



TRADE OBSERVER

The official Customs Bridge monthly update
may 2021

18

Customs, a modern language



TOMATO : FRUIT OR VEGETABLE

TARIFF ENGINEERING

**THE HARMONIZED SYSTEM FACING
TECHNOLOGICAL INNOVATIONS**

The tomato: a fruit or a vegetable?

Pain au chocolat or chocolatine? Milk before or after cereals? To these long-lasting dilemmas we add the tomato, a fruit or a vegetable?

To better understand this dilemma, we will first distinguish between culinary and botanical classification.

In the kitchen, the classification system for fruits and vegetables changes considerably compared to their botanical classification.

In fact, in our kitchens, the tomato is a vegetable because, due to its flavour profile, which is more salty than sweet, it is more easily found in dishes than in desserts, whereas a fruit has a soft texture and tends to be sweeter.

As you can see, there has always been a debate about tomatoes, but Customs had to decide: In the nomenclature, tomatoes are listed in Chapter 7 of vegetables (0702 tomatoes, fresh or chilled). It seems that customs officers are more like cooks than botanists.



tomate	
▼ 07 LÉGUMES, PLANTES, RACINES ET TUBERCULES ALIMENTAIRES	
▼ 0702 Tomates, à l'état frais ou réfrigéré	
0702000070 Tomates cerises	65
▼ 20 PRÉPARATIONS DE LÉGUMES, DE FRUITS OU D'AUTRES PARTIES DE PLANTES	
▼ 2002 Tomates préparées ou conservées autrement qu'au vinaigre ou à l'acide acétique	
▼ 200210 Tomates, entières ou en morceaux	65
20021010 pelées	65
20021090 autres	65
▼ 21 PRÉPARATIONS ALIMENTAIRES DIVERSES	
▼ 2103 Préparations pour sauces et sauces préparées; condiments et assaisonnements, composés; farine de moutarde et moutarde préparée	
210320 Tomato ketchup et autres sauces tomates	65

However, tomatoes can also be classified in chapter 20 "Preparation of vegetables, fruit or other parts of plants" where we find processed or preserved tomatoes, or in chapter 21 if we talk about ketchup or other tomato sauces.

The difference will be significant in terms of customs duty, because for the vegetable chapter (chapter 07) we will have a common external tariff per hectogram, whereas for chapter 20 or 21 the CET will be expressed in %.

As you can see, sometimes classification can be more complicated than it seems. That is why it is important to have a wide knowledge of the product, to have customs expertise and therefore experts, but also to have tools that allow you to easily and quickly reach a decision on customs classification.

Tariff engineering

Some industries and companies get a head start on administrative barriers by tailoring their products to the relevant tariffs, which is known as "tariff engineering."

Tariff engineering involves modifying products so that tariff benefits, such as a reduced rate, apply at the time of import. Unlike tariff evasion, tariff engineering focuses on understanding how duties are defined at the time of design and production in order to legally obtain a lower duty.

The process takes into account parameters such as fiber content, materials used and construction of the product prior to manufacturing.

However, it is illegal to remove the previously made modification once the product is going to be imported, because this process of "artifice, disguise and fictitious product" can result in penalties and fines. Example below



Nike's Converse sneakers were tariff-engineered when they received a layer of felt to cover more than half of the sole of their shoes.

Indeed, footwear imports into the U.S. can be subject to up to 48 percent duty, while slippers enjoy a much more favorable rate of 6 percent.

Since "the classification of footwear depends primarily on the composition of the outsoles and uppers," the addition of felt was incorporated to thus categorize this Converse sneaker as a slipper and not a shoe and thus take advantage of the loophole.

Another interesting example is that concerning textiles. Some products, when imported from specific countries, may have high tariffs. Women's or girls' blouses, shirts and shirts made of synthetic fibers may be subject to tariffs of up to 26.9 percent of the value of the goods, but they may be classified under a lower tariff rate if they have a pocket below the waist or a ribbed waistband, as stated in the Explanatory Notes to heading 6206.

These two concrete examples show that anticipating customs duties upstream is a major strategic and economic challenge.

The Harmonized System facing technological innovations

The private sector continues to innovate, so the work to amend the Harmonized System never ends. To illustrate this phenomenon, we will use the example of the evolution of lighting technologies and the consequent adaptations of the HS.

Starting point

Every five years, at the global level, there is a revision cycle of the HS leading to amendments. Any contracting party to the HS can propose an amendment, these proposals often come from requests from the innovative industry sector. In this case, the U.S. lighting industry proposed an amendment to the HS Committee in 2012 when LED products first appeared. It took a few years to fully understand and adapt the HS to this new product. Indeed, the invention of blue LEDs paved the way for several other technological advances such as the screens of cell phones, computers, televisions, tablets etc.



The reflection on the amendments

It was found that lamps were classified under heading **85.39**, covering "*electric filament or discharge lamps and tubes, including articles known as headlamps and sealed beam projectors and ultraviolet or infrared lamps and tubes; arc lamps.*"

85.39 does not cover LEDs, and prior to this revision, most jurisdictions classified LEDs under **85.43**, covering "*machinery and mechanical appliances having a function of their own, not specified or included elsewhere in this Chapter.*"

In April 2012, the subcommittee considered two proposed amendments, the EU's and South Korea's, based on the positions cited above. The debate to decide between the two focused on the clarifications towards OLED and PHOLED technology products. The debate finally tipped in favor of Korea's proposal. The HS amendment work continues, with the US, EU and Japan submitting draft amendments for new LED products. The Subcommittee will aim to clarify their classification for the 2022 version of the HS.

This illustrates the challenge of the HS revision cycle. This work is necessary for the customs community and international trade actors to rely on the HS nomenclature to ensure smooth trade flows and consistent customs measures.