composed of brewer's yeast, water and 3.9% natural citrus-fruit juice, put up in liquid form and potable, and intended to be taken several times daily in small quantities for the improvement of health.

In Case 114/80,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof [Federal Finance Court] for a preliminary ruling in the action pending before that court between

DR RITTER GMBH & CO, with registered officies in Köln-Deutz,

v

OBERFINANZDIREKTION [Principal Finance Office] HAMBURG,

on the interpretation of headings 21.06 and 22.02 of the Common Customs Tariff,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, A. Touffait and O. Due, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

On 24 April 1978 Dr Ritter GmbH & Co, whose registered offices are in Köln-Deutz, requested the Oberfinanzdirektion München [Regional Finance

Office, Munich] under Article 23 of the German Zollgesetz [Customs Law] of 14 June 1961, for a "verbindliche Zolltarifauskunft" (a binding customs tariff ruling) for a product described as "whole yeast, liquid brewer's yeast" (Voll-Hefe, flüssige Bierhefe).

The product concerned is a liquid put up in bottles with a capacity of 500 ml, composed of 80.5% brewer's yeast (inactive), 3.9% natural lemon juice and 16.6% water, the latter corresponding to the natural water content of brewer's yeast. The protein, fat and carbohydrate content of the product are respectively 9%, 1% and 7.5%. According to the information on the wrapping, the product is a food supplement which contains vitamins of the B-complex which are beneficial to the metabolism, enables working capacity to be maintained and [promotes] a healthy complexion. It is taken in quantities of one to two tablespoonfuls thrice daily, that is to say, approximately 50 to 70 ml. The product is manufactured by diluting brewer's yeast with citrus-fruit juice; it is then subjected to high-temperature treatment in order to ensure its keeping qualities. The specific function of the citrus-fruit juice in the manufacturing process is to serve as catalyst and stabilizer for the yeast cells.

The request was transmitted by the Oberfinanzdirektion München to the Oberfinanzdirektion Hamburg, which, after samples had been examined by the Zolltechnische Prüfungs- und Lehranstalt [Customs Laboratory and Training College] Hamburg, issued a binding customs tariff ruling on 14 June 1978 assigning the product to subheading 22.02 A of the Common Customs Tariff ("Lemonade, flavoured spa waters and flavoured aerated waters, and other non-alcoholic beverages, not including fruit and vegetable juices falling with heading No 20.07: ... Not containing milk or milkfats"). Goods falling within that subheading are subject to autonomous customs duty at a rate of 20% or conventional duty at a rate of 15%.

On 28 June 1978 Ritter lodged an objection against that ruling at the Oberfinanzdirektion Hamburg.

In support of its objection it maintained that the product in question fell within subheading 21.06 B II of the Common Customs Tariff ("inactive natural yeasts other than those in tablet, cube or similar form or in immediate packings of a net capacity of 1 kg or less"). The duty fixed for that subheading is 10% for the autonomous duty and 8% for the conventional duty.

By a decision dated 6 December 1978 the Oberfinanzdirektion Hamburg dismissed the objection; it considered that the product should be assigned to Chapter 22 of the Common Customs Tariff. Ritter appealed against that decision to the Bundesfinanzhof [Federal Finance Court].

By an order issued by its Seventh Senate on 1 April 1980, the Bundesfinanzhof decided to stay the proceedings pending a preliminary ruling from the Court of Justice under Article 177 of the EEC Treaty on the following questions:

"1. Is the expression 'other non-alcoholic beverages' within the meaning of tariff heading 22.02 of the Common Customs Tariff to be interpreted as including a product which is composed of brewer's yeast, water and 3.9% natural citrus-fruit juice, is liquid and suitable for consumption as a beverage and is intended to be taken several times daily in small quantities for the improvement of health?

2. If Question 1 is answered in the negative: Is tariff heading 21.06 to be interpreted, in conjunction with General Rule 3 (b) for the Interpretation of the Common Customs Tariff, as including the product described above?"

The order of the Bundesgerichtshof was lodged at the Court Registry on 2 May 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 8 July 1980 by the Commission of the European Communities, represented by Manfred Beschel, a member of its Legal Department, and on 9 July 1980 by Dr Ritter GmbH, the plaintiff in the main action, represented by Fritz Modest, Rechtsanwalt Hamburg.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By an order dated 16 September 1980, made pursuant to Article 95 (1) and (2) of the Rules of Procedure, the Court decided to assign the case to the Second Chamber.

II — Written observations submitted to the Court

Dr. Ritter GmbH & Co, the plaintiff in the main action, is of the opinion that the product in question falls within Chapter 21 of the Common Customs Tariff.

The facts

The product in question is made from inactive brewer's yeast, supplied by a brewery, washed several times and thus cleansed of some of its bitter substances as well as the particles of hops which it contained; the yeast is then compressed and made suitable for dispatch, any remaining beer being drained off when the yeast is compressed. The moisture content thus lost is replaced by the Ritter company by mixing the yeast with natural lemon juice to which water has been added. The percentage of lemon juice added to the yeast is 3.9%; the yeast is then pasteurized at a temperature above 60° thus enabling it to be preserved. The addition of natural lemon juice makes it possible, without having recourse to chemical additives, to prevent the bursting or plasmolysis of the yeast cells, so that they retain their natural gas- and plasma-filled form, in which the vacuoles and the volutine granules may be seen clearly. The active substances contained in the yeast cell are thus preserved owing to the attainment of a suitable pH; in addition, as the fruit juice contains ascorbic acid, it cleanses the cells detaching the yeast gum which may be adhering to them and the resinous components of the hops which they may still contain. The finished product is whole yeast, free of bacteria, with natural keeping qualities and containing a minimum added amount of lemon juice. The lemon juice also tones down the natural flavour of the yeast, which the consumer often finds disagreeable.

Tariff classification of the disputed product

(a) The case-law of the Court reveals that the classification of goods in a tariff heading cannot be influenced by the fact that it has undergone processing if, after such processing, the processed product contains the essential components of the basic product in proportions which do not vary substantially from the percentage of such components contained by the product in question in its natural state.

Those conditions are met in this case: the processing or preparation and the addition of 3.9% of lemon juice, which is a negligible quantity, do not result in

the essential components of the basic product and their proportions being altered substantially from the levels of such components which the product in question has in its natural state.

The product manufactured and marketed by the plaintiff company is whole yeast, not merely within the meaning of the term in food laws, but equally within the meaning of the law relating to the Common Customs Tariff, and it should be classified in tariff heading 21.06.

(b) General Rule 3 (b) for the Interpretation of the Common Customs Tariff Nomenclature, concerning goods which appear to be classifiable under two or more headings, does not apply in this instance: that rule would not enter into account unless the amount of natural lemon juice added were so great that it was no longer possible to consider that the finished product contained, even approximately, the essential components of the basic product, in this instance yeast, in proportions not differing substantially from the proportions of those components contained by the product in question in its natural state.

(c) If the disputed product cannot be classified in tariff heading 21.06 owing to the addition of 3.9% of lemon juice, it should be considered as a food preparation within the meaning of heading 21.07.

(d) Classification under heading 22.02 is excluded, as that heading refers only to beverages which are intended to be thirst-quenching or which are consumed for the sake of their taste.

(e) The Explanatory Notes to tariff heading 21.07 indicate, admittedly, that tonic preparations which, even though they are taken in small quantities, for example by the spoonful, are suitable for direct consumption as beverages, are not covered by that heading; according to the general considerations relevant to Chapter 22 such tonic preparations are to be classified under the latter.

It should be noted on that point that the product in dispute is not a tonic, and that in any event the Explanatory Notes concerning tonics are inaccurate; they are not binding and are not matched by the tariff headings in question. Only tonics such as Schweppes tonic water fall within heading 22.02 of the Common Customs Tariff.

(f) The replies to the questions put by the Bundesfinanzhof should be as follows:

(1) A product which is composed of brewer's yeast with the addition of 3.9% natural lemon juice, without the essential components of the brewer's yeast itself being thereby modified, or the proportions thereof substantially modified, falls within heading 21.06, and not heading 22.02, of the Common Customs Tariff.

(2) Alternatively, if the Court does not accept classification in heading 21.06: a product composed of brewer's yeast, to which is added, apart from water, 3.9% natural lemon juice, is to be considered as a food preparation to be classified in heading 21.07 of the Common Customs Tariff.

The *Commission* observes that the court which has made the reference is seeking clarification as to the content and scope of subheadings 22.02 A, 21.06 B II and 21.07 G I (a) of the Common Customs Tariff. For that purpose it is necessary to commence with the wording, the objective and the structure of the Common Customs Tariff itself; in order to supplement that, reference should be made to the Explanatory Notes and to the classification opinions issued by the Customs Cooperation Council as decisive criteria, or to the Explanatory

Notes to the Customs Tariff of the European Communities as "a valuable aid to interpretation".

(a) In the case of a liquid product, which may be drunk as it is and which is intended to be drunk, what must be decided in this case is whether a product having such characteristics must, in order to be considered as a beverage within the meaning of heading 22.02 of the Common Customs Tariff, have, in addition, always and necessarily the purpose of quenching thirst. The answer to that question should be in the negative.

Subheading 22.09 C indicates that alcoholic drinks belong equally to the category of "beverages"; such beverages, however, including rum, gin, whisky and vodka, are certainly not intended to quench thirst. Similarly, a whole range of vegetable juices, such as celery juice or sauerkraut juice, are not intended to quench thirst but fulfil other functions, such as providing vitamins. Even if in common usage the expression non-alcoholic "beverages" is taken to mean primarily thirst-quenching liquids, that does not exclude the possibility that other "beverages" may exist.

It is therefore logical that the test used in the Explanatory Notes on heading 21.07 and those relating to headings 22.02 and 30.03 of the Common Customs Tariff is whether or not a product intended for human consumption may be drunk as it is, irrespective of the quantity, frequency and purpose of its consumption. In that respect the Explanatory Notes are in conformity with the principle of legal certainty, being based on objective criteria and verifiable characteristics, and they take into account the practical requirements of tariff classification.

(b) The disputed product cannot be classified in heading 21.06.

The addition of citrus-fruit juice and the manufacturing method adopted has made of the yeast a new product having its own characteristics and intended for a specific purpose: water and citrus-fruit juice have been added to the compressed brewer's yeast and the mixture obtained heated to a temperature in excess of 60° for preservation purposes. That product could not have been manufactured in its final form without such additions and without the heat treatment; moreover, its smell and taste would have made it unsuitable, or at least less suitable, for human consumption and it would not have been in the liquid, potable form essential for the purpose for which it is intended. Such a product is already outside the scope of the wording of heading 21.06 which, according to General Rule 1 for the Interpretation of the Common Customs Tariff, legally determines the classification. General Rules 2 (b) and 3 (b) cannot, consequently, be applied: they apply only when several headings come into consideration within the framework laid down by the wording of the heading in question. The Explanatory Notes to the Customs Cooperation Council Nomenclature on General Rule 2 (b) state expressly, moreover, that that rule "does not, however, widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading . . .".

(c) The various treatments which it has undergone convert the original yeast into a preparation which, if heading 22.02 did not exist or did not apply, would have to be classified in heading 21.07 of the Common Customs Tariff. The fact that the disputed product is composed essentially of a single basic material, which is in a certain sense "characteristic" of the product, does not change that. The goods at issue in the main proceedings are not therefore yeast, but yeast-based preparations; they are, in any case, logically described by the plaintiff in the main action itself as a "yeast preparation" (Hefepräparat).

(d) The second question which has been referred to the Court for a preliminary ruling does not require a reply; the reply to Question 1 should be as follows:

The concept of "other non-alcoholic beverages" in heading 22.02 of the Common Customs Tariff should be interpreted as including also a product composed of brewer's yeast, water and 3.9% natural citrus-fruit juice, put up in liquid form and potable, and intended to be taken several times daily in small quantities for the improvement of health.

III — Oral procedure

Oral observations were presented at the hearing on 29 January 1981 by Dr Ritter GmbH, the plaintiff in the main action, represented by Dr Fritz Modest, and by the Commission, represented by Dr Manfred Beschel.

The Advocate General delivered his opinion at the sitting on 12 March 1981.

Decision

1 By an order dated 1 April 1980 which was received at the Court on 2 May 1980 the Bundesfinanzhof referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions as to the interpretation of heading 22.02, or alternatively heading 21.06, of the Common Customs Tariff.

2 It appears from the file on the case that the plaintiff in the main action requested a binding customs tariff ruling from the revenue authorities for a product called "whole yeast" and described in the order making the reference in the following terms: "The product is composed of (inactive) brewer's yeast, water and 3.9% natural citrus-fruit juice. It is liquid and suitable for direct consumption as a beverage. According to the wording on the wrapping it serves as a food supplement, helps to maintain working capacity and gives the skin a healthy complexion. From one to three tablespoonfuls must be taken three times a day."

3 The revenue authorities are of the opinion that the product in question should be classified as a "beverage" under heading 22.02 because it is a product suitable for direct consumption as a beverage, regardless of its composition, mode of consumption and the purpose for which it is drunk. The plaintiff on the other hand contends that the product in question, the main ingredient of which is brewer's yeast, should be classified as a yeast under heading 21.06.

4 The Bundesfinanzhof considers that a decision depends on the interpretation of the word "beverages" in heading 22.02, according to whether that term is to be understood as including all liquids intended for human consumption, or only those products intended to quench thirst which the word is commonly used to denote. In the latter case a liquid such as that in question which is intended to be taken for health reasons should not be classified as a "beverage".

5 In order to clarify the issue the Bundesfinanzhof has put the following questions:

1. Is the expression "other non-alcoholic beverages" within the meaning of tariff heading 22.02 of the Common Customs Tariff to be interpreted as including a product which is composed of brewer's yeast, water and 3.9% natural citrus-fruit juice, is liquid and suitable for consumption as a beverage and is intended to be taken several times daily in small quantities for the improvement of health?

2. If Question 1 is answered in the negative: Is tariff heading 21.06 to be interpreted, in conjunction with General Rule 3 (b) for the Interpretation of the Common Customs Tariff, as including the product described above?

6 The tariff headings referred to in the questions form part of Chapter 21 of the tariff, entitled "Miscellaneous edible preparations", and Chapter 22, entitled "Beverages, spirits and vinegar". In so far as they are relevant to the dispute, they are worded as follows:

21.06 Natural yeasts (. . . inactive) . . . Other.

22.02 Lemonade, flavoured spa waters and flavoured aerated waters, and other non-alcoholic beverages, not including fruit and vegetable juices falling within heading No 20.07.

7 In conformity with the structure of the Common Customs Tariff the expression "other . . . beverages" in heading 22.02 is to be understood as a generic concept embracing all liquids intended for human consumption, in so far as they are not included in any other specific classification.

8 The scope of that concept must be determined on the basis of criteria which are both objective and verifiable. It is not permissible, therefore, to make its scope dependent on purely subjective, variable factors such as the manner in which the product is taken or the purpose for which it is consumed, to quench thirst, for example, to improve health, or for some other purpose. Within the meaning of that heading therefore, "beverages" must be understood to signify any liquid suitable and intended for human consumption regardless of the quantity in which it is absorbed, or the special purposes for which various kinds of liquids may be consumed.

9 The classification of a product as a beverage within the meaning of heading 22.02 cannot, moreover, depend on the basic ingredients used. The distinguishing characteristic in the tariff heading in question is the fact that the products in question are liquids and are intended for human consumption. Although the product in question is made basically from yeast, which falls under heading 21.06, the decisive characteristic as far as classification in the tariff is concerned is its liquid state, chiefly obtained by adding water, and not the basic ingredient employed.

10 That reasoning is supported by the actual wording of the heading in question which, after referring to "beverages" in general, expressly excludes fruit and vegetable juices which are included in heading 20.07 in Chapter 20, covering "Preparations of vegetables, fruit or other parts of plants". That indicates that without that express exception the juices in question would be classified in the chapter on beverages, and not in that covering the relevant basic ingredients.

11 A similar indication is to be found in the Explanatory Notes to the Common Customs Tariff which exclude "tonic preparations" from heading 21.07 (which, together with yeasts, is included in the chapter on edible preparations) when they are put up as liquids suitable for direct consumption as beverages. The underlying principle of that note may be extended by analogy to the aqueous dilution of yeast like that under consideration in the present case.

12 The reply to the first question must therefore be that the concept of "other non-alcoholic beverages" in heading 22.02 of the Common Customs Tariff must be interpreted as including a product composed of brewer's yeast, water and 3.9% natural citrus fruit juice, put up in liquid form and potable, and intended to be taken several times daily in small quantities for the improvement of health.

13 It is therefore unnecessary to reply to the second question.

Costs

14 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the questions referred to it by the Bundesfinanzhof by order dated 1 April 1980, hereby rules:

The concept of "other non-alcoholic beverages" in heading 22.02 of the Common Customs Tariff must be interpreted as including a product composed of brewer's yeast, water and 3.9 % natural citrus-fruit juice,

put up in liquid form and potable, and intended to be taken several times daily in small quantities for the improvement of health.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 26 March 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 12 MARCH 1981 [1]

Mr President,
Members of the Court,

The subject of the reference for a preliminary ruling on which I give my opinion today is a problem concerning tariff classification.

On 24 April 1978 Dr Ritter GmbH & Co KG [hereinafter referred to as "Ritter"] of Köln-Deutz, the plaintiff in the main action, requested from the Oberfinanzdirektion München [Regional Finance Office, Munich] a binding customs tariff ruling under Article 23 of the German Zollgesetz [Customs Law] of 14 June 1961 for a product which it described as "whole yeast (liquid brewer's yeast)".

According to the report issued subsequently by the Zolltechnische Prüfungs- und Lehranstalt [Customs Laboratory and Training College] Hamburg the product, which is put up in bottles with a capacity of 500 ml, becomes when stirred a yellowish-white, opaque liquid with a distinctive sharp taste. It is composed of 80.5% pure inactive brewer's yeast and 3.9% natural citrus-fruit juice, to which water is added in a proportion which corresponds to the natural water content of brewer's yeast. It is made, according to the description of the product furnished by the plaintiff, by diluting the brewer's yeast with citrus-fruit juice and applying thermal treatment for preservation purposes. According to the description on the wrapping the product is a food supplement which is supposed to maintain creative power and promote a healthy complexion and should be taken in quantities of one to two tablespoonfuls thrice daily, that is to say, approximately 50 to 70 ml.

The request was transmitted by the Oberfinanzdirektion München to the Oberfinanzdirektion Hamburg as the office more properly concerned and the latter issued a binding customs tariff ruling on 14 June 1978 assigning the

1 — Translated from the German.