JUDGMENT OF THE COURT (Second Chamber)
13 December 1989 *

In Case C-1/89

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court), Berlin, for a preliminary ruling in the proceedings pending before that court between

Ingrid Raab, owner of an art gallery, residing in Berlin,

and

Hauptzollamt (Principal Customs Office) **Berlin-Packhof,**

on the interpretation of tariff subheading 49.11 B, (Photographs) and Heading No 99.02 (Original engravings, prints and lithographs) of the Annex to Council Regulation (EEC) No 3618/86 of 24 November 1986 amending Regulation (EEC) No 3331/85 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (Official Journal 1986, L 345, p. 1), and of tariff subheading 49.11 B (Artists' screen prints) in Table II annexed to Council Regulation (EEC) No 1945/86 of 18 June 1986 temporarily suspending the autonomous Common Customs Tariff duties on a number of industrial products (Official Journal 1986, L 174, p. 1),

THE COURT (Second Chamber)

composed of: F. A. Schockweiler, President of Chamber, G. F. Mancini and T. F. O'Higgins, Judges,

Advocate General: W. Van Gerven
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of the Commission of the European Communities, represented by Jörn Sack, Legal Adviser,

* Language of the case: German.

having regard to the Report for the Hearing and further to the hearing on 11 October 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 November 1989,

gives the following

Judgment

1 By order of 8 November 1988, which was received at the Court on 3 January 1989, the Finanzgericht Berlin referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of tariff subheading 49.11 B (Photographs) and Heading No 99.02 (Original engravings, prints and lithographs) of the Annex to Council Regulation (EEC) No 3618/86 of 24 November 1986 amending Regulation (EEC) No 3331/85 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (Official Journal 1986, L 345, p. 1) and of tariff subheading 49.11 B (Artists' screen prints) in Table II annexed to Council Regulation No 1945/86 of 18 June 1986 temporarily suspending the autonomous Common Customs Tariff duties on a number of industrial products (Official Journal 1986, L 174, p. 1).

2 That question was raised in proceedings between Mrs Ingrid Raab, the owner of an art gallery in Berlin, and the Hauptzollamt Berlin-Packhof concerning the tariff classification of a consignment of 36 photographs by the artist Robert Mapplethorpe, purchased by Mrs Raab for a total sum of DM 66 783.30 and imported into the Federal Republic of Germany from the United States of America in March 1987.

3 Mrs Raab applied to the customs office at Tegel Airport, Berlin, for the release of the photographs into free circulation, declaring them as 'Original engravings, prints and lithographs' under Code 9902 000 00 of the Common Customs Tariff, which were exempt from customs duty.

4 The customs office classified the goods under Code No 4911 400 90 of the Common Customs Tariff (Photographs) and charged customs duty at 5.8%.

5 Mrs Raab brought an action challenging that decision before the Finanzgericht Berlin, claiming that the photographs in question, of which only a limited number of copies were made from an artistically prepared original plate and the value of which was far higher than the value of the materials used, should be regarded as works of art within the meaning of Chapter 99 of the Common Customs Tariff and classified under Heading No 99.02 because they were related to the field of the graphic arts.

6 If it was impossible to interpret the Common Customs Tariff in such a way that art photographs came under Heading No 99.02, Mrs Raab argued in the alternative that, in accordance with the principle that all works of art made using a mechanical or photomechanical process should be treated in the same way, artistic photographs should be treated in the same way as artists' screen prints which — though covered, like photographs, by subheading 49.11 B of the Common Customs Tariff — benefited on importation from the suspension of customs duties under Regulation No 1945/86.

7 The Hauptzollamt contended that, in view of the unequivocal wording of the provisions of the Common Customs Tariff and since a classification criterion based on the artistic nature of goods would be unusable in practice, photographs should be classified, regardless of their artistic merit, only under Code No 4911 400 90 of the Common Customs Tariff.

8 Considering that the dispute raised a problem of interpretation of the relevant Community legislation, the Finanzgericht Berlin stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Are 36 photographs by the artist Robert Mapplethorpe, purchased together for the sum of DM 66 783.30, to be classified under Code No 4911 400 90 ("Photographs") or Code No 9902 000 00 ("Original engravings, prints and lithographs") or, in the alternative, are they to be classified under Code No 4911 500 10 ("Suspension of customs duties for artists' screen prints") of the Common Customs Tariff?'

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 By its question the national court seeks to establish essentially whether the provisions of the Common Customs Tariff must be interpreted in such a way that art photographs are to be classified, like original engravings, prints and lithographs, in Heading No 99.02 of the Common Customs Tariff or, in the alternative, are they to be considered to be artists' screen prints within the meaning of subheading 49.11 B of Table II of the Annex to Council Regulation No 1945/86. If this question is answered in the negative, the national court also asks whether all the photographs must be classified, regardless of whether or not they are artistic, under subheading 49.11 B of the Common Customs Tariff.

11 In order to reply to that question, it must be stated first that Heading No 99.02 forms part of Chapter 99 of the Common Customs Tariff, entitled 'Works of art, collectors' pieces and antiques', and covers 'Original engravings, prints and lithographs'.

12 It should be observed at the outset that, although an exemption from customs duty was provided for goods covered by Chapter 99 of the Common Customs Tariff in order to promote artistic production (see judgment of 14 December 1988 in Case 291/87 *Huber* v *Hauptzollamt Frankfurt am Main Flughafen* [1988] ECR 6449, paragraph 16), that does not mean that all objects that may be recognized as being of an artistic nature are to be classified under that chapter. According to General Rule 1 for the interpretation of the nomenclature of the Common Customs Tariff, the titles of sections, chapters and sub-chapters are provided for ease of reference only, and classification is to be determined according to the terms of the headings and any relevant section or chapter Notes.

13 Secondly, it should be stated that Note 2 to Chapter 99 of the Common Customs Tariff states that, for the purposes of Heading No 99.02, the expression 'original engravings, prints and lithographs' means 'impressions produced directly, in black and white or in colour, of one or of several plates wholly executed by hand by the artist, irrespective of the process or of the material employed by him, but not including any mechanical or photomechanical process'.

14 In this regard the Court has already held (see judgment in Case 291/87, *Huber*, cited above, paragraphs 17 and 18) that works covered by Heading No 99.02 of the Common Customs Tariff are always a reproduction of an original design executed by hand by the artist, without any mechanical or photomechanical process being used to make the original plate from which the impressions are produced.

15 It follows from that judgment that original engravings, prints and lithographs within the meaning of Heading No 99.02 of the Common Customs Tariff are characterized by the personal intervention of the artist, in executing the original by hand, and only the reproduction of the original may be carried out by means of a mechanical printing process.

16 It must be stated that photographs, including those of an artistic nature, do not satisfy this condition. Although a photographer may, by the choice of subject and the techniques used, confer some artistic merit on his work, the original is always the result of a technical process consisting in fixing the image of objects on a sensitive surface, by the action of light. This original therefore cannot be considered to be wholly executed by hand within the meaning of Note 2 to Chapter 99 of the Common Customs Tariff.

17 Accordingly, art photographs cannot be classified under Heading No 99.02 of the Common Customs Tariff.

18 As regards the question whether, for purposes of tariff classification, art photographs may be regarded as artists' screen prints, reference should be made to the description of the process used to obtain a screen print contained in the 'Facts and issues' of the judgment of the Court of 27 October 1977 in Case 23/77 *Westfälischer Kunstverein* v *Hauptzollamt Münster* [1977] ECR 1985. It states as follows: 'Screen printing is a printing process which uses a printed matrix made of a special gauze of natural (silk) or synthetic (nylon, etc.) fibres or of wire thread (stainless steel, etc.) stretched on a frame of wood or metal. There are two stages to the printing process: first, the preparation of the screen, that is, the "transfer"

on to the screen of the original design to be reproduced (preparation of the printing frame) and, secondly, its reproduction onto the printing surface (printing)'.

19 It follows that, although the printing process for screen prints is different from that used for the reproduction of original engravings, prints and lithographs within the meaning of Heading No 99.02 of the Common Customs Tariff, artists' screen prints have a characteristic in common with the works covered by this tariff heading in so far as the original design to be reproduced is executed by hand by the artist.

20 Therefore artistic photographs cannot, for purposes of tariff classification, be treated as artists' screen prints within the meaning of subheading 49.11 B in Table II annexed to Regulation No 1945/86, for the same reasons as those which preclude their classification under Heading No 99.02 of the Common Customs Tariff.

21 Under these circumstances, it is necessary to consider whether all photographs must be classified, regardless of whether or not they are artistic, in subheading 49.11 B of the Common Customs Tariff.

22 In this regard it should be stated, as has already been pointed out (in paragraph 12), that articles that may be recognized as being of an artistic nature do not all necessarily have to be classified under Chapter 99 of the Common Customs Tariff, and classification in the Common Customs Tariff is determined according to the terms of the headings and notes.

23 Photographs are expressly referred to in subheading 49.11 B of the Common Customs Tariff. This subheading does not draw any distinction according to whether or not the photographs are of an artistic nature, and the Court has held (in its judgment in Case 23/77 *Westfälischer Kunstverein*, cited above, paragraph 5) that it is a residual heading which covers all artistic printed matter not listed or referred to in any other heading of the Common Customs Tariff.

24 Although according to General Rule 1 for the interpretation of the nomenclature of the Common Customs Tariff, the titles of chapters may serve as reference for purposes of classification in the Common Customs Tariff, the alleged artistic nature of an article which is referred to in one tariff heading cannot be used to justify its classification under a heading in another chapter of the Common Customs Tariff.

25 That is the case in particular since, as the Court has pointed out (see judgment in Case 23/77 *Westfälischer Kunstverein*, cited above, paragraph 3), the possible artistic merit of an article is defined essentially by reference to subjective and indeterminate criteria, whereas tariff classification must be founded on the objective criteria adopted by the Common Customs Tariff for the purposes both of its effective operation and of legal certainty.

26 Consequently, photographs which may be recognized as being of an artistic nature fall, like all photographs, within subheading 49.11 B of the Common Customs Tariff.

27 It follows from all the considerations set out above that the answer to the question asked by the national court must be that the provisions of the Common Customs Tariff are to be interpreted as meaning that art photographs are not to be classified, like original engravings, prints and lithographs, under tariff Heading No 99.02 of the Common Customs Tariff, nor can they be regarded as artists' screen prints under tariff subheading 49.11 B of Table II of the Annex to Regulation No 1945/86. All photographs must be classified, regardless of whether or not they are artistic, under subheading 49.11 B of the Common Customs Tariff.

Costs

28 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings 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 (Second Chamber),

in answer to the question referred to it by the Finanzgericht Berlin, by order of 8 November 1988, hereby rules:

The provisions of the Common Customs Tariff are to be interpreted as meaning that art photographs are not to be classified, like original engravings, prints and lithographs, under tariff Heading No 99.02 of the Common Customs Tariff, nor can they be regarded as artists' screen prints under tariff subheading 49.11 B of Table II of the Annex to Council Regulation (EEC) No 1945/86 of 18 June 1986 temporarily suspending the autonomous Common Customs Tariff duties on a number of industrial products. All photographs must be classified, regardless of whether or not they are artistic, under subheading 49.11 B of the Common Customs Tariff.

Schockweiler Mancini O'Higgins

Delivered in open court in Luxembourg on 13 December 1989.

J.-G. Giraud
Registrar

F. A. Schockweiler
President of the Second Chamber