

as dairy protein blends under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts

On June 21, 2001, NMPF requested that Customs initiate a proceeding under Section 625(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), to modify various ruling letters relating to the classification under the HTSUS of certain dairy protein blends identified as "milk protein concentrates" (MPC). Should Customs not initiate a proceeding under section 625, NMPF requested that its communication be considered a domestic interested party petition pursuant to Section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516).

Specifically, NMPF contends that certain dairy products classified in New York ruling letters (NY) 800374, dated July 27, 1994, and NY D83787, dated November 13, 1998, did not meet the statutory definition of MPC and were therefore not classifiable in subheading 0404.90.10, HTSUS, which provides for "milk protein concentrates." In its submission, NMPF suggests that the subject dairy protein blends should be classified in heading 0402, HTSUS, which provides for milk and cream, concentrated or containing added sugar or other sweetening matter.

The products in the rulings you have identified are described by the importer as being milk protein concentrates. According to the rulings, the products have the following ingredients:

Product 1: Lactose (42.2 percent, \pm 0.5 percent), protein (41.5 percent, \pm 0.5 percent), ash (8.2 percent, \pm 0.5 percent), moisture (4.1 percent, \pm 0.3 percent), and fat (2.5 percent, \pm 0.5 percent) (NY 800374).

Product 2: Protein (41 percent), fat (29 percent), minerals (7 percent), and moisture (6 percent) (NY D83787).

Both products contain over 40 percent protein by weight. Additionally, product 2 also contains a significantly higher percentage of fat than naturally occurs in milk. Neither ruling contains any information about how the product was manufactured and there is no indication that this information was provided to Customs. Unfortunately, any materials which might have been included in the original case files were lost in the destruction of the New York Customs House at the World Trade Center on September 11, 2001.

As requested, Customs reviewed the classification decisions in both NY 800374 and NY D83787. This review did not persuade Customs that the classification in those rulings was incorrect. Therefore, on September 18, 2002, in accordance with the procedures outlined in 19 U.S.C. 1516, and Title 19, Code of Federal Regulations, Part 175 (19 CFR Part 175), Customs published a notice of "Receipt of Domestic Interested Party Petition Concerning Tariff Classification of Dairy Protein Blends" in the **Federal Register** (67 FR 58837). Customs summarized the NMPF contentions and invited the public to comment on the correctness of the rulings cited and the arguments made by NMPF. During the comment period that ended on November 18, 2002, Customs received over 960 comments. Many of the comments contained nearly identical language expressing support for or opposition to the NMPF position.

Issue

Whether milk protein concentrates of subheading 0404.90.10, HTSUS, are limited to products produced by ultrafiltration and containing casein and lactalbumin in the same proportion as found in milk, or whether they also include a blend of milk constituents and concentrated milk proteins where the

total casein and lactalbumin content exceeds 40 percent by weight.

Law and Analysis

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

- 0402—Milk and cream, concentrated or containing added sugar or other sweetening matter:
0404—Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included:

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0404.90	Other:
0404.90.10	Milk protein concentrates
	Other:
	Dairy products described in additional U.S. note 1 to chapter 4:
0404.90.28	Described in general note 15 of the tariff schedule and entered pursuant to its provisions.
0404.90.30	Described in additional U.S. note 10 to this chapter and entered pursuant to its provisions.
0404.90.50	Other ¹

¹ See subheadings 9904.04.50–9904.05.01.

Additional U.S. Note 13 to Chapter 4 describes "Milk protein concentrate" as follows:

13. For purposes of subheading 0404.90.10, the term "milk protein concentrate" means any complete milk protein (casein plus lactalbumin) concentrate that is 40 percent or more protein by weight.

You contend that the products classified in NY 800374 and NY D83787 are not "complete milk proteins" as defined by Additional U.S. Note 13 because they are not "unified protein complexes in which both the casein and lactalbumin are present in the same proportion, relative to each other, as they are found in milk." Even though the rulings do not provide information about the method of manufacture, you also contend that neither product of the rulings can be

described as "concentrates," since you contend that they have not been produced and concentrated by means of ultrafiltration.

You assert that the language of Additional U.S. Note 13 is intended to restrict classification in subheading 0404.90.10, HTSUS, to products which have been produced from skim milk by a process known as ultrafiltration. In that process, skim milk is forced through a membrane which allows smaller lactose, water, mineral, and vitamin molecules to pass through the membrane, while the larger protein and fat molecules are retained and concentrated. You argue that the phrase "complete milk protein (casein plus lactalbumin)" requires that a product classified in subheading 0404.90.10 contain only fully functional, single (unified) protein complexes in

concentrate form. You claim that only products made by the ultrafiltration process contain such proteins. You also contend that milk proteins obtained from methods other than ultrafiltration are neither complete nor fully functional. You state that products produced by means other than ultrafiltration are not products described in the note and are not eligible for classification in subheading 0404.90.10, HTSUS.

You refer to two Customs Headquarters ruling letters, HQ 070297, dated October 7, 1982, and HQ 073235, dated December 21, 1983, in which an ultrafiltrated product referred to as Total Milk Proteinate (TMP) containing nearly 90 percent milk protein was classified as a product in chief value of casein and not subject to the dairy quota. Despite the fact that these rulings were