Case 57/85

Senelco GmbH
v
Oberfinanzdirektion München

(reference for a preliminary ruling
from the Bundesfinanzhof)

(Reference for a preliminary ruling — Common Customs Tariff —
Detached parts of an electrical anti-shoplifting device)

Summary

Common Customs Tariff — Tariff headings — Note 2 to Section XVI — Classification of parts or detached pieces of electrical equipment for emitting a signal

Note 2 in conjunction with Note 5 to Section XVI ('Machinery and mechanical appliances; electrical equipment') of the Common Customs Tariff must be interpreted as meaning that parts or detached pieces of electrical equipment for emitting a signal which are presented separately fall, pursuant to paragraph (b) of the aforementioned Note 2, within the same tariff heading as the equipment in question if, by virtue of their function they are intended exclusively for that equipment.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 11 December 1985 *

Mr President,
Members of the Court,

A. The proceedings which have resulted in the present reference to the Court relate to the treatment for customs duty purposes of goods imported from the USA and described as 'security tags made of synthetic materials for protecting goods electronically from shoplifting'. These so-called Alligator

* Translated from the German.

tags, which are to be attached to the goods, consist, according to the description given on page 3 of the order for reference, 'of two antenna plates placed between layers of paper and synthetic materials, whose length, breadth and curvature reflect the frequencies of an alarm system, and linked together by a diode chip and which, on being brought within range of the alarm system . . . emit a coded data frequency which, when received by the electronic apparatus in the system, activates the alarm'. It appears from the documents before the Court that the security system consists of an overhead system which generates a field of sensitivity and an alarm console which emits a signal as soon as the Alligator tag enters the field of sensitivity.

A binding tariff notification, which related solely to the tags and not to the alarm system as a whole, stated that the tags were to be classified under tariff heading No 85.22 C II of the Common Customs Tariff ('Electrical appliances and apparatus, having individual functions, [1] not falling within any other heading in this Chapter: . . . Other appliances and apparatus'). The classification was based primarily on the fact that the tag was an electrical appliance having an individual function.

The plaintiff in the main proceedings considers, however, that the tags should more correctly have been classified under tariff heading No 85.17 ('Electric sound or visual signalling apparatus (such as . . . burglar alarms)'). The plaintiff's objection on that basis was, however, unsuccessful. The failure to classify the tags under the latter heading was justified in the decision rejecting the objection on the ground that the tag was the agent which disturbed the field of sensitivity and that it did not detect any signals activating the alarm. The decision went on to state that if the tag were treated as a part of the security system the significant factor would be that it emitted a data frequency and therefore had an individual electronic function. It was clear from Note 2 to Section XVI of the Common Customs Tariff ('Machinery and mechanical appliances; electrical equipment'), which provided that

'. . . parts of machines . . . are to be classified according to the following rules:

(a) Goods of a kind described in any of the headings of Chapters 84 and 85 . . . are in all cases to be classified in their respective headings;

(b) Other parts, if suitable for use solely or principally with a particular kind of machine . . . are to be classified with machines of that kind',

that the rule contained in paragraph (a) took priority over that contained in paragraph (b).

An appeal against that decision was brought before the Bundesfinanzhof. The plaintiff contended that, in accordance with the aforementioned Note 2 (b), the only correct classification was under tariff heading No 85.17 and that the whole security system, of which the tags formed part, had to be regarded as a single unit. In its opinion, it was significant that the tags had no independent electrical function since they did not of themselves emit data frequencies. On the contrary, since they enabled the field of sensitivity to operate and since in their absence the alarm could not be activated, they must be regarded as necessary components of the security system and in that connection it was also significant that they were intended to be used exclusively for the emission of signals in the system in question. The practice of the French and Belgian customs authorities, according to which the tags were classified under tariff heading No 85.17 as being part of a functional unit, namely a 'security system', was based, according to the plaintiff, on that view.

1 — Translator's note: the reference to 'individual functions' does not appear in the French or German versions of the Common Customs Tariff.

The Oberfinanzdirektion, on the contrary, continued to take the view that the tags had an individual function since they generated new oscillations and activated the alarm.

The point at issue before the Bundesfinanzhof is thus whether the correct classification is under tariff heading No 85.17 or under tariff heading No 85.22 C II. That court believes that some guidance on the matter is to be found in the [German] Explanatory Notes to the Nomenclature of the Customs Cooperation Council, which suggest that the classification should be under the latter tariff heading. However, it is in doubt as to whether the requirement that the apparatus in question must have an individual function, which also applies to classification under tariff heading No 85.22 according to those Explanatory Notes, is satisfied and states that, in view of the functional unity of the security system, an application of the aforementioned Note 2 (b) could lead to classification under tariff heading No 85.17. The Bundesfinanzhof goes on to state that the ruling of the Court of Justice in Case 60/77 [2] concerning the tariff classification of part of an electrical signalling apparatus is of no assistance in this case. Although it was considered to be important in that decision with regard to Note 2 (b) that the goods were necessary components of machinery forming a functional unit, and indeed it was declared that individual electrical appliances which are suitable for use solely or principally with an electric sound or visual signalling apparatus within the meaning of tariff heading No 85.17 were to be classified according to Note 2 (b) under tariff heading No 85.17, the Bundesfinanzhof takes the view that it may have been significant in that context that the case concerned appliances which were *linked* by cable to the signal-emitting device (which was clearly not the case in the dispute before it). Consequently, by order of 29 January 1985 it stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Is Note 2 in conjunction with Note 5 to Section XVI of the Common Customs Tariff to be interpreted to the effect that individual electrical appliances, which are presented separately, are to be regarded as "parts" within the meaning of that note where they are intended to be fixed to goods in such a manner that if the goods are brought within range of another appliance they release an audible or visible signal, and are the individual electrical appliances to be classified as a result of that function under tariff heading No 85.17 of the Common Customs Tariff pursuant to those notes?'

The Government of the Federal Republic of Germany has submitted that the correct classification is under tariff heading No 85.22. The only other observations were submitted by the Commission, which is of the opinion that the tags in question must be classified under tariff heading No 85.17 as parts of an electrical signalling apparatus if the system as a whole is covered by that heading.

The argument put forward by the Government of the Federal Republic of Germany turns on the term 'signalling apparatus' contained in the title of heading No 85.17. It takes the view that a distinction must be made between the complete *operational* unit (in this case the anti-theft security system) and the *apparatus*. Only the latter is covered by tariff heading No 85.17. The apparatus with which the main proceedings are concerned consists solely of an overhead system and an alarm console since with those two elements it is complete and fully operational, that is to say the equipment is thereby capable of fulfilling all its tasks. With regard to the tags, they may be compared to data processing equipment

2 — Judgment of 15 December 1977 in Case 60/77 *Fritz Fuss KG v Oberfinanzdirektion München* [1977] ECR 2453, at p. 2460 *et seq.*

where the software is not regarded as a component of the machinery but is classified for tariff purposes according to its intrinsic characteristics. Alternatively, a comparison may be made with vending machines, where the coins are not part of the machine, or with burglar alarms where, similarly, the burglar does not form part of the apparatus. If, in accordance with the foregoing, the tags are to be classified for tariff purposes as independent goods according to their intrinsic characteristics, they must necessarily be classified as electrical apparatus having individual functions under tariff heading No 85.22.

B. I take the view — as does the Commission — that that argument may be criticized on various counts, and furthermore that, in the final analysis, the Commission's viewpoint (which I shall examine shortly) is more persuasive.

1. Doubts arise immediately with regard to the opinion of the representative of the Government of the Federal Republic of Germany that the apparatus is *fully operational* as such. I suggest that it is operational only with the security tags and not without them. It is also doubtful whether the tags have an 'individual function' within the meaning of the Explanatory Notes (which will be considered further in connection with the arguments put forward by the Commission).

With regard to the comparisons drawn by the Government of the Federal Republic of Germany, it must not be forgotten that the tapes used in connection with data processing equipment may also have functions outside that equipment (which is not the case, however, in relation to the security tags at issue in these proceedings). Furthermore, in the case of the coins used in connection with vending machines (or a railway train, fire or a burglar in relation to signalling apparatus), there is (apart from the fact that the agents referred to not only have other functions but must be regarded as foreign elements rather than as components of the system) a significant difference between them and the security tags, namely the fact that those agents have a *purely passive* function in triggering a reaction, whereas the security tags receive a frequency which has been emitted elsewhere and convert it so that the alarm is activated.

2. With regard to the Commission's opinion, it is evident to me that a distinction must be made according to whether the security tags are *presented* to the customs authorities *together* with the other components of the security system or are *imported separately.*

In the former case, it is to be noted that the [German] Explanatory Notes, which according to the Court represent a valuable aid to interpretation, refer expressly, in connection with the parts of an apparatus which together are intended to fulfil a single, precisely defined function, to such a 'functional unit' in the case of burglar alarms (Section XVI, Point VI, Notes 63, 64 and 73). In connection with that, Note 74 states that if all the components of such a unit are presented at the same time, the whole signalling apparatus is to be classified under tariff heading No 85.17. In the latter case, that is, when the parts are presented separately, the goods are to be classified for customs tariff purposes according to their own intrinsic characteristics, as is clear from the following section in the notes.

3. In the second case, the one at issue in the main proceedings and which alone may give rise to problems, the Commission also argued persuasively that if the tariff classifi-

cation was to be made according to intrinsic characteristics the *material* from which the tags are made would scarcely come into consideration. The nature and character of the tags would certainly not be determined by such materials but rather by their construction and operation.

The Commission also showed that it is not correct to equate the tags with *aerials* within the meaning of tariff heading No 85.15 (which is apparently the heading under which they are classified by the Belgian authorities). They do not fulfil the requirements referred to in the [German] Explanatory Notes to tariff heading No 85.15 because they are not instruments for the transmission of communications or for remote control. Moreover, since the security system, the principal entity, cannot fall under that heading, the tags belonging to it cannot be classified under tariff heading No 85.15 as 'parts' thereof.

With regard to classification under tariff heading No 85.17 — one of the two headings regarded by the Bundesfinanzhof as relevant in this case — the Commission is of the opinion that, since the tags themselves do not amount to a warning device but are only able to operate together with the principal apparatus, the question arises whether they can be regarded as 'parts' of the system or whether, on the contrary, — since they merely activate the alarm — they are to be regarded as the *means by which the apparatus is put into operation* (such as coins in the case of an automatic vending machine, a coded card at a bank or a coded tag in a department store). The Commission believes that the latter alternative must be rejected — as seems evident — precisely because the alarm is not activated simply by bringing the tag into the field covered by the principal apparatus but by converting and re-emitting the signals received (in which connection a more appropriate example might be the sensors built into an automatic vending machine).

If, in the light of the foregoing, there is greater support for regarding the tags as parts of a functional unit (even if there is no physical link as there was with the appliances which were the subject of Case 60/77), the aforementioned Note 2 to Section XVI is of considerable importance to their tariff classification (and in that connection it is also relevant that according to Note 5 the expression 'machine' includes in this context any apparatus or appliance of a kind falling within Section XVI).

According to Note 2 (a) the first question is whether the parts in question are goods of a kind described in any of the tariff headings of Chapters 84 or 85 (in which case they have to be classified under that heading regardless of the type of machine for which the parts are intended). In the Commission's opinion that question must, as I have already stated, be answered in the negative having regard to tariff heading No 85.15. However, the Commission has also explained convincingly that the same applies to tariff heading No 85.22. Nevertheless, it must be stated in that connection that although the tags in question satisfy *some* of the essential criteria necessary for classification under tariff heading No 85.22 and referred to in the [German] Explanatory Notes (because they generate electric signals, are composed of electric component parts — express reference is made to diodes — and operate electrically; see Notes 3, 9 and 41), it is important (see Note 2 thereto) that the appliances falling within tariff heading No 85.22 must have '*individual functions*' and that to that extent the [German] Explanatory Notes to tariff heading No 84.59 must be applied by analogy. The tags at issue in this case are certainly not covered by the definition of an appliance with individual functions contained in those Notes. That conclusion may be derived from the contents of Point

A (Note 10) (according to which the function of an appliance must be clearly distinguishable from the function of other appliances and it must necessarily be capable of being exercised *independently* of the other appliances). The same applies to the requirement set out in Point B (Notes 14 — 16) (according to which it is important that the function of an appliance should not be regarded as an *inseparable* part of the functioning of the unit in question).

In view of the foregoing — as the tags are not independent of the security system but, on the contrary, function within it — it must be assumed that Note 2 (b) applies to them. It would appear that this case concerns other parts which are suitable for use solely or principally with a particular kind of machine and that therefore, since the principal apparatus is classified under tariff heading No 85.17, the parts must also be classified under that heading.

C. The question referred to the Court by the Bundesfinanzhof should therefore be answered in the manner proposed by the Commission and the ruling to be given to the court making the reference should be that Note 2 in conjunction with Note 5 to Section XVI of the Common Customs Tariff is to be interpreted to the effect that individual electrical appliances, which are presented separately, are to be regarded as 'parts' within the meaning of that note where they are intended to be fixed to goods in such a manner that if the goods are brought within range of another appliance they release an audible or visible signal, and that the individual electrical appliances are to be classified as a result of that function under tariff heading No 85.17 of the Common Customs Tariff pursuant to those Notes.