



UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-570-848
Scope Review
Public Document
IA/Office 9: SF

12/17/04

MEMORANDUM TO: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

FROM: James C. Doyle
Director, Office 9
Import Administration

SUBJECT: Scope Ruling: Antidumping Duty Order on Freshwater Crawfish
Tail Meat from the People's Republic of China (A-570-848);
Coastal Foods, LLC

BACKGROUND:

On June 14, 2004, the Department of Commerce (the Department) received an application from Coastal Foods, LLC (Coastal) for a scope ruling on whether crawfish etouffee (etouffee) is covered by the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China (PRC). See Notice of Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Freshwater Crawfish Tail Meat from the People's Republic of China, 62 FR 48218 (September 15, 1997) (the Order). On June 24, 2004, the Department requested additional and clarifying information from Coastal regarding the preparation and cooking process, and the ingredients included in Coastal's etouffee. On July 2, 2004, Coastal provided the Department with a supplemental submission containing additional information regarding the process for preparing crawfish etouffee.¹ On July 29, 2004, the Department informed all interested parties that it was initiating a scope inquiry pursuant to section 351.225(e) of the Department's regulations. On August 30, 2004, the Crawfish Processors Alliance (Petitioners), submitted comments regarding Coastal's scope request. On September 9, 2004, Coastal Foods submitted rebuttal comments with regard to petitioners' August 30, 2004 submission.

¹ On July 13, 2004, the Department requested that Coastal refile its July 2, 2004, comments, in conformance with the Department's regulations with regard to the treatment of proprietary information. On July 16, 2004, Coastal refiled its July 2, 2004, comments. On August 2nd and 4th, 2004, petitioners submitted comments requesting that the Department reject Coastal's submissions as improperly filed, and rescind the scope proceeding, or in the alternative, extend the deadline for submission of comments.



GENERAL COMMENTS:

Coastal's June 14, 2004, Request:

Coastal's June 14, 2004, submission requests that the Department clarify whether packaged etouffee is included within the scope of the antidumping duty order on freshwater crawfish tail meat from the PRC. Coastal states that etouffee is a product made by combining and integrating flour, cooking oil, onions, bell peppers, tomatoes (paste puree or other form), celery or other vegetables, garlic, pepper, salt, other seasonings, water, thickeners (starches), oleo or butter, and crawfish tail meat. Coastal states that not one ingredient is dominant and that the finished product derives its unique character from the fusion of all the ingredients. Coastal contends that making etouffee involves a complex cooking procedure at temperatures ranging from 200 to 350 degrees over a considerable time period, and it results in the complete blending and integration of the ingredients. According to Coastal, due to its permeable nature, the crawfish tail meat undergoes a permanent alteration and change in character by taking in the flavors of the other ingredients, while giving up much of the original water in which it was cooked. Coastal argues that crawfish tail meat is only one of many ingredients used in making etouffee, and that once the tail meat has been blended and integrated with the other ingredients, it cannot be "unblended and un-integrated." Coastal contends that the process results in the creation of a new article with a character and use that is different from that possessed by the constituent articles prior to processing.

Coastal states that etouffee, in which crawfish tail meat is only one ingredient, was never intended to be, and has never (to Coastal's knowledge) been classified in the antidumping category applied to freshwater crawfish tail meat. Coastal believes that etouffee was not intended to be covered by the scope of crawfish tail meat. Coastal states that in the antidumping investigation of crawfish tail meat, the statement of scope is followed by the statement: "Crawfish are sold for consumption in three forms: whole live crawfish, whole boiled crawfish and processed (peeled) tail meat. The subject merchandise includes only tail meat." Coastal argues that this statement makes clear that the scope only intends to cover tail meat which may be sold as "tail meat." Coastal argues that the scope for tail meat addresses tail meat alone, and does not make sense if applied to all products that may contain tail meat as one of their ingredients. Coastal contends that the words "...in all its forms (whether washed or with fat on, whether purged or unpurged), grades and sizes;..." are specific to crawfish tail meat, and the words "packed, preserved, or prepared," when read in context, apply to packing, preserving, or preparing (as in saute, pickling, etc.) crawfish tail meat so that the product is still crawfish tail meat and may be sold as such.

Coastal states that the International Trade Commission (ITC) investigation focuses on the "peeling" industry that processes and prepares crawfish tail meat for sale as tail meat. Coastal believes that the order on freshwater crawfish tail meat is not meant to address food preparations containing tail meat, unless the preparation is crawfish tail meat. Otherwise, Coastal contends, the scope might state that the product covered is any product in which the presence of freshwater

crawfish tail meat is detected. Coastal notes that to expand the scope to include all food preparations containing crawfish tail meat would make the scope overly broad, and spread its effects beyond that which was intended for any antidumping order. Coastal states that etouffee contains crawfish tail meat as only one of its ingredients, and is an entirely different product from crawfish tail meat.

Coastal states that the process of making etouffee results in the creation of a product with a character and use which is different from that possessed by crawfish tail meat prior to the processing. Coastal argues that crawfish tail meat, prior to its processing into etouffee, has a large variety of uses. Crawfish tail meat is suitable for preparation by a number of methods, which include blanching, broiling, braising, marinating, steaming, sauteing, roasting, and pickling, and can be sold as crawfish tail meat alone. However, Coastal notes, crawfish tail meat may also be used as an ingredient in prepared meals, such as gumbo, bisque, etouffee, and Creole. Coastal states that once crawfish tail meat is used as an ingredient and undergoes the processing necessary to make a finished product like etouffee, the flavor and nature of the tail meat is permanently altered and is rendered suitable for only one particular use - heating and serving as etouffee. Coastal contends that this makes it a new article, entirely different from the articles from which it is made.

Finally, Coastal states that the tail meat cannot be unblended and un-integrated from the etouffee. Once prepared, there is no possibility of separating the tail meat for use or sale as crawfish tail meat. Coastal argues that it has been substantially transformed into a new and different product with a limited use, and cannot be untransformed.

Coastal's July 2, 2004, Supplemental Comments::

In response to the Department's June 24, 2004, request for additional clarifying information, Coastal provided the Department with a description of the process of preparing etouffee. Coastal provided the Department with the details of its etouffee recipe, which included the ingredients and each step in etouffee preparation process. Coastal also included a chart, which stated the percentage composition that each ingredient represents in the etouffee by weight, value, cost per kilogram and cost per pound. Coastal notes that the resulting product is fully cooked and ready to heat and serve, best described as a "stew" comprised of mostly gravy. Finally, Coastal also included a table breaking down the manufacturing and delivery costs as a percentage of total cost.

Petitioners' Comments:

Petitioners state that etouffee is included within the literal terms of the scope description as "preserved" and "prepared" crawfish tail meat because the established commercial meanings of these terms encompass all operations performed to produce etouffee, as evidenced by numerous decisions of the U.S. Court of International Trade (CIT), U.S. Court of Appeals for the Federal Circuit, and predecessor courts, in cases requiring elucidation of the established meanings of such terms.

Petitioners cite Frosted Fruit Products Co. v. United States, 18 Cust. Ct. 119 (1947) (Frosted Fruit), a case where the U.S. Customs Court (a predecessor to the CIT) considered whether frozen guava fruit was preserved because it was frozen. In deciding whether freezing constituted preservation, the Court cited U.S. v. Conkey & Co., 12 Ct. Cust. 552 (1925) (U.S. v. Conkey), for the proposition that cooking is a form of preservation. Petitioners also state that in Wakunaga of America Co., Ltd. v. United States, 1 CIT 302 (1981) (Wakunaga), the CIT considered whether it was within the normal commercial meaning of “prepared” to regard mixtures of garlic in powder form and soybean powder as prepared garlic. Petitioners contend that in that case, the garlic in Wakunaga underwent changes that were far more extreme than those involved in the production of etouffee. Petitioners finally cite the Court in United States v. J.H. Brown, Brown, Alcantar & Brown, Inc. 46 CCPA 1 (1958) (J.H. Brown), which considered a number of cases in consideration of the meaning of the term “prepared” for tariff classification purposes. Petitioners state that J.H. Brown stands for the proposition that an item may not ordinarily be regarded as “prepared” unless it is advanced in condition toward a narrower end use.

Petitioners contend that cooking is recognized as a process used to produce both “preserved” and “prepared” foodstuffs, and the mixing of other ingredients with the ingredient that gives the mixture its essential character, such as crawfish tail meat, is recognized as inherent in the process of producing “prepared” foodstuffs. Petitioners claim that advancement in value, as a narrowing of potential end use, are both inherent in the term “prepared.”

Petitioners argue that if etouffee were not already included under the express terms of the order as “preserved” or “prepared” tail meat, it would nonetheless be covered as a “minor alteration” of crawfish tail meat under section 781(c) of the Tariff Act of 1930, as amended (the Act). Petitioners claim that etouffee is not materially different from other products within the scope of the order, including other “preserved” or “prepared” tail meat products, in terms of overall physical characteristics, the expectations of ultimate users, the use of the merchandise, or channels of marketing. In addition, Petitioners state that the cost of modification involved in the production of etouffee, are a small portion of the total cost.

Petitioners also claim that if etouffee were not already included under the express terms of the order as “preserved” or “prepared” tail meat, it would nonetheless be covered as “later-developed merchandise” under section 781(d) of the Act. Petitioners claim that there is substantial evidence on the record of this proceeding which is sufficient to conclude that frozen, packaged etouffee was not produced in China until after the initiation of the original antidumping investigation. Petitioners state that this later-developed product is not materially different from other products within the scope of the order, including other “preserved” or “prepared” tail meat products, in terms of the physical characteristics, the expectations of the ultimate users, the use of the merchandise, or the channels of marketing. Petitioners argue that the Department should therefore include etouffee within the scope of the order, even if is beyond the order’s literal terms. Petitioners state that the Department need not consult or notify the ITC in this matter because etouffee does not incorporate a significant technological advance or significant alteration of an earlier product.

Finally, Petitioners state that if etouffee were not already included under the express terms of the order as “preserved” or “prepared” tail meat, it would nonetheless be covered under the criteria laid out in Diversified Products Corp. v. United States, 572 F. Supp. 883, 889 (Ct. Int’l Trade 1983) and the factors described in section 351.225(k)(2) of the Department’s regulations. Petitioners contend that etouffee is not materially different from other products within the scope of the Order, including other “preserved” or “prepared” tail meat products, in terms of the overall physical characteristics, the expectations of the ultimate users, the use of the merchandise, or the channels of marketing.

Coastal’s Rebuttal Comments:

In its rebuttal comments, Coastal states that Petitioners’ interpretation of the scope, as inclusive of any product in which crawfish tail meat is detected, is overly broad. Coastal believes that the intent of the scope is revealed by the sentence “{t}he subject merchandise includes only tail meat,” which immediately follows the statement of scope in the investigation {Cite No. 731-TA-752}. Coastal states that it is clear that the scope only contemplates tail meat which may be sold as tail meat. Coastal argues that the scope, as written, does not make sense if applied to all products that may contain tail meat as one of the ingredients.

Coastal further contends that the intent of the scope is also evidenced by the absence of consideration of etouffee by the ITC investigation. Coastal states that in the investigation, Petitioners provided evidence to the ITC that etouffee was being produced by the domestic processors in 1984, but that now, in a declaration, the domestic crawfish processors state that there was no market for packaged etouffee in the United States at the time of the investigation. See Petitioners’ August 30, 2004, Comments, at pages 8-9. Coastal states that in the sunset review of this order, completed in July 2003, the ITC again did not consider etouffee, although petitioners were aware of etouffee imports from China, as the Louisiana Department of Agriculture & Forestry was regulating all products related to crawfish and required various tests and inspections for products related to crawfish. Coastal also alleges that some members of the petitioners were aware of imports of crawfish etouffee during the five year period preceding the sunset review.

Coastal states that, contrary to Petitioners’ assertion that etouffee is “preserved tail meat,” the cooking and freezing of crawfish etouffee does not result in the etouffee becoming “preserved” tail meat. Coastal states that U.S. v. Conkey, cited by Petitioners, holds that preservation in a tariff sense ordinarily involves cooking, salting, drying, smoking, curing, or the application of some method or process whereby the fresh or natural condition of the article is so changed as to be more or less a permanent preservation. Coastal, however, argues that the freezing of etouffee is merely a temporary preservation and not a preservation of tail meat for tariff purposes. Coastal states that crawfish etouffee cannot be considered a permanent preservation of crawfish tail meat.

Coastal also rebuts Petitioners’ use of the term “prepared.” Coastal states that “prepared” most commonly applies to items that are “prepared” for further processing and not to items that are other, finished or final products. Coastal states that this application of the term “prepared” is also

the commercial understanding in the context of international trade and customs classification law. Coastal argues that the cases cited by Petitioners relate to items that have been prepared for further processing and do not relate to other, finished or final products such as Coastal's etouffee.

Coastal cites Wakunaga for the proposition that "prepared," as used in Wakunaga, is "prepared" for further processing into another, finished or final product. Coastal further claims that Petitioners' reliance on Stein, Hirsch & Co. v. United States, 6 Ct. Cust. 154, T.D. 35397 (1915) (Stein Hirsch), cited in J.H. Brown, does not support their claim that etouffee is prepared tail meat. In Stein Hirsch, the Court found that potatoes finely ground into powder were "potatoes, prepared." Coastal argues that in that case, the product had not acquired a new name, use or character. No chemical change in the raw material was effected by the drying and grinding process. Coastal states that again, in this case, prepared refers to "prepared" for further use or processing, not to another, finished or final product, like Coastal's etouffee. Coastal further states that the Court found in U.S. v. Conkey that "prepared" implies that the fresh or raw material has undergone certain changes and usually implies that it has been advanced toward the condition in which it is used. Coastal argues that this use of the term "prepared" could apply to processing which results in tail meat, but could not be applied to the use of tail meat in another, finished or final product.

With regard to Stone & Downer Co. v. United States, 17 CCPA 34, T.D. 43323 (1929) cited in J.H. Brown, Coastal states that the Court found that certain dates were "prepared" since the pits had been removed and that the pitting process made the dates more valuable for their ultimate use in grinding, and said that if the pitting advanced them "in value and condition" for their ultimate use, they are 'prepared' in any manner. Again, Coastal notes, the term "prepared" refers to an item that is to be used in further processing to make another, finished or final product. Coastal further rebuts Petitioners' reliance on both C.J. Tower & Sons v. United States, 18 CCPA 152, T.D. 44362 (1953), cited in J.H. Brown, and Orlando Food Corp. v. United States, 140 F.3d 1437 (Fed. Cir. 1998), arguing that in both cases, the "prepared" food products, unlike etouffee, were being "prepared" for further processing to make another, finished or final product. In sum, Coastal argues that all of the cases cited by Petitioners clearly indicate the commercial meaning of the term "prepared" means preparing an item so that it may be further processed or used in making another, finished or final product. Coastal states that applying the cases cited by Petitioners to the scope description of freshwater crawfish tail meat establishes that "prepared" tail meat is tail meat that is "prepared" for further processing or use in making another, finished or final product. Coastal argues that etouffee is another, finished final product, not the "prepared" tail meat used to make it.

Coastal further disagrees with Petitioners' contention that etouffee should be covered as a "minor alteration" of crawfish tail meat. Coastal states that in Kawasaki Steel Corp. v. U.S., 219 F.3d 1348 (Fed. Cir. 2000), the Court stated that "in essence, section 1677j(c) includes within the scope of the order products that are so insignificantly changed from a covered product that they should be considered within the scope of the order even though the alteration removes them from the order's literal scope." Coastal argues that the difference between tail meat and etouffee could never be considered insignificant. Coastal argues that etouffee is different in aroma, texture,

taste, color, consistency, and appearance than crawfish tail meat. Coastal cites a definition of etouffee which describes it in part as “a thick spicy stew of crayfish and vegetables served over white rice. Its rich, deep color and flavor come from the ... roux on which it’s based.” Coastal states that etouffee is a finished, final product consisting of a stew, while tail meat is an unfinished product consisting of just tail meat. Coastal argues that further cooking is required of the tail meat. Thus, Coastal argues, the overall physical characteristics of etouffee and tail meat are entirely different.

Coastal states that the ultimate users of etouffee would never mistake etouffee for crawfish tail meat. In support of its claim, Coastal cites a Customs ruling on seasoned and breaded crawfish tail meat. In this ruling, Customs notes that the seasoning and breading of crawfish tail meat renders the tail meat suitable for only deep frying, “a limitation of such magnitude that it constitutes a change in the end use of the product.”

DEPARTMENT’S POSITION:

The Department finds that crawfish etouffee is not included in the scope of the antidumping duty order on freshwater crawfish tail meat from the PRC. In arriving at this conclusion, the Department considered the descriptions of freshwater crawfish tail meat in the petition, investigation, and prior proceedings, as well as the range of issues raised by Coastal Foods and Petitioners. See 19 CFR 351.225(k)(1). The Department further considered etouffee under the Diversified Products criteria set forth in section 351.225(k)(2) of the Department’s regulations. Section 351.225(k)(2) of the regulations requires that when the criteria identified in 351.225(k)(1) are not dispositive the Department will further consider (i) the physical characteristics of the product; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and displayed. No single element of the Diversified Products criteria is dispositive.

With respect to Petitioners’ argument that Coastal’s etouffee should be considered under the “minor alterations of merchandise” and “later-developed merchandise” criteria of sections 351.225(i) and (j) of the regulations, respectively, the Department finds that it is not appropriate to consider such an allegation in the context of a scope inquiry under 19 CFR 351.225(k).² Therefore, the Department, at this time, is not making a determination as to whether Coastal’s etouffee is a “minor alteration” of tail meat or “later-developed merchandise.”

² Coastal’s June 14, 2004, submission asked that the Department clarify whether etouffee is included under the scope of the antidumping duty order on freshwater crawfish tail meat from the PRC, which is covered under section 351.225(k) of the Department’s regulations. Coastal’s request contained no reference to sections 351.225(i) or (j) of the Department’s regulations. Petitioners also did not submit a formal request for inquiry under sections 351.225(i) or (j) of the Department’s regulations

Descriptions of Scope from the Petition and Prior Proceedings

The September 20, 1996, petition provided the following description of freshwater crawfish tail meat:

The imported product subject to this petition is freshwater crawfish tail meat from China in all its forms, grades, sizes, whether frozen, fresh, chilled, and regardless of how it is preserved, or prepared. The tail meat currently imported from China is frozen. Frozen freshwater crawfish of all types are provided for in subheading 0306.19.0010 of the Harmonized Tariff Schedule of the United States ("HTS") and are free of duty. Freshwater crawfish of all types that are not frozen are provided for in subheading 0306.29.0000 of the HTS and are also free of duty.

Tail meat is a peeled crawfish product, which is usually blanched prior to peeling. Whole crawfish, including live and whole boiled crawfish, whether frozen, fresh, or chilled, are not included within the scope of this petition. Salt water crawfish of any type are similarly not within the scope of this petition.

See Freshwater Crawfish Tail Meat: Antidumping Petition, September 26, 1996 at pages 3-4.

In the Department's notice of initiation of the investigation, the Department described the scope as follows:

The product covered by this investigation is freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged), grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared. Excluded from the scope of the investigation are live crawfish and other whole crawfish, whether boiled, frozen, fresh, or chilled. Also excluded are saltwater crawfish of any type and parts thereof. Freshwater crawfish tail meat is currently classifiable in the Harmonized Tariff Schedule of the United States (HTS) under item numbers 0306.19.00.10 and 0306.29.00.00. The HTS subheadings are provided for convenience and customs purposes. Although the HTS numbers are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

See Freshwater Crawfish Tail Meat from the People's Republic of China: Initiation of Antidumping Investigation, 61 FR 54154 (October 17, 1996) ("Investigation"). The Department made no material changes to the scope description in the antidumping duty order. See the Order at 48219.

The scope description from a recently completed new shipper review of freshwater crawfish tail meat from the PRC reflects the current scope, and is largely unchanged from the description contained in the petition and the Order. Apart from changes related to amendments of the HTSUS numbers for classification purposes, the pertinent language remains unchanged, and reads as follows:

The product covered by this antidumping duty order is freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged), grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared. Excluded from the scope of the order are live crawfish and other whole crawfish, whether boiled, frozen, fresh, or chilled. Also excluded are saltwater crawfish of any type, and parts thereof. Freshwater crawfish tail meat is currently classifiable in the Harmonized Tariff Schedule of the United States (HTS) under item numbers 1605.40.10.10 and 1605.40.10.90, which are the new HTS numbers for prepared foodstuffs, indicating peeled crawfish tail meat and other, as introduced by the U.S. Customs Service in 2000, and HTS items 0306.19.00.10 and 0306.29.00, which are reserved for fish and crustaceans in general. The HTS subheadings are provided for convenience and customs purposes only. The written description of the scope of this order is dispositive.

See Notice of Preliminary Results of Antidumping Duty New Shipper Review and Rescission of New Shipper Reviews: Freshwater Crawfish Tail Meat from the People's Republic of China, 69 FR 53669, September 2, 2004.

The Department has not issued any scope rulings under the antidumping duty order on freshwater crawfish tail meat from the PRC, as part of an administrative review, new shipper review, or other proceeding. Therefore, an examination of the petition and investigation up to the present reviews, reflects that the scope of the Order has remained unchanged in pertinent part, and encompassed the same product description. Therefore, as the petition, investigation, and previous reviews did not address etouffee specifically, the description of the merchandise contained in these proceedings are not dispositive as to whether etouffee was intended to be included in the order on freshwater crawfish tail meat.

ITC Determinations

The record for the ITC injury investigation does not discuss the production of etouffee by crawfish processors during the period of review. Although Petitioners provided evidence that domestic crawfish processors had produced etouffee in 1984, the ITC did not discuss such products during the investigation of imports of Chinese crawfish tail meat. In the ITC's five-year sunset review, completed in July 2003, no arguments were raised regarding the description of freshwater crawfish tail meat, and the ITC found the domestic like product to consist of crawfish tail meat, "coextensive with Commerce's scope." The ITC report relied on U.S. import statistics, but excluded imports under HTSUS item 1605.40.1090, as it is a "basket" category consisting of products other than tail meat, such as whole-cooked crawfish. The ITC record therefore, is not dispositive as to whether etouffee was intended to be included in the order on freshwater crawfish tail meat.

The Definitions of the Terms “Preserved” and “Prepared”

As the inclusion or exclusion of etouffee is not explicitly addressed in the petition, investigation, ITC proceedings, or prior administrative proceedings, the Department has considered whether the issue is resolved by reference to the description of the subject merchandise contained in the scope. Here, the pertinent language of the scope describing the subject merchandise covered under the Order includes “freshwater crawfish tail meat from China in all its forms (whether washed or with fat on, whether purged or unpurged), grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared.”

Much of Coastal’s and Petitioners’ comments on the analysis of language contained in the scope, center on differing interpretations of what is meant by the terms “preserved” and “prepared.” As noted above in the summary of comments, Coastal argues that etouffee is not within the scope of the order on tail meat because “the crawfish tail meat undergoes a permanent alteration and change in character” during the process of cooking the tail meat with all of other ingredients contained in the final product of etouffee. Coastal argues that the cooking of tail meat in the stew that makes up etouffee, and subsequently freezing it for shipment does not constitute a method of “preservation” in the sense envisioned when the phrase “regardless of how it is . . . preserved” was included in the scope. Petitioners, for their part, cite the 1947 case Frosted Fruit Products, a case decided by the U.S. Customs Court, for the proposition that cooking is a method of preservation. Therefore, Petitioners reason, any alteration in the tail meat arising from the use of a preservative process such as cooking is inadequate to remove the preserved product from the scope of the Order.

As noted above, both parties also provide differing interpretations of the meaning of the term “prepared,” as used in the scope. Petitioners cite a number of cases in which a product which underwent some alteration or change from its original state was ultimately found to be a prepared version of the original input. However, as Coastal Foods contends in its rebuttal comments, in all of the cases cited by the Petitioners, none of the products which were considered “prepared” were finished, final products. Rather, the cases relate to products that were, as Coastal Foods points out, items that were prepared for further processing and not other, finished or final products, such as prepared meals.

However, regardless of Petitioners’ and Coastal’s differing interpretations of the terms “preserved” and “prepared,” the question is ultimately whether in this instance, the product, etouffee, is still considered tail meat, or whether the tail meat has been transformed into a different product. Any product that contains tail meat would in some way necessitate “preservation” for purposes of shipping the product. Also, any product that contains tail meat would have to be “prepared,” as it is a food item. However, there is no indication from the investigation, ITC proceedings, any subsequent administrative proceedings, or the plain language of the scope that reflects an intent that any prepared food item, or other product which contains tail meat as an ingredient, would be covered by the order on freshwater crawfish tail meat.

Nevertheless, because the descriptions of freshwater crawfish tail meat contained in the petition, investigation, and prior proceedings do not clearly address this issue, we have determined that an analysis of etouffee under the Diversified Products criteria set forth in section 351.225(k)(2) of the Department’s regulations is appropriate.

Diversified Products Analysis

1. Overall Physical Characteristics

Petitioners argue that the combination of tail meat with other ingredients does not provide etouffee with any physical characteristics that differ materially from peeled crawfish tail meat. Petitioners state that while it might be true that tail meat cooked with the other ingredients in etouffee differs in taste from tail meat products within the scope of the Order, Petitioners claim that such variations in taste are minor. Coastal argues that etouffee, as compared to tail meat alone, differs in aroma, texture, taste, color, consistency, and appearance. Coastal states that etouffee, unlike tail meat, is a stew containing, among other ingredients, permanently altered tail meat.

The Department finds that the overall physical characteristics of tail meat, when included in etouffee in the process described by Coastal, are altered from the physical characteristics of tail meat, by itself. In a previous customs ruling with respect to seasoned and breaded tail meat, CBP stated:

“it is important to note that one of the basic characteristics of crawfish which renders it desirable as a foodstuff is its ability to take on the flavors of those items with which it is combined. Because of this permeable nature, when subjected to seasoning operations, the flavoring rapidly penetrates and is completely absorbed by the crawfish tailmeat, permanently altering the taste of the article. ... The combined seasoning and breading operations performed upon the subject crawfish are not a mere surface application, but permanently alter one of the fundamental characteristics of the underlying crawfish meat - its taste. Thus, as a result of seasoning and breading, the imported crawfish undergoes a change in character.”

See Customs Ruling: HQ 560931, July 8, 1998. Thus, CBP found that the character of the tail meat is altered when subjected to seasoning and breading, and is considered to have undergone a substantial transformation. Similarly, the Department finds that crawfish tail meat which has been included with the various ingredients included in etouffee, and cooked in the manner described by Coastal, has also undergone a substantial transformation into a new and different product. Once the tail meat is prepared in the etouffee, the tail meat included in the stew is permanently altered. The flavors contained in the etouffee, which penetrate the tail meat, cannot be subsequently extracted from the tail meat. The crawfish tail meat's fundamental characteristics have been altered.

2. Expectations of Ultimate Users

Petitioners also argue that because the ultimate users of etouffee expect that by purchasing the etouffee they will obtain the unique taste of crawfish tail meat, the expectations of the ultimate users of etouffee and of tail meat are the same. Coastal Foods however, contends that the ultimate users of etouffee would never mistake etouffee for crawfish tail meat. Etouffee, Coastal Foods points out, is a final product ready to be consumed by simply heating and serving. Tail

meat, however, requires further cooking, and is purchased with the expectation that it could be further processed into any number of finished products that contain tail meat as an ingredient.

The Department finds that the expectations of the ultimate users of etouffee differ from the expectations of the ultimate users of crawfish tail meat. While the ultimate users of freshwater crawfish tail meat could include the tail meat as an ingredient in any variety of meals, etouffee is suitable only for heating and serving, and the tail meat included in the etouffee stew, as noted above, cannot then be used for any other purpose once it is included in the etouffee stew.

In the same Customs Ruling noted above, CBP stated that “. . . prior to seasoning and breading operations the imported tailmeat have a large variety of uses. They are suitable for preparation by many methods (e.g., baking, steaming, sauteing, boiling, deep frying) to be served in presentation either alone or as an ingredient (e.g., gumbo, bisque, etouffee, etc.)” As with “seasoned and breaded” tail meat, the Department finds that the ultimate users of etouffee could not have any expectation of subsequently baking, steaming, sauteing, boiling, deep frying, or using the tail meat in any way other than that which it has already been used, which is as an ingredient in etouffee.

3. Use of the Merchandise

Petitioners quote statements in the petition that crawfish tail meat “is considered to have a single purpose and that is to bring glory to prepared dishes.” Petitioners, however, also recognize that etouffee is only one of several dishes that contain crawfish tail meat as an ingredient. Coastal again points out that etouffee has only one use, whereas crawfish tail meat has a multitude of uses.

As with the preceding section, the Department finds that the use of crawfish tail meat, by itself, differs from the use of etouffee, which is suitable for only one use. As CBP noted, regarding seasoned and breaded crawfish tail meat:

“ . . . the processed crawfish are essentially suitable only for deep frying. . . . a limitation of such magnitude that it constitutes a change in the end use of the product. . . . we conclude. . . the operations performed upon the crawfish tails, which permanently alter the flavor of the imported article and render it suitable for one particular use, are not minor in nature, but result in the creation of a new article with a character and use which is different from the article prior to processing. Therefore, . . . we find . . . the operations are sufficient to effect a substantial transformation . . . ”

Thus, CBP found that the end use of seasoned and breaded crawfish was different than that of the tail meat alone. The Department finds that etouffee has been similarly transformed, and its end use limited, when compared to tail meat sold by itself.

4. Channels of Marketing

Petitioners contend that the channels of marketing for etouffee appear to be the same as for crawfish tail meat. Coastal, however, states that its intended channel of marketing is to national

restaurant chains and to contract service companies, while Petitioners "market" tail meat to food stores, restaurants and food distributors.

Although the record is unclear as to whether tail meat and etouffee have distinct channels of marketing, Petitioners' and Coastal's own comments suggest that the channels of marketing (i.e. restaurants and food distributors) are at least similar.

5. Manner of Advertising and Display

Petitioners do not address the manner of advertising and display of etouffee as compared to tail meat, as they state that "{t}he manner of advertising and display is not believed to be relevant in this instance." Coastal also does not specifically address the manner of advertising and display of the two products.

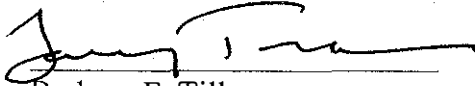
We disagree with Petitioners that the manner of advertising and display is not relevant in this instance. It would seem obvious from the differences between the two products that freshwater crawfish tail meat could not be advertised and displayed as etouffee, and etouffee could not be advertised and displayed as freshwater crawfish tail meat.

RECOMMENDATION:

As the scope of the Order does not clearly include or exclude etouffee, the Department has considered etouffee under the Diversified Products criteria set forth at section 351.225(k)(2) of the Department's regulations, taking into account the difference in the overall physical characteristics, the expectations of the ultimate users, and the uses of both etouffee and crawfish tail meat. While no single element of the Diversified Products criteria is dispositive, based on our analysis of etouffee and tail meat under this criteria, as well an analysis of the comments received, we recommend excluding etouffee as outside the scope of the order on freshwater crawfish tail meat. If accepted, we will send the attached letter to the interested parties, and will notify CBP of our determination.

AGREE

DISAGREE


Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

12/17/04
Date

