

Ottawa, Thursday, October 31, 1996

Appeal No. AP-95-170

IN THE MATTER OF an appeal heard on February 6, 1996,
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 with respect to requests for re-determination
under section 63 of the *Customs Act*.

BETWEEN

NALLEY'S CANADA LIMITED

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Raynald Guay

Raynald Guay
Member

Desmond Hallissey

Desmond Hallissey
Member

Susanne Grimes

Susanne Grimes
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-170

NALLEY'S CANADA LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue under subsection 63(3) of the *Customs Act*. The issue in this appeal is whether salsa products are properly classified under classification No. 2103.20.00.90 as other tomato sauces, as determined by the respondent, or should be classified under classification No. 2001.90.90.99 as other vegetables preserved by vinegar or acetic acid, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal finds that the goods in issue cannot be classified in heading No. 20.01 since it covers vegetables that have been preserved by the use of vinegar or other acetic acid, to the exclusion of other methods of preservation, such as citric acid and heat pasteurization which are used to preserve the goods in issue. Moreover, the Tribunal finds that the goods in issue are a mixture of vegetables and, as such, are significantly different from the list of the principal goods classified in heading No. 20.01, namely, cucumbers, gherkins, onions, shallots, tomatoes, cauliflowers, olives, capers, sweet corn, artichoke hearts, palm hearts, yams, walnuts and mangoes, as set out in the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (the Explanatory Notes). The Tribunal further finds that it is not precluded by the Explanatory Notes to heading No. 20.01 from classifying the goods in issue as sauces in heading No. 21.03.

With respect to the Explanatory Notes to heading No. 21.03, the Tribunal finds that the description and list of products covered by that heading were not intended to be exhaustive and that the various definitions and examples of "sauce" provided by counsel for both parties from food publications, as well as from general dictionaries, indicate that the word "sauce" is a broad term that may be used to describe a number of different food items. In the Tribunal's view, the goods in issue meet this general description of "sauce" and, more particularly, "tomato sauce," in light of the fact that tomatoes are the primary ingredient.

Place of Hearing: Vancouver, British Columbia

Date of Hearing: February 6, 1996

Date of Decision: October 31, 1996

Tribunal Members: Arthur B. Trudeau, Presiding Member
Raynald Guay, Member
Desmond Hallissey, Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Anne Jamieson

Appearances: Brenda C. Swick-Martin and Wyatt S. Holyk, for the appellant
Josephine A.L. Palumbo, for the respondent

Appeal No. AP-95-170

NALLEY'S CANADA LIMITED

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
RAYNALD GUAY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue under subsection 63(3) of the Act. The issue in this appeal is whether salsa products are properly classified under classification No. 2103.20.00.90 of Schedule I to the *Customs Tariff*² as other tomato sauces, as determined by the respondent, or should be classified under classification No. 2001.90.90.99 as other vegetables preserved by vinegar or acetic acid, as claimed by the appellant. The following is the relevant tariff nomenclature from Schedule I to the *Customs Tariff*:

20.01	Vegetables, fruit, nuts and other edible parts of plants, prepared or preserved by vinegar or acetic acid.
2001.90	-Other
2001.90.90	---Other
2001.90.90.99	-----Other
21.03	Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard.
2103.20.00	-Tomato ketchup and other tomato sauces
2103.20.00.90	-----Other

The goods in issue were described by the appellant as vegetable-based food products, eaten as dips and used as ingredients in such dishes as tacos and fajitas. The ingredients include water, tomatoes, chilies, tomato paste, green peppers, dehydrated onions, vinegar, salt, spices, paprika, citric acid, garlic powder, dehydrated parsley, xanthum gum and dehydrated jalapeno peppers.

Counsel for the appellant presented evidence through two witnesses: Mr. George R. Young, Executive Vice-President of Nalley's Canada Limited, and Mr. Donald R. Park, a senior food technologist in product development at Nalley's Fine Foods, Division of Curtice-Burns Foods, Inc. (Nalley's US) in Tacoma, Washington, the exporter of the goods in issue.

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

Mr. Young is responsible for sales and marketing and explained that the appellant is a distributor of packaged food products, which include the goods in issue, to the retail and food service trades. The goods in issue are sold under various labels, La Restaurante, Co-Op, No-Name, Sunspun and Value Priced, in original, hot and spicy flavours, to the wholesale, retail, food service and institutional trades. He indicated that, in the retail trade, the goods in issue may be displayed in two places, in the Mexican food section and in the snack food section, but that they would not be displayed beside ketchup.

With respect to the various uses of the goods in issue, Mr. Young indicated that they may be used as ingredients in other foods, such as chili con carne, tacos and burritos. By way of illustration, he introduced as an exhibit an excerpt from *Bon Appétit*³ listing recipes for appetizers, soups and side dishes in which salsa is an ingredient. He also introduced point of sale material describing various products which included coupons and recipes and which showed that salsa can be used as an ingredient in other foods and as a dip. Mr. Young indicated that the largest use of salsa is as a dip and that various media, such as nacho chips and crackers, may be used for dipping. He further stated that the goods in issue may be eaten by themselves and that the quantity of the goods in issue normally consumed would be greater than that of other items, such as barbecue sauce, ketchup, salt, pepper, etc.

In discussing the use of the goods in issue in restaurants, Mr. Young agreed that they are a value-added component to a menu item and referred to the example of a Mexican burger with salsa which would cost more than a plain hamburger or cheeseburger. By contrast, he referred to other examples of items that might be put on a hamburger, such as ketchup and mayonnaise, for which a customer would not pay extra money.

In cross-examination, Mr. Young agreed that a tomato sauce containing mushroom pieces could still be considered a sauce and confirmed that the goods in issue contain tomatoes and tomato paste, may be poured over other foods, such as rice or pasta, and contribute to the flavour of other foods.

The appellant's second witness, Mr. Park, is involved in developing new products, working on quality issues on existing products and developing line extensions for existing products. In his employment, he has produced a number of salsa formulations and is the thermal process authority at Nalley's US's processing plant in Tacoma. He indicated that all products produced by Nalley's US are preserved through the use of chemicals, heat or both or acidification. The manufacturing procedure for the goods in issue⁴ involves several steps. First, the dry ingredients, namely, spices, thickeners, citric acid in an anhydrous form and dehydrated vegetables are blended. Second, the tomato paste, diced tomatoes and chili peppers are mixed in a kettle. Third, water is added to the kettle, and the kettle is agitated and heated. Fourth, the dry ingredients and vinegar, which contains acetic acid, are added to the kettle. Fifth, the ingredients in the kettle are mixed thoroughly and heated to a minimum temperature of 60°C. Sixth, quality assurance tests for attributes such as pH, acid level, salt level, drained weight and viscosity are undertaken. Finally, the ingredients are heated to a minimum temperature of 85°C, poured into jars and steam sealed.

With respect to the issue of preservation of the goods in issue, Mr. Park indicated that this is achieved in a combination of ways. First, the pH level (measure of acidity of a product) is adjusted to below a regulated level of 4.6 by the addition of an acetic acid, namely, vinegar, and a citric acid to prevent the

3. Exhibit A-10.

4. Exhibit A-13.

growth and development of toxin-producing micro-organisms, such as *C. botulinum*. He stated that this method of preservation is common to other preserved goods, such as pickles and relish. The citric acid is used to achieve a more rapid drop in the pH level and to balance the flavour to make a more palatable product. He indicated that a lot of different preserves, even tomato products, use citric acid as a method of preservation and that, to the best of his knowledge, no product can be preserved by vinegar alone. Second, the goods in issue are preserved by heat to prevent the onset of “economic spoilage organisms” which would reduce the shelf life or make the goods in issue appear unpalatable to the consumer.

Mr. Park introduced definitions of “salsa” and “sauce,” as well as a commentary on the differences between the two products. In *Salsas & Ketchups*,⁵ “salsa” is described as “any small dish made principally from fruit or vegetables, whether raw or cooked.”⁶ In the *Foods & Nutrition Encyclopedia*,⁷ a sauce is described as follows: “The word *sauce* comes from the Latin word *salsa* meaning *salted*. A *sauce can be defined as a liquid food, which is poured over a solid food*.... It can range from liquid to very thick; from no seasoning to highly seasoned; from cold to piping hot.... [T]he sauce often lifts up the dish: it glamorizes the simplest food; it gives the recipe distinction; it increases the appetite appeal; it is the crowning touch.”⁸ Furthermore, the following examples of sauces are provided: French dressing, mayonnaise, salad dressings, barbecue sauce, butter sauce, cheese sauce, fruit sauces, such as apple sauce, and gravies. In Mr. Park’s opinion, the goods in issue do not meet the descriptions of any of the sauces listed as examples. Moreover, he was of the view that a sauce is a finely puréed liquid food that could contain vegetables, but that those vegetables would not be visible. In support of his view that a salsa is different from a sauce, Mr. Park referred to the following excerpt from the *Salsa Lovers Cook Book*:⁹

I am often asked about the difference between salsas and sauces. While there are no absolutes, I like to characterize salsas as a combination of raw, cooked or partially cooked ingredients that are put together to form a harmonious chord. In a good salsa, each component retains its own taste, texture, and personality so that each bite will contain a myriad of flavors and a kaleidoscope of textures. In a sauce, on the other hand, all the ingredients are usually cooked together to create a single texture and a more homogeneous taste.¹⁰

Mr. Park further distinguished the goods in issue from sauces on the basis that sauces are puréed liquid ingredients, whereas whole particulates are added to the goods in issue to make them chunky. To illustrate this point, he referred to a sample 325-g container of La Restaurante hot, chunky salsa from which the vegetable pieces had been removed and only the liquid portion remained. He indicated that there were approximately 100 pieces of onion, pepper and tomato which were approximately 1 cm² wide by 10 mm thick and other pieces of vegetables ranging in size from 10 mm² to 1cm². He stated that the results of this exercise indicated that the total vegetable matter represented approximately one half of the volume by weight. On cross-examination, he agreed that the leftover liquid, which comprised about 50 percent of the contents of the jar, was a tomato-based liquid.

5. S. Franco (London: New Burlington Books, 1995), Exhibit A-22.

6. *Ibid.* at 13.

7. First ed. (Clovis: Pegus Press, 1983), Exhibit A-23.

8. *Ibid.* at 1963.

9. S.K. Bollin (Phoenix: Golden West Publishers, 1993), Exhibit A-24.

10. *Ibid.* at viii.

Mr. Park also discussed the drained weight test, which gives the drained weight as a percentage of the total weight of a product and is a way of measuring the amount of particulate. The test is conducted by draining goods in a sieve of a defined mesh size. Whatever is left in the sieve is the drained weight. He referred to the drained weight standards for the goods in issue (Exhibit A-17) and confirmed that the results of the drained weight test showed that tomatoes, one of the major vegetable ingredients in the goods in issue, comprise approximately 33.5 percent, and that vegetable particulates comprise approximately 34.0 percent. Of the 33.5 percent of tomatoes, 20.0 percent is tomato paste, 3.5 percent is crushed tomatoes and 10.0 percent is diced tomatoes.

Counsel for the respondent called, as an expert witness, Dr. Brian W. Raines, Technical Director at Thomas J. Lipton (Canada) responsible for Diverse Product Line, Research, Product Development and Quality Assurance. Dr. Raines holds a Ph.D. in food science and civil engineering and has had extensive experience in the food industry working for competitors of the appellant and Nalley's US. Following the objections of counsel for the appellant concerning the impartiality of a witness employed by a competitor, the Tribunal qualified Dr. Raines to give expert technical and scientific evidence concerning the preservation of salsa and the method of preparation of typical commercial tomato sauces as compared to the method of preparation of salsa and, in particular, the percentage and type of particulates used. With respect to Dr. Raines' evidence concerning the consumer uses and essential character of the goods in issue, as well as how the goods in issue are commonly referred to in the food industry, the Tribunal determined that this evidence would not be treated as expert evidence, given Dr. Raines' position and expertise.

In his testimony, Dr. Raines generally confirmed the preservation method described by Mr. Park. However, he further testified that vinegar alone is insufficient to preserve salsa and indicated that vinegar has a characteristic flavour that is balanced by the addition of citric acid and the naturally occurring acids in vegetables, such as in tomatoes.

In comparing the processes for the production of salsa and the production of tomato sauces, Dr. Raines indicated that both require a minimum pH level and undergo thermal processing. He further indicated, with the aid of an exhibit showing the drained weights of various commercially available tomato-based products, including other brands of salsa and spaghetti sauces,¹¹ that the drained weight of a thick and chunky spaghetti sauce was similar to the drained weight of the goods in issue. On cross-examination, Dr. Raines confirmed that many of the products listed on the exhibit had significantly lower drained weights than the goods in issue.

Dr. Raines introduced excerpts from a market research study conducted by Thomas J. Lipton (Canada) in 1992. He pointed out that the study showed that, of the people surveyed, essentially in the western provinces and Ontario, 27 percent had used salsa with tortilla chips at least once, 54 percent had used salsa as a flavouring in Mexican or Tex-Mex foods at least once, 23 percent had used salsa in hamburgers and hot dogs at least once, 19 percent had used salsa in eggs and omelettes at least once, 17 percent had used salsa in pasta at least once, 11 percent had used salsa in chili at least once, 9 percent had used salsa in sandwiches at least once and 3 percent had used salsa on french fries at least once. He added that there has likely been some shift in use since this survey was completed.

11. Exhibit B-3.

In Dr. Raines' opinion, a sauce is an additive to a meal that imparts a characteristic flavour, aroma and taste. He further opined that, in the industry, he considered preserved vegetables to mean either canned or frozen rather than a sauce being used as the preservation method and that the differences between salsa and guacamole are the use, texture, flavour and appearance.

In argument, counsel for the appellant indicated that the basic question before the Tribunal in this appeal is whether the goods in issue are preserved vegetables or sauces. Counsel submitted, based on the evidence of the witnesses, that the goods in issue could not be considered to be sauces. In particular, counsel referred to the evidence of Mr. Young that the goods in issue are not typically sold in retail stores alongside ketchup, mustard and salad dressing, which, counsel submitted, are sauces. Counsel also referred to Mr. Young's testimony that the goods in issue are primarily used as dips, that they are available as appetizers on a menu as separate side dishes and as value-added items sold by restaurants and that they are also used as ingredients in a variety of foods. In further support, counsel relied on the definition of "sauce" introduced by Mr. Park, which lists examples of sauces.

Counsel for the appellant submitted that the Tribunal should interpret the words of the relevant headings in accordance with their ordinary meaning and indicated that the Tribunal may look to both general and industry-specific dictionaries for guidance. Counsel referred the Tribunal to the following description for guidance:

The more research we did, the more we found that the individual names of these dishes result from the ingredients used in them, rather than from any type of technique or preparation. For example, a raw relish using typically Mexican ingredients is a salsa.¹²

Counsel submitted that a relish is classified in heading No. 20.01 as a preserved vegetable and, accordingly, that the goods in issue should also be classified in that heading.

In addressing the issue of whether the goods in issue are sauces, counsel for the appellant referred to the excerpt from the *Salsa Lovers Cook Book* which, counsel submitted, indicates that sauces have a homogeneous taste and a single texture, whereas salsa is a combination of cooked or partially cooked vegetables with a myriad of textures. Counsel also referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*¹³ (the Explanatory Notes) to heading No. 20.01, which provide as follows:

The goods covered by this heading differ from sauces of **heading 21.03** in that the latter are generally liquids, emulsions or suspensions containing practically no pieces of fruit, vegetables or other edible parts of plants.

Based on this provision, counsel submitted that the goods in issue cannot be classified in heading No. 21.03 as sauces because they contain large chunks of vegetables representing almost 50 percent of the goods in issue by volume and a dry solid content of about 35 percent. Moreover, counsel submitted that the goods in issue are not homogeneously textured liquids nor do they resemble any of the examples of sauces provided, namely, French dressing, mayonnaise, barbecue sauce, butter sauce and cheese sauce.

12. *Salsas, Sambals, Chutneys & Chowchows*, 1st ed. (New York: William Morrow and Company, 1993) at xvi.

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

In further support, counsel for the appellant referred to two US customs rulings which provide that certain salsa and tomato-related products were properly classified in heading No. 20.05 as other vegetables prepared or preserved otherwise than by vinegar or acetic acid and may not be classified in heading No. 21.03.¹⁴

Counsel for the appellant submitted that the fact that the word “*salsa*” in Spanish translated into English means “sauce” is irrelevant and not determinative of the issue of classification. In support, counsel referred to the Tariff Board’s decision in *Canado Industrial Products Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*¹⁵ which, counsel submitted, stands for the proposition that one must look at the true character of the imported goods to determine their proper classification and that the name used to refer to the goods is not determinative. Counsel referred the Tribunal to the definition of “sauce” as a “condiment or relish for food.”¹⁶

Counsel for the appellant also referred to the Tribunal’s decision in *Calavo Foods, Inc. v. The Deputy Minister of National Revenue*¹⁷ in which it was found that guacamole was properly classified under tariff item No. 2008.99.92 as others mixtures of fruit. In particular, counsel referred to the following excerpt from that decision:

The evidence shows that guacamole can easily be distinguished from products such as ketchup and mustard, which clearly are “mixed condiments.” For example, guacamole is typically eaten in greater quantity, is considered a value-added component to many dishes, contains a fair amount of nutritional value and could arguably be eaten by itself. In the Tribunal’s view, guacamole does more than add flavour to other food. It is usually treated as an important ingredient in a dish, as would be other ingredients, such as meat, cheese, tomatoes or lettuce. When eaten with tortilla chips, for example, guacamole is clearly part of the dish and not simply something which is served with the tortilla chips to add flavour. In the Tribunal’s view, it would be quite extraordinary to eat ketchup, mustard or even mayonnaise in such a way.¹⁸

Counsel submitted that the goods in issue are similar to guacamole in that they are more of an ingredient or food item by themselves.

In addressing the words of heading No. 20.01, counsel for the appellant submitted that, in order to be classified as preserved vegetables, the vegetables must be prepared or preserved by vinegar or acetic acid. Counsel submitted, based on the evidence, that the goods in issue are preserved by vinegar and acetic acid and that the sole purpose for adding these ingredients is to reduce the pH level to an amount below 4.6 to make those goods safe for consumers to eat. Counsel disputed the respondent’s position that heading No. 20.01 requires that goods be preserved by vinegar or acetic acid alone and not in combination.

14. Ruling HQ 085838, December 21, 1989, and Ruling HQ 088976, January 6, 1992, appellant’s brief, tab 5.

15. (1981), 7 T.B.R. 415.

16. *Webster’s Ninth New Collegiate Dictionary* (Springfield: Merriam-Webster, 1991) at 1045.

17. Appeal No. AP-94-159, October 12, 1995.

18. *Ibid.* at 4.

Counsel for the respondent submitted that, although the goods in issue are used with tortilla chips, they are also used as a sauce on salads, rice, pasta, sandwiches and a variety of other foods, to provide those foods with a Mexican taste and to enhance the taste or texture of other foods.

Counsel for the respondent submitted that the Tribunal should give limited weight to the standards provided by the appellant's witness concerning drained weight, particulate size and acetic acids, since those standards were prepared for the appellant's use and were not supported by independent sources.

In addressing the words of heading No. 20.01 specifically, counsel for the respondent argued that, since vinegar alone is insufficient for the preservation of the goods in issue and vinegar is not the only acid in the goods in issue, the goods in issue cannot be classified in heading No. 20.01.

With respect to heading No. 21.03, counsel for the respondent submitted that this heading specifically refers to sauces and does not exclude chunky sauces. In other words, the presence of fixed particles or items does not exclude goods from being classified in heading No. 21.03. Counsel submitted that the word "salsa" in Spanish translated into English means "sauce"¹⁹ and that "sauce" may be defined as:

Liquid preparation taken as relish with some article of food ... something that adds piquancy. Solution of salt & other ingredients used in some manufacturing processes. Season with [sauces] ... add relish to;²⁰ or

a condiment or relish for food; *esp*: a fluid dressing or topping.²¹

A "relish" may be defined as:

thing eaten with plainer food to add flavour. Serve as relish to, make piquant;²² or characteristic flavor; ... something adding a zestful flavor.²³

Counsel referred to the Explanatory Notes to heading No. 21.03 which provide that the heading includes "preparations, generally of a highly spiced character, used to flavour certain dishes (meat, fish, salads, etc.), and made from various ingredients (eggs, vegetables)." Counsel submitted that, having regard to these notes and the use of salsa with other foods as a dressing or topping, it is a sauce within the meaning of heading No. 21.03. Finally, counsel referred to the excerpt from the *Foods & Nutrition Encyclopedia* introduced by Mr. Park to support counsel's position that the definition of "sauce" is broader than that proposed by the appellant.²⁴

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules for the Interpretation of the Harmonized System*²⁵ (the General Rules) and the *Canadian Rules*.²⁶ Rule 1 of the General Rules provides that classification is to be determined according to the terms of

19. *Larousse Gran Diccionario, Español-Inglés* (Mexico: Larousse, 1986) at 618.

20. *The Concise Oxford Dictionary of Current English*, 5th ed. (Oxford: Clarendon Press, 1967) at 1118.

21. *Webster's New Collegiate Dictionary* (Springfield: Merriam-Webster, 1979) at 1019.

22. *Supra* note 20 at 1048.

23. *Supra* note 21 at 969.

24. *Supra* note 7.

25. *Supra* note 2, Schedule I.

26. *Ibid.*

the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the principles set out in Rules 2 through 6, as well as the Canadian Rules which follow. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the Explanatory Notes as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*. Thus, the starting point in classifying the goods in issue is to consider the terms of heading Nos. 20.01 and 21.03 and any relative Section or Chapter Notes and the Explanatory Notes, which may provide some guidance as to the appropriate interpretation of the terms of those headings.

Heading No. 20.01 covers vegetables prepared or preserved by vinegar or acetic acid. The Explanatory Notes to heading No. 20.01 provide that it includes certain preparations known as pickles, mustard pickles, etc., and that the principal products preserved by the methods described in the heading are cucumbers, gherkins, onions, shallots, tomatoes, cauliflowers, olives, capers, sweet corn, artichoke hearts, palm hearts, yams, walnuts and mangoes. The Tribunal observes that the goods in issue are preserved in several ways: first, with the addition of citric acid; second, with the addition of vinegar, an acetic acid; and, third, by heat pasteurization. The Tribunal is of the view that heading No. 20.01 covers vegetables that have been preserved by the use of vinegar or other acetic acid, to the exclusion of other methods of preservation, such as citric acid and heat pasteurization which are used to preserve the goods in issue. This is supported by the fact that other headings, namely, heading No. 20.05, which specifically covers other vegetables prepared or preserved otherwise than by vinegar or acetic acid, freezing or sugar, cover vegetables preserved by other methods. In the Tribunal's view, neither the words of heading No. 20.01 nor those of heading No. 20.05 contemplate the three-step process used to preserve the goods in issue.

Moreover, the Tribunal observes that the Explanatory Notes to heading No. 20.01 set out a list of the principal goods classified in heading No. 20.01, namely, cucumbers, gherkins, onions, shallots, tomatoes, cauliflowers, olives, capers, sweet corn, artichoke hearts, palm hearts, yams, walnuts and mangoes. In the Tribunal's view, these goods are significantly different from the goods in issue, which are a mixture of vegetables and which are not specifically mentioned in the Explanatory Notes to heading No. 20.01, but which are contemplated by the Explanatory Notes to other headings, namely, heading Nos. 20.04 and 20.05.

The Explanatory Notes to heading No. 20.01 provide that the "goods covered by [that] heading differ from sauces of **heading 21.03** in that the latter are generally liquids, emulsions or suspensions containing practically no pieces of fruit, vegetables or other edible parts of plants." The Tribunal is of the view that the word "generally" in the Explanatory Notes means "usually"²⁷ and that the inclusion of the word "generally" in that description indicates that there may be some goods that, although they may not meet the general description, are not necessarily excluded from being classified in that heading.²⁸

27. See *Narco Canada Inc., Div. of North American Refractories Co. and North American Refractories Co. v. The Deputy Minister of National Revenue*, Canadian International Trade Tribunal, Appeal Nos. AP-94-016 and AP-94-109, December 7, 1994, at 7; and *M & M Trading Inc. v. The Deputy Minister of National Revenue for Customs and Excise*, Canadian International Trade Tribunal, Appeal No. AP-92-045, September 9, 1993, at 3.

28. See *ibid.* and *Allied Colloids (Canada) Inc. v. The Deputy Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-93-271, September 8, 1994.

The Explanatory Notes to heading No. 21.03 provide that the heading “covers preparations, generally of a highly spiced character, used to flavour certain dishes ... and made from various ingredients.” The Explanatory Notes further provide that the heading includes “certain products based on vegetables ... but these differ from the preserved products in Chapter 20 (and more especially those under heading 20.01) in that they are mainly liquids, emulsions or suspensions containing very little solid matter.” The examples of products covered by the heading include “mayonnaise, salad dressings, *Béarnaise*, *bolognaise* (consisting of chopped meat, tomato purée, spices, etc.), ... tomato ketchup ... and other tomato sauces.” The Tribunal acknowledges that the goods in issue do not share all of the characteristics of all of the examples of sauces listed in either the Explanatory Notes or the excerpt from the *Foods & Nutrition Encyclopedia* introduced by Mr. Park.²⁹ However, these lists are not intended to be exhaustive lists of all of the goods that may be considered to be sauces. Moreover, one of the examples of sauces referred to in the Explanatory Notes, “*bolognaise*,” does contain an undefined amount of solid matter.

The various definitions and examples of “sauce” provided by counsel for both parties from food publications, as well as from general dictionaries, indicate, in the Tribunal’s view, that the word “sauce” is a broad term that may be used to describe a number of different food items. The breadth of the word “sauce” is further illustrated by the following definition:

Any preparation, usually liquid or soft, and often consisting of several ingredients, intended to be eaten as an appetizing accompaniment to some article of food.³⁰

In the Tribunal’s view, the goods in issue meet this general description of “sauce.”

Having found that the goods in issue are sauces, the Tribunal must further consider whether they may be considered tomato sauces. Clearly, the goods in issue contain several types of vegetables, including tomatoes. However, the evidence shows that tomatoes, in the form of tomato paste, crushed tomatoes and diced tomatoes, represent a significant portion of the weight of the goods in issue, are the primary vegetable ingredient in the goods in issue and, aside from water, are the primary ingredient in the goods in issue. As a result, the Tribunal is of the view that the goods in issue are properly described as tomato sauces.

In the Tribunal’s opinion, the decision in *Calavo* that guacamole should be classified as a mixture of fruit as opposed to a condiment provides little or no guidance to the Tribunal in classifying the goods in issue. Counsel for the appellant have argued that the goods in issue are similar to guacamole in that they are more of an ingredient or food item by themselves, that they are a value-added component and that they do more than add flavour to other foods. In the Tribunal’s view, to accept these characterizations of the goods in issue would only assist the Tribunal in determining that, like guacamole, the goods in issue may not be classified as condiments. However, the acceptance of these characterizations does not preclude classifying the goods in issue as tomato sauces.

29. *Supra* note 7.

30. *The Oxford English Dictionary*, 2nd ed., Vol. XIV (Oxford: Clarendon Press, 1989) at 512.

Accordingly, the appeal is dismissed. The goods in issue are properly classified under classification No. 2103.20.00.90 as other tomato sauces.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Raynald Guay

Raynald Guay
Member

Desmond Hallissey

Desmond Hallissey
Member