JUDGMENT OF THE COURT (SECOND CHAMBER)
26 MAY 1977 [1]

Klöckner-Ferromatik GmbH v Oberfinanzdirektion München (preliminary ruling requested) by the Bundesfinanzhof

'Mining machinery'

Case 108/76

Common Customs Tariff — Description of goods — 'Structure' within the meaning of tariff heading 73.21 — Concept — Exclusion of mobile machines intended to render the mine face safe in mining — Classification under subheading 84.59 E — Attachment to mining machinery — Classification under tariff heading 84.23

The term 'structure' in tariff heading 73.21 of the Common Customs Tariff may not be interpreted so as to include an article which is intended to render the mine face safe in mining and *inter alia* is equipped in such a way that it and mining machinery placed on a part of it can be moved forward step by step by means of hydraulic cylinders and a motorized pump unit which is separately installed. If such machinery is directly attached to mining machinery for working the earth's crust it is to be classified under tariff heading 84.23 of the Common Customs Tariff. If this is not the case, it must be classified under subheading 84.59 E of that Tariff.

In Case 108/76

Reference to the Court pursuant to Article 177 of the Treaty establishing the European Economic Community by the Bundesfinanzhof (VIIth Senate) of the Federal Republic of Germany for a preliminary ruling in the action pending before that court between

KLÖCKNER-FERROMATIK GMBH

and

OBERFINANZDIREKTION MÜNCHEN

on the interpretation of tariff headings of the Common Customs Tariff relating to certain mining machinery,

1 — Language of the Case: German.

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate-General: G. Reischl
Registrar: H. J. Eversen (Deputy Registrar)

gives the following

JUDGMENT

Facts and issues

The order making the reference and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. On 22 January 1974 the firm Klöckner-Ferromatik GmbH, the plaintiff in the main action, requested a binding customs tariff notification for the import of an article described as a 'Ferromatik-Schildausbau' (ferromatic shield assembly), which is intended to render the mine face safe in mining and consists of a floor-member, a flushing shield, a back shield, a roof-canopy and a guidance wedge. Controlled by means of a hydraulic device, which was not imported at the same time, the whole device is progressively shifted forwards. In its notification of 16 July 1974 the Oberfinanzdirektion (Regional Finance Office) classified the article under subheading 84.59 E of the Common Customs Tariff. The tariff heading is worded as follows:

'Machines and mechanical appliances, having individual functions, not falling within any other heading of this Chapter:
A ...
B ...
C ...
D ...
E Other.'

On 1 August 1974 the Klöckner undertaking lodged an objection with the Oberfinanzdirektion München against this notification. It requested that the goods in question should be classified under heading 73.21 of the Common Customs Tariff, the wording of which is as follows:

'Structures and parts of structures (for example, hangars and other buildings, bridges and bridge-sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, pillars and columns), of iron or steel; plates, strip, rods, angles, shapes, sections, tubes and the like, prepared for use in structures, of iron or steel.'

Since the objection was rejected the undertaking brought an action on 10

February 1975 before the Bundesfinanzhof which by order dated 26 October 1976 stayed the proceedings and referred the following questions to the Court of Justice of the European Communities for a preliminary ruling under the first and third paragraphs of Article 177 of the EEC Treaty:

1. Is the term 'structure' in tariff heading 73.21 of the Common Customs Tariff to be interpreted so as to include also an article which is intended to render the mine face safe in mining and *inter alia* is equipped in such a way that it and mining machinery placed on a part of it can be moved forward step by step by means of incorporated hydraulic cylinders and a motorized pump unit which is separately installed?
2. If Question 1 is answered in the negative: does tariff heading 84.23 of the Common Customs Tariff include only such machinery and appliances for mining as are intended to work the earth directly?

The Bundesfinanzhof has summarized the submissions of the parties to the main action.

The Oberfinanzdirektion, the *defendant in the main action,* stated that the tariff classification was not affected by the fact that the article was presented for customs clearance without the hydraulic device necessary for its operation. It agreed that the conventional support of mine tunnels by means of hydraulic pit-props is classified under tariff heading 73.21, but the article to be classified was not just a further development of such an appliance because it fulfils its purpose by its mobility and its ability to advance from place to place in the course of use, whilst goods coming under tariff heading 73.21 (including so-called 'moving' bridges) are stationary constructions. The classification made was therefore the only possible one.

In the view of Klöckner, the *plaintiff in the main action,* all props, stays and similar equipment for the lining of tunnels, shafts and mines, no matter whether they are telescopic or adjustable, hydraulic or non-hydraulic, come under tariff heading 73.21. The characteristics of the shield assembly in comparison with normal powered supports do not justify a different classification; the manner of functioning is the same in both cases and the element of movement cannot be decisive, as the classification of so-called moving bridges shows. It argued that classification under Chapter 84 is justified only if a more precise classification (in the present case under heading 73.21) is not possible. Classification under heading 73.21 is supported by the classification of the German patent for the goods in question, since for the purposes of patent law the latter falls within the concept 'face support'.

Having regard to this statement of the views of the parties to the main action the *Bundesfinanzhof* has stated that the decision in the case is dependent on the interpretation of the Common Customs Tariff in force at the time of import, which is based on Regulation No 950/68. For the tariff classification of the goods regard should be had not only to the tariff headings mentioned by the parties but also to heading 84.23 (boring and extracting machinery, ... for earth, minerals and ores) and, especially, to Note 1 (f) to Section XV; according to the latter, articles falling within Section XVI are not covered by Section XV, which means that machinery or mechanical appliances within the meaning of Section XVI cannot fall under tariff heading 73.21, which is in Section XV. The Bundesfinanzhof doubts whether the article in question is a machine because it does not transform matter and it transports matter at most as a sort of side effect. It may therefore be asked whether the article may be regarded as a mechanical appliance. This concept, however, which can scarcely be exactly defined and which must be understood to include any equipment in

which a certain purposeful movement occurs would cover not only the 'Ferromatik-Schildausbau' but also hydraulic pit-props which, according to the Tariff Decision of the Committee on Common Custom Tariff Nomenclature of 9 June 1972, fall under tariff heading 73.21. From this it may be concluded that the fact that a certain process of movement occurs in an article is not sufficient as a criterion for delineation between Section XV and Section XVI.

A characteristic of a 'structure' is the stationary element, whereas the characteristic of machinery or mechanical appliances is the element of movement. Both elements are contained in the article at issue. Clearly, the stationary element is preponderant as the actual use of the article is to support the area of the face of a working against the caving-in of the earth, which purpose is traditionally fulfilled by 'structures' within the meaning of tariff heading 73.21. The element of movement is contained in the hydraulic cylinders with which the article is equipped and the fact that, with the aid of separately installed hydraulic equipment, the machine can move forward step by step and can thus transport mining machinery situated on the under-frame. The question of which element is decisive in this case involves the interpretation of provisions of the Common Customs Tariff.

If the article at issue is to be regarded as machinery or a mechanical appliance it must, in the Bundesfinanzhof's view, be considered whether it is machinery for mining, in which case it falls within the wording of tariff heading 84.23; according to the Explanatory Notes to the Brussels Nomenclature, however, that subheading covers only mechanical appliances 'for attacking the earth's crust' or 'for preparing or compacting the terrain'; in that case there only remains the catch-all heading 84.59 E.

The order of the Bundesfinanzhof was registered at the Court on 22 November 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities written observations were submitted by the Commission of the European Communities.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without any preparatory inquiry and referred the case to the Second Chamber.

II — Summary of the observations submitted pursuant to Article 20 of the Statute of the Court

First, the Commission summarizes the proceedings and describes in detail the article at issue, stressing the element of 'self propulsion' and emphasizing the fact that, compared with the classical system for the protection of mine workings, the article represents an improvement; the Commission then states that the objective of the question is to give the court making the reference the Community criteria which are to be derived from the wording of the Common Customs Tariff, as clarified by the interpretative Notes thereto, by the tariff decisions in specific cases and by the Explanatory Notes to the Brussels Nomenclature.

Three tariff headings are relevant, namely headings 73.21, 84.23 and 84.59. On the basis of Notes 1 (f) to Section XV it is first to be considered whether the article at issue is to be viewed as a 'structure' or as 'machinery or mechanical appliances'. The characteristic of 'machinery' is movement, whereas the characteristic of a 'structure' is the stationary element. The Common Customs Tariff reflects this essential difference, for Chapter 73 includes articles according to their material composition whereas Chapter 84 has regard to the use for which the machinery is intended. In the

Explanatory Notes to the Brussels Nomenclature (Note B of the Explanatory Notes to Chapter XVI) it is made clear that in classifying machinery no regard should be paid to the material from which it is made.

In brief, therefore, it may be said that the terms 'machinery' and 'mechanical' appliances' cover technical objects the functional characteristic of which is a more or less constant process of mechanical activity (movement) and that machinery is of a more complicated nature than mechanical appliances. On the other hand, the characteristic of 'structures' within the meaning of tariff heading 73.21 is that, once placed in position, they remain, in principle, permanently stationary.

The Explanatory Notes to the Brussels Tariff Nomenclature show that the mobility of parts which serve to facilitate the erection of a structure do not change the stationary nature of the structure and its components after erection. In the same way, it may be inferred from the Tariff Decision of the Committee on Common Custom Tariff Nomenclature of 9 June 1972 that a mechanical element which is of a subsidiary nature cannot be decisive in altering the character of a 'device'.

In the present case the shield assembly, in view of its particular use (including the transport and incorporation of the winning machine), is characterized by its mechanical mobility, which is both autonomous and permanent. It is no longer a simple support device, even though the appliance still fulfils that purpose and even though it contains a hydraulic device similar to certain more conventional pit-props which come under tariff heading 73.21. The comparison with moving bridges which likewise fall under that heading does not carry the matter any further because the stationary character of such bridges is predominant. Finally, the Common Customs Tariff may not be interpreted on the basis of the patent law of the individual States.

With regard to the second question referred for a preliminary ruling the Commission notes that the court making the reference sees a contradiction here between the wording of tariff heading 84.23 (which does not expressly limit itself to machinery 'for "attacking" the earth's crust') and the notes to heading 84.23 contained in the Explanatory Notes to the Brussels Nomenclature, according to which the articles must be 'for "attacking" the earth's crust (e.g.: for cutting and breaking down rock, coal, earth ...) or for preparing or compacting the terrain'.

This conflict can be resolved by having regard to all the articles listed in tariff heading 84.23 and to the different language versions of that heading; from this it is apparent that only machinery which is intended to work the earth directly falls under that heading. Accordingly, it must be determined whether, if the shield assembly is joined to the winning machines by an under-frame supporting a conveyor, it may or may not be classified under tariff heading 84.23. This conclusion gains weight if it is borne in mind that the shield assembly (which is made specifically for this purpose) is only a part of the whole winning machinery. Note E of the Explanatory Notes to the Brussels Nomenclature to tariff heading 84.23 shows that machinery which combines the functions of support and extraction can be classified under that heading. If the shield assembly is not, however, directly attached to the winning machines then classification under subheading 84.59 E alone is possible.

In view of all the above the Commission proposes that the questions for a preliminary ruling should be answered as follows:

1. The term 'structure' in heading 73.21 of the Common Customs Tariff, in conjunction with Note 1 (f) to Section

XV of the Common Customs Tariff, precludes the classification under the said tariff heading of articles which, although intended to render the mine face safe in mining, are nevertheless, by reason of their complex mechanical nature and their consequent ability to advance independently by means of an external motor system, machines or mechanical appliances within the meaning of Section XVI of the Common Customs Tariff.

2. If such machines are directly attached to mining machinery for attacking the earth's crust they fall under tariff heading 84.23 of the Common Customs Tariff. If this is not the case, they are to be classified under subheading 84.59 E of the Common Customs Tariff.

III — Oral procedure

At the hearing on 29 March 1977 the Klöckner-Ferromatik undertaking was represented by Siegfried Geissler, Rechtsanwalt, of Duisburg, and the Commission by Jean Amphoux and Manfred Beschel.

The *plaintiff in the main action* described the device at issue and in doing so stressed in particular that on average it moves forward daily only some six metres in consecutive stretches of 70 cm, which it takes 15 seconds to cover every two hours; such movement could be compared to that of a moving bridge, since the mobility in both cases is secondary; moreover, the support function continues even when the winning machine is removed.

The plaintiff in the main action proposed that the Bundesfinanzhof should be given the reply, first, that the term 'structure' in tariff heading 73.21 of the Common Customs Tariff, in conjunction with Note 1 (f) to Section XV of the Common Customs Tariff, permits the classification under the said tariff heading of articles which are mainly intended to render the mine face safe in mining, but which nevertheless, because of various hydraulic parts, are capable of moving forward independently by means of an external motor system; if such articles are nevertheless directly attached to winning machines they fall under heading 84.23 of the Common Customs Tariff.

The *Commission* observed that the difficulty arises from the fact that technology is continually progressing, whereas the Customs Tariff and its headings remain unchanged. In the present case the relevant criteria for making a distinction between the tariff headings in question lies in the stationary character of structures and the mobility of machines. The complexity of the device to be classified is due precisely to its characteristic mobility; the speed of movement is not relevant. Moreover, the individual parts of a whole cannot be examined separately since the purpose for which the movable whole is intended depends on the concertation of the individual parts.

With regard to the second question the Commission's view is that the wording of tariff heading 84.23 in the German version should be read in the light of the versions in the other languages and in particular the versions in English, French, Italian and Dutch, from which it becomes clear that that heading concerns only those machines which work directly upon the earth's crust.

The Advocate-General delivered his opinion at the hearing on 5 May 1977.

Decision

1 By an order dated 26 October 1976, which was lodged at the Registry of the Court on 22 November 1976, the Bundesfinanzhof referred the following two questions for a preliminary ruling under Article 177 of the EEC Treaty:

1. Is the term 'structure' in tariff heading 73.21 of the Common Customs Tariff to be interpreted so as to include also an article which is intended to render the mine face safe in mining and *inter alia* is equipped in such a way that it and mining machinery placed on a part of it can be moved forward step by step by means of incorporated hydraulic cylinders and a motorized pump unit which is separately installed?

2. If question 1 is answered in the negative: does tariff heading 84.23 of the Common Customs Tariff include only such machinery and appliances for mining as are intended to work the earth directly?

2 These questions have arisen in an action between the undertaking Klöckner-Ferromatik GmbH and the Oberfinanzdirektion München. Klöckner-Ferromatik GmbH imported the device at issue, which it describes as equipment for the support of mine tunnels to be classified by analogy with hydraulic pit-props and moving bridges under tariff heading 73.21: 'structure'; on the other hand, the Oberfinanzdirektion München considers the device to be a self-advancing pit-prop which belongs to Chapter 84 of the Common Customs Tariff because of its mechanical components.

3 In these circumstances the following three tariff headings come into consideration:

— Tariff heading 73.21: 'Structures and parts of structures (for example, hangars and other buildings, bridges and bridge sections ... roofing frameworks ...), of iron or steel ...';

— Tariff heading 84.23: 'Excavating, levelling, tamping, boring and extracting machinery, stationary or mobile, for earth, minerals or ores (for example mechanical shovels, ... levellers and bulldozers) ...';

— Tariff heading 84.59: 'Machines and mechanical appliances, having individual functions, not falling within any other heading of this Chapter'.

It must therefore be considered whether the article in question is a 'structure' within the meaning of tariff heading 73.21 of Section XV or a 'machine or mechanical appliance' falling under Chapter 84 of Section XVI.

4 'Structures' within the meaning of tariff heading 73.21 are characterized by the fact that, in principle, after erection at the site they remain stationary. The concept of stability is the basis of the examples given in tariff heading 73.21, as well as in Note 1 (f) at the beginning of Section XV, which excludes machinery and mechanical appliances which have a certain mobility. This interpretation also agrees with the system of Chapter 73 of the Common Customs Tariff where, under the heading 'Iron and steel and articles thereof', classification of goods is effected mainly in accordance with the material of which they are composed or with their physical composition. The reason why, by the Tariff Decision of 9 June 1972, the Committee on Common Customs Tariff Nomenclature classified hydraulic pit-props under tariff heading 73.21 was that the mechanical activity performed by such appliances has only secondary significance and was not regarded as a decisive reason for classification under another heading, since pit-props remain stationary while used as tunnel supports and are extended hydraulically only to facilitate manipulation during erection and dismantling which, however, does not affect their basically stationary character. The same is true of the classification of moving bridges under that heading, since bridges of this kind rest on foundations and do not require a supply of motive energy.

5 On the other hand, Chapter 84, the headings of which largely relate to the purpose of the goods, is concerned with the use of parts intended for machinery or mechanical appliances the functional characteristic of which is a more or less constant process of mechanical movement.

6 It may be inferred from the observations made to the Court that the device in question is not intended to remain stationary after erection and that its function is always to accompany the extraction process, so that all its parts are adapted for the possibility of movement. The shield assembly advances independently to keep pace with the extraction process. Its particular use depends on its mechanical mobility, even though it is in motion only for short periods. From these findings it follows that a device of the kind which is the subject of the main action cannot be classified under tariff heading 73.21 and must be classified under Chapter 84 on the basis of its essential characteristics.

7 The first question must therefore be answered to the effect that the term 'structure' in tariff heading 73.21 of the Common Customs Tariff may not be interpreted so as to include an article which is intended to render the mine face safe in mining and *inter alia* is equipped in such a way that it and mining machinery placed on a part of it can be moved forward step by step by means of incorporated hydraulic cylinders and a motorized pump unit which is separately installed.

8 So far as the second question is concerned, machinery and mechanical appliances within the meaning of tariff heading 84.23 in the official versions in English, French, Italian and Dutch are characterized by their purpose, which is directly to modify matter, namely here the earth's crust; further they all fall within the class of machines for 'attacking the earth's crust', that is, machinery and mechanical appliances which are intended directly to modify the earth's crust. The less precise versions in German and Danish must be read in the light of this. The Explanatory Notes to the Brussels Nomenclature in respect of tariff heading 84.23 support this interpretation. The latter does not, however, necessarily mean that classification under tariff heading 84.23 is ruled out for devices of the kind in question here. The view may be taken that because of the special technical equipment incorporated into the shield assembly and because of its conveyor under-frame the whole appliance may be equated with mining machinery in the true sense; equally, it could be maintained that certain kinds of shield assembly appliance should be classified under subheading 84.59 E, since they are not equipped for direct attachment to mining machinery.

9 Whether or not appliances of the kind in question in the main action fulfil these conditions is a matter of the application rather than the interpretation of the Common Customs Tariff; the decision on this point must therefore be taken by the national court. With this reservation, the second question must be answered to the effect that the machinery described in question 1 is to be classified under tariff heading 84.23 of the Common Customs Tariff if it is directly attached to mining machinery for working the earth's crust; if this is not the case, it must be classified under subheading 84.59 E of the Common Customs Tariff.

Costs

10 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these

proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Bundesfinanzhof, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Bundesfinanzhof (VIIth Senate) by order of 26 October 1976, hereby rules:

1. **The first question must be answered to the effect that the term 'structure' in tariff heading 73.21 of the Common Customs Tariff may not be interpreted so as include an article which is intended to render the mine face safe in mining and *inter alia* is equipped in such a way that it and mining machinery placed on a part of it can be moved forward step by step by means of incorporated hydraulic cylinders and a motorized pump unit which is separately installed.**

2. **Subject to the reservation referred to in the grounds of this decision, the second question must be answered to the effect that the machinery described in question 1 is to be classified under tariff heading 84.23 of the Common Customs Tariff if it is directly attached to mining machinery for working the earth's crust; if this is not the case, it must be classified under subheading 84.59 E of the Common Customs Tariff.**

Pescatore Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 26 May 1977.

H. J. Eversen
Deputy Registrar

P. Pescatore
President of the Second Chamber