IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S161 of 2019

BETWEEN: COMPTROLLER-GENERAL OF CUSTOMS
Appellant
and
PHARM-A-CARE LABORATORIES PTY LTD (ACN 003 468 219)
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: Outline of Propositions

The Tribunal's reasons – identification of the goods

2. The Administrative Appeals Tribunal (**Tribunal** or **T**) first identified the goods (T [10]). In a practical sense, the products are vitamin or garcinia delivery systems. This identification step involves findings of fact which are not challenged by the appellant.

The Tribunal's reasons – vitamin preparations

3. Having regard to Note 2 to Section VI, the Tribunal properly took as its starting point Note 1(a) to Ch 30 to Sch 3 of the *Customs Tariff Act 1995* (Cth) (**Act**).

4. The Tribunal correctly had regard to the ordinary meaning of "foods" and "food supplements" used in Note 1(a) guided by common sense, experience of the world and local knowledge (T [56]-[62], RS [9], [13]). No party suggested that "food" or "food supplement" had a special trade meaning. The AAT did not adopt the reasoning of two earlier AAT cases or various English or Canadian authorities.

5. The Tribunal identified that there were two possible views of Note 1(a): whether Note 1(a) operates to exclude all food supplements from Ch 30, or only those food supplements that are also "foods or beverages". The Tribunal preferred the latter view.

6. The French language version of Note 1(a) is a distraction and does not assist in choosing one

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of the two possible constructions of Note 1(a). The texts are materially different and inherently liable to lead to different outcomes. The English text is an authentic version and the only one enacted in the Act. The classification task is intended to take place as a practical and common sense wharfside assessment by customs officers in English.

7. Having thus construed Note 1(a), the Tribunal correctly found that the vitamin preparations were not "food" (T [57]-[60]). Addressing the alternative construction of Note 1(a), the Tribunal also found that the vitamin preparations were not "food supplements" (T [54], [61]-[62], RS [9], [13]). Thus, on either construction, the vitamin preparations are not excluded by Note 1(a). This makes the construction question (i.e. issues 1 and 2) irrelevant.

Issue 1: "such as"

8. The Tribunal correctly adopted the ordinary and natural meaning of "such as". That Note 1(a) is drawn from treaty language does not justify a departure from its ordinary meaning. The text in brackets in Note 1(a) provides the function of providing clarification.

9. This interpretation of "such as" is consistent with other uses in the Convention (e.g. heading 1902). The Convention uses other words, such as "includes" or "means" or "covers", when seeking to expand an ordinary meaning (RS [38]). The High Court cases relied upon by the appellant do not provide useful guidance (RS [41]-[42]).

Issue 2: Parentheses at the end of Note 1(a)

10. The FC upheld the Tribunal's construction of Note 1(a) and its conclusion that it did not cover the vitamin preparations before offering additional and supplementary reasons for endorsing that construction. The correctness or otherwise of this supporting argument does not affect the correctness of the Tribunal's decision (RS [44]).

11. The FC's approach first requires consideration of whether a good is a food or a beverage, and then, if it is a food or beverage, whether it falls within Section IV. In this case, it makes no practical difference because the two headings into which the appellant submitted that the vitamin preparations could fall (1704 and 2106) are both located in Section IV of the Act (RS [46]).

12. The better view is that the cross-references given in parentheses have operative force (RS [46]-[51]). This is consistent with *Chief Executive Officer of Customs v ICB Medical Distributors Pty Ltd* (2008) 73 ATR 306, which accepted the argument advanced by the CEO of Customs (RS [48]-[50]).

Garcinia preparations – ground 2

13. Ground 2 is limited to the construction of heading 2106.

14. In construing and applying heading 2106, the Tribunal did not state that the goods were not food preparations because they were not food. The better reading of T [87] is that the Tribunal gave "food preparations" its ordinary meaning and approached it in a commonsense manner, and thus found that it did not cover the garcinia preparations (identified as weight loss products serving a cosmetic purpose) (RS [14], [55], [61]).

15. The FC correctly understood that the Tribunal's approach was to reject the garcinia preparations as food preparations based on the nature of the garcinia products themselves (RS [61]). The FC also considered the statutory context of 2106 and saw nothing in it that would require a weight loss product to be classified under that heading (RS [62]).

16. The Tribunal recognised that a product can be classified under a heading even if its essential character does not warrant such a classification. This occurs in the application of the "most akin" test, which is not relevant to the construction of heading 2106 (RS [57]).

Relief

17. Even if the appellant is successful in relation to ground 1 (issues 1 or 2), the appeal should be dismissed because the Tribunal made findings to address the appellant's preferred construction of "such as" in Note 1(a) (issue 1), and did not make the alleged error with respect to "(Section IV")" in Note 1(a) (issue 2) (RS [63]). If ground 2 is upheld, only the Tribunal's decisions in relation to the garcinia products should be set aside and remitted (RS [64]).

18. No notice of contention is required for the appellant to rely upon the Tribunal's finding in relation to food supplements. The Tribunal made the relevant findings and these were adopted by the FC.

Dated 17 October 2019

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