JUDGMENT OF THE COURT (Fourth Chamber)
17 June 1997 *

In Case C-164/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Supremo Tribunal Administrativo for a preliminary ruling in the proceedings pending before that court between

Fábrica de Queijo Eru Portuguesa Ld^a^

and

Alfândega de Lisboa (Tribunal Técnico Aduaneiro de 2ª Instância)

on the interpretation of subheadings 0406 20 90 and 0406 90 11 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EEC) No 3174/88 of 21 September 1988 amending Annex I to Regulation (EEC) No 2658/87 (OJ 1988 L 298, p. 1) and by Commission Regulation (EEC) No 316/91 of 7 February 1991 concerning the classification of certain goods in the combined nomenclature (OJ 1991 L 37, p. 25),

* Language of the case: Portuguese.

THE COURT (Fourth Chamber),

composed of: J. L. Murray, President of the Chamber, P. J. G. Kapteyn and H. Ragnemalm (Rapporteur), Judges,

Advocate General: G. Cosmas,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Fábrica de Queijo Eru Portuguesa Ld[a], by R. Vasco Lavrador, of the Lisbon Bar;

— the Portuguese Government, by L. Fernandes, Director of the Legal Service of the European Communities Directorate-General in the Ministry of Foreign Affairs, and L. A. Máximo dos Santos, Assistant in the Lisbon Law Faculty, acting as Agents;

— the Commission of the European Communities, by F. de Sousa Fialho, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Fábrica de Queijo Eru Portuguesa Ld[a], represented by A. M. Pereira and A. Caneira, of the Lisbon Bar, and T. Sandberg, of the Rotterdam Bar, the Portuguese Government, represented by L. A. Máximo dos Santos, and the Commission, represented by A. Caeiro, of its Legal Service, acting as Agent, at the hearing on 7 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 16 January 1997,

gives the following

Judgment

1 By judgment of 25 January 1995, received at the Court on 29 May 1995, the Supremo Tribunal Administrativo (Supreme Administrative Court) referred for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of subheadings 0406 20 90 and 0406 90 11 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1, hereinafter 'the CN'), as amended by Commission Regulation (EEC) No 3174/88 of 21 September 1988 amending Annex I to Regulation (EEC) No 2658/87 (OJ 1988 L 298, p. 1) and by Commission Regulation (EEC) No 316/91 of 7 February 1991 concerning the classification of certain goods in the combined nomenclature (OJ 1991 L 37, p. 25).

2 Those questions have arisen in a dispute between the company Fábrica de Queijo Eru Portuguesa Ld[a] (hereinafter 'Eru Portuguesa') and the Alfândega de Lisboa (Tribunal Técnico Aduaneiro de 2[a] Instância) (Lisbon Customs Authority (Specialized Customs Court of Second Instance)) (hereinafter 'the Customs Authority') concerning the customs classification of cheese imported into Portugal from the Netherlands.

3 At the material time, that is to say, in 1989, the transition period provided for in the Treaty governing the accession of the Portuguese Republic to the European Communities, during which a national customs tariff continued to apply in certain circumstances, was still in force.

4 On 20 March 1989, Eru Portuguesa imported 1 110 cartons of cheese from the Netherlands, packed in plastic bags each weighing some 15 kg. The packed cheese had the appearance of a paste or compact mass. After unpacking and exposure to the surrounding air, it broke down into irregular granules. On the exporter's invoice, the cheese was described as 'grated cheese'.

5 Eru Portuguesa declared the product as coming under subheading 0406 20 90 of the CN, whereas the Customs Authority classified it under subheading 0406 90 11.

6 Subheadings 0406 20 90 and 0406 90 11 are worded as follows:

— subheading 0406 20 90:

0406 20 — Grated or powdered cheese, of all kinds:

0406 20 10 — Glarus herb cheese (known as Schabziger) made from skimmed milk and mixed with finely ground herbs

0406 20 90 — Other

— subheading 0406 90 11:

0406 90 — Other cheese:

0406 90 11 — For processing.

7 When the product in question was imported, the Explanatory Notes on the Combined Nomenclature of the European Communities published by the Commission regarding subheading 0406 20 90 were worded as follows:

'Grated cheeses, usually used as seasonings. They are obtained from hard cheeses (more particularly Grana, Parmigiano-Reggiano, Emmentaler, Reggianito, Sbrinz, Asiago, Pecorino, etc.) which after grating have been partially dehydrated with the object of ensuring the longest possible preservation.'

8 In the 1990 version (OJ 1990 C 263, p. 10), the Explanatory Notes relating to the same subheading were drafted as follows:

'Grated cheeses, usually used as seasonings or for other purposes in the food-processing industry. They are most often obtained from hard cheeses (for example, Grana, Parmigiano-Reggiano, Emmental, Reggianito, Sbrinz, Asiago, Pecorino, etc.). These cheeses may have been partially dehydrated with a view to ensuring the longest possible preservation.

This classification also covers cheeses which, after grating, are agglomerated.'

9 According to Point 1 of the Annex to Regulation No 316/91, 'Grated cheese which as a result of its high moisture content and conditions of transport or packaging (partially vacuum packed) becomes agglomerated' is classified under subheading 0406 20 90.

10 Eru Portuguesa instituted proceedings against the decision of the Customs Authority before the Tribunal Tributário de 2ª Instância (Tax Court of Second Instance), which deals with actions brought against decisions at final instance delivered by special customs appeal boards. That court confirmed the decisions of the Customs Authority.

11 On appeal, the Supremo Tribunal Administrativo decided to stay the proceedings and to refer the following four questions to the Court:

'In view of the fact that, on 20 March 1989, there was presented to the Portuguese Customs Authorities for release into free circulation or for another customs procedure cheese coming from a Community country, described by the exporter as grated cheese, which had been ground and subjected to an industrial process in

which oxygen was replaced by an injected nitrogen/002 solution, in order to enhance its preservation, and then packaged and compacted in plastic bags, each containing about 15 kgs, with a high moisture content, having the appearance of a compact mass or paste, which, after unpacking and exposure to the atmosphere breaks down into irregular granules, the following questions arise:

1. Having regard to Commission Regulation (EEC) No 316/91 of 7 February 1991, should the said cheese be classified under tariff heading 0406 20 90, as "grated or powdered cheese, of all kinds", or under tariff heading 0406 90 11 as "other cheese, for processing"?

2. Is the said regulation interpretative and therefore applicable retroactively to the import of the said cheese?

3. In the event of either of the foregoing questions being answered in the negative, is account to be taken in this case of the Explanatory Notes to the Combined Nomenclature of the European Communities in the version referred to in Official Journal C 263 of 18 October 1990, p. 10, or of the previous Explanatory Notes?

4. In either case, under which of the two tariff headings mentioned above is the said cheese to be classified?'.

12 In its questions, which should be dealt with together, the national court is asking in essence whether subheading 0406 20 90, as worded at the time of the facts in the main proceedings, must be interpreted as including grated cheese which, when imported, is, by reason of the method of packaging and preservation used, in an agglomerated form and, after unpacking and exposure to the surrounding air, breaks down into irregular granules. If not, it wishes to know to what extent subsequent provisions, in particular those contained in Regulation No 316/91, may affect the classification of such a product.

13 The Court has consistently held that, in the interests of legal certainty and ease of verification, the decisive criterion for the customs classification of goods must be their objective characteristics and properties, as defined by the wording of the headings of the Common Customs Tariff and the notes to the sections or chapters (Joined Cases C-274/95, C-275/95 and C-276/95 *Wünsche* v *Hauptzollamt Hamburg-Jonas* [1997] ECR I-2091, paragraph 15). Likewise, the notes preceding the chapters of the Common Customs Tariff and the explanatory notes drawn up by the Customs Cooperation Council are important means for ensuring the uniform application of the Tariff and may be an important aid to the interpretation of the scope of the various tariff headings but do not have any legally binding force (see Joined Cases C-106/94 and C-139/94 *Colin and Dupré* [1995] ECR I-4759, paragraph 21, and Case C-121/95 *VOBIS Microcomputer* v *Oberfinanzdirektion München* [1996] ECR I-3047, paragraph 13).

14 According to Annex I to Regulation No 3174/88, the general rules for the interpretation of the CN applicable at the time of the facts in the main proceedings provided that where goods are prima facie classifiable under two or more headings, the heading which provides the most specific description is to be preferred to headings providing a more general description (Rule 3(a)) and that, for legal purposes, the classification of goods in the subheadings of a heading are to be determined according to the terms of those subheadings and any related subheading notes, on the understanding that only subheadings at the same level are comparable (Rule 6).

15 Heading 0406 covers 'cheese and curd', and therefore a product such as that here in the main proceedings comes under that heading. It thus remains to consider whether a product having the same characteristics as that at issue in the main proceedings comes under subheading 0406 20 90 or subheading 0406 90 11.

16 It should be noted in this regard that subheading 0406 20 covers 'grated or powdered cheese, of all kinds', while subheading 0406 90 covers 'other cheese'.

17 It therefore follows that subheading 0406 20, being more specific, is in principle to be preferred to subheading 0406 90.

18 With regard to the scope of subheading 0406 20, it should be noted that the term 'of all kinds' is not limited exclusively to certain grated cheeses. On the contrary, it must be applied in all cases where the product can, by reason of its objective characteristics and properties, be treated as 'grated cheese', without that product necessarily having to satisfy other conditions.

19 This finding is supported both by the 1989 Explanatory Notes and those of 1990.

20 According to the 1989 Explanatory Notes, subheading 0406 20 90 includes grated cheeses usually used as seasonings, but does not exclude those used for other purposes. While the 1989 Notes state in their explanations that grated cheeses 'are obtained from hard cheeses', the fact that even that aspect is not exhaustive is made clear by the 1990 Notes, which add that grated cheeses are 'most often' obtained from hard cheeses. The 1990 Notes further specify that 'this classification also covers cheeses which, after grating, are agglomerated'.

21 It follows that, in so far as the case involves cheese which was grated prior to packaging and broke down into irregular granules after unpacking and exposure to the surrounding air, neither the fact that the product in question is obtained from a type of cheese having a moisture content greater than that normally used to produce grated cheese nor the method of packaging or preservation of the product can, for purposes of the CN, deprive it of its objective characteristic as grated cheese.

22 Accordingly, without its being necessary to consider whether Regulation No 316/91 is applicable, the answer to the questions submitted must be that subheading 0406 20 90 of Regulation No 2658/87, as amended by Regulation No 3174/88, must be interpreted as including grated cheese which, when imported, is, by reason of the method of packaging and preservation used, in an agglomerated form and, after unpacking and exposure to the surrounding air, breaks down into irregular granules.

Costs

23 The costs incurred by the Portuguese Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by judgment of 25 January 1995, hereby rules:

Subheading 0406 20 90 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EEC) No 3174/88 of 21 September 1988 amending Annex I to Regulation (EEC) No 2658/87, must be inter-

preted as including grated cheese which, when imported, is, by reason of the method of packaging and preservation used, in an agglomerated form and, after unpacking and exposure to the surrounding air, breaks down into irregular granules.

Murray Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 17 June 1997.

R. Grass

Registrar

J. L. Murray

President of the Fourth Chamber