CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, June 20, 1995

Appeal Nos. AP-94-121 and AP-94-122

IN THE MATTER OF appeals heard on December 14, 1994, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated April 21 and 22, 1994, with respect to requests for re-determination under to section 63 of the *Customs Act*.

BETWEEN

PEPSI-COLA CANADA LTD. AND
PEPSI-COLA CANADA BEVERAGES (WEST) LTD. **Appellants**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

AND

COCA-COLA BOTTLING LTD. **Intervener**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Raynald Guay
Raynald Guay
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-94-121 and AP-94-122

PEPSI-COLA CANADA LTD. AND PEPSI-COLA CANADA BEVERAGES (WEST) LTD. **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

COCA-COLA BOTTLING LTD. **Intervener**

The appellants are importers of a bottled iced tea product known as "Lipton Original Real Brewed Iced Tea." The issue in these appeals is whether the iced tea in issue is properly classified under tariff item No. 2202.90.90 as other waters and other non-alcoholic beverages, as determined by the respondent, or should be classified under tariff item No. 2101.20.00 as preparations with a basis of tea, as claimed by the appellants.

HELD: *The appeals are dismissed. The iced tea in issue, as a non-alcoholic beverage, is properly classified under tariff item No. 2202.90.90.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*December 14, 1994*
Date of Decision:	*June 20, 1995*
Tribunal Members:	*Charles A. Gracey, Presiding Member* *Anthony T. Eyton, Member* *Raynald Guay, Member*
Counsel for the Tribunal:	*Robert Desjardins*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Riyaz Dattu, for the appellants* *Ian McCowan, for the respondent* *G.P. (Patt) MacPherson, for the intervener*

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-94-121 and AP-94-122

PEPSI-COLA CANADA LTD. AND PEPSI-COLA CANADA BEVERAGES (WEST) LTD. **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

COCA-COLA BOTTLING LTD. **Intervener**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
ANTHONY T. EYTON, Member
RAYNALD GUAY, Member

REASONS FOR DECISION

These are appeals under section 67 of the *Customs Act*[1] (the Act) from two decisions of the Deputy Minister of National Revenue made under section 63 of the Act.

The product in issue is bottled iced tea known as "Lipton Original Real Brewed Iced Tea." The issue in these appeals is whether the iced tea in issue is properly classified under tariff item No. 2202.90.90 of Schedule I to the *Customs Tariff*[2] as other waters and other non-alcoholic beverages, as determined by the respondent, or should be classified under tariff item No. 2101.20.00 as preparations with a basis of tea, as claimed by the appellants.

The appellants are importers of bottled iced tea. Mr. Peter F. Goggi, Director of Materials Planning and Tea Buying for Thomas J. Lipton, Inc. (Lipton), appeared as a witness for the appellants. As indicated to the Tribunal by Mr. Goggi, Lipton has long been involved in the tea business. Mr. Goggi established his broad knowledge of the tea business by underlining the various positions that he has held with Lipton, such as research chemist, tea taster and manager of production. In particular, the Tribunal found interesting his overview of the long history of tea and of the various steps involved in the production of tea (from the plucking of tea on the plantation to the packing of tea). In the course of his testimony, Mr. Goggi indicated that water was one of the best agents for extracting the numerous solids from the tea leaves. Thus, many compounds and substances are released from the tea leaves during the brewing process. Mr. Goggi readily conceded that the resulting preparation was a beverage.

Mr. Goggi also outlined the history of iced tea. It first appeared in the United States in 1904 at the St. Louis World Fair. Hot weather caused poor sales of hot tea. A tea vendor poured the hot beverage over

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

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ice for sale to consumers, and, according to Mr. Goggi, this beverage became a hit. Iced tea drinking has been an American tradition ever since. Mr. Goggi noted that iced tea is not a very popular beverage elsewhere in the world.

Bottled iced tea, according to Mr. Goggi, was first produced in 1992. The production process consists of: (1) pouring hot water over a blend of tea leaves to extract the tea; (2) adding to the tea any sweeteners, flavours or other ingredients; and (3) bottling the resulting beverage. In launching this product, Lipton's ultimate goal was to match the at-home brewed taste of iced tea and to make it available to customers in convenient locations (e.g. convenience stores, grocery stores, gas stations, etc.). For Lipton, the typical purchaser of this convenience tea tends to be a male in his teens up to his late twenties.

Part of Mr. Goggi's testimony dealt with a description of instant tea and a comparison of that product with the iced tea in issue. Instant tea, according to Mr. Goggi, is produced by adding boiling water to dried tea solids (either tea powder or crystals) to form a beverage. In Mr. Goggi's view, this would be a beverage based on a preparation of instant tea. By contrast, the iced tea in issue is produced in the traditional manner, i.e. by a brewing process using tea rather than dried tea solids. Mr. Goggi described the iced tea in issue as "preparations with a basis of tea."

Finally, Mr. Goggi rejected the suggestion that the iced tea in issue could be considered as a flavoured water on the basis that the brewing process did much more than merely add flavour to water. In this respect, he referred to the oils, the aroma compounds, the flavour compounds, the polyphenols, the tannins and the other compounds that are released into the beverage during the brewing process.

During cross-examination, Mr. Goggi conceded that the iced tea in issue contains more than 80 percent water. He also agreed with counsel for the respondent that the iced tea in issue is basically marketed as a thirst-quenching beverage. Mr. Goggi also agreed with counsel that the iced tea in issue, in common trade parlance, would be known as a beverage.

Mr. Goggi was also cross-examined by counsel for Coca-Cola Bottling Ltd., the intervener in these appeals. To the question as to whether two bottled products, "Lipton Original Real Brewed Iced Tea" and "Nestea," both with natural lemon flavour, competed in the marketplace with canned "Lipton Brisk Iced Tea" and canned "Nestea," Mr. Goggi answered in the affirmative. However, he added that there were also differences. He noted that cans tend to be more commonly found in grocery stores, whereas bottles tend to be more commonly found in convenience stores and refrigerated vending machines. Finally, Mr. Goggi said that he did not bring with him any manufacturing reports in which the iced tea in issue would be identified as "preparations with a basis of tea" and agreed with counsel for the intervener that such an expression was absent from the marketing process outlined in the course of his testimony.

In argument, counsel for the appellants started out by noting that the word "tea" includes, by definition, the tea beverage. He contended that the iced tea in issue is clearly tea in a bottle and that the manner in which the tea is contained cannot affect the classification of this product. In his view, the iced tea in issue is a portable form of tea. He also submitted that the word "preparation" is broad enough in scope to cover the iced tea in issue. In his view, no dictionary definitions were adduced before the Tribunal to indicate that the word "preparation" had to be confined essentially to food or solid products. He also referred to Mr. Goggi's evidence that water is necessary to make a preparation with a basis of tea. In addition,

he mentioned the Explanatory Notes to the Harmonized Commodity Description and Coding System[3] (the Explanatory Notes). With respect to Note 5(d) of the Explanatory Notes to heading No. 21.01, counsel argued essentially that this note did not have the same force as Section Notes or Chapter Notes.

Conceding that the iced tea in issue may also, *prima facie*, be described in tariff item No. 2202.90.90, counsel for the appellants raised, in the appellants' brief, the question of the applicability of Rule 3 (a) or (b) of the General Rules for the Interpretation of the Harmonized System[4] (the General Rules). Thus, he contended that tariff item No. 2101.20.00 provided the most specific description of the iced tea in issue. Should the need to proceed to Rule 3 (b) of the General Rules arise, added counsel, it would be necessary to look at the product on the basis of the essential character of such product. In his view, this essential character is tea or tea extracts, since the iced tea in issue is commercially known as a product of the tea industry. Counsel also made clear that Rule 1 of the General Rules was sufficient to dispose of these appeals. In his view, if the iced tea in issue is found to be a preparation with a basis of tea, this conclusion would take precedence over a residual category expressed in terms of "other non-alcoholic beverages."

Counsel for the respondent first submitted that, under section 11 of the *Customs Tariff*, it is mandatory that regard be had to the Explanatory Notes in interpreting the headings of Schedule I to the *Customs Tariff*. Then, referring to Note 5(d) of the Explanatory Notes to heading No. 21.01, he pointed out that this heading does not include goods of Chapter 22. Thus, given Note 5(d) of the Explanatory Notes, the iced tea in issue must be first considered in Chapter 22. Only if it does not fall in that chapter does it qualify for consideration of classification in heading No. 21.01. Second, counsel submitted that the iced tea in issue could be classified by applying Rule 1 of the General Rules. In this connection, he noted that all parties were in agreement that the iced tea in issue constituted a non-alcoholic beverage. In counsel's view, this is determinative of these appeals, and there is no need to proceed to either Rule 2 or 3 of the General Rules. In the alternative, given the broad meaning of the word "preparations," counsel argued that the word "beverages" was, in fact, more precise and more specific than the expression "preparations with a basis of tea." Furthermore, he submitted that water was the essential character of the iced tea in issue.

Counsel for the intervener supported the respondent's position. Furthermore, as pointed out in the respondent's brief and during argument, there are various Explanatory Notes that indicate that specific beverage precursors are no longer covered by their home chapters once they are transformed into beverages ready for consumption and that, on reaching that state, they are covered by Chapter 22. On the other hand, there does not appear to be a single reference in the Explanatory Notes of a ready-to-drink beverage in Chapter 21. It was also argued that the inappropriateness of classifying a beverage in Chapter 21 is supported, in a practical sense, by the fact that the units of measure prescribed for the tariff items or classification numbers of Chapter 21 are generally kilograms and not litres (the sole exceptions being certain fortified juice concentrates in heading No. 21.06).

As stated above, the issue in these appeals is whether the iced tea in issue is properly classified under tariff item No. 2202.90.90 as other waters and other non-alcoholic beverages, as determined by the respondent, or should be classified under tariff item No. 2101.20.00 as preparations with a basis of tea, as claimed by the appellants. Rule 1 of the General Rules, to which the parties have referred, states that

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

classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. In addition, section 11 of the *Customs Tariff* requires that regard shall be had to any relevant Explanatory Notes. As stated in *York Barbell Co. Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*[5] and in other decisions, most recently in *Narco Canada Inc., Div. of North American Refractories Co. and North American Refractories Co. v. The Deputy Minister of National Revenue*,[6] this section makes it mandatory for the Tribunal to have regard to the Explanatory Notes.

Before going any further, the Tribunal duly notes that all parties agree that the iced tea in issue is a non-alcoholic beverage. In this connection, the evidence adduced before the Tribunal shows that this beverage, containing more than 80 percent water, is marketed as a thirst-quenching beverage. Bottled iced tea can be found at various outlets, such as convenience stores and gas stations, and is normally refrigerated so that it is ready to drink. This beverage is aimed at a particular market, namely, young customers. The purchaser of convenience tea, such as the iced tea in issue, tends to be a male in his teens up to his late twenties. The Tribunal also notes that the iced tea in issue would be known, in common trade parlance, as a beverage.

The Tribunal has had regard to the relevant Explanatory Notes, in particular Notes 4 and 5(d) of the Explanatory Notes to heading No. 21.01. Thus, Note 4 provides two examples of "[p]reparations with a basis of coffee, tea or maté." These are "coffee pastes" and "tea preparations consisting of a mixture of tea, milk powder and sugar." The Tribunal acknowledges that these examples are not exhaustive. Nonetheless, in the Tribunal's view, neither of these examples would suggest a ready-to-drink beverage. On the same point, Note 5 of the Explanatory Notes to heading No. 21.01 is also instructive as to the actual scope of that heading. It refers to "[r]oasted chicory and other roasted coffee substitutes and extracts, essences and concentrates thereof."

This being said, in the Tribunal's view, the fact that the Explanatory Notes unambiguously state that heading No. 21.01 does not cover "[p]roducts of Chapter 22" is most important. As rightly argued by counsel for the respondent, for the appellants to succeed, a determination that the iced tea in issue does not fall in Chapter 22 must be made. In other words, it must be determined that bottled iced tea is not a non-alcoholic beverage. As stated earlier, it is clear, on the basis of the evidence before the Tribunal, that the iced tea in issue does constitute a non-alcoholic beverage. The Tribunal agrees with counsel for the respondent that this is determinative of both appeals and that the Explanatory Notes remove the iced tea in issue from the classification proposed by the appellants. To accept the classification proposed by the appellants would render the Explanatory Notes meaningless.

In addition to the foregoing, the Tribunal observes that the Explanatory Notes to Chapter 22 clearly indicate that "[t]he products of this Chapter constitute a group quite distinct from the foodstuffs covered by the preceding Chapters of the Nomenclature" and include, *inter alia*, "[w]ater and other non-alcoholic beverages and ice." Incidentally, a close review of the group of headings in Chapter 22 (heading Nos. 22.01 to 22.06) would suggest that all ready-to-drink beverages, except the milk of Chapter 4 and the fruit and vegetable juices of Chapter 20, whether alcoholic or non-alcoholic, are to be classified within this specific chapter. Again, as there is no doubt that the iced tea in issue is a non-alcoholic beverage, the Explanatory

5. Canadian International Trade Tribunal, 5 T.C.T. 1150, Appeal No. AP-91-131, March 16, 1992.
6. Canadian International Trade Tribunal, Appeal Nos. AP-94-016 and AP-94-109, December 7, 1994.

Notes to Chapter 22 clearly suggest that heading No. 22.01 is the only appropriate heading for the iced tea in issue. There is no necessity to proceed beyond Rule 1 of the General Rules to determine the proper classification in the present appeals.

In light of the foregoing, the appeals are dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Raynald Guay
Raynald Guay
Member