

JUDGMENT OF THE COURT (Fifth Chamber)

26 September 2000 \*

In Case C-42/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Supremo Tribunal Administrativo, Portugal, for a preliminary ruling in the proceedings pending before that court between

**Fábrica de Queijo Eru Portuguesa Ld.<sup>a</sup>**

and

**Tribunal Técnico Aduaneiro de Segunda Instância,**

Joined party:

**Ministério Público,**

on the interpretation of the Combined Nomenclature as set out in Annex I of Commission Regulation (EEC) No 3174/88 of 21 September 1988 amending

\* Language of the case: Portuguese.

Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1988 L 298 p. 1),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, P.J.G. Kapteyn, H. Ragnemalm (Rapporteur) and M. Wathelet, Judges,

Advocate General: N. Fennelly,  
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Fábrica de Queijo Eru Portuguesa Ld.<sup>a</sup>, by Á. Caneira, lawyer, Lisbon,
- the Portuguese Government, by L. Fernandes, Director of the Legal Service in the Directorate-General for European Community Affairs in the Ministry of Foreign Affairs, Â. Seiça Neves, a member of that service, and H. Ventura, a member of the Legal Service of the Directorate-General for Customs and Special Consumer Taxes, acting as Agents,
- the Commission of the European Communities, by F. de Sousa Fialho, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Fábrica de Queijo Eru Portuguesa Ld.<sup>a</sup>, represented by Á. Caneira; of the Portuguese Government, represented by V. Guimarães, lawyer at the Centre for Fiscal Studies of the Directorate-General for Taxes, acting as Agent; and the Commission, represented by A. Caeiros, of its Legal Service, acting as Agent, at the hearing on 6 April 2000,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2000,

gives the following

### Judgment

- 1 By order of 13 January 1999, received at the Court on 12 February 1999, the Supremo Tribunal Administrativo (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of the Combined Nomenclature as set out in Annex I to Commission Regulation (EEC) No 3174/88 of 21 September 1988 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1988 L 298 p. 1, hereinafter 'the CN').
- 2 Those questions were raised in proceedings between Fábrica de Queijo Eru Portuguesa Ld.<sup>a</sup> (hereinafter 'Eru Portuguesa') and the Tribunal Técnico Aduaneiro de Segunda Instância regarding the tariff classification under the CN of a product described as 'skimmed milk cheese'.

## The Community legislation

3 The following CN headings are considered relevant by the referring court:

'0406	Cheese and curd:
...	
0406 90	— Other cheese:
0406 90 11	— — For processing
	— — Other
...	
3501	Casein, caseinates and other casein derivatives; casein glues:
3501 10	— Casein:
...	
3501 10 90	— — Other'.

4 Note 2 to Chapter 4 of Regulation No 3174/88 states:

'Products obtained by the concentration of whey and with the addition of milk or milkfat are to be classified as cheese in heading No 0406 provided that they have the three following characteristics:

(a) a milkfat content, by weight of the dry matter, of 5% or more;

(b) a dry matter content, by weight, of at least 70% but not exceeding 85%;

(c) they are moulded or capable of being moulded.'

- 5 The explanatory notes to the Harmonised Commodity Description and Coding System (hereinafter 'the HS') state, as regards heading 3501, (A), (1), 'Casein, caseinates and other casein derivatives', that casein is the main protein constituent of milk and is obtained from skimmed milk by precipitation (curdling), generally with acids or rennet.
- 6 The Commission's explanatory notes to the CN state, as regards tariff subheadings 3501 10 10 to 3501 10 90:

'These subheadings cover the caseins referred to in the HS Explanatory Notes to Heading No 3501, (A), (1). These caseins — irrespective of the method of precipitation used to obtain them — are classified in these subheadings when they contain 15% or less by weight of water; otherwise they are classified in Heading No 0406.'

#### **The main proceedings and the questions referred for a ruling**

- 7 In March 1989, Eru Portuguesa imported from Denmark 1 863 boxes of a commodity described as 'skimmed milk cheese'. The product had the

following composition: 54% water, 0.9% fat, 5.7% phosphorus, 2% salt and casein.

- 8 According to a statement by Eru Portuguesa, annexed to the written observations of the Portuguese Government, the product is made by the addition of rennet to skimmed milk and takes the form of flakes which are not soluble in water but soluble in an alkaline medium.
- 9 Also according to that statement, the product is intended for the manufacture of dietetic products. At the hearing Eru Portuguesa stated that the product was intended to be made into cheese.
- 10 Eru Portuguesa declared the product under tariff heading 3501 10 90 as casein. However, the Portuguese customs authorities, the Tribunal Técnico de Primeira Instância (Specialised Customs Court of First Instance) and the Tribunal Técnico Aduaneiro de Segunda Instância (Specialised Customs Court of Second Instance) classified it under tariff heading 0406 90 11 as cheese. Eru Portuguesa brought an appeal before the Supremo Tribunal Administrativo after the Tribunal Tributário de Segunda Instância (Tax Court of Second Instance) had dismissed an action contesting that classification.
- 11 In those circumstances, the Supremo Tribunal Administrativo decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '1. Are the Explanatory Notes to the Combined Nomenclature, where they state that caseins containing by weight more than 15% water are included under

heading 0406 (cheese and curd), contrary to Commission Regulation (EEC) No 3174/88 according to which (Chapter 4) they are to be classified under heading 0406 as cheese provided that:

- (a) they have a fat content of 5% or more;
- (b) they have a dry matter content, by weight, of at least 70% but not exceeding 85%; and
- (c) they are moulded or capable of being moulded?

2. Having regard to Commission Regulation (EEC) No 3174/88, are the imported goods (which have the following composition: 54% water, 0.9% fat, 5.7% phosphorus, 2% salt and casein) to be classified under customs heading 3501 10 90 0 00 000 as “Casein — Other”, or under customs heading 0406 90 11 01 0 000 as “Other cheese?”
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- 12 By its questions, which should be considered together, the referring court is asking whether the CN is to be interpreted as meaning that a product made by adding rennet to skimmed milk and made up of 54% water, 0.9% fat, 5.7% phosphorous and 2% salt and casein must be classified under CN tariff subheading 0406 90 11 ‘Other cheese: — For processing’ or under CN tariff subheading 3501 10 90 ‘Casein: — Other’.
  - 13 It is settled case-law that, in the interests of legal certainty and for ease of verification, the decisive criterion for the classification of goods for customs

purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN. There are also explanatory notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the Customs Cooperation Council, which may be an important aid to the interpretation of the scope of the various tariff headings but which do not have legally binding force (see, in particular, Case C-201/96 *LTM v FIRS* [1997] ECR I-6147, paragraph 17, and Case C-280/97 *Rose Elektrotechnik* [1999] ECR I-689, paragraph 16).

- 14 In the present case, it must be observed that neither the terms of the headings nor the notes to the sections or chapters provide any clarification as to the tariff classification of the product at issue in the main proceedings.
  
- 15 On the other hand, the explanatory notes to the HS and the CN regarding the tariff headings concerned give useful indications for the classification of a product such as that at issue in the main proceedings.
  
- 16 The HS explanatory notes state, with regard to heading 3501 concerning casein and casein derivatives, that casein is the main protein constituent of milk and is obtained from skimmed milk by precipitation, generally with acids or rennet.
  
- 17 The Commission's CN explanatory notes provide, as regards tariff subheadings 3501 10 10 to 3501 10 90, that caseins are classified under those subheadings when they contain 15% or less by weight of water. Otherwise, they are classified under heading 0406.



- 18 According to the statement by Eru Portuguesa mentioned at paragraph 8 above, the product in question was made by the addition of rennet to skimmed milk, that is to say in the same way as caseins.
- 19 However, it is clear from the order for reference that the water content of the product is 54%. According to the CN explanatory notes on subheadings 3501 10 10 to 3501 10 90, the product should accordingly be classified under heading 0406 'Cheese and curd'. Since the product does not appear to fall under any other heading in particular and it is intended for processing, subheading 0406 90 11 'Other cheese: — For processing' seems to be the most appropriate classification.
- 20 Since the explanatory notes are not binding, it must be determined whether their content is compatible with the provisions of the CN and does not alter their scope.
- 21 In that regard, it must first be observed that the explanatory notes relating to subheadings 3501 10 10 to 3501 10 90 do not contradict Note 2 to Chapter 4 of Regulation No 3174/88, cited by the referring court in its first question, since those notes concern products made from skimmed milk whereas Note 2 to Chapter 4 of Regulation No 3174/88 concerns only products obtained by the concentration of whey.
- 22 Moreover, it must be observed that the classification resulting from the explanatory notes to subheadings 3501 10 10 to 3501 10 90 does not alter the

scope of the provisions of the CN, given that, first, cheese can be made by the same method as the product at issue in the main proceedings, that is to say by adding rennet to skimmed milk and, second, the Community legislation relating to casein, mentioned by the Advocate General at points 31 and 32 of his Opinion, provides that it has a reduced water content which must on no account exceed 15%.

- 23 Finally, it must be observed that the argument put forward by the Commission at the hearing, to the effect that a product such as that at issue in the main proceedings should not be classified as cheese because of its high level of phosphorous, has no basis either in the provisions of the CN or in the explanatory notes to the HS or the CN.
- 24 Accordingly, the answer to be given to the questions referred should be that the CN is to be interpreted as meaning that a product made by adding rennet to skimmed milk and made up of 54% water, 0.9% fat, 5.7% phosphorous and 2% salt and casein must be classified under tariff subheading 0406 90 11 'Other cheese: — For processing'.

### Costs

- 25 The costs incurred by the Portuguese Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Fifth Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by order of 13 January 1999, hereby rules:

The Combined Nomenclature as set out in Annex I to Commission Regulation (EEC) No 3174/88 of 21 September 1988 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff is to be interpreted as meaning that a product made by adding rennet to skimmed milk and made up of 54% water, 0.9% fat, 5.7% phosphorous and 2% salt and casein must be classified under tariff subheading 0406 90 11 'Other cheese: — For processing'.

Edward

Sevón

Kapteyn

Ragnemalm

Wathelet

Delivered in open court in Luxembourg on 26 September 2000.

R. Grass

D.A.O. Edward

Registrar

President of the Fifth Chamber