CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, January 7, 2002

Appeal No. AP-2000-057

IN THE MATTER OF an appeal heard on August 14, 2001, under section 63 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated December 19, 2000, and January 19, 2001, with respect to a request for redetermination under section 67 of the *Customs Act*.

BETWEEN

INTERSAVE WEST BUYING AND MERCHANDISING SERVICES **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-2000-057

INTERSAVE WEST BUYING AND MERCHANDISING SERVICES **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

This is an appeal under section 67 of the *Customs Act* from decisions of the Commissioner of the Canada Customs and Revenue Agency pursuant to subsection 60(4) of the *Customs Act*. The product in issue is canned coconut milk. The issue in this appeal is whether the product in issue is properly classified under tariff item No. 2106.90.99 as other food preparations not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 2009.80.19 as other juice of any other single fruit or, in the alternative, under tariff item No. 2008.99.90 as other fruit, nuts and other edible parts of plants, as claimed by the appellant.

HELD: The appeal is allowed; the product in issue should be classified under tariff item No. 2008.99.90. Looking first at heading No. 20.09, the Tribunal notes that this heading covers fruit juices and vegetable juices. Having read the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (the Explanatory Notes) to heading No. 20.09, it is clear to the Tribunal that, for a normal fruit juice to be classified in heading No. 20.09, it must not contain added water. As the product in issue contains added water, even if the Tribunal were to consider the coconut milk a normal fruit juice, it would not meet the requirements of the Explanatory Notes to heading No. 20.09.

The Tribunal is now left with heading Nos. 20.08 and 21.06. Heading No. 20.08 covers fruit, nuts and other edible parts of plants, while heading No. 21.06 covers food preparations not elsewhere specified or included. The Explanatory Notes to heading No. 20.08 allow for other substances to be added to the products of this heading, as long as they do not alter the essential character of the fruit or nuts. Thus, the fact that the product in issue contains added water and a preservative does not prevent it from being classified in that heading.

The Tribunal agrees with the appellant as to the residual character of heading No. 21.06 and the fact that the Explanatory Notes to that heading exclude preparations made from fruit and nuts, provided the essential character of the preparation is given by such fruit or nuts. In the Tribunal's view, it is clearly the case here, since the evidence demonstrates that the essential character of the canned coconut milk is given by the coconut itself.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	August 14, 2001
Date of Decision:	January 7, 2002
Tribunal Member:	Peter F. Thalheimer, Presiding Member
Counsel for the Tribunal:	Dominique Laporte
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael Sherbo, for the appellant Ritu Banerjee, for the respondent

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Appeal No. AP-2000-057

INTERSAVE WEST BUYING AND MERCHANDISING SERVICES **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

TRIBUNAL: PETER F. THALHEIMER, Presiding Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] from decisions of the Commissioner of the Canada Customs and Revenue Agency dated December 19, 2000, and January 19, 2001, pursuant to subsection 60(4) of the Act. The product in issue, "Rooster" and "Aroy-D" canned coconut milk, was imported between January 6, 1998, and January 8, 1999, under various transaction numbers. The issue in this appeal is whether the product in issue is properly classified under tariff item No. 2106.90.99 of the schedule to the *Customs Tariff*[2] as other food preparations not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 2009.80.19 as other juice of any other single fruit or, in the alternative, under tariff item No. 2008.99.90 as other fruit, nuts and other edible parts of plants, as claimed by the appellant.

The relevant tariff nomenclature is as follows:

20.08	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included.
2008.99	--Other
2008.99.90	---Other
20.09	Fruit juices (including grape must) and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter.
2009.80	-Juice of any other single fruit or vegetable
2009.80.19	----Other
21.06	Food preparations not elsewhere specified or included.
2106.90	-Other
2106.90.99	----Other

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. R.S.C. 1985 (3d Supp.), c. 41.

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EVIDENCE

Several physical exhibits were filed with the Tribunal. The appellant filed a coconut, a piece of coconut meat and juice drained from a coconut, and the respondent filed a can of Rooster coconut milk.

Ms. Catherine R. Copeland, Senior Chemist in the Organic and Inorganic Products Section at the Laboratory and Scientific Services Directorate of the Canada Customs and Revenue Agency, gave evidence on the respondent's behalf. Ms. Copeland was qualified by the Tribunal as an expert in the chemistry of organic and inorganic products.

Ms. Copeland testified that a coconut is a nut that is the centre part of the fruit of the coconut palm. She further testified that the fruit of the coconut palm is an entire part that hangs on the tree itself. She explained that, although the term "coconut milk" is sometimes used to describe the liquid inside the coconut, coconut milk is obtained by grinding the coconut meat, usually with the addition of water, and then straining the liquid material. She stated that coconut milk comes from the meat or endosperm of the coconut.

Ms. Copeland indicated that she had analyzed one of the brands of the product in issue, the "Aroy-D" coconut milk, which, the parties agreed, is identical to the "Rooster" coconut milk. She indicated that it contained coconut milk, added water and a preservative. She stated that the product was widely used in cooking. Her expert report indicates that the product is obtained by pressing the liquid out of finely grated coconut meat to which water has been added. The product obtained by pressing the liquid out of the pulp is a natural oil-in-water emulsion. When asked if there was something called coconut juice, Ms. Copeland stated that a product, known as coconut juice, is made from the water in the nut before maturity. She further stated that a fruit juice had to come from a fruit and that, in her view, no fruit juice comes from nuts or seeds. She noted that a fruit juice is simply the liquid that is expressed from the fruit and that, as provided under the *Food and Drug Regulations*[3] standards, it cannot contain added water. In her view, the product in issue cannot be defined as a fruit juice.

ARGUMENT

The appellant argued that the product in issue is a preparation made from fruit or nuts that is specifically excluded from heading No. 21.06. Although the product in issue fulfils the requirements of heading No. 20.08, the appellant submitted that it is a residual heading that only covers goods that cannot be classified elsewhere. As the product in issue meets the requirements of heading No. 20.09, the appellant argued that it should be classified as a fruit juice.

The appellant first noted that the fact that the product in issue is coconut milk was not in dispute and that it had been accepted by the expert witness that there was a product considered to be coconut juice.

With respect to heading Nos. 21.06 and 20.08, the appellant submitted that these are residual headings that only cover goods not specified elsewhere in the nomenclature. In addition, the appellant submitted that the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[4] to heading No. 21.06 exclude preparations made from fruit, nuts or other edible parts of plants of heading No. 20.08, provided the essential character of the preparation is given by such fruit, nuts or other edible parts of plants. The appellant further argued that the essential character of the product in issue was the coconut

3. C.R.C., c. 870.
4. Customs Co-operation Council, 2d., Brussels, 1996 [hereinafter Explanatory Notes].

milk and that, regardless of whether the coconut is considered to be a nut or a fruit, the product in issue is classifiable in heading No. 20.08, as this heading provides indistinctly for both. The appellant also pointed to the Explanatory Notes to heading No. 20.08, which allow for the goods to contain added water, as long as it is in a proportion insufficient to render them ready for direct consumption as beverages. It is the appellant's position that the evidence is clear that people do not consume the product in issue as a beverage.

In reply to the respondent's position that nutmeat must be present in the final form and that the product must be in a physical form specified in the Explanatory Notes in order for the product to be classified in heading No. 20.08, the appellant argued that nowhere was this requirement found under the terms of heading No. 20.08 or the Explanatory Notes to that heading. The appellant further submitted that the fact that the Explanatory Notes to heading No. 20.08 include peanut butter contradicts the respondent's position.

As heading No. 20.08 is a residual heading, it is the appellant's position that the Tribunal must look at heading No. 20.09, which covers fruit juices. In this regard, the appellant argued that, in a broad sense, a coconut falls within the definition of a fruit. The appellant noted that the process used for the production of coconut milk is identical to the one used to produce fruit juices. Regarding the Explanatory Notes to heading No. 20.09, which provide that the addition of water to a normal fruit juice results in diluted products that have the character of beverages of heading No. 22.02, the appellant contends that it only makes a distinction between a juice and a beverage and, therefore, it cannot be used to exclude the product in issue from heading No. 20.09.

In response to the point made by the respondent that several U.S. Customs rulings had classified different variations of coconut milk in heading No. 21.06, the appellant argued that these rulings give no guidance as to heading No. 20.08 or 20.09 and that the Tribunal was not bound by them. The appellant further submitted that the Federal Court of Appeal had found that the *Food and Drugs Act*,[5] upon which the respondent relied in the present case, was irrelevant in matters dealing with tariff classification.

The respondent urged the Tribunal to find that the canned coconut milk is a food preparation properly classified in heading No. 21.06. In his view, the product in issue is not a fruit juice of heading No. 20.09, nor is it classifiable in heading No. 20.08.

The respondent submitted that the evidence clearly indicated that a coconut is a nut for the purpose of tariff classification and that the part used to make the canned coconut milk comes from the seed of the coconut fruit and not from the entire fruit. It also argued that the *Customs Tariff* contains separate headings relating to nuts, fruit and vegetables and that, as a principle of statutory interpretation, words that are used in a statute are supposed to be used consistently throughout the statute.

The respondent further argued that, as coconut milk is not a fruit, it could not be classified as a fruit juice. In addition, the respondent pointed out that Ms. Copeland noted that the quantity of sugar present in the canned coconut milk is fairly small in comparison to the larger amount present in a fruit juice and that, being fatty in texture, the canned coconut milk cannot be used as a beverage. The respondent stated that the addition of water as an ingredient distinguishes coconut milk from a fruit juice. It was further submitted that the fact that the *Customs Tariff* does not allow for a fruit juice to contain water was consistent with Canadian and international standards for the production of fruit juices.

5. R.S.C. 1985, c. F-27.

The respondent submitted that the Explanatory Notes to heading No. 21.06 provide that it covers preparations for use, either directly or after processing, for human consumption, and preparations consisting wholly or partly of foodstuffs, used in making beverages or food preparations for human consumption. Accordingly, the respondent contends that a preparation such as the canned coconut milk, which is used in baking and cooking, falls squarely within the goods described in heading No. 21.06. Furthermore, the respondent made reference to a U.S. Customs ruling that has classified coconut milk as other food preparations.

Finally, in reply to the appellant's argument that the product in issue fulfils the requirements of heading No. 20.08, the respondent stated that, while this heading covers nuts, whether whole, in pieces or crushed, there was no whole coconut, nor pieces or crushed pieces of the coconut, in the canned coconut milk and only a trace amount of fibre. He further submitted that the Explanatory Notes to heading No. 20.08 cover goods that are very distinct from coconut milk.

DECISION

Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*.[6] Section 11 provides, in part, that, in interpreting the headings and the subheadings in the schedule, regard shall be had to the Explanatory Notes.

The General Rules are structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on. Rule 1 provides the following:

> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the [subsequent rules].

The competing headings in this case are as follows:

20.08	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included.
20.09	Fruit juices (including grape must) and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter.
21.06	Food preparations not elsewhere specified or included.

The parties agreed that the product in issue is coconut milk and contains coconut milk, water and a preservative, potassium meta bisulphide.

The appellant submitted that the coconut milk should be classified in heading No. 20.09 as a fruit juice or, in the alternative, in heading No. 20.08 as fruit, nuts and other edible parts of plants. On the other hand, the respondent argued that the product in issue is properly classified in heading No. 21.06.

Looking first at heading No. 20.09, the Tribunal notes that this heading covers fruit juices and vegetable juices. While the appellant argued that, in a broad sense, a coconut falls within the definition of a

6. *Supra* note 2, schedule [hereinafter General Rules].

fruit, the respondent emphasized that a coconut is a nut that is the centre part of the fruit of the coconut palm. Accordingly, the respondent contended that, a coconut being a nut rather than a fruit, the product in issue is not classifiable as a fruit juice. In the Tribunal's view, in order to determine whether the product in issue is classifiable in heading No. 20.09, it is unnecessary to make a determination as to whether a coconut is defined as a nut or a fruit for the purpose of the *Customs Tariff*.

Indeed, the Tribunal finds the Explanatory Notes to heading No. 20.09 instructive as to whether the coconut milk, even if one were to consider a coconut a fruit, could be classified as a fruit juice. They read, in part, as follows:

> However, the addition of water to a normal fruit or vegetable juice, or the addition to a concentrated juice of a greater quantity of water than is necessary to reconstitute the original natural juice, results in diluted products which have the character of beverages of **heading 22.02**.

Having read this note, it is clear to the Tribunal that, for a normal fruit juice to be classified in heading No. 20.09, it must not contain added water. While the appellant submitted that the process used to produce coconut milk is similar to the one used to produce fruit juices, the Tribunal notes that a major difference lies in the fact that water is added to coconut milk during the production process.

In accordance with the Explanatory Notes to heading No. 20.09, added water will only be allowed in the case of a concentrated juice, but in a quantity not greater than what is necessary to reconstitute the original juice. Moreover, the substances that can be added to a fruit juice are restricted to the ones listed.

The evidence indicates that the coconut milk is not a concentrated juice, nor is it drinkable as a beverage. As the product in issue contains added water, even if the Tribunal were to consider the coconut milk a normal fruit juice, it would not meet the requirements of the Explanatory Notes to heading No. 20.09. Accordingly, the product in issue is not classifiable in heading No. 20.09.

The Tribunal is now left with heading Nos. 20.08 and 21.06. Heading No. 20.08 covers fruit, nuts and other edible parts of plants, while heading No. 21.06 covers food preparations not elsewhere specified or included.

The appellant submitted that, based on the terms of the headings and the Explanatory Notes, the product in issue should be classified in heading No. 20.08 rather than in heading No. 21.06. The appellant argued that, in accordance with the Explanatory Notes to Chapter 21, heading No. 21.06 excludes preparations made from fruit, nuts or other edible parts of plants of heading No. 20.08, provided the essential character of the preparation is given by such fruit, nuts or other edible parts of plants. As the essential character of coconut milk is given by the coconut component, the appellant submitted that this exclusion specifically directs that the product in issue does not fall within heading No. 21.06.

The respondent argued that the product in issue, which is used in baking and cooking, falls squarely within the uses described in the Explanatory Notes to heading No. 21.06. Moreover, the respondent argued that canned coconut milk does not fall within heading No. 20.08, as, for a nut product to be classified in heading No. 20.08, the nutmeat must be present in the final form of the product and the product must be in the physical form specified by the Explanatory Notes.

What the Tribunal must now determine is whether the product in issue fulfils the requirements of heading No. 20.08. The Explanatory Notes to heading No. 20.08 read, in part, as follows:

> This heading covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.
>
> Other substances (e.g., starch) may be added to the products of this heading, provided that they do not alter the essential character of fruit, nuts or other edible parts of plants.

Dealing with the respondent's argument that the nutmeat must be present in the final form of the product and that the product must be in the physical form specified by the Explanatory Notes to heading No. 20.08, the Tribunal is of the view that nowhere do the Explanatory Notes set such conditions.

In the Tribunal's view, the terms of the Explanatory Notes to heading No. 20.08, which indicate that the "heading covers fruit, nuts and other edible parts of plants, **whether whole, in pieces or crushed, including mixtures thereof**" [emphasis added], make it clear that the final form of the goods is not a condition for classification in that heading.

Furthermore, the Explanatory Notes to heading No. 20.08 allow for other substances to be added to the products of this heading, as long as they do not alter the essential character of the fruit or nuts. Thus, the fact that the product in issue contains added water and a preservative does not prevent it from being classified in that heading.

The Tribunal agrees with the appellant as to the residual character of heading No. 21.06 and the fact that the Explanatory Notes to that heading exclude preparations made from fruit and nuts, provided the essential character of the preparation is given by such fruit or nuts. In the Tribunal's view, it is clearly the case here, since the evidence demonstrates that the essential character of the canned coconut milk is given by the coconut itself.

For the above reasons, the product in issue should be classified under tariff item No.2008.99.90 and, consequently, the appeal is allowed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, January 15, 2002

Appeal No. AP-2000-057

IN THE MATTER OF an appeal heard on August 14, 2001, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated December 19, 2000, and January 19, 2001, with respect to a request for redetermination under subsection 60(4) of the *Customs Act*.

BETWEEN

INTERSAVE WEST BUYING AND MERCHANDISING SERVICES **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

CORRIGENDUM

In the first paragraph of the introductory heading to the decision, the reference to section 63 should have been to section 67.

In the second paragraph of the introductory heading to the decision, the reference to section 67 should have been to subsection 60(4).

This corrigendum pertains only to the English version. The French version will reflect the changes when published.

By order of the Tribunal,

Michel P. Granger
Secretary

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