Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-040

Sy Marketing Inc.

v.

President of the Canada Border Services Agency

Decision issued
Monday, June 2, 2008

Reasons issued
Thursday, July 17, 2008

Canada

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IN THE MATTER OF an appeal heard on November 27, 2007, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated August 29, 2006, with respect to requests for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

SY MARKETING INC. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 27, 2007
Tribunal Member:	Ellen Fry, Presiding Member
Counsel for the Tribunal:	Alain Xatruch
Research Officer:	Gabrielle Nadeau
Assistant Registrar:	Gillian Burnett
Registrar Officer:	Stéphanie Doré

PARTICIPANTS:

Appellant	**Counsel/Representative**
Sy Marketing Inc.	Barry Korchmar
Respondent	**Counsel/Representative**
The President of the Canada Border Services Agency	Jennifer Francis

WITNESSES:

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President
Sy Marketing Inc.

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STATEMENT OF REASONS

1. This is an appeal filed by Sy Marketing Inc. (Sy Marketing) under subsection 67(1) of the *Customs Act*[1] from decisions made on August 29, 2006, by the President of the Canada Border Services Agency (CBSA) under subsection 60(4).

2. The issue in this appeal is whether cans of Philippine Brand™ Mango Juice Nectar (the goods 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 CBSA, or whether they 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. 2008.99.30 as other fruit otherwise prepared or preserved, as claimed by Sy Marketing.

3. The nomenclature of the *Customs Tariff* which Sy Marketing claims should apply to the goods in issue reads 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.**
. . .	
	-Other, including mixtures other than those of subheading 2008.19:
. . .	
2008.99	**- -Other**
. . .	
2008.99.30	- - -. . . , mangoes, . . .
. . .	
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**
	- - -Of a fruit:
. . .	
2009.80.19	- - - -Other

4. The nomenclature of the *Customs Tariff* which the CBSA ruled applicable to the goods in issue reads as follows:

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

1. R.S.C. 1985 (2d Supp.), c. 1 [the *Act*].
2. S.C. 1997, c. 36.

PROCEDURAL HISTORY

5. The goods in issue were imported from the Philippines by Sy Marketing, a non-resident importer in Santa Clara, California, between July 26, 2004, and December 16, 2005, under 24 separate transaction numbers. Following a customs compliance verification, the CBSA determined that, pursuant to subsection 59(1) of the *Act*, the goods in issue were properly classified under tariff item No. 2202.90.90 as other non-alcoholic beverages.

6. Sy Marketing then made requests for a re-determination of the tariff classification of the goods in issue pursuant to subsection 60(1) of the *Act*. On August 29, 2006, the CBSA issued its decisions under subsection 60(4), which denied the requests and confirmed its prior determination with respect to the tariff classification of the goods in issue.

7. On November 27, 2006, Sy Marketing appealed the decisions to the Tribunal.

8. A public hearing was held in Ottawa, Ontario, on November 27, 2007. Dr. Massimo F. Marcone, Professor, Department of Food Science at the Ontario Agricultural College of the University of Guelph, testified on behalf of Sy Marketing. Dr. Marcone was qualified by the Tribunal as an expert in food chemistry, food engineering processing and international food law. Ms. Kathleen Smith, a food chemist in the Organic/Inorganic Products Section of the Laboratory and Scientific Services Directorate of the CBSA, gave evidence on behalf of the CBSA. Ms. Smith was qualified by the Tribunal as an expert in the chemical analysis of organic and food products.

9. In addition to the above-mentioned expert witnesses, the Tribunal also heard from two lay witnesses. Mr. Henry Sy, President of Sy Marketing, testified on behalf of Sy Marketing, and Mr. Donald Bush, a food inspection consultant, testified on behalf of the CBSA.

GOODS IN ISSUE

10. The goods in issue are manufactured in the Philippines by Profood International Corporation and imported into Canada by Sy Marketing. According to Mr. Sy, at the time of the hearing, the goods in issue were primarily sold to Oriental specialty stores and to Costco Wholesale Canada Ltd.

11. Sy Marketing filed two cans of the "Philippine Brand™ Mango Juice Nectar" (250 ml each) as physical exhibits with the Tribunal. It also filed a Tetra Pak of "Buavita Mango Juice" (1000 ml), which was not in issue, but was used for comparative purposes.

12. The label on the goods in issue states that the product is "NOT from Concentrate" and that it "Contains 37% Juice". The list of ingredients on the label reads as follows: "Water, MANGO JUICE NECTAR, Sugar, Citric Acid, Ascorbic Acid (Vitamin C)".

ANALYSIS

13. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

14. The tariff nomenclature is set out in considerable detail in the schedule to the *Customs Tariff*, which is divided into sections and chapters. Each chapter of the schedule contains a list of goods categorized under a number of headings, subheadings and tariff items. Sections and chapters can include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the methodology that the Tribunal must follow when interpreting the schedule in order to come to the proper tariff classification of a given good.

15. Subsection 10(1) of the *Customs Tariff* reads as follows: ". . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System[3] and the Canadian Rules[4] set out in the schedule."

16. The *General Rules* are comprised of six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.[5] Therefore, classification always begins with Rule 1, which reads as follows: ". . . 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 following provisions."

17. Section 11 of the *Customs Tariff* states the following: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System[6] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[7] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time."

18. Once the Tribunal has used this process to determine the heading in which the goods should be classified, the next step is to determine the appropriate subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

19. In the present appeal, the dispute between the parties arises at the heading level. Sy Marketing claims that the goods in issue should be classified in heading No. 20.09 as fruit juice or, in the alternative, in heading No. 20.08 as fruit otherwise prepared or preserved. On the other hand, the CBSA maintains that the goods in issue are properly classified in heading No. 22.02 as other non-alcoholic beverages.

20. The terms of the competing headings read 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.**
>
> **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.**

21. The Tribunal notes that there are no Chapter or Section Notes that are relevant for the purposes of determining in which heading the goods in issue are to be classified. The Tribunal also notes that no *Classification Opinions* were submitted by the parties to support their respective positions. However, in the Tribunal's view, the *Explanatory Notes* to both heading Nos. 20.08 and 20.09 set out considerations that are relevant to this appeal.

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3. S.C. 1997, c. 36, schedule [*General Rules*].
4. S.C. 1997, c. 36, schedule.
5. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 are applicable for classification at the subheading level. Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable for classification at the tariff item level.
6. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
7. World Customs Organization, 3d ed., Brussels, 2002 [*Explanatory Notes*].

22. The *Explanatory Notes* to heading No. 20.08 read as follows:

> . . .
>
> [This heading] includes, *inter alia*:
>
> . . .
>
> (5) Whole fruits, such as peaches (including nectarines), apricots, oranges (whether or not peeled or with the stones or pips removed) crushed and sterilised, whether or not containing added water or sugar syrup but in a proportion insufficient to render them ready for direct consumption as beverages. When rendered ready for direct consumption as beverages by addition of a sufficient quantity of water or of sugar syrup, these products fall in **heading 22.02**.
>
> . . .

23. The *Explanatory Notes* to heading No. 20.09 read as follows:

> . . .
>
> **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.
>
> . . .
>
> 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**. . . .

24. Sy Marketing argued that, while the goods in issue are produced and marketed as nectars, they meet the terms of the *Explanatory Notes* to heading No. 20.09, since they have, within allowable standards, the same constituents, in the same proportions, as found in the natural fruit. It relied on Dr. Marcone's expert report and testimony, which, according to Sy Marketing, confirms that the composition of the goods in issue is consistent with that of a mango. It submitted that, when mangoes are processed, water is lost due to evaporation and enzymatic activity. However, it submitted that, when the goods in issue are produced, no more water is added than what was proportionate in the natural fruit. Although it did concede that sugar was perhaps added to the goods in issue, it submitted that this was allowed by the terms of the headings and the *Explanatory Notes*. For these reasons, Sy Marketing is of the view that the goods in issue are fruit juices of heading No. 20.09.

25. With respect to its alternative claim that the goods in issue can also be classified in heading No. 20.08, Sy Marketing submitted that the goods in issue are fruit purées that happen to be suitable for immediate consumption. It again argued that the addition of water during the manufacturing process simply serves to restore the water content that was found in the natural fruit. Thus, according to Sy Marketing, this cannot be said to be a process that renders the purée ". . . ready for direct consumption . . ." and that, as a result, the exclusion found in the *Explanatory Notes* to heading No. 20.08 does not apply.

26. The Tribunal notes that, at the hearing, Sy Marketing decided to abandon its alternative claim that the goods in issue are fruit purées of heading No. 20.08 and, instead, decided to rely solely on its claim that the goods are fruit juices of heading No. 20.09.[8] However, given the uncertainty concerning the exact composition of the goods in issue and given the similarities in the circumstances provided for in the *Explanatory Notes* which lead to the exclusion of the goods in issue from these headings (i.e. the addition of water), the Tribunal will continue to consider both headings for the purposes of determining the proper tariff classification.

27. The CBSA submitted that, based on the test results obtained by Ms. Smith, the composition of the goods in issue is consistent with their having been made from mango pulp or purée to which significant amounts of sugar and water have been added. It submitted that, according to the *Explanatory Notes* to heading No. 20.09, the addition of water to normal fruit juices results in diluted products which are beverages of heading No. 22.02. However, it also argued that, because it believes that the goods in issue are made from mango pulp or purée rather than from pressed fruit and because purées are products of heading No. 20.08, regard must be had to the *Explanatory Notes* to heading No. 20.08. In this respect, it submitted that the addition of water to the goods in issue has rendered them ready for direct consumption as beverages and that, as a result, the *Explanatory Notes* provide that they are to be considered as beverages of heading No. 22.02.

28. The CBSA argued that, based on their composition, the goods in issue are normally considered to be nectars. It submitted that definitions of the term "nectar", including the one found in the *Codex Alimentarius*,[9] provide that nectar is essentially a product obtained by adding water to a fruit juice or purée, with or without other ingredients, such as sugar, acids and vitamins. The CBSA further submitted that the Tribunal has already ruled, in *Excelsior Foods Inc. v. Commissioner of the Canada Customs and Revenue Agency*,[10] that goods which are similar in composition to the goods in issue are nectars which are properly classified in heading No. 22.02. Since the Tribunal's decision in *Excelsior* was also upheld by the Federal Court of Appeal,[11] the CBSA argued that it is a binding precedent which must be followed in the present case.

29. Based on the text of the *Explanatory Notes* to heading Nos. 20.08 and 20.09 and the parties' submissions, it is clear to the Tribunal that a key question that must be answered in order to decide this appeal is whether the goods in issue contain added water (i.e. water that was not already present in the mango juice or purée in its original state) and, if so, in what quantity.

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8. *Transcript of Public Hearing*, 27 November 2007 at 214-15.
9. See section 2.1.6 of the Codex General Standard for Fruit Juices and Nectars (CODEX STAN 247-2005). The Codex Alimentarius Commission was created in 1963 by the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) to develop food standards, guidelines and related texts, such as codes of practice under the Joint FAO/WHO Food Standards Programme. The main purposes of this programme are to protect the health of consumers, ensure fair trade practices in the food trade and promote the coordination of all food standards work undertaken by international governmental and non-governmental organizations.
10. (23 September 2004), AP-2002-113 (CITT) [*Excelsior*].
11. *Excelsior Foods Inc. v. Canada (Attorney General)*, 2005 FCA 376.

30. The Tribunal notes that, in Ms. Smith's rebuttal to Dr. Marcone's expert report, it is stated that the *Food and Drug Regulations*[12] require that the ingredients of a product be shown on the label in the order of predominance (i.e. descending order of their proportion of the product) and that the components of the ingredients, if applicable, be shown immediately after the ingredient of which they are components.[13] Sy Marketing has not disputed this fact and, at the hearing, Dr. Marcone stated that he was aware that ingredients must be listed in order of predominance, from highest to lowest.[14] Since the label on the goods in issue lists "water" as the first ingredient and since the label also states that the product is "NOT from Concentrate" and "Contains 37% Juice", this appears to indicate that water has indeed been added. However, Sy Marketing, based on the evidence of Dr. Marcone, is of the opinion that the label is wrong or misleading.[15] Consequently, Sy Marketing submitted that the goods in issue should not be classified based on the information on the label and cited the Tribunal's decision in *Costco Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency*[16] as support for this proposition.

31. The Tribunal agrees that, while the information on the label provides an indication of the contents of a product, it is not necessarily determinative for classification purposes. Therefore, in addition to considering the information on the label, the Tribunal will consider the other evidence to determine whether the goods in issue contain added water.

Do the Goods in Issue Contain Added Water?

32. As indicated above, Sy Marketing submits that the goods in issue contain no added water other than what was necessary to offset any water lost to evaporation and enzymatic action during processing and to restore the water content that was found in the natural fruit. It submitted that this is confirmed by the results of Dr. Marcone's analysis, which shows that the composition of the goods in issue is very similar to the composition of mango fruit.

33. In his expert report, Dr. Marcone stated that the only soluble sugars found in the goods in issue were fructose, glucose and sucrose. He further stated that the total amount of all three soluble sugars, the ratio of glucose to fructose and the amount of sucrose expressed as a percentage of total sugar were found to be in agreement with amounts commonly reported in peer-reviewed scientific literature pertaining to mango juice and mango pulp/purée, as well as with results obtained from his own analytical work performed on "Fat Cat" mangoes in his laboratory. Dr. Marcone also stated that the titratable acidity of the goods in issue was in agreement with what has been reported in scientific literature. Finally, Dr. Marcone compared the above results with those obtained for another commercially available mango product, Buavita Mango Juice, and found them to be comparable. On the basis of these results, Dr. Marcone stated that, in his opinion, the composition of the goods in issue is very similar to what would be found in mango fruit and that, for this reason, the label on the product does not provide an accurate description of its contents. In his view, the goods in issue consist of 100 percent mango juice.

34. The CBSA, on the other hand, submits that the goods in issue contain added water and that this can be proven by demonstrating that the sugar present in the goods in issue does not originate solely from mango fruit. According to the CBSA, if sugar has been added to the goods in issue, then water must also have been added to offset the extra sugar and to maintain a total sugar concentration that is similar to that found in mango fruit.

12. C.R.C., c. 870.
13. C.R.C., c. 870, ss. B.01.008(3) and (5).
14. *Transcript of Public Hearing*, 27 November 2007, at 94.
15. Expert witness report of Dr. Marcone, Tribunal Exhibit AP-2006-040-22A at 5; *Transcript of Public Hearing*, 27 November 2007, at 96, 113, 190.
16. (30 November 2001), AP-2000-050 (CITT).

35. In her rebuttal to Dr. Marcone's expert report, Ms. Smith stated that she performed a carbon isotope ratio analysis on the goods in issue to detect the presence of added sugar. She explained that, by comparing the ratio of the stable carbon isotopes ^{13}C and ^{12}C obtained for the goods in issue with the reference values cited in scientific literature for mango fruit and for cane and corn sugar,[17] she was able to determine that approximately half of the sugar found in the goods was from a cane or corn sugar source. More specifically, by comparing a ratio of -18.7 obtained for the goods in issue with an average ratio of -11.5 for cane and corn sugar and a ratio of -25.5 for mango fruit, she calculated that approximately half of the sugar had to come from a cane or corn source in order to lower the ratio of -25.5, which is the ratio normally found in mango fruit, to -18.7, which is the ratio found for the goods in issue.[18]

36. In her testimony, Ms. Smith stated that, if half of the sugar came from an additional source, then the other half had to come from a mango source. Since she had previously stated in her expert report that the total amount of sugar accounted for 12.4 percent of the goods in issue,[19] she concluded that 6.2 percent of the goods in issue comprised sugar from a mango source and that another 6.2 percent of the goods in issue comprised sugar from a cane or corn source. Then, by comparing the amount of sugar normally found in mango pulp/purée (she used a value of 15 percent based on the literature[20]) with the amount of sugar from mango fruit found in the goods in issue (i.e. 6.2 percent), she was able to determine that approximately 40 percent of the goods in issue consisted of mango pulp/purée, which is very close to the 37 percent juice content that is claimed on the label. On the basis of these results, she determined that approximately 50 percent of the goods in issue consisted of added water, with the other 50 percent consisting of mango pulp/purée, added sugar and small amounts of other ingredients. Thus, she concluded that her analysis was consistent with the order of predominance of the ingredients listed on the label for the goods in issue (i.e. water, mango juice nectar, sugar, etc.).

37. Regarding Dr. Marcone's conclusions, Ms. Smith stated that, in her view, the total amount of sugar and the specific ratios of one type of sugar to another are important in identifying a fruit only if there is no added sugar. She acknowledged that, if there was no added sugar, the results obtained by Dr. Marcone would be consistent with those for mango fruit. However, in her view, the presence of added sugar in the goods in issue results in conclusions that are quite different.

38. In his testimony, Dr. Marcone acknowledged that his expert report did not state that the sugar found in the goods in issue came only from mango fruit and agreed that, by performing a carbon isotope ratio analysis, the presence of added sugar could be detected.[21] Dr. Marcone also agreed that, if correct, the results from the carbon isotope ratio analysis obtained by Ms. Smith would indicate that approximately half of the sugar found in the goods in issue was from a cane or corn sugar source.[22] However, Dr. Marcone took

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17. The reference values for mango fruit and for cane and corn sugar were obtained from S Nagy and R. L. Wade, eds., *Methods to Detect Adulteration of Fruit Juice Beverages*, Vol. 1 (Auburndale, Florida: Agscience, Inc.) at 42, 43. These pages were attached to Ms. Smith's rebuttal report to Dr. Marcone's expert report. See Tribunal Exhibit AP-2006-040-44A.
18. This conclusion results from the fact that the ratio for the goods in issue is approximately halfway between the ratio for mango fruit and the ratio for cane and corn sugar. In other words, a ratio of -18.7 is approximately halfway between -11.5 and -25.5.
19. Expert report of Ms. Smith, Tribunal Exhibit AP-2006-040-23B at 1 of the laboratory report.
20. While Ms. Smith stated that, based on the literature, the sugar content for mango purée normally ranges from 15 percent to 20 percent, she did not provide any verifiable references for these figures. However, the Tribunal notes that, in his expert report, Dr. Marcone used similar reference values that ranged from approximately 15 percent to 17 percent and that these were obtained from peer-reviewed publications.
21. *Transcript of Public Hearing*, 27 November 2007, at 85, 86.
22. *Ibid*. at 68, 69.

issue with the reference value of -25.5 used by Ms. Smith for mango fruit. He explained that, because mango fruit is a biological compound, a range of reference values should have been used. He noted that the book from which Ms. Smith obtained the value had ranges of values for major commercial fruits, but not for mango fruit. Dr. Marcone was of the view that, by applying the range indicated for grape juice in this same book to the reference value for mango fruit, it could be concluded that no sugar was added or, alternatively, that a lot more sugar was added.

39. At the hearing, Ms. Smith testified that the reference values used for the carbon isotope ratio analysis were obtained from a book which compiled results from peer-reviewed journal articles and that the specific table from which the reference value for mango fruit was taken did not include ranges. However, she acknowledged that there is a range for mango fruit, but that, for convenience of space, it was not indicated in the book. In her opinion, fruits that have reference values in the -25 range are known as C3 plants and such plants have reference values that generally range from -22 to -30. According to Ms. Smith, even if it were assumed that the reference value for mango fruit was -22 instead of -25.5, the analyses would still result in a finding that significant amounts of sugar, and hence water, were added to the goods in issue.

40. The Tribunal notes that, for the most part, in the analyses performed by Dr. Marcone and Ms. Smith, raw fruit was used as a basis of comparison with the goods in issue. However, in some instances, Dr. Marcone used mango juice as a basis of comparison. While this may, at first glance, appear to be problematic, given that heading No. 20.08 requires a comparison with the fruit itself (or purée) and heading No. 20.09 requires a comparison with juice, both Dr. Marcone and Ms. Smith testified that, for purposes of analyzing such things as sugar content and titratable acidity, it made no real difference whether raw fruit or juice was used as a basis of comparison.[23] Dr. Marcone noted however that differences would exist with regard to other compositional elements of the raw fruit and juice. Given that the key evidence presented by both expert witnesses essentially involved comparisons of sugar types and levels in one form or another, the Tribunal is of the view that it should consider the analyses using both raw fruit (or purée) and juice as a basis of comparison to determine if water has been added to the goods in issue.

41. In the Tribunal's opinion, the evidence and testimony offered by Ms. Smith have made it quite clear that, in order to determine whether any water has been added to the goods in issue, it is necessary to first determine whether sugar has been added. While Dr. Marcone was of the view that the total amount of sugar found in the goods in issue was similar to the amount of sugar found in mango fruit, the Tribunal is not convinced that this is, in itself, sufficient to establish that the goods in issue are 100 percent fruit purée or juice. It can easily be seen, as indicated by the expert evidence, that, as long as water and sugar are added to a product in appropriate proportions, the total percentage of sugar in that product could always be made to approximate the percentage of sugar naturally found in another fruit or juice.

42. The Tribunal notes that both expert witnesses agreed that the presence of added sugar could be detected by performing a carbon isotope ratio analysis on the goods in issue. The Tribunal further notes that, while Dr. Marcone did not perform such a test, he sought to cast doubt on Ms. Smith's conclusions on the basis that the reference value of -25.5 used for mango fruit could vary within a range and that, if it were at the lowest end of that range, the conclusion would be that no sugar had been added.

43. The Tribunal is not persuaded by Dr. Marcone's assertions. In order to conclude that no sugar was added to the goods in issue, the reference value for mango fruit would have to be near -18.7 (i.e. the ratio obtained for the goods in issue), or approximately 7 below what is assumed to be the average reference value of -25.5. If this were true, it would imply that reference values for mango fruit could have a range

23. *Ibid*. at 109, 155.

of 14 (i.e. -25.5 ± 7). By consulting the book from which Ms. Smith obtained her reference values,[24] it can be seen that, for those fruits or juices that had a range indicated, the largest range found was for grape juice, and it was a range of 7. Applying such a range to mango fruit would result in reference values that could vary from -22 to -29 (i.e. -25.5 ± 3.5). This is essentially in agreement with Ms. Smith's view that mango fruit is a "C3" plant and that reference values for these types of plants are all within the -22 to -30 range. The Tribunal observes that Ms. Smith's view is supported by the fact that, for all fruits listed in the aforementioned book that had average reference values near -25, the indicated ranges were always between -22 and -30. Therefore, the Tribunal agrees that the lowest possible reference value that could have been used for mango fruit was -22.

44. Based on the evidence presented, the Tribunal is satisfied that, even if a reference value of -22 was used for mango fruit, it would nonetheless have led to a conclusion that a significant amount of sugar had been added to the goods in issue. The Tribunal is also satisfied that, on the basis of the evidence presented by Ms. Smith, the addition of a significant amount of sugar to the goods in issue, while preserving a total percentage of sugar that is similar to the percentage of sugar naturally found in mango fruit or juice, inevitably leads to a conclusion that the goods have been diluted by the addition of water.

45. This conclusion is consistent with the label on the goods in issue which, as indicated above, lists water as the first ingredient and sugar as the third ingredient, and also indicates that the product contains 37 percent, rather than 100 percent, juice. Although Sy Marketing claimed that the information on the label was incorrect, it did not submit any evidence from the manufacturer of the goods in issue to support this claim. The Tribunal considers that it would be very unlikely to have a label stating that a product contains 37 percent juice if it really contained 100 percent juice. In fact, Mr. Bush, who indicated that he is familiar with industry standards for fruit juices and nectars, testified that he had never seen a product that is 100 percent juice but that is labelled as something less than 100 percent juice. Therefore, based on the conclusion that sugar and water have been added, and based on the estimates provided by Ms. Smith as to the actual amounts of sugar and water that have been added, the information on the label concerning the ingredients and their order of predominance appears to be correct.

46. Having determined that the goods in issue contain a significant amount of added water and that the information on the label appears to be correct, the Tribunal will now determine in which heading the goods are to be classified.

Heading No. 20.09

47. Heading No. 20.09 covers "[f]ruit juices . . . unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter." In addition, the *Explanatory Notes* to heading No. 20.09 provide that ". . . 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**. . . ."

48. Therefore, in order to be classified in heading No. 20.09, the Tribunal believes that the goods in issue must be fruit juices to which no water has been added or a concentrated juice to which no more water than is necessary to reconstitute the original juice has been added.

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24. The Tribunal notes that the reference values were obtained from a book which contains a compilation of results gathered from peer-reviewed journal articles and not simply from a dictionary or encyclopaedia, as suggested by Sy Marketing.

49. On the basis of the evidence presented, the Tribunal concludes that the goods in issue have been produced from mango purée, not from mango juice. In its brief, Sy Marketing referred to mangoes being processed into a purée and, at the hearing, Ms. Smith stated that, in her view, the goods in issue had been produced from mango purée because that is the common form of mango that is processed into other products. According to her, this is due to the fact that, because mango fruit is so pulpy, it is not really economically feasible to produce a juice from it.

50. As indicated in *Excelsior*, the process to produce a purée involves homogenization of the whole fruit, less pits, cores and skin, whereas the process to produce a juice typically involves pressing the fruit to extract the liquid from the solid portion of the fruit.[25] In *Excelsior*, the Tribunal also stated that to extend the meaning of "juice" to products that are made by adding 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."[26] Because the Tribunal considers that the goods in issue have been produced with mango purée instead of mango juice, they cannot be classified in heading No. 20.09.

51. However, the Tribunal notes that, even if the goods in issue had been produced from mango juice,[27] the Tribunal would nonetheless have concluded, having regard to the *Explanatory Notes* to heading No. 20.09, that the addition of a significant quantity of water to the goods in issue has resulted in diluted products which have the character of beverages of heading No. 22.02 and, hence, that they are not classifiable in heading No. 20.09.

52. The Tribunal notes that, other than its submissions that any water added to the goods in issue during the manufacturing process was simply to restore the water content that was found in the natural fruit, Sy Marketing did not argue or submit evidence *per se* that the goods in issue were made from concentrate. The label on the product also states that it is "NOT from Concentrate". Consequently, the Tribunal does not consider that the evidence indicates that the goods in issue are made from concentrate and, hence, when having regard to the *Explanatory Notes* to heading No. 20.09, does not need to determine whether a greater quantity of water than is necessary to reconstitute the original natural juice has been added to a concentrated mango juice.

53. In light of the foregoing, the Tribunal finds that the goods in issue cannot be classified in heading No. 20.09.

Heading No. 20.08

54. Heading No. 20.08 covers "[f]ruit, 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." In addition, the *Explanatory Notes* to heading No. 20.08 provide that ". . . [w]hen rendered ready for direct consumption as beverages by [the] addition of a sufficient quantity of water or of sugar syrup, these products [i.e. whole fruits that are crushed and sterilized] fall in **heading 22.02.**"

25. See *Excelsior* at 8. The *Explanatory Notes* to heading No. 20.09 also provide that ". . . fruit and vegetable juices of this heading are generally obtained by pressing fresh, healthy and ripe fruit or vegetables. . . ."
26. See *Excelsior* at 9.
27. While Ms. Smith was of the view that the goods in issue had been produced from mango purée, she noted that there was a possibility that the products were made from mango juice. The Tribunal notes that, since mango fruit is pulpy, and can produce juices which appear thicker than juices obtained from other fruit, it may not always be possible to clearly distinguish between goods made from mango purée and goods made from mango juice. This is recognized by the *Explanatory Notes* to heading No. 20.09, which state the following: ". . . 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."

55. Therefore, in order to be classified in heading No. 20.08, the Tribunal believes that the goods in issue must be fruit purées (i.e. crushed whole fruits) which do not contain added water in a quantity sufficient to render them ready for direct consumption as beverages.

56. As indicated above, it appears that the goods in issue are more likely to have been produced from mango purée than from mango juice. It has also been established that a significant amount of water has been added to the goods in issue. Furthermore, it is clear that the goods in issue are meant to be directly consumed as beverages and can actually be consumed as such. This is obvious by looking at the packaging of the goods in issue and by examining the product itself by pouring it into a glass.

57. Thus, the remaining question that must be answered is whether it is the added water that has rendered the goods in issue ready for direct consumption as beverages or whether mango purée would still have been consumable as a beverage without the addition of water.

58. At the hearing, Dr. Marcone testified that, when mango fruit is initially made into a purée, it is a malleable mass that has a creamy consistency and that it is not really drinkable.[28] Dr. Marcone also explained that, once mango fruit is made into a purée, enzymes such as pectinase start to work faster than in the raw fruit to break down the purée and release water (i.e. to liquefy the purée). However, he cautioned that, while over time, mango purée could theoretically come close to being as thin as the goods in issue through the effect of the pectinase, there would be spoilage before it ever got to that point unless it was pasteurized. On the basis of the evidence, the Tribunal is of the view that the addition of a significant amount of water to the goods in issue was necessary to render them ready for direct consumption as beverages as contemplated by the *Explanatory Notes* to heading No. 20.08.

59. In light of the foregoing, and noting the fact that Sy Marketing did not maintain its position that, in the alternative, the goods in issue could be classified in heading No. 20.08, the Tribunal finds that the goods in issue cannot be classified in heading No. 20.08.

Heading No. 22.02

60. Having concluded that the products in issue are not classifiable in heading No. 20.08 or 20.09, the Tribunal must now look at the only other competing heading, which is heading No. 22.02. This heading covers "[w]aters, 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."

61. The *Explanatory Notes* to heading No. 22.02 read as follows:

> . . .
>
> (B) **Other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09**.
>
> This group includes, *inter alia* :
>
> (1) **Tamarind nectar rendered ready for consumption as a beverage** by the addition of water and sugar and straining.
>
> . . .
>
> This heading **does not include**:
>
> . . .
>
> (c) Fruit or vegetable juices, whether or not used as beverages (**heading 20.09**).
>
> . . .

28. *Transcript of Public Hearing*, 27 November 2007, at 44, 99.

62. The evidence indicates that the goods in issue consist of other non-alcoholic beverages, as contemplated by the *Explanatory Notes* to heading No. 22.02.[29] In addition, the *Explanatory Notes* to heading Nos. 20.08 and 20.09 essentially direct that products which result from the addition of water to fruit purées or juices, as the case may be, are to be classified in heading No. 22.02. Consequently, pursuant to Rule 1 of the *General Rules*, the Tribunal is of the view that the goods in issue are properly classified in heading No. 22.02.

63. The Tribunal must next determine in which subheading the goods should be classified. Heading No. 22.02 has two subheadings, No. 2202.10 ("Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured") and No. 2202.90 ("Other"). Based on the *Explanatory Notes* to heading No. 22.02, it is clear that subheading No. 2202.10 covers beverages such as mineral waters and colas, while subheading No. 2202.90 covers other non-alcoholic beverages such as nectars and beverages containing milk. Therefore, pursuant to Rule 6 of the *General Rules*, the appropriate subheading is No. 2202.90.

64. Finally, the Tribunal must determine under which tariff item the goods in issue should be classified. Subheading No. 2202.90 is subdivided into five first-level tariff items as follows: non-alcoholic beer, non-alcoholic wine, non-concentrated juices fortified with vitamins or minerals, beverages containing milk, and other. As the goods in issue clearly do not fall within any of the first four tariff items, they must be classified under the fifth one. Therefore, pursuant to Rule 1 of the *Canadian Rules*, the appropriate tariff item is No. 2202.90.90.

DECISION

65. For the foregoing reasons, the Tribunal finds that the goods in issue are properly classified under tariff item No. 2202.90.90 as other non-alcoholic beverages.

66. The appeal is therefore dismissed.

Ellen Fry
Ellen Fry
Presiding Member

29. Based on the wording of heading No. 22.02 and the *Explanatory Notes* to that heading, it is clear that fruit juices of heading No. 20.09 cannot be classified in heading No. 22.02. However, as the Tribunal has already determined that the goods in issue are not fruit juices of heading No. 20.09, the goods are not *prima facie* precluded from classification in heading No. 22.02.