JUDGMENT OF THE COURT (Fourth Chamber)

12 June 2008 *

In Case C-458/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Regeringsrätten (Sweden), made by decision of 9 November 2006, received at the Court on 16 November 2006, in the proceedings

Skatteverket

v

Gourmet Classic Ltd,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, J. Malenovský and T. von Danwitz, Judges,

* Language of the case: Swedish.

Advocate General: Y. Bot,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Belgian Government, by A. Hubert, acting as Agent,

— the Portuguese Government, by L.I. Fernandes and Â. Seiça Neves, acting as Agents,

— the Commission of the European Communities, by W. Mölls and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first indent of Article 20 of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

2 The reference was made in the context of an appeal brought by the Skatteverket (Swedish tax administration) before the Regeringsrätten (Supreme Administrative Court), seeking confirmation of a preliminary opinion of the Skatterättsnämnden (Swedish Revenue Law Commission) concerning the taxation of alcohol contained in cooking wine.

Legal framework

Community legislation

3 Article 20 of Directive 92/83 provides:

'For the purposes of this Directive the term 'ethyl alcohol' covers:

— all products with an actual alcoholic strength by volume exceeding 1.2% volume which fall within CN [headings] 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN,

…'

4 Article 27(1)(f) of the directive provides:

'Member States shall exempt the products covered by this Directive from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

…

(f) when used directly or as a constituent of semi-finished products for the production of foodstuffs, filled or otherwise, provided that in each case the alcoholic content does not exceed 8.5 litres of pure alcohol per 100 kg of the product for chocolates, and 5 litres of pure alcohol per 100 kg of the product for other products.'

National legislation

5 In Sweden, the taxation of alcohol and various types of alcoholic drinks is regulated by the Law (lagen (1994:1564) om alkoholskatt (SFS 1994, No 1564); 'the LAS') on excise duty on alcohol.

6 Under Paragraph 1(1) of the LAS, alcohol excise duty is payable on beer, wine and other fermented beverages, intermediate products and ethyl alcohol, which are produced in Sweden, brought or taken from another Member State of the European Union or imported from a non-member State.

7 Under Paragraph 6 of the LAS, excise duty on ethyl alcohol is payable on products covered by CN headings 2207 and 2208 with an alcoholic strength exceeding 1.2% by volume, even when those products form part of a product which falls within another chapter of the Combined Nomenclature.

8 Under Paragraph 7(1)(5) of the LAS, no excise duty is payable on products which are used directly in foodstuffs or as a constituent of semi-finished products for the production of foodstuffs, filled or otherwise, provided that, in each case, the alcohol content does not exceed 8.5 litres of pure alcohol per 100 kg of the product for chocolates and 5 litres of pure alcohol per 100 kg of the product for other foodstuffs.

The main proceedings and the question referred for a preliminary ruling

9 Wishing to market cooking wine in Sweden and to know how it would be taxed, Gourmet Classic Ltd ('Gourmet') applied for a preliminary opinion from the Skatterättsnämnden.

10 In support of its application, Gourmet contended that cooking wine falls within the exemption provided for in Article 27(1)(f) of Directive 92/83 and Paragraph 7(1)(5) of the LAS.

11 In the same proceedings, the Skatteverket submitted that cooking wine is subject to excise duty but can be exempted under Paragraph 7(1)(5) of the LAS.

12 In its preliminary opinion, the Skatterättsnämnden came to the conclusion that although cooking wine is, in principle, subject to excise duty, since it is a foodstuff it is exempt from such duty under Article 27(1)(f) of Directive 92/83.

13 However, the President of the Skatterättsnämnden issued a dissenting opinion according to which cooking wine does not fall within the scope of the LAS.

14 The Skatteverket appealed against the preliminary opinion of the Skatterättsnämnden to the referring court, seeking confirmation of the opinion.

15 In that regard, the referring court points out that the main proceedings have the peculiarity that, in order to establish a precedent in taxation matters, the Skatteverket may appeal from a preliminary opinion of the Skatterättsnämnden, inter alia to request confirmation, even if that opinion is not disputed by the parties concerned.

16 In the main proceedings, the referring court considers that, in order to rule on the application by the Skatteverket, it is necessary to determine whether cooking wine contains ethyl alcohol within the meaning of the first indent of Article 20 of Directive 92/83.

17 In those circumstances the Regeringsrätten decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the alcohol contained in cooking wine to be classified as ethyl alcohol as referred to in the first indent of Article 20 of Directive [92/83] …?'

Jurisdiction of the Court

18 In view of the circumstances in which the Regeringsrätten referred its question for a preliminary ruling, it is necessary to rehearse and clarify a number of principles concerning the jurisdiction of the Court under Article 234 EC.

19 Pursuant to the second and third paragraphs of Article 234 EC, where a question on the interpretation of the EC Treaty or of subordinate acts of the institutions of the

Community is raised before any court or tribunal of a Member State, that court or tribunal may or, if it is a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, must, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon (see Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 17, and Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 9).

20 Article 234 EC aims to avoid divergences in the interpretation of Community law which the national courts have to apply and aims to ensure that, in all circumstances, that law has the same effect in all Member States (see, to that effect, Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 2).

21 According to settled case-law, the procedure provided for in Article 234 EC is an instrument of cooperation between the Court of Justice and the national courts (Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 33; Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 17; and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20).

22 In the context of that cooperation, it is for the national court or tribunal, which alone has direct knowledge of the facts of the main proceedings and which must assume responsibility for the subsequent judicial decision, to assess, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 23; *Leclerc-Siplec*, paragraph 10; and Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549, paragraph 34).

23 In particular, the obligation to refer imposed by the third paragraph of Article 234 EC is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. That obligation is intended in particular to prevent

a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State (see Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraph 25; Case C-393/98 *Gomes Valente* [2001] ECR I-1327, paragraph 17; Case C-99/00 *Lyckeskog* [2002] ECR I-4839, paragraph 14; and Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraphs 29 and 38).

24 Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court of Justice is, in principle, obliged to give a ruling (*Meilicke*, paragraph 24; *Leclerc-Siplec*, paragraph 11; and Case C-200/98 *X and Y* [1999] ECR I-8261, paragraph 19).

25 However, the Court has held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. Thus, the Court may refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; and *Schneider*, paragraph 22).

26 While the spirit of cooperation which must prevail in the exercise of the functions assigned by Article 234 EC to the national courts, on the one hand, and the Community judicature, on the other, requires the Court of Justice to have regard to the particular responsibilities of the national court, it implies at the same time that the national court, in the use which it makes of the possibilities offered by that article, must have regard to the particular function entrusted to the Court of Justice in this field, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see Case 244/80 *Foglia*, paragraphs 18 and 20, and *Meilicke*, paragraph 25).

27 With regard to the main proceedings, the Court has already held that, in the case of an appeal, the purpose of the procedure before the Regeringsrätten is to review the legality of an opinion which, once it becomes definitive, binds the tax authorities and serves as the basis for the assessment to tax if and to the extent to which the person who applied for the opinion continues with the action envisaged in his application and that, in those circumstances, the Regeringsrätten must be held to be carrying out a judicial function (*X and Y*, paragraph 17).

28 The fact that the Skatteverket confirmed the preliminary opinion of the Skatterättsnämnden does not affect the judicial nature of the main proceedings.

29 In addition, in the main proceedings, the referring court asks the Court of Justice a question concerning the interpretation of a provision of Community law, namely the first indent of Article 20 of Directive 92/83, and it considers that a preliminary ruling on that point is necessary in order to review the legality of the preliminary opinion of the Skatterättsnämnden. The Court is therefore not being asked to deliver an advisory opinion on a hypothetical question.

30 According to the order for reference, the Regeringsrätten has unlimited jurisdiction in this connection, independently of the submissions of the parties.

31 Moreover, since there is no judicial remedy under national law against the decisions of the Regeringsrätten, that court is obliged, under the third paragraph of Article 234 EC, to bring the matter before the Court of Justice.

32 Consequently, as already stated in paragraph 23 of this judgment, in proceedings such as the main proceedings, it is only by referring a question to the Court for a preliminary ruling that the objective pursued by that provision can be attained, that is to ensure the proper application and uniform interpretation of Community law in all

the Member States and to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in the Member State concerned.

33 Taking into account all the foregoing considerations, the Court has jurisdiction to reply to the question posed by the Regeringsrätten.

The question referred for a preliminary ruling

34 By its question, the referring court asks whether the alcohol contained in cooking wine is to be classified as ethyl alcohol as referred to in the first indent of Article 20 of Directive 92/83.

35 In that regard, although, as the national court states, cooking wine is, as such, an edible preparation falling within chapter 21 of the Combined Nomenclature annexed 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), the fact remains that that edible preparation contains ethyl alcohol falling within headings 2207 and 2208 of that nomenclature.

36 It follows that if the ethyl alcohol contained in cooking wine has an alcoholic strength exceeding 1.2 % volume, that alcohol falls within the scope of the first indent of Article 20 of Directive 92/83.

37 The fact that cooking wine is, as such, regarded as an edible preparation does not affect that assessment.

38 The first indent of Article 20 of Directive 92/83 applies even when the products covered by that provision form part of a product which falls within another chapter of the combined nomenclature.

39 Consequently, the alcohol contained in cooking wine, if it has an alcoholic strength exceeding 1.2% by volume, constitutes ethyl alcohol within the meaning of the first indent of Article 20 of Directive 92/83, which is, without prejudice to the exemption provided for in Article 27(1)(f) of that directive, subject to the harmonised excise duty.

40 Having regard to all the foregoing considerations, the answer to the question referred must be that the alcohol contained in cooking wine is, if it has an alcoholic strength exceeding 1.2% by volume, to be classified as ethyl alcohol as referred to in the first indent of Article 20 of Directive 92/83.

Costs

41 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 (Fourth Chamber) hereby rules:

The alcohol contained in cooking wine is, if it has an alcoholic strength exceeding 1.2% by volume, to be classified as ethyl alcohol as referred to in the first

indent of Article 20 of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages.

[Signatures]