supplement with a guaranteed content in mineral salts (calcium and magnesium) and vitamin C, rich in trace elements. Specially recommended for growing teenagers, pregnant or breastfeeding women, to preserve and replenish their reserves, menopausal women whose bones become more fragile with reduced oestrogen production, and older people, to slow down the inevitable bone loss worsened by little physical activity[8]"; Leritone "Magnésium" Vitamine E is used "[t]o fight against nervous fatigue and learn to sleep naturally again[9]"; Buccozyme: "[*c*]*onçu pour apaiser les gorges irritées, revigorer les gencives fragiles et pour assainir la bouche, BUCCOZYME renforce vos défenses naturelles contre la pollution des villes, la fumée, l'irritation du tabac, l'air conditionné, les microbes*[10]" ("is designed to soothe throat irritations, firm up soft gums and purify the buccal cavity; BUCCOZYME strenghtens your natural defenses against city pollution, smoke, irritations caused by tobacco, air conditioning, microbes, etc."); Cyclobiol "has been developed to address inconveniences felt during the menstrual cycle: feeling of bloating, irritability, fatigue, etc.[11]"; Effidigest contains "natural digestive enzymes [that] contribute to the degradation of food and help to reduce heaviness and discomfort after the meal[12]" and "helps fight problems related to poor digestion, such as: bloating, drowsiness, bad breath, blotchy complexion, heaviness, constipation[13]"; and Pectibran combats constipation.

Mr. Philippe G. St-Amour, a senior chemist at the Laboratory and Scientific Services Directorate of the Department of National Revenue (Revenue Canada), testified on behalf of the respondent. He was qualified as an expert witness in the field of chemistry. He testified that he tested 11 of the goods in issue. As a first step, he analyzed the products to make sure that they contained the ingredients listed on the labels. The tests confirmed that the list of ingredients for each of the products seemed to be accurate and that most of the products are vitamins and mineral supplements or other types of supplements containing nutritional substances.

Mr. St-Amour testified that he had attempted to determine whether there were any ingredients in the products which could be considered medicinal ingredients or drugs. He concluded that all of the ingredients were nutritional or food ingredients which supplement nutrients which are normally found in the diet and that none of the ingredients could be said to be an active drug ingredient or medicinal ingredient. He further explained that the ingredients included mostly mineral salts and vitamins, which are normally found in the diet and which are required for the metabolism. They are not considered to be pharmaceutical substances or drugs. He added that such ingredients are not listed in any of the pharmacopoeias as drugs, but rather as nutrients. He acknowledged that he had not tested one of the products, Effidigest. However, he indicated that, on the basis of the ingredients listed on the label, he would have reached the same conclusion concerning the nature of this product.

In cross-examination, Mr. St-Amour testified that someone who read the label on the Effidigest product, for example, which indicates that it is a "digestive stimulant," could possibly buy the product to

6. Exhibit A-15.
7. Exhibit A-19.
8. Exhibit A-8.
9. Exhibit A-14.
10. Exhibit A-7.
11. Exhibit A-6.
12. Exhibit A-5.
13. *Ibid.*

solve a digestive problem. The same was said with respect to the Nutricap product, which is sold to prevent seborrhoea. In answering questions from the Tribunal, Mr. St-Amour explained that phospholipids are compounds derived from fat. He testified, however, that he was not aware of the particular physiological effects of phospholipids. He explained that, although calcium might be used for the treatment or prevention of osteoporosis, which is an illness, it is nonetheless a substance found in food. In his view, there are no ingredients in the goods in issue that would be effective in treating a specific disease or ailment.

The appellant's representative argued that there is nothing in the tariff nomenclature requiring that a product contain a certain level of medicinal ingredients in order to be proven to be an effective medicament. A possible reference to product efficacy may be found in the Explanatory Notes to heading No. 30.03 which state that the heading includes "[m]ixed medicinal preparations such as those listed in an official pharmacopoeia, proprietary medicines, etc." The representative submitted that such a statement is specific to heading No. 30.03 and that it has no bearing on heading No. 30.04. In support of this, he referred to *Intercraft Industries of Canada Inc.* v. *The Deputy Minister of National Revenue*,[14] where the Tribunal held that the Explanatory Notes to heading No. 44.10 could not be construed to apply to heading No. 44.11, unless explicitly stated.

The appellant's representative argued that the goods in issue are not "food preparations" nor "food supplements," but that they are "vitamin and mineral supplements." He referred to the decision of the Federal Court of Canada - Trial Division in *Shaklee Canada Inc.* v. *Her Majesty the Queen*,[15] which involved very similar products. In that case, the goods were described by the Court as "dietary supplements or nutritional supplements and not food.[16]" The representative acknowledged that some of the Explanatory Notes to heading No. 21.06 appeared to expand the heading beyond what would normally be regarded as food preparations, but he argued that, when goods are intended to be used for the prevention or treatment of disease or ailments, they must be excluded from that heading. He reiterated that the goods in issue are not food supplements, in that they are not "based on extracts from plants, fruit concentrates, honey, fructose, etc.[17]" Rather, they are dietary or nutritional supplements. He argued that each of the four products, which the respondent described as "food supplements," are targeted at a particular ailment and are not for general well-being.

The appellant's representative argued that the goods in issue are not covered by the Explanatory Notes to heading No. 30.04, which excludes from that heading "food supplements containing vitamins or mineral salts which are put up for the purpose of maintaining health or well-being but have no indication as to use for the prevention or treatment of any disease or ailment." Moreover, the goods in issue are not plants or parts of plants used for making herbal infusions or herbal teas and claimed to offer relief from ailments or contribute to general health and well-being but whose infusions do not constitute a therapeutic or

14. Canadian International Trade Tribunal, Appeal Nos. AP-93-358 and AP-93-353, March 14, 1995.
15. Unreported, Court File No. T-3012-90, February 28, 1995.
16. *Ibid.* at 28.
17. The particular Explanatory Notes, to which the representative referred, read as follows: "(16) Preparations, often referred to as *food supplements*, based on extracts from plants, fruit concentrates, honey, fructose, etc. and containing added vitamins and sometimes minute quantities of iron compounds. These preparations are often put up in packagings with indications that they maintain general health or well-being. Similar preparations, however, intended for the prevention or treatment of diseases or ailments are excluded (heading 30.03 or 30.04).

prophylactic dose of an active ingredient specific to a particular ailment, which are also excluded from heading No. 30.04, in accordance with the Explanatory Notes to that heading.

Next, reference was made to paragraph (b) of the Explanatory Notes to heading No. 30.04, which provides that the heading covers medicaments, provided they are "[i]n packings for retail sale for therapeutic or prophylactic use." It also provides that "[t]his refers to products,… which, because of their packing and, in particular, the presence of appropriate indications (statement of disease or condition for which they are to be used, method of use or application, statement of dose, etc.) are clearly intended for sale directly to users" and confirms that such indications may be given by label, literature or otherwise. The appellant's representative argued that this note provides that this heading has a very broad scope.

The appellant's representative argued that the evidence showed that each of the products in issue is intended for use in the prevention or treatment of a specific disease or ailment. For example, Nutricap is used to prevent or treat seborrhoea; Leritone is used to prevent or treat disorders such as sleep disorders. Furthermore, all of the products are put up in measured doses, and the intended use or dose that must be taken is, in all cases, indicated on the packaging. It was contended that the approach of Revenue Canada has been to treat heading No. 21.06 as a sort of "catch-all" heading for anything that it does not know where to classify. In the representative's view, a residual heading such as heading No. 21.06 should only be used when another appropriate classification cannot be found.

Counsel for the respondent pointed out that, in *Shaklee Canada Inc.* v. *The Minister of National Revenue*,[18] it involved the application of another statute, the *Excise Tax Act*,[19] and that the issue in that case was the interpretation to be given to the term "health goods." He also pointed out that the Tribunal, in its decision, which was upheld by the Federal Court of Appeal, found that the goods in issue were not "food," but "food supplements." He then contended that the goods in issue in the present case are food supplements.

Next, counsel for the respondent argued that the appellant did not present sufficient evidence to show that the goods in issue are for therapeutic or prophylactic use and that the Tribunal would have needed the expert testimony of a physician or a nutritionist to support such a conclusion. Counsel referred to several of the Explanatory Notes to heading No. 30.04 in support of his contention that the appellant must prove that the goods have a medicinal effect in order for them to be classified in that heading. He argued that there is no evidence of any medicinal effect with regard to any of the products. Counsel noted that the results of clinical trials which were introduced into evidence were all prepared by the appellant and were not signed by the author, and no witnesses qualified to explain the results were called to testify.

When classifying goods in Schedule I to the *Customs Tariff*, the application of Rule 1 of the *General Rules for the Interpretation of the Harmonized System*[20] is of the utmost importance. This rule states that classification is first determined according to the terms of the headings and any relative Chapter Notes. Therefore, the Tribunal must determine whether the goods in issue are named or generically described in a particular heading. If they are, then they must be classified therein subject to any relative Chapter Note. Section 11 of the *Customs Tariff* provides that, in interpreting the headings or subheadings, the Tribunal shall have regard to the Explanatory Notes.

18. Canadian International Trade Tribunal, Appeal No. 2940, September 6, 1990.
19. R.S.C. 1985, c. E-15.
20. *Supra* note 3, Schedule I.

As indicated, heading No. 21.06 provides for the classification in that heading of "[f]ood preparations not elsewhere specified or included." The Explanatory Notes to heading No. 21.06 further provide that "[p]reparations, often referred to as *food supplements*, based on extracts from plants, fruit concentrates, honey, fructose, etc. and containing added vitamins and sometimes minute quantities of iron compounds [are included]. These preparations are often put up in packagings with indications that they maintain general health or well-being. Similar preparations, however, intended for the prevention or treatment of diseases or ailments are excluded (heading 30.03 or 30.04)." While the Tribunal is of the view that the goods in issue are generally not included in the common understanding given to the term "food" and while it relies on its decision in *Shaklee* in support of this view, it acknowledges that "food supplements" may be considered "food preparations" for the purposes of classification within the *Customs Tariff*.

The appellant's representative argued that the goods in issue are not "food supplements." Rather, they are "nutritional or dietary supplements." In the Tribunal's view, there is no meaningful distinction to be drawn between these terms. While the goods in issue are generally not based on extracts from plants, fruit concentrates, honey or fructose, the Tribunal does not consider this a limiting factor in finding the goods in issue to be "food supplements." The goods in issue are edible products, generally made from foodstuffs containing vitamins and minerals. Accordingly, in the Tribunal's view, they are food supplements.

Having said this, the Tribunal notes that heading No. 30.04 provides for the classification of "[m]edicaments … consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale" in that heading. The Explanatory Notes to heading No. 30.04 provide that "this heading excludes food supplements containing vitamins or mineral salts which are put up for the purpose of maintaining health or well-being but have no indication as to use for the prevention or treatment of any disease or ailment." It also provides that "[t]hese products which are usually in liquid form but may also be put up in powder or tablet form, are generally classified in heading 21.06 or Chapter 22." In the Tribunal's view, the meaning of these Explanatory Notes is that "food supplements" which have an "indication as to use for the prevention or treatment of any disease or ailment" may be classified in heading No. 30.04, provided they are "put up in measured doses or in forms or packings for retail sale."

In the Tribunal's view, the Explanatory Notes to heading No. 30.04 and to heading No. 21.06 essentially parallel each other and, when considered together, indicate that food supplements which have indications as to use for the prevention or treatment of any disease or ailment are classifiable in heading No. 30.04, while those which do not are classifiable in heading No. 21.06. Essentially, they indicate that food supplements which have indications as to use for the prevention or treatment of a disease or ailment may be considered "medicaments" and, therefore, would be classifiable in heading No. 30.04. In the Tribunal's view, this condition is met by the goods in issue.

Counsel for the respondent argued that the appellant must prove the therapeutic or prophylactic effect of the products in order to convince the Tribunal that they should be classified in heading No. 30.04. While the Tribunal agrees with counsel that very little reliable evidence was presented with respect to this issue, the Tribunal can find no requirement in the relative Section or Chapter Notes or the Explanatory Notes or in the terms of the heading that a product must contain a certain level of medicinal ingredients and be scientifically proven to be an effective medicament in order to be classified in heading No. 30.04. The Explanatory Notes require only that there be some indication that the goods are used in the treatment or prevention of a disease or an ailment. The words "disease" and "ailment" are not defined in the tariff nomenclature. The word "disease" is defined in *The New Lexicon Webster's Dictionary of the English*

Language as "an unhealthy condition; a particular malady.[21]" The word "ailment" is defined as an "illness of a trivial nature.[22]" There was some evidence presented by Ms. Lefebvre and Mr. Wasfy that the products are used to prevent or treat a variety of conditions. For example, Nutricap is used to prevent or treat seborrhoea, while Effidigest is used to treat digestive problems, and the Leritone products are used to prevent or treat sleep disorders. The packagings for a majority of the products also indicate that the products are used to treat a variety of conditions. While, in the Tribunal's view, these conditions would not be considered diseases, they can be described as ailments. The word "disorder," for example, is defined as an "ailment.[23]"

The Tribunal notes that the evidence shows that the goods in issue are "put up in measured doses or in forms or packings for retail sale," as specified by the terms of heading No. 30.04.

All the conditions of heading No. 30.04 having been met, the Tribunal finds that the goods in issue should be classified under tariff item No. 3004.90.99.

Accordingly, the appeal is allowed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

21. Encyclopedic ed. (New York: Lexicon Publications, 1987) at 271.
22. *Ibid.* at 17.
23. *Ibid.* at 272.