Case 227/84

Texas Instruments Deutschland GmbH
v
Hauptzollamt München-Mitte

(reference for a preliminary ruling
from the Finanzgericht München)

'Common Customs Tariff — Electronic memories: dimensions of housings'

Summary

Common Customs Tariff — Alteration or suspension of import duties — Powers of the Council — Limits
(EEC Treaty, Art. 28; Council Regulation No 2841/79)

Although Article 28 of the EEC Treaty, which concerns autonomous alterations or suspensions of Common Customs Tariff duties, leaves the Council considerable discretion, it is for the Court to ascertain whether or not the manner in which the Council has carried out the duties thereby entrusted to it constitutes a misuse of power or gives rise to discrimination.

OPINION OF ADVOCATE GENERAL
SIR GORDON SLYNN
delivered on 4 July 1985

My Lords,

This reference for a preliminary ruling under Article 177 of the EEC Treaty, dated 20 August 1984, is made by the Finanzgericht [Finance Court] Munich, in proceedings pending before that Court between Texas Instruments Deutschland GmbH ('Texas Instruments') and the Hauptzollamt [Principal Customs Office] Munich Centre. In those proceedings Texas Instruments challenges a notice of

assessment to customs duty on electronic programmable UV-erasable read-only memories (Eproms) imported by it from Singapore in January 1980.

The external dimensions of the Eproms, so imported, were 15.1 x 30.4 mm. The Customs Office classified them under Heading No 85.21 D II of the Common Customs Tariff. Duty at the rate of 17% was imposed involving a charge of DM 49 290.94.

By Article 28 of the EEC Treaty,

'Any autonomous alteration or suspension of duties in the Common Customs Tariff shall be decided unanimously by the Council ... Such alterations or suspensions may only be extended, under the same conditions, for one further period of six months'.

The Council may decide on such an alteration or suspension without a proposal from the Commission.

Pursuant to Article 28 the Council adopted on 11 December 1979 regulation No 2841/79 (Official Journal 1979, L 322/4), by Article 1 of which autonomous Common Customs Tariff duties were totally suspended from 1 January to 30 June 1980 on products under CCT Heading No 85.21 D II, described as: 'electronic programmable read-only memories (Eproms), UV-erasable, with a storage capacity of 32K bits or 64K bits, in the form of a monolithic integrated circuit contained in a housing bearing a capacity marking of "32" or "64", whose exterior dimensions do not exceed 14.2 mm x 33.3 mm, with a quartz window on the upper surface and 12 connecting pins along each of the longer sides'.

The goods imported by Texas Instruments did not qualify under this suspension because, and it seems only because, their exterior dimensions exceeded 14.2 x 33.3 mm, in that the short side was 15.1 mm. The essence of Texas Instruments' complaint is that the exterior dimensions have no relevance to the technical qualities or uses of the product. The dimensions adopted were wholly arbitrary and there is no objective reason for distinguishing between items whose exterior dimensions are not more than 14.2 x 33.3 mm and those which are 15.1 x 30.4 mm. This complaint is said to be borne out by the fact that only five months later, on 6 May 1980, the Council adopted Regulation No 1136/80 (Official Journal 1980, L 116/49). This regulation having recited the suspension made in the earlier regulation, went on 'it has proved necessary to amend the description of the products in question'. Article 2 repealed Regulation No 2841/79, and Article 1 provided for the suspension of autonomous Common Customs Tariff duties from 7 May 1980 until 30 June 1980 (i.e. the remainder of the period covered by the earlier regulation) on products under CCT Heading No 85.21 D II described in identical terms to those contained in the earlier regulation, save that the exterior dimensions were not to exceed 15.6 x 33.3 mm and save that the requirement that there should be '12 connecting pins along each of the longer sides' was deleted.

By Regulation No 2916/80 of 11 November 1980 (Official Journal 1980, L 304/1) which entered into force on 13 November 1980 the dimensions were again altered this time to 15.6 x 36 mm, thus increasing the longer side. On 16 December 1980 by Council Regulation No 3498/80 (Official Journal 1980, L 367/27) a further suspension was made in different terms but extending the maximum size of the housing to 17 x 39 mm. This time the regulation was made following a draft prepared by the Commission.

The Finance Court, Munich, was disposed to consider that the earlier regulation, by

limiting the suspension to housings of not more than 14.2 x 33.3 mm violated the principle of equal treatment, but it was concerned as to whether it was possible to delete this limitation from the regulation, since to declare the whole regulation unlawful would remove the suspension even from those goods which fell within its terms and would not in any event be of any benefit to Texas Instruments.

It accordingly referred the following questions to the Court for a preliminary ruling:

'(1) Does Council Regulation (EEC) No 2841/79 of 11 December 1979 infringe the general principle of equal treatment because it makes the exemption from customs duties of the electronic programmable UV-erasable read-only memories (Eproms) described therein dependent on their having exterior dimensions not exceeding 14.2 mm x 33.3 mm?

(2) If so, what are the legal consequences of that infringement?'

The Council and the Commission have not sought to indicate any technical distinction, either for customs purposes or at all, between those housings which have a short side of 14.2 mm and those which have a short side of 15.1 mm. Nor has any explanation been given as to why the requirement of 12 pins on the longer side has been deleted.

What is said here is, firstly, that there is no discrimination between importers, only a distinction between products which the Council is entitled to introduce. The Council stresses that it is essential to be precise when defining customs headings and more particularly when granting suspensions, especially in the field of electronic components where miniaturization is increasingly important. Moreover, it is possible that different considerations may apply at different times to different products, and it is for the Council, whether or not on a proposal from the Commission, to evaluate the economic or other grounds which justify granting an exception and to define precisely the products concerned.

If a Member State makes a request, rather than the Commission a proposal, it is said that the Treaty empowers the Council to grant a suspension if it is unanimous. Here it was said by the Council in answer to questions from the Court that the request for suspension which led to Regulation No 2841/79 came from the Federal Republic of Germany which in turn had been asked by a German trade association called the Verein Deutscher Maschinenbau-Anstalten (VDMA). The latter, in support of its request, had asserted that regardless of their memorizing capacity, all Eproms had the same exterior dimensions. Those dimensions (not exceeding 14.2 x 33.3 mm) corresponded to standard DIN 41 866 and — according to the VDMA — also to an IEC (International Electrotechnical Commission) standard. The Federal Government also consulted the competent manufacturers' trade association, the Zentralverband der Elektrotechnischen Industrie, and in particular the branch which specialized in electronics, the Fachverband Elektronik, which did not raise any objection, although that consultation did not concern details such as the dimensions of the housing. However it is said that there was plainly no reason to raise that question after the report of the VDMA and in view of the fact that the dimensions adopted for the housing corresponded to a DIN and an IEC standard. Special or non-standard models might exist outside the description given, but no request was received for them to be included in the suspension measure. On the other hand, Regulation No 1136/80 followed a request from the French Republic and not the Federal Republic of Germany, this time apparently because it

was found that in France housings of a different size were imported.

When the second regulation was made it was not made retroactive partly because that would have been contrary to the Council's policy set out in Point II (a) of its Resolution of 27 June 1974 (Official Journal 1974, C 79/1) in which it undertook that, other than in exceptional cases, tariff provisions would not have retroactive effect, and partly because such a course would have violated the interests of legal certainty.

It does not seem to me that Texas Instruments has shown here that there was discrimination against a particular trader or traders, and it is not suggested that there is any discrimination on the grounds of nationality.

The fact remains that housings of 14.2 mm attracted no duty: those of 15.1 mm or even of 14.3 mm attracted a duty of 17%.

It seems from what the Court has been told that the Council made no independent assessment of the dimensions which should be prescribed, though the Court was told that it is the practice to refer requests for suspension to a Committee of Experts. There is an arbitrary cut-off point for exemption which flows directly from the request received by the Council. Does it follow that this unequal treatment of these two sizes of housing is thereby unlawful?

At first glance it seems difficult to justify the distinction in this case and it is disturbing that the lines can be drawn in such a way as to leave outside the suspension goods which seem broadly the same when no inquiries are made as to the effect of the limit imposed on such other goods.

I entirely accept that the definition of customs headings, the fixing of rates and the granting of suspensions is a matter for the appropriate authorities and that lines may have to be drawn which it is not always easy for the non-expert to appreciate. Even so I do not think that it is a sufficient answer to say, as the Commission appears to say, that a difference in size *may* be a relevant factor. In a clear case, in my view, the Court is entitled to say that the distinction made is so glaring that if it cannot be explained it is unlawful. Nor is it, as the Council appears to contend, an unassailable answer that the Council merely acceded to a request from a Member State. Even such a request may need investigation and justification.

In the present case, however, it is clear that a trade association was consulted, that another trade association which was informed raised no objections. The explanation for adopting the particular maximum size was that this satisfied DIN and IEC standards, whereas larger housings fell outside those standards. These would, therefore, appear to be the category of standard Eproms which needed support by the suspension of the duty. The Council, which has to handle a very large number of tariff headings, and many hundreds of requests for suspension, often in areas of great technical complexity, was not informed, as far as can be seen, of the existence of other sizes which might justify equal treatment. Certainly no application was made for the sizes imported by Texas Instruments. When it was asked, the Council made the necessary amendment to a measure which at the time appeared limited to standard sizes.

Accordingly although I think the result is unfortunate in fact, and that this is a case which might have been considered with a view to being treated as an exception so as to justify a retroactive measure, it seems to me to be not possible to say that this

suspension in respect of particular sizes was unlawful for breach of the principle of equality.

Since, in my view, the first question posed by the Finance Court falls to be answered on the basis that the regulation does not infringe the general principle of equal treatment, the second question does not call for an answer. If I had come to the view that Regulation No 2481/79 was invalid as breaching the principle of equal treatment, it seems to me that it would have been necessary to declare the whole regulation invalid. It does not seem to me that it is possible to say that the regulation is invalid in so far as it excluded Eproms of the size imported by Texas Instruments. Nor can the Court say that all Eproms should have been included. It is not for the Court to define the precise limits of the suspension which should have been made. That is a matter for the Council, whether or not on a proposal of the Commission. If the regulation is invalid it is for the Council to correct the invalidity by a Council regulation consistent with the principle of equality. (Paragraphs 11 to 13 of Joined Cases 117/76 and 16/77 *Ruckdeschel* v *Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753 at 1771-1772). In any event in the present case I do not consider that the Court has before it sufficient evidence to decide what should be the appropriate specifications of the complex product in question.

Accordingly I am of the view that the questions referred should be answered on the following lines:

Consideration of the case has not shown that Council Regulation (EEC) No 2841/79 of 11 December 1979 infringes the general principle of equal treatment because it makes the exemption from customs duties of the electronic programmable UV-erasable read-only memories (Eproms) described therein dependent on their having exterior dimensions not exceeding 14.2 x 33.3 mm.

The costs of the plaintiff in the main action fall to be dealt with by the national court. No order should be made as to the costs of the Commission or the Council.