CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, December 12, 1996

Appeal No. AP-95-252

IN THE MATTER OF an appeal heard on juillet 8, 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 dated December 4, 1995, 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

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-95-252

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

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal pursuant to section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 2202.90.90 as other waters containing added sugar or other sweetening matter or flavoured and other non-alcoholic beverages, in accordance with a previous decision of the Tribunal dealing with identical goods, as determined by the respondent, or should be classified under tariff item No. 2009.70.99 as other apple juice, as claimed by the appellant. At the hearing, counsel for the respondent raised a preliminary issue. She argued that the appeal should be dismissed summarily without proceeding to the merits of the case on the basis that the issue in this appeal had been decided by the Tribunal in a previous appeal by the appellant. She argued that the doctrine of *res judicata* applied, preventing the Tribunal from making a finding in this case.

HELD: The appeal is dismissed. The Tribunal is of the opinion that the doctrine of *res judicata*/issue estoppel or simply issue estoppel provides authority for the Tribunal to decline to consider the merits of this appeal. More particularly, the Tribunal is of the view that the issue in this appeal was decided in the appellant's previous appeal, i.e. the tariff classification of sparkling apple juice. Furthermore, the Tribunal is of the opinion that its decision in that case, which the appellant is attempting to appeal to the Federal Court of Canada, is final. Lastly, the parties to this appeal are the same parties that were involved in the appellant's previous appeal. The Tribunal is not persuaded that there exist any reasons to revisit the issue resolved in that case.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 8, 1996
Date of Decision:	December 12, 1996
Tribunal Member:	Robert C. Coates, Q.C., Presiding Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Peter E. Kirby, for the appellant Janet Ozembloski, for the respondent

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-95-252

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

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member

REASONS FOR DECISION

This is an appeal pursuant to section 67 of the *Customs Act*[1] (the Act), heard by one member of the Tribunal,[2] from decisions of the Deputy Minister of National Revenue dated December 4, 1995, made under section 63 of the Act.

The goods in issue, described as "sparkling apple juice," were imported into Canada under five different transactions from March 24 to December 9, 1993. At the time of importation, they were classified under tariff item No. 2202.90.90 of Schedule I to the *Customs Tariff*[3] as other waters containing added sugar or other sweetening matter or flavoured and other non-alcoholic beverages," in accordance with a previous decision of the Tribunal[4] dealing with identical goods (the previous appeal). A request, pursuant to section 63 of the Act, for re-determination of the tariff classification of the goods in issue under tariff item No. 2009.70.99 as other apple juice was denied by the respondent. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 2202.90.90, as determined by the respondent, or should be classified under tariff item No. 2009.70.99, as claimed by the appellant.

At the hearing, counsel for the respondent raised a preliminary issue. She argued that the appeal should be dismissed summarily without proceeding to the merits of the case on the basis that the issue in this appeal had been decided by the Tribunal in the previous appeal. She argued that the doctrine of *res judicata* applied, preventing the Tribunal from making a finding in this case. Counsel noted that the previous appeal involved identical goods, the same issue and the same parties, i.e. I.D. Foods Superior Corp. and the Deputy Minister of National Revenue. The only difference is that the present appeal involves different importations. In the previous appeal, the Tribunal found that the level of carbonation in the goods imported by the appellant was above the threshold for carbonation of fruit juices classifiable in heading No. 20.09. As a result, the Tribunal found that the goods were properly classified under tariff item No. 2202.90.90. The appellant

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. Section 3.2 of the *Canadian International Trade Tribunal Regulations*, added by SOR/95-27, December 22, 1994, *Canada Gazette* Part II, Vol. 129, No. 1 at 96, provides, in part, that the Chairman of the Tribunal may, taking into account the complexity and precedential nature of the matter at issue, determine that one member constitutes a quorum of the Tribunal for the purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to the Act.
3. R.S.C. 1985, c. 41 (3rd Supp.).
4. *I.D. Foods Superior Corp.* v. *The Deputy Minister of National Revenue*, Appeal No. AP-94-102, June 8, 1995.

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

sought leave to appeal the Tribunal's decision, which was denied by the Federal Court - Trial Division. The appellant appealed the decision of the Federal Court - Trial Division to the Federal Court of Appeal.

Counsel for the respondent argued that, although the Tribunal is not bound by its previous decisions, consistency in its decisions is desirable. She referred to two previous decisions of the Tribunal[5] which dealt with this issue and the issue of *res judicata*. Counsel argued that both those cases are distinguishable on the basis that the Tribunal was not dealing with the same issue or identical products as in the present case. Finally, counsel argued that the Tariff Board's decision in *E.T.F. Tools Limited* v. *The Deputy Minister of National Revenue for Customs and Excise*[6] applies directly to the present case. In that instance, the Tariff Board dismissed an appeal summarily without hearing the merits of the case on the grounds that the appeal was frivolous and vexatious. The goods in issue in that case were identical to the goods in issue in a previous decision of the Tariff Board, and the appeal involved the same parties. The only difference was that the second appeal involved a different importation. The appellant filed a third appeal under a different name.[7] This appeal was also dismissed summarily on the grounds that it was frivolous and vexatious, and a scandal and an abuse of the Tariff Board's process.

Counsel for the appellant argued that the issue of *res judicata* ought to form part of the final argument. He argued that the fact that the present appeal deals with products identical to those in issue in the previous appeal and that the parties are the same does not prevent the Tribunal from revisiting its previous decision and reconsidering the matter. He argued that the issue of *res judicata* does not apply to the circumstances of the present case. Counsel submitted that the overriding rule is that the Tribunal, as any other administrative body, is not bound by its previous decisions. He acknowledged that consistency is desirable, but that the circumstances of this particular case are such that the Tribunal should hear the appeal. Counsel submitted that a strict interpretation of the doctrine of *res judicata* limits the ability of the Tribunal to always interpret the *Customs Tariff* in light of new technology. Counsel argued that the appellant would be presenting facts and arguments that were not raised in the previous appeal, which could affect the interpretation to be given to the relevant tariff nomenclature.

Counsel for the appellant also explained the difficulties that the appellant has encountered in attempting to appeal the decision in the previous appeal to the Federal Court of Canada, as well as the reasons why the appellant believes that an appeal before the Federal Court of Canada would be successful. According to counsel, the previous appeal was not well presented or argued before the Tribunal. More particularly, the evidence was presented in a way that made it unintelligible to the Tribunal, and evidence and argument were mixed. In addition, counsel argued that, in the previous appeal, the Tribunal misinterpreted the relevant *Explanatory Notes to the Harmonized Commodity Description and Coding System*[8] in finding that carbon dioxide can be used to preserve fruit juices. If the Tribunal was right, then, according to counsel, it neglected to say what amount of carbon dioxide is needed to preserve a fruit juice and still enable it to be classified in heading No. 20.09.

---

5. *Farmer's Sealed Storage Inc.* v. *The Deputy Minister of National Revenue*, Appeal Nos. AP-94-116 and AP-94-186, July 25, 1995, and *Vilico Optical Inc.* v. *The Deputy Minister of National Revenue*, Appeal No. AP-94-365, May 7, 1996.
6. (1964), 3 T.B.R. 132.
7. *W.J. Elliott and Co.* v. *The Deputy Minister of National Revenue for Customs and Excise* (1965), 3 T.B.R. 256.
8. Customs Co-operation Council, 1st ed., Brussels, 1986.

Counsel for the appellant argued that courts, in appellate review, accord a high degree of deference to administrative tribunals. As a result, the power of administrative tribunals to oversee their decisions rests with them. Counsel submitted that a strict application of the doctrine of *res judicata* would take away such power and an appellant's ability to obtain a different interpretation of a provision in a statute. As counsel declared: "We can't go to the appellate jurisdictions because they are exercising curial deference.[9]" He submitted that this appeal is the appellant's only alternative.

After hearing the arguments of counsel for the respondent and counsel for the appellant, the Tribunal adjourned for a few moments and issued the following ruling:

> PRESIDING MEMBER: As you can appreciate, we have been gone a little while because we wanted to be certain of the facts in relation to this case and to associate them with the previous decision that was rendered by this Tribunal in the same matter.
>
> As I understand it, the previous decision that was rendered by the Tribunal was appealed by the Appellant to the Federal Court. Is that correct?
>
> MR. KIRBY: We sought leave to appeal, Mr. Chairman, and leave to appeal was not granted. Then we appealed the decision refusing leave to appeal, and we are now before the Federal Court of Appeal.
>
> PRESIDING MEMBER: Subsequent to that, you made a decision to apply to the [Tribunal] once again to, in effect, re-hear the case that was previously one of the participants in the hearing. Is that not correct?
>
> MR. KIRBY: With the qualification that we are not seeking to re-hear the previous case. We are seeking to hear a case on a different importation. Effectively, the goods are the same and the parties are the same. Does that answer your question?
>
> PRESIDING MEMBER: Yes. I have read both the briefs and the other documentation associated with those briefs, and I have listened to [counsel for the respondent] and I have listened to your arguments in relation to the matter. As I anticipate what would happen, the Appellant has now sought leave in the Federal Appeal Court to appeal to the Federal Court the decision that was previously rendered.
>
> From that point of view, I have to conclude that it would be improper for this Tribunal to hear AP-95-252. I would like to [quote] from MacAulay's "Practice and Procedure Before Administrative Tribunals" and refer you to page 28NC-5 where Justice Muldoon makes the following statement in a case reported as 43 F.T.R. 47, Attorney General v. Canada (Human Rights Commission) in 1991:
>
> > "The underlying notion of issue estoppel is to prohibit one party to previous litigation from putting a concluded issue finally determined therein, into contention again in newly instituted proceedings taken against the same opponent before the same, or another tribunal having jurisdiction to adjudicate and determine that issue anew."
>
> I find that statement by Mr. Justice Muldoon to apply to this case and, on that basis, I find that I must dismiss this application on the basis of res judicata.
>
> Thank you.[10]

---

9. *Transcript of Public Hearing*, July 8, 1996, at 17.
10. *Ibid.* at 21-23.

In the *Canadian Law Dictionary*,[11] *res judicata* is defined as "a thing decided. If the thing actually and directly in dispute has been already adjudicated upon, it cannot be **litigated** again.[12]" The following definition appears in *Words and Phrases Legally Defined*:[13]

> [*Res judicata*] gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to relitigate the same question, even though the decision may be wrong. If it is wrong, it must be challenged by way of appeal or not at all. As between themselves, the parties are bound by the decision, and may neither relitigate the same cause of action nor reopen any issue which was an essential part of the decision.[14]

In *Nordic Laboratories* v. *The Deputy Minister of National Revenue*,[15] Nadon J. of the Federal Court - Trial Division quoted from the judgement of Linden J. of the Federal Court of Appeal in *Canada (Minister of Employment and Immigration)* v. *Chung*,[16] who explained the doctrine of *res judicata* as follows:

> "The doctrine of *res judicata*, or estoppel *per rem judicatam* as it is also known, exists in two different forms: cause of action estoppel and issue estoppel. Cause of action estoppel was not argued in this case and need not be considered. As regards the other form of *res judicata*, the requirements for issue estoppel were set out by Lord Guest in *Carl Zeiss Stiftung v. Raymer & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.) and approved by the Supreme Court of Canada in *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 (Spence and Laskin JJ. dissenting in the outcome). Those requirements are:
>
> 1. The same question must have been decided;
> 2. The judicial decision which is said to create the estoppel must be final; and,
> 3. The parties to the judicial decision on their privies must be the same persons as the parties to the proceedings in which the estoppel is raised or their privies."[17]

In certain cases, courts have said that there are two separate doctrines: the doctrine of *res judicata* and the doctrine of issue estoppel. For instance, in *Grand Chief Michael Mitchell also known as Kanantakeron* v. *The Minister of National Revenue*,[18] Teitelbaum J. of the Federal Court - Trial Division quoted from a judgement of Joyal J. in *Musqueam Indian Band* v. *Canada (Minister of Indian and Northern Affairs)*,[19] who, in attempting to explain the distinction between *res judicata* and issue estoppel, cited from the decision of *Hoysted* v. *Federal Commissioner of Taxation*.[20] Joyal J. wrote as follows:

> I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the

---

11. J.A. Yogis (Woodbury, N.Y.: Barron's Educational Series, 1983).
12. *Ibid*. at 187.
13. D. Hay, ed., 3rd ed., Supplement 1995 (London: Butterworths, 1995).
14. *Ibid*. at 161.
15. Unreported, Federal Court - Trial Division, Court File No. T-1050-93, February 26, 1996.
16. [1993] 2 F.C. 42.
17. *Supra* note 15 at 9.
18. [1993] 3 F.C. 276.
19. [1990] 2 F.C. 351 (T.D.).
20. (1921), 29 C.L.R. 537 (Aust. H.C.).

> doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").[21]

Teitelbaum J. then went on and enumerated the same three requirements mentioned in *Nordic Laboratories* which must be met in order for the doctrine of issue estoppel or *res judicata*/cause of action to apply.

The Tribunal recognizes that it is well-settled law that administrative tribunals are not bound by their previous decisions. The principal of *stare decisis* does not apply to administrative tribunal decisions.[22] However, courts have held that the doctrine of issue estoppel can apply to proceedings before administrative tribunals in order to prevent the hearing of a matter that has already been decided.[23] For example, in *O'Brien*, Décary J.A. of the Federal Court of Appeal stated the following:

> Issue estoppel precludes re-litigation by the same parties of issues which have been finally determined in a previous decision.... This Court has implicitly extended the applicability of the doctrine of issue estoppel, developed in the context of judicial proceedings, to proceedings before statutorily established administrative tribunals.[24]

In *O'Brien*, Décary J.A. referred to several decisions of the Federal Court of Appeal where the doctrine of issue estoppel has been considered. In particular, Décary J.A. referred to the judgement of Muldoon J. in *Canada (Attorney General)* v. *Canada (Human Rights Commission)*.[25] The learned judge concluded as follows:

> There appears to be no sound policy reason for declining to apply this estoppel principle to the decisions of adjudicative boards, commissions and other tribunals insofar as their pronouncements do in fact determine at least nominally contentious issues inter partes, in the same way as courts do. (at 65)
>
> The underlying notion of issue estoppel is to prohibit one party to previous litigation from putting a concluded issue finally determined therein, into contention again in newly instituted proceedings taken against the same opponent before the same, or another, tribunal having jurisdiction to adjudicate and determine that issue anew. (at 66)[26]

The evidence shows that this appeal involves a different importation from the one in the previous appeal. As a result, the Tribunal is of the opinion that the doctrine of *res judicata*/cause of action estoppel or simply *res judicata*, whichever way one characterizes the issue, does not apply to prevent the Tribunal from hearing this appeal. The Tribunal is of the view, however, that the doctrine of *res judicata*/issue estoppel or simply issue estoppel provides authority for the Tribunal to decline to consider the merits of this appeal, the three requirements enunciated in *Chung* having been met. More particularly, the Tribunal is of the view that

---

21. *Supra* note 19 at 362 and *supra* note 18 at 286.
22. See, for example, *Roland Lapointe* v. *Domtar Inc.*, [1993] 2 S.C.R. 756.
23. See, for example, *O'Brien* v. *Canada (Attorney General)*, 12 Admin. L.R. (2d) 287, Federal Court of Appeal, Court File No. A-291-91, April 16, 1993.
24. *Ibid*. at 290.
25. (1991), 43 F.T.R. 47, Federal Court of Canada - Trial Division, Court File No. T-381-90, April 24, 1991.
26. *Supra* note 23 at 291.

the issue in this appeal was decided in the previous appeal, i.e. the tariff classification of sparkling apple juice. Furthermore, the Tribunal is of the opinion that its decision in that case, which the appellant is attempting to appeal to the Federal Court of Canada, is final. Lastly, the parties to this appeal are the same parties that were involved in the previous appeal. The Tribunal is not persuaded that there exist any reasons to revisit the issue resolved in that case.

Accordingly, the appeal is dismissed.

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