JUDGMENT OF THE COURT (Seventh Chamber)

5 June 2008 *

In Case C-312/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Tribunal d'instance du XIe arrondissement de Paris (France), made by decision of 23 January 2007, received at the Court on 6 July 2007, in the proceedings

JVC France SAS

v

Administration des douanes — Direction nationale du renseignement et des enquêtes douanières,

THE COURT (Seventh Chamber),

composed of U. Lõhmus, President of the Chamber, J. Klučka and P. Lindh (Rapporteur), Judges,

* Language of the case: French.

Advocate General: V. Trstenjak,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 6 March 2008,

after considering the observations submitted on behalf of:

— JVC France SAS, by F. Goguel and F. Foucault, avocats,

— the French Government, by G. de Bergues and A.-L. During, acting as Agents,

— the Commission of the European Communities, by J.-P. Keppenne and S. Schønberg, 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 the interpretation of the subheadings 8525 40 91 and 8525 40 99 of the Combined Nomenclature in Annex 1 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 2261/98 of 26 October 1998 (OJ 1998 L 292, p. 1), Commission Regulation (EC) No 2204/1999 of 12 October 1999 (OJ 1999 L 278, p. 1), Commission Regulation (EC) No 2388/2000 of 13 October 2000 (OJ 2000 L 264, p. 1, and corrigendum OJ 2000 L 276, p. 92) and Commission Regulation (EC) No 2031/2001 of 6 August 2001 (OJ 2001 L 279, p. 1) ('the CN'), and the legal scope of the explanatory notes to the Combined Nomenclature of the European Community ('the explanatory notes') published in accordance with Article 9(1) of Regulation No 2658/87.

2 The reference has been made in the course of proceedings between JVC France SAS ('JVC') and the Administration des Douanes (French Customs authorities) in respect of customs duties which the Administration des Douanes are claiming from JVC and which relate to the importing of digital camcorders originating in Japan and Singapore.

Legal context

The Customs Code

3 Article 220(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the Customs Code') states as follows:

'Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time-limit may be extended in accordance with Article 219.'

4 Article 239 of that code states:

'1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:

— to be determined in accordance with the procedure of the committee;

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases.'

The CN

5 The CN, established by Regulation No 2658/87, is based on the international Harmonised Commodity Description and Coding System ('the HS') drawn up by the Customs Cooperation Council, now the World Customs Organisation, and established by the International Convention concluded at Brussels on 14 June 1983 and approved on behalf of the Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). The CN takes six-digit headings and subheadings from the HS, only the seventh and eighth digits forming subdivisions that are specific to it.

6 Section XVI, in Part Two of the CN, contains Chapter 85, entitled 'Electrical machinery and equipment and parts thereof, sound recorders and reproducers, television

image and sound recorders and reproducers, and parts and accessories of such articles'.

7 Subheading 8525 40, entitled 'Still image video cameras and other video cameras; digital cameras' contains subheading 8525 40 91, entitled 'Other video camera recorders: Only able to record sound and images taken by the television camera' and subheading 8525 40 99, entitled 'Other video camera recorders: Other'.

8 The wording of subheadings 8525 40 91 and 8525 40 99 is identical in Regulations No 2261/98, No 2204/1999, No 2263/2000, No 2031/2001.

9 The camcorders classified under subheading 8525 40 91 are subject to a customs duty of 4.9%, while for camcorders under subheading 8525 40 99 it is 14%.

The explanatory notes

10 The Commission of the European Communities publishes in the *Official Journal of the European Union*, at regular intervals, explanatory notes to the CN.

11 Those adopted on 15 September 1998 (OJ 1998 C 287, p. 1) and on 13 July 2000 (OJ 2000 C 199, p. 1) under the subheading 8525 40 99 state:

'others

This subheading covers apparatus combinations consisting of a video camera and a video recording or reproducing apparatus (so-called "camcorders") for the recording not only of images taken by the camera but also of television programmes. The images thus recorded can be reproduced by means of an external television receiver.

However, "camcorders" with which only the images taken by the video camera can be recorded and reproduced by means of an external television receiver fall within subheading 8525 40 91.'

12 The explanatory notes were amended following a Commission notice of 6 July 2001 (OJ 2001 C 190, p. 10). With respect to subheading 8525 40 99, the previous wording was repeated and a second paragraph was added:

'This subheading also includes "camcorders" in which the video input is obstructed by a plate, or in another way, or in which the video interface can be subsequently activated as video import by means of software. The apparatus is nevertheless designed to record TV programmes and other externally incoming video signals.'

13 Following a Commission notice of 23 October 2002 (OJ 2002 C 256, p. 1), the last sentence of that text was slightly amended:

'… TV programmes or other externally incoming video signals'.

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

14 Following an investigation, the Administration des Douanes disputed the tariff classification used by JVC when importing digital camcorders in two categories originating in Japan and Singapore.

15 By a first notice of 11 October 2002, the customs officers recorded that between 29 June 1999 and 23 July 2001 JVC had imported camcorders with an enabled digital input/output terminal ('DV in/out'). That type of camcorder can record not only images and sound but also an external signal, via a dedicated connection. It can be connected directly to a computer or to a television for the transfer of digital video images taken by the camcorder (DV-out function) and in return it can record digital clips from any source processed by the computer (DV-in function).

16 The customs officers considered that the appropriate tariff classification was subheading 8525 40 99 and not the classification used by JVC, namely, subheading 8525 40 91.

17 JVC did not challenge that classification and paid the amount of duty outstanding. However, it applied for remission of the duty under Article 239 of the Customs Code claiming that the error arose due to a change in Community practice. That application was rejected by a first decision of 16 December 2004.

18 By a second notice of 11 October 2002, the customs officers recorded that between 22 June 1999 and 28 August 2002 JVC had imported digital camcorders having only the DV-out function activated, it being possible to activate the DV-in function after customs clearance.

19 The customs agents again considered that the appropriate tariff classification was subheading 8525 40 99 and not the classification used by JVC, namely, subheading 8525 40 91 and issued a notice to pay on 6 January 2004. JVC, on the one hand, challenged that notice and, on the other hand, applied for remission of duty. That application was rejected by a second decision of 16 December 2004.

20 JVC then brought two actions before the Tribunal d'instance du XI[e] arrondissement de Paris (District Court for the 11th arrondissement of Paris) (France).

21 By its first action, brought on 7 March 2005, JVC sought the annulment of the notice to pay of 6 January 2004, claiming that the relevant camcorders should be classed under subheading 8525 40 91.

22 By its second action, brought on 2 February 2006, JVC sought the annulment of the two decisions of 16 December 2004 rejecting the applications for remission of duties. JVC maintained that the notices to pay are the result of a change in Community practice on account of the publication of amended versions of the explanatory notes to the CN. That change constitutes a special circumstance within the meaning of Article 239(1) of the Customs Code.

23 Before the national court, JVC claimed that, before 2001, importers and the customs authorities classified camcorders, having only the DV-out function activated at the time of import, under subheading 8525 40 91. It was not until after the amendment of the explanatory notes by the Commission notice of 6 July 2001 that the customs practice was changed. According to JVC, while the German and British customs

authorities decided to apply the new interpretation only for imports after 6 July 2001, the French customs authorities decided to apply the interpretation retrospectively, which is contrary to the Customs Code.

24 It is in those circumstances that the Tribunal d'instance du XI[e] arrondissement de Paris, having joined the two actions, decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must a camcorder, which when imported is unable to record external video signals, be classified under subheading 8525 40 99, if its video interface can subsequently be set as a video input by using software or an enabler (widget) equipped with electronic circuitry enabling it to record an external video sound signal, even though the manufacturer and the seller have not mentioned this possibility and do not endorse it?

2. If so, to the extent that the subsequent amendments of the explanatory notes entail a change in Community practice with regard to the classification of camcorders and an exception to the principle that goods must be classified according to their actual characteristics at the time of customs clearance, was the European Commission entitled to make this change by amending the explanatory notes and hence with retrospective effect, rather than by adopting a classification regulation that was applicable only in the future?'

The questions referred for a preliminary ruling

The first question

25 By its first question, the national court asks, essentially, whether, for the classification of the camcorders, the possibility of activating the DV-in function may or must be taken into account if it has not been activated at the time of customs clearance, but if it may subsequently be activated manually or by the addition of software. It also queries the significance of the fact that the manufacturer did not mention or endorse that possibility at the time of customs clearance.

26 In Joined Cases C-208/06 and C-209/06 *Medion and Canon Deutschland* [2007] ECR I-7963 the Court of Justice replied to a question referred for a preliminary ruling identical to that referred by the national court in the present case. Accordingly, an identical reply must be given to this question.

27 Therefore, the answer to the first question must be that a camcorder may be classified under subheading 8525 40 99 of the CN only if the function for recording images and sounds from sources other than the integrated camera or microphone is active at the time of customs clearance or if, even though the manufacturer did not intend to promote that characteristic, that function may be activated subsequently by simple modification of the apparatus by a user who does not have special skills, without modification of the camcorder's hardware. Where the camcorder is activated subsequently, it is also necessary, first, that, once activated, it functions in a manner similar to that of another camcorder whose function for recording images and sounds from sources other than the integrated camera or microphone is active at the time of customs clearance and, second, that it functions independently. The existence of those conditions must be capable of being ascertained at the time of customs clearance. It is for the national court to establish whether those conditions

are fulfilled. If those conditions are not fulfilled the camcorder must be classified under subheading 8525 40 91 of the CN.

The second question

28 By its second question, the national court wishes to know, in essence, the legal effect of amendments to the explanatory notes to the CN, in particular with regard to the classification of the goods in question in the main proceedings and enquires whether the Commission should not have proceeded by way of adoption of a new classification regulation rather than an interpretation of the existing regulation.

The admissibility of the question

29 The Commission takes the view that the question is inadmissible as it is hypothetical and does not assist in determining the outcome of the dispute. In its view, the amendments to the explanatory notes to the CN do not constitute a change in relation to an earlier legal position. Those notes do not have legal effect as such. Their amendment does not therefore affect the rights of economic operators. Finally, the order for reference did not contain sufficient factual information to allow the Court to broaden the question and possibly reword it.

30 In that regard, it must be observed that, according to established case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine 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, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 47).

31 The Court can refuse the request from the national court only where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (see *Bosman*, paragraph 61, and *Acereda Herrera*, paragraph 48).

32 In the dispute at issue in the main proceedings, the national court has before it an application for remission of customs duty based on Article 239(1) of the Customs Code and must, on that basis, look for elements likely to constitute a specific circumstance arising from facts which imply neither deception nor obvious negligence on the part of JVC. In that context, the question of the legal scope of the explanatory notes to the CN seems relevant. The question is thus admissible.

Substance

33 It should be recalled, first of all, that it is settled case-law that, in the interests of legal certainty and for 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 the notes to the sections or chapters (see, in particular, Case C-42/99 *Eru Portuguesa* [2000] ECR I-7691, paragraph 13; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 47; Case C-445/04 *Possehl Erzkontor* [2005] ECR I-10721, paragraph 19; and Case C-500/04 *Proxxon* [2006] ECR I-1545, paragraph 21).

34 The Court has also held that the explanatory notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those notes must therefore be consistent with the provisions of the CN and cannot alter their scope (see *Intermodal Transports*, paragraph 48; *Possehl Erzkontor*, paragraph 20; and *Proxxon*, paragraph 22). Where it is apparent that they are contrary to the wording of the headings of the CN and the section or chapter notes, the explanatory notes to the CN must be disregarded (see Case C-229/06 *Sunshine Deutschland Handelsgesellschaft* [2007] ECR I-3251, paragraph 31).

35 As regards the subheadings of the CN which are relevant for the disputes in the main proceedings, it should be noted that the wording of subheading 8525 40 99 comprises only the term 'others'. That subheading thus contains all camcorders other than those 'only able to record sound and images taken by the television camera', (DV out function), which come under subheading 8525 40 91. The Commission was therefore led to interpret, in the explanatory notes to the CN, the content of subheading 8525 40 99. Those explanatory notes indicated, from 15 September 1998, that the camcorders covered by subheading 8525 40 99 were those having the DV in function and the DV out function. On 6 July 2001, the Commission again amended the explanatory notes to the CN specifying that subheading 8525 40 99 also includes camcorders designed with the DV in function without that function being activated at the time of customs clearance.

36 It should be stated that, having regard to the respective wording of subheadings 8525 40 91 and 8525 40 99, the explanatory notes to the CN in relation to the latter are in accordance with the provisions of the CN and do not alter its scope.

37 It follows from all of the foregoing considerations that the reply to the second question must be that the explanatory notes to the CN relating to subheading 8525 40 99, published on 6 July 2001 and 23 October 2002, are interpretative in character and do not have legally binding force. They are in accordance with the wording of the CN and do not alter its scope. It follows that the adoption of a new classification regulation was not necessary.

Costs

38 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 (Seventh Chamber) hereby rules:

1. **A camcorder may be classified under subheading 8525 40 99 of the Combined Nomenclature in Annex 1 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 2261/98 of 26 October 1998, Commission Regulation (EC) No 2204/1999 of 12 October 1999, Commission Regulation (EC) No 2388/2000 of 13 October 2000 and Commission Regulation (EC) No 2031/2001 of 6 August 2001 only if the function for recording images and sounds from sources other than the integrated camera or microphone is active at the time of customs clearance or if, even though the manufacturer did not intend to promote that characteristic, that function may be activated subsequently by simple modification of the apparatus by a user who does not have special skills, without modification of the camcorder's hardware. Where the camcorder is activated subsequently, it is also necessary, first, that, once activated, it functions in a manner similar to that of another camcorder whose function for recording images and sounds from sources other than the integrated camera or microphone is active at the time of customs clearance and, second, that it functions independently. The existence of those conditions must be capable of being ascertained at the time of customs clearance. It is for the national court to establish whether those conditions are fulfilled. If those conditions are not fulfilled the camcorder must be classified under subheading 8525 40 91 of the Combined Nomenclature.**

2. The explanatory notes to that Combined Nomenclature relating to subheading 8525 40 99, published on 6 July 2001 and 23 October 2002, are interpretative in character and do not have legally binding force. They are in accordance with the wording of the Combined Nomenclature and do not alter its scope. It follows that the adoption of a new classification regulation was not necessary.

[Signatures]