



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2021-008

Charoen Pokphand Foods Canada
Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, May 17, 2022*

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DECISION	15

IN THE MATTER OF an appeal heard on January 13, 2022, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated June 15, 2021, with respect to a request for further re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CHAROEN POKPHAND FOODS CANADA INC.

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: Videoconference
Date of Hearing: January 13, 2022

Tribunal Panel: Cheryl Beckett, Presiding Member

Tribunal Secretariat Staff: Nadja Momcilovic, Counsel
Kim Gagnon-Lalonde, Acting Senior Registrar
Officer
Rekha Sobhee, Registrar Officer

PARTICIPANTS:**Appellant**

Charoen Pokphand Foods Canada Inc.

Respondent

President of the Canada Border Services
Agency

Counsel/Representatives

Robert MacDonald
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WITNESS:

Kelsey Viner
Food and Organics Chemist
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STATEMENT OF REASONS

OVERVIEW

[1] This appeal was filed by Charoen Pokphand Foods Canada Inc. (Charoen) on July 6, 2021, pursuant to subsection 67(1) of the *Customs Act*¹ from a further re-determination made on June 15, 2021, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4) of the Act.

[2] The issue in appeal is whether the goods in issue are properly classified under tariff item No. 2104.10.00 as “soups and broths and preparations therefor”, as submitted by Charoen, or whether they should be classified under tariff item No. 1902.20.00 as “stuffed pasta, whether or not cooked or otherwise prepared”, as determined by the CBSA.²

GOODS IN ISSUE

[3] The goods in issue are Charoen Pokphand Authentic Asia™ Hand Wrapped Shrimp Wonton Soups, which consist of 6 frozen, sealed containers of 145 grams. Each container is composed of 5 frozen wontons, which are stuffed with cooked shrimp and are placed in a block of frozen liquid soup concentrate. The frozen wontons and soup concentrate are combined in the same packaging.³ They do not contain additional seasoning or separately packaged ingredients.⁴

PROCEDURAL HISTORY

[4] The goods in issue were imported by Charoen between May and September 2019 and classified under tariff item No. 1902.30.31 as “other [pasta], containing 25% or more by weight of wheat, without meat, over access commitment, in packages of a weight not exceeding 2.3 kg each”.⁵

[5] On November 26, 2020, under section 42 and subsection 42.01 of the Act, the CBSA conducted a trade compliance verification and re-determined the tariff classification of the goods. The CBSA classified the goods under tariff item No. 1902.20.00 as “stuffed pasta, whether or not cooked or otherwise prepared”. That decision was treated as a re-determination under paragraph 59(1)(a) of the Act.⁶

[6] On January 14, 2021, Charoen submitted a request to review the re-determination made by the CBSA under subsection 60(1) of the Act. Charoen claimed that the goods should have been classified under tariff item No. 2104.10.00 as “soups . . . and preparations therefor”.⁷

¹ R.S.C., 1985, c. 1 (2nd Supp.).

² Exhibit AP-2021-008-12.B at para. 3.

³ *Ibid.* at para. 2.

⁴ Exhibit AP-2021-008-05 at para. 10.

⁵ Exhibit AP-2021-008-12.B at para. 10.

⁶ *Ibid.* at para. 11.

⁷ *Ibid.* at para. 12.

[7] On June 15, 2021, under subsection 60(4) of the Act, the CBSA issued a further re-determination of the tariff classification of the goods. The goods in issue were classified under tariff item No. 1902.20.00.⁸

[8] On July 6, 2021, Charoen filed an appeal with the Tribunal under subsection 67(1) of the Act.⁹

[9] On September 17, 2021, Charoen filed the appellant's brief.

[10] On November 19, 2021, the CBSA filed confidential and public versions of the respondent's brief.

[11] On December 7, 2021, the CBSA filed an expert report concerning the goods in issue.

[12] On December 20, 2021, Charoen filed a supplementary appellant's brief.

[13] On January 4, 2022, the CBSA filed revised public versions of the respondent's brief and the expert report, removing certain redactions and considering the previously confidential elements to be public.

[14] Neither of the parties filed physical exhibits of the goods in issue. The CBSA called upon the expertise of Ms. Kelsey Viner, who analyzed the goods for the purpose of this appeal.

Expert witness – Ms. Kelsey Viner

[15] The CBSA's proposed expert witness, Ms. Viner, testified on the composition of the goods in issue, their packaging and their preparation for consumption.¹⁰

[16] Ms. Viner is a specialist in the area of chemistry and has been working in the food and organics subgroup of the CBSA since 2019.¹¹

[17] In a letter received on December 20, 2021, Charoen indicated that it did not intend to challenge Ms. Viner's qualification as an expert witness in the general field of chemistry. However, Charoen asked that the CBSA clarify in which specific area of chemistry it intended to qualify Ms. Viner as an expert.¹²

[18] In its letter of December 23, 2021, the Tribunal indicated that it considered to have sufficient information as to Ms. Viner's area of expertise and that any further representations from the parties on this issue could be made at the hearing.¹³

⁸ *Ibid.* at para. 13.

⁹ *Ibid.* at para. 14.

¹⁰ Exhibit AP-2021-008-14.C.

¹¹ Ms. Viner's résumé is available in Exhibit AP-2021-008-14.C at 104–108.

¹² Exhibit AP-2021-008-20 at 1.

¹³ Exhibit AP-2021-008-25 at 2.

[19] Having reviewed Ms. Viner's résumé and considered submissions at the hearing from both parties on the issue of her qualification as an expert witness, the Tribunal accepted the qualification of Ms. Viner as an expert witness in the field of food composition and food analysis.

LEGAL FRAMEWORK

[20] The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,¹⁴ which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).¹⁵ 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.

[21] 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* (General Rules)¹⁶ and the *Canadian Rules*¹⁷ set out in the schedule.

[22] 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.

[23] 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* (Classification Opinions)¹⁸ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (Explanatory Notes),¹⁹ 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.²⁰

[24] 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. 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.²¹

¹⁴ S.C. 1997, c. 36.

¹⁵ Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

¹⁶ S.C. 1997, c. 36, schedule.

¹⁷ S.C. 1997, c. 36, schedule.

¹⁸ World Customs Organization, 4th ed., Brussels, 2017.

¹⁹ World Customs Organization, 6th ed., Brussels, 2017.

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

²¹ *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21. Rules 1 through 5 of the General Rules apply to classification at the heading level.

[25] 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.²² The final step is to determine the proper tariff item.²³

[26] The relevant tariff classification provisions are as follows:

	Chapter 19 PREPARATIONS OF CEREALS, FLOUR, STARCH OR MILK; PASTRYCOOKS’ PRODUCTS	Chapitre 19 PRÉPARATIONS À BASE DE CÉRÉALES, DE FARINES, D’AMIDONS, DE FÉCULES OU DE LAIT; PÂTISSERIES
19.02	Pasta, whether or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagna, gnocchi, ravioli, cannelloni; couscous, whether or not prepared. -Uncooked pasta, not stuffed or otherwise prepared	Pâtes alimentaires, même cuites ou farcies (de viande ou d’autres substances) ou bien autrement préparées, telles que spaghetti, macaroni, nouilles, lasagnes, gnocchi, ravioli, cannelloni; couscous, même préparé. -Pâtes alimentaires non cuites ni farcies ni autrement préparées
1902.20.00	-Stuffed pasta, whether or not cooked or otherwise prepared	-Pâtes alimentaires farcies (même cuites ou autrement préparées)

	Chapter 21 MISCELLANEOUS EDIBLE PREPARATIONS	Chapitre 21 PRÉPARATIONS ALIMENTAIRES DIVERSES

²² 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 the above Rules [i.e. Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

²³ 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.

21.04	Soups and broths and preparations therefor; homogenized composite food preparations.	Préparations pour soupes, potages ou bouillons; soupes, potages ou bouillons préparés; préparations alimentaires composites homogénéisées.
2104.10.00	-Soups and broths and preparations therefor	-Préparations pour soupes, potages ou bouillons; soupes, potages ou bouillons préparés

[27] The relevant chapter notes are as follows:

Note 1(a) to Chapter 19:

This Chapter does not cover : (a) Except in the case of stuffed products of heading 19.02, food preparations containing more than 20% by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16).

Note 1(e) to Chapter 21:

This Chapter does not cover : . . . (e) Food preparations, other than the products described in heading 21.03 or 21.04, containing more than 20% by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16).

[28] The relevant explanatory notes to heading 19.02 provide as follows:

The pasta of this heading are unfermented products made from semolinas or flours of wheat, maize, rice, potatoes, etc.

These semolinas or flours (or intermixtures thereof) are first mixed with water and kneaded into a dough which may also incorporate other ingredients (e.g., very finely chopped vegetables, vegetable juice or purées, eggs, milk, gluten, diastases, vitamins, colouring matter, flavouring).

. . .

The pasta of this heading may be cooked, stuffed with meat, fish, cheese or other substances in any proportion or otherwise prepared (e.g., as prepared dishes containing other ingredients such as vegetables, sauce, meat). Cooking serves to soften the pasta without changing its basic original form.

Stuffed pasta may be fully closed (for example, ravioli), open at the ends (for example, cannelloni) or layered, such as lasagne.

...

This heading **does not cover** :

(a) Preparations, other than stuffed pasta, containing more than 20 % by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (**Chapter 16**).

(b) Soups and broths and preparations therefor, containing pasta (**heading 21.04**).

[29] The relevant explanatory notes to heading 21.04 provide as follows:

(A) SOUPS AND BROTHS AND PREPARATIONS THEREFOR

This category includes :

(1) Preparations for soups or broths requiring only the addition of water, milk, etc.

(2) Soups and broths ready for consumption after heating.

These products are generally based on vegetable products (vegetables, flour, starches, tapioca, pasta, rice, plant extracts, etc.), meat, meat extracts, fat, fish, crustaceans, molluscs or other aquatic invertebrates, peptones, amino-acids or yeast extract.

They are generally put up as tablets, cakes, cubes or in powder or liquid form.

[30] The relevant WCO classification opinion reads as follows:

1902.20: 1. Preparation consisting of pasta stuffed with shrimps (wontons) and soup concentrate. The preparation is frozen and put up in a plastic bowl for retail sale. Before consumption, after adding water, it has to be re-heated in a microwave oven.

Application of GIRs 1 and 6.

POSITION OF THE PARTIES

Charoen

[31] Charoen submits that the goods in issue should be classified as “soups and broths and preparations therefor” of heading 21.04 by way of application of Rule 1.²⁴

[32] Charoen contends that the exclusionary note to heading 19.02 requires the classification of the goods in issue in heading 21.04 as soup preparations containing pasta²⁵ and that applying the exclusionary note makes it impossible to apply the WCO classification opinion. Given that the goods in issue are most specifically provided for in heading 21.04, Charoen argues that there is sufficient reason to depart from the WCO classification opinion.²⁶

[33] Moreover, Charoen claims that, should the Tribunal consider Rule 3(b) in classifying the goods, it should conclude that the weight of the shrimp wontons vis-à-vis the soup concentrate is not

²⁴ Exhibit AP-2021-008-05 at para. 19.

²⁵ *Ibid.* at para. 60.

²⁶ *Ibid.* at paras. 61–62.

decisive in determining the essential character of the goods in issue.²⁷ Rather, the goods in issue are marketed and consumed as a soup, and it is the soup which gives the goods their essential character.²⁸

CBSA

[34] The CBSA submits that the goods in issue cannot be classified by the sole application of Rule 1, given that they are composed of two separate components, namely a soup concentrate and a type of stuffed pasta (shrimp wontons).²⁹

[35] Rather, the CBSA argues that rules 2(b) and 3(b) must be applied. By applying Rule 3(b), the Tribunal must consider the essential character of the goods in issue, which the CBSA alleges is given by the shrimp wonton component, accounting for a greater proportion of the goods in terms of both volume and weight. This in turn allows for classification of the goods in issue as stuffed pasta in heading 19.02.³⁰

ANALYSIS

[36] With respect to the order of analysis, it is established that, where there is one exclusionary note that precludes the *prima facie* classification of goods in both headings at issue, the Tribunal must begin its analysis with the heading referred to in that explanatory note.³¹ Here, an explanatory note to heading 19.02 excludes goods of heading 21.04.³² The Tribunal will therefore begin its analysis with heading 21.04.

[37] The Tribunal notes that explanatory note (b) to heading 19.02 refers to soups, broths or preparations of heading 21.04. The WCO classification opinion concerning subheading 1902.20 determined that the goods in issue could not be classified in heading 21.04 by reviewing the terms of the heading as per Rule 1. As examined in the section that follows, the Tribunal comes to the same conclusion.

The goods in issue are not preparations for soups or soups of heading 21.04

[38] The explanatory notes to heading 21.04, which read as follows, indicate that the heading covers two types of goods: (1) preparations for soups; and (2) soups:

(A) SOUPS AND BROTHS AND PREPARATIONS THEREFOR

This category includes :

- (1) Preparations for soups or broths requiring only the addition of water, milk, etc.
- (2) Soups and broths ready for consumption after heating.

²⁷ *Ibid.* at para. 28.

²⁸ *Ibid.* at para. 47.

²⁹ Exhibit AP-2021-008-12.B at para. 4.

³⁰ *Ibid.* at paras. 5–6.

³¹ See, for example, *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-005 (CIIT) at para. 42.

³² Explanatory note (b) to heading 19.02 reads as follows: “This heading **does not cover** . . . Soups and broths and preparations therefor, containing pasta (**heading 21.04**)”.

These products are generally based on vegetable products (vegetables, flour, starches, tapioca, pasta, rice, plant extracts, etc.), meat, meat extracts, fat, fish, crustaceans, molluscs or other aquatic invertebrates, peptones, amino-acids or yeast extract.

[39] The Tribunal's analysis in *Anderson Watts* proves useful for the present appeal. In *Anderson Watts*, the Tribunal analyzed dry instant noodles, packaged with powdered "seasoning" sachets intended to make a soup base. In that appeal, the Tribunal held that "preparations" and "mixtures" "blend ingredients together" and can be distinguished from goods which "consist of [or combine] multiple edible components intended to be used and packaged together".³³

[40] Charoen submits that the goods in issue only require the addition of water before they can be consumed.³⁴ According to Charoen, the goods are a "mixture of culinary ingredients (wonton and concentrated soup base), packaged together",³⁵ which only require the addition of water and heating in order to be ready for consumption. Consequently, Charoen argues that the goods should be considered preparations for soups.³⁶

[41] The Tribunal finds that the goods in issue require the addition of water before they can be consumed. Accordingly, they are not soups of subcategory (2). However, the fact that the goods in issue only require the addition of water prior to consumption does not, in itself, determine that the goods are preparations for soups of subcategory (1). Indeed, this only precludes them from being classified as "soups" in subcategory (2).

[42] The CBSA submits that, in their state of importation, the goods are not ready for immediate consumption given that water must be added before they can be heated and eaten. Moreover, the CBSA notes that the goods cannot meet the definition of "preparations", as the soup concentrate and wontons do not blend two culinary ingredients. Rather, it contends that the frozen wontons sit atop the frozen soup concentrate, separate from it, and are not blended or mixed with the frozen liquid.³⁷

[43] The Tribunal agrees that the goods cannot meet the definition of "preparations", as the soup concentrate and wontons are not blended. However, the Tribunal disagrees with the CBSA's position that the frozen wontons sit atop the soup concentrate. Based on the evidence and video presented by the expert witness, the Tribunal finds that the frozen wontons are combined or intermingled with the soup concentrate, as it is not possible to easily separate the wontons from the soup concentrate in their frozen form. The Tribunal observes that the wontons are partially immersed in the frozen soup base, as the proportion of soup concentrate is not sufficient to fully cover the wontons. It is only upon thawing the whole product that the wontons can be separated from the overall product.

[44] The evidence demonstrates that the wontons remain a distinct component and do not form part of the frozen soup concentrate. The wontons are not "blended" into the soup concentrate as per

³³ *Anderson Watts Ltd. v. President of the Canada Border Services Agency* (20 March 2019), AP-2018-003 (CITT) [*Anderson Watts*], at para. 42.

³⁴ Exhibit AP-2021-008-05 at paras. 21–23.

³⁵ *Ibid.* at para. 38. The Tribunal notes that the WCO classification opinion of subheading 1902.20 is consistent with Charoen's position on this point. The WCO classification opinion does consider the goods as "preparations". Rather than considering the goods as preparations of soup, the Harmonized System Committee considers the goods as preparations of pasta that include a soup concentrate.

³⁶ Exhibit AP-2021-008-05 at para. 39.

³⁷ Exhibit AP-2021-008-12.B at paras. 33–34, 37, referring to *Anderson Watts*.

the Tribunal's analysis in *Anderson Watts* but are rather "otherwise prepared" to be consumed in a soup broth.

[45] Therefore, given that the goods in issue are not preparations for soups, they are not covered by the exclusionary note to heading 19.02, which excludes preparations for soups containing pasta. Accordingly, the goods in issue cannot be classified in heading 21.04.

[46] The WCO classification opinion adopted in 2011 also rejected the proposition that the goods in issue could be classified in heading 21.04. The opinion classified the goods in issue in subheading 1902.20. This is discussed in the section that follows.

The WCO classification opinion for subheading 1902.20

[47] The Tribunal has carefully reviewed the report of the discussions held by the WCO's Harmonized System (HS) Committee, which led to the adoption of the WCO classification opinion for subheading 1902.20, which reads as follows:

1902.20: 1. Preparation consisting of pasta stuffed with shrimps (wontons) and soup concentrate. The preparation is frozen and put up in a plastic bowl for retail sale. Before consumption, after adding water, it has to be re-heated in a microwave oven.

Application of GIRs 1 and 6.

[48] In 2011, the Customs Administration of Thailand brought the case to the WCO inquiring whether a product called "shrimp wonton"³⁸ should be classified in heading 16.05 as "crustaceans, molluscs and other aquatic invertebrates, prepared or preserved" or in heading 19.02 as "pasta, whether or not cooked or stuffed (with meat or other substances) . . .".

[49] The HS Committee found that the relevant section of explanatory note 2 to chapter 16 states that the provisions of chapter 16 "do not apply to the *stuffed products* of heading 19.02 or to the *preparations of heading 21.03 or 21.04*" [emphasis added].³⁹

[50] The HS Committee additionally noted that explanatory note 1 to Chapter 19 states that the chapter does not cover "(a) Except in the case of *stuffed products of heading 19.02*, food preparations containing more than 20 % by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16)" [emphasis added].⁴⁰

[51] The HS Committee further explained that the explanatory notes to heading 19.02 clarify the statement in Note 1 (a) to Chapter 19 by indicating that "[t]he pasta of this heading may be cooked,

³⁸ The WCO analyzed two products. Product No. 1 is of interest in the present appeal and is described in Exhibit AP-2021-008-19 at 5: "Product No. 1: 145.0 gram of shrimp wontons in concentrate soup, presented in plastic bowl, containing 5 pieces of frozen cooked shrimp wontons placed in frozen concentrate. Before consumption, microwave cooking is required with the addition of water." Product No. 1 from the WCO classification opinion is substantially identical in all respects to the goods at issue in this appeal.

³⁹ Exhibit AP-2021-008-19 at 6.

⁴⁰ *Ibid.*

stuffed with meat, fish, cheese or other substances *in any proportion* or otherwise prepared” [emphasis added].⁴¹

[52] The HS Committee also reviewed Thailand’s request that heading 21.04 also be considered given that wontons are “said to be typically served as a soup” and that the good labelled as “Product 1 is even called ‘Wonton soup’”.⁴²

[53] In reviewing heading 21.04, the HS Committee analyzed the term “soup” by stating the following:

Although the term “soup” is not defined in the HS, it is commonly taken to mean *liquid food* made by cooking different ingredients. In the products at hand it is, however, wontons that constitute by far the most important part of the whole and determine the character of the products, while the liquid in which wontons are served can arguably be regarded merely as a medium that is designed to facilitate the final stage of the preparation of wontons before they can be eaten. This medium is even not necessarily consumed itself. Hence, the fact that wontons are served in a liquid with salt, spices, etc., would not suffice for the whole to qualify as a liquid food, or soup, for the purposes of classification.⁴³

[Emphasis in original, footnote omitted]

[54] In making its decision, the HS Committee first considered that, by way of application of rules 1, 2(b), 3(b) and 6, the goods should be classified in heading 19.02. The analysis using rules 2(b) and 3(b) provided that “account should be taken of the presence of two different components in the products at issue : soup, which would be classified in heading 21.04 if presented separately, and wontons of heading 19.02”.⁴⁴ Given that the soup and wonton components are intended to be used together in preparing the final dish, the goods in issue should be considered as “‘sets for retail sale’, by application of GIR 3(b), and classified according to the component that gives them their essential character.”⁴⁵ On this notion, the HS Committee found that the wonton component of the products gave the goods their essential character given the larger proportion of wontons in the products as well as the fact that the products are both consumed as wontons, not soup.⁴⁶

[55] However, the ultimate legal basis used by the HS Committee was to classify the goods by reference to rules 1 and 6.⁴⁷ The HS Committee based its finding, in part, on its revised view that the wontons and the soup concentrate are “mixed” before being frozen.⁴⁸

[56] The Tribunal interprets the HS Committee’s ultimate finding as follows: Product No. 1 was composed of a “mixture” of food components and not two separate food components.

⁴¹ *Ibid.* at 7–8.

⁴² *Ibid.* at 7.

⁴³ *Ibid.*

⁴⁴ *Ibid.* at 8.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 6, 8.

⁴⁷ Exhibit AP-2021-008-28 at 3.

⁴⁸ The Tribunal notes that, in this appeal, it does not have any evidence as to when the items in the goods in issue are frozen, whether separately or together. However, product No. 1 from the WCO’s classification opinion is substantially identical in all respects, which makes it probable that a similar production process is used for the goods in issue in this appeal.

The goods in issue are pasta otherwise prepared of heading 19.02Shrimp wontons are “stuffed pasta”

[57] The expert evidence presented to the Tribunal confirmed that the wonton wrapping is made from a dough containing over 25%, by weight, of cooked wheat flour.⁴⁹ Accordingly, the wrapping falls under the definition of pasta made from flours of wheat, as provided for in the explanatory notes to heading 19.02. The CBSA and the WCO Classification Opinions support this evidence. Charoen did not contest the composition of the wonton wrapper as falling under the definition of pasta.⁵⁰

[58] As the wonton wrapping can be categorized as “pasta”, it is evident that the wonton component of the goods in issue are “stuffed pasta”, as provided for in the explanatory notes to heading 19.02. They are, in particular, pasta stuffed with shrimp. Both parties and the WCO classification opinion support the fact that wontons are “stuffed pasta”.⁵¹

[59] Accordingly, the Tribunal finds that a wonton is “stuffed pasta”, as noted by the analysis undertaken by the HS Committee in the classification opinion.

[60] Furthermore, the Tribunal finds that the goods in issue are not *de facto* a preparation for soup.

[61] In making this determination, the Tribunal considers the basic food composition of the goods in issue, rather than placing the greatest emphasis on the potential end use or marketing of the goods. An objective analysis of the goods in issue is consistent whether as noted on the labelling on the product⁵² or the analysis conducted by the expert witness: a greater proportion of the product consists of wontons, which are a stuffed pasta. The goods in issue are a combination of wontons and soup concentrate (or, as the WCO classification opinion refers to them, a preparation of pasta stuffed with shrimp, i.e. wontons, and soup concentrate).

The goods in issue are a combination of pasta and soup concentrate

[62] The CBSA submits that the goods in issue are a “combination of pasta and other ingredients” rather than a simple “preparation of pasta”. As such, the goods in issue cannot, as a whole, be classified in heading 19.02 pursuant to Rule 1.⁵³ The CBSA also submits that the WCO classification opinion did not have the benefit of the Tribunal’s decision in *Anderson Watts* to help define the term “preparations” and that the goods in issue are a combination rather than a preparation of pasta.⁵⁴ The CBSA nonetheless agrees that the goods should ultimately be classified in subheading 1902.20.⁵⁵

[63] As previously indicated, the Tribunal finds that the goods in issue are not blended together as per the Tribunal’s analysis in *Anderson Watts*. Rather, the shrimp wontons and soup concentrate are combined or intermingled and cannot easily be separated in their frozen form.

⁴⁹ Exhibit AP-2021-008-14.C at 3.

⁵⁰ See Exhibit AP-2021-008-12.B at para. 9; Exhibit AP-2021-008-19 at 7.

⁵¹ Exhibit AP-2021-008-05 at para. 10; Exhibit AP-2021-008-12.B at para. 2; Exhibit AP-2021-008-19 at 6.

⁵² Exhibit AP-2021-008-12.B at 29.

⁵³ Exhibit AP-2021-008-12.B at para. 39.

⁵⁴ *Ibid.* at para. 47.

⁵⁵ *Ibid.* at para. 46.

[64] The Tribunal also finds that the analysis of the WCO classification opinion is confusing when it amended its analysis to state that the goods can be classified using only rules 1 and 6. By confirming that only Rule 1 is required for the classification, the HS Committee is stating that the goods in issue can be classified at the heading level according to 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.

[65] The WCO classification opinion notes that the wontons and soup concentrate are “mixed” prior to being frozen and imported. It appears that this “mixing” of the two components changed the HS Committee’s analysis so that Rule 1 was sufficient to classify the goods in issue as a “preparation consisting of . . . wontons and soup concentrate”. However, if the preparation includes both wontons and soup concentrate, under the Tribunal’s analysis, part of the goods in issue should fall in heading 19.02 and another part of the goods should fall in heading 21.04. As two headings would be involved, the analysis requires the Tribunal to look at rules 2 and 3 to determine the proper classification.

The WCO classification opinion should be followed

[66] Charoen submits that there is sound reason to depart from the WCO classification opinion of subheading 1902.20,⁵⁶ because it is not “privy to the facts and arguments that were put forth to obtain this decision. [It does] not know if 21.04 was even considered”.⁵⁷ The Tribunal notes that the evidence on record confirms that the HS Committee did consider heading 21.04,⁵⁸ only to determine that the “wontons . . . constitute by far the most important part of the whole” and give the product its essential character because “the liquid in which the wontons are served can arguably be regarded merely as a medium that is designated to facilitate the final stage of the preparation of wontons before they can be eaten.”⁵⁹

[67] Charoen also argues that applying the WCO classification opinion would ignore explanatory note (b) to heading 19.02, which excludes “soups and broths and preparations therefor, containing pasta” as goods of heading 21.04.⁶⁰ As such, Charoen submits that the goods are most specifically provided for under Rule 1 and the exclusionary note to heading 19.02 gives sufficient reason to depart from the WCO classification opinion.⁶¹

[68] Having considered the HS Committee’s findings, and in line with the Tribunal’s finding in *Anderson Watts*, the Tribunal finds that the goods in issue do not fall in heading 21.04, because they do not meet the definition of a soup or a preparation of a soup. Even though a portion of the goods in issue consist of a soup concentrate, the goods are also composed of a second component, stuffed pasta, which, by volume, weight and character, imparts the essential character upon the whole goods in issue.

[69] While classification opinions and explanatory notes are not binding, the Federal Court of Appeal has stated that the Tribunal should apply them unless there is a sound reason to do

⁵⁶ Exhibit AP-2021-008-05 at para. 56.

⁵⁷ *Ibid.* at para. 57.

⁵⁸ See Exhibit AP-2021-008-19; Exhibit AP-2021-008-28.

⁵⁹ Exhibit AP-2021-008-19 at para. 16.

⁶⁰ Exhibit AP-2021-008-05 at para. 60.

⁶¹ *Ibid.* at paras. 62–63, citing *Best Buy*.

otherwise.⁶² The Federal Court of Appeal provided guidelines in *Suzuki* and *Best Buy* on those circumstances where it considered there to be “sound reason” to deviate from classification opinions and explanatory notes.

[70] In *Suzuki*, the Federal Court of Appeal found that “[e]xpert evidence can, in some circumstances, provide [a sound reason not to apply the Explanatory Notes]”.⁶³ In *CITT Best Buy* and *Mattel*, the Tribunal found that “the same principle applies to classification opinions”.⁶⁴

[71] In *CITT Best Buy*, the Tribunal considered that there was no sound reason to apply “classification opinions [that were not] persuasive as to the proper classification of the goods in issue”.⁶⁵ In that appeal, the Tribunal more specifically found that the goods covered by the classification opinions and the goods in issue had “different form and function” and that these distinctions were important enough to not apply the classification opinions.⁶⁶ The Federal Court of Appeal agreed.

[72] In light of these considerations, the Tribunal finds that the evidence on file does not provide any “sound reason” to justify diverging from the HS Committee’s ultimate classification of the goods in issue in subheading 1902.20. The goods in issue are identical to those covered by Product No. 1 of the WCO classification opinion, and Charoen provided no valid reason for the Tribunal to deviate from the WCO classification opinion.

The goods in issue are separate edible components packaged together

[73] The CBSA submits that neither heading 19.02 nor heading 21.04 provides for the goods as a whole, as the separate components are *prima facie* classifiable in separate headings: the stuffed pasta in heading 19.02 and the soup concentrate in heading 21.04.⁶⁷

[74] As such, the CBSA disagrees with the manner in which the HS Committee arrived at its conclusion, preferring its initial determination under Rule 3(b) than its ultimate determination under Rule 1. Even though the outcome is the same, the Tribunal favours a reasoning under Rule 3(b) as well. In the Tribunal’s view, classification based on Rule 1 is not optimal.⁶⁸

[75] Having decided to look beyond Rule 1, the Tribunal notes that Rule 2(a) does not assist in the classification of the goods in issue and therefore turns to Rule 2(b).⁶⁹ Rule 2(b) does not “widen the terms of a heading to cover goods which do not answer the description of the terms of a heading”.⁷⁰ Seeing as heading 19.02 and heading 21.04 do not “cover pasta or soup which are combinations and not mixtures [or preparations] of culinary ingredients”,⁷¹ the Tribunal pursues its analysis by looking

⁶² See *Suzuki* at paras. 13, 17; *Best Buy* at para. 4.

⁶³ *Suzuki* at paras. 13, 17.

⁶⁴ See *Mattel Canada Inc. v. President of the Canada Border Services Agency* (19 June 2019), AP-2018-005 (CITT) [*Mattel*] at para. 49; see also *Best Buy Canada Ltd. v. President of the Canada Border Services Agency* (4 July 2019), AP-2016-027R (CITT) [*CITT Best Buy*] at para. 13.

⁶⁵ *CITT Best Buy* at para. 13.

⁶⁶ *Ibid.* at para. 14.

⁶⁷ Exhibit AP-2021-008-12.B at para. 50.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at para. 51.

⁷⁰ *Ibid.* at paras. 52, 55, 54.

⁷¹ *Ibid.* at para. 54.

to Rule 3. Since headings 19.02 and 21.04 “each refer only to one part of the goods”, each heading is considered equally specific based on Rule 3(a) and the analysis must proceed to Rule 3(b).⁷²

[76] Section VI of the explanatory notes to Rule 3(b) indicates that this rule relates only to: “(i) Mixtures; (ii) Composite goods consisting of different materials; (iii) Composite goods consisting of different components; and (iv) Goods put up in sets for retail sales”. The goods in issue are put up for retail sale, as per the terms of Rule 3(b) for the following reasons: (1) they contain two different culinary ingredients, namely stuffed pasta (19.02) and soup concentrate (21.04); (2) the ingredients are used together in the preparation of a ready-to-eat dish; and (3) the goods are imported in a package containing six dishes ready for retail sale.⁷³

[77] The Tribunal considers the goods to consist of two components that are combined rather than blended together: a stuffed pasta of heading 19.02 and a soup concentrate of heading 21.04.

[78] In *Anderson Watts*, the Tribunal found that instant noodles should be classified as “other pasta” of heading 19.02 despite the presence of seasoning sachets used to make a so-called “soup base”. The Tribunal determined that the goods as a whole were *prima facie* only classifiable in heading 19.02 based on the application of rules 1 and 2(b).⁷⁴ Applying Rule 2(b), the Tribunal found that the scope of heading 19.02 included a good composed of pasta with another substance, namely seasoning sachets. The explanatory notes to Rule 2(b), however, indicate that Rule 2(b) cannot “widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading; [which] occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading.”⁷⁵

[79] In the present appeal, the goods in issue consist of two separate components, which are *prima facie* each classifiable in a different heading. This was not the case in *Anderson Watts*. The Tribunal must therefore also consider Rule 3, as per the explanatory notes to Rule 2(b).⁷⁶

The wontons give the goods in issue their essential character

[80] Explanatory note VIII to Rule 3(b) reads as follows:

The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

⁷² *Ibid.* at para. 57.

⁷³ *Ibid.* at paras. 64–65.

⁷⁴ *Anderson Watts* at para. 68.

⁷⁵ Explanatory note XII to Rule 2(b).

⁷⁶ Explanatory note XIII to Rule 2(b) reads as follows: “As a consequence of this Rule, mixtures and combinations of materials or substances, and goods consisting of more than one material or substance, if *prima facie* classifiable under two or more headings, must therefore be classified according to the principles of Rule 3.”

[81] Product labelling and literature, as well as expert evidence on file show that the goods contain 55 to 60 percent shrimp wontons and 40 to 55 percent soup concentrate⁷⁷ and 76 percent shrimp wonton and 24 percent soup concentrate⁷⁸, by weight respectively.

[82] Considering the HS Committee's finding, and based on the totality of evidence presented, the Tribunal finds that the soup concentrate component of the goods in issue is mainly a medium facilitating the preparation of the wontons prior to consumption.⁷⁹

[83] Applying Rule 3(b), the Tribunal finds that the wontons form a greater proportion of the goods, as highlighted by the evidence that the wontons are the main component of the goods by bulk, quantity, weight and value. This is confirmed by the product labelling and advertising⁸⁰ as well as the expert report.⁸¹ The fact that the wontons are presented, broth-soaking, in an almost ready-to-eat light-lunch or appetizer format is entirely secondary for the determination of essential character purposes.

[84] The Tribunal concludes, based on rules 1 and 3(b), that the essential character of the goods in issue is imparted by its wonton-stuffed pasta component and that the goods in issue are therefore classified in heading 19.02.

Classification at the subheading and tariff item levels

[85] The only appropriate subheading in heading 19.02 describing the goods in issue is subheading 1902.20.

[86] Given that the subheading 1902.20 is not subdivided, the goods are classified under tariff item No. 1902.20.00 as "stuffed pasta, whether or not cooked or otherwise prepared".

DECISION

[87] The appeal is dismissed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

⁷⁷ Exhibit AP-2021-008-12.B at paras. 8–9.

⁷⁸ Exhibit AP-2021-008-14.C at 3.

⁷⁹ Exhibit AP-2021-008-19 at para. 16.

⁸⁰ Exhibit AP-2021-008-12.B at 29.

⁸¹ Exhibit AP-2021-008-14.C at 3.