Case 155/84

Reinhard Onnasch
v
Hauptzollamt Berlin-Packhof

(reference for a preliminary ruling
from the Finanzgericht Berlin)

'Common Customs Tariff — Sculptures and statuary'

Summary

Common Customs Tariff — Tariff headings — Classification of a work of art — 'Original sculptures and statuary, in any material' within the meaning of tariff heading No 99.03

The expression 'original sculptures and statuary, in any material' in heading No 99.03 of the Common Customs Tariff must be understood to refer to all three-dimensional artistic productions, irrespective of the techniques and materials used. In consequence a work of art consisting of a wall relief made of cardboard and expanded polystyrene, sprayed with black paint and oil and attached to a wooden panel by means of wire and synthetic resin, must be regarded as a work of sculpture or statuary within the meaning of that tariff heading.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 21 March 1985 *

Mr President,
Members of the Court,

A. The background to this reference for a preliminary ruling is as follows:

On 1 September 1982 in Berlin, the plaintiff in the main proceedings declared for importation from the United States of America a wall relief by the American artist Claes Oldenburg. The work measures 61 by 87.5 by 31.5 cm and is entitled 'Modl. Motor

* Translated from the German.

Section — Giant Soft Fan'. It is made from cardboard glued to expanded polystyrene, sprayed with black paint and oil and attached by means of wire and synthetic resin to a wooden panel. The work is concerned with the artistic alienation of everyday objects and is typical of the artist.

Although the plaintiff declared the work as an original sculpture or work of statuary under heading No 99.03 of the Common Customs Tariff, the Hauptzollamt (Principal Customs Office) Berlin-Packhof, the defendant in the main proceedings, claims that it should be classified under tariff heading No 39.07 on the basis of its composition. If the work is an original sculpture, it is exempt from customs duties; otherwise the duty payable is 14.2% of the value for customs purposes, which is DM 7 500, that is to say, duty of DM 1 065.

The defendant, supported by an opinion of the Zolltechnische Prüfungs- und Lehranstalt [Customs Laboratory and Training College], does not deny that the object is a work of art. But it does not consider that fact decisive since the work is certainly not sculpture or statuary because it cannot be so described unless it is made from a hard material according to traditional techniques. The plaintiff on the other hand claims that its nature as a work of art is decisive for its tariff classification.

The Finanzgericht Berlin [Finance Court, Berlin] is in doubt on the question of classification because it considers that it may be appropriate in certain cases to take recent artistic developments into account in interpreting the Common Customs Tariff. In its view, the concept of sculpture or statuary has been considerably extended and now takes in new materials such as 'junk' and plastics. In addition new techniques for working the material have been introduced. For that reason it has referred the following question of interpretation to the Court of Justice:

'Is a work recognized by the customs authority as being a work of art, consisting of a wall relief made of cardboard and expanded polystyrene, sprayed with black paint and oil and attached to a wooden panel by means of wire and synthetic resin, to be classified as "original sculpture or statuary, in any material' under heading No 99.03 (Code No 99.03.00.00) of the Common Customs Tariff or, because of the materials of which it is composed, under heading No 39.07 (Code No 39.07.999.00)?'

The Commission takes the view that the article at issue in the main proceedings is unquestionably a work of art and that its classification under tariff heading No 99.03 receives support from two provisions in the Common Customs Tariff itself.

That tariff heading expressly refers to 'Original sculptures and statuary, *in any material*', which suggests a certain latitude as regards the work's material composition.

The Commission adds that by virtue of Note 4 (a) to Chapter 99, articles falling within both Chapter 99 and other chapters of the Common Customs Tariff are to be classified under Chapter 99. From that it may be inferred that in cases of doubt — apart from the exceptions mentioned — goods should be classified under Chapter 99. If it is also borne in mind that, in any event, genuine artistic creation in the Community cannot practically be protected or promoted by the Common Customs Tariff, that provision must mean that Chapter 99 is applicable to this case.

The Commission states that it would be unjust to classify the article, which derives its high value from the work done upon it by the artist, according to its material composition, since the value of the materials used is likely to be minimal.

It therefore proposes that the question referred to the Court by the Finanzgericht Berlin be answered as follows:

A wall relief recognized as being a work of art made from expanded polystyrene with

cardboard glued to it, sprayed with oil and paint and mounted on a panel falls within heading No 99.03 of the Common Customs Tariff as original sculpture and statuary, in any material.

B. Here at the outset of my opinion I should like to set out the wording of the relevant tariff headings in the version applicable at the material time: [1]

'99.03 Original sculptures and statuary, in any material';

'39.07 Articles of materials of the kinds described in headings Nos 39.01 to 39.06:

A. Piping and tubing, with fittings attached, suitable for conducting gases or liquids, for use in civil aircraft

B. Other:

I. Of regenerated cellulose

II. Of vulcanized fibre

III. Of hardened proteins

IV. Of chemical derivatives of rubber

V. Of other materials:

(a) Spools, reels and similar supports for photographic and cinematographic film or for tapes, films and the like falling within heading No 92.12

(b) Fans and hand screens, non-mechanical; frames and handles therefor and parts of such frames and handles

(c) Corset busks and similar supports for articles of apparel or clothing accessories

(d) Other'.

I do not propose to enumerate all the materials referred to under tariff headings Nos 39.01 to 39.06, but would mention that they include artificial resins and plastic materials, cellulose esters and ethers, and articles thereof.

Since the parties are agreed that the imported article is a work of art, the only question at issue in these proceedings is whether it is a work of *sculpture or statuary.*

The Hauptzollamt, relying on an opinion of the Zolltechnische Prüfungs- und Lehranstalt of the Oberfinanzdirektion [Principal Revenue Office] Berlin, construed the concept of sculpture or statuary restrictively. It stated that only objects having a sculptural form, in the round, made by traditional techniques, that is, worked from a hard material or moulded in a soft material, and including sculptures therefore, could be regarded as 'original sculptures and statuary'. Other art works, in particular contemporary art works such as textile hangings, collages, assemblages, etc., could not be classified under Chapter 99 because of the techniques or media used in making them and should be classified under the chapter for the relevant materials. The decision to classify the sculpture made of cardboard sections, canvas and synthetic materials under tariff heading No 39.07 was neither arbitrary nor a stop-gap interpretation because the sculpture did not fall within the scope of tariff heading No 99.03 by virtue of the method of production and the atypical materials used in making it.

I cannot follow that restrictive interpretation of the concept of 'sculptures and statuary'.

1 — Council Regulation (EEC) No 3300/81 of 16 November 1981 amending Regulation (EEC) No 950/68 on the Common Customs Tariff; Official Journal 1981, L 335, p. 1.

In the order for reference, the Berlin Finanzgericht refers to the entry on 'Bildhauerkunst' in the 1972 edition of the Meyers-Enzyklopädisches Lexikon. That entry states:

'The terms "Bildhauerkunst", "Bildnerei" and "Plastik' are normally used to mean the same thing, although, strictly speaking, "Plastik" refers only to works in a soft material (clay, wax, plaster) and to sculptures which have been cast, while "Bildhauerkunst" and "Skulptur" refer only to works carved out of a hard material (stone, wood). The principal materials used in sculpture were stone, wood, metal, ivory, clay and wax. ... In modern times "Bildhauerkunst" has acquired a considerably extended meaning; new materials (junk, plastics) are used and new techniques (welding and soldering of pieces of iron, work with electric cutting tools, cast stone, etc.) are applied . . . '.

In the 1981 edition of the *Neues Fischer Lexikon*, 'Bildhauerkunst' is defined as the art of creating a three-dimensional figurative form. It states:

'*Bildhauerkunst* (Plastik, Skulptur), *the art of creating a three-dimensional* figurative form, either carved from wood or ivory, sculpted from stone (marble, alabaster, porphyry, granite), modelled in a soft medium which later hardens (clay, wax, plaster) or cast in metal (hammered, embossed, etc.) . . . Forms: statue in the round (free-standing, worked on all sides), bas relief, mezzo-relievo, high relief . . . '.

It is clear that even ordinary usage does not justify restricting the concept of sculpture to hard material worked in the traditional way. Furthermore, the restriction to so-called 'hard' materials cannot be reconciled with the wording of the Common Customs Tariff which refers to 'any material'. The wording of the tariff heading in the other language versions also suggests a liberal interpretation of the concept of sculpture. With the exception of the Danish version, they all use several expressions to render the term 'Bildhauerkunst', for example 'Productions originales de l'art statuaire et de la sculpture' in the French and 'Original sculptures and statuary' in the English.

Thus tariff heading No 99.03 is not based on a restrictive interpretation of the concept of sculpture. In addition it should be pointed out that according to Note 4 (a) to Chapter 99, in case of doubt Chapter 99 is to take precedence: 'Subject to Notes 1 to 3 above, articles falling within headings of this Chapter are to be classified in whichever of those headings is appropriate and not in any other heading of the Tariff.'

Final confirmation is to be found in tariff subheading 39.07 B V (d) and the kinds of objects usually classified under that subheading. I do not propose to quote all the specific provisions of the Explanatory Notes to the Customs Cooperation Council Nomenclature or the individual tariff classifications of the Commission but shall only mention two examples of cases in which the Commission has classified objects under that subheading.

In Commission Regulation No 810/83 of 5 April 1983, [2] the Commission decided that —the following item was to be classified under tariff subheading 39.07 B V (d): 'plastic money-box in the form of a penguin, about 16 cm high, with a red scarf and a slot in the back for inserting coins.'

Article 1 of Commission Regulation No 1218/84 of 30 April 1984 [3] provides that:

2 — Official Journal 1983, L 90, p. 11.

3 — Official Journal 1984, L 117, p. 16.

'Wash basins composed of 30% of artificial plastic materials (styrenated polyester resin) and 70% of filler (mainly of silicate) and having a coating of transparent artificial plastic material (styrenated polyester resin about 0.2 mm thick on the working surface), shall be classified in the Common Customs Tariff as follows:

39.07 Articles of materials of the kinds described in headings Nos 39.01 to 39.06:

B. Other:

V. Of other materials

(d) Other.'

Those examples should suffice to demonstrate that it would be inappropriate to classify the imported work of art according to its material composition. Furthermore, I share the view of the Commission that it would be grossly unjust to classify the article, which derives its high value from the work done upon it by the artist, according to its material composition, since the value of the materials used is likely to be minimal. I also endorse the Commission's more general contention that, in any event, genuine artistic creation in the Community cannot practically be protected or promoted by means of the Common Customs Tariff and that the article in question should therefore be held to fall within Chapter 99.

C. I therefore propose that the Court of Justice answer the question referred to it by the Finanzgericht Berlin by order of 20 March 1984 as follows:

A work recognized by the customs authority as being a work of art, namely, a wall relief made of cardboard and expanded polystyrene, sprayed with black paint and oil and attached to a wooden panel by means of wire and synthetic resin, is to be classified under 'original sculptures and statuary, in any material' in tariff heading No 99.03 of the Common Customs Tariff.