JUDGMENT OF THE COURT OF 11 NOVEMBER 1975 [1]

Bagusat KG v Hauptzollamt Berlin-Packhof (preliminary ruling requested by the Finanzgericht Berlin)

Case 37/75

Summary

1. *Common Customs Tariff — Classification of goods — Several tariff headings — Choice — Discretion of the Commission*
   (Regulation (EEC) No 97/69 of the Council)

2. *Common Customs Tariff — Classification of goods — Cherries — Put up in a mixture of water and ethyl alcohol — Tariff subheading 20.06 B 1*
   (Regulation (EEC) No 1709/74 of the Commission)

1. Regulation (EEC) No 97/69 of the Council has conferred on the Commission, acting in cooperation with the customs experts of the Member States, a wide discretion as to the choice between two or more headings which come into consideration with regard to the classification of specific goods with the sole reservation that the provisions adopted by the Commission do not amend the text of the Tariff.
2. Under Regulation (EEC) No 1709/74 of the Commission, cherries put up in a mixture of water and ethyl alcohol must be classified under subheading 20.06 B 1 of the Common Customs Tariff.

In Case 37/75

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

BAGUSAT KG

and

BERLIN-PACKHOF

on the validity of Regulation (EEC) No 1709/74 of the Commission of 2 July 1974 (OJ L 180, p. 15) and on the interpretation of heading 08.11 and of subheading 20.06 B 1 of the Common Customs Tariff,

1 — Language of the Case: German.

THE COURT

composed of: R. Lecourt, President, R. Monaco and H. Kutscher, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts of the case, the procedure and the 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

The undertaking Bagusat KG imports cherries from Yugoslavia for the chocolate industry. To ensure their provisional preservation during transport, the cherries are immersed in a flavoured mixture of water and alcohol in Yugoslavia. This mixture, known in the trade as 're-usable syrup', is removed from the cherries by draining and is re-used as far as possible by Bagusat KG to import fresh consignments of cherries.

The main action is concerned with the question whether these cherries are to be classified under tariff heading 08.11 or under tariff heading 20.06 of the Common Customs Tariff.

These headings appear as follows:

'08.11 Fruit provisionally preserved (for example, by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions), but unsuitable in that state for immediate consumption:

.....

D. Other';

20 Preparations of ... fruit

20.06 Fruit otherwise prepared or preserved, whether or not containing added sugar or spirit:

B. Other:

I. Containing added spirit:

e) Other fruits:

2. Other

Om 16 January 1973 the Bundesfinanzhof, Munich, in a preliminary opinion classified these products under tariff heading 08.11.

By Regulation (EEC) No 97/69 of the Council on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (OJ, English Special Edition 1969 (I) p. 12) since it was essential that the nomenclature of the Common Customs Tariff be uniformly applied in all Member States and the adoption of provisions to that end at Community

level was necessary, a Committee on Nomenclature was set up composed of representatives of the Member States and with a representative of the Commission as chairman.

The representative of the Commission submits to the Committee a draft of the provisions to be adopted. According to the second recital of the preamble 'those provisions should specify the content of the headings or subheadings of the Common Customs Tariff without, however, amending the text thereof'. The Commission adopts the provisions envisaged where they are in accordance with the Opinion of the Committee (Article 3).

On 2 July 1974, in application of Regulation No 97/69 of the Council, the Commission adopted Regulation No 1709/74 on the classification of goods under subheading 20.06 B 1 of the Common Customs Tariff (OJ 1974, L 180, p. 15). According to the third recital of the preamble thereto:

'Whereas the "Explanatory Notes" to the Brussels Nomenclature make it clear that the above-mentioned heading No 08.11 applies to fruit which has been treated solely to ensure its provisional preservation during transport or storage prior to use, provided that it remains unsuitable for immediate consumption in that state; whereas, consequently, this heading excludes fruit which has been treated in a way which does not make it unsuitable for immediate consumption.'

According to Article 1 thereof:

'Cherries put up in a mixture of water and ethyl alcohol shall be classified as fruit suitable for immediate consumption in the following subheading of the Common Customs Tariff:

20.06 Fruit otherwise prepared or preserved, whether or not containing added sugar or spirit:
B. Other:
I. Containing added spirit.'

The provisions of Regulation (EEC) No 1709/74 are in accordance with the opinion of the Committee on Common Customs Tariff Nomenclature.

By a provisional decision of 11 September 1974 the Berlin-Packhof customs office, considering itself bound by Regulation (EEC) No 1709/74, classified the cherries imported by Bagusat KG under subheading 20.06 B e I of the Common Customs Tariff.

In its direct application, the plaintiff in the main action claimed that the customs office could not rely upon Regulation (EEC) No 1709/74 since that regulation was illegal on the ground that in the present case the Commission exceeded the limits of its legislative power because it took a decision contrary to the structure and logic of the Common Customs Tariff.

According to the customs office, Regulation (EEC) No 1709/74, which is binding in its entirety and which is applicable in every Member State, amended neither the wording nor the content of the Common Customs Tariff, but simply defined the latter restrictively.

By order of 25 March 1975 the Finanzgericht Berlin stayed the proceedings and referred the following two questions to the Court in accordance with Article 177 of the EEC Treaty:

'Are cherries, which are put up in a mixture of water and ethyl alcohol and which were imported into the territory of Berlin (West) on 9 September 1974, to be classified under heading 08.11 of the Common Customs Tariff (CCT) or subheading 20.06 B I CCT?

In particular is Regulation (EEC) No 1709/74 of the Commission of 2 July 1974 — Official Journal L 180/15 of 3 July 1975 — valid in so far as it classifies goods under subheading 20.06 B I CCT?'

The order making the reference was registered at the Court Registry on 15 April 1975.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General it was decided to ask the Commission and the plaintiff in the main action to produce various documents.

II — Summary of the written observations

A — The *undertaking Bagusat KG* considers that there cannot be any difference between a decision of the Commission relating to a tariff heading and a regulation of the Commission on classification, since these two legal measures are only auxiliary methods for the interpretation of tariff headings when the latter are doubtful. They cannot however amend either the wording or the meaning of the Tariff.

The delimitation of the two tariff headings in question is carried out in accordance with three criteria:
- the method of preservation;
- suitability for immediate consumption;
- the economic and commercial purpose of applying customs duties at different rates.

Method of preservation

A comparison of the two subheadings and their wording shows that only heading 08.11 is applicable, since all fruit which is not provisionally preserved comes under heading 20.06. It is not the method of effecting preservation which is of decisive importance, but its purpose. The cherries imported by the applicant were preserved only provisionally:
- a mixture of water and spirit was added to them;
- its strength was sufficient solely to preserve the product during transport and for a short storage period;
- the alcohol content was kept at the lower limit required to ensure provisional preservation.

The Bagusat undertaking quotes the Explanatory Notes to the Brussels Nomenclature relating to heading 08.11 and takes the view that its product is covered by the explanations appearing therein.

Since it gives only secondary importance to the criterion of provisional preservation, Regulation (EEC) No 1709/74 is based on an erroneous ground. The concept 'provisionally preserved' is the decisive criterion for the distinction between headings 08.11 and 20.06.

The criterion 'unsuitable in that state for immediate consumption'

The statement by the Commission in Regulation (EEC) No 1709/74 that cherries of the type in question 'are not thereby rendered *unsuitable* for immediate consumption' is not reasoned. It is, furthermore, false, since suitability for consumption presupposes preservation for an unlimited period.

Further, the expression 'immediate' restricts the concept of suitability for consumption. Cherries immersed in spirit and transported in casks are not eaten in that state.

The determining factor lies in consumer practices in normal circumstances. In that respect, the Bagusat undertaking produces an expert's report by the Director of the Bund für Lebensmittelrecht und Lebensmittelkunde.

Applicable rate of customs duty

Tariff heading 08.11 includes primary products which are preserved only provisionally for the length of transport time and are then processed finally by the national industry. Tariff heading 20.06, on the other hand, covers fruit which has been finally prepared and preserved, has already been through all the stages of processing and which, as products fit for consumption and generally ready for sale, may be despatched directly to the consumer.

This explains why the rates of customs duty laid down in Chapter 20 are distinctly higher.

B— The *Commission* points out that, as a regulation within the meaning of Article 189, Regulation (EEC) No 1709/74 requires the courts of the Member States to classify goods in accordance with its instructions. The Court of Justice itself has not the power to make a classification other than the classification prescribed.

Only if the Court rules that the regulation is invalid may the exact classification of the cherries once more be the subject of discussion.

Since the objective of the regulations concerning tariff classification such as Regulation (EEC) No 1709/74 is not formal amendment of the nomenclature of the tariff and they decide exclusively on the classification under a particular tariff heading of the goods which they describe, an amendment of the wording of the tariff by means of such regulations could only be illegal if goods were classified under a tariff heading to which they clearly did not belong, in view of the structure of the Common Customs Tariff and the definition of the heading in question.

It is not sufficient that according to the wording of the tariff, a classification different from that laid down is conceivable or possible for it immediately to be regarded as an unacceptable amendment of the tariff and an infringement of the enabling provision laid down in Regulation (EEC) No 97/69 entailing the nullity of the measure in question.

Regulations such as Regulation (EEC) No 1709/74 in question would be deprived of their true function if the mere fact that a classification other than that laid down was conceivable could lead to their annulment.

They cannot be regarded as void unless the decision which they contain is clearly contrary to the letter, the structure, and the rules of tariff classification, is clearly wrong and arbitrary and can no longer be justified by means of substantive arguments.

It is impossible to infer the nullity of a regulation concerning tariff classification only from the fact that this regulation does not correspond to the interpretation given to the tariff in certain Member States or that it was adopted in reaction to decisions taken by national authorities and regarded as improper by the Commission. In this case the regulation should not be annulled but the tariff classification, as applied in the Member State in question, should be revised.

The only legal source of the regulations concerning tariff classification which are based on Regulation (EEC) No 97/69, is Community law. Their validity can therefore be assessed solely in accordance with the criteria laid down in the EEC Treaty and by means of an independent analysis of the letter and the spirit of the Common Customs Tariff carried out with the help of the binding rules of interpretation which it contains.

The wording of tariff heading 20.06 describes cherries put up in spirit with the help of three of their objective characteristics; they must be
— fruit
— preserved
— with the addition of spirit.

Cherries however come under heading 20.06 only if they have been preserved or prepared 'otherwise' than by one of the methods prescribed in Chapter 8. In these circumstances, the validity of Regulation (EEC) No 1709/74 may only be questioned if cherries put up in alcohol ought clearly and without any doubt to be classified under heading 08.11.

Heading 08.11 includes cherries which have been 'provisionally preserved'. Spirit is a traditional steeping agent intended

for the preservation of food and also fruit. From a strength of about 14 % to 16 % of alcohol by volume onwards, micro-organisms can no longer decompose the fruit and the fermentation process is prevented. The resulting preservation is permanent, above all if it is reckoned that fruit is not generally preserved for ever but merely until its consumption at some time in the future. The samples of cherries preserved in spirit which served as the basis of the judgment of the Bundesfinanzhof were still in a perfect state of preservation after four years. At the time of the discussions concerning the adoption of Regulation (EEC) No 1709/74, the competent committee used even older samples which were very well preserved.

It is impossible to remove from cherries which are processed 'sweetmeats' all the alcohol in which they were preserved before they are processed, so that the latter contributes decisively to their subsequent preservation until they are consumed.

According to the wording of tariff heading 08.11 the latter refers only to preserving processes, the application of which makes cherries 'unsuitable for consumption'. In the absence of that characteristic, if cherries which are originally suitable for immediate consumption are not made unsuitable for immediate consumption by the preserving process, they do not come under tariff heading 08.11 but under tariff heading 20.06.

Cherries which are 'unsuitable' for consumption are cherries which cannot be eaten without disturbance or damage to health. This concept can only be used in a nomenclature which is applied throughout the world such as the Brussels nomenclature by being described objectively in this way.

The Commission examines the examples of preservatives mentioned under tariff heading 08.11. It concludes that according to these examples the preservative must either be removed or reduced to safe quantities so as not to be harmful to health before the goods are put on sale.

The words used under tariff heading 08.11 as applied to daily practice mean that the product cannot be consumed in the state in which it is because of the nature of its preservation or preparation and it must, before being consumed, undergo preparation so that it can be eaten without danger to the system.

Cherries are, as such, consumable fruit; the means of preservation, potable spirit with an alcoholic strength of 14 % to 16 % by volume, is also fit for consumption.

What the Bundesfinanzhof did was to replace the concept of 'suitable for immediate consumption' by that of 'intended for immediate consumption'.

A product is described as 'intended for immediate consumption' when it is to be consumed in the state in which it already is. On the other hand, it is described as 'suitable for immediate consumption' when it may be eaten without danger, whether that is normal or not.

The Commission quotes several examples in the Common Customs Tariff of the use of both concepts to distinguish a tariff heading.

Further, the explanatory notes of the Commission concerning the customs tariff with regard to tariff heading 20.06 mention a whole series of products which may certainly be eaten immediately, but which, as intermediate and semi-finished products, are used and intended not for immediate consumption but for the manufacture of finished food products.

Thus although the tariff concept 08.11 does not include the cherries in question in a manner which is completely clear and free from ambiguity so that

classification under tariff heading 20.06 appears to be *a priori* and manifestly indefensible, the Commission has not, by adopting Regulation (EEC) No 1709/74, exceeded the limits of the power of interpretation which was conferred on it by Regulation (EEC) No 97/60.

In conclusion, the Commission suggests the following reply to the questions referred for a preliminary ruling.

'If cherries put up in alcohol are imported into the Community after the entry into force of Regulation (EEC) No 1709/74 they must be classified under tariff subheading 20.06 B 1 of the Common Customs Tariff'.

The Bagusat undertaking represented by D. Ehle of the Cologne Bar and the Commission of the European Communities represented by its Legal Adviser Peter Kalbe, acting as Agent, presented oral observations at the hearing on 6 October 1975.

The Advocate-General delivered his opinion at the hearing on 22 October 1975.

Law

1 By an order of 25 March 1975, received at the Court on 15 April 1975, the Finanzgericht Berlin requested the latter, under Article 177 of the EEC Treaty, to give a preliminary ruling on the validity of Regulation (EEC) No 1709/74 of the Commission of 2 July 1974 (OJ L 180, p. 15) and on the interpretation of heading 08.11 and of subheading 20.06 B 1 of the Common Customs Tariff.

2 The main action is concerned with the question whether cherries immersed in a mixture of water and alcohol in order to preserve them provisionally during transport to the Community and until, after draining, they are used for the chocolate industry in the Community, are to be classified under tariff subheading 20.06 B 1.

3 The Court is asked to rule whether cherries put up in a mixture of water and ethyl alcohol must be classified under heading 08.11 or under subheading 20.06 B 1 of the Common Customs Tariff and in particular whether Regulation (EEC) No 1709/74 is valid to the extent to which it classifies certain products under subheading 20.06 B 1.

4 Article 1 of Regulation (EEC) No 1709/74 provides that 'Cherries put up in a mixture of water and ethyl alcohol shall be classified as fruit suitable for immediate consumption in the following subheading of the Common Customs Tariff:

20.06 Fruit otherwise prepared or preserved, whether or not containing added sugar or spirit:

B. Other:

I. containing added spirit'.

5 The second recital of the preamble to Regulation No 97/69 of the Council on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (OJ, English Special Edition 1969 (I) p. 12) explains that the provisions ensuring that the nomenclature is uniformly applied in all the Member States should specify the content of the headings or subheadings of the Common Customs Tariff, with the sole reservation that the provisions adopted by the Commission do not amend the text of the Tariff.

6 The regulation set up a Committee on Common Customs Tariff Nomenclature, specifying in the third recital of the preamble thereto that the provisions concerning the measures which may be necessary for classifying certain goods in the Tariff relate to a particularly technical field and that close cooperation is required between the Member States when drawing them up.

7 In this field, the Council has conferred on the Commission, acting in cooperation with the customs experts of the Member States, a wide discretion as to the choice between two or more headings which came into consideration with regard to the classification of specific goods.

8 It is necessary to consider whether the effect of Regulation (EEC) No 1709/74 has been to amend the text of the Tariff.

9 Although the terms of subheading 20.06 B 1 of the Common Customs Tariff are appropriate to cover the goods in question, nevertheless the chapter notes which according to the general rules for the interpretation of the nomenclature of the Common Customs Tariff are, together with the terms of the headings, determinative for legal purposes with regard to the classification of a product, state that Chapter 20 does not cover fruit prepared or preserved by the processes specified in Chapter 8.

According to the terms of heading 08.11, the only heading of this chapter which could be taken into consideration with regard to the classification of

the goods in question, that heading covers 'Fruit provisionally preserved (for example, by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions), but unsuitable in that state for immediate consumption'.

It is precisely in a case like that in the present instance where the tariff does not set out an exhaustive list of preserving processes which come under heading 08.11 but gives only examples that the Commission, acting in cooperation with the national experts, is empowered to adopt a regulation defining the types of process which are referred to therein.

10 The expert's report lodged by the plaintiff in the main action tends only to show that cherries put up in a mixture of water and ethyl alcohol, in the absence of other constituents calculated to improve the taste, cannot be regarded, according to general opinion, as 'suitable for immediate consumption'.

11 On the other hand, the Commission, following the opinion of the Committee on Common Customs Tariff Nomenclature, considered that such cherries are not made unsuitable for consumption.

No factor put forward by the plaintiff in the main action is such as to show that the Commission has exceeded the limits of the discretion conferred upon it.

12 Consequently it is necessary to reply to the national court that an examination of the question raised has not disclosed any factor such as to affect the validity of Regulation (EEC) No 1709/74 of the Commission and that under that regulation cherries put up in a mixture of water and ethyl alcohol must be classified under subheading 20.06 B 1 of the Common Customs Tariff.

Costs

13 The costs incurred by the Commission of the European Communities which has submitted its 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 on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Finanzgericht Berlin by order of 25 March 1975 hereby rules:

1. **An examination of the question raised has not disclosed any factor such as to affect the validity of Regulation (EEC) No 1709/74 of the Commission;**

2. **Under Regulation (EEC) No 1709/74 of the Commission, cherries put up in a mixture of water and ethyl alcohol must be classified under subheading 20.06 B 1 of the Common Customs Tariff.**

Lecourt Monaco Kutscher Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 11 November 1975

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 22 OCTOBER 1975 [1]

Mr President,
Members of the Court,

The German limited partnership Bagusat KG imports from Yugoslavia cherries intended for the chocolate industry. This fruit is preserved in a flavoured mixture of water and ethyl alcohol.

On 9 September 1974 it submitted a consignment of 30 barrels containing this product to the Berlin-Packhof customs office and stated in its declaration that it came under heading No 08.11 of the Common Customs Tariff relating to 'Fruit provisionally preserved (for example, by sulphur

1 – Translated from the French.