



High Court Sets Aside Customs Ruling And Applies The “Essential Character” Test In Tariff Classification

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Last Friday, the High Court allowed the judicial review application filed by Yakult (Malaysia) Sdn Bhd (Company) and set aside the Customs’ decision to reclassify the “Yakult Ace” and “Yakult Ace Light” (Products) drinks manufactured by the company from fermented milk products to beverages. The High Court held that the Products should properly fall under tariff code 0403.90.9000 as “other fermented or acidified milk” as opposed to under tariff code 2202.99.5000 as “other non-aerated beverages ready for immediate consumption without dilution”.

Beyond the immediate classification outcome, the decision is significant for reaffirming two core principles in Customs classification disputes. First, tariff classification must be anchored in the essential character of the product, assessed holistically with regard to its composition, function, and intended use, rather than superficial physical form. Second, the Customs’ departure from long-standing classification practice must be supported by cogent justification and internally consistent, particularly where such departure affects established commercial and licensing arrangements.

The Company was successfully represented by the firm’s Tax, SST & Customs partner, S. Saravana Kumar, together with senior associate, Dharshini Sharma and pupil, Rita Soong.

Background

The Company manufactures probiotic fermented milk products containing over 30 billion live Shirota strain bacteria per 80ml bottle, together with skimmed milk powder, sugar, glucose, and permitted flavouring. The Products are intended to support gut health and improve immune function.

Pursuant to a manufacturing licence issued by the Customs on 4.11.2003, the Products were first classified under tariff code 0403.90.910 as “other fermented or acidified milk” pursuant to the Customs Duties Order 2002, which was subsequently classified under tariff code 0403.90.9000 (also as “other fermented or acidified milk”) following a legislative amendment via the Customs Duties Order 2022. This classification remained in place for over two decades.

On 20.7.2023, the Customs issued a letter informing the Company that the Products should instead be classified under tariff code 2202.99.5000 as “non-aerated beverages ready for immediate consumption without dilution”.

The Customs took the position that the Products had lost their essential character as fermented milk due to dilution with water and relied, inter alia, on a letter from the Ministry of Health (MOH), which stated that the Products were not yogurt in solid form and therefore, lacked the essential characteristics of yogurt.

The Dispute

The central issue before the High Court was whether the Products should properly be classified under tariff code 0403.90.9000 as fermented milk products or under tariff code 2202.99.5000 as beverages.

This turned on whether the addition of water and ready-to-drink form altered the essential character of the Products for classification purposes under the Harmonised System General Rules of Interpretation.

The Essential Character Analysis

The Company’s submission before the High Court was anchored on the General Rules for the Interpretation of the Harmonized System under the International Convention on the Harmonized Commodity Description and Coding System, particularly rule 3(a), which provides that goods are to be classified under the heading which gives the most specific description.

It was highlighted that heading 04.03 expressly covers “other fermented or acidified milk”, and was therefore the more specific heading compared to the residual beverage classification under heading 22.02.

Relying on the Court of Appeal’s ruling in *Ketua Pengarah Kastam v Power Root (M) Sdn Bhd & Ors* (Rayuan Sivil No.: W-01(1M)-441-10), the Company contended that classification must be determined by the product’s essential character including its primary function and intended use. The Products are not designed as thirst-quenching beverages but as functional dairy products intended to promote gut health through probiotic content. The Company further emphasised that consumption in liquid form does not transform the Products into beverages for tariff purposes.

In addition, the Company highlighted the Customs’ inconsistent classification practice including the fact that a similar probiotic dairy product manufactured by a competitor

was continued to be classified under heading 0403 notwithstanding both products had comparable water content. The long-standing classification of the Products over 23 years, supported by the manufacturing licence, was also relied upon as giving rise to a legitimate expectation that the Customs could not depart from its over 20-year-old classification stance without proper justification.

The High Court’s Decision

The High Court allowed the judicial review application and set aside Customs’ reclassification decision. The court held that the Products retain a strong basis to be characterised as fermented milk and should properly fall under tariff code 0403.90.9000 as the heading expressly includes “*yoghurt... and other fermented or acidified milk and cream.*” The court accepted that the core composition of the Products remains that of fermented milk containing live bacteria cultures, skimmed milk powder, sugar and flavouring, notwithstanding the addition of water.

Most importantly, the essential character of the Products was that of a fermented milk drink and not a thirst-quenching beverage. It was primarily associated with gut health benefits. In fact, the general consumer perception of the Products was that of a fermented milk product for digestive health, rather than an ordinary beverage for casual consumption.

Accordingly, the High Court concluded that the addition of water does not displace the essential character of the Products as fermented milk, which remained properly classifiable under tariff code 0403.90.9000.

Why This Decision Matters

This decision reinforces several key principles in Customs classification jurisprudence.

First, it affirms that “essential character” remains the governing test in determining tariff classification, particularly in borderline cases such as the determination between dairy-based products and beverages. Functional purpose and composition will prevail over form and presentation.

Secondly, it underscores that long-standing classification practice cannot be lightly departed from, especially where it has informed regulatory treatment and commercial reliance over an extended period. Any departure requires clear and reasoned justification. Absent cogent reasons, such departures may be vulnerable to judicial intervention.

Finally, the decision reflects a purposive and harmonised approach to customs' classification, confirming that fermented milk products do not cease to fall within the scope of beverages merely because they are presented in ready-to-drink form.

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