[2018] UKFTT 360 (TC)

TC06574

Appeal number: TC/2017/03509

CUSTOMS DUTY – WHETHER PROTEIN MIXES ARE WITHIN 2016 10 80 30 – NO –APPLICATION OF 2016 10 20 90 AND 1806 90 70 10 - APPEAL DISMISSED

FIRST-TIER TRIBUNAL
TAX CHAMBER

GLOBAL BY NATURE LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE IAN HYDE

Sitting in public in Birmingham on 19 June 2018

Andrew Lee for the Appellant

Isabel McArdle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal concerns the liability of the appellant to customs duty and import VAT on their importation of two types of protein shakes, being Sun Warrior Warrior Blend Vanilla Flavoured Powdered Drink Mix ("Warrior Vanilla") and Sun Warrior Classic Protein Chocolate flavoured protein ("Classic Chocolate").

2. The appellant argues that both were correctly classified on import under Code 2016 10 80 30. HMRC argue that the Warrior Vanilla should have been declared under 2016 10 20 90 and the Classic Chocolate under 1806 90 70 10 thus attracting in aggregate an additional £6,414.29 of import duty and £1,282.86 of import VAT.

The facts

3. The facts of this appeal, save for the composition and testing of the Warrior Vanilla mix, are not in dispute and the Tribunal's findings of fact are set out below.

4. The appellant purchases and imports the relevant products as part of a range of products from the manufacturers Sun Brothers in the United States of America and resells them in the UK along with other products sourced from the UK. The appellant typically places an order with Sun Brothers every 4 to 6 weeks for a range of protein products for the health and fitness market.

5. This appeal concerns two different products. Both are protein based powders intended to be mixed with any beverage to provide protein for fitness and building muscle mass.

6. The Warrior Vanilla ingredients are a blend of protein made from raw pea protein, raw cranberry protein, and hemp seed protein with vanilla extract, sea salt and sweeteners.

7. The Classic Chocolate ingredients are sprouted and fermented brown rice protein, cocoa, vanilla extract, flavours and sweeteners.

8. On 14 April 2016 the products were imported from the USA and declared using TARIC Code 2016 1080 30 and additional code 7005 and duty paid of £68.73 for the Warrior Vanilla and £91.64 for the Classic Chocolate. The goods were examined by UK Border Agency on 20 April 2016. During the examination sample 1kg tubs of Warrior Vanilla and Classic Chocolate were taken and sent to HMRC's independent testing laboratory, Campden BRI, for testing.

9. The samples were tested by Campden BRI (as described below) on 19 May 2016.

10. Warrior Vanilla was found to contain;

1.1% sucrose

4.1% starch/glucose

8.9% total fat of which less than 0.1% was milk fat

72.4% total protein

11. Classic Chocolate was found to contain;

3.1% sucrose

15.3% starch/glucose

1.5% total fat of which less than 0.1% was milk fat

67.6% total protein

12. On 31 May 2016 HMRC issued a non-live liability ruling in relation to the Classic Chocolate finding that it ought to have been declared using Code 1806 9070 10 7005 so that duty of £3,102.20 and additional import VAT was payable.

13. On 2 June 2016 HMRC issued a non-live liability ruling in relation to the Warrior Vanilla finding that it ought to have been declared using Code 2106 1020 90 so that duty of £3,472.46 and additional import VAT was payable.

14. On 28 July 2016 a different batch of Warrior Vanilla imported on 11 July 2016 was tested and found to contain starch/glucose at 5.5% and so HMRC confirmed in respect of that import the application of Code 2016 1080 30.

15. On 29 September 2016 the appellant made representations in response to HMRC's right to be heard letter of 1 September stating HMRC's intention to issue a post clearance duty demand note ("C18").

16. On 6 October 2016 the appellant made representations to HMRC.

17. On 6 October HMRC, not having received the representations made on the same date, issued a C18;

(1) Finding that the Classic Chocolate ought to have been declared using TARIC Code 1806 9070 10 7005 so that additional duty of £3,102.20 and additional import VAT was payable.

(2) Finding that the Warrior Vanilla ought to have been declared using TARIC Code 2106 1020 90 so that additional duty of £3,472.46 and additional import VAT was payable.

18. On 3 November 2016 the appellant requested a review of the disputed decision and, an extension of time having been agreed by the parties, HMRC upheld the original decision on 17 March 2017.

19. The appellant appealed on 26 April 2017 but HMRC do not object to the appellant's appeal being out of time.

20. In January 2017 HMRC requested a re-test of the April 2016 sample of Warrior Vanilla. The results for this re-test which was done in duplicate were starch/glucose levels of 4.6% and 4.8%.

21. On 22 November 2017 a separate import of Warrior Vanilla was imported and tested and found to have a starch/glucose level of 6.4%

22. Mrs Geary of Campden BRI gave evidence. Mrs Geary manages the Food Specification and Control Group ("the FSC Group") in Campden BRI and has done so for the last 20 years. Campden BRI carries out research and testing for the food and drink and allied industries. The work of the FSC Group includes the examination and analysis of formal samples submitted by HMRC and the Rural Payments Agency. The work involves the visual assessment, testing and reporting on goods in order to ensure the correct classification, specification and description of goods and sometimes whether or not they are counterfeit. They also advise on duty suspension and VAT liability for HMRC.

23. Mrs Geary has over 20 years experience testing formal samples for starch/glucose content and meeting the requirements set out by HMRC. I accept that Mrs Geary is an expert in this field, not only in food testing generally but as to the requirements need to be met for testing in the context of tariff classification. I found Mrs Geary to be a credible witness and I accept her evidence.

24. Mrs Geary outlined the process and nature of the test that was carried out on the products. Under the terms of Campden BRI's contract with HMRC the instructions for testing are set out in form C&E 140C which accompanies the sample. The testing of the products was carried out on 16 May 2016 by Megan Harris, a senior enforcement analyst in Mrs Geary's team.

25. When samples are received by Campden BRI a strict protocol and methodology derived from relevant independent accreditation, procedures set out in the HMRC contract with Campden BRI, and best practice developed by membership of the Customs Laboratories European Network applies to all stages from examination on arrival to storage and the testing methodology. Two 1kg tubs of the same product would have been blended to produce an even representative sample and some 0.5g used for testing. The testing - a form of High Performance Liquid Chromatography set out in Commission Regulations (EU) No 900/2008 and 118/2010 - would also have been carried out at the same time with samples of other products. Control samples are also tested at the same time and subjected to the same process. These are bought in products with known chemical contents which are used to check whether there has been an error in the testing process by showing up anomalous results.

26. The sample was tested for the four characteristics required by the declared code with the results as set out at paragraphs 10 and 11 above including the starch/glucose content which was found to be 4.1%.

27. Mrs Geary explained the relationship between starch, glucose and fructose. Starch is a polymer of the simple sugar glucose and so glucose can be expressed to be

starch. However, sucrose is a disaccharide which consists of the two simple sugars (monosaccharides) glucose and fructose. During processing sucrose can break down into glucose and fructose. So, when fructose and glucose are found in any analysis, the amount of glucose in excess of the fructose content is taken into account in the starch/glucose calculation and the sucrose is taken to be the remaining glucose and the fructose. This avoids double counting with glucose being counted twice in both the sucrose and the starch/glucose results.

28. Mrs Geary gave further information on the January 2017 re-test. This test was carried out in duplicate – that is to say two samples were tested at the same time – because, according to Mrs Geary, as a matter of policy and for quality control reasons some 10% of starch/glucose testing is carried out in duplicate. Where duplicate tests are carried out the acceptable difference for this method is 5% of the mean of the numbers. The results for this re-test were starch/glucose levels of 4.6% and 4.8%. The results were different but within the 5% of the mean of 4.7% and so within the acceptable tolerance.

Classification of goods

29. Customs duty is payable on the import of goods into the United Kingdom from outside the European Union in accordance with the Combined Nomenclature Regulation (Reg (EEC) No 2658/87) which provides for a systematic classification of goods.

30. Goods on importation are given a numerical or classification code of at least four digits, sometimes eight. The first two refer to the relevant chapter in the Combined Nomenclature, the next two refer to the heading and, if relevant, another four digits refer to the subheading.

31. There are six General Rules of Interpretation ("GIRs") set out in Annex 1 of the EC Council Regulation which have legal force in assisting in interpretation of the Combined Nomenclature and must be applied in numerical order so that if an earlier rule determines the point then the later rules are irrelevant. These are, so far as they are potentially relevant;

> Rule 1
>
> "The titles of sections, chapter and sub-chapter are provided for ease of reference only; for legal purposes classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions"
>
> Rule 3
>
> "(a) the heading which provides the most specific description shall be preferred to headings providing a more general description…
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up for retail sale, which cannot be classified by reference to 3(a) shall be classified as if they consisted of the

material or component which gives them their essential character in so far as this criterion is applicable

(c) when goods cannot be classified by reference to 3 (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration"

Rule 4

"Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin"

Rule 6

"For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheadings and any related subheading notes and *mutatis mutandis* to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of the rule the relative section and chapter notes also apply, unless the context otherwise requires"

32. In *Flir Systems AB v HMRC* [2009] EWHC 83 Henderson J confirmed:

"[14] It can be seen that the General Rules quoted above provide a hierarchical set of principles, and if the correct classification can be ascertained at a given stage it is unnecessary to proceed any further."

33. Judge Hetherington in the Upper Tribunal in *EP Barrus, Kubota (UK) Ltd v HMRC* [2013] UK UT 449 (TCC) at paragraph 41 in his decision helpfully summarised the approach to be taken in these disputes and specifically;

(1) "The decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters…

(2) The relevant criteria must be apparent from the external characteristics of the goods so that they can be easily appraised by the customs authorities…

(3) By the examination of the external characteristics the main purpose of the product must be inferred. It does not matter if there are other purposes for the product…

(4) The CNENs and HSENs should be used as an aid to interpretation as can specific classification regulations, but the latter only in relation to products identical to those specifically classified…

(5) Marketing materials and a product's targeted use are not to be taken into account…"

34. The Explanatory Notes to the Harmonised System drawn up by the World Customs Organisation ("HSENS") and the Explanatory Notes to the Combined Nomenclature ("CNENS") drawn up by the European Commission are valid aids to the construction of the Combined Nomenclature but do not have legal force but can be persuasive (*Develop Dr Eisbein GHbH & Co v Hauptzollant Stuffgart-West* (Case C-35/93)

The Warrior Vanilla issue

35. There are two headings relevant to the Warrior Vanilla appeal, 2016 10 80 30 and 2016 1020 90.

36. Heading 2016 1080 30 provides;

"21 Miscellaneous edible preparations

06 Food preparations not otherwise specified

1080 Other

30 Containing more than 1% milk fats, 1% other fats or more than 5% sugar"

37. Heading 2016 1020 90 provides;

"21 Miscellaneous edible preparations

06 Food preparations not otherwise specified

10 protein concentrates and textured protein substances

20 Containing no milk fats, sucrose, isoglucose or starch or containing by weight, less than 1.5% milkfat, 5% sucrose or isoglucose, 5% glucose or starch

90 other"

38. The issue for the Warrior Vanilla appeal is a narrow one and resolves around the Campden BRI finding that the sample contained 4.1% glucose/starch. If that is the right level of glucose/starch then both parties agree that HMRC is correct and the product should be treated as being within 2016 1020 90 being "less than…5% glucose or starch". However, if the correct amount is higher than 5% then the appellant is right and heading 2016 1080 30 applies, the product "Containing …more than 5% sugar".

The appellant's arguments on Warrior Vanilla

39. The appellant argues that the testing by Campden BRI cannot be relied on. When the product was re-tested in 2017 the outcome from two sample tests were 4.6% and 4.8%, significantly higher than the 4.1% result from the original test. This indicated

that the original test was unreliable. For example, if the 5% error rate were applied to the 4.8% test result, this would produce a starch/glucose content of 5.1%, above the threshold for heading 2016 1080 30.

40. The appellant has been importing this product for a number of years and along with the Natural and Chocolate variants (a different product from the Classic Chocolate that is also subject to this appeal), previous samples have been tested at above 5%. Thus in July 2016 and February 2017 HMRC accepted that, on the basis of similar testing showing glucose/starch content of 5.5% and 6.4% respectively, other imports of Warrior Vanilla was properly coded to 2016 1080 30. These imports were of the same product with the same ingredients.

41. The product is a natural product and there may have been some seasonal variation to account for the difference in starch/glucose content.

42. The appellant in correspondence advanced an argument that the amount of sucrose should be added to the starch/glucose level but did not pursue the argument in this appeal.

43. For these reasons the appellant argues that the test carried out in April 2016 and relied upon by HMRC is unreliable and the duty should be calculated in accordance with the pattern of testing, namely a starch/glucose content of over 5%.

HMRC's arguments on Warrior Vanilla

44. HMRC argues that the Campden BRI testing is the only way to determine an objective fact such as whether the sugar or glucose level of a product meets the percentage test for any given tariff classification. Campden BRI have carried out the test in accordance with the relevant standards and this should be determinative of the duty classification.

45. The other tests were carried out on different imports and can have no bearing on the classification of the importation tested in April 2016. Even if a product has the same packaging and ingredient list it may fall either side of an objective test such as the one being considered in this appeal.

46. It is not an answer to say that the goods are marketed under the same brand. Judge Hetherington in *EP Barrus* made it clear that marketing material and a product's intended use could not be taken into account save as evidence of objective characteristics such as evidence of the ingredients.

47. Finally, and in response to as an answer to the appellant's argument as to adding up the starch/glucose with the sucrose, HMRC relied on the evidence of Mrs Geary summarised at paragraph 28 above that this would be double counting.

The Classic Chocolate issue

48. HMRC disagrees with the appellant's declaration of the Classic Chocolate to heading 2016 10 80 30 not because of the starch/glucose content which was over 5%, but because the description in another part of the Nomenclature is a better description.

49. Heading 2016 1080 30 provides;

"21 Miscellaneous edible preparations

06 Food preparations not otherwise specified

1080 Other

30 Containing more than 1% milk fats, 1% other fats or more than 5% sugar"

50. Heading 1806 9070 10 provides;

"18 cocoa and cocoa preparations

06 Chocolate and other food preparations containing cocoa

90 70 preparations containing cocoa for making beverages

10 in immediate packings of a net content not exceeding 1kg"

51. The Notes to Chapter 18 provide;

"1. This chapter does not cover the preparations of heading 0403, 1901, 1904, 1905, 2105, 2202, 2208, 3003 or 3004.

2. Heading 1806 includes sugar confectionary containing cocoa and, subject to note 1 to this chapter, other food preparations containing cocoa"

The appellant's arguments on Classic Chocolate

52. The appellant argues that 2016 9070 10 is the most appropriate heading. The relevant test is as to determine the objective characteristics and properties and to fit those to the relevant heading in the Nomenclature.

53. The product brand is Sun Warrior, the variant is "Classic", "Protein" (ie protein powder from rice) and the flavour is chocolate. The range has three flavours, chocolate, vanilla and natural. The natural has only one ingredient, whole grain brown rice protein. The vanilla and chocolate flavours are essentially the same with some added flavour and sweetener.

54. The appellant argues that these products are essentially protein powders for dietary supplementation and cannot be described as anything else. The flavour of a protein powder is not a defining factor. These products are a rice preparation with a high protein content. A flavour should not change the classification.

55. In the Notes to Chapter 19 it states

> "the essential character of a food supplement is not only given by its ingredients, but also by its specific form and presentation revealing its function as a food supplement, once it determines the dosage, the way it is absorbed and the place where it is supposed to be active such food preparations are to be classified under heading 2106 in so far as they are not specified or included elsewhere".

56. For all these reasons the form and presentation of the Classic Chocolate is therefore as rice protein supplement and not a cocoa preparation, 1806 does not apply and so 2106 is the relevant heading

HMRC's arguments on Classic Chocolate

57. HMRC's argument is that applying GIR1 to the subheadings by the application of GIR6, the Classic Chocolate product should be allocated to the heading and sub heading description that best fits the product. Classic Chocolate fits the descriptions of "cocoa and cocoa preparation", "chocolate and other food preparations containing cocoa', "preparations containing cocoa for making beverages" and is sold in "immediate packings of a net content not exceeding 1kg".

58. In contrast, HMRC say, looking at heading 2016 1080 30, whilst Classic Chocolate might be described as "Miscellaneous edible preparations", it is not "Food preparations not otherwise specified". The product falls into 1806 and so 2016 being a default heading it cannot be said to be "…not otherwise specified".

59. The notes to Chapter 18 Notes clarify the interpretation of 1806 and indicate that cocoa includes chocolate and that the chocolate mix would fall into chapter 18 unless a Note 1 exclusion applies and the parties are agreed that there are no relevant exclusions.

60. The essential characteristics argument does not apply. That argument is in GIR 3(b) which, applying *Flir Systems*, only applies if the goods cannot be classified by under preceding rules. GIR1 applies and so GIR 3(b) is irrelevant. Even if the essential characteristics argument was engaged, 1806 would still be the appropriate heading as the chocolate content gives the product its essential character.

61. HMRC noted a number of Binding Tariff Informations produced in evidence. HMRC accepted that these were not binding but indicated that chocolate supplement mixes were classified under heading 1806.

62. Finally, the notes to Chapter 19 are not relevant to this appeal, principally because they are included in the 2018 version of the Nomenclature and not the 2016 version with which this appeal is concerned.

Decision on Warrior Vanilla

63. The appellant's appeal on this product is based on challenging the accuracy of the test carried out in May 2016 by focusing on the different outcome from the January 2017 re-test and, further, pointing to other tests of other imports of Warrior Vanilla which showed in excess of 5% starch/glucose.

64. I do not accept the appellant's argument that January 2017 re-tests of the April 2016 import sample indicate that the original May 2016 test was unreliable. I accept Mrs Geary's evidence that there can be a variation in the test results which accounts for that variation.

65. Further, I do not accept that the application of the 5% tolerance level to the highest result obtained in the January 2017 re-test for the April 2016 batch indicates that the content could have been 5% and so should be treated as such. This is entirely speculation and is based on the only permutation from the data that might produce a number over 5%. Other interpretations produce lower results. In any event as Mrs Geary explained the 5% variation is from the mean of the duplicate test results, here 4.7%. Increasing 4.7% by 5% produces 4.935%.

66. HMRC engaged a laboratory that carried out the tests which on the face of it and in accordance with the evidence of Mrs Geary (which I accept), were carried out in accordance with industry standards. The appellant has not criticised the methodology merely the differences between the original test, the re-tests and other tests on samples of different imports. Further, the appellant did not produce its own evidence to demonstrate that the May 2016 and the January 2017 re-tests were defective and that there was a different starch/glucose content for the April 2016 import that is the subject of this appeal.

67. The tariff classification of an importation of a product must be judged by the actual characteristics of the product as imported. I agree with HMRC that just because a product is imported on a number of occasions under the same name and packaging does not mean that each import must be treated the same for customs duty purposes. Each import must be considered at the time on objective criteria. If different results are reached for different imports of apparently the same product, then in the absence of evidence demonstrating that the test was defective or that a different testing obtained a different result, that is simply the outworking of the system. The alternative of a fixed treatment for similarly packaged goods irrespective of actual content would be unworkable.

Decision on Classic Chocolate

68. This issue on this product is whether the addition of the chocolate flavourings means that, unlike the vanilla and natural versions of the product, Classic Chocolate should be classified not under 2016 1080 30 but 1806 9070 10. The test, as described by Judge Hetherington in *EP Barrus*, is to consider the objective characteristics and properties as defined in the wording of the relevant heading of the Nomenclature and of the notes to the sections or chapters. Further, the relevant criteria must be apparent from the external characteristics of the goods so that they can be easily appraised by the customs authorities.

69. The relevant objective characteristics are that Classic Chocolate is a powdered protein mix sold in 1kg tubs with ingredients of rice protein, chocolate and sweetener and intended to be mixed with a suitable liquid in order to be drunk as a beverage for the purpose of consumption.

70. The relevant principles are set out in the GIRs and applying GIR1 (as expanded by GIR 6) and, if relevant, GIR3(a), I agree with HMRC that the product falls naturally within 1806 being "preparations containing cocoa for making beverages". Heading 2106 is a default category of "food preparations not otherwise specified…other".

71. The appellants argue that the objective characteristic is as a food supplement and that the other variants of the same product are accepted by HMRC as being within 2106. However, that is to ignore the presence of chocolate which brings it within 1806 and I cannot see how the chocolate can be ignored. The appellant points out categorisation under 1806 would mean that different flavoured versions of the same product would be classified differently. I accept that but the issue in this appeal is the classification of the Classic Chocolate version.

72. I do not accept that GIR 3(b) requiring classification in accordance with a good's "essential character" is relevant as I find that the issue is determined by GIR1 or GIR3(a).

73. I note the BTIs produced by HMRC but do not find them necessary in reaching this decision. Finally, I agree with HMRC that the notes to Chapter 19 in the 2018 version of the Nomenclature are not relevant to imports made in 2016.

74. For the reasons set out above, I therefore dismiss the appeal in respect of both the Warrior Vanilla and the Classic Chocolate products.

75. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

IAN HYDE
TRIBUNAL JUDGE

RELEASE DATE: 28 JUNE 2018