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## Customs Chinese Pasta Case Stuffed

We are pleased to note that we have had our second successful case against Customs in the AAT in this month. The first case was the case of Brackley Industries Pty Ltd and CEO of Customs 8th of April 2015.

The Brackley case was the first time an importer had been successful against Customs on a TCO eligibility issue for more than 12 months.

In Brackley the TCO read *"cases or trays, compact disc"*. The importer had imported cases which had a Blu-Ray logo on them and were larger than the standard CD cases. Both boxes were, however, designed to hold exactly the same sized disc i.e. there is no difference in size between a CD, DVD or Blu-Ray Disc. The Tribunal found that references to trademarks and intended use was prohibited in both the making and interpretation of TCOs. As the imported goods held an optical disc they complied with the TCO.

In the more recent case of Pacific Worldwide Pty Ltd and CEO of Customs 24th of April 2015 the issue was whether Asian style foods such as wontons, dumplings and dim sims etc. should be classified as stuffed pasta to heading 1902. The Applicant maintained that the goods should be classified to heading 1605 as "Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved".

By the workings of various notes, including Note 2 to Chapter 16, if the goods were to fall to 1902 they were excluded from Chapter 16. Accordingly, the issue was whether the subject goods were in fact be identified and classified as stuffed pasta.

The approach we sought to emphasise was that of common sense. This of course is an element that seems to be frequently lacking in Customs decisions. Thus, we made the observation that

when one goes into a Chinese restaurant for a meal you are not likely to ask the waiter “what is the pasta special this evening?”. In fact, there will be no pasta dishes listed on the menu.

Similarly, you are not likely to be served any yum cha in an Italian restaurant.

The fact that the imported goods, as Asian style foods, might be produced in a similar way to pasta does not change their identity into pasta. The Senior Member at one point enquired of the Customs representative in the following approximate terms:

> *“If the cook in the family were to say to the spouse “go down the supermarket and get me some pasta for our meal this evening” do you believe that that request would be satisfied if the shopper came back with a bag of wontons, dumplings and dim sims?”*

The answer to the above is obviously no.

The Tribunal also noted that there are differences in the way pasta is made as against the imported goods. Furthermore, the general public would never identify the imported goods as pasta. Pasta had its historical origins in Italy and the general population would not identify the goods as pasta but rather as Asian style foods.

It should also be noted that this case is of historical interest only, as these goods are now imported under relevant FTAs. As to why Customs want to run these types of cases is very difficult to fathom. They incur substantial expense to the taxpayer. The lawyer and Customs’ Tariff Officer have to fly to Melbourne the day before the case and Customs engaged a professional expert to provide a report and provide evidence. In this day and age, when budgets are tight one would have hoped that someone senior in Customs would have exercised a greater degree of scrutiny before allowing this type of matter to proceed.

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