HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND GORDON JJ

COMPTROLLER-GENERAL OF CUSTOMS APPELLANT

AND

PHARM-A-CARE LABORATORIES PTY LTD RESPONDENT

Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd
[2020] HCA 2
Date of Hearing: 17 October 2019
Date of Judgment: 5 February 2020
S161/2019

ORDER

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

N J Williams SC with D P Hume for the appellant (instructed by Australian Government Solicitor)

S B Lloyd SC with J E Taylor for the respondent (instructed by Clayton Utz)

CATCHWORDS

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

Customs and excise – Customs tariff – Tariff classification – Where no duty owed if goods classifiable as medicaments under heading 3004 of Sch 3 to *Customs Tariff Act 1995* (Cth) – Where Administrative Appeals Tribunal found vitamin preparations and garcinia preparations classifiable under heading 3004 – Where Comptroller-General of Customs contended vitamin preparations and garcinia preparations classifiable under heading 1704 ("sugar confectionery") or heading 2106 ("food preparations") so that duty owed – Whether vitamin preparations and garcinia preparations excluded from heading 3004 by Note 1(a) to Ch 30 of Sch 3 to *Customs Tariff Act* – Whether Administrative Appeals Tribunal erred in classifying vitamin preparations and garcinia preparations under heading 3004.

Words and phrases – "duties of customs", "error of law", "essential character", "food preparations", "food supplements", "foods", "French language", "Harmonized System", "Harmonized System Convention", "medicament", "most akin", "ordinary meaning", "products for therapeutic or prophylactic uses", "tariff classification", "Vienna Convention", "vitamin".

Administrative Appeals Tribunal Act 1975 (Cth), s 44.
Customs Act 1901 (Cth), s 273GA.
Customs Tariff Act 1995 (Cth), Schs 2, 3.
International Convention on the Harmonized Commodity Description and Coding System (1983).
Vienna Convention on the Law of Treaties (1969), Art 33.

1 KIEFEL CJ, BELL, GAGELER, KEANE AND GORDON JJ. This appeal is from a judgment of the Full Court of the Federal Court[1] on an appeal on questions of law under the *Administrative Appeals Tribunal Act 1975* (Cth)[2] from a decision of the Administrative Appeals Tribunal[3] under the *Customs Act 1901* (Cth)[4]. It raises issues concerning the construction and application of provisions of the *Customs Tariff Act 1995* (Cth) ("the Tariff Act") which implement the International Convention on the Harmonized Commodity Description and Coding System[5] ("the Harmonized System Convention").

2 The issues arise in the context of a dispute between the Comptroller-General of Customs and Pharm-A-Care Laboratories Pty Ltd about the tariff classification of goods imported into Australia from Germany. The goods were referred to by the Tribunal and the Full Court as "vitamin preparations" and "garcinia preparations".

Tariff Act

3 The Tariff Act imposes duties of customs on goods imported into Australia[6]. The amount of duty imposed on imported goods is ordinarily worked out by reference to the rate of duty (expressed as a percentage of the customs value of the goods) set out in the tariff classification in Sch 3 to the Tariff Act under which the goods are classified[7]. The statutory premise is that all goods are classifiable under a uniquely applicable tariff classification.

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1 *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd* (2018) 262 FCR 449.

2 Section 44.

3 *Pharm-A-Care Laboratories Pty Ltd and Comptroller-General of Customs* [2017] AATA 1816.

4 Section 273GA.

5 [1988] ATS 30.

6 Section 15.

7 Section 16(1)(a).

4 Schedule 3 to the Tariff Act adopts the structure and the English text of the Harmonized Commodity Description and Coding System ("the Harmonized System"), as set out in the Annex to the Harmonized System Convention and as amended in accordance with the procedure for amendment prescribed by the Convention[8]. Conformably with the Harmonized System, the Schedule is divided into "Sections" and, within Sections, into "Chapters". Each Section and each Chapter has a title, and at the commencement of Sections and Chapters there are often "Notes". Within each Chapter are then "headings", typically indicated by four digits in the first column[9]. Under headings are "subheadings", typically indicated by between five and eight digits in the first column opposite to a dash or dashes in the second column[10].

5 For the purpose of working out the duty imposed by the Tariff Act, the uniquely applicable tariff classification under which imported goods are classified is the heading or subheading under which the goods are classified, in the third column of which a rate of duty is set out in Sch 3 to the Tariff Act[11].

6 Potentially relevant to the tariff classification of the vitamin preparations and the garcinia preparations are headings and subheadings located within four Chapters. The four Chapters are in turn located within two Sections. They are Section IV and Section VI.

7 Section IV is entitled "Prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes". Within it are relevantly Chapter 17 and Chapter 21.

8 Chapter 17 is entitled "Sugars and sugar confectionery". Note 1(c) to Chapter 17 states that the Chapter does not cover "[m]edicaments or other products of Chapter 30". Within Chapter 17 is heading 1704, which is as follows:

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8 Articles 7(1)(a), 8(1) and 16 of the Harmonized System Convention.

9 Section 4(1)(a).

10 Section 4(1)(b).

11 Section 6.

"1704	SUGAR CONFECTIONERY (INCLUDING WHITE CHOCOLATE), NOT CONTAINING COCOA:	
1704.10.00	-Chewing gum, whether or not sugar-coated	5%
1704.90.00	-Other	5%".

9 Chapter 21 is entitled "Miscellaneous edible preparations". Within Chapter 21 is heading 2106, which is as follows:

"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: (a) compound alcoholic preparations of a kind used for the manufacture of beverages; (b) food preparations of flour or meal; (c) hydrolysed protein	5% DCS:4% DCT:5%

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".

The references in the third column of subheadings under heading 2106 to "DCS" and "DCT" are to rates applicable in respect of goods imported from developing countries[12]. They are of no present relevance.

10 Section VI is entitled "Products of the chemical or allied industries". Note 2 to Section VI is of some importance. Subject to an immaterial exception, the Note relevantly states that "goods classifiable in 3004 ... by reason of being put up in measured doses or for retail sale are to be classified in those headings and in no other heading of this Schedule". Within Section VI are relevantly Chapter 29 and Chapter 30.

11 Chapter 29 is entitled "Organic chemicals". Note 1(a) to Chapter 29 relevantly states that the headings of Chapter 29 apply only to "[s]eparate chemically defined organic compounds". Within Chapter 29 is heading 2936, which is "PROVITAMINS AND VITAMINS, NATURAL OR REPRODUCED BY SYNTHESIS (INCLUDING NATURAL CONCENTRATES), DERIVATIVES THEREOF USED PRIMARILY AS VITAMINS, AND INTERMIXTURES OF THE FOREGOING, WHETHER OR NOT IN ANY SOLVENT". Because the terms of heading 2936 assume present significance only for the purpose of understanding a reference to heading 2936 in subheading 3004.50.00, there is no need to refer to the subheadings of heading 2936.

12 Chapter 30 is entitled "Pharmaceutical products". Note 1(a) to Chapter 30, the construction and application of which give rise to the central issues in the appeal, is as follows:

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12 Section 14.

"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)".

13 Within Chapter 30 is heading 3004, which is as follows:

"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:	
3004.10.00	-Containing penicillins or derivatives thereof, with a penicillanic acid structure, or streptomycins or their derivatives	Free
3004.20.00	-Other, containing antibiotics	Free
3004.3	-Other, containing hormones or other products of 2937:	
3004.31.00	--Containing insulin	Free
3004.32.00	--Containing corticosteroid hormones, their derivatives or structural analogues	Free
3004.39.00	--Other	Free
3004.4	-Other, containing alkaloids or derivatives thereof:	
3004.41.00	--Containing ephedrine or its salts	Free

3004.42.00	--Containing pseudoephedrine (INN) or its salts	Free
3004.43.00	--Containing norephedrine or its salts	Free
3004.49.00	--Other	Free
3004.50.00	-Other, containing vitamins or other products of 2936	Free
3004.60.00	-Other, containing antimalarial active principles described in Subheading Note 2 to this Chapter	Free
3004.90.00	-Other	Free".

14 For the purpose of working out the particular heading or subheading in Sch 3 to the Tariff Act under which imported goods are classified, the Tariff Act requires that use must be made of the "Interpretation Rules" set out in Sch 2 to the Tariff Act[13]. Those Interpretation Rules are the General Rules for the Interpretation of the Harmonized System ("the GIRs"), also set out in the Annex to the Harmonized System Convention[14].

15 To the extent that the GIRs it sets out have potential to bear on the tariff classification of the vitamin preparations and the garcinia preparations, Sch 2 provides:

> "Classification of goods in Schedule 3 shall be governed by the following principles:
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> 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

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13 Section 7(1), read with s 3(1) (definition of "Interpretation Rules").

14 Section 3(1) (definition of "Interpretation Rules").

Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) ...

(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.

4. 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.

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6. For legal purposes, 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, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."

Tribunal

16 Before the Tribunal, Pharm-A-Care contended that the vitamin preparations and the garcinia preparations were to be classified under subheadings 3004.50.00 and 3004.90.00 respectively, so as to be free of duty. The Comptroller-General contended that each was to be classified under either subheading 1704.90.00, so as to be dutiable at a rate of 5%, or subheading 2106.90.90, so as to be dutiable at a rate of 4%.

17 Determining the dispute before it, the Tribunal adopted the conventional two-staged approach to tariff classification explained in *Re Gissing and Collector of Customs*[15]. The first stage involves making findings as to the identification of the goods in the condition in which they were imported, including as to the composition of the goods and the functions the goods were designed to serve. The second stage is the construction and application to the goods so identified of the potentially relevant provisions of Sch 3 in accordance with the applicable GIRs set out in Sch 2.

18 Turning first to the identification of the goods in the condition in which they were imported, the Tribunal found that the vitamin preparations and the garcinia preparations were identified as pastilles, imported in bulk in plastic

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15 (1977) 1 ALD 144 at 146. See also *Chinese Food & Wine Supplies Pty Ltd v Collector of Customs (Vic)* (1987) 72 ALR 591 at 599; *Vernon-Carus Australia Pty Ltd v Collector of Customs* (1995) 21 AAR 450 at 455-456.

sealed bags each containing some 5,000 pastilles and weighing approximately 10.5 kilograms accompanied by certificates of analysis. Each pastille contained sucrose, glucose syrup, gelatin, flavours and other substances. The other substances in the vitamin preparations included vitamins of specified descriptions. The other substances in the garcinia preparations did not include vitamins but did include garcinia cambogia, the scientific name of which is hydroxycitric acid[16].

19 Taking account of the certificates of analysis and of other evidence which bore on the characteristics of the goods in the condition in which they were imported, the Tribunal made an express finding that "the essential feature" or "essential character or purpose" of the vitamin preparations was the vitamins that they contained[17]. The Tribunal implicitly made the corresponding finding that the essential feature of the garcinia preparations was the hydroxycitric acid that they contained, noting that the garcinia preparations were designed to enable weight loss, that their efficacy in that respect was disputed, and that their "main purpose" appeared to be "cosmetic"[18].

20 Turning to consider the provisions of Sch 3 potentially relevant to the tariff classification of the vitamin preparations, the Tribunal looked first to Note 1(a) to Chapter 30. Construing "such as" within the first parentheses in the Note to mean "for example", the Tribunal took the view that the vitamin preparations were excluded from Chapter 30 by the Note only if they answered the relevant description of "[f]oods"[19]. Having regard to the fact that the essential feature of the vitamin preparations was the vitamins they contained, the Tribunal concluded that the vitamin preparations did not answer the description of "[f]oods" according to the ordinary meaning of that term[20].

21 The Tribunal went on separately to conclude that the vitamin preparations did not in any event answer the description of "food supplements" in Note 1(a) to

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16 [2017] AATA 1816 at [4]-[7], [10].

17 [2017] AATA 1816 at [60].

18 [2017] AATA 1816 at [79], [85].

19 [2017] AATA 1816 at [51].

20 [2017] AATA 1816 at [57].

Chapter 30, according to the ordinary meaning of that expression[21]. In reaching that conclusion, the Tribunal expressed the view that there was room for differences of opinion as to the "complete denotation" of the expression "food supplement". For its own part, the Tribunal did "not think that vitamin preparations would naturally or normally be described as food supplements in this country" and did "think that a vitamin preparation would naturally be referred to as such rather than as a food supplement"[22].

22 The Tribunal next turned its attention to heading 3004, concluding that the vitamin preparations answered the description in that heading of "medicaments ... consisting of ... products for therapeutic or prophylactic uses"[23]. The Tribunal noted in light of Note 2 to Section VI that the effect of its conclusion that the vitamin preparations were classifiable to heading 3004 was that the vitamin preparations were classifiable only to heading 3004 and were classifiable neither to heading 1704 nor to heading 2106[24]. Necessarily implicit in the Tribunal's conclusions as to the application of heading 3004 and as to the application of Note 2 to Section VI was its acceptance that the vitamin preparations answered the description of medicaments consisting of products which were not only "for therapeutic or prophylactic uses" but also "put up in measured doses". Under heading 3004, the Tribunal considered subheading 3004.50.00 to provide the most appropriate description[25].

23 Turning to consider the provisions of Sch 3 potentially relevant to the tariff classification of the garcinia preparations, the Tribunal concluded that, like the vitamin preparations, the garcinia preparations answered the description neither of "[f]oods" nor of "food supplements" according to the ordinary meanings of those expressions and that they were therefore not excluded by Note 1(a) to Chapter 30[26]. The Tribunal doubted whether the garcinia preparations

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21 [2017] AATA 1816 at [54], [61]-[64].

22 [2017] AATA 1816 at [61]-[62].

23 [2017] AATA 1816 at [67]-[74].

24 [2017] AATA 1816 at [77].

25 [2017] AATA 1816 at [78].

26 [2017] AATA 1816 at [79].

could be characterised as "products for therapeutic or prophylactic uses" within heading 3004[27], and rejected the contention that they could be regarded as either "sugar confectionery" within heading 1704 or "food preparations" within heading 2106[28]. Applying GIR 4, the Tribunal rejected heading 2106 as a heading to which the garcinia preparations were akin and formed the view that the garcinia preparations were more akin to heading 3004 than to heading 1704 "because there is often a significant health advantage to weight loss"[29]. The Tribunal thereby concluded in the application of GIR 4 that heading 3004 was that to which the garcinia preparations were "most akin". Under heading 3004, the Tribunal considered subheading 3004.90.00 to provide the most appropriate description[30].

24 The result was that the Tribunal determined that the vitamin preparations were classifiable to subheading 3004.50.00 and that the garcinia preparations were classifiable to subheading 3004.90.00[31], with the consequence that no duty was owed.

Full Court

25 The Comptroller-General appealed from the decision of the Tribunal to the Federal Court on numerous questions of law. The Full Court dismissed the appeal. For present purposes, it is necessary to refer only to those aspects of the Full Court's reasoning which responded to challenges to the Tribunal's decision taken up by the Comptroller-General on further appeal to this Court. The relevant aspects of the Full Court's reasoning concern the Tribunal's treatment of Note 1(a) to Chapter 30 in relation to the vitamin preparations and the Tribunal's treatment of heading 2106 in relation to the garcinia preparations.

26 The Full Court upheld the Tribunal's construction of Note 1(a) to Chapter 30 and found that the Tribunal had not erred in law in concluding that the vitamin

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27 [2017] AATA 1816 at [85].

28 [2017] AATA 1816 at [87].

29 [2017] AATA 1816 at [88].

30 [2017] AATA 1816 at [89].

31 [2017] AATA 1816 at [98].

preparations did not answer the description either of "[f]oods" or of "food supplements"[32]. But the Full Court also went further in support of the Tribunal's conclusion that Note 1(a) to Chapter 30 did not exclude the vitamin preparations.

27 The Full Court adopted a construction of the reference to "Section IV" in the second parentheses at the end of that Note which had not been advanced by either party to the appeal before it. The Full Court construed the reference as further confining the exclusory operation of the Note to "only those items of food and beverages which fall within the scope and ambit of Section IV"[33]. Having regard to the Tribunal's finding that the essential feature or essential character of the vitamin preparations was the vitamins that they contained, the Full Court concluded that the vitamin preparations did not fall within the scope and ambit of Section IV because they could not be described as "sugar confectionery", so as to be classifiable under heading 1704, and could not be described as "food preparations", so as to be classifiable under heading 2106[34].

28 In relation to the Tribunal's classification of the garcinia preparations, the Full Court rejected arguments advanced by the Comptroller-General that the Tribunal erred in law either by wrongly equating "food preparations" in heading 2106 with "[f]oods" or "food supplements" in Note 1(a) to Chapter 30 or by failing to give adequate reasons as to why the garcinia preparations did not answer the description of "food preparations" in heading 2106[35]. In so doing, the Full Court characterised the Tribunal's finding that the main purpose of the garcinia preparations appeared to be cosmetic as "a finding ... concerning the essential character of the garcinia preparations". From that finding of "essential character", the Full Court appeared to reason that it followed as a matter of law that the garcinia preparations were not "food preparations" for the reason that "a product whose essential character is 'cosmetic' cannot also bear the essential characteristic of being a 'food preparation'"[36]. The Full Court noted that the Comptroller-General did not challenge the Tribunal's conclusion that, if the

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32 (2018) 262 FCR 449 at 462-463 [31]-[35].

33 (2018) 262 FCR 449 at 463-464 [36]-[38].

34 (2018) 262 FCR 449 at 464 [39], 465 [41].

35 (2018) 262 FCR 449 at 472 [67]-[71].

36 (2018) 262 FCR 449 at 472 [68].

garcinia preparations were not "food preparations", GIR 4 was capable of applying to classify the garcinia preparations to heading 3004 on the basis that it was the heading to which the garcinia preparations were most akin[37].

Note 1(a) to Chapter 30

29 The principal focus of the Comptroller-General's appeal to this Court, by special leave, from the judgment of the Full Court is on the construction of Note 1(a) to Chapter 30 of Sch 3 to the Tariff Act.

30 Observing that the Harmonized System Convention was authenticated in the French language as well as the English language and is equally authoritative in each language, the Comptroller-General draws attention to the French text of Note 1(a) to Chapter 30 of the Harmonized System. The French text of the Note is in the following terms:

> "Le présent Chapitre ne comprend pas:
>
> (a) les aliments diététiques, aliments enrichis, aliments pour diabétiques, compléments alimentaires, boissons toniques et eaux minérales, autres que les préparations nutritives administrées par voie intraveineuse (Section IV)".

31 Notably absent from the French text of Note 1(a) to Chapter 30 of the Harmonized System are opening words equivalent to "[f]oods or beverages" in the English text together with parentheses introduced by words equivalent to "such as". Their absence, the Comptroller-General submits, indicates that those features of the English text were not intended to control the meaning of the words of Note 1(a) that are common to both texts.

32 Reading the English text of Note 1(a) to Chapter 30 of the Harmonized System as transposed into Note 1(a) to Chapter 30 of Sch 3 to the Tariff Act in light of the French text of Note 1(a) to Chapter 30 of the Harmonized System, the Comptroller-General submits that it becomes tolerably clear that the Tribunal and the Full Court were wrong to construe the references in the first parentheses in the English text of the Note as examples of a wider genus of "[f]oods or beverages". If goods answer the description of "food supplements"

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37 (2018) 262 FCR 449 at 472 [70].

("compléments alimentaires"), the Comptroller-General submits, they are excluded by the Note without also needing to answer the description of "food".

33 The Comptroller-General submits that the Full Court was also wrong to regard the parentheses at the end of the Note as importing a further limitation on the coverage of the Note. The reference to "Section IV" in those second parentheses, the Comptroller-General submits, is no more than a convenient cross-reference, indicating to the reader where goods excluded by the Note from Chapter 30 of Section VI might be classified. The reference is without operative legal effect.

34 Those submissions as to the construction of Note 1(a) to Chapter 30 of Sch 3 to the Tariff Act can be accepted.

35 Transposition of the English text of the Harmonized System into the text of Sch 3 to the Tariff Act attracts the principle of statutory construction identified by Brennan CJ in *Applicant A v Minister for Immigration and Ethnic Affairs*[38]:

> "If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way".

36 By operation of Art 33 of the Vienna Convention on the Law of Treaties[39], not only is the French text of the Harmonized System Convention equally authoritative with the English text[40], but each term of the Harmonized System Convention is presumed to have the same meaning in each text[41]. Application of that presumption "requires that every effort should be made to find a common

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38 (1997) 190 CLR 225 at 230-231 (footnote omitted). See also at 239-240. cf *Minister for Justice (Cth) v Adamas* (2013) 253 CLR 43 at 55 [32].

39 [1974] ATS 2.

40 Article 33(1).

41 Article 33(3).

meaning for the texts before preferring one to another"[42], from which "[i]t follows that the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language"[43].

37 Because the English text of Note 1(a) to Chapter 30 of the Harmonized System is presumed to have the same meaning as the French text, a meaning that gives simultaneous effect to all of the terms of the English text and of the French text must be preferred to a meaning that does not. Simultaneous effect can be given to all of the terms of both texts by reading the words "such as" in the first parentheses in the Note in the demonstrative sense of meaning "of the following kinds"[44]. The words then signify not that the particular kinds of goods that are specified within the parentheses are examples of a wider genus indicated of "[f]oods or beverages", but rather that the exclusion from the coverage of Chapter 30 introduced by the reference to "[f]oods or beverages" is confined to the particular kinds of goods specified within the parentheses. Read in that way, the English text corresponds to the French text in referring affirmatively only to "dietetic, diabetic or fortified foods" ("aliments diététiques, aliments enrichis, aliments pour diabétiques"), "food supplements" ("compléments alimentaires"), "tonic beverages" ("boissons toniques") and "mineral waters" ("eaux minérales"). Goods must meet one of those descriptions to fall within the scope of the Note. For goods that meet any of those descriptions, there is no added requirement that the goods also meet the more general description of "[f]oods or beverages" in order to be excluded by the Note from the coverage of Chapter 30.

38 As to the reference to "Section IV" in the parentheses at the end of Note 1(a) to Chapter 30 of Sch 3 to the Tariff Act, it reflects no more than a drafting convention employed in the drafting of both the English text and the French text of the Harmonized System. The drafting convention is to insert parenthetical references to Sections, Chapters or headings at the end of Section Notes and

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42 United Nations, *Yearbook of the International Law Commission* (1966), vol II at 225.

43 World Trade Organization, Report of the Appellate Body, *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 19 January 2004 at [59].

44 *The Oxford English Dictionary*, 2nd ed (1989), vol XVII at 102, "such", sense 7a.

Chapter Notes to indicate for ease of reference where goods excluded by the Section or Chapter Notes might otherwise be classified. Where a Section or Chapter Note operates to exclude goods on the basis of the classification of those goods to a heading within another Section or Chapter, the Note typically does so by referring to goods "of" that other Section or Chapter. Note 1(c) to Chapter 17 is an example.

39 The Tribunal was therefore wrong to construe Note 1(a) to Chapter 30 of Sch 3 to the Tariff Act as excluding the vitamin preparations and the garcinia preparations from the coverage of Chapter 30 only if they answered the relevant description of "[f]oods". The Full Court was also wrong to think that the Tribunal's conclusion that the vitamin preparations were not excluded from the coverage of Chapter 30 could be supported by the parenthetic reference to Section IV at the end of the Note on the basis that those goods were not classifiable under either of the headings within Section IV to which the Comptroller-General had argued that they were classifiable.

40 However, it does not follow that the Comptroller-General's appeal to the Federal Court from the decision of the Tribunal ought to have succeeded. That is because, for an error of law on the part of the Tribunal identified in an appeal on a question of law to the Federal Court to result in an order setting aside the decision of the Tribunal, the error must be shown to be material to the decision of the Tribunal in the sense that the decision which was in fact made by the Tribunal might have been different if the error of law had not occurred[45].

41 On the correct construction of Note 1(a) to Chapter 30 of Sch 3 to the Tariff Act, the vitamin preparations and the garcinia preparations were excluded by the Note from the coverage of Chapter 30 only if they answered the relevant description of "food supplements" ("compléments alimentaires"). Nothing in the French text or in the broader context of the Harmonized System is argued to indicate that the expression "food supplements" encompasses anything more or less than is signified by the common understanding of that expression. Within the bounds of reasonableness, the application or non-application of the common

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45 *Hyundai Automotive Distributors Australia Pty Ltd v Australian Customs Service* (1998) 81 FCR 590 at 599; *3-D Scaffolding Pty Ltd v Federal Commissioner of Taxation* (2009) 75 ATR 604 at 614 [35].

understanding of an expression used in a statute to facts that have been found is itself a question of fact[46].

42 Hence, in a context in which appeals from the Tribunal to the Federal Court are limited to appeals on questions of law, the Tribunal's conclusions that the vitamin preparations and the garcinia preparations as identified by it each fell outside the description of "food supplements" had the status of findings of fact. The structure of the Tribunal's reasons for decision makes plain that it reached those findings independently of its earlier findings that the preparations did not answer the description of "[f]oods". There is no reason to consider that the findings were in any other way affected by the Tribunal's misconstruction of the Note. Nor are the findings suggested to have been unreasonable.

43 The Comptroller-General nevertheless submits that the Tribunal arrived at its findings that the preparations fell outside the common understanding of "food supplements" through the application of a wrong legal test. The wrong legal test which the Comptroller-General submits that the Tribunal applied was to depart from the second stage of the two-staged approach to tariff classification explained in *Re Gissing and Collector of Customs* so as not to ask whether the goods having the characteristics identified by the Tribunal at the first stage answered the tariff description of "food supplements" but instead to ask how those goods would commonly be described.

44 Though there is no error of law merely in making a wrong finding of fact[47], there is no doubt that a finding of fact can be erroneous in law if the finding is reached through the application of a wrong legal test[48]. There is also no doubt that the Tribunal would have applied a wrong legal test if the Tribunal had found that the preparations fell outside the description of "food supplements" by asking how those goods would commonly be described. That error of law, if made, would have been elementary. Its making is not lightly to be inferred.

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46 *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7-8; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450-451 [24]-[25].

47 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77.

48 *Times Consultants Pty Ltd v Collector of Customs (Qld)* (1987) 16 FCR 449 at 462-463; *Sharp Corporation of Australia Pty Ltd v Collector of Customs* (1995) 59 FCR 6 at 12.

45 Fairly read, as they must be[49], the Tribunal's reasons for decision disclose no basis for considering that the Tribunal committed the legal error which the Comptroller-General ascribes to it. In finding that the preparations fell outside the description of "food supplements", the Tribunal proceeded by looking to what the Tribunal understood to be signified by the common understanding of "food supplements" and by asking whether goods having the characteristics identified by the Tribunal answered that description. That was precisely what it was required to do.

46 Moreover, as is accepted by both the Comptroller-General and Pharm-A-Care, the Tribunal did not err in law in finding that the preparations did not answer the description of "food supplements" having regard to its express finding that the "essential feature" of the vitamin preparations was the vitamins that they contained and to its implicit finding that the "essential feature" of the garcinia preparations was the hydroxycitric acid that they contained. The Tribunal would have erred in law had it purported to apply GIR 2(b) to treat the preparations as mixtures of substances prima facie classifiable under two or more headings and had it then purported to apply GIR 3(b) to find that the preparations were not excluded from heading 3004 because they did not answer the description of "food supplements" in Note 1(a) to Chapter 30 by reference to their "essential character". That is perhaps what the Full Court thought that the Tribunal did. But it is not what the Tribunal in fact did.

47 The Tribunal's findings as to the "essential feature" or "essential character or purpose" of each of the preparations are to be understood as findings as to the most important characteristic of those goods, which the Tribunal made as an aspect of its identification of the goods at the first stage of the two-staged approach to tariff classification explained in *Re Gissing and Collector of Customs*. That is to say, in referring to the "essential feature" or "essential character or purpose" of each of the preparations, the Tribunal was doing no more than asking "what really are the [g]oods, and what really is it that they do?"[50]. No doubt, in framing its answer to those questions, the Tribunal was focusing its attention on the feature of the goods which it thought most important to the classification of the goods at the second stage of the two-staged approach.

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49 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1100 [38]; 373 ALR 196 at 205.

50 *Anite Networks Pty Ltd v Collector of Customs* [1999] FCA 26 at [32].

And, no doubt, the Tribunal was doing so in light of the competition between headings presented by the dispute before it. That was entirely appropriate. Although the identification of goods "cannot be controlled by the descriptions of goods adopted in the nomenclature of the Tariff", it must always be remembered that the sole purpose of identification is to facilitate classification. Accordingly, "in identifying goods it is necessary to be aware of the structure of the nomenclature, the basis on which goods are classified and the characteristics of goods which may be relevant to the frequently complex task of classification"[51].

48 What the Tribunal did at that first stage of the two-staged approach to tariff classification explained in *Re Gissing and Collector of Customs* is not to be confused with what the Tribunal then went on to do at the second stage. Neither in finding that the preparations did not answer the description of "food supplements" in Note 1(a) to Chapter 30 nor in finding that the vitamin preparations did answer the description of "products for therapeutic or prophylactic uses" in heading 3004 did the Tribunal mention or purport to apply GIR 2(b) or GIR 3(b). That is in contrast to the Tribunal's express application of GIR 4 to classify the garcinia preparations to heading 3004, having found that the garcinia preparations answered neither the description in heading 3004 nor a competing description in heading 1704 or heading 2106[52].

49 The Tribunal's application of GIR 4 to classify the garcinia preparations to heading 3004 might at first glance seem incongruous with its non-application of GIRs 2(b) and 3(b) in determining that the garcinia preparations as well as the vitamin preparations did not answer descriptions in Note 1(a) to Chapter 30 so as to be excluded from heading 3004. Because that is so, the reason why GIRs 2(b) and 3(b) had no application warrants some elaboration.

50 The GIRs are not limited to rules of construction. For the most part, the GIRs are rules that govern the process of classification of goods to headings and subheadings.

51 As the Tribunal correctly recognised in the structure of its reasoning, GIRs 1 and 6 require goods to be classified first to a heading and, only once classified to a heading, then to a subheading within that heading. GIR 1 sets out the

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51 *Re Tridon Pty Ltd and Collector of Customs* (1982) 4 ALD 615 at 620 [15].

52 [2017] AATA 1816 at [88].

primary rule that classification of goods to a heading is to be determined according to the terms of potentially applicable headings as well as to such Section or Chapter Notes as are "relative" to those headings. GIR 6 correspondingly requires classification of goods within a heading to a subheading to be determined according to the terms of potentially applicable subheadings as well as to such Section or Chapter Notes as are "relative" to those subheadings. The GIRs do not contemplate Section Notes or Chapter Notes as having a freestanding operation that is independent of a heading or subheading.

52 Through GIRs 1 and 6, a Section Note or a Chapter Note is to be read as a note to each of the headings and subheadings to which the Note relates. Put another way, each heading and each subheading is to be read with each Section Note that relates to that heading or subheading as well as with each Chapter Note that relates to that heading or subheading. Each Note so read contributes to defining the precise scope and limits of the heading or subheading as if the text of the Note were incorporated into the text of the heading or subheading.

53 Thus, Note 2 to Section VI is to be read as if it were incorporated into the text of heading 3004 and, within heading 3004, into the text of subheadings 3004.50.00 and 3004.90.00. So is Note 1(a) to Chapter 30. In the same way, Note 1(c) to Chapter 17 is to be read as if it were incorporated into the text of heading 1704 and, within heading 1704, into the text of subheading 1704.90.00.

54 GIR 1 goes on to require that classification of goods to a heading be in accordance with GIRs 2, 3, 4 and 5, "provided such headings or Notes do not otherwise require". GIR 6 correspondingly requires that classification of the goods to a subheading within a heading be in accordance with the same GIRs, subject to the same proviso.

55 Whereas GIR 1 is always engaged in the classification of any goods, GIRs 2, 3, 4 and 5 are not framed to govern the classification of all goods. Relevantly, GIR 2(b) is engaged only in respect of the classification of goods that are mixtures or combinations of a material or substance described in a heading with other materials or substances. Where GIR 2(b) is engaged, it operates to expand the scope of the heading by deeming the description in the heading to include goods consisting wholly or partly of the material or substance described in the heading[53]. GIR 3, including GIR 3(b), is only engaged where goods are prima

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53 *Canada (Attorney General) v Igloo Vikski Inc* [2016] 2 SCR 80 at 93-95 [23]-[24].

facie classifiable under two or more headings. Goods might be prima facie classifiable under two or more headings so as to engage GIR 3 through the deeming effect of GIR 2(b) on one or more of those headings or because the goods answer descriptions in one or more of those headings independently of GIR 2(b). The "failsafe 'likeness' rule"[54] in GIR 4 is applicable only where GIRs 1, 2 and 3 fail to yield a classification.

56 Were it possible to ignore Note 2 to Section VI and Note 1(c) to Chapter 17, the Tribunal's findings as to the identification of the vitamin preparations leave little doubt that the Tribunal would properly have treated them as mixtures engaging GIR 2(b). Application of GIR 2(b) to headings 1704 and 2106 would have the potential to result in the vitamin preparations being not only prima facie classifiable by operation of GIR 1 under heading 3004 (as "mixed ... products for therapeutic or prophylactic uses") but also prima facie classifiable under heading 1704 (as goods consisting partly of "sugar confectionery") and heading 2106 (as goods consisting partly of "food preparations"). If so, GIR 3(b) would apply to require the choice between the descriptions in the three competing headings to be made by treating the vitamin preparations as consisting of the material or component which gave them their "essential character". Applied to heading 3004, the requirement of GIR 3(b) to treat the vitamin preparations as consisting of the material or component which gave them their "essential character" would apply as much to determining whether or not the vitamin preparations answered the description of "food supplements" in Note 1(a) to Chapter 30 as it would to determining whether or not they answered the description of "products for therapeutic or prophylactic uses" in heading 3004. To countenance inconsistent treatment of the Note and the heading in the application of GIR 3(b) would be to countenance an anomaly[55].

57 However, it is not possible to ignore Note 2 to Section VI and Note 1(c) to Chapter 17. Nor is it possible to defer consideration of their application until after GIRs 2(b) and 3(b) have been applied. That is because the proviso to GIR 1 makes clear that classification is only to proceed in accordance with GIRs 2, 3, 4 and 5 provided that a heading or any relative Section Note or Chapter Note does not "otherwise require". The proviso in that way subordinates each of those GIRs

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54 *Canada (Attorney General) v Igloo Vikski Inc* [2016] 2 SCR 80 at 97 [28].

55 *Re Tridon Pty Ltd and Collector of Customs* (1982) 4 ALD 615 at 619 [14]. See also Horton, *Import and Customs Law Handbook* (1992) at 32-34.

to any requirement of a heading and of any relative Section Note or Chapter Note that is in any way inconsistent with the operation of another GIR. The exclusory effect on GIRs 2, 3, 4 and 5 of an inconsistent requirement in a heading or relative Section Note or Chapter Note is not all-or-nothing but is only to the extent of the inconsistency. Hence, there is no difficulty with the notion that a particular Note in a particular context might exclude the application of GIRs 2(b) and 3(b) and yet leave open the application of GIR 4.

58 The effect of the proviso's subordination of each of GIRs 2, 3, 4 and 5 to a contrary requirement of a heading or of any relative Section Note or Chapter Note is emphasised in the Harmonized System Explanatory Notes[56] ("the Explanatory Notes"). The Explanatory Notes are prepared and approved under the Harmonized System Convention as a guide to the interpretation of the Harmonized System[57]. In consequence, they are available to be used in the interpretation of so much of the Tariff Act as transposes the text of the Harmonized System Convention[58].

59 The Explanatory Notes spell out that GIR 1 provides that classification must be determined "according to the terms of the headings and any relative Section or Chapter Notes" and "where appropriate, **provided the headings or Notes do not otherwise require**, according to the provisions of Rules 2, 3, 4, and 5"[59]. By way of amplification of the bolded text, the Explanatory Notes go on to state[60]:

> "The expression 'provided such headings or Notes do not otherwise require' is intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, ie, they are the first consideration in determining classification. For example, in Chapter

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56 World Customs Organization, *Harmonized Commodity Description and Coding System: Explanatory Notes*, 6th ed (2017).

57 Articles 7(1)(b) and 8(2) of the Harmonized System Convention.

58 *Barry R Liggins Pty Ltd v Comptroller-General of Customs* (1991) 32 FCR 112 at 118-120, 123.

59 Note (III) to Rule 1 (emphasis in original).

60 Note (V)(a) to Rule 1 (emphasis in original).

31, the Notes provide that certain headings relate **only** to particular goods. Consequently those headings cannot be extended to include goods which otherwise might fall there by reason of the operation of Rule 2(b)."

60 To the same effect, the Harmonized System Compendium, prepared by the World Customs Organization[61], explains[62]:

"The legal elements of classification are:

- the terms of headings;
- Section or Chapter Notes; and
- if not prevented by the two elements above, the remaining General Interpretative Rules.

For legal purposes classification is determined by the terms of the headings, the Section or Chapter Notes where relevant, and, if necessary and allowable, the other GIRs.

Where the terms of the headings and any relevant Notes leave only one heading open for consideration, or they direct either the classification or the means of classification, then only GIR 1 is used at heading level."

61 Note 2 to Section VI is within the category referred to in the Harmonized System Compendium as Notes that "leave only one heading open for consideration". By leaving only one heading open for consideration, the Note "otherwise require[s]" within the meaning of the proviso to GIR 1 to the

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61 Established by the Convention establishing a Customs Co-operation Council [1961] ATS 1.

62 World Customs Organization, *The Harmonized System: A universal language for international trade – 30 Years On* (2018) at 22.

exclusion of GIRs 2(b) and 3(b)[63]. Note 1(c) to Chapter 17 similarly "otherwise require[s]" by excluding one heading from consideration[64].

62 That exclusionary operation of Note 2 to Section VI was implicitly acknowledged by the Tribunal in recognising that the vitamin preparations were not classifiable under heading 1704 or heading 2106 if they answered the description of "products for therapeutic or prophylactic uses" in heading 3004 and if they were not excluded from that heading by Note 1(a) to Chapter 30. By stating that goods classifiable under heading 3004 are to be classified in that heading and in no other heading in Sch 3, Note 2 to Section VI operates to produce the result that, if goods are determined to be classifiable in heading 3004 by reason of meeting a description in heading 3004 and by reason of not being excluded from the scope of heading 3004 by any Section or Chapter Note that relates to heading 3004, that is the end of the process of classification of those goods: the goods are to be classified under heading 3004 and are not even prima facie classifiable under any other heading. The Note so operates to the exclusion of GIR 3(b) by preventing goods classifiable under heading 3004 from ever being goods that are prima facie classifiable under two or more headings so as to come within the chapeau of GIR 3. Necessarily, the Note further operates to the exclusion of GIR 2(b) by preventing the expansion of references in other headings to cover mixed goods classifiable under heading 3004 so as to preclude the scenario contemplated by GIR 2(b) of those mixed goods needing to be classified in accordance with GIR 3.

63 By reason of Note 2 to Section VI, GIRs 2(b) and 3(b) can therefore have nothing to say about the process of determining whether or not mixed goods are classifiable in heading 3004. They can have nothing to say about whether or not the goods answer a description in heading 3004. They can also have nothing to say about whether or not the goods are excluded from the scope of heading 3004

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63 *Vernon-Carus Australia Pty Ltd v Collector of Customs* (1995) 21 AAR 450 at 459. See also at 453-454.

64 cf *Liebert Corporation Australia Pty Ltd v Collector of Customs* (unreported, Federal Court of Australia, 26 February 1992) at 18-20, affirmed in *Liebert Corporation Australia Pty Ltd v Collector of Customs* (1993) 23 AAR 287 at 289-290. See also *Victoria's Secret Direct LLC v United States* (2013) 908 F Supp 2d 1332 at 1355-1356; *Kent International Inc v United States* (2019) 393 F Supp 3d 1218 at 1223.

by any other Section or Chapter Note that relates to heading 3004, including about whether or not the goods answer a description in Note 1(a) to Chapter 30 in so far as that Note relates to heading 3004.

64 Concurrently with yet independently of Note 2 to Section VI, Note 1(c) to Chapter 17 operates in the context of the dispute between the Comptroller-General and Pharm-A-Care to exclude the operation of GIRs 2(b) and 3(b) to a more limited extent. By stating that Chapter 17 does not cover medicaments or other products of Chapter 30, Note 1(c) to Chapter 17 relevantly operates to limit the scope of heading 1704 so as to exclude from that heading medicaments or other products that are classifiable to heading 3004. The effect of the Note, in so far as the dispute is as to whether the preparations should be classified to heading 3004 or to heading 1704, is to prevent goods classifiable to heading 3004 from ever being classifiable to heading 1704. Thus, if goods are classifiable to heading 3004, that is again the end of the dispute so far as it concerns heading 1704 and GIRs 2(b) and 3(b) can have no operation.

65 The consequence of there being no error of law in the Tribunal's findings that the vitamin preparations and the garcinia preparations failed to answer the description of "food supplements" is that the Tribunal was correct in law in concluding that the vitamin preparations and the garcinia preparations were not excluded by Note 1(a) to Chapter 30 from being covered by heading 3004. That is so notwithstanding that the Tribunal was wrong in law in considering that the heading was not excluded by the Note because the preparations also failed to answer the description of "[f]oods".

66 The Tribunal's error in construing Note 1(a) to Chapter 30 of Sch 3 to the Tariff Act as requiring for its application that the vitamin preparations and the garcinia preparations separately answer the description of "[f]oods" was therefore immaterial to the decision which it made.

Heading 2106

67 The Comptroller-General also complains about the Full Court's rejection of his argument that, in applying the "most akin" test in GIR 4 to the garcinia preparations, the Tribunal wrongly equated the expression "food preparations" in heading 2106 with the expression "[f]oods" or "food supplements" in Note 1(a) to Chapter 30.

68 In so far as the Full Court treated the Tribunal as having made a finding about the "essential character" of the garcinia preparations and in so far as the Full Court went on to treat that finding of "essential character" as foreclosing a

finding that the garcinia preparations answered the description of "food preparations", the Comptroller-General's complaint is well-founded. The Tribunal would have erred in law had it sought to apply the criterion of "essential character" to choose between descriptions in supposedly competing headings pursuant to GIR 3(b). As already explained, the Tribunal correctly recognised that GIR 3(b) had no application.

69 Nevertheless, for reasons other than those which the Full Court gave, the Full Court was correct to reject the Comptroller-General's argument that the Tribunal equated "food preparations" with "[f]oods" or "food supplements".

70 The Tribunal's reasons for decision in relation to the garcinia preparations are brief but adequate. Fairly read, those reasons do not suggest that the Tribunal equated one statutory expression with either of the other two slightly different statutory expressions. What the reasons disclose is that the Tribunal applied the same process of decision-making to all three. Having identified the "main purpose" of the garcinia preparations as "cosmetic", the Tribunal found as a fact that the garcinia preparations did not meet the description of "food preparations" according to the common understanding of that expression in the same way as the Tribunal found as a fact that the garcinia preparations did not meet the description of "[f]oods" or "food supplements" according to the common understanding of those other expressions.

Heading 3004

71 Different views have been expressed internationally as to the content of the reference to "products for therapeutic or prophylactic uses" in the heading of the Harmonized System that corresponds to heading 3004 of Chapter 30 of Sch 3 to the Tariff Act[65]. Against that background, it is as well to record that the Comptroller-General raised no question before the Full Court or before this Court

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65 See, eg, *Unigreg Ltd v Commissioners of Customs and Excise* [1998] 3 CMLR 128 at 137-138 [22]-[25]; *Flora Manufacturing & Distributing Ltd v Minister of National Revenue* (2000) 258 NR 134 at 138 [17]; *Warner-Lambert Co v United States* (2005) 425 F 3d 1381 at 1385 [2]; *Nutricia NV v Staatssecretaris van Financiën* (2014) C-267/13 at [20]. See also Bureau of Customs and Border Protection, *US Customs Bulletin and Decisions*, vol 38, no 44 (2004) at 16; Canada Border Services Agency, *Tariff Classification of Medicaments Including Natural Health Products*, D10-14-30 (2014) at 2-5 [4]-[16].

as to whether the Tribunal erred in law in its construction or application of that expression in heading 3004. Nothing in these reasons should be taken to express any opinion on that question.

Disposition

72 The appeal must be dismissed. The Comptroller-General having undertaken as a condition of the grant of special leave to pay Pharm-A-Care's costs of the appeal irrespective of the outcome, an order for costs is unnecessary.