

Ottawa, Monday, May 31, 1999

Appeal No. AP-97-069

IN THE MATTER OF an appeal heard on September 17, 1998,
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of
National Revenue dated June 17, 1997, with respect to a request
for re-determination under section 63 of the *Customs Act*.

BETWEEN

ITALFINA INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-97-069

ITALFINA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue made under section 63 of the *Customs Act*. The issue in this appeal is whether certain food products, known under the trade names of “*Millefoglie D’Italia*” and “*Glassatine*,” imported by the appellant are properly classified under tariff item No. 1905.90.39 as pastries, as determined by the respondent, or should be classified under tariff item No. 1905.30.99 as sweet biscuits, as claimed by the appellant.

HELD: The appeal is dismissed. Given that the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 19.05 require sweet biscuits to have a base of flour, sugar or other sweetening matter and fat, the Tribunal concludes that the products in issue cannot be classified as sweet biscuits. The Tribunal is of the view that, in the case of the products in issue, the base is the beginning formulation of these products, that is, the ingredients of the dough at the time that it is mixed. If it were otherwise, the term “base” would lose its sense and could include whatever ingredient is added to the dough before a product is baked. The Tribunal is of the view that spraying sugar, in a pure form or in a mixed form, onto the dough once it has been mixed and just prior to baking, does not make the sugar part of the base. This sugar is simply a form of coating, which does not make it part of the dough. The fact that the sugar diffuses through the dough during baking does not affect this conclusion, since the baking process takes place after the mixing of the dough.

The Tribunal is of the view that the products in issue are properly classified in subheading No. 1905.90 (Other), more particularly under tariff item No. 1905.90.39 as pastries. The Tribunal notes that the manufacturer of the products in issue labels and markets them as puff pastry. The Tribunal is of the opinion that pastry, in certain cases, can have a low water content. This is shown in a table found in the expert report of Dr. Stanley. This table indicates that flaky pastry generally contains 7.7 percent water, an amount which is not significantly different from that of the products in issue. The Tribunal also concludes that the fact that the products in issue are not bendable does not prevent them either from being classified as pastry. With respect to the long shelf-life of the products in issue, the Tribunal is of the view that this fact is not inconsistent with their classification as pastry. An extract of the *Encyclopaedia of Food Science, Food Technology and Nutrition* contradicts Dr. Stanley’s position that pastry cannot have a long shelf-life. The extract states that there are long-shelf-life pastries. Finally, the Tribunal notes that this encyclopaedia describes processes for the commercial preparation of pastry which are similar to the process for the manufacture of the products in issue.

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 17, 1998
Date of Decision: May 31, 1999

Tribunal Members: Pierre Gosselin, Presiding Member
Peter F. Thalheimer, Member
Richard Lafontaine, Member

Counsel for the Tribunal: Philippe Cellard

Clerk of the Tribunal: Anne Turcotte

Appearances: C. Brent Jay, for the appellant
Catharine Moore, for the respondent

Appeal No. AP-97-069

ITALFINA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
PETER F. THALHEIMER, Member
RICHARD LAFONTAINE, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue made under section 63 of the Act. The issue in this appeal is whether certain food products, known under the trade names of “*Millefoglie D’Italia*” and “*Glassatine*,” imported by the appellant are properly classified under tariff item No. 1905.90.39 of Schedule I to the *Customs Tariff*² as pastries, as determined by the respondent, or should be classified under tariff item No. 1905.30.99 as sweet biscuits, as claimed by the appellant. The relevant tariff nomenclature is as follows:

19.05	Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa; 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 ---Other:
1905.30.99	----Other
1905.90	-Other ---Pizza and quiche; pastries, pies, puddings and cakes, including sweet bakery products leavened with yeast; bakery products made without flour:
1905.90.39	----Other

The relevant excerpts from the *Explanatory Notes to the Harmonized Commodity Description and Coding System*³ (the Explanatory Notes) to heading No. 19.05 read as follows:

(A) **Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa.**

The heading includes the following products:

(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. They are baked for a long time to improve

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. Customs Co-operation Council, 2nd ed., Brussels, 1996.

the keeping qualities and are generally put up in closed packages. There are various types of biscuits including :

- (b) **Sweet biscuits**, which are fine bakers' wares with long-keeping qualities and a base of flour, sugar or other sweetening matter and fat (these ingredients constituting at least 50 % of the product by weight), whether or not containing added salt, almonds, hazelnuts, flavouring, chocolate, coffee, etc. The water content of the finished product must be 12 % or less by weight and the maximum fat content 35 % by weight (fillings and coatings are not to be taken into consideration in determining these contents). Commercial biscuits are not usually filled, but they may sometimes contain a solid or other filling (sugar, vegetable fat, chocolate, etc.). They are almost always industrially manufactured products.
- (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.

Ms. Lia Violante-Budaci, an employee of Italfina Inc., gave evidence on behalf of the appellant. She testified that the appellant is an importer and distributor of food products. With respect to the manufacturer of the products in issue, Vincenzi Biscotti S.p.A., she indicated that it does not sell any fresh products. She mentioned that the translation of *biscotti* is cookie or biscuit. Ms. Violante-Budaci indicated that the manufacturing of the products in issue, *Millefoglie D'Italia* and *Glassatine*, is highly automated. As regards the sale of the products in issue by the appellant, she testified that the sales are made to grocery stores and not to bakery shops. In the grocery stores, the products in issue are found in the dry cookie aisle rather than in the bakery area.

Dr. D.W. Stanley, a former professor of food science at the University of Guelph, testified on behalf of the appellant as an expert witness in food science. Dr. Stanley stated that lower moisture content and longer shelf-life differentiate biscuits and sweet biscuits from pastry. He indicated that the average shelf-life of a pastry is less than a week. He added that sweet biscuits tend to be manufactured industrially, whereas pastry, because of its short shelf-life and propensity to spoilage, is almost always manufactured locally in a bakery. Another difference is that biscuits and sweet biscuits are more friable and crumbly while pastry is more bendable.

Dr. Stanley dealt with the results of an analysis of the composition of the products in issue performed by Dr. Massimo F. Marcone, a research technologist (chemist) of the Department of Food Science at the University of Guelph, who did not testify at the hearing. Dr. Stanley indicated that both *Millefoglie D'Italia* and *Glassatine* contained more than 50 percent flour, fat and sugar, less than 12 percent water and 35 percent or less fat by weight. He stated that the products in issue contain sugar. The sugar, which is put on the outside of the dough before baking, diffuses into the products in issue during baking. The results of the analysis conducted on the products have shown that the products in issue contain approximately 16 percent sugar. The percentage of the sugar on the outside layer of the products in issue is higher than the percentage found inside. Dr Stanley stated that dough is dough until baked and that, since the sugar migrates inward during the baking process, the sugar can be considered part of the dough. In answering a question from counsel for the respondent, Dr. Stanley indicated that in sugar cookies, sugar is mixed with flour and water to form the dough. Questioned on the meaning of the word "base," Dr. Stanley indicated that the word did not have a specific meaning in food science. Relying on a dictionary definition, he referred to the base as "the basis of or part of the base." He stated that the base of the products in issue contains flour, fat and sugar.

Mr. Wendell Ward, head of the Analytical Section of the Organic and Food Products Laboratory at the Department of National Revenue, testified on behalf of the respondent. He agreed with the results of the analysis performed by Dr. Marcone. Mr. Ward also indicated that, in the course of his analysis, he only found small amounts of sugar in the centre of the products in issue.

Counsel for the appellant submitted that, in accordance with Dr. Stanley's testimony and with the definitions of biscuits and sweet biscuits found in the Explanatory Notes to heading No. 19.05, the products in issue should be classified in subheading No. 1905.30 as sweet biscuits. He submitted that, as Dr. Stanley stated, the friability of the products in issue, as well as their low water content and their long shelf-life, pointed to their being sweet biscuits rather than pastry. With respect to the definition of biscuits found in the Explanatory Notes to heading No. 19.05, counsel submitted that the products in issue are made from flour and fat to which sugar has been added, baked for a long time to improve their keeping qualities and put up in closed packages. Counsel submitted that the products in issue also satisfy the criteria found in the definition of sweet biscuits in the Explanatory Notes to heading No. 19.05. When dealing with the requirement for the base to be of flour, sugar or other sweetening matter and fat, counsel submitted that the base indeed contained sugar. He stated that it would be difficult to say that sugar is not part of the base of the products in issue, given the fact that the sugar represented about 15 percent of the total weight of the final products and that it is disseminated through them. Finally, counsel addressed the question of the importance to be given to the description of the products in issue on the packaging. He submitted that the description of *Millefoglie D'Italia* as "delicate puff pastry with butter" and of *Glassatine* as "delicate sugar icing coated puff pastry" is only a marketing technique used to give the products in issue a very positive product image.

Counsel for the respondent submitted that the products in issue do not meet the criteria specified in the Explanatory Notes for sweet biscuits because the base does not contain sugar or another sweetener, the moisture content is not significantly different from the one for flaky pastry and the goods are described as puff pastry. Counsel submitted that the base of the products in issue consists of flour and fat, but not sugar. Noting that the sugar was sprayed on the products in issue just prior to baking, she submitted that, for the appellant's contention to be correct, i.e. that the base consists of flour, sugar and fat, the term "base" would have to be interpreted as meaning the entire product. She suggested that, on the contrary, "base" must mean something less than that. She further suggested that, to have a base of flour, fat and sugar, these ingredients must be mixed into the dough and then baked, as is the case for sugar cookies. Regarding the moisture content of the products in issue, counsel noted that it is not significantly different from that found for flaky pastry on a chart provided by Dr. Stanley. She also noted that puff pastry was described as "flakier" not "bendable," both in the expert report of the appellant's witness, Dr. Stanley, and in an extract from the *Encyclopaedia of Food Science, Food Technology and Nutrition*⁴ (the Encyclopaedia) filed with the Tribunal by the appellant. Having recalled that the packaging of the products in issue refers to puff pastry, counsel submitted that the production process used in manufacturing the products in issue is similar to the process used for puff pastry which is described in an excerpt of the Encyclopaedia.

Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System* (the General Rules).⁵ Rule 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. In the present appeal, the parties agree that the products in issue shall be classified in heading No. 19.05 as bread, pastry, cakes, biscuits and other bakers'

4. R. Macrae, R.K. Robinson & M.J. Sadler, Academic Press, Exhibit A-1, Tab 12.

5. *Supra* note 2, Schedule 1.

wares. The issue arising between the parties concerns the classification at the subheading level. Rule 6 of the General Rules provides that “[f]or legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings . . . on the understanding that only subheadings at the same level are comparable.” In the present appeal, the products in issue must be classified in subheading No. 1905.30 as sweet biscuits, as claimed by the appellant, or in subheading No. 1905.90 as other bread, pastry, cakes, biscuits and other bakers’ wares, as determined by the respondent. In interpreting the headings and subheadings in Schedule I, Section 11 of the *Customs Tariff* provides that regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁶ and the Explanatory Notes.

The Tribunal must therefore have regard to the definition of sweet biscuits, which is provided in the Explanatory Notes to heading No. 19.05, in order to determine whether the products in issue can be classified in subheading No. 1905.30. The appellant has submitted that the content requirements regarding water, fat and the combination of flour, sugar and fat have been satisfied by the products in issue. The respondent has not challenged this fact. Neither has the appellant’s position, that the products are fine bakers’ wares with long-keeping qualities and that they are industrially manufactured products, been questioned.

The requirement for the base of sweet biscuits to be of flour, sugar or other sweetening matter and fat has, however, been the object of debate between the parties, the appellant contending that it had been met, and the respondent submitting that it had not. Dr. Stanley indicated that the word “base” should be given its general sense, that it should be interpreted as meaning “the basis” of something.⁷ The Tribunal is of the view that, in the case of the products in issue, the base is the beginning formulation of these products, i.e. the ingredients of the dough at the time that it is mixed. If it were otherwise, the term “base” would lose its sense and could include whatever ingredient is added to the dough before a product is baked. The Tribunal is of the view that spraying sugar, in a pure form or in a mixed form, onto the dough once it has been mixed and just prior to baking, does not make the sugar part of the base. This sugar is simply a form of coating which does not make it part of the dough. The fact that the sugar diffuses through the dough during baking does not affect this conclusion, since the baking process takes place after the mixing of the dough. For the foregoing reasons, the Tribunal is of the view that sugar cannot be said to be part of the base of the products in issue. Therefore, given that the requirement in the Explanatory Notes to heading No. 19.02 for sweet biscuits to have a base of flour, sugar or other sweetening matter and fat has not been satisfied, the Tribunal concludes that the products in issue cannot be classified in subheading No. 1905.30.

The Tribunal is of the view that the products in issue are properly classified in subheading No. 1905.90 (Other), more particularly, under tariff item No. 1905.90.39 as pastries. The Tribunal notes that the manufacturer of the products in issue labels and markets them as puff pastry. Notwithstanding the appellant’s argument that the term “pastry” was simply used as a marketing technique, the Tribunal is of the view that the products in issue can indeed be classified as pastry. The Tribunal does not agree with the arguments presented by the appellant to support its position that the products in issue cannot be classified as pastry. The Tribunal is of the opinion that pastry, in certain cases, can have a low water content. This is shown in a table found in the expert report of Dr. Stanley. This table indicates that flaky pastry contains generally 7.7 percent water.⁸ The Tribunal notes that puff pastry is described in an extract from the Encyclopaedia as flaky pastry.⁹ Based on Dr. Stanley’s testimony that a difference in water content

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

7. *Transcript of Public Hearing and Argument* at 154-55.

8. Exhibit A-1, Tab 1 at 4.

9. *Supra* note 4 at 3462.

from 3.5 percent to 16.6 percent only begins to be significant when the water content reaches upwards of 8 to 10 percent,¹⁰ the Tribunal is of the view that the water content of the products in issue is not significantly different from that of flaky pastry and, therefore, does not prevent them from being classified as pastry. Similarly, the Tribunal also concludes that the fact that, like flaky pastry, the products in issue are not bendable does not prevent them from being classified as pastry.

With respect to the long shelf-life of the products in issue, the Tribunal is of the view that this is not inconsistent with them being classified as pastry. An excerpt of the Encyclopaedia contradicts the position of Dr. Stanley that pastry cannot have a long shelf-life.¹¹ The extract states that there are long-shelf-life pastries. Finally, the Tribunal notes that the Encyclopaedia describes processes for the commercial preparation of pastry which are similar to the process for the manufacture of the products in issue.¹²

For the foregoing reasons, the Tribunal concludes that the products in issue are properly classified under tariff item No. 1905.90.39 as pastries. Consequently, the appeal is dismissed.

Pierre Gosselin

Pierre Gosselin
Presiding Member

Peter F. Thalheimer

Peter F. Thalheimer
Member

Richard Lafontaine

Richard Lafontaine
Member

10. *Supra* note 7 at 148-49.

11. *Supra* note 4 at 3465.

12. *Ibid.*