



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

9 October 2014*

(Reference for a preliminary ruling — Customs union and common customs tariff —
Tariff classification — Heading 3822 — Concept of ‘diagnostic or laboratory reagents’ — Indicators of
exposure to a predetermined target temperature)

In Case C-541/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg
(Germany), made by decision of 11 September 2013, received at the Court on 16 October 2013, in the
proceedings

Douane Advies Bureau Rietveld

v

Hauptzollamt Hannover,

THE COURT (Ninth Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, M. Safjan and A. Prechal, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Douane Advies Bureau Rietveld, by B. Rietveld,
- the Hauptzollamt Hannover, by T. Röper, acting as Agent,
- the European Commission, by A. Caeiros and B.-R. Killmann, acting as Agents,

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

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of heading 3822 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), as amended by Commission Regulation (EU) No 861/2010 of 5 October 2010 (OJ 2010 L 284, p. 1).
- 2 The request has been made in proceedings between Douane Advies Bureau Rietveld ('Rietveld'), a Dutch company, and Hauptzollamt Hannover (Customs office, Hanover), concerning the customs classification of two products marketed, respectively, under the names 'WarmMark' and 'ColdMark' ('the products at issue in the main proceedings').

Legal context

The CN

- 3 The CN is based on the Harmonised Commodity Description and Coding System ('the HS'), which was drawn up by the Customs Cooperation Council, now the World Customs Organisation (WCO), and established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983. That convention, and the protocol of amendment thereto of 24 June 1986, was approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). The CN adopts the headings and sub-headings of the HS.
- 4 The second part of the CN includes Section VI, entitled 'Products of the chemical or allied industries', which covers Chapters 28 to 38.
- 5 Chapter 38 of the CN is entitled 'Miscellaneous chemical products'. That chapter includes, in particular, heading 3822, which is worded: 'Diagnostic or laboratory reagents on a backing, prepared diagnostic or laboratory reagents whether or not on a backing, other than those of heading 3002 or 3006; certified reference materials'. The products classified under that heading are exempt from customs duty.
- 6 Heading 3824 of the CN is worded: 'Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included'. The sub-heading 3824 90 97 is a residual sub-heading that covers products not elsewhere specified or included. The products covered by that sub-heading are subject to customs duty at a rate of 6.5%.

The Explanatory Notes to the HS

- 7 The WCO approves, under the conditions laid down in Article 8 of the convention referred to in paragraph 3 of this judgment, the Explanatory Notes and Classification Opinions adopted by the HS Committee. Those notes, in the version adopted in 2007, are applicable to the dispute in the main proceedings.
- 8 The Explanatory Notes to the HS concerning heading 3822 are worded as follows:

'This heading covers diagnostic or laboratory reagents on a backing, prepared diagnostic or laboratory reagents, other than diagnostic reagents of heading 30.02 or diagnostic reagents designed to be administered to the patient and blood grouping reagents of heading 30.06. It also covers certified reference materials. Diagnostic reagents are used in the evaluation of physical, biophysical or

biochemical processes and states in animals and humans; their function is based upon a measurable or observable change in the biological or chemical substances constituting the reagent. Prepared diagnostic reagents of this heading may be similar in function to those designed to be administered to patients (subheading 3 006,30), with the exception that they are used for in vitro, rather than for in vivo, applications. Prepared laboratory reagents include not only diagnostic reagents, but also other analytical reagents used for purposes other than detection or diagnosis. Prepared diagnostic and laboratory reagents may be used in medical, veterinary, scientific or industrial laboratories, in hospitals, in industry, in the field or, in some cases, in the home.

Reagents of this heading are either on a backing or in the form of preparations and thus comprise more than a single constituent. For example, they may consist of admixtures of two or more reagents or of single reagents dissolved in solvents other than water. They may also be in the form of paper, plastics or other materials (used as backings or support), impregnated or coated with one or more diagnostic or laboratory reagents, such as litmus, pH or pole-finding papers or pre-coated immuno-assay plates. Reagents of this heading may also be put up in the form of kits, consisting of several components, even if one or more components are separate chemically defined compounds of Chapter 28 or Chapter 29, synthetic colouring matter of heading 32.04 or any other substance which, when presented separately, would be classifiable under another heading. Examples of such kits are those for testing glucose in blood, ketones in urine, etc., and those based on enzymes. However, diagnostic kits having the essential character of products of heading 30.02 or 30.06 (e.g., those based on monoclonal or polyclonal antibodies) are excluded.

The reagents of this heading should be clearly identifiable as being for use only as diagnostic or laboratory reagents. This must be clear from their composition, labelling, instructions for in vitro or laboratory use, indication of the specific diagnostic test to be performed or physical form (e.g., presented on a backing or support).

With the exception of the products of Chapter 28 or 29, for the classification of certified reference materials, heading 38.22 shall take precedence over any other heading in the Nomenclature.

...'

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

- 9 Rietveld applied for binding tariff information from the Hauptzollamt Hannover in relation to the products at issue in the main proceedings. That application sought confirmation that those products were covered by heading 3822 of the CN.
- 10 Those products are single-use temperature indicators which indicate irreversibly, by changing colour, when a specified upper or lower temperature has been reached (the 'target temperature'). They can be affixed to goods that are sensitive to variations in temperature, such as vaccines or medicines and chemicals, in order to monitor the temperatures to which they were exposed during storage or transport. There are a number of versions of the product corresponding to different target temperatures. Certain versions are capable of indicating the duration of exposure to those temperatures.
- 11 The product called 'WarmMark' is composed, essentially, of two strips of paper, one placed on top of the other, separated by a strip of colourless film and enclosed within a paper covering. The lower of the two strips of paper is permeated with a red substance not visible on the outside. The upper strip of paper is white and is visible from the outside through small transparent windows in the paper covering. Once the separator film is removed, the two strips of paper come into direct contact with each other. As soon as the target temperature is reached or exceeded, the red substance (the temperature at which that red substance becomes liquid being the same as the target temperature)

migrates via capillary force, thus colouring the white strip of paper. It can then be seen through the transparent window whether the target temperature has been reached. The extent of the red colouring provides information on the length of exposure to the target temperature.

- 12 The product called ‘ColdMark’ is a gel indicator consisting of a small tube within a plastic cover and formed into a bulb at the end. Only the bulb is visible through the plastic cover. The bulb is filled with a colourless liquid, whereas the hidden part of the tube contains violet-coloured liquid. When the ambient temperature goes below the threshold temperature given on the paper strip, the reduction in volume of the colourless liquid in the bulb causes the coloured liquid to be sucked in, which causes the hitherto colourless liquid to become irreversibly violet-coloured.
- 13 In January 2011 the Hauptzollamt Hannover issued two binding tariff informations in which it classified both of the products at issue in the main proceedings under the sub-heading 3824 90 97 of the CN, as products of the chemical industry, not elsewhere specified or included.
- 14 Rietveld brought an administrative action before the Hauptzollamt Hannover challenging the binding tariff informations. On 19 September 2011 the Hauptzollamt Hannover dismissed the action brought by the applicant in the main proceedings on the ground that it is a prerequisite of classification under heading 3822 of the CN that the use of the products should involve a chemical or biochemical reaction. According to that customs office, the changes in colour arising on the use of the products at issue in the main proceedings are the result of a physical process, namely the migration of coloured liquids, and not a chemical process.
- 15 The applicant in the main proceedings brought an action before the referring court seeking the classification of the products at issue in the main proceedings under heading 3822 of the CN. The applicant produced, in support of its action, a letter from Mr de Wolf, a representative of the European Chemicals Agency, which comes to the conclusion that those products should be classified under heading 3822 of the CN.
- 16 The referring court states that it agrees with the interpretation given by the Hauptzollamt Hannover according to which the products at issue in the main proceedings should not be classified under heading 3822 of the CN in so far as that heading includes the term ‘reagent’, which presupposes a chemical process, whereas those products function on the basis of a physical process. The referring court considers, however, that the interpretation of the term ‘reagent’ is not without uncertainty.
- 17 In those circumstances, the Finanzgericht Hamburg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is the concept of “reagent”, as used in the phrase “diagnostic or laboratory reagents” in tariff heading 3822 of the CN, to be interpreted as meaning a substance which by means of its chemical transformation as a result of a chemical reaction on or with a substance under investigation is used to indicate a state or property of the latter substance?’

Consideration of the question referred for a preliminary ruling

- 18 It should be observed as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court of Justice may have to reformulate the questions referred to it (judgment in *Lukoil Neftohim Burgas*, C-330/13, EU:C:2014:1757, paragraph 29 and the case-law cited).

- 19 In the present case, it is clear from the order for reference that, by its question, the referring court in fact inquires about the interpretation of heading 3822 of the CN for the purpose of the tariff classification of products with properties such as those of the products that are at issue in the main proceedings.
- 20 Hence, the question referred for a preliminary ruling must be considered to be asking whether heading 3822 of the CN, which covers diagnostic or laboratory reagents, must be interpreted as meaning that temperature indicators, such as the products at issue in the main proceedings, which, by the effect of a change in colour caused by the variation in volume of the liquids that they contain, indicate, irreversibly, whether a target temperature has been reached, are covered by that heading.
- 21 It is settled case-law that, in the interests of legal certainty and 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 in the section or chapter notes. The Explanatory Notes drawn up by the European Commission, as regards the CN, and by the WCO, as regards the HS, may be an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (judgment in *Sysmex Europe*, C-480/13, EU:C:2014:2097, paragraphs 29 and 30 and the case-law cited).
- 22 It must also be noted that the intended use of a product may also 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 (judgment in *Sysmex Europe*, EU:C:2014:2097, paragraph 31 and the case-law cited).
- 23 In the present case, the products at issue in the main proceedings are intended for use as temperature indicators. The function of those products is to indicate, after having been affixed to goods that are sensitive to variations in temperature, whether those goods have been exposed to a predetermined target temperature during transport or storage.
- 24 It is clear that the products at issue in the main proceedings are not expressly referred to either in the wording of heading 3822 of the CN or in the notes to the relevant section or chapter of the CN. The wording of heading 3822 of the CN refers, in particular, to 'diagnostic or laboratory reagents on a backing, prepared diagnostic or laboratory reagents'.
- 25 According to the HS Explanatory Notes that relate to heading 3822, that heading covers several types of reagents, namely diagnostic or laboratory reagents.
- 26 As regards diagnostic reagents, it is clear from those notes that diagnostic reagents are used in the evaluation of physical, biophysical or biochemical processes and states in animals and humans and that their function is based upon a measurable or observable change in their constituent biological or chemical substances (see, to that effect, judgment in *Sysmex Europe*, EU:C:2014:2097, paragraph 34).
- 27 In that respect, it must be held that, with regard to their objective characteristics and properties and their intended use, the products at issue in the main proceedings do not fall within the category of diagnostic reagents.
- 28 First, it is clear from the description given by the referring court that the products, even though they can be used for the transport or storage of goods of biological origin, such as blood, never enter, either directly or indirectly, into a reaction with those goods.
- 29 Second, the products at issue in the main proceedings are not used in the evaluation of physical, biophysical or biochemical processes and states in animals and humans. Those products are ambient temperature markers and do not evaluate such processes or states.

- 30 Third, the products at issue in the main proceedings do not function on the basis of any change in their constituent substances that is the result of a reaction with the goods with which they are intended to be used, whatever the nature of that reaction.
- 31 Thus, in the light of the foregoing, the products at issue in the main proceedings do not fall within the category of diagnostic reagents within the meaning of heading 3822 of the CN.
- 32 The same conclusion must be reached with respect to laboratory reagents. The Explanatory Notes to the HS concerning heading 3822 cannot lead to the conclusion that, unlike a diagnostic reagent, a laboratory reagent could be covered by that heading where it does not function on the basis of a change in its constituent substances resulting from a reaction with the goods with which it is intended to be used.
- 33 In the light of the foregoing, the answer to the question referred is that heading 3822 of the CN, which covers diagnostic or laboratory reagents, must be interpreted as meaning that temperature indicators, such as the products at issue in the main proceedings, which, by the effect of a change in colour caused by the variation in volume of the liquids that they contain, indicate, irreversibly, whether a target temperature has been reached, are not covered by that heading.

Costs

- 34 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 (Ninth Chamber) hereby rules:

Heading 3822 of the Combined Nomenclature in Annex 1 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 (EU) No 861/2010 of 5 October 2010, must be interpreted as meaning that temperature indicators, such as the products marketed under the names ‘WarmMark’ and ‘ColdMark’, which, by the effect of a change in colour caused by the variation in volume of the liquids that they contain, indicate, irreversibly, whether a temperature higher or lower than a specified threshold has been reached, are not covered by that heading.

[Signatures]