REPORT FOR THE HEARING
in Case C-219/89 *

I — Facts and procedure

A — *Facts and relevant provisions*

The present case concerns the tariff classification of a product composed of 39.4% orange juice and 60.6% sugar which is intended to be made into beverages by adding water and/or sugar.

The Oberfinanzdirektion München (Principal Revenue Office, Munich) issued WeserGold GmbH & Co. KG (hereinafter referred to as 'WeserGold') with a binding customs tariff ruling classifying the product under heading No 2106 of the Common Customs Tariff. Heading No 2106 is a residual heading and concerns 'Food preparations not elsewhere specified or included'.

The Oberfinanzdirektion considered that the addition of sugar deprived the product of its original character of fruit juice and that therefore it could no longer be classified under heading No 2009. That heading applies to 'fruit juices (including grape must) and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter'. It further considered that the intended use of the product also excluded it from heading No 2202. That heading concerns 'waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit or vegetable juices of heading No 2009'.

WeserGold contested the classification before the Bundesfinanzhof (Federal Finance Court). According to WeserGold the 'sweetened orange juice' in question falls under heading No 2009. Its taste and yellow colour are evidence that its original character of fruit juice has been preserved.

B — *The question referred for a preliminary ruling*

By order of 6 June 1989 the Bundesfinanzhof decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling pursuant to Article 177 of the Treaty:

'Is a product consisting of 39.4% orange juice and 60.6% sugar to be classified as "fruit juice containing added sugar" under heading No 2009 of the Combined Nomenclature?'

According to the Bundesfinanzhof heading No 2106, applied by the Oberfinanzdirektion, is indeed the correct heading. Having been transformed into syrup and become unsuitable for direct consumption, the product has lost its character of orange juice and therefore cannot be classified under heading No 2009. That view is shared by the Verband der Deutschen Fruchtsaft-Industrie (Association of the German fruit

* Language of the case: German.

juice industry) and the Bundesverband der Deutschen Erfrischungsgetränke-Industrie (Federal association of the German soft drinks industry). Moreover it is supported by Council Directive 75/726/EEC of 17 November 1975 on the approximation of the laws of the Member States concerning fruit juices and certain similar products (Official Journal L 311, p. 40). In order that a product may be marketed under the designation 'fruit juice', Articles 1(5) and 4(2) of the directive permit the addition of sugar to only a very limited extent and require the product to retain the colour, aroma and taste of fruit juice.

C — *Procedure before the Court*

The order of the Bundesfinanzhof was registered at the Court Registry on 13 July 1989.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 20 October 1989 by WeserGold, applicant in the main proceedings, represented by V. von Alvensleben, Rechtsanwalt, and on 30 October 1989 by the Commission of the European Communities, represented by J. Sack, a member of its Legal Department, acting as Agent, assisted by R. Kubicki, an official of the Ministry of Justice of the Federal Republic of Germany seconded to the Legal Department of the Commission under an exchange scheme for national officials.

Upon 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 order of 4 July 1990 pursuant to Article 95(1) and (2) of the Rules of Procedure the Court decided to assign the case to the First Chamber.

II — Written observations submitted to the Court

According to *WeserGold* it is not correct to take into consideration, as did the Oberfinanzdirektion, the intended or actual use of the product at issue for the purpose of classifying it under heading No 2009. Wesergold observes that the Court has consistently held (in particular the judgment in Case 38/76 *Luma* [1976] ECR 2027 and the judgment in Case 62/77 *Carlsen-Verlag* [1977] ECR 2343) that tariff classification should, except as laid down in the Common Customs Tariff, be effected on the basis of the product's objective characteristics. In the present case that rule is particularly relevant as the wording of heading No 2009 refers to the product's composition and not to its intended use.

In any event, subheadings 2009 11 91 and 2009 19 91 prove that classifying under heading No 2009 is not subject to the condition that the product can be consumed immediately. Those subheadings apply to fruit juices with 'added sugar content exceeding 30% by weight', whereas fruit juices for immediate consumption undiluted contain a maximum of 20% sugar.

WeserGold next refers to the Explanatory Notes of the Customs Cooperation Council, from which it appears that, in order to be classified under heading No 2009, a product

must have retained its character of fruit juice. That condition is satisfied in the present case; in that connection WeserGold emphasises that the tariff ruling itself describes the product as a yellow-coloured, cloudy and syrupy liquid, smelling and tasting of oranges.

In support of its submission WeserGold produces three opinions by experts from the Institut Nehring, the Institut Fresenius and the Gesellschaft für Lebensmittel-Forschung mbH (Company for food research) respectively. Those three organizations are said to be nationally renowned and to have extensive knowledge of the product at issue.

WeserGold rejects the Oberfinanzdirektion's opinion that a product can only be classified under heading No 2009 if the fruit juice contains less than 50% sugar. Having a totally neutral meaning, the word 'added' used in the wording of that heading merely describes the action of adding one thing to another without requiring the product added to remain a minor constituent in the compound. In any event, in the present case the sugar is simply dissolved in the preparation and has not become the principal constituent of the product.

The idea that, in order that a product can come under heading No 2009, the sugar can only be used for the purpose of restoring to the juice its natural sweet taste — an idea which, according to WeserGold, was accepted by the Oberfinanzdirektion — is contradicted by both the Common Customs Tariff and the Explanatory Notes of the Customs Cooperation Council. According to its actual wording, subheading 2009 19 91 applies to fruit juices with 'added sugar content exceeding 30% by weight' a quantity which is already significantly higher than that necessary for restoring the natural sweet flavour to the orange juice. The Explanatory Notes establish a distinction between sugar and other sweetening agents. Whereas for the latter the requirement is that 'the quantity added does not exceed that necessary for normal sweetening purposes', no such provision is laid down in respect of sugar. On the contrary, it is permissible to deduce therefrom that adding sugar, unlike other sweetening agents, is not subject to any limit.

Contrary to what the Oberfinanzdirektion asserted, subheading 2009 19 91 is not restricted to the concentrate of fruit juices whose natural sugar content is itself very high. According to WeserGold that view is inconsistent with the Common Customs Tariff, the Common Customs Council's Explanatory Notes and the Opinion of Mr Advocate General Warner preceding the judgment in Case 91/74 *Hauptzollamt Hamburg-Ericus* v *Hamburger Import-Kompanie* ([1975] ECR 643). Firstly, heading No 2009 and subheading 2009 19 91 concern fruit juices with added sugar and not fruit juices whose sugar content has been increased by the concentration process. Next, the Explanatory Notes on heading No 2009 state explicitly that it is irrelevant that the sugar content of the fruit juice results from the manufacturing process or has been added separately. Lastly, in the abovementioned case, the Advocate General emphasized that the parties had not sought to show that the 63% sugar contained in the orange juice at issue constituted natural sugar; he thereby

indicated that the origin of the sugar was not conclusive for the classification.

In addition WeserGold denies that Directive 75/726/EEC and, more generally, the law relating to foodstuffs have any relevance in the present context, and puts forward two reasons for that view. First, the law relating to foodstuffs, being intended to establish the conditions in which a product can be made available to the final consumer, cannot be used for the purposes of interpreting the Common Customs Tariff, where the radically different objectives consist in regulating the import of goods. Secondly, applying the law relating to foodstuffs in the present case leads to subheading 2009 19 91 being deprived of its significance. That heading concerns fruit juice with an 'added sugar content exceeding 30% by weight', a product which from the perspective of the law on foodstuffs should be characterized as orange syrup.

WeserGold next rejects the two opinions produced by the Bundesfinanzhof. The Bundesverband der deutschen Erfrischungsgetränke-Industrie is, as it itself recognizes, not competent to classify fruit juice under the tariff, and the Verband der deutschen Fruchtsaft-Industrie adopts a position which is wrong. According to the latter organization a product loses its character of fruit juice once its sugar content exceeds double the quantity authorised by the law applying to foodstuffs. WeserGold considers that such a rule has two defects: first, it is based on Directive 75/726/EEC which for the reasons already indicated cannot be applied in the present context; secondly, it is inconsistent with the Common Customs Tariff which, in heading No 2009, refers to orange juice containing added sugar exceeding 30% by weight.

Finally, WeserGold observes that before 1987 the German customs authorities classified the contested product under heading No 2009 and that classification has continued to be applied in other Member States. The change decided upon by the Oberfinanzdirektion places German companies at a disadvantage compared with their foreign competitors.

The *Commission* argues that heading No 2009 does not concern fruit juice containing more than 50% sugar. That limitation is apparent from the Common Customs Tariff and the Explanatory Notes and from the General Rule of Interpretation No 3 of the Common Customs Tariff.

The Commission emphasizes, first, that an orange juice containing 43% sugar comes, without any doubt, under heading No 2009 of the Combined Nomenclature. The wording of subheadings 2009 11 91 and 2009 19 91 refer expressly to an orange juice containing an added sugar content exceeding 30% by weight whereas Additional Note No 5 sets the natural sugar content of such a juice at 13%.

The Commission observes next that in its Explanatory Notes on heading No 2009 the Customs Cooperation Council generally requires the orange juice to have kept its original character as fruit juice and, in the case of sweetening agents other than sugar being added, the balance between the different constituents to be preserved. It follows therefrom that classification under heading No 2009 is limited to orange juice containing less than 50% sugar.

Lastly, the above rule finds additional support in Rule 3 of the general rules for the interpretation of the combined nomenclature, according to which 'when . . . goods are *prima facie* classifiable under two or more headings . . . mixtures . . . shall be classified as if they consisted of the material or component which gives them their essential character'. In the present case the sugar has become the decisive characteristic of the product, which can therefore no longer be classified under heading No 2009.

According to the Commission the third indent of Article 4(2)(a)(ii) of Directive 75/726/EEC, which only authorizes the addition of sugars 'in a quantity expressed as dry matter, not greater than . . . 100 g per litre of juice in other cases, for the purpose of sweetening', does not furnish any argument to counter the argument it puts forward. In any event the directive pursues a different objective and cannot serve as a basis for interpreting the Common Customs Tariff.

Nor, in the Commission's view, can the product be classified under heading No 2002, because it is not fit for immediate consumption. That is the condition which arises from paragraph 4 of the Customs Cooperation Council's Explanatory Notes, its collection of classification opinions, and the judgment of the Court of Justice in Case 114/80 *Ritter* [1981] ECR 895.

The Commission therefore concludes that the product comes under the residual heading, heading No 2106. In that connection the Commission emphasizes that the product corresponds to the description in paragraph 12 of the Explanatory Notes, which states as follows: 'preparations for the manufacture of lemonades or other beverages, consisting, for example, of flavoured or coloured syrups, being sugar solutions with natural or artificial substances added to give them the flavour of, for example, certain fruits . . . '.

Consequently the Commission suggests that, in reply to the national court's question, the Court should rule that 'the heading which serves as a basis in the Common Customs Tariff in its version in force since 1 January 1988 must be interpreted as meaning that an orange juice to which has been added a quantity of sugar such that its total sugar content exceeds 60% must not be classified as "fruit juice with added sugar" under heading No 2009 of the Combined Nomenclature'.

R. Joliet
Judge-Rapporteur