



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2002-113

Excelsior Foods Inc.

v.

Commissioner of the Canada
Customs and Revenue Agency

*Decision and reasons issued
Thursday, September 23, 2004*

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IN THE MATTER OF an appeal heard on January 27, 2004, 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 November 14, 2002, with respect to requests for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

EXCELSIOR FOODS INC.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 27, 2004

Tribunal Member: James A. Ogilvy, Presiding Member

Counsel for the Tribunal: Dominique Laporte

Clerk of the Tribunal: Anne Turcotte

Appearances: Barry P. Korchmar, for the appellant
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STATEMENT OF REASONS

1. This is an appeal under section 67 of the *Customs Act*¹ from decisions of the Commissioner of the Canada Customs and Revenue Agency (CCRA) dated November 14, 2002, and issued pursuant to subsection 60(4) of the *Act*. The products in issue, Yoga[®] nectars in peach, pear and apricot flavours, were imported between November 16, 1998, and January 19, 2000, under various transaction numbers. The issue in this appeal is whether the products in issue are properly classified under tariff item No. 2202.90.90 of the schedule to the *Customs Tariff*² as other non-alcoholic beverages, as determined by the CCRA, or should be classified under tariff item No. 2009.80.19 as other juice of any other single fruit, as claimed by Excelsior Foods Inc. (Excelsior).

2. The relevant tariff nomenclature is as follows:

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
22.02	Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09.
2202.90	-Other
2202.90.90	---Other

EVIDENCE

3. Several physical exhibits were filed with the Tribunal. Excelsior filed a bottle of Yoga[®] pear nectar (700 ml) and a bottle of Yoga[®] peach nectar (700 ml), while the CCRA filed a bottle of Yoga[®] peach nectar (125 ml) and a tetra pack of each of the pear and apricot nectars (200 ml).

4. Dr. Massimo F. Marcone, professor in the Department of Food Science at the Ontario Agricultural College of the University of Guelph, testified on behalf of Excelsior. Dr. Marcone was qualified as an expert in food chemistry, food engineering processing and international food law. He stated that he had examined the three types of nectar. For this purpose, he first looked at standards of the United States Department of Agriculture and performed an analysis of the edible portion of the corresponding raw fruits. With respect to the water content of the raw fruit, he stated that it could vary by around 7 percent depending on the variety of the fruit and on the season. He indicated that he also looked at proteins, as well as sucrose, fructose and glucose. On that point, he noted that certain amounts of sugars had been added to the pear, peach and apricot nectars, but that the protein levels were very similar to what is in the fruit itself. When asked to explain the difference in the sugar levels between the raw fruits and the nectar, he noted that the relative amount of water was an important factor that affected the concentration of sugar. At the end of his analysis, he concluded that the substances in the bottles of nectar were the fruits themselves and that the peach, pear and apricot nectars had retained the essential character of fruit juices. In his view, there are no imbalances in the constituent of the nectars as compared to the raw fruits.

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

2. S.C. 1997, c. 36.

5. Dr. Marcone also testified that the Yoga[®] nectars would fall under section B.11.134, “Apricot Nectar”, of the “*Fruit Juices*” heading of the *Food and Drug Regulations*.³ He stated that, in his opinion, the products should be labelled “juice” and not “nectar”. He also noted that a specific manufacturing process was used to create the fruit purée used in the nectars. In response to a question from the CCRA, he acknowledged that the L-malic acid and citric acid found in the nectars had been added.

6. Ms. Catherine R. Copeland, Senior Chemist in the Organic and Inorganic Products Section at the Laboratory & Scientific Services Directorate of the CCRA, gave evidence on the CCRA’s behalf. Ms. Copeland was qualified by the Tribunal as an expert in chemical analysis of organic and food products.

7. Ms. Copeland indicated that she had analysed the three types of products in issue. She testified that, in her experience, a nectar is understood in the fruit juice industry to be a product made from pureed fruit, to which water and sugar, and sometimes other optional ingredients, such as organic acids, are added. In her view, the fact that water is listed on the label of the products clearly suggests that water was added to the product, in contrast with water that was originally in the fruit purée. Further, the fact that water also appears first in the order in which the ingredients are listed on the label indicates that the water is found in greater proportion than the fruit purée, which is the next ingredient. According to her analysis, for the apricot nectar, 49 percent of the water was not accounted for by the fruit ingredient. These figures are 30 percent and 40 percent for the peach nectar and the pear nectar respectively. Regarding the presence of sugars in the products, she stated that they were added, which is natural practice in the manufacture of apricot, pear and peach nectars. As to the appearance of the product, she testified that the liquid in the bottle was extremely pulpy and opaque, and not a clear juice. She testified that this is consistent with the appearance of a nectar.

8. Regarding the issue of concentration and reconstitution which was addressed by Dr. Marcone, Ms. Copeland stated that reconstitution occurs when water is added back to a product from which water was removed, and the amount of water that is added is the amount needed to reconstitute the product to its original composition and character. However, in her view, there is no evidence that the products in issue were reconstituted in any way. She further indicated that none of the products that were analysed meets the composition profile of a natural pear juice, apricot juice or peach juice.

9. Mr. Richard Couture, Vice-president of Research and Development at A. Lassonde Inc., appeared on behalf of the CCRA. Mr. Couture was qualified by the Tribunal as an expert in the manufacturing industry and in the marketing sector of pure juice and fruit drinks. When asked to define a pure fruit juice as recognized in the industry, M. Couture explained that it consisted of the juice obtained from the first extraction, to which vitamin C or natural flavours are sometimes added. As pertains to fruit juice from concentrate, he indicated that its composition should be the same as that of the original fruit juice and that the addition of a greater amount of water causes it to lose its fruit juice appellation. Mr. Couture declared that fruit nectar is a product that is constituted from fruit purée, to which water and sweeteners are added.

ARGUMENT

10. Excelsior submitted that the products in issue should be classified in heading No. 20.09 as fruit juices. In its view, the issues in this case can be summarized as follows: what is a fruit juice and at what point does the addition of water to a juice render it not a fruit juice and force it into another tariff classification? Dealing with these questions, Excelsior argued that the products in issue were reconstituted to the point where the proportion of water that was present before the start of the process had been restored, but not beyond that level. This is why, in Excelsior’s view, the products in issue are still fruit juices.

3. C.R.C., c. 870.

11. As to the opinion found in the *Compendium of Classification Opinions*⁴ which deals with the tariff classification of peach and pear nectars and which classifies them in heading No. 22.02 as other non-alcoholic beverages, Excelsior submitted that no rationale was provided in respect of the type of nectars that were examined. Excelsior further emphasized that the products before the Tribunal were the Yoga[®] nectars and that the Tribunal was not dealing with the general phrase “fruit nectars”. As to the labelling of the products, Excelsior argued that under the *Food and Drug Regulations*, it was obliged to call them fruit nectars, which does not however mean that, for customs classification purposes, they are not fruit juices.

12. The CCRA argued that the products in issue were properly classified in heading No. 22.02 as other non-alcoholic beverages. Dealing first with the weight to be given to the *Food and Drug Regulations*, the labelling requirements and the standards of the Codex Alimentarius when classifying products under the *Customs Tariff*, the CCRA argued that they reflected the industry standards and that their language also mirrors the *Customs Tariff*. Although the CCRA acknowledged that these frameworks were not binding on the Tribunal, it submitted that they were of tremendous assistance in determining the proper tariff classification of the products in issue under the *Customs Tariff*.

13. The CCRA referred to the testimony of Ms. Copeland that the products in issue consist of fruit purée to which tap water, sugar and acids were added and that the percentage of the total composition of these products that is made up of water was significant. The CCRA submitted that the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁵ to heading No. 20.09, which provide that the addition of water to a normal fruit juice results in a diluted product which has the character of a beverage of heading No. 22.02, make it clear that the products in issue cannot be classified in heading No. 20.09. The CCRA also pointed out that the *Explanatory Notes* to heading No. 22.02 provide that the heading covers, among other things, tamarind nectar, which is akin to the products in issue. The CCRA also made reference to the *Compendium of Classification Opinions*, which classifies peach and apricot nectars in heading No. 22.02.

DECISION

14. 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 *Compendium of Classification Opinions* and the *Explanatory Notes*.

15. 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].

4. Customs Co-operation Council, 1st ed., Brussels, 1987.

5. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

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

16. The competing headings in this case are as follows:

- | | |
|-------|---|
| 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. |
| 22.02 | Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09. |

17. Pursuant to Rule 1 of the *General Rules*, the Tribunal is of the view that the products in issue are classifiable in heading No. 22.02 as other non-alcoholic beverages. The Tribunal first notes that the great majority of evidence offered by both sides in this case, both written and in oral testimony, focused on the terms of the *Food and Drug Regulations*, the *Processed Products Regulations* and the *Codex Alimentarius*. While these frameworks may be appropriate to establish disciplines within the food industry for the composition and quality of food products, the Tribunal is bound by the terms of the *Customs Tariff*. Norms established by other regulatory frameworks, common industry usage, etc., can serve as guidance to the Tribunal, but must be seen as secondary to the terms of the *Customs Tariff*.

18. The *Explanatory Notes* to heading No. 20.09 are reproduced in part below:

The fruit and vegetable juices of this heading are generally obtained by pressing fresh, healthy and ripe fruit or vegetables. This may be done (as in the case of citrus fruits) by means of mechanical “extractors” operating on the same principle as the household lemon-squeezer, or by pressing which may or may not be preceded either by crushing or grinding (for apples in particular) or by treatment with cold or hot water or with steam (e.g., tomatoes, blackcurrants and certain vegetables such as carrots and celery).

The liquids thus obtained are then generally submitted to the following processes:

As a result of these various treatments the fruit or vegetable juices may consist of clear, unfermented liquids. Certain juices, however (in particular those obtained from pulpy fruits such as apricots, peaches and tomatoes) still contain part of the pulp in finely divided form, either in suspension or as a deposit.

The juices of this heading may be **concentrated** (whether or not frozen) or in the form of **crystals or powder** provided, in the latter case, that they are entirely or almost entirely soluble in water. Such products are usually obtained by processes involving either heat (whether or not in a vacuum) or cold (lyophilisation).

Certain concentrated juices can be distinguished from their corresponding non-concentrated juices on the basis of their Brix value (see Subheading Note 3 to this Chapter).

Provided they retain their original character, the fruit or vegetable juices of this heading may contain substances of the kinds listed below, whether these result from the manufacturing process or have been added separately:

- (1) Sugar.
- (2) Other sweetening agents, natural or synthetic, provided that the quantity added does not exceed that necessary for normal sweetening purposes and that the juices otherwise qualify for this heading, in particular as regards the balance of the different constituents (see Item (4) below).
- (3) Products added to preserve the juice or to prevent fermentation (e.g., sulphur dioxide, carbon dioxide, enzymes).

- (4) Standardising agents (e.g., citric acid, tartaric acid) and products added to restore constituents destroyed or damaged during the manufacturing process (e.g., vitamins, colouring matter), or to “fix” the flavour (e.g., sorbitol added to powdered or crystalline citrus fruit juices). However, the heading **excludes** fruit juices in which one of the constituents (citric acid, essential oil extracted from the fruit, etc.) has been added in such quantity that the balance of the different constituents as found in the natural juice is clearly upset; in such case the product has lost its original character.

Similarly, intermixtures of the juices of fruits or vegetables of the same or different types remain classified in this heading, as do reconstituted juices (i.e., products obtained by the addition, to the concentrated juice, of a quantity of water not exceeding that contained in similar non-concentrated juices of normal composition).

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**. Fruit or vegetable juices containing a greater quantity of carbon dioxide than is normally present in juices treated with that product (aerated fruit juices), and also lemonades and aerated water flavoured with fruit juice are also **excluded (heading 22.02)**.

19. Both parties depended on the constituent make-up of the goods and the implications that could be drawn from laboratory analysis.

20. With regard to the water component, Excelsior stated that water added to the product could not be readily distinguished from the water that occurs naturally in the fruit, while the CCRA indicated that ionic analysis showed that tap water had been added to the fruit purée in significant quantities. The CCRA went on to argue that it was impermissible to add water to the product, because that caused dilution and took it out of the range of the definition of “juice”. However, the *Explanatory Notes* to heading No. 20.09 permit the addition to a concentrated juice of “a quantity of water not exceeding that contained in similar non-concentrated juices of normal composition”. The *Explanatory Notes* go on to say that “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**.” Excelsior indicated that the products in issue were not reconstituted from concentrated juices, but noted that small quantities of water were added to replace water lost during the processing of the fruit.

21. With regard to the sugar component, Excelsior’s analysis shows similar total levels of sugars (sucrose, glucose and fructose) to those found in the fruit. The CCRA took the position that sugar could not be added to a juice. However, the *Explanatory Notes* to heading No. 20.09 allow for the addition of sugar and other natural or synthetic sweetening agents. The one condition is that “the quantity added does not exceed that necessary for normal sweetening purposes”. It does not limit the sugar level to that of sugar found in, or typical of, the original fruit.

22. With regard to the acid component, the CCRA took the position that, although the addition of some acid is allowed by the Codex Alimentarius, no acid other than L-ascorbic is allowed. Further, it submitted that “the addition of both sugar and acid is never allowed to a fruit juice.”⁷ The Tribunal notes that the *Explanatory Notes* to heading No. 20.09, in a non-exhaustive list of standardising agents, explicitly name citric and tartaric acids as permissible additives and, further, permit their use along with sugar and other sweetening agents.

7. *Transcript of Public Hearing*, 27 January 2004 at 225.

23. Working within such frameworks as industry usage, the *Food and Drug Regulations*, the *Processed Products Regulations* and the Codex Alimentarius, the CCRA has made a persuasive case for viewing nectars as distinct from juices. However, the Tribunal must determine whether this remains valid within the classification system of the *Customs Tariff*.

24. In this connection, the Tribunal took careful note of the *Explanatory Notes* to the competing chapters in order to determine the intent of the language of the headings in the classification system. The *Explanatory Notes* to heading No. 20.09 contained a number of details which are dealt with below, whereas the *Explanatory Notes* to heading No. 22.02 were very limited in scope.

25. The Tribunal notes that, in certain respects, the *Explanatory Notes* to heading No. 20.09 are more permissive than either industry usage or the other frameworks relied upon by both Excelsior and the CCRA. These differences include the following:

- Under the *Customs Tariff*, a product may be subjected to a number of processes and may contain a number of substances and still be considered a juice.
 - Whereas the CCRA took the position that juice cannot contain both added sugar and added acid, the *Explanatory Notes* to heading No. 20.09 permit the final juice to contain both.
 - Whereas the CCRA took the position that juice cannot contain liquid sugar, the *Explanatory Notes* to heading No. 20.09 allow “sugar” without restricting it to sugar in solid form. The *Explanatory Notes* also permit “[o]ther sweetening agents, natural or synthetic”. The latter is restricted to a quantity not exceeding what is necessary “for normal sweetening purposes”. The Tribunal notes that this language neither disallows sweetening agents in liquid form nor restricts the quantity to that which would match the proportion in the original fruit or juice.
- Reconstituted juices are included in this heading.
 - Whereas the CCRA took the position that no water may be added, the *Explanatory Notes* to heading No. 20.09 allow the addition of water to a concentrated juice, subject to the condition that the amount of water added is not “of a greater quantity of water than is necessary to reconstitute the original natural juice.”

26. The substances noted in the first case above, while permitted in juices, are subject to one overarching condition: that the juices in question “retain their original character.” The Tribunal must consider therefore whether the products in issue have retained their original character. The *Explanatory Notes* to heading No. 20.09 provide some illumination of the concept of “original character” in connection with the addition of standardising agents, such as citric acid, indicating that the original character is lost if one of the constituents is added in such quantity that “the balance of the different constituents as found in the natural juice is clearly upset”.

27. The “character” of a juice is determined in part by chemical analysis, of the sort conducted by both Excelsior and the CCRA, and in part by organoleptic qualities, such as aroma.

28. With respect to the first basis for determining character, Excelsior performed laboratory analyses in which it used raw fruit as a basis of comparison with the products in issue. Taking into account the allowance provided by the *Explanatory Notes* to heading No. 20.09 for the addition of certain substances, the laboratory results might allow for the conclusion that the products in issue fall within the scope of the definition of “juice”. Nevertheless, the Tribunal wishes to stress that the comparison that is required by the *Explanatory Notes* is between the natural juice of the fruits and the products in issue, in contrast with the

raw fruit itself and the products in issue. Had the laboratory analyses been performed using the juice of the fruit as a basis for comparison, this might have led to different results. With respect to sugar, for example, the products in issue replicate within reasonable tolerances the sugar content of the original fruit. While there may be higher or lower proportions of certain sugars, this distinction is one that is not made in the *Explanatory Notes* to heading No. 20.09. In the Tribunal's view, the *Customs Tariff* deals only with total sugars, since it does not subdivide this component. With respect to acids, in light of the *Explanatory Notes*, the addition of citric acid is permissible short of upsetting the balance of constituents in the natural juice.

29. There was little evidence provided in the area of organoleptic analysis. The CCRA's laboratory reports gave brief descriptions of the goods that included their appearance and aroma, and there was no disagreement that the aromas of the products were appropriate to the fruits from which they were derived. With respect to the viscosity of the products in issue, which the CCRA's laboratory report described as "slightly viscous, pulpy",⁸ the *Explanatory Notes* to heading No. 20.09 provide that, although juices may consist of clear liquids, certain juices, and in particular those obtained from pulpy fruits such as apricots and peaches, may still contain part of the pulp in finely divided form, whether in suspension or as a deposit. While viscosity might be subject to either scientific or organoleptic analysis, neither party made significant submissions on this feature.

30. The Tribunal must also consider the implications of the addition of water to the products.

31. The term "reconstituted" has a particular meaning. Reconstituted juices are defined in the *Explanatory Notes* to heading No. 20.09 as "products obtained by the addition, to the concentrated juice, of a quantity of water not exceeding that contained in similar non-concentrated juices of normal composition". It is implicit in this language that the starting point for reconstituted juice is a concentrate, and testimony indicated that concentrates are obtained by the removal of water from the original juice. Dr. Marcone acknowledged that there was no suggestion anywhere in his report or analysis that a fruit concentrate was being used in these products.⁹ He further testified that it was impossible to reconstitute a product without having started with a concentrate.¹⁰ Although he stated that there were various ways to concentrate a product and that the products in issue were in fact reconstituted juices, the Tribunal finds that, given that the products in issue have never been in concentrated form, they are not "reconstituted juices" in accordance with the terms of the *Explanatory Notes* to heading No. 20.09.

32. On the matter of water content, both parties testified that the loss of water in the process used to obtain a purée is typically minimal. Nevertheless, the labelling of the products, while not determinative from a classification perspective, clearly indicates that the products are combinations of separate components and provides a rough indication of their relative proportions in the final products. The result of the processing of the raw fruit is a purée, which in the case of the peach and pear products is the predominant ingredient, and in the case of the apricot product is second in proportion to the other ingredients. In the peach and pear products, water is second in proportion, whereas in the apricot product, it is the predominant ingredient.

33. Having found that the products in issue are not "reconstituted juices" in accordance with the *Explanatory Notes*, the Tribunal must now determine whether a purée, to which water and other components have been added that do not upset the balance of the constituents of the fruit from which the purée is derived, can still be found to be a "juice" under the *Customs Tariff*.

8. Respondent's brief, Tab 2.

9. *Transcript of Public Hearing*, 27 January 2004 at 117.

10. *Ibid.* at 116.

34. Excelsior submitted that apricots, peaches and pears, because they are pulpy fruits, must have water added to them in order to make them drinkable and that, if the resulting product cannot be called a juice, one would never be able to have an apricot, peach or pear juice. In contrast, Mr. Couture testified that it is possible to obtain either a juice or a nectar from pears, just as it is from apples.¹¹ Further, in his testimony, he drew a distinction between two different potential yields from the same quantity of original fruit. He illustrated this by an example in which one might obtain 1/2 tonne of juice from a tonne of fruit. However, if one wished to produce a nectar, it would be possible to obtain 1/2 tonne of purée from the same tonne of fruit and dilute it through the addition of water to produce 3/4 tonne of saleable product.¹² Mr. Couture further indicated that the total process to achieve a finished product would include the addition of sugars, organic acids and possibly vitamin C.

35. The evidence presented supports a distinction between two processes and their initial products. The process leading to a nectar, including the products in issue, involves homogenization of the whole fruit, less pits, cores and skin. The result is a purée that, both parties stated, is too thick to be drunk or even poured. As it is provided for under the *Explanatory Notes*, the process leading to a juice, on the other hand, typically involves pressing the fruit to extract the liquid from the solid portion of the fruit; although some pulp may appear in this product, it is essentially a liquid. It is the Tribunal's view that, in the case of the purée, it can be brought to the approximate consistency of a juice only by the addition of water.

36. On the basis of the evidence presented, it is the Tribunal's view that, once the purée is diluted by the addition of water, it is clear that the proportions of certain other constituents of the fruit or the purée, such as sugar and acids, would be reduced by the dilution. Starting with this new base material, i.e. the combined water and purée, it would be only by the addition of ingredients such as sugar and acids that the balance of constituents could be restored and a juice simulated. The "original character" of the juice that might have been produced is simulated by the product that results from the further processing of the purée, particularly the addition of water, sugars and acids.

37. With regard to the acceptable additives and their levels, the *Explanatory Notes* permit the addition of both sugar and acid, contrary to the position taken by the CCRA. In the case of sugar, the evidence does not suggest that the quantity added to the products in issue "exceed[s] that necessary for normal sweetening purposes". In the case of acids, the Tribunal has noted above that the list of acceptable ingredients that includes citric acid is not exhaustive. The Tribunal therefore sees no reason to disqualify the products in issue as juices simply on the basis of the addition to the purée of sugar or acid.

38. However, the addition of water to something that is not a concentrate is not permissible under the *Customs Tariff*. Only the ingredients that are specifically listed are allowed. The *Explanatory Notes*, although restrictive in nature, in that they do not allow a product made of purée and added water to fall under the products that are categorized as "juice", are nevertheless consistent with the common meaning and understanding of this term. Indeed, the *Collins Dictionary of the English Language* defines "juice" in part as follows:

1. any liquid that occurs naturally in or is secreted by plant or animal tissue.¹³

11. *Transcript of Public Hearing*, 27 January 2004 at 277.

12. *Ibid.* at 273-74.

13. Second ed., s.v. "juice".

39. The *MerriamWebster Online Dictionary* defines “juice” in part as follows:

1.: the extractable fluid contents of cells or tissues.¹⁴

40. These two definitions convey the idea that a juice is a fluid or liquid that “occurs naturally” or that is “extractable”. The examples of manufacturing processes found in the *Explanatory Notes* to heading No. 20.09 have in common a method by which the natural liquid of a fruit is extracted. The only variant allowed is that of a concentrate, which is created from the naturally extracted juice. To extend the meaning of “juice” to products that are artificially manufactured by the addition of water to a purée would have the consequence of depriving that word of its ordinary meaning and would go against the scheme of the *Explanatory Notes* to heading No. 20.09.

41. In the Tribunal’s view, the products in issue are simulations of fruit juices, in which the constituent ingredients occur in proportions that are appropriate to those among the constituents of the related fruit juices. However, rather than being extracted from the fruit as juice and simply enhanced with permissible additives, they are manufactured from a combination of ingredients taken from different sources. The total process therefore simulates juices rather than producing them by extraction directly from the fruit.¹⁵

42. The Tribunal further notes that, in establishing the benchmark for comparisons, the *Explanatory Notes* consistently refer to juices rather than to the fruits from which they are extracted. For example, the reference to acceptable additives requires that the “original character” that is to be maintained be that of juices, not of their respective fruits. Dr. Marcone, on the other hand, produced a chemical analysis that compared the profile of each nectar to the *fruit* from which it was obtained. Furthermore, in response to a question, he acknowledged that there were significant differences between a pear juice and the pear nectar in issue.¹⁶ The Tribunal is of the view that Excelsior thereby failed to make the comparisons required to satisfy the terms of the *Explanatory Notes*.

43. Having concluded that the products in issue are not classifiable in heading No. 20.09, the Tribunal must now look at the only other competing heading, which is heading No. 22.02. This heading covers, among other things, other non-alcoholic beverages. Both the terms of the heading and the *Explanatory Notes* to that heading specifically exclude fruit juices of heading No. 20.09.

44. The Tribunal finds that the products in issue meet the requirements of this heading. In coming to its decision, the Tribunal notes that it considered the following classification opinion of the Customs Co-Operation Council:

2202.90 1. **Peach nectar** and **apricot nectar** consisting of crushed and strained (homogenised) whole fruits (peeled and with the stone removed) and about the same volume of added sugar syrup, **used directly as a beverage**.

45. Nevertheless, the Tribunal gives little weight to this classification opinion, as it appears to deal with products which contain a very high concentration of added sugar syrup. In the Tribunal’s view, with such a quantity of added sugar, these products would clearly not retain the original character of a fruit juice, and

14. *s.v.* “juice”.

15. Something defined as a juice can be made even from dried fruits, as indicated by the example of prune juice given in the *Explanatory Notes*. However, there is no indication that, through the process described, it is permissible to create a product that is significantly different from the juice that might have been extracted from the fresh fruit. In the case of the example given for prune juice in the *Explanatory Notes*, it still provides for the *extraction* of the juice by a heating process.

16. *Transcript of Public Hearing*, 27 January 2004 at 171.

they would consequently be excluded from heading No. 20.09. The products in the context of this opinion are consequently distinguishable from the Yoga[®] nectars.

46. In light of the above, the Tribunal is of the view that the products in issue are properly classified under tariff item No. 2202.90.90 as other non-alcoholic beverages.

47. Therefore, the appeal is dismissed.

James A. Ogilvy
James A. Ogilvy
Presiding Member