JUDGMENT OF THE COURT (Third Chamber)

10 December 2009 *

In Case C-260/08,

REFERENCE for a preliminary ruling under Article 234 EC, from the Bundesfinanzhof (Germany), made by decision of 6 May 2008, received at the Court on 18 June 2008, in the proceedings

Bundesfinanzdirektion West

v

HEKO Industrieerzeugnisse GmbH,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting as the President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus (Rapporteur) and A. Ó Caoimh, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2009,

after considering the observations submitted on behalf of:

— HEKO Industrieerzeugnisse GmbH, by T. Lieber, Rechtsanwalt,

— the Greek Government, by G. Kanellopoulos and I. Bakopoulos and by M. Tassopoulou, acting as Agents,

— the Commission of the European Communities, by R. Lyal and B.-R. Killmann, 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 Article 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the Customs Code'), for the purpose of determining the origin of goods coming under heading 7312 of the Combined Nomenclature, constituting 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 1719/2005 of 27 October 2005 (OJ 2005 L 286, p. 1) ('the CN').

2 The reference has been made in proceedings between Bundesfinanzdirektion West (Western Federal Revenue Office) ('the Bundesfinanzdirektion') and HEKO Industrieerzeugnisse GmbH ('HEKO'), concerning the determination of the non-preferential origin of steel cables manufactured in North Korea using stranded wire originating in China.

Legal context

The Agreement on Rules of Origin

3 By Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), the Council of the European Union approved, inter alia, the Agreement on Rules of Origin (WTO-GATT 1994) (OJ 1994 L 336, p. 144), annexed to the final act signed in

Marrakesh on 15 April 1994. That agreement seeks to harmonise rules of origin and establishes, for a transitional period, a harmonisation work programme.

4 Article 2 of that agreement, headed 'Disciplines During the Transition Period' provides:

'Until the work programme for the harmonisation of rules of origin set out in Part IV is completed, Members shall ensure that:

(a) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular:

(i) in cases where the criterion of change of tariff classification is applied, such a rule of origin, and any exceptions to the rule, must clearly specify the subheadings or headings within the tariff nomenclature that are addressed by the rule;

…'

The Community customs rules

5 Article 24 of the Customs Code provides:

'Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.'

6 Chapter 1, entitled 'Non-preferential origin', of Title IV of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1) ('the implementing regulation'), includes Articles 35 to 40.

7 Under Article 35 of the implementing regulation:

'This chapter lays down, for textiles and textile articles falling within Section XI of the [CN], and for certain products other than textiles and textile articles, the working or processing which shall be regarded as satisfying the criteria laid down in Article 24 of the [Customs] Code and shall confer on the products concerned the origin of the country in which they were carried out.

…'

8 Article 39 of that regulation provides:

‘In the case of products obtained which are listed in Annex 11, the working or processing referred to in column 3 of the Annex shall be regarded as a process or operation conferring origin under Article 24 of the [Customs] Code.

…’

9 Heading 7312 of the CN, namely ‘[s]tranded wire, ropes, cables, plaited bands, slings and the like, of iron or steel, not electrically insulated’, is not referred to in Annex 11 to the implementing regulation.

The main proceedings and the question referred for a preliminary ruling

10 In May 2005, HEKO requested binding origin information (‘BOI’) from the Bundesfinanzdirektion for various types of steel cables coming under heading 7312 of the CN, manufactured in North Korea using stranded wire originating in China also coming under heading 7312 of the CN.

11 It is apparent from the documents before the Court that, in order to manufacture those cables, stranded wire consisting of several wires are twined together on cabling machines in an undertaking equipped for that purpose in North Korea. Depending on their intended future use, the steel cables are also cut into sections, joined, compressed, filled, flattened, twined together and/or coated in that undertaking.

12 On 11 January 2006, the Bundesfinanzdirektion issued five BOIs under which the People's Republic of China is designated as the country of origin of the steel cables on the ground that, in the absence of a change in tariff heading, the cabling of the stranded wire culminating in the manufacture of steel cables, carried out in North Korea, did not constitute substantial processing or working within the meaning of Article 24 of the Customs Code.

13 In order to substantiate its position, the Bundesfinanzdirektion relied on rules known as 'list rules', drawn up by the Commission of the European Communities with the aim of defining the terms in Article 24 of the Customs Code and available on its internet site. It is apparent from those rules that goods under heading 7312 of the CN cannot be regarded as having undergone their last substantial processing or working unless they change tariff heading.

14 HEKO appealed against the Bundesfinanzdirektion's decisions to the Finanzgericht Düsseldorf (Finance Court, Düsseldorf). By judgment of May 2007, that court cancelled the disputed BOIs and ordered the Bundesfinanzdirektion to issue BOIs in which the People's Democratic Republic of Korea was to be indicated as the country of origin of the steel cables. According to that court, the list rules are incompatible with the Court's case-law and do not constitute a binding legal Community act.

15 The Bundesfinazdirektion appealed against that ruling to the referring court, claiming that, even though the list rules do not have legal effect, they do, nevertheless provide to some extent an interpretation of Article 24 of the Customs Code.

16 In those circumstances, the Bundesfinanzhof decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is the only substantial processing or working of goods coming under heading 7312 of the [CN] which confers non-preferential origin that which has the effect that the product resulting from that processing or working is to be classified under a different heading of the [CN]?'

The question referred for a preliminary ruling

17 By its question, the referring court asks, in essence, whether the term 'substantial processing or working' in Article 24 of the Customs Code must be interpreted as covering, with regard to goods classified under heading 7312 of the CN, only processing or working that has the effect that the resulting product is to be classified under a different heading of the CN.

18 First of all, concerning the applicability of the list rules in general, HEKO considers that, since they have not been published in the *Official Journal of the European Union*, they do not have mandatory force and cannot bind the courts of the Member States.

19 Nor does the Commission attach binding effect to those list rules, the contents of which were agreed, it states, with the representatives of the Member States in the Customs Code Committee. The Commission, suggests however, that they be taken into account to ensure that the application of Community customs legislation complies with the obligations contracted by the European Community in the context of the World Trade Organisation (WTO). The list rules provide concrete criteria in order to satisfy the condition set out in Article 2 of the Agreement on the Rules of Origin, according to

which, when issuing administrative determinations of general application, the requirements to be fulfilled must be clearly defined.

20 In that regard, it should be noted that, although the list rules drawn up by the Commission contribute to the determination of the non-preferential origin of goods, those rules do not have binding legal force.

21 Accordingly, the content of those rules must be compatible with the rules of origin as set out in Article 24 of the Customs Code, and may not alter the scope of those rules (see, by analogy, concerning the Explanatory Notes to the CN, Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 28, and Case C-376/07 *Kamino International Logistics* [2009] ECR I-1167, paragraph 48).

22 It should be added that, although relevant acts of secondary legislation must be interpreted in the light of the agreements adopted in the context of the WTO (see, to that effect, Case C-300/98 *Dior and Others* [2000] ECR I-11307, paragraph 47, and Case C-245/02 *Anheuser-Busch* [2004] ECR I-10989, paragraph 55), the fact remains that the Agreement on Rules of Origin establishes, for the present, only a harmonisation work programme for a transitional period. Since that agreement does not constitute complete harmonisation, the members of the WTO enjoy a margin of discretion with regard to the adaptation of their rules of origin. In that regard, it is clear from the WTO Panel Report, presented on 20 June 2003 (United States) — Rules of Origin for Textiles and Apparel Products (DS243), paragraphs 6.23 and 6.24, that the members of the WTO are free to determine the criteria which confer origin, to alter those criteria over time, or to apply different criteria to different goods.

23 It is apparent from those considerations that the courts of the Member States may have recourse to criteria resulting from the list rules when interpreting Article 24 of the Customs Code, provided that that does not result in an alteration of that article.

24 As regards, in particular, the interpretation of the term 'substantial processing or working' in Article 24 of the Customs Code, with respect to goods coming under heading 7312 of the CN, HEKO contends that the criterion of a change of tariff heading resulting from the list rules is inconsistent with that article, because that criterion is not based on a real and objective distinction between the basic product and the processed product, depending fundamentally on the specific material qualities of each of those products.

25 Conversely, the Greek Government and the Commission are of the opinion that, for goods coming under tariff heading 7312 of the CN, a last substantial processing or working conferring origin implies a change of tariff heading. The criterion based on a change of tariff heading allows, first, Article 24 of the Customs Code to be applied uniformly in the customs territory of the Community and, second, the technical stages of the processing or working during the manufacture of the cables to be taken into account. In that regard, the Commission adds that the processing of stranded wire into steel cables does not bring about a clear qualitative change in the basic product and constitutes only an assembly operation which does not confer origin on those goods. By contrast, the manufacture of cables from steel wire brings about a change of tariff heading and consequently confers a new origin on those goods.

26 That argument cannot be upheld.

27 According to Article 24 of the Customs Code, where more than one country is involved in the production of goods, those goods are considered to originate in the country in which they underwent their last substantial economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.

28 It is apparent from the case-law of the Court concerning the interpretation of Article 5 of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (OJ English Special Edition 1968(I), p. 165), the provision which preceded Article 24 of the Customs Code but was drafted in identical terms, that processing or working is 'substantial', for the purposes of that provision, only if the product resulting therefrom has its own properties and a composition of its own, which it did not possess before that process or operation. Activities altering the presentation of a product for the purposes of its use, but which do not bring about a significant qualitative change in its properties, are not of such a nature as to determine the origin of that product (Case 49/76 *Gesellschaft für Überseehandel* [1977] ECR 41, paragraph 6, and Case 93/83 *Zentrag* [1984] ECR 1095, paragraph 13).

29 It also follows from that case-law that it is not sufficient to seek criteria defining the origin of goods in the tariff classification of processed products, since the Common Customs Tariff has been conceived to fulfil special purposes and not in relation to the determination of the origin of the products. On the contrary, the determination of the origin of goods must be based on a real and objective distinction between the basic product and the processed product, depending fundamentally on the specific material qualities of each of those products (*Gesellschaft für Überseehandel*, paragraph 5, and Case 162/82 *Cousin and Others* [1983] ECR 1101, paragraph 16).

30 Furthermore, as regards the question whether an assembly operation of different elements constitutes substantial processing or working, the Court has already held that there are situations where consideration on the basis of technical criteria may not be decisive in determining the origin of goods and that, in such cases, it is necessary to take account, in the alternative, of other criteria (see, to that effect, Case C-26/88 *Brother International* [1998] ECR I-4253, paragraph 20, Cases C-447/05 and C-448/05 *Thomson and Vestel France* [2007] ECR I-2049, paragraph 27, and Case C-372/06 *Asda Stores* [2007] ECR I-11223, paragraph 37).

31 The Court has thus recognised the validity of recourse to a clear and objective criterion, such as that of added value, which, in respect of goods composed of many different

parts, makes it possible to explain what is meant by the substantial processing conferring on them their origin (see, inter alia, *Thomson and Vestel France*, paragraph 39).

32 In the present case, it should be ascertained whether the application of a single criterion, namely that of a change of tariff heading, for the purpose of determining the origin of goods coming under heading 7312 of the CN, is consistent with the case-law recalled in paragraphs 28 and 29 of this judgment and enables it to be established whether the manufacture of steel cables from stranded wire constitutes substantial processing or working within the meaning of Article 24 of the Customs Code.

33 In that connection it should be pointed out that the criterion of a change of tariff heading is not based on a real and objective distinction between the basic product, namely the stranded steel wire, and the processed product, namely the steel cables, or on the specific material qualities of each of those products, and does not take account of the specific processing or working which resulted in the manufacture of the processed product.

34 The Court has, it is true, already held that, in order to define the abstract concepts of specific processing or working, it was not incompatible with Article 5 of Regulation No 802/68 for the Commission to rely on a method in which the change of tariff heading of a product served as the basic rule, which was itself supplemented and adjusted by additional lists taking the particular features of specific processing or working into account (see *Cousin and Others*, paragraph 17).

35 However, although it is correct that a change in the tariff heading of a product, caused by a processing operation, constitutes an indication of the substantial nature of that processing or working, the fact remains that processing or working may be substantial in nature even if there is no such change of heading. As the Commission itself accepts,

the criterion of a change of tariff heading provided for in the list rules covers most of situations, but does not enable all the situations in which the processing or working of the goods is substantial to be identified. It is, therefore, necessary to take other criteria into consideration in order to determine whether the conditions provided for in Article 24 of the Customs Code are fulfilled.

36 It follows that an interpretation of the term 'substantial processing or working' in Article 24 of the Customs Code, in respect of goods coming under heading 7312 of the CN, that relies exclusively on the criterion of a change of tariff heading, without any indication of the specific processing or working undergone by those goods, is liable to restrict the scope of that article.

37 In view of the above considerations, the answer to the question referred must be that, with regard to goods classified under heading 7312 of the CN; 'substantial processing or working', within the meaning of Article 24 of the Customs Code, may cover not only such processing or working as leads to the goods which have undergone the process being classified under a different heading of the CN, but also such processing or working as results, without such a change of heading, in the creation of a product with properties and a composition of its own which it did not have before the operation.

Costs

38 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 (Third Chamber) hereby rules:

With regard to goods classified under heading 7312 of the Combined Nomenclature constituting 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 Regulation (EC) No 1719/2005 of 27 October 2005, 'substantial processing or working' within the meaning of Article 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, may cover not only such processing or working as leads to the goods which have undergone the process being classified under a different heading of the Combined Nomenclature, but also such processing or working as results, without such a change of heading, in the creation of a product with properties and a composition of its own which it did not have before the process.

[Signatures]