In Case 170/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht München [Finance Court, Munich] for a preliminary ruling in the action pending before that court between

EINKAUFSGESELLSCHAFT DER DEUTSCHEN KONSERVENINDUSTRIE GMBH

and

HAUPTZOLLAMT [Principal Customs Office] BAD REICHENHALL

on the interpretation of tariff heading 08.11 of the Common Customs Tariff,

THE COURT (Third Chamber)

composed of: J. Mertens de Wilmars, President, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

# JUDGMENT

## Facts and Issues

The order making the reference to the Court and the observations submitted under 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

Between 16 August 1968 and 24 April 1973 the plaintiff in the main action

imported from Yugoslavia mahaleb and sweet cherries preserved in a mixture of alcohol and water. The Oberfinanzdirektion München [Regional Finance Office, Munich] issued the plaintiff with an official notice classifying those products under tariff heading 20.06 B I (e) 1:

Fruit otherwise prepared or preserved, whether or not containing added sugar or spirit:

...

B. Other:

I. Containing added spirit:

...

(e) Other fruits:

1. With a sugar content exceeding 9 % by weight,

and the customs offices applied that classification in the case of each importation.

On the application of the plaintiff in the main action, on 16 January 1973 the Bundesfinanzhof [Federal Finance Court] annulled that classification notice and on 9 May 1973 the Oberfinanzdirektion München issued to the plaintiff in the main action a new notice classifying the goods under tariff heading 08.11 D:

Fruit provisionally preserved (for example, by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions), but unsuitable in that state for immediate consumption:

...

D. Other.

The attempt by the plaintiff in the main action to obtain rectification of all the notices of assessment which had been sent to it on the basis of the annulled notice led to the dispute in the main action in which the Finanzgericht München delivered a first judgment on 26 February 1975. That judgment was set aside by a judgment of 26 April 1979 of the Bundesfinanzhof which referred the case back to the Finanzgericht München. On re-examining the case the Finanzgericht München referred the following question to the Court of Justice:

"How was tariff heading 08.11 of the Common Customs Tariff as regards the characteristics 'provisionally preserved' and 'unsuitable in that state for immediate consumption' to be interpreted and distinguished from tariff heading 20.06 before the entry into force of Regulation (EEC) No 1709/74 of the Commission of 2 July 1974?"

The Finanzgericht München stated in its judgment that the answer was intended to "clarify the question whether cherries which are put up in a mixture of water and ethyl alcohol with a concentration of from 10.8 to 18.1 % of alcohol by weight are to be classified under tariff heading 08.11 or 20.06". The court making the reference also states that the crucial nature of the question arises from the fact that the action can be successful only if the customs offices have classified the imported goods inappropriately and consequently fixed excessive import charges.

The order making the reference was registered at the Court on 24 July 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Commission of the European Communities, represented by Rolf Wägenbaur, Legal Adviser of the Commission, acting as Agent, and by the

plaintiff in the main action, represented by Barbara Festge of the Hamburg Bar.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court, by order of 19 November 1980, decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the Third Chamber.

## II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

### *A — Observations submitted by the Commission*

The Commission wonders whether the Court did not answer this question in its judgment of 20 March 1980 (Joined Cases 87, 112 and 113/79 *Bagusat* [1980] ECR 1159). Whilst acknowledging that the decisive factor in those cases was Regulation No 1709/74 of the Commission of 2 July 1974 relating to the classification of goods under subheading 20.06 B I of the Common Customs Tariff (Official Journal L 180, p. 15), the Commission in fact points out that in that judgment the Court entered upon an examination of the independent tariff subheading 20.06 B I, concluding that:

"Fruit put up in a mixture of water and alcohol, which is not unsuitable in that state for immediate consumption, must be classified under subheading 20.06 B I of the Common Customs Tariff".

Furthermore, whilst acknowledging that Regulation No 1709/74 is not retroactive, the Commission observes that, since it has in its opinion an explanatory function only, there is no reason why it should not be applied to the period prior to its entry into force in order to help interpret the tariff headings in question. That is especially borne out by the fact that there is nothing in the order for reference to justify altering the view adopted by the Court in regard to the period subsequent to the entry into force of Regulation No 1709/74.

The Commission therefore proposes the following reply to the question submitted:

"Before the entry into force of Regulation (EEC) No 1709/74 of the Commission of 2 July 1974 tariff headings 08.11 and 20.06 of the Common Customs Tariff had to be interpreted as meaning that fruit put up in a mixture of water and ethyl alcohol and which is not unsuitable in that state for immediate consumption must be classified under subheading 20.06 B I of the Common Customs Tariff."

### *B — Observations of the plaintiff in the main action*

The plaintiff in the main action claims that Regulation No 1709/74 is constitutive in nature and that, as the Court acknowledged in its judgment of 24 November and 15 December 1971 (Case 30/71 *Kurt Siemers* [1971] ECR 919 and Case 77/71 *Gervais-Danone* [1977] ECR 1127), it cannot have any retroactive effect.

Before the entry into force of Regulation No 1709/74 and contrary to the situation examined by the Court in its judgment of 23 March 1977 (Case 86/76 *Gervais-Danone* [1977] ECR 619) several interpretations of the tariff headings at issue, including that adopted by the Oberfinanzdirektion München in its notice of 9 May 1973, were possible, logically of equal rank and therefore correct from a legal point of view.

It was precisely for the purpose of bringing that situation to an end that the Commission adopted Regulation No

1709/74; the date of its entry into force provided for in Article 2 thereof confirms that it has no retroactive effect.

The plaintiff in the main action accordingly proposes the following reply to the question submitted:

"Before the entry into force of Regulation (EEC) No 1709/74 of the Commission of 2 July 1974 tariff heading 08.11 of the Common Customs Tariff could be interpreted as regards the characteristics 'provisionally preserved' and 'unsuitable in that state for immediate consumption' as meaning that cherries to be used in the chocolate industry which had been preserved in a solution of water and ethyl alcohol which was so weak that it provided only temporary preservation of the cherries, that is to say during the period of transportation, also came under that tariff heading".

III — Oral procedure

The Commission of the European Communities represented by Rolf Wägenbaur, acting as Agent, and the plaintiff in the main action, represented by Barbara Festge of the Hamburg Bar, presented oral argument at the sitting on 7 May 1981.

At that sitting the plaintiff argued that the question to be settled was not whether before the entry into force of Regulation No 1709/74 of the Commission the product in question had to be classified under heading 08.11 or 20.06 but whether the decision of the Oberfinanzdirektion München of 9 May 1973 classifying the product under subheading 08.11 D had binding effect as regards the period covered by that decision. The plaintiff in the main action asks the Court to reply to that question in the affirmative. In the plaintiff's view it follows from the case-law of the Court that that decision, based on the Explanatory Notes of the Customs Cooperation Council, was binding. An answer to the contrary would moreover run counter to the principle of legality and of legitimate expectation accepted by the Court.

The Advocate General delivered his opinion at the sitting on 4 June 1981.

## Decision

1 By order of 4 July 1980, which was received at the Court on 24 July 1980, the Finanzgericht München referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of tariff heading 08.11 of the Common Customs Tariff.

2 Between 16 August 1968 and 24 April 1973 the plaintiff in the main action imported from Yugoslavia over 100 consignments of mahaleb and sweet cherries preserved in a mixture of alcohol and water. By decision of

16 August 1968 the Oberfinanzdirektion München issued the plaintiff with an official classification notice classifying those products under heading 20.06 B I (e) 1 (Fruit otherwise prepared or preserved, whether or not containing added sugar or spirit . . .) and throughout the period mentioned above customs duties and levies were paid on that basis.

3 By judgment of 16 January 1973, the Bundesfinanzhof annulled the classification notice issued in 1968, after which the Oberfinanzdirektion issued to the plaintiff on 9 May 1973 a new notice classifying the goods in question thenceforth under heading 08.11 D (fruit provisionally preserved but unsuitable in that state for immediate consumption . . .), a classification more favourable to the importer. The plaintiff in the main action however asked that it also be granted the benefit of that more favourable classification for the imports which it had effected between 1968 and 1973. The Oberfinanzdirektion refused to grant that request and the plaintiff in the main action then brought the issue before the Finanzgericht München.

4 While those proceedings were going on the Commission in accordance with the opinion of the Committee on Common Customs Tariff Nomenclature adopted Regulation No 1708/74 of 2 July 1974 on the classification of goods under subheading 20.06 B I of the Common Customs Tariff (Official Journal L 180, p. 15). According to the recitals in the preamble thereto the aim of that Regulation was to define, as regards preserved cherries, the respective spheres of application of headings 08.11 and 20.06 B I. Article 1 of that Regulation lays down that "cherries put up in a mixture of water and ethyl alcohol shall be classified as fruit suitable for immediate consumption under the following subheading of the Common Customs Tariff: 20.06 Fruit otherwise prepared or preserved, whether or not containing added sugar or spirit: B. Other: I Containing added spirit" which implied a view different from that resulting from the judgment of the Bundesfinanzhof of 16 January 1973 and from the classification notice of 9 May 1973.

5 It was in these circumstances that the German court put the following question:

"How was tariff heading 08.11 of the Common Customs Tariff as regards the characteristics 'provisionally preserved' and 'unsuitable in that state for immediate consumption' to be interpreted and distinguished from tariff heading 20.06 before the entry into force of Regulation (EEC) No 1709/74 of the Commission of 2 July 1974?"

6 As the Court accepted in its judgment of 20 March 1980 (Joined Cases 87, 112 and 113/79 *Bagusat* [1980] ECR 1159), it follows from the use of the expression "fruit provisionally preserved, but unsuitable in that state for immediate consumption" in tariff heading 08.11 that fruit provisionally preserved may only come under that heading if the preservation process results in making the fruit unsuitable for consumption in that state. On the other hand the question whether or not the goods at issue are to undergo subsequent processing is irrelevant for the purpose of defining the scope of headings 08.11 and 20.06. It follows from this that fruit preserved in a mixture of water and alcohol must be classified under subheading 20.06 B I if it is not unsuitable for immediate consumption in that state.

7 According to that judgment the fact that the goods at issue are not, in the view of consumers at the present time, considered to be appetizing and though it is not unusual to consume them as they are, does not signify that they are thereby unsuitable for consumption as long as they may be consumed in that state without risk to health. Indeed the applicant in the main action hat not argued that the consumption in that state of the goods at issue which are intended to be used in the food industry represents a special risk to health.

8 It should also be mentioned that in its judgment of 11 November 1975 (Case 35/75 *Bagusat* [1975] ECR 1345) the Court indicated that Regulation No 1709/74 of the Commission did not involve an amendment to tariff heading 08.11 or consequently any amendment of the respective spheres of application of that heading and of heading 20.06 B I (e) 1. It follows that the classification under heading 20.06 laid down in that regulation for cherries put up in a mixture of water and ethyl alcohol represents a correct interpretation of the spheres of application of headings 08.11 and 20.06 as they appear in the Common Customs Tariff in the version in Regulation No 950/86 of 28 June 1968.

9 The question asked should therefore be answered to the effect that the description "fruit provisionally preserved but unsuitable in that state for immediate consumption" indicates that tariff heading 08.11 covers only those products for which the preservation process used has made them unsuitable for immediate consumption in their then state without risk to health.

10 It should further be mentioned, in view of the arguments put forward at the hearing by the applicant in the main action, that if, on the basis of the interpretation of tariff heading 08.11 given above, the national court finds that the classification notice of 9 May 1973 was not in accordance with Community law it is for that court to draw the inferences.

## Costs

11 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable.

As these proccedings 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 (Third Chamber),

in answer to the question referred to it by the Finanzgericht München by order of 4 July 1980, hereby rules:

**The description "fruit provisionally preserved but unsuitable in that state for immediate consumption" indicates that tariff heading 08.11 covers only those products for which the preservation process used has made them unsuitable for immediate consumption in their then state without risk to health.**

Mertens de Wilmars Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 8 July 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President