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)

10 Respondent

RESPONDENT'S POST-HEARING NOTE

Part I: Certification

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

Part II: Note

2. These submissions address the Appellant's Post-Hearing Note (**APHN**) on how the Chapter Notes relate to the headings in Schedule 3 of the *Customs Tariff Act 1987* (Cth) (**Act**).

20 *No relevant ground of appeal*

3. At the outset, the respondent notes that these submissions are intended to assist the Court but are not designed to affect the outcome of the appeal. The respondent accepts the appellant's submissions at APHN [19] that the Tribunal held that Note 1(a) did not cover the vitamin preparations or the garcinia preparations, classified the vitamin preparations without turning to Interpretation Rules 2, 3 and 4 in Schedule 2 of the Act (all Rules in Schedule 2 the **Interpretation Rules**), and classified the garcinia preparations by applying Interpretation Rule 4 (APHN [19]).

4. The application of the Interpretation Rules is relevant only to the classification of goods and not to the construction of the relevant headings or for any other purpose: see

Filed on behalf of the respondent by:
Clayton Utz
Level 15, 1 Bligh St
Sydney NSW 2000

Telephone: (02) 9353 4000
Fax: (02) 8220 6700
Email: mstill@claytonutz.com
Ref: Mary Still

s 7(1) of the Act; *Rheem Australia Ltd v Collector of Customs (NSW)* (1988) 78 ALR 285 at 297 (Burchett J). The appellant's grounds of appeal related only to questions of *construction* of Note 1(a) to Ch 30 and heading 2106. The Tribunal's process of classification of the goods, including its application of the Interpretation Rules, does not arise on this appeal. There was also no ground of appeal relating to the Interpretation Rules before the Full Court of the Federal Court of Australia.

5. If at APHN [10] the appellant is submitting that the Tribunal correctly proceeded first by addressing whether the vitamin preparations and garcinia preparations were covered by Note 1(a), the respondent agrees. The respondent also notes that the Tribunal considered the "essential character" of the vitamin preparations and garcinia preparations at the prior identification step, which was the correct approach and was not challenged by the appellant. Whether or not Interpretation Rule 3(b) of the Interpretation Rules is applicable, it is "both a practical and perfectly legitimate enquiry… to ask what is [the relevant good's] essential character and purpose": *Cray Communications Ltd v Collector of Customs* [1998] FCA 122 (Madgwick J; affirmed on appeal: *Anite Networks Pty Ltd v Collector of Customs* [1999] FCA 26 (Einfeld, Carr and Lehane JJ (***Anite***)).

6. In *Anite*, the dispute concerned whether the relevant goods were multiplexors or packet switches. The Tribunal found that "what gives the subject goods their essential character and purpose is the switching function" and classified them to the sub-heading appropriate to that function. The Full Court of the Federal Court of Australia read the Tribunal's reasons as indicating that the Tribunal had first asked "what are the goods essentially and what is the essential function that they perform", and then secondly taken the next step of classification (at [31]). The Court continued at [32]-[33], confirming that the concept of "essential character" may be relevant at the identification stage (that is, prior to classification and the application of relevant Interpretation Rules):

> *There is no trace in that reasoning of any attempt to apply Note 4: the language used by the Tribunal by no means reflects that note. Para3(b) of the Interpretation Rules is nowhere mentioned in the Tribunal's reasons; the only basis for a suggestion that the Tribunal applied that paragraph, or had regard to it, is an expression of doubt early in the reasons, as to the applicability of r2 and r3(a) and the use by the Tribunal, in the identification process, of the words "essential character", words which appear in the Interpretation Rule 3(b)... In referring to essential character and function, the Tribunal was, more colloquially, asking "what really are the Goods, and what really is it that they do?".*

The Tribunal found that they were switches; there was ample evidence to support that finding; it was a finding of fact; it ought not to be disturbed.

7. Although the identification dispute is not at issue in this Appeal, a similar analysis and conclusion would apply to the Tribunal's identification of the vitamin preparations and garcinia preparations in the present case.

The Interpretation Rules may apply to classification of goods pursuant to Chapter Notes

8. The respondent disagrees with the appellant's submission that the relevant headings and Chapter Notes are always "applied" *before* "applying" Interpretation Rules 2-5 (see APHN [4]), if this is intended to mean that a heading or Chapter Note is fully and finally "applied" before consideration is given to Interpretation Rules 2-5. If the appellant's apparent position were correct, Interpretation Rules 2-5 would have very little work to do. The respondent submits that, although the heading or Chapter Note is the starting point for classification, the application of Interpretation Rules 2-5 (where relevant) is not a discrete task applied separately at a later stage in the classification process. The Interpretation Rules may inform the application of a heading or Chapter Note. The respondent also disagrees that the appellant's submission reflects the "general understanding" articulated in the Harmonized System Explanatory Notes (**HSEN**) (cf APH [5]). As the HSEN states in respect of Interpretation Rule 1, the terms of the headings and any relevant Section or Chapter Notes are the "first consideration" in determining classification (see excerpt (V) at APHN [6]). This says no more than that this is the starting point. HSEN explanatory note (III) to Interpretation Rule 1 does not suggest that one applies (a) first and then (b); rather, this says that one must follow the steps in both (a) and (b), *except where* (b) is excluded by a heading or Note. Where a Note does not "otherwise require", the Interpretation Rules are not displaced.

9. Contrary to APHN [9], the appellant's understanding of the HSEN is not reflected in the express text of the Act. Section 7 of the Act expressly provides that "the Interpretation Rules" must be used for working out the tariff classification under which goods are classified. Interpretation Rule 6 provides that the classification of goods in the subheadings of a heading shall be determined "according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules…" This reinforces that the Interpretation Rules play a role in classifying goods according to the terms of subheadings and subheading notes (and, implicitly, for headings and Chapter Notes prior

to reaching the subheading level).

10. In *Re Tridon Pty Ltd and Collector of Customs* (1982) 4 ALD 615 (Joint Book of Authorities (**JBA**), **vol 4, tab 35**), the Tribunal was concerned with the operation of various Notes in the older *Customs Tariff Act 1966* (Cth) and the Rules for the Interpretation of the First Schedule. These are relevantly similar to the current Interpretation Rules in Sch 2 of the Act. In response to a submission that interpretative rule 2(3) applied only to a reference in a heading and not to a reference in a divisional note or chapter note, the Tribunal noted at 619 (**JBA vol 4 p.1388**):

> *Serious anomalies in the application to the Tariff could arise if goods which, on a proper application of the Rules, are found to "fall" to an item etc were treated differently when construing a reference to such goods in a divisional or chapter note.*

11. The respondent endorses that approach. If relevant and there is no express statement requiring otherwise, the Interpretation Rules may be used as part of the process for determining whether the relevant goods fall within a Chapter Note.

12. The respondent agrees with the statement at APHN [4] that, if a Chapter Note requires that a kind of good not fall within the Chapter, one does not – and cannot – then classify the good to a heading within the Chapter. For example, if a kind of good falls within any of the specified headings in Note 2 to Section VI (including heading 3004), that Note requires that goods are classified to one of the headings specified in the Note. The respondent disagrees with the appellant, however, if this submission is intended to suggest that one comes to a conclusion on this question without ever having regard to any of Interpretation Rules 2-5. In applying Note 2 to Section VI, for example, it may be necessary to turn to the Interpretation Rules in order to determine whether or not goods are properly classifiable to heading 3004 (for example, Interpretation Rule 2(a) may apply such that an incomplete or unfinished article falls within heading 3004).

13. While the respondent does not dispute that the approach in *Re Liebert Corporation Australia Pty Ltd v Collector of Customs* [1992] FCA 65 (Foster J) and in *Liebert Corporation Australia Pty Ltd v Collector of Customs* [1993] 23 AAR 287 (Wilcox, O'Connor and Drummond JJ) (***Liebert FCAFC***) was first to ascertain whether a good fell within Ch 90 as per the relevant Note (see APHN [16]-[18]), those cases stand for the proposition that a Chapter Note that provides that a section does not cover articles of a Chapter is a Chapter Note that "otherwise requires" within the meaning of Interpretation

Rule 1 for the purpose of Interpretation Rule 3(b). Those cases did not say that all of the Interpretation Rules were necessarily and inevitably inapplicable in determining whether a good fell under some heading of Ch 90. For example, in order to determine whether a good falls under a heading of Ch 90, it may be necessary to apply a rule such as Rule 2(a) to the extent any goods are incomplete or unfinished.

Where Chapter Notes or headings "otherwise require"

14. The respondent accepts that Interpretation Rule 3 is not applicable when applying Note 2 to Section VI (see *Vernon-Carus Australia Pty Ltd v Collector of Customs* (1995) 21 AAR 450 (***Vernon-Carus***) at 459 (Jenkinson J)).

10 15. Another example of a Chapter Note which "otherwise require[s]" is given in the HSEN in respect of Interpretation Rule 3 (see excerpt at APHN [7] re Note 4(b) to Ch 97). The HSEN records that Note 4(b) to Ch 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of the former headings, and not according to Interpretation Rule 3 (equivalent to headings 9701-9706 under the nomenclature used in the Act). Headings 9701 to 9705 cover items including certain paintings, engravings, prints, lithographs, original sculptures, postage or revenue stamps and the like, and heading 9706 covers antiques of an age exceeding one hundred years. Thus, Interpretation Rule 3(a) could not be used to say that, for example, heading 9701 provided the "most specific description" when compared
20 with heading 9706, and therefore that the goods should be classified to heading 9701 instead of 9706. Nevertheless, other Interpretation Rules other than Interpretation Rule 3 may be relevant and applicable.

Construction of Chapter Notes

16. The respondent agrees with APHN [20] that headings and sub-headings are relevant to the construction of Chapter Notes (see also *Comptroller-General of Customs v*

Sulo MGB Australia Pty Ltd [2017] FCA 315 at [76]).

Dated 31 October 2019

Stephen Lloyd
Ph: (02) 9235 3753
stephen.lloyd@sixthfloor.com.au

Jane Taylor
Ph: (02) 8023 9027
janetaylor@elevenwentworth.com

10