JUDGMENT OF THE COURT (FIRST CHAMBER)
16 FEBRUARY 1984 [1]

Gerlach & Co. BV v Inspecteur der Invoerrechten en Accijnzen, Amsterdam (reference for a preliminary ruling from the Tariefcommissie, Amsterdam)

(Common Customs Tariff — Fish-liver oil)

Case 46/83

Common Customs Tariff — Tariff headings — Fish-liver oil, acyclic hydrocarbon — Classification under subheading 29.01 A — End use of the goods — Favourable tariff arrangement (subheading 29.01 A II) — Lack of authorization — Not permissible
(Commission Regulation No 1535/77, Art. 3, and No 1775/77)

A completely hydrogenated animal oil, manufactured from fish liver, which is at the same time an acyclic hydrocarbon, must be classified under subheading 29.01 A of the Common Customs Tariff.

In the absence of the authorization provided for by Commission Regulation No 1775/77 of 4 July 1977 determining the conditions under which certain petroleum products are eligible upon importation for a favourable tariff arrangement by reason of their end use, such a product cannot be classified under subheading 29.01 A II and must be classified under subheading 29.01 A I.

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tariefcommissie [Administrative Court of Last Instance in revenue matters], Amsterdam, for a preliminary ruling in the proceedings pending before that court between

GERLACH & Co. BV, Amsterdam,

and

1 — Language of the Case: Dutch.

INSPECTEUR DER INVOERRECHTEN EN ACCIJNZEN [Inspector of Customs and Excise], AMSTERDAM,

on the interpretation of subheading 29.01 A of the Common Customs Tariff and Commission Regulation No 1775/77 of 28 July 1977 determining the conditions under which certain petroleum products are eligible upon importation for a favourable tariff arrangement by reason of their end-use (Official Journal L 195, p. 5),

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: G. Reischl
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

On 8 August 1980 the appellant declared the importation for home use of goods described in the declaration as "fish-liver oil. Subheading 15.04 A II". The goods originated in and were exported from Spain. On receipt of that declaration, the Collector of Customs and Excise issued a document classifying the goods in subheading 15.04 A II under which no import duty is payable.

On the basis of tests carried out on a sample, the official concerned considered that the imported goods should be classified under subheading 29.01 A I as "acyclic hydrocarbons" which, being of

Spanish origin, were liable, at the time of importation, to 6.7% *ad valorem* duty. By a demand for payment, the collector of Customs and Excise sought from the appellant the amount thus payable, HFL 11 942.80.

The report of the director of the Ministry of Finance Laboratory, dated 15 September 1980, stresses that:

"Analysis of the product described in the import documents as 'fish-liver oil' revealed that it is:

Perhydrosqualene, an acyclic hydrocarbon (. . .) subheading 29.01 A II".

Before the Tariefcommissie, the appellant claimed that the acyclic hydrocarbon compounds falling within heading No 29.01 had to be derived from mineral hydrocarbons. The product in question here was of animal origin, as could be determined by application of the C-14 method. That test would show that, unlike purely synthetic perhydrosqualene, the perhydrosqualene in question, derived from fish-liver oil, was impure since it contained other hydrocarbons and the $C_{30}H_{62}$ compound. The appellant submitted that it should therefore be classified in subheading 15.04 A II.

The Inspecteur der Invoerrechten en Accijnzen contended that the imported product no longer displayed the outward characteristics of fish oil. As a result of its processing, it had, moreover, become a chemically-defined compound, namely an acyclic hydrocarbon, which is expressly covered by subheading 29.01 A. For the purposes of tariff classification it was therefore irrelevant whether the product was of organic or synthetic origin. Although it was not a power or heating fuel within the meaning of subheading 29.01 A I, it should nevertheless be classified under that subheading.

The Tariefcommissie considers that heading No 15.12 must also be taken into account.

The relevant provisions of the Common Customs Tariff

Subheading 15.04 A is worded as follows:

"Fats and oils, of fish and marine mammals, whether or not refined:

A. Fish-liver oil:

I. Of a vitamin A content not exceeding 2 500 international units per gram

II. Other".

The Explanatory Notes to the Customs Cooperation Council Nomenclature on heading No 15.04 state that:

"This heading covers oils and fats derived from several varieties of fish (cod, halibut, menhaden, herring, sardines, salmon, etc.) and marine mammals (whales, dolphins, seals, etc.). They are extracted from the body or liver of the fish or from fish waste. They usually have a characteristic fishy smell and a disagreeable taste, and vary in colour from yellow to reddish-brown.

Cod liver and halibut liver and other fish liver yield oils with a high content of vitamins and other organic substances; they are, therefore, chiefly used in medicine. These oils remain under the present heading whether or not their vitamin content has been increased by irradiation or otherwise, but they fall within Chapter 30 when put up as medicaments, or emulsified or containing

other substances added with a view to therapeutic use.

...

The fats and oils derived from fish and marine mammals remain in this heading when refined, but are excluded if hydrogenated, or solidified or hardened by any other process (heading 15.12)."

Heading No 15.12 is worded as follows:

"Animal or vegetable oils and fats, wholly or partly hydrogenated, or solidified or hardened by any other process, whether or not refined, but not further prepared:

A. In immediate packings of a net capacity of 1 kg or less

B. Other."

Heading No 29.01 is worded as follows:

"Hydrocarbons:

A. Acyclic:

I. For use as power or heating fuels

II. For other purposes (a)."

Note (a) above refers to the following footnote:

"Entry under this subheading is subject to conditions to be determined by the competent authorities."

Article 2 of Regulation No. 1775/77 provides that:

"The person concerned shall be required to furnish the competent authorities, at their request, with the following information:

(a) at the time of the application for authorization, a brief description of the plant to be used for the proposed treatments;

(b) the nature of the proposed treatments;

(c) the description and quantity of the products to be used;

(d) in cases where Additional Notes 5 (n) and 6 to Chapter 27 of the Common Customs Tariff apply, the description, quantity and tariff classification of the products obtained.

The person concerned shall, in addition, enable the competent authorities, to their satisfaction, to trace the products in the establishment or establishments of the undertaking during the course of the treatment."

Headings No 15.04 and 15.12 are delimited from heading No 29.01 by the rules contained in Note 1 (d) to Chapter 15 and Note 1 (a) to Chapter 29.

The relevant part of Note 1 (d) to Chapter 15 is worded as follows:

"1. This Chapter does not cover:

(d) ... other goods falling within any heading in Section VI."

Note 1 (a) to Chapter 29, which is part of Section VI, is worded as follows:

"1. Except where the context otherwise required, the headings of this Chapter are to be taken to apply only to:

(a) Separate chemically defined organic compounds, whether or not containing impurities."

It has been established that the imported product is an acyclic hydrocarbon, which, as a separate chemically defined organic compound, is referred to in heading No 29.01 of Section VI. The Tariefcommissie considers that, in view of its properties, the product is not intended to be used as a power or heating fuel so that it cannot be classified under subheading 29.01 A I. It would be possible to classify the product under

subheading 29.01 A II, but such classification would be subject to various conditions set out in Regulation No 1775/75 which were not fulfilled by the appellant.

The Tariefcommissie considers that the dispute raises the question under which heading the product is to be classified and, if according to the system of the Common Customs Tariff it is to be classified under subheading 29.01 A II, how such classification is to be reconciled with the procedure under the regulation, which requires authorization for classification under that subheading, where such authorization has not been obtained. Since the answer to those questions depends upon the interpretation of Community law, the Tariefcommissie made an order referring to the Court under Article 177 of the EEC Treaty the following questions:

"1. Under which heading of the Common Customs Tariff should a completely hydrogenated animal oil which is manufactured from fish liver and is at the same time an acyclic hydrocarbon compound be classified?

2. If a product of the kind referred to in Question 1 is to be classified under subheading 29.01 A of the Common Customs Tariff, does subheading I or II apply where, although the product is intended to be used otherwise than as a power or heating fuel, no authorization within the meaning of Commission Regulation (EEC) No 1775/77 of 28 July 1977 has been obtained?"

The order making the reference was lodged at the Court Registry on 24 March 1983.

By order of 19 October 1983, the Court assigned the case to the First Chamber, pursuant to Article 95 (1) and (2) of the Rules of Procedure.

Pursuant to Article 20 of the Protocol of the Statute of the Court of Justice of the EEC, written observations were submitted by the Inspectie der Invoerrechten en Accijnzen [Inspectorate of Customs and Excise], Amsterdam, represented by K. P. Vroonland, acting as Agent, and by the Belgian Government, represented by W. Collins, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

The *Inspectie der Invoerrechten en Accijnzen* contends that the imported product does not display any characteristic identifying it as fish oil falling within heading No 15.04 of the Common Customs Tariff. The product is a separate chemically defined organic compound, falling under subheading 29.01 A of the Common Customs Tariff.

The Belgian Government observes that it classifies "Perhydrosqualene" under subheading 29.01 A if it is a chemically pure product within the meaning of Note 1 to Chapter 29.

The nature of the raw material from which it is manufactured and the manufacturing process are irrelevant.

Since it is established that no authorization within the meaning of Regulation No 1775/77 has been submitted, the goods can be classified in subheading 29.01 A II and thus enjoy the favourable

tariff arrangement applying thereto only if the competent authorities of the Member State in which the goods are to be imported for home use can still issue a written authorization having the necessary retroactive effect.

III — Oral procedure

At the sitting on 17 November 1983, Gerlach & Co. BV, represented by F. E. van Bruggen, company counsel, and the Commission of the European Communities, represented by A. Haagsma, acting as Agent, presented oral argument.

The *Commission* pointed out that the first question posed by the Tariefcommissie deals with a product which is simultaneously "a completely hydrogenated animal oil which is manufactured from fish liver", and "an acyclic hydrocarbon". It considers that such a product cannot exist. Two types of constituents are normally found in fish-liver oils: one is glyceric and the other is unsaponifiable. Ordinarily, other unsaponifiable components are also found in them. It thus seems that a fish-liver oil is always a mixture of several constituents.

It should be emphasized that the solidification process used in the present case (hydrogenation) does not change the composition of the oil. Total hydrogenation of the oil simply transforms the unsaturated constituents into saturated constituents. Thus, for example, unsaturated squalene is turned into squalane (perhydrosqualene). This is even true of certain shark-liver oils particularly rich in unsaponifiable constituents, these in their turn being largely made up of squalene. Thus, in the most favourable case, the content of unsaponifiable constituents may reach 90% of which, again in the most favourable case, 90% may be squalene. It is thus clear that fish-liver oil cannot contain more than 81% squalene.

However, according to Chapter 29 of the Common Customs Tariff, Note 1a, that chapter applies only to "separate chemically defined organic compounds, whether or not containing impurities". Also, Note 6 to Chapter 29 in the Explanatory Notes to the Customs Tariff of the European Communities provides that this chapter covers:

"ethane and other saturated acyclic hydrocarbons (other than methane and propane), single isomers not less than 95% pure on the anhydrous product, calculated by reference to volume for gaseous products and to weight for non-gaseous products (a) ex 29.01 A)."

According to the Commission, that 95% purity cannot be attained in the case of an "animal oil which is manufactured from fish liver" and there is thus no question of a "separate chemically defined organic compound".

Thus the Commission concludes that the statement in the first question that a product can be both a "completely hydrogenated animal oil which is manufactured from fish liver" and a hydrocarbon is incorrect and it is therefore not possible to reply to the first preliminary question.

Being aware of the problems of classification which face the Tariefcommissie, the Commission has none the less tried to indicate under what heading the product in question should be classified. It relies on the factual information

supplied though this is extremely summary.

The Commission shares the opinion of the Tariefcommissie that only three tariff headings need to be taken into account: tariff headings and subheadings 15.04 A, 15.12 and 29.01 A.

In its view, the products do not belong in subheading 15.04 A because they have been hydrogenated. They might come under heading 15.12, if the condition therein mentioned is met, that is, if, apart from being wholly or partly solidified and possibly refined, they are not further prepared.

As regards subheading 29.01 A, the Commission points out that:

(a) according to Chapter 29, Note 1a, of the Common Customs Tariff, that chapter applies only to "separate chemically defined organic compounds";

(b) as regards purity, Note 6 to Chapter 29 of the Explanatory Notes to the Customs Tariff of the European Communities requires a minimum level of 95% for substances like those in the present case (saturated acyclic hydrocarbons);

(c) in the most favourable case, fish-liver oil can contain only 81% squalene (saturated acyclic hydrocarbon).

The Commission then draws attention to the fact that the conclusion has thus been drawn that a hydrogenated fish-liver oil will never be able to meet the conditions of purity required to be classified in subheading 29.01 A.

That does not mean, in its view, that the products could not be considered for classification under subheading 29.01 A. It is possible that the product is no longer a fish-liver oil, whether hydrogenated or not, but an oil having been subjected to a process designed to isolate a specific substance, for example, squalane. It may be deduced from the application brought before the Tariefcommissie by Gerlach & Co. that the product in question is not fish-liver oil but "perhydrosqualene derived from fish-liver oil". The applicant in the main action thus appears to be saying that it is no longer a question of fish-liver oil properly so-called but of the squalene extracted from it.

The application of a process designed so to isolate the squalene (perhydrosqualene) contained in the fish-liver oil might certainly result in a product having a pure squalene content of over 95%. That content might even reach 99% or more.

However, since squalane (perhydrosqualene) is an acyclic hydrocarbon, subheading 29.01 A is in this case the appropriate classification for this product.

The preliminary questions

According to the Commission, the first question, as formulated by the Tariefcommissie, cannot be answered. At most, the court might be provided with a number of guidelines which would allow it to make the necessary customs classification of the product in the case before it. Because of the extremely summary character of the information concerning the nature of the product, it is not possible to state definitely what heading or subheading it should choose.

As regards the second preliminary question, the Commission contends that

the import duties payable on goods classified under subheading 29.01 A vary according to their end-use. Subheading 29.01 A is subdivided into two subsidiary subheadings as follows:

"I. For use as power or heating fuels

II. For other purposes (a)".

In the case of the end-use mentioned at I, import duty is payable whilst in the other case, the goods may be imported duty free. Footnote (a) referring to this second subsidiary subheading reads:

"Entry under this subheading is subject to conditions to be determined by the competent authorities."

Such conditions were determined by the Commission in Regulation (EEC) No 1775/77 of 28 July 1977 determining the conditions under which certain petroleum products are eligible upon importation for a favourable tariff arrangement by reason of their end-use (Official Journal, L 195, p. 5). Article 3 of Regulation (EEC) No 1535/77 of 4 July 1977 (Official Journal, L 171, p. 1), to which Regulation (EEC) No 1775/77 refers, provides that the benefit of the favourable tariff arrangement, in this case duty-free importation, is conditional upon the grant by the competent authorities of a written authorization.

According to the Commission, it appears from the Tariefcommissie's reference that Gerlach & Co. did not seek before importation the authorization allowing it to bring in the goods under subheading 29.01 A II.

Since the procedure pursuant to footnote (a), which is a condition which must be met if the goods are to be classified under subheading 29.01 A II., has not been followed, they must be classified under tariff subheading 29.01 A I., which, at the date of importation, made them liable to a 6.7% import duty.

The Advocate General delivered his opinion at the sitting on 11 January 1984.

Decision

1 By order of 16 March 1983, which was received at the Court on 24 March 1983, the Tariefcommissie, Amsterdam, referred to the Court, pursuant to Article 177 of the EEC Treaty, two preliminary questions relating to the interpretation of tariff heading 29.01 A of the Common Customs Tariff and of Commission Regulation No 1775/77 of 28 July 1977 determining the conditions under which certain petroleum products are eligible on importation for a favourable tariff arrangement by reason of their end-use (Official Journal, L 195, p. 5).

2 On 8 August 1980, Gerlach & Co. BV, the plaintiff in the main action, declared the importation for home use of goods, made in and coming from Spain, which it described as "fish-liver oil, tariff subheading 15.04 A II". The

customs authorities first accepted that classification, under which no import duty is payable.

3 On the basis of samples, the official concerned considered that the imported goods should be classified under subheading 29.01 A I as "acyclic hydrocarbons" which, being of Spanish origin, were liable, at the time of importation, to a 6.7% *ad valorem* duty.

4 An objection by the company to the decision to classify the goods under subheading 29.01 A I was rejected and the company then brought an action before the Tariefcommissie, claiming that the acyclic hydrocarbon compounds falling within that subheading must be derived from mineral hydrocarbons. In this case the product was of animal origin and should therefore be classified in subheading 15.04 A II.

5 The Inspector of Customs and Excise, Amsterdam, the defendant in the main action, contended that the product no longer displayed, at the time of importation, the outward characteristics of fish oil and that as a result of the processing which it had undergone, had become a chemically defined compound, namely an acyclic hydrocarbon covered by subheading 29.01 A. Even though the goods were probably not intended to be used as power or heating fuels within the meaning of subheading 29.01 A I, they should be classified under that subheading because the importing company had not sought the authorization allowing the more favourable classification under subheading 29.01 A II, namely, as an acyclic hydrocarbon, intended for other purposes.

6 Considering that the decision in the main action depended upon the interpretation of Community law, the Tariefcommissie referred the following questions to the Court:

"1. Under which heading of the Common Customs Tariff should a completely hydrogenated animal oil which is manufactured from fish liver and is at the same time an acyclic hydrocarbon compound be classified?

2. If a product of the kind referred to in Question 1 is to be classified under subheading 29.01 A of the Common Customs Tariff, does sub-

heading I or II apply where, although the product is intended to be used otherwise than as a power or heating fuel, no authorization within the meaning of Commission Regulation (EEC) No 1775/77 of 28 July has been obtained?"

7 In the order referring these questions to the court, the Tariefcommissie considers that not only should headings and subheadings 15.04 and 29.01 A, put forward by the parties, be taken into account, but also heading 15.12.

8 The first question therefore asks under which of these three headings the goods in question should be classified.

9 Heading 15.04 covers fats and oils, of fish and marine mammals, whether or not refined. According to the Explanatory Notes to the Customs Cooperation Council's Nomenclature, that heading covers oils and fats derived from fish and marine mammals which are extracted from the body or liver of the fish or from fish waste, and which usually have a characteristic fishy smell and a disagreeable taste. Their natural colour may vary from yellow to reddish-brown. When refined fats and oils derived from fish or marine mammals have been hydrogenated, solidified or hardened by any process, they are classified under heading 15.12. That heading covers animal or vegetable oils and fats, wholly or partly hydrogenated, or solidified or hardened by any other process, whether or not refined, but not further prepared.

10 In its order for reference, the Tariefcommissie found that the product in question was transparent, colourless and odourless and that it must be regarded as completely hydrogenated. That fact is sufficient to conclude that the goods cannot be covered by heading 15.04.

11 Neither can the goods in question be classified under heading 15.12, since they must have been prepared in order to become a colourless and odourless product and that only products which have been hydrogenated but not further prepared are covered by heading 15.12.

12 Heading 20.01 is formulated in the following terms:

"Hydrocarbons:

A. Acyclic:"

According to Note 1 (a) to Chapter 29, the headings of the chapter are to be taken as applying to "separate" chemically defined organic compounds, whether or not containing impurities". Furthermore, the Explanatory Notes to the Customs Tariff of the European Communities say, in relation to Chapter 29, that

"the products below are classified in this Chapter when they satisfy the following criteria as to purity:

...

6. Ethane and other saturated acyclic hydrocarbons (other than methane and propane), single isomers not less than 95% pure on the anhydrous product, calculated by reference to volume for gaseous products and to weight for non-gaseous products."

13 The reply to the first question must therefore be that a completely hydrogenated animal oil, manufactured from fish liver, which is at the same time an acyclic hydrocarbon, must be classified under subheading 29.01 A of the Common Customs Tariff.

14 In its second question, the Tariefcommissie enquires if a product classified under subheading 29.01 A falls under subheading 29.01 A I or subheading 29.01 A II when it is intended to be used otherwise than as a power or heating fuel, but where no authorization within the meaning of Commission Regulation (EEC) No 1775/77 has been obtained.

15 Subheading 29.01 A is divided into two subheadings as follows:

"I. For use as power or heating fuels

II. For other purposes (a)."

Products classified under subheading 29.01 A II may be imported free of duty.

According to Footnote (a) relating to the second subheading:

"Entry under this subheading is subject to conditions to be determined by the competent authorities."

16 Such conditions were determined by the Commission in Regulation No 1775/77 (Official Journal, L 195, p. 5) which states that Commission Regulation No 1535/77 of 4 July 1977 determined the conditions under which certain goods were eligible upon importation for a favourable tariff arrangement by reason of their end-use. Article 3 of the latter regulation provides that the benefit of the favourable tariff arrangement is conditional upon the grant of a written authorization by the competent authorities. The Tariefcommissie found that the plaintiff in the main action did not obtain such an authorization.

17 The obligation to obtain a written authorization from the competent authorities is designed to facilitate the task of the customs authorities and to avoid fraud. In the interest of legal certainty and the smooth functioning of the administration, the procedure provided for in the Community rules must be followed.

18 Consequently, the reply to the second question must be that a product cannot be classified under subheading 29.01 A II where an authorization within the meaning of Regulation No 1775/77 has not been obtained.

19 As a result, the product referred to in the second question cannot be classified under subheading 29.01 A II, and must be classified under subheading 29.01 A I.

Costs

20 The costs incurred by the Government of the Kingdom of Belgium and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in answer to the questions referred to it by the Tariefcommissie, Amsterdam, by order of 16 March 1983, hereby rules:

1. **A completely hydrogenated animal oil, manufactured from fish liver, which is at the same time an acyclic hydrocarbon, must be classified under subheading 29.01 A of the Common Customs Tariff.**

2. **In the absence of the authorization provided for by Commission Regulation No 1775/77 of 4 July 1977 (Official Journal, L 195, p. 5), such a product must be classified under subheading 29.01 A I.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 February 1984.

For the Registrar

H. A. Rühl

Principal Administrator

T. Koopmans

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 JANUARY 1984 [1]

Mr President,
Members of the Court,

In August 1980, Gerlach & Co. BV, whose registered office is in Amsterdam, the plaintiff in the main action, declared goods, which it was importing from Spain, as "fish-liver oil, subheading 15.04 A II" of the Common Customs Tariff. Accordingly, the Netherlands

1 — Translated from the German.