

Case 65/85

Hauptzollamt Hamburg-Ericus

v

Van Houten International GmbH

(reference for a preliminary ruling
from the Bundesfinanzhof)

(Valuation for customs purposes — Weighing costs)

Summary

Common Customs Tariff — Customs value — Transaction value — Determination — Arrival contracts — Weighing costs paid by the importer — Not included
(Council Regulation No 1224/80, Art. 3 (1) and (3))

Article 3 (1) and (3) of Regulation No 1224/80 on the valuation of goods for customs purposes must be interpreted as excluding from the transaction value the cost of establishing the weight of the goods on arrival, where that cost is to be borne by the buyer, in the case of what is known as an arrival contract.

OPINION OF MR ADVOCATE GENERAL

VERLOREN VAN THEMAAT

delivered on 11 December 1985*

*Mr President,
Members of the Court,*

1. Introduction

1.1. *The background to Regulation No 1224/80*

Like Case 290/84 (*Mainfrucht*), in which Advocate General Lenz delivered his

opinion on 12 November and the Fourth Chamber gave its judgment on 10 December 1985, this case concerns the interpretation of the term 'transaction value' contained in Article 3 of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (Official Journal 1980, L 134, p. 1). The regulation is noteworthy in that it implements the

* Translated from the Dutch.

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade approved by the Council on 10 December 1979 and concluded in the framework of the Tokyo Round. These detailed rules on the implementation of Article VII of GATT, which concerns customs value, are published in the Official Journal 1980, L 71, p. 107. Together with the Protocol annexed to the agreement (Official Journal 1980, L 71, p. 127), they may be relevant for interpreting the regulation at issue, since they are binding on the Community. In its order for reference the national court states that Article 8 of that Protocol may be particularly relevant to the question referred to the Court of Justice. The Protocol was implemented by Council Regulation (EEC) No 3193/80 of 8 December 1980 amending Regulation (EEC) No 1224/80. For the text of the provisions which are relevant to this case and are mentioned hereafter, I refer to the Official Journal. The most important provisions for the purposes of this case are set out in the Report for the Hearing.

1.2. *The facts and the procedure*

In July 1980 the plaintiff and respondent in the appeal before the Bundesfinanzhof applied for clearance for home use of a consignment of cocoa beans. It declared, in addition to the net invoice price, weighing costs of DM 157 which it had incurred. According to the contract of sale produced by the plaintiff, the sale was concluded c.i.f. Hamburg 'net delivered weights', so that the purchase price was determined by the delivered weight and the weighing costs were to be borne by the buyer. The defendant and appellant in the appeal, the Hauptzollamt [Principal Customs Office] Hamburg-Ericus, incorporated the weighing costs in the customs value. The plaintiff

challenged its decision before the Finanzgericht [Finance Court] Hamburg, which decided that the weighing costs had been wrongly incorporated in the customs value. The defendant brought an appeal on a point of law before the Bundesfinanzhof, contending *inter alia* that the weighing costs constituted a payment for the benefit of the seller for the imported goods within the meaning of Article 3 (3) (a) of Regulation No 1224/80. The seller was under an obligation to hand over the goods and transfer ownership, and where goods are traded by weight the steps necessary so to do included the determination of their weight. The weighing costs incurred as a result were transfer costs to be borne by the seller. That was confirmed by the interpretation given to the usual contractual terms in foreign trade agreements. Weighing was not an activity undertaken by the buyer on his own account within the meaning of Article 3 (3) (b) of the aforesaid regulation.

The Bundesfinanzhof stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Should Article 3 (1) and (3) of Council Regulation (EEC) No 1224/80, in the version in force prior to 1 January 1981, be interpreted as including in the transaction value the cost of establishing the weight on arrival in the case of what is known as an arrival contract if, according to the contract of sale, that cost is to be borne by the buyer?'

In its order for reference the Bundesfinanzhof states that Article 3 (3) (a) should probably be interpreted on the basis of the new version supplied by Regulation No 3193/80 of 8 December 1980. According to the fourth recital in the preamble to Regu-

lation No 3193/80, the amendment was designed to bring the provisions of Regulation No 1224/80 into conformity with the provisions of the Protocol in respect of which the EEC's instrument of acceptance was deposited on 25 July 1980. The additional clause is identical to Paragraph 8 of Section I of the Protocol, which was agreed on 1 November 1979 by the parties to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT).

The Bundesfinanzhof considers that the weighing costs paid by the plaintiff were part of the transaction value if they were a payment for the benefit of the seller and if the plaintiff made them 'to satisfy an obligation of the seller'.

The Bundesfinanzhof points out that according to the preamble to the agreement on customs valuation, customs value should be based on simple and equitable criteria. That requirement can be fully satisfied only if the actual terms of the contract of sale are taken as the sole basis for calculating the customs value. On the other hand, it might be argued that the rules on customs valuation may include standard terms which do not accord with the terms of the actual contract. It is therefore possible that such a standard term is also inherent in the words 'obligation of the seller'. According to the Bundesfinanzhof, that argument is supported by the fact that otherwise the magnitude of the transaction value and hence of the customs value would be left to be determined largely by the contract of sale underlying the importation.

The Bundesfinanzhof states that if the Court of Justice were to conclude that 'obligations of the seller' means all the obligations that customarily devolve on the

seller, the question would arise whether in the type of contract of sale at issue it was customary for the seller to bear the weighing costs. Support for that view is to be found in Article 90 of the Hague Convention of 1 July 1964 relating to a Uniform Law on the International Sale of Goods (*United Nations Treaty Series* 834, p. 107). As the contract in this case was an arrival contract, the weighing costs should probably be regarded as having arisen before satisfaction of the delivery obligations.

2. The Commission's views

In the procedure before the Court, only the Commission submitted written observations and appeared at the hearing. In its written observations the Commission also points out that the regulation at issue originated in the GATT negotiations, but goes on to base its views exclusively on the regulation itself. My summary of the views set out in its written observations and amplified at the hearing largely accords with the Report for the Hearing.

Article 3 (1) of the regulation defines the 'transaction value' as 'the price actually paid or payable for the goods when sold for export to the customs territory of the Community', adjusted if necessary in accordance with Article 8.

Article 8 (3) contains an exhaustive list of the costs to be added to the price actually paid. As the weighing costs are not listed and cannot be included under any of the costs which are mentioned, the issue to be decided in this case is whether the weighing costs must be regarded as part of the price actually paid by the buyer to the seller.

Article 3 (3) defines the price actually paid or payable and specifies in paragraph (a) what payments are to be included in that price and in paragraph (b) what payments are not to be included. The fact that Article 3 (3) (a) was amended by Regulation No 3193/81 of 1 January 1981 is irrelevant for the purposes of the present case, as the preliminary question relates to facts which pre-date that amendment. In any event, that amendment is largely declaratory.

According to Article 3 (3) (a), payment need not necessarily take the form of a transfer of money but may also be made 'indirectly'. Article 3 (3) (b) indicates that weighing costs are not to be regarded as indirect payment. From that provision it can be inferred that such costs must not be included in the customs value if, as in this case, it is clear from the contract of sale that the buyer undertakes the weighing at his own expense and on his own account, so that the weighing costs cannot be regarded as an indirect payment to the seller. In addition the Commission points out that the weighing was an economic activity which took place within the Community and for that reason should not constitute part of the customs value.

As the rules in question are expressly based on concrete transactions — subject to certain exceptions which are not relevant here — the Commission considers that it is in principle irrelevant whether or not the terms of a particular contract are consistent with the customary terms of transactions between the parties to an international contract of sale.

Lastly, the Commission points out that the Committee on Customs Value decided in 1981 that unloading and warehousing costs were not to be included in the customs value if they were not part of the price actually paid. In the Commission's opinion, that case resembles the present in several respects.

Consequently, the Commission proposes that the Court should answer the question referred to it as follows:

'Article 3 of Council Regulation (EEC) No 1224/80, in the version in force prior to 1 January 1981, must be interpreted as meaning that in the case of what is known as an arrival contract the cost of establishing the weight of the goods on arrival does not constitute an indirect payment which forms part of the transaction value if that cost is to be borne by the buyer.'

At the hearing the Commission again stressed that under the new rules the starting point must in principle be the particular contract at issue, which in the case of different purchase prices for identical goods may give rise to different customs values. However, in order to prevent arbitrary price manipulation, Articles 3 (3) and 8 of Regulation No 1224/80 *inter alia* provide for certain adjustments to be made. At the hearing the Commission further explained why it did not consider that those adjustments were applicable here on the basis of the version of the regulation at issue in this case. The cost of determining the weight of the goods clearly did not form part of the price actually paid. Nor were the adjustments set out in Article 8 applicable here. The Commission considered it less clear whether there was an indirect payment within the meaning of Article 3 (3) (a). In particular, there could be some doubt on this point if Regulation No 3193/80 were applicable in this case (although as we have seen the Commission rejected that possibility in its written observations) because under that regulation a payment made by the buyer to a third party to satisfy an obligation of the seller is also regarded as forming part of the price actually paid. At the hearing, however, the Commission stated that in case of doubt Article 3 (3) (b) should settle the matter: the

weighing costs should be regarded as covered by the term 'marketing activities, undertaken by the buyer on his own account' and as such, subject to Article 8, they 'are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller or have been undertaken by agreement with the seller'. In the case of an arrival contract such as that concerned here — unlike the more usual contracts of sale, in which the risk passes to the buyer on dispatch — the buyer pays only the value of the goods received, that is to say, the value which he has himself established by weighing the goods on arrival. Moreover, the Commission repeated at the hearing that it could not have been intended to charge customs duty on economic activities (in this case weighing) which have taken place within the Community.

3. Conclusion

It is unnecessary to consider here whether, if Regulation No 3193/80, which was not adopted until 8 December 1980, is not applicable to the transaction at issue,

perhaps the Protocol on which it was based and which (as is clear from its preamble) was approved by the Community on 25 July 1980 is so relevant. As I have already stated, the Commission stressed at the hearing that even if Regulation No 3193/80 (which implemented the aforesaid Protocol) had been applicable it would not have altered the Commission's own conclusion as set out in its written observations. I can endorse that view, although it seems to me that in this particular case it may in any event follow from the fact that here weighing was not one of the obligations of the seller, so that it would in any event be impossible to speak of an indirect payment to the seller.

The Commission's argument on the other points I also find convincing: I would merely ascribe greater significance to the argument that the rules on the determination of customs value cannot have been intended to include in the customs value payment for economic transactions which take place within the Community. In another context (as regards transport costs within the Community) that point was settled in Case 290/84, which I mentioned at the beginning of my Opinion.

In conclusion, I conclude for the foregoing reasons that the question referred to the Court by the Bundesfinanzhof should be answered in accordance with the Commission's proposal as follows:

'Article 3 of Council Regulation No 1224/80, in the version in force prior to 1 January 1981, must be interpreted as meaning that in the case of what is known as an arrival contract the cost of establishing the weight of the goods on arrival does not constitute an indirect payment which forms part of the transaction value if that cost is to be borne by the buyer.'