U.S. Customs Service

General Notices

GRANT OF "LEVER-RULE" PROTECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of grant of "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR §133.2(f), this notice advises interested parties that Customs has granted "Lever-Rule" protection to McCormick Delaware, Inc. for its two products, "MAYONESA" and "MERMELADA."

FOR FURTHER INFORMATION CONTACT: Paul Pizzeck, Esq., Intellectual Property Rights Branch, Office of Regulations & Rulings, (202) 572–8704.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR §133.2(f), this notice advises interested parties that Customs has granted "Lever-Rule" protection with regard to the following products:

1) "MAYONESA" mayonnaise with lime juice which bears the following trademarks: MC & DESIGN (U.S. Patent & Trademark Office Registration No. 2,223,933; U.S. Customs Recordation No. TMK 01–00488) and/or MCCORMICK (U.S. Patent & Trademark Office Registration No. 2,233,809; U.S. Customs Recordation No. TMK 01–00491).

2) "MERMELADA" strawberry fruit spread which bears the following trademarks: MC & DESIGN (U.S. Patent & Trademark Office Registration No. 2,223,933; U.S. Customs Recordation No. TMK 01–00488) and/or MCCORMICK (U.S. Patent & Trademark Office Registration No. 2,233,809; U.S. Customs Recordation No. TMK 01–00491).

Customs has determined that the aforementioned McCormick Delaware, Inc. products authorized for sale in the U.S. differ physically, materially from that company's products produced for foreign markets in that 1) "MAYONESA" and "MERMELADA" produced for the U.S. market have safety seals around their lids, whereas "MAYONESA" and "MERMELADA" produced for the Mexican market do not; and 2) "MAYONESA" and "MERMELADA" produced for the U.S. market utilize a single label printed in both English and Spanish whereas

"MAYONESA" and "MERMELADA" produced for the Mexican market are labeled only in Spanish with an additional label containing a list of ingredients and nutritional information in English affixed to their lids by adhesive backing. In addition we note that these additional stick-on labels contain spelling errors and detract from the appearance of the products' packaging.

In *Iberia Foods Corp. v. Roland Romeo, Jr.*, 150 F.3d 298 (3d Cir. 1998) the Third Federal Circuit noted that characteristics of gray market goods that are not shared by the trademark owner's goods are likely to affect consumers' perceptions regarding the desirability of the goods. The gray market goods under consideration herein feature the absence of a safety seal and the presence of a stick-on label with product information printed in English, characteristics which are not shared by McCormick Delaware's (authorized) goods. In the case of the authorized goods there is a safety seal present and the jars do not utilize a stick-on label; rather, all product information is printed in both Spanish and English on one label glued to the side of the jar. The absence of safety seals on the gray market products, as well as the presence of adhesive labels listing ingredients and nutritional information (in English) on the lids of the gray market products, are characteristics likely to affect a consumer's perceptions regarding the desirability of those goods.

This theory was buttressed by the Eleventh Circuit in *Davidoff & CIE v. PLD Int'l Corp.* 263 F. 3d 1297 (11th Cir. 2001). There the Eleventh Federal Circuit defined a material difference as one that consumers consider relevant to a decision about whether to purchase a product. The court found that physical differences (i.e. etching fragrance bottles to remove batch codes) were material because consumers may conclude that the product has been tampered with. Based on that rationale, it is likely that consumers would consider the presence of a safety seal on a food product relevant to their decision about whether to purchase the product, and may conclude that the absence of a safety seal on the gray market product indicates a possibility that the product has been tampered with.

Additionally, the First Federal Circuit has held that use of different languages on product labeling constitutes a material difference. *Societe Des Produits Nestle, S.A.. v. Casa Helvetia, Inc*. 982 F. 2d 633 (1st Cir. 1992); see also *Ferrero U.S.A., Inc. v. Ozak Trading, Inc.*, 753 F. Supp 1240 (D.N.J.), aff'd 935 F. 2d 1281 (3d Cir. 1991) (unauthorized product differed materially because, *inter alia*, its labels did not contain information indicating number of servings per container or nutritional information, and because it used foreign variants of words displayed on the authorized product's label).

ENFORCEMENT

Importation of gray market "MAYONESA" and "MERMELADA" produced by Herdez S.A. de C.V. is restricted, unless the labeling requirements of 19 CFR §133.23(b) are satisfied.

Dated: October 31, 2002.

JOANNE ROMAN STUMP,
Chief, Intellectual Property Rights Branch,
Office of Regulations & Rulings.

NOTICE OF CANCELLATION OF CUSTOMS BROKER PERMIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker local permits are canceled without prejudice.

Name	*Permit No.*	*Issuing Port*
Arthur Andersen LLP	93–008	Houston
Arthur Andersen LLP	(no number)	Detroit
US Express International, Inc.	D–09–01	Dallas/Ft. Worth
Edward M. Jones Co., Inc.	093	Seattle
Khosrow Khorraminejad	16001–P	San Francisco
James F. Mooring	5386–056	Houston
Fritz Companies, Inc.	007	Great Falls
Independent Brokerage LLC	056	Great Falls
Fritz Companies, Inc.	057	Seattle
Tower Group International, Inc.	112	Seattle

Dated: October 22, 2002.

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 6, 2002 (67 FR 67688)]

NOTICE OF CANCELLATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker licenses and any and all associated local and national permits are canceled without prejudice.

Name	*License No.*	*Issuing Port*
William F. Joffroy, Inc.	03897	Nogales
American Customs Brokers, Inc.	11321	Duluth
W.Y. Moberly, Inc.	02926	Great Falls
Trans-Border Customs Services, Inc.	11408	Champlain
Miles & Joffroy, Inc.	11296	San Diego
Rudolph Miles & Sons, Inc.	04665	El Paso
H.A. & J.L. Wood, Inc.	04057	Pembina
Associated Customs Brokers, Inc.	10448	Pembina
Galax, Inc.	21362	New York
Arthur Andersen LLP	13678	Detroit

Dated: October 22, 2002.

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 6, 2002 (67 FR 67689)]

NOTICE OF REVOCATION OF CUSTOMS BROKER PERMIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930 as amended (19 USC 1641) and the Customs Regulations [19 CFR 111.45(b)], the following Customs Broker Permit is revoked by operation of law.

Name	*Permit No.*	*Issuing Port*
Leschaco, Inc.	96006	Los Angeles

Dated: October 22, 2002.

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 6, 2002 (67 FR 67688)]

NOTICE OF REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930 as amended (19 USC 1641) and the Customs Regulations [19 CFR 111.45(a)], the following Customs broker license is revoked by operation of law.

Name	*Permit No.*	*Issuing Port*
General Shipping, Inc.	7650	New York

Dated: October 22, 2002.

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 6, 2002 (67 FR 67688)]

MODIFICATION AND CLARIFICATION OF PROCEDURES OF THE NATIONAL CUSTOMS AUTOMATION PROGRAM TEST REGARDING RECONCILIATION; CORRECTION

AGENCY: Customs Service, Treasury.

ACTION: General notice; correction.

SUMMARY: On September 27, 2002, Customs published a document in the Federal Register which announced modifications to the Customs Automated Commercial System (ACS) Reconciliation prototype test and clarified certain aspects of the test. The notice stated that among the topics related to the test for which Customs was providing clarifications and reminders was the "right to file Reconciliation entries." The language reminding test participants who has the right to file entries under the test was inadvertently omitted from the notice. This document sets forth the omitted language.

DATES: Effective as of November 8, 2002.

FOR FURTHER INFORMATION CONTACT: Mr. John Leonard at (202) 927–0915 or Ms. Christine Furgason at (202) 927–2293. Additional information regarding the test can be found at *http://www.customs.gov/recon*. Email inquiries may be sent to: *Recon.Help@customs.treas.gov.*

SUPPLEMENTARY INFORMATION:

BACKGROUND

A general notice document was published in the Federal Register (67 FR 61200) on Friday September 27, 2002, to announce certain modifica-

tions to the Automated Commercial System (ACS) Reconciliation Prototype test regarding NAFTA Reconciliation entries, the method for filing Reconciliation entries covering flagged entry summaries for which liquidated damages have been assessed, acceptance of compact disks for Reconciliation spreadsheets, and applicability to test participants of previously suspended regulatory provisions of part 111, Customs Regulations. The notice also provided clarifications and reminders to test participants regarding certain other aspects of the test and announced a new address for Reconciliation submissions for the port of NY/Newark.

In the third paragraph of the "Background" section of the general notice, it stated that among the topics related to the test for which Customs was providing clarifications and reminders was the "right to file Reconciliation entries." Inadvertently, the language reminding Reconciliation test participants who has the right to file entries under the test was omitted from the "Clarifications and Reminders" section of the notice.

This document sets forth the omitted language.

CORRECTION

In general notice FR Doc 02–24588, published on September 27, 2002 (67 FR 61200), make the following correction:

On page 61204, in the second column, immediately before the section entitled "Updated Address and ABI Filing Information for NY/Newark Port 1001," insert the following section:

Right to File Reconciliation Entries

Customs reminds test participants that the filing of a Reconciliation entry, like the filing of a regular consumption entry, is governed by 19 U.S.C. 1484 and can be done only by the importer of record as defined in that statute.

Dated: November 5, 2002

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 8, 2002 (67 FR 68238)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, November 6, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

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

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A BEVERAGE SWEETENER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and treatment relating to the classification of a beverage sweetener.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling concerning the tariff classification of a beverage sweetener, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocations was published on September 4, 2002, in Volume 36, Number 36, of the CUSTOMS BULLETIN. One comment was received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 20, 2003.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, (202) 572–8784.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, Customs published a notice in the September 4, 2002, CUSTOMS BULLETIN, Volume 36, Number 36, proposing to revoke New York Ruling Letter (NY) A80165, dated March 6, 1996, and to revoke any treatment accorded to substantially identical merchandise. One comment was received in response to this notice and is discussed in the attached ruling.

In NY A80165, Customs ruled that a beverage sweetener consisting of "water, alcohol, (11.5 percent by volume), and a sugar additive (one or more of invert sugar syrup, liquid sugar, liquid fructose, high fructose corn syrup, sugar water solution, or fructose water solution) was classified in subheading 2106.90.12, HTSUS, the provision for "[f]ood preparations, not elsewhere specified or included; [c]ompound alcoholic preparations of an alcoholic strength by volume exceeding 0.5 percent vol., of a kind used for the manufacture of beverages: [c]ontaining not over 20 percent of alcohol by weight."

It is now Customs position that the beverage sweetener was not correctly classified in NY A80165 because it primarily consists of sugar. As such, the instant merchandise is classified as an "other food preparation" in subheading 2106.90.94, 97 or 99, HTSUS, by its sugar content. The appropriate quota provisions may apply.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party, who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs, pursuant to section 625(c)(1), is revoking NY A80165 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 965509 set forth as an attachment to this notice. Additionally, pursuant to section 625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: October 30, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 30, 2002.

CLA–2 RR:CR:GC 965509 AM
Category: Classification
Tariff No. 2106.90.94, 95, 97 or 99

MR. JOHN PELLEGRINI
ROSS & HARDIES
65 East 55th Street
New York, NY 10022–3219

Re: NY A80165 revoked; beverage sweetener.

DEAR MR. PELLEGRINI:

This is in reference to New York Ruling Letter (NY) A80165 issued to you on March 6, 1996, by the Director, Customs National Commodity Specialist Division, concerning the classification, under the Harmonized Tariff Schedule of the United States, (HTSUS), of a beverage sweetener. We have had an opportunity to review this ruling and believe it is incorrect.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY A80165 was published on September 4, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 36. One comment was received in response to this notice and is discussed in the Law And Analysis section below.

Facts:

NY A80165 states that the beverage sweetener consists of "water, alcohol, (11.5 percent by volume), and a sugar additive (one or more of invert sugar syrup, liquid sugar, liquid fructose, high fructose corn syrup, sugar water solution, or fructose water solution)." The merchandise was classified in subheading 2106.90.12, HTSUS, the provision for "[c]ompound alcoholic preparations of an alcoholic strength by volume exceeding 0.5 percent vol., of a kind used for the manufacture of beverages: [c]ontaining not over 20 percent of alcohol by weight."

Issue:

What is the classification, under the HTSUS, of a beverage sweeter?

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The competing provisions occur at the eighth digit. The following sub-headings are relevant to the classification of this product:

2106	Food preparations not elsewhere specified or included:
2106.90	Other
2106.90.12	Compound alcoholic preparations of an alcoholic strength by volume exceeding 0.5 percent vol., of a kind used for the manufacture of beverages: Containing not over 20 percent of alcohol by weight.
* * * * * * *	
	Other
	Articles containing over 65 percent by dry weight of sugar described in additional U.S. note 2 to chapter 17:
2106.90.94	Other
	Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17:
2106.90.95	Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions
2106.90.97	Other
2106.90.99	Other

EN 21.06 states, in pertinent part, the following:

> The heading includes, *inter alia:*
>
> (7) Non-alcoholic or alcoholic preparations (not based on odoriferous substances) of a kind used in the manufacture of various non-alcoholic or alcoholic

> beverages. These preparations can be obtained by compounding vegetable extracts of heading 13.02 with lactic acid, tartaric acid, citric acid, phosphoric acid, preserving agents, foaming agents, fruit juices, etc. The preparations contain (in whole or in part) the flavouring ingredients which characterize a particular beverage. As a result, the beverage in question can usually be obtained simply by diluting the preparation with water, wine or alcohol, with or without the addition, for example, of sugar or carbon dioxide gas. Some of these products are specially prepared for domestic use; they are also widely used in industry in order to avoid the unnecessary transport of large quantities of water, alcohol, etc. As presented, these preparations are not intended for consumption as beverages and thus can be distinguished from the beverages of Chapter 22.

The commenter makes the following three arguments: (1) the subject merchandise satisfies each of the requirements found in text of subheading 2106.90.12, HTSUS; (2) EN 21.06(7) does not support Customs proposition that subheading 2106.90.12, HTSUS, is confined to substantially complete beverages; and (3) the legislative history creating subheading 2106.90.12, HTSUS, supports the commenter's interpretation of subheading 2106.90.12.

In so arguing, the commenter notes that subheadings 2106.90.12, 15, and 18, HTSUS, were created in 1996, when, as part of amendments to the tariff schedule, heading 2208, HTSUS, was modified, removing compound alcoholic preparation from its purview. Subheading 2106.90.12, HTSUS, the provision for "[f]ood preparations, not elsewhere specified or included; [c]ompound alcoholic preparations of an alcoholic strength by volume exceeding 0.5 percent vol., of a kind used for the manufacture of beverages: [c]ontaining not over 20 percent of alcohol by weight" was created in 1996 due to a recommendation by the Customs Cooperation Council (CCC), now known as the World Customs Organization (WCO).

Originally, the International Trade Commission (ITC) proposed that products which had been classified in subheading 2208.10, HTSUS (1995), the provision for "[u]ndenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages: compound alcoholic preparations of a kind used for the manufacture of beverages: [c]ompound alcoholic preparation of a kind used for the manufacture of beverages," be moved to heading 3302, HTSUS (1995). This change expanded heading 3302, HTSUS, from covering "mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis of one or more of these substances, of a kind used as raw materials in industry" to include coverage of "* * * other preparations based on odoriferous substances, of a kind used for the manufacture of beverages." However, certain products described by subheading 2208.10 did not contain odoriferous substances as defined in Chapter 33 and, therefore, could not be classified in heading 3302, HTSUS. Accordingly, the ITC recommended the additions of subheading 2106.90.12 through 2106.90.18. In a report dated August 1993, the ITC explained the following:

> The CCC's intent in deleting subheading 2208.10 was to **transfer as many of the subheading's products as possible to a newly expanded heading 3302.** However, in a written submission, Joseph E. Seagram & Sons, Inc. pointed out that **certain products of subheading 2208.10 do not contain odoriferous substances** as defined in new note 2 to chapter 33, and therefore could not be "based on" odoriferous substances. After consultation with Customs, the Commission **proposed these new subheadings to provide for products of subheading 2208.10 that could not fall in expanded heading 3302.** (emphasis added).

Proposed Modifications to Harmonized Tariff Schedule of the United States, Investigation No. 1205–3 (August 1993), at page B–16, fn 68. Clearly, the newly created subheadings 2106.90.12–18 contain only products that could have been classified in subheading 2208.10, HTSUS (1995). This intent is obvious from the fact that the phrase "compound alcoholic preparations of a kind used for the manufacture of beverages" was transferred verbatim from subheading 2208.10, HTSUS (1995) to subheading 2106.90.12, HTSUS, being qualified only for alcoholic strength. Courts have consistently ruled that a change in statutory language is significant in tariff classification. *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423; 1997 U.S. App. (discussing the deletion of the term "tree" in the HTSUS from the corresponding subheading in the Tariff Schedules of the United States.) *Id.* at 1428. Here, the statutory language did not change. This, too, is significant. Hence, if the instant merchandise would not have been classifiable in subheading 2208.10,

HTSUS (1995), it can not be deemed to fall in subheading 2106.90.12, HTSUS, today by its terms.

In HQ 955265, dated February 9, 1994, we held that a citric acid additive was not classified in heading 2208, HTSUS. The product contained 89 percent ethyl alcohol, 10 percent citric acid, and water and was blended with a wine or malt base, water, sugar, preservatives, flavorings, colorings and a carbonating agent after entry to produce a wine cooler. We stated in that ruling that "the citric acid additive, rather than being a complex preparation, is essentially an alcohol flavored with the acid used to impart a tang to a wine or malt base, which is processed further to produce the cooler; it only accounts for, at most, 2.5 percent of the finished product. Thus, the additive would not be a preparation of a type classifiable in heading 2208."

By contrast, HQ 953327, dated June 4, 1993, held that a non-fat dairy base rum liqueur was classified in heading 2208, HTSUS. The product consisted of milk protein concentrate, skim milk concentrate, sucrose, water, rum and maltodextrins. After entry it was mixed with additional distilled spirits, sugar, flavors and color. We stated that "the beverage is substantially complete as imported; the ingredients added subsequent to importation do not change the basic composition of the imported product, which is that of an almost completed alcoholic beverage, but merely enhance it."

Indeed, the instant merchandise, consisting primarily of sugar and commercially known as a beverage sweetener, would not have been classifiable in heading 2208.10, HTSUS (1995), because it is unlike the base in HQ 953327, a "substantially complete" beverage that need only be diluted, sweetened and further flavored. Like the citric acid additive of HQ 955265, a mixture of three ingredients added to impart a tang to the finished beverage, the instant merchandise also contains just three ingredients added to impart a sweetness to the finished beverage. Hence, the beverage sweetener at issue would not have been classifiable in subheading 2208.10, HTSUS, before 1996 and could not be one of the products intended to be transferred to a newly expanded heading 3302 or a newly added subheading 2106.90.12, HTSUS.

EN 21.06 (7), *supra*, supports this view. The instant beverage sweetener is not obtained by compounding vegetable extracts with other ingredients. It does not contain the flavoring ingredients which characterize a particular beverage. It does not render the finished beverage simply by dilution with water, wine or alcohol and/or addition of sugar or carbon dioxide gas. The instant merchandise, a beverage sweetener, is but one ingredient in the composition of any of a number of beverages. It does not, as described in the EN, contain the characteristics of a particular beverage. It is not described by EN 21.06 (7), the description corresponding to products falling in subheadings 2106.90.12–18.

Furthermore, EN 21.06(7) closely tracks EN 22.08 (1992). It stated the following:

> The heading also covers compound alcoholic preparations of a kind used in the manufacture of various beverages (e.g., aperitives, liqueurs and non-alcoholic beverage. **These products,** generally a complex mixture of distillates, tinctures, alcoholates and natural or synthetic essences, **contain all of the odoriferous substances and other flavouring ingredients (e.g., citric acid) which characterize a particular beverage and sometimes other constituents (sugar, etc.). As a result, the beverage in question can be obtained simply by diluting the preparation with water, wine or alcohol, with or without addition, for example, of sugar or carbon dioxide gas.** Some of these products are specially prepared for domestic use; they are also widely used in industry in order to avoid the unnecessary transport of large quantities of water, alcohol, etc. These preparations are not intended for immediate consumption and thus can be distinguished from the liqueurs and other spirituous beverages of this heading (emphasis added).
>
> This heading **excludes:**
>
> (a) Similar compound preparations having an alcoholic strength by volume not exceeding 0.5% vol **(heading 21.06).**
>
> (b) Alcoholic preparations of a kind used for the manufacture of beverages, based on one or more odoriferous substances but not containing all of the flavouring ingredients which characterize a particular beverage **(heading 33.02).**

Almost identical language regarding dilution of the compound alcoholic preparation yielding the completed beverage. The commenter argues that the word "usually" inserted in EN 21.06(7) is significant and would allow a beverage sweetener which does not yield the finished beverage by dilution to be classified as a "compound alcoholic preparation." This argument ignores the history of the provisions and the wording itself.

Before 1996, heading 2208 covered alcoholic preparations which (1) were compound, (2) had an alcohol content exceeding .5% volume, and (3) contained all of the odoriferous substances and flavoring ingredients which characterize a particular beverage. Heading 3302 covered alcoholic preparations which (1) were compound, (2) had an alcohol content exceeding .5% volume, and (3) contained odoriferous but not all of the flavoring ingredients in a beverage.

In *Pfaff Am. Sales Corp. v. United States*, 17 C.I.T. 550; 1993, the court states "[I]t is well settled customs law that when a tariff term is not defined in either the HTSUS or its legislative history, the correct meaning of a term in a tariff provision is the common meaning understood in trade or commerce. It is also well established that since the meaning of a customs term is a question of law, a court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities, to determine their common meaning" (citations omitted). Before 1996, the term "odoriferous" was not defined in the tariff, hence the common meaning would apply. Webster's II New College Dictionary defines "odoriferous" as "having or giving off an odor." However, in 1996, the term "odoriferous substances" became a term of art defined as referring only to substances of heading 3301, HTSUS. Chapter 33, note 2. As Seagrams noted, this definition served to limit the number of compound alcohol preparations which could be transferred from heading 2208, HTSUS (1995) to heading 3302. Hence, an alcoholic preparation of heading 2208, which may have a substance which contained an odor in it, but was not an "odoriferous substance" as defined by Chapter 33, note 2, would be transferred to headings 2106.90.12–18. Hence, the alcoholic preparations of 2106.90.12–18 might not "contain all of the odoriferous substances and other flavouring ingredients (e.g., citric acid) which characterize a particular beverage and sometimes other constituents (sugar, etc.)," because an odoriferous substance of heading 3301, HTSUS, would need to be added to the preparation. Taken in context, the word "usually" inserted into EN 21.06(7), *supra*, refers to the situation where simple dilution will not produce the complete beverage because some flavorings or odoriferous substances need to be added, not, as the commenter claims, the situation where everything but the sweetener needs to be added.

Furthermore, in 1996, heading 3302 was expanded by three new subheadings to describe those items added from heading 2208. Subheadings 3302.10.40–.50 are for "preparations requiring only the addition of ethyl alcohol or water to produce a beverage suitable for human consumption." The commenter argues that subheading 3302.10.90, HTSUS, the provision for preparations "other" than those requiring only the addition of ethyl alcohol or water to produce a beverage suitable for human consumption, would be superfluous if Customs interpretation were correct. On the contrary, the "other" subheading could refer to a product containing odiferous substances that needs dilution, more flavoring and/or sweetening or carbonation. In this manner, the terms "of a kind used for the manufacture of beverages" remain consistent throughout the tariff.

Customs has ruled in this manner since 1996. For instance, NY H82685, dated August 1, 2001, classified a Natural Tequila/Agave flavoring containing agave spirits, alcohol, agave wine, natural orange flavor, tequila, anhydrous citric acid and water in subheading 2106.90.15, HTSUS, as a compound alcoholic preparation. The preparation needed only dilution to complete the beverage and, although emitting an odor, did not contain odoriferous substances described by Chapter 33, note 2. Likewise, in NY C87981, dated May 29, 1998, we classified concentrated fermented apple cider and pear cider as compound alcoholic preparations because they need only be diluted, sweetened and carbonated to transform into the final products, apple and pear ciders.

In conclusion, the instant product, commercially known as a beverage sweetener, consists mainly of sugar. Unlike the non-fat dairy base rum liqueur, tequila/agave flavoring and apple and pear ciders, the instant merchandise does not contain any flavorings and can not be diluted and further flavored to produce a finished beverage. Therefore, we do not believe the instant mixture falls within the scope of the terms "compound alcoholic preparations of a kind used for the manufacture of beverages" as outlined above.

Holding:

The beverage sweetener is classified in subheading 2106.90.94, 95, 97 or 99, HTSUS, by its sugar content. The appropriate quota provisions may apply. Should the importer desire a binding ruling on the beverage sweetener, a ruling request containing all necessary information should be submitted to the Director, National Commodity Specialist Division, U.S. Customs, Attn: CIE/Ruling Request, One Penn Plaza, 10th Floor, New York, NY 10119.

Effect on Other Rulings:

NY A80165 is revoked.

In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)