



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

19 July 2012*

(Common Customs Tariff — Tariff classification — Combined Nomenclature — Polishing pads intended exclusively for semiconductor wafer-polishing machines — Tariff headings 3919 and 8466 (or 8486) — Definition of ‘parts’ or ‘accessories’)

In Case C-336/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour d’appel de Lyon (France), made by decision of 16 June 2011, received at the Court on 1 July 2011, in the proceedings

Receveur principal des douanes de Roissy Sud,

Receveur principal de la recette des douanes de Lyon Aéroport,

Direction régionale des douanes et droits indirects de Lyon,

Administration des douanes et droits indirects

v

Rohm & Haas Electronic Materials CMP Europe GmbH,

Rohm & Haas Europe SARL,

Rohm & Haas Europe Trading APS-UK Branch,

THE COURT (Eighth Chamber),

composed of A. Prechal, President of the Chamber, L. Bay Larsen and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 18 April 2012,

after considering the observations submitted on behalf of:

— Rohm & Haas Electronic Materials CMP Europe GmbH, Rohm & Haas Europe SARL and Rohm & Haas Europe Trading APS-UK Branch, by P. De Baere and F. Citron, avocats,

* Language of the case: French.

— the French Government, by G. de Bergues, C. Candat and M. Perrot, acting as Agents,
— the European Commission, by B.-R. Killmann and L. Bouyon, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of headings 3919 and 8466 (or 8486 from 2007 onwards) of the Combined Nomenclature ('the CN') in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), in the successive versions of the following regulations, amending Annex I to Regulation No 2658/87: Commission Regulations (EC) No 1789/2003 of 11 September 2003 (OJ 2003 L 281, p. 1); No 1810/2004 of 7 September 2004 (OJ 2004 L 327, p. 1); No 1719/2005 of 27 October 2005 (OJ 2005 L 286, p. 1); and No 1549/2006 of 17 October 2006 (OJ 2006 L 301, p. 1).
- 2 The reference has been made in proceedings between Rohm & Haas Electronic Materials CMP Europe GmbH, Rohm & Haas Europe SARL and Rohm & Haas Europe Trading APS-UK Branch (together 'Rohm & Haas') and the Administration des douanes (Customs Authority) concerning the tariff classification of polishing pads imported by Rohm & Haas and the application for repayment of customs duties that they consider to have been unduly paid between 2004 and 2007.

Legal context

The CN

- 3 The CN, established by Regulation No 2658/87, is designed to meet the requirements of both the Common Customs Tariff and the external trade statistics of the European Community. It is based on the Harmonised Commodity Description and Coding System ('the HS') drawn up by the Customs Cooperation Council, now the World Customs Organisation, established by the International Convention concluded at Brussels on 14 June 1983 and approved on behalf of the Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).
- 4 Part One of the CN contains a series of preliminary provisions. In Section I on general rules, subsection A sets out general rules in accordance with which the classification of goods in the CN is governed. Thus, it is provided, *inter alia*, that for legal purposes the classification is to be determined according to the terms of the headings and any relative section or chapter notes and that the classification of goods in the subheadings of a heading is to be determined according to the terms of those subheadings and any related subheading notes, the relative section and chapter notes also apply in principle.
- 5 In Part Two of the CN, Section VII includes Chapter 39, which is entitled 'Plastics and articles thereof'. According to note 2(p) (or (s) in Regulation No 1549/2006) to Chapter 39 of the CN, that chapter does not cover 'articles of Section XVI (machines and mechanical or electrical appliances)'.

6 Heading 3919 of the CN is worded as follows:

‘3919 Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls:

...

3919 90 – Other:

3919 90 10 - - further worked than surface-worked or other than merely cut into squares or rectangles

...’

7 Note 2(b) to Section XVI of Part Two of the CN, which is entitled ‘Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles’, provides that ‘[s]ubject to note 1 to this section, note 1 to Chapter 84 and note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules: ... [o]ther parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading ... are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate’.

8 Heading 8464 of the CN, applicable up to 31 December 2006, is worded as follows:

‘Machine tools for working stone, ceramics, concrete, asbestos-cement or like mineral materials or for cold working glass:

8464 20 – Grinding or polishing machines:

8464 20 05 - - For working semiconductor wafers

...’

9 Heading 8466 of the CN, applicable up to 31 December 2006, provides as follows:

‘Parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for machine tools; tool holders for any type of tool for working in the hand:

...

8466 30 00 - Dividing heads and other special attachments for machine tools

- Other:

...

8466 91 - - For machines of heading 8464:

8466 91 15 - - - For machines of subheading 8464 10 10, 8464 20 05 or 8464 90 10’.

- 10 Regulation No 1549/2006, which entered into force on 1 January 2007, created heading 8486 of the CN, which is worded as follows:

‘Machines and apparatus of a kind used solely or principally for the manufacture of semiconductor boules or wafers, semiconductor devices, electronic integrated circuits or flat panel displays; machines and apparatus specified in note 9(C) to this chapter; parts and accessories:

...

8486 90 - Parts and accessories:

...

8486 90 90 - - - Other’.

The Explanatory Notes to the HS

- 11 The Customs Cooperation Council, now the World Customs Organisation, approves, under the conditions laid down in Article 8 of the International Convention on the Harmonised Commodity Description and Coding System, the Explanatory Notes and Classification Opinions adopted by the HS Committee.

- 12 The Explanatory Notes concerning heading 8466 of the HS are worded as follows:

‘With the exception of the tools of Chapter 82 and subject to the general provisions regarding the classification of the parts ..., this heading covers:

(A) Parts of the machine-tools of the 10 preceding headings, 8456 to 8465.

(B) Accessories for these machine-tools, that is, subsidiary devices used in connection with machine-tools, such as interchangeable devices which modify the machine-tool so that it can perform a wider range of operations; devices to increase precision; devices which perform a particular service relative to the main function of the machine.

...’

- 13 The Explanatory Notes concerning heading 8486 of the HS, in the version from 2007 onwards applicable to the present case, state as follows:

‘Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), the heading includes parts and accessories for the machines and apparatus of this heading. Parts and accessories falling in this heading thus include, inter alia, work or tool holders and other special attachments which are solely or principally used for the machines and apparatus of this heading.’

The dispute in the main proceedings and the question referred for a preliminary ruling

- 14 Rohm & Haas imported into France polishing pads intended for semiconductor wafer-polishing machines. In particular, those ‘wafers’ are used for the purpose of manufacturing integrated circuits. The pads, in the form of discs which measure approximately 40 cm in diameter and 3 mm thick, are adhesive and made up of different plastic layers and are intended for polishing machines for working semiconductor materials.

- 15 By a customs declaration of 3 June 2004, Acta obtained customs clearance on behalf of Rohm & Haas for two parcels of 'abrasive felt' under tariff subheading 5911 10 00 which covers 'textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams)', for which the customs duty is 5.3%.
- 16 The Customs Authority disputed the declared tariff heading and took the view that the imported goods came under tariff subheading 3919 90 10, for which the customs duty is 6.5%.
- 17 Between 8 July 2004 and 9 August 2006, Rohm & Haas continued to obtain customs clearance for the polishing pads in question under tariff subheading 5911 10 00 of the CN.
- 18 On referral to the commission de conciliation et d'expertise douanière ('CCED') (Customs and Excise Commission for conciliation) by the importing companies, the CCED issued an opinion of 26 June 2007 according to which it upheld that the goods at issue in the main proceedings come under heading 8466 as 'parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465'. Goods classified under subheading 8466 of the CN are exempt from customs duties.
- 19 Rohm & Haas therefore made an application to the Customs Authority for repayment of customs duties that they consider to have been unduly paid between 2004 and 2007.
- 20 Following the failure of that application, Rohm & Haas brought an action before the Tribunal d'instance de Lyon (District Court, Lyon) with a view to obtaining the reimbursement of those customs duties. That action was upheld by that court which, by judgment of 20 April 2009, held that the goods in question come under the subheading advocated by the CCED because the polishing pads were found to be essential for the operation of polishing machines and to constitute part of those machines.
- 21 The Customs Authority appealed against that judgment before the Cour d'Appel de Lyon (Court of Appeal, Lyon).
- 22 Before that court, the Customs Authority questioned the relevance of the opinion issued by the CCED, arguing that that opinion is based not on the particular characteristics of that good, but on the fact that the sample stated that the good in question was intended for machines under headings 8456 to 8465 of the CN.
- 23 The Customs Authority submitted that the polishing pads in question are covered by heading 3919 of the CN which concerns flat wafers of plastic with an adhesive side. It also refers to Commission Regulation (EU) No 336/2010 of 21 April 2010 concerning the classification of certain goods in the Combined Nomenclature (OJ 2010 L 102, p. 25) which was adopted subsequently for machines similar to those on which pads such as the pads at issue in the main proceedings are fitted.
- 24 Rohm & Haas claimed, before the referring court, that the polishing pads at issue in the main proceedings are exclusively intended to be fitted on polishing machines for working semiconductor wafers under heading 8464 of the CN, and that each pad is intended for a particular model of machine and for a particular type of work. It argues that the polishing pads are suitable and necessary parts for the functioning of those machines, hence the labelling of the product taken as a sample. Rohm & Haas submitted that it is impossible to classify the pads under heading 3919, because it is not simply a pad which is adhesive on one side as a result of contact, or under heading 8207, since they do not enable, as such, the polishing work. They refer, in that regard, to the opinion issued by the CCED. Rohm & Haas also claimed that Regulation No 336/2010 is not retroactive, even by analogy, that it does not concern the same products and that it is invalid.

- 25 In those circumstances, the Cour d'appel de Lyon decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Should the [CN] set out in Annex I to [Regulation No 2658/87], as amended by [Regulation No 1549/2006] and Commission Regulation (EC) No 1214/2007 of 20 September 2007 [(OJ 2005 L 286, p. 1)] be interpreted as meaning that polishing pads, intended for a polishing machine for working semiconductor materials — as such coming under tariff heading 8460 — imported separately from the machine, in the form of discs perforated in the centre, made up of a hard polyurethane layer, a layer of polyurethane foam, an adhesive layer and a protective plastic film, which do not contain any metal part or any abrasive substance and are used to polish "wafers", in association with an abrasive liquid, and must be replaced at a frequency determined by their level of wear, come under tariff subheading 8466 91 15, as parts or accessories suitable for use solely or principally with the machines classified under headings 8456 to 8465, or, on the basis of their constituent material, under tariff subheading 3939 90 10, as self-adhesive flat shapes made of plastic?'

Consideration of the question referred for a preliminary ruling

- 26 It should be noted at the outset that Regulation No 1214/2007 referred to in the question referred for a preliminary ruling entered into force on 1 January 2008, with the result that the version of the CN set out therein is not applicable to imports of the polishing pads at issue, which, as was confirmed at the hearing by the appellants in the main proceedings, were made between 2004 and 2007. The question referred for a preliminary ruling must therefore be understood in the light of the versions of the CN set out in Regulations Nos 1789/2003, 1810/2004, 1719/2005 and 1549/2006.
- 27 In addition, it must be noted that the reference, in the wording of the question referred, to heading 8460 and subheading 3939 90 10 of the CN is clearly the result of a clerical error and that it is necessary to understand that question as referring, respectively, to heading 8464 of the CN (or 8486 of the CN since Regulation No 1549/2006 entered into force) and subheading 3919 90 10 of the CN.
- 28 It follows that, by its question, the referring court asks the Court, in essence, whether the CN must be interpreted as meaning that polishing pads intended for a polishing machine — as such coming under tariff heading 8464 (or heading 8486 of the CN since Regulation No 1549/2006 entered into force) — imported separately from the machine, in the form of discs perforated in the centre, made up of a hard polyurethane layer, a layer of polyurethane foam, an adhesive layer and a protective plastic film, which do not contain any metal part or any abrasive substance and are used to polish 'wafers', in combination with an abrasive liquid, and which must be replaced at a frequency determined by their level of wear, come under tariff subheading 8466 91 15 of the CN (or subheading 8486 90 90 of the CN since Regulation No 1549/2006 entered into force), as parts or accessories suitable for use with that machine, or, on the basis of their constituent material, under subheading 3919 90 10 of the CN, as self-adhesive flat shapes, other than squares or rectangles, made of plastic.
- 29 Rohm & Haas submit that the polishing pads at issue in the main proceedings are parts exclusively or principally intended to be fitted on polishing machines under heading 8464 of the CN (or heading 8486 of the CN since Regulation No 1549/2006 entered into force), which cannot function properly without those pads, and that those pads may only be fitted on that particular model of polishing machine. According to Rohm & Haas, those pads imported before 1 January 2007 must therefore be classified under heading 8466 and those imported after that date under heading 8486.
- 30 The French Government and the European Commission submit that those polishing pads must, on the basis of their constituent material, be classified under heading 3919 of the CN, as self-adhesive flat shapes made of plastic.

- 31 It must be borne in mind that according to settled case-law, 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 and the notes to the sections or chapters (see, in particular, Case C-376/07 *Kamino International Logistics* [2009] ECR I-1167, paragraph 31; Joined Cases C-288/09 and C-289/09 *British Sky Broadcasting Group and Pace* [2011] ECR I-2851, paragraph 60, and Case C-152/10 *Unomedical* [2011] ECR I-5433, paragraph 25).
- 32 In the present case, having regard to their physical characteristics, there are grounds, in principle, to classify the polishing pads at issue in the main proceedings under Chapter 39 of the CN. However, in accordance with note 2(p) to Chapter 39 of the CN, that chapter does not cover articles in Section XVI of the CN which covers, inter alia, parts and accessories for the machines of the headings in that section. Consequently, it is necessary to examine whether such polishing pads may be classified under Section XVI and, in particular, under heading 8466 of the CN (or heading 8486 of the CN since Regulation No 1549/2006 entered into force), as ‘parts’ or ‘accessories’ for semiconductor wafer-polishing machines which come under heading 8464 of the CN as ‘[m]achine tools for working stone, ceramics, concrete, asbestos-cement or like mineral materials or for cold working glass’ (or under heading 8486 of the CN as ‘[m]achines and apparatus of a kind used solely or principally for the manufacture of semiconductor ... wafers, semiconductor devices ...’ since Regulation No 1549/2006 entered into force).
- 33 In that regard, it must be noted that, in accordance with note 2(b) to Section XVI of the CN, parts of machines are classified, ‘if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading’, with the machines of that kind or, as appropriate, in other headings in Section XVI of the CN, such as heading 8466 which covers ‘parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465 ...’.
- 34 However, the CN, in the versions applicable to the main proceedings, does not define the notions of ‘parts’ and ‘accessories’ within the meaning of Chapter 84 thereof. Nonetheless, it is clear from the case-law that the notion of ‘parts’ implies a whole for the operation of which the part is essential and that the notion of ‘accessories’ implies an interchangeable part designed to adapt a machine for a particular operation, or to increase its range of operations, or to perform a particular service relative to the main function of the machine (see, to that effect, Case C-339/98 *Peacock* [2000] ECR I-8947, paragraph 21; Case C-267/00 *Turbon International* [2002] ECR I-1389, paragraphs 30 and 32; and *Unomedical*, paragraph 29).
- 35 However, in the present case, firstly, and as Rohm & Haas claim, while a semiconductor wafer-polishing machine is not able to function properly without polishing pads, it is nevertheless established that the mechanical and electrical functioning of those machines is not dependent on there being polishing pads. Consequently, polishing pads are not essential for the operation of wafer-polishing machines.
- 36 That finding is supported by the fact that, as Rohm & Haas submitted at the hearing, several different types of polishing pad may be fitted on a semiconductor wafer-polishing machine.
- 37 Second, it is common ground that polishing pads do not enable those machines to perform operations other than that for which they are designed. Therefore, the polishing pads in question do not enable those machines to be adapted for a particular operation, nor do they increase their range of operations, or enable them to perform a particular service connected with their main function.
- 38 It follows that polishing pads such as those at issue in the main proceedings cannot be considered to be ‘parts’ or ‘accessories’ suitable for use with semiconductor wafer-polishing machines and cannot therefore be classified under heading 8466 of the CN (or heading 8486 of the CN since Regulation No 1549/2006 entered into force).

- 39 The arguments of Rohm & Haas that the polishing pads at issue in the main proceedings are exclusively intended to be fitted on certain types of polishing machines for such wafers and that those machines are already fitted with a polishing pad are not sufficient to question the finding in paragraph 38 of this judgment. Neither the fact that a good is intended exclusively to be used with a particular kind of machine nor the fact that it is possible that the machine may already be fitted with that good are, in the light of the case-law cited in paragraph 34, relevant considerations for the purposes of classifying the good in question as a ‘part’ or ‘accessory’.
- 40 Accordingly, the answer to the question referred for a preliminary ruling must be that the CN, in the successive versions of Regulations No 1789/2003, 1810/2004, 1719/2005 and 1549/2006, must be interpreted as meaning that polishing pads intended for a polishing machine for working semiconductor materials — as such coming under tariff heading 8464 (or heading 8486 from 1 January 2007) — imported separately from the machine, in the form of discs perforated in the centre, made up of a hard polyurethane layer, a layer of polyurethane foam, an adhesive layer and a protective plastic film, which do not contain any metal part or any abrasive substance and are used to polish ‘wafers’, in combination with an abrasive liquid, and must be replaced at a frequency determined by their level of wear, come under subheading 3919 90 10, as self-adhesive flat shapes, other than squares or rectangles, made of plastic.

Costs

- 41 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

The Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, in the successive versions of the following regulations, amending Annex I to Regulation No 2658/87: Commission Regulations (EC) No 1789/2003 of 11 September 2003; No 1810/2004 of 7 September 2004; No 1719/2005 of 27 October 2005; and No 1549/2006 of 17 October 2006, must be interpreted as meaning that polishing pads intended for a polishing machine for working semiconductor materials — as such coming under tariff heading 8464 (or heading 8486 from 1 January 2007) — imported separately from the machine, in the form of discs perforated in the centre, made up of a hard polyurethane layer, a layer of polyurethane foam, an adhesive layer and a protective plastic film, which do not contain any metal part or any abrasive substance and are used to polish ‘wafers’, in combination with an abrasive liquid, and must be replaced at a frequency determined by their level of wear, come under subheading 3919 90 10, as self-adhesive flat shapes, other than squares or rectangles, made of plastic.

[Signatures]