

Ottawa, Thursday, January 25, 1996

Appeal No. AP-94-215

IN THE MATTER OF an appeal heard on August 16, 1995,
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 July 11 and 12, 1994, with respect to a
request for re-determination under section 63 of the *Customs Act*.

BETWEEN

THE PERRIER GROUP OF CANADA LTD.

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

Lyle M. Russell

Lyle M. Russell
Member

Anita Szlajak

Anita Szlajak
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-215

THE PERRIER GROUP OF CANADA LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The issue in this appeal is whether Perrier carbonated natural mineral waters with natural lemon or lime flavour, sold in bottles or cans, imported into Canada by the appellant between August 10 and September 14, 1992, are properly classified under tariff item No. 2202.10.00, as determined by the respondent, or should be classified under classification No. 2201.10.00.90, as claimed by the appellant.

HELD: *The appeal is dismissed. In the Tribunal's view, the evidence shows that the goods in issue are flavoured. They have an aroma or smell of lemon or lime. Dr. Stanley's evidence that all three kinds of Perrier natural mineral water appeared identical does not change the fact that two of the kinds are flavoured, while one is not. The Tribunal finds support for the above conclusion in the Explanatory Notes to the Harmonized Commodity Description and Coding System to heading No. 22.02, which provide that it includes "[s]weetened or flavoured mineral waters (natural or artificial)." As such, the Tribunal finds that the goods in issue are properly classified under tariff item No. 2202.10.00.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: August 16, 1995

Date of Decision: January 25, 1996

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Lyle M. Russell, Member
Anita Szlazak, Member*

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Anne Jamieson

*Appearances: Barry P. Korchmar, for the appellant
Anne M. Turley, for the respondent*

THE PERRIER GROUP OF CANADA LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
LYLE M. RUSSELL, Member
ANITA SZLAZAK, 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 made under subsection 63(3) of the Act.

The issue in this appeal is whether Perrier carbonated natural mineral waters with natural lemon or lime flavour, sold in bottles or cans, imported into Canada by the appellant between August 10 and September 14, 1992, are properly classified under tariff item No. 2202.10.00 of Schedule I to the *Customs Tariff*,² as determined by the respondent, or should be classified under classification No. 2201.10.00.90, as claimed by the appellant. For purposes of this appeal, the relevant tariff nomenclature reads as follows:

- 22.01 *Waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavoured; ice and snow.*
- 2201.10.00 *-Mineral waters and aerated waters*
- 90 *-----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.*
- 2202.10.00 *-Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured*

The appellant's representative called two witnesses: Mr. Frank de Vries, President of The Perrier Group of Canada Ltd., and Dr. David W. Stanley, a professor of food science at the University of Guelph.

Mr. de Vries described the goods in issue. He explained that Perrier natural mineral water comes from one spring in a town called Vergèze in the south of France and that one plant produces the goods in issue for the whole world. The bottles are manufactured at the plant. They are filled with Perrier natural mineral water, capped, labelled, put into boxes and then shipped to Canada. Mr. de Vries also explained that the production site sits on top of the actual spring. The natural gases are captured under the spring and then come to the surface. In the past, they came naturally. There have since been holes drilled to bring up both the water and the natural gases. The production line is totally automated. The essences, including the lemon and

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

the lime, are placed into the bottles after the water has been poured into them and before they are capped. Mr. de Vries also testified that he has tasted several brands of mineral water, including flavoured mineral waters such as the goods in issue. According to Mr. de Vries, each brand has a distinct taste, even the brands that are not flavoured. As such, they all compete with one another and should all be classified under the same tariff item.

During cross-examination, Mr. de Vries confirmed that the labels on the bottles of the goods in issue indicate that they have either a natural lemon flavour or a natural lime flavour. He also testified that, when tasting both these products, he could detect a taste and an aroma of lemon in one and of lime in the other.

The appellant's second witness, Dr. Stanley, was qualified as an expert in food science. He had been asked by the appellant's representative to analyze the chemical composition and physical characteristics of eight water samples, including samples of the goods in issue. He performed several tests that he described for the Tribunal. More particularly, he determined pH values, conductivity, refractive indexes and boiling points. He also performed a mineral analysis. Dr. Stanley explained the results of his analysis. At page 3 of his report, he indicated that, based on a series of standardized, well-accepted objective physical and chemical assays, the properties of the three Perrier samples were not different in any respect. He, therefore, concluded that the addition of lemon or lime flavouring did not significantly change either the physical or chemical nature of the products. Furthermore, Dr. Stanley was of the view that the three Perrier samples were much more similar to other commercial mineral waters than to "sparkling water beverages." The addition of sweeteners to the latter group of products necessitates the use of acidic preservatives that change the fundamental nature of the products.

During cross-examination, Dr. Stanley testified that he did not test the water samples for flavour. He explained that he could have performed a gas chromatography test if he had been requested to do so by the appellant's representative. Dr. Stanley testified that, if he had performed this test, he would have expected to find a difference between the unflavoured Perrier natural mineral water and the goods in issue. In answer to a question by the Tribunal, Dr. Stanley explained that a gas chromatography test would only identify flavouring materials if they were present in the mineral water. However, it would not distinguish between lemon and lime flavourings. The only way to do this would be through trained sensory analysis.

Mr. James A. Drum testified on behalf of the respondent. He was qualified as an expert in chemistry and the beverage industry. Mr. Drum agreed with Dr. Stanley that the three Perrier natural mineral waters are virtually identical in chemical composition and physical characteristics. In his view, a flavour connotes some kind of aroma, or something over and above the salt content in a product, which can affect its taste. Therefore, in analyzing the goods in issue to determine whether they are flavoured, the fact that they have a citrus content must be taken into account. According to Mr. Drum, a gas chromatography test was the test that should have been performed to identify the flavouring components in the goods in issue. He described the test for the Tribunal. In his view, mineral content as described by Dr. Stanley connotes taste and not flavour. He added that flavour is usually something that you smell. For example, orange juice smells like oranges. According to Mr. Drum, the goods in issue are flavoured mineral waters.

The appellant's representative acknowledged that the goods in issue are flavoured mineral waters. He argued, however, that mineral waters are part of the bottled water industry and not the soft drink industry. As such, the Tribunal should rely on the definition of "[b]ottled [w]ater" in rule 1 of the "Model Bottled Water Regulation" of the International Bottled Water Association to determine whether the goods in issue are flavoured or unflavoured within the meaning of the tariff nomenclature. He argued that, according to this definition, bottled water will not be considered flavoured if it comprises less than 1.0 percent by weight of flavouring. The evidence having shown that the amount of flavouring in the goods in issue is 1 mL/L or

0.1 percent, the representative argued that they meet the bottled water industry standard and that they should not be classified as flavoured mineral waters. Furthermore, the evidence shows that mineral waters are excluded from the soft drink industry. The representative referred to several dictionary definitions of the word “flavour” and argued that the Tribunal should not base its decision on taste, as each mineral water has a different taste. If that is the case, then all mineral waters should be classified in heading No. 22.02, therefore rendering heading No. 22.01 meaningless.

The appellant’s representative also argued that the Explanatory Notes to the Harmonized Commodity Description and Coding System³ (the Explanatory Notes) to Chapter 22 are of no assistance, as they do not define the word “flavour.” He argued that the goods in issue are not covered by the Explanatory Notes to heading No. 22.01, which excludes “sweetened or flavoured (orange, lemon, etc.) mineral waters (natural or artificial).” The fact that there is a trace of lemon or lime flavour in the goods in issue does not mean that they should be classified as flavoured mineral waters. He argued that the goods in issue should be classified on the basis of their essential character, i.e. mineral water. In support of this argument, he relied on Dr. Stanley’s expert report. The representative argued that classifying the goods in issue in heading No. 22.02 would have the effect of classifying them as being part of the soft drink industry, which, according to him, would be incorrect.

Counsel for the respondent argued that the goods in issue are clearly flavoured mineral waters and, as such, that they are properly classified in heading No. 22.02. She argued that there is no authority for the argument of the appellant’s representative that there must be a certain percentage of flavouring in the mineral water for it to be classified in heading No. 22.02. Relying on the Tribunal’s decision in *Poli-Twine Canada, A Division of TecSyn International Inc. v. The Minister of National Revenue*,⁴ counsel argued that the Tribunal should not read into the tariff heading words that do not exist. According to counsel, the Tribunal does not need to go beyond Rule 1 of the General Rules for the Interpretation of the Harmonized System⁵ (the General Rules), as the goods in issue are specifically described in heading No. 22.02. Counsel referred to the Explanatory Notes to heading No. 22.01, which provide that “sweetened or flavoured (orange, lemon, etc.) mineral waters (natural or artificial)” are excluded from that heading, and to the Explanatory Notes to heading No. 22.02, which provide that it includes “[s]weetened or flavoured mineral waters (natural or artificial),” in support of her argument. According to counsel, the tariff nomenclature does not distinguish between the bottled water industry and the soft drink industry. She argued that the bottled water regulations are totally irrelevant. Finally, relying on dictionary definitions and the common ordinary meaning of the word “flavour,” counsel argued that there is no doubt that something, which contains lemon or lime, is flavoured.

When classifying goods in Schedule I to the *Customs Tariff*, the application of Rule 1 of the General Rules is of the utmost importance. This rule states that classification is first determined according to the terms of the heading and any relative Chapter Notes. Therefore, the Tribunal must first determine whether the goods in issue are named or generically described in a particular heading of Schedule I to the *Customs Tariff*. If the goods in issue are named in a heading, they are to be classified therein subject to any relative Chapter Notes. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, the Tribunal shall have regard to the Explanatory Notes and the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System.⁶

3. Customs Co-operation Council, 1st ed., Brussels, 1986.

4. Appeal No. AP-94-153, August 3, 1995.

5. *Supra*, note 2, Schedule I.

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

Heading No. 22.02 provides for the classification of “[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 No. 20.09.” The evidence clearly shows that the goods in issue are mineral waters. The only issue in this appeal is whether the goods in issue are flavoured mineral waters. The word “flavoured” is not defined in the tariff nomenclature. The Oxford English Dictionary⁷ defines the word “flavour” as “[a] smell, odour ... an olfactory suggestion of the presence of some particular ingredient; an aroma.⁸” In the Tribunal’s view, the evidence shows that the goods in issue are flavoured. They have an aroma or smell of lemon or lime. Dr. Stanley’s evidence that all three kinds of Perrier natural mineral water appeared identical does not change the fact that two of the kinds are flavoured, while one is not. The Tribunal finds support for the above conclusion in the Explanatory Notes to heading No. 22.02, which provide that it includes “[s]weetened or flavoured mineral waters (natural or artificial).” The Tribunal cannot find any support in the legislation or the tariff nomenclature for the proposition that it should rely on the definition of “[b]ottled [w]ater” in rule 1 of the “Model Bottled Water Regulation” of the International Bottled Water Association to determine whether the goods in issue are flavoured or unflavoured within the meaning of the tariff nomenclature, i.e. that bottled water will not be considered flavoured if it comprises less than 1 percent by weight of flavouring.

Having found that the goods in issue are flavoured mineral waters and, therefore, specifically described in heading No. 22.02, they cannot be classified in heading No. 22.01. The Explanatory Notes to heading No. 22.01 are also helpful. They provide that “sweetened or flavoured (orange, lemon, etc.) mineral waters (natural or artificial)” are excluded from that heading. As such, the Tribunal finds that the goods in issue are properly classified under tariff item No. 2202.10.00.

Accordingly, the appeal is dismissed.

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

Lyle M. Russell
Lyle M. Russell
Member

Anita Szlazak
Anita Szlazak
Member

7. Second ed.(Oxford: Clarendon Press, 1989).

8. *Ibid.* at 1029.