JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 31 MAY 1979 [1]

Firma Hans Peter Galster
v Hauptzollamt Hamburg-Jonas
(preliminary ruling requested by the Bundesfinanzhof)

Case 183/78

1. *Common Customs Tariff — Tariff headings — Products "slightly dried or slightly smoked" within the meaning of subheadings 02.06 B I (b) 3 (aa) and 02.06 B I (b) 5 (aa) — Concept*

2. *Common Customs Tariff — Tariff headings — Frozen meat within the meaning of heading 02.01 — Concept*

1. Having regard to the Explanatory Notes and Additional Notes to the Common Customs Tariff it is clear that the basis of the decisive criterion for tariff classification of "slightly dried" or "slightly smoked" products within the meaning of subheadings 02.06 B I (b) 3 (aa) and 02.06 B I (b) 5 (aa) of that tariff is not the water/protein ratio in the meat considered in isolation, but is primarily the capacity of such slight drying or slight smoking to ensure the actual preservation of the meat.

2. The expression "frozen" in heading 02.01 of the Common Customs Tariff covers not only meat which has been frozen when fresh but also meat which has first been slightly dried and subsequently frozen, in so far as its actual and lasting preservation depends essentially upon such freezing.

In Case 183/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof [Federal Finance Court] for a preliminary ruling in the proceedings pending before that court between

FIRMA HANS PETER GALSTER, Hamburg,

and

1 — Language of the Case: German.

HAUPTZOLLAMT [Principal Customs Office] HAMBURG-JONAS,

on the interpretation of certain headings of the Common Customs Tariff concerning pigmeat which has been slightly dried and subsequently frozen,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. In July 1973 the undertaking Hans Peter Galster (hereinafter referred to as "Galster"), whose principal place of business is in Hamburg, exported some pigmeat (unboned (bone-in) hams and unboned (bone-in) loins) to Spain.

Asserting that the goods had been slightly dried it claimed the grant of the export refund applicable to products under tariff subheadings 02.06 B I (b) 3 (aa) and 02.06 B I (b) 5 (aa). The goods described by these two subheadings are those which are "slightly dried or slightly smoked": hams and cuts of ham, unboned (bone-in) on the one hand and loins and cuts of loins, unboned (bone-in) on the other hand.

However, the customs authorities refused the refund on the ground that the goods had not been preserved by drying or smoking but by freezing, that when exported they were frozen and that frozen meat falls within tariff heading 02.01 in respect of which no export refund was at that time provided.

The Finanzgericht [Finance Court] Hamburg, before which the proceedings instituted by Galster against the rejection

of its claim were brought, also refused to admit the application for an export refund. It stated, *inter alia*, that, in the case of frozen meat, slight drying is of no significance in relation to its subsequent freezing. In so far as the actual keeping quality of meat which has been partially dehydrated by slightly drying it is achieved by freezing or deep-freezing, the drying process is superseded for tariff purposes by the freezing process, and the resultant product is to be classified as "frozen meat" under tariff heading 02.01.

Galster appealed against that decision to the Bundesfinanzhof, on the ground that the decision was based on a wrong interpretation of tariff subheadings 02.06 B I (b) 3 (aa) and 02.06 B I (b) 5 (aa), because freezing goods covered by these tariff subheadings after drying cannot in fact convert them into goods covered by heading 02.01.

The Bundesfinanzhof decided by an order of 22 August 1978 to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1. Does the term "frozen" in tariff heading 02.01 cover not only meat which has been frozen when fresh but also meat which has first been "slightly dried" within the meaning of tariff subheadings 02.06 B I (b) 3 (aa) and B I (b) 5 (aa) and only then frozen?

   If the answer to this question is in the negative:

2. How is the term "fresh" in tariff heading 02.01 to be distinguished from the term "slightly dried" in tariff subheadings 02.06 B I (b) 3 (aa) and B I (b) 5 (aa)?

2. A certified copy of the order of reference was received at the Court Registry on 11 September 1978.

Galster, represented by K. Landry, and the Commission of the European Communities, represented by its Legal Adviser, Peter Kalbe, submitted written observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided, by order of 17 January 1979, pursuant to Article 95 of the Rules of Procedure, to assign this case to the First Chamber and to open the oral procedure without any preparatory inquiry.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. *Galster* submits, in connexion with the *first question*, that frozen meat within the meaning of tariff heading 02.01 is meat which has been frozen when fresh, since subsequent freezing or deep freezing of slightly dried meat cannot cause its tariff classification to be altered.

Galster calls attention, in support of its argument, to the view expressed by the Bundesfinanzhof itself in its order making the reference and points out that its interpretation is confirmed by the wording of the tariff headings in question. The wording of heading 02.01 leads to the conclusion that it only covers, in addition to fresh meat, meat which has been exposed when fresh to a very low temperature. Tariff heading 02.06 for its part relates only to meat the keeping quality of which has been

increased independently by one of the processes mentioned in the same heading. It is therefore impossible for meat which has been slightly dried within the meaning of subheadings 02.06 B I (b) 3 (aa) and 02.06 B I (b) 5 (aa), because of subsequent freezing, to be classified again as fresh meat under tariff heading 02.01.

The wording of this heading compels the conclusion that freezing or deep freezing meat must not and cannot lead to any alteration of its tariff classification. In spite of being frozen fresh meat is still classified under tariff heading 02.01. Likewise frozen meat after it has been cooked comes within heading 16.02.

Galster, in support of this interpretation, refers to the Explanatory Notes to the Common Customs Tariff, published by the Ministery for Finance of the Federal Republic of Germany (Chapter 2, Part II) and the opinions expressed within the context of those notes in paragraphs 10 and 11 of Part I thereof on tariff heading 16.02, and points out that the reason why freezing meat must not and cannot lead to an alteration of the tariff classification lies in the fact that this specific process of preservation is one which can be stopped at any time. If the freezing of the meat were to entail an alteration of its tariff classification, its thawing would make another classification necessary and this must clearly be avoided.

Thus fresh beef, even when frozen, remains a product coming within heading 02.01; beef which has been cooked, even when frozen, remains a product coming within heading 16.02; beef or pork, seasoned for example with pepper and salt, even when frozen, remains a product coming within heading 16.02. Slightly dried meat, even when frozen, should consequently remain a product coming within heading 02.06.

In support of this analysis Galster has produced, as an annex to its written observations, two opinions, one from the Oberfinanzdirektion München [Regional Finance Office, Munich] of 21 November 1973, and the other from the Zolltechnische Prüfungs- und Lehranstalt [Technical Customs Examination and Teaching Institution], Munich, of 20 June 1974.

As far as concerns the *second question* Galster points out that according to Additional Note No 3 to Chapter 2 of the Common Customs Tariff the water/protein ratio is decisive for the interpretation of the expression "slightly dried".

That note indicates, in the first place, that slightly dried meat is different from dried meat because its water/protein ratio is more than 2.8 and, in the second place, that that ratio must be lower than that of fresh meat.

Several expert opinions make it clear that the water/protein ratio of pigmeat from pigs which have been recently slaughtered is between 3.4 and 4 and that pigmeat with a water/protein ratio of less than 3.3 is regarded as slightly dried.

Finally it follows from the above-mentioned note that slight drying also leads to an improvement in keeping quality to the extent which is normal and attainable in the case of a slightly dried product (expert report). The improvement in the keeping quality is of course less in that case than that resulting from thorough smoking or deep freezing. However, in so far as keeping quality assumes importance for the classification of a slightly dried product, it should

logically be sufficient if the normal and attainable keeping quality is achieved by this process. Otherwise either additional steps would have to be taken to improve the keeping quality or one tariff heading would no longer be relevant.

2. The *Commission of the European Communities* begins by stressing that pigmeat which has first been preserved by means of one of the processes (salting, preserving in brine, drying or smoking) mentioned in tariff heading 02.06 and then frozen ought in any case to be classified as goods within tariff heading 02.06.

However, in this case the goods in question differ from those described above, since they are meat which "before being frozen has been hung for some time in well-ventilated premises at a moderate temperature".

The specific question raised in the main action relating to the structure of the tariff has arisen because the exporter claims that the goods in question are "slightly dried" pigmeat within the meaning of subheadings 02.06 B I (b) 3 (aa) and 02.06 B I (b) 5 (aa) which has retained that character even though it was subsequently frozen.

As a rule, if goods which were originally within a given tariff heading, such as heading 02.06 for example, subsequently undergo an additional preservation process, they remain within the original tariff heading until that treatment produces goods which, owing to their nature and particular features, unquestionably satisfy the requirements for classification within another tariff heading.

Therefore the issue in this case is in what circumstances "meat and edible meat offals" must be regarded as "dried" within the meaning of tariff heading 02.06 to such a degree that they can no longer be regarded as fresh meat which has been preserved by freezing within the meaning of heading 02.01. Although there is no generally applicable legal definition or description of what is understood by "dried" meat within the meaning of tariff heading 02.06, the wording and arrangement of the nomenclature and also the Explanatory Notes provide useful pointers in this connexion.

For meat to be "dried" within the meaning of the tariff it is not enough that its water content has been incidentally reduced by an insignificant amount. In the tariff drying, as a preservation process, ranks equally with and has the same value as the processes of chilling, freezing, salting, preservation in brine and smoking, whereby fresh meat is preserved for various purposes.

Meat is "dried" within the meaning of tariff heading 02.06 if it has been preserved and protected against normal deterioration by drying. The Explanatory Notes to the Customs Tariff of the European Communities clearly indicate that meat which has been partially dehydrated but the actual preservation whereof is ensured by freezing or deep freezing falls in tariff heading 02.01 and not heading 02.06. On the other hand meat is "dried" if the drying process which it has undergone has produced lasting preservation, even if there has not been any additional preservation treatment (such as freezing).

It is difficult to state, in a generally applicable form of words, exactly when this point is reached during the preservation process in each specific case. In this connexion a pointer is provided by Additional Note 3 to Chapter 2 of the

tariff which states that for the purposes of the subheadings which are relevant in this case products whose water/protein ratio in the meat is more than 2.8 shall be considered as "slightly dried and slightly smoked". Therefore it follows from this that meat which has been (thoroughly) "dried" must have a water/protein ratio of less than 2.8.

It cannot be established from the file whether the water/protein ratio of the goods to be classified in this case was below that threshold. It has moreover been established that after slaughter the meat before being frozen was hung for some days in premises having a moderate temperature: this makes meat tender and improves its quality from the standpoint of the consumer without however producing any lasting preservation capable of protecting it against normal deterioration. As far as the meat in question is concerned its keeping quality has been achieved only by freezing so that the meat at issue is frozen meat as referred to in the Explanatory Notes to the Customs Tariff of the European Communities relating to subheading 02.06 B I (b) according to which meat which has been dehydrated but the actual preservation of which is ensured by freezing falls in tariff heading 02.01 (as frozen meat).

As that is the scope of tariff heading 02.06 it follows, as far as concerns the classification for tariff purposes of "slightly dried" meat, that

— Fresch meat which has been "slightly" dried, that is to say not dried sufficiently for it to be preserved, remains within its original heading (02.01)

— Slight drying is not enough for meat to be classified as "dried" meat under heading 02.06. What is more the classification of "slightly dried" meat under subheadings 02.06 B I (b) and 02.06 B I (b) 5 presupposes that such meat has undergone as well one of the other preservation processes (such as salting) mentioned in that tariff heading.

The Commission goes on to say that, although tariff heading 02.06 contains at present specific subheadings for slightly dried or slightly smoked meat, this is due to the need, which became apparent after the accession of the three new Member States, to define more effectively in the tariff bacon products which are of special concern to those States. That is why varieties of bacon which have been slightly dried or for reasons of taste slightly smoked, but whose keeping quality has been achieved by salting, were included in subheading 02.06 B I (b).

On the strength of these observations the Commission considers that the questions submitted might be answered as follows:

"1. The word 'frozen' in tariff heading 02.01 includes fresh meat which has first been slightly dried and then frozen, because drying which is only slight and not sufficiently thorough to ensure preservation does not take away from the raw material its original character of fresh meat within the meaning of the tariff.

2. Drying which is only slight and does not effect a lasting preservation of the meat cannot by itself cause it to be classified under tariff heading 02.06.

3. 'Slightly dried' meat under subheadings 02.06 B I (b) 2 (aa) and 02.06 B I (b) 5 (aa) is restricted to meat which has been partially dehydrated but whose keeping quality has been achieved by one of the preservation processes included under tariff heading 02.06 (salting, preservation in brine, smoking). 'Slightly dried' meat only ceases to

be fresh meat within the meaning of tariff heading 02.01 when this additional preservation process is applied."

III — Oral procedure

Galster and the Commission of the European Communities presented oral argument at the hearing on 8 February 1979.

The case was reheard on 5 April 1979 since there had been a change in the composition of the Chamber.

During the latter hearing Galster and the Commission of the European Communities referred to the oral observations which they had submitted during the previous hearing on 8 February 1979.

The Advocate General delivered his opinion during the latter hearing.

Decision

1 By an order of 22 August 1978 which was received at the Court on 11 September 1978 the Bundesfinanzhof, pursuant to Article 177 of the EEC Treaty, referred to the Court two questions relating to the interpretation of certain provisions of the Common Customs Tariff concerning the classification for tariff purposes of fresh meat which has been frozen.

2 These questions were raised in the context of an action between the customs authorities and a German exporter concerning the classification for tariff purposes of unboned (bone-in) hams and loins of pigmeat which had been "slightly dried" and then "frozen" with a view to export.

3 The exporter maintains that these goods must be classified under tariff subheadings 02.06 B I (b) 3 (aa) and 02.06.B I (b) 5 (aa), whereas the customs authorities consider that they come within tariff subheadings 02.01 A III (a) 2 and 02.01 A III (a) 4.

4 In order to be apprised of the criteria to be applied when classifying these goods for tariff purposes the Bundesfinanzhof has referred the following questions to the Court for a preliminary ruling:

1. Does the term "frozen" in tariff heading 02.01 cover not only meat which has been frozen when fresh but also meat which has first been "slightly dried" within the meaning of tariff subheading 02.06 B I (b) 3 (aa) and B I (b) 5 (aa) and only then frozen?

   If the answer to this question is in the negative:

2. How is the term "fresh" in tariff heading 02.01 to be distinguished from the term "slightly dried" in tariff subheadings 02.06 B I (b) 3 (aa) and B I (b) 5 (aa)?

5 The Bundesfinanzhof by these questions has asked the Court in substance whether and to what extent heading 02.01 of the Common Customs Tariff covers products such as those mentioned by subheadings 02.06 B I (b) 3 (aa) and 5 (aa) which have been first "slightly dried" and subsequently "frozen".

6 Heading 02.01 of the Common Customs Tariff applies to "Meat and edible offals... fresh, chilled or frozen" including hams and loins, unboned (bone-in), of subheadings 02.01 A III (a)2 and 02.01 A III (a) 4.

7 As far as heading 02.06 is concerned it applies to salted meat and to dried or smoked meat and in most of its subheadings draws a distinction between meat which has been dried or smoked in the normal way and meat which has been only "slightly" dried or smoked.

8 In particular "slightly dried" or "slightly smoked" hams and loins are mentioned in tariff subheadings 02.06 B I (b) 3 (aa) and 02.06 B I (b) 5 (aa)

9 Additional Note 3 to Chapter 2 of the Common Customs Tariff provides that "For the purposes of subheadings 02.06 B I (b) 3 (aa), ..., 5 (aa) ..., products whose water/protein ratio in the meat (nitrogen content multiplied by 6.25) is more than 2.8 shall be considered as slightly dried and slightly smoked".

10 Although this detailed explanation enables products having a water/protein ratio equal to or less than 2.8 to be classified under subheading 02.06 B I (b) relating to dried or smoked meat, it does not provide a decisive criterion for the classification for customs purposes of all products which have been partially dehydrated as a result of being slightly dried or slightly smoked and in particular of those having a ratio, as mentioned above, much more than 2.8.

11 In these circumstances the fact that a product has been slightly dried or slightly smoked cannot be regarded as a criterion for classification for customs purposes of all products which have been partially dehydrated.

12 On the other hand the last paragraph of the Explanatory Notes to the Common Customs Tariff relating to subheading 02.06 B I (b) states that "Meat which has been partially dehydrated, but the actual preservation of which is ensured by freezing or deep freezing falls in heading 02.01."

13 Having regard to those notes and taking into account the above-mentioned Additional Notes it is clear that the basis of the decisive criterion for tariff classification of "slightly dried" or "slightly smoked" products is not, according to the Customs Tariff, the water/protein ratio in the meat considered in isolation, but is primarily the capacity of such slight drying or slight smoking of the meat to ensure the actual preservation of the meat.

14 Products which have been partially dehydrated as a result of being slightly dried or slightly smoked come in fact within heading 02.01 relating to fresh frozen meat in so far as their actual keeping quality has been achieved not by partial dehydration of the meat but by freezing it.

15 When such products have to be classified it is for the national court to determine whether, and to what extent, the lasting preservation of the meat, which is capable of protecting it from normal deterioration, is due to its being slightly dried or slightly smoked or whether it has been achieved essentially by freezing.

16 The answers to the questions submitted must therefore be that the expression "frozen" in heading 02.01 of the Common Customs Tariff covers not only meat which has been frozen when fresh but also meat which has first been slightly dried and subsequently frozen, in so far as its acutal and lasting preservation depends essentially upon such freezing.

Costs

17 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable; since the proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds

THE COURT,

in answer to the questions referred to it by the Bundesfinanzhof by order of 22 August 1978, hereby rules:

The expression "frozen" in heading 02.01 of the Common Customs Tariff covers not only meat which has been frozen when fresh but also meat which has first been slightly dried and subsequently frozen, in so far as its actual and lasting preservation depends essentially upon such freezing.

Mertens de Wilmars O'Keeffe Bosco

Delivered in open court in Luxembourg on 31 May 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber