

"4. The tomato paste under seizure traveled from Patterson, California, to St. Louis, Missouri, and was manufactured at the Claimant's plant in Patterson, California, on September 19 and 20, 1961.

"5. Tomato paste is an article of food. During an inspection at Claimant's plant at Patterson, California, on September 20, 1961, the machinery and equipment of the plant, as shown by photographs introduced in the Court and the testimony of the Food and Drug Inspector, had thousands of drosophila flies on various parts of the equipment used in processing of tomatoes, including conveyor belts, seed extractors, hood coverings, and other parts of the processing machinery.

"6. The photographs showing the flies revealed that they were in many instances only inches away from the tomatoes being processed. The evidence showed that on occasions while being processed the tomatoes would hit parts of the machinery which was covered by these flies.

"7. An analysis of the seized products from thirty 100-gram samples of the tomato paste taken from thirty separate cans, each sample representing about one thirty-sixth of the total contents of the can, showed drosophila maggots, drosophila eggs, insect eggs, fly leg parts and other filth and contamination in the samples. The samples analyzed include tomato paste manufactured both on the 19th and 20th days of September, 1961.

"8. Tests made on behalf of the Claimant also showed worm skins, fly skins and other filthy substances.

"9. The presence of drosophila flies in the large number shown by the evidence constitutes insanitary conditions at the manufacturing plant of the Claimant and the presence of maggots, skins, flies and other filthy substances in the paste is contamination of the tomato paste.

CONCLUSIONS OF LAW

"1. Tomato paste is a food within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321 (f).

"2. The Federal Food, Drug and Cosmetic Act provides that a food shall be deemed adulterated if it consists wholly or in part of a filthy substance, 21 U.S.C. 342(a) (3), or if it is prepared or packed under insanitary conditions whereby it may become contaminated with filth, 21 U.S.C. 342(a) (4). In this instance the premises were insanitary and the product consisted partially of filthy substance.

"3. The Claimant argues that the presence of a small amount of maggots, fly wings and other filthy substance is not sufficient to condemn and forfeit the tomatoes. The Court is not persuaded and finds that there is no tolerance for filth under the Federal Food, Drug and Cosmetic Act, and the Secretary of Health, Education and Welfare has no authority to establish any tolerance.

"4. 21 U.S.C. 334 requires that food seized pursuant to that statute and shown to be adulterated must be condemned and forfeited to the United States.

"5. The government is entitled to a decree of condemnation forfeiting the seized tomato paste to the United States and a judgment in accordance with the terms of this memorandum will be entered providing that the food shall not be used for human consumption and shall be destroyed.

"Costs will be assessed against the Claimant.

"Dated this 28th day of February, 1963."

On or about 5-10-63, the claimant moved to re-tax costs which totaled \$1,529.01 and included \$698.90 allocated as witness fees. On 5-24-63, the court issued an order reducing the fees for witnesses and disallowing any costs for a witness who was not called by the Government, but was called by the court. Total costs paid were \$910.11.

29684. Tomato paste. (F.D.C. No. 50336. S. No. 1-872 A.)

QUANTITY: 145 cases, each containing 6 6-lb. 15-oz. cans, at Quincy, Fla.

SHIPPED: 4-20-64, from San Francisco, Calif., by Kings Food Products.

LABEL IN PART: (Can) "King-Ko Tomato Paste * * * Distributed by Kings Food Products San Francisco, California."

RESULTS OF INVESTIGATION: Analysis showed that the article was undergoing chemical decomposition.

LIBELED: On or about 7-8-64, N. Dist. Fla.

CHARGE: 402(a) (3)—contained a decomposed substance when shipped.

DISPOSITION: 9-1-64. Default—destruction.

29685. Tomato catsup. (F.D.C. No. 50094. S. No. 42-314 A.)

QUANTITY: 65 cases, each containing 24 1-lb. 15-oz. cans, at Idaho Falls, Idaho.

SHIPPED: 3-27-64, from Ogden, Utah, by Utah Packers, Inc.

LABEL IN PART: (Can) "Pierce's Tomato Catsup * * * Distributed by Utah Packers, Inc. Ogden Utah."

LIBELED: 5-26-64, Dist. Idaho.

CHARGE: 402(a) (3)—contained decomposed tomato material when shipped.

DISPOSITION: 6-24-64. Default—destruction.

SPICES, FLAVORS, AND SEASONING MATERIALS*

29686. Mayonette dressing and Frenchette dressing. (F.D.C. No. 44927. S. Nos. 32-629 R, 36-049 R.)

QUANTITY: 20 cases, each containing 12 13-oz. jars of Mayonette dressing, and 31 cases, each containing 24 6-oz. btls., of Frenchette dressing, at Jamaica, N.Y.

SHIPPED: Between 6-29-60 and 8-18-60, from Jersey City, N.J. by Frenchette, Div. of Carter Products, Inc.

LABEL IN PART: (Jar) "Mayonette Low Calorie Replacement for Whip Salad Dressing and Mayonnaise * * * Only 8 Calories in a Full Tsp. * * * The Frenchette Div. of Carter Products, Inc. N.Y. Dist." (paper collar on jar) "80% LESS CALORIES than mayonnaise * * * Also Try Frenchette all the superb flavor of finest French Dressing * * * Italianette all the tangy flavor of real Italian Dressing," (btl.) "Non-Fattening FRENCHETTE Brand Dressing for Salads * * * Approx. 1 Calorie per Tablespoon * * * The Frenchette Div. of Carter Products, Inc., N.Y. Dis." (paper collar on btl.) "Approx. 1 Calorie per tablespoon Regular Dressing 60 Calories Per Spoon * * * Also Try Low Calorie Italianette and Mayonette."

RESULTS OF INVESTIGATION: Examination of the articles showed that the Mayonette dressing was a pale, pasty, semisolid with a taste, odor, and general appearance similar to mayonnaise, and that it contained approximately 13.5% fat by weight; and that the Frenchette dressing was a viscous, orange-colored liquid with a strong aroma of vinegar and paprika, similar in appearance to emulsified french dressing, and that it contained 0.35% fat by weight.

LIBELED: 10-13-60, E. Dist. N.Y.

CHARGE: Mayonette: 403(a)—the name of the article, "Mayonette Low Calorie" and the declaration "Whip Salad Dressing and Mayonnaise," were misleading in that they suggested and implied that the article was a low calorie mayonnaise which it was not; 403(a)—the label statements "Frenchette superb flavor of finest French Dressing," and "Italianette all the tangy flavor of real Italian Dressing," contained false and misleading representations that "Frenchette" was french dressing and "Italianette" was italian dressing;

*See also No. 29635.