



TC04524

Appeal number: TC/2009/10267

CUSTOMS DUTY – Combined Nomenclature – Preserved diced papaya classified under heading 2006 as “preserved by sugar” – Whether it should have been classified under residual heading 2008 – Insufficient evidence adduced by appellant to displace burden of proof – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VITAL NUT COMPANY LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JOHN BROOKS
GILL HUNTER**

Sitting in public at the Royal Courts of Justice on 8 – 10 June 2015

Frank Mitchell, counsel instructed by John Weston & Co Solicitors, for the Appellant

Brendon McGurk, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Vital Nut Company Limited (the “Company”) imported preserved diced papaya (the “papaya”) from Thailand into the United Kingdom. This was sold to third parties for inclusion in breakfast cereals or onward sale, either on its own or mixed with other fruit and nuts. It appeals against the decision, of HM Revenue and Customs (“HMRC”), to issue C18 Post Clearance Demand Notes on the basis that it had imported the papaya under an incorrect commodity code heading of the Combined Nomenclature (“CN”).

2. Mr Brendan McGurk, counsel for HMRC, submits that the papaya should be classified under commodity code heading 2006:

Vegetables, fruit nuts, fruit-peel and other parts of plants preserved by sugar (drained, glace or crystallised).

Whereas Mr Frank Mitchell, who appears for the Company, contends that the papaya falls within commodity code heading 2008:

Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing any added sugar or other sweetening matter or spirit, not otherwise specified or included.

3. The background to the appeal, which is not disputed, is conveniently set out in the Statement of Agreed Facts provided by the parties as follows:

(1) Prior to the raising of the impugned post-clearance demand Notes (the “C18s”), the Company imported papaya dices which it declared under classification commodity code 2008 9947 90 and commodity code 2008 9948 99.

(2) On 27 May 2008 a sample of papaya dices, declared under import entry 071-045042L were selected by HMRC for inspection. The sample was taken on 1 June 2008 and sent to a laboratory for analysis.

(3) The result of the examination of the sample that was made on behalf of HMRC was that the latter concluded that the product had been imported under an incorrect classification commodity code and that the correct commodity code was 2006 0035 00 to which a higher rate of customs duty applies.

(4) On 1 August 2008, HMRC issued a C18 Post Clearance Demand Note (C1802/163608) in the amount of £2,976.22 (being the difference in customs duty due at what HMRC believed to be the correct rate on the goods). The Company requested a review of the decision on 18 August 2008 and the C18 demand was paid on 20 August 2008.

(5) The Company requested a review on the basis that the product was correctly classifiable under heading 2008. HMRC confirmed that it remained of the view that the classification of the product to heading 2006 is correct. The Company requested a formal departmental review which was deemed upheld.

5 (6) An examination of the Company's import records for the preceding three years was conducted following HMRC's decision and on 2 February 2009 HMRC issued a further C18 Demand Note (C1801/0636/08) for £115,950.67. This demand was for the difference in customs duty due on previous imports where the goods had been declared under commodity code 2008 9947 90 and commodity code 2008 9948 99 instead of commodity code 2006 0035 00.

10 (7) On 27 February 2009, the Company's representative, John Weston & Co., requested a formal departmental review of the decision of 2 February 2009. HMRC were unable to review the decision within the 45-day statutory time-limit and the decision was therefore deemed upheld. The original decision was reconsidered by HMRC and the conclusion to uphold the decision to issue the C18 Demand was communicated to the Company's representative on 12 May 2009.

15 (8) On 11 June 2009 the Company paid the full amount of the disputed duty. A Notice of Appeal was lodge on 12 May 2009. A statement of Case was lodged on 4 December 2009. On 26 February 2014, with the permission of the Tribunal, the Company served amended grounds of appeal and on 4 April 2014 HMRC served an amended Statement of Case.

20 4. It is therefore clear that the substantive issue in this case is whether the papaya imported by the Company was properly classifiable under commodity code heading 2006 or 2008.

25 5. Although there was no doubt that the appeal against the C18 issued on 2 February 2009 in the sum of £115,950.67 was clearly before the Tribunal there was some discussion as to the scope of the appeal and whether the C18 issued on 1 August 2009 in the sum of £2,976.22 and a claim for repayment of duty in the sum of £9,336.41 on papaya imported by the Company after receiving the C18s which it had, in the circumstances, classified under heading 2006 were included.

30 6. However, it is not necessary for us to resolve this issue as Mr McGurk, on behalf of HMRC, was able to confirm that HMRC would apply and give effect to our decision in respect of both C18s and the Company's repayment claim.

Evidence

7. Mr Mark Brunton, the Managing Director of the Company gave oral evidence on behalf of the Company and was cross-examined by Mr McGurk.

35 8. We also heard expert evidence on behalf of the Company from Professor Keshavan Niranjana, Professor of Food Bioprocessing at Reading University, a Fellow of the Institute of Food Science and Technology, Member of the Institution of Chemical Engineers, Current Chairman of the International Society of Food Engineering and a Registered Scientist (RSci) in the UK and the editor of the *Journal of Food Engineering*. In addition to his two reports Professor Niranjana had, in 2014, visited Vanda Preserved Company Limited ("Vanda") the Thai company which supplied the papaya to the Company.

9. We found Professor Niranjana to be an impressive and authoritative witness.

10. Ms. Louise Geary BSc, Manager of the Food Specification & Control Group of Campden BRI gave oral expert evidence for HMRC having provided a report following the testing of the papaya at the laboratory of Campden BRI.

5 11. A witness statement, made on 6 August 2014, by Ms Suppanan Uppatham, the Marketing Manager of Vanda, was tendered on behalf of the Company. However, Ms Uppatham, who is based in Thailand, did not attend the hearing and no arrangements were made for her to give live evidence eg by video link. Mr Brunton explained that the Company had obtained a statement from Ms Uppatham although she was the marketing manager as her English was “very good” unlike her colleagues in the
10 production department.

12. However, this was contradicted by Professor Niranjan who interviewed the factory manager who “spoke good English” when he visited Vanda in 2014. In the circumstances, although we admitted Ms Uppatham’s statement into evidence, we attach considerably less weight to it than would have been the case had Ms Uppatham
15 given oral evidence under oath which could have been subject to cross-examination.

13. We were also provided with the witness statement of Mr Roby Danon, Managing Director of Voicevale Limited and former Chairman of the National Dried Fruits Trades Association. This was in relation to products, including what was described as “dehydrated papaya”, imported by Voicevale. As his evidence was not
20 challenged his witness statement was admitted into evidence.

14. There was also a bundle of documents which included copies of correspondence between the parties.

15. In addition we were provided with the following samples, some of which we tasted:

- 25 (1) a sample of the actual papaya that was selected for testing by HMRC in May 2008;
- (2) a sample from the same batch of papaya that had been selected by HMRC in 2008 that had been retained by the Company;
- (3) a more recent sample of papaya;
- 30 (4) a packet of Neal’s Yard “Fruit Surprise” described on the packet as a “blend of Dried and Sugar Infused Fruit” including papaya;
- (5) a packet of Neal’s Yard “Dried Papaya”;
- (6) a packet of Neal’s Yard “Pineapple & Papaya Mix”;
- 35 (7) a box of Jordans “Truly Fruity Muesli” described on the box as having “succulent chunks of pineapple, mango & papaya with juicy raisins and chopped almonds”; and
- (8) a small tub of “Red Glacé Cherry Halves”.

16. On the basis of this evidence we make the following further findings of facts in addition to those set out in the Statement of Agreed facts (see paragraph 3, above).

Additional Facts

17. After gaining experience over 15 years as an employee of a company involved in the importation of nuts and dried fruit Mr Brunton established the Company in 1999. He explained that he had met Ms Uppatham at a food fair, either in Germany or Paris, during which orders would be discussed. Although he had visited Vanda's premises in Thailand in around 2000, as he was not food scientist, Mr Brunton could not give evidence about the production process but had no reason to believe it had changed between then and 2008 and assumed it was still the same in 2014 as described by Ms Uppatham in her witness statement. Professor Niranjana who witnessed the process in 2014 also could not say if it changed from 2008.

18. In her witness statement Ms Uppatham says that papaya is harvested between October and December each year whilst it is quite raw. In order for it to be preserved, for up to 12 months, it is sliced and immersed in a solution containing a firming agent so that the fruit becomes stiff and firm. Professor Niranjana who witnessed the process in 2014 described the fruit at this stage of the process as "almost rock-like".

19. The fruit is then washed to bring calcium and other chemicals below the permitted level before "cooking" or blanching in boiling water to inactivate enzymes and prepare it for osmotic dehydration. During his visit to the factory it was confirmed to Professor Niranjana that, in a typical process, the fruit is initially at 38°C and dropped into a mass of water roughly twice its weight at 95°C. The introduction of the fruit caused the temperature of the water to fall to approximately 78°C and the blanching takes place when the water re-heats to 95°C and takes around 10-13 minutes although, as Professor Niranjana observed, the timings given were "very arbitrary" and that "time was not an issue at the plant".

20. The next stages in the process, described as "syruping", involves placing the papaya first in a 30%-40% sucrose syrup solution, then in a 40%-55% syrup and finally in a 60%-65% syrup each of which are heated to 60-65°C before the fruit is added and then allowed to cool for six to eight hours with the fruit in it before the next stage takes place. The papaya is then dried in a hot air tunnel for three days. To prevent it clogging together icing sugar is added to the surface of the papaya which is then cut to customer requirements.

21. As Professor Niranjana explained all syrup solutions used are hypertonic and the mass transfer gradients are such that as water exits the fruit, sugars simultaneously infuse into it as an inevitable consequence of the process. Even though osmosis was a natural process, as it would have taken too long and not been commercially viable to rely on purely natural osmotic dehydration occurring, it was necessary for Vanda to undertake the process as described.

22. Although he had not undertaken any analysis of the product, based on information provided by Vanda, Professor Niranjana noted that fresh papaya only contains glucose and fructose (at 4.63% and 3.93% respectively) but after the process has been completed there was found that there was 57.58% sucrose, 12.6% glucose and 11.01% fructose. As only sucrose is infused during the process he explained that any increase in the percentage of glucose and fructose may be attributed to the hydrolysis of some of the sucrose during the process.

23. Professor Niranjana noted that the moisture content of the papaya after repeated immersion in the three hypertonic solutions is reported to be around 29%-35% which

is brought down to less than 13% after air drying. In his view it is the low value of the moisture content that is responsible for the preservation of the papaya, ie it is preserved by the removal of the water not by the addition of the sugar, although he accepts that sugar does have a part to play in this.

- 5 24. That this is the case, is also apparent from Ms Geary's Report where under the sub-heading 'The role of sugar in preservation' it states:

10 Sugar preserves fruit and other foodstuffs because of the 'osmotic potential' it creates. When a micro-organism such as a bacterium or yeast cell is placed in a food product containing a high sugar concentration such as honey, water is drawn out of the cell of that micro-organism, across its semi-permeable cell membrane, and into the honey. The yeast or bacterium is effectively dehydrated by this process and is unable to function, so cannot degrade the food. The preservation of the product is dependent on the Water Activity (Aw) rather than the sugar concentration as such. Water Activity is a measure of the availability of water to micro-organisms, and the more sugar (or other solutes) present, the lower the Water Activity will be and hence the less water will be available to micro-organisms. It is possible to convert '% sugar to 'Aw' but each sugar will have a different conversion graph (glucose is much better at dropping Aw per unit than sucrose for example), and if there is more than one sugar present (likely), it gets quite complicated!

- 15 25. As is clear from the agreed facts (see paragraph 3, above) a sample of papaya was taken by HMRC on 27 May 2008 and sent a laboratory for analysis. The laboratory was that of Campden BRI and the analysis of the papaya, which was divided into two samples, was undertaken by Ms Geary.

26. A visual assessment of each of the samples was recorded in identical terms in her report as follows:

30 The sample received was a sub sample tub of small pieces of dehydrated papaya varying in colour for yellow to red. These are small firm/hard pieces with sugar crystals on the outside and they have a glassy appearance when cut open. They did not rehydrate in water as would have been expected of a dried fruit.

- 35 27. Ms Geary's report continued with the following description of microscopy examinations on the papaya samples:

40 These two samples consisted of chunks of sweet orange/yellow pulp. Sections were taken and mounted in both paraffin and water. This showed the presence of a considerable amount of crystals, probably sugar, especially in the outer layers of the chunks indicating that the sample had been crystallised or glacéed with sugar. The cell structure was typical of papaya, Cell separation was seen indicating that the product had undergone heat treatment that was not just drying. Plates 1, 2 5 and 5 showing the diced papaya with the crystallised sugar on the surface of the fruit, this crystallisation on the surface is extensive and results in an almost crisp outer surface. Plates 3, 4, 7 and 8 show the penetration of the sugar into the outer layers of the fruit. This penetration is not throughout the whole piece of dried fruit but is significant. If osmotic dehydration had taken place in the correct way then the only sugar should be that which is naturally present and this penetration would not be seen.

28. Sugar crystals were clearly visible on the outside and outer layers of the papaya in photographs illustrating the visual assessments and microscopy examinations (the “Plates” referred to above).

29. While Professor Niranjan agreed that sugar crystals were “quite evident” on and in the papaya as stated in the report and shown in the photographs, he did not accept her conclusion that the papaya had been glacéed or crystallised or that it could be rehydrated as she suggested. Indeed Ms Geary herself agreed that it was not possible to return fruit to its original fresh appearance by rehydration. She also accepted that air drying would produce sugar crystals in the papaya.

30. An analysis of the sugar and moisture content of the papaya samples in Ms Geary’s report is as shown in the table below:

Sucrose (%)	Fructose (%)	Glucose (%)	% Sucrose (inc. invert sugar)	% Moisture
43.2	18	19.4	77.4	11.7
42.9	16.5	18.2	74.3	11.3

31. Although Professor Niranjan did not dispute these figures or Ms Geary’s analysis he did not accept her conclusion that:

All the findings above lead me to believe the products in question have been preserved by sugar and should be classed as such. The penetration of sugar into the diced fruit is extensive and therefore means the product has been preserved by sugar. If osmotic dehydration had been applied correctly then only water would be removed and some sugar would be seen on the surface of the fruit, penetration to this extent should not be seen.

32. In his first report Professor Niranjan states:

Crystallised and glacé products generally tend to have higher moisture contents (around 25%) and are also saturated with sugars. It is the high concentration of sugars in solution that prevent microbial growth and are responsible for product preservation. In my opinion, preservation in OD [osmotic dehydrated] product is achieved by having low moisture content, whereas, the preservation in crystallised product is achieved predominantly as a result of high sugar content. The former process can be achieved at lower temperatures and lower concentration of sugar syrup than as compared to crystallisation. OD is, therefore, more suitable for fragile fruits and is ore energy efficient. This is the fundamental difference between the two processes. Another possible difference between OD and crystallised product may relate to the percentage of invert sugars as a percentage of total sugars in the product. In Appendix 3 [from where the figures referred to in paragraph 17, above, are derived] the percentage of glucose (12.60%) and fructose (11.01%) together works out to 23.61% which is 29% of the total sugar percentage of 81.19%. In crystallised products, one generally aims for a higher percentage of invert sugars, principally because the invert sugars form an amorphous glassy mass with water which imparts the desired translucent appearance. Moreover, a higher percentage of invert sugars also enable higher total sugar infusion into the product because invert sugars are much smaller molecules than sucrose. Hence, every attempt is made to employ processing conditions

(temperature, pH etc) which increases the level of invert sugars formed by the hydrolysis of sucrose; eg by repeated boiling, adding acids etc.

33. Ms Geary describes the process of osmotic dehydration in her report, first explaining that:

5 A plant cell consists of the living material (the cytoplasm) surrounded
by a very thin semi-permeable membrane, which is itself surrounded
by a much thicker cellulose wall. It is the cell membrane which
controls the movement of water and solutes into and out of the cell.
10 The membrane is permeable to water but not to sugar, so if a cell is
placed in a concentrated solution of sugar, water will pass out of the
cell, across the membrane, until the concentrations of sugar are the
same inside and outside the cell. This process is reversible so long as
the cell membrane remains intact, so if the cell is then moved to a
15 solution with a much lower concentration of sugar, water will move
back into the cell. When the cell is fully rehydrated, it exerts an
internal pressure on the cellulose cell wall, referred to as “Turgor
pressure”, rather like a balloon inside the cell. It is this turgor pressure
that maintains the structure of most green plants, and without it the
20 plant will droop. This is the cause of wilting in plants – the plant has
insufficient water to maintain full turgor pressure inside all its cells, so
the structure becomes floppy. The same basic process can be seen in
excised pieces of plant tissue such as cubes of fruit – they are firm and
crisp if kept in water so that the cells can maintain full turgor pressure,
but if allowed to dry out, they become softer and rubbery.

25 In the osmotic dehydration process, slices or cubes of fruit are
immersed in a concentrated solution of one or more solutes, usually
containing sugar. In the process, partial dehydration and some solute
uptake occurs simultaneously. Water is drawn out of the cells of the
fruit by osmosis, as water moves outwards through the semi-permeable
30 cell membranes into the surrounding sugar solution, because the
concentration in the cell sap is lower than that in the surrounding sugar
solution. The degree of dehydration (ie water removal) that is achieved
will depend on the exact concentrations used, and the time and
temperature. Initially, as water is drawn out of the cell, the cell volume
35 will decrease and the cell membrane will shrink away from the more
rigid cellulose wall. This process, whereby the living contents of a cell
peel away from the cell wall, leaving gaps between the cell wall and
the membrane and making the plant cell flaccid, is known as
plasmolysis. The water within the cellulose cell walls will be replaced
40 by sugar solution, and any spaces between the cells will fill with sugar
solution. If no heat has been used and the cell membrane remains
intact, this process can be reversed by immersing a hypotonic solution
of pure water, and the cell will re-absorb water and re-expand to its
original volume.

45 34. However, Professor Niranjana, in his second report, takes issue with Ms
Geary’s “hypothesis” that the presence of “intact and physiologically active
membrane is a pre-requisite for osmotic dehydration”; her “inferences” that osmosis
and turgor pressure form the basis of osmotic dehydration; that osmotic dehydration is
“reversible”; and that no cell damage should occur during osmotic dehydration,
50 stating that it does not hold in industrial osmotic dehydration processes.

35. His second report continues:

Industrial osmotic dehydration relies on the following principle: an osmotic pressure based driving force is established by having a higher concentration sugar solution outside of a fruit than the concentration of sugars normally prevailing inside fruit cells. An osmotic driving force is established across the cell membrane, which is selectively permeable to water. Hence water leaves the fruit in an attempt to lower the driving force, until the concentrations are eventually equalised. There are millions of cell membranes inside any fruit. Some may be physiologically active with activities varying depending on their age, health etc; while a significant number may be damaged or physiologically dead. Thus, the permeability of individual cell membranes to water and other substances can vary dramatically from cell to cell in any commercial sample of fruit. The storage period of the fruit is also known to influence membrane permeability.

He then refers to an article, published in 2006, in a peer review publication *Journal of Food Engineering*, the *Effect of long-term storage and blanching pre-treatments on the osmotic dehydration kinetics of carrots* which:

... shows that longer the storage period at low temperature, the less permeable the membrane. In practice, the majority of the cell membranes allow water to leave under the osmotic pressure driving force, and a significant number can also allow sugars to enter under a mass transfer driving force created by the sugar concentration being higher outside than inside.

Thus, the cell membrane, the cell wall and the very arrangement of the cellular architecture, all act as barriers for the water to leave the cell (and for the sugars to enter). This makes osmotic dehydration an inherently slow process. Moreover, the fact that fruits are stored at low temperatures for extended periods of time prior to osmotic dehydration, alter the membranes and cellular structure in such a way that the process becomes even slower. So, methods have to be found to accelerate water removal, in order for the process to be viable on an industrial scale. This is achieved by a variety of means such as high temperature blanching, high pressure processing, application of high intensity electric fields. All these processes increase the permeability of the membranes as well as the cell walls; they also open up the cellular architecture and accelerate the rates of water exit. It may be noted that blanching per se is not wholly intended for this purpose; it primarily inactivates fruit spoilage enzymes and extends its keeping quality. However, by intensifying the blanching conditions, we can achieve the additional purpose of making the membranes, the cell walls and the interstitial spaces more permeable for the water to leave the fruit. Despite altering the cellular permeability and diffusivity, it is worth noting that the pre-treatment methods employed do not stop osmotic dehydration from occurring in the first place, as stated in the attached references [including the article referred to above] and numerous other articles that the scientific literature is replete with. Once the water has left the tissue, the cellular architecture is irreversibly transformed, and, for all practical purposes cannot be restored simply by rehydration.

50 *Law*

36. As Henderson J noted in *HMRC v Flir Systems AB* [2009] EWHC 82 Ch:

5 “6. A full account of the legal background to the EU customs tariffs, and the principles to be followed in their interpretation, was given by Lawrence Collins J (as he then was) in *Vtech Electronics (UK) Plc v Customs & Excise Commissioners* [2003] EWHC 59 (Ch) ("*Vtech*"). What follows is intended to be a relatively brief summary.

10 7. The EU is a contracting party to the International Convention on the Harmonised Commodity Description and Coding System, generally known as "the Harmonised System". The Convention requires that the tariffs and nomenclatures of contracting states conform to the Harmonised System, and all contracting states therefore use the headings and sub-headings of the Harmonised System. The system is administered by the World Customs Organisation in Brussels, which publishes explanatory notes to the Harmonised System known as "HSEns".

15 8. At Community level, the amount of customs duties on goods imported from outside the EU is determined on the basis of the Combined Nomenclature ("CN") established by Article 1 of Council Regulation 2658/87 and Article 20.3 of Regulation 2913/92. The CN is re-issued annually. It comprises three elements:

- 20 (a) the nomenclature of the Harmonised System;
- (b) Community sub-divisions to that nomenclature; and
- (c) the preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.

25 9. The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the Harmonised System, while the two following digits identify the CN sub-headings, of which there are about ten thousand. Where there is no Community sub-heading, these two digits are "00". There may also be ninth and tenth digits which identify further Community (TARIC) sub-headings, of which
30 there about eighteen thousand.

10. Apart from the HSEns to which I have already referred, the European Commission also issues Explanatory Notes of its own to the CN which are known as "CNENs".

35 11. The Court of Justice of the European Communities ("the ECJ") has repeatedly stated that the decisive criterion for the tariff classification of goods must be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN. The two categories of Explanatory Notes, that is to say the HSEns and the CNENs, are an important aid to the interpretation of the scope of the various tariff headings, but do not themselves have legally binding force. The content of the Explanatory Notes must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions. See, for example, Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financien*, [2005] ECR I-8151, at paragraphs 47 and 48.
45

50 12. Part 1 of the CN contains at Section 1A the General Rules for the Interpretation of the CN. These General Rules are known as "GIRs". Unlike the Explanatory Notes, they have the force of law (see *Vtech* at paragraph 16). “

37. So far as material to the present appeal the GIRs provide as follows:

Classification of goods in the Combined Nomenclature shall be governed by the following principles:

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

2. – 3. ...

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. – 6. ...

38. The approach to interpretation of a CN has recently been considered by the Court of Appeal in *Amoena (UK) Limited v HMRC* [2015] EWCA Civ 25 where Arden LJ said:

“54. It is clear from the Opinion of Advocate General Kokott in *Uroplasty* that the court must apply a structured approach. At the first stage it must determine the intended use and material composition of the article. Next the court must make a provisional classification by reference to section and chapter headings. Then the court must make a combined examination of the headings and Notes, applying GIRs 2 to 5 in case of conflict. The interpretation of the headings and EN should be consistent with the HS. Finally the article must be placed under the appropriate subheading. The relevant paragraphs in the Opinion are as follows:

42. First, the intended use and material composition of the article must be precisely determined. Next, in the light of the wording of the headings of the relevant sections and chapters a provisional classification must be undertaken according to the article's intended use and material composition. There must then be considered whether on a combined examination of the wording of the headings and the explanatory notes to the relevant sections and chapters a definitive classification may be reached. If not, then in order to resolve the conflict between the competing provisions recourse must be had to Rules 2 to 5 of the general rules. Lastly, classification must be made under the subheadings.

43 ...

44. In this exercise the wording of the headings and the explanatory notes of the CN are to be interpreted so as to be consistent with the Harmonised System. The Court has consistently held that the explanatory notes drawn up, as regards the Harmonised System, by the World Customs Organisation, may be an important aid to the interpretation of the individual tariff headings, although they do not have legally binding force. (5)

55. The CJEU emphasised that the determination of the characteristics and properties of the article must be an objective one, and that the wording of the CN must prevail over the EN, which cannot alter the scope of the headings:

5 40. According to settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs tariff purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters (see, in particular, Case C-42/99 *Eru Portuguesa* [2000] ECR I-7691, paragraph 13; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 47; 10 Case C-445/04 *Possehl Erzkontor* [2005] ECR I-0000, paragraph 19; and Case C-500/04 *Proxxon* [2006] ECR I-0000, paragraph 21).

15 41. The Explanatory Notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those Notes must therefore be consistent with the provisions of the CN and cannot alter their scope (see, in particular, Case C-130/02 *Krings* [2004] ECR I-2121, paragraph 28, Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 17, and *Proxxon* paragraph 22).

25 42. For the purposes of classification under the appropriate heading, it is important, finally, to recall that the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see *Krings* paragraph 30, *Ikegami*, paragraph 23, and *Proxxon*, paragraph 31).”

30 39. She observed at [64]:

35 “While the HSEs are not binding on the CJEU, they are important as an aid to interpretation as a means of ensuring the uniform application of the EU Customs Code: see, for example, *Lohmann* where the CJEU held:

40 31. In addition, the Court has consistently held that the purposes of interpreting the Common Customs Tariff both the notes which head the chapters of the Common Customs Tariff and the HS Explanatory Notes are important means of ensuring the uniform application of the Tariff and as such may be regarded as useful aids to its interpretation.”

45 40. In *Weber v Milchwerke Paderborn-Rimbeck* [1989] ECR 1395 Case 40/88 The European of Justice (“ECJ”) was asked for a preliminary ruling in relation to the interpretation of the Common Customs Tariff and whether the way in which a product was manufactured could have an effect on the tariff classification of the product. In its decision the Court stated:

50 “13. In order to reply to those questions it should be pointed out, first, that according to settled case-law (see, for example, the judgments of 23 March 1972 in Case 36/71 *Henck v Hauptzollamt Emden* ((1972)) ECR 187, paragraph 4, and of 26 September 1985 in Case 166/84 *Thomasduenger v Oberfinanzdirection Frankfurt am Main* ((1985))

5 ECR 3001, paragraph 13), in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their characteristics and objective properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters.

10 14. With regard to the question whether the method of manufacture of the product has an effect on classification for customs purposes, the Court has already decided (see the judgment of 16 December 1976 in Case 38/76 *Industriemetall LUMA v Hauptzollamt Duisburg* ((1976)) ECR 2027, paragraph 7) that whilst the Customs Tariff does indeed in certain cases contain references to manufacturing processes it is generally preferred to employ criteria for classification based on the objective characteristics and properties of products which can be
15 ascertained when customs clearance is obtained .”

41. However, it is clear from the decision of the Court of Justice of the European Union (“CJEU”) in *Delphi Deutschland GmbH v Hauptzollamt Düsseldorf* [2011] EUECJ C-423/10 at [23-26] that while, as in *Weber*, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their
20 objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes it is “necessary to take into account also the explanatory notes.”

42. It is common ground in this case that the papaya is within chapter 20 of the CN, *Preparation of Vegetables, Fruit, Nuts or Other Parts of Plants*, and that and no other
25 heading or chapter of the CN is applicable. It is also common ground that is the papaya does not fall within heading 2006 it should be classified under heading 2008.

43. The relevant additional notes to chapter 20 provide:

1. ...
2. (a) The content of various sugars expressed as sucrose (sugar content) of the products classified in this chapter corresponds to the
30 figure indication by a refractometer (used in accordance with the method prescribed in the Annex to Regulation (EEC) No 558/93) at a temperature of 20°C and multiplied by the factor:
 - 0.93 in respect of products of subheadings ... 2008 99 or,
 - 35 – 0.95 in respect of the other headings.
- (b) ...
3. The products of subheadings ... 2008 99 shall be considered as containing added sugar when the sugar content thereof exceeds by weight the percentage given hereunder, according to the kind of fruit or
40 edible part of the plant concerned:
 - pineapple and grapes: 13%.
 - other fruits, including mixture of fruits, and other edible parts of plants: 9%.
4. – 7. ...
- 45 8. For the purposes of subheadings ... 2006 00 35 ... 2008 99 48, 2008 99 63 ... “tropical fruit” means ... pawpaws (papaya)

44. Although we have set out these headings at paragraph 2 above, as it is clear from *Delphi* that these should be read in conjunction with the HSEs, for ease of reference we do so again with each followed by the relevant HSEN.

45. Heading 2006 states:

5 Vegetables, fruit, nuts, fruit-peel and other parts of plants preserved by sugar (drained, glacé or crystallised).

46. The HSEN to heading 2006 is as follows:

10 The products of this heading are prepared first by treating the vegetables, fruit, nuts, fruit-peel or other parts of plants with boiling water (which softens the material and facilitates penetration of the sugar), and then by repeated heating to boiling point and storage in syrups of progressively increasing sugar concentration until they are sufficiently impregnated with sugar to ensure their preservation.

15 The principal products preserved by sugar are whole fruit or nuts (cherries, apricots, pears, plums, chestnuts (marrons glacés), walnuts, etc.), sections or pieces of fruit (oranges, lemons, pineapples, etc.) fruit peel (citron, lemon, orange, melon etc.), other parts of plants (angelica, ginger, yams, sweet potatoes, etc.) and flowers (violets, mimosa, etc.).

20 Drained products are prepared by using a syrup (eg a mixture of invert sugar or glucose with a proportion of sucrose) which does not crystallise on exposure to the air. After impregnation the excess syrup is drained off leaving the product sticky to the touch.

25 Glacé products are obtained by dipping the drained product in a sucrose syrup which dries as a thin, shiny coating.

30 Crystallised products are prepared by allowing the sucrose syrup to penetrate into the product so that, on drying it forms crystals on the surface or throughout the product.

35 Those goods preserved by sugar and put up in syrup, whatever the packing, are excluded from this heading (heading 2002, 2003 or 2005, in the case of vegetables, or heading 2008, in the case of fruit, nuts, fruit-peel and other edible parts of plants, eg marrons glacés or ginger).

40 Dried fruits (eg dates and prunes) remain classified in Chapter 8 even if small quantities of sugar have been added, or if the exterior is covered with a deposit of dried natural sugar which may give the fruit an appearance somewhat similar to that of crystallised fruit of this heading.

47. Heading 2008 states

45 Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing any added sugar or other sweetening matter or spirit, not otherwise specified or included.

48. Insofar as it applies to the present case the HSEN to heading 2008 provides:

50 This heading covers fruit, nuts, and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.

55 It includes, inter alia

(1) – (9) ...

5 (10) Fruit preserved by osmotic dehydration. The expression “osmotic dehydration” refers to a process whereby pieces of fruit are subjected to prolonged soaking in a concentrated sugar syrup so that much of the water and the natural sugar of the fruit is replaced by sugar from the syrup. The fruit may subsequently be air-dried to further reduce the moisture content.

Discussion and Conclusion

10 49. Taking the “structured approach” set out in *Amoena* and the authorities cited by Arden LJ (see paragraph 38, above) it is first necessary to determine the intended use of the product and then its objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters.

15 50. We have no difficulty in finding that the intended use of the papaya is its inclusion in cereals or as a snack, either on its own or with other fruit. Turning to its objective characteristics and properties the papaya is clearly a “tropical fruit” as defined by the notes to chapter 20 and therefore a fruit within heading 2006 if “preserved by sugar (drained, glacé or crystallised)” or under heading 2008 if not. It is therefore necessary to consider whether the papaya is “preserved by sugar” and within heading 2006 and, in the absence of a definition of “preserved by sugar” in that heading and notes it is necessary to turn to the HSEN for that heading (which we have set out at paragraph 46, above) as an aid to its interpretation.

20 51. Ms Geary’s analysis of the samples selected by HMRC, which was not challenged by Professor Niranjan, revealed the sugar content of the papaya to be between 74.3%-77.4%. Indeed Professor Niranjan in his first report, based on information provide by Vanda refers to a “total sugar percentage of 81.19% (see paragraph 32, above). It was also not disputed that the papaya samples contained sugar crystals. Given the infusion of the sucrose syrup solution which occurs simultaneously with the dehydration of the papaya it would appear to fall within the definition of “crystallised” as set out in the HSEN.

30 52. However, as Mr Mitchell emphasised, the first paragraph of the HSEN refers to the preparation of the “products of this heading” first by treating with boiling water “and then by repeated heating to boiling point and storage in syrups of progressively increasing sugar concentration”. As both experts agreed when the question was put to them by Mr Mitchell, it would be pointless to boil a product in water and immerse it in a syrup solution until sufficiently impregnated with syrup and then re-boil it in water as this would reverse the infusion process. Therefore the reference to “repeated heating” in the HSEN must refer to repeated heating in the syrup and not repeated boiling in water.

35 53. In the absence of evidence of repeated heating, Mr Mitchell submits that the papaya is not a product to which the HSEN refers and cannot therefore be within heading 2006. Mr McGurk counters this contending that the HSEN is an aid to interpretation and should not itself be read as though it were a statute. Not surprisingly he emphasises the definition of “crystallised” in the HSEN to which we have already referred.

40 54. It is clear to us that in order to determine whether heading 2006 or heading 2008 is applicable in the present case it is necessary to consider the process by which the

papaya is preserved. As Mr McGurk reminds us, it is for the Company to establish that, because of the process by which it was preserved, the papaya should not be classified under heading 2006.

5 55. However, there was no evidence before us in relation to the way the papaya was preserved during 2008, the year in which the papaya samples were taken by HMRC. The only evidence of the preservation process is contained in Ms Uppatham's witness statement made in August 2014 which did not address the issue of whether the processes described were in operation in 2008. It is also clear that neither Professor Nirajan nor Mr Brunton could assist with this issue. Had Ms Uppatham or Vanda's
10 factory manager, who Professor Nirajan said spoke good English and was aware of the preservation process, been called to give evidence it is quite possible that the Company would have been in a position to establish, on the evidence, that the process does not satisfy the scientific requirement of the HSEN to 2006 and therefore should not be classified under heading 2006 but under heading 2008.

15 56. Although we may have reached a different conclusion if evidence of the preservation process during 2008 had been adduced, in the absence of any such evidence we have no alternative but to dismiss the Company's appeal.

Right to Apply for Permission to Appeal

20 57. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"
25 which accompanies and forms part of this decision notice.

JOHN BROOKS

30

TRIBUNAL JUDGE
RELEASE DATE: 7 July 2015