

JUDGMENT OF THE COURT (Fourth Chamber)

8 December 2005<sup>\*</sup>

In Case C-445/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht (Finance Court) Düsseldorf (Germany), made by decision of 13 October 2004, received at the Court on 21 October 2004, in the proceedings

**Possehl Erzkontor GmbH**

v

**Hauptzollamt Duisburg,**

THE COURT (Fourth Chamber),

composed of K. Lenaerts, acting for the President of the Fourth Chamber, M. Ilešič (Rapporteur) and E. Levits, Judges,

<sup>\*</sup> Language of the case: German.

Advocate General: A. Tizzano,  
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 14 September 2005,

after considering the observations submitted on behalf of:

- Possehl Erzkontor GmbH, by H. Bleier, Rechtsanwalt,
  
- the Commission of the European Communities, by B. Schima, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of subheading 2519 90 10 of 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 (OJ 1987 L 256, p. 1), as amended by Commission

Regulations (EC) Nos 3115/94 of 20 December 1994 (OJ 1994 L 345, p. 1), 1359/95 of 13 June 1995 (OJ 1995 L 142, p. 1), 2448/95 of 10 October 1995 (OJ 1995 L 259, p. 1) and 3009/95 of 22 December 1995 (OJ 1995 L 319, p. 1) ('the CN').

- 2 The reference was made in proceedings between Possehl Erzkontor GmbH ('Possehl') and the Hauptzollamt (Principal Customs Office) Duisburg, concerning the tariff classification for fused magnesia (MgO).

### **Legal context**

- 3 The CN, established by Regulation No 2658/87, is based on the Harmonised Commodity Description and Coding System ('the HS') drawn up by the Customs Cooperation Council (now the World Customs Organisation), and 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). It takes six-digit headings and subheadings from the HS, only the seventh and eighth digits forming subdivisions specific to the CN.
- 4 Heading 2519 in Chapter 25 of Section V of Part II of the CN is worded as follows: 'Natural magnesium carbonate (magnesite); fused magnesia; dead-burned (sintered) magnesia, whether or not containing small quantities of other oxides added before sintering; other magnesium oxide, whether pure or not pure'.

5 That heading contains subheading 2519 90, which is worded as follows: 'Other'. That subheading contains, inter alia, subheadings 2519 90 10 and 2519 90 90, which are worded, respectively, as follows: 'Magnesium oxide, other than calcined magnesium carbonate' and 'Other'.

6 With regard to subheading 2519 90 10, the Explanatory Notes to the CN of 5 December 1994 (OJ 1994 C 342, p. 1) state:

'This subheading includes:

...

2. magnesium oxide obtained by fusing in an electric arc (fused magnesia); this product is usually colourless, purer than the product obtained by calcination of magnesite but usually not more than 97% pure;

...'

- 7 The general rules for the interpretation of the CN, which are set forth in Part I of Title I A thereof ('the general rules'), provide:

'Classification of goods in the [CN] shall be governed by the following principles:

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.
  2. ...
    - (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.
3. When by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

- (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;
  
- (b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable;
  
- (c) when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.’

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

8 Fused magnesia is a product which is suitable for the production of refractory materials. The fused magnesia at issue in the main proceedings was obtained, prior to being imported into the European Union, from natural mined Australian magnesite. It is produced in two essential stages of heat treatment. It is produced at the first of these stages by calcination of natural mined magnesite in furnaces at temperatures of up to 1 000 °C and, at the second processing stage, by fusion of the magnesium oxide thus obtained in electric arc furnaces at temperatures in excess of 2 800 °C.

- 9 As of 1990, Possehl declared a large number of consignments of fused magnesia imported into the European Union via the ports of Rotterdam (The Netherlands) and Antwerp (Belgium) to the Principal Customs Office Emmerich, whose functions were subsequently transferred to the Principal Customs Office Duisburg, under subheading 2519 90 90, without this giving rise to any challenge. Customs duty does not apply to this subheading.
- 10 In 1991 Possehl requested a binding tariff information for this imported product from the Oberfinanzdirektion (Principal Revenue Office) Frankfurt-am-Main, Customs Laboratory and Training College. According to the binding tariff information communicated, that product was to be classified under subheading 2519 90 10, which gave rise to the payment of customs duty.
- 11 Possehl made no use of this binding tariff information.
- 12 In 1997 it was subject to an investigation by the Hauptzollamt für Prüfungen (Principal Office for Investigations) Kiel into its imports over the period from 1 January 1995 to 31 December 1996. The Principal Office for Investigations found that the fused magnesia imported should have been classified under subheading 2519 90 10 and not subheading 2519 90 90.
- 13 In 1998, in response to that finding, the Principal Customs Office Emmerich demanded post-clearance recovery of customs duty from Possehl in the amount of DEM 383 833.30. This decision was then amended by two subsequent decisions, which, altogether, reduced the amount to be paid to DEM 28 631.28.

- 14 Possehl's contention that the imported product should have been classified under subheading 2519 90 90 was rejected by the Principal Customs Office Emmerich, essentially on the ground that this classification was determined by the method of production, which consisted of calcination and then fusion in an electric arc furnace at temperatures of between 2 800 °C and 3 000 °C.
- 15 Possehl brought an action before the Finance Court Dusseldorf, which decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does fused magnesia of the kind described in detail in this order, which is caustic-burned from natural mined magnesite and obtained in a second processing stage by fusion in an electric arc furnace, come under subheading 2519 90 10 of Annex I to the [CN]?'

### **The question referred for a preliminary ruling**

#### *Observations submitted to the Court*

- 16 Possehl argues that fused magnesia should be classified under subheading 2519 90 90 since this product requires heat treatment. Fused magnesia should not, therefore, be regarded as a synthetic product. As regards the use of the term 'calcined' in subheading 2519 90 10, Possehl argues that account should be taken of the fact that the process takes place in an electric arc furnace and that the temperature at which and the number of times the product concerned is calcined is irrelevant. Moreover, Possehl considers that an examination of the history of all of



the amendments to the Customs Tariff reveals that for several years this product was exempt from payment of customs duties and should remain so in the light of the international law obligations of the European Community. Lastly, Possehl maintains that fused magnesia, which occurs in seven different colours, cannot be regarded as a synthetic product.

- 17 According to the Commission of the European Communities, this product should, by contrast, be classified under subheading 2519 90 10. It observes that the Explanatory Notes to the HS make a distinction between various different categories of magnesium oxide, so that it is possible to conclude that it is entirely consistent with the HS to classify these categories of product under different subheadings of the CN. The amendments to the latter, introduced in 1999, which, moreover, are not applicable to the facts of the main proceedings, add force to the argument that subheading 2519 90 10 covers fused magnesia produced at high temperatures in two essential stages of heat treatment. Finally, the Commission considers that the description of fused magnesia in the order for reference is a determining factor in the tariff classification of this product.

### *Reply of the Court*

- 18 It should be noted, first, that fused magnesia comes under heading 2519 and under subheading 2519 90 and that it is not expressly referred to under an eight-digit subheading of the CN.
- 19 According to settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs tariff purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the

sections or chapters (Case C-396/02 *DFDS* [2004] ECR I-8439, paragraph 27; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 47).

20 The Explanatory Notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those Notes must therefore be consistent with the provisions of the CN and cannot alter their scope (*Intermodal Transports*, cited above, paragraph 48).

21 According to the general rules, the heading which provides the most specific description is to be preferred to headings providing a more general description. In this case, subheading 2519 90 10 provides, as regards the objective characteristics and properties of fused magnesia, and in particular on account of the fact that this subheading refers expressly to 'magnesium oxide', a more specific description than subheading 2519 90 90.

22 Lastly, the national court observed that, depending on the level of impurity, fused magnesia occurs in seven different colours with a magnesium oxide content of between 95.94% and 97.95% and an average of 97.38% by weight. The fact remains, therefore, that fused magnesia is essentially composed of magnesium oxide.

23 In that context, it should be noted that the Community legislature intended, by the use of the words 'other than calcined magnesium carbonate', to exclude magnesium oxide obtained at the end of the first stage of heat treatment. However, whilst it is the case that, after this first stage, magnesium carbonate (magnesite) may come

under subheading 2519 90 90, this does not apply to magnesium oxide since this product is, at the second stage of heat treatment, fused in electric arc furnaces at temperatures in excess of 2 800 °C. Fused magnesia is, however, precisely the result of magnesite being subjected to two stages of heat treatment, namely calcination and fusion.

24 In this regard, the national court explained that it is technically impossible to produce fused magnesia directly from natural magnesium carbonate (mined magnesite) by calcination.

25 It follows that subheading 2519 90 10 of the CN covers fused magnesia such as that at issue in the main proceedings.

26 Moreover, this interpretation is borne out by implication by the Explanatory Notes to the CN on subheading 2519 90 10 which refer to '[a] product ... purer than the product obtained by calcination of magnesite'.

27 Further support for that interpretation is lent by the fact that, according to the general rules, where composite goods are concerned, reference must be made to the material which gives them their essential character. Although fused magnesia contains only a small quantity of sintered parts, this cannot be determinative of the tariff classification of this product since it is, as was pointed out at paragraph 22 of

this judgment, essentially composed of magnesium oxide and, therefore, must be regarded as magnesium oxide. Possehl's argument that by the use of the words 'usually colourless' the Explanatory Notes to the CN refer only to synthetically or chemically produced fused magnesia cannot lead to a different interpretation.

28 In that regard, it should be noted that the wording of heading 2519, namely 'Natural magnesium carbonate (magnesite); fused magnesia; dead-burned (sintered) magnesia, whether or not containing small quantities of other oxides added before sintering; other magnesium oxide, whether pure or not pure' makes clear the general distinction that must be made between natural magnesium carbonate (magnesite) and the various kinds of magnesium oxide. None the less, it should be noted that this wording, which does not give an exhaustive list of the different kinds of magnesium oxide, does not make a hierarchical distinction between synthetic or chemical treatment or heat treatment. In particular, neither the wording of subheading 2519 90 10 of the CN nor that of the Explanatory Notes to the latter relating to this stipulate that either synthetic or chemical production or heat treatment is determinative of whether goods are to be classified under that subheading.

29 It is clear that the Community legislature intended to give a definition of subheading 2519 90 10 that was based on criteria other than the method of production, irrespective of whether the goods were produced synthetically, chemically or by heat treatment.

30 Having regard to all of the foregoing considerations, the answer to the question referred for a preliminary ruling must be that fused magnesia such as that at issue in the main proceedings comes under subheading 2519 90 10 of the CN.

## Costs

- 31 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 (Fourth Chamber) hereby rules:

**Fused magnesia such as that at issue in the main proceedings comes under subheading 2519 90 10 of 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, as amended by Commission Regulations (EC) Nos 3115/94 of 20 December 1994, 1359/95 of 13 June 1995, 2448/95 of 10 October 1995 and 3009/95 of 22 December 1995.**

[Signatures]