JUDGMENT OF THE COURT (First Chamber)
28 April 1999 *

In Case C-405/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Finanzgericht Bremen (Germany) for a preliminary ruling in the proceedings pending before that court between

Mövenpick Deutschland GmbH für das Gastgewerbe

and

Hauptzollamt Bremen

on the interpretation of tariff heading 0802 of the Combined Nomenclature, in the version contained in Annex I to Commission Regulation (EEC) No 2551/93 of 10 August 1993, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1993 L 241, p. 1) and on the interpretation of Article 522(3) of Commission Regulation

* Language of the case: German.

(EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1),

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, D. A. O. Edward and L. Sevón, Judges,

Advocate General: A. Saggio,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mövenpick Deutschland GmbH für das Gastgewerbe, by Otto Wilser, tax adviser, Stuttgart,

— the Commission of the European Communities, by Richard B. Wainwright, Principal Legal Adviser, and Karin Schreyer, a national civil servant on secondment to its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 27 January 1999,

gives the following

Judgment

1 By order of 7 October 1997, received at the Court on 3 December 1997, the Finanzgericht (Finance Court), Bremen referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of tariff heading 0802 of the Combined Nomenclature, in the version contained in Annex I to Commission Regulation (EEC) No 2551/93 of 10 August 1993, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1993 L 241, p. 1 (the 'CN') and on the interpretation of Article 522(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1 ('the implementing provisions').

2 Those questions were raised in proceedings between Mövenpick Deutschland GmbH für das Gastgewerbe ('Mövenpick') and the Hauptzollamt ('the Principal Customs Office') Bremen concerning the tariff classification of a batch of dried walnut pieces.

The legal background

3 Heading 0802 of the CN reads as follows:

'0802 Other nuts, fresh or dried, whether or not shelled or peeled:

...

— Walnuts:

...

0802 32 00 — — shelled'.

4 Tariff heading 0811 of the CN is worded as follows:

'0811 Fruit and nuts, uncooked or cooked by steaming or boiling in water, frozen, whether or not containing added sugar or other sweetening matter:

...

0811 90 — other

...

— — other

...

0811 90 99 — — — other'.

5 Article 112(2) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, 'the Code') provides with regard to imported goods:

'Where the said goods have undergone the usual forms of handling within the meaning of Article 109, the nature of the goods, the customs value and the quantity to be taken into account in determining the amount of import duties shall, at the request of the declarant, be those which would be taken into account for the goods, at the time referred to in Article 214 if they had not undergone such handling. However, derogations from this provision may be adopted under the Committee procedure.'

6 Article 214(1) of the Code provides that, save as otherwise expressly provided, the time referred to is the time when the customs debt in respect of the goods is incurred.

7 In the version in force at the material time, Article 522(3) of the implementing provisions provided:

'Where handling would result in higher import duties than those applying to the goods before handling, the person concerned shall not present the request referred to in Article 112(2) of the Code.

In this case, the warehouse keeper of a type D warehouse shall waive any advantage he might gain from the application of the items of charge recognised or accepted for the handled goods when they were entered for the procedure.'

8 That provision was amended by Article 1(16) of Commission Regulation (EC) No 3254/94 of 19 December 1994 amending Regulation No 2454/93 (OJ 1994 L 346, p. 1). In the new version, which entered into force on 7 January 1995, Article 522 of the implementing provisions no longer includes the restriction previously provided in paragraph 3.

9 As amended by Article 1(18) of Regulation No 3254/94, Article 526(4) of the implementing provisions provides that, where the goods to be transferred have undergone usual forms of handling and Article 112(2) of the Code applies, the movement certificate is to include the nature, customs value and quantity of the transferred goods, which would be taken into account in the event of the incurrence of a customs debt if the goods concerned had not undergone the said handling.

The dispute in the main proceedings

10 Mövenpick imported dried walnut pieces from China. During transport, the goods were refrigerated at a temperature between 0 and +5 °C. On their arrival in Germany, the goods were placed in a customs warehouse where they were kept at a temperature of - 24 °C. Before they entered into free circulation, the goods were placed in a warehouse in which the temperature was 0 °C.

11 On 22 December 1994 the plaintiff in the main proceedings declared a batch of dried walnut pieces at the Zollamt Neustädter Hafen (the customs office) for admission to free circulation under heading 0802 32 00 of the CN. The customs office, however, classified the goods as frozen walnuts under heading 0811 90 99. The duty applicable to that heading is greater than the duty applicable to heading 0802 32 00.

12 On 16 January 1995 Mövenpick lodged a complaint with the Principal Customs Office which, by decision of 15 March 1996, dismissed the complaint as unfounded.

13 In the action which it brought on 3 April 1996 before the Finanzgericht Bremen Mövenpick argued that goods must be declared under the heading most closely corresponding to their condition at the time of customs clearance. In so far as it is impossible to distinguish thawed walnuts from walnuts which have not been frozen, the former should be classified under heading 0802. The plaintiff in the main proceedings added that Article 522(3) of the implementing provisions renders ineffective the principle laid down by Article 112(2) of the Code, with the result that it does not observe the limits of the powers conferred by the latter provision and is, accordingly, invalid.

14 The Finanzgericht commissioned an expert to establish whether walnut pieces, imported and stored under the conditions which were applied to the goods concerned, undergo any alteration in flesh structure, taste and appearance. The expert found that, since they contain so little water, walnuts temporarily placed in a temperature of or of less than - 20 °C do not, after thawing out, show any alterations characteristic of freezing. He concluded that:

'A reduction in the temperature of walnuts to - 20 °C cannot in the physical sense be referred to as a freezing procedure but merely as a chilling procedure, since walnuts typically contain no freezable water.'

15 The Principal Customs Office has adhered to its classification and argues that the freezing process, although it does not change the natural properties of the walnuts, nevertheless has an effect on them in so far as it prevents their oil from becoming rancid.

16 The Finanzgericht inclines to the view of the Principal Customs Office. However, having regard to a question of interpretation of provisions of Community law, it has decided to stay proceedings and to refer the following questions to the Court:

'1. Is the Common Customs Tariff in the version contained in Annex I to Commission Regulation (EEC) No 2551/93 of 10 August 1993 (OJ 1993 L 241, p. 1) amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (Combined Nomenclature 1994) to be interpreted so that dried walnut pieces imported from a non-member country, which were stored deep-frozen in a customs warehouse in the Community and subsequently presented for admission to free circulation in a thawed condition, are to be classified under heading No 0802?

2. If not:

Was Article 522(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 (OJ 1993 L 253, p. 1), which has since been replaced by the new version of Article 522 introduced by Commission Regulation (EC) No 3254/94 of 19 December 1994 (OJ 1994 L 346, p. 1), inoperative?

3. If so:

Should Article 522 in conjunction with Article 526(4) of the Provisions implementing the Community Customs Code, in the versions enacted by Article 1, points 16 and 18, of Commission Regulation (EC) No 3254/94 of 19 December 1994 (OJ 1994 L 346, p. 1), also be applied to customs declarations before 7 January 1995?'

The first question

17 By its first question, the national court is seeking in substance to ascertain whether, on a proper interpretation of the CN, dried walnut pieces imported from a non-member country which, within the Community, are stored at a temperature of −24 °C and which, after being thawed out, are cleared through customs and admitted into free circulation, must be classified under heading 0802, as 'Other nuts, fresh or dried, whether or not shelled or peeled', or under heading 0811, as 'Fruit and nuts, uncooked or cooked by steaming or boiling in water, frozen'.

18 It is settled case-law that, in the interests of legal certainty and for ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN. There are also explanatory notes drawn up, as regards the CN, by the Commission and, as regards the Harmonised Commodity Description and Coding System, by the Customs Cooperation Council, which may be an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (see, in particular, Case C-328/97 *Glob-Sped* v *Hauptzollamt Lörrach* [1998] ECR I-8357, paragraph 26, and Case C-280/97 *Rose Elektrotechnik* v *Oberfinanzdirektion Köln* [1999] ECR I-689, paragraph 16).

19 According to point 2 of the introductory notes to chapter 8 of the CN, chilled fruit and nuts are to be classified in the same headings as the corresponding fresh fruit and nuts. According to point 3 of the same notes, dried fruit or nuts may be treated in order to improve their preservation or stabilisation.

20 It is stated in the general considerations in chapter 8 of the CN of the Customs Cooperation Council that the expression 'frozen' means that the product has been cooled to below its freezing point until it is frozen 'throughout', whereas a 'chilled' product is one whose temperature has been reduced without the product being frozen.

21 It is clear from the findings of the national court, in particular from the report drawn up by the expert appointed by it, that dried walnuts do not contain water capable of being frozen, a feature which led the expert to conclude that the treatment undergone by the goods in issue in the main proceedings during their storage could not be regarded as a freezing procedure, but rather as a chilling procedure. Those facts are sufficient to exclude any freezing 'throughout'.

22 It is also clear from the report of the expert appointed by the national court that the treatment applied to the goods in issue in the main proceedings did not lead, when the goods were warmed up by raising the storage temperature, to any changes characteristic of freezing. In the circumstances in the main proceedings there were not, therefore, any 'irreversible changes ... in particular to the structure of the flesh', whose existence had been noted by the Court in Case 120/75 *Riemer* v *Hauptzollamt Lübeck-West* [1976] ECR 1003, paragraph 4, in which the Court concluded that after thawing goods cannot be classified as fresh goods.

23 The fact that the treatment undergone by the goods in question in the main proceedings has nevertheless had some influence on those goods, in so far as it prevented the oil they contained from becoming rancid, cannot be considered as a decisive factor, since point 3 of the introductory notes to chapter 8 of the CN expressly provides that dried fruits may be treated for additional preservation or stabilisation.

24 The answer to be given to the first question must therefore be that, on a proper interpretation of the CN, dried walnut pieces, imported from a non-member country, which have been stored in the Community at a temperature of −24 °C and which, after thawing out, are cleared through customs to be released into free circulation must be classified under tariff heading 0802.

The second and third questions

25 In the light of the answer given to the first question, there is no need to reply to those questions.

Costs

26 The costs incurred by the Commission, which has 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 (First Chamber),

in answer to the questions referred to it by the Finanzgericht Bremen by order of 7 October 1997, hereby rules:

On a proper interpretation of the Combined Nomenclature, in the version contained in Annex I to Commission Regulation (EEC) No 2551/93 of 10 August

1993 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the common customs tariff, dried walnut pieces, imported from a non-member country, which have been stored in the Community at a temperature of - 24 °C and which, after thawing out, are cleared through customs to be admitted into free circulation must be classified under tariff heading 0802.

Jann Edward Sevón

Delivered in open court in Luxembourg on 28 April 1999.

R. Grass P. Jann

Registrar President of the First Chamber