CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, June 8, 1995

Appeal No. AP-94-102

IN THE MATTER OF an appeal heard on November 21, 1994, 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 dated March 29, 1994, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

I.D. FOODS SUPERIOR CORP. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

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

Raynald Guay
Raynald Guay
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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

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

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UNOFFICIAL SUMMARY

Appeal No. AP-94-102

I.D. FOODS SUPERIOR CORP. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether sparkling apple juice is properly classified under tariff item No. 2202.90.90 as other non-alcoholic beverages, not including fruit juices of heading No. 20.09, as determined by the respondent, or should be classified under tariff item No. 2009.70.99 as other unfermented fruit juices, as claimed by the appellant.

HELD: *The appeal is dismissed. The Tribunal is of the view that the level of carbonation in the juice in issue is above the threshold for carbonation of fruit juices classifiable in heading No. 20.09. As a result, the juice in issue is properly classified under tariff item No. 2202.90.90.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*November 21, 1994*
Date of Decision:	*June 8, 1995*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *Raynald Guay, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Heather A. Grant*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*George Q. Carroll, for the appellant* *Josephine A.L. Palumbo, for the respondent*

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

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-102

I.D. FOODS SUPERIOR CORP. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
RAYNALD GUAY, 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 dated March 29, 1994, made under section 63 of the Act.

The issue in this appeal is whether sparkling apple juice is properly classified under tariff item No. 2202.90.90 of Schedule I to the *Customs Tariff*[2] as other non-alcoholic beverages, not including fruit juices of heading No. 20.09, as determined by the respondent, or should be classified under tariff item No. 2009.70.99 as other unfermented fruit juices, as claimed by the appellant. The juice in issue is packaged in a green, see-through bottle, similar in shape and size to a champagne bottle. The bottle has two labels: a main product label, which includes a list of the ingredients, and a second label around the neck of the bottle. The bottle cap is covered with a white foil wrap which extends down the neck of the bottle approximately 7 cm. For the purposes of this appeal, the relevant tariff nomenclature reads 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.*
2009.70	*-Apple juice*
2209.70.99	*----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 No. 20.09.*
2202.90	*-Other*
2202.90.90	*---Other*

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

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Mr. Stephen C. Martinelli, President and General Manager of S. Martinelli & Company (Martinelli), was the first witness to testify on behalf of the appellant. Martinelli is the producer of the juice in issue. Mr. Martinelli described the juice as pasteurized, undiluted, 100 percent apple juice pressed from fresh apples. Moreover, it contains no concentrate, no added water, no sweeteners, no flavourings and no preservatives. Mr. Martinelli further emphasized that the juice is unfermented and contains no added spirit. He stated that the juice is identical to a non-sparkling apple juice produced by Martinelli except for the presence of added vitamin C and approximately 3.4 volumes[3] of carbonation after pasteurization. According to Mr. Martinelli, vitamin C is a natural constituent of apple juice, which is added for the purposes of de-oxidation. In reference to a laboratory report, Mr. Martinelli stated that the level of carbonation in competing brands of sparkling apple juice ranges between 3.1 and 5.8 volumes. Therefore, in his view, the level of carbonation in the juice in issue is well within the range of normal levels of carbonation in competing brands of sparkling apple juice.

Mr. Martinelli stated that the carbonation does not have a preservative effect and does not prevent fermentation in the juice in issue. In fact, he emphasized that no amount of carbonation alone could prevent fermentation in the juice. Mr. Martinelli also stated that the carbonation does not cause dilution or alter the distinguishing character or composition of the juice. He stated that the carbonation only adds a festive touch to the juice, in that when it is poured, it bubbles and has a tingling effect on the tongue when it is consumed.

Mr. Martinelli added that there is a difference between fruit juices and carbonated beverages and that the juice in issue cannot be considered a carbonated beverage because it is not diluted by the carbon dioxide. Moreover, the carbonation does not react with the constituents of the juice.

Further to questions from the Tribunal, Mr. Martinelli testified that carbon dioxide is added to apple juice in order to offer a "sparkling" apple juice to consumers, in addition to Martinelli's non-carbonated version. He further stated that non-carbonated apple juice may contain a trace of carbon dioxide, but that, if so, the amount would likely be unmeasurable. Furthermore, some companies may add a very low level of carbonation during processing.

The appellant's representative called Mr. Everett C. Golden, Vice-President of Otis McAllister, Inc., as the appellant's second witness. Otis McAllister, Inc. is the worldwide sales agent for Martinelli's apple juice. In this capacity, its responsibilities include handling the label clearance and product clearance with the customs authorities in each country, as well as with the food and drug authorities. Mr. Golden stated that the juice in issue is labelled "apple juice" in consideration of Canada's labelling laws and the Codex Alimentarius,[4] of which Canada is a signatory member. According to Mr. Golden, there are three principal characteristics of the juice which are emphasized for the purposes of sale: first, the juice is pure juice made from fresh apples; second, no preservatives or sweeteners are added; and third, the juice is effervescent, which adds a festive touch to the juice.

During cross-examination, Mr. Golden admitted that, in promoting the juice in issue, displays are often used for three or four months during the holiday season, as sparkling apple juice is a more seasonal

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3. Mr. Martinelli defined a volume as "the amount of carbon dioxide that could be dissolved into [a liquid] at [an] atmospheric pressure of 15 pounds per square inch of pressure."

4. Food and Agriculture Organization of the United Nations, World Health Organization, 2nd ed., Rome, 1992.

item than Martinelli's non-carbonated apple juice. Further to questions from the Tribunal, Mr. Golden stated that, if his company were to export Martinelli's non-carbonated apple juice to Canada, the only changes required to the label would be the deletion of the word "sparkling" from the name of the juice and of the words "carbon dioxide" from the list of ingredients.

The third witness appearing on behalf of the appellant was Mr. James Crabb, Sales Manager for Martinelli. Mr. Crabb testified in respect of consumer preference for the juice in issue. According to Mr. Crabb, consumers are willing to pay a premium price for juice squeezed fresh from apples as opposed to juice prepared from concentrate.

Ms. Kathleen Smith, a chemist with the Organics/Food Laboratory of the Laboratory and Scientific Services Directorate of the Department of National Revenue, appeared as an expert witness for the respondent in the area of chemical analysis. Ms. Smith testified that, when carbon dioxide is dissolved in juice, there is a corresponding increase in the amount of carbonic acid in the juice. She acknowledged that, as a result of her analysis, she had no doubt that the juice in issue was produced from pure apple juice. However, Ms. Smith emphasized that, at the time of importation, the juice constitutes pure apple juice which has been carbonated. Ms. Smith was unaware of a distinction between fruit drink and fruit juice in the sense that the former is a beverage while the latter is not. During cross-examination, Ms. Smith acknowledged that she was unaware of what would be considered a "normal" level of carbonation in a fruit juice.

The appellant's representative argued that the respondent misapplied the General Rules for the Interpretation of the Harmonized System[5] (the General Rules). Specifically, he argued that the respondent only considered Rules 1 and 6 and not Rules 2 through 5, as required. The representative further emphasized that consideration may only be given to the texts of the headings and Section and Chapter Notes for the purposes of classification at the 4-digit level, to the exclusion of the Explanatory Notes to the Harmonized Commodity Description and Coding System[6] (the Explanatory Notes).

The appellant's representative submitted that, as there is a conflict between the appellant's opinion and that of the respondent as to the proper classification of the juice in issue at the 4-digit level, consideration must be given to Rule 3 of the General Rules. The representative argued that, in applying Rule 3 (a), the juice can only be classified in heading No. 20.09, as it provides the more specific description of the juice as compared with heading No. 22.02. In the alternative, should Rule 3 (a) not be applicable, the application of Rule 3 (b) still requires that the juice be classified in heading No. 20.09, as the essential character of the juice remains defined by its apple juice content and not its carbonation. The representative submitted that, based on the foregoing arguments, the juice should be classified in heading No. 20.09.

In considering the classification of the juice in issue at the 6- and 8-digit levels, the appellant's representative submitted that the Explanatory Notes to Chapter 22 state that products covered by that Chapter are quite distinct from the foodstuffs covered by the preceding chapters of Schedule I to the *Customs Tariff*. In the representative's view, the chief distinction is that the products of heading No. 22.02 are diluted, or mostly composed of water, while the juice in issue constitutes pure, undiluted apple juice. In support of this view, the representative referred to a statement in the Explanatory Notes which provides that Chapter 22 does not include "[f]ruit or vegetable juices, whether or not used as beverages."

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5. *Supra*, note 2, Schedule I.
6. Customs Co-operation Council, 1st ed., Brussels, 1986.

In reference to the Explanatory Notes to Chapter 22, the appellant's representative submitted that goods of heading No. 22.02 are "beverages" or artificial products, such as Coca-Cola or lemonade. In his opinion, the artificial nature of products covered by heading No. 22.02 makes them entirely distinct from the goods of Chapter 20. In his view, this distinction indicates a deliberate decision on the part of the framers of the Harmonized Commodity Description and Coding System[7] to separate goods classifiable as foodstuffs from those derived from a mixture of various liquids and chemicals, which do not retain the original character of any of their ingredients as a single entity. The representative submitted that the addition of carbon dioxide to apple juice does not alter the essential character of any of the natural constituents of the juice. Moreover, it does not constitute a fixed constituent of the juice, as it dissipates on opening.

In the opinion of the appellant's representative, the appellant's method of classification provides a more specific classification of the product than the respondent's method, in that the juice in issue will be classified as "[a]pple juice" in subheading No. 2009.70 and as "[o]ther" under tariff item No. 2009.70.99 at the 8-digit level.

Counsel for the respondent argued that, in order for the appellant to be successful in its appeal, it must establish that the respondent's classification is incorrect. Counsel submitted that the appellant has failed to meet this onus. Counsel contended that, for classification purposes, regard must be had to the Explanatory Notes in interpreting headings and subheadings of Schedule I to the *Customs Tariff*. Furthermore, goods must be classified according to their physical characteristics at the time of importation.

Counsel for the respondent argued that the juice in issue cannot be classified in heading No. 20.09 because the addition of carbon dioxide transforms the character of the juice from pure apple juice into sparkling apple juice. Although the Explanatory Notes provide for the addition of certain substances, including carbon dioxide, provided the substance does not alter the original character of the fruit juice, the addition of carbon dioxide will not affect the classification of goods in that heading. Counsel argued that, in this case, the addition of carbon dioxide to apple juice alters the original character of the juice, in particular the character of the juice at the time of importation. Furthermore, the carbon dioxide is added to the juice in order to change its taste and not to prevent fermentation, which is identified as the purpose for the carbon dioxide being added to the juice.

In reference to the Explanatory Notes to heading No. 20.09, counsel for the respondent argued that the heading expressly excludes "aerated fruit juices," which counsel submitted applies to the juice in issue. In sum, counsel argued that the bottling, packaging, pricing and effervescent nature of the juice clearly establish that the carbonation changes the intrinsic character of the juice from that of pure apple juice to a product classifiable in heading No. 22.02.

In rebuttal, the appellant's representative argued that "aerated fruit juices" are not excluded from heading No. 20.09, only those with above normal carbonation, which, he submitted, does not apply to the juice in issue. In the representative's view, the level of carbonation in the juice is such that it will not prevent fermentation, which, he suggested, is meant by the reference to normal levels in the Explanatory Notes. Therefore, the juice in issue is not excluded from classification in heading No. 20.09.

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

As stated by the Tribunal in *Garlock of Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,[8] "[t]he nomenclature of Schedule I to the *Customs Tariff* is organized into a hierarchical system, and classification of goods within the nomenclature is accomplished through a systematic process.[9]" Accordingly, the juice in issue must be classified at the 4-digit level before consideration of the classification of the juice at the 6- and 8-digit levels. Section 10 of the *Customs Tariff* provides that reference shall be made to the General Rules in classifying goods. Rule 1 of the General Rules provides that 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]."

Section 11 of the *Customs Tariff* further provides that "[i]n interpreting the headings and subheadings in Schedule I, regard shall be had to ... the *Explanatory Notes to the Harmonized Commodity Description and Coding System*." Accordingly, in considering the terms of the headings, the Tribunal is required to have regard to the Explanatory Notes, contrary to the assertions of the appellant's representative. Furthermore, if the juice in issue can be classified at the heading level pursuant to Rule 1 of the General Rules and the Explanatory Notes, there is no need for the Tribunal to go beyond Rule 1 for purposes of classification.[10]

The Tribunal recognizes that "fruit juices" are named goods in heading No. 20.09. However, the Tribunal further recognizes that, at the time of importation, the juice in issue is not just a fruit juice. Rather, it is a sparkling fruit juice, containing added carbon dioxide. Upon consideration of the Explanatory Notes to heading No. 20.09, the Tribunal noticed the statement that reads as follows: "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 [from heading No. 20.09] (heading 22.02)."

In the Tribunal's view, this phrase suggests that a distinction is made between non-carbonated and carbonated or "aerated" fruit juices. In other words, aerated fruit juices, which the Tribunal considers to be fruit juices containing a greater degree of carbon dioxide than is normally present in juices treated with carbon dioxide, are intended to be excluded from heading No. 20.09 and classified in heading No. 22.02. In the Tribunal's view, the reference to "treated" refers to the addition of carbon dioxide in order to preserve the juice or prevent fermentation, as provided by the Explanatory Notes to that heading, which addition will not exclude the juice from classification in heading No. 20.09, provided the juice retains its original character.

The Tribunal accepts the testimony of Mr. Martinelli that carbon dioxide is added to produce a "sparkling" or bubbly apple juice and not to preserve the juice nor prevent it from fermenting. Furthermore, based on Mr. Martinelli's testimony, the Tribunal accepts the fact that the volume of carbon dioxide added to the juice in issue cannot prevent fermentation in the juice.

However, the Tribunal does not accept that, where carbon dioxide is added for a purpose other than to preserve the juice or prevent fermentation, the juice remains classifiable in heading No. 20.09 regardless

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8. Appeal No. AP-93-035, May 3, 1994.
9. *Ibid.* at 5.
10. This principle is affirmed in the Tribunal's recent decision in *Canper Industrial Products Ltd. v. The Deputy Minister of National Revenue*, Appeal No. AP-94-034, January 24, 1995.

of the amount of added carbon dioxide. In the Tribunal's view, the acceptable level of carbon dioxide for juice to be classifiable in heading No. 20.09 is linked to the level normally present in juice "treated" with carbon dioxide. Accordingly, in order for juice to be classified in heading No. 20.09, the level of carbonation must be lower than that threshold.

Even though Mr. Martinelli testified that no amount of carbonation will preserve the juice or prevent fermentation, the Tribunal is not prepared to rule out the possibility that some juice classifiable in heading No. 20.09 may be treated with a certain amount of carbon dioxide, either to preserve it or to prevent fermentation under circumstances peculiar to the production and sale of that particular juice. Where an amount of carbon dioxide greater than normally present in juices treated with such a product is added, the juice is distinguishable from a non-carbonated juice on that basis and becomes an "aerated" fruit juice which is classifiable in heading No. 22.02.

In the Tribunal's view, in producing the juice in issue, non-carbonated apple juice is transformed from a fruit juice of heading No. 20.09 into an "aerated" fruit juice because of the level of carbon dioxide present in the juice. As a result, the juice is classifiable in heading No. 22.02. The Tribunal bases this view primarily on the fact that the carbonation in the juice gives it an effervescence which was intended to distinguish it from a non-carbonated juice and has succeeded in doing so. Therefore, the Tribunal is of the view that the juice was meant to be excluded from heading No. 20.09 as an aerated fruit juice.

With respect to the significance of the carbonation in the juice in issue, the Tribunal was influenced by the fact that the witnesses agreed that the carbonation gives the juice a bubbly, festive touch. Moreover, the Tribunal recognizes that it is this particular feature which is highlighted by the packaging of the juice and constitutes a principal selling feature of the juice. The packaging invokes a natural association with champagne or sparkling wine which is generally consumed on "festive" occasions. Mr. Golden also acknowledged that special displays are used during the holiday season, as sparkling apple juice is a more seasonal juice than Martinelli's non-carbonated apple juice. The Tribunal is of the view that it is not relevant to classification that the carbonation does not dilute the apple juice.

Since the Tribunal has found that the juice in issue is not a fruit juice of heading No. 20.09, it follows that it is a non-alcoholic beverage classifiable in heading No. 22.02, as directed by the Explanatory Notes to heading No. 20.09. Heading No. 22.02 specifically provides for "other non-alcoholic beverages, not including fruit ... juices of heading No. 20.09." Furthermore, the Tribunal is of the view that the wording of this heading suggests that fruit juices classifiable in heading No. 20.09 may be considered as "other non-alcoholic beverages" and would, therefore, be classifiable in heading No. 22.02, except for the fact that they are specifically excluded from such by the terms of heading No. 22.02.

The Tribunal considered the arguments of the appellant's representative with respect to the meaning of the term "beverage." Although the Tribunal recognizes that there may be an industry definition which limits the meaning of the term to artificial or diluted products, the Tribunal does not believe that it ought to apply such a narrow and restrictive meaning to the term in this case for the purposes of classifying the juice in issue. In the Tribunal's view, the term "beverage" is an ordinary word, which is used in everyday conversation to mean a "drink," as supported by dictionary definitions of the term, i.e. "a liquid used or prepared for drinking. *Examples: milk, tea, coffee, beer, and wine*[11]" and "any potable liquid, esp. one other

11. Gage Canadian Dictionary (Toronto: Gage Publishing, 1983) at 110.

than water, as tea, coffee, beer, or milk.[12]" Therefore, in the Tribunal's view, the term "beverage" ought to be interpreted in its grammatical and ordinary sense.

Given the Tribunal's finding that the juice in issue is classifiable in heading No. 22.02 as a "non-alcoholic beverage," the Tribunal further finds that the juice in issue is properly classified under tariff item No. 2202.90.90.

Accordingly, the appeal is dismissed.

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

Raynald Guay
Raynald Guay
Member

Lise Bergeron
Lise Bergeron
Member

12. The Random House Dictionary of the English Language, 2nd ed. (New York: Random House, 1987) at 201.