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.

product to subheading 22.02 A of the Common Customs Tariff as being a non-alcoholic beverage not containing milk or milk-fats, for which autonomous customs duty applies at a rate of 20% and conventional customs duty at 15%.

That classification was contested by the plaintiff in a letter of 28 June 1978 on the ground that the goods in question fell within subheading 21.06 B II of the Common Customs Tariff. Under that subheading, which covers other than "inactive natural yeasts in tablet, cube or similar form or in immediate packings of a net capacity of 1 kg or less" autonomous customs duty applies at a rate of 10% and conventional customs duty at 8%.

By a decision dated 6 December 1978 the Oberfinanzdirektion Hamburg dismissed the objection as unfounded. Ritter appealed against that decision to the Bundesfinanzhof asking for a ruling that the goods be assigned to subheading 21.06 B II.

By an order issued by its Seventh Senate the Bundesfinanzhof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

"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?"

My opinion on these questions is as follows.

According to the reference for a preliminary ruling the issue in the main proceedings is whether a product of the kind here in question is to be considered as an "other non-alcoholic beverage .. not containing milk or milk-fats" within the meaning of tariff subheading 22.02 A, as an "other" inactive natural yeast" within the meaning of tariff subheading 21.06 B II, or as a "food preparation ... other ... containing no milk-fats" and "containing no sucrose" within the meaning of tariff subheading 21.07 G I (a) of the Common Customs Tariff. As the answer to the questions which have been raised lies solely in the content and respective limitations of those three tariff subheadings I think it is desirable to examine their legal import in detail.

Before I do so it must first be made clear — and here all the parties appear to be in agreement — that the product in question is not to be considered as a *medicament* within the meaning of heading 30.03 of the Common Customs Tariff. That covers only, as may be seen from the introductory notes on Chapter 30 of the Common Customs Tariff, products for internal or external use in human or veterinary medicine for therapeutic or prophylactic purposes in the treatment of illness. That explains why it is there also expressly stated that the heading applies to "goods (other than foods or beverages such as dietetic, diabetic or fortified foods, tonic beverages, spa water)". The point is also repeated in the Explanatory Notes of the

Customs Cooperation Council [Note 33 of the German version] — hereinafter referred to as "the Brussels Notes" — regarding that chapter, where it is stated that it does not include "food supplements" which contain vitamins and mineral salts and are intended to maintain health or well-being in so far as they contain no indications concerning the prevention or treatment of an illness. Such products are generally to be classified, according to the said note, in heading 21.07 of the Common Customs Tariff.

In the plaintiff's opinion the product in question can only be a yeast product in view of its high yeast content, which determines its character. Only a small quantity of citrus-fruit juice has been added to it for preservation purposes and in order to make it palatable for the consumer. In accordance with the Rules for the Interpretation of the Nomenclature of the Common Customs Tariff and the case-law of the Court the product is therefore to be assigned to tariff subheading 21.06 B II. Should the addition of citrus-fruit juice prevent the product from coming under that tariff heading, it should be considered as a food preparation within the meaning of tariff heading 21.07. Tariff classification under heading 22.02 is excluded because that heading covers only beverages which are designed to quench thirst or to be drunk for pleasure.

Although I must admit that at first glance, in the light of its properties of taste and the classic use of the product as a vitamin B preparation, there is something to be said for the plaintiff's submission, I agree with the defendant in the main proceedings and the Commission, which has submitted observations on the request for a preliminary ruling and, lastly, with the Seventh Senate of the Bundesfinanzhof in thinking that this preparation cannot be described as yeast within the meaning of tariff subheading 21.06 B II of the Common Customs Tariff. It must be borne in mind here that the starting product, brewer's yeast, has, as we have heard, undergone several stages of processing. Water and citrus-fruit juice were added to the brewer's yeast when it had been drained and the whole heated to a temperature above 60°C for preservation purposes. The addition of the foreign element of citrus-fruit juice in the percentage of 3.9% is made, according to the plaintiff's submissions, so that it may act as a catalyst and stabilizer for the yeast cells and it is designed, moreover, to cleanse the yeast cells of the yeast gum adhering to them and the resinous components of the hops. In addition the additive is meant to tone down the natural taste of the yeast which many people find disagreeable. By means of this deliberate operation, and with the aid of the water mixed with it, there is thus created a product which without the processing described would not be suitable in the same way for human consumption and would not be in the state required for consumption as a liquid. It is therefore no longer, as the plaintiff maintains, brewer's yeast within the meaning of the Common Customs Tariff, which has merely been pasteurized, but is now, as the defendant in the main proceedings rightly stated in rejecting the objection, and particularly in view of the addition of the citrus-fruit juice, a new product, or more exactly a *food preparation based on brewer's yeast.* A "preparation" includes, as the Court

of Justice stated in Case 36/71 *(Günter Henck* v *Hauptzollamt Emden* [1972] ECR 187), the processing of a product or its being mixed with other products.

That judgment cannot, however, be used to support the plaintiff's submissions. In that case the Court pointed out that not every treatment alters the character of a product, so that products processed from maize and sorghum may fall under headings 11.01 and 11.02 if after processing they retain the essential constituents of the basic product in approximately the same proportions as before processing. But, as the Commission rightly stresses, that statement must be considered not in isolation but in conjunction with the particular characteristics of the product in question in that case — as the Court is aware, the question was whether it was cereal or forage. The heart of the problem in that case lay specifically in the fact that it was not possible on the basis of the objectively verifiable characteristics to state unequivocally whether the product concerned was processed or not. Whilst in these circumstances no other decision was possible, in the present case the addition of citrus-fruit juice to the yeast and its effects are apparent and objectively verifiable. Accordingly the statement made by the Court in the same judgment that "in the interests of legal certainty and of [good] administration the classification of goods in the Common Customs Tariff is in principle carried out on the basis of their objective characteristics" applies in the present case.

Contrary to the plaintiff's opinion the classification of the product in question as a food preparation which is used either directly or after further treatment for human consumption as a food is not prejudiced by the fact that it consists largely of a single basic material which thus constitutes an essential characteristic of the product. This may be refuted on the basis of a whole series of products consisting almost exclusively of one substance but which are listed as food preparations in the Common Customs Tariff itself or in the Brussels Notes.

Once the product in question fulfils in principle the conditions laid down in the Tariff for it to be considered as a food preparation it ceases immediately to satisfy the terms of heading 21.06, which according to General Rule 1 of the Rules for the Interpretation of the Nomenclature of the Common Customs Tariff are the sole guideline. It follows, as the Commission rightly points out, that there remains no scope for the application of General Rules 2 (b) and 3 (b) of the Rules for the Interpretation of the Nomenclature since these only enter into account if within the framework set by the terms of the relevant heading more than one heading falls to be considered. This is made clear in the Brussels Notes on General Rule 2 (b) of the Rules for the interpretation of the nomenclature which in its turn is a prerequisite for the application of General Rule 3 (b), where it is stated that the rule does not widen the heading so as to cover goods which do not, as required by General Rule 1, answer the description in the heading. That is the case, however, as the notes go on to

state, where the addition of another substance alters the character of goods falling within that heading.

Once that conclusion has been reached it remains to be examined whether, as the plaintiff submits in the alternative, the product may be classified in heading 21.07 or as another non-alcoholic beverage within the meaning of heading 22.02 of the Common Customs Tariff, as food preparations fall within the first-mentioned heading only in so far as they are not specified or included elsewhere in the tariff. In other words, heading 21.07 is excluded if a product such as this is a beverage within the meaning of tariff heading 22.02. Whether the product falls under the latter heading depends therefore, as the Seventh Senate of the Bundesfinanzhof rightly pointed out, on the interpretation of the term "beverage" used in that heading.

It is beyond dispute that a product must be liquid and immediately potable in order to satisfy the concept of a beverage. In the dispute between the parties there is therefore the further question whether a product which has those qualities must in addition be always and necessarily, as maintained by the plaintiff, intended to quench thirst or to be taken for pleasure, in order to be able to qualify as a beverage for the purposes of the customs tariff.

Here the general observation may be made that in normal usage as revealed in the relevant dictionaries in all the Community languages, the test of quenching thirst or that of being consumed for pleasure is not necessarily an essential element in the concept of a "beverage" of in the corresponding terms in the other Community languages. Thus, for example, it would be difficult to maintain that spirits, which undeniably qualify as beverages, are intended to quench thirst. Similarly, the term "beverage" in normal usage extends beyond substances consumed for pleasure to liquid foods such as, for example, milk, cocoa, soups, etc. That is why that term, or the corresponding expressions in other Community languages in the relevant dictionaries are all defined — essentially to the same effect — as a liquid which is drunk or which is intended to be drunk.

That the term "beverage" as used in the customs tariff means similarly a liquid, immediately potable product which is intended to be drunk is also to be deduced from the descriptions of goods in the Common Customs Tariff. Thus the term "beverage" as used in the tariff includes, as shown by subheading 22.09 C, spirituous beverages such as rum, gin, whisky, etc., which are not intended to quench thirst. In addition, vegetable juices which may not always serve to quench thirst but to promote health are generally to be considered as beverages within the meaning of the Common Customs Tariff. That is shown in particular by the fact that they are expressly excepted from heading 22.02.

Lastly it should also be remembered that, as the Court has emphasized in a consistent series of decisions, in the interests of legal certainty and for practical reasons it is generally the objective features and properties of products which are decisive in determining their classification within the Common Customs Tariff. Features such as quantity, taste or contribution to health depend, as the Commission rightly points out, very much on the subjective

judgment of the individual consumer and are therefore scarcely practicable.

In the light of those considerations it is appropriate, the plaintiff's opinion notwithstanding, that the Explanatory Notes to the Common Customs Tariff of the European Communities which, although they are not binding, serve as an important aid to interpretation (see the decision of the Court of Justice of 26 February 1980 in Case 54/79, *Firma Hako-Schuh Dietrich Bahner* v *Hauptzollamt Frankfurt am Main-Ost* [1980] ECR 311) likewise refer to the test whether a product destined for human consumption is immediately potable or not as the dividing line between headings 21.07 and 22.02 of the Common Customs Tariff. Thus, for example, Note D I [9 in the German version] of those Notes on heading 21.07 provides that, in particular, yoghourt, which is not ready for consumption as a drink, is covered by that heading, while in the same Note [10] to that heading and, correspondingly, in Note B [3] of the Notes on tariff heading 22.02, yoghourt in a liquid state ready for consumption as a drink is classified as an "other non-alcoholic beverage". The same applies, as may be seen in the last sentence of Note G [32] to tariff heading 21.07 in the Explanatory Notes to the Common Customs Tariff of the European Communities, as also under the heading "General" in the notes on Chapter 22 [2] to tonic preparations which are suitable for direct consumption as beverages.

As to the latter it is, moreover, expressly confirmed that classification in Chapter 22 does not depend on the quantities in which the product is taken, as it is expressly provided that Chapter 22 of the Common Customs Tariff covers tonic preparations which, even though they are taken in small quantities, for example, by the spoonful, are suitable for direct consumption as beverages. Although it is expressly stated only in relation to tonic preparations that must apply to other products which are intended to promote health or general well-being. If that means that the product in question is classifiable under tariff heading 22.02 then according to General Rule 3 (a) on the interpretation of the Nomenclature that heading is to be preferred, as providing the most specific description of the product, to tariff heading 21.07 which provides the more general description.

On those considerations, which make a reply to the second question which has been submitted for a preliminary ruling superfluous, it is accordingly sufficient to answer the first question which has been referred to the Court by the Seventh Senate of the Bundesfinanzhof as follows:

The concept of "other non-alcoholic beverages" as used 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, which is in liquid form and potable and intended to be taken several times daily in small quantities for the improvement of health.