

JUDGMENT OF THE COURT (Third Chamber)
24 March 1994^{*}

In Case C-148/93,

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

3M Medica GmbH

and

Oberfinanzdirektion (Principal Revenue Office) Frankfurt am Main

on the interpretation of heading 9021 of the Common Customs Tariff in the version appearing in Commission Regulation (EEC) No 2587/91 of 26 July 1991 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff (Official Journal 1991 L 259, p. 1),

THE COURT (Third Chamber),

composed of: J. C. Moitinho de Almeida (Rapporteur), President of the Chamber,
F. Grévisse and M. Zuleeg, Judges,

^{*} Language of the case: German.

Advocate General: M. Darmon,
Registrar: R. Grass,

after considering the written observations submitted on behalf of the Commission of the European Communities by Francisco de Sousa Fialho, a member of the Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe, of the Brussels Bar,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 January 1994,

gives the following

Judgment

- 1 By order of 2 February 1993, which was received at the Court on 9 April 1993, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of heading 9021 of the Common Customs Tariff in the version contained in Commission Regulation (EEC) No 2587/91 of 26 July 1991 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff (Official Journal 1991 L 259, p. 1).
- 2 Those questions were raised in the course of proceedings between the firm, 3M Medica and the Oberfinanzdirektion (Principal Revenue Office), Frankfurt am

Main concerning the tariff classification of two products known as the 'canvas cast shoe' (a sandal) and the 'vinyl cast shoe' (a shoe), under subheadings 6404 19 90 and 6402 91 90 respectively.

3M Medica's objection to this tariff classification was dismissed by the Oberfinanzdirektion. It therefore instituted proceedings before the Bundesfinanzhof, claiming that the items in question were orthopaedic appliances within the terms of heading 9021 on the ground that they replace walking crampons (orthopaedic accessories fitted to the feet below plaster casts in order to facilitate walking), are only supplied on prescription by pharmacies or clinics, and may be purchased singly and not only in pairs. They are also substitutes for crutches.

The Oberfinanzdirektion, on the other hand, contended that the items in question which enable a person to walk better when wearing a plaster have merely an ancillary function and do not act directly on the deformed or diseased foot. They are neither substitutes for crutches nor fracture appliances.

According to the national court these are products with outer soles of plastics and uppers of textile materials or plastics designed to be worn on the foot over a plaster cast. These items are walking aids to be used when a plaster cast is worn, and are of orthopaedic interest. They could therefore be classified under heading 9021 which covers orthopaedic appliances and fracture appliances and other parts thereof.

Whilst ruling out that the items at issue may be classified as fracture appliances or as orthopaedic footwear, the national court considers that under heading 9021 they could be regarded as orthopaedic appliances for the foot for 'supporting or holding organs following an illness or operation' if the customs tariff notion as so defined

were to be interpreted broadly so as to include walking aids used with a plaster cast. If the plaster cast itself were to be viewed as an orthopaedic appliance, the articles in question could be deemed on the basis of their intended purpose to constitute accessories ('parts') falling under subheading 9021 90 90.

- 7 The national court considers that those articles might also be classified as other orthopaedic appliances. In that connection it observes that heading 9021 also includes crutches and that the articles in question, though not crutches, perform a comparable function.
- 8 In view of its doubts on the classification by the Oberfinanzdirektion, the Bundesfinanzhof requested the Court to give a preliminary ruling on the following questions:
 - '1. Must the term "orthopaedic appliances" in heading 9021 of the Combined Nomenclature (1992) be interpreted as including products of the kind described in the grounds of the order as shoes serving as walking aids to be worn with a fitted plaster cast?
 2. If Question 1 is answered in the negative, is the term "splints and other fracture appliances" or "parts" (of orthopaedic appliances etc.) to be interpreted so that products such as those mentioned above fall thereunder?

The first question

- 9 In the first question the national court seeks to ascertain whether sandals and shoes with outer soles of plastics and uppers of textile materials or plastics designed

to be worn on the foot over a plaster cast constitute 'orthopaedic appliances' under heading 9021 of the combined nomenclature (1992).

- 10 According to the Explanatory Notes to heading 9021 orthopaedic articles and appliances are for 'preventing or correcting certain bodily deformities', or for 'supporting or holding organs following an illness or operation'. They are 'orthopaedic footwear ... made only to measure' and 'special insoles, made to measure', and 'orthopaedic foot appliances (talipes appliances, surgical boots, etc.)'.
- 11 On the other hand, according to the same Explanatory Notes, heading 9021 does not include 'simple protectors or devices designed to reduce pressure on certain parts of the foot' or 'mass-produced footwear the inner soles of which have been simply arched to alleviate flat-footedness'.
- 12 Consequently, as the Commission and the Advocate General have pointed out, the items coming under this heading have in common that they are specially adapted to the handicaps which they are intended to correct, and are specifically designed for a given person.
- 13 Cast sandals and shoes facilitate walking and enhance comfort when a plaster cast is worn. They are not intended to correct bodily deformities, are not designed for supporting or holding organs following an illness or an operation, and are not appliances or articles specially designed for a given handicap and made to measure.

- 14 Those sandals and shoes may thus be assimilated to mass-produced inner soles or to mass-produced footwear the soles of which support the arch, which are articles not falling within Chapter 90.
- 15 Nor does the parallel with crutches, expressly mentioned under heading 9021, permit classification under that heading, given that the functions performed are different: whereas crutches are essential for a person with a mobility handicap, the items in question merely facilitate walking with a plaster cast.
- 16 The reply to be given to the first question should therefore be that a sandal and shoes with outer soles of plastics and uppers of textile materials or plastics designed to be worn on the foot over a plaster cast do not constitute 'orthopaedic appliances' under heading 9021 of the combined nomenclature (1992).

The second question

- 17 In its second question the national court asks, if the reply to the first question is in the negative, whether the items in question must be regarded as 'splints and other fracture appliances' (subheading 9021 19 90) or as parts of or accessories to orthopaedic or fracture appliances.
- 18 According to the Explanatory Notes, splints and fracture appliances 'may be used either to immobilize injured parts of the body (for extension or protection), or for setting fractures'. As the Commission points out, their characteristic feature is that they act directly on the organ affected. However, cast sandals and shoes worn over a plaster cast do not have that feature.

- 19 Moreover, they cannot be regarded as parts of or accessories to an orthopaedic or fracture appliance or splint. For that it would first be necessary for the plaster casts to be classified as such. However, as pointed out by the Advocate General, the plaster cast on the leg of the patient cannot be reutilized and does not constitute a product within the meaning of the Customs Tariff. That analysis is confirmed by the Explanatory Notes to heading 9021 (II — splints and other fracture appliances), which list a series of cradles and supports, but not plaster casts.
- 20 Consequently, the reply to be given to the second question must be that the items mentioned may not be regarded as 'splints and other fracture appliances' (subheading 9021 19 90) or as parts of or accessories to orthopaedic or fracture appliances or splints.
- 21 Since in the end the items in question do not come within heading 9021, they fall under Chapter 64 entitled 'Footwear, gaiters and the like; parts of such articles'. That Chapter comprises various types of footwear 'irrespective of their shape and size, the particular use for which they are designed, their method of manufacture or the materials of which they are made', but not 'disposable' items 'without applied soles' (see remarks under the heading 'General' of the Explanatory Notes).
- 22 The items in question are designed as footwear with applied soles. The fact that they are not worn on the foot itself but over a plaster is immaterial since that is also true of overshoes which, according to the Explanatory Notes, come within Chapter 64.

Costs

- 23 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings

are, for the parties to the main proceedings, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 2 February 1993, hereby rules:

1. Sandals and shoes with outer soles of plastics and uppers of textile materials or plastics designed to be worn on the foot over a plaster cast do not constitute 'orthopaedic appliances' under heading 9021 of the combined nomenclature (1992);
2. The items mentioned may not be regarded as 'splints and other fracture appliances' (subheading 9021 19 90) or as parts of or accessories to orthopaedic or fracture appliances or splints.

Moitinho de Almeida

Grévisse

Zuleeg

Delivered in open court in Luxembourg on 24 March 1994.

R. Grass

J. C. Moitinho de Almeida

Registrar

President of the Third Chamber