

issued under the Tariff Schedules of the United States (TSUS) (the predecessor to the Harmonized Tariff Schedule of the United States), you argue that they show a clear intent of Customs to classify only products which are manufactured by means of ultrafiltration in non-quota provisions. In your view, these rulings served as the impetus for Congressional modification of the TSUS. To support your position you provided language from the 1984 Senate Finance Committee Report on the Omnibus Tariff and Trade Measures (S. Prt 98–219) which created three new provisions in the TSUS to provide for: Whey Protein Concentrate (Item 118.35); Lactalbumin (Item 118.40); and Milk Protein Concentrate (Item 118.45). The Committee report describes total milk proteinate as being “a soluble milk proteinate in which casein and undenatured whey products are isolated as a single protein complex.”

That Committee Report also contained a proposed TSUS Headnote defining milk protein concentrate as “any milk protein concentrate that is 40 percent or more protein by weight.” You contend that the report demonstrates that only ultrafiltered milk protein concentrates were intended to be included within the non-quota tariff provision created by Congress. When the HTSUS was adopted, the non-quota treatment of MPCs was carried forward to the subheading at issue. However, you concede that Congress did not include any language in either the TSUS Headnote, or the HTSUS Additional U.S. Note, which explicitly identifies any particular manufacturing process as being required for MPC.

As stated above, goods are classified under the HTSUS according to the terms of the headings and relevant section and chapter notes and by applying the GRIs in order. You have contended that the MPC products in the identified rulings should be classified in heading 0402, HTSUS. Heading 0402, HTSUS, provides for: Milk and cream, concentrated or containing added sugar or other sweetening matter. “Concentrated” milk is defined by the U.S. Food and Drug Administration (FDA) as being “the liquid food obtained by partial removal of water from milk.” The products which are the subjects of the disputed rulings are not concentrated milk, but rather are products which consist of milk constituents. The ENs to heading 0404, HTSUS, provide, in pertinent part, “The heading also covers fresh or preserved products consisting of milk constituents, which do not have the same composition as the natural product, provided they are not more specifically covered elsewhere. Thus the heading includes products which lack one or more natural milk constituents, milk to which natural milk constituents have been added (to obtain, for example, a protein-rich product).” As such, milk protein concentrates are described by the terms of heading 0404 and not those of heading 0402. Accordingly, they are ineligible for classification in heading 0402 and we must now determine the correct subheading for the products within heading 0404, HTSUS.

The manufacturers and importers buy and sell the products under consideration as

“Milk Protein Concentrates.” We have determined that the products are goods of heading 0404, HTSUS. We must now determine whether the products are included within the scope of the legal definition of milk protein concentrate contained in Additional U.S. Note 13 to Chapter 4.

A number of the comments received in response to the 516 Notice discussed the terms of Additional U.S. Note 13. Many of the comments contend that your position, which limits coverage of the Note to products produced by ultrafiltration, is not supported by the language of the Note. These comments point out that when Congress was drafting the Note, it could have used restrictive language to achieve the result you urge. However, this was not done.

These commenters state that in the food industry, the term “milk protein concentrates” is commonly used to refer to a wide variety of products of varying composition. These products are manufactured to specification to render them suitable for specific end uses in the food industry. In addition, they point out that certain milk protein concentrates are obtained by a combination of ultrafiltration and blending, while other products contain milk proteins that are isolated from milk by other processes such as precipitation. They contend that products containing 40 percent or more protein by weight have more protein than milk and are thus milk protein concentrates. They also note that if Congress intended the provision to be limited to the total milk proteinate that was the subject of the previous Customs ruling, it would not have enacted the broad language of Additional Note 13 and would not have set the milk protein threshold as low as 40 percent.

Upon consideration of the petition and the comments submitted, Customs agrees with the comments received that the Note does not restrict MPCs to any particular method of manufacture. Rather, the Note speaks to “any” complete milk protein concentrate which contains a specified protein percentage by weight. The use of the term “any” suggests that a broad rather than restrictive reading of the note was intended. The Note does require that the protein be “complete” which, according to the Note, requires that it contain casein and lactalbumin. However, the Note neither requires that the proteins be in the same proportion as they are found in milk, nor does it specify relative percentages of the protein components. It requires only that the source of the proteins be milk, that casein and lactalbumin be present, and that they constitute 40 percent or more, by weight, of the product.

None of the conditions you urge such as retention of “fully functional properties” and that the proteins not be “denatured”, which you have indicated are requirements for inclusion in the subheading 0404.90.10, are specified in the text of Additional U.S. Note 13 to Chapter 4. Had Congress intended the subheading to be limited to only those products which meet the standards you specify, it could have drafted the provision accordingly. However, the text that was adopted does not contain any of the narrow

restrictions you describe. Moreover, there is nothing in the legislative history that demonstrates an intent to limit the provision to ultrafiltered products. Finally, as many commenters pointed out, and the study performed by the General Accounting Office on this issue made clear, the term “milk protein concentrates” is used in commerce to refer to a class of products much broader than those produced by ultrafiltration. For example, the study states that products known as milk protein concentrates produced in Canada are made by blending milk proteins. (General Accounting Office, *Report to Congressional Requesters, Dairy Products: Imports, Domestic Production, and Regulation of Ultra-filtered Milk*, GAO–01–326, March 2001, at 7). Tariff terms are presumed to reflect their commercial meaning. (*Nylos Trading Co. v. United States*, 37 CCPA 71 (1949); *Carl Zeiss, Inc v. United States*, 195 F.3d 1375 (1999), citing *Simod Am. Corp. v. United States*, 872 F.2d 1572 (Fed. Cir. 1989).

For a product to be eligible for classification in subheading 0404.90.10, HTSUS, it must be a concentrate. You argue that the term refers to a product that has had liquids removed from it to make it stronger, and that only ultrafiltered products satisfy this requirement. Customs itself initially considered this view in 2001, when, as part of a Notice of proposed revocation, it stated: “the common dictionary meaning of the words ‘milk protein concentrate’ would be a protein product derived from milk in which the milk protein content has been intensified or purified by the removal of ‘foreign or inessential’ milk constituents, such as water, minerals and lactose.” (*See Customs Bulletin and Decisions*, Vol. 35, No. 40, October 3, 2001).

Comments received in response to that Notice noted that products known in the trade as milk protein concentrates were in fact produced by a variety of methods other than ultrafiltration. They argued these products, e.g., a blend of skim milk and whey protein concentrates or caseinates, were concentrates since they were dairy products whose milk protein content was higher than that found in milk.

Upon further consideration, Customs agrees that such products may be considered concentrates within the meaning of the provision. These products consist of milk constituents whose protein content has been intensified by blending with a concentrated milk protein such as whey protein concentrate or caseinates.

In that same proposed revocation, Customs referred to an International Dairy Federation publication of May 1992, as the basis for the statement that “The dairy industry has specific terminology and parameters when referring to milk protein concentrate.”

While that statement reflected certain information before Customs at the time of the proposal, comments received thereafter revealed that there is no standard of identity for MPC recognized under the *Codex Alimentarius* or other international non-governmental organizations. Similarly, there is no recognized commercial standard for these products. Milk protein concentrates contain varying amounts of milkfat, proteins