JUDGMENT OF THE COURT (First Chamber)

16 December 2010 *

In Case C-339/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Nejvyšší správní soud (Czech Republic), made by decision of 2 July 2009, received at the Court on 24 August 2009, in the proceedings

Skoma-Lux s. r. o.

v

Celní ředitelství Olomouc,

* Language of the case: Czech.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.J. Kasel, A. Borg Barthet, E. Levits and M. Safjan (Rapporteur), Judges,

Advocate General: V. Trstenjak,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 9 September 2010,

after considering the observations submitted on behalf of:

— Skoma-Lux s. r. o., by M. Filouš, advokát,

— the Celní ředitelství Olomouc, by M. Brázda, acting as Agent,

— the Czech Government, by M. Smolek, acting as Agent,

— the Greek Government, by G. Kanellopoulos, Z. Chatzipavlou and V. Karra, acting as Agents,

— the European Commission, by L. Bouyon, L. Jelínek and M. Šimerdová, 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 headings 2204 and 2206 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), as amended by Commission Regulation (EC) No 1719/2005 of 27 October 2005 (OJ 2003 L 286, p. 1) ('the CN').

2 The reference has been made in proceedings between Skoma-Lux s. r. o. ('Skoma-Lux') and Celní ředitelství Olomouc (Customs Directorate, Olomouc) concerning the CN classification of goods labelled as 'red dessert wine Kagor VK', imported into the Czech Republic.

Legal context

3 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, adopted by the International Convention concluded in Brussels on 14 June 1983 and approved on behalf of the European Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). The CN reproduces the headings and subheadings of the HS to six digits, with only the seventh and eighth figures creating subheadings which are unique to it.

4 In order to provide further explanations as to the application of the Harmonised System, the World Customs Organisation regularly publishes Harmonised System Explanatory Notes ('the HSEN'). Likewise, pursuant to the second indent of Article 9(1)(a) of Regulation No 2658/87, in order to ensure application of the CN, the European Commission draws up Explanatory Notes. Those notes, which are published regularly in the *Official Journal of the European Union*, do not replace the HSEN, but should be viewed as complementary to those notes and consulted together with them.

5 In the 2002 version of the HS, applicable to the facts of the dispute in the main proceedings, heading 2204 is entitled 'wine of fresh grapes, including fortified wines; grape must other than that of heading 2009'.

6 The HSEN with regard to heading 2204 state:

'2204,10 — Sparkling wine

— Other wine; grape must with fermentation prevented or arrested by the addition of alcohol:

2 204,21 – – In containers holding two litres or less

2 204,29 – – Other

2 204,30 – Other grape marc

(I) Wine of fresh grapes

The wine classified in this heading is the final product of the alcoholic fermentation of the must of fresh grapes.

This heading covers:

...

4. Liqueur wines (also called dessert wines, etc.) which are rich in alcohol and are generally obtained from must with a high sugar content, only part of which is converted to alcohol by fermentation; in some cases they are fortified by the addition of alcohol, or of concentrated must with added alcohol. Liqueur wines include Canary, Cyprus, Lacryma Christi, Madeira, Malaga, Marsala, Port, Malmsey, Samos, Sherry, etc.

...'

7 The 2002 version of the HS includes also heading 2206, entitled 'Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included'.

8 According to the HSEN relating to heading 2206:

'This heading covers all fermented beverages other than those in headings 2203 to 2205.

It includes inter alia:

…

(10) Ginger beer and herb beer, which are sparkling beverages prepared from sugar, water, ginger or certain herbs and fermented with yeast.

All these beverages may be either naturally sparkling or artificially charged with carbon dioxide. They remain classified in the heading when fortified with added alcohol or when the alcohol content has been increased by further fermentation, provided that they retain the character of products falling in the heading.

…'

9 The version of the CN applicable to the facts at issue in the main proceedings arises from Regulation No 1719/2005, which entered into force on 1 January 2006.

10 Part One of the CN contains a series of preliminary provisions. In that part, under Section I, which contains the general rules, Subsection A, entitled 'General rules for the interpretation of the [CN]', provides:

'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.

…'

11 The second part of the CN contains the schedule of duties. Section IV of that part, entitled 'Prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured

tobacco substitutes' contains a Chapter 22, entitled 'Beverages, spirits and vinegar', which includes in particular headings 2203 to 2206, worded as follows:

'2203 00 Beer made from malt:

…

'2204 Wine of fresh grapes, including fortified wines; grape must other than that of heading No 2009:

…

2205 Vermouth and other wine of fresh grapes flavoured with plants or aromatic substances:

…

2206 00 Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included:

…'

12 Chapter 22 of the schedule of customs duties contains also additional notes, worded as follows:

'…

5. Subheadings 2204 21 11 to 2204 21 99 and 2204 29 12 to 2204 29 99 shall be taken to include:

(a) grape must with fermentation arrested by the addition of alcohol, that is to say, a product:

— having an actual alcoholic strength by volume of not less than 12 % vol but less than 15 % vol, and

— obtained by the addition to unfermented grape must having a natural alcoholic strength by volume of not less than 8.5 % vol of a product derived from the distillation of wine;

(b) wine fortified for distillation, that is to say, a product:

— having an actual alcoholic strength by volume of not less than 18 % vol but not more than 24 % vol,

— obtained exclusively by the addition to wine containing no residual sugar of an unrectified product derived from the distillation of wine and having a maximum actual alcoholic strength by volume of 86 % vol, and

— having a maximum volatile acidity of 1.5 g/l, expressed as acetic acid;

(c) liqueur wine, that is to say, a product:

— having a total alcoholic strength by volume of not less than 17.5 % vol and an actual alcoholic strength by volume of not less than 15 % vol but not more than 22 % vol, and

— obtained from grape must or wine, which must come from vine varieties approved in the third country of origin for the production of liqueur wine and have a minimum natural alcoholic strength by volume of 12 % vol,

— by freezing, or

— by the addition during or after fermentation:

— of a product derived from the distillation of wine, or

— of concentrated grape must or, in the case of certain quality liqueur wines appearing on a list to be adopted of wines for which such prac-

tice is traditional, of grape must concentrated by direct heat, which, apart from this operation, corresponds to the definition of concentrated grape must, or

— of a mixture of these products.

…'

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

13 On 18 January 2006, Skoma-Lux submitted to the Celní úřad Olomouc (Olomouc Customs Office) a declaration for free circulation of goods labelled as 'red dessert wine Kagor VK'. Those goods, from Moldavia, were declared under heading 2204 of the CN.

14 During an audit of that customs declaration, the Celní úřad Olomouc took a sample of those goods in order to identify the origin of the alcohol, sugar and water contained in them. It is apparent from the analyses carried out that that sample contained at least 25% of sugar of an origin other than grape juice, probably from a mixture of grape juice, beet sugar and sugar resulting from the hydrolysis of corn starch. According

to those analyses, those goods were produced from sweetened grape juice, to which corn alcohol was added, which arrested the fermentation process.

15 By decision of 28 November 2006, in the light of those analyses, the Celní úřad Olomouc considered that the goods at issue in the main proceedings should be classified under heading 2206 of the CN, on the ground that they were not liqueur wine since, in the course of their manufacture, they had been fortified, not with products obtained by the distillation of wine, but by alcohol of another origin.

16 On 5 April 2007, the Celní ředitelství Olomouc dismissed the action brought by Skoma-Lux against that decision of the Celní úřad Olomouc.

17 On 4 December 2007, following an action brought by Skoma-Lux, the Krajský soud v Ostravě (Regional Court, Ostrava) set aside that decision of the Celní ředitelství Olomouc and referred the case back to it for further consideration. The Krajský soud v Ostravě held that the goods at issue should be classified under heading 2204 of the CN, noting in particular that the addition of sugar or alcohol, whatever their origin, did not result in a change in the fundamental features of those goods, namely that they were produced from fresh grapes.

18 The Celní ředitelství Olomouc appealed on a point of law against the decision of the Krajský soud v Ostravě before the Nejvyšší správní soud (Supreme Administrative Court), which held that the goods at issue in the main proceedings should be classified under heading 2206 of the CN. As it was established that those goods contained corn alcohol, they were not exclusively of grape origin.

19 Taking the view, however, that the outcome of the dispute before it required an interpretation of the relevant European Union legislation, the Nejvyšší správní soud decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must goods labelled as "red dessert wine Kagor VK", contained in 0.75 litre bottles with an alcohol content of 15.8 % — 16.1 % by volume, to which beet sugar and corn alcohol have been added during their manufacture, those substances not originating from fresh grapes, be classified under heading 2204 or heading 2206 of the [CN]?'

The question referred for a preliminary ruling

Admissibility

20 In its observations, Skoma-Lux claims, in essence, that the features of red dessert wine Kagor VK do not correspond to those of the goods described in the question referred for a preliminary ruling. According to Skoma-Lux, that wine is obtained by the fermentation of grape must, which is arrested by the addition of wine alcohol or distillate of wine in order to achieve the necessary alcohol content.

21 In that regard, in proceedings under Article 267 TFEU, 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. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; and Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraph 51).

22 According to settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see, inter alia, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22 and case-law cited).

23 Furthermore, 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 the implementation of 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. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (see, inter alia, Case C-56/08 *Pärlitigu* [2009] ECR I-6719, paragraph 23 and case-law cited).

24 Consequently, as the Commission contends, it is for the Court to reformulate the question which is referred to it so that it relates to resolving the question whether a beverage fermented on the basis of fresh grapes, sold in 0.75 litre bottles, with an alcoholic content of 15.8 % to 16.1 % by volume, to which are added in the course of

its production beet sugar and corn alcohol ('the beverage at issue'), must be classified under heading 2204 or heading 2206 of the CN.

The application of Regulation (EC) No 600/2006

25 In its order for reference, the Nejvyšší správní soud refers to Commission Regulation (EC) No 600/2006 of 18 April 2006 concerning the classification of certain goods in the combined nomenclature (OJ 1999 L 106, p. 5). That regulation, adopted on the basis of Article 9(1)(a) of Regulation No 2658/87, which empowers the Commission to clarify the contents of a tariff heading, classifies a product with the features of the beverage at issue under heading 2206 of the CN.

26 In that regard, the Commission states in its observations that that regulation was adopted following different tariff classifications carried out by the customs authorities of the Member States with regard to red dessert wine Kagor VK.

27 However, it follows from settled case-law that a regulation specifying the conditions for classification in a tariff heading or subheading is of a legislative nature and cannot have retroactive effect (see, inter alia, Case C-479/99 *CBA Computer* [2001] ECR I-4391, paragraph 31, and Case C-403/07 *Metherma* [2008] ECR I-8921, paragraph 39).

28 According to the first recital in the preamble to Regulation No 600/2006, that regulation was adopted in order to ensure uniform application of the CN. It is, nevertheless, not disputed that that regulation entered into force on 9 May 2006, that is to say after

the declaration for free circulation of the goods at issue in the main proceedings was submitted, and that it was not given any restrospective effect.

29 In those circumstances, Regulation No 600/2006 is not applicable to the dispute in the main proceedings. The question referred for a preliminary ruling must therefore be examined in the light of Regulation No 2658/87, as amended by Regulation No 1719/2005.

Substance

Observations submitted to the Court

30 Skoma-Lux claims that the particular organoleptic characteristics of the beverage at issue, as well as its intended use, correspond to those of goods classified under heading 2204 of the CN. In support of that, the customs authorities of several Member States issued binding tariff information relating to the classification of red dessert wine Kagor VK under that heading.

31 The Celní ředitelství Olomouc considers that, in accordance with the HSEN, that beverage must be classified under heading 2206 of the CN since it contains added alcohol with an origin other than the distillation of wine.

32 The Czech Government states that the alcohol contained in the beverages classified under heading 2204 of the CN must derive exclusively from the fermentation of

grapes. Since the beverage at issue contains to some extent alcohol of an origin other than wine, it comes under heading 2206 of the CN, which includes all fermented beverages which cannot be classified under other headings of Chapter 22 of the CN.

33 The Greek Government considers that the beverage at issue comes under heading 2206 of the CN. First, with regard to additional note 5 to Chapter 22 of the CN, it could not be classified under heading 2204 to the extent that the ethyl alcohol used for its production does not derive from the distillation of wine. Secondly, heading 2206 of the CN includes beverages for which the addition of corn ethyl alcohol is permitted, on condition that the essential character of the basic product is maintained, which would be the case for that beverage.

34 The Commission is of the opinion that the HSEN does not preclude the addition of alcohol not derived from grapes to wine. Therefore, the beverage at issue should, in principle, be classified under heading 2204 of the CN. However, although, by the addition, during the course of the production, of beet sugar and corn alcohol, the character of the beverage fermented on the basis of fresh grapes was altered to the extent that the features of the product diverge clearly from the organoleptic and chemical properties defined by the international or national norms for products typical of heading 2204 of the CN, and in particular where at least half of the actual alcoholic strength by volume of the beverage does not derive from fresh grapes, it is necessary, according to the Commission, to classify the beverage at issue under heading 2206 of the CN. It is for the competent authorities of the Member State concerned to assess the extent of that divergence.

The Court's reply

35 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-142/06 *Olicom* [2007] ECR I-6675, paragraph 16, and Case C-370/08 *Data I/O* [2010] ECR I-4401, paragraph 29).

36 It should also be recalled that both the notes which precede the chapters of the Common Customs Tariff and the HSEN are important means of ensuring the uniform application of that tariff and as such may be regarded as useful aids to its interpretation (see, inter alia, Case C-338/95 *Wiener SI* [1997] ECR I-6495, paragraph 11, and Case C-123/09 *Roeckl Sporthandschuhe* [2010] ECR I-4065, paragraph 29).

37 In the present case, the wording of heading 2204 of the HS mentions 'wine of fresh grapes, including fortified wines'. The HSEN relating to that heading state that, for the wines of fresh grapes, the wine classified under that heading is exclusively the final product of the alcoholic fermentation of the must of fresh grapes.

38 Among those wines of fresh grapes, heading 2204 includes liqueur wines, also called dessert wines, in relation to which it is not disputed that the alcoholic strength by volume, stated in additional note 5(c) to Chapter 22 of the CN, corresponds to that of the beverage at issue. It is also not disputed that that beverage does not fulfil the conditions imposed by additional notes 5(a) and (b), which concern respectively grape must with fermentation arrested by the addition of alcohol and wine fortified for distillation.

39 Furthermore, additional note 5(c) to Chapter 22 of the CN authorises, for liqueur wines, during or after fermentation, the addition solely of a product derived from the distillation of wine, or from concentrated grape must, or from a mixture of those products.

40 Therefore, contrary to what the Commission claims, it is clearly and unambiguously apparent from the HSEN relating to heading 2204, read in conjunction with additional note 5(c) to Chapter 22 of the CN, that the alcohol contained in liqueur wine, whether it results from alcoholic fermentation or is added, must derive exclusively from grapes.

41 It follows that the beverage at issue, which was fortified by the addition of corn alcohol during the course of its production, cannot be classified under heading 2204 of the CN, and that is so without there being any need to examine whether liqueur wine, within the meaning of that heading, can contain beet sugar.

42 That having been determined, it must be held that, in the light of its objective characteristics and properties, the beverage at issue fulfils the conditions to be classified under heading 2206 of the CN.

43 That heading covers 'other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included'. The HSEN states that that heading covers all fermented beverages other than those in headings 2203 to 2205.

44 First, it follows from the foregoing that the beverage at issue cannot be included under heading 2204 of the CN. In view of its ingredients, nor can it be classified under heading 2203 00 of the CN, relating to 'beer made from malt', or under heading 2205, which concerns 'vermouth and other wine of fresh grapes flavoured with plants or aromatic substances'.

45 Secondly, with regard to the addition of alcohol and sugar to the beverage at issue, it should be noted that the HSEN relating to heading 2206 state that beverages remain classified under that heading even when they have been fortified with added alcohol. Furthermore, a beverage to which sugar was added during the course of its production can be classified under heading 2206. In that regard, explanatory note 10 of the HS relating to heading 2206 states that ginger and herb beer, prepared from sugar, water and ginger or certain herbs, are listed under that heading.

46 Thirdly, also according to the HSEN relating to heading 2206, the addition of alcohol to beverages coming under that heading does not preclude such beverages from retaining that classification provided that they retain the character of products coming under the heading, namely that of fermented beverages. It is apparent from the order for reference that the beverage in question has the taste, colour and smell of a beverage made from grapes. Consequently, it has not lost the particular organoleptic characteristics of a fermented beverage (see, to that effect, Case C-150/08 *Siebrand* [2009] ECR I-3941, paragraph 37).

47 Fourthly, with regard to Skoma-Lux's argument that since the red dessert wine Kagor VK is intended to be drunk as wine, it should be classified under heading 2204 of the CN, it should be noted that, whilst, 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-183/06 *RUMA* [2007] ECR I-1559, paragraph 36, and *Roeckl Sporthandschuhe*, paragraph 28), the intended use of the product is a relevant criterion only where the classification can be made on the sole basis of the objective characteristics and properties of the product (see, to that effect, Case 38/76 *Industriemetall LUMA* [1976] ECR 2027, paragraph 7). In this case, it follows from all of the foregoing that, in the light of its objective characteristics and properties, the beverage in question clearly comes exclusively under heading 2206 of the CN.

48 In view of those considerations, the answer to the question referred is that Regulation No 2658/87, as amended by Regulation No 1719/2005, must be interpreted as meaning that a beverage fermented on the basis of fresh grapes, sold in 0.75 litre bottles, with an alcohol content of 15.8 % to 16.1 % by volume, to which beet sugar and corn alcohol have been added during the course of its production, must be classified under heading 2206 of the CN.

Costs

49 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 (First Chamber) hereby rules:

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 1719/2005 of 27 October 2005, must be interpreted as meaning that a beverage fermented on the basis of fresh grapes, sold in 0.75 litre bottles, with an alcohol content of 15.8 % to 16.1 % by volume, to which beet sugar and corn alcohol have been added during the course of its production, must be classified under heading 2206 of the Combined Nomenclature in Annex I to that regulation.

[Signatures]