CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, November 28, 2000

Appeal No. AP-99-085

IN THE MATTER OF an appeal heard on August 16, 2000, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the Canada Customs and Revenue Agency dated November 1, 1999, with respect to a request for redetermination under subsection 63(3) of the *Customs Act*.

BETWEEN

BIO AGRI MIX LTD. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal No. AP-99-085

BIO AGRI MIX LTD. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

This appeal is pursuant to section 67 of the *Customs Act*. At issue is whether the goods in issue are properly classified under tariff item No. 2309.90.99, as determined by the respondent, or should be classified under classification No. 2309.90.39.42, as claimed by the appellant. The goods in issue are feed-grade chlortetracycline. The appellant manufactures chlortetracycline premix in Canada using the goods in issue as its main ingredient. Chlortetracycline premix is added to feed in order to prevent disease in animals.

HELD: The appeal is dismissed. The goods in issue are properly classified under tariff item No. 2309.90.99 as other preparations of a kind used in animal feeding. The goods in issue are not classifiable under tariff item No. 2309.90.39, which describes other complete feed and feed supplements, including concentrates. While the goods in issue are preparations of a kind used in animal feeding, and, therefore, classified in subheading No. 2309.90, they are neither a complete feed nor a feed supplement, as they do not contain any nutrient value. Nor are they concentrates of a complete feed or feed supplement. They are goods used to make a premix, which is also not a complete feed or feed supplement.

As the goods in issue are not classifiable under tariff item No. 2309.90.39, nor classifiable under any other tariff item in subheading No. 2309.90, they are properly classified according to Rule 1 of the *General Rules for the Interpretation of the Harmonized System* and Rule 1 of the *Canadian Rules* under residual tariff item No. 2309.90.99.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	August 16, 2000
Date of Decision:	November 28, 2000
Tribunal Members:	Patricia M. Close, Presiding Member Peter F. Thalheimer, Member Zdenek Kvarda, Member
Counsel for the Tribunal:	John Dodsworth
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Jesse I. Goldman and Daryl H. Pearson, for the appellant Greg Moore, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-99-085

BIO AGRI MIX LTD. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member
PETER F. THALHEIMER, Member
ZDENEK KVARDA, Member

REASONS FOR DECISION

This appeal is pursuant to section 67 of the *Customs Act*.[1] At issue is whether the goods in issue are properly classified under tariff item No. 2309.90.99 of Schedule I to the *Customs Tariff*,[2] as determined by the respondent, or should be classified under classification No. 2309.90.39.42, as claimed by the appellant. The goods in issue, imported in 1996 and 1997, are feed-grade chlortetracycline. The appellant manufactures chlortetracycline premix using the goods in issue as its main ingredient. Chlortetracycline premix [hereinafter premix] is added to animal feed in order to prevent disease.

The relevant tariff nomenclature is as follows:

23.09	Preparations of a kind used in animal feeding.
2309.10.00	-Dog or cat food, put up for retail sale
2309.90	-Other
	---Complete feeds and feed supplements, including concentrates:
2309.90.39	----Other
	---Other:
2309.90.91	----Mineral blocks; flavourings; pellet binders; preservatives; single ingredient feeds; yeast cultures
2309.90.99	----Other

EVIDENCE

The appellant's witness was Mr. Paul Lake, President of Bio Agri Mix Ltd. At the hearing, the Tribunal qualified Mr. Lake as an expert witness regarding the specific composition of animal feed.

The appellant is a wholly owned Canadian manufacturer located in Mitchell, Ontario, and employs 32 people. The appellant is a generic company that manufactures medicinal animal feed additives, animal health products and disinfectants. The expression "medicinal animal feed additives" refers to products used for disease prevention or treatment, as opposed to products that have a nutrient value, which are delivered through feed.

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

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The appellant dilutes, blends, granulates and packages the goods in issue to manufacture the premix. The goods in issue are used solely in the premix. The chlortetracycline contained in the goods in issue is an antibiotic, which is produced by a fermentation process. The fermentation process, which is completed prior to the importation, results in a product, either pure chlortetracycline or feed-grade chlortetracycline. Mr. Lake testified that the molecular structure of the goods in issue does not change as a result of the production of premix.

The goods in issue are used in the prevention and treatment of disease in animals. The benefits and uses of the goods in issue and the finished premix are similar, and both contain the same active ingredient - the calcium complex of chlortetracycline hydrochloride. Mr. Lake further testified that, prior to government regulations prohibiting such practice, the goods in issue were added directly to animal feed. The importation of the goods in issue for use in the manufacture of premix is illegal, unless the importer is registered under the *Food and Drugs Act*.[3]

In addition to the calcium complex of chlortetracycline hydrochloride, the goods in issue consist of crude protein, fibre fat, moisture and ash. Mr. Lake testified that the calcium complex of chlortetracycline hydrochloride is a "biomass" containing metabolites, themselves containing amino acids and trace amounts of vitamins. Mr. Lake equated the meaning of the word "biomass" with that of the expression "carrier matter". The appellant imports a variety of potencies of the goods in issue, in terms of the concentration of the active ingredient, the chlortetracycline.

Mr. Lake testified that the premix is produced by dilution of the goods in issue, using calcium sulphate and mineral oil. The calcium sulphate is used to arrive at the guaranteed potency of the chlortetracycline contained in the finished premix. The mineral oil is added to act as a binder and a dust suppression formulation. The feed-grade chlortetracycline is placed in a mixer, together with the diluent, and blended together to make a powder. The powder blend is then granulated and packaged.

Mr. Lake testified that sulfamethazine, an antibiotic, is added to three of the five premix products produced by the appellant. Mr. Lake testified that one premix produced by the appellant contains 50 percent of the goods in issue, and another contains 100 percent of the goods in issue.

On cross-examination, Mr. Lake testified that the premix does not, itself, have any nutrient value. It is merely a product used to incorporate a drug into feed. The goods in issue do not have their own Drug Identification Number (DIN), but are registered as part of the registration of the appellant's premix, which does have a DIN.

In response to questions from the Tribunal, Mr. Lake testified that the goods in issue are not imported as a feed. Mr. Lake testified that the goods in issue are not a feed supplement, according to regulatory requirements, as they must be formulated into a drug premix before being added to feed. In addition to sulfamethazine, the appellant adds penicillin to some of the premixes. The premix is an additive that is used in the manufacture of a medicated feed. Mr. Lake also testified that, according to the industry, the premixes are all principally drugs. The packages for all premixes contain a statement "for veterinary use only", which means that it is for animal, not human, consumption.

The respondent's witness was Ms. Judy Thompson. The Tribunal qualified Ms. Thompson as an expert in livestock feed evaluation. Ms. Thompson testified that the word "feed" refers to substances that include a nutrient and that add energy or other nutrients to an animal's diet. A "complete feed" is a product

3. R.S.C. 1985, c. F-27.

that includes nutrients and is ready to eat. Ms. Thompson testified that a "feed supplement" contains nutrients, such as protein, minerals, vitamins and energy, that would balance the animal's diet. Ms. Thompson testified that the goods in issue are not a complete feed, nor are they a feed supplement, since they are, essentially, a drug. Ms. Thompson testified that the goods in issue contain very little nutrient value.

Ms. Thompson further testified that, in the field, the word "concentrate" refers to a feed containing a highly concentrated level of nutrients. According to Ms. Thompson, neither the goods in issue nor the finished premixes produced by the appellant from the goods in issue are concentrates, since they are drug premixes. Ms. Thompson testified that, in order to be a feed supplement containing an antibiotic, the preparation, in addition to the antibiotic, would have to contain a protein source, as well as minerals and vitamins.

ARGUMENT

The appellant submitted that the goods in issue should be classified in accordance with Rule 1 of the *General Rules for the Interpretation of the Harmonized System*[4] under classification No. 2309.90.39.42 as feed supplements, including concentrates, containing an antibiotic and chlortetracycline, not under residual tariff item No. 2309.90.99, as determined by the respondent.

The appellant submitted that the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[5] to heading No. 23.09 do not provide instruction as to which goods are classifiable as a feed supplement or concentrate or which are classifiable under the residual category of the tariff heading. As such, the appellant bases its argument in support of its proposed classification on specific wording of the tariff item and other sources, such as definitions of those terms.

In this regard, the appellant submitted that the evidence of the respondent's witness, suggesting definitions drawn from the *Feeds Act*,[6] was not probative or material to the issues arising in the appeal. The appellant submitted that the *Feeds Act* was not entered into evidence by the respondent, nor is the *Feeds Act in pari materia* with the *Customs Tariff*. Further, the appellant suggests that Ms. Thompson did not provide a definition of the term "concentrate" drawn from trade usage, but from her expertise in the administration of the *Feeds Act*.

The appellant referred to Customs Notice N-665,[7] contained in the respondent's brief. The appellant points out that this Customs Notice equates the definition of "concentrate" on one hand with the definition of "macro-premix". The Customs Notice provides separate definitions for "complete feed", "feed supplement", "premix" and "concentrate", which, according to the appellant, support its position that, according to the terms of the tariff item, a concentrate need not be ready for use. Instead, it need only be a preparation used in animal feeding.

The Customs Notice further states that all premixes are deemed to be concentrates and are classified under tariff item No. 2309.90.91 or 2309.90.92. The appellant submitted that the wording of tariff item No. 2309.90.91, as found in the *Customs Tariff*, 1992, is identical to the wording of tariff item No. 2309.90.39 as found in the *Customs Tariff*, 1997, which, the appellant submitted, is the proper

4. *Supra* note 2, Schedule I [hereinafter General Rules].
5. Customs co-operation Council, 2d ed., Brussels, 1996 [hereinafter Explanatory Notes].
6. R.S.C. 1985, c. F-9.
7. *Preparations of a kind used in animal feeding (Heading No. 23.09)*, 1 February 1992, Department of National Revenue, Customs and Excise [hereinafter Customs Notice].

classification of the goods in issue. The appellant urged the Tribunal to take judicial notice of the *Customs Tariff*, 1992, as it was not filed in evidence. The appellant submitted that, according to the Customs Notice, a concentrate is a premix and that an unfinished concentrate, such as the goods in issue, constitutes an unfinished premix.

The appellant referred to Mr. Lake's testimony that the definitions contained in the appellant's brief support the fact that the goods in issue were, in fact, a more concentrated version of the finished chlortetracycline premix. The appellant submitted that tariff item No. 2309.90.39 contains a "deeming" provision, whereby the word "including" in this description is conjunctive in nature. As such, the words "including concentrates" does not modify the words "[c]omplete feeds" or "feed supplements". The appellant suggests that a "preparation" that satisfies the definition of a "concentrate" may fall within the ambit of this description and need not be a concentrate of a complete feed or a feed supplement. The appellant submitted that, if the word "concentrate" were intended to refer to the words "complete feed" or "feed supplement", the description in this tariff item would have read "feed supplements whether concentrated or not".

In the alternative, the appellant submitted that the goods in issue should be classified under tariff item No. 2309.90.39 in accordance with Rule 2 (a) of the General Rules. Rule 2 (a) directs classification of incomplete or unfinished goods as complete or finished goods, provided the goods have the essential character of the complete or finished article. The appellant submitted that the goods in issue are unfinished chlortetracycline premixes, in that feed-grade chlortetracycline is essentially chlortetracycline concentrate that is diluted, granulated and, after the addition of a few trace minerals, sold as the finished product, chlortetracycline premix. As such, the feed-grade chlortetracycline also has the essential character of the premix and should, therefore, be classified as the finished product.

The appellant referred to two decisions of the Tribunal that, it submitted, support its view. The appellant submitted that, in *Integrated Protection* v. *DMNR*,[8] the Tribunal decided that all the parts and components required for the assembled or complete article need not be imported together for the rule to apply. The appellant submitted that this case stands for the principle that, as long as the main essential features of an article are imported, locally purchased parts could be added to it without impacting the application of Rule 2 (a) of the General Rules. The appellant referred to the Tribunal's decision in *Viessmann Manufacturing* v. *DMNR*[9] as standing for the principle that, for the purposes of Rule 2 (a), an "unassembled article" does not have to be fully operational and may require considerable assembly subsequent to importation. According to Rule 2 (a), the heading for the assembled article includes the unassembled article, as long as it has the essential character of the assembled article.

Applying these principles, the appellant submitted that the goods in issue are unfinished chlortetracycline premixes, having the main essential feature of a premix. Therefore, they are classifiable under the same tariff item as the premix, which the appellant argued is classified under tariff item No. 2309.90.39. The essential character of the goods in issue is the chlortetracycline. The fact that locally purchased components are added to the feed-grade chlortetracycline does not alter that conclusion, according to the appellant.

Therefore, the appellant submitted that, by operation of Rule 2 (a) of the General Rules, the goods in issue should be classified under tariff item No. 2309.90.39.

8. (7 February 1997), AP-95-240 (CITT).
9. (14 November 1997), AP-96-196 to AP-96-198 (CITT).

The appellant submitted that, if the Tribunal finds that the goods in issue are also classifiable under tariff item No. 2309.90.99, classification of the goods in issue must be made in accordance with Rule 3 of the General Rules, which applies in circumstances in which the goods are *prima facie* classifiable under two tariff items. The appellant also submitted that Rule 2 (b) applies, as the feed-grade chlortetracycline is a mixture and composed of more than one substance and therefore *prima facie* classifiable in more than one heading.

The appellant submitted that Rule 3 of the General Rules directs, in part, that, in such circumstances, the goods should be classified under the tariff item that provides the most specific description of the goods. Accordingly, the appellant submitted that Rule 3 directs classification under tariff item No. 2309.90.39, since, in its view, that tariff item more specifically describes the goods in issue than does tariff item No. 2309.90.99.

The respondent argued that the goods in issue cannot be classified under tariff item No. 2309.90.39 and are, therefore, properly classified under residual tariff item No. 2309.90.99. The respondent submitted that the testimony of Ms. Thompson indicates that the goods in issue do not fit within any of the terms of tariff item No. 2309.90.39. The appellant referred to Ms. Thompson's testimony that the goods in issue are not a complete feed or a feed supplement. The respondent submitted that the evidence shows that the primary characteristic of a feed supplement is that it provides nutrition to the animal.

The respondent further submitted that the goods in issue are not a concentrate of a complete feed or a feed supplement. For the purposes of this tariff item, the respondent submitted, a concentrate must be a feed. The respondent argued that the words "including concentrates", as found in tariff item No. 2309.90.39, are to be read as being a subset of "complete feeds" and "feed supplements". The respondent further submitted that the definition of "concentrate" upon which it relies is drawn from the expertise of its witness, Ms. Thompson, and is not drawn from the *Feeds Act*. The appellant argued that, in order to be considered a feed, the preparation must provide nutrients. The respondent further argued that the evidence indicates that the goods in issue and the resulting premix produced by the appellant are drugs and do not provide nutrition.

As such, the respondent submitted that neither the goods in issue nor the premix produced by the appellant from the goods in issue are classifiable under tariff item No. 2309.90.39. In the respondent's view, it is, therefore, irrelevant whether the goods in issue represent the unfinished version of the premix, since the suggested finished product, the premix, is not itself classified under tariff item No. 2309.90.39. In its brief, the respondent submitted that Rule 2 of the General Rules did not assist the Tribunal in the classification of the goods in issue, as that rule refers to an unfinished or unassembled "article" and the goods in issue are not an "article".

The respondent provided an alternative argument with respect to the appellant's argument that Rule 2 (a) of the General Rules applies in this case. The respondent submitted that other antibiotics are added to three of the five "strengths" of the goods in issue. The other two require processing and cannot be used, as imported, as a feed. As such, the goods in issue are not unfinished premix, as they are different from the premix. In addition, the respondent argued that the goods in issue do not have the essential character of the premix given that they do not have a DIN. A DIN is given to a substance after having gone through a regulatory process intended to ensure its safety for animal use.

The respondent argued that the feed-grade chlortetracycline is not imported in a condition that can be used as a premix. The respondent points to the Explanatory Notes to heading No. 23.09 which refer to the preparations that the heading describes as being used as a basic material in the preparation, in particular, "premixes". The respondent points to definitions of complete feed, feed supplements, premix, additive and

concentrate from the Explanatory Notes and product literature to show that such terms, as used in tariff item No. 2309.90.39, do not refer to the goods in issue. Similarly, the respondent submitted that the terms of tariff item No. 2309.90.91, as it existed prior to April 1998, do not cover the goods in issue. As such, feed-grade chlortetracycline cannot be classified in either tariff item and must be classified under residual tariff item No. 2309.90.99.

DECISION

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. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in Schedule I to the *Customs Tariff*, regard shall be had to the Explanatory Notes.

The General Rules are structured in cascading form. If the classification of an article cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. Rule 1 provides the following:

> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall 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 [subsequent] provisions.

The appellant and respondent agree that the goods in issue are properly classified in subheading No. 2309.90. The Tribunal agrees with the parties in this respect. The terms of that subheading describe "preparations" of a kind used in animal feeding, "other" than "[d]og or cat food, put up for retail sale". Clearly, the goods in issue are preparations used in animal feeding and are not dog or cat food.

The issue that the Tribunal must determine, therefore, is whether the goods in issue should be classified under tariff item No. 2309.90.39 as other complete feeds and feed supplements, including concentrates, as claimed by the appellant, or under tariff item No. 2309.90.99 as other preparations used in animal feeding, as determined by the respondent.

In this regard, Rule 1 of the *Canadian Rules*[10] states:

> For legal purposes, the classification of goods in the tariff items or a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [General Rules], on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

The Tribunal notes that the appellant's proposed classification makes reference to the wording of the *Customs Tariff* at the 9th and 10th digit levels. Specifically, the description "containing chlortetracycline" is found at classification No. 2309.90.39.42. The 9th and 10th digits, however, are not part of the classification system, rather they are statistical codes used by Statistics Canada. As such, they do not form part of the schedule to the *Customs Tariff*, having been added by Statistics Canada solely for the purpose of gathering statistical information. The Tribunal has consistently maintained that it is inappropriate

10. *Supra* note 2, Schedule I.

to have regard to the 9th and 10th digits in deciding matters of tariff classification. In fact, the General Rules and the *Canadian Rules* do not direct classification at the 9th and 10th digit levels.[11]

The Tribunal is of the view that the goods in issue are not a "complete feed" or a "feed supplement" for the purposes of tariff item No. 2309.90.39, as they do not contain any nutrient value. In this regard, the Tribunal refers to the Explanatory Notes to heading No. 23.09, which makes reference to the words "complete feed" and "feed supplements" and their meaning. In each case, such references emphasize the nutrient value of such preparations. The Explanatory Notes to heading No. 23.09 state:

> 23.09 - PREPARATIONS OF A KIND USED IN ANIMAL FEEDING.
>
> . . .
>
> (II) OTHER PREPARATIONS
>
> (A) PREPARATIONS DESIGNED TO PROVIDE THE ANIMAL WITH ALL THE NUTRIENT ELEMENTS REQUIRED TO ENSURE A RATIONAL AND BALANCED DAILY DIET (COMPLETE FEEDS)
>
> The characteristic feature of these preparations is that they contain products from each of the three groups of nutrients described below:
>
> . . .
>
> (B) PREPARATIONS FOR SUPPLEMENTING (BALANCING) FARM-PRODUCED FEED (FEED SUPPLEMENTS)
>
> . . .
>
> Although, qualitatively, these preparations have much the same composition as those described in paragraph (A) above, they are distinguished by a relatively high content of one particular nutrient.

The evidence of Ms. Thompson was also clear on this point that, in order to be a complete feed or a feed supplement, a preparation must have nutrient value. It may be the case that some feeds contain an antibiotic, but they must also have a nutrient value in order to be a feed. She further testified that the goods in issue were neither a complete feed nor feed supplements, since they are drugs that contain little, if any, nutrient value. While Ms. Thompson's evidence was drawn, in part, from her experience in the administration of the *Feeds Act*, Ms. Thompson, in her testimony, also referred to her substantial experience in the feed industry and was qualified by the Tribunal as an expert in livestock feed evaluation. As such, the Tribunal finds her testimony to be relevant to the issues raised in this appeal.

The appellant argued that, as a matter of statutory interpretation, tariff item No. 2309.90.39 includes "concentrates" of a preparation used in animal feeding, containing an antibiotic and chlortetracycline. The appellant argued that, as the goods in issue do meet that description, they should be classified under tariff item No. 2309.90.39 according to Rule 1 of the General Rules. The appellant argued that the word "including", as found in that tariff item, is a "deeming provision", that is, conjunctive in nature, meaning that the words "including concentrates" does not refer to the words "[c]omplete feeds" or "feed supplements" which precede them. The appellant refers to the Customs Notice in support of this argument.

The Tribunal does not find this argument to be convincing. In considering the issue in this appeal, the Tribunal must interpret the wording of the *Customs Tariff*, not the Customs Notice. In this regard, the word "including", in the way presented in the nomenclature, can only make sense if it relates to the words that precede it, in this case "complete feed" or "feed supplement". If concentrates were to mean something unrelated to complete feed or feed supplements, it would warrant its own tariff item. The word

11. *Dairy Farmers of Canada* v. DMNR (26 March 1999), AP-98-055 (CITT); and *supra* note 8.

"concentrates" merely acknowledges that a complete feed and feed supplement may be in different forms, one of which may be a concentrated formulation.

In support of its argument, the appellant stated that, if the word "concentrate" was intended to refer to the words "[c]omplete feed" or "feed supplements", the phrase would have read "feed supplements whether concentrated or not". The Tribunal is not aware of any case or principle of statutory interpretation that would suggest that the Tribunal is to adhere to such an approach in interpreting the *Customs Tariff*. In this regard, the Tribunal notes that the word "including" is used in other areas of the *Customs Tariff* in a way that does not suggest its use in a "conjunctive" manner, as suggested by the appellant.[12]

Therefore, the Tribunal is of the view that tariff item No. 2309.90.39 refers to concentrates of complete feeds or feed supplements. In this regard, the goods in issue are not concentrates of a complete feed or a feed supplement. Even if the goods in issue could be considered to be a concentrate of the premix produced by the appellant, the premix is also not a complete feed or feed supplement. Again, the Tribunal is of the view that, in order to be considered to be a complete feed or a feed supplement, a product must have a nutrient value. The evidence, however, was clear that the premix is essentially an antibiotic without significant nutrient value, if any. This is also in accordance with the evidence of Ms. Thompson, who testified that a concentrate must itself have a nutrient value and that a concentrate is a more concentrated form of a feed, whether a complete feed or a feed supplement.

The Tribunal is of the view that the goods in issue, while neither a complete feed nor a feed supplement, are inputs to those goods described in Note (II)(C) of the Explanatory Notes to heading No. 23.09, which states, in part:

> (b) Preparations consisting of an active substance of the type described in (1) above with a carrier, for example products of the antibiotics manufacturing process obtained by simply drying the mass, i.e. the entire contents of the fermentation vessel (essentially mycelium, the culture medium and the antibiotic). The resulting dry substance, whether or not standardised by adding organic or inorganic substances, has an antibiotic content ranging generally between 8 % and 16 % and is used as basic material in preparing, in particular, "premixes".

The appellant argued, in the alternative, that the goods in issue are essentially unfinished premixes, containing the essential character of the premix, and, therefore, are classified with the finished premix according to Rule 2 (a) of the General Rules.

In its brief, the respondent submitted that Rule 2 of the General Rules did not assist the Tribunal in the classification of the goods in issue, as it refers to an unfinished or unassembled "article" and the goods in issue are not an article. The Tribunal notes, in this regard, that the Explanatory Notes to Rule 2 (a) of the General Rules state as follows:

> (IX) In view of the scope of the headings of Sections I to VI, this part of the Rule does not normally apply to goods of these Sections.

In this regard, Chapter 23 is found in Section IV of the *Customs Tariff* and, according to this note, Rule 2 (a) of the General Rules would not normally apply.

In any event, since the Tribunal is of the view that the premix itself is not a complete feed or feed supplement, the fact that the goods in issue may be an unfinished premix does not assist the appellant.

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12. For example, tariff item No. 0305.30.4X: "-Smoked fish, including fillets".

Nor is the Tribunal of the view that Rule 3 of the General Rules applies in this case. Rule 3 may be applied in circumstances in which a product is *prima facie* classifiable in two headings (or tariff items according to Rule 1 of the *Canadian Rules*) by application of Rule 2 (b) or for any other reason. The Tribunal is of the view that it is not possible for the goods in issue to be classifiable, *prima facie*, under both tariff item Nos. 2309.90.39 and 2309.90.99. Indeed, tariff item No. 2309.90.99 is a residual tariff item, which can apply only if the goods in issue are not classified under tariff item No. 2309.90.39.

The Tribunal is also of the view that Rule 2 (b) of the General rules does not assist the appellant. Rule 3 (b) direct that mixtures which are *prima facie* classifiable in two or more headings according to Rule 2 (b) are to classified according to that material or component which gives the article its essential character. Even if chlortetracycline is the essential characteristic of the article, Rule 3 (b) does not help in determining whether or not the article should be classified under a residual tariff item or in the complete or supplementary feed tariff item.

As the goods in issue are not classifiable under tariff item No. 2309.90.39, nor are they classifiable under any other tariff item in subheading No. 2309.90, they are properly classified according to Rule 1 of the General Rules and Rule 1 of the *Canadian Rules* under residual tariff item No. 2309.90.99, as determined by the respondent.

Consequently, the appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Zdenek Kvarda
Zdenek Kvarda
Member