

OMB Number: 1545-1662.

Regulation Project Number: REG-121063-97 Final.

Type of Review: Extension.

Title: Averaging of Farm Income.

Description: Code section 1301 allows an individual engaged in a farming business to elect to reduce his or her regular tax liability by treating all or a portion of the current year's farming income as if it had been earned in equal proportions over the prior three years. The regulation provides that the election for averaging farm income is made by filing Schedule J of Form 1040, which is also used to record and total the amount of tax for each year of the four year calculation.

Respondents: Farms, individuals or households.

Estimated Number of Respondents: 1.

Estimated Burden Hours Per

Respondent: 1 hour.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 1 hour.

Clearance Officer: Glenn Kirkland, Internal Revenue Service, Room 6411-03, 1111 Constitution Avenue, NW., Washington, DC 20224, (202) 622-3428.

OMB Reviewer: Joseph F. Lackey, Jr., Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, (202) 395-7316.

Mary A. Able,

Departmental Reports Management Officer.

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DEPARTMENT OF THE TREASURY

Customs Service

Receipt of Domestic Interested Party Petition Concerning Tariff Classification of Dairy Protein Blends

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: Customs has received a petition submitted on behalf of a domestic interested party requesting the reclassification under the Harmonized Tariff Schedule of the United States (HTSUS) of certain imported dairy protein blends. The petitioner contends that the imported dairy products are being mischaracterized as milk protein concentrates and have been incorrectly classified in subheading 0404.90.1000 HTSUS, with a general rate of duty of 0.37¢ per kilogram. Petitioner contends that the products are properly

classifiable under various subheadings of heading 0402, HTSUS. This document invites comments with regard to the correctness of the current classification.

DATES: Comments must be received on or before November 18, 2002.

ADDRESSES: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, NW., Washington, DC 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW., Washington, DC, during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at 202-572-8768.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202-572-8778.

SUPPLEMENTARY INFORMATION:

Background

This document concerns two Customs rulings on the tariff classification of certain imported dairy protein blends. The imported products that are the subject of the rulings are identified as being a "milk protein concentrate" and have, according to the rulings, the following ingredients:

Product 1: Lactose (42.2 percent, +/- 0.5 percent), protein (41.5 percent, +/- 0.5 percent), ash (8.2 percent, +/- 0.5 percent), moisture (4.1 percent, +/- 0.3 percent), and fat (2.5 percent, +/- 0.5 percent).

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

A petition has been filed under section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of American producers of dairy products that directly compete with the imported dairy blends requesting that Customs reclassify the imported products. Customs has classified these products under subheading 0404.90.1000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for: "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: Other: Milk protein concentrates" which has a general duty rate of 0.37 cents per kilogram, and is not subject to a tariff-rate quota. The petition contends that these products are blends, *i.e.*, mixtures of skim milk powder and other dry milk ingredients—such as "milk protein

concentrate"—created, at least in part, to circumvent the tariff rate quotas.

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined 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 GRI may then be applied. The Harmonized Commodity Description and Coding System, Explanatory Notes (EN), represent the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and the GRI. The EN, although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are indicative of the proper interpretation of these headings. See T.D. 89-80, 54 FR 35127, 35128 (August 23, 1989).

Classification of dairy products is essentially based on the composition of the product. In the present case, direction is also provided by Additional U.S. Note 13 to Chapter 4, which states: "For the 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."

In New York Ruling Letter (NY) 800374, dated July 27, 1994 and NY D83787, dated November 13, 1998, Customs classified two dairy products, both identified by the importer as "milk protein concentrates," in subheading 0404.90.1000, HTSUS, as milk protein concentrates. Both products contain over 40 percent milk protein concentrate. Additionally, one product also contains a significantly higher percentage of fat than naturally occurs in milk. Unfortunately, neither ruling contains information about the method(s) used to produce either product, and the original files were lost in the destruction of the New York Customs House at the World Trade Center on September 11, 2001.

Petitioner contends that neither of the products classified in those rulings should be classified in subheading 0404.90.1000, HTSUS. Petitioner contends that the expression "complete milk protein" in Additional U.S. Note 13 requires the presence of both casein and lactalbumin in the same, or very nearly the same proportion, relative to

each other, as they are naturally found in skim milk. Petitioner further contends that the term "complete" requires that the product be a unified protein complex that retains the functional properties of the proteins, including both casein and lactalbumin, as they occur in skim milk. Petitioner further contends that the term "concentrate" requires that the product have been concentrated—*i.e.*, reduced in volume or bulk by the removal of liquids and other ingredients.

In support of its position, petitioner refers to Customs rulings (HQ 052200, dated September 1, 1977 and HQ 070297, dated October 7, 1982) and legislative history surrounding development of item 118.45, and its addition to the Tariff Schedules of the United States (TSUS), the predecessor to the HTSUS, in 1984, in section 123 of the Tariff and Trade Act of 1984 (Public Law 98-573, 98 Stat. 2955, October 30, 1984).

Petitioner argues that the legislative history and early Customs rulings indicate that the tariff provision for "milk protein concentrates" was created to cover products that had been manufactured by means of an ultra-filtration process that isolates all the protein concentrates of non-fat dry milk (NFDM) (casein and lactalbumin) in a single protein complex, while retaining all of their functional properties.

Petitioner states that the expression "complete milk protein (casein plus lactalbumin) concentrate" found in Additional U.S. Note 13 "was intended to cover dairy products (1) that are fully functional (unified) protein complexes, (2) that are undenatured, (3) that retain their functional properties after ultra-filtration, and (4) that are in concentrate form."

Petitioner maintains that the ultra-filtration process is the only one which produces a product that fits this standard, since the resulting milk protein concentrate product is what remains after the liquid and other ingredients have been removed from the skim milk by filtration. Petitioner argues that dairy protein blends contain various proteins that are not complete or whose functionality has been altered by processing, thus making the resulting product ineligible for classification in subheading 0404.90.1000, HTSUS.

Petitioner asserts that dairy protein blends do not satisfy the definition found in Additional U.S. Note 13 to Chapter 4, HTSUS, and are properly classified as "milk . . . in powder, granules or other solid forms," under subheading 0402.10.0402.21, or 0402.29, HTSUS, depending on their fat content. As such, they would be subject to tariff rate quotas.

Comments

Pursuant to section 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments on the petition from interested parties.

The domestic party petition, as well as all comments received in response to this notice will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552, section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), between the hours of 9 a.m. and 4:30 p.m. on regular business days, at the U.S. Customs Service, Office of Regulations and Rulings, Regulations Branch, 5th Floor, 799 9th Street, NW., Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at 202-572-8768.

Authority: This notice is published in accordance with section 175.21(a), Customs Regulations (19 CFR 175.21(a)), 19 U.S.C. 1516.

Robert C. Bonner,

Commissioner of Customs.

Approved: September 13, 2002.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

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