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Dear Sir:

RE: Internal Advice 247/80

This is in response to your request for internal advice as to the tariff classification of canned sweet pepper strips, a product of Israel. The request was initiated by (attorneys) on behalf of their client (corporation name).

FACTS:

The merchandise at issue consists of (1) green and (2) red and green peppers, cut into strips, each approximately 3/8 of an inch in width by 3 inches in length, packed in airtight tins in a solution consisting of citric acid, water, calcium salt, and acetic acid.

On entry (pending entries and/or protests have been suspended at various ports pending resolution of this request for internal advice) the merchandise was held classifiable under the provision for other vegetables (whether or not reduced in size), prepared or preserved otherwise than by packing in salt, in brine, or pickling and except dried, desiccated or dehydrated, as provided for in Schedule 1, Part 8, Subpart B, Tariff Schedules of the United States (TSUS), in item 141.88, TSUS (now 141.98 dutiable at the column 1 rate of duty of 17.5 percent ad valorem, eligible, since March 31, 1981, as a product of Israel, for duty-free treatment pursuant to the provisions of the Generalized System of Preferences (GSP).

It is the position of the importer that the merchandise is properly classifiable under the provision for other pickled vegetables (whether or not reduced in size) in item 141.77, TSUS, dutiable then and now at the reduced column 1 rate of duty of 12 percent ad valorem and entitled, as a product of Israel, to duty-free treatment, pursuant to the GSP.

ISSUE:

- 1.Has the Customs Service been arbitrary or capricious in defining the scope of the term "pickled" in Headnote 1(b), Schedule 1, Part 8, Subpart C, TSUS, and requiring the presence of 0.5 percent acetic acid on an equilibrated basis in products so classified?"
- 2.Does the mere presence of acetic acid, regardless of quantity, constitute pickling for tariff purposes?"
- 3.Do the Customs laboratory tests and methods applied in the analysis of the amount of acetic acid present in the product comport with accepted practice? Would ph level of the product constitute a better measure of the term "pickled"?"

LAW AND ANALYSIS:

Headnote 1(b), Schedule 1, part 8, Subpart C, TSUS, provides that "the term 'pickled' means prepared or preserve din vinegar or acetic acid whether or not packed in oil or containing sugar, salt, or spices."

Neither the Headnote nor court cases nor Headquarters rulings specify the amount of vinegar or acetic acid required to be present in this product at the time of entry to price it within the scope of this term.

In the absence of a specific legislative intent to the contrary, it is a well-settled principle of customs law that tariff terms are to be construed according to the common and commercial meanings thereof, which are presumed to be the same. Meyer & Lang v. United States, 6 Cust. Ct. Appls, 181, T.D. 35436 (1915); United States v. C.J. Tower & Sons, 48 CCPA 87, C.A.D. 770 (1961).

However, where it is shown that the common and commercial designations of particular products are different, absent a clear Congressional intent to the contrary, the commercial designation is controlling. Hummel Chemical Co. v. United States, 29 CCPA 178, C.A.D. 189 (1941); United States v. C.J. Tower & Sons, 44 CCPA 1, C.A.D. 626 (1956).

Based on information from the trade and general knowledge, it is generally accepted that canned fresh peppers and canned pickled peppers are separate and distinct articles of commerce with different organoleptic properties and different uses.

The pepper strips at issue are marketed as "sweet pepper strips" and sold primarily to delicatessens and pizza parlors for use in the preparation of various specialty food items.

The importer has stated, and the National Import Specialist relied thereon, in correspondence in the file, that it was the intent in formulating the preparation of this product by the addition of 0.5 percent acetic acid * in the packing or canning stage that, "...unlike other pickled items which seek a vinegary or acetic acid taste, the attempt here is to flavor the product to result in a natural pepper flavor. An adulterated flavor (i.e., pickled), would seriously limit the commercial application of this item" (emphasis added).

The National Import Specialist properly concluded from these facts that the addition of acetic acid in the amount of 0.5 percent * in the preparation of this product was intended not to result in a "pickled" product in the common and/or commercial understanding, but merely to meet the minimum standards, prescribed by Customs and previously communicated to the importer, for classification under this provision with the attendant duty-free status accorded under the GSP.

While it is true that an importer may fashion his merchandise in such a manner so that it may be entitled to the lowest possible duty rate upon its importation, the merchandise must in fact be that which is classifiable under the provision affording the sought-after result and the determination is to be made on the basis of the condition of the merchandise at the time of importation (emphasis provided). *United States v. Citroen*, 223 U.S. 407 (1911) and cases cited therein; *The Carrington Co. v. United States*, 61 CCPA 77, C.A.D. 1126 (1974).

Herein, by the initial Customs Laboratory analysis, the amount of acetic acid present in the equilibrated product subsequent to the time of entry was determined to be 0.16 and .27 percent, which was believed to obviously result from the naturally occurring equilibration of the peppers and the packing solution between the time of the introduction of the solution during the canning process and its entry and subsequent laboratory testing.

The use by the Congress of the term "pickled" in the above-cited Headnote 1(b), without specific delineation of the amount of the named pickling media required to be present in the product when imported, cannot be interpreted to mean that their presence in any amount, no matter how minimal, requires a determination that the product falls within the scope of that term for tariff classification purposes.

As indicated above, in the absence of specific legislative intent to the contrary, common and commercial meanings apply in construing tariff terminology.

*During the conference, referred to infra, the reference to 0.5 percent acetic acid added was intended to indicate the desired level after equilibration we now have an affidavit from the producer/exporter attesting to the addition of approximately 1 percent acetic acid to the brine during the canning stage at all times involved and production quality control records purporting to verify this statement.

"Pickled" is defined as:

1.... a brine, acid, sugar or spice solution used to preserve or flavor food ... cured and unfermented pickles are prepared directly by heating the raw food in vinegar or other organic acid solutions, with salt, sugar, and spices in order to impart certain characteristics to the food [emphasis provided]. *Encyclopedia Americana* (1980); and

2.a solution or bath for preserving ... as ... a brine or vinegar solution in which foods are preserved [emphasis provided]." *Websters Seventh New Collegiate Dictionary* (1963).

Technical and trade sources consulted indicate that there are no trade standards applicable for determining when a product is pickled. The United States Food and Drug Administration (FDA) regards a canned acidified product with a finished equilibrium pH of 4.6 or less to be sufficiently acidified to be safe for human consumption and may be called or purport to be called "pickled." However, these guidelines relate primarily to canning procedures and do not consider the taste or flavor of the food product involved. Neither are these guidelines binding on the Customs Service in defining or applying the tariff provisions for classification purposes. Additionally, the referenced FDA guidelines do not specify the concentration of acetic acid required in such a "pickled" product. We would also note at this point, with respect to the importer's claim that the definition of "pickled" for purposes of the Headnote and tariff classification should incorporate this FDA guideline and consider the pH level rather than the percentage of acetic acid, that the pH level of any particular product could be manipulated by the inclusion of any of several acids, including citric or lactic for example, not enumerated in the Headnote and, therefor, not applicable to the determination of the tariff classification of "pickled" products.

In this respect, we also note that citric acid is the principle acidulent in the product at issue.

Further, although again not binding on the determination of the proper classification of such products, the United States Department of Agriculture, in establishing guidelines for Grade A fresh-packed cucumber pickles, indicates a minimum of 5 grams of acetic acid per 100 milliliters, or 0.5 percent acetic acid, for "good flavor."

Some technical sources consulted opined that acetic acid in concentrations as low as .35 percent in an equilibrated product would impart a slightly sour taste to the product; however, the consensus of such sources agreed that 0.5 percent or 5 grain vinegar as acetic acid equilibrated in the product is the minimum necessary to impart a "pickled" flavor to a product. We are convinced that Congress intended to incorporate the common understanding of the term "pickled" in providing this provision, requiring that organoleptic considerations be taken into account, as well as the medium by which attained.

In *Runebey-Cheney v. United States*, 61 CCPA 10, C.A.D. 1110 (1973), the Court stated, at p. 14, that [i]t is a familiar rule

that a thing may be within the letter of the statute and yet not within ... its spirit, nor within the intention of its makers." Further, in *Varsity Watch Co. v. United States*, 34 CCPA 155, C.A.D. 359 (1947), at p. 163, also cited (as C.A.D. 259 [sic]) by the inquirer, the court held that "an ingredient ... may be ignored for classification purposes [not necessarily because of the quantity present], depending upon many different circumstances, including the purpose which Congress sought to bring about by the language used and whether or not the amount used has really changed or affected the nature of the article and ... its saleability."

As indicated above, we believe Congress intended, by use of the term "pickled," more than merely prepared or preserved with a minimal amount of acetic acid. The amount of acetic acid used must result in a product with organoleptic properties commonly associated with "pickled" products. To hold otherwise would negate the rationale of having included an *eo nomine* provision for pickled vegetables separate and apart from otherwise prepared or preserved vegetables. The laboratory analysis of the product reasonably led the National Import Specialist to conclude that the amount of acetic acid present therein was so minimal in quantity as to be undistinguishable in the equilibrated product and, while it may be considered to minimally aid in (1) increasing the acidity of the pack; and (2) the retention of firmness of the pepper strips, these properties would have resulted from the presence of only the citric acid and calcium salt, respectively.

Accordingly, the presence of acetic acid in minimal amounts (less than 0.5 percent) in this product, was believed to have resulted in no apparent appreciable organoleptic properties attributable thereto, was considered *de minimis*, and was disregarded in the determination of its classification.

Insofar as the issue of the acceptability of the laboratory procedures used in determining the percentage of acetic acid present, the Customs Laboratory uses the Official Methods of Analysis of Analytical Chemists (12th ed., 1975 and 13th ed., 1980) and, specifically, the standard tests designated as items 30.071, 30.072, and 30.073. These accepted standards are conducted on equilibrated samples, which, with respect to the product at issue, will occur within 1 to 2 weeks after canning. The concerned National Import Specialist believed that there was little room for doubt that, considering the time lapse from final canning to actual testing, including shipping and storage times on both ends of the pipeline, the product was fully equilibrated.

However, as a result of a conference on September 29, 1982, at Headquarters between the importer and his attorney, together with a principal of the exporter, the case handler, and the General Classification Branch Chief, held to review a tentative determination denying the importer's position and affirming the position of the concerned National Import Specialist, certain information (including a Customs Laboratory report contradicting those relied on originally and statements regarding the processing procedures involved) became available for the first time and raised substantial questions of fact bearing on the classification issues involved.

As a result, requests were sent to the field offices concerned where entries of the subject merchandise remained unliquidated to ascertain whether samples and/or laboratory reports were available and soliciting comments. One sample and two laboratory reports were received, both of which later supported the original report relied on by the National Import Specialist in denying the claimed classification.

The case handler consulted with Technical Services Division personnel regarding the samples available (one received from the field and two received from the importer, together with two domestically produced similar products for comparison) and requested analysis of the acetic acid content thereof, specifying not only the level in the liquid brine solution, but also the amount, if any, which had been absorbed into the cellular material of the peppers themselves during the equilibration process.

The resulting analysis clearly shows that the levels of acetic acid in the brine solution (i.e., 0.148 to 0.188 percent) are consistent with the levels found present in the previous laboratory reports; however, the analysis also indicates an absorption into the peppers' tissue of from 1.521 to 2.365 times the amount of acetic acid present in the brine solution. Since acetic acid is not naturally present in the peppers, this level can only be explained as having occurred during the equilibration process. The total level of acetic acid determined present in the involved samples tested ranged from 0.472 to 0.498 percent. Considering the volatility of acetic acid, even under laboratory conditions, we have been advised that totally accurate measurement is a virtual impossibility. The results of the analysis were subsequently corroborated by double-blind organoleptic testing; the panel involved uniformly finding the merchandise to possess a clearly pickled taste.

Accordingly, considering the total amount of acetic acid analytically determined to be present in the product at issue, the organoleptic test results, and the affidavit submitted by the producer/exporter attesting to the fact that an acetic acid level of approximately 1 percent was introduced into the brine of all such merchandise produced for this importer, Headquarters now believes that the products at issue meet the definition requirements of the term "pickled" for tariff classification purposes and are properly classifiable, as entered, in item 141.77, TSUS, entitled to duty-free entry as a product of Israel, pursuant to the GSP.

HOLDING:

1. Based on trade, technical, and common understanding of the term "pickled," the obvious intent of Congress in its use thereof was to require more than a mere minimal amount of acetic acid in order to result in a "pickled" product for tariff purposes. The requirement of Customs that such a product contain a minimum of 0.5 percent acetic acid (subject to allowable tolerances) in the equilibrated product comports with these bases of well-settled principles of Customs law interpreting the scope of various terms and is not arbitrary or capricious;

2. Use of Ph level is inappropriate to determine whether or not a product is "pickled" for tariff purposes, since the scope of that term is specifically limited to, among other substances, acetic acid and Ph level can be manipulated by the addition of any of a number of acids not provided for as pickling media; however, analysis must include testing for absorption into the product itself, as well as the brine, in situations where the acetic acid levels of the brine are not affirmatively determinative. A tolerance of 10 percent, to account for the volatility losses, is acceptable.

3. The testing procedure used by the Customs Laboratory to determine the presence and amount of acetic acid in the product are standards promulgated by a recognized professional organization and no evidence has been presented to rebut the presumption of their validity. Accordingly, their use is affirmed; however, as stated in (2) above, consideration must be given where indicated to total contents and not merely levels in the brine; and

4. Canned sweep pepper strips consisting of 91) green and (2) red and green pepper strips, in a solution of citric acid, acetic acid, and calcium salt, the acetic acid constituting less than 0.5 percent (5 grams per 100 milliliters) on an equilibrated basis, based on analysis of both the brine and the peppers, are not considered "pickled" within the scope of that term as set forth in Headnote 1(b), Schedule 1, Part 8, Subpart C, TSUS, and are properly classifiable under the provision for other vegetables (whether or not reduced in size), in brine, or by pickling and except dried, desiccated or dehydrated, at the time of entry in item 141.88, TSUS, and on or before May 31, 1981, in item 141.98, TSUS. However, the instant merchandise, having in excess of this amount, considering both the brine and the peppers, adjusted for volatility, is property identifiable, as entered, under the provision for other pickled vegetables in item 141.77, TSUS.

Sincerely,

Harvey B. Fox
Director, Classification and Value Division

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