



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2019-004

Cool King Refrigeration Ltd.

v.

President of the Canada Border
Services Agency

*Decision issued
Tuesday, February 25, 2020*

*Reasons issued
Wednesday, March 11, 2020*

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IN THE MATTER OF an appeal heard on October 29, 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 April 24, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

COOL KING REFRIGERATION LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Serge Fréchette

Serge Fréchette
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing: Ottawa, Ontario
Date of Hearing: October 29, 2019
Tribunal Panel: Serge Fréchette, Presiding Member
Support Staff: Heidi Lee, Counsel

PARTICIPANTS:**Appellant**

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STATEMENT OF REASONS

OVERVIEW

[1] This is an appeal filed by Cool King Refrigeration Ltd. (Cool King) pursuant to subsection 67(1) of the *Customs Act*,¹ from a decision made by the President of the Canada Border Services Agency (CBSA) under subsection 60(4) of the *Act*.

[2] The issue in appeal is whether various flavoured powders (the goods in issue) are properly classified in tariff item No. 1901.90.34 as “other food preparations of goods of heading 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included, not put up for retail sale”, as determined by the CBSA, or in tariff item No. 2106.90.98 as “ice cream powders, not elsewhere specified or included”, as claimed by Cool King.

GOODS IN ISSUE

[3] The goods in issue are 17 flavoured powders used in the manufacture of gelato ice cream and pastry products.² The goods comprise milk solids, fat components, sweeteners, stabilizers, emulsifiers and flavouring. In all of the powders, the main component by percentage is sugars.

[4] After importation, the goods are mixed with fresh milk to produce ice cream.

[5] The parties agree that the goods are “food preparations” as defined in the Nomenclature.

PROCEDURAL HISTORY

[6] Cool King imported the goods between October 2015 and August 2017.

[7] On December 21, 2017, the CBSA issued a re-determination of the goods pursuant to subsection 59(1) of the *Act*. Cool King corrected the tariff classification of the goods in accordance with the CBSA’s determination, and then requested a further re-determination of the goods under subsection 60(1) of the *Act*.

[8] On April 24, 2019, the CBSA issued a further re-determination maintaining that the goods are properly classified under tariff item No. 1901.90.34. Cool King filed the present appeal on April 25, 2019.

[9] A public hearing was held on October 29, 2019, at Ottawa. Cool King called Lorenzo Stangarone, Gelato Chef at Cool King, as a lay witness and Dr. Douglas Goff as an expert witness. The CBSA called Dr. Jacques Goulet as an expert witness.³

[10] As neither party objected to the other’s proposed expert witness, the Tribunal did not undertake an oral qualification process during the hearing.⁴ After consideration of each witness’s *curriculum vitae* and experience, the Tribunal accepted Dr. Goff and Dr. Goulet as experts in the area of milk and dairy products.

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

² Originally, there were 19 flavours in appeal; Cool King removed two at the hearing (see *Transcript* at p. 4).

³ Dr. Goulet testified in French.

⁴ See *Transcript* at p. 4.

LEGAL FRAMEWORK

[11] 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).⁵ 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.

[12] Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁶ and the *Canadian Rules*⁷ set out in the schedule.

[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.

[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*⁸ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁹ published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is sound reason to do otherwise.¹⁰

[15] The Tribunal must therefore 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. As the Supreme Court of Canada indicated in *Igloo Vikski*, 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”.¹¹

[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.¹² The final step is to determine the proper tariff item.¹³

⁵ Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

⁶ S.C. 1997, c. 36, schedule [*General Rules*].

⁷ S.C. 1997, c. 36, schedule.

⁸ World Customs Organization, 4th ed., Brussels, 2017.

⁹ World Customs Organization, 6th ed., Brussels, 2017.

¹⁰ See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17 and *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 at para. 4.

¹¹ *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

¹² Rule 6 of the *General Rules* provides that “the classification of goods in the subheadings of a heading shall be determined according to the 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.”

¹³ 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.

[17] The relevant provisions of the *Customs Tariff* are as follows.

Chapter 4

DAIRY PRODUCE; BIRDS' EGGS; NATURAL HONEY; EDIBLE PRODUCTS OF ANIMAL ORIGIN, NOT ELSEWHERE SPECIFIED OR INCLUDED

- 04.01** Milk and cream, not concentrated nor containing added sugar or other sweetening matter.
- 04.02** Milk and cream, concentrated or containing added sugar or other sweetening matter.
- 04.03** Buttermilk, curdled milk and cream, yogourt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruits, nuts or cocoa.
- 04.04** Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included.

Chapter 19

PREPARATIONS OF CEREALS, FLOUR, STARCH OR MILK; PASTRY COOKS' PRODUCTS

- 19.01** Malt extract; food preparations of flour, groats, meal, starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of heading 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.
- 1901.90** -Other
- -Food preparations of goods of headings 04.01 to 04.04, containing more than 10% but less than 50% on a dry weight basis of milk solids:
- 1901.90.34 - - - -Other, not put up for retail sale, over access commitment

Chapter 21

MISCELLANEOUS EDIBLE PREPARATIONS

- 21.06** Food preparations not elsewhere specified or included.
- 2106.90** -Other

--Other:

2106.90.98 ---Jelly powders, ice cream powders and powders for similar preparations

[18] All relevant notes to chapters and explanatory notes are set out in Annex A of these reasons.

POSITIONS OF THE PARTIES

Cool King

[19] Cool King submitted that the goods in issue are not classified in heading No. 19.01 as they are not “goods of headings 04.01 to 04.04”. In Cool King’s view, the goods in issue are not goods of headings No. 04.01 to 04.04 because milk or dairy is not the predominant ingredient. Cool King submitted that the goods in issue are therefore properly classified in heading No. 21.06.

CBSA

[20] The CBSA submitted that the goods in issue are classified in heading No. 19.01 as they meet the four conditions for classification in that heading, as described by the CBSA: the goods are (1) food preparations; (2) of goods of headings No. 04.01 to 04.04; (3) that contain cocoa in an amount less than 5 percent by weight calculated on a totally defatted basis; and (4) are not elsewhere specified or included.

[21] As the goods are classified in heading No. 19.01, the CBSA argued that they are therefore excluded from heading No. 21.06, which covers food preparations not elsewhere specified or included.

ANALYSIS

[22] The issue in this appeal is at the heading level.

[23] The two headings identified by the parties are heading No. 19.01, which includes “food preparations of goods of heading 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included”, and heading No. 21.06, which covers “food preparations not elsewhere specified or included”.¹⁴

[24] In addition to the terms of the headings, the explanatory notes provide further direction for the tariff classification of the goods in issue.

[25] The explanatory notes provide that powders for ice cream are classified in either heading No. 19.01 or 21.06.¹⁵ Explanatory note (d) to Chapter 19 further directs that powders for the manufacture of ice cream that are not based on goods of headings No. 04.01 to 04.04 are excluded from Chapter 19. Meanwhile, explanatory note (I) to heading No. 21.06 excludes powders for ice cream based on goods of headings No. 04.01 to 04.04.¹⁶

¹⁴ As noted above, the parties agree that the goods in issue are food preparations, and that they contain ingredients which exclude them from classification in Chapter 4, as set out in the general explanatory notes to that chapter. They also agree that the cocoa content of the goods is also not in issue.

¹⁵ The explanatory notes to heading No. 19.01 and to heading No. 21.06 each provide that their respective headings include powders for ice cream.

¹⁶ These notes are consistent with the explanatory notes to heading No. 21.05, which provide that mixes and bases for ice cream are classified according to their “essential constituents”.

[26] In other words, with respect to powders for ice creams, headings No. 19.01 and 21.06 are mutually exclusive. Powders that are based on goods of headings No. 04.01 to 04.04 are classified in heading No. 19.01, while powders that are not are classified in heading No. 21.06.

[27] Accordingly, the issue before the Tribunal is whether the goods in issue are “of” goods of headings No. 04.01 to 04.04.¹⁷

Are the goods in issue “of” goods of headings No. 04.01 to 04.04?

[28] Central to the issue in appeal is the meaning of the phrase “of goods of headings 04.01 to 04.04”.

[29] In *CDC Foods*, the Tribunal held that in order to be “of” goods of headings No. 04.01 to 04.04, goods must be “based on” the goods of those headings.¹⁸ In addition, the Tribunal held that “of” can also be synonymous with the words “containing” and “made from”, within the context of the terms of heading No. 19.01.¹⁹ In that case, the Tribunal found that the drink mixes in appeal were “of goods of headings 04.01 to 04.04” as they contained a “significant percentage” of goods of those headings.

[30] In the present appeal, the CBSA submitted that there is no minimum percentage requirement, and that the goods in issue contain goods of headings No. 04.01 to 04.04 in sufficient amounts to be “based on” those goods.

[31] Cool King submitted that application of the Tribunal’s jurisprudence in *CDC Foods* to the present appeal must be informed by the Nomenclature. Noting that the explanatory notes expressly contemplate classification of powders for ice cream in heading No. 21.06, Cool King argued that “based on” and “containing” are too broad in this context. In this respect, Cool King also relied on a number of WCO classification opinions to argue that “significant” quantities of milk or dairy do not preclude classification in heading No. 21.06.²⁰

[32] Instead, Cool King contended that the goods in issue are classified according to their “essential ingredients”, as directed by the explanatory notes to heading No. 21.05, which provide that mixes and bases for ice creams are classified according to their essential constituents. In Cool King’s view, “essential constituents” are ingredients that comprise more than 50 percent of a good. In this regard, Cool King again relied on the classification opinions, which it argued demonstrates that goods are only classified in heading No. 19.01 when milk and dairy amount to more than 50 percent of the good.

¹⁷ With respect to the order of analysis, the CBSA argued that the Tribunal must first consider whether the goods are classified in heading No. 19.01 before turning to heading No. 21.06, on the basis that the explanatory notes to heading No. 21.06 exclude powders based on goods of headings No. 04.01 to 04.04. Based on the Tribunal’s reading of the Nomenclature, there is no particular order of analysis required.

¹⁸ *CDC Foods v. President of the Canada Border Services Agency* (14 December 2016), AP-2015-035 and AP-2016-015 (CITT) [*CDC Foods*] at para. 65. The Tribunal also held that goods must contain additives not permitted by the terms of headings No. 04.01 to 04.04, in accordance with the explanatory notes to Chapter 4. In the present appeal, the parties agree that this condition is met.

¹⁹ *CDC Foods* at para. 68.

²⁰ Cool King relied on WCO classification opinions No. 1901.90/2, 1901.90/3, 2106.90/4, 2106.90/12, 2106.90/14, 2106.90/21, and 2106.90/23. These classification opinions can be found at Annex B of these reasons.

[33] Although the parties differ slightly on the exact amount of milk and dairy ingredients of the goods, they agree that all the powders in issue contain less than 50 percent of milk or dairy.²¹ Each powder in issue comprises a number of ingredients, of which sugars are the largest component.

[34] The WCO classification opinions cited by Cool King and *CDC Foods*²² demonstrate to the Tribunal that the goods in issue may be classified in heading No. 21.06 even if they contain goods of headings No. 04.01 to 04.04 in large quantities.

[35] In particular, classification opinions 2106.90/12 and 2106.90/14 demonstrate that preparations including large proportions of milk powder, that is 49 and 44 percent respectively, may still be classified under heading No. 21.06. The Tribunal also agrees that the goods in issue are reasonably similar to the classification opinion 21.06/90.21, which covers “dry solid food preparation consisting of 69% sugar, 29% milk powder, and 2% dextrin, used in the manufacture of food and beverage preparations”.²³

[36] Altogether, in the Tribunal’s view, for the goods in issue to be “based on” goods of headings No. 04.01 to 04.04 requires more than merely containing such goods in significant amounts.

[37] Within the context of this appeal, where the quantity of an ingredient alone is not determinative, the Tribunal is left to consider the role and relative importance of each ingredient in order to determine whether any ingredient is more essential than the others for the intended purpose and function of the powder. Therefore, whether the goods in issue can be said to be “based on” certain ingredients is a question of essentiality.²⁴ In other words, if milk or dairy are more essential to the purpose and function of the goods in issue than any of the other ingredients, the goods in issue can be said to be “based on” goods of headings No. 04.01 to 04.04.

[38] In the Tribunal’s view, the witnesses provided consistent evidence regarding the functional roles of the various ingredients.²⁵ Sweeteners provide sweetness and decrease the freezing point so the mixture stays soft at temperatures below zero. Stabilizers extend shelf life and emulsifiers help provide structure and shape retention properties.²⁶ Fats provide a creamy texture, structure and melt-resistance and milk proteins facilitate the emulsification of fats into water and incorporate air bubbles into the mixture. In this regard, the Tribunal notes that in addition to the milk solids and dairy fats contained in powder form in the goods in issue, the resulting ice cream mixtures also derive fats and milk proteins from the milk used in the rehydration process.

²¹ Confidential Exhibit AP-2019-004-11A, paras. 21-23, Vol. 2; *Transcript* at p. 33.

²² *CDC Foods* at paras. 57 and 102.

²³ *Transcript* at pp. 31-33. The Tribunal notes that the CBSA submitted that the classification opinions do not support a finding that the goods in issue should be classified in heading No. 21.06 (see Exhibit AP-2019-004-07, paras. 67-82, Vol. 1). The CBSA’s submissions argue that the goods in issue are distinguishable from those covered by the opinions and attempt to explain the tariff classification exercise underlying the opinions. In the Tribunal’s view, the value of the classification opinions is limited to the fact that they demonstrate that high percentages of milk ingredients do not preclude classification under heading No. 21.06. The CBSA’s submissions did not otherwise persuade the Tribunal.

²⁴ In the Tribunal’s view, this approach is also consistent with the guidance provided by the explanatory notes to heading No. 21.05.

²⁵ There was some testimony on whether the milk used to rehydrate the goods in issue could be substituted with water. Although the Tribunal appreciates the efforts of the witnesses, it ultimately found that this matter was not relevant to the issue in appeal.

²⁶ See Exhibit AP-2019-004-11, para. 17, Vol. 1; *Transcript* at pp. 14-15, 52-53, 72, 75; Exhibit AP-2019-004-13, paras. 2, 5-8, Vol. 1.

[39] According to Dr. Goff, expert witness for Cool King, the goods in issue are precisely formulated to develop the correct structure and quality of the resulting ice cream when hydrated in accordance with the instructions for each powder, i.e. with milk or water, as appropriate. It is this balance of ingredients that provides value to the powders.²⁷ Each ingredient has an important functional contribution to the taste, texture, quality and performance of the resulting ice cream.²⁸ In Dr. Goff's view, the milk and dairy components are no more important than any of the other components.²⁹ Rather, Dr. Goff testified that the milk and dairy component and the remaining ingredients are both "absolutely critical".

[40] Mr. Stangarone also testified that every ingredient in the powders, as well as the milk required to rehydrate them, is fundamental to the end result.³⁰

[41] In Dr. Goulet's opinion, the essential factors that contribute to the structure and texture of ice cream are water, dairy proteins, sugar and air.³¹ In this regard, the Tribunal notes that water and air are incorporated in the rehydration process and are not part of the goods at the time of importation. Dr. Goulet also testified that although sugar is absolutely critical,³² dairy has a particularly important role in ice cream structure and texture.³³ In his view, the importance of each ingredient of the goods in issue is not necessarily proportional to its concentration.³⁴

[42] After careful consideration of the evidence presented in this appeal, the Tribunal is not persuaded that the milk and dairy components of the powders are *more* essential than the other ingredients, such as the sugars and stabilisers. As evidenced by Dr. Goff, the goods in issue are specifically formulated to create an ice cream with specific properties, such as those with respect to texture, structure and mouthfeel. The Tribunal accepts Dr. Goff's and Mr. Stangarone's evidence that each ingredient is critical in its own right. Each is as essential as the next. In this regard, the Tribunal recalls that Dr. Goulet also testified that, in addition to dairy, sugar is also critical to the goods in issue. In the Tribunal's view, this finding is supported by the expert evidence provided by both Dr. Goff and Dr. Goulet.

[43] Accordingly, the Tribunal does not find that the goods in issue are "based on" the milk or dairy ingredients contained in the products. The goods in issue are therefore not of goods of headings No. 04.01 to 04.04, and are not classified in heading No. 19.01.

Heading No. 21.06

[44] Classification in heading No. 21.06 has two conditions: (1) the good is a "food preparation" and (2) it is not specified or included elsewhere in the Nomenclature.³⁵

[45] Based on the above, the Tribunal finds that these conditions are met.

²⁷ *Transcript* at pp. 18-19, 23.

²⁸ Exhibit AP-2019-004-11, para. 17, Vol. 1; *Transcript* at pp. 19-20.

²⁹ *Transcript* at pp. 27-28; Exhibit AP-2019-004-11, para. 23, Vol. 1.

³⁰ *Transcript* at p. 60.

³¹ Exhibit AP-2019-004-13, paras. 6 and 13, Vol. 1.

³² *Transcript* at p. 72.

³³ Exhibit AP-2019-004-13, paras. 1, 4-5, Vol. 1.

³⁴ Exhibit AP-2019-004-13, para. 13, Vol. 1.

³⁵ See *CDC Foods* at para. 55.

Conclusion

[46] For the foregoing reasons, the Tribunal finds that the goods in issue are classified in heading No. 21.06.

[47] The Tribunal agrees with Cool King, and the CBSA did not dispute that the goods in issue are properly classified under subheading No. 2106.90 and tariff item No. 2106.90.98.

DECISION

[48] The appeal is allowed.

Serge Fréchette

Serge Fréchette
Presiding Member

ANNEX A

[1] The relevant **notes to Chapter 4** provide as follows:

1. The expression “milk” means full cream milk or partially or completely skimmed milk. . . .

4. This Chapter does not cover: . . .

(b) Products obtained from milk by replacing one or more of its natural constituents (for example, butyric fats) by another substance (for example, oleic fats) (heading 19.01 or 21.06);

[2] The relevant **explanatory notes to Chapter 4** provide as follows:

This Chapter covers:

(I) Dairy products:

(A) **Milk**, i.e., full cream milk and partially or completely skimmed milk.

(B) **Cream.**

(C) **Buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream.**

(D) **Whey.**

(E) **Products consisting of natural milk constituents, not elsewhere specified or included.**

(F) **Butter and other fats and oils derived from milk; dairy spreads.**

. . .

The products mentioned at Items (A) to (E) above may contain, in addition to natural milk constituents (e.g., milk enriched in vitamins or mineral salts), small quantities of stabilising agents which serve to maintain the natural consistency of the product during transport in liquid state (disodium phosphate, trisodium citrate and calcium chloride, for instance) as well as very small quantities of anti-oxidants or of vitamins not normally found in the product. Certain of these products may also contain small quantities of chemicals (e.g., sodium bicarbonate) necessary for their processing; products in the form of powder or granules may contain anticaking agents (for example, phospholipids, amorphous silicon dioxide).

For the purposes of Note 4 (b) to this Chapter the expression “butyric fats” means milk fats and the expression “oleic fats” means fats other than milk fats, in particular vegetable fats (e.g., olive oil).

. . .

This Chapter also **excludes**, *inter alia*, the following:

- (a) Food preparations based on dairy products (in particular, **heading 19.01**).
- (b) Products obtained from milk by replacing one or more of the natural constituents (e.g., butyric fats) by another substance (e.g., oleic fats) (**heading 19.01** or **21.06**).

[3] The relevant **explanatory notes to Chapter 19** provide as follows:

GENERAL

This Chapter covers a number of preparations, generally used for food, which are made . . . from the goods of headings 04.04 to 04.04.

This Chapter **excludes**:

...

(b) Food preparations of . . . goods of headings 04.01 to 04.04 containing 5% or more by weight of cocoa calculated on a totally defatted basis (**heading 18.06**).

...

(d) Powders for the manufacture of custards, desserts, ice cream or similar preparations but not being preparations based on . . . goods of headings 04.04 to 04.04 (generally **heading 21.06**).

[4] The relevant **explanatory notes to heading No. 19.01** provide as follows:

(III) Food preparations of goods of headings 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included

The preparations of this heading may be distinguished from the products of headings 04.01 to 04.04 in that they contain, in addition to natural milk constituents, other ingredients not permitted in the products of those earlier headings. Thus heading 19.01 includes, for example:

- (1) Preparations in powder or liquid form used as food suitable for infants or young children or for dietetic purposes and consisting of milk to which secondary ingredients (e.g., cereal groats, yeast) have been added.
- (2) Milk preparations obtained by replacing one or more constituents of milk (e.g., butyric fats) by another substance (e.g., oleic fats).

...

This heading also covers mixes and bases (e.g., powders) for making ice cream but it **excludes** ice cream and other edible ice based on milk constituents (**heading 21.05**).

[5] The relevant **explanatory notes to heading No. 21.06** provide as follows:

Provided that they are not covered by any other heading of the Nomenclature, this heading covers:

(A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption.

...

This heading includes, *inter alia*:

(1) Powders for table creams, jellies, ice creams or similar preparations, whether or not sweetened.

Powders based on . . . goods of headings 04.01 to 04.04, whether or not containing added cocoa, fall in **heading 18.06** or **19.01** according to their cocoa content (see the General Explanatory Note to Chapter 19).

[6] The relevant **explanatory notes to heading No. 21.05** provide as follows:

This heading covers ice cream, which is usually prepared with a basis of milk or cream and other edible ice (e.g., sherbet, iced lollipops), whether or not containing cocoa in any proportion. However, the heading **excludes** mixes and bases for ice cream which are classified according to their essential constituents (e.g., **heading 18.06, 19.01, or 21.06**).

ANNEX B

[1] The WCO classification opinions relied on by Cool King are as follows:

1901.90

2. **Whipped cream** put up in an aerosol can, exhibiting the smell and taste of vanilla, containing cream made from cows' milk, invert sugar syrup, condensed milk, concentrated milk, glucose, natural flavour (vanilla) and stabilising agent (E407).

Application of GIRs 1 and 6.

3. **Preparation intended to be consumed as cheese substitute**, consisting of skimmed milk (81.8%), vegetable oils (15.65%), and small quantities of salt, milk (whey) protein, rennet, acidifying culture, colouring matter and vitamin D, obtained by mixing skimmed milk with vegetable oils and subsequent treatment by a bacterial culture and enzyme, coagulation, separation of casein, heating, pressing, forming, cutting, salting, and subsequent ripening for 7 to 10 weeks. This preparation is sometimes referred to as "cheese analogue".

Application of GIRs 1 and 6.**2106.90**

4. **Preparations intended to be consumed as beverages, after mixing with milk**, in fine powder form, consisting essentially of sugars, fruit powder, milk powder, calcium phosphate and vitamins.

12. **Preparation** consisting of 51% refined and hydrogenated coconut oil and 49% skimmed milk powder, used for the manufacture of various food preparations (e.g., ice cream, biscuits and confectionary).

14. **Preparation** consisting of 49% butteroil, 44% skimmed milk powder and 7% coconut oil, used in the ice cream industry.

21. **Dry solid food preparation** consisting of 69% sugar, 29% milk powder and 2% dextrin, used in the manufacture of food and beverage preparations.

23. **Non-dairy creamer**, milk substitute for use in hot beverages, in the form of a powder consisting of 55% glucose syrup, 22% emulsified solid vegetable fat, 18% skimmed milk powder, 3% water and 2% stabiliser (E340).

Application of GIRs 1 and 6.