

KWE CANADA COMPLIANCE

MEMO 2010 . XI

1. **AUTOMATED IMPORT REFERENCE SYSTEM (AIRS) VERIFICATION SERVICE (AVS):** KWE (CANADA) INC has been granted access to the AVS by the Canadian Food Inspection Agency (CFIA). The AVS provides detailed feedback to the customs broker showing almost instantly if there are any AIRS-coding irregularities in a transmission, how many there are, where within the entry declaration they may be and what the nature of each irregularity is.

As can be imagined the AVS is a very great help to the broker who may be transmitting a declaration with many many different food products on it. Because, *without access to the AVS*, the CFIA if it discovers *any* AIRS-coding irregularities in a declaration merely rejects the whole entry as being erroneously AIRS-coded, without indicating what exactly is wrong or with which commodity or commodities. And if the CFIA rejects the whole entry, it does not even indicate how many coding irregularities it found.

With the AVS tool any AIRS-coding error that may have occurred can be found in no time flat, and can as easily then be corrected. This represents a significant efficiency for KWE, and a valuable modality for the importer to avoid costly delays in obtaining foods and foodstuffs and other CFIA-type goods.

KWE will have the AVS interface available sometime early in the new year.

2. **SECONDARY SUFFERANCE WAREHOUSES & FORM A8A:** Note should be made that even when goods will eventually move from a primary to a secondary sufferance warehouse, the CBSA will not accept a cargo control document Form A8A showing a secondary sufferance warehouse as a First-Point-of-Arrival (FPOA) destination or location-of-goods.

3. **US CARBORUNDUM RULES & CLASSIFICATION "AT TIME OF ENTRY".** A fundamental rule of classification is that it must be undertaken with respect to imported products *as they are at time of entry*. Leaving aside the special case of end-use provisions and tariff codes that in very specific instances provide for goods which are imported for a particular use in Canada, this rule applies generally, and is prime. To classify a product under the Harmonized System Nomenclature (known as the "HS") properly, that is, the physical characteristics of that product, *as they were at the moment it crossed the border*, must be known; and *that* product is the product that must be classified—not as it may become at some later date.

However this rule is so fundamental that sometimes it is misconstrued to mean that *only* the physical characteristics of a thing can or should be taken into account in arriving at a persuasive classification.

This could not be more wrong. The language of a statute must be construed with its broad context and remedial purpose in mind. Imported products are classified with respect to the "List of Tariff Provisions", which is part of the *Customs Tariff*. The *Customs Tariff* is commercial legislation. Its List of Tariff Provisions must be so construed—as being concerned with commerce, not science or technology. And its (main) remedial purpose is to distinguish articles of commerce one from another, and afford calibrated and varied protection to Canadian industry from imports when, and to the extent only, such protection is in the interest of Canada and Canadians.

So although in order to classify a product it is of the first importance to know its physical characteristics as they are at time of entry, often a truly persuasive classification may only be arrived at if other factors, as well, are considered. It is often important, for example, to consider the design of a fully manufactured article in order to discover a commercial purpose. It may be important to know what it is called within the industry; how it is marketed; how it will be used by the ultimate purchaser; how it is advertised and sold; how it is referred to on invoicing; and with which domestically available product-types it can be expected to compete in the Canadian marketplace.

These other considerations were employed by the Court of International Trade (CIT) in the U.S. to define the scope of a class or kind of goods in a safeguard case [see *United States v. Carborundum Co.*, 63 CCPA 98, C.A.D. 1172, 536 F. 2nd 373 (1976), *certiorari* denied 429 U.S. 979]. But of course these commercial considerations were for almost a century arrows in the quiver of our Tariff Board (as it was before it was succeeded by the CITT, the Canadian International Trade Tribunal) in deciding classification cases. Typically the Tariff Board in its written decision would first set out the physical characteristics of the product whose classification was in issue. Then it would proceed to remind itself for the record that the *Customs Tariff* was commercial legislation. And then it would acknowledge, again for the record, that how a fully-manufactured product is sold, invoiced, advertised and marketed, how it is referred to between the purchaser and the vendor, and with what type of domestically available products it would be expected to compete, were relevant considerations in its classification.

In 1988, after the coming-into-force of the HS-based Tariff with its accompanying Explanatory Notes, both the Canada Border Services Agency (CBSA) and the CITT began to take a more tariff-internal and technological approach to construing provisions in the Tariff. This was done—and is done currently—sometimes at the expense of the older approach of including (let's call them) Carborundum commercial considerations in arriving at a classification interpretation.

S.C. Johnson & Son, Ltd. v. President of the Canada Border Services Agency (AP-2005-015), at the CITT, is a case in point. The article to be classified was a "plug-in" room deodorizer, imported as a single unit comprising an electric plug-in component and a deodorizing component. The CITT found that this product should be classified as an electro-thermic appliance. This was a wrong decision, on the merits and on its own terms; but more importantly for our purposes here it was wrong in utterly failing to even consider the commercial purpose of the imported article, *which is to compete for sales in Canada with other room deodorizers that are domestically available*. In enacting the *Customs Tariff* List of Tariff Provisions, Parliament saw fit to distinguish as commercial products "prepared room deodorizers" at the "highest" level within the provisions of the Tariff, and to calibrate a rate of duty on them which it felt would afford protection to domestic industry. But what was the point, if the S.C. Johnson Plug-In Deodorizers are determined to be dutiable at the rate for "[o]ther electro-thermic appliances" by the CITT?

The product is bought and sold and marketed by S.C. Johnson as a room deodorizer. It has no other use. It will compete in the Canadian marketplace with other room deodorizers, not with electro-thermic appliances. Sales of it will *displace* sales of other room deodorizers in the Canadian marketplace, not sales of (say) electro-thermic appliances such as toasters or hair dryers. Why would the CITT not note these important commercial facts, and allow them to guide its decision?

Because, as noted, the CBSA and the CITT have increasingly become prey to not seeing the commercial, practical forest for the technological and academic trees. In this case the CITT was led astray into thinking the S.C. Johnson Plug-In Deodorizer was a "composite" article within the meaning of General Interpretive Rule (GIR) # 3. GIR 3 (as concerns us here) requires that in order to arrive at a classification of composite goods a decision must be made first as to which of the two components gives the Plug-In Deodorizer its "essential character", and then to classify the plug-in deodorizer as if it were comprised *only* of that component.

But the General Interpretive Rules are hierarchically arranged; and so employing GIR # 3 is possible only (to speak to the case at hand) if classification cannot be achieved pursuant to GIR # 1. GIR # 1 requires that classification (again, to speak to the case at hand) be determined according to the terms of the headings; and there is a heading in the *Customs Tariff* List of Tariff Provisions that provides specifically and precisely for "prepared room deodorizers". So the CITT should have determined the plug-in deodorizers properly classified as prepared room deodorizers pursuant to GIR 1, and determined in its reasoning, *obiter dicta*, that GIR 3 was irrelevant with respect to their classification.

To determine the plug-in deodorizers properly classified as "[o]ther electro-thermic appliances", as the CITT did, is to miss the *commercial* point of the *Customs Tariff* altogether. Commercial considerations like those enunciated under the US Carborundum rules should be taken into account for all cases of fully-manufactured goods; and the way a fully-manufactured product is bought and sold, how it is invoiced and referred to in the trade, and with what products it is expected to compete in the marketplace, are factors which, if not dispositive of classification, should not be cavalierly ignored in arriving at a classification.