JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 15 JUNE 1976 [1]

Firma Walter J. Riemer
v Hauptzollamt Lübeck-West
(preliminary ruling requested by the Finanzgericht Hamburg)

'Cranberries'

Case 120/75

Summary

Common Customs Tariff — Tariff heading 08.08 — Concept

The term 'Berries, fresh' used in heading 08.08 of the Common Customs Tariff must be interpreted as not including berries which have been frozen, even for a short time and merely for the purpose of transportation, and which, at the relevant time, have started to thaw or have thawed out again.

In Case 120/75

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg, for a preliminary ruling in the action pending before that court between

FIRMA WALTER J. RIEMER, Hamburg,

and

HAUPTZOLLAMT LÜBECK-WEST,

on the interpretation of tariff heading 08.08 B (Berries, fresh, cranberries) of the Common Customs Tariff (Regulation No 950/68 of the Council, OJ L 172, p. 1, as last amended by Regulation No 3000/75 of the Council, OJ L 304, p. 1),

1 — Language of the Case: German.

THE COURT (SECOND CHAMBER)

composed of: H. Kutscher, President of Chamber, P. Pescatore and M. Sørensen, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order referring the case and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. In May and June 1974 Firma Walter J. Riemer declared to the Zollamt (customs office) Lübeck-Hafen two consignments of cranberries imported from Finland and intended for release into free circulation; it claimed that the goods came under tariff heading 08.08 B (0 %):

'08.08 Berries, fresh:
.....
B. Cranberries.'

The Zollamt Lübeck-Hafen classified the goods under tariff heading 08.10 B (20 %):

'08.10 Fruit (whether or not cooked), preserved by freezing, not containing added sugar:
A. Strawberries, raspberries, black currants, red currants, bilberries, blackberries (brambleberries), mulberries and cloudberries
B. Other.'

In June and July 1974 the undertaking lodged objections against the notices of assessment of May and June 1974, on the ground that the imported products were fresh cranberries.

The Hauptzollamt (Principal Customs Office) Lübeck-West dismissed the objections of the importer, who then brought an application before the Finanzgericht (Finance Court) Hamburg against this decision dismissing the objections.

2. By order of 31 October 1975 the Finanzgericht stayed the proceedings and requested the Court of Justice to give a preliminary ruling under Article 177 of the EEC Treaty on the following question:

'May cranberries which have merely been frozen for a short time for the purpose of transportation and which are transported without refrigeration and have already started to thaw or have thawed out again

be classified as fresh berries within the meaning of tariff heading 08.08 B?'

3. The order of the Finanzgericht Hamburg shows that before this court the parties to the main action put forward the following principal arguments, which are summarized below:

Walter J. Riemer has alleged that, for customs purposes, the concepts of fresh goods and frozen goods cannot be given a different interpretation from that applied for trade purposes. In the trade goods are regarded as fresh where they are intended for immediate consumption or processing by not where, as a result of the use of any kind of preservatives, a specific method of treatment or storage or the passage of time, the goods are only intended to be released for consumption or processed after some considerable time.

The actual condition of the goods at the time of the customs examination is, therefore, not decisive for the customs classification. If such were the case then the persons liable for customs duty could, at any time, bring the goods under different tariff headings, by selecting the date for the customs examination.

In this instance the goods in question are of the current season and, after importation into Germany, have been subjected to processing. The cranberries are stored in Finland in underground concrete bunkers immediately after the harvest. In order that they may be transported without deterioration, they are placed in a deepfreeze depot for a short period; they do not thereby lose the character of fresh goods. There is no continuous chain of cold storage operations during transportation.

The reason lying behind the exemption from payment of customs duties is, moreover, that trade in fresh goods intended for immediate consumption or use ought to be encouraged.

The *Hauptzollamt* maintains that, for the purpose of tariff classification, it does not matter for what reason the fruits have been frozen, whether it be for consumption, processing or transportation, since the objective characteristics of the product at the relevant time are alone material.

According to the 'Zollgesetz' (Customs Law) manipulation of the date of the customs examination cannot bring the goods under a more favourable tariff subheading.

It considers that fruits which are frozen throughout at temperatures below 0 °C must be classified under heading 08.10. In this instance, a customs examination revealed that, inside the barrel, the imported goods were as hard as rock and in an icy and crystallized condition; at the sides of the barrels and in the upper layers the cranberries had started to thaw or were a little further on the way to thawing out.

4. In the order referring the case, the *Finanzgericht Hamburg* stated, in particular, that it is doubtful whether a purely static consideration of the concepts 'fresh' or 'frozen' without taking into consideration the whole set of circumstances and the economic requirements of trade, can result in a correct classification.

The Finanzgericht does not consider that the Explanatory Notes to the Brussels Nomenclature provide clear guidance on the correct classification of the imported goods. In this respect, it states:

'On the one hand, tariff heading 08.10 includes on this footing all edible fruits frozen throughout at temperatures below 0° C (see marginal number 1 of the Explanatory Notes to the Brussels Nomenclature on tariff heading 08.10 and the explanatory notes to tariff heading 07.02). On the other hand, according to marginal number 2 of the Explanatory Notes to the Brussels

Nomenclature on tariff heading 08.10, fruit which has merely been chilled is classified as fresh fruit. Accordingly, the cranberries some of which at the relevant date had started to thaw or had thawed out might have to be considered merely as fruit which was (still) chilled and thus have to be classified as fresh fruit, because the 'frozen' state has not been maintained or not been completely maintained during transportation until customs clearance. The definition of the concept chilled ('i.e. maintained at a temperature around 0° C to retain their fresh character without becoming frozen') given in marginal number 1 of the Explanatory Notes to the Brussels Nomenclature on tariff heading 07.01 does not fully answer to these conditions, in which case it is doubtful whether the definition laid down in respect of vegetables may be applied indiscriminately to fruit. On the other hand this very definition of 'chilled' might, then again, permit of the inference that chilling or freezing must be treatment carried out by the importer on a long-term basis or that the intention of the plaintiff 'to keep the goods fresh' by the ways and means described must be taken into consideration.'

5. The order of the Finanzgericht Hamburg was received at the Court Registry on 5 December 1975.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on behalf of the Commission by its Legal Adviser, Peter Kalbe.

By order of 22 March 1976, the Court decided, under Article 95 (1) of the Rules of Procedure, to assign the case to the Second Chamber.

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

II — Written observations submitted to the Court

The *Commission* considers that the decision to be taken in this instance does not involve a definition of what, in the trade, is regarded as fresh or frozen, but rather concerns the distinction existing under the Common Customs Tariff between the two headings 08.08 and 08.10.

By using the descriptions 'fresh' and 'preserved by freezing', the two tariff headings refer to objective characteristics of the berries at the time of importation.

In the absence of any binding Community provisions, the relevant time is determined according to national rules, as regards Germany, these rules are contained in Article 35 of the 'Zollgesetz' which states that the relevant time shall be that when the application for customs clearance is submitted or takes effect.

As regards the tariff heading applying to the berries the Commission notes that the original action has not yet established whether the goods presented for customs clearance were frozen berries, in an icy and crystallized condition, or berries which were frozen and then unfrozen. For this reason, and in the light of the wording of the preliminary question, the Commission explains its attitude to the classification of these two categories of goods in the Common Customs Tariff.

As regards the tariff classification of the first category, the Commission maintains that tariff heading 08.10 may alone be considered.

Current usage of the terms 'frozen berries' means berries which have been solidified by the effect of cold. The Explanatory Notes to the Brussels Nomenclature concerning tariff headings 08.10 and 07.02 confirm this interpretation and further define it.

The main action concerns the question whether or not it is necessary to adopt a

special interpretation of the term 'preserved by freezing' which takes particular account of the fact that the goods have merely been frozen for the purposes of transportation, are subsequently transported without refrigeration and that they must be marketed, after thawing out, as fresh goods.

However, no such interpretation can be presumed in the present instance, since it is neither indicated by the Tariff nor by any of its Explanatory Notes.

The Commission also considers that a single type of frozen goods cannot be classified in a different category on the basis of its intended use, which can only be verified with difficulty and which has not necessarily been determined when the goods are imported.

Furthermore, the slowness or the speed of the process of freezing the berries in no way alters their characteristics as a frozen product. This is shown by tariff heading 07.02.

The argument that the importation of fresh berries is encouraged by the exemption from payment of customs duty provided for to this end is irrelevant as regards tariff classification, since the exemption in no way affects the distinction in the Tariff between fresh goods and frozen goods and it can only apply if the goods imported are actually fresh and unfrozen.

As regards the tariff classification of cranberries which are frozen and then thawed out, the Commission maintains that frozen cranberries certainly lose their consistency when they are thawed out, but that they are only excluded from tariff heading 08.10 if this operation were to be regarded as a form of processing or preservation, as a result of which they satisfy the criteria of classification of another tariff heading. This is not the case here since, as a result of their thawing out, the berries could not fall either under tariff heading 08.11 or under tariff headings 08.12 or 20.03. Moreover, the Commission does not consider that mere thawing out constitutes preparing or preserving within the meaning of tariff heading 20.06.

Furthermore thawed berries cannot be regarded as 'fresh' berries within the meaning of tariff heading 08.08. By contrasting the 'fresh' berries under tariff heading 08.08 with the cooked fruit, preserved by freezing, dried, containing added sugar or preserved temporarily or for a long period by one means or another, governed by tariff headings 08.10, 08.11 and 08.12, as well as 20.06, the wording of the Tariff shows that the berries to be regarded as 'fresh' are those which are in the natural state in which they have been harvested and have not undergone any of the forms of preservation or treatment referred to.

As a result of the freezing process to which they have been subjected, the thawed berries have lost the characteristics of 'fresh' berries, they are no longer in the natural state in which they have been harvested and thus can no longer be classified as 'fresh' berries within the meaning of tariff heading 08.08.

The Commission observes that it is not unaware of the fact that it may be difficult to distinguish between 'fresh' and 'thawed' berries on the basis of their outward appearance. However, although the freezing process is reversible, other changes, in particular those to the flesh of the berry, are irreversible and result in a 'thawed' berry which is softer than a fresh one, crushes more easily under pressure and has a lower juice content.

The Commission concludes: 'Cranberries which have merely been frozen for the purpose of transportation, which are transported without refrigeration and which, at the relevant time, have started to thaw or have thawed out completely,

cannot be classified as fresh berries within the meaning of subheading No 08.08 B of the Common Customs Tariff, but come under tariff heading No 08.10 as fruit, preserved by freezing'.

At the hearing on 6 May 1976 the Commission, represented by its Legal Adviser, Peter Kalbe, submitted its oral observations.

The Court asked the Commission to explain, during the hearing, the reasons for the considerable difference between the rates of customs duty applicable, on the one hand, to fresh berries and, on the other hand, to berries preserved by freezing.

In reply, the Commission stated in particular that, as regards the duty under the Common Customs Tariff on frozen berries (20 %), this is an autonomous duty [a duty decided upon independently] fixed at the level of the arithmetic mean of the duties in force in the various Member States when the Common Customs Tariff was drawn up.

At the national level, the duties have been based on economic considerations. Thus, the previous German duty on frozen berries (30 %) was fixed in order to protect the German industry which, at that time, was just starting.

As regards the duty on fresh berries under the Common Customs Tariff (0 %), the Commission maintains that this is a conventional duty [a duty agreed to internationally] and follows from the Dillon Round, during which certain countries, such as Sweden and Finland, demanded a concession for fresh fruit.

When questioned by a Member of the Court, the Commission explained during the hearing that, in making the distinction under the Common Customs Tariff, it is not possible to take account of the fact that the goods in question, which are a raw material for the food-preserving industry, do not compete with the frozen product. There are cases in which the ultimate use of goods forms a criterion for classification, but these cases are provided for by the Tariff. Such criteria for classification are generally linked to an official verification of the use to which the goods are put. In this instance the question which may arise is whether the amount of the duty on frozen berries (20 %) is justified.

The Advocate-General delivered his opinion at the hearing on 26 May 1976.

Law

1 By order of 31 October 1975, received at the Court on 5 December 1975, the Finanzgericht Hamburg referred to the Court under Article 177 of the EEC Treaty the following question:

'May cranberries which have merely been frozen for a short time for the purpose of transportation and which are transported without refrigeration and have already started to thaw or have thawed out again be classified as fresh berries within the meaning of tariff heading 08.08 B?'

2 The order referring the case shows that this question arose in an action between a German importer and the competent customs authorities over two consignments of cranberries which, as 'fruit, preserved by freezing', were classified under heading 08.10 B of the Common Customs Tariff, although the importer claims that they came under heading 08.08 B, as 'Berries, fresh'.

The question raised therefore concerns the interpretation of the term 'fresh' appearing in heading 08.08 in relation to the term 'preserved by freezing' in heading 08.10.

3 The Tariff distinguishes between 'fresh' berries referred to under heading 08.08 and fruit preserved by freezing, dried or preserved, under headings 08.10, 08.11, 08.12 and 20.06.

It follows that the term 'fresh' must be interpreted to mean those berries which are in the natural state in which they have been harvested and which have not undergone any of the methods of preservation or treatment mentioned.

4 The information provided to the Court shows that the characteristics of the berries which are subjected to the freezing processes undergo certain irreversable changes as a result of this very process, in particular to the structure of the flesh, with the result that they are no longer in the natural state, even after they have started to thaw or have thawed out.

5 The appropriate reply to the question referred is therefore that the term 'Berries, fresh' used in heading 08.08 of the Common Customs Tariff must be interpreted as not including berries which have been frozen, even for a short time and merely for the purpose of transportation, and which, at the relevant time, have started to thaw or have thawed out again.

Costs

6 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 national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the question referred to it by the Finanzgericht Hamburg by order of 31 October 1975, hereby rules:

The term 'Berries, fresh' used in heading 08.08 of the Common Customs Tariff must be interpreted as not including berries which have been frozen, even for a short time and merely for the purpose of transportation, and which, at the relevant time, have started to thaw or have thawed out again.

Kutscher Pescatore Sørensen

Delivered in open court in Luxembourg on 15 June 1976.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 26 MAY 1976 [1]

Mr President,
Members of the Court,

1. The proceedings before the Finanzgericht Hamburg, which has referred a question to this Court under Article 177 of the EEC Treaty, are concerned with the customs classification of cranberries imported into Germany from Finland in 1974. At the material time in the main action, cranberries, which come under tariff heading 08.08 B of the Common Customs Tariff, covering fresh berries, could be imported into the Community from Finland free of customs duty whereas frozen cranberries, which come under tariff heading 08.10 B, were subject to a duty of 20 %.

During the examination of the goods concerned when they crossed the frontier, the German authorities noted that the product appeared to constitute a very hard mass, in a frozen and crystallized condition, although it was frozen to a lesser extent on the outside and there were indications that it was thawing out. The authorities considered

1 — Translated from the Italian.