Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-034

AFOD Ltd.

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, November 13, 2019

Canada

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IN THE MATTER OF an appeal heard on July 23, 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 June 18, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

AFOD LTD. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Jean Bédard
Jean Bédard, Q.C.
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 23, 2019
Tribunal Panel:	Jean Bédard, Q.C., Presiding Member
Support Staff:	Kalyn Eadie, Counsel

PARTICIPANTS:

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Respondent	**Counsel/Representative**
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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by AFOD Ltd. (AFOD) with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*[1] from a decision by the President of the Canada Border Services Agency (CBSA) dated June 18, 2018, made pursuant to subsection 60(4).

2. The issue in this appeal is whether Selecta brand mellorine ice confections in various flavours (the goods in issue) can be classified under tariff item No. 2105.00.92 of the schedule to the *Customs Tariff*[2] as other ice cream and other edible ice, whether or not containing cocoa, over access commitment, as determined by the CBSA, or under tariff item No. 2105.00.10 as ice cream and other edible ice, whether or not containing cocoa, flavoured ice and ice sherbets, as claimed by AFOD.

PROCEDURAL HISTORY

3. The goods in issue were imported on August 4 and August 26, 2014, and classified under tariff item No. 2105.00.10 as flavoured ice. As the result of a verification, on October 19, 2015, the CBSA re-determined the tariff classification of the goods in issue pursuant to subparagraph 59(1)(a)(i). The CBSA found that the goods in issue were properly classified under tariff item No. 2105.00.92 as other edible ice, over access commitment.

4. On January 8, 2016, AFOD requested a further re-determination under subsection 60(1) of the *Act*, contending that the goods in issue had been properly classified as imported under tariff item No. 2105.00.10. On June 8, 2018, the CBSA further re-determined the tariff classification pursuant to paragraph 60(4)(a) of the *Act* and confirmed that the goods in issue were properly classified under tariff item No. 2105.00.92.

5. On September 10, 2018, AFOD filed this appeal with the Tribunal. On July 23, 2019, the appeal was heard by way of written submissions, in accordance with Rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.[3]

DESCRIPTION OF THE GOODS IN ISSUE

6. The goods in issue are various flavours of mellorine. Mellorine is defined as "a frozen dessert intended as a substitute for ice cream, containing vegetable or animal fat rather than, or in greater quantity than, butterfat."[4] AFOD described mellorine as "a flavored ice confectionary usually made with a small amount of non-fat milk constituents, vegetable oil, sweetener and flavorings."[5]

7. The flavours of the goods in issue are as follows: Buco Salad (young coconut), Buco Pandan (young coconut and pandan), Halo Halo Mixed Fruit, Macapuno (coconut sport), Mango, Mango and Cashews, Ube Keso (purple yam and cheese), Ube Macapuno (purple yam and coconut sport), and Ube Royale (purple yam).[6]

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1 R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2 S.C. 1997, c. 36.
3 SOR/91-499.
4 Exhibit AP-2018-034-13A at 103, Vol. 1.
5 Exhibit AP-2018-034-11A at para. 2, Vol. 1.
6 Exhibit AP-2018-034-11A at 39-44, Vol. 1. AFOD also imported a flavour of the goods called "Quezo Real", which consists of 12% whole milk powder. AFOD submitted that this flavour is not at issue in this appeal: Exhibit AP-2018-034-11A at para. 6, Vol. 1.

8. AFOD submitted that the dairy content of the goods in issue was limited to the skim milk powder contained therein and therefore, based on product documentation, submitted that the goods in issue contain between 4 and 7 percent milk solids.[7]

9. The CBSA conducted a laboratory analysis of samples of the goods in issue. The report prepared by the laboratory noted the presence of other milk-derived ingredients (whey powder and buttermilk powder) in the product information provided by AFOD and included them in the calculation of milk solids present in the goods in issue. As a result, according to the CBSA, the goods in issue contain between 5.5 and 10 percent milk solids.[8]

LEGAL FRAMEWORK

10. 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). 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.

11. Subsection 10(1) of the *Customs Tariff* provides that, subject to subsection (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* and the *Canadian Rules* set out in the schedule.

12. Subsection 10(2) of the *Customs Tariff* provides that goods shall not be classified under a tariff item that contains the phrase "within access commitment" unless the goods are imported under the authority of a permit issued under section 8.3 of the *Export and Import Permits Act*[9] and in compliance with the conditions of the permit.

13. 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.

14. 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* and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*, published by the WCO. While the classification opinions and the explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise. Furthermore, Rule 2 of the *Canadian Rules* provides that, "[w]here both a Canadian term and an international term are presented in this Nomenclature, the commonly accepted meaning and scope of the international term shall take precedence."

15. Therefore, the Tribunal must first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.

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7 Exhibit AP-2018-034-11A at para. 5, Vol. 1.
8 Exhibit AP-2018-034-13A, Tab 2, Vol. 1.
9 R.S.C., 1985, c. E-19.

16. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to use a similar approach to determine the proper subheading.

17. The final step is to determine the proper tariff item classification. 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." The classification opinions and the explanatory notes do not apply to classification at the tariff item level.

Relevant tariff nomenclature, notes and explanatory notes

Section IV **PREPARED FOODSTUFFS; BEVERAGES, SPIRITS AND VINEGAR; TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES**	**Section IV** **PRODUITS DES INDUSTRIES ALIMENTAIRES; BOISSONS, LIQUIDES ALCOOLIQUES ET VINAIGRES; TABACS ET SUCCÉDANÉS DE TABAC FABRIQUÉS**
Chapter 21 **MISCELLANEOUS EDIBLE PREPARATIONS**	**Chapitre 21** **PRÉPARATIONS ALIMENTAIRES DIVERSES**
2105.00 Ice cream and other edible ice, whether or not containing cocoa.	2105.00 Glaces de consommation, même contenant du cacao.
2105.00.10 - - -Flavoured ice and ice sherbets	2105.00.10 - - -Glaces et sorbet aromatisés
- - -Other:	- - -Autres :
2105.00.91 - - - -Within access commitment	2105.00.91 - - - -Dans les limites de l'engagement d'accès
2105.00.92 - - - -Over access commitment	2105.00.92 - - - -Au-dessus de l'engagement d'accès

POSITIONS OF THE PARTIES

18. The parties agree that the goods in issue are classified in subheading 2105.00 as "ice cream and other edible ice, whether or not containing cocoa". Accordingly, the dispute between the parties lies at the tariff item level.

19. AFOD submitted that the goods in issue are "flavoured ice" of tariff item No. 2105.00.10, which covers "flavoured ice and ice sherbets", because they derive their essential character from the flavouring ingredients and not from milk. The CBSA contended that, based on their milk solids content, the goods in issue do not meet the definitions of flavoured ice or ice sherbets, and must therefore be classified as "other". Further, since AFOD did not possess the required import permit at the time of importation, the goods in issue must be classified under tariff item No. 2105.00.92, "over access commitment".

20. AFOD argued that a good with such a small percentage of milk content should not be precluded from classification as a flavoured ice. AFOD noted that the CBSA relied on the definition of "flavoured ice" set out in Memorandum D10-18-4 (the D-Memo), which provides that flavoured ice is "a frozen food containing water, sugar or other sweetening agents, fruit juice or other flavouring but not containing milk,

cream or other milk-derived ingredients."[10] AFOD submitted that this definition is not binding on the Tribunal and argued that the presence of milk, cream or other milk-derived ingredients is only relevant where the good derives its essential character from the milk ingredients.

21. AFOD submitted that this conclusion is consistent with the U.S. Court of International Trade (CIT) and the U.S. Court of Appeal for the Federal Circuit (CAFC) decisions in *Arko Foods International, Inc. v. United States* (*Arko Foods*), which found that mellorine was not a dairy product on the basis of the "essential character" test found in Rule 3(b) of the *General Rules*. The CAFC, applying the "essential character" test as developed under U.S. law, found that milk was not the preponderant ingredient of mellorine by weight, even considering the addition of water, nor was it the most costly ingredient; instead, sugar, oil and flavouring ingredients were the majority ingredients and the costliest. Therefore, the CAFC found that mellorine does not have the essential character of milk.[11]

22. AFOD noted that the same principle applies in the *Codex Alimentarius*, specifically that under the *Codex* ice cream and milk ices are goods that derive their essential character from the milk or cream ingredient, but products such as ices, sherbets, juice ices and water ices derive their essential character from other ingredients. AFOD further noted that the CBSA and the Tribunal have relied on the *Codex* to determine tariff classification in several appeals, such as *Excelsior Foods* and *J. Cheese*.

23. AFOD also submitted that the Import Control List (ICL) Codes for items falling under tariff item No. 2105.00.91 (ICL 134) refer to them as being for "products manufactured mainly of ice cream or ice milk".

24. Finally, AFOD submitted that nothing in the context of the tariff item requires that anything other than its ordinary meaning be applied to the term "flavoured ice", and notes that "flavoured" is defined as "mixed with some ingredient used to impart a flavor" or "having a taste, seasoned, containing flavoring".[12] AFOD submitted that the goods in issue contain a number of ingredients specifically used to impart a flavour to the ice, and further submitted that these flavour-related ingredients represent a far greater proportion of the goods in issue than the milk-derived ingredients, are far costlier, and are the most important from a marketing and consumer standpoint.

25. The CBSA noted that AFOD's submissions failed to address the Tribunal's decision in *Nestlé Canada Inc. v. President of the Canada Border Services Agency*,[13] where the Tribunal found that the presence of milk solids precludes goods from being classified as "flavoured ice". In addition, the CBSA notes that dictionary definitions of "water ice" and "ice" are consistent with the definition found in the D-Memo, as they suggest that those terms describe a frozen mixture of water, fruit juice and/or sugar. Accordingly, AFOD's argument that "flavoured ice" can contain milk solids is erroneous.

26. With respect to AFOD's argument that the essential character of the goods in issue is not derived from milk, the CBSA argued that essential character is only considered under a Rule 3 analysis, and AFOD has not explained why it is necessary to consider Rule 3, in particular as neither Rule 2 (composite good) or Rule 3(a) have been dealt with. The CBSA further submits that it is not necessary to consider essential character because classification can be resolved using Rule 1.

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10 Exhibit AP-2018-034-13A, Tab 5 at para. 20, Vol. 1.
11 Exhibit AP-2018-034-11A at 12-37 and 45-53, Vol. 1.
12 Exhibit AP-2018-034-11A at para. 36, Vol. 1.
13 (7 February 2017), AP-2015-027 (CITT) [*Nestlé*].

27. In addition, the CBSA noted that the terms of the U.S. tariff items are different from those adopted by Canada and that accordingly the U.S. CIT and CAFC decisions relied on by AFOD have little to no application in this dispute.

28. With respect to AFOD's argument regarding the ICL Codes, the CBSA noted that, as the Tribunal found in *Nestlé*, the terms of the *Customs Tariff* and the nomenclature govern inclusion on the ICL and not vice-versa.

29. Although AFOD did not make any submissions on this issue, the CBSA also submitted that the goods in issue are not "ice sherbet", which is the other type of good described by tariff item No. 2105.00.10. The CBSA submitted that the term "sherbet" has consistently been defined in domestic regulations and policy as a frozen food, other than ice cream or ice milk, but made from a milk product, with between 2 and 5 percent milk solids. In *Nestlé*, the Tribunal accepted the expert opinion which referred to the regulatory standard in defining sherbet, and found that the product at issue was not an "ice sherbet", noting that it had more than 5 percent milk solids, was not acidified and did not have a fruit flavour profile. According to the CBSA's calculations, the goods in issue all contain more than 5 percent milk solids and accordingly cannot be considered "ice sherbet".

30. As a result, the CBSA submitted that the goods in issue must be classified as "other" under tariff item No. 2105.00.91 or 2105.00.92. As AFOD does not have the requisite import permit, the goods in issue must be classified under tariff item No. 2105.00.92, "over access commitment".

ANALYSIS

31. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

32. As noted above, the parties agree that the goods in issue are classified in heading 21.05 and subheading 2105.00 as "other edible ice". The Tribunal agrees that the goods in issue are "edible ice", in accordance with the interpretation of that term adopted in *Nestlé*. In that case, the Tribunal accepted that "the term 'edible ice' is internationally understood as an umbrella term for all sweetened confection-type products that are characterized by being eaten while frozen."[14] The evidence is that the goods in issue contain a substantial amount of sugar and are to be eaten while frozen.[15] Accordingly, the goods in issue are properly classified in heading 21.05 and subheading 2105.00.

33. The Tribunal will next determine the proper tariff item classification of the goods in issue. Classification at the tariff item level proceeds by *mutatis mutandis* application (pursuant to Rule 1 of the *Canadian Rules*) of the *General Rules*.

34. If the good in issue is not flavoured ice and ice sherbet, then the only alternative is classification under residual tariff item No. 2105.00.90 "other", which contains tariff item Nos. 2105.00.91, within access commitment, and 2105.00.92, over access commitment.

35. It is important to note that the seventh and eight digits of the nomenclature are reserved for individual member countries of the WCO to develop their own classifications. This is particularly relevant in this appeal because it involves tariff items that are subject to tariff rate quotas (TRQs) as part of Canada's system for the supply management of dairy products.

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14 *Nestlé* at para. 62.

15 Exhibit AP-2018-034-11A at 39-44, Vol. 1; Exhibit AP-2018-034-13A at 19, 23, 25, 27, 35, 37.

36. Goods subject to TRQs are listed on the ICL, which is enacted under the authority of the *EIPA* and is administered by Global Affairs Canada. The Minister of Foreign Affairs has the authority to grant permits to import goods that are included on the ICL. Goods that are imported under the authority of a permit may be imported at the "within access commitment" rate, as provided for by subsection 10(2) of the *Customs Tariff*. In the absence of an import permit, the importer must pay the "over access commitment" duty rate, which is significantly higher.

37. Inclusion on the ICL is governed by tariff classification. Tariff item Nos. 2105.00.91 and 2105.00.92 are included on the list at item No. 134. Item No. 134 of the ICL also replicates the terms of the tariff item:

134 Ice cream and other edible ice, whether or not containing cocoa, other than flavoured ice and ice sherbets, that are classified under tariff item No. 2105.00.91 or 2105.00.92 in the List of Tariff Provisions set out in the schedule to the *Customs Tariff*.	134 Crème glacée ou autres glaces de consommation, même contenant du cacao, autres que les glaces aromatisées et les sorbets glacés, qui sont classées dans les numéros tarifaires 2105.00.91 ou 2105.00.92 de la liste des dispositions tarifaires de l'annexe du *Tarif des douanes*.

38. GAC also publishes the *Handbook of Export and Import Commodity Codes*, which ostensibly describes the goods that are included in the ICL items and assigns each of them unique four-digit codes. AFOD referred to the fact that the codes for tariff items No. 2105.00.91 and 2105.00.92 refer to "products manufactured mainly of ice cream or ice milk" in support of its argument that only products that derive their essential character from milk should be included in those tariff items.

39. As the Tribunal noted in *Nestlé*, the *Handbook* is an administrative policy statement and its terms are not binding on the Tribunal. With respect to the ICL itself, the Tribunal found that customs tariff classification governs inclusion on the ICL and not vice-versa. The Tribunal also found that the fact that products subject to supply management are captured in a residual tariff item, rather than being explicitly described, suggests that Parliament's intention was only to carve out flavoured ices and ice sherbets, and ensure anything else falling within the subheading was subject to the supply management scheme. Given that the Tribunal found in *Nestlé* that goods containing more than 5 percent milk solids could not be classified as "flavoured ice" or "ice sherbet", it follows that even goods with small percentages of milk content were intended to be classified under tariff item Nos. 2105.00.91 and 2105.00.92 and be subject to the supply management regime.[16]

40. The fact that the tariff items are specific to individual countries is also relevant in the context of this appeal because AFOD has asked the Tribunal to adopt the approach to the classification of mellorine employed by the U.S. courts, but did not address the fact that the decisions it cited concern an interpretation of the terms of the eight-digit U.S. tariff items, which are very different from the Canadian ones.

41. Specifically, the relevant U.S. tariff items provide as follows:

> 2105 Ice cream and other edible ice, whether or not containing cocoa:
>
> . . .
>
> Other:
>
> Dairy products described in additional U.S. note 1 to chapter 4:
>
> . . .

[16] *Nestlé* at paras. 102, 106 and 108.

2105.00.30	Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions
2105.00.40	Other[17]

42. Additional U.S. Note 1 to Chapter 4 provides that:

> For the purposes of this schedule, the term "dairy products described in additional U.S. note 1 to chapter 4" means any of the following goods: malted milk, and articles of milk or cream (except (a) white chocolate and (b) inedible dried milk powders certified to be used for calibrating infrared milk analyzers); articles containing over 5.5 percent by weight of butterfat which are suitable for use as ingredients in the commercial production of edible articles (except articles within the scope of other import quotas provided for in additional U.S. notes 2 and 3 to chapter 18); or, dried milk, whey or buttermilk (of the type provided for in subheadings 0402.10, 0402.21, 0403.90 or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported.[18]

43. The dispute in *Arko Foods* was whether mellorine was an "article of milk or cream" and therefore a dairy product as described in Additional U.S. Note 1 to Chapter 4. The CIT decided that this question should be resolved on the basis of whether "milk or cream is the essential ingredient, the ingredient of chief value, and the preponderant ingredient" in accordance with previous U.S. case law, as well as whether the industry considered mellorine as an article of milk or cream. The CIT also referred to the U.S. Food and Drug Administration's regulations for dairy products. The CAFC affirmed the CIT's decision and decided that the essential character test must govern the determination of whether something is an "article of milk".

44. In short, these decisions are of very little assistance to the Tribunal in the tariff classification exercise required in this case. The Tribunal must determine whether the goods in issue are "flavoured ice" or "ice sherbet" of tariff item No. 2105.00.10, not whether they are "articles of milk".

45. As noted by the CBSA, the Tribunal recently considered the meaning of the terms "flavoured ice" and "ice sherbet" in *Nestlé*. In that case, it was established that the term "flavoured ice" has a particular meaning in the industry, which is that "flavoured ice" cannot contain any milk solids. The Tribunal noted that this definition is more restrictive than a definition based on the ordinary meaning of the term "flavoured ice", but found that it was appropriate to adopt the industry meaning of the term.[19]

46. The Tribunal sees no reason to depart from this approach in this case. Accordingly, the goods in issue cannot be considered "flavoured ice" as they contain milk solids.

47. Similarly, in *Nestlé*, the Tribunal interpreted the term "ice sherbet" in accordance with the industry meaning, established by expert testimony, and with reference to the definition of "sherbet" found in the *Food and Drug Regulations*. It should be noted that the Tribunal differentiated between an "ice sherbet" (*sorbet* in the French version of the tariff), which it found could contain no dairy products, and a "sherbet" (*sorbet laitier*), which is the term defined in the *Food and Drug Regulations* and the D-Memo as having no more than 5 percent milk solids.[20]

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17 *Arko Foods* (CIT) at 4, footnote 10.
18 *Arko Foods* (CIT) at 4, footnote 11.
19 *Nestlé* at paras. 94-95.
20 *Nestlé* at paras. 85-91.

48. As in *Nestlé*, the goods in issue in this instance cannot be either an "ice sherbet" (*sorbet*) or a "sherbet" (*sorbet laitier*) as they contain more than 5 percent milk solids, when the buttermilk powder and whey powder are included in the calculation of milk solids.

49. As a result, the goods in issue cannot be classified under tariff item 2105.00.10 and must be classified in either tariff item No. 2105.00.91, within access commitment, if imported under the authority of a permit issued under section 8.3 of the *EIPA*, or under tariff item No. 2105.00.92, over access commitment, if not imported under the authority of a permit issued under section 8.3 of the *EIPA*. There is no evidence that AFOD had the requisite permit at the time of importation; accordingly, the goods in issue are properly classified under tariff item No. 2105.00.92 as other ice cream and other edible ice, whether or not containing cocoa, over access commitment.

DECISION

50. The appeal is dismissed.

Jean Bédard
Jean Bédard Q.C.
Presiding Member