the juice in the course of pressing the oranges and which have subsequently been strained off, even if they contain scarcely any part of the flesh of the fruit or fruit juice and instead consist principally of cell membrane and albedo.

Kutscher Donner Pescatore

Sørensen Mackenzie Stuart O'Keeffe Bosco

Delivered in open court in Luxembourg on 15 February 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 19 JANUARY 1977

My Lords,

These two cases come to the Court by way of references for preliminary rulings by the Bundesfinanzhof. The parties are the same in both of them: the appellant is the Firma Rolf H. Dittmeyer, of Hamburg, and the respondent is the Hauptzollamt Hamburg-Waltershof.

In each case the question that the Bundesfinanzhof has to decide is as to the classification under the Common Customs Tariff of a product imported by the appellant. That product is essentially the same in the two cases. The difference is that in the first case it was imported pasteurized whereas in the second it was imported frozen, the fact being of course that it is a product of a kind such that, unless it is subjected to some preserving treatment, it deteriorates.

The appellant is, as I understand, a manufacturer of fruit juice, and in particular of citrus fruit juices. For the purpose of its business it imports from countries such as Morocco and Brazil locally manufactured citrus fruit juice concentrates. But it also imports from them the product that is in question in these cases, which is, if I may use the expression without seeming to pre-judge any issue, a by-product of the manufacture of those concentrates.

It seems that, at the first stage in that process of manufacture, the juice is extracted from the fruit, either by pressing or by suction, in such a way that there are inevitably to be found in it some solid particles from the fruit. These particles are strained off and subjected to a further pressing so as to extract the last of the juice from them. What then

remains is described by the Bundesfinanzhof in its orders for reference as 'containing scarcely any constituent parts of the flesh of the fruit or fruit juice' and as consisting 'principally of cell membrane and albedo'.

The appellant imports this product for the purpose of putting it into the fruit juices that it manufactures so as, according to the appellant, to give them added eye-appeal. The appellant asserts however that such a use of the product is exceptional and that by far the greatest quantities of it are simply thrown away as industrial waste, though some of it has been known to be used to feed animals. No-one seems to challenge those assertions.

At the time of the relevant importations, all of which took place in 1970, the appellant entered the goods for customs purposes under Tariff Heading No 23.06, which covers 'Products of vegetable origin of a kind used for animal food, not elsewhere specified or included'. That classification was at first accepted by the Customs authorities at Hamburg, but, in November 1971, they came to the conclusion that it should be revised. They called upon the appellant to pay additional duty on the footing that —

(1) where the product in question was pasteurized it fell within Tariff Heading No 20.06, which covers 'Fruit otherwise prepared or preserved, whether or not containing added sugar or spirit' — 'otherwise' there meaning otherwise than by vinegar, acetic acid, freezing or sugar; and that
(2) where the product was frozen, it fell within Tariff Heading No 08.10 which covers 'Fruit (whether or not cooked), preserved by freezing, not containing added sugar'.

It seems that, in reaching that conclusion, the Customs authorities were influenced by two things.

The first was a 'Classification Slip' issued on 4th May 1971 by the Committee on Common Customs Tariff Nomenclature (which I shall call for short 'the CCT Nomenclature Committee'). That 'Classification Slip' is Annex III to the Commission's observations and it is common ground that it relates to the product here in question in so far as it is derived from oranges. In that 'Slip' the product is described in these terms:

'Product known as "orange cells", in the form of a thick fruit purée, uncooked, yellowish, with a neutral or very slightly bitter taste similar to that of an orange, not containing added sugar; it is obtained by filtering orange juice containing pulp, and includes a certain amount of more or less finely crushed peel, mainly from the inner white part. It is intended for adding to diluted concentrates of orange juice and to soft drinks.'

The reasons given by the Committee for its classification were as follows:

'As the product in question consists in fact of parts of the fruit, i.e. the pulp, the skin of the cells and a certain quantity of the peel mainly from the inner white part, it falls in heading No 20.06 when pasteurised and in heading No 08.10 when frozen. It cannot be classified in heading No 23.06 mainly because, in view of the method by which it is produced and the way in which it is preserved, it is not a residue within the meaning of that heading.'

The word 'residue' is not of course used in Heading No 23.06 itself, but it forms part of the Title of Chapter 23 of the Common Customs Tariff, of which that Heading forms part. The Title is 'Residues and Waste from the Food Industries; Prepared Animal Fodder'. Despite Rule A 1 of the General Rules for the interpretation of the nomenclature of the CCT, which lays down that the titles of Chapters 'are provided for ease of reference only', it is

in my opinion legitimate, having regard to the relevant Explanatory Notes to the Brussels Nomenclature issued by the Customs Cooperation Council, to bear in mind, in interpeting the various Headings in Chapter 23, that that Chapter is intended to cover residues and wastes from the food preparing industries. To those Explanatory Notes I shall advert in a moment.

The second thing that seems to have influenced the Customs authorities in Hamburg was the result of an examination carried out later in 1971 by a 'Zolltechnische Prüfungs- und Lehranstalt' (Customs Technical Testing and Research Institute) of samples of the product imported by the appellant. So far as I can discern, however, the fact that that examination took place, and its results, are now merely part of the narrative; there is nothing in them that will assist Your Lordships in deciding these cases.

The appellant protested through administrative channels against the additional assessments that it had received, without success. It then appealed against them to the Finanzgericht of Hamburg, again without success. The Finanzgericht appears to have regarded itself as bound by the 'Classification Slip' issued by the CCT, Nomenclature Committee. Hence the appellant's present appeals to the Bundesfinanzhof.

The Bundesfinanzhof, in its orders for reference, expresses doubt as to whether 'products consisting of parts of fruit which however are almost entirely lacking in any of those features which determine the nature of fruit' can be classified for tariff purposes as 'fruit', and consequent doubt as to the correctness of the CCT Nomenclature Committee's 'Classification Slip'. On the other hand the Bundesfinanzhof expresses doubt as to whether a product that is 'not intended to be used for animal food' can be classified under Heading No 23.06.

So it refers to this Court, in each case, three questions.

The first is whether the product that it has described is within Heading No 20.06 or Heading No 08.10, as the case may be.

The second is whether, on the footing that the first question is to be answered in the negative, that product can be classified under Heading No 23.06 even though in general, and in the particular case, it is not used for animal food.

The third is whether, if both the first and the second questions are to be answered in the negative, the product can be brought under one or other of the two Headings in point through the application of what was in 1970 Rule 5 (and is now Rule 4) of the General Rules for the interpretation of the nomenclature of the CCT i.e. the rule that 'Goods not falling within any heading of the Tariff shall be classified under the heading appropriate to the goods to which they are most akin'.

Before I deal with those questions, I must consider what is the legal standing of a 'classification slip' issued by the CCT Nomenclature Committee.

The Commission says that the 'Slip' in question was issued under Article 2 of Council Regulation (EEC) No 97/69 of 16 January 1969. That Regulation, which is expressed to be 'on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff', was, Your Lordships remember, the one by which the CCT Nomenclature Committee was set up. Article 1 provides that the Committee is to be composed of representatives of the Member States and that a representative of the Commission is to be chairman.

Article 2 is in these terms:

'The Committee may examine any matter concerning the nomenclature of

the Common Customs Tariff referred to it by its chairman either on his own initiative or at the request of the representative of a Member State.' (OJ L 14 of 21. 1. 1969).

Then Article 3 lays down a procedure in accordance with which 'the provisions required for the application of the nomenclature of the Common Customs Tariff as regards the classification of goods' are to be adopted. This procedure is essentially the same as the procedure laid down by Article 14 of Council Regulation (EEC) No 802/68 'on the common definition of the concept of the origin of goods' which I had occasion to describe to Your Lordships recently in Case 49/76 *Gesellschaft für Überseehandel mbH* v *Handelskammer Hamburg*. That procedure involves, Your Lordships remember, the submission of a draft by the Commission to the Committee and the adoption of the provisions envisaged in that draft if the Committee delivers an Opinion concurring with them, but, if the Committee does not deliver such an opinion, the submission of proposals by the Commission to the Council, which is given three months in which to reach a decision, failing which the Commission adopts the provisions it has proposed.

In Case 37/75 *Bagusat* v *Hauptzollamt Berlin-Packhof* [1975] ECR 1339 the Court had before it a Regulation of the Commission adopted under Article 3. The Court there held that the effect of Article 3 was to confer on the Commission 'acting in cooperation with the customs experts of the Member States' a wide discretion with regard to the classification of specific goods under this or that heading of the CCT, the only limit on that discretion being that the Commission had no power to 'amend' the text of the CCT (see in particular paragraphs 7, 8 and 11 of the Judgment).

I was at one time under the impression that the present case was the first in which the Court had been concerned with a 'classification slip' issued by the CCT Nomenclature Committee. But in fact the Court had such a 'slip' before it in Cases 98 & 99/75 *Carstens Keramik* v *Oberfinanzdirektion Frankfurt am Main* [1976] ECR 241. The English and French texts of the Judgment do not make this clear. The English text refers to the 'slip' there in question sometimes as a 'tariff decision' (see at pp. 243, 244 and 246) and sometimes as an 'opinion' (see at pp. 250 and 252). The French text calls it sometimes a 'décision tarifaire' (see Rec. 1976 at pp. 243, 244 and 246) and sometimes an 'avis' (see ibid. at pp. 250 and 253), whereas the French equivalent of 'classification slip' is actually 'fiche de classement'. There are similar terminological inexactitudes in the Danish, Dutch and Italian texts. The German text, however, which is the authentic text, correctly has 'Tarifentscheid' throughout. When I say 'correctly' I mean of course correctly according to the CCT Nomenclature Committee's own terminology. At all events the Court held that that 'slip' had no binding effect but represented a 'valid indication' for the purposes of the interpretation of the CCT. Your Lordships will remember that I referred to this too in the *Gesellschaft für Überseehandel,* case where I concluded that there was no distinction between the status of an opinion of the Committee on Origin acting under Regulation No 802/68 and that of an 'opinion' of the CCT Nomenclature Committee acting under Regulation No 97/69.

It seems to me that the same must be true of the 'Classification Slip' here in question: the Court must have regard to it as representing the views of the Commission and of the competent authorities in the Member States, but is in no way bound by it.

On that footing I turn to the questions referred to the Court by the Bundesfinanzhof, and I will say at once that, in my opinion, the Bundesfinanzhof's doubts as to whether

the product here in question can be classified as 'fruit' are entirely justified. Indeed it seems to me that to describe that product as 'fruit' is an abuse of language.

In an endeavour to vindicate the view taken by the CCT Nomenclature Committee, the Commission submits that the references to 'fruit' in Headings No 20.06 and 08.10 must be construed as including 'parts of fruit'. No doubt they must. They are not limited to entire fruit. For instance subheadings No 20.06 B II (a) 2 and 20.06 B II (b) 2 refer to 'grapefruit segments'; and in the Explanatory Notes to the Brussels Nomenclature one finds, in regard to Chapter 20, a 'Chapter Note' (No 3) to the effect that 'Edible plants, parts of plants and roots of plants conserved in syrup (for example, ginger and angelica) are to be classified with the preserved fruit falling under heading No 20.06'; in regard to the same Chapter one finds a 'General Note' to the effect that 'The fruit, vegetables and other plants or parts of plants classified in the present Chapter may be whole, in pieces or in pulp'; and, in regard to Heading No 20.06 itself, one finds a note to the effect that 'This heading covers fruit (whether whole, in pieces or crushed), prepared or preserved otherwise than by any of the processes specified in the headings of Chapter 8 or in the preceding headings of this Chapter'.

Nowhere, however, in those Explanatory Notes does one find any suggestion that Heading No 08.10 or Heading No 20.06 can cover 'parts of fruit' in the sense of a product derived from fruit but which has lost all identity as fruit. Indeed it is significant that, in Chapter 8 of the Tariff, 'fruit peel' is dealt with separately from 'fruit': see Heading No 08.13. In Chapter 20 'fruit peel' is dealt with somewhat untidily. Heading No 20.04 covers 'Fruit, fruit peel and parts of plants, preserved by sugar (drained, glacé or crystallized)'. But there is no heading expressly covering fruit peel preserved otherwise than by sugar. The Commission referred to an episode in 1957 when the Egyptian delegation to the Customs Cooperation Council drew attention to that anomaly. The result seems to have been a recommendation that the words 'fruit peel' should be inserted in Heading No 20.06 (see Annex I to the Commission's observations). But that recommendation does not appear to have been followed, and I do not think that, even if it had been, that could make any difference to this case. The Commission also referred to opinions of the Customs Cooperation Council about a variety of other products, none of which seems to me to have more than a distant resemblance to the product here in question (see Annex II to the Commission's observations).

So I am of the opinion that Headings Nos 08.10 and 20.06 do not cover that product.

Your Lordships will remember that, as to whether Heading No 23.06 covers it, the Bundesfinanzhof's main cause of hesitation is that that product is not in general used for animal food, nor is it intended to be so used when imported by the appellant.

As to that, the point must, I think, be made that, in order to come within Heading No 23.06, a product does not have to be 'intended' for use as animal food. It needs only to be 'of a kind' used for animal food. Whether a product is of such a kind is, of course, a question of fact, and one would normally say that, on a reference for a preliminary ruling, it was for the competent national Court to determine it. For the reason that I shall explain in a moment, however, I do not think that the question will require determination in this case.

The Explanatory Notes to the Brussels Nomenclature say of Chapter 23 that it 'covers the various residues and wastes derived from vegetable materials used by food-preparing industries, and also

certain products of animal origin'. They add: 'The main use of most of these products is as animal feeding stuffs... Certain of them... however, have industrial uses'. The notes to Heading No 23.06 say:

'Provided that they are not included in any other more specific heading of the Nomenclature and are of a kind used for animal food, this heading covers vegetable products, vegetable waste, and residues and by-products from the industrial processing of vegetable materials in order to extract some of their constituents.

It covers, *inter alia:*

...

(5) Waste of fruit (peel and cores of apples, pears, etc.) and fruit pomace or marc (from the pressing of grapes, apples, pears, citrus fruit, etc.), even if they may also be used for the extraction of pectin.

...'

It is obvious from a consideration of Chapter 23 as a whole and of Heading No 23.06 in particular that they are not concerned with residues or wastes in the sense of 'rubbish' or 'refuse'. Indeed that must be so, for there could be little purpose in classifying for customs purposes that which is fit only to be thrown away. So, in this context, 'residues' and 'wastes' are relative terms: what is one industry's 'residue' or 'waste' is another's raw material.

Thus interpreted, the words 'residues and wastes derived from vegetable materials used by food-preparing industries' seem to me to cover accurately the product here in question, and it does not seem to me to matter whether that product is or is not 'of a kind used for animal food'. If it is of such a kind, it falls directly under Heading No 23.06. If it is not, General Rule 4 in my opinion applies, for Heading No 23.06 is then that appropriate to the goods to which the product is most akin.

The CCT Nomenclature Committee said, Your Lordships remember, that the product was not within Heading No 23.06 'mainley because, in view of the method by which it is produced and the way in which it is preserved, it is not a residue within the meaning of that heading'. The Commission, in its observations, threw some light upon the meaning of that somewhat obscure pronouncement. It seems to rest upon the view that the CCT draws a sharp distinction between animal feeding stuffs and human food, and that a product which has been manufactured under hygienic conditions and then preserved by pasteurization or freezing with a view to its incorporation into human food cannot be classified with the former. This seems to me, with all respect, the wrong approach. Chapter 23 is not concerned only with animal feeding stuffs, nor does it exclude, either expressly or by necessary implication, goods that have been produced under hygienic conditions or goods which have been subjected to a process designed to prevent them from deteriorating. Even less does it make the use to which a particular consignment of goods is destined a criterion for their classification.

In the result, I am of the opinion that, in answer to the questions referred to the Court by the Bundesfinanzhof, Your Lordships should declare that the products described in the orders for reference are within Heading No 23.06 of the Common Customs Tariff.