JUDGMENT OF THE COURT (First Chamber)
15 January 1998 *

In Case C-80/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Hessisches Finanzgericht, Kassel, Germany, for a preliminary ruling in the proceedings pending before that court between

Quelle Schickedanz AG und Co.

and

Oberfinanzdirektion Frankfurt am Main

on the interpretation and validity of Point 6 of the Annex to Commission Regulation (EC) No 1966/94 of 28 July 1994 concerning the classification of certain goods in the combined nomenclature (OJ 1994 L 198, p. 103),

THE COURT (First Chamber),

composed of: M. Wathelet, President of the Chamber, P. Jann (Rapporteur) and L. Sevón, Judges,

* Language of the case: German.

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Quelle Schickedanz AG und Co., by Hilmar Nehm, Rechtsanwalt, Düsseldorf,

— the Commission of the European Communities, by Fernando Castillo de la Torre, of its Legal Service, acting as Agent, and Hans-Jürgen Rabe, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Quelle Schickedanz AG und Co. and of the Commission at the hearing on 3 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 17 July 1997,

gives the following

Judgment

1 By order of 7 March 1996, received at the Court on 18 March 1996, the Hessisches Finanzgericht (Hessen Finance Court), Kassel, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation

and validity of Point 6 of the Annex to Commission Regulation (EC) No 1966/94 of 28 July 1994 concerning the classification of certain goods in the combined nomenclature (OJ 1994 L 198, p. 103).

2 Those questions were raised in proceedings between Quelle Schickedanz AG und Co. ('Quelle'), a mail-order company, and the Oberfinanzdirektion (Principal Revenue Office) Frankfurt am Main concerning the tariff classification of a set of garments comprising a brassière and briefs.

3 In 1994 Quelle applied to the Oberfinanzdirektion for a binding tariff notice concerning the tariff classification of a 'brassière set, 90% polyamide, 10% elastane (underwired brassière and briefs) value: brassière DM 5.93; briefs DM 4.31'.

4 In that notice the Oberfinanzdirektion stated that each item of the set had to be classified separately, that is to say, the brassière under tariff subheading 6212 10 00 and the briefs under tariff subheading 6108 21 00 of the combined nomenclature, as established by Commission Regulation (EEC) No 2551/93 of 10 August 1993 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1993 L 241, p. 1; hereinafter 'the combined nomenclature'). In determining that classification the Oberfinanzdirektion based itself on Regulation No 1966/94, and in particular on Point 6 of the Annex thereto.

5 Quelle unsuccessfully challenged that classification and eventually brought an action before the Hessisches Finanzgericht, claiming that Regulation No 1966/94 was invalid. In its order for reference, the Finanzgericht states that it shares Quelle's doubts as to its validity. It considers that the set of brassière and briefs constitutes 'goods put up in sets for retail sale' within the meaning of Rule 3(b) of the general rules for the interpretation of the combined nomenclature and that, consequently, the set should have been classified under one heading. Moreover, in the view of the Finanzgericht, the statement of reasons in the regulation is insufficient, since it gives no indication as to why General Rule No 3(b) was not applied, or whether, despite the existence of that provision, the Commission in fact had the power to decide that the two items should be classified separately. The

Finanzgericht adds that, if General Rule No 3(b) must be applied, it is the brassière which gives the set its essential character, so that the set of brassiere and briefs should be classified under tariff subheading 6212 10 00.

6 In those circumstances, the Hessisches Finanzgericht, Kassel, referred the following two questions to the Court for a preliminary ruling:

'(1) Where goods put up in sets for retail sale, comprising a brassière and briefs, are classified individually pursuant to Point 6 of the Annex to Commission Regulation (EC) No 1966/94 of 28 July 1994 concerning the classification of certain goods in the combined nomenclature, is that classification valid, inasmuch as it thereby conflicts with Rule 3(b) of the general rules for the interpretation of the combined nomenclature?

(2) If the answer to Question (1) is in the negative:

Is a set put up for retail sale, comprising a knitted brassière and knitted briefs, covered by code number 6212 10 00 because the brassière falls to be regarded, in accordance with Rule 3(b) of the said general rules, as the component which gives the goods their essential character?'

7 Even though the Commission considers that Regulation No 1966/94 is not applicable to the goods in question on account of the combination of their basic materials, it is clear that the Oberfinanzdirektion relied on that regulation in issuing its classification. If the Court were to decide that it had no jurisdiction to examine the validity of the regulation, the goods at issue would in any event have to be classified in accordance with the relevant provisions of the general rules for interpretation. That classification is the subject-matter of the national court's second question, the admissibility of which has not been contested by the Commission (see paragraphs 7 and 8 of the Advocate General's Opinion).

8 Consequently the reference for a preliminary ruling is admissible.

9 Since no heading or subheading of the combined nomenclature relates specifically to sets of women's underwear such as the goods at issue in the main proceedings, the Commission has submitted that it was obliged, by virtue of Note 13 to Section XI, to classify the goods separately.

10 For the reasons set out in paragraph 17 of the Advocate General's Opinion, Note 13 to Section XI of the combined nomenclature does not relate to goods such as those at issue in the main proceedings.

11 It is therefore necessary to apply the general rules for interpretation, including Rule 3.

12 Since General Rule No 3(a) does not apply to the goods at issue in the main proceedings, as is clear from paragraph 22 of the Advocate General's Opinion, their classification must be considered under General Rule No 3(b) *in fine*, which provides that classification of goods put up in sets is to be effected under a single heading by reference to the component which gives them their essential character. In that regard, as is clear from paragraphs 33 and 34 of the Advocate General's Opinion, in this case the characteristic property of the set would be taken away if one of its components, whether the briefs or the brassière, were removed. Classification therefore cannot be effected under General Rule 3(b) *in fine*.

13 In those circumstances, as the Advocate General has concluded in paragraph 34 of his Opinion, it is necessary to turn to General Rule No 3(c), according to which goods put up in sets for retail sale are in such an event to be classified under the heading which occurs last in numerical order among those which equally merit consideration.

14 As the Advocate General has stated in paragraph 35 of his Opinion, it follows from the foregoing that, by providing in Point 6 of the Annex to Regulation No 1966/94 for a separate classification for sets of a knitted brassière and knitted briefs, whereas General Rule No 3(c) requires a single classification for such a set, the Commission materially amended the combined nomenclature and thus acted *ultra vires*.

15 The answer to the first question must therefore be that Regulation No 1966/94 is invalid in so far as in Point 6 of the Annex thereto it classifies goods put up in sets for retail sale, comprising a brassière and briefs, separately under tariff subheadings 6108 21 00 and 6212 10 00.

16 The answer to the second question must then be that on a proper construction of the combined nomenclature, such goods are to be classified under the heading which occurs last in numerical order, namely under subheading 6212 10 00.

Costs

17 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 Hessisches Finanzgericht, Kassel, by order of 7 March 1996, hereby rules:

1. **Commission Regulation (EC) No 1966/94 of 28 July 1994 concerning the classification of certain goods in the combined nomenclature is invalid insofar as in Point 6 of the Annex thereto it classifies goods put up in sets for retail sale, comprising a brassière and briefs, separately under tariff subheadings 6108 21 00 and 6212 10 00.**

2. **On a proper construction of the combined nomenclature, as established by Annex I to Commission Regulation (EEC) No 2551/93 of 10 August 1993 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, such goods are to be classified under the heading which occurs last in numerical order, namely subheading 6212 10 00.**

Wathelet Jann Sevón

Delivered in open court in Luxembourg on 15 January 1998.

R. Grass M. Wathelet

Registrar President of the First Chamber