

In Case 38/77

Reference to the Court under [Article 267 TFEU] by the Tariefcommissie (an administrative court of last instance in revenue matters), Amsterdam, for a preliminary ruling in the proceedings pending before that court between

ENKA BV

and

INSPECTEUR DER INVOERRECHTEN EN ACCIJNZEN (Inspector of Customs and Excise), ARNHEM,

on the interpretation of Article 10 (2) (d) of Council Directive No 69/74/EEC of 4 March 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs warehousing procedure,

THE COURT

composed of: H. Kutscher, President, M. Sorensen and G. Bosco, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keefe and A. Touffait, Judges,

Advocate-General: J.-P. Warner

Registrar: A. Van Houtte

gives the following

## JUDGMENT

### Decision

- 1 By order of 15 November 1976, received at the Court Registry on 4 April 1977, the Tariefcommissie, Amsterdam, referred to the Court three questions on the interpretation of Article 10 (2) (d) of Council Directive No 69/74/EEC of 4 March 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs warehousing procedure (OJ English Special Edition 1969 (I), p. 82).
- 2 Those questions have arisen in the context of an action between the customs authorities in the Netherlands and an importer who submitted a customs declaration in relation to the valuation for customs purposes ex warehouse at Arnhem of a consignment of steel cord used in the manufacture of tyres, sold by an Irish manufacturer to a purchaser established in the Grand Duchy of Luxembourg.
- 3 According to the customs authorities, the defendant in the main action, in determining the value of goods for customs purposes the costs of storing them in a warehouse cannot be deducted from the aggregate amount invoiced by the vendor to the purchaser, whilst according to the plaintiff in the main action, that deduction must be made.
- 4 Article 10 (2) (d) of Directive No 69/74 provides that:

'Where the price paid or payable is taken into account in determining the value for customs purposes, the following special provisions shall apply: ...

- (d) The costs of warehousing and of preserving the goods while in warehouses borne by a purchaser shall not be included in the value for customs purposes where the price paid or payable by that purchaser is taken as the basis for valuation.'

5 For the purpose of applying the said Article 10 (2) the rules applicable in the Netherlands, in this instance Article 16 g of the *Tariefbesluit* 1960, were modified by a Royal Decree of 17 June 1970 (*Staatsblad* 1970, p. 68 7) and now read as follows:

'For the purpose of determining the value of goods released from bonded warehouses ... where the price paid or payable is taken into account the following special provisions shall apply ...:

(c) the price paid or payable taken as the basis for valuation need not be adjusted in respect of costs of warehousing and of preserving the goods while in warehouses ...'

6 According to the defendant in the main action, Article 16 g and, in particular, the phrase 'need not be adjusted' (*dient niet te worden aangepast*) must be interpreted as meaning that where - as is possible under Article 9 of Regulation No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (OJ English Special Edition 1968 (I), p. 170) - the price paid or payable for the goods is accepted by the customs authorities as corresponding to the 'normal' price which, according to Article 1 of the same regulation, determines the value for customs purposes, such price need not be reduced by the costs of warehousing the goods if those costs are included therein and that they must not be added to that price if they were not included therein.

7 While accepting that the wording of Article 16 g of the *Tariefbesluit* is not exactly the same as that of the directive, the Netherlands customs administration maintains that the essence of the directive is respected and that since the directive does not have direct effect the plaintiff in the main action cannot rely on the difference between the wording of the two versions so as to make that of the directive prevail.

The first question

- 8 The first question asks whether the provision in Article 10 (2) (d) of Council Directive No 69/74 of 4 March 1969 is of such a specific nature that it must be regarded as directly binding, that is to say, as having direct effect.
- 9 The Court has already found in its judgment of 1 February 1977 in Case 51/76 (*Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen*, [1977] ECR 1 13) that where the [Union] authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of [Union] law.
- 10 That is especially so when the individual invokes a provision of a directive before a national court in order that the latter shall rule whether the competent national authorities, in exercising the choice which is left to them as to the form and the methods for implementing the directive, have kept within the limits of their discretion as set out in the directive.
- 11 It emerges from the third paragraph of [Article 288 TFEU] that the choice left to the Member States as regards the form of the measures and the methods used in their adoption by the national authorities depends upon the result which the Council or the Commission wishes to see achieved.
- 12 As regards the harmonization of the provisions relating to customs matters laid down in the Member States by law, regulation or administrative action, in order to bring about the uniform application of the Common Customs Tariff it may prove necessary to ensure the absolute identity of those provisions which govern the treatment of goods imported into the [Union], whatever the Member State across whose frontier they are imported.
- 13 According to the sixth recital to the aforementioned Regulation No 803/68 'the value for customs purposes must be determined in a uniform manner in Member States, so that the level of the protection given by the Common Customs Tariff is the same throughout the [Union] and any deflection of trade and activities and any distortion of competition which might arise from differences between national provisions is thereby prevented'.
- 14 In order to achieve that objective Articles 1 to 8 of the regulation state precisely

what is to be understood by the 'normal price' of the goods, which is to be used as the basis for valuation for customs purposes, and Article 9 defines the 'price paid or payable' which may, in certain circumstances, be accepted as corresponding to the normal price.

- 15 Article 10 (2) (d) of Directive No 69/74 is in fact a provision applying the said Article 9 to the particular case of goods which, before obtaining customs clearance, were stored in a warehouse in [Union] territory.
- 16 If it is not to cause distortions and deflections of trade, that provision must therefore be given an identical application in all the Member States.
- 17 It must thus be concluded that as regards the content of the concept of the 'price paid or payable' referred to in Article 9 of Regulation No 803/68 the directive leaves the national authorities no area of discretion, with the result that the terms of the directive must prevail over any provisions which may be incompatible with it in each Member State.
- 18 The answer to the first question must therefore be that Article 10 (2) (d) of Directive No 69/74 of 4 March 1969 may be relied on by parties concerned for the purpose of verifying whether the national measures adopted for its implementation are in accordance with it and that the national courts must give it precedence over any national measures which may prove incompatible with its terms.

The second question

- 19 If an affirmative answer is given to the first question, the Court is next asked whether the wording of Article 16 g of the Tariefbesluit 1960 adequately reflects the wording of Article 10 of Directive No 69/74.
- 20 The Court has no power in the context of proceedings under [Article 267 TFEU] either to interpret provisions of national law or to rule on their possible incompatibility with [Union] law.

- 21 However, in the context of the interpretation of [Union] law, it may provide the national court with the criteria enabling it to deal with the action before it, in particular as regards any incompatibility of national provisions with [Union] rules.
- 22 The reply to the third question is capable of providing the necessary information in that respect.

The third question

- 23 The third question asks whether Article 10 (2) (d) of Directive No 69/74 must be interpreted to mean that where the price paid or payable is the basis for valuation it must be reduced by the costs of warehousing the goods while in the territory of the [Union]?
- 24 All the Member States are Contracting Parties to the Convention on the Valuation of Goods for Customs Purposes, which was signed at Brussels on 15 December 1950 and came into force on 25 July 1953.
- 25 According to Article 1 of Annex I to that Convention, the 'normal price' of any imported goods, which constitutes their dutiable value for the purpose of levying *ad valorem* duties, is to be determined on the assumption that the goods are delivered to the buyer at the port or place of introduction into the country of importation and that the price includes all costs incidental to the sale and delivery of the goods at the port or place of introduction but excludes any duties or taxes applicable in the country of importation.
- 26 Article 1 (2) of Regulation No 803/68 reproduces that rule almost word for word by providing that 'The normal price of any imported goods shall be determined on the following assumptions:
- (a) that the goods are delivered to the buyer at the place of introduction into the customs territory of the [Union];

- (b) that the seller bears all costs, charges and expenses incidental to the sale and to the delivery of the goods at the place of introduction, which are hence included in the normal price;
- (c) that the buyer bears any duties or taxes applicable in the customs territory of the [Union], which are hence not included in the normal price.'

27 It follows from Article 9 (1) (c) of that regulation that the same distinction must be made where the price paid or payable for the imported goods is accepted as the value for customs purposes, since that price must, if necessary, be adjusted to take account of circumstances of the sale which differ from those on which the normal price is based.

28 Article 10 (2) of Directive No 69/74 concerns the application of that rule to the particular case of goods which remain in the warehouse after their introduction into the [Union] territory and provides, therefore, that the costs of warehousing must not be included in the value for customs purposes since by virtue of the legal fiction relating to the formation of the normal price they are deemed to be borne by the purchaser, that is, to be payable, within the meaning of Article 1 (2) (c) of Regulation No 803/68, within the territory of the [Union].

29 That interpretation, which is in accordance with the [Union] rules and with the international conventions which are implemented by the provision in question, excludes that according to which such costs are either excluded from the value for customs purposes or included therein depending on whether they are invoiced separately or included in the aggregate price charged to the purchaser.

30 Furthermore, the latter interpretation would not be compatible with the rule laid down in Article 9 (1) (c) of Regulation No 803/68, according to which the price paid or payable may be accepted as the value for customs purposes only in so far as it is adjusted, if necessary, 'to take account of circumstances of the sale which differ from those on which the normal price is based'.

31 The reply must therefore be that Article 10 (2) (d) of Directive No 69/74 must be interpreted as meaning that if the price paid or payable by the purchaser is taken as the basis in calculating the value of goods for customs purposes and if, in

addition to the price of the goods, it includes an amount corresponding to the costs of warehousing and of preserving the goods whilst in warehouses within the territory of the [Union], that price must be adjusted in such a way as to exclude the latter factors from it.

### Costs

- 32 The costs incurred by the Commission of the European [Union] and the Netherlands Government, which have submitted observations to the Court, are not recoverable.
- 33 As these 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

in answer to the questions referred to it by the Tariefcommissie, Amsterdam, by order of 15 November 1976, hereby rules:

- 1. Article 10 (2) (d) of Directive No 69/74 of 4 March 1969 may be relied on by parties concerned for the purpose of verifying whether the national measures adopted for its implementation are in accordance with it and the national courts must give it precedence over any national measures which may prove incompatible with its terms.**
- 2. Article 10 (2) (d) of Directive No 69/74 must be interpreted as meaning that if the price paid or payable by the purchaser is taken as the basis in calculating the value of goods for customs purposes and if, in addition**

**to the price of the goods, it includes an amount corresponding to the costs of warehousing and of preserving the goods whilst in warehouses within the territory of the [Union], that price must be adjusted in such a way as to exclude the latter factors from it.**

Kutscher      Sorensen      Bosco      Donner      Mertens de Wilmars  
Pescatore      Mackenzie Stuart  
O'Keeffe      Touffait

Delivered in open court in Luxembourg on 23 November 1977.

A. Van Houtte  
Registrar

H. Kutscher  
President

Robert Schütze European Union Law Lisbonised C11