OPINION OF ADVOCATE GENERAL DARMON

delivered on 17 March 1992 *

Mr President,
Members of the Court,

1. The questions referred to the Court by the Finanzgericht Hamburg (Finance Court, Hamburg) for a preliminary ruling will lead the Court to clarify the manner in which a financing arrangement relating to the purchase of imported goods is to be taken into account in order to determine the valuation of goods for customs purposes.

2. Between 1983 and 1985, including after 1 March 1985, Firma Wünsche Handelsgesellschaft International (GmbH & Co.) ('Wünsche') imported from Spain goods for which credit over 180 days from loading on board the vessel was agreed. Some contracts specified a price FOB plus a separate 4% of the purchase price to cover bank interest borne by the seller in respect of the credit period. Other contracts specified an overall price, plus the same interest charge. However, the invoices for the contracts specified the price of the goods and the amount due by way of interest separately. Wünsche did not include the interest in the customs-value declaration. On the other hand, the Hauptzollampt (Principal Customs Office) Hamburg-Jonas decided to apply the customs duty due also to the amount of interest stipulated in the contracts. Wünsche challenged that decision before the Finanzgericht Hamburg which has referred two questions to the Court for a preliminary ruling.

3. The questions are concerned with the interpretation of the expression 'financing arrangement relating to the purchase of imported goods' in Article 3 of Commission Regulation No 1495/80, [1] accord being taken of the amendment to this provision under Regulation No 220/85. [2]

4. Article 3 of Regulation No 1495/80 provided as follows:

'Provided that they are distinguished from the price actually paid or payable, the following shall not be included in the customs value ...:

...

(c) interest payable under a financing arrangement relating to the purchase of imported goods'.

5. As a result of the amendment under Article 1 of Regulation No 220/85, the new Article 3 of Regulation No 1495/80 includes,

* Original language: French.

1 — Commission Regulation (EEC) No 1495/80 of 11 June 1980 implementing certain provisions of Articles 1, 3 and 8 of Council Regulation (EEC) No 1224/80 on the valuation of goods for customs purposes (OJ 1980 L 154 p. 14).

2 — Commission Regulation (EEC) No 220/85 of 29 January 1985 amending Regulation (EEC) No 1495/80 implementing certain provisions of Articles 1, 3 and 8 of Council Regulation (EEC) No 1224/80 on the valuation of goods for customs purposes (OJ 1985 L 154 p. 14).

amongst others, the following three paragraphs:

'2. Charges for interest under a financing arrangement entered into by the buyer and relating to the purchase of imported goods shall not be included in the customs value determined under Regulation (EEC) No 1224/80 provided that:

(a) the charges are distinguished from the price actually paid or payable for the goods;

(b) the financing arrangement has been made in writing;

(c) where required, the buyer can demonstrate that:

— such goods are actually sold at the price declared as the price actually paid or payable, and

— the claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided.

3. The provisions of paragraph 2 shall apply, *mutatis mutandis*, where customs value is determined under a method other than the transaction value.

4. The provisions of paragraphs 2 and 3 shall apply regardless of whether the finance is provided by the seller, a bank or another natural or legal person.'

6. Regulation No 220/85 entered into force on 1 March 1985 (Article 2(1)). The original provisions of Article 3(c) of Regulation No 1495/80 continue to apply to goods for which the material time for valuation for customs purposes is prior to 1 March 1985 (Article 2(2)). Therefore both the regulations apply concurrently to the imports carried out by Wünsche.

7. To my mind, the first observation to be made is that the change brought about by Regulation No 220/85 did not have the effect of modifying the concept — which moreover is not defined — of 'financing arrangement'. The paragraphs inserted by Regulation No 220/85 merely require *new methods of proof*: the financing arrangement has to be made in writing; the buyer has to prove that the goods were actually sold at the price declared and that the claimed rate of interest does not exceed the levels of such transactions prevailing in the country where, and at the time when, the finance was provided. Consequently, two different definitions of the expression 'financing arrangement' cannot be applied depending on whether the initial version of Regulation No 1495/80 or the version as amended by Regulation No 220/85 is applicable. This moreover is the view taken by the national court, Wünsche and the Commission.

8. There is no such unanimity about the concept of '*financing arrangement*' itself.

9. The national court considers that where interest is stipulated when time is granted for payment, this may not be regarded as a 'financing arrangement'. In its view the upshot of such an interpretation would be, on the one hand, that the transaction value determined would be different in amount from the total payment made by the buyer, contrary to Article 3(3)(a) of Council Regulation No 1224/80, [3] and, on the other, that this would open up opportunities for fraud. The national court proposes that in order to qualify for the deduction of interest from customs value the buyer must prove that the goods would have been sold for a lower price if he had paid on delivery.

10. The Commission seems to share these concerns. In its view, the agreement on time for payment may not of itself be regarded as a 'financing arrangement', since, if it were, all international sales contracts not requiring payment for in cash would qualify for deduction of interest. This would be contrary to the fundamental principle of the law relating to customs valuation which is referred to in Article 2(4)(g) of Regulation No 1224/80 which proscribes recourse to arbitrary or fictitious values. Lastly, a financing arrangement presupposes both the stipulation of an exceptionally long period for payment and proof that *separate provision* was made for interest and that the buyer would have been entitled to pay a lower price had he paid in cash.

11. Wünsche, on the other hand, maintains that any stipulation for payment of interest where credit is granted is a financing arrangement within the meaning of Article 3 of Regulation No 1495/80.

12. As appears from the third recital in the preamble to Regulation No 220/85, the new Article 3 constitutes implementation by the Community of a decision by the GATT Council for customs cooperation. More specifically, the decision in question is that of 26 April 1984 of the Committee on Customs Valuation on 'Treatment of Interest Charges in the Customs Value of Imported Goods'. [4]

13. I should say at once that Wünsche's view seems to me to be the only correct one. There is nothing in the provisions of Regulations Nos 220/85 and 1495/80 to suggest that the concept of 'financing arrangement' can be restricted in this way. The aforementioned decision of the Committee on Customs Valuation, or at least its title, refers to 'interest charges' without mentioning a specific type of financing arrangement. Furthermore it states that it is to apply 'regardless of whether the finance is provided by the seller, a bank or another natural or legal person', which demonstrates the very broad terms in which it was intended to provide for the deduction of interest. Moreover, that same wording is incorporated in the new Article 3(4) of Regulation No 1495/80.

3 — Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1).

4 — *Basic Instruments and Selected Documents*, vol. 31, p. 299.

14. The national court's proposal, adopted by the Commission, to the effect that the application of the right to deduct interest should be subject to the buyer's proving that the goods would have been sold to him for a lower price if he had paid in cash does not seem to me to be acceptable. It is not possible to use requirements relating to the *rules governing proof* in order to determine *the legal nature* of an agreement concluded between traders. The Court will have noted that this requirement of proof is already embodied in the provisions of the new Article 3(2)(c) of Regulation No 1495/80, which provides that the buyer, 'where required', must demonstrate that 'such goods are actually sold at the price declared', which in plain language means that the price declared is not artificially low.

15. The other criterion, that of an abnormally long period, put forward by the Commission seems to me to be completely irrelevant. Apart from the difficulties of assessment which that criterion necessarily involves, it is not certain that it takes sufficient account of the realities of economic life. Undertakings sometimes need very short-term credit, in particular to cover the period in which they have to pay their suppliers and their employees but have not yet received payment from their customers. [5] It is therefore difficult to see how the grant of time for payment, even a short time, coupled with provision for payment of interest, may not be regarded as a financing arrangement. Whatever the period granted, what is involved is sums paid by the buyer to the seller in return for a service *distinct* from the sale of the goods.

5 — Conversely, an exceptionally long period may be granted by the seller in order to facilitate, for cash-flow reasons, the sale of goods which have been in stock for a long time.

16. Such a conclusion — unlike the view which the national court seems to take — does not conflict with Article 3(3)(a) of Regulation No 1224/80. That article provides that 'the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods'. However, Article 3(4) itself enables certain costs to be deducted and Article 3 of Regulation No 1495/80 has made further additions to the list of possible deductions. It cannot therefore be considered that there is an absolute principle, allowing of no exception, according to which the price actually paid or payable is the total amount of the sums paid by the buyer to the seller.

17. The same applies to Article 2(4)(f) and (g) under which customs value may not be based on minimum, arbitrary or fictitious value. It is surprising that the Commission is invoking those provisions against the rules — to my mind unambiguous — contained in Regulations Nos 220/85 and 1495/80, regulations which it itself adopted in implementation of the GATT.

18. Certainly, the concerns expressed by the national court and the Commission about the risk of fraud are legitimate. It is necessary to prevent the price of the goods from being artificially reduced in order to diminish the customs value, the seller receiving, in the form of exorbitant interest, payment for part of the normal value of the goods. It is in order to take account of that concern that the new Article 3 of Regulation No 1495/80 requires the financing arrangement

to have been made in writing and requires the buyer to demonstrate, where required by the customs authorities, that such goods are actually sold at the price declared and that the interest rate does not exceed 'the level for such transactions prevailing' in the country where, and at the time when, the finance was provided. Since, moreover, the amount of the interest has to be shown separately, it is not very difficult for the customs authorities to ascertain the interest rate agreed and to compare it with the rates prevailing in the country concerned.

19. It is true that, for the period prior to 1 March 1985, Article 3 of Regulation No 1495/80 required interest only to be distinguished. However, Article 10(1) of Regulation No 1224/80 provides that 'with a view to determining value for customs purposes and without prejudice to national provisions which confer wider powers on the customs authorities of Member States, any person or undertaking directly or indirectly concerned with the import transactions in question shall supply *all necessary information* and documents to those authorities within the time-limit prescribed by the latter'. [6] Consequently, in my view there is nothing to prevent the customs authorities — even for the period prior to 1 March 1985 — from requiring as necessary information within the meaning of Article 10(1) of Regulation No 1224/80, evidence which may now be required pursuant to Article 3 of Regulation No 1495/80 as amended by Regulation No 220/85.

20. I propose therefore that the Court should rule as follows:

(1) Article 3 of Commission Regulation (EEC) No 1495/80 of 11 June 1980 implementing certain provisions of Articles 1, 3 and 8 of Council Regulation (EEC) No 1224/80 on the valuation of goods for customs purposes [7] must be interpreted as meaning that 'interest payable under a financing arrangement' refers to the interest agreed when the seller grants time for payment, irrespective of the length of that time.

(2) That interpretation is unaffected by the new wording of the aforesaid Article 3, resulting from Article 1 of Commission Regulation (EEC) No 220/85 of 29 January 1985 amending Regulation (EEC) No 1495/80. [8]

6 — Emphasis added.

7 — OJ 1980 L 154 p. 14.

8 — OJ 1985 L 25 p. 7.