



## Reports of Cases

### JUDGMENT OF THE COURT (Eighth Chamber)

9 February 2023\*

(Reference for a preliminary ruling – Customs union – Common Customs Tariff – Combined Nomenclature – Tariff classification – Heading 9401 – Scope – Air sofas ('air loungers'))

In Case C-635/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Bremen (Finance Court, Bremen, Germany), made by decision of 18 August 2021, received at the Court on 15 October 2021, in the proceedings

**LB GmbH**

v

**Hauptzollamt D,**

THE COURT (Eighth Chamber),

composed of N. Piçarra (Rapporteur), acting as President of the Chamber, N. Jääskinen and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- LB GmbH, by H. Bleier, Rechtsanwalt,
- the Hauptzollamt D, by A. Böttcher, acting as Agent,
- the European Commission, by L. Mantl and M. Salyková, 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 subheading 9401 80 00 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), in the version resulting from Commission Implementing Regulation (EU) 2016/1821 of 6 October 2016 (OJ 2016 L 294, p. 1) ('the CN').
- 2 This request has been made in proceedings between LB GmbH and the Hauptzollamt D (Principal Customs Office D, Germany) concerning the tariff classification of air sofas, called 'air loungers', which were imported by that company in Germany.

### Legal context

#### *The HS*

- 3 The Harmonised Commodity Description and Coding System ('the HS') was established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983 within the framework of the World Customs Organisation (WCO), and approved, with its amending protocol of 24 June 1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). The Explanatory Notes to the HS are drawn up within the WCO in accordance with the provisions of that convention.
- 4 Under Article 3(1) of that Convention, each Contracting Party undertakes to apply the general rules for the interpretation of the HS and all the section, chapter and subheading notes and is not to modify the scope of the sections, chapters and subheadings.
- 5 Chapter 94 of the HS is entitled 'Furniture; [medico-surgical furniture;] bedding, mattresses, mattress supports, cushions and similar stuffed furnishings; lamps and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated name-plates and the like; prefabricated buildings'.
- 6 The general remarks in the Explanatory Notes to Chapter 94 of the HS, in the version applicable to the case in the main proceedings, state:

'This Chapter covers, subject to the exclusions listed in the Explanatory Notes to this Chapter:

- (1) All furniture and parts thereof (headings 94.01 to 94.03).

...

For the purposes of this Chapter, the term "furniture" means:

- (A) Any "movable" articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists' surgeries, etc., or ships, aircraft, railway

coaches, motor vehicles, caravan-trailers or similar means of transport. ... Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

...'

### ***The CN***

- 7 It is apparent from Article 1(1) of Regulation No 2658/87, as amended by Council Regulation (EC) No 254/2000 of 31 January 2000 (OJ 2000 L 28, p. 16), the CN, established by the European Commission, governs the tariff classification of goods imported into the European Union. It reproduces the HS six-digit headings and subheadings, with only the seventh and eighth figures creating further subheadings which are specific to it.
- 8 Under Article 12(1) of Regulation No 2658/87, as amended by Regulation No 254/2000, the Commission is to adopt each year a regulation reproducing the complete version of the CN, together with the rates of duty, as resulting from measures adopted by the Council of the European Union or the Commission. That regulation is to be published no later than 31 October in the *Official Journal of the European Union* and it is to apply from 1 January of the following year.
- 9 On the basis of these provisions, Implementing Regulation 2016/1821, which entered into force on 1 January 2017 and which includes the CN, was adopted.
- 10 General Rule 1 for the interpretation of the CN, contained in Section A, Title I, Part One of that regulation, provides that the classification of goods is legally determined on the basis of the terms of the headings and notes of sections or chapters; the wording of the titles of sections, chapters or subchapters are merely indicative.
- 11 Chapter 94 of the CN, entitled 'Furniture; [medico-surgical furniture;] bedding, mattresses, mattress supports, cushions and similar stuffed furnishings; lamps and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated name plates and the like; prefabricated buildings', is contained in Section XX, entitled 'Miscellaneous manufactured articles', of Part Two of the CN, which sets out the 'Schedule of customs duties'. Notes 1 and 2 to that chapter state:
- '1. This chapter does not cover:
- (a) pneumatic or water mattresses, pillows or cushions, of Chapter 39, 40 or 63;
- ...
2. The articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground.
- ...'
- 12 That chapter includes, inter alia, heading 9401 and subheading 9401 80 00, which are as follows:

CN code	Description	Conventional rate of duty (%)	Supplementary unit
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(1)	(2)	(3)	(4)
9401	Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof		
...			
9401 80 00	– Other seats	Free	—'

13 That chapter also includes heading 9404 and subheading 9404 90 90, which are worded as follows:

'CN code	Description	Conventional rate of duty (%)	Supplementary unit
...			
9404	Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered		
...			
9404 90 90	– – Other	3,7	—'

14 Part Two of the CN contains Section XI, entitled 'Textiles and textile articles', which includes Chapter 63, entitled 'Other made-up textile articles; sets; worn clothing and worn textile articles; rags'.

15 That chapter includes CN heading 6306, which is structured as follows:

'CN code	Description	Conventional rate of duty (%)	Supplementary unit
...			
6306	Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods		
...	...	...	...
6306 40 00	– Pneumatic mattresses	12	p/st
6306 90 00	– Other	12	—'

- 16 Part Two of the CN contains Section VII, entitled ‘Plastics and articles thereof; rubber and articles thereof’, which includes Chapter 39, entitled ‘Plastics and articles thereof’.
- 17 That chapter includes, inter alia, CN heading 3926, which is structured as follows:

‘CN code	Description	Conventional rate of duty (%)	Supplementary unit
...			
3926	Other articles of plastics and articles of other materials of headings 3901 to 3914		
...	...	...	...
3926 90	– Other		
...	...	...	...
	– – Other		
3926 90 92	– – – Made from sheet	6,5	—’

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

- 18 In July 2017, LB declared goods described as ‘air loungers’ imported from China [for release for free circulation] in CN subheadings 9404 90 90 and 3926 90 92. Those subheadings refer, respectively, to ‘other’ ‘articles of bedding and similar furnishing[s]’ not classified in other subheadings of heading 9404 of the CN and to ‘other articles of plastics and articles of other materials of headings 3901 to 3914’, not classified in other subheadings of heading 3926 of the CN, ‘made from sheet’, for which the applicable rate of customs duties on imports is 3.7% and 6.5%, respectively. The customs authorities granted that request.
- 19 However, following a classification opinion issued by the Bildungs- und Wissenschaftszentrum der Bundesfinanzverwaltung (Education and Science Centre of the Federal Revenue Administration, Germany), in 2019 the Principal Customs Office D issued an import duty notice, stating that the goods at issue do not fall under Chapter 94 or Chapter 39 of the CN, but rather under subheading 6306 90 00, which covers ‘other camping equipment’ and in respect of which the applicable import duty rate is 12%.
- 20 In accordance with that notice, the customs office proceeded with post-clearance recovery for the goods at issue at LB’s expense and dismissed its objection as unfounded.
- 21 LB then brought an action before the Finanzgericht Bremen (Finance Court, Bremen, Germany), the referring court, claiming that the goods at issue were classified as ‘other seats’ falling under subheading 9401 80 00 of the CN or, in the alternative, as articles of plastics ‘made from sheet’ falling under subheading 3926 90 92 of the CN.

- 22 The referring court described the goods at issue as a type of air sofa consisting of an inner tube made of plastic film and an outer covering made of textile fabric, which are sewn together in the closure area in such a way that air can flow into two chambers. It states that the air loungers are inflated by pulling the open end through the air and then immediately closed by rolling the opening in several times and using the quick-closing fastener so as to form a kind of recess in which a person can sit or lie.
- 23 According to that court, the stability of the goods at issue depends on the degree of inflation; after the air lounge has initially been completely inflated, it loses air within a few hours, thereby affecting stability and making it necessary to inflate it again. Furthermore, following an inspection, that court found that, in order to achieve a stable sitting position, the user must sit in the middle, when viewing the longitudinal side, with bent legs and keeping his or her feet on the ground. Any other sitting position is unstable and risks knocking or tipping over the user.
- 24 In order to resolve the dispute before it, which, in essence, relates to whether the goods at issue constitute an ‘other seat’ within the meaning of CN heading 9401, the referring court asks the court to determine the scope of that heading.
- 25 According to that court, in order to be classified as ‘seats’ within the meaning of that heading and thus as ‘furniture’ within the meaning of Chapter 94 of the CN, goods which are used to equip different places must remain there with a certain degree of permanence. In addition, in order to be classified as ‘seats’, those goods must enable the person using it to sit on it in a stable manner, possibly assuming various sitting positions.
- 26 As regards, more specifically, seats convertible into beds, also covered by CN heading 9401, the referring court mentions that the English and French versions of that heading use, respectively, the terms ‘beds’ and ‘lits’, which are generally understood to be a piece of furniture used for sleeping, lying down or resting, and as having a lying surface on which the entire body can be placed in all possible sleeping positions. It points out, first, that the terms used in those two language versions of the CN reflect the wording of the corresponding heading of the HS in its English and French versions, which are binding on the agreement that established the HS, and, second, that the German version of the CN uses a different term, namely ‘*Liegen*’ (loungers/couches).
- 27 The referring court is inclined to consider that the goods at issue do not constitute seats within the meaning of CN heading 9401 because they are relatively unstable and need to be re-inflated on a regular basis, which, in its view, makes them suitable for being taken along to different places and for being used there temporarily and only to a limited extent for permanent use as articles of furniture. The referring court emphasises that the mere possibility of sitting on an air lounge is not sufficient to attribute to it a fundamental intended purpose of being used as a seat.
- 28 It notes, however, that there are remaining doubts as to the interpretation of that tariff heading, because, at the time of the events in the main proceedings, binding tariff information issued by customs authorities of other Member States for similar goods classified such goods as ‘seats’.

29 Under those circumstances, the Finanzgericht Bremen (Finance Court, Bremen) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the [CN] to be interpreted as meaning that ‘air loungers’ such as those in the [main proceedings] and as described in more detail in the order [for reference] come under subheading 9401 80 00 [of the Nomenclature]?’

### **Consideration of the question referred**

30 By its question, the referring court asks, in essence, whether CN heading 9401 must be interpreted as covering an article called air lounger, described as a type of air sofa consisting of an inner tube made of plastic film and an outer covering made of textile fabric.

31 As a preliminary point, it should be noted that, when the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the referring court with guidance on the criteria which will enable it to classify the relevant products correctly in the CN, rather than to effect such a classification itself. That classification results from a purely factual assessment which it is not for the Court to make in the context of a reference for a preliminary ruling (judgment of 20 October 2022, *Mikrotikls*, C-542/21, EU:C:2022:814, paragraph 21 and the case-law cited).

32 It should also be noted that, in accordance with General Rule 1 for the interpretation of the CN, the tariff classification of goods is to be determined according to the terms of the headings and any relative section or chapter notes to that nomenclature.

33 According to the settled case-law of the Court, in the interests of legal certainty and ease of verification, the decisive criterion for the tariff classification of those goods is, in general, to be sought in their objective characteristics and properties as defined in the wording of the relevant CN heading and in the corresponding section or chapter notes. The intended use of the product concerned 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 (see, to that effect, judgment of 20 October 2022, *Mikrotikls*, C-542/21, EU:C:2022:814, paragraph 22 and the case-law cited).

34 Furthermore, the Court has repeatedly held that, although the Explanatory Notes to the HS and CN do not have binding force, they are an important means of ensuring the uniform application of the Common Customs Tariff and, as such, may be regarded as useful aids to its interpretation (judgment of 20 October 2022, *Mikrotikls*, C-542/21, EU:C:2022:814, paragraph 23 and the case-law cited).

35 CN heading 9401, to which the question referred for a preliminary ruling refers, is entitled ‘seats (other than those of heading No 9402), whether or not convertible into beds, and parts thereof’ and includes, inter alia, subheading 9401 80 00, which mentions ‘other seats’ not included in other subheadings of that heading.

36 In accordance with Note 1 to Chapter 94 of the CN, that chapter does not cover pneumatic or water mattresses, pillows or cushions, of Chapter 39, 40 or 63. Consequently, if such goods come under one of those chapters, they cannot, therefore, be classified under Chapter 94 of the CN.

- 37 Furthermore, in accordance with Note 2 to Chapter 94, read in conjunction with the general remarks of the Explanatory Notes to Chapter 94 of the HS, the goods to which heading 9401 refers must both be designed to be placed on the floor or ground and be used, mainly with a utilitarian purpose, to equip private dwellings or other indoor or outdoor spaces referred to there by way of example, and also various means of transport. Accordingly, if an article does not fulfil those two cumulative conditions, it cannot be classified under CN heading 9401 (see, to that effect, judgment of 10 May 2001, *VauDe Sport*, C-288/99, EU:C:2001:262, paragraphs 18 and 19).
- 38 In the present case, the air sofas at issue in the main proceedings are particularly suitable for being taken along to different places and being used there temporarily because of, inter alia, the need to re-inflate them on a regular basis. Therefore, they may not be suitable for equipping, mainly with a utilitarian purpose and on a somewhat permanent basis, the dwellings or other indoor or outdoor spaces referred to in the general remarks of the Explanatory Notes to Chapter 94 of the HS, which is for the referring court to verify.
- 39 In the light of the foregoing, the answer to the question referred is that CN heading 9401 must be interpreted as not covering a type of ‘air sofa’ consisting of an inner tube made of plastic film and an outer covering made of textile fabric.

### **Costs**

- 40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

**Heading 9401 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 Implementing Regulation (EU) 2016/1821 of 6 October 2016, must be interpreted as not covering a type of ‘air sofa’ consisting of an inner tube made of plastic film and an outer covering made of textile fabric.**

[Signatures]