

JUDGMENT OF THE COURT (Fifth Chamber)

27 April 2006^{*}

In Case C-15/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te Amsterdam (Netherlands), made by decision of 28 December 2004, received at the Court on 19 January 2005, in the proceedings

Kawasaki Motors Europe NV

v

Inspecteur van de Belastingdienst/Douane district Rotterdam,

THE COURT (Fifth Chamber),

composed of J. Makarczyk, President of the Chamber, R. Silva de Lapuerta and P. Kúris (Rapporteur), Judges,

^{*} Language of the case: Dutch.

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Kawasaki Motors Europe NV, by J.A.H. Hollebeek, adviseur, and K. Winters, advocaat,
- the Netherlands Government, by H. Sevenster and C. Wissels, acting as Agents,
- the Commission of the European Communities, by J. Hottiaux and F. Tuytschaever, 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, first, the validity of point 5 of the table annexed to Commission Regulation (EC) No 2518/98 of 23 November 1998 concerning the classification of certain goods in the Combined Nomenclature

(OJ 1998 L 315, p. 3) and, second, the interpretation of the subheadings of the Common Customs Tariff ('CCT') which should be adopted for goods falling within that point in the case of invalidity.

- 2 The reference was made in proceedings between Kawasaki Motors Europe NV ('Kawasaki') and the Inspecteur van de Belastingdienst/Douane district Rotterdam ('the Inspector') concerning the classification of new Kawasaki All Terrain Vehicles ('ATVs') for customs purposes.

Legal context

International law

- 3 Council Decision 87/369/EEC of 7 April 1987 concerning the conclusion of the International Convention on the Harmonised Commodity Description and Coding System and of the Protocol of Amendment thereto (OJ 1987 L 198, p. 1) approved on behalf of the Community that Convention, done at Brussels on 14 June 1983, as amended by the Protocol of Amendment to that Convention of 24 June 1986 ('the HS Convention').
- 4 Under Article 3(1)(a) of that Convention, each Contracting Party undertakes to ensure that its customs tariff and statistical nomenclatures are in conformity with the harmonised system ('the HS'), and to that end to use all of the headings and

subheadings of the HS without addition or modification, together with their related codes, and to follow the numerical sequence of that system. The same provision also requires the Contracting Parties to apply the general rules for the interpretation of the HS and all its section, chapter and subheading notes, and not to modify their scope.

- 5 Article 7(1)(b) of the HS Convention provides in essence that, having regard to the provisions of Article 8, the Harmonised System Committee ('the Committee') is to be responsible, in particular, for taking decisions with regard to the explanatory notes, the classification opinions or other advice as guides to the interpretation of the HS.
- 6 Article 8(2) of the HS Convention states in essence that the explanatory notes, classification opinions and other advice on the interpretation of the HS and recommendations to secure uniformity in the interpretation and application of the HS, prepared during a session of the Committee, are to be deemed to be approved by the Customs Cooperation Council established by the international convention establishing that Council, done at Brussels on 15 December 1950, now the World Customs Organisation ('the WCO'), if, not later than the end of the second month following the month during which that session was closed, no Contracting Party has notified the Secretary General of the WCO of a request for such matter to be referred to the WCO.
- 7 The WCO approves decisions adopted by the Committee under the conditions laid down in Article 8(3) of the HS Convention.
- 8 The nomenclature set out in the annex to the HS Convention contains Section XVII, entitled 'Vehicles, aircraft, vessels and associated transport equipment', which

includes Chapter 87, entitled 'Vehicles other than railway or tramway rolling stock, and parts and accessories thereof'. This chapter contains, in particular, headings 87.01 'Tractors (other than tractors of heading 87.09)' and 87.03, 'Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars'.

- 9 Note 2 to Chapter 87, concerning heading 87.01, reads as follows:

'For the purposes of this Chapter, "tractors" means vehicles constructed essentially for hauling or pushing another vehicle, appliance or load, whether or not they contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods.

Machines and working tools designed for fitting to tractors of heading 87.01 as interchangeable equipment remain classified in their respective headings even if presented with the tractor, and whether or not mounted on it.'

- 10 The WCO explanatory note relating to heading 87.03 reads:

'This heading covers motor vehicles of various types (including amphibious motor vehicles) designed for the transport of persons; it does not, however, cover the motor vehicles of heading 87.02. The vehicles of this heading may have any type of motor (internal combustion piston engine, electric motor, gas turbine, etc.).

...

The heading also includes:

...

- (6) Four-wheeled motor vehicles with tube chassis, having a motor-car type steering system (e.g. a steering system based on the Ackerman principle).

...'

- ¹¹ *The HS Compendium of Classification Opinions* ('the HS Compendium') published by the WCO contains the numerical list of classification opinions adopted by the WCO, drawn up in the order of HS headings and subheadings. The following classification opinion appears in the HS Compendium, adopted in a decision taken by the Committee at its 23rd session, held in May 1999:

- '8703.21 2. Four wheel-driven All Terrain Vehicle ("A.T.V."), with tube chassis, equipped with motorcycle-type saddle, handlebars for steering, and off-road balloon tyres. Steering is achieved by turning the two front wheels and is based on a motor-car-type steering system (Ackerman principle). The vehicle is fitted with a five-speed dual range transmission with one reverse gear, front-wheel dual drum brakes and rear-wheel single drum brakes. It is powered by a four-stroke

single cylinder engine of a cylinder capacity of 386 cc, the power being transmitted to the rear and front wheels by shafts. It is fitted with cargo racks to carry goods (total load capacity of 120 kg, excluding the driver) and a trailer hitch, and has a towing capacity of 410 kg (the vehicle itself has a weight of 273 kg).'

Community law

- ¹² 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) introduced, in order to meet the requirements of both the CCT and the external trade statistics of the European Community, a nomenclature of goods entitled 'the Combined Nomenclature' ('CN'), based on the HS. Each subheading of the CN has a numerical code, the first six digits of which correspond to the codes of the HS headings and subheadings, to which are added two digits forming subdivisions which are specific to the CN.

- ¹³ The version of the CN applicable at the time of the facts in the main proceedings is set out in Annex I to that regulation, as amended by Commission Regulation (EC) No 2388/2000 of 13 October 2000 (OJ 2000 L 264, p. 1, and corrigendum OJ 2000 L 276, p. 92). The second part of that annex includes in Section XVII, entitled 'Vehicles, aircraft, vessels and associated transport equipment', Chapter 87, entitled 'Vehicles other than railway or tramway rolling stock, and parts and accessories thereof'.

14 That chapter includes the following headings and subheadings:

‘8701 Tractors (other than tractors of heading 8709):

...

8701 90 — Other:

— — Agricultural tractors (excluding pedestrian-controlled tractors)
and forestry tractors, wheeled:

— — New, of an engine power:

8701 90 11 — — — — Not exceeding 18 kW

8701 90 20 — — — — Exceeding 18 kW but not exceeding 37 kW

...

8703 Motor cars and other motor vehicles principally designed for the transport
of persons (other than those of heading 8702), including station wagons and
racing cars:

...

8703 21 — — Of a cylinder capacity not exceeding 1 000 cm³:

8703 21 10 — — — New

...'

- ¹⁵ Regulation No 2658/87 authorises the Commission of the European Communities to clarify the content of a tariff heading. Article 9(1) of that regulation provides:

'Measures relating to the matters set out below shall be adopted in accordance with the procedure defined in Article 10:

- (a) application of the combined nomenclature and the [integrated tariff of the European Communities] concerning in particular:

— the classification of goods in the nomenclatures referred to in Article 8,

— explanatory notes;

- (b) amendments to the Combined Nomenclature to take account of changes in requirements relating to statistics or to commercial policy;

...

- (d) amendments to the Combined Nomenclature and adjustments to duties in accordance with decisions adopted by the Council or the Commission;

- (e) amendments to the Combined Nomenclature intended to adapt it to take account of technological or commercial developments or aimed at the alignment or clarification of texts;

...'

- ¹⁶ Article 9 of that regulation constitutes the basis for Regulation No 2518/98. According to point 5 of the table annexed to that regulation, goods corresponding to the following description must be classified in CN code 8703 21 10:

‘New (all terrain) four-wheeled vehicles with a single cylinder 4-stroke 395-cm³ spark ignition internal combustion piston engine, a gearbox with five forward speeds plus reverse and twin hydraulic front brakes. The vehicles have a seat for one passenger only and handlebar mounted controls. The steering mechanism is based on the Ackerman principle.

They are equipped with rack porters and a towing hook and have a towing capacity of 880 kg (braked).

They are further equipped with an hour meter, an oil cooler and a limited slip differential.

Dimensions (length, width, height): 1 944 mm, 1 156 mm, 1 080 mm, dry weight: 249 kg. '

17 The reason for classification in point 5 reads as follows:

'Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the Combined Nomenclature [set out in Title I of the first part of Annex I to Regulation No 2658/87] and the wording of CN codes 8703, 8703 21 and 8703 21 10.

The vehicles which are suitable both for the transport of people in difficult terrain (e. g. for leisure purposes) and for hauling or pushing another vehicle, appliance or load do not fulfil the requirements of note 2 to Chapter 87 as they are not constructed essentially for hauling or pushing another vehicle, appliance or load. '

The main proceedings and the questions referred for a preliminary ruling

- 18 In 1992, Kawasaki lodged an appeal against the decision by which the Netherlands customs authorities had altered the stated tariff heading for ATVs of the types KLF 300-B5, KLF 300-C3 and KLF 400-B1, giving heading 8703 21 10 as the correct heading for vehicles designed for the transport of persons.
- 19 By its decision No 13 013 (UTC 1995/39) of 10 March 1995, the Tariff Committee concerned determined that these vehicles should be classified in tariff heading 8701 90 11, covering ‘other tractors’ of an engine power not exceeding 18 kW.
- 20 On 28 April 1995 the Netherlands customs authorities issued binding tariff information (‘BTI’) in accordance with that decision for the ATVs concerned.
- 21 On 21 May 2001 the Inspector informed Kawasaki that this BTI, which applied for six years, had ceased to be valid on 28 April 2001.
- 22 On 20 June 2001 Kawasaki submitted to the Inspector eight BTI applications in respect of eight types of ATV, stating that it sought classification in tariff headings 8701 90 11 or 8701 90 20, depending on whether the power of the engines fitted to the vehicles was 18 kW or below or in excess of 18 kW.

- 23 On 21 August 2001 the Inspector issued eight BTI classifying all types of ATV in subheading CN 8703 21 10, covering motor cars and other motor vehicles, new, principally designed for the transport of persons, of a cylinder capacity not exceeding 1 000 cm³.
- 24 On 14 March 2002 Kawasaki lodged an appeal before the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal) against the Inspector's order dismissing the earlier objection to the BTI.
- 25 In the course of the proceedings thus initiated, the Inspector sought to justify, in particular, the classification adopted in the BTI at issue in the main proceedings by referring to point 5 of the annex to Regulation No 2518/98.
- 26 In that regard, it is stated in the order for reference that ATVs are driven by a cardan shaft. Some are equipped with four-wheel drive ('4×4'). ATVs of the types KLF 220 and KLF 300 have five forward gears with automatic clutch and one reverse gear. The KLF 300 4×4 also has high/low reduction.
- 27 Vehicles of the types KVF 400, KVF 400 4×4 and KVF 650 4×4 have continuously variable high/low transmission. All these types of ATV also have an automatic clutch and a reverse gear.

- 28 All the vehicles have a braking system on front and rear wheels. Vehicles of the type KLF 220 have drum brakes on all four wheels; vehicles of the types KLF 300, KLF 300 4×4, KVF 300, KVF 300 4×4, KVF 400 and KVF 400 4×4 have disc brakes on the front wheels and drum brakes on the rear wheels; vehicles of the type KVF 650 4×4 have disc brakes on the front wheels and an 'oil bathed' braking system on the rear wheels.
- 29 All the vehicles are steered by means of a handlebar with two grips incorporating the controls. Their maximum speed is 70 km/h.
- 30 The engine of these vehicles was specially designed for use in difficult terrain and is capable in low ratio of delivering sufficient power to tow attached equipment. The towing capacity of the ATVs is 740 kg in the case of the KLF 220, 916 kg in the case of the KLF 300 and over 1 000 kg in the case of the other types.
- 31 The tyres fitted to all the vehicles have a deep tread design suitable for rough terrain. All the vehicles have front and rear shock absorbers. They have a single seat for the driver, consisting of a saddle similar to that on a motorcycle. They are also equipped as standard with a towing hitch on the rear axle and cargo racks. Their maximum load capacity is between 20 kg and 40 kg for the racks mounted on the front of the vehicles and between 30 kg and 70 kg for those mounted on the rear.
- 32 According to Kawasaki, the technical features of the ATVs and their use in conjunction with other equipment, such as trailers or mowers, distinguish them from Sports Utility Vehicles (Sports Quads), which belong to a different branch of industry. ATVs constitute a quality and less expensive alternative to normal tractors.

33 In those circumstances, the Gerechtshof te Amsterdam decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- '(1) Is [Regulation No 2518/98] valid in so far as the new, all terrain four wheeled vehicles described at point 5 of the annex thereto are classified as a vehicle designed for the transport of persons within the meaning of subheading 8703 21 of the CCT?
- (2) If [that] regulation is invalid, can the CCT be interpreted as meaning that the goods at issue can be classified in one of the subheadings of heading 8701 90 of the CCT?

The questions

First question

34 By its first question, the referring court is asking in essence whether, by classifying the all terrain vehicle described therein, which is comparable to the vehicles at issue in the main proceedings, in tariff heading 8703, Regulation No 2518/98 has unlawfully extended the scope of that heading.

35 At the outset it must be recalled that the Council has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, a broad discretion to define the subject-matter of tariff headings falling to be

considered for the classification of particular goods. However, the Commission's power to adopt the measures mentioned in Article 9(1)(a), (b), (d) and (e) of Regulation No 2658/87 does not authorise it to alter the subject-matter of the tariff headings which have been defined on the basis of the HS established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify (see Case C-267/94 *France v Commission* [1995] ECR I-4845, paragraphs 19 and 20; Case C-309/98 *Holz Geenen* [2000] ECR I-1975, paragraph 13; and Joined Cases C-304/04 and C-305/04 *Jacob Meijer and Eagle International Freight* [2005] ECR I-6251, paragraph 22).

³⁶ Moreover, although the WCO opinions classifying goods in the HS do not have legally binding force, they amount, as regards the classification of those goods in the CN, to indications which are an important aid to the interpretation of the scope of the various tariff headings of the CN (see, to that effect, the order in Case C-206/03 *SmithKline Beecham* [2005] ECR I-415, paragraph 26).

³⁷ Likewise, the explanatory notes to the CN and those to the HS are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (see, in particular, Case C-396/02 *DFDS* [2004] ECR I-8439, paragraph 28). The content of those notes must therefore be compatible with the provisions of the CN and may not alter the meaning of those provisions (see, in particular, Case C-280/97 *ROSE Elektrotechnik* [1999] ECR I-689, paragraph 23; Case C-42/99 *Eru Portuguesa* [2000] ECR I-7691, paragraph 20; and Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 48).

³⁸ Lastly, according to the Court's settled case-law, 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 found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters (see, in particular, *DFDS*, paragraph 27, and *Intermodal Transports*, paragraph 47).

- 39 In the present case, it should be noted that the wording of the headings and subheadings both for tractors falling within heading 8701 and for vehicles falling within heading 8703 is the same in both the HS and the CN.
- 40 In view of the foregoing, the classification of a vehicle in heading 8701 or heading 8703 depends on its construction as determined by its objective characteristics and properties.
- 41 In order to determine that construction it is necessary to interpret the abovementioned tariff headings taking into account the relevant explanatory notes.
- 42 In that regard, it should be noted that note 2 to Chapter 87, relating to CN heading 8701, which is the same as note 2 to the same chapter of the HS, defines a tractor as a motor vehicle constructed essentially for hauling or pushing another vehicle, appliance or load.
- 43 With regard to heading 87.03, the HS explanatory note states in essence that this heading covers motor vehicles of various types (including amphibious motor vehicles) designed for the transport of persons; the vehicles may have any type of motor and have certain technical characteristics such as motor-car-type steering based on the Ackerman principle.
- 44 As regards determining the construction of the vehicles described in point 5 of the annex to Regulation No 2518/98 in order to classify them in one of the abovementioned headings, it should be noted that, at its 22nd session held in August 1998, the Committee was called upon to give an opinion on the classification

of a four-wheel-driven all terrain vehicle having characteristics similar to all terrain vehicles of the same type as those concerned in the main proceedings but having a lower engine power, owing to differences of interpretation that had arisen between the Contracting Parties to the HS Convention over the classification of that vehicle in either heading 87.01 or heading 87.03.

45 The classification opinion adopted by the Committee, which was published in the HS Compendium in 1999, decided on subheading 8703.21 on the ground that the technical characteristics are such that the vehicle concerned is incapable of hauling or pushing twice its own weight or more.

46 It may therefore be inferred that it is the towing capacity of a vehicle that constitutes the objective property that determines whether it is constructed essentially for hauling or pushing another vehicle, appliance or load or, on the other hand, for transporting persons.

47 In the present case, the technical characteristics of the ATVs are similar to those of the vehicle described in the abovementioned classification opinion. The ATV comprises a tube chassis with four wheels, has a seat for one passenger only, is fitted with a handlebar for steering the directional wheels (Ackerman principle), has five forward gears and is fitted with cargo racks.

48 It should be noted on the one hand that point 5 of the annex to Regulation No 2518/98 describes vehicles with technical characteristics similar to those mentioned in the preceding paragraph.

- 49 On the other hand, point 5 mentions a towing capacity of 880 kg (braked) for vehicles whose dry weight is 249 kg, thereby indicating that such vehicles are constructed for hauling or pushing another vehicle, appliance or load weighing three and a half times their own weight.
- 50 Thus, by classifying a vehicle capable of hauling or pushing loads twice its own weight or more in heading 8703, the Commission has restricted the scope of heading 8701 and hence exceeded the bounds of its discretion. Point 5 of the table annexed to Regulation No 2518/98 must therefore be declared invalid.
- 51 Accordingly, the answer to the first question must be that, by adopting a capacity different from that contained in the Committee's classification opinion of 1999 for vehicles described in subheading 8703 21 10 of the CN, namely the capacity to tow loads three times their own weight or more, and thereby extending the scope of the heading covering vehicles principally designed for the transport of persons, point 5 of the table annexed to Regulation No 2518/98 is invalid.

Second question

- 52 By its second question, the national court is asking in essence whether, if Regulation No 2518/98 is invalid in so far as it relates to the classification of vehicles described in point 5 of the annex to that regulation, ATVs can be classified in one of the CN subheadings of heading 8701 covering tractors.
- 53 Rule 1 of the general rules for the interpretation of the CN states that, for legal purposes, classification is to 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 other general rules of interpretation. As regards the classification of goods in the subheadings of a heading, Rule 6 of those general rules states first that only subheadings at the same level are comparable and second that the relative section and chapter notes also apply, unless the context otherwise requires.

- 54 It is settled case-law that the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see, in particular, Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 23).
- 55 With regard to ATVs, it is clear that the objective characteristics and properties of such vehicles comply with the terms of note 2 to Chapter 87 of the CN in that they are constructed essentially for hauling or pushing another vehicle, appliance or load. Application of Rule 1 of the general rules for the interpretation of the CN therefore means that ATVs should be classified in heading 8701.
- 56 Under Rule 6 of the general rules for the interpretation of the CN, it is necessary to determine a classification in the subheadings of heading 8701 according to the technical characteristics of the different types of vehicle concerned.
- 57 In that regard, subheading 8701 90 of the CN, 'Other', includes, in particular, subheading 8701 90 11, covering vehicles of an engine power not exceeding 18 kW, and subheading 8701 90 20, covering vehicles of an engine power exceeding 18 kW but not exceeding 37 kW.

58 In the light of the technical characteristics of the various types of ATV at issue in the main proceedings, it is for the referring court to classify them in subheading 8701 90 of the CN and, more particularly, in subheadings 8701 90 11 or 8701 90 20 depending on their engine power.

59 The answer to the second question referred by the national court must therefore be that new all terrain four-wheeled vehicles with one seat only, fitted with Ackerman steering controlled by a handlebar, equipped with a towing hitch and the technical characteristics of which enable them to push twice their own weight or more, must be classified in subheading 8701 90 of the CN. It is for that court to classify such vehicles in the subheadings which correspond to their engine power.

Costs

60 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:

1. **By adopting a capacity different from that contained in the Harmonised System Committee's classification opinion of 1999 for vehicles described in**

subheading 8703 21 10 of the Combined Nomenclature, namely the capacity to tow loads three times their own weight or more, and thereby extending the scope of the heading covering vehicles principally designed for the transport of persons, point 5 of the table annexed to Commission Regulation (EC) No 2518/98 of 23 November 1998 concerning the classification of certain goods in the Combined Nomenclature is invalid.

- 2. New all terrain four-wheeled vehicles with one seat only, fitted with Ackerman steering controlled by a handlebar, equipped with a towing hitch and the technical characteristics of which enable them to push twice their own weight or more, must be classified in subheading 8701 90 of that Nomenclature. It is for the Gerechtshof te Amsterdam to classify such vehicles in the subheadings which correspond to their engine power.**

[Signatures]