

In Case 317/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof [Federal Finance Court] for a preliminary ruling in the action pending before that court between

HOWE & BAINBRIDGE BV, Mijdrecht, The Netherlands,

and

OBERFINANZDIREKTION [Principal Revenue Office] FRANKFURT AM MAIN,

on the interpretation and validity of Note 2 (A) to Chapter 59 of the Common Customs Tariff,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 22 of the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

The main action concerns the classification of fabric described as "sail-cloth textile fabric", which it is common

ground has been treated with artificial plastic materials.

By a binding customs tariff ruling issued on 22 May 1975, the Oberfinanzdirektion [Principal Revenue Office], Frankfurt am Main, classified the goods under heading 51.04 A of the Common Customs Tariff (woven fabrics of synthetic textile fibres; duty of 13%). The plaintiff in the main action lodged an objection to that opinion with the Oberfinanzdirektion, requesting classification under heading 59.08 (textile fabrics impregnated, coated, covered or laminated with preparations of cellulose derivatives or of other artificial plastic materials; duty of 14%).

The Oberfinanzdirektion rejected that objection, having regard to Note 2 (A) to Chapter 59, which provides that:

"Heading No 59.08 is to be taken to apply to textile fabrics impregnated, coated, covered or laminated with preparations of cellulose derivatives or of other artificial plastic materials whatever the weight per square metre and whatever the nature of the plastic material (compact, foam, sponge or expanded).

It does not, however, cover:

- (a) fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually Chapters 5C to 5E and 6D); for the purpose of this provision, no account should be taken of any resulting change of colour;
- (b) products which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15° and 32° C (usually Chapter 39); or
- (c) products in which the textile fabric is either completely embedded in artificial plastic material or coated or covered on both sides with such material (Chapter 39)."

The plaintiff in the main proceedings challenged that refusal before the Bundesfinanzhof (Federal Finance Court) which requested an expert opinion from the Bundesanstalt für Materialprüfung (Federal Institute for the Testing of Materials). According to the Bundesfinanzhof, the technical expert referred not only to the concept of direct visual perceptibility (appearance of a piece of fabric lying flat on the table), but also to possibilities of indirect visual examination (that is to say, whether or not the fabric, which is usually imported in bales, has smooth edges where it has been cut, whether or not the fabric clings to the base or whether or not, for example, it has a crease which could have been brought about only in the course of the examination for the purpose of tariff classification). He reached the conclusion that those criteria supported a finding made with the naked eye to the effect that the fabric had been treated within the meaning of Note 2 (A) (a), since otherwise it would fray out at the edges, it would cling to a base on which it was placed and also could not be creased.

Before making a ruling, the Bundesfinanzhof then referred to the Court the following two questions:

- "1. Which is the correct interpretation of Note 2 (A) (a) to Chapter 59 of the Common Customs Tariff which states that heading 59.08 does not cover fabrics in which the impregnation, coating or covering with preparations of cellulose derivatives or of other artificial plastic materials cannot be seen with the naked eye? Does the interpretation depend upon the perception of any observer or of an average or particularly experienced customs official or on that of an expert? Do the words 'cannot be seen with the naked eye' mean that only a piece of fabric

living on a flat surface is to be visually appraised or do they also allow the possibility of recognition by indirect visual means which point to the stiffness of the fabric as a result of impregnation, coating or covering (for example, lack of 'fraying out' at the cut edges, continued presence of creases in the fabric)?

2. If such interpretation depends upon the perception of any observer or of an inexperienced customs official:

Is the above-mentioned note valid inasmuch as it confronts these persons with almost insoluble tariff classification problems?"

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Council, represented by its Legal Adviser, A. Sacchetti, acting as Agent, and by the Commission, represented by its Legal Adviser, R. Wagenbaur, acting as Agent, assisted by T. van Rijn, a member of its Legal Department.

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

By an order of 19 May 1982, the Court decided to assign the case to the Second Chamber.

II — Background and interpretation of Note 2 (A)

In the version of the Common Customs Tariff in force in 1968, the note required, like the Nomenclature of the Customs Cooperation Council, that the treatment of the fabric should be "apparent"

By a decision in 1966, the Nomenclature Committee of the Customs Cooperation Council had confirmed that the word "apparent" was to be interpreted as meaning "visible to the naked eye" and had rejected the possibility of taking into consideration the fact that the treatment could be perceptible to the touch or recognizable with the aid of an instrument.

By amendments to the Nomenclature of the Customs Cooperation Council and of the Common Customs Tariff made in 1969 and 1972 respectively, the note was drafted in its present form.

The Committee on Common Customs Tariff Nomenclature, at a meeting in January 1976, interpreted the note as meaning that heading 59.08 did not apply to goods the treatment of which could not be seen with the naked eye except after they had been creased and, in 1978, in a decision concerning the classification of a knitted fabric impregnated with plastic material, the Nomenclature Committee of the Customs Cooperation Council took the view that:

"The words 'can ... be seen with the naked eye' are to be interpreted narrowly, as meaning direct perception, by looking at the surface of the fabric. The fact that the impregnation has made the fabric somewhat stiff, where moreover no traces of the impregnating product are visible to the naked eye on the surface of the fabric, does not permit the classification of such fabric under heading 59.08."

III — Written observations

1. Interpretation

The Commission proposes a narrow interpretation, that is to say in favour of direct perception, by looking at the

surface of the fabric. To be seen with the naked eye, traces of the impregnating product should be visible to the naked eye on the surface of the fabric.

The Commission therefore excludes recourse to instruments such as a magnifying glass or microscope, or chemical analyses. It also rejects the idea of "indirect perception" suggested by the Bundesanstalt für Materialprüfung as being permissible to meet the requirements contained in Note 2 (A). It would therefore not be acceptable to draw conclusions from the fact that the fabric has smooth edges everywhere it has been cut or that impregnation makes the fabric stiff so that it does not cling to the base. It would also not be permissible to fold or handle the fabric in order to see whether it holds its position horizontally.

2. *Validity*

The *Council* and the *Commission* both take the view that the contested note is valid.

They both agree that it is the task of the customs authorities so to organize themselves as to ensure the proper application of the Common Customs Tariff. It is the perceptual ability of the

average customs officer, not that of any observer or of an inexperienced customs officer, which must be taken into account. Such an officer is quite capable of arriving at a decision in a case such as this, because he has received the necessary training and because he has then acquired some practical experience. Furthermore, the note is worded in terms identical to those of the Nomenclature of the Customs Cooperation Council. The Council cites other examples of notes establishing criteria based on the sensory capacity of customs officials required to apply those nomenclatures. Such subjective criteria are justified in order to make it possible to check goods rapidly at the time of customs clearance.

IV — Oral procedure

At the sitting on 15 July 1982 oral argument was presented by the following: N. Pfeiffer, Rechtsanwalt, Düsseldorf, for the plaintiff in the main action; A. Sacchetti, Legal Adviser, acting as Agent, for the Council; and T. van Rijn, a Member of the Legal Department, acting as Agent, for the Commission.

The Advocate General delivered his opinion at the sitting on the same date.

Decision

By order dated 17 November 1981 which was received at the Court on 21 December 1981 the Bundesfinanzhof [Federal Finance Court] referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation and validity of Note 2 (A) (a) to Chapter 59 of the Common Customs Tariff:

- 2 Those questions arose in the course of proceedings between a Netherlands undertaking, the plaintiff in the main action, and the Oberfinanzdirektion [Principal Revenue Office] Frankfurt am Main on the question of a binding customs tariff ruling of 22 May 1975 relating to goods described by the plaintiff as "sailcloth textile fabric".
- 3 In the ruling the Oberfinanzdirektion classified the goods under heading 51.04 A of the Common Customs Tariff (woven fabrics of synthetic textile fibres) whereas the plaintiff desired classification under heading 59.08 (textile fabrics impregnated, coated, covered or laminated with preparations of cellulose derivatives or of other artificial plastic materials).
- 4 It appears from the file that the goods in question had in fact been treated in the manner provided for in heading 59.08 but the Oberfinanzdirektion rejected classification thereunder by reason of Note 2 (A) to Chapter 59 according to which heading 59.08 does not cover *inter alia*:

"(a) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye"

- 5 Upon the plaintiff's bringing an action against the customs tariff ruling the Bundesfinanzhof referred the following questions to the Court:

"1. Which is the correct interpretation of Note 2 (A) (a) to Chapter 59 of the Common Customs Tariff which states that heading 59.08 does not cover fabrics in which the impregnation, coating or covering with preparations of cellulose derivatives or of other artificial plastic materials cannot be seen with the naked eye? Does the interpretation depend upon the perception of any observer or of an average or particularly experienced customs official or on that of an expert? Do the words 'cannot be seen with the naked eye' mean that only a piece of fabric lying on a flat surface is to be visually appraised or do they also allow the possibility of recognition by indirect visual means which point to the stiffness of the fabric as a result of impregnation, coating or covering (for example, lack of 'fluffing out' on the cut edges, continued presence of creases in the fabric)?

2. If such interpretation depends upon the perception of any observer or of an inexperienced customs official:

Is the above-mentioned note valid inasmuch as it confronts these persons with almost insoluble tariff classification problems?"

- 6 There are two parts to Question 1, the first of which concerns the relevant observer for the purposes of the interpretation and application of the note. Since that first part is closely connected with Question 2, relating to the validity of the note they need to be considered together but as a preliminary the second part of Question 1 must be examined.
- 7 In the second part of Question 1 the Bundesfinanzhof is asking essentially whether the note makes it a condition for the application of heading 59.08 that the impregnation, coating or covering must be directly visible upon simple visual examination or whether the note allows such treatment to be inferred from the stiffness of the material resulting therefrom.
- 8 In its observations submitted to the Court the Commission stressed in particular matters of interpretation to be derived from the history of the note in question and of the identical note in the corresponding chapter of the Customs Cooperation Council Nomenclature as well as the practice followed by the two Nomenclature Committees, that of the Common Customs Tariff and that of the Customs Cooperation Council with regard to the application of those notes.
- 9 In that respect it must be observed that the original versions of the two notes provided that heading 59.08 did not cover fabrics where the impregnation or coating was not "apparent". Since the Nomenclature Committee of the Customs Cooperation Council interpreted that as meaning "can be seen with the naked eye", the wording of that Nomenclature was amended to that effect in 1969. Subsequently the Common Customs Tariff was amended in the same way by Regulation No 1/72 of the Council of 20 December 1971 (Journal Officiel L 1 of 1 January 1972, p. 1).

- 10 After the amendment the two Nomenclature Committees were called upon to give a ruling on the interpretation of the new version of the notes. In 1976 the Committee on Common Customs Tariff Nomenclature considered that heading 59.08 did not apply to fabrics the treatment of which was not apparent until after the sample had been folded. In 1978 the Nomenclature Committee of the Customs Cooperation Council considered that the words "can be seen with the naked eye" were to be interpreted in the sense of "direct perception" by looking at the surface of the fabric and that the fact that the impregnation had given a certain stiffness to the fabric did not allow it to be classified under heading 59.08.
- 11 The interpretation thus suggested by the amendment of the wording is confirmed by the practice of the Nomenclature Committees; it corresponds to the first alternative proposed by the national court and is in fact consistent with the meaning given to that expression in everyday language.
- 12 Such an interpretation also accords with the objective of the note in question. As the Council has remarked in its observations to the Court, the reasons for which the provisions in force at Community and international level establish such criteria for tariff classification in special cases are basically to be found in the concern to allow speedy checking on customs clearance.
- 13 Moreover, the addition to paragraph (a) of the note, to the effect that no account is to be taken of any resulting change of colour confirms the contention that it must be possible to observe the existence of the treatment directly and not to infer it from other properties which the treatment may have conferred on the fabric.
- 14 That part of Question 1 must therefore be answered to the effect that the expression "can be seen with the naked eye" in Note 2 (A) (a) to Chapter 59 of the Common Customs Tariff is to be interpreted as meaning that the impregnation, coating or covering of the fabric must be directly visible on simple visual examination and that the wording of the note does not allow the conclusion to be drawn from the stiffness of a fabric that it has received such treatment.

- 15 In the first part of Question 1 the Bundesfinanzhof asks whether for the interpretation and application of the note in question account must be taken of the perception of any observer or of an average or particularly experienced customs official or that of an expert.
- 16 In that respect it must be emphasized that although the Common Customs Tariff constitutes a measure of Community law to be interpreted uniformly in all Member States, its application is entrusted to the States.
- 17 That part of Question 1 must therefore be answered to the effect that it is for the Member States to designate the authorities and persons required to undertake the tariff classification of products and to decide their training in order to enable them properly to fulfil such tasks.
- 18 In Question 2 the Bundesfinanzhof essentially asks whether or not the note as far as concerns the words at issue is valid in view of the difficulties which their application may cause to persons called upon to decide the tariff classification of the goods in question.
- 19 In that respect it must be stressed that although difficulties caused by the application of a Community provision may be relevant to its interpretation they are not of such a nature as to call its validity in question.
- 20 It must moreover be mentioned that the application of the note in question, as interpreted above, does not seem to present the difficulties which the question mentions. In cases where the persons entrusted with the task by the Member State are not able by simple visual examination to ascertain that the fabric has been treated it follows from the note that such treatment, if it has in fact taken place, is not sufficient to transfer the fabric from the tariff heading normally applicable to a fabric of that type to the specific heading provided for under No 59.08. Thus the note does in fact reject any examination exceeding the capacities of such persons for the purpose of checking whether or not the fabric has undergone such treatment.

- 21 The second question must therefore be answered to the effect that consideration of the note has disclosed no factor of such a kind as to affect its validity.

Costs

- 22 The costs incurred by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since the 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 (Second Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 17 November 1981, hereby rules:

- (1) The expression "can be seen with the naked eye" in Note 2 (A) (a) to chapter 59 of the Common Customs Tariff is to be interpreted as meaning that the impregnation, coating or covering of the fabric must be directly visible upon simple visual examination. The wording of the note does not allow the inference to be drawn from the stiffness of a fabric that it has received such treatment.
- (2) It is for the Member States to designate the authorities and the persons called upon to undertake the tariff classification of products and to determine the training of such persons in order to enable them to perform their task properly.

- (3) Consideration of the note has disclosed no factor of such a kind as to affect its validity.

Due

Chloros

Grévisse

Delivered in open court in Luxembourg on 30 September 1982.

J. A. Pompe

Deputy Registrar

O. Due

President of the Second Chamber

OPINION OF ADVOCATE GENERAL
SIR GORDON SLYNN
DELIVERED ON 15 JULY 1982

My Lords,

Howe & Bainbridge BV applied for a binding customs tariff ruling in respect of goods which they wished to import into Germany. On 22 May 1975 the Oberfinanzdirektion, Frankfurt am Main, ruled that the goods should be classified under tariff heading 51.04 A, "woven fabrics of synthetic textile fibres". The company objected that the classification should have been under heading 59.08 as "textile fabrics impregnated, coated, covered or laminated with preparations of cellulose derivatives or of other artificial plastic materials".

That objection having been disallowed, the company brought the issue before the Bundesfinanzhof. The argument centred on the proper construction of Note 2 (A) (a) of the Chapter Notes to Chapter 59 of the Common Customs Tariff which, it is accepted, are to be looked at for the purposes of construing the heading. That Note states that heading 59.08 does not cover "fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually Chapters 50 to 58 and 60); for the purpose of this provision, no account should be taken of any resulting change of colour". The French text of the Note,