Case 290/84

Hauptzollamt Schweinfurt
v
Mainfrucht Obstverwertung GmbH

(reference for a preliminary ruling
from the Bundesfinanzhof)

'Value for customs purposes — Transport costs'

Summary

Common Customs Tariff — Valuation for customs purposes — Transaction value — Meaning — Intra-Community transport costs — Excluded — Inspections — Permissible (Council Regulation No 1224/80, Art. 3 (1))

Where an importer has paid a supplier, in addition to the price of the goods, an amount in respect of 'intra-Community transport costs' on the basis of a separate invoice, the transaction value within the meaning of Article 3 (1) of Regulation No 1224/80 on the valuation of goods for customs purposes includes only the first of those amounts; however the competent customs authorities may, if the circumstances warrant it, check the invoice relating to the costs in question in order to verify that they are not fictitious.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 12 November 1985 *

Mr President,
Members of the Court,

A. The central question in the reference for a preliminary ruling in regard to which I deliver my Opinion today is how the customs value of goods imported into the European Economic Community from non-member countries is to be calculated. The problem is, in particular, whether the cost of

* Translated from the German.

transporting the imported goods within the Community is to be included in the customs value and what are the requirements for 'distinguishing' those transport costs if the supplier invoices them separately.

The following facts emerge from the main proceedings:

Between July and September 1980 Mainfrucht Obstverwertung GmbH, the plaintiff and respondent (which I shall refer to as 'the plaintiff'), imported 28 consignments of precooled morello cherries and one consignment of frozen raspberries into the Federal Republic of Germany from Bulgaria and placed those goods in free circulation by way of the customs procedure without clearance. The suppliers invoiced the plaintiff at a net price per tonne for the goods, including carriage paid up to the German border, with additional charges of DM 40 per tonne for the cherries and DM 70 per tonne for the raspberries in respect of internal freight charges in Germany or freight charges from the German frontier to the plaintiff's place of business. Those separately itemized freight charges were shown partly in the invoices for the goods and partly in separate invoices. They were to be paid to the suppliers and not to the carriers.

The Hauptzollamt [Principal Customs Office] Schweinfurt, the defendant and appellant (which I shall refer to as 'the defendant') initially accepted the plaintiff's customs declarations by notices of assessment dated 5 August, 4 September and 7 October 1980. However, by notices of amendment of 24 November 1980, it changed the customs value and claimed payment of duties in respect of the cost of transport within the Community. It justified the amendment by stating that although the freight costs for the consignments in question had been distinguished, they could not be verified since the invoices for the cost of transport from the frontier to the place of delivery had been issued by the supplier.

After lodging an unsuccessful objection, the plaintiff brought an action before the Finanzgericht München [Finance Court, Munich], which upheld the plaintiff's claim that the cost of transport within the Community should not be included in the customs value. In the Finanzgericht's view, the cost of transport within the Community which the plaintiff had paid formed part of the *transaction value* within the meaning of Article 3 (3) (a) of Council Regulation No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (which I shall call 'the Customs Value Regulation'). [1] However, the inclusion of those transport costs in the customs value was conditional upon the requirement laid down in Article 15 (1) of the Customs Value Regulation. Since a separate invoice was issued in respect of the transport costs from the German frontier to the place of delivery, those costs had been 'distinguished' within the meaning of the said provision. It could not be inferred from that provision that the buyer must provide verifiable evidence of the actual freight costs charged by the carrier. Article 15 (2) (a) of the Customs Value Regulation was not applicable since it only became relevant when the separately stated transport costs related to a journey partly within and partly outside the customs territory of the Community. The fact that the cost of transport within the Community had been distinguished within the meaning of Article 15 (1) of the Customs Value Regulation did not, however, mean that the amount of such costs must be taken as the basis for customs clearance without any further consideration. It was not the information given by the persons liable to pay duty, or indicated by them in the documents they submitted, which must govern the matter but the true circumstances. According to information obtained by the Finanzgericht from a Chamber of Commerce, the costs indicated by the plaintiff lay within the usual range of transport charges.

1 — OJ 1980, L 134, p. 1.

The defendant brought an appeal against that judgment before the Bundesfinanzhof [Federal Finance Court], essentially on the following grounds:

The use of the term 'distinguished' [getrennt ausgewiesen] in Article 15 (1) of the Customs Value Regulation meant not merely that a sum must be designated as transport costs but that those costs must be substantiated by the production of verifiable documentation; otherwise the customs value of goods would ultimately be determined by the seller by way of its formal invoice and there would be too great a risk of fraud.

In order to resolve the point of law, the Bundesfinanzhof referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

'1. (a) Where a local purchaser has paid a foreign supplier, in addition to the price of the goods, an amount in respect of 'intra-Community transport costs' on the basis of a separate invoice, does the transaction value within the meaning of Article 3 (1) of Council Regulation (EEC) No 1224/80 include both amounts?

(b) If so, must that amount be adjusted pursuant to Article 15 of Regulation No 1224/80 in order to be taken as the customs value of the goods?

2. If those questions are answered in the affirmative:

(a) Is Article 15 (2) (a) of Regulation No 1224/80 applicable where the person concerned declares transport costs covering transport within the Community alone?

(b) If Question (a) is answered in the affirmative:

In the case of through transport as referred to in Article 15 (2) (a) of Regulation No 1224/80, is the deduction, in assessing the customs value of goods, of transport costs calculated to have been incurred within the Community conditional upon production by the person concerned of a separate figure for the total cost of through transport in accordance with Article 15 (1) of the Regulation?

If so, is that condition met where the person concerned gives separate figures for those transport costs, or must he provide proof of the actual costs incurred for the through transport by presenting verifiable documentary evidence? If such proof is necessary, what requirements must it satisfy? May customs authorities waive such proof where the person concerned is unable to provide it by reason of the conduct of his supplier?'

B. My Opinion in this case will take the form of a statement of the views of the national court and of the parties to the proceedings before the Court of Justice, followed by a statement of my own opinion on the individual questions.

I — 1. The Bundesfinanzhof first states that according to Article 3 (1) of the Customs Value Regulation, the transaction value is 'the price actually paid or payable for the goods when sold for export to the customs territory of the Community'. It is the 'total payment ... for the imported goods' and includes 'all payments made ... as a condition of sale of the imported goods by the buyer to the seller'. In determining the transaction value it should therefore be

immaterial whether payment is made by the buyer to the seller in one or several amounts on the basis of one or several invoices and whether those amounts are paid for the goods themselves or for other services provided by the seller with regard to the goods. In this case the transaction value should therefore include the payments designated as transport costs within Germany as well as the actual price of the goods.

Should the Court of Justice reach that conclusion, the further question arises whether that value is itself the customs value or whether it must first be adjusted since according to Article 15 of the Customs Value Regulation, the customs value does not include certain transport costs.

If exclusion of the cost of transport within the Community is permitted under Article 15, the Bundesfinanzhof submits Question 2 (a) on the applicability of Article 15 (2) in the present case, in which the plaintiff submitted invoices only in respect of transport costs within the Community and not for transport to the German frontier. In this case, the imported goods were carried by the same means of transport to a point beyond the place of introduction into the customs territory of the Community. That is precisely the situation covered by Article 15 (2), whose application should not be dependent on the way in which the persons concerned prove their transport costs.

If Article 15 (2) is applicable in this case, the Bundesfinanzhof submits Question 2 (b) in order to ascertain whether the possibility of deducting the cost of transport within the Community from the price of the goods is conditional on those costs being presented separately. The national court points out that although that duty is only provided for in the context of Article 15 (1), it must also be applicable by analogy to cases referred to in Article 15 (2).

The Bundesfinanzhof is therefore inclined to take the view that notwithstanding the different terms used in Article 15 (the word 'distinguished' [ausgewiesen] is used in Article 15 (1) whereas the expression 'the production of evidence' [nachgewiesen] is employed in Article 15 (2)), verifiable documentary evidence must be produced of the transport costs so distinguished even when invoices are produced only in respect of transport costs within the Community. Were it otherwise, it would be possible by showing only evidence of the costs of transport within the Community to reduce the customs value by subtracting an arbitrary amount from the purchase price and declaring it as the cost of freight within the Community.

In order to avoid that, it is not sufficient to do as the Finanzgericht did and permit the customs authorities to verify the amount of the cost of transport declared by comparing it with the usual cost for the carriage in question, since only costs actually incurred may be deducted.

Assuming that verifiable documentary evidence must be produced of the cost of transport within the Community, the question arises whether customs authorities must be satisfied with checking that the separately stated transport costs are reasonable if, because of a lack of cooperation on the part of the supplier, more precise evidence cannot be produced.

2. The plaintiff and the Commission of the European Communities are largely in agreement in the observations they submitted to the Court on the questions referred to it by the Bundesfinanzhof. Those observations may be summarized as follows:

(a) *Both parties* consider that Question 1 (a) (whether the cost of transport within the Community should be included in the customs value or the transaction value) should be answered in the negative having regard to the origins of that provision and the overall scheme of the system.

It is apparent from the recitals in the preamble to the said regulation that the regulation was adopted for the purpose of incorporating into Community law the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT). [2] According to Article 8 (2) of the Agreement, the Contracting Parties are solely entitled to include in the customs value the cost of transport of the imported goods to the port or place of importation. The Community was therefore not entitled to adopt provisions requiring the inclusion of intra-Community transport costs in the customs value.

That interpretation is confirmed by the overall scheme of the Customs Value Regulation. Nowhere in Article 3 is it stated that intra-Community transport costs are included in the transaction value, reference being made only to Article 8, which concerns the cost of transport outside the Community. Article 3 (3) states that the price actually paid or to be paid is 'the total payment made or to be made ... for the import of goods'. That in no way implies that any intra-Community transport costs paid by the buyer to the seller are to be included in that price.

It is to be inferred from Article 15 of the Customs Value Regulation that intra-Community transport costs are not included in the customs value, either when the costs are shown separately (paragraph 1) or when the overall transport costs have to be apportioned (paragraph 2).

Consequently, both the plaintiff in the main proceedings and the Commission propose that Question 1 (a) be answered in the negative.

(b) Although the remaining questions are submitted by the Bundesfinanzhof only if Question 1 (a) is answered in the affirmative, the parties also deal with them.

In regard to Question 1 (b) (whether the transaction value must be adjusted if it includes intra-Community freight costs) the *plaintiff* maintains that a free-at-frontier price, that is to say a price which already includes the cost of transport outside the Community, must not be adjusted by means of Article 15, since the cost of intra-Community transport is not a component of the customs value and must not, therefore, be added to that price. In fact, Article 15 can only apply when the agreed price includes, in addition to the price of the goods, services provided beyond the point of introduction into the customs territory of the Community, such as, for example, intra-Community transport costs.

The *Commission* considers that only where the customs authorities do not accept the breakdown showing separately the price of the goods and the intra-Community transport costs indicated in the invoices submitted by the importer, and consider that all the amounts paid by the importer constitute a free domicile price, is it open to them to deduct the intra-Community transport costs from the total amount pursuant to Article 15 in order to determine the customs value of the goods. However, no such deduction is possible if the said

2 — See Council Decision 80/271 of 10 December 1979, OJ 1980, L 71, p. 1, at p. 107 *et seq.* The Agreement is hereinafter referred to as 'the Customs Value Code'.

costs are identifiable as such and can be distinguished from the price of the goods.

(c) With regard to Question 2 (a) (whether Article 15 (2) (a) of the Customs Value Regulation is applicable if the person concerned declares transport costs covering transport within the Community alone) the *plaintiff* claims that Article 15 (2) cannot be applied in this case since that provision presupposes that the intra-Community transport costs are not distinguished within the meaning of Article 15 (1). However, it is clear from the order of reference that they were so distinguished.

The *Commission* also considers that the conditions laid down in Article 15 (2) are not fulfilled and that that provision is therefore not applicable to the present case. It provides the persons concerned in customs transactions with general rules permitting them to calculate the customs value in a series of typical cases. However, they are limited to cases in which the transport costs shown separately do not make it possible to determine the amounts which correspond to transport outside and inside the Community respectively. In that situation, the total amount should be apportioned between the journey outside and the journey inside the Community.

(d) With regard to the first part of Question 2 (b) (whether in the case of through transport the deduction, in assessing the customs value of goods, of transport costs calculated to have been incurred within the Community is conditional upon the production of a separate figure for the total cost of through transport) the *plaintiff* claims that it is apparent from the wording of Article 15 (1) that only the cost of intra-Community transport must be shown separately and that that obligation does not extend to all transport costs. For that reason, this question should be answered in the negative.

(e) With regard to the second part of Question 2 (b) (whether the total transport costs have been sufficiently 'distinguished' if separate figures are produced for them, or whether the costs actually incurred must be proved by presenting verifiable documentary evidence of them) the *plaintiff* emphasizes that Article 15 (1) confines itself to requiring that the intra-Community transport costs be 'distinguished' from the price of the goods, which implies that such costs should be shown in a separate document. That is also confirmed by the English version of the regulation. Accordingly, nothing in Article 15 (1) provides grounds for concluding that verifiable documentary evidence must be produced in order to apply that provision. Such documentary evidence must be produced only in the context of Article 15 (2), which refers to 'evidence'.

The *Commission* shares the plantiff's view on that point. It considers that it would be excessive to regard the condition laid down in Article 15 (1) as satisfied only if the intra-Community transport costs are formally evidenced by special documents whose correctness and authenticity have been irrefutably established. The term 'Ausweis' (distinguished) appearing in the German version of Article 15 (1) does not mean 'förmlich nachweisen' (provide formal evidence). It is to be inferred from the Customs Value Code that the term in question means no more than 'distinguished' or 'identified as a separate component of the cost'. That requirement is satisfied by a special reference in the invoice. Moreover, the Customs Value Regulation uses the expression 'Nachweis' (evidence) only where it requires in addition to a separate statement concrete and credible evidence, as, for example, in Article 15 (2) (a).

(f) As regards the third part of Question 2 (b) (what requirements must be satisfied as to proof of the transport costs and whether the customs authorities may waive such proof where the person concerned is unable to provide it by reason of the conduct of his supplier) the *plaintiff* notes that the Customs Value Regulation is intended to 'foster world trade by introducing a fair, uniform and neutral system of customs valuation excluding the use of arbitrary or fictitious customs values'. Consequently, 'the customs value must be determined in accordance with criteria which are compatible with trade practice'.

No requirement of evidence may be imposed in excess of that which might normally be produced as a matter of commercial practice without flouting the abovementioned principles. For that reason the evidence required must in all cases be limited to that which the importer can produce himself, without having to depend on the seller or his transport undertaking.

Moreover, the German customs administration requirements in regard to evidence of total transport costs have not in fact been logically applied. In November 1982 they issued an internal memorandum to the effect that the requirement of verification would be waived where the intra-Community transport costs did not exceed DM 1.80 per km.

It is not clear to the plaintiff why it should not be possible to claim intra-Community transport costs exceeding the flat rate of DM 1.80 per km without producing special proof.

That interpretation is also confirmed by Article 10 of the Customs Value Regulation, which contemplates only documents and information available to the person actually making the customs declaration.

The *Commission* points out that the customs authorities are not obliged to accept without verification the amounts indicated and the supporting documents produced to them in respect of intra-Community transport costs. Since Community law makes no provision in that regard, it is incumbent upon the national authorities to verify the information provided by the importer. The Commission refers to the judgment of the Court of Justice of 14 February 1980 in Case 84/79 [3] concerning Article 8 of Regulation No 803/68 of the Council of 27 June 1968, [4] which is couched in the same terms as Article 15 of the Customs Value Regulation. According to that judgment, the invoices produced must be examined on the basis of objective criteria and must be accepted to the extent to which the amounts advanced correspond to the usual costs for the provision of that kind of service.

(g) With regard to the fourth part of Question 2 (b) (whether the customs authorities may waive proof of the transport costs where the person concerned is unable to provide it by reason of the conduct of his supplier) the *plaintiff* states that the recitals in the preamble to the Customs Value Regulation show that in such a case the customs authorities are not only entitled but obliged to waive such proof.

(h) Finally, the *Commission* refers to the opinion of the German customs authorities. They consider that persons making declarations of value for customs purposes should be liable for the correctness of the information supplied. However, they cannot

3 — Judgment of 14 February 1980 in Case 84/79 *R. Meyer-Uetze KG* v *Hauptzollamt Bad Reichenhall* [1980] ECR 291.

4 — OJ, English Special Edition 1968 (I), p. 170.

be, because the only information they have regarding the internal calculations carried out by the consignor in the Eastern Bloc is the transport costs which have been invoiced and not the actual cost of transport from the frontier. Since undertakings in the Eastern Bloc are not obliged to calculate their prices in accordance with the rules of the market, the normal internal scale of charges reveals nothing about the actual cost. Customs value should not be manipulated by *pro forma* invoices of that kind, which are for that reason basically unacceptable as evidence. Consequently, such costs cannot be deducted owing to the lack of valid, and therefore 'distinguishable', evidence.

This problem has been dealt with on numerous occasions by the Customs Valuation Committee which was set up pursuant to Article 17 of the Customs Valuation Regulation; however, the German customs authorities were alone in their view. The Commission, like the other Member States, remains of the opinion that the purpose of Article 15, which is to deduct intra-Community transport costs from the customs value, would be defeated by an administrative practice which automatically refused to take account of certain invoices in respect of internal transport costs which have undoubtedly been paid.

(i) In reply to questions put by the Court, the Federal Ministry of Finance, the intervener in the main proceedings, stated that the internal memorandum (which was issued only after the commencement of the main proceedings) on the general recognition of intra-Community transport costs was intended to take account of the practice followed in the other Member States of accepting intra-Community transport costs without proof, provided that such costs are not manifestly too high or are in conformity with the usual scales of charges for internal transport. A general insistence by the German customs authorities on proof of the transport costs actually calculated in individual cases could lead to distortion of competition and diversion of traffic.

In any case, the German administrative services concerned with this case did not submit observations to the Court of Justice. The Federal Government also did not express a view on this case.

(j) Finally, the parties proposed that the Court of Justice reply to the questions referred to it by the Bundesfinanzhof as follows:

The plaintiff:

'Where a purchaser has paid a foreign seller, in addition to the price of the goods, a specific amount in respect of intra-Community transport costs, the transaction value within the meaning of Article 3 (1) of Regulation (EEC) No 1224/80 does not comprise both amounts, but only the price paid by the buyer to the seller for the goods, to the exclusion of separately invoiced intra-Community transport costs'.

The Commission:

'(1) The cost of transporting imported goods from the Community frontier to the place of delivery within national teritory are not to be included in the customs value.

(2) If the price actually paid or to be paid by the buyer includes such costs, those costs are "distinguished' within the meaning of Article 15 (1) of Regulation No 1224/80 if they are shown in invoices relating thereto as a cost component distinct from the price of the goods.

(3) Verification of the amounts declared for that purpose is the responsibility of the competent authorities in the Member States which must, in the

discharge of that duty, take account of the purpose of Regulation (EEC) No 1224/80. An administrative practice whereby invoices of the kind produced in the main proceedings are in all cases rejected outright is incompatible with that purpose and, in particular, with the purpose of Article 15 (1) of that regulation.'

II — Before giving my opinion on this preliminary reference, let me make a remark that the Commission made in Case 183/85, also a reference for a preliminary ruling from the Bundesfinanzhof on the subject of customs valuation:

'This case shows that the application to simple and frequently recurring situations of everyday life of a body of rules carefully devised by experts may sometimes give rise to serious difficulties.'

Those difficulties may be connected with the fact that although Articles 3 to 7 of Council Regulation No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes form to some extent a general scheme, they group together individual provisions which, like Article 15 in particular, which is at issue in this case, can no longer be understood merely on the basis of the terms in which they are drafted.

1. The central question referred to the Court for a preliminary ruling by the Bundesfinanzhof is whether the transaction value within the meaning of Article 3 (1) of the Customs Value Regulation includes both the price of the goods and the intra-Community transport costs when the buyer has paid both amounts to a foreign seller on the basis of a separate invoice for each amount.

Article 3 (1) of the Customs Value Regulation reads as follows:

'The customs value of imported goods determined under this Article shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted in accordance with Article 8...'

Article 3 (3) (a) defines the price actually paid or payable as follows:

'The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods.'

That definition was extended by Council Regulation No 3193/80 [5] by adding the following clause to the sentence cited above:

'... and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller.'

Although the Bundesfinanzhof based its reference for a preliminary ruling on that clause and cited it verbatim, it cannot come into consideration in this case since the aforementioned regulation amending it in that regard was only applicable from 1 January 1981, and thus was not in force at the time of the contested importations and of the decision as to their customs value.

Article 8 of the Customs Value Regulation, referred to in Article 3 (1), in accordance with which the transaction value is to be adjusted before being used as the customs value, reads as follows:

5 — OJ 1980, L 333, p. 1.

'In determining the *customs value* under Article 3, there shall be added to the price actually paid or payable for the imported goods:

...

(e) (i) the cost of transport and insurance of the imported goods ...

to the place of introduction of the goods into the customs territory of the Community.'

It is clear from the provisions cited above that as a general rule, intra-Community transport costs should not be included in the customs value. Where goods are sold *for export* to the customs territory of the Community, the transaction value consists of the full amount that the buyer paid or was liable to pay to the seller *for the imported goods*. That transaction value is, however, to be adjusted in accordance with Article 8 as, for example, when payment for the imported goods does not include the cost of transport to the place of introduction into the customs territory of the Community, that is to say, the place where the first customs office is situated (Article 14 (1) (c)). It is thus apparent from the terms of Article 3 of the Customs Value Regulation that 'customs value' means the full amount paid for the imported goods at the place of introduction into the customs territory of the Community. Article 8 of the same regulation confirms that result. If the cost of transport to the place of introduction of the goods into the customs territory of the Community is not already included in the price of the goods, it must be added to the transaction value in order to obtain the customs value. That necessarily leads to the conclusion *a contrario* that the cost of transport between the place of introduction of the goods into the customs territory of the Community and the place of destination is not to be included in the customs value.

Consideration of the origins of the Customs Value Regulation bears out that interpretation.

It is clear from the preamble that the Customs Value Regulation was adopted in order to harmonize the Community provisions on customs valuation with the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade [6] which was concluded in the context of GATT. In relation to this case, it is immaterial whether that Agreement (the Customs Value Code) can have direct effect within the Community. [7] It is certain, however, that the Customs Value Code, which has been accepted by the EEC, can provide useful information regarding the interpretation of the Customs Value Regulation.

That information shows unequivocally that transport costs within a State or within the Community are not to be included in the customs value.

Several different methods of calculation are provided for in the Customs Value Code, of which only the method of calculating the customs value from the transaction value laid down in Articles 1 and 8 is relevant here. The Customs Value Code also defines the transaction value as 'the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8'. Article 8 (2) of the Customs Value Code empowers the Contracting Parties to include certain costs, either in whole or in part, in the customs value. That provision reads as follows:

'In framing its legislation, each Party shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:

6 — OJ 1980, L 71, p. 107.

7 — See the judgments of 16 March 1983 in Case 266/81 *Società Italiana per l'Oleodotto Transalpino (SIOT)* v *Ministero delle Finanze, Ministero della Marina Mercantile, Circoscrizione Doganale di Trieste and Ente Autonomo del Porto di Trieste* and in Joined Cases 267 to 269/81 *Amministrazione delle Finanze dello Stato* v *Società Petrolifera Italiana SpA and SpA Michelin Italiana* [1983] ECR 731 and 801 respectively.

(a) the cost of transport of the imported goods to the port or place of importation; ...'

The Contracting Parties are thus free to include the cost of transport to the port or place of importation in the customs value but they are not obliged to do so. The conclusion *a contrario* to be drawn from the Customs Value Code is that transport costs incurred on the territory of the importing party may not be included in the calculation of the customs value.

That conclusion is further confirmed by the interpretative notes to Article 1 which form part of the Customs Value Code (Annex 1) and which read as follows:

'The customs value shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods:

...

(b) the cost of transport after importation;

...'

That interpretative note to Article 1 of the Customs Value Code found its way into Article 15 (1) of the Customs Value Regulation, which reads as follows:

'The customs value of imported goods shall not include the cost of transport after importation into the customs territory of the Community provided that such cost is distinguished from the price actually paid or payable for the imported goods.'

The conclusion which may be drawn at this point as to the reply to be given to Question 1 (a) is that 'intra-Community freight costs' which are distinguished by being invoiced separately from the price of the goods are not part of the transaction value within the meaning of Article 3 (1) of the Customs Value Regulation and are also therefore not to be included in the customs value.

2. Although the Bundesfinanzhof raised the question of the requirements laid down in Article 15 (1) of the Customs Value Regulation regarding the distinguishing of intra-Community transport costs only in the context of its consideration of Article 15 (2), it is necessary to discuss that problem here.

A literal interpretation of Article 15 shows that the term 'distinguished' in Article 15 (1) imposes less strict conditions than those imposed by the term 'evidence' in Article 15 (2). The Community legislature consciously chose two different concepts and did so not merely in the German version of the regulation.

The reason for the different terms employed can be deduced from the Customs Value Code. The words 'getrennter Ausweis' are expressed as follows in the French and English versions of the notes to Article 1:

'La valeur en douane ne comprendra pas les frais ou coûts ci-après, à la condition *qu'ils soient distincts* du prix effectivement payé ou à payer pour les marchandises importées'.

'The customs value shall not include the following charges or costs, provided *that they are distinguished* from the price actually paid or payable for the imported goods'.

The term 'distinguished' therefore requires only that the cost elements in question can be distinguished from the purchase price — that is, that they can be recognized as a separate part of the overall cost.

The Technical Committee on Customs Valuation set up pursuant to Article 18 (2) of the Customs Value Code came to the

same conclusion when it decided that the duties and taxes of the country of importation are automatically 'distinguished' because they are 'by their nature' distinguishable from the price actually paid. The Technical Committee's actual opinion is formulated as follows:

'Étant donné que, par définition, il est possible d'établir une distinction entre les droits et taxes du pays d'importation et le prix effectivement payé ou à payer, ces droits et taxes ne font pas partie de la valeur en douane.'

'Since the duties and taxes of the country of importation are by their nature distinguishable from the price actually paid or payable, they do not form part of the customs value.'

The Technical Committee came to that conclusion in a case in which the duties and taxes of the country of importation were not separately stated in the invoice but were included in the price paid and the importer had not sought to have them deducted.

If costs are *sufficiently* 'distinguished' when they can be *separately deduced*, then there must be sufficient 'distinction' when the price of the imported goods on the one hand and the intra-Community transport costs on the other are presented separately.

That is not to say that the customs offices concerned are obliged to accept without verification the amounts indicated and the supporting documents produced to them in respect of intra-Community transport costs. The Commission rightly pointed out that the customs offices are obviously entitled and even obliged to verify whether and to what extent the costs indicated to them are correct. In that regard, it is possible to deduce from Article 2 (4) (g), read in conjunction with the sixth recital in the preamble to that regulation, the general principle, applicable beyond the immediate field of application of the Customs Value Regulation, that the customs value must not be based on arbitrary or fictitious values. That is a general matter concerning the application of the law, however, and since Community law as yet contains no provisions in that regard it remains the concern of the national authorities.

However, when in regard to *proof* of the difference between a 'free domicile price' and a 'free-frontier price' within the meaning of Article 15 (2) (b), as it was put in the judgment of the Court of Justice of 14 February 1980 in Case 84/79,[8] 'Statements made *a posteriori* by the supplier or by his agent [are] accepted as evidence, if such statements supply *reliable* particulars of the price situation at the time of importation', that must indicate to the national authorities that they cannot impose the same conditions when the term '*distinguished*' is used as when the term '*evidence*' is used.

3. I can deal briefly with the other questions referred to the Court by the Bundesfinanzhof because that Court submitted them only in case Question 1 (a) was answered in the affirmative.

(a) Question 1 (b): Adjustment of the transaction value if intra-Community transport costs are included in it.

This question should be answered in the negative. The transaction value determined in accordance with Article 3 of the Customs Value Regulation cannot be adjusted by the amount of the intra-Community transport costs since it does not include those costs in any event.

(b) Question 2 (a): Applicability of Article 15 (2) (a) of the Customs Value Regulation

8 — See Footnote 3; this judgment, dealing with Article 8 (2) of Regulation No 803/68 on the valuation of goods for customs purposes (Official Journal, English Special Edition 1968 (I), p. 170) can be relied on in regard to the interpretation of Article 15 (2) (c) of Regulation No 1224/80 because of the similarity of the provisions.

when only intra-Community transport costs are shown separately.

This question must also be answered in the negative, because the problem it refers to does not come within the scope of Article 15 (2) of the Customs Value Regulation.

Article 15 (2) (a) of the Customs Value Regulation governs the problem of how the total cost of transport is to be allocated as between that part of the journey inside the Community and that part outside it. Since the way in which separately stated intra-Community transport costs must be treated has already been dealt with in Article 15 (1), Article 15 (2) (a) can only refer to the case in which overall transport costs are payable but those in respect of transport within the Community are not distinguished.

(c) The reply to the first part of Question 2 (b) (whether the overall cost of through transport as referred to in Article 15 (2) (a) must be separately stated) flows directly from what I have said. That question should be answered in the affirmative because Article 15 (2) (a) governs precisely the division of the overall transport costs between that part of the journey lying within the Community and that part lying outside it. It should be noted, however, that that provision is not applicable when the intra-Community transport costs have already been distinguished within the meaning of Article 15 (1).

(d) The second part of Question 2 (b), namely what constitutes such 'distinguished' costs, can be answered in the affirmative on the basis of what has been said at 2, above, with regard to the term 'distinguished'. It should, however, be pointed out that this question refers to the division of overall transport costs, which was not the case in the main proceedings.

(e) The reply to the third and fourth parts of Question 2 (b), concerning the requirements as to proof of the overall transport costs and whether the customs authorities may waive such proof where the person concerned is unable to provide it by reason of the conduct of his supplier, also follows from the questions which have been previously answered. Since *special proof* of overall transport costs cannot be required but only a *separate statement* of them, what has been said at 2, above, in regard to 'distinguished' applies *mutatis mutandis.*

4. The conclusion thus arrived at that intra-Community transport costs may be included neither in the transaction value nor in the customs value is further confirmed by other factors. Although Article 15 (2) (b) in principle includes intra-Community transport costs in the customs value in regard to goods invoiced at a uniform free domicile price, that provision none the less permits those costs to be deducted if evidence is produced to the customs authorities that the free-frontier price would be lower than the uniform free domicile price.

In addition, Article 15 (2) (c) provides that transport costs to the place of introduction into the customs territory of the Community calculated in accordance with the schedule of freight rates normally applied for the same modes of transport are to be included in the customs value where transport is free or provided by the buyer. In this situation also, as the Court confirmed in its judgment of 14 February 1980 in Case 84/79, intra-Community transport costs are not to be included in the customs value. In that judgment, the Court decided *inter alia* that:

'The national court must, however, take into account the purpose of that Community provision, which is to allow transport costs within the customs territory of the Community which are actually included in the uniform price — but only those transport costs — to be deducted from the price when the customs valuation is determined.'

That decision, dealing with the earlier Customs Value Regulation (No 803/68), is still valid today because the provisions in question are comparable.

Finally, it is very difficult to understand why duty should be levied on intra-Community transport costs, that is to say, on a service which is performed in Community territory. That could lead to discrimination between traders within the Community since the same goods would be taxed differently depending on how far their ultimate destination was from the place of introduction into the customs territory of the Community.

Such an interpretation would be contrary to the general principle of equality and to the seventh recital in the preamble to Regulation No 803/68 on the valuation of goods for customs purposes, which was replaced by Regulation No 1224/80 solely for the purpose of harmonizing Community law with the Customs Value Code and not to repeal basic principles of Community law such as the principle of equal treatment of traders.

Since according to Article 14 (1) (c) the place of introduction into the customs territory of the Community is the place where the first customs office is situated in the case of goods carried by road, the further the ultimate destination is from that customs office the more heavily the imported goods will be taxed. I cannot see why goods originating in Bulgaria, as do those in this case, should be more heavily taxed because they were not to be delivered to a buyer based near the Community frontier in Bavaria rather than, for example, a buyer based in Brittany or in Denmark.

C. On the basis of the foregoing, I propose that the Court of Justice reply to the questions submitted by the Bundesfinanzhof as follows:

(1) The cost of transporting imported goods between the Community frontier and the place of delivery are not to be included in the customs value.

(2) If the price actually paid or payable by the buyer includes such costs, they are 'distinguished' within the meaning of Article 15 (1) of Regulation No 1224/80 if they are presented in the invoices issued in respect of the transaction as a cost element separate from the price of the goods.

(3) Verification of the amounts claimed is a matter for the competent authorities in the Member States.