



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-026

H. Topas

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, April 18, 2019*

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IN THE MATTER OF an appeal heard on March 7, 2019, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated July 6, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

H. TOPAS

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeal is dismissed.

Cheryl Beckett

Cheryl Beckett

Presiding Member

Place of Hearing: Ottawa, Ontario
Dates of Hearing: March 7, 2019
Tribunal Panel: Cheryl Beckett, Presiding Member
Support Staff: Yusuf Khan, Counsel
Laura Little, Counsel

PARTICIPANTS:**Appellant**

H. Topas

Counsel/Representative

H. Topas

Respondent

President of the Canada Border Services Agency

Counsel/RepresentativesLuc Vaillancourt
Mélyne Félix

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7
Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal filed by H. Topas (Mr. Topas) with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to a request for re-determination of tariff classification.

[2] The issue in this appeal is whether certain Kosher for Passover cheese and butter goods imported by Mr. Topas (the goods in issue), in addition to being classified as “[b]utter and other fats and oils derived from milk; dairy spreads” and “[c]heese and curd” under heading Nos. 04.05 and 04.06 of the schedule to the *Customs Tariff*², as determined by the CBSA, may also be classified as “Passover products” under tariff item No. 9905.00.00, and thereby benefit from duty-free treatment, as claimed by Mr. Topas.

[3] The Tribunal finds that the goods in issue are not entitled to benefit from such duty-free treatment because they are not listed as eligible Passover Products under tariff item No. 9905.00.00. Mr. Topas relied on a prior importation of similar goods duty-free and the *Passover Products Remission Order*³; however, neither is relevant to the tariff classification of the goods in issue, for the reasons that follow.

DESCRIPTION OF THE GOODS IN ISSUE

[4] The goods in issue consist of the following cheese and butter products imported by Mr. Topas on March 8, 2018, which were marked as Kosher for Passover:⁴

- Camembert cheese;
- Edam cheese;
- Cheddar cheese;
- Cheese (for pizza, shredded);
- Mozzarella cheese;
- Mozzarella (grated and strings) cheese;
- Muenster cheese;
- Parmesan cheese;

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

2. S.C. 1997, c. 36.

3. The *Passover Products Remission Order*, SI/91-10, as amended by SI/95-25 and SI/98-17 [Remission Order] concerns the remission of taxes imposed under the *Excise Tax Act* (R.S.C., 1985, c. E-15) payable on certain Passover foods and products.

4. Exhibit AP-2018-026-01, Vol. 1 at 14-29; Exhibit AP-2018-026-08A, Vol. 1 at 4-5, 69-81.

- Parmesan (grated and shredded) cheese;
- Pecorino Romano cheese;
- Processed cheese;
- Romano (grated) cheese; and
- Whipped butter.

PROCEDURAL HISTORY

[5] On March 8, 2018, Mr. Topas imported the goods in issue while entering Canada from the United States at the St-Bernard-de-Lacolle, Quebec, point of entry. He was required to pay customs duties on the goods in issue, as he did not have an import permit for dairy products exceeding the personal exemption quantity.⁵

[6] On March 11, 2018, Mr. Topas requested a refund of the duties paid.

[7] In a letter dated April 11, 2018, the CBSA denied Mr. Topas' request pursuant to subparagraph 59(1)(a)(ii) of the *Act*, on the basis that the goods in issue were correctly evaluated at the time of importation and stating that “[c]ertain products qualify for the [Remission Order] (9905.00.00) but cheese and butter are not listed.”⁶ The CBSA also referred Mr. Topas to its Memorandum D8-3-6 regarding tariff item No. 9905.00.00 and the Remission Order, which was enclosed with the decision letter.⁷

[8] Mr. Topas filed an Informal Adjustment Request dated April 17, 2018, which indicated that he had imported similar Passover products in 2017, and that all duties paid on those products were subsequently refunded. Mr. Topas further indicated that he believed that the Remission Order should apply and that the duties should also be refunded in this instance.

[9] On July 6, 2018, the CBSA issued a decision pursuant to subsection 60(4) of the *Act*, affirming its previous determination. It indicated that the scope of this appeal was limited to the March 8, 2018, importation (and the applicable legislative provisions), and that similar importations from previous years would not be considered. In addition, the CBSA noted that the Remission Order did not apply to dairy products such as cheese and butter as these items were not among the list of products covered by the Remission Order.⁸

[10] Mr. Topas filed the present appeal on July 22, 2018.

[11] On September 21, 2018, Mr. Topas notified the Tribunal that his notice of appeal would serve as his brief and that he did not intend to file further written submissions. On September 25, 2018, he indicated his preference to present his arguments orally before the Tribunal.

5. Pursuant to section 8.3 of the *Export and Import Permits Act*, R.S.C., 1985, c. E-19.

6. Respondent's Brief, Annex 9 (Exhibit AP-2018-026-08A, Vol. 1 at 89).

7. <https://www.cbsa-asfc.gc.ca/publications/dm-md/d8/d8-3-6-eng.html>.

8. Respondent's Brief, Annex 10 (Exhibit AP-2018-026-08A, Vol. 1 at 97).

[12] On November 9, 2018, the CBSA filed its written submissions with the Tribunal, which was served on Mr. Topas.

[13] The hearing was held in Ottawa, Ontario, on March 7, 2019. Mr. Topas made a statement. The CBSA did not call any witnesses. Both parties made closing arguments.

LEGAL FRAMEWORK FOR TARIFF CLASSIFICATION

[14] The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).⁹ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

[15] Subsection 10(1) of the *Customs Tariff* provides that, subject to subsection 10(2), the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*¹⁰ and the *Canadian Rules*¹¹ set out in the schedule.

[16] The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that 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 other rules. It is only where Rule 1 does not conclusively determine the classification of the goods that the other general rules become relevant to the classification process.¹²

[17] Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*¹³ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,¹⁴ published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁵

[18] Once the Tribunal has determined the heading in which the goods in issue should be classified, a similar approach is used to determine the proper subheading.¹⁶ The final step is to determine the proper tariff item.¹⁷

9. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

10. S.C. 1997, c. 36, schedule [*General Rules*].

11. S.C. 1997, c. 36, schedule.

12. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

13. WCO, 4th ed., Brussels, 2017.

14. WCO, 6th ed., Brussels, 2017.

15. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 (CanLII) at para. 4.

16. Rules 1 through 5 of the *General Rules* apply to classification at the heading level. Rule 6 of the *General Rules* provides that “the classification of goods in the subheadings of a heading shall be determined according to the

[19] Chapter 99 of the schedule to *Customs Tariff*, which includes tariff item No. 9905.00.00, provides special classification provisions that allow certain goods to be imported into Canada duty-free. Such goods must first be classified under Chapters 1 to 97 (note 3 to Chapter 99). As each heading of Chapter 99 has only one subheading and one tariff item number, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter. Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), these provisions are not standardized at the international level and there are no classification opinions or explanatory notes to consider with regard to these tariff items.

TRIBUNAL'S ANALYSIS

Classification of the goods in issue under tariff item No. 9905.00.00

[20] Regarding classification under Chapters 1 to 97 of the schedule to the *Customs Tariff*, Mr. Topas did not dispute the classification of the goods in issue under heading Nos. 04.05 and 04.06 as cheese and butter. The relevant tariff nomenclature for those headings is set out in the Annex to these reasons.¹⁸ Therefore, the only issue in this appeal is whether the goods in issue are classifiable in tariff item No. 9905.00.00 in order to qualify for customs duty relief.

[21] The relevant nomenclature for tariff item No. 9905.00.00 provides as follows:

Section XXI

WORKS OF ART, COLLECTORS' PIECES AND ANTIQUES

Chapter 99

SPECIAL CLASSIFICATION PROVISIONS – COMMERCIAL

...

9905.00.00 The following Passover products for use during the Passover holiday and so marked, imported during the period beginning two months before the eve of the first day of that holiday and ending on the last day of the holiday:

Cake mix, pancake mix and baked goods; Canned fish and fish products other than pickled herring; Canned fruits and vegetables; Chocolates, candy and gum (excluding fruit jelly candy and jelly rings, chocolate-covered jellies, chocolate-covered marshmallows, and chocolate-covered orange peels); Dried apples; Grapeseed oil; Jam; Jelly powders and

terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to [Rules 1 through 5] . . .” and that “the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

17. Rule 1 of the *Canadian Rules* provides that “the classification of goods in the tariff items of 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*] . . .” and that “the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.” Classification opinions and explanatory notes do not apply to classification at the tariff item level.
18. The relevant tariff nomenclature for those headings is set out in the Annex to these reasons.

puddings; Juices (except apple juice) and juice blends (not containing apple juice); Matzo and matzo products; Margarine of tariff item No. 1517.10.10, not exceeding 50,000 kg each; Passover holiday; Olives; Potato chips; Salad dressings and ketchup; Soups (including borsch) and gravies; Tomato ketchup, paste, purée and sauce; Vegetable shortening; and Vinegar. Under this Act, the Governor in Council may amend the above list of products.

[22] The evidence shows that the goods in issue are clearly marked as Kosher for Passover.¹⁹ However, the Tribunal finds that the goods in issue are not covered by the list of Passover Products under tariff item No. 9905.00.00. Thus, Passover cheese and butter products are not eligible for duty-free treatment. Moreover, Mr. Topas did not make any submissions with respect to the classification of the goods in issue under tariff item No. 9905.00.00.

[23] As the appellant, Mr. Topas bears the burden of demonstrating that the CBSA's classification of the goods was incorrect.²⁰ The following analysis will examine specific arguments raised by Mr. Topas in support of the duty-free treatment of the goods in issue, including a) whether the Remission Order is applicable in resolving the tariff classification issue; and b) the consideration of Mr. Topas' prior duty-free importation of similar goods.

The Passover Products Remission Order is not applicable

[24] The Remission Order provides for the remission of *taxes* payable on eligible Passover products imposed under the *Excise Tax Act*. Division III of Part IX of the *Excise Tax Act* (section 212), imposes a goods and services tax (GST) on imported goods, subject to some exceptions. The Remission Order is a Governor General in Council Order that provides that it is in the public interest to provide specific relief on the payment of these taxes for a limited period of time leading up to and including the period of Passover. Accordingly, eligible Passover products may be subject to customs duty relief pursuant to tariff item No. 9905.00.00, *or* to tax relief under the Remission Order or both subject to the eligibility rules set out in each piece of legislation.

[25] While Passover products are subject to remission of customs duty and tax relief if they are for use during the Passover holiday and imported during the period beginning two months before the eve of the first day of that holiday and ending on the last day of that holiday, the Remission Order and tariff item No. 9905.00.00 each provide for their own specific conditions, as follows:

- For taxes to be remitted, the Remission Order requires that the Passover products be “of a class not available in Canada”. The Remission Order not only applies to Passover products, but also to Passover foods.
- To be subject to customs duty relief, tariff item No. 9905.00.00 requires that the Passover products for use during the Passover holiday be “so marked” and included in the list provided in the tariff item.

19. Exhibit AP-2018-026-01, Vol. 1 at 21-29; Exhibit AP-2018-026-08A, Vol. 1 at 72-80.

20. Subsection 152(3) of the *Act*; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (23 May 2014), AP-2011-033 (CIIT) at para. 25; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at paras. 7, 21; *Jakks Pacific Inc. v. President of the Canada Border Services Agency* (30 March 2016), AP-2015-012 (CIIT) at para. 33; *J. Cheese Inc. v. President of the Canada Border Services Agency* (13 September 2016), AP-2015-011 (CIIT) at para. 63.

[26] When importing the goods in issue, Mr. Topas only paid customs *duties* (and not *taxes*), as shown in the Casual Goods Accounting Document dated March 8, 2018.²¹ Accordingly, the Remission Order is not relevant to resolve the issue on appeal. Although the Remission Order deals with the same type of goods, there is no relief required under this Order. Furthermore, it is the Tax Court of Canada, and not the Tribunal, that has jurisdiction to hear appeals of CBSA determinations of the tax status of goods.²²

[27] The Tribunal acknowledges that there was some confusion between the parties regarding the relevance of the Remission Order for tariff classification purposes. In its brief, the CBSA initially appeared to conflate the Remission Order and tariff item No. 9905.00.00, stating that the Remission Order provided for the remission of customs duties payable on eligible Passover products, and that the Passover products covered by the Remission Order were listed in tariff item No. 9905.00.00.²³ At the hearing, the CBSA recognized that it should have been more precise regarding the applicability of the Remission Order to the remission of taxes and not to the remission of customs duties.²⁴

[28] Providing the public with a clear understanding of the distinct and separate nature of the Remission Order and customs duty relief under tariff item No. 9905.00.00 of the schedule to the *Customs Tariff* is further complicated by the full title of the Remission Order itself, which is set out in the preamble of the order as “. . . the annexed Order respecting the remission of customs duties imposed under the Customs Tariff and taxes imposed under Division III of Part IX and under any other part of the Excise Tax Act, payable on Passover foods and products of a class not available in Canada. . .” [italics in original; underlining added]. Since the Remission Order first came into force in 1991, certain provisions have been amended and repealed.²⁵ In 1998, the Remission Order was amended to reflect the new (1997) *Customs Tariff*, such that customs duty relief for Passover Products formerly granted by the Remission Order was moved to tariff item No. 9905.00.00 in the schedule to the *Customs Tariff*, whereas the Remission Order was retained for the purposes of GST and excise tax relief.²⁶ As a result, it is understandable that the reference to the remission of customs duties in the full title of the Remission Order could be misleading to importers who are not familiar with these historical changes to the statutory scheme.

[29] In light of the above, the Tribunal sympathizes with Mr. Topas’ misunderstanding regarding the applicability of the Remission Order to his request for a refund of customs duties, especially given the confusing statements made by the CBSA in this regard. However, as stated above, the Remission Order is not relevant to the tariff classification of the goods in issue and the customs duty relief sought by Mr. Topas.

Prior duty-free importations are not relevant

[30] Mr. Topas cited his prior importation, in 2017, of similar dairy products, for which he was granted a refund of duties by the CBSA, to support his position that he should be given similar duty-

21. Respondent’s Brief, Annex 6 (Exhibit AP-2018-026-08A, Vol. 1 at 84).

22. Subsection 216(4) of the *Excise Tax Act*.

23. Respondent’s Brief at para. 23 (Exhibit AP-2018-026-08A, Vol. 1 at 12).

24. *Transcript of Public Hearing* at 16-17. See also Exhibit AP-2018-026-22, Vol. 1 at 1-2.

25. SI/91-10, as amended by SI/95-25 and SI/98-17.

26. Explanatory Note to the Order Amending the Passover Products Remission Order, C. Gaz. 1998.II.328. See Exhibit AP-2018-026-22, Vol. 1 at 12.

free treatment for the importation of the goods in issue. Although Mr. Topas acknowledged that the Tribunal is not a court of equity, he submitted that it should not be a court of *inequity* either.²⁷

[31] The law is well established on these points. First, the CBSA's treatment of prior importations is irrelevant for the purposes of determining the tariff classification of the goods in issue in the present appeal.²⁸ The Tribunal is equally not bound by a prior CBSA decision in respect of a separate importation, regardless of whether or not the goods were similar to the goods in issue.²⁹ The CBSA's administrative action, or inaction, cannot change the law, and accordingly, such previous decisions are not relevant for the purposes of determining the tariff classification of goods in issue. Second, the Tribunal is not a court of equity and must apply the law as it is written; it does not have jurisdiction to grant relief that goes beyond what is provided by law, even if a taxpayer received misleading or confusing information.³⁰

[32] It is unclear from the record in this appeal whether the CBSA provided any explanation to Mr. Topas for the issuance of a refund for the duties assessed in 2017. From the evidence and arguments presented at the hearing, it appears that Mr. Topas made certain assumptions regarding the status of the law based upon the actions taken by the CBSA in 2017. Whether those assumptions were reasonable or not is not relevant nor the issue in this appeal. Had Mr. Topas been made aware of the ineligibility of dairy products for duty relief under tariff item No. 9905.00.00, it is possible that he may have reconsidered his decision to import similar goods in 2018. In the Tribunal's view, this situation underlines the importance of the CBSA providing importers with clear and transparent reasons for decisions regarding tariff classification.

DECISION

[33] For the foregoing reasons, the Tribunal finds that the goods in issue are properly classified in heading Nos. 04.05 and 04.06 and that they are not entitled to benefit from duty-free treatment conferred by tariff item No. 9905.00.00.

[34] The appeal is dismissed.

27. *Transcript of Public Hearing* at 6-7.

28. *Helly Hansen Leisure Canada Inc. v. Canada (Border Services Agency)* (2 June 2008), AP-2006-054 (CITT) at para. 52, and confirmed in *Helly Hansen Leisure Canada Inc. v. Canada (Border Services Agency)*, 2009 FCA 345 (CanLII) at para. 16 [*Helly Hansen FCA*].

29. As confirmed in *Helly Hansen FCA* at para. 16 and cited in *Rutherford Controls International Corp. v. President of the Canada Border Services Agency* (26 January 2011), AP-2009-076 (CITT) at para. 68.

30. *G. Thériault v. President of the Canada Border Services Agency* (12 March 2013), AP-2012-013 (CITT) at para. 35; *R. Christie v. President of the Canada Border Services Agency* (15 January 2014), AP-2012-072 (CITT) at para. 63; *T. Shannon v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-059 (CITT) at para. 15; *W. Ericksen v. President of the Canada Border Services Agency* (3 January 2002), AP-2000-059 (CITT) at 3; and *R. L. Klaasen v. President of the Canada Border Services Agency* (18 October 2005), AP-2004-007 (CITT) at 2.

Cheryl Beckett

Cheryl Beckett
Presiding Member

ANNEX

The relevant tariff nomenclature and notes to heading Nos. 04.05 and 04.06 of the *Customs Tariff* read as follows:

Section I**LIVE ANIMALS; ANIMAL PRODUCTS****Chapter 4****DAIRY; PRODUCE; BIRDS' EGGS; NATURAL HONEY;
EDIBLE PRODUCTS OF ANIMAL ORIGIN,
NOT ELSEWHERE SPECIFIED OR INCLUDED**

...

04.05 **Butter and other fats and oils derived from milk; dairy spreads.**

...

0405.90 **-Other**

...

0405.90.20 00 -- -Over access commitment

...

04.06 **Cheese and curd.**

...

0406.20 **-Grated or powdered cheese, of all kinds**

...

-- -Other:

...

0406.20.92 00 --- -Over access commitment

0406.30 **-Processed cheese, not grated or powdered**

...

0406.30.20 00 -- -Over access commitment

...

0406.90**-Other Cheese:**

-- -Cheddar and Cheddar types

...

0406.90.12 --- -Over access commitment

-- -Camembert and Camembert types:

...

0406.90.22 00 --- -Over access commitment

...

-- -Gouda and Gouda types:

...

0406.90.42 00 --- -Over access commitment

...

-- -Mozzarella and Mozzarella types:

...

0406.90.62 00 --- -Over access commitment

...

-- -Other:

...

0406.90.94 00 --- -Parmesan and Parmesan types, over access commitment

...

0406.90.96 00 --- -Romano and Romano types, over access commitment

...

0406.90.99 00 --- -Other, over access commitment