

JUDGMENT OF THE COURT (Fifth Chamber)

18 June 2009 *

In Case C-173/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te Amsterdam (Netherlands), made by decision of 10 April 2008, received at the Court on 25 April 2008, in the proceedings

Kloosterboer Services BV

v

Inspecteur van de Belastingdienst/Douane Rotterdam,

THE COURT (Fifth Chamber),

composed of M. Ilešič, President of the Chamber, A. Borg Barthet and J.-J. Kasel (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: Y. Bot,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 1 April 2009,

after considering the observations submitted on behalf of:

- Kloosterboer Services BV, by M. Boekhoud and M. Janse, advocaten,
- the Commission of the European Communities, by M. Patakia and A. Sipos, acting as Agents, and F. Tuytschaever, advocaat,

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, first, the validity of point 2 of the table in the Annex to Commission Regulation (EC) No 384/2004 of 1 March 2004 concerning the classification of certain goods in the Combined Nomenclature (OJ 2004 L 64, p. 21) and, secondly, the interpretation, in the event that that regulation is invalid,

of the subheadings relevant for the purposes of the classification of a cooling system for computers in 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), as amended by Commission Regulation (EC) No 1789/2003 of 11 September 2003 (OJ 2003 L 281, p. 1) ('Regulation No 2658/87').

- ² The reference has been made in the course of proceedings between Kloosterboer Services BV ('Kloosterboer'), a company established in the Netherlands which is a customs forwarding agent, and the Inspecteur van de Belastingdienst/Douane Rotterdam (head of the Rotterdam Customs District) ('the Inspecteur') concerning the tariff classification of that cooling system for computers.

Legal context

- ³ The tariff subheadings of the CN in Regulation No 2658/87 which are relevant to the main proceedings are the following:

'8414 Air or vacuum pumps, air or other gas compressors and fans; ventilating or recycling hoods incorporating a fan, whether or not fitted with filters:

...

— Fans:

8414 51 — — Table, floor, wall, window, ceiling or roof fans, with a self-contained electric motor of an output not exceeding 125 W:

...

8414 59 — — Other

8414 59 10 — — — For use in civil aircraft (1)

— — — Other:

8414 59 30 — — — — Axial fans

8473 Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472:

...

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8473 30 — Parts and accessories of the machines of heading 8471:

8473 30 10 — — Electronic assemblies

8473 30 90 — — Other'

4 Point 2 of the table in the Annex to Regulation No 384/2004 is worded as follows:

Description of the goods	Classification (CN code)	Reasons
(1)	(2)	(3)
<p>2. Apparatus consisting of:</p> <ul style="list-style-type: none"> — an axial fan with an electrical motor and an electronic assembly for adjusting the speed of the fan; and — an aluminium heat sink. <p>The function of the apparatus is to remove the excess heat of a central processing unit of an automatic data processing machine.</p>	8414 59 30	<p>Classification is determined by the provisions of General Rules 1, 3(b) and 6 for the interpretation of the [CN], and by the wording of CN codes 8414, 8414 59 and 8414 59 30.</p> <p>The fan gives the product its essential character. It is the primary component for removing excess heat.</p>

- 5 Part One of the CN contains ‘preliminary provisions’. That part, Section I, on the general rules, includes under A, paragraphs 1 to 6, ‘General rules for the interpretation of the [CN]’ (‘the general rules’), which state:

‘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.

...

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:

...

- (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.

...

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise.'

6 The sections and chapters of the CN are preceded by a certain number of section or chapter notes. In the second part of the CN, note 2 to Section XVI provides:

'Subject 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:

(a) Parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8485, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;

- (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) 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. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517;
- (c) All other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8485 or 8548.'

7 The CN is based on the international Harmonised Commodity Description and Coding System ('the HS'), which was drawn up by the Customs Cooperation Council, now the World Customs Organisation, established by the International Convention concluded in Brussels on 14 June 1983, and approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). Chapter 84 of the explanatory notes to the CN refers, with regard to fans, to the machines described in the explanatory notes to the HS, which are worded as follows:

'B. — Fans

These machines, which may or may not be fitted with integral motors, are designed either for delivering large volumes of air or other gases at relatively low pressure or merely for creating a movement of the surrounding air.

Those of the first kind may act as air extractors or as blowers (e.g., industrial blowers used in wind tunnels). They consist of a propeller or blade-type impeller revolving in a casing or conduit, and function on the principle of rotary or centrifugal compressors.

The second type are of more simple construction, and consist merely of a driven fan rotating in free air.

Fans are used, inter alia, for ventilating mines and premises of all kinds, silos, ships; for extracting by suction dust, steam, smoke, hot gases, etc.; for drying many materials (leather, paper, textiles, paint, etc.); in mechanical draught apparatus for furnaces.

This group also includes room fans, whether or not with a tilting or oscillating device. These include ceiling fans, table fans, wall bracket fans, ring mounted fans for building into walls, window panes, etc.

This heading excludes fans fitted with elements additional to their motors or housing (such as large dust separating cones, filters, cooling or heating elements and heat exchangers) if such elements give them the characteristics of more complex machines of other headings, e.g., air heaters, not electrically heated (heading 73.22), air conditioning machines (heading 84.15), dust extractors (heading 84.21), air coolers for the industrial treatment of materials (heading 84.19) or for premises (heading 84.79), electric space heating apparatus with built-in fans (heading 85.16).'

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

- 8 On 6 January 2004, Kloosterboer submitted a customs declaration to the customs authorities of Rotterdam regarding the release of goods for free circulation which included, among other things, ‘computer fans’. These goods, originating in China, were entered under subheading 8414 51 90 of the CN and were subject to a customs duty of 3.2% of the declared value.
- 9 On 7 January 2004, the Inspecteur classified those goods under subheading 8414 51 90 of the CN and issued the notice for recovery of the corresponding customs duties.
- 10 On 21 July 2004, Kloosterboer submitted a request for a refund of those customs duties, claiming that the goods at issue in the main proceedings, which the manufacturer had classified as ‘computer parts for processor’, should, in accordance with the case-law of the national courts, be classified under subheading 8473 30 90 of the CN, under which no customs duties were payable.
- 11 By decision of 9 September 2004, the Inspecteur rejected that request considering that ‘investigation has shown that on 1 March 2004 the Commission [of the European Communities] adopted a Regulation No 384/2004. This regulation states that the fans should be classified under [subheading] 8414 59 30... The fan gives the product its essential character. It is the primary component for removing excess heat. This regulation is binding in its entirety’.
- 12 As the objection lodged against the Inspecteur’s decision was also dismissed, Kloosterboer initiated proceedings before the referring court seeking the annulment of that decision.

- 13 The Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) describes the goods at issue in the proceedings before it as machines consisting of a cooling component, commonly called a 'heat sink', and a fan, which are durably attached to each other to form a whole. The heat sink comprises a metal block with fixing elements. Aluminium fins are raised out of this block, which are in turn attached to a component, made of synthetic material, to which the (axial) fan is attached. This fan is operated by a direct-current 12-volt motor. Those devices are attached to the motherboard on the underside of the central processor unit by means of a special clip-on attachment. To prevent the formation of an insulating layer of air between the upper surface of the processor and the lower surface of the heat sink, the latter is covered with a thermal conductive paste. The heat generated by the processor is absorbed by the fins of the heat sink. The operation of the fan, which creates a current of air, then ensures that the heat absorbed by the fins is conducted away. The goods in question are solely intended to be used in a computer and are designed to cool the processor.
- 14 Before the referring court, Kloosterboer claims, in essence, that, since a computer cannot function without a cooling component, the goods at issue in the main proceedings should be considered to be parts of a computer. The fact that, in the present case, a fan is attached to the heat sink is not such as to alter that conclusion since the fan has the sole purpose of increasing the cooling capacity of the apparatus without the fins of the heat sink having to increase in size. The heat sink constitutes the main element of the goods at issue and gives them their essential character. The computer fans should therefore be classified under heading 8473 of the CN and not under heading 8414 thereof. It follows that Regulation No 384/2004 is in conflict with the general rules for the interpretation of the CN.
- 15 The Inspecteur contends that, in view of their objective characteristics and properties, the goods at issue in the main proceedings must be considered to be fans. It is indeed the fan which gives those goods their essential character, because this part of the machine plays the most important role in removing excess heat. Even though they are undeniably intended to be used as computer components, the fans should, on the basis of

paragraphs 1, 3(b) and 6 of the general rules, be classified under heading 8414 of the CN. That interpretation is moreover supported by Regulation No 384/2004.

- ¹⁶ The referring court considers that the goods in question fulfil a broader function than the fans referred to in heading 8414, so that they cannot be compared with the fans referred to in the explanatory notes to that heading and that heading cannot therefore be taken into consideration. The essential characteristic of those goods is that they can absorb heat and conduct it away, a function which a fan as such does not perform. It follows that, in the second part of the CN, Note 2(a) to Section XVI is not applicable to the present case.
- ¹⁷ In view of Note 2(b), and paragraphs 1 and 6 of the general rules, and of the fact that it is not disputed that the goods at issue in the main proceedings are specially manufactured for computers, that is to say ‘automatic data-processing machines and units thereof’ according to the definition in heading 8471 of the CN, and in view of the fact that the cooling of the processor is essential for the proper functioning of computers, those goods must, according to the referring court, be classified under subheading 8473 30 90 of the CN.
- ¹⁸ Since the goods at issue in the main proceedings correspond exactly to the machines described in Regulation No 384/2004, the referring court has serious doubts, first, as to whether the classification provided for in that regulation is in agreement with the wording of the CN and, secondly, about the validity of that regulation.
- ¹⁹ In those circumstances, the *Gerechtshof te Amsterdam* decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Is [Regulation No 384/2004] valid in so far as, according to that Regulation, subheading 8414 59 30 of the [CN] covers the goods [consisting of a heat sink and a fan]?
- (2) If [Regulation No 384/2004] is invalid, can the Common Customs Tariff then be interpreted to mean that those goods should be classified as “parts and accessories of the machines of heading 8471” as referred to in subheading 8473 30 90 of the [CN]?

The questions referred for a preliminary ruling

- 20 It should be pointed out first of all that the lodging of the request for the release of the goods at issue in the main proceedings for free circulation and the decision of the Inspecteur concerning that request predate the entry into force of Regulation No 384/2004, that is to say 22 March 2004. It is apparent from the order for reference that Kloosterboer lodged its request on 6 January 2004 and that the Inspecteur adopted his decision on the classification of those goods the following day.
- 21 In that regard, it should be recalled that a regulation specifying the conditions for classification in a tariff heading or subheading is of a legislative nature and cannot have retroactive effect (see, *inter alia*, Case C-479/99 *CBA Computer* [2001] ECR I-4391, paragraph 31, and judgment of 27 November 2008 in Case C-403/07 *Metherma*, paragraph 39). In addition, it is settled case-law that the Court may deem it necessary to consider provisions of Community law to which the national court has not referred when formulating its question for a preliminary ruling (see, *inter alia*, Joined Cases C-329/06 and C-343/06 *Wiedemann and Funk* [2008] ECR I-4635, paragraph 45, and *Metherma*, paragraph 39).

- 22 In those circumstances, the questions referred for a preliminary ruling must be examined in the light not of the provisions of Regulation No 384/2004, as suggested by the wording of the order for reference, but of those of Regulation No 2658/87.
- 23 In view of the foregoing, the questions referred should be understood as asking, in essence, whether Regulation No 2658/87 must be interpreted as meaning that goods, such as those at issue in the main proceedings, made up of a heat sink and a fan and which are solely intended to be incorporated in a computer must be classified under subheading 8473 30 90 or under subheading 8414 59 30 of the CN.
- 24 In order to answer that question, it should be noted that it is settled case-law that, 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, *inter alia*, Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 27; and Joined Cases C-208/06 and C-209/06 *Medion and Canon Deutschland* [2007] ECR I-7963, paragraph 34).
- 25 The explanatory notes drawn up by the Commission as regards the CN and by the World Customs Organisation as regards the HS are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (Case C-250/05 *Turbon International* [2006] ECR I-10531, paragraph 16).
- 26 For the purposes of classification under the appropriate heading, the intended use of a product may constitute an objective criterion for classification if it is inherent to the

product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see, inter alia, *RUMA*, paragraph 36, and *Medion and Canon Deutschland*, paragraph 37).

27 Moreover, it should be noted that it is apparent from the case-law of the Court that the word 'part', within the meaning of heading 8473 of the CN, implies a whole for whose operation the part is essential (Case C-339/98 *Peacock* [2000] ECR I-8947, paragraph 21; and *Turbon International*, paragraph 17).

28 In the present case, it is apparent from both the order for reference and the explanations provided by Kloosterboer and the Commission at the hearing that the goods at issue in the main proceedings are essential for the operation of the computers for which they are solely intended. They are therefore capable of being regarded as 'parts' and, accordingly, classified in subheading 8473 30 90 of the CN.

29 The fact that those goods are composed of two distinct elements, namely a heat sink and a fan, which, when considered separately, could each be classified under a different subheading of the CN, namely subheadings 8473 30 90 and 8414 59 30, is not such as to call that classification into question.

30 Since the goods at issue in the main proceedings are composed of different materials and neither of the two subheadings mentioned in the previous paragraph is more specific than the other, it is appropriate, for the purposes of classifying those goods, to have recourse to the rule in paragraph 3(b) of the general rules (see, to that effect, *Turbon International*, paragraph 20).

31 Under that rule, in carrying out the tariff classification of goods it is necessary to identify, from among the materials of which they are composed, the one which gives

them their essential character. This may be done by determining whether the goods would retain their characteristic properties if one or other of their constituents were removed from them (*Turbon International*, paragraph 21).

32 In the same way, as stated in paragraph VIII of the explanatory note to the HS on general rule 3(b), the factor which determines the essential character of the goods may, depending on the type of goods, be determined for example by the nature of the constituent material or components, its bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.

33 In this case, it must be stated that, contrary to the Commission's argument, it is the heat sink, and not the fan, which gives the goods at issue their essential character.

34 First, as the referring court observed, the main function of those goods is to absorb the heat of the processor and conduct it away. However, the part of them which allows that function to be fulfilled, and which was specially designed for that purpose, is the heat sink. It is, moreover, not disputed that, before goods such as those at issue in the main proceedings were developed, the cooling of computer processors was exclusively effected by heat sinks. Adding fans to those heat sinks did not fundamentally change their properties, but merely improved their effectiveness by increasing their cooling capacity.

35 Secondly, it is also not disputed that, unlike the heat sinks, the fans with which the goods at issue in the main proceedings are equipped are not designed to operate

constantly, but they start to turn only when the cooling effected by the heat sink is no longer sufficient to prevent the temperature of the processor from exceeding a certain level.

³⁶ In those circumstances, and having regard to the wording of the explanatory note to the HS concerning heading 8414, and in particular to the last paragraph of part B dealing with fans, it must be concluded that goods such as those at issue in the main proceedings cannot be classified under that heading.

³⁷ Since, as already stated in paragraph 28 of the present judgment, the goods at issue in the main proceedings are solely intended for computers coming under heading 8471 of the CN, they must, in accordance with Note 2(b) of Section XVI of the first part of the CN, be classified under subheading 8473 30 90.

³⁸ Having regard to all of the foregoing considerations, the answer to the questions referred is that Regulation No 2658/87 must be interpreted as meaning that goods, such as those at issue in the main proceedings, made up of a heat sink and a fan and which are solely intended to be incorporated in a computer must be classified under subheading 8473 30 90 of the CN.

Costs

³⁹ 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 (Fifth Chamber) hereby rules:

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 Regulation (EC) No 1789/2003 of 11 September 2003, must be interpreted as meaning that goods, such as those at issue in the main proceedings, made up of a heat sink and a fan and which are solely intended to be incorporated in a computer must be classified under subheading 8473 30 90 of the Combined Nomenclature in Annex I to that regulation.

[Signatures]