price must relate to the actual net weight of the whole of the goods.

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 10 June 1975.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 15 MAY 1975

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Bundesfinanzhof. The essential question that that Court has to decide is whether the Respondent before it, the Hamburger Import-Kompanie GmbH, is liable, under Community legislation, to pay a levy on an importation, which it effected in June 1970, of concentrated orange-juice from Israel.

That question arises in this way.

On 28 June 1968 the Council adopted Regulation (EEC) No 865/68 (JO L 153 of 1.7.1968) on the common organization of the market in products processed from fruit and vegetables. One of the objects of that Regulation, was, as its preamble evinces, to bring the trading system for such products into line with the trading system for sugar, in view of the 'direct and substantial incidence' on the cost of certain of those products of prices for sugar, glucose and glucose syrup.

Article 2 of the Regulation accordingly provided that, in addition to the customs duty imposed under the Common Customs Tariff, an import levy should be charged on added sugars contained in, among other products, 'fruit and vegetable juices with an added sugar content exceeding 30 % by weight'. The amount of the levy was to be calculated, in accordance with a prescribed formula, from the levy already imposed on certain products (mainly syrups) included in the common organization of the market in sugar. That organization, Your Lordships remember, had been established by Council Regulation No 1009/67/EEC of 18 December 1967.

It was soon found that in practice it was difficult to determine by analysis, at all

events in the case of some imported fruit and vegetable juices, whether a high sugar content was due to the presence of added sugar or to a concentration of natural sugar. It was however also ascertained that products that were rich in natural sugar generally commanded a higher price than those to which an equivalent amount of sugar had been artificially added.

The Council accordingly, on 11 March 1969, amended Regulation (EEC) No 865/68 by Regulation (EEC) No 455/69 (OJ L 64 of 14. 3. 1969). Reciting that 'the charging of a levy on fruit or vegetable juices ... which have a high concentration of natural sugar should be avoided', it differentiated between the fruit and vegetable juices to which the former Regulation applied, where they had a specific gravity of 1·33 or less at 15 °C, according to their value.

In the case of grape, apple and pear juice, and of mixtures of apple and pear juice, the dividing line was placed at 18 u.a. per 100 kg net weight. In the case of other fruit and vegetable juices (including orange juice) it was placed at 30 u.a. per 100 kg net weight. In each case, products of which the value was above the dividing line were exempt from the levy, whilst those of which the value was below that line remained *prima facie* subject to it. I say '*prima facie*' because it was always open to an importer to adduce evidence to show that in fact a particular product contained only natural sugar — see Case 3/71 *Gebrüder Bagusat v Hauptzollamt Berlin-Packhof* (Rec. 1971, p. 577).

By the combined effect of Article 9 (2) of Regulation No 865/68 and Article 2 of Regulation No 455/69 the nomenclature resulting from the provisions of those Regulations was incorporated in the Common Customs Tariff. In the result the Common Customs Tariff has two sub-headings that are relevant in the present case. They are:

Heading 20.07 B II (a) 1, comprising orange juice of a specific gravity of 1·33 or less at 15 °C and of a value exceeding 30 u.a. per 100 kg net weight, and

Heading 20.07 B II (b) 1 (aa), comprising orange juice of the same specific gravity but of a value of 30 u.a. or less per 100 kg net weight, and with an added sugar content exceeding 30 % by weight.

The importation effected by the Respondent was of a consignment of 1 248 cartons of concentrated orange juice. It is not in dispute that this orange juice had a specific gravity of 1·33 or less at 15 °C, nor that it had a sugar content exceeding 30 % by weight. It was actually declared to have a sugar content of 63 %. No attempt was made by the Respondent to show that this was all natural sugar. In the result, the only dispute is as to whether the orange juice should be regarded as having had a value of less or of more than 30 u.a. per 100 kg net weight.

According to the declaration made by the Respondent to the German Customs authorities, each carton contained twelve bottles and each bottle contained 895 g of orange juice. The invoiced price was stated to be DM 11·80 per carton. This gave, on paper, a value of DM 109·89 per 100 kg of orange juice, just 9 pfennigs above the equivalent of 30 u.a., which was DM 109·80.

That each carton contained 12 bottles is not questioned, but a random check by the Customs authorities on three bottles showed contents of 927, 929, and 934 g. This gave an average net weight per bottle of 930 g. On that basis, given a price of DM 11·80 per carton, the value of the orange juice per 100 kg net weight was DM 105·73 and so below 30 u.a. The Respondent was provisionally assessed to levy amounting to DM 4 088·43.

Against that provisional assessment the Respondent complained through administrative channels. It argued that,

for the purposes of classification under Heading 20.07 B II (a) 1 or 20.07 B II (b) 1 (aa), the value of the orange juice should be computed, not by reference to its actual net weight, but by reference to its net weight as expressed in the contract, because it was by reference to the latter that the price had been fixed. The bottles had been overfilled by the Israeli exporter for his own protection against the risk of a breach of contract through underfilling, which could result from changes in temperature or from irregularities in the weight of the bottles themselves. The resultant excess in the content of each bottle had not been contracted for and no part of the contract price should therefore be attributed to it.

The complaint led to the Customs authorities opening another 15 bottles and finding that the net weight of their contents averaged 932 g. It also led to their ascertaining that the rate of levy that had been applied was for the wrong date and so reducing the assessment to DM 3·98548. The assessment was confirmed in that sum.

Against the assessment as so confirmed the Respondent appealed to the Finanzgericht of Hamburg, and there succeeded. Hence the further appeal by the Federal Customs authorities, represented by the present Appellant, the Hauptzollamt Hamburg-Ericus, to the Bundesfinanzhof.

The arguments of the parties centre on certain provisions governing the interpretation of the Common Customs Tariff and the valuation of goods for customs purposes, to which I must now turn.

Article 9 (2) of Regulation No 865/68, to which I have already referred, provides that 'The general rules for the interpretation of the Common Customs Tariff... shall apply to the tariff classification of the products covered by this Regulation.'

It is common ground that, of those general rules, the ones that are relevant here are General Rules C.1 and C.2, which come under the heading 'General rules applicable both to nomenclature and to duties'. They are as follows:

'1. Unless provided otherwise, the provisions relating to value for customs purposes shall be applied to determine, in addition to the value for the assessment of *ad valorem* customs duties, the values by reference to which the scope of certain headings or subheadings is defined.

2. The dutiable weight, in the case of goods chargeable by weight, and the weights by reference to which the scope of certain headings or subheadings is defined, shall be taken to be:

(a) in the case of a reference to "gross weight", the aggregate weight of the goods and of all packings thereof;

(b) in the case of a reference to "net weight" or simply to "weight" without qualification, the weight of the goods themselves without packing of any kind.

For the purposes of paragraphs (a) and (b) above, "packing" means any external or internal containers, holders, wrappings or supports, other than transport devices (e.g., transport containers), tarpaulins, tackle or ancillary transport equipment.'

It is also common ground that the 'provisions relating to value for customs purposes' referred to in General Rule C.1 are those of Council Regulation (EEC) No 803/68 of 27 June 1968 as amended (OJ L 148 of 28. 6. 1968). That Regulation, as its preamble makes clear, was adopted in order to establish a uniform method of valuation of goods for customs purposes in all the Member States, so as to obtain a uniform application of the Common Customs Tariff. Its provisions are based on those of the Brussels Convention on the Valuation of Goods for Customs

Purposes of which all the Member States (including the three new Member States) are signatories. Article 1 (1) of the Regulation provides:

'For the purposes of applying the Common Customs Tariff, the value for customs purposes of the goods imported shall be taken to be the normal price, that is to say, the price which they would fetch, at the time referred to in Article 5, on a sale in the open market between a buyer and a seller independent of each other.'

Article 1 (2) and Articles 2 to 8 of the Regulation are devoted to defining the concept thus introduced by Article 1 (1), by laying down in great detail the terms and other characteristics of the hypothetical sale there postulated. Thus, Article 1 (2) prescribes the assumptions to be made as to place of delivery, as to which party to the sale is to bear the costs, charges and expenses incidental to it and to delivery, and as to which is to bear the burden of internal duties and taxes. Article 2 requires the price to be the sole consideration and refines on what is meant by 'a buyer and a seller independent of each other'. Article 3 relates to the right to use any relevant patent, design, trade mark or copyright. Article 4, on which reliance is placed by the Respondent, provides that, subject to exceptions in the case of goods imported in split consignments, 'The normal price shall be determined on the assumption that the sale is a sale of the quantity to be valued.' Article 5 defines the material time for valuation, i.e., in general, the time of importation. Articles 6 and 7 contain definitions relevant for the purposes of Article 1 (2). Finally Article 8 deals with transport costs.

It is not until Article 9 that there is any reference in the Regulation to the actual contract, if any, under which the goods are imported. That Article provides:

'1. The price paid or payable may be accepted as the value for customs purposes if:

(a) the contract of sale is executed within the period specified in Article 10,

(b) the price corresponds, at the time it is agreed upon, to prices on a sale in the open market between a buyer and a seller independent of each other, and

(c) that price is adjusted, if necessary, to take account of circumstances of the sale which differ from those on which the normal price is based.

2. Adjustments under paragraph 1 (c) may in particular be required with reference to:

(a) the costs, charges and expenses mentioned in Article 1 (2),

(b) reductions in price granted in favour of sole agents or sole concessionaires or any other person operating in comparable circumstances,

(c) abnormal rebates and any other reduction from the ordinary competitive price.'

Article 10 provides in effect that, subject to exceptions, Article 9 is to apply only where the date of the contract does not precede the material time for valuation by more than six months. The exceptions are for goods usually sold with delivery periods longer than six months, for goods manufactured to order and for cases of *force majeure.*

It is clear, in my opinion, that the contract price can be used as a measure of value for customs purposes only in so far as it accords with 'the normal price'. In the Brussels Convention, the Definition of Value itself (Annex I to the Convention) contains no reference to the contract price. That Definition simply prescribes the 'normal price' as the measure of value and defines it (in less detail than Regulation No 803/68). Note 5 of the Interpretative Notes (Annex II to the Convention), which are also binding, says this:

'The object of the Definition of Value is to make it possible in all cases to

calculate the duties payable on the basis of the price at which imported goods are freely available to any buyer on a sale in the open market at the port or place of introduction into the country of importation. It is a concept for general use and is applicable whether or not the goods are in fact imported under a contract of sale, and whatever the terms of that contract.

But the application of the Definition implies an enquiry into current prices at the time of valuation. In practice, when imported goods are the subject of a *bona fide* sale, the price paid or payable on that sale can generally be considered as a valid indication of the normal price mentioned in the Definition. This being so, the price paid or payable can reasonably be used as a basis for valuation, and Customs Administrations are recommended to accept it as the value of the goods in question, subject:

(a) to proper safeguards aimed at preventing evasion of duty by means of fictitious or colourable contracts or prices; and

(b) to such adjustments of that price as may be considered necessary on account of circumstances of the sale which differ from those envisaged in the Definition of Value.'

The Explanatory Notes issued by the Valuation Committee of the Customs Cooperation Council under Article VI of the Convention contain (at p. 32) this passage about Interpretative Note 5:

'However, this Note, whilst stating that when imported goods are the subject of a *bona fide* sale the price paid or payable can reasonably be used as a basis for valuation, does not thereby set up an alternative standard to the normal price of the Definition. The possibility of such an alternative cannot be entertained, not only because the Definition precludes the use of a dual standard, but also because the price paid or payable on a contract entirely consistent with the conditions which the Definition prescribes is no more than the materialization of its concept.'

The same point is emphasized both in the recitals and in the operative part of Commission Regulation EEC No 1581/74 of 24 June 1974, which supplements Regulation No 803/68 — though not in a manner directly in point here.

The Appellant has not submitted any observations to the Court, but its line of argument is discernible from the text of its decision confirming the assessment on the Respondent, as well as from the Judgment of the Finanzgericht of Hamburg and from the discussion of the case contained in the Order for Reference made by the Bundesfinanzgericht. That line of argument does not appear to me to differ substantially from that put forward to the Court on behalf of the Commission.

The argument of the Commission is, briefly, that there are two distinct elements that must be ascertained by the responsible customs officers in a case of this kind: the 'net weight' of the goods and their 'value'. The only relevant rule governing the ascertainment of net weight is General Rule C.2 (b) in the Common Customs Tariff. This must be interpreted as having the same meaning in all the circumstances in which it may come into play, i.e. whether it comes into play for the ascertainment of dutiable weight in the case of goods chargeable by weight, or for the ascertainment of weight where, as here, weight enters into the definition of a relevant heading or subheading. That being so, the references to 'weight' in Rule C.2 (b) can only be references to the actual weight of the goods, because that is what customs duties are imposed upon and, incidentally, that is all that customs officers can reliably check.

The Respondent on the other hand argues that there is only one element to be ascertained here, namely the value of

the goods. Their weight, the Respondent says, enters into the matter only because value necessarily has to be expressed in terms of some unit, be it of weight, volume, length or whatever. Here the unit prescribed by the legislation is 100 kg net weight, but it does not follow that what is relevant is actual net weight rather than contractual net weight.

I do not understand the Respondent to say that Rule C.2 (b) is wholly irrelevant. Certainly that Rule must be relevant at least to the extent that it makes clear that that by reference to which the value of goods has to be ascertained is 'the weight of the goods themselves without packing of any kind', i.e. in this case the weight of the orange juice itself without the bottles and cartons. The Respondent's argument is, I think, that it is a question purely of interpretation of the provisions relating to value, i.e. of Regulation No 803/68, whether, in this context, 'the weight of the orange juice itself without the bottles and cartons' means its actual weight or its weight as prescribed by the contract.

My Lords, I am content to assume in favour of the Respondent that its argument is correct so far, but I cannot agree with the next step in that argument, which is that, where the value of the goods is determined by reference to the contract price pursuant to Article 9 of Regulation No 803/68, as it was here, the net weight to which that value relates must necessarily also be so determined.

Of course, in a case where bottles had been fortuitously overfilled or, for that matter underfilled, the discrepancy could be ignored. For then the contract price could be taken, all other things being equal, as an accurate measure of the 'normal price' for the contractual quantity. So also where, as envisaged by paragraph 37 of the German Wertzollordnung of 29 November 1961 (BGBl. I, 1983), which is referred to by the Bundesfinanzhof in its Order for Reference, there had been a variation in weight during the course of transit resulting from natural causes, or been variations, up or down, within tolerances customary in the trade.

But in the present case we have an express finding by the Finanzgericht that there was nothing fortuitous about the overfilling: overfilling is the custom in this trade. That finding is reflected in the terms of the question referred to this Court by the Bundesfinanzhof, which are as follows:

'For the purpose of classification under tariff subheading 20.07 B II (a) 1 or 20.07 B II (b) 1 (aa) of the Common Customs Tariff read in conjunction with the General Rules of the Common Customs Tariff, Section C, paragraphs 1 and 2 (b), in a case where the invoice price is adopted as the basis of valuation, is the determining factor the actual net weight of the imported goods or the minimum weight per unit agreed in the contract of purchase, where, under such a contract, it is customary in the trade to supply an additional quantity without further charge?'

So the question relates to a case where overfilling is customary. As is mentioned by the Bundesfinanzhof in the Order for Reference there are, in practice, many examples of such customs of 'over-supply' — e.g. in the textile trade, in the trade in tinned goods, and so on. The question is therefore of general importance.

In my opinion, it is crucial to bear in mind, in answering it, that the dominant concept in Regulation No 803/68 is that of the 'normal price' and also that that concept applies to 'the goods imported' — see Article 1 (1) of the Regulation. The contract price can never be more than a measure of the 'normal price' for 'the goods imported' — that is to say of the price that those goods would fetch 'on a sale in the open market between a buyer and a seller independent of each other'.

On that footing, the answer to the question posed by the Bundesfinanzhof seems to me clear. Since it is the custom, in this particular trade, to overfill the bottles, the price agreed between the Respondent and its supplier can be a measure only of the 'normal price' for overfilled bottles. It is of no consequence, in my opinion, that such overfilling, as the Respondent repeatedly reminded the Court, is 'gratuitous', in the sense that the lack of it could not give rise to an action for breach of contract. That is simply the circumstance that gives rise to the problem.

In conclude that in a case like the present, the relevant net weight must be that of the actual orange juice in the bottles.

I mentioned to Your Lordships that the Respondent relied on Article 4 of Regulation No 803/68. I confess that I do not follow its argument in so far as it is based on that Article. It was said on behalf of the Commission at the hearing, in answer to a question from one of Your Lordships, that Article 4 was directed to quite a different problem. I agree. The role of Article 4, to my mind, is to relate the hypothetical sale postulated by Article 1 (1) to the quantity of goods falling to be valued in each particular case, i.e. to the quantity of goods imported in that case. This is because, owing to quantity discounts and the like, prices for goods often vary, in commercial practice, according to the quantities bought. In my view Article 4 is hardly in point in this case, but, in so far as it has any relevance, it supports the argument of the Commission rather than that of the Respondent.

Your Lordships will also remember that the argument for the Respondent contained allusions to the German legislation about weights and measures. The Court accordingly asked Counsel for the Respondent, at the hearing, to furnish it with particulars of that legislation. This he did by a telex dated 30 April 1975. It seems that the only relevant provision in force at the date of the contract between the Respondent and its Israeli supplier was paragraph 15 of the Eichgesetz (BGBl. 1969 I, 759 ff.). This simply provided that packets of prepacked goods containing equal quantities of goods should be so manufactured that at the time of manufacture the quantity contained was on average not less than that stated on the package. In other words it permitted variations up or down so long as the average quantity was not less than that stated. On 16 December 1971 there came into force the Fertig-packungsverordnung ('Pre-packed Goods Order') (BGBl. 1971 I, 2000). This was of course well after the date of the importation here in question, but it is stated on behalf of the Respondent that the text of the Order had been under discussion between trade associations and the Government since 1969. At all events, paragraph 17 of that Order prescribes the permissible deviations from stated contents. These again appear to be up-or-down tolerances. They are expressed in ml, which makes them difficult to relate to the facts of the present case, since we do not know the exact specific gravity of the orange juice in question. On the whole it does not seem to me that reference to that legislation assists the Respondent's case. In my opinion, as I have already indicated, up-or-down tolerances are a different thing from a custom of consistent overfilling.

In the result, I am of the opinion that the question referred to the Court by the Bundesfinanzhof should be answered as follows:

'For the purpose of classification under subheadings 20.07 B II (a) 1 or 20.07 B II (b) 1 (aa) of the Common Customs Tariff, in a case where the

contract price is adopted as the basis of valuation and where, under such a contract, it is customary in the trade to supply an additional quantity without further charge, the determining factor is the actual net weight of the imported goods and not the minimum weight per unit agreed in the contract.'