JUDGMENT OF THE COURT
OF 7 NOVEMBER 1973 [1]

Herbert Fleischer Import-Export v Hauptzollamt Flensburg (preliminary ruling requested by the Finanzgericht Hamburg)

'Bulk caramel'

Case 49/73

Summary

Common Customs Tariff — Description of goods — Sugar confectionery — Classification of products under subheading 17.04-D-II — Criteria

The milkfat content of goods covered by subheading 17.04-D-II of the Common Customs Tariff must not be such as to effect the character of those products as sugar confectionery.

Products in bulk form intended for use in the making of sugar confectionery, even if their sugar content must be increased during processing into the finished product, are covered by subheading 17.04-D-II, provided that their composition specifically and definitely designates them for use in the making of a certain category of sugar confectionery.

In Case 49/73

Reference to the Court of Justice of the European Communities under Article 177 of the EEC Treaty by the Hamburg Finanzgericht for a preliminary ruling in the action pending before that Court between

HERBERT FLEISCHER, IMPORT-EXPORT, Berlin,

plaintiff,

and

HAUPTZOLLAMT FLENSBURG,

defendant,

on the interpretation of headings 17.04-D-II and 21.07-F-VII of the Common Customs Tariff as established by EEC Regulation No 950/68 of the Council dated 28 June 1968 (OJ L 172, 1968) and amended by EEC Regulation No 2451 of the Council dated 8 December 1969 (OJ L 311/1),

1 — Language of the Case: German.

THE COURT

composed of: R. Lecourt, President, A. M. Donner (Rapporteur) and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore, and C. Ó Dálaigh, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

In February 1970 Firma Herbert Fleischer imported from Denmark a product which was described in the vendor's invoice as 'bulk caramel' and in the customs declaration form as 'bulk' caramel confectionery (containing more than 70 % by weight of sucrose and more than 1·5 % by weight of milkfat, otherwise containing only aromatic and flavouring material)'. The customs office first assigned the goods to tariff heading 17.04-D-II (c) of the Common Customs Tariff (CCT). [1]

Analysis by the customs technical service of specimins taken at the customs clearance subsequently showed that the following raw materials were used in the manufacture of the imported product (the proportions are approximate):

— 50 % butter or butterfat,
— 20 % sugar,
— 20 % glucose,
— 5 % milk powder,
— Aromatic and flavouring material.

This analysis was performed by the Customs Technical Examination and Training Centre (Zolltechnische Prüfungs- und Lehranstalt) of Hamburg-Altona, which at first considered that the product should be classified under heading 17.04-D-II (a); subsequently, however, it was decided that the product was equivalent to a 'sweetfat food preparation' and as such should be classified under heading 21.07-F-VII (b), (1). [2] In conformity with this finding the

1 — 17.04 Sugar confectionery, not containing cocoa.
D. Other:
I — Containing no milkfats or containing less than 1·5 % by weight of such fats:
.....
II — Other:
Containing by weight of sucrose (including invert sugar expressed as sucrose):
(a) Less than 50 %,
(b) 50 % or more but less than 70 %,
(c) 70 % or more.

2 — 21.07 Food preparations not elsewhere specified or included:
F. Other:
.....
VII — Containing 45 % or more but less than 65 % by weight of milkfats.
(a) .....
(b), (1). Containing no starch or containing less than 5 % by weight of starch.

customs office informed the plaintiff firm that it was required to pay further import duty in the sum of 78 452·99 DM. The complaint lodged by the plaintiff against this demand was rejected by the Hauptzollamt at Flensburg. The main action before the Hamburg Finanzgericht contests the demand for further payment and the rejection of the plaintiff's complaint.

The Finanzgericht is of the opinion that the interpretation to be put upon subheading 17.04-D-II of the Common Customs Tariff is of decisive importance to the outcome of the main action and accordingly, by Order dated 22 February 1973, it stayed proceedings and referred the following questions to the Court:

'1. Is the milkfat content in goods within tariff heading 17.04-D-II subject to any, and if so what, limitation?

2. Can half-finished products, in the finishing of which sugar must be added, be included in the sugar confectionery in this tariff heading?

3. If Question 2 is answered in the affirmative: in this case does it depend upon the general opinion obtaining in the confectionery trade, or on something else, and if so, what?'

This Order was registered at the Court on 15 March 1973.

Firma Fleischer, represented by Jurgen Hesse, of the Hamburg Bar, and the Commission of the European Communities, represented by its legal adviser, Dieter Oldekop, submitted written observations in accordance with Article 20 of the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

The plaintiff in the main action and the Commission made their oral observations at the hearing on 26 September 1973.

The Advocate-General delivered his opinion at the hearing on 24 October 1973.

II — Observations submitted under Article 20 of the Statute

The observations submitted under Article 20 of the Statute may be summarized as follows:

Firma Fleischer, plaintiff in the main action, stated that the decisive question was whether the product at issue must be classified under tariff heading 17.04 or 21.07 of the Common Customs Tariff.

The Explanatory Notes to the Brussels Nomenclature give the only valid indication of the correct interpretation to be put upon tariff heading 17.04, since when the product was imported the Nomenclature Committee had provided no explanation or drawn up any more precise provisions as to the scope of this tariff heading. The text of the Explanatory Notes to the Brussels Nomenclature which applies here is as follows:

'This heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and commonly referred to as sweetmeats or confectionery. It includes *inter alia:* boiled sweets, (including those containing malt extract); caramels, cachous, candies, nougat, fondants, sugared almonds, Turkish delight; gums (including sweetened chewing-gum and the like).

The heading also covers pastes containing sugar used for making fondants, marzipan, nougat, etc.'

In the opinion of the plaintiff in the main action the Explanatory Notes make it clear that goods included under tariff heading 17.04 have the following characteristics:

1. a considerable sugar content;
2. a solid or semi-solid consistency;
3. they are generally suitable for immediate consumption;
4. they are commonly referred to as sweetmeats or confectionery.

1. The examples mentioned, which include sweetened chewing-gum containing a maximum of 10 % sugar, but which is still listed as a sweetmeat, show that the sugar content of the goods listed under tariff heading 17.04 is not fixed at a certain minimum percentage of the finished product when suitable for consumption. This being the case for the abovementioned finished products, intended directly for consumption, it should also be so in particular for those goods known as 'pastes' for the manufacture of sweetmeats. It follows that sugar content is not a sufficient determining criterion. In this respect the only decisive factor is the fact that the goods do indeed contain sugar.

2. The requirement that the goods have a solid or semi-solid conistency presents no problem here.

3. The requirement that the product be suitable, in general, for immediate consumption cannot be interpreted strictly in the case of 'pastes' for the manufacture of sweetmeats. For such products the suitability for immediate consumption cannot be assessed by the same criteria as those applicable to finished products. Thus the term 'in general' no doubt refers to pastes.

4. To determine whether the product may be commonly referred to by the names 'sweetmeat' or 'confectionery' and classified under tariff heading 17.04 it may be necessary to examine it for taste.

The product at issue here should have the taste of a caramelized sweetmeat, although it may not necessarily have precisely the taste of a particular finished product, provided that the typically characteristic taste of the sweetmeat is present.

The plaintiff in the main action further stated that the words *'commonly referred to as sweetmeats or confectionery'* are a reference to generally accepted trade terminology. Such a criterion can only be of use, however, if it is the same in all Member States. In this case uniformity is likely, since the manufacture of sweetmeats must have followed the same technical evolution throughout the Community.

Accordingly the question whether the goods in question are to be classified under tariff heading 17.04 should be answered in the affirmative. Turning to the questions put by the Hamburg Finanzgericht, the plaintiff suggested the following replies:

Question 1: it is expressly provided that goods within tariff heading 17.04 may contain milkfat, provided that the latter is not present in such proportion as to neutralize the characteristic flavour of the sweetmeats.

Question 2: since it is in the nature of pastes that other ingredients must be added to them in creating a finished product, it is clear that the addition of sugar to pastes during the preparation of finished products is permitted.

Question 3: the only feasible solution is to refer to concepts current in the confectionery trade, as suggested by the terms employed in the Common Customs Tariff and the Explanatory Notes to the Brussels Nomenclature.

The plaintiff's observations were summarized as follows:

'A paste may not be classified under tariff heading 17.04 of the Common Customs Tariff if, owing to the proportion of milkfat contained in the product, the latter loses the flavour characteristic of a paste for the manufacture of sweetmeats. It is for the national court to decide whether or not this is the case.'

The *Commission* prefaced its observations with the statement that the outcome of the main action depended primarily upon the interpretation to be

put upon heading 17.04, since heading 21.07, in view of its subject-matter, is of a subsidiary character. The tariff rating of the goods in question is not specifically laid down in any Community provision, nor in tariff provisions made under EEC Regulation No 97/69 of the Council of 16 January 1969 (OJ 1969, L 14/1), nor in in the form of explanatory notes to the Common Customs Tariff.

Referring to heading 17.04, as it stood when the import was made, the Commission showed that a content of more than 1·5 % by weight of milkfat does not, in theory, exclude a product from this heading. A comparison of subheading I ('Containing no milkfats or containing less than 1·5 % by weight of such fats') with subheading II ('Other . . .') shows that no maximum figure for milkfat content is expressly laid down.

However, this is not to say that no such limit exists. On the contrary, the fact that heading 17.04 covers 'sugar confectionery' must mean that it has to do with products whose major characteristic is their sugar content. This argument is supported by the Explanatory Notes to the Brussels Nomenclature. [1]

If the conclusion cannot be drawn that a product covered by heading 17.04 must be mainly composed of sugar, it may be deduced that the proportion of ingredients other than sugar must not be such as to affect the character of the product as 'sugar confectionery', or to determine of itself the character of the goods. In view of the large number of recipes for the preparation of sweetmeats a maximum limit of general application for milkfat content could not be fixed.

However, the following remarks suggest that the milkfat content must in general be fairly small.

(a) The trade arrangements laid down by Regulation (EEC) No 1059/69 of the Council of 28 May 1969 (OJ 1969, L 141/1) applicable to certain goods resulting from the processing of agricultural products which do not appear on the list provided for by Article 38 of the EEC Treaty and which forms Annex II to that Treaty, as supplemented by Regulation (EEC) No 1060/69 of the Council of 28 May 1969 (OJ L 141/7, 1969), do not include butter as a basic product for any of the goods covered by heading 17.04, though they do for those covered by heading 21.07.

Regulation (EEC) No 1060/69 fixes — for the purpose of calculating the variable component of the levy to be charged on imports — the quantities of basic agricultural products taken as having been used in the manufacture of goods covered by each of the descriptions in the Common Customs Tariff governing the goods listed in Regulation (EEC) No 1059/69.

Although Regulation (EEC) No 1060/69 is not intended to establish the composition which allows the classification of these products under headings 17.04 and 21.07, it nevertheless provides a valid indication: if butter had been an important, consistently employed ingredient of goods covered by heading 17.04, the authors of the Regulation would have had to take it into account.

(b) The subdivisions of heading 17.04 themselves provide sufficient confirmation that in general products classified under this heading contain only a small proportion of milkfat.

1 — 'This heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and commonly referred to as sweetmeats or confectionery. It includes, *inter alia:* boiled sweets (including those containing malt extract); caramels, cachous, candies, nougat, fondants, sugared almonds, Turkish delight; gums (including sweetened chewing-gum and the like); .....

This heading also covers pastes containing sugar used for making fondants, marzipan, nougat etc.
.....

The heading does not cover:
.....

Sweetened food preparations such as fruit, fruit peel etc., preserved by sugar, and jams, fruit jellies, etc.'

If the point of departure adopted by the authors of the Regulation had been that the milkfat content of sweetmeats could exceed 1·5 % by an appreciable margin, it is inconceivable that they should not have provided a larger number of subheadings, graded according to milkfat content, in order to allow the variable component of the levy to play its protective rôle.

The Commission continued that if a maximum limit for milkfat content was not accepted advantage could be taken of this omission to avoid the high levy charged on the import of butter into the Community, by substituting the much lower levy applied to maize, sugar or whole milk powder (which, according to Regulation (EEC) No 1060/69, are the basic products for the sweetmeats under heading 17.04).

To conclude, the Commission's reply to the first question would be as follows:

The milkfat content for goods covered by heading 17.04-D-II is limited in so far as it must not alter their character as sugar confectionery. The assessment of such a maximum limit cannot be conducted within the procedure laid down by Article 177, which applies only to interpretation of Community law. It would rather be the task of the relevant national authorities or courts.

On the second and third questions

In the Commission's view it appears from the Explanatory Notes to the Brussels Nomenclature that not only sweetmeats suitable for immediate consumption should be classified under this heading, but also sweetmeats in the form of semi-finished products. This view is supported by the German term 'Rohmasse' (which is wider than the terms 'pâtes' and 'pastes' in the French and English versions) and by the phrase 'used for making . . .' The term 'pastes', within the meaning of heading 17.04, must be taken to mean specific semi-finished products intended for the making of a certain type of sweetmeat, and which, in general, display the essential characteristics of the finished product. This interpretation must be adopted, firstly, because the pastes mentioned in the Brussels Explanatory Notes necessarily form part of the concept of 'sugar confectionery' as used at heading 17.04 in the Common Customs Tariff. Secondly, the Brussels Explanatory Notes show that this is indeed the case in that they enumerate, as examples, various well-defined pastes corresponding to well-known products, that is, those intended for the making of fondants, marzipan and nougat. Finally, the general scheme of the Common Customs Tariff itself is an indication; if non-specific compounds intended for the making of sugar confectionery could also be classified under heading 17.04, the distinction to be made between this heading and various headings in Chapters 19, 20 and 21, in particular the collective heading 21.07, would present difficulties.

The differences between a paste intended for the making of sugar confectionery within the meaning of heading 17.04 and the finished product, if the paste is to remain within the ambit of that heading, are thus of necessity limited. It is impossible to give such limits general application, since they depend upon factual data relating to the method of manufacture and composition of the finished product.

As to the product in question in the main action, the Commission again emphasized that it cannot be classified under heading 17.04 if, in using it for the making of caramels, large additional quantities of sugar must be employed to neutralize the surplus milkfat. Moreover any possibility of an alternative use for such a product would contravene the requirement stating that it must be a specific semi-finished product.

The Commission suggested that Questions 2 and 3 should be answered as follows:

Pastes to be used in the manufacture of

sugar confectionery are deemed to be sugar confectionery even if their sugar content must be increased for the purpose of processing into the finished product, the the extent that such pastes already amount to specific semi-finished products to be used in the making of a definite category of sugar confectionery.

Grounds of judgment

1 By order dated 22 February 1973, filed at the Court of Justice on 15 March 1973, the Hamburg Finanzgericht referred, under Article 177 of the EEC Treaty, three questions on the interpretation of subheading 17.04-D-II of the Common Customs Tariff.

It appears from the order that the questions refer to the tariff classification of a product imported into the Federal Republic from Denmark in February 1970, designated 'bulk caramel' and containing about 50% butter or butterfat, about 20% sugar, about 20% glucose, about 5% milk powder and aromatic and flavouring material.

On the first question

2 It is asked whether the milkfat content in goods within subheading 17.04-D-II is subject to any, and if so, what, limitation.

3 Whereas subheading 17.04-D-I lays down an upper limit (containing no milkfats or containing less than 1·5% by weight of such fats), subheading 17.04-D-II does not.

Although the wording of subheading 17.04-D-II does not state that the products covered must be largely composed of sugar, it does indicate quite clearly that ingredients other than sugar must not be present in such proportion as to affect the character of the product as 'sugar confectionery'.

This being the case, it is not possible to fix a generally applicable quantified limit for milkfat content for the purposes of the subheading at issue.

A maximum limit of this kind must be fixed having regard to the facts of each case, in particular, data as to the method of manufacture, composition and use of the product in question.

Thus the fixing of this limit must be left to the discretion of the court charged with the application of the Common Customs Tariff in each case, having regard to the fact that the milkfat content of goods covered by subheading 17.04-D-II of the Common Customs Tariff must not be such as to alter the character of those products as sugar confectionery.

On the second and third questions

4 It is asked whether semi-finished products, in the finishing of which sugar must be added, can be included in 'sugar confectionery' within the meaning of subheading 17.04-D-II and, if so, whether such classification depends upon the general opinion obtaining in the confectionery trade.

5 The Explanatory Notes to the Brussels Nomenclature state with regard to heading 17.04 that the heading also covers 'pastes used for making fondants, marzipan, nougat etc'.

Therefore products in the form of semi-finished products are to be classified under this heading if they already display the specific and essential characteristics of 'sugar confectionery'.

6 Whilst the product in its bulk form, not having attained its final composition in respect of its principal ingredients and requiring, for example, the addition of sugar, may, in some cases, show the characteristics of sugar confectionery within the meaning of heading 17.04, its composition must specifically and definitely designate it for use in the making of a certain category of sugar confectionery.

In order to ascertain if this is so, account must be taken of factual data with regard to the usual method of manufacture and composition of the finished product in question.

7 Accordingly, products in bulk form intended for use in making sugar confectionery, even if their sugar content must be increased during processing into the finished product, are to be deemed to be covered by subheading 17.04-D-II provided that their composition specifically and definitely designates them for use in the making of a certain category of sugar confectionery.

Costs

8 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable, and as these written proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before a national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation No 950/68 EEC of the Council of 28 June 1968 establishing the Common Customs Tariff;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Hamburg Finanzgericht, by order of that Court dated 22 February 1973, hereby rules:

1. **The milkfat content of goods covered by subheading 17.04-D-II of the Common Customs Tariff must not be such as to affect the character of those products as sugar confectionery;**

2. **Products in bulk form intended for use in the making of sugar confectionery, even if their sugar content must be increased during processing into the finished product, are covered by subheading 17.04-D-II, provided that their composition specifically and definitely designates**

them for use in the making of a certain category of sugar confectionery.

Lecourt Donner Sørensen

Monaco Mertens de Wilmars Pescatore Ó Dálaigh

Delivered in open court in Luxembourg on 7 November 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 24 OCTOBER 1973 [1]

Mr President,
Members of the Court,

The dispute between the parties in the case pending before the national court is here concerned with whether a product should be assigned to tariff heading 17.04 ('Sugar confectionery, not containing cocoa') of heading 21.07 ('Food preparations not elsewhere specified or included') of the Common Customs Tariff. It is for us to explain the meaning of the Customs Tariff in this respect, so as to enable the national court to apply it correctly to this case.

As often happens in the interpretation of the Common Customs Tariff, although the national court took care to make its questions appear abstract, nevertheless, in attempting to give a useful reply there is the risk of letting oneself be dragged into an examination of the facts and of considering specifically the particular product whose actual assignment is being discussed by the national court. I will take as much care as possible to avoid doing so while at the same time bearing in mind the need to give the national court a useful reply which will clear up the matter.

We are here concerned with a product imported in 1970 from Denmark and which was described in the vendor's invoice as 'bulk caramel' and in the customs declaration form as 'bulk caramel confectionery' and appearing on analysis to contain less than 50 % by weight of sucrose and 46·4 % of milkfat.

The relevant customs office, after having carried out an analysis of the product giving the results indicated above, decided to assign the product to tariff heading 21.07-F-VII-b-1. The German importer objected to that decision, maintaining that the product was covered by heading 17.04, for which the

1 — Translated from the Italian.