FEDERAL COURT OF AUSTRALIA

Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd

[2018] FCAFC 237

Appeal from:	*Pharm-A-Care Laboratories Pty Limited v Comptroller-General of Customs* [2017] AATA 1816
File number:	VID 1262 of 2017
Judges:	**BURLEY, STEWARD AND THAWLEY JJ**
Date of judgment:	21 December 2018
Catchwords:	**TAXATION** – Customs and Excise – tariff classification – appeal from a decision of the Administrative Appeals Tribunal – whether Tribunal erred in classifying vitamin preparations and garcinia preparations as medicaments under the Customs Tariff and free from duty – whether the preparations should be classified as food supplements and subject to duty
Legislation:	*Acts Interpretation Act 1901* (Cth) s 15AB *Administrative Appeals Tribunal Act 1975* (Cth) s 44 *Customs Tariff 1965* (Cth) *Customs Tariff Act 1995* (Cth) ss 3, 7, Sch 2, Sch 3 *Income Tax Assessment Act 1936* (Cth) *Income Tax Assessment Act 1997* (Cth) s 815-135 *Sales Tax (Exemptions and Classifications) Act 1935* (Cth)
Cases cited:	*Air International Pty Ltd v Chief Executive Officer of Customs* (2002) 121 FCR 149 *BASF Australia Ltd v Chief Executive Officer of Customs* [2015] AATA 140 *Bristol-Myers Company Pty Ltd v Commissioner of Taxation* (1990) 23 FCR 126 *Chinese Food and Wine Supplies Pty Ltd v Collector of Customs (Vic)* (1987) 72 ALR 591 *Collector of Customs v Chemark Services Pty Ltd* (1993) 42 FCR 585 *Commissioner of Taxation v Cooling* (1990) 22 FCR 42 *Comptroller-General of Customs v Sulo MGB Australia Pty Ltd* [2017] FCA 315 *D & R Henderson (Manufacturing) Pty Ltd v Collector of Customers for New South Wales* (1974) 48 ALJR 132

D & R Henderson (MFG) Pty Ltd v Forbes (1975) 7 ALR 104

Federal Commissioner of Taxation v Greenhatch (2012) 203 FCR 134

Federal Commissioner of Taxation v SNF (Australia) Pty Ltd (2011) 193 FCR 149

Haritos v Federal Commissioner of Taxation (2015) 233 FCR 315

Lansell House Pty Ltd v Federal Commissioner of Taxation (2011) 190 FCR 354

Lansell House Pty Ltd v Federal Commissioner of Taxation [2010] FCA 329; 76 ATR 19

May v Military Rehabilitation and Compensation Commission (2015) 233 FCR 397

Norrie v NSW Registrar of Births, Deaths and Marriages (2013) 84 NSWLR 697

Primaplas Pty Ltd v Chief Executive Officer of Customs (2016) 242 FCR 268

Seay v Eastwood [1976] 1 WLR 1117

Times Consultants Pty Ltd v Collector of Customs (Qld) (1987) 16 FCR 449

Toyota Tsusho Australia Pty Ltd v Collector of Customs [1992] FCA 282

Unigreg Ltd v Her Majesty's Customs and Excise (1999) 45 BMLR 179

Vernon-Carus Australia Pty Ltd v Collector of Customs (1995) 21 AAR 450

Date of hearing:	27 August 2018
Date of last submissions:	31 August 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	72
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Solicitor for the Respondent: Clayton Utz

ORDERS

VID 1262 of 2017

BETWEEN:	**COMPTROLLER-GENERAL OF CUSTOMS** Applicant
AND:	**PHARM-A-CARE LABORATORIES PTY LIMITED (ACN 003 468 219)** Respondent
JUDGES:	**BURLEY, STEWARD AND THAWLEY JJ**
DATE OF ORDER:	**21 DECEMBER 2018**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs, as agreed or as assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 This is an appeal from a decision of the Administrative Appeals Tribunal (the "Tribunal") concerning the correct classification of certain pastilles or gummies which contain vitamins (called the "vitamin preparations") and also certain weight loss gummies (called the "garcinia preparations") for the purposes of the Customs Tariff in Sch 3 (the "Tariff") to the *Customs Tariff Act 1995* (Cth) (the "Customs Tariff Act").

2 The Tribunal found that the vitamin preparations should be classified as medicaments under heading 3004 of the Tariff (in particular subheading 3004.50.00) and the garcinia preparations as most akin to medicaments under heading 3004.90.00, and thus in each case free from duty. It rejected the applicant's (the "Comptroller") case that the preparations should be classified as a "food supplement"; in particular, it rejected the classification of the vitamin preparations as "sugar confectionery" under heading 1704 of the Tariff, or as "food preparations…– Other" under heading 2106. It also rejected the classification of the garcinia preparations under the same subheading in heading 2106. In each of these cases, duty is payable at the rate of 4% or 5%. The Comptroller appeals that decision to this Court pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the "AAT Act").

THE LEGISLATIVE REGIME

3 Chapter 30 of the Tariff is headed "Pharmaceutical products" and is contained in Section VI of the Tariff which is headed "Products of the chemical or allied industries". Heading 3004 and subheading 3004.50.00 are in the following terms:

3004	MEDICAMENTS (EXCLUDING GOODS OF 3002, 3005 OR 3006) CONSISTING OF MIXED OR UNMIXED PRODUCTS FOR THERAPEUTIC OR PROPHYLACTIC USES, PUT UP IN MEASURED DOSES (INCLUDING THOSE IN THE FORM OF TRANSDERMAL ADMINISTRATION SYSTEMS) OR IN FORMS OR PACKINGS FOR RETAIL SALE:	
	…	
3004.50.00	- Other, containing vitamins or other products of 2936	Free

4 The notes to Ch 30 are also relevant. Note 1, in particular subpara (a), which assumed some importance in this appeal, is in the following terms:

> 1. This Chapter does not cover:
>
> (a) Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters), other than nutritional preparations for intravenous administration (Section IV);
>
> (b) Preparations, such as tablets, chewing gum or patches (transdermal systems), intended to assist smokers to stop smoking (2106 or 3824);
>
> (c) Plasters specially calcined or finely ground for use in dentistry (2520);
>
> (d) Aqueous distillates or aqueous solutions of essential oils, suitable for medicinal uses (3301);
>
> (e) Preparations of 3303.00.00 to 3307, even if they have therapeutic or prophylactic properties;
>
> (f) Soap or other products of 3401 containing added medicaments;
>
> (g) Preparations with a basis of plaster for use in dentistry (3407.00.00); or
>
> (h) Blood albumin not prepared for therapeutic or prophylactic uses (3502).

5 The Comptroller contended that the vitamin and garcinia preparations the subject of this appeal are "food supplements" within Note 1(a), and thus excluded from Ch 30. This contention was critical to the Comptroller's case.

6 Heading 1704 is contained within Ch 17 of Section IV of the Tariff. Section IV is headed "Prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes". The subject matter of that Section may be contrasted with that of earlier Sections dealing with "Live animals; animal products" (Section I), "Vegetable products" (Section II); and "Animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes" (Section III).

7 Chapter 17 is headed "Sugars and sugar confectionery". Heading 1704 is in the following terms:

> SUGAR CONFECTIONERY (INCLUDING WHITE CHOCOLATE), NOT CONTAINING COCOA:

The subheadings in heading 1704 are in the following terms:

> 1704.10.00 -Chewing gum, whether or not sugar-coated 5%

1704.90.00	- Other	5%

8 Note 1(c) of Ch 17 provides:

> This Chapter does not cover:
>
> …
>
> (c) Medicaments or other products of Chapter 30.

9 Subheading 2106.90.90 is contained within Ch 21 which is headed "Miscellaneous edible preparations" and is in these terms:

2106	FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED:	
	…	
2106.90.90	---Other	4% DCS:Free

Unlike Ch 17, the notes to Ch 21 do not include an express exclusion of medicaments within Ch 30.

10 The Comptroller, but not the respondent, also relied upon certain parts of the "Harmonized System Explanatory Notes" ("HSEN") which are published by the World Customs Organisation pursuant to Art 7 of the *International Convention on the Harmonized Commodity Description and Coding System* (1983) 1503 UNTS 168 (the "Convention"), to which Australia is a party. Article 7 of that Convention provides for the publication of explanatory notes as a guide to the interpretation of the Harmonized System. There was a dispute about the relevance of the HSEN, which we will need to return to.

11 Section 7(1) of the Customs Tariff Act provides that the "Interpretation Rules" must be used for "working out" the tariff classification under which goods are to be classified. The term "Interpretation Rules" is defined by s 3 of that Act as follows:

> ***Interpretation Rules*** means the General Rules for the Interpretation of the Harmonized System provided for by the Convention, as set out in Schedule 2.

12 The term "Convention" is also defined in s 3 as follows:

> ***Convention*** means the International Convention on the Harmonized Commodity Description and Coding System done at Brussels on 14 June 1983.

13 In relation to the garcinia preparations, the Tribunal applied r 4 of the Interpretation Rules, which is in the following terms:

Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.

14 We also note that rr 1 to 3 of Sch 2 of the Customs Tariff Act are in the following terms:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of Rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

FACTS

15 The facts are not in dispute. The following findings made below at [1]-[10] are material:

1. The applicant imported from Germany goods described as pastilles containing vitamins manufactured according to a specification agreed

between it and the manufacturer, which it markets in Australia under the trade mark "VitaGummies" and under its "Nature's Way" umbrella brand. Seven categories of VitaGummies branded products are marketed to adults and six are marketed for consumption by children. We will call those goods, when referred to as a group, the vitamin preparations.

2. The applicant also imports from the same manufacturer two categories of weight loss gummies, which do not contain vitamins, but do contain garcinia cambogia, the scientific name of which is hydroxycitric acid. We will call those goods the garcinia preparations.

…

4. All of the goods are imported in bulk as either sea or air cargo. As imported they are contained in thick plastic sealed bags within a fibre board shipper, each containing some 5,000 pastilles and weighing approximately 10.5 kilograms. Each shipment is accompanied by one or more Certificates of Analysis which confirm that the goods comply with the agreed specification. That is, in the case of each category of the vitamin preparations, they record the results of tests conducted for the purpose of showing that they contain relevant quantities of vitamins and other substances in accordance with its product specification, and the smell, taste and appearance of the goods. In the case of the garcinia preparations they show, inter alia, the relevant quantity of hydroxycitric acid, and the smell, taste and appearance of the pastilles imported.

5. In the case of all the goods with which this review is concerned, the pastilles contain sucrose, glucose syrup, gelatin, flavours and other substances. They are either dusted with sugar or oiled, apparently to facilitate separation.

6. The vitamin preparations are all listed on the Australian Register of Therapeutic Goods as complementary medicines and are regulated by regulations made pursuant to the *Therapeutic Goods Act 1989*. The garcinia preparations are not complementary medicines and are not so regulated.

7. The goods in all categories arrive in bulk and, after importation they are packaged in plastic bottles and labeled by the applicant in Australia.

…

10. The identification of the goods is not difficult in this case, particularly since the active ingredients are described in the Certificates of Analysis accompanying the goods at the time of importation. Samples of the certificates for each category of the goods are in evidence before us, and in the case of the vitamin preparations, the certificates show which vitamin or vitamins are contained in the products and in what proportions, and which other active substances (such as zinc and the like) if any, are included in the products. The same is true of the garcinia preparations, which are accompanied by certificates showing the presence and quantities of garcinia within the products. Resort may be had if necessary to the literature to determine the known effects of particular vitamins and the garcinia. The presence of sucrose, glucose syrup, flavours and the like is also known from the specifications in evidence. They are correctly described in our opinion as vitamin preparations and garcinia preparations respectively.

16 The following is an example of what one "Certificate of Analysis" discloses for one vitamin preparation:

Nature's Way Vita Gummies Family Multi Caps:

- Vitamin C
- Niacin
- Vitamin E (di-alpha tocopheryl acetate)
- Vitamin B6
- Folic Acid
- Biotin
- Vitamin D3
- Vitamin B12
- Vitamin B1
- Vitamin B2
- Calcium
- Iodine
- Magnesium
- Zinc

17 Relying on Collocott M.A. and Dobson A.B., *Chambers Science and Technical Dictionary*, 1974 (reprinted 1984), as well as information collected and retained by the respondent for purposes connected with the Therapeutic Goods Administration records, the Tribunal also found at [74], as a fact, that the vitamin preparations "have prophylactic and therapeutic properties".

18 The respondent also relies upon the following, which it submitted, were further findings of fact made by the Tribunal. We accept that these were relevant findings.

(a) The goods referred to by the Tribunal as the vitamin preparations would be described as a vitamin preparation or by some similar words embodying the word "vitamin" or "vitamins" or multi-vitamins (at [57]).

(b) Certificates of analysis showed which vitamin or vitamins are contained in the products and in what proportions, and which other active substances (such as zinc) are included in the products; or which show the presence and quantities of garcinia within the products (at [10], see also at [71]).

(c) A vitamin preparation would not ordinarily be described as a "food" in the sense in which that expression is ordinarily used (at [57]).

(d) There are some "food supplements" which might be described as a food, such as a powder product sold in gyms as a supplement to foods, to be mixed with water and used to build up muscle and the like (at [57]). Vitamin preparations would not naturally or normally be described as food supplements in Australia (at [62]).

(e) The essential feature of the goods, and that which should be used to characterise them, is the vitamins that they contain and not the excipients. The presence of the excipients does not detract from their essential character or purpose, which was to deliver vitamins (at [60]).

(f) The vitamin preparations are medicaments with prophylactic and therapeutic properties (at [73]-[74]).

(g) The garcinia preparations are designed to enable weight loss (at [79]).

(h) A weight-loss preparation would not ordinarily be described as a food or a food supplement (at [79]).

(i) Weight-loss may be beneficial for certain diseases, such as diabetes (at [79]).

(j) The excipients in the garcinia preparations seemed wholly incidental to the main purpose of the goods (at [88]).

THE REASONING BELOW

19 The Tribunal found that the vitamin preparations were not "food supplements" for the purposes of Note 1(a) of Ch 30 of the Tariff and instead decided that these preparations were medicaments for the purposes of subheading 3004.50.00. A critical element of the reasoning below was the acceptance of the proposition that a "food supplement" must otherwise be a "food" or "beverage" for the purposes of that Note. As the Tribunal reasoned at [51]:

> 51. Note 1(a) may itself contain relevant context. Immediately following the words "Foods or beverages" the words in brackets appear. The enumeration in the brackets begins with the words "such as". Those words mean "for example" and are words which would ordinarily suggest that each of the items which follow are themselves foods or beverages in the ordinary English sense. Putting to one side the words "food supplements", each of the other items in the enumeration refers to a food or to a beverage properly so-called. In our opinion that suggests that the expression "food supplements" also refers to things which are either of "Foods or beverages". We prefer the view that "food supplements" as used in Note 1(a) must refer to a food (or no doubt in some cases, to a beverage). If that is correct the view would not be open that something is not a food (or a beverage), but yet is a food supplement within Note 1(a). If the view of context which we prefer is correct, then in order to conclude that goods are a food supplement within the meaning of Note 1(a), one would also need to conclude that the goods are food, or a beverage.

The question then for determination was whether the vitamin preparations could be said to be "food". The Tribunal thought not. It reasoned at [56] and [57] as follows:

> 56. We doubt whether it is necessary to resort to a dictionary to find out whether something is or is not a food, at least when that thing is a regular item of commerce, such as a vitamin preparation. As is pointed out in Pearce D.C. and Geddes R.S., *Statutory Interpretation in Australia*, (8th ed, LexisNexis Butterworths, 2014) pp 154 at [4.8], "[t]he House of Lords said that courts should be cautious of subjecting words in legislation that have an ordinary, everyday meaning to intensive analysis. Commonsense experience of the

> world and local knowledge should guide the interpretation of such provisions".
>
> 57. The word "food" is not apt to describe a vitamin preparation in this country in our opinion. A vitamin preparation would not ordinarily be so described, in our understanding of the sense in which that expression is ordinarily used. It would be described as a vitamin preparation or by some similar words embodying the word "vitamin" or "vitamins" or multi-vitamins. Other goods might well be described as a food supplement and as foods, such as a powder product sold in gyms as a supplement to foods, to be mixed with water and used build up muscle and the like. On the other hand, to our understanding it would not be a usual use of language to describe a vitamin preparation as food.
>
> (Footnotes omitted.)

The Tribunal also rejected the submission that the vitamin preparations were food because of the excipients contained in them. It had been submitted that the preparations contained 70-80% sucrose and gelatin; they therefore comprised food. This was rejected by the Tribunal (at [60]) on the basis that the essential feature of these goods were the vitamins they contained; the excipients were present for the subsidiary purpose of making the goods more attractive to consumers. The essential character of the preparations was that of various blends of vitamins.

20 Finally, the Tribunal declined to follow an earlier Tribunal decision in *BASF Australia Ltd v Chief Executive Officer of Customs* [2015] AATA 140 ("*BASF*"). In that case, Deputy President Forgie had reached a different conclusion concerning the meaning of the phrase "food supplement," in relation to other goods, by relying on dictionary meanings of "food" and "supplement".

21 In relation to the garcinia preparations, the Tribunal formed the view that it was difficult to characterise a weight loss product as having prophylactic or therapeutic properties. The Tribunal made the following findings of fact, which were not challenged on appeal, at [85] and [88]:

> 85. The main purpose of the garcinia preparations appear to us to be cosmetic.
>
> …
>
> 88. … the excipients in the product seem wholly incidental to the main purpose of the goods, and to their proper classification.

At the same time, the Tribunal rejected the characterisation of these preparations as an item of food. At [79], the Tribunal said:

> 79. We now turn to the garcinia preparations. These products are designed to enable weight loss. They appear to us not to be within Note 1(a) to Chapter 30. A weight-loss preparation would not ordinarily be described as a food or as a food supplement in our opinion.

22 The Tribunal looked at other headings within the Tariff and found none to be directly applicable to these preparations. It therefore applied r 4 of Sch 2, *supra*, to determine a classification to which the goods are most akin. This was found to be subheading 3004.90.00 ("- Other"). At [88], the Tribunal reasoned:

> 88. The present appears to be a case for the application of rule 4 of Schedule 2, which calls for a determination of the classification to which the goods are most akin. We would reject 2106 as a category to which the goods are akin. The choice of heading then is between heading 1704 and heading 3004. It seems to us that heading 3004 is one to which the goods are more akin than heading 1704, because there is often a significant health advantage to weight loss, and a good example of that is with type 2 diabetes.

NOTICE OF APPEAL

23 The Comptroller relied, with the conditional consent of the respondent, upon an amended notice of appeal which contained the following grounds:

> **The vitamin preparations**
>
> 1. The Tribunal misconstrued Note 1(a) to Chapter 30 of the Tariff Act by:
>
> (a) failing to construe the words "Foods or beverages" as having a meaning that is expanded by the words given in parentheses ([2017] AATA 1816 at [51]);
>
> (b) interpreting the Note as not applying to any "food supplements" that would not ordinarily be regarded as "foods" or "beverages" ([2017] AATA 1816 at [51]);
>
> (c) failing to interpret the expression "food supplements" as being capable of encompassing goods in the nature of vitamin preparations ([2017] AATA 1816 at [62]);
>
> (d) failing to have regard to the HSEN; and
>
> (e) failing to conclude that the vitamin preparations were "food supplements" within Note 1(a).
>
> 2. The Tribunal asked itself the wrong question and/or adopted an erroneous approach to the statutory task of classification by:
>
> (a) enquiring whether the vitamin preparations would be naturally or normally described as "foods" or "food supplements" ([2017] AATA 1816 at [57] and [62]); and
>
> (b) failing to assign meaning to the expressions "foods" and "food supplements" in the context of Note 1(a), and to consider whether the vitamin preparations fell within the terms of the Note as properly construed.

3. The Tribunal's reasons are inadequate as they do not disclose:

   (a) the meaning which the Tribunal assigned to the expressions "foods" and "food supplements" in the context of Note 1(a); and

   (b) the logical path by which the Tribunal moved from the findings that the vitamin preparations were pastilles containing vitamins and having the essential character or purpose of delivering vitamins, to the conclusion that the vitamin preparations were not "foods" or "food supplements" for the purpose of Note 1(a).

3A. The Tribunal denied the Applicant procedural fairness by failing to respond to the substantial, clearly articulated argument that the vitamin preparations are formulated and intended as a general supplement to a person's diet, and were distinguishable from other vitamin preparations of a higher-dose or which were otherwise targeted to the treatment or prevention of particular disease and which might properly be regarded as medicaments of heading 3004.

3B. The Tribunal:

   (a) erroneously found that it was not able to have regard to the use of the vitamin preparations as indicated on the labels applied to the vitamin preparations when they are put up for retail sale ([2017] AATA 1816 at [37] and [76]);

   (b) classified the vitamin preparations based on its findings as to the nature of vitamins generally rather than the specific use to which the vitamin preparations (being the particular goods the subject of the application before the Tribunal) will be put in Australia; and

   (c) therefore adopted an erroneous approach to the identification of the vitamin preparations and/or failed to consider a relevant matter.

The garcinia preparations

4. The Tribunal misconstrued heading 2106 of the Tariff Act by interpreting the expression "food preparations":

   (a) as having the same meaning as "foods" ([2017] AATA 1816 at [87]);

   (b) without regard to the particular context in which that expression is used in heading 2106, where it is followed by the words "not elsewhere specified or included" or the general context of the Tariff Act, which describes many other types of food preparations and necessarily informs the meaning to be given to a residual heading such as heading 2106; and

   (c) as incapable of encompassing the garcinia preparations ([2017] AATA 1816 at [87]).

5. The Tribunal asked itself the wrong question and/or adopted an erroneous approach to the statutory task of classification by:

   (a) considering whether the garcinia preparations, being designed to enable weight- less, would ordinarily be described as "food" ([2017] AATA 1816 at [79] and [87]); and

   (b) failing to first assign meaning to the expression "food preparations"

in the context of heading 2106, and then consider whether the garcinia preparations fell within the terms of heading 2106 as properly construed.

6. The Tribunal's reasons are inadequate as they do not disclose:

(a) the meaning which the Tribunal assigned to the expressions "food preparations" in the context of heading 2106; and

(b) the logical path by which the Tribunal moved from the findings that the garcinia preparations were pastilles containing garcinia designed to enable weight-loss, to the conclusion that the garcinia preparations were not "foods preparations" for the purpose of heading 2106 of the Tariff Act.

CONSIDERATION

24 The following principles inform the disposition of this appeal from the Tribunal:

(1) First, it is now settled that the proper construction of ordinary words used in a provision is a question of law: *May v Military Rehabilitation and Compensation Commission* (2015) 233 FCR 397 at [183] -[193] per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ; *Norrie v NSW Registrar of Births, Deaths and Marriages* (2013) 84 NSWLR 697 at [62] per Beazley ACJ; *Comptroller-General of Customs v Sulo MGB Australia Pty Ltd* [2017] FCA 315 at [64] per Moshinsky J. Accordingly, if the Tribunal misconstrued the ordinary meaning of the word "food" or the phrases "food supplement" or "food preparation", it will have erred at law.

(2) Secondly, subject to statutory context, function or purpose, courts should be cautious of subjecting words in legislation that have an ordinary everyday meaning to intensive analysis. Decision-makers should use "their local knowledge, experience of the world and common sense, to give a sensible interpretation" to the words used; an appellate court "required to review such decisions should endorse those that have been reached and confirmed in this way": *Lansell House Pty Ltd v Federal Commissioner of Taxation* [2010] FCA 329; 76 ATR 19 ("*Lansell House"*) at [57] per Sundberg J (upheld on appeal at (2011) 190 FCR 354 per Bennett, Edmonds and Nicholas JJ); *Seay v Eastwood* [1976] 1 WLR 1117 (*"Seay v Eastwood"*) at 1121 per Lord Wilberforce.

(3) Thirdly, the classification rules in the Tariff recognise that a particular good or item may inherently fall under more than one classification, but the rules are designed to ensure, so far as possible, that this does not happen. Where it does, special rules may be found in the notes to particular headings which allocate or exclude an item or good

where necessary: *Air International Pty Ltd v Chief Executive Officer of Customs* (2002) 121 FCR 149 (*"Air International"*) at [25] per Hill J. Where goods exhibit more than one character it may be necessary to ascertain their "essential character": *Air International* at [20] per Hill J; *Primaplas Pty Ltd v Chief Executive Officer of Customs* (2016) 242 FCR 268 (*"Primaplas"*) at [55] per Siopis, Davies and Wigney JJ; r 3(b) of Sch 2 of the Customs Tariff Act. The essential character of an item or good is a question of fact. Accordingly, in order to succeed on appeal to this Court from the Tribunal on a question concerning the essential character of an item or good, it will be necessary to show that the Tribunal misdirected itself in deciding that issue of fact: *Times Consultants Pty Ltd v Collector of Customs (Qld)* (1987) 16 FCR 449 at 462 per Morling and Wilcox JJ; see also, more generally, *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 (*"Haritos"*) per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ.

(4) Fourthly, in characterising the goods, one must consider them objectively in the condition in which they are imported. That includes a consideration of their general presentation, any labelling, and an analysis of their composition: *Chinese Food and Wine Supplies Pty Ltd v Collector of Customs (Vic)* (1987) 72 ALR 591 at 599. As Lockhart J (Woodward and Ryan JJ agreeing) said at 599 in that case:

> Whether the goods in suit properly fall within Item 30.03 of the Customs tariff is determined by an objective test not by the intentions of the manufacturer in China or of the exporter or the importer. The test is applied at the port of entry of the goods and at the time of entry. The characteristics of the goods, their get-up, colour, decoration, labelling and packaging are all relevant considerations. In some cases, a visual inspection of the goods and their packaging will disclose characteristics of the goods and enable a judgment to be made as to whether they are for therapeutic or prophylactic use. But visual inspection will not necessarily provide the answer in each case. Tests may have to be carried out and enquiries made to ascertain the relevant characteristics of the goods. In the present case, samples were taken and sent for chemical analysis. As the tribunal noted, the paucity of the information contained in the labelling of the goods necessitated further enquiries being made in respect of them.

(5) Finally, and for the sake of completeness, we are mindful that the customs classification regime, and the Interpretation Rules in Sch 2, have their origin in the Convention. It follows that the Tariff should receive an interpretation which is consistent with the Convention, and that, consistently with treaty interpretation more generally, its words should be construed in good faith and in accordance with their ordinary meaning, in the light of the object and purpose of the Convention: *Air*

International at [25] per Hill J. Neither party relied here on the text of the Convention.

(i) Vitamin Preparations

25 The issue for determination, in relation to the vitamin preparations, is not what is the meaning of the word "foods" or the phrase "food supplements". It is, rather, what is the meaning of those words as they appear in Note 1(a) to Ch 30 of the Tariff, and in the context of the two headings said by the Comptroller to be engaged here; namely, headings 1704 and 2106.

26 The starting point is not the dictionary, although dictionary meanings are not irrelevant. As Hill J observed in *Commissioner of Taxation v Cooling* (1990) 22 FCR 42 at 68, the process of statutory construction does not consist merely of ascertaining the meaning of words used, aided by the dictionary. As the High Court also said in *Thiess v Collector of Customs* (2014) 250 CLR 664 at [23]:

> 23. Objective discernment of statutory purpose is integral to contextual construction. The requirement of s 15AA of the *Acts Interpretation Act 1901* (Cth) that "the interpretation that would best achieve the purpose or object of [an] Act (whether or not that purpose or object is expressly stated ...) is to be preferred to each other interpretation" is in that respect a particular statutory reflection of a general systemic principle. For:
>
> > "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."
>
> (Footnotes omitted.)

To the extent that Deputy President Forgie's decision in *BASF* was anchored in dictionary definitions without more, it was, with respect, misconceived.

27 A possible starting point is the decision of Lockhart J in *Bristol-Myers Company Pty Ltd v Commissioner of Taxation* (1990) 23 FCR 126 (*"Bristol-Myers"*). In that case the issue for determination was whether the product "Sustagen Gold" was a "beverage" for the purposes of the former *Sales Tax (Exemptions and Classifications) Act 1935* (Cth). His Honour said at 130:

> "Food" is what is eaten or taken into the body for nourishment, to maintain life and growth. What constitutes foods does not admit of any absolute definition because different societies accept and use different substances as food.

We agree that the word "food" does not admit of any absolute definition. If its meaning has to be ascertained, it will be by reference to the applicable statutory function or purpose as well as to context.

28 The Comptroller submitted that the Tribunal erred in its construction of the Note 1(a) to Ch 30 in the following ways:

(1) It failed to give a broader meaning to the phrase "foods or beverages". A broader meaning was justified because of the express exclusion of "nutritional preparations for intravenous administration". Such an exclusion was necessary because, it was contended, without it the phrase "foods or beverages" would extend to the intravenous receipt of nourishment, as well as all other possible means of consumption;

(2) It failed to construe or give meaning to the phrase "food supplements" when it decided that a food supplement still had to constitute a "food", as that term is used at the commencement of Note 1(a). The Comptroller submitted that the Tribunal had effectively thereby read out of the text of Note 1(a) the term "food supplements";

(3) The Tribunal should have construed the phrase "food supplements" as referring to any product which can be ingested for nutritional purposes for the purposes of supplementing a normal diet that might otherwise be classified as a medicament. In the Comptroller's contention, the vitamin preparations in issue here plainly fell into the phrase "food supplements" when construed in this way.

29 The respondent disagreed. It contended that the Tribunal had rightly decided that a "food supplement" needed to be "foods or beverages" for the purposes of Note 1(a) and that it was open to the Tribunal to decide that the vitamin preparations were not "food". It also submitted that the word "foods", for the purposes of Note 1(a) did not mean anything of nutritional value, but referred to that which is eaten at a meal or snacked upon, regardless of its nutritional value. Lettuce, it was suggested, had no nutritional value but was still food.

30 Both parties agreed that the words appearing in the first parentheses in Note 1(a) exist for the purpose of clarification, or as an example of foods or beverages which might otherwise potentially have fallen within Ch 30, and which have been identified in the parentheses for the purposes of confirming classification, perhaps, in some cases and in our view, out of abundance of caution: cf *Federal Commissioner of Taxation v Greenhatch* (2012) 203 FCR 134 at [40] per Edmonds, Greenwood and Robertson JJ.

31 The meaning of the phrases "foods or beverages" and "food supplements" is not at large and is to be ascertained by the language used in Note 1(a). Whilst the words in the first parenthesis identify examples, each item listed must, nonetheless, and as a matter of construction, be a food or beverage. That includes the reference to "food supplements". Something which might be considered to be a "food supplement" which is not otherwise "foods or beverages" is not within Note 1(a). We thus respectfully agree with the reasons of the Tribunal at [51], *supra*.

32 Here, the finding below is that the preparations would be described as a vitamin preparation and that, as such, would not ordinarily be described as "food" in the sense that this term is ordinarily used: see [57], *supra*. The Tribunal also found that the essential character of the preparations was not to be determined by the excipients contained within them, but was the vitamins they contained. We do not consider that this approach to construction reflects error.

33 The Comptroller submitted that the Tribunal erred by not giving a meaning to the word "foods" or the term "food supplements", and by not disclosing sufficient reasons for reaching the conclusion that the vitamin preparations were not "food supplements". It was submitted that it was "insufficient" for the Tribunal to state that the words "foods" and "food supplements" bore their ordinary meaning and then conclude that the vitamin preparations did not fall within Note 1(a) of Ch 30 of the Tariff because such preparations would not ordinarily be described as food or as a food supplement.

34 With respect, we reject that submission. In our view, the Tribunal sufficiently explained why it had formed its view that the vitamin preparations were not food or food supplements. Bearing in mind Lockhart J's observation in *Bristol-Myers* that the word "food" does not "admit of any absolute definition", the Tribunal was not required to spell out the meaning of that word for the purposes of Ch 30. We also endorse Sundberg J's observation in *Lansell House* that the Court should be cautious of subjecting everyday words to "intensive analysis". That observation applies equally to the Tribunal.

35 The Tribunal reached its conclusion here without reliance upon dictionary meanings, and by using its own knowledge and experience of the world and by deploying common sense, to use the language of *Lansell House*. As an appellate court we should endorse a conclusion reached in this way: see also *Seay v Eastwood* at 1121.

36 The foregoing conclusion is supported by what appears in the second parentheses at the end of Note 1(a), namely the term "Section IV". Similar references to other headings or subheadings in the Tariff appear in parentheses at the end of in Notes 1(b), (c), (d), (g), and (h). On each occasion, the purpose of the references made in the parentheses is to draw to the attention of the reader where the item or product described in the Note is classified elsewhere in the Tariff. The references thus serve the function of ensuring that the item identified, whilst potentially falling within Ch 30, is to be classified elsewhere in the Tariff. This approach is consistent with the third proposition we mentioned above, namely that the Tariff sometimes has to employ special rules where an item or good could possibly be classified in more than one place. For example, for the sake of convenience, we reproduce Note 1(b), which is in the following terms:

> (b) Preparations, such as tablets, chewing gum or patches (transdermal systems), intended to assist smokers to stop smoking (2106 or 3824);

The reference to headings 2106 and 3824 is to specific preparations which fall within the more general language used by Note 1(b), and which are not to be classified as medicaments within Ch 30. Thus, subheading 2106.90.20, which is within heading 2106, is in these terms:

> ---Preparations for oral consumption, such as tablets and chewing gum containing nicotine, intended to assist smokers to stop smoking

Presently, subheading 3824.99.10(f) (before January 2017, this subheading was 3824.90.10(f)), which is in heading 3824, is in these terms:

> (f) preparations, including patches (transdermal systems), intended to assist smokers to stop smoking, other than goods of 2106.90.20

But for the language in Note 1(b), these items might have been eligible for classification in both Chs 21 and 38 as well as Ch 30. The purpose of Note 1(b) is to ensure that this does not take place.

37 It follows, in our view, that the reference to "foods or beverages" is not a reference to *any* food or beverage, but only to those foods or beverages which are addressed in "Section IV" of the Tariff. If Parliament had intended otherwise, it might have not referred to Section IV at all. Alternatively, if it had intended Note 1(a) to cover more food than that classified by Section IV it might have referred also to Section I of the Tariff ("Live animals; animal products") which covers food such as meat, fish, milk, cheese or honey, or Section II of the Tariff ("Vegetable products"), which covers food such as fruit. Instead, Parliament, by referencing only "Section IV", intended Note 1(a) to exclude only those items of food and

beverages which fall within the scope and ambit of Section IV. Thus, when one then examines the general descriptions of the items referred to in the first parentheses of Note 1(a), it is possible to identify more specific items in Section IV which might thereby be specifically excluded from Ch 30 (whether because they might also have been considered medicaments, or out of an abundance of caution or otherwise). For example:

(1) subheading 2106.10.10 within Section IV refers to "[p]rotein concentrates." This might have also fallen within Ch 30 but for the reference in Note 1(a) to "dietetic, diabetic or fortified foods";

(2) subheading 1904.20.10 refers to "[m]uesli" type preparations which might also constitute a "dietetic" or "diabetic" food;

(3) subheading 2202.10.00 refers to "mineral waters" which is excluded from Ch 30 by the reference to "mineral waters" in Note 1(a);

(4) subheading 2102.20.00 refers to "[i]nactive yeasts; other single cell micro-organisms" which might be added to food as a supplement, as that term is used in Note 1(a), for health reasons;

(5) subheading 2206.00.30 refers to "cider" and to "mead" and subheading 2202.10.00 refers to "aerated waters" with added sugar. Each of these products, on one view, could, depending upon their particular properties, be seen as "tonic beverages" for the purposes of Note 1(a).

38 The question *thus* for consideration is not whether the vitamin preparations comprise "food" or "food supplements", but rather whether they fall within a heading or subheading within Section IV. The two subheadings in Section IV that the Comptroller relies upon, it will be recalled, are heading 1704 ("sugar confectionery…") and heading 2106 ("food preparations…– Other").

39 As to the first, it is not disputed that the preparations contain sugar. However, the Tribunal found that the essential character of the goods is the vitamins they contain. The presence of sugar was subordinate to that essential character; it served to make the preparations "more attractive". The Comptroller did not challenge the making of that finding of fact which, in our view, was open to the Tribunal to reach. The finding was not infected with any suggested error of law: *Haritos*. It follows, that the vitamin preparations are not sugar confectionery within heading 1704, even though the preparations contain much sugar. It was not otherwise demonstrated that they are confectionary.

40 As to the second, the word "other" and the term "food preparations" must take their meaning from context. That includes the heading to Ch 21 ("Miscellaneous edible preparations") and the other headings and subheadings of that chapter. The specific context is heading 2106 and the subheadings therein contained which are in the following terms:

2106	FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED:	
2106.10	-Protein concentrates and textured protein substances:	
2106.10.10	---Protein concentrates	Free
2106.10.20	---Textured protein substances	5% DCS:4% DCT:5%
2106.90	-Other:	
2106.90.10	---Goods, as follows:	5%
	(a) compound alcoholic preparations of a kind used for the manufacture of beverages;	DCS:4% DCT:5%
	(b) food preparations of flour or meal;	
	(c) hydrolysed protein	
2106.90.20	---Preparations for oral consumption, such as tablets and chewing gum containing nicotine, intended to assist smokers to stop smoking	Free
2106.90.90	---Other	4% DCS: Free

41 Having regard to the finding of fact made by the Tribunal concerning the essential character of the vitamin preparations, we are also not satisfied that they are a "food preparation" within heading 2106. The Tribunal decided that the preparations were not food but vitamins with prophylactic and therapeutic properties. For the reasons already given, by so concluding the Tribunal did not err.

42 The statutory context does not compel any different conclusion. Chapter 21 is concerned with a series of edible preparations, such as extracts, essences and concentrates of coffee or tea, yeast, sauces (such as tomato ketchup), mustard, soups and broths, ice cream, protein concentrates and preparations intended to assist smokers to quit smoking. These items appear to have nothing in common, save that each is edible and is probably food, or an ingredient of food. That observation detracts from, and does not support the contention that vitamin preparations should be taxed in accordance with Ch 21, given their essential character, as found below.

43 Statutory purpose also arguably supports the conclusion reached by the Tribunal. Most of the items listed in Ch 30 may be imported free from duty. Inferentially, that may be because the items are medicaments. In contrast, many of the items listed in Chs 17 and 21 are subject to duty. The prophylactic and therapeutic properties of the vitamin preparations here, together with the findings made below about their essential character, support, and do not detract from, the Tribunal's conclusion.

44 The Comptroller's reliance upon the HSEN compels no different conclusion. There are two issues for consideration. First, can this Court consider those notes as an extrinsic aid for the purposes of construing the Tariff? Secondly, do the notes support the Comptroller's case?

45 The notes in question were made before the enactment of the Customs Tariff Act. They were prepared by the Harmonized System Committee as established by the Convention to which Australia is a party. As already mentioned, pursuant to Art 7(1)(b) of the Convention, the Committee is authorised to prepare the notes "as guides to the interpretation of the Harmonized System". The notes are deemed to be approved by the World Customs Organization in certain circumstances.

46 In *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149 ("*SNF*"), a Full Court of this Court was invited to consider the *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* as published by the Organisation for Economic Co-operation and Development (the "OECD Guidelines"), for the purposes of construing and applying Australia's domestic transfer pricing rules, then contained in Div 13 of Pt III of the *Income Tax Assessment Act 1936* (Cth) and certain articles contained in certain double tax treaties. It was also said that the OECD Guidelines could assist in the consideration of the internationally accepted "arm's length" principle, referred to in the Explanatory Memorandum to the Bill which introduced Div 13. The Full Court disagreed. Pursuant to Art 31 of the *Vienna Convention on the Law of Treaties 1969* (the "Vienna Convention"), the Court instead decided that the OECD Guidelines could not be considered unless they reflected a subsequent agreement reached by the countries in question, or reflected subsequently agreed practice. As there was no evidence before the Court of any such agreement or practice, the OECD Guidelines were not considered.

47 Here, the Comptroller submitted that:

(1) The HSEN should be construed as a subsequent agreement between the parties to the Convention, because the Convention contemplates, by Arts 7 and 8, that the Harmonized System Committee would issue interpretive notes from time to time;

(2) There was a practice of countries, including Australia, treating the HSEN as guidelines to the interpretation of the Harmonized System, although no evidence of such a "practice" was before the Court;

(3) The respondent had accepted the legitimacy of examining the HSEN before the Tribunal, and had the Comptroller known about this issue he would have adduced evidence of the "practice" now alleged by him. The respondent should, the Comptroller submitted, be bound by its concession.

48 The respondent disagreed with the contention that it had made a concession concerning the relevance of the HSEN. A review of the transcript below supports that submission.

49 If it matters, and for reasons given below it may not, in our view this Court may legitimately consider the contents of the HSEN as an aid to construction without proof of practice or agreement. Having said that, the HSEN should be considered cautiously. Australia has not enacted the Convention to be a part of our domestic law (cf s 815-135 of the *Income Tax Assessment Act 1997* (Cth)). Rather, Parliament has enacted Sch 3, and it is the words of that Schedule which must be given primary consideration, even though, as the "User's Guide" which appears in the preamble of the Customs Tariff Act confirms, the Tariff "classifies goods in accordance with Australia's international obligations as a party to the World Trade Organization Agreement". In that respect, s 7 of the Customs Tariff Act directs the reader to use the Interpretation Rules in Sch 2 for the purposes of working out the classification of an item under the Tariff. It does not direct the reader to the HSEN.

50 Nonetheless, it is now well-established that the Convention itself may, in an appropriate case, be treated as an aid to construction of the Tariff. As Mason J observed in *D & R Henderson (Manufacturing) Pty Ltd v Collector of Customers for New South Wales* (1974) 48 ALJR 132 at 135 in relation to the former *Customs Tariff 1965* (Cth) and the predecessor Convention:

> Although the Customs Tariff 1965 and the relevant amendments to it were enacted before Australia ratified the Convention, notwithstanding the absence in the Act of any reference to the Convention, it is evident that Act adopted the Convention nomenclature in anticipation of subsequent Australian ratification. If the language of the statute is ambiguous it is permissible to refer to the provisions of an international convention to which the statute is intended to give effect in order to assist in resolving ambiguity, even if the statute is enacted before ratification of the

Convention.

In that case, Mason J said it was an open question as to whether explanatory notes prepared by what was then called the "Nomenclature Committee" could be a permissible aid to construction. Mason J was upheld on appeal: (1975) 7 ALR 104.

51 Subsequently, the Full Court of this Court confirmed the potential relevance of the explanatory note as an aid to construction pursuant to s 15AB of the *Acts Interpretation Act 1901* (Cth): see *Toyota Tsusho Australia Pty Ltd v Collector of Customs* [1992] FCA 282 ("*Toyota Tsusho"*); *Primaplas* at [72]. Section 15AB(1), authorises the Court to consider the HSEN if their content "is capable of assisting" the meaning of a provision in the Tariff. As Black CJ and Heerey J said in *Toyota Tsusho* at [24]:

> 24. It is established by decisions of Full Courts of this court that s.15AB of the *Acts Interpretation Act 1901* permits, in the manner allowed by s.15AB(1), reference to be made to the Explanatory Notes to assist in the interpretation of the Customs Tariff Act: *Barry R. Liggins Pty. Ltd. v Comptroller-General of Customs and Ors*., (1991) 103 ALR 565. In *Gardner Smith Pty. Ltd. v Collector of Customs, Victoria* (1986) 66 ALR 377, the Full Court of the Federal Court approved the use of the Explanatory Notes to the Brussels nomenclature as an aid to the interpretation of Schedule 3 to the *Customs Tariff Act 1982*, to which the same principles apply.

52 However, explanatory notes, such as the HSEN, have only limited use. They are only helpful if they are capable of assisting the task of construction. As Black CJ and Heerey J went on to observe in *Toyota Tsusho* at [25]:

> 25. The limitations on the use of extrinsic materials must of course be kept in mind. In *Barry R. Liggins Pty. Ltd. v Comptroller-General of Customs* at 573, Beaumont J., with whom Lockhart and Gummow JJ. agreed, quoted with approval a passage from E.J. Cooper, Customs and Excise Law, (Cumulative Supplement to 30 June 1985 at 9) where it is said:
>
> > "... (The Brussels Notes) are a secondary guide only and cannot displace the plain words of the statute ... or be used when there is no ambiguity in the legislation, eg a doubt cannot be created by the use of the explanatory notes and then have the doubt settled by reference to the same notes."

The foregoing passage applies equally to the HSEN.

53 There is nothing in the Vienna Convention which precludes or diminishes a court's authority to consider the HSEN if it assists in the task of construction of the Tariff. The terms of that Convention cannot alter the operation of s 15AB and the Court's duty to consider extrinsic material, if helpful.

54 Nor does *SNF* compel a contrary conclusion. That case was not concerned with s 15AB and the interpretation of the Tariff.

55 Both parties referred to different parts of the HSEN, although their contents assumed much greater prominence in the Comptroller's submissions. The Comptroller relied upon the following parts of the notes in relation to the heading 1704:

> It [ie heading 1704] includes:
>
> …
>
> Preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agent's (including substances having medicinal properties, such as benzyl alcohol, menthol, eucalyptol and tolu balsam).

In relation to heading 2106, the Comptroller relied upon [10] and [16], which are in these terms:

> …this heading covers:
>
> …
>
> Preparations (e.g. tablets) consisting of saccharin and a foodstuff, such as lactose, used for sweetening purposes.
>
> …
>
> Preparations, often referred to as food supplements, based extracts from plants, fruit concentrates, honey, fructose et cetera and containing added of items and sometimes minute quantities of iron compounds. These preparations are often put up in packagings with indications that they maintain general health or well-being. Similar preparations, however, intended for the prevention or treatment of diseases or ailments are excluded (heading 30.03 or 30.04).

56 Finally, the Comptroller relied upon the following notes relating to heading 3004:

> However, preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agent's (including substances having medicinal properties, such as benzyl alcohol, menthol, eucalyptol and tolu balsam) fall in heading 17.04.
>
> ….
>
> Similarly foodstuffs and beverages containing medicinal substances are excluded from the heading [ie heading 3004] if those substances are added solely to ensure a better dietetic balance, to increase the energy - giving or nutritional value of the product or to improve its flavour, always provided that the product retains the character of a foodstuff or a beverage.
>
> …
>
> Further this heading [ie heading 3004] excludes food supplements containing buttons or mineral salts which are put up for the purpose of maintaining health or well - being

> have no indication as to use the prevention or treatment of any disease or ailment. These products which are usually in liquid form may also be put up in powder tablet form, are generally classified in heading 21.06 or Chapter 22.

57 In contrast, the respondent found passages in the HSEN which it said support its case. Thus, in relation to the notes for heading 3004 it relied upon the following passages:

> This heading covers medicaments consisting of mixed or unmixed products, provided they are:
>
> (a) Put up in measured doses or in forms such as tablets, ampoules (for example, re-distilled water, in ampoules of 1.25 to 10 cm^3, for use either for the direct treatment of certain diseases, e.g., alcoholism, diabetic coma or as a solvent the preparation of injectible medicinal solutions), capsules, cachets, drops or pastilles, or small quantities of powder, ready for taking as single doses for therapeutic or prophylactic use.
>
> …
>
> Throat pastilles or cough drops containing substances having medicinal properties, other than flavouring agents, remain classified in this heading when put up in measured doses or in forms or packings for retail sale, provided that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.
>
> …
>
> … the heading covers preparations in which the foodstuff or the beverage merely serves as a support, vehicle or sweetening agent for the medicinal substances (e.g., in order to facilitate ingestion).

58 We make two observations about the HSEN:

(1) First, the Comptroller contended that the Tribunal erred because it "failed to have regard" to the HSEN. That is not so. The Tribunal did consider the HSEN but found the notes not to be "helpful": at [65] below. The Tribunal, for that purpose, cited *Primaplas* at [72], *supra*.

(2) Secondly, we generally agree with the submission of the respondent that the HSEN do not add much to the debate. To the extent that they suggest that, for example, "throat pastilles" should be classified as a medicament when put up in "measured doses or in forms or packings for retail sale" provided that the proportion of the substance is such that each pastille is thereby "given therapeutic or prophylactic uses", this does not support the Comptroller's appeal. Here, the finding of fact below was that the essential character of the vitamin preparations were the vitamins they contained, and that they have prophylactic and therapeutic properties. As noted, those findings were not challenged before us. No finding was made below that the prophylactic or therapeutic effects of the preparations were only incidental or subordinate to the

quality of the preparations as something to be eaten. Instead, it was found that the excipients were subordinate or incidental to the function and purpose of the gummies.

59 The Comptroller also complained that he was denied procedural fairness because an argument he had presented had not been addressed. The argument was that a distinction should be drawn between vitamin preparations which have a general purpose of supplementing a person's diet and higher dose or targeted vitamin preparations that might more properly be regarded as medicaments. This submission, inspired it would seem by the text of the HSEN, was not, in our view, overlooked by the Tribunal. The distinction formed part of the reasoning of the Queen's Bench Division in *Unigreg Ltd v Her Majesty's Customs and Excise* (1999) 45 BMLR 179 (*"Unigreg"*). In that case, the issue for determination was whether certain "Forceval capsules", which contained vitamins and minerals, were correctly classified by the VAT and Duties Tribunal to be a food preparation and not a medicament for the purposes of the Common Customs Tariff (UK). Moses J affirmed the Tribunal decision. His Lordship said at 187:

> … the fact that a product has a broad spectrum of prophylactic or preventative functions does not disqualify it from being classified under heading 30.04. That proposition is not in dispute, but it is a proposition which must be based on a finding that the product does have specific effects, even though there may be a number of specific effects.
>
> The difficulty in this case is that on the findings of the Tribunal this product has no specific effect at all. It has not been shown to have an effect or even effects concentrated on precise functions of the human organism.

The Tribunal below considered *Unigreg* in some detail at [33] to [41]. It was distinguished on the basis that the case turned upon the United Kingdom Tariff which was materially different to the Australian Tariff. The distinction drawn by Moses J between products which have specific effects and those which do not, is one of which the Tribunal would have been aware, and which is essentially the same distinction sought to be made by the Comptroller. It was accordingly implicitly rejected by the Tribunal when it declined to follow *Unigreg*. Before us, the Comptroller did not challenge the Tribunal's rejection of *Unigreg*. Indeed, he did not refer to that case in argument before us. For these reasons, the Comptroller was not denied procedural fairness.

60 As to the merits of the Comptroller's submission that a distinction should be made between vitamin preparations which have only a general effect on a person's health as against more targeted vitamin preparations, in our view it is not supported by the language of headings

1704 or 2106. The means delineated by Note 1(a) of Ch 30 of addressing any potential overlap between Section IV and Ch 30 in respect of a given item or good is to ask whether that item falls within Section IV; if it does, it is not to be classified within Ch 30 regardless of its medicinal properties.

61 Finally, the Comptroller submitted that the Tribunal erred in law in not having regard to the content of the labels which appeared on the packets of vitamin preparations. It was accepted that those labels were only attached following importation; they were not present on the goods at the "wharf-side". It was also accepted that the content of the labels would have been, in some cases, affected by control exercised by the Therapeutic Goods Administration. Nonetheless, the Comptroller contended that the labels revealed the true purpose and function of the preparations; namely, that they were no more than dietary supplements. Thus, one of the labels describes the function of one of the preparations in the following terms:

> To help get their essential vitamins and minerals.
>
> As part of a healthy lifestyle, it is important to get the key vitamins and minerals your body need [sic] every day and support good health. Specifically formulated with 14 key vitamins and minerals to help support: Immunity, Energy, Heart Health, Eye Health, Stress and Nerves, Strong bones & teeth.

62 These labels, it was contended, also supported the distinction sought by the Comptroller to be drawn between preparations which generally assisted a person's health, and those directed at specific medical issues. Other labels, however, indicated more specific functions or purposes. For example, the purpose of one product was described on its label in the following terms:

> To help support:
>
> Strong Bones & Calcium Absorption
>
> Nature's Way Vitamin D3 Vitagummie, the "Sunshine" gummie, contains 1000iu of Vitamin D3 and is the delicious way to support your Vitamins D3 levels. Vitamin D3 Vitagummies can help improve Calcium absorption, [p]romote strong bones and teeth, and maintain muscle strength.
>
> Some Australians have insufficient levels of Vitamin D3 due to increasing awareness about some protection, lack of sun exposure or an inadequate diet.

63 In *Collector of Customs v Chemark Services Pty Ltd* (1993) 42 FCR 585, the issue for determination was the classification for Tariff purposes of drums of metham sodium solution. For such drums to fit within subheading 3808.40.00 of the former Tariff, they had to be "put up in forms or packings for retail sale". When imported the drums bore no labels. Labels were added later. Chemark Services Pty Ltd's argument included that the absence of a label

meant that the drums could not be "put up in forms or packings for retail sale" because there could not be a lawful retail sale of the drums under Victorian law without a label outlining safety information and directions for use. In respect of this argument, the Full Court of this Court stated at 591-592:

> We respectfully agree with and adopt the findings of his Honour that the presence or absence of the label is not relevant to the interpretation of heading 3808. The addition of the label did not modify or enhance the metham sodium in any way, and could not be said to affect the question of whether the drums were in a form or packing bound or intended for retail sale when imported. As stated by his Honour [the primary judge]:
>
> > "If it were otherwise, importers would be able to escape the duty prescribed by heading 3808 simply by instructing foreign manufacturers not to attach labels to chemicals put up for retail sale which are bound for Australia."

64 The Court pointed out in the second sentence of that passage that the fact that a label was affixed after the drums were imported could not change the character of what had been imported and did not affect the form or packaging of the goods as imported.

65 Where a relevant heading or subheading of the Tariff includes, as part of its description of the item or good, references to intended use or purpose, the contents of a label have been recognised as potentially relevant. As Northrop J (with whom Jenkinson J agreed) observed in *Vernon-Carus Australia Pty Ltd v Collector of Customs* (1995) 21 AAR 450 at 456:

> Some heading classifications make specific reference to a form or to a purpose. Where this is so, a "practical wharf-side" task, may not be appropriate. Evidence may need to be received relating to the form or purpose of the goods. In cases of this kind, the heading will need to be construed properly in order to determine what evidence is relevant to identify the goods.

The heading in issue in that case was in these terms:

> Wadding, guaze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings *for retail sale for medical, surgical, dental or veterinary purposes*.
>
> (Our emphasis.)

Other than heading 3004 which refers to products "for" therapeutic or prophylactic uses, no equivalent language appears in the notes, headings or subheadings in issue in this case. At least if the language of a heading refers to the intended use or purpose of a good, the Court is not necessarily limited to examination of the physical attributes of that product as at the wharf-side, although in a given case, that may be a sufficient means of objectively determining use. Other evidence, whether it be labels, either present at the wharf-side or

added later, or other material, may, if probative as to how the goods are to be used, be legitimately admitted into evidence and considered by the Court, so long as it is directed to the state of the goods when they enter Australia.

66 Here, the Tribunal, as already mentioned, made a finding of fact that the vitamin preparations have prophylactic and therapeutic properties. That was a finding capable of being made without the assistance of the contents of the labels. In that respect, the Tribunal made a further finding of fact, namely that the content of the labels could not qualify the conclusion that the goods had prophylactic and therapeutic properties: at [76]. The making of that finding of fact was not shown to be affected by any error of law: cf *Haritos*.

(ii) Garcinia Preparations

67 The Comptroller submitted:

(1) First, that the Tribunal erred in equating the expression "food preparations" in heading 2106 with the meaning of "foods" or "food supplements" in Note 1(a) to Ch 30. "Food preparations", it was submitted, "do not have to be 'food'" contrary to the Tribunal's suggestion. Rather, it was submitted that "food preparations" refers to substances to be eaten that comprise a mixture of more than one ingredient. In that respect, the Comptroller also complained that the Tribunal had failed to consider statutory context;

(2) Secondly, that the Tribunal had again failed to supply adequate reasons and had again failed to state what meaning should be given to the term "foods".

We would, with respect, reject the second alleged error for the reasons earlier given concerning the same complaint in relation to the vitamin preparations. In our view, the reasoning of the Tribunal was adequate.

68 As to the first, we think that the Tribunal's reliance upon its earlier reasoning concerning the application of Note 1(a) to Ch 30 to reject the Comptroller's classification of the weight loss gummies as "food preparations" was not erroneous. In that respect, it did not only rely on those reasons. It made a finding of fact that the main purpose of the garcinia preparations appeared to be cosmetic (at [85]). That was a finding, in our view, concerning the essential character of the garcinia preparations. It was not challenged on appeal. Having so characterised these products, it follows that they were not "food preparations". In other

words, in the context of Section IV and Ch 21, a product whose essential character is "cosmetic" cannot also bear the essential characteristic of being a "food preparation".

69 Statutory context, earlier adverted to, does not support the contrary conclusion. There is nothing about the miscellaneous items listed in Ch 21 that would support the conclusion that the garcinia preparations should be classified as food preparations. Nor, given the unchallenged finding of the Tribunal that the gummies often confer significant health advantages, does statutory purpose support the Comptroller's classification.

70 The Comptroller did not otherwise attack the Tribunal's conclusion that the weight loss gummies, if not a "food preparation", were akin to heading 3004 for the purposes of r 4 of Sch 2 of the Customs Tariff Act, given the health advantages of weight loss.

71 For these reasons, the Tribunal did not err at law in classifying the vitamin and garcinia preparations under Ch 30 of the Tariff.

72 The Comptroller's appeal must be dismissed.

I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Burley, Steward and Thawley.

Associate:

Dated: 21 December 2018