CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, October 28, 1993

Appeal No. AP-91-133

IN THE MATTER OF an appeal heard on April 30, 1993, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated May 28, 1991, with respect to a request for a re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

NABISCO BRANDS LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

W. Roy Hines
W. Roy Hines
Presiding Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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UNOFFICIAL SUMMARY

Appeal No. AP-91-133

NABISCO BRANDS LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

The issue in this appeal is whether the fruit mixture described as Del Monte Tropical Fruit Salad is properly classified under tariff item No. 2008.92.10 of the Customs Tariff, as it contains pineapple, a fruit not listed within the nomenclature of that tariff item. The Deputy Minister of National Revenue for Customs and Excise maintained that the list was exhaustive and, as the imported goods included pineapple, they could not be classified thereunder. The appellant maintained that the tariff item applies to fruit mixtures that consist of at least two or more of the fruits specifically mentioned in the tariff item.

HELD: *The appeal is allowed. The Tribunal makes reference to the French nomenclature, which supports its conclusion that tariff item No. 2008.92.10 does not present an exhaustive list of fruits that could comprise the mixtures classified thereunder. In support of this, the Tribunal notes that citrus fruit mixtures are listed within a classification number found under this tariff item. As citrus fruits are not listed within the tariff item, yet apparently classified thereunder, so too could other fruits not listed be classified thereunder.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*April 30, 1993*
Date of Decision:	*October 28, 1993*
Tribunal Members:	*W. Roy Hines, Presiding Member* *Robert C. Coates, Q.C., Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Shane Brown, for the appellant* *Gilles Villeneuve, for the respondent*

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
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(613) 990-2452 Téléc. (613) 990-2439

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Appeal No. AP-91-133

NABISCO BRANDS LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member
ROBERT C. COATES, Q.C., Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) made under subsection 63(3) of the Act.

The goods in issue are Del Monte Tropical Fruit Salad, packaged in cans of 14 oz. (398 mL) containing pineapple, papaya, bananas, guava purée, pineapple juice, passion fruit juice, citric acid, ascorbic acid, and natural and simulated flavours. The issue in this appeal is whether the goods in issue, imported by the appellant from the Philippines on March 2, 1989, are properly classified under tariff item No. 2008.92.90 of Schedule I to the *Customs Tariff*[2] as determined by the Deputy Minister, or more properly classified under tariff item No. 2008.92.10, as claimed by the appellant. At the time of entry, the tariff nomenclature 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.*
2008.92	*--Mixtures*
2008.92.10	*---Consisting of [47 fruits] or yams*
2008.92.10.10	*-----Citrus fruit mixtures, in air-tight containers*
2008.92.90.00	*-----Other*

Tariff item No. 2008.92.10 was amended on April 9, 1992, by adding pineapple and citrus fruits to the list of fruits itemized thereunder.

More specifically, the Tribunal had to determine whether the fruit mixture in issue is more properly classified under tariff item No. 2008.92.10, as it contains pineapple, a fruit not listed within the nomenclature of that tariff item. The Deputy Minister maintained that the list was exhaustive and, as the imported goods included pineapple, they could not be classified

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

thereunder. The appellant maintained that this tariff item applies to fruit mixtures that consist of at least two or more of the fruits specifically mentioned in the tariff item.

Counsel for the appellant called two witnesses, both of whom were qualified as expert witnesses. Mr. Randy Weyersberg, a senior product manager employed with the appellant, affirmed that the appellant ceased importing Del Monte Tropical Fruit Salad in June 1991. He testified that the sensory effect (combined affect of taste, texture and appearance) provided the "essential character" of the fruit mixture, which is the characteristic that governs consumers' preference for goods of this kind.

The second witness, Mr. Richard Naruse, a food scientist who works for the appellant, referred to a number of confidential documents to explain, to the Tribunal, the nature and composition of the goods in issue. He also stated that the sensory effect of the fruit mixture provided the essential character of the goods, noting that the firm texture is provided by the pineapple and papaya chunks, and the soft texture by the bananas; the appearance is provided by the brighter orange-like yellow of the papaya, the soft yellow of the pineapple and the pale colour of the banana; and the flavour is obtained from solid pieces of banana and papaya combined with passion fruit juice and guava purée.

Mr. Naruse stated that, in his expert opinion, "the fruit components other than pineapple predominate in imparting all three aspects of essential character [to] the subject goods." He added that the papaya, bananas and guava purée represent about 53.9 percent of the total weight of the solid and purée fruit of the goods in issue. However, the weight of both pineapple solids and juice was the single largest component by weight in the final product.

In support of classification under tariff item No. 2008.92.10, counsel for the appellant submitted the following arguments. First, imports of the goods in issue, except for the entry at issue, were all classified under this tariff item without challenge by the Department of National Revenue (Revenue Canada) until February 1990. Second, the pre-Harmonized System cross-reference to the Harmonized Commodity Description and Coding System,[3] issued by Revenue Canada, identified only tariff item No. 2008.92.10 as a replacement for former tariff item 10609-1, which previously covered the goods in issue, and which provided for "Fruits, prepared, in air-tight cans or other air-tight containers, n.o.p. ... Of a class or kind not grown in Canada." Thus, it did not appear necessary to the appellant to seek a change in the wording of the new tariff item at the time of the tariff conversion. Finally, in October 1991, the appellant requested an amendment to the tariff item to rectify the omission of pineapple from the list of fruits in tariff item No. 2008.92.10, which was amended on April 9, 1992.

Counsel for the appellant argued that the amendments to tariff item No. 2008.92.10 were intended to clarify the classification of the goods in issue thereunder, even though, in his view, the goods were properly classified under this tariff item by virtue of either Rule 1 of the General Rules for the Interpretation of the Harmonized System[4] (the General Rules) or, alternatively, Rules 2 and 3 of the General Rules.

Counsel for the respondent argued that the tropical fruit salad cannot be classified under tariff item No. 2008.92.10 as it contained pineapple, which is not one of the tropical fruits listed in that tariff item. Moreover, pineapple is the dominant ingredient in the imported product, both

3. Customs Co-operation Council, 1st ed., Brussels, 1986.
4. *Ibid.*, Schedule I.

in terms of solids, and combined solids and liquids. Counsel argued that the use of the expression "[c]onsisting of," together with the list of tropical fruits found in the tariff item, clearly suggests that Parliament intended this classification to be restricted only to mixtures of the fruits specifically mentioned in the tariff item. In this regard, counsel argued that the expression "[c]onsisting of" implies a restrictive interpretation, such as "made up of" or "composed of," rather than a broader interpretation that might be associated with the expression "including."

In this connection, counsel for the respondent noted that the French nomenclature to tariff item No. 2008.92.10 uses the word "*[c]omprenant*," which in English means "including." With this apparent conflict, and since both versions of the law are equally authoritative, counsel suggested that, in interpreting bilingual statutes, one must refer to the intention of Parliament. He also noted that, according to Pierre-André Côté in his book Interprétation des lois,[5] the word "*comprenant*" can be understood, in English, to mean "include." Counsel for the respondent concluded that the English text best reflects the intention of Parliament because of the long enumeration of products in the tariff item, because the provision had to be amended in 1992 to include pineapple and citrus fruits, and because a separate provision is included within the tariff nomenclature for "other" mixtures of fruit.

The Tribunal has given careful consideration to the arguments put forward by both counsel in this case. The Tribunal does not find it necessary to go beyond Rule 1 of the General Rules in classifying the fruit mixture in issue, as it is a product which, by its nature and composition, is a "mixture" of fruits that is identified under subheading No. 2008.92. This subheading contains two tariff items of equal status, the issue being which tariff item more properly covers a mixture of fruits containing some pineapple.

While the Tribunal fully recognizes the position put forward by counsel for the respondent, it concludes that the goods in issue are more properly classified under tariff item No. 2008.92.10. As pointed out by counsel for the respondent, the French nomenclature uses the word "*comprenant*" (including). According to Côté, when a definition is introduced by the word "*comprend*" (includes), it is meant to be extensive or illustrative. On the other hand, the word "*signifie*" or "*désigne*" (means) is used to indicate an exhaustive definition.[6] Côté notes, however, that in some cases, an exhaustive meaning has been conferred on the word "*comprenant*" because of the context within which it was used or to take into account the intent of the legislator. Côté stresses the need to put a word within its context, since it may be necessary to deviate from the general meaning of a word to take into account the intent of the legislator. In the present case, the French version uses the word "*comprenant*" which, in the Tribunal's view, is not meant to be exhaustive.

The Tribunal is not convinced that Parliament intended tariff item No. 2008.92.10 to cover only mixtures of the fruits listed. For instance, reference to "citrus fruit mixtures" in a classification number found under that tariff item implies that combinations of fruits other than those listed must have been contemplated, as the tariff item does not list citrus fruits. The Tribunal is of the view that the provision must be interpreted having regard to the context within which it is used and the intention of Parliament. The Tribunal believes the intent was to cover all of the goods covered by former tariff item 10609-1, i.e. fruits of a kind not grown in Canada, which obviously would include pineapple and citrus fruits. Whether pineapple and citrus fruits were unintentionally omitted is irrelevant to the classification decision in this

5. 2nd ed., (Montreal: Yvon Blais, 1990).
6. *Ibid.* at 57.

instance, although the subsequent amendment to the tariff item would appear to support the Tribunal's view as to the original intention of Parliament. Lastly, the goods in issue consisted of three of the fruit solids specifically named in tariff item No. 2008.92.10. These fruits account for 53.9 percent of the total weight of the solids and purée fruit in the imported goods and, as such, qualify for classification under this tariff item.

Accordingly, the appeal is allowed.

W. Roy Hines
W. Roy Hines
Presiding Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Lise Bergeron
Lise Bergeron
Member