JUDGMENT OF THE COURT (Third Chamber)
26 September 1985 *

In Case 166/84

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

Thomasdünger GmbH, Düsseldorf,

and

Oberfinanzdirektion [Principal Revenue Office] Frankfurt am Main

on the tariff classification of a substance declared on importation as 'converter lime with phosphate',

THE COURT (Third Chamber)

composed of: C. Kakouris, President of Chamber, U. Everling and Y. Galmot, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

Thomasdünger GmbH, the plaintiff in the main proceedings, by Mr Krautz, of the Cologne Bar, and

the Commission of the European Communities, by Jörn Sack, a Legal Advisor,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 May 1985,

gives the following

* Language of the Case: German.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 8 May 1984 which was received at the Court on 2 July 1984 the Bundesfinanzhof [Federal Finance Court] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions as to the interpretation of tariff headings 26.02 and 31.03 of the Common Customs Tariff for the purpose of classifying a substance described as 'converter slag or converter lime' with phosphate.

2 The questions arose in proceedings between Thomasdünger GmbH, Düsseldorf, and the Oberfinanzdirektion [Principal Revenue Office] Frankfurt am Main, concerning the formal notice of classification of the substance in question, which was imported from France.

3 The relevant provisions of the Common Customs Tariff are as follows:

'Chapter 26

Metallic ores, slag and ash

...

(Heading number)

26.01 ...

26.02 Slag, dross, scalings and similar waste from the manufacture of iron or steel:

(A) Blast-furnace dust (ECSC)

(B) Other.'

...

'Chapter 31

Fertilizers

Notes

1. ...

2. Heading No 31.03 is to be taken to apply, and to apply only, to the following goods, provided that they are not put up in the forms or packings described in heading No 31.05:

(A) Goods which answer to one or other of the descriptions given below:

(i) Basic slag;

(ii) Disintegrated (calcined) calcium phosphates (thermophosphates and fused phosphates) and calcined natural aluminium calcium phosphates;

(iii) Superphosphates (single, double or triple);

(iv) Calcium hydrogen phosphate containing not less than 0.2% by weight of fluorine.

(B) Fertilizers consisting of any of the goods described in (A) above, but without quantitative criteria, mixed together.

(C) Fertilizers consisting of any of the goods described in (A) or (B) above, but without quantitative criteria, mixed with chalk, gypsum or other inorganic non-fertilizing substances.

3. ...

(Heading number)

31.03 neral or chemical fertilizers, phosphatic;

(A) Mentioned in Note 2 (A) to this Chapter:

(I) Superphosphates

(II) Other

(B) Mentioned in Note 2 (B) or (C) to this Chapter.'

4 It appears from the order making the reference that the German customs authorities in a binding customs tariff ruling issued on 9 July 1980 determined on the basis of analyses that the substance in question consisted essentially of oxides,

silicates and phosphates of calcium and magnesium, as well as iron and manganese compounds, in the form of by-products of steel manufacture to which disintegrated phosphates had been added in order to obtain a fixed phosphorus content. The product was held to contain about 7.5% of phosphorus expressed as P_2O_5 soluble in 2% citric acid. The German customs authorities therefore classified the substance under tariff subheading 31.03 B. Products which come under that subheading are subject to customs duty.

5 Thomasdünger lodged an objection to that ruling which was rejected by the German customs authorities. Following that rejection it brought the action which is the subject of the main proceedings. It claimed that the product in question was a compound of converter slag with a 6% phosphate content soluble in citric acid obtained by virtue of its production alone, without any addition of disintegrated phosphates. It should therefore be classified under heading 26.02, and thus be exempt from customs duty.

6 The German customs authorities contended that the action should be dismissed as unfounded. They argued in particular that the product in question had a high phosphate content which is important for phosphorus soil conditioning. An analysis by the Zolltechnische Prüfungs- und Lehranstalt [Customs Laboratory and Training College] showed that the product in question had a P_2O_5 content of 7.5%. In view of that phosphate content the product must consist either of slag from the treatment of phosphatic iron, or of a mixture of slags with different phosphate content, or the like. It was therefore to be regarded as phosphorus fertilizer within the meaning of Chapter 31 of the Common Customs Tariff.

7 In order to give a decision in those proceedings, the Bundesfinanzhof referred to the Court for a preliminary ruling the following questions:

'(1) Is tariff heading 26.02 of the Common Customs Tariff to be interpreted as including converter slag or converter lime with a phosphate content of about 6 to 7%?

Is it relevant in this regard that the product in question is a mixture of converter slags or converter limes the individual components of which have a varying phosphate content or that phosphate has been added?

(2) If the answer to question (1) is in the negative:

Is tariff subheading 31.03 B of the Common Customs Tariff to be interpreted as including that product?

(3) If the answer to question (2) is in the negative:

Is tariff subheading 31.03 A II of the Common Customs Tariff to be interpreted as including that product?'.

8 In observations submitted to the Court, the German customs authorities point out that the Committee on Common Customs Tariff Nomenclature, which, as is stated in the order for reference, was consulted by the German authorities, decided on 7 June 1984 that the product described as 'converter lime with phosphate' should be classified as basic slag under tariff subheading 31.03 A II of the Common Customs Tariff, and was therefore not subject to customs duty. Accordingly, by a decision of 24 August 1984, the German customs authorities annulled the decision of 9 July 1980 and replaced it by a new classification ruling, which was challenged by Thomasdünger in the proceedings before the Bundesfinanzhof.

9 Thomasdünger claims that the product in question is converter lime with phosphate with a P_2O_5 content of 3.7%, which comes within heading 26.02 of the Common Customs Tariff and can in no circumstances be regarded as a phosphatic fertilizer. Within the European Communities a product must be regarded as a phosphatic fertilizer only when its P_2O_5 content is at least 10%. That conclusion is consistent with modern technology, the principles applied in the legislation in various countries concerning fertilizers, to which the Common Customs Tariff refers, and commercial practice.

10 The Commission considers that heading 26.02 does not cover the products in question. It maintains that, in accordance with Note 1 (c) to Chapter 26, 'basic slag' comes under Chapter 31 of the Common Customs Tariff. That corresponds to Note 2 to Chapter 31, which describes exhaustively the products included under heading 31.03, among which is listed, at point A (i) of Note 2, 'basic slag'. Moreover, according to Note 2 (B) and (C), heading 31.03 also covers the products described in (A) mixed together or mixed with inorganic non-fertilizing substances. The Commission considers that, as a general rule, heading 26.02 covers only slag of relatively low value. Slag with a phosphate content of 3% or more and hence with fertilizing properties must be classified under Chapter 31, irrespective of the manner in which the phosphate content was achieved. In the Commission's view the product in question, in particular, comes under subheading 31.03 B because it is a mixture of basic slag and disintegrated phosphates. On the other hand, if the product consisted merely of basic slags or of mixtures of such slags without the addition of disintegrated phosphates, and it is for the national court to determine whether that is the case, the product must be classified under subheading 31.03 A II.

11 Before considering the questions submitted by the Bundesfinanzhof, it must be noted that in the course of the proceedings before the Court, the question was raised as to what the applicant's interest was in instituting the main proceedings and what useful purpose would be served by the interpretation of the Common Customs Tariff headings requested by the Bundesfinanzhof. In that respect it is sufficient to point out that, except in exceptional cases in which it is clear that the provision of Community law which the Court is asked to interpret does not apply to the facts of the dispute in the main proceedings, the Court leaves it to the national court to determine in the light of the facts of each case whether the rgtpreliminary ruling is necessary in order to decide the dispute pending before it.

12 As regards the three questions submitted by the Bundesfinanzhof, it may be noted that their purpose essentially is to clarify the criteria for determining the scope of headings 26.02 and 31.03, in the first place, and subheadings 31.03 A II and 31.03 B, in the second place, of the Common Customs Tariff, for the purpose of classifying the product described in the questions.

The first question

13 As the Court has repeatedly held, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their characteristics and objective properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters.

14 Moreover, the Court has consistently stated that in interpreting the Common Customs Tariff the notes which precede the chapters of the Common Customs Tariff and the Explanatory Notes to the Nomenclature of the Customs Cooperation Council, like the classification slips issued by the Committee on Common Customs Tariff Nomenclature, constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States and as such may validly be relied upon when interpreting the tariff. In order to interpret the abovementioned tariff headings it is therefore necessary to take into consideration not only the wording and the scheme of the Common Customs Tariff but also the contents of the explanatory notes and the classification opinions relating thereto.

15 It is clear both from the wording of headings 26.02 and 31.03 and an analysis of those headings in their context, and from consideration of the abovementioned

notes and opinions that, as a general rule, converter slag with a phosphate content sufficient to give it fertilizing properties comes within the ambit of heading 31.03. That interpretation conforms, *inter alia*, to the requirement that products be classified on the basis of their characteristics and objective properties.

16 Although according to the terms of heading 26.02 it covers 'Slag . . . and similar waste from the manufacture of iron or steel', Note 1 (c) to Chapter 26 states that the chapter does not cover 'Basic slag of Chapter 31'. That note is identical to Explanatory Note 1 (c) to Chapter 26 in the Explanatory Notes to the Nomenclature of the Customs Cooperation Council, in which, in addition, it is expressly provided in the note to heading 26.02 that '. . . the phosphatic slags ("basic slag" or "Thomas slag") . . . are classified in Chapter 31'.

17 Note 2 to Chapter 31, which concerns fertilizers, states that basic slag comes under heading 31.03. According to the Explanatory Notes to the Nomenclature of the Customs Cooperation Council, heading 31.03 'is to be taken to apply, and to apply only, to . . . Basic slag (also known as "Thomas slag", "Thomas phosphates", "phosphatic slag" or "metallurgical phosphates"). It is a by-product of the manufacture of steel from phosphatic iron in basic furnaces or converters'. In addition, it should be noted that it is stated in the same Explanatory Notes that the products in question 'are classified in this heading even when they are clearly not to be used as fertilizers'.

18 It follows from the foregoing that the decisive criterion for classifying products under heading 31.03 rather than under the heading 26.02, is the presence of a fertilizing element, as for example in this instance phosphate, in a quantity sufficient to attribute to the products concerned fertilizing properties which may be used in agriculture. On the other hand, products which contain fertilizing elements but in a quantity insufficient to give them such fertilizing properties may not be classified under heading 31.03. It is for the national court to make the necessary findings of fact in each individual case.

The second and third questions

19 By these questions the Bundesfinanzhof seeks essentially to establish the criterion for classifying goods in either the subheading 31.03 A II or subheading 31.03 B.

20 In that respect, it must be noted that the scope of each of the two subheadings is determined by their wording (given above), which includes references to the notes to that chapter. It follows that the products listed in Note 2 (A) come under subheading 31.03 A II (with the exception of superphosphates) if they are in isolation. If, on the other hand, they are mixed together or mixed with other inorganic non-fertilizing substances they come under subheading 31.03 B. It is for the national court to make the necessary findings of fact in each individual case.

Costs

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

On those grounds,

THE COURT (Third Chamber)

in reply to the questions submitted to it by the Bundesfinanzhof by an order of 8 May 1984, hereby rules:

— **The decisive criterion for classifying products under heading 31.03, rather than heading 26.02, is the presence of a fertilizing element, as for example, in this instance phosphate, in a quantity sufficient to attribute to the products concerned fertilizing properties which may be used in agriculture. On the other hand, products which contain fertilizing elements but in a quantity insufficient to give them such fertilizing properties may not be classified under heading 31.03.**

— **The products listed in Note 2 (A) come under subheading 31.03 A II (with the exception of superphosphates) if they are in isolation. If, on the other hand, they**

are mixed together or mixed with other inorganic non-fertilizing substances they come under subheading 31.03 B.

— **It is for the national court, in each individual case, to make the findings of fact on which the application of those criteria will depend.**

Kakouris Everling Galmot

Delivered in open court in Luxembourg on 26 September 1985.

P. Heim
Registrar

C. Kakouris
President of the Third Chamber