

Date: 20091216

Docket: A-201-09

Citation: 2009 FCA 374

**CORAM: NOËL J.A.
PELLETIER J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

NORTH AMERICAN TEA & COFFEE INC.

Appellant

and

**PRESIDENT OF THE CANADA BORDER
SERVICES AGENCY**

Respondent

Heard at Vancouver, British Columbia, on December 16, 2009.

Judgment delivered from the Bench at Vancouver, British Columbia, on December 16, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on December 16, 2009)

NOËL J.A.

[1] This is an appeal from a decision of the Canadian International Trade Tribunal (the Tribunal) dated February 11, 2009 classifying preparations containing *inter alia* pickled cucumbers together with either pickled dill weed and/or pickled garlic (the goods) as “cucumbers and gherkins” under subheading 2001.10 of the *Schedule to the Customs Tariff Act*, S.C. 1997, c. 36 (the *Customs Tariff*). The appellant contends that the goods in issue should be classified as “other” under tariff subheading 2001.90.

[2] The appellant's contention is based on the fact that garlic or dill is added to the cucumber preparation. According to the appellant, these additional ingredients transform the goods into other vegetables preserved by vinegar or acetic acid (reasons, para. 24).

[3] Relying on the relevant *Explanatory Notes* (Explanatory Notes to the Harmonized Commodity Description and Coding System, World Customs Organization, 3d ed., Brussels, 2002) according to which goods under subheading 2001.10 may contain "spices" or "other additives", the Tribunal found that (reasons, para. 38):

. . . garlic and dillweed are in the nature of spices, or other additives, which are present for their flavouring properties.

[4] Giving effect to this reasoning, the Tribunal went on to conclude that the dillweed or garlic does not transform the goods in issue into something other than pickled cucumbers.

[5] Relying on the terms of heading 20.01, the appellant maintains that the dillweed or garlic, being "vegetables or other parts of plants" within the meaning of this heading, cannot be viewed as spices or additives for purposes of the *Explanatory Notes*. However, the Tribunal found that when these ingredients are used as spices or additives, they should be treated as such.

[6] In order to succeed, it was incumbent upon the appellant to show that this decision was unreasonable in that it fell outside the range of possible, acceptable outcomes which are defensible

in respect of the facts and the relevant provisions of the *Customs Tariff* (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 25).

[7] Despite Ms. Cook's able argument, the appellant has fallen short of making this demonstration.

[8] The appeal will be dismissed with costs.

"Marc Noël"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-201-09

STYLE OF CAUSE: North American Tea & Coffee Inc.
and President of the Canada Border
Services Agency

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: December 16, 2009

REASONS FOR JUDGMENT OF THE COURT BY: (NOËL, PELLETIER, LAYDEN-
STEVENSON J.J.A.)

DELIVERED FROM THE BENCH BY: NOËL J.A.

APPEARANCES:

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Lorne Ptack FOR THE RESPONDENT

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