

# Regulating for Globalization

Trade, Labor and EU Law Perspectives

## High Court Appeal – Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd

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During each year we discuss various important decisions handed down by the Tribunals and Courts.

Recently, this included the High Court appeal in *Comptroller General of Customs v Zappia* from late 2018 which has been covered in webinars and presentations to various groups. We can now report that the High Court has granted leave to appeal sought by the Comptroller – General of Customs (**Comptroller or Customs**) in the matter of *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd*. This will now be another in a long line of High Court decisions affecting industry.

## **AAT Application and Federal Court Appeal**

Readers may be aware that in 2017 Pharm-A-Care Laboratories Pty Ltd (**Pharm-A-Care**) made an application to the Administrative Appeals Tribunal (**AAT**) for review of a decision made by Customs in relation to the tariff classification of certain pastilles or gummies containing vitamins (**Vitamin Gummies**) and certain weight loss gummies (**Weight Loss Gummies**).

In the AAT, Pharm-A-Care argued that both the Vitamin Gummies and the Weight Loss Gummies should be classified as medicaments under tariff heading 3004. The Comptroller argued that the Vitamin Gummies and Weight Loss Gummies were more appropriately classified under tariff heading 2106 as food preparations. Tariff heading 2106 attracts a general duty rate of between 4% and 5% whereas tariff heading 3004 attracts a 0% duty rate.

Pharm-A-Care was successful in the AAT which found that the Vitamin Gummies and Weight Loss Gummies were appropriately classified as medicaments under tariff heading 3004 (and sub headings 3004.50.00 and 3004.90.00 respectively).

The Comptroller subsequently appealed the decision to the Full Court of the Federal Court. The Federal Court dismissed the appeal, finding that the AAT had not erred in finding that the Vitamin Gummies and Weight Loss Gummies were medicaments and not food preparations.

### **Application for special leave to appeal**

The Comptroller then made an application for special leave to appeal to the High Court of Australia with leave to appeal granted on 17 May 2019. As we have previously discussed, leave to appeal to the High Court in these matters is not granted automatically and a party seeking leave must first convince the High Court that the issue is sufficiently important to warrant the attention of the High Court. Some of the transcript for the special leave application has identified the issues considered to be important and the views of counsel for Pharm-A-Care in opposing the application for special leave.

### **Interpretation of the Chapter Notes**

The submissions made to the High Court by counsel for Pharm-A-Care focussed on the Federal Court's interpretation of Note 1 (**Note**) to Chapter 30 of Section IV of the *Customs Tariff Act 1995* (**Tariff**) which is applicable to tariff heading 3004. That Note purports to exclude certain food supplements from classification under Chapter 30. Counsel for Pharm-A-Care addressed the Comptroller's argument that the Federal Court's reasoning in relation to the interpretation of the Note was '*novel, wrong and likely to have significant juridical and financial impacts.*'

Counsel for Pharma-A-Care also made submissions that the most appropriate way for any issue of interpretation and application of the Federal Court's decision to be addressed would be by Parliament in the relevant additional notes in the Tariff.

## Financial impact

The Comptroller estimated that the likely financial impact of the Federal Court's decision would be \$45 million in potential revenue derived from approximately \$100 million worth of imported vitamins and mineral supplements. However, it was argued by counsel for Pharm-A-Care in submissions that certain effervescent vitamin supplements are already classified under tariff heading 3004 (as the result of a separate AAT decision) and so the estimated impact on revenue may need to be reduced.

## High Court's findings in relation to the special leave application

The High Court considered it appropriate to grant the Comptroller special leave to appeal. Special leave to appeal was granted on the condition that any costs orders made by the Full Court of the Federal Court were not disrupted and that the Comptroller would pay Phama-A-Care's costs of the appeal regardless of the outcome.

If the Comptroller is successful in its appeal there is likely to be widespread impacts on the classification of vitamin and mineral supplements (or complementary items) imported to Australia with the potential for duty to be imposed on those goods at a rate of 4% to 5%. There will also be consequences for the manner in which the Interpretive Rules and chapter notes are applied to classification of goods.

We will be watching the case closely and will keep readers updated on developments. Further, even if the Comptroller is successful that leaves open whether the Comptroller will seek to recover duty on goods previously imported on which duty was not paid or where refunds of duty had been paid. As expected many parties who had originally paid duty had sought refunds based on the decisions of the AAT and the Federal Court.

We will also be addressing this application for special leave to appeal and the appeal itself at our upcoming seminars and forums with the Customs Brokers and Forwarders Council of Australia.

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