

JUDGMENT OF THE COURT (Third Chamber)

18 July 2007 *

In Case C-142/06,

REFERENCE for a preliminary ruling under Article 234 EC, by Østre Landsret (Denmark), made by decision of 9 March 2006, received at the Court on 16 March 2006, in the proceedings

Olicom A/S

v

Skatteministeriet,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, U. Löhmus (Rapporteur), A. Ó Caoimh and A. Arabadjiev, Judges,

* Language of the case: Danish.

Advocate General: J. Mazák,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Danish Government, by J. Molde, acting as Agent, and by P. Biering, advokat,
- the Commission of the European Communities, by J. Hottiaux, acting as Agent, and by P. Heidmann, advokat,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2007,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Note 5(E) to Chapter 84 of the Combined Nomenclature of the Common Customs Tariff, contained 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 3009/95 of 22 December 1995 (OJ 1995 L 319, p. 1) ('the CN').

- ² The reference was made in the course of proceedings between Olicom A/S ('Olicom'), a company established in Denmark, and Skatteministeriet (Danish Ministry of Taxation and Excise) regarding the tariff classification of certain network cards with a modem function.

Legal context

- ³ Heading No 8471 of the CN is worded as follows:

'Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included'.

- ⁴ Note 5 to Chapter 84 of the CN, which relates to heading No 8471, states:

'A. ...

B. Automatic data-processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:

(a) it is of a kind solely or principally used in an automatic data-processing system;

(b) it is connectable to the central processing unit either directly or through one or more other units; and

(c) it is able to accept or deliver data in a form (codes or signals) which can be used by the system.

C. Separately presented units of an automatic data-processing machine are to be classified in heading No 8471.

D. ...

E. Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data-processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.'

5 Heading No 8517 of the CN is worded as follows:

'Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones'.

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

6 Between 1996 and 1999, Olicom imported computer network equipment which it classified under heading No 8471 of the CN. This consisted, in particular, of combined network/modem PCMCIA cards, designed to be inserted into portable computers.

7 Those cards receive and convert signals and deliver them from a computer to other computers in the network. Some of the network cards imported are used solely to connect computers to local networks (the 'LAN' or Local Area Network function), while others are combined in that they have, in addition, a modem function ('combined cards'), which enables portable computers to be connected to external networks (the 'WAN' or Wide Area Network function).

- 8 It is clear from the decision for reference that combined cards are the result of development of pure LAN products and that they are designed so that the WAN function cannot be used without the LAN function, the latter, however, remaining operational even if the WAN function is disabled. As a percentage of the total price of the combined card, the WAN function constitutes 27% or 40%. With regard to data transmission speeds, that of the LAN function of those cards is 500 times higher than that of the WAN function.
- 9 That type of combined card meets the needs of portable computer users who normally use a local network for communication but who occasionally need to transmit or receive data when they are away from their usual work station. In such a situation, they can use the WAN function of the card as a modem. That added functionality means that the customers are not obliged to buy a separate modem. The price of the combined cards sold by Olicom was three to six times higher than the price of a plain modem.
- 10 In application of point 4 of the Annex to Commission Regulation (EC) No 1165/95 of 23 May 1995 concerning the classification of certain goods in the combined nomenclature (OJ 1995 L 117, p. 15), pursuant to which cards for incorporation in cable-linked computers enabling the exchange of data over a local area network without using a modem were to be classified under heading No 8517, which meant a rise in the rate of duty to be paid, the Danish authorities decided to proceed to post-clearance recovery of customs duties due from Olicom. The company appealed against that decision on 16 June 1999.
- 11 By its judgment in Case C-463/98 *Cabletron* [2001] ECR I-3495, the Court declared Regulation No 1165/95 invalid inasmuch as it classified the network cards referred to in point 4 of the Annex to that regulation under heading No 8517 of the CN.

- 12 On the basis of guidelines for interpretation of the judgment in *Cabletron*, drawn up by the Commission and addressed to the Member States, Olicom obtained reimbursement of customs duties relating to network cards with a purely LAN function. With regard to the duty on the combined cards, the competent Danish authorities refused reimbursement, taking the view that, because those cards also had a modem function, they should be classified under heading No 8517, as telecommunication apparatus.
- 13 Olicom contested that classification of the combined cards and, after administrative remedies had been exhausted, brought the dispute before the Østre Landsret. Initially, that court requested the Danish authorities to submit the matter to the Customs Code Committee. That committee issued an opinion on 10 January 2005, stating that the combined cards were to be classified under heading No 8517.
- 14 It was in those circumstances that the Østre Landsret decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:
- ‘(1) Is Annex I to ... Regulation (EEC) No 2658/87 ..., as amended by ... Regulation No 3009/95, to be interpreted as meaning that combined network/modem cards such as those at issue in the main proceedings are to be subject, after 1 January 1996, to customs duty as data-processing machines under heading No 8471 or as telecommunication apparatus under heading No 8517?’

In that connection the Court of Justice of the European Communities is asked to rule on whether “specific function” within the meaning of Note 5(E) to Chapter 84 of the CN, as amended by Regulation No 3009/95, is to be

interpreted as meaning that classification of the 24 products in question is to be under a heading other than 8471 when a WAN function is present, or whether there is to be a classification under a heading other than 8471 only if the WAN function can operate independently of an automatic data-processing machine.

- (2) If the Court of Justice of the European Communities should find that the WAN function in the combined network/modem card is a specific function, the Court is asked to rule on whether it is relevant for the customs classification that the product's principal function can be deemed to be the LAN function.'

The questions referred for a preliminary ruling

The first question

- 15 By its first question, the national court asks whether combined cards designed to be inserted into portable computers must, after 1 January 1996, be classified as data-processing machines under heading No 8471 of the CN or, as telecommunication apparatus, under heading No 8517 thereof. In that regard, it asks whether, for the purposes of such classification, 'specific function' within the meaning of Note 5(E) to Chapter 84 of the CN is to be interpreted as requiring that the modem function of those cards may operate independently of an automatic data-processing machine or whether it is sufficient that the cards have that function.
- 16 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 (see, inter alia, Case C-339/98 *Peacock* [2000] ECR I-8947, paragraph 9; Case C-396/02 *DFDS* [2004] ECR I-8439, paragraph 27; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 47; and Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 26).

- 17 Both the notes which head the chapters of the Common Customs Tariff and the Explanatory Notes to the Nomenclature of the Customs Cooperation Council are important means of ensuring the uniform application of the Tariff and as such may be regarded as useful aids to its interpretation (see Case C-11/93 *Siemens Nixdorf* [1994] ECR I-1945, paragraph 12; Case C-382/95 *Techex* [1997] ECR I-7363, paragraph 12; and *Peacock*, paragraph 10).
- 18 Finally, for the purposes of classification under the appropriate heading, it should be recalled that 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 Case C-459/93 *Thyssen Haniel Logistic* [1995] ECR I-1381, paragraph 13, *DFDS*, paragraph 29, and Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36).
- 19 It should be noted first of all that, in paragraph 23 of its judgment in *Peacock*, the Court held that, between July 1990 and May 1995, network cards designed to be installed in automatic data-processing machines were to be classified under heading No 8471 as units of machines of that type.

- 20 The Court also held, in paragraphs 16 to 20 of the judgment in *Peacock*, that network cards are designed solely for automatic information processing machines, that they are directly connected to those machines and that their function is to supply and accept data in a form which those machines can use. From this it inferred that network cards are comparable to any other medium whereby an automatic data processing machine accepts or delivers data in the sense that they have no function which they would be capable of performing without the assistance of such a machine. Accordingly, the final subparagraph of Note 5(B) to Chapter 84 of the CN, in the version in force prior to 1 January 1996, could not preclude them from being classified under heading No 8471, given that they do not perform any specific function. Furthermore, network cards satisfy the conditions relating to 'units' set out in that note, since they can be connected to the central unit and are specifically designed as parts of an automatic data-processing system.
- 21 That interpretation was confirmed in paragraphs 16 and 17 of the judgment in *Cabletron*, in which the Court also made clear, in paragraph 27, that the network cards referred to in point 4 of the Annex to Regulation No 1165/95, that is to say cards for incorporation in cable-linked digital computers enabling the exchange of data over a local network without using a modem, were to be classified under heading No 8471 of the CN both before and after 1 January 1996.
- 22 Secondly, it is appropriate to consider whether the case-law referred to in paragraphs 19 to 21 of the present judgment may also apply to the combined cards which, because they have a modem function, can be used for data exchange over external networks.
- 23 In this case, the wording of heading No 8471 of the CN refers, inter alia, to automatic data-processing machines and their units, whereas that of heading No 8517 covers, inter alia, telecommunication apparatus for carrier-current line systems or for digital line systems.

24 It follows from Note 5(B) to Chapter 84 of the CN that automatic data-processing machines may be in the form of systems consisting of a variable number of separate units. Subject to Note 5(E) to that chapter, a unit is to be regarded as being a part of a complete system if it meets simultaneously three conditions, that is to say, firstly, that it is of a kind solely or principally used in an automatic data-processing system, secondly, that it is directly or indirectly connectable to the central processing unit, and, thirdly, that it is able to accept or deliver data in a form which can be used by the system. Note 5(C) to that chapter adds that separately presented units of an automatic data-processing machine are to be classified under heading No 8471.

25 Like the network cards which were the subject of the judgments in *Peacock* and *Cabletron*, the combined cards, according to the description in the file, simultaneously meet those three conditions since they are used solely when inserted in portable computers, they work only if they are connected to that type of computer and are capable of converting incoming signals into data usable by an automatic data-processing machine and outgoing signals into data usable externally, whether they are transmitted across a local network (LAN) or an external network (WAN).

26 The Danish Government and the Commission of the European Communities take the view, however, that, because they are able independently to transfer information in the form of data communication in a line telephony network, without using the portable computers to which they are connected, those cards have a specific function within the meaning of Note 5(E) to Chapter 84 of the CN. Since it is not possible to determine the primary function of such combined cards in accordance with Note 3 to Section XVI of the CN, the correct tariff heading must be decided by application of Rule No 3(c) of the General Rules for the interpretation of the CN, according to which goods are to be classified under the heading which occurs last in

numerical order among those which equally merit consideration. It follows that the combined cards should be classified under heading No 8517 as telecommunication apparatus.

27 That argument cannot be accepted.

28 Firstly, although the combined cards can transfer information in the form of data communication in a line telephony network because they have a modem function, that does not mean, contrary to the submissions of the Danish Government and the Commission, that they are able to do so in an autonomous way or that they can operate independently without using the portable computer to which they are connected.

29 It is apparent from the file, firstly, that the modem function of a combined card is operational only if it is connected to an automatic data-processing machine, which transmits to it the necessary instructions and data and, secondly that that function cannot operate without the LAN function, whereas the latter remains operational even if the WAN function is disabled.

30 Secondly, it follows from the wording of Note 5(E) to Chapter 84 of the CN that the 'specific function' performed by a machine working with an automatic data-processing machine must be a function 'other than data-processing'. Since the combined cards are designed to transfer data between a number of computers and, in order to do so, render incoming external signals comprehensible to the computer and transform outgoing signals processed by it into signals usable externally,

regardless of whether the signal received or emitted is analogue or digital, the function which they perform consists of data-processing. It follows that such cards do not perform a 'specific function' within the meaning of that note.

- 31 Thirdly, although it is true that, at the time of the facts at issue in the main proceedings, the explanatory notes to the Harmonised System of the World Customs Organisation relating to heading No 8517 expressly included modulator-demodulator apparatus amongst telecommunication apparatus for carrier-current line systems or for digital line systems, the fact remains that, according to established case-law, those explanatory notes are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force. The content of those notes must therefore be compatible with the provisions of the CN and may not alter the scope of those provisions (see, *inter alia*, *Intermodal Transports*, paragraph 48; Case C-445/04 *Rossehl Erzkontor* [2005] ECR I-10721, paragraph 20; and Case C-500/04 *Proxxon* [2006] ECR I-1545, paragraph 22).
- 32 In the light of all of the foregoing, the answer to the first question must be that combined cards designed to be inserted into portable computers must, after 1 January 1996, be classified as data-processing machines under heading No 8471 of the CN.

The second question

- 33 The second question was referred only in case the Court should consider that the modem function of the combined cards constituted a specific function. In the light of the answer given to the first question, there is no need to examine the second question.

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 (Third Chamber) hereby rules:

Combined cards designed to be inserted into portable computers must, after 1 January 1996, be classified as data-processing machines under heading No 8471 of the Combined Nomenclature of the Common Customs Tariff, contained 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 Regulation (EC) No 3009/95 of 22 December 1995.

[Signatures]