



Ottawa, Thursday, October 28, 1999

Appeal Nos. AP-98-053 and AP-98-054

IN THE MATTER OF appeals heard on January 11, 1999, under section 63 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated May 21 and July 2, 1998, with respect to requests for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**REHA ENTERPRISES LTD. AND COSMETIC IMPORT CO. LIMITED**                      **Appellants**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**                                      **Respondent**

**DECISION OF THE TRIBUNAL**

The Tribunal rejects the respondent's determinations that the goods in issue are properly classified under tariff item No. 3305.10.00 as shampoo or under tariff item No. 3307.90.00 as other toilet preparations or under tariff item No. 3307.30.00 as other bath preparations, as well as the appellants' contention that the goods should be classified under tariff item No. 3401.11.90 as other organic surface-active products for toilet use or under tariff item No. 3401.20.90 as other liquid soap, and determines that the goods in issue should be classified under tariff item No. 3402.20.90 as other surface-active preparations put up for retail sale.

Anita Szlazak  
Anita Szlazak  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-98-053 and AP-98-054

**REHA ENTERPRISES LTD. AND COSMETIC IMPORT CO. LIMITED** Appellants

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

These are appeals under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the *Customs Act*. The issues in these appeals are: (1) whether Ombra body wash, in various fragrances, is properly classified under tariff item No. 3305.10.00 as shampoo, as determined by the respondent, or should be classified under tariff item No. 3401.11.90 as other organic surface-active products for toilet use or under tariff item No. 3401.20.90 as other liquid soap, as claimed by Reha Enterprises Ltd.; and (2) whether Fa shower gel, in various fragrances, is properly classified under tariff item No. 3307.90.00 as other toilet preparations, as determined by the respondent, or, as argued by counsel for the respondent at the hearing, under tariff item No. 3307.30.00 as other bath preparations, or should be classified under tariff item No. 3401.11.90 as other organic surface-active products for toilet use or under tariff item No. 3401.20.90 as other liquid soap, as claimed by Cosmetic Import Co. Limited. The Tribunal also considered the applicability of heading No. 34.02, organic surface-active agents (other than soap).

**HELD:** The Tribunal rejects the respondent's determinations that the goods in issue are properly classified under tariff item No. 3305.10.00 as shampoo or under tariff item No. 3307.90.00 as other toilet preparations or under tariff item No. 3307.30.00 as other bath preparations, as well as the appellants' contention that the goods should be classified under tariff item No. 3401.11.90 as other organic surface-active products for toilet use or under tariff item No. 3401.20.90 as other liquid soap, and determines that the goods in issue should be classified under tariff item No. 3402.20.90 as other surface-active preparations put up for retail sale.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 11, 1999
Date of Decision:	October 28, 1999
Tribunal Member:	Anita Szlazak, Presiding Member
Counsel for the Tribunal:	Gerry Stobo Marie-France Dagenais
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael Sherbo, for the appellants Patrick Vézina, for the respondent

Appeal Nos. AP-98-053 and AP-98-054

**REHA ENTERPRISES LTD. AND COSMETIC IMPORT CO. LIMITED Appellants**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ANITA SZLAZAK, Presiding Member

**REASONS FOR DECISION**

These are appeals under section 67 of the *Customs Act*<sup>1</sup> from decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the *Act*. In the decision with respect to the Ombra body wash, the respondent stated, in part, the following:

Based on product information submitted, 'Ombra' bath/shower gels in sport, extr. [sic] mild, fresh and soft scented varieties, being preparations containing water, synthetic, organic surface-active agents and perfume for use on the hair and body are classified pursuant to GIR 3(A) in the heading which provides the most specific description - 33.05, tariff item 3305.10.00. (00) as preparations for use on the hair - shampoos.

In the decision with respect to the Fa shower gel, the respondent stated, in part, the following:

We have considered all the facts brought forward concerning the classification of these goods. None of them are soaps or liquid soaps as are named in the heading 34.01(I) Explanatory Notes, page 518. Chemically, these goods are named in the heading 34.01(II) Explanatory Notes, but they are not in a form named therein. When we consider the heading 33.07(III) Explanatory Notes, page 522 [512], then we have to agree with your agent that these goods are not bath preparations. However, they are preparations for personal hygiene. As such the following Fa shower gels are classified under 3307.90.00.90. A. Beauty B. Fresh C. Light D. Marine.

The issues in these appeals are: (1) whether Ombra body wash, in various fragrances, is properly classified under tariff item No. 3305.10.00 of the schedule to the *Customs Tariff*<sup>2</sup> as shampoo, as determined by the respondent, or should be classified under tariff item No. 3401.11.90 as other organic surface-active products for toilet use or under tariff item No. 3401.20.90 as other liquid soap, as claimed by Reha Enterprises Ltd.; and (2) whether Fa shower gel, in various fragrances, is properly classified under tariff item No. 3307.90.00 as other toilet preparations, as determined by the respondent, or, as argued by counsel for the respondent at the hearing, under tariff item No. 3307.30.00 as other bath preparations, or should be classified under tariff item No. 3401.11.90 as other organic surface-active products for toilet use or under tariff item No. 3401.20.90 as other liquid soap, as claimed by Cosmetic Import Co. Limited.

The tariff nomenclature relevant to the issues in these appeals is as follows:

33.05	Preparations for use on the hair
3305.10.00	-Shampoos

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter *Act*].
2. R.S.C. 1985 (3rd Supp.), c. 41.

33.07	Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties.
3307.30.00	-Perfumed bath salts and other bath preparations
3307.90.00	-Other
34.01	Soap; organic surface-active products and preparations for use as soap, in the form of bars, cakes, moulded pieces or shapes, whether or not containing soap; paper, wadding, felt and nonwovens, impregnated, coated or covered with soap or detergent.  -Soap and organic surface-active products and preparations, in the form of bars, cakes, moulded pieces or shapes, and paper, wadding, felt and nonwovens, impregnated, coated or covered with soap or detergent:
3401.11	--For toilet use (including medicated products)
3401.11.90	---Other
3401.20	-Soap in other forms
3401.20.90	---Other

At the hearing, the appellants' representative introduced a sample of each of the goods in issue, the "Ombra Aromatic Body Wash For body and hair" and the "Fa Shower Gel". The back label of the Ombra body wash container states, in part, as follows:

A body wash with mild cleansing agents that leave your skin silky and smooth while its pleasant scent discreetly invigorates the body. Gently formulated for dry skin.

Alkaline free, pH skin-neutral. Dermatologically tested

Directions for use: Squeeze a small amount onto a bath sponge or puff for optimum fragrance release and lather.

The back label of the Fa shower gel container states, in part, as follows:

Fa's unique non-soap formula contains an extra-mild cleansing complex to gently care for your skin and a special vitamin factor to moisturize and maintain its natural balance. Use instead of soap.

Directions: Squeeze Fa Shower Gel into palm, washcloth or sponge and apply to wet skin. Rinse off.

The appellants' representative indicated that, while the samples introduced did not represent the full range of products in issue, the only difference between those samples and the other products was the fragrance. Counsel for the respondent agreed with the representative's statement. In order to facilitate the disposition of the hearing, it was agreed prior to the hearing that the goods in issue are not soap, but that they are organic surface-active products and preparations.

It was argued by the appellants' representative that both the Ombra body wash and the Fa shower gel are basically the same goods. In particular, he referred to the fact that both parties had agreed that the goods in issue are organic surface-active products and to the fact that the labels on the goods in issue indicate that they have the same application, are applied in the same manner and are used as a replacement for soap. In the case of the label for the Fa products, he pointed out that the label actually states that the products are to be used instead of soap.

The appellants' representative commented on the fact that the *Harmonized Commodity Description and Coding System*,<sup>3</sup> while encyclopedic, is slow to change in response to rapid changes in technology and the introduction of new products on the market. He submitted that the goods in issue potentially were not in the marketplace when the *Harmonized System* was developed and that no changes have been introduced to deal specifically with the goods in issue.<sup>4</sup>

The appellants' representative submitted that the classification of the goods in issue revolves around Rule 1 of the *General Rules for the Interpretation of the Harmonized System*<sup>5</sup> and the *Explanatory Notes*.<sup>6</sup>

The appellants' representative specifically addressed and discounted the respondent's classification decisions. First, he submitted that the Ombra body wash could not be classified as shampoo in heading No. 33.05 on the basis that it is neither a preparation for use on the hair, given that the label says that it is a "body wash", nor shampoo within the common and ordinary definition of that term as a liquid or powder preparation for hair. Second, he submitted that the Fa shower gel could not be considered a bath preparation, as determined by the respondent. Therefore, he concluded that the remaining issue was whether the goods in issue should be classified in heading No. 33.07 as toilet preparations, not elsewhere specified. The representative referred to Note (III) of the *Explanatory Notes* to heading No. 33.07, which describes bath preparations as goods "such as **perfumed bath salts and preparations for foam baths**", and submitted that the goods in issue do not meet this description and cannot, therefore, be classified in heading No. 33.07 as bath preparations.

To assist in interpreting the phrase "perfumery, cosmetic or toilet preparations" in heading No. 33.07, the appellants' representative referred the Tribunal to Note 4 to Chapter 33 which states the following:

The expression "perfumery, cosmetic or toilet preparations" in heading No. 33.07 applies, *inter alia*, to the following products: scented sachets; odoriferous preparations which operate by burning; perfumed papers and papers impregnated or coated with cosmetics; contact lens or artificial eye solutions; wadding, felt and nonwovens, impregnated, coated or covered with perfume or cosmetics; animal toilet preparations.

He submitted that the goods in issue are not encompassed in this description, nor are the goods in issue remotely similar to those goods listed.

The appellants' representative contended that the goods in issue should be classified under tariff item No. 3401.11.90. He referred the Tribunal to the words of the heading, which include "organic surface-active products and preparations for use as soap, in the form of bars, cakes, moulded pieces or shapes, whether or not containing soap". In accordance with section 11 of the *Customs Tariff*, which gives a direction to consider the *Explanatory Notes* as a guide to the interpretation of the headings and subheadings in the schedule to the *Customs Tariff*, he then referred to the *Explanatory Notes* to heading No. 34.01, which

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3. Customs Co-operation Council, 1st ed., Brussels, 1987 [hereinafter *Harmonized System*].

4. Neither counsel for the respondent nor the appellants' representative raised the amendment to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System* [hereinafter *Compendium of Classification Opinions*] or the changes to the *Explanatory Notes to the Harmonized Commodity Description and Coding System* [hereinafter *Explanatory Notes*], which were issued in February 1998 and which dealt with liquid soaps. The amendments are discussed further in these reasons.

5. *Supra* note 2 [hereinafter *General Rules*].

6. Customs Co-operation Council, 2d ed., Brussels, 1996.

provide, in part, that organic surface-active products and preparations for use as soap include “toilet or washing products and preparations, in which the active component consists wholly or partly of synthetic surface-active agents . . . **provided** they are put up in the form of bars, cakes or moulded pieces or shapes, that is to say, the ordinary forms of soaps intended for the same uses”. It was argued by the representative that the goods in issue are for use as soap and that liquid is an ordinary form of soap intended for the same purpose as soap.

Alternatively, the appellants’ representative argued that, if the Tribunal is not satisfied that the goods can be classified in any of the proposed headings, that is, heading No. 33.05, 33.07 or 34.01, then the Tribunal should resort to Rule 4 of the *General Rules* which provides that “[g]oods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin”. He submitted that the goods in issue are most akin or similar to liquid soaps which are covered by tariff item No. 3401.20.90.

Counsel for the respondent argued that the Ombra body wash is properly classified under tariff item No. 3305.10.00 as shampoo and that the Fa shower gel is properly classified under tariff item No. 3307.90.00 as other toilet preparations or, in the alternative, under tariff item No. 3307.30.00 as other bath preparations. Counsel referred to section 10 of the *Customs Tariff* which provides that classification is to be made in accordance with the *General Rules* and that Rule 1 provides that the wording of the headings is of primary importance in classifying any product. Counsel also referred to section 11 of the *Customs Tariff* which provides that, in interpreting the headings, regard shall be had to the *Explanatory Notes*. In counsel’s view, although the Tribunal is to look at the *Explanatory Notes* in interpreting the headings, if there is a contradiction between the *Explanatory Notes* and the words in the heading, the Tribunal must rely on the words in the heading.

Referring to the words in heading No. 34.01, counsel for the respondent argued that the heading provides an exhaustive enumeration of the shapes or forms that organic surface-active products and preparations for use as soap must take. The forms enumerated are bars, cakes, moulded pieces or shapes. Counsel submitted that the common feature of all these forms is that they are solid, unlike the goods in issue. In counsel’s view, it would not have been necessary to restrict the forms covered by the heading if all types of products, regardless of their form, were included.

Counsel for the respondent argued that this view is consistent with the *Explanatory Notes*. Counsel referred to Part (I) of the *Explanatory Notes* to heading No. 34.01 which provides, in part, that there are three categories of soap: hard soaps, soft soaps and liquid soaps. The description of hard soaps provides, in part, that they comprise the bulk of the ordinary soaps. The description of liquid soaps provides that they do not contain synthetic organic surface-active products. Part (I) further provides that, subject to the exception in paragraph 1 (f), which refers to abrasive soaps, the soaps of heading No. 34.01 are generally in the form of bars, cakes, moulded pieces or shapes, flakes, powder, paste or aqueous solution. Based on the *Explanatory Notes*, counsel argued that, except for the liquid soaps, there is no restriction as to the form that soap can take.

Counsel for the respondent then referred to Part (II) of the *Explanatory Notes* to heading No. 34.01 which provides, in part, that organic surface-active products and preparations for use as soap in heading No. 34.01 include “toilet or washing products and preparations, in which the active component consists wholly or partly of synthetic surface-active agents . . . **provided** they are put up in the form of bars, cakes or moulded pieces or shapes, that is to say, the ordinary forms of soaps intended for the same uses”.

In counsel's view, the *Explanatory Notes* are not inconsistent with the words of heading No. 34.01 and indicate an intention to cover hard soaps, which, as the *Explanatory Notes* provide, comprise the bulk of ordinary soaps. Counsel pointed out that there is no specific mention in Part (II) of the *Explanatory Notes* to heading No. 34.01 of aqueous solutions.

Alternatively, counsel for the respondent contended that the words of heading No. 34.01 are so clear that it is not necessary to resort to the *Explanatory Notes*. Counsel acknowledged that, in the respondent's decision, the Fa shower gel was classified as other toilet preparations. However, counsel submitted that the expression "other toilet preparations" is broader than, and inclusive of, "bath preparations". Counsel contended that the Fa shower gel could be classified either as a bath preparation or other toilet preparations, but that it should be classified as a bath preparation, as this is more specific.

Counsel for the respondent argued that "toilet" means "the process of washing oneself, dressing, etc. . . . toilet soap, soap for washing oneself"<sup>7</sup> and that "*toilette*" means "*action de se laver, de se coiffer, de s'habiller. Ensemble des soins de propreté du corps*"<sup>8</sup> ("the process of washing oneself, of dressing one's hair, of dressing oneself. Overall cleanliness of the body"). "Toiletry" is "any of various articles or cosmetics used in washing, dressing, etc."<sup>9</sup> Defining "toilet" on the basis of these definitions, counsel submitted that it is broad enough to cover the goods in issue.

With respect to the Ombra body wash, counsel for the respondent contended that it is partly a body wash and partly shampoo. Counsel relied on the definition of "shampoo" as a "liquid or powder preparation for washing the hair"<sup>10</sup> and submitted that the Ombra body wash meets this definition. Counsel then referred to Note 1(c) to Chapter 34, which expressly excludes shampoos from Chapter 34, and to heading No. 33.05, which, he pointed out, covers "[p]reparations for use on the hair". Referring to the description of the product on the label, counsel submitted that the Ombra body wash should be classified in heading No. 33.05. Alternatively, counsel submitted that, if the Tribunal is of the view that the Ombra body wash is classifiable in two headings, it should resort to Rule 3 (a) of the *General Rules* which provides that, in such a case, the more specific heading should prevail. In counsel's view, a preparation for use on the hair, or shampoo, is more specific than a surface-active agent or product.

Finally, counsel for the respondent referred to the Notes to Section VI, "Products of the Chemical or Allied Industries". Note 2 provides, in part, that goods classifiable in heading No. 33.05 or 33.07 by reason of being put in measured doses or for retail sale are to be classified in those headings and in no other heading. Counsel submitted, based on this note, that heading Nos. 33.05 and 33.07 should prevail over heading No. 34.01.

In reply, the appellants' representative submitted that bath preparations and toilet preparations cannot be the same thing or else they would not have been mentioned separately. He also pointed out that counsel for the respondent is inconsistently arguing that one should not go behind the heading to the *Explanatory Notes* to interpret what is meant by the wording in heading No. 34.01, but that it is acceptable to look to the *Explanatory Notes* to heading No. 33.07 to interpret bath preparations as including preparations for personal hygiene. Finally, he argued that, if, in the *Explanatory Notes* to heading No. 34.01, it had been intended that heading No. 34.01 cover only surface-active products in the form of hard soaps,

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7. *The Concise Oxford Dictionary of Current English*, 8th ed., s.v. "toilet".

8. *Petit Larousse Illustré*, 1982, s.v. "*toilette*".

9. *Supra* note 7, s.v. "toiletry".

10. *Ibid.*, s.v. "shampoo".

which is only one form of ordinary soap, then it would not have been necessary to add the words “that is to say, the ordinary forms of soaps intended for the same uses”.

During post-hearing deliberations, the Tribunal became aware of an addition to the *Compendium of Classification Opinions* issued in February 1998 and of an amendment to the *Explanatory Notes* also issued at that time relating to goods very similar, if not identical, to the goods in issue. The classification opinion states that “[o]rganic surface-active preparations, not containing soap but sometimes referred to as ‘liquid soaps’, in the form of liquid or cream, put up for retail sale for washing the skin” should be classified in subheading No. 3402.20. Consequent to that opinion, the *Explanatory Notes* were amended by adding the following: “This group also includes preparations, consisting wholly or partly of organic surface-active agents, in the form of liquid or cream, whether or not put up for retail sale for washing the skin”.

Given this information, the Tribunal asked the parties to comment on the applicability of heading No. 34.02 to the goods in issue. The appellants’ representative responded by saying that, since the classification opinion and the amendment to the *Explanatory Notes* were issued after the date of importation, they should not be considered by the Tribunal in coming to its decision, a view shared by counsel for the respondent. Both counsel and the representative restated their initial positions as set out above.

The issues in these appeals are: (1) whether Ombra body wash is properly classified under tariff item No. 3305.10.00 as shampoo or should be classified under tariff item No. 3401.11.90 as other organic surface-active products for toilet use or under tariff item No. 3401.20.90 as other liquid soap; and (2) whether Fa shower gel is properly classified under tariff item No. 3307.90.00 as other toilet preparations or under tariff item No. 3307.30.00 as other bath preparations or should be classified under tariff item No. 3401.11.90 as other organic surface-active products for toilet use or under tariff item No. 3401.20.90 as other liquid soap.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules* and the *Canadian Rules*.<sup>11</sup> 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* which follow. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the *Explanatory Notes* and the *Compendium of Classification Opinions* as a guide to the interpretation of the headings and subheadings in the schedule to the *Customs Tariff*. For the purposes of these appeals, the Tribunal must decide whether the goods in issue fall in heading No. 33.05, 33.07 or 34.01 or, if none of those headings are appropriate, whether another heading is more accurate.

The Tribunal first considered the respondent’s decision that the Ombra product should be classified as a preparation for use on the hair and, more specifically, as shampoo. The Tribunal reviewed the product itself and the directions for use as a body wash, in conjunction with the common and ordinary meaning of the word “shampoo”. While the Tribunal accepts that the Ombra product may be used on the hair, as a substitute for shampoo, the Ombra product is used for more than simply washing the hair, most notably for washing the body. The Tribunal, therefore, is not persuaded that it is appropriate to classify the Ombra body wash as a preparation for use on the hair or as shampoo, as it is more than shampoo.

Having found that the Ombra product is not properly classified as a preparation for use on the hair, in heading No. 33.05, the Tribunal must consider whether it is properly classified in heading No. 33.07

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11. *Supra* note 2.



or 34.01. Since the same headings are being considered with respect to the classification of the Fa product and since the Ombra product is similar to the Fa product in terms of composition, characteristics and use, the Tribunal is of the view that the decision made with respect to the Ombra product is equally applicable to the Fa product. Therefore, the Tribunal will consider whether both the Ombra products and the Fa products should be classified in heading No. 34.01 or 33.07.

Heading No. 34.01 covers, in part, organic surface-active products and preparations for use as soap, in the form of bars, cakes, moulded pieces or shapes. Both parties agreed that the Ombra and Fa products are organic surface-active products and preparations. It is also clear from the descriptions and the directions for use on the labels of the Ombra and Fa products that they are used as soaps. However, the parties disagree as to whether it is necessary for organic surface-active products or preparations for use as soaps to be in the form of bars, cakes, moulded pieces or shapes in order for them to be classified in heading No. 34.01.

In the Tribunal's view, the words of heading No. 34.01 clearly indicate that the heading covers only organic surface-active products and preparations that are in the specified forms. The Tribunal considered the *Explanatory Notes* to heading No. 34.01, which state, in part, that the heading includes organic surface-active products or preparations "**provided** they are put up in the form of bars, cakes or moulded pieces or shapes, that is to say, the ordinary forms of soaps intended for the same uses". Were it not for the clear and unambiguous words in heading No. 34.01, the Tribunal believes that this heading could have been read to include products in the ordinary forms of soaps intended for the same purposes and not necessarily only those products in the forms of bars, cakes, moulded pieces or shapes. However, the Tribunal is not persuaded that it should, in these appeals, interpret the *Explanatory Notes* to broaden the scope or coverage of heading No. 34.01 to include more forms than those expressly provided for in the words of heading No. 34.01.

Having determined that the Ombra and Fa products should not be classified in heading No. 34.01, the Tribunal will consider whether those products should be classified in heading No. 33.07 as either bath preparations or toilet preparations.

With respect to bath preparations, the Tribunal notes that the *Explanatory Notes* to heading No. 33.07 provide, in part, that the heading covers "[b]ath preparations, such as **perfumed bath salts and preparations for foam baths**, whether or not containing soap or other organic surface-active agents . . . and preparations for personal hygiene". Even though the description on the labels of the Ombra and Fa products and the directions for use suggest that they may be considered as "[b]ath preparations . . . and preparations for personal hygiene" and, consequently, classified as other bath preparations under tariff item No. 3307.30.00, the *Explanatory Notes* indicate that heading No. 33.07 is intended to cover goods which play only a secondary role in the act of washing one's body. At best, the soaps or organic surface-active agents contemplated in this heading would have a passive role in cleaning the body and only because of their presence in the bath water.

With respect to toilet preparations, the Tribunal observes that Note 4 to Chapter 33 lists a number of products to which the expression "perfumery, cosmetic or toilet preparations" applies. The appellants' representative argued that the goods listed are very different from the Ombra and Fa products. While the Tribunal observes that Note 4 includes the words "*inter alia*", which indicate that the list of goods is not exhaustive of all the goods covered by the expression "perfumery, cosmetic or toilet preparations", it does give an indication as to the type of goods that would fall in this heading. Even accepting a broad interpretation of the phrase "toilet preparations", the Tribunal is not persuaded that the Ombra and Fa

products, which are described on their labels as preparations used for washing oneself, are properly covered by that expression and, therefore, should be classified as other toilet preparations under tariff item No. 3307.90.00.

It is evident to the Tribunal that none of the headings No. 33.05, 33.07 and 34.01 adequately describes the goods in issue. In view of the difficulties encountered by the Tribunal in attempting to classify the goods in issue according to the headings proposed by the appellant and the respondent, other headings were reviewed. Subsection 67(3) of the *Act* directs the Tribunal to “make such order, finding or declaration as the nature of the matter may require”. The Tribunal considers that this subsection allows it to classify a product without accepting either the respondent’s or the appellants’ choice, in cases where it is appropriate to do so; in other words, to arrive at what it considers to be the correct classification. This is consistent with the Tribunal’s reasons in *Research Products/Blankenship of Canada v. D.M.N.R.*<sup>12</sup> and the Tribunal’s conclusion in *Rigel Shipping Canada v. D.M.N.R.*<sup>13</sup> While this happens only occasionally, it is an important tool available to the Tribunal to ensure that the correct classification, based on the evidence, is given to a product.<sup>14</sup>

The *Harmonized System* was introduced in the mid-1980s and, although it provides for the classification of thousands of goods, it could not have provided for all products which the world has seen developed over the intervening years. Therefore, there will be products in the marketplace for which there is no obvious existing tariff classification. It seems that soap was recognized in a liquid form when the *Harmonized System* was drafted, but organic surface-active agents were thought to exist primarily in a solid form. Hence, the construction of heading No. 34.01.

It is common knowledge that products used to wash the body were sold almost exclusively as bars, cakes or moulds, except for liquid soaps that one would encounter in commercial or industrial applications for example. However, there has recently been a proliferation of body washing products sold in liquid form. The liquid products are now readily available for washing the body, as are bars of soap.

In the present case, the Tribunal, in addition to the classification options proposed by the parties, considered the applicability of heading No. 34.02 as it read before the February 1998 changes. The Tribunal is of the view that heading No. 34.02 is a reasonable alternative to consider, as the ones proposed by the parties all have significant obstacles to the classification of the goods in issue. On the face of it, the goods in issue can fall in this heading. Unlike the clear wording of heading No. 34.01, which expressly excludes organic surface-active products which are not in the form of bars, cakes, moulded pieces or shapes, no such limitation exists in heading No. 34.02. Similarly, heading No. 34.02 does not have the limitations presented by heading Nos. 33.05 (shampoos) and 33.07 (bath and toilet preparations). It, therefore, is not unreasonable to consider heading No. 34.02 as one that might accommodate the classification of the goods in issue at the time of their importation.

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12. (30 January 1992), AP-90-174 (C.I.T.T.).

13. (15 September 1998), AP-97-045 (C.I.T.T.).

14. See *Norton Christensen Canada v. D.M.N.R.* (9 December 1985), 10 T.B.R. 280, No. 2181; and *Kenneth Field v. D.M.N.R.* (22 February 1985), 10 T.B.R. 39, No. 2066.

As mentioned earlier, the *Explanatory Notes* were amended in February 1998 to take into account a classification opinion issued by the Customs Co-operation Council.<sup>15</sup> The relevant changes are highlighted in the “pre- and post-” February 1998 *Explanatory Notes* to heading No. 34.02. The wording of the heading prior to February 1998 is that which applied when the goods in issue were imported and reads as follows:

- 34.02 Organic surface-active agents (other than soap); surface-active preparations, washing preparations (including auxiliary washing preparations) and cleaning preparations, whether or not containing soap, other than those of heading No. 34.01.

The *Explanatory Notes* to heading No. 34.02 prior to February 1998 read, in part, as follows:

- (A) Surface-active preparations.

These include:

...

- (vii) Emulsifying agents used in the preparation of pharmaceutical or cosmetic products

...

This heading does not cover:

- (a) Shampoos or preparations for foam baths or for personal hygiene, whether or not containing soap or other surface-active agents (Chapter 33).

The *Explanatory Notes* to heading No. 34.02 after February 1998 read, in part, as follows:

- (A) Surface-active preparations.

These include:

...

- (vii) Emulsifying agents used in the preparation of pharmaceutical or cosmetic products

**This group also includes preparations, consisting wholly or partly of organic surface-active agents, in the form of liquid or cream, whether or not put up for retail sale for washing the skin.** [Emphasis added]

This heading does not cover:

- (a) Shampoos or preparations for foam baths, whether or not containing soap or other surface-active agents (Chapter 33).

The Tribunal notes that the amendment resulted in the words “or for personal hygiene” being deleted from the paragraph beginning “This heading does not cover”. The deletion of the phrase “for personal hygiene”, a modifier of “[s]hampoos or preparations for foam baths”, adds clarity to the intent of the World Customs Organization that products used primarily for cleaning the body, hence for personal hygiene, should be classified in heading No. 34.01 or 34.02 and not in Chapter 33.

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15. The Customs Co-operation Council, established in 1950, now called the World Customs Organization, was given the mandate to create a universal customs classification system. The result of its work was the *Harmonized System*. The Harmonized System Committee of the World Customs Organization meets regularly to consider classification issues among members, to update the *Harmonized System* and the *Explanatory Notes* and to issue classification opinions which are compiled in the *Compendium of Classification Opinions*.

To reinforce that view, amendments to the *Explanatory Notes* to heading No. 33.07 also were made. Heading No. 33.07 reads as follows:

- 33.07 Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties.

The *Explanatory Notes* to heading No. 33.07 prior to February 1998 read, in part, as follows:

This heading covers:

- (III) Bath preparations, such as perfumed bath salts and preparations for foam baths, whether or not containing soap or other organic surface-active agents (see Note 1 (c) to Chapter 34), and preparations for personal hygiene.

The *Explanatory Notes* to heading No. 33.07 after February 1998 read, in part, as follows:

This heading covers:

- (III) Bath preparations, such as perfumed bath salts and preparations for foam baths, whether or not containing soap or other organic surface-active agents (see Note 1 (c) to Chapter 34).

**Preparations consisting wholly or partly of organic surface active agents, in the form of liquid or cream, whether or not put up for retail sale for use in washing the skin, are classified in heading 34.02.** [Emphasis added]

Once again, it is interesting to note that the phrase “and preparations for personal hygiene” was removed from the *Explanatory Notes* to heading No. 33.07.

The Tribunal notes that, pursuant to section 11 of the *Customs Tariff*, regard shall be had to the *Compendium of Classification Opinions* in the same manner that regard shall be had to the *Explanatory Notes*. As recognized by the Tribunal in *Trudell Medical Marketing v. D.M.N.R.*,<sup>16</sup> the Tribunal is directed by section 11 to consider the classification opinions, among other things, as a guide to the interpretation of the headings and subheadings in the schedule to the *Customs Tariff*.

The Tribunal has interpreted the requirement to have “regard” to the *Explanatory Notes* to mean that it must take them into account when coming to a view as to the tariff classification of goods, but that it is not bound to follow them when classifying goods in specific headings. In *Fastco Canada v. D.M.N.R.*,<sup>17</sup> the Tribunal held that it should not consider itself bound by the *Explanatory Notes* and that, after taking them into account in its deliberations, it will give them whatever weight it considers appropriate.

The Tribunal agrees with the arguments of both counsel for the respondent and the appellants’ representative that it must apply the *Customs Tariff* as it existed on the date of importation of the goods in issue.<sup>18</sup> The classification opinion and the amendment to the *Explanatory Notes* postdated the importation.

16. (24 July 1997), AP-96-016 (C.I.T.T.).

17. (29 April 1997), AP-96-078 (C.I.T.T.).

18. See *D.M.N.R. v. Rollins Machinery* (15 September 1999), A-3-98 (F.C.A.). In this case, the Federal Court of Appeal concluded that the Tribunal erred in classifying goods under a tariff item that was not in force at the time that the goods were imported. In the present situation, tariff item No. 3402.20.90 was in force at the time of the importation of the goods.

Although the Tribunal must consider the *Customs Tariff* as it was on the date of importation, it would be irresponsible to ignore relevant amendments to the *Explanatory Notes* which help to confirm or clarify the classification of an imported product. This is particularly so where the classification of imports is very difficult, if not impossible, taking into account the heading, the *Explanatory Notes*, etc., as they were at the time of importation. In the Tribunal's view, the 1998 amendments to the *Explanatory Notes* confirm the appropriateness of classifying the goods in issue in subheading No. 3402.20 as surface-active preparations put up for retail sale.

In light of the foregoing, the Tribunal is persuaded that the Ombra and Fa products, which come in liquid form and which are used as replacements for soap, are organic surface-active preparations in the form of a liquid, for washing the skin and, as such, should be classified under tariff item No. 3402.20.90 as other surface-active preparations put up for retail sale.

Anita Szlajak

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Presiding Member