



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

9 February 2017*

(Reference for a preliminary ruling — Common Customs Tariff — Tariff classification — Combined Nomenclature — Headings 3824 90 97 and 2106 90 92 — Product in powder form composed of calcium carbonate (95%) and modified starch (5%))

In Case C-441/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Bremen (Bremen Finance Court, Germany), made by decision of 16 July 2015, received at the Court on 12 August 2015, in the proceedings

Madaus GmbH

v

Hauptzollamt Bremen,

THE COURT (Eighth Chamber),

composed of M. Vilaras, President of the Chamber, J. Malenovský and D. Šváby (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Madaus GmbH, by G. Eder, Rechtsanwalt,

— the European Commission, by M. Wasmeier, 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 subheadings 3824 90 97 and 2106 90 92 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) No 927/2012 of 9 October 2012 (OJ 2012 L 304, p. 1).
- 2 The request has been made in proceedings between Madaus GmbH and the Hauptzollamt Bremen (Principal Customs Office, Bremen) (Germany) ('the HB') concerning the tariff classification within that nomenclature of a raw material with the designation 'DESTAB Calcium Carbonate 90 SE Ultra 250', intended for the manufacture of calcium tablets in the form of simple tablets, effervescent tablets and chewable tablets.

Legal context

The CN

- 3 The customs classification of goods imported into the European Union is governed by the tariff and statistical nomenclature.
- 4 Article 12 of Regulation No 2658/87, as amended by Council Regulation (EC) No 254/2000 of 31 January 2000 (OJ 2000 L 28, p. 16), requires the European Commission to adopt each year a regulation reproducing the complete version of the tariff and statistical nomenclature together with the corresponding autonomous and conventional rates of duty of the Common Customs Tariff, as they result from measures adopted by the Council of the European Union or by the Commission. That regulation is to be published in the *Official Journal of the European Union* not later than 31 October, to apply from 1 January of the following year.
- 5 The referring court takes the view that Regulation No 927/2012 is applicable. However, it is apparent from the file before the Court that the declaration of release for free circulation at issue is dated 11 April 2014. In those circumstances, the version of the tariff and statistical nomenclature applicable to the facts in the main proceedings is that in force as of 1 January 2014 and resulting from Commission Implementing Regulation (EU) No 1001/2013 of 4 October 2013 (OJ 2013 L 290, p. 1) ('the CN'). However, the content of both regulations is identical as regards the headings concerned.
- 6 Part one of the CN, relating to preliminary provisions, includes Section I, on 'General Rules', subsection A of which, entitled 'General rules for the interpretation of the Combined Nomenclature', provides inter alia as follows:

'Classification of goods in the [CN] shall be governed by the following principles.

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall 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 following provisions.

...'

- 7 Part Two of the CN, which contains a schedule of customs duties, is divided into sections. Section IV of that part contains Chapter 21 of the CN, entitled 'Miscellaneous edible preparations'.

- 8 Heading 2106 of the CN, which is in Chapter 21, is structured as follows:

‘2106 Food preparations not elsewhere specified or included:

2106 10 — Protein concentrates and textured protein substances:

...

2106 90 — Other:

...

2106 90 92 – – – Containing no milk fats, sucrose, isoglucose, glucose or starch or containing, by weight, less than 1.5% milk fat, 5% sucrose or isoglucose, 5% glucose or starch

...’

- 9 Part two of the CN also includes Section VI thereof, relating to products of the chemical or allied industries. Chapter 38, entitled ‘Miscellaneous chemical products’ is included in that section and contains the following note:

‘1. This chapter does not cover:

...

- (b) mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs (generally, heading 2106);

...’

- 10 Heading 3824 of the CN, which is in Chapter 38, is structured as follows:

‘3824 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:

...

3824 90 — Other

...

3824 90 97 – – – – Other’

Regulation (EU) No 328/2013

- 11 Commission Implementing Regulation (EU) No 328/2013 of 8 April 2013 concerning the classification of certain goods in the Combined Nomenclature (OJ 2013 L 102, p. 10), contains, in the annex thereto, a table with three columns, the first containing a description of each of the goods concerned, the second containing the classification in the CN attributed to the goods and the third concerning the reasons for that classification.

- 12 It is apparent from that annex that a product in powder form consisting of 97% calcium carbonate and 3% starch is classified under heading 2106 90 92 of the CN. In the column concerning the description of the goods, that product is described as:

‘Product in powder form consisting of (% by weight):

- calcium carbonate 97,
- starch 3.

The product is suitable for use in several different areas, e.g. human foodstuffs, medicaments and paint fillers.

The product is suitable for use in the manufacturing of calcium tablets.’

- 13 In the column relating to the reasons for the classification given it is stated that the latter ‘is determined by General Rules 1 and 6 for the interpretation of the [CN], Note 1(b) to Chapter 38 and the wording of CN codes 2106, 2106 90 and 2106 90 92’.

- 14 That column also contains the following notes:

‘Due to the presence of a substance not covered by Note 1(a), (d) or (e) to Chapter 28, classification in that Chapter is excluded.

...

Due to the composition of the product, classification in Chapter 38 is excluded by virtue of Note 1(b) to that Chapter (see also the Harmonised System Explanatory Notes to Chapter 38, General part).

The product is therefore to be classified under heading 2106 as a food preparation, not elsewhere specified or included.’

The HS and the CN

- 15 The Customs Cooperation Council, now the World Customs Organisation (WCO), was established by the convention establishing that body, concluded in Brussels on 15 December 1950. The Harmonised Commodity Description and Coding System (‘the HS’) was drawn up by the WCO and established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983 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).
- 16 Headings 2106 and 3824 of the CN repeat the wording of headings 2106 and 3824 of the HS.
- 17 The Explanatory Notes to the HS are drawn up within the WCO in accordance with the provisions of the HS Convention.
- 18 The Explanatory Notes to the HS concerning Chapter 38 thereof state, inter alia, as follows:

‘General

...

For the purposes of Note 1(b) to the Chapter, the expression “foodstuffs or other substances with nutritive value” principally includes edible products of Sections I to IV.

The expression “foodstuffs or other substances with nutritive value” also includes certain other products, inter alia products of Chapter 28 used as mineral supplements in food preparations, sugar alcohols of heading 29.05, essential amino acids of heading 29.22, lecithin of heading 29.23, provitamins and vitamins of heading 29.36, sugars of heading 29.40, animal blood fractions of heading 30.02 for use in food preparations, casein and caseinates of heading 35.01, albumins of heading 35.02, edible gelatin of heading 35.03, edible protein substances of heading 35.04, dextrins and other edible modified starches of heading 35.05, sorbitol of heading 38.24, edible products of Chapter 39 (such as amylopectin and amylose of heading 39.13). It should be noted that this list of products is simply illustrative and should not be taken to be exhaustive.

The mere presence of “foodstuffs or other substances with nutritive value” in a mixture would not suffice to exclude the mixture from Chapter 38, by application of Note 1(b) [of that chapter]. Substances having a nutritive value that is merely incidental to their function as chemical products, e.g., as food additives or processing aids, are not regarded as “foodstuffs or substances with nutritive value” for the purpose of this Note. The mixtures which are excluded from Chapter 38 by virtue of Note 1(b) are those which are of a kind used in the preparation of human foodstuffs and which are valued for their nutritional qualities.’

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

- 19 It is apparent from the order for reference that on 11 April 2014, Madaus lodged a declaration for release of calcium carbonate from the United States for free circulation. In that declaration it classified the product at issue under subheading 2836 50 00 of the CN.
- 20 That product is a raw material used for the manufacture of calcium tablets in the form of simple tablets, effervescent tablets and chewable tablets. It has the designation ‘DESTAB Calcium Carbonate 90SE Ultra 250’ and is composed of chemically defined calcium carbonate in powder form and modified starch.
- 21 In accordance with the applicant’s request the imported goods were released for free circulation, the import duties having as a result been fixed at the rate of 5%, applicable to subheading 2836 50 00 of the CN.
- 22 The HB nevertheless had those products analysed. According to the expert opinion produced on the tariff classification of the products, they had to be classified under subheading 2106 90 92 of the CN. According to the analyses carried out, having regard to the modified starch content, which was less than 5% by weight, that added starch was not an important component of the product concerned.
- 23 Since the rate of customs duties corresponding to that tariff subheading was 12.8%, on 24 June 2014 HB sent an import duty notice to the applicant in order to obtain payment of the outstanding duty.
- 24 After exhausting the administrative review procedure against that notice, Madaus brought an action seeking its annulment before the referring court. In support of its action, it now claims, essentially, that the product at issue in the main proceedings should have been classified not under subheading 2836 50 00 of the CN, but under subheading 3824 90 97 of that nomenclature. It states, first, that the starch content of the product at issue exceeds 5% of its total weight and, secondly, that the starch is not added because of its nutritional properties but serves simply as a processing aid in order to improve the suitability of calcium carbonate for use in calcium tablets. Any minimal nutritive value of the added starch is incidental.

- 25 Madaus submits that, having regard to the foregoing, the product at issue falls within the scope of Chapter 38 of the CN. The exclusion of certain products from the scope of that chapter, provided for in Note 1(b) thereto relating to ‘mixtures of chemicals with foodstuffs or other substances with nutritive value’, does not apply to the product at issue in the main proceedings since it is not a mixture composed *inter alia* of a foodstuff or other substance with nutritive value. In accordance with the Explanatory Notes to the HS on Chapter 38, the mere presence of foodstuffs or other substances with nutritive value, such as the modified starch in the present case, in a mixture would not suffice to exclude the mixture from the scope of Chapter 38 of the CN, given that, according to those Explanatory Notes, a substance having a nutritive value that incidental to its function as a processing aid is not regarded as a substance with nutritive value. Madaus adds, lastly, that Implementing Regulation No 328/2013 is invalid on the grounds that it misinterprets the scope of Note 1(b) to Chapter 38 of the CN.
- 26 HB submits that both components of the product at issue in the main proceedings, namely calcium carbonate and modified starch, are substances with nutritive value within the meaning of that note and that the product is therefore a food preparation falling under heading 2106 of the CN.
- 27 The referring court notes that the product at issue in the main proceedings is composed of calcium carbonate, which is undisputedly a chemical product within the meaning of heading 3824 of the CN, and modified starch.
- 28 As stated above, according to Note 1(b) to Chapter 38 of the CN, ‘mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs’ are not covered by that chapter.
- 29 The referring court has indicated that the outcome of the proceedings pending before it depends on whether that other component constitutes a foodstuff or other substance with nutritive value within the meaning of that note.
- 30 That court takes the view that the product at issue in the main proceedings falls within the scope of Chapter 38 of the CN, since the main component, calcium carbonate, is a chemical product whereas the modified starch was added merely in order to improve the suitability of the former for use in calcium tablets. As a result, it considers that the modified starch is included in the product at issue in the main proceedings merely to serve as a processing aid and not in order to confer on that product nutritive value.
- 31 The referring court relies in this connection on the Explanatory Notes to Chapter 38 of the HS, as they are set out in paragraph 18 above, according to which, as the referring court states ‘the mere presence of a substance with nutritive value in a mixture is not sufficient to exclude that mixture from Chapter 38 by virtue of Note 1(b) to that Chapter where the nutritive value of the substance is merely incidental to its function as a chemical product’.
- 32 It nevertheless has doubts as regards whether the product at issue in the main proceedings may fall within the scope of Chapter 38 of the CN in the light of Implementing Regulation No 328/2013. It states that that regulation refers to Note 1(b) to Chapter 38, by virtue of which certain mixtures of chemicals with foodstuffs or other substances with nutritive value are excluded from that chapter. Thus, a product comparable to that at issue in the main proceedings would fall within the scope of Chapter 21 of the CN, and should therefore be classified under heading 2106 of that nomenclature, and not in Chapter 38 thereof. The referring court considers that the regulation concerned could be invalid on the same grounds as those which seem to that court to warrant classification of the product at issue in the main proceedings in Chapter 38 of the CN and, accordingly, on the grounds that it misinterprets the scope of Note 1(b) to that chapter.

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

‘Is the [CN] to be interpreted as meaning that a raw material with the designation “DESTAB Calcium Carbonate 90SE Ultra 250”, used for the manufacture of calcium tablets in the form of simple tablets, effervescent tablets and chewable tablets, consisting of chemically defined calcium carbonate in powder form and, to improve suitability for use in tablets, added modified starch, and with a starch content — determined in accordance with Commission Regulation (EU) No 118/2010 of 9 February 2010 amending Regulation (EC) No 900/2008 laying down the methods of analysis and other technical provisions necessary for the application of the arrangements for imports of certain goods resulting from the processing of agricultural products (OJ 2010 L 37, p. 21) — of less than 5% by weight, is to be classified under subheading 3824 90 97 [of the CN]?’

Consideration of the question referred

- 34 By its question, the referring court asks, in essence, whether the CN must be interpreted to the effect that a product, such as that at issue in the main proceedings, used for the manufacture of calcium tablets in the form of simple tablets, effervescent tablets and chewable tablets, consisting of chemically defined calcium carbonate in powder form and, to improve suitability for use in tablets, added modified starch, and with a starch content of less than 5% by weight, must be classified under heading 2106 of that nomenclature, as a food preparation, or under heading 3824 thereof, as a chemical product.
- 35 First of all, it must be pointed out that, when the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the national court with guidance on the criteria which will enable the latter to classify the products at issue correctly in the CN, rather than to effect that classification itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard. In any event the national court is in a better position to do so (judgment of 17 September 2015, *Kyowa Hakko Europe*, C-344/14, EU:C:2015:615, paragraph 24 and the case-law cited).
- 36 Next, it should be noted that, 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 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 (judgment of 17 February 2016, *Salutas Pharma*, C-124/15, EU:C:2016:87, paragraph 29 and the case-law cited).
- 37 Thus, the chapter notes to the CN constitute important means for ensuring the uniform application of the common customs tariff and provide, as such, useful information for its interpretation. The content of those notes must therefore be consistent with the provisions of the CN and cannot modify its scope (judgment of 17 February 2016, *Salutas Pharma*, C-124/15, EU:C:2016:87, paragraph 30).
- 38 Furthermore, the explanatory notes drawn up by the Commission as regards the CN and by the WCO as regards the HS are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (judgment of 17 February 2016, *Salutas Pharma*, C-124/15, EU:C:2016:87, paragraph 31 and the case-law cited).
- 39 Finally, for the purposes of classification under the appropriate heading, it should also 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 (judgments of 20 June 2013, *Agroferm*, C-568/11, EU:C:2013:407, paragraph 41, and of 4 March 2015, *Oliver Medical*, C-547/13, EU:C:2015:139, paragraph 47). However, the intended use of the product is a relevant criterion only where the

classification cannot be made on the sole basis of the objective characteristics and properties of the product (judgments of 16 December 2010, *Skoma-Lux*, C-339/09, EU:C:2010:781, paragraph 47, and of 28 April 2016, *Oniors Bio*, C-233/15, EU:C:2016:305, paragraph 33).

- 40 In the present case, it is apparent from the order for reference that the product at issue in the main proceedings is composed of calcium carbonate, a chemical product, and modified starch, a substance with nutritive value, in the proportions of approximately 95% and 5% respectively. The product at issue in the main proceedings is used as a raw material in the manufacture of calcium tablets intended as a human foodstuff. Consequently, having regard to the objective characteristics and properties of the product at issue, in principle it falls within the scope of Chapter 38 of the CN on 'Miscellaneous chemical products'.
- 41 However, according to the wording of Note 1(b) to Chapter 38, 'mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs (generally, heading 2106)' are excluded from that chapter.
- 42 It is necessary, in order to assess the criterion relating to the composition of the mixture, to interpret Note 1(b) to Chapter 38 of the CN in the light of the relevant explanatory notes.
- 43 In this connection, first, whether a mixture of chemicals with foodstuffs or other substances with nutritive value is classified in Chapter 38 or Chapter 21 of the CN depends on the composition of that mixture, as it results from the objective characteristics and properties of the mixture.
- 44 Secondly, the last sentence of the last paragraph of the Explanatory Notes to the HS on Chapter 38 thereof states that mixtures which are excluded from that chapter 'are those which are of a kind used in the preparation of human foodstuffs and which are valued for their nutritional qualities'.
- 45 The term 'mixture' within the meaning of that last paragraph thus refers to the mixture itself, of chemical products and foodstuffs or other substances with nutritive value, without making any distinction according to the constituent substances of such a mixture.
- 46 It is therefore necessary to use, as criteria for the tariff classification of the product at issue, not only the criterion relating to the characteristics and properties of that product, in particular the nutritive value of the mixture itself, but also that relating to the intended use of that product, that is whether it is used on the manufacture of food preparations.
- 47 In the present case, the product at issue in the main proceedings is a mixture composed of a chemical product, calcium carbonate, and a substance with nutritive value, modified starch. In this connection, the Court has held that that the term 'substances with nutritive value' may apply to chemical products (judgment of 30 January 1992, *SuCrest*, C-14/91, EU:C:1992:48, paragraph 10). Thus, the fact that a substance such as calcium carbonate is a chemical product does not prevent it from being regarded as a substance with nutritive value.
- 48 It is also apparent from the order for reference that the product at issue in the main proceedings was initially declared by the applicant in the main proceedings as 'Calcium carbonate — Food supplement'. The Court has already held that the wording of heading 2106 of the CN refers to food preparations not elsewhere specified or included and that the Explanatory Notes to the HS concerning that heading state that it includes preparations referred to as 'food supplements', which are presented in packagings with indications that they maintain general health or well-being (judgment of 17 December 2009, *Swiss Caps*, C-410/08 to C-412/08, EU:C:2009:794, paragraph 31).

- 49 It is not disputed that the product at issue in the main proceedings is used in order to manufacture calcium tablets in the form of simple tablets, effervescent tablets and chewable tablets, intended as a human foodstuff. As the Commission stated in its observations, those calcium tablets help to regulate gastric secretion, in order to stimulate or facilitate digestion and, more generally, to keep the human organism healthy and in good condition.
- 50 Therefore a mixture such as that at issue in the main proceedings is intended, according to its objective characteristics and properties, for the preparation of products which are human foodstuffs.
- 51 Having regard to the foregoing, a product such as that at issue in the main proceedings falls within the scope of the exclusion provided for in Note 1(b) to Chapter 38 of the CN and must accordingly, on any view, be excluded from that chapter on 'Miscellaneous chemical products'.
- 52 A mixture such as that at issue in the main proceedings consequently falls within the scope of Chapter 21 of the CN, entitled 'Miscellaneous edible preparations', and must therefore be classified under heading 2106 of the CN relating to 'Food preparations not elsewhere specified or included', to which Note 1(b) to Chapter 38 of the CN expressly refers.
- 53 It follows from all the foregoing considerations that the CN must be interpreted to the effect that a product, such as that at issue in the main proceedings, used for the manufacture of calcium tablets in the form of simple tablets, effervescent tablets and chewable tablets, consisting of chemically defined calcium carbonate in powder form and, to improve suitability for use in tablets, added modified starch, and with a starch content of less than 5% by weight, must be classified under heading 2106 of that nomenclature.

Costs

- 54 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 (Eighth Chamber) hereby rules:

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, in the version resulting from Commission Implementing Regulation (EU) No 1001/2013 of 4 October 2013 must be interpreted to the effect that a product, such as that at issue in the main proceedings, used for the manufacture of calcium tablets in the form of simple tablets, effervescent tablets and chewable tablets, consisting of chemically defined calcium carbonate in powder form and, to improve suitability for use in tablets, added modified starch, and with a starch content of less than 5% by weight, must be classified under heading 2106 of that nomenclature.

[Signatures]