JUDGMENT OF THE COURT (Third Chamber)
2 June 1994 *

In Case C-356/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Techmeda Internationale Medizinisch-Technische Marketing- und Handels-GmbH & Co. KG

and

Oberfinanzdirektion Köln,

on the interpretation of heading No 3822 and of subheading No 4823 9090 of the Combined Nomenclature for 1991 adopted by Commission Regulation (EEC) No 2472/90 of 31 July 1990 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1990 L 247, p. 1),

THE COURT (Third Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, F. Grévisse (Rapporteur) and M. Zuleeg, Judges,

* Language of the case: German.

Advocate General: W. Van Gerven,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the United Kingdom, by J. D. Colahan, of the Treasury Solicitor's Department, acting as Agent,

— the Commission of the European Communities, by Francisco de Sousa Fialho, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe, of the Hamburg and Brussels Bars,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 April 1994,

gives the following

Judgment

1 By order of 8 June 1993 received at the Court on 14 July 1993, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of heading No 3822 and of subheading No 4823 9090 of the Combined Nomenclature for 1991 adopted by Commission Regulation (EEC) No 2472/90 of 31 July 1990 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1990 L 247, p. 1).

2 Those questions were raised in proceedings between Techmeda Internationale Medizinische Marketing- und Handels-GmbH & Co. KG ('Techmeda') and the Oberfinanzdirektion Köln (Principal Customs Office, Cologne), concerning the tariff classification of a diagnostic test for determining the cholesterol level of blood plasma.

3 According to a binding customs ruling — No 126/91 — issued to Techmeda by the Oberfinanzdirektion on 30 April 1991, the test is a retail product put up in a set in paperboard packaging, consisting of a test card, a lancet, web-backed paper and a leaflet giving information and instructions for use.

4 The test card itself consists of several items: a reagent-impregnated paper glued on to plastic covered by self-adhesive, perforated web-backed paper. The chemical products in the paper are a chromogen (tetramethylbenzidine) and three enzymes required for the reactive sequence. The web-like material serves as a filter and separator. When a drop of blood is deposited on it the cellular components, in particular the red globules, are absorbed. The other components of the blood go through to the reagent-impregnated paper which changes colour, thus enabling the cholesterol level to be determined.

5 In its abovementioned binding tariff classification ruling No 126/91 the Oberfinanzdirektion classified the test under subheading No 4823 9090 of the Combined Nomenclature — 'other' articles of paper. That classification was upheld in a decision of 20 May 1992 on the objection. Techmeda appealed against that decision to the Bundesfinanzhof, maintaining that the test fell to be classified under heading No 3822.

6 At the hearing of the appeal, the Bundesfinanzhof referred to the Court the following questions for a preliminary ruling:

'(1) Is the Common Customs Tariff — Combined Nomenclature 1991 — to be interpreted as meaning that a retail product put up in a set, namely the "Chemcard Cholesteroltest", used for determining the cholesterol level of blood plasma — comprising a test card with a glued-on, reagent-impregnated, shaped paper cut-out (0.6 cm thick) covered by web-backed paper, a lancet, wadding etc. (as more particularly described in the grounds of the order), is to be classified pursuant to General Rule No 3(b) as a "composite diagnostic reagent" under heading No 3822 on the ground that the component which gives that product its essential character is the test card?

(2) If Question 1 is answered in the negative: is the Common Customs Tariff to be interpreted as meaning that the component which constitutes the product's essential characteristic, namely the test card, is to be classified as "other" articles of paper under subheading No 4823 9090?

(3) If Question 2 is answered in the negative: to which other heading is the set of goods including the test card which constitutes its essential characteristic to be assigned?'

7 These three questions may be grouped together so as to receive a single reply.

8 Heading No 3822 of the Combined Nomenclature in force in 1991 is worded as follows:

'Composite diagnostic or laboratory reagents, other than those of heading No 3002 or 3006.'

9 It is not disputed that the item at issue in the main proceedings does not fall under headings Nos 3002 or 3006.

10 Heading 4811 is worded as follows:

'Paper, paperboard, cellulose wadding and webs of cellulose fibres, coated, impregnated, covered, surface-coloured, surface-decorated or printed, in rolls or sheets, other than goods of heading No 4803, 4809, 4810 or 4818.'

11 Note 7 to Chapter 48 states that:

'Heading Nos 4811 ... apply only to paper, paperboard ...:

(a) in strips or rolls of a width exceeding 15 cm;

or

(b) in rectangular (including square) sheets with one side exceeding 36 cm and the other side exceeding 15 cm in the unfolded state.'

12 Heading No 4823 is worded as follows:

'Other paper, paperboard, cellulose wadding and webs of cellulose fibres, cut to size or shape, other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibres:

4823 90 other

4823 9090 other.'

13 In its order the Bundesfinanzhof points out that, in accordance with General Rule 3(b) for the interpretation of the Combined Nomenclature, tariff classification is determined by the component of the goods which gives them their essential character. In the present case that component is undeniably the test card. The tariff classification of the test therefore depends on the classification of the test card. However, the applicant in the main proceedings and the Oberfinanzdirektion are divided on which component of the test card gives it its essential character for the purpose of determining its classification in the Combined Nomenclature.

14 Before the Bundesfinanzhof Techmeda is maintaining that the test essentially consists of two chemical reactions: the separation of the blood constituents by means of chemical reagents penetrating the semi-permeable membrane and the effect of the other blood constituents on the reactive area of the test card. In Techmeda's view, the most important element of the test card is the web acting as a filter covering the test area. On the other hand the test area itself does not give the set its essential character: the paper-like material serves only as a medium for displaying the result of the reaction induced.

15 For those reasons, the product which consists essentially of plastic is, in Techmeda's view, correctly classified in the United Kingdom under heading No 3822.

16 The Oberfinanzdirektion contends that the separation of the plasma and cellular components by the web is a purely physical process. The web itself contains no chemical reagents. The essential element of the test card is the paper impregnated with reagent forming the test area itself; only the chemical substances located on the reactive area permit the detection in qualitative or quantitative terms of cholesterol and are thus reagents. The specific combination of paper and chemicals, and also of composite reagents, comes under heading No 4823. Even though the reclassification under heading No 3822 of the products in question may be desirable, pending that amendment they must be classified as paper articles.

17 The Bundesfinanzhof states that it is inclined to favour the interpretation advanced by Techmeda but for different reasons. It emphasizes that Techmeda has not demonstrated that the web acting as a filter and composed of paper fibres and synthetic textile fibres could be regarded as a composite diagnostic reagent.

18 The view taken by the Commission is that the product to be classified is not the reagent but the reagent-impregnated paper. Such items clearly fall under Chapter 48 of the Combined Nomenclature. However, the Commission observes that diagnostic reagent papers will soon be classified under heading No 3822. In fact, on 6 July 1993 the Customs Cooperation Council adopted an amendment to the harmonized commodity description and coding system which will enter into force on 1 January 1996. With effect from that date heading No 3822 will include diagnostic reagents on any material.

19 Finally, the United Kingdom merely points out that the customs authorities of that Member State, contrary to the initial information provided to Techmeda, subsequently informed it that the tests had to be classified under heading No 4823. It adds that that classification must continue to be applied until the Combined Nomenclature is altered.

20 The interpretation proposed by the Commission, applied by the Oberfinanzdirektion Köln and finally adopted by the United Kingdom customs authorities, must be upheld.

21 First of all, it is beyond doubt and moreover undisputed that there is no specific heading for a set of goods such as the test.

22 Secondly, the test card is the item giving the goods which make up the test their essential character.

23 Finally, it is apparent from the findings of the national court that only reagent-impregnated paper glued on to a plastic backing permits the detection by means of a colour reaction of the cholesterol level of blood deposited on the test card. The webbing superimposed on the glued paper serves only as a filter enabling the test result to be read by collecting the cellular constituents of the blood in particular the red globules which were they to come into contact with the reagent paper would prevent the user from establishing the colour of the paper.

24 Accordingly, in accordance with General Rule 3(b) for the interpretation of the Combined Nomenclature, the tariff classification of the test depends on the tariff classification of the reagent-impregnated paper, not on the material acting as a filter, as Techmeda argues.

25 As the Commission points out, it appears from Notes 1(c) and (d) to Chapter 48 of the Combined Nomenclature that impregnated papers not falling under that chapter were expressly mentioned. That does not include reagent-impregnated papers.

26 Moreover, Heading No 3822 mentions only composite diagnostic or laboratory reagents and not paper or other materials impregnated with such reagents.

27 Accordingly, reagent-impregnated papers not expressly excluded from Chapter 48 of the Combined Nomenclature nor, a fortiori, included in heading No 3822, fall within Chapter 48. That interpretation is also corroborated by an explanatory note to the harmonized commodity description and coding system established by the Customs Cooperation Council which in a non-exhaustive list mentions certain reagent papers amongst the impregnated papers falling under Chapter 48.

28 On account of its dimensions and in view of Note 7 to Chapter 48 an impregnated paper such as that which is glued to the test card cannot be classified under heading No 4811 and therefore, there being no other appropriate subheading, falls under residual subheading No 4823 9090.

29 Finally, the fact that the Combined Nomenclature is to be amended in the near future, in accordance with an amendment to the harmonized commodity description and coding system, adopted by the Customs Cooperation Council on a proposal by the Commission, is not such as to call in question the interpretation of the tariff classification at the material time but on the contrary tends to corroborate it.

30 Though the preparatory work to that amendment which took place within the harmonized system committee of the Customs Cooperation Council is not binding on the Community, none the less it was therein concluded that papers impregnated with composite diagnostic or laboratory reagents fell within Chapter 48 of the harmonized system. It was on that basis that the Customs Cooperation Council finally decided to alter the wording of heading No 3822 in order to group together under that heading diagnostic or laboratory reagents other than those coming under Nos 3002 and 3006, even when they are supplied on backing material other than paper.

31 Consequently, the reply to the questions submitted by the Bundesfinanzhof must be that the Combined Nomenclature in force in 1991 introduced by Regulation No 2472/90 must be interpreted as meaning that goods put up in sets for retail sale for determining the cholesterol level of blood plasma with the characteristics of the 'Chemcard Cholesteroltest' must be classified under subheading No 4823 9090.

Costs

32 The costs incurred by the United Kingdom 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 (Third Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 8 June 1993, hereby rules:

The Combined Nomenclature in force in 1991 introduced by Commission Regulation (EEC) No 2472/90 of 31 July 1990 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff must be interpreted as meaning that a product put

up in a set for retail sale for determining the cholesterol level of blood plasma with the characteristics of the 'Chemcard Cholesteroltest' must be classified under subheading No 4823 9090.

Moitinho de Almeida Grévisse Zuleeg

Delivered in open court in Luxembourg on 2 June 1994.

R. Grass

Registrar

J. C. Moitinho de Almeida

President of the Third Chamber