

U.S. Customs Service

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 15, 2003,

The following documents of the Bureau of Customs and Border Protection (“CBP”), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
*Assistant Commissioner,
Office of Regulations and Rulings.*



NOTICE OF DECISION ON DOMESTIC INTERESTED PARTY PETITION AND NOTICE OF DESIRE TO CONTEST DECISION

AGENCY: Customs and Border Protection, Department of Homeland Security

ACTION: Notice of petitioner’s desire to contest Customs decision in response to domestic interested party petition.

SUMMARY: On September 18, 2002, the U.S. Customs Service (now Customs and Border Protection (CBP)) published in the **Federal Register** a notice of receipt of a domestic interested party petition which had been received pursuant to section 516, Tariff Act of 1930, as amended, regarding the classification, under the Harmonized Tariff Schedule of the United States, of certain imported dairy protein blends. The petition asked CBP to review the classification of these products and change the classification from a non-quota classification into a quota classification. On April 1, 2003, after reviewing comments received in response to the petition, CBP issued a Headquarters decision denying the petition and affirming the current classification of the milk protein blends. On April 29, 2003, pursuant to 19 CFR 175.23, the domestic interested party petitioner filed a notice with CBP that it desired to contest this decision. Pursuant to Section 516(c), this notice attaches CBP’s determination as to the

classification of the merchandise and notification of petitioner's desire to contest that decision.

DATE: July 15, 2003.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, Office of Regulations and Rulings, CBP, Department of Homeland Security, 202-572-8778.

SUPPLEMENTARY INFORMATION

BACKGROUND

Classification of Merchandise.

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRIs taken in order.

Milk Protein Concentrates/Milk Protein Blends

Classification of dairy products is essentially based on the composition of the product. In the matter here in issue, direction is also provided by Additional U.S. Note 13 to Chapter 4, HTSUS, 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." CBP has classified several products which are called milk protein concentrates under subheading 0404.90.10, 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 filed by the domestic interested party pursuant to Section 516, Tariff Act of 1930, as amended, (19 U.S.C. 1516), contended that certain merchandise is not eligible for classification in subheading 0404.90.10, HTSUS, because in petitioner's view it does not conform to all the requirements set forth in Additional U.S. Note 13 to Chapter 4 (set forth above). The petition asked CBP to review two classification rulings on products identified as "milk protein concentrates." On September 18, 2002, a notice of the petition was published in the **Federal Register** (67 FR 58837) informing the public of the petition and inviting comments on the correctness of CBP classification of the merchandise.

After careful review of arguments set forth by petitioner, as well as those raised by comments received in response to the **Federal Register** Notice, CBP determined that the classification contained in the rulings under review was correct and, on April 1, 2003 issued the decision appended hereto, which denied the petitioner's requested reclassification of the goods.

On April 29, 2003, pursuant to 19 CFR 175.23, by letter to the CBP, petitioner filed a notice that it desired to contest the classification of the goods. The notice to contest designated the ports at which the goods are currently being entered and at which petitioner desires to protest the liquidation of one entry of the goods.

AUTHORITY:

This notice is published in accordance with 19 CFR 175.24 and 19 U.S.C. 1516.

Dated: July 9, 2003

ROBERT C. BONNER,
*Commissioner,
Customs and Border Protection.*

ATTACHMENT

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965592
April 1, 2003
CLA-2 RR:CR:GC 965592ptl
CATEGORY: Classification
TARIFF NO.: 0404.90.10

MR. ROBERT TORRESEN
SIDLEY AUSTIN BROWN & WOOD, LLP
1501 K Street, NW
Washington, D.C. 20005

RE: Domestic Interested Party Petition on Dairy Protein Blends

DEAR MR. TORRESEN:

This letter concerns Customs decision regarding a petition you filed on behalf of the National Milk Producers Federation (NMPF), pursuant to Section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), involving the tariff classification of certain products referred to as dairy protein blends under the Harmonized Tariff Schedule of the United States (HTSUS).

FACTS:

On June 21, 2001, NMPF requested that Customs initiate a proceeding under Section 625(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), to modify various ruling letters relating to the classification under the HTSUS of certain dairy protein blends identified as "milk protein concentrates" (MPC). Should Customs not initiate a proceeding under section 625, NMPF requested that its communication be considered a domestic interested party petition pursuant to Section 516 of the Tariff Act of 1930, as amended (19 U.S.C.1516).

Specifically, NMPF contends that certain dairy products classified in New York ruling letters (NY 800374, dated July 27, 1994, and NY D83787, dated November 13, 1998, did not meet the statutory definition of MPC and were therefore not classifiable in subheading 0404.90.10, HTSUS, which provides for "milk protein concentrates." In its submission, NMPF suggests that the subject dairy protein blends should be classified in heading 0402, HTSUS, which provides for milk and cream, concentrated or containing added sugar or other sweetening matter.

The products in the rulings you have identified are described by the importer as being milk protein concentrates. According to the rulings, the products have 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) (NY 800374).

Product 2: Protein (41 percent), fat (29 percent), minerals (7 percent), and moisture (6 percent) (NY D83787).

Both products contain over 40 percent protein by weight. Additionally, product 2 also contains a significantly higher percentage of fat than naturally occurs in milk. Neither ruling contains any information about how the product was manufactured and there is no indication that this information was provided to Customs. Unfortunately, any materials which might have been included in the original case files were lost in the destruction of the New York Customs House at the World Trade Center on September 11, 2001.

As requested, Customs reviewed the classification decisions in both NY 800374 and NY D83787. This review did not persuade Customs that the classification in those rulings was incorrect. Therefore, on September 18, 2002, in accordance with the procedures outlined in 19 U.S.C. 1516, and Title 19, Code of Federal Regulations, Part 175 (19 CFR Part 175), Customs published a notice of "Receipt of Domestic Interested Party Petition Concerning Tariff Classification of Dairy Protein Blends" in *The Federal Register* (67 FR 58837). Customs summarized the NMPF contentions and invited the public to comment on the correctness of the rulings cited and the arguments made by NMPF. During the comment period that ended on November 18, 2002, Customs received over 960 comments. Many of the comments contained nearly identical language expressing support for or opposition to the NMPF position.

ISSUE:

Whether milk protein concentrates of subheading 0404.90.10, HTSUS, are limited to products produced by ultrafiltration and containing casein and lactalbumin in the same proportion as found in milk, or whether they also include a blend of milk constituents and concentrated milk proteins where the total casein and lactalbumin content exceeds 40 percent by weight.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, 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 GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

0402	Milk and cream, concentrated or containing added sugar or other sweetening matter:
0404	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:
*	* * * * *
0404.90	Other:
0404.90.10	Milk protein concentrates
	Other:
	Dairy products described in additional U.S. note 1 to chapter 4:
0404.90.28	Described in general note 15 of the tariff schedule and entered pursuant to its provisions.
0404.90.30	Described in additional U.S. note 10 to this chapter and entered pursuant to its provisions.
0404.90.50	Other ¹

¹ See subheadings 9904.04.50–9904.05.01.

Additional U.S. Note 13 to Chapter 4 describes “Milk protein concentrate” as follows:

13. For 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.

You contend that the products classified in NY 800374 and NY D83787 are not “complete milk proteins” as defined by Additional U.S. Note 13 because they are not “unified protein complexes in which both the casein and lactalbumin are present in the same proportion, relative to each other, as they are found in milk.” Even though the rulings do not provide information about the method of manufacture, you also contend that neither product of the rulings can be described as “concentrates,” since you contend that they have not been produced and concentrated by means of ultrafiltration.

You assert that the language of Additional U.S. Note 13 is intended to restrict classification in subheading 0404.90.10, HTSUS, to products which have been produced from skim milk by a process known as ultrafiltration. In that process, skim milk is forced through a membrane which allows smaller lactose, water, mineral, and vitamin molecules to pass through the membrane, while the larger protein and fat molecules are retained and concentrated. You argue that the phrase “complete milk protein (casein plus lactalbumin)” requires that a product classified in subheading 0404.90.10 contain only fully functional, single (unified) protein complexes in concentrate form. You claim that only products made by the ultrafiltration process contain such proteins. You also contend that milk proteins obtained from methods other than ultrafiltration are neither complete nor fully functional. You state that products produced by means other than ultrafiltration are not products described in the note and are not eligible for classification in subheading 0404.90.10, HTSUS.

You refer to two Customs Headquarters ruling letters, HQ 070297, dated October 7, 1982, and HQ 073235, dated December 21, 1983, in which an ultrafiltrated product referred to as Total Milk Protein (TMP) containing nearly 90 percent milk protein was classified as a product in chief value of casein and not subject to the dairy quota. Despite the fact that these rulings were issued under the Tariff Schedules of the United States (TSUS) (the predecessor to the Harmonized Tariff Schedule of the

United States), you argue that they show a clear intent of Customs to classify only products which are manufactured by means of ultrafiltration in non-quota provisions. In your view, these rulings served as the impetus for Congressional modification of the TSUS. To support your position you provided language from the 1984 Senate Finance Committee Report on the Omnibus Tariff and Trade Measures (S. Prt 98-219) which created three new provisions in the TSUS to provide for: Whey Protein Concentrate (Item 118.35); Lactalbumin (Item 118.40); and Milk Protein Concentrate (Item 118.45). The Committee report describes total milk proteinate as being "a soluble milk proteinate in which casein and undenatured whey products are isolated as a single protein complex."

That Committee Report also contained a proposed TSUS Headnote defining milk protein concentrate as "any milk protein concentrate that is 40 percent or more protein by weight." You contend that the report demonstrates that only ultrafiltrated milk protein concentrates were intended to be included within the non-quota tariff provision created by Congress. When the HTSUS was adopted, the non-quota treatment of MPCs was carried forward to the subheading at issue. However, you concede that Congress did not include any language in either the TSUS Headnote, or the HTSUS Additional U.S. Note, which explicitly identifies any particular manufacturing process as being required for MPC.

As stated above, goods are classified under the HTSUS according to the terms of the headings and relevant section and chapter notes and by applying the GRIs in order. You have contended that the MPC products in the identified rulings should be classified in heading 0402, HTSUS. Heading 0402, HTSUS, provides for: Milk and cream, concentrated or containing added sugar or other sweetening matter. "Concentrated" milk is defined by the U.S. Food and Drug Administration (FDA) as being "the liquid food obtained by partial removal of water from milk." The products which are the subjects of the disputed rulings are not concentrated milk, but rather are products which consist of milk constituents. The ENs to heading 0404, HTSUS, provide, in pertinent part, "The heading also covers fresh or preserved products consisting of milk constituents, which do not have the same composition as the natural product, provided they are not more specifically covered elsewhere. Thus the heading includes products which lack one or more natural milk constituents, milk to which natural milk constituents have been added (to obtain, for example, a protein-rich product)." As such, milk protein concentrates are described by the terms of heading 0404 and not those of heading 0402. Accordingly, they are ineligible for classification in heading 0402 and we must now determine the correct subheading for the products within heading 0404, HTSUS.

The manufacturers and importers buy and sell the products under consideration as "Milk Protein Concentrates." We have determined that the products are goods of heading 0404, HTSUS. We must now determine whether the products are included within the scope of the legal definition of milk protein concentrate contained in Additional U.S. Note 13 to Chapter 4.

A number of the comments received in response to the 516 Notice discussed the terms of Additional U.S. Note 13. Many of the comments contend that your position, which limits coverage of the Note to products produced by ultrafiltration, is not supported by the language of the Note. These comments point out that when Congress was drafting the Note, it could have used restrictive language to achieve the result you urge. However, this was not done.

These commenters state that in the food industry, the term "milk protein concentrates" is commonly used to refer to a wide variety of products of varying composition. These products are manufactured to specification to render them suitable for specific end uses in the food industry. In addition, they point out that certain milk protein concentrates are obtained by a combination of ultrafiltration and blending, while other products contain milk proteins that are isolated from milk by other processes such as precipitation. They contend that products containing 40 percent or more protein by weight have more protein than milk and are thus milk protein concentrates. They also note that if Congress intended the provision to be limited to the total milk proteinate that was the subject of the previous Customs ruling, it would not have en-

acted the broad language of Additional Note 13 and would not have set the milk protein threshold as low as 40 percent.

Upon consideration of the petition and the comments submitted, Customs agrees with the comments received that the Note does not restrict MPCs to any particular method of manufacture. Rather, the Note speaks to “any” complete milk protein concentrate which contains a specified protein percentage by weight. The use of the term “any” suggests that a broad rather than restrictive reading of the note was intended. The Note does require that the protein be “complete” which, according to the Note, requires that it contain casein and lactalbumin. However, the Note neither requires that the proteins be in the same proportion as they are found in milk, nor does it specify relative percentages of the protein components. It requires only that the source of the proteins be milk, that casein and lactalbumin be present, and that they constitute 40 percent or more, by weight, of the product.

None of the conditions you urge such as retention of “fully functional properties” and that the proteins not be “denatured”, which you have indicated are requirements for inclusion in the subheading 0404.90.10, are specified in the text of Additional U.S. Note 13 to Chapter 4. Had Congress intended the subheading to be limited to only those products which meet the standards you specify, it could have drafted the provision accordingly. However, the text that was adopted does not contain any of the narrow restrictions you describe. Moreover, there is nothing in the legislative history that demonstrates an intent to limit the provision to ultrafiltered products. Finally, as many commenters pointed out, and the study performed by the General Accounting Office on this issue made clear, the term “milk protein concentrates” is used in commerce to refer to a class of products much broader than those produced by ultrafiltration. For example, the study states that products known as milk protein concentrates produced in Canada are made by blending milk proteins. (General Accounting Office, *Report to Congressional Requesters, Dairy Products: Imports, Domestic Production, and Regulation of Ultra-filtered Milk*, GAO-01-326, March 2001, at 7). Tariff terms are presumed to reflect their commercial meaning. (*Nylos Trading Co. v. United States*, 37 CCPA 71 (1949); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375 (1999), citing *Simod Am. Corp. v. United States*, 872 F.2d 1572 (Fed. Cir. 1989).

For a product to be eligible for classification in subheading 0404.90.10, HTSUS, it must be a concentrate. You argue that the term refers to a product that has had liquids removed from it to make it stronger, and that only ultrafiltered products satisfy this requirement. Customs itself initially considered this view in 2001, when, as part of a Notice of proposed revocation, it stated: “the common dictionary meaning of the words ‘milk protein concentrate’ would be a protein product derived from milk in which the milk protein content has been intensified or purified by the removal of ‘foreign or inessential’ milk constituents, such as water, minerals and lactose.” (See *Customs Bulletin and Decisions*, Vol. 35, No. 40, October 3, 2001).

Comments received in response to that Notice noted that products known in the trade as milk protein concentrates were in fact produced by a variety of methods other than ultrafiltration. They argued these products, e.g., a blend of skim milk and whey protein concentrates or caseinates, were concentrates since they were dairy products whose milk protein content was higher than that found in milk.

Upon further consideration, Customs agrees that such products may be considered concentrates within the meaning of the provision. These products consist of milk constituents whose protein content has been intensified by blending with a concentrated milk protein such as whey protein concentrate or caseinates.

In that same proposed revocation, Customs referred to an International Dairy Federation publication of May 1992, as the basis for the statement that “The dairy industry has specific terminology and parameters when referring to milk protein concentrate.”

While that statement reflected certain information before Customs at the time of the proposal, comments received thereafter revealed that there is no standard of identity for MPC recognized under the *Codex Alimentarius* or other international non-governmental organizations. Similarly, there is no recognized commercial standard for these products. Milk protein concentrates contain varying amounts of milkfat, pro-

teins and other constituents which are customized by producers to meet the needs of customers.

It has become clear that in the dairy industry, it currently is common practice to create products by adding ingredients, which may, in fact be protein concentrates themselves (such as whey protein concentrates or caseinates), to raw materials. The resulting products are marketed and sold to customers as milk protein concentrates. This practice is acknowledged by the previously cited EN to heading 0404, "Thus the heading includes * * * milk to which natural milk constituents have been added (to obtain, for example, a protein-rich product)."

Based upon the foregoing information provided in the comments, Customs decided to withdraw the proposed revocation of the rulings.

Additional U.S. Note 13 to Chapter 4, in our view, describes a product, not a process. The provision cannot be seen to specify all the methods that might be employed to create MPC, in part because they had not been developed. Technologies have developed since 1984 which enable manufacturers to produce an increasing number of varieties of products that are entered into the marketplace and offered for sale to purchasers which are identified as MPCs. This analysis of tariff language was recently employed by the United States Court of International Trade when, in reference to chemical products, it stated: " * * * the tariff schedule should not be interpreted by reference to the method of producing the chemical compound at issue, instead of the relative simplicity of the finished product's chemical structure. Relying on method of production would undermine any consistency in the classification of imported chemicals, as new and complex chemical processes are developed constantly." *E.T. Horn Co. v. United States*, CIT Slip Op. 03-20 (February 27, 2003).

Over the course of many years, Customs has classified many different products identified as MPCs in subheading 0404.90.10, HTSUS. These products contain varying amounts of proteins and other ingredients such as milkfat and lactose. The determinative factor in these rulings has been the protein content, not the manufacturing process (see, HQ 950484, dated January 3, 1992, a product produced from skim milk by a chromatographic separation process, containing 76 to 80 percent protein; NY 812858, dated August 3, 1995, a product produced from coagulated, heated skim milk, containing 80 percent protein; NY 800374, dated July 27, 1994, process unidentified, protein content 41 percent; HQ 965395, dated April 5, 2002, a product produced either by dry blending nonfat dry milk, whey protein concentrate 35 and fine, 90-mesh casein or by mixing condensed liquid skim milk with whey protein concentrate 35 and casein, containing 42 to 44 percent protein). Moreover, these products were bought and sold in the trade as MPCs.

Based upon the above analysis of the language of the tariff, the arguments you raised and the comments received in response to the Notice, Customs finds that the classification provided in rulings NY 800374, dated July 27, 1994 and NY D83787, dated November 13, 1998 is correct. Accordingly, Customs hereby denies your petition to reclassify the subject products, referred to as dairy protein blends.

HOLDING:

The classification of milk protein concentrates in subheading 0404.90.10, HTSUS, in NY 800374, dated July 27, 1994 and NY D83787, dated November 13, 1998, which were the subject of the domestic interested party petition, is correct, and these rulings are affirmed.

Please be advised that pursuant to 19 CFR 175.23, if you so wish, you may file a notice that you desire to contest the classification of the subject products within 30 days of the date of this letter. Such notice should also designate the port or ports at which the products are being imported into the United States, and at which you desire to protest.

MYLES B. HARMON,
Director,
Commercial Rulings Division.