OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 24 April 1986 *

Mr President,
Members of the Court,

By a decision of 7 May 1985 the Bundesfinanzhof has referred to the Court for a preliminary ruling a question on the interpretation of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (Official Journal 1980, L 134, p. 1).

The facts of the case are the following:

On 30 December 1980 the respondent in the main proceedings imported a consignment of frozen beef from Argentina. It was found that the goods had been damaged by thawing which, according to experts, had occurred during loading in Argentina and had reduced the value of the whole shipment by 17%. The defendant, who had already paid the purchase price to its supplier and considered that it was for practical purposes impossible to bring a claim for damages against the supplier, was indemnified by its transport insurers for a diminution in value of 14%, so that it had to bear 3% itself. The customs value was nevertheless fixed on the basis of the transaction value (including the cost of shipping and insurance).

The defendant considers that that valuation is incorrect: it takes the view that the diminution in value should be taken into account in assessing the customs value.

After an unsuccessful administrative appeal the respondent was successful before the Finanzgericht, on the basis of the same arguments. The court held that it was necessary to interpret by analogy the term 'transaction value' as defined in Article 3 of Regulation (EEC) No 1224/80, which is worded as follows:

'The customs value of imported goods determined under this article shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community . . . '.

The court went on to hold that its view was supported by the second sentence of Article 4 of Commission Regulation (EEC) No 1495/80 (as amended by Commission Regulation No 1580/81, Official Journal 1981, L 154, p. 36), which provides as follows:

'Apportioning the price actually paid or payable shall also apply in the case of the loss of part of a consignment or when the goods being valued have been damaged before entry into free circulation.'

The Hauptzollamt Itzehoe brought an appeal on a point of law against that judgment. It considers that under Regulation No 1224/80 the only point to be taken into account is the fact that the respondent paid the whole of the invoice price; in its view none of the applicable provisions permit a diminution in value resulting from a defect in the goods to be taken into account. The second sentence of Article 4 of Regulation No 1495/80 cannot be taken into account since that provision, according to Article 2 of Regulation No 1580/81, came into force only in June 1981.

* Translated from the French.

The Bundesfinanzhof seems inclined, on the basis of the wording of Regulation No 1224/80, to uphold the Hauptzollamt's argument; however, it has doubts regarding that interpretation, in view of its 'economically absurd result'. For that reason, it stayed the proceedings and asked the Court to give a preliminary ruling on the following question:

'On 30 December 1980 did the transaction value, as referred to in Article 3 (1) of Regulation No 1224/80, include the full amount of the price actually paid even where the goods, brought free of defects, had deteriorated and thus diminished in value before the relevant valuation date, in circumstances giving rise to the indemnification of the buyer under his transport insurance but not to the refund of any part of the purchase price by the seller?'

On that question I should like to make the following remarks:

1. The general principle established by Council Regulation No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes is the following (Article 2 (1]:

'The customs value of imported goods is to be determined under Article 3 whenever the conditions prescribed therein are fulfilled.'

It is therefore necessary first of all to establish whether in this case the conditions prescribed by Article 3 were fulfilled.

Article 3 (1) provides that the customs value of imported goods is the transaction value, that is to say the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted in accordance with Article 8, provided that certain circumstances, set out in subparagraphs (a) to (d), are not present. None of those circumstances is present in this case; nor are the adjustments provided for in Article 8 applicable.

It is tempting to conclude, therefore, that that is the end of the matter and that Article 3 (1) must be applied, so that the customs value of the imported meat must be assessed on the basis of the price actually paid by the importer. As we have seen, the importer paid the whole of the price which was agreed upon when the contract was entered into.

In interpreting Article 3, however, the implementing provisions adopted by the Commission cannot be ignored.

Article 4 of Commission Regulation No 1495/80 of 11 June 1980 implementing certain provisions of Articles 1, 3 and 8 of Council Regulation No 1224/80 (Official Journal 1980, L 154, p. 14), which came into force at the same time as the basic regulation, provides as follows:

'Where goods declared for free circulation in the customs territory of the Community are part of a larger quantity of the same goods purchased in one transaction, the price actually paid or payable for the purposes of Article 3 (1) of Regulation (EEC) No 1224/80 shall be that price represented by the proportion of the total price which the quantity so declared bears to the total quantity purchased.'

In applying the concept of the transaction value it is thus possible to exercise some discrimination: what counts is not always the total sum actually paid to the vendor, but the sum paid for the part of the goods imported into the Community.

The following sentence was subsequently added to Article 4:

'Apportioning the price actually paid or payable shall also apply in the case of the loss of part of a consignment or when the goods being valued have been *damaged* before entry into free circulation' (Article 1 of Commission Regulation No 1580/81 of 12 June 1981 amending Regulation No 1495/80, Official Journal 1981, L 154, p. 36).

When part of a cargo is lost overboard or is completely destroyed during the voyage it is the portion of the price corresponding to the portion of the cargo delivered in good condition that is regarded as the price actually paid.

But to what do the words 'or when the goods . . . have been damaged' refer? Do they refer to damage suffered by part of the goods or also damage which, as in this case, affects the whole of a consignment?

A close reading of the provision tends to encourage the conclusion that the second interpretation is the correct one, for the reference to the 'part of a consignment' relates only to 'loss' and not to 'damage'. The wording is not 'in the case of the loss or damage of part of a consignment . . .'.

In German the situation is even clearer: 'Im Falle eines Teilverlustes oder einer Beschädigung' and not 'Im Falle eines Verlustes oder einer Beschädigung eines Teiles der zu bewertenden Ware'.

That interpretation might be thought to conflict with the word 'apportioning' with which the sentence starts. In the case of damage affecting the whole of the goods one should speak not of 'apportioning' but of a 'proportional *reduction*'.

I think, however, that we may interpret the word 'apportioning' as including 'proportional reduction'.

Nor can the fact that Commission Regulation No 1580/81 came into force only on 15 June 1981, that is to say, after the importation of the goods in question, prevent its use in the interpretation of Article 3 of the Council regulation.

As appears from the first recital in the preamble, that regulation was not intended to alter the meaning of Article 3 of Regulation No 1224/80. Indeed, it could not have such an effect. It is intended simply to make clear the meaning of that article. We are therefore entitled to apply it to the facts of this case.

On the basis of the reasoning set out above one might therefore conclude that

(i) Article 3 of Regulation No 1224/80 is applicable in this case;

(ii) under that article, interpreted in the light of the Commission regulation, the price to be taken into consideration for the purpose of calculating the customs value of the goods may be reduced in proportion to the damage suffered by the goods.

2. In opposition to that interpretation, however, the Commission argues that Article 3 cannot be applied in the case of damage affecting the whole of a consignment, because the price actually paid (the transaction value) will have been agreed upon not for damaged goods, such as those delivered, but for undamaged goods.

In support of its reasoning the Commission refers to the fact that Regulation No 1224/80 was adopted in implementation of an agreement concluded in the context of

GATT and approved by the Council on behalf of the Community, namely the 'Agreement on implementation of Article VII of the General Agreement on Tariffs and Trade' (Official Journal 1980, L 71, p. 107).

In accepting that agreement the Community placed itself under an obligation to ensure that its legislation concerning customs valuation was in conformity with the provisions of the agreement (see the fifth recital in the preamble to Regulation No 1224/80).

Any interpretation of Regulation No 1224/80 must therefore take into account the interpretation given to the agreement on which it is based.

In March 1982 the Technical Committee on Customs Valuation, established by the Customs Cooperation Council pursuant to Article 18 (2) of the Agreement referred to above, published an Explanatory Note regarding the questions raised by damaged goods.

It appears from that note that Article 1 of the 'Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade', which corresponds word for word to Article 3 of Regulation No 1224/80, is considered inapplicable when the whole of the goods delivered has suffered damage.

The same view is taken by commentators, who also emphasize that the goods subject to customs valuation must be identical to the goods purchased. That is not the case where goods are bought in good condition but are delivered in a damaged state (See Zepf, *Wertverzollung*, Commentary A.2.3.3 on Article 3; Saul L. Scherman and Hinrich Glashoff, *A businessman's guide to the GATT Customs Valuation Code*, Chapter 3, No 114).

That reasoning is not entirely convincing. Could it not apply equally to goods of which only part has been destroyed or damaged? In that case, too, the goods delivered are not identical to the goods purchased.

Since the experts of the Customs Cooperation Council have agreed upon that interpretation, however, and it is desirable to ensure that the agreement entered into in the framework of GATT is applied uniformly by as many contracting parties as possible, I propose that the Court should adopt the conclusion put forward by the Commission and hold that Article 3 of Regulation No 1224/80 does not apply to goods which have been damaged in their entirety.

The Court cannot restrict itself to that finding, however. In accordance with a well-established practice, in spite of the fact that the national court referred only to Article 3 of Regulation No 1224/80, the Court must provide it with a ruling concerning the Community law applicable which will enable it to arrive at a decision in the main proceedings.

Its attention should therefore be drawn to Article 2 (2) of Regulation No 1224/80, according to which, where the customs value cannot be determined under Article 3, reference must be made successively to Articles 4, 5, 6 and 7, each of those articles being subsidiary to the article before it.

As the Commission has pointed out, Articles 4 and 5 cannot be applied in this case.

Article 6 might apply if the meat was sold in the Community in the state in which it was imported.

If that is not the case, and since it appears that Article 7 is also inapplicable, the customs value must be determined in accordance with Article 2 (3), that is to say, 'using reasonable means'.

In that context damage such as that which has occurred in this case must be taken into account.

The answer to the question referred to the Court by the Bundesfinanzhof should therefore be that:

'Where the whole of a consignment of goods has been damaged before its release for free circulation and the purchaser (the importer) bears the loss, the customs value of the goods must be calculated not on the basis of the transaction value as referred to in Article 3 of Regulation (EEC) No 1224/80 but in accordance with Article 2 (2) and (3) of that regulation.'