



**TC05282**

**Appeal number: TC/2015/04444**

*Customs duty – tariff classification – Swiss Caps case – food supplements – oils encased in a capsule – classification prior to 12 August 2013 – heading 2106 – appeal refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SAVANT DISTRIBUTION LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE SCOTT  
PATRICIA GORDON**

**Sitting in public at Tribunal Hearing Centre, 2<sup>nd</sup> Floor, Royal Courts of Justice,  
Chichester Street, Belfast on Wednesday 20 July 2016**

**Ciaran Hurley of CKH Fiscal Services, for the Appellant**

**Mark Fell of Counsel, instructed by the General Counsel and Solicitor to HM  
Revenue and Customs, for the Respondents**

## DECISION

### Background

1. The appellant has challenged a C18 Post Clearance Demand Note for customs  
5 duty on goods imported from Canada in the period 2 April 2012 to 11 August 2013. The appellant had imported Udo's Choice Ultimate Oil Blend Capsules and Flax Omega Capsules ("the capsules"). The former is a blend of oils contained in a gelatin capsule and the latter is flax oil in a gelatin capsule. Both are described on their packaging as food supplements and the advertising states that they provide health  
10 benefits.
2. When declared to customs in the European Community, goods must generally be classified according to the Combined Nomenclature ("CN"), as established by Council Regulation (EEC) Number 2658/87.
3. The appellant argues that in that period those capsules were properly classified in  
15 headings 1517 and 1515 respectively of Chapter 15, Annex 1 of the CN. HMRC argue that the products should be classified in heading 2106 of Chapter 21 which carries a higher duty rate.
4. The significance of the date 11 August 2013, since the products continued to be  
20 imported after that date, is that Commission Implementing Regulation 698/2013 ("the Implementing Regulation") inserted a new Additional Note into Chapter 21 of the CN with effect from 12 August 2013.
5. It is a matter of agreement between the parties that from that date the capsules fell to be categorised under heading 2106.
6. The appellant offered no evidence but simply legal argument.
7. HMRC had lodged in process the witness statement with relevant exhibits of  
25 Officer Emma Brown but since she was on maternity leave the witness statement with exhibits of the replacement officer, Officer Haskew had later been lodged in process. In the event we did not hear evidence from Officer Haskew since the factual content of his evidence was not in dispute. It was his opinion on the application of the law  
30 that was disputed. At the outset of the hearing I drew the parties attention to the fact that opinion evidence of a witness who was not an expert witness would automatically be excluded. Officer Haskew, although expert in his field, was not an expert witness. He gave no oral evidence.

### The appellant's arguments

8. In essence the appellant's argument was that the decision of the CJEU in joined  
35 cases C-410/08 to C-412/08, *Swiss Caps AG v Hauptzollamt Singen* ("Swiss Caps") was specific and related to three products only, namely fish oil, wheat-germ oil and black cumin oil in capsule form.

9. The first and the third of those products contained oil to which vitamins had been added. The appellant argued that it was a crucial distinguishing factor as nothing had been added to the capsules.

10. It was also argued that because the Implementing Regulation was described as “Implementing” that meant that it was intended to extend the *Swiss Caps* judgment to other encapsulated food supplements which were not previously included.

11. It was argued that the encapsulation did not determine the way in which the capsules are absorbed and the place where they are supposed to become active, on the basis that the gelatin capsule did not affect the method of absorption.

12. The appellant stated that in the period prior to the implementation of the Implementing Regulation on 12 August 2013, the UDO’s Choice Ultimate Oil Blend capsules, being an edible mixture of vegetable oils, conformed to the specific wording of heading 1517 and that the Flax Omega Capsules, being a food supplement containing 100% flax seed oil, conformed to the specific wording of heading 1515. They could not fall into the category of “miscellaneous edible preparations” in Chapter 21.

13. Lastly, the appellant argued that the capsules were excluded from classification in heading 2106 prior to 12 August 2013 because they did not contain “added vitamins and sometimes minute quantities of iron compounds”. The rationale advanced for that was that until that date headings 1517 and 1515 respectively were more specific than heading 2106 as there was only one Explanatory Note that addressed types of food supplements such as the capsules and it included that wording. The appellant’s Skeleton Argument referred to that Explanatory Note as being a CNEN (Combined Nomenclature Explanatory Note) whereas it is in fact an HSEN (Harmonised System Explanatory Note). That HSEN was referenced and quoted in paragraph 8 in *Swiss Caps*.

### **HMRC’s argument**

14. HMRC argue quite simply that *Swiss Caps* clarified and established the law in regard to food supplements contained in a capsule to the effect that heading 2016 in Chapter 21 applied to them. It was not restricted to the three products in those cases. The Implementing Regulation confirmed the broad application of the *Swiss Caps* ruling and made explicit that heading 2106 was appropriate for the same product whether presented in tablet, pastille, pill or capsule format. The description in Chapter 21 is more specific than the description in Chapter 15.

### **Discussion**

15. Firstly, in regard to the appellant’s argument about the addition, or not, of vitamins, one of the products in *Swiss Caps* had no added vitamins – so it cannot be a crucial distinguishing factor. Secondly, at paragraph 28 in *Swiss Caps*, the Court makes it clear that whilst Explanatory Notes are an important aid to the interpretation of the scope of the various tariff headings, they do not have legally binding force. We agree with HMRC that those Notes are not binding or exhaustive and simply give examples of various items that might be included in a category. Lastly the Court had

looked at the Explanatory Note and decided that, whether or not vitamins were added, heading 2106 was more specific.

16. Annex 1 of EC Council Regulation 2658/87 contains the General Rules for the Interpretation of the CN. Those are known as the GRIs”. GRI 1 reads:

5           “Classification is determined according to the terms of the headings and any relative section or chapter notes, and provided that such headings or notes do not require otherwise according to GRIs 3 to 6”.

GRI 3(a) reads:

10           “When goods are *prima facie* classifiable under two or more headings, the more specific heading is preferred”.

17. It was not in dispute that products are classified in accordance with the GRIs by reference to their objective characteristics and properties and that Article 9(1)(a) of Council Regulation (EEC) No.2658/87 enables the European Commission to adopt regulations regarding the classification of goods in the CN.

15   18. Chapter 15 is the designated Chapter in the CN for “Animal or Vegetable Fats and Oils and ...”. The heading at 1515 is for “Other fixed vegetable fats and oils...other than fats of headings 1507 to 1514...”. The heading at 1517 is for “... edible mixtures or preparations of animal or vegetable fats or oils ...other than...of heading 1516”.

20   19. Chapter 21 is the designated chapter for “Miscellaneous Edible Preparations” and the heading at 2106 is for “Food preparations not elsewhere specified or included”.

#### *The Swiss Caps case*

25   20. The first and most obvious point to make is that the Court (Fifth Chamber) does not act as an appeal court, nor does it make any decision on the facts of a particular case. Its function is to interpret the relevant provision of Community law and having given judgment on a reference it is for the referring Tribunal or Court to decide the case in light of that judgment. A reference is only made where the point in issue is not clear.

30   21. Nine questions had been referred to the Court in regard to the three products but the Court decided that, since all three products had similar characteristics and all of the questions essentially sought to determine under which heading of the CN the products should be classified, a single answer should be given.

22. Those characteristics were described at paragraph 24 as:

35           “...namely that they are, in the view of the national court, edible preparations intended for use as supplements and are composed principally of vegetable or animal oil to which a certain quantity of vitamins has been added. These preparations are contained in casings composed principally of gelatin and presented in capsule form.”

23. In fact one of the three products did not include added vitamins. As is made clear at paragraph 26 the national court was unconvinced that the products should be classified under 1515 and 1517 but should rather be classified under 2106 of the CN.

5 24. The Court determined that the casing which contained the oils was not a “packing material” within the meaning of GRI 5.

25. The Court went on to state at paragraph 32:

10 “That form of presentation of the oils at issue in the main proceedings is a decisive factor which reveals their function as a food supplement, since it determines the dosage of the edible preparations, the way in which they are absorbed and the place where they are supposed to become active. Consequently the casing is a factor which, together with their content, determines the use and character of the goods at issue in the respective main proceeding”.

The capsule itself was decisive because at paragraph 36 the Court stated:

15 “However, on the one hand, the fact that the raw materials of which the edible preparations at issue in the main proceedings are composed, namely animal and vegetable oils, are partly covered by headings 1515 and 1517 of the CN does not preclude their classification under heading 2106 inasmuch as, as has been pointed out in paragraph 32 of the present judgment, their packaging in a capsule determines both their content and their objective characteristics and properties. Headings 1515 and 1517 CN, however, do not allow account to be taken of that characteristic of the goods.”

20 26. The decision of the Court was that heading 2106 of the CN was more specific than headings 1515 and 1517 and all three oil capsules, whether or not containing vitamins, came under heading 2106 of the CN. The crucial point is that Chapter 15 does not allow account to be taken of the packaging which determines the characteristics of encapsulated food supplements.

25 27. We have no difficulty in reading that decision as determining that encapsulated food supplement products comprised of oils, of whatever description, should be classified under heading 2106.

30 28. We are supported in that view by the very clear terms of the Implementing Regulation which subsequently amended Chapter 21 and it is appropriate to set out in full the wording, which reads as follows:-

“THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

35 Having regard to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, and in particular Article 9(1)(a) thereof,

Whereas:

(1) Regulation (EEC) No 2658/87 established a nomenclature of goods, hereinafter referred to as the Combined Nomenclature, which is set out in Annex I to this Regulation.

(2) The judgment of the Court of Justice of 17 December 2009 in Joined Cases C-410/08 to C-412/08 ('Swiss Caps') presented a new paradigm for the classification of 'food supplements'.

5 (3) On the one hand, paragraph 29 of this judgment states that '*the intended use of an article may constitute an objective criterion for the classification if it is inherent to the article*'. On the other hand, paragraph 32 states that the presentation in capsules is '*a decisive factor which reveals their function as a food supplement, since it determines the dosage of the edible preparations, the way in which they are absorbed and the place where they are supposed to become active*'.

10 (4) Consequently, pursuant to the Court's ruling, products that are used as food supplements to maintain general health or well-being and that are presented in capsules are classified under heading 2106 as '*food preparations not elsewhere specified or included*'.

15 (5) However, tariff classification problems could occur in case of the classification of products with the same composition, the same purpose, containing a measured dose, but presented in tablets, pastilles or pills.

20 (6) Therefore, in order to ensure a consistent interpretation of the Combined Nomenclature, the classification of food preparations presented in measured doses, such as capsules, tablets, pastilles and pills and which are intended for use as food supplements, should take into account the criteria developed in Joined Cases C-410/08 to C-412/08 ('Swiss Caps').

(7) Consequently, a new Additional Note should be inserted in Chapter 21 of the Combined Nomenclature to ensure a uniform interpretation throughout the territory of the Union.

25 (8) The measures provided for in this Regulation are in accordance with the opinion of the Customs Code Committee,

HAS ADOPTED THIS REGULATION:

*Article 1*

30 In Chapter 21 of the Combined Nomenclature set out in Annex I to Regulation (EEC) No 2658/87, the following Additional Note 5 is inserted:

*5. Other food preparations presented in measured doses, such as, capsules, tablets, pastilles and pills, and which are intended for use as food supplements are to be classified under heading 2106, unless elsewhere specified or included.*

*Article 2*

35 This Regulation shall enter into force on the twentieth day following that of its publication in *The Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States."

40 29. We agree with HMRC's argument that the narrative, and particularly paragraphs (2) and (4) make it explicit that *Swiss Caps* was certainly not restricted in its application to the three products at issue. The use of the word "paradigm" is telling since that means "a typical example or pattern of something; a pattern or model".

30. We do not accept the appellant's argument that the essential purpose of the Implementing Regulation was to extend *Swiss Caps* to encapsulated oils but find

rather that it clarified and extended it to food supplements of any type which are presented in measured doses in tablets, pastilles or pills.

5 31. We cannot find any distinguishing factor in regard to the argument that the capsules do not determine absorption and where the capsules become active. Gelatin capsules are gelatin capsules. They delay absorption. There is no distinction between the capsules and the encapsulated products in *Swiss Caps* in terms of absorption and when and where they become active.

10 32. In support of his argument that *Swiss Caps* related only to specific products, Mr Hurley relied on Implementing Regulation EC/716/2012 which classified a food supplement encapsulated in a gelatin capsule and containing colostrum powder under heading 1901. We do not accept that argument. Paragraph 33 of *Swiss Caps* reads:

“However, classification of those goods under heading 2106 can be envisaged only if the food preparations in questions are not specified or included elsewhere.”

15 In this case the capsules are not more precisely specified elsewhere unlike colostrum capsules.

20 33. He also argued that the JCCC Customs Newsletter 27 in April 2010 supported his argument that *Swiss Caps* had limited application. That intimated HMRC’s view that the impact of *Swiss Caps* was that classification of all food supplements in capsule form should be in heading 2106 and that “EC regulations will be brought into line with this”. His stance was that it was not until regulations came into force that other products were “caught”. We do not accept that. That Newsletter has no legal significance whatsoever.

25 34. Mr Hurley placed great stress on the fact that there had been dissent amongst Community members for a period of approximately three years following the issue of the decision in *Swiss Caps* and he referred us to reports of the Customs Code Committee, Tariff and Statistical Nomenclature section. We have indeed read all of those minutes and we accept HMRC’s argument that those minutes simply inform the background to the Implementing Regulation.

35 We note that the summary report of the 29<sup>th</sup> meeting in Brussels on 25 March 2010 made it explicit that the *Swiss Caps* judgment did not refer only to the three products in question. It reads in the penultimate paragraph at 5.3:-

35 “Concerning the questions raised by the Member States, the Chairman explained that with the entry into force of the ‘Swiss Caps’ judgement the products intended to be used as food supplements and presented in gelatine capsules have to be classified in heading 2106 (as a consequence of the binding nature of the judgement). Concerning other types of presentations, the Commissions services will analyse the question with the Legal Service.”

40 36. The “other presentations” referred to were food supplements in tablets or sachets and food supplements for animals. There was also concern as to whether *Swiss Caps* related to the classification of all encapsulated products or just oils in capsules and about the possible contradiction between the *Swiss Caps* ruling and some other regulations current at the time.

37. At 4.6 of the report of the 36<sup>th</sup> meeting it is explicit that *Swiss Caps* applied to “products presented in capsules, and intended to be used as a food supplement”, that there was a lack of clarity in respect of products in tablet form and the conflict in the Regulations was noted. Those conflicts were resolved by Commission Regulation 11/2011 which  
5 repealed/cancelled the conflicting Regulations. However, the conflict does not relate to the period with which we are concerned.

38. Lastly, in terms of those reports Mr Hurley indicated that he relied in particular on the report of the 49<sup>th</sup> meeting on 9 December 2010 on the basis that it is clear from that that further legislation was required. That report summarises the controversy in  
10 regard to *Swiss Caps* and makes it explicit that ECJ judgments are a legitimate reason to amend classifications to bring matters into line with the judgment in that case. It makes it quite clear that products presented in capsules and intended to be used as food supplements which are not classified in heading 2106 should be invalidated.

39. We find that these reports, whilst noting various disagreements make it quite clear  
15 that the Member States did not believe that the *Swiss Caps* ruling was restricted only to the three products therein mentioned.

40. For all these reasons, we find that following the ruling in *Swiss Caps*, the capsules had to be classified in Chapter 21 at heading 2106 and the appeal is dismissed.

41. This document contains full findings of fact and reasons for the decision. Any  
20 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)”  
25 which accompanies and forms part of this decision notice.

**ANNE SCOTT  
TRIBUNAL JUDGE**

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**RELEASE DATE: 4 AUGUST 2016**