JUDGMENT OF THE COURT (Third Chamber)

22 December 2010 *

In Case C-273/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank Haarlem (Netherlands), made by decision of 18 June 2009, received at the Court on 16 July 2009, in the proceedings

Premis Medical BV

v

Inspecteur van de Belastingdienst/Douane Rotterdam, Kantoor Laan op Zuid,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby (Rapporteur), E. Juhász, G. Arestis and T. von Danwitz, Judges,

* Language of the case: Dutch.

Advocate General: P. Cruz Villalón,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 October 2010,

after considering the observations submitted on behalf of:

— Premis Medical BV, by A. Jansen and M. Hoeijmans, advocaten,

— the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

— the European Commission, by L. Bouyon and W. Roels, 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 relates to the validity of Commission Regulation (EC) No 729/2004 of 15 April 2004 concerning the classification of certain goods in the Combined Nomenclature (OJ 2004 L 113, p. 5), in the version resulting from a corrigendum published on 7 May 2004 (OJ 2004 L 173, p. 9) ('Regulation No 729/2004, as rectified').

2 The reference has been made in proceedings between Premis Medical BV ('Premis Medical') and the Inspecteur van de Belastingdienst/Douane Rotterdam, kantoor Laan op Zuid (Inspector of the Rotterdam Customs Duty Department, Laan op Zuid office) ('the Inspector') concerning the classification in the Combined Nomenclature ('the CN') of the product 'walker-rollator' pursuant to Regulation No 729/2004, as rectified.

Legal context

The classification of goods

3 The CN was established by 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 Council Regulation (EC) No 254/2000 of 31 January 2000 (OJ 2000 L 28, p. 16) ('Regulation No 2658/87'). The CN is based on the International Convention on the Harmonised Commodity Description and Coding System ('the HS'), concluded in Brussels on 14 June 1983, and the Protocol of Amendment thereto of 24 June 1986, which were approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).

4 Regulation No 2658/87 authorises the Commission of the European Communities to clarify the content of a tariff heading. In that regard, 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 [CN] and the TARIC, concerning in particular:

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

— explanatory notes;

…'

5 Under Article 10(1) of Regulation No 2658/87:

'The Commission shall be assisted by the Customs Code Committee set up by Article 247 of Regulation (EEC) No 2913/92 …'

6 Annex I to Regulation No 2658/87 is updated by the Commission on an annual basis. By Commission Regulation (EC) No 1789/2003 of 11 September 2003 amending Annex I to Regulation No 2658/87 (OJ 2003 L 281, p. 1), the Commission adopted a complete version of the CN, applicable with effect from 1 January 2004.

7 Chapter 90 in Section XVIII of Part Two of the CN is entitled 'Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof'.

8 Heading 9021 of the CN is worded as follows:

'9021 Orthopaedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability:

…

9021 90 – Other:

…

9021 90 90 – – Other.'

9 Note 6 to Chapter 90 of the CN is worded as follows:

'For the purposes of heading 9021, the expression "orthopaedic appliances" means appliances for:

— preventing or correcting bodily deformities; or

— supporting or holding parts of the body following an illness, operation or injury.

…'

10 The HS Explanatory Notes relating to heading 9021 provide as follows:

' …

(V) – Other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability

This group includes:

(1) Speech aids for persons having lost the use of their vocal cords as a result of an injury or a surgical operation. …

(2) Pacemakers for stimulating defective heart muscles. …

(3) Electronic aids for the blind. …

(4) Appliances implanted in the body, used to support or replace the chemical function of certain organs (e.g., secretion of insulin).

…'

11 The Explanatory Notes of the CN relating to heading 9021 state:

'For the purposes of this heading, the expression "to compensate for a defect or disability" means only appliances which actually take over or substitute for the function of the defective or disabled part of the body.

This heading does not include appliances which simply alleviate the effects of the defect or disability.

…'

12 Chapter 87 in Section XVII of Part 2 of the CN is entitled 'vehicles other than railway or tramway rolling-stock, and parts and accessories thereof'.

13 Heading 8716 of the CN is worded as follows:

'8716 Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof:

…

8716 80 00 – Other vehicles'.

14 The HS Explanatory Notes relating to heading 8716 provide as follows:

'This heading covers a group of non-mechanically propelled vehicles (other than those of the preceding headings) equipped with one or more wheels and constructed for the transport of goods or persons. It also includes non-mechanical vehicles not fitted with wheels (e.g., sledges, special sleds running on timber trackways).

The vehicles of this heading are designed to be towed by other vehicles (tractors, lorries, trucks, motorcycles, bicycles, etc.), to be pushed or pulled by hand or to be drawn by animals.

…'

Regulation No 729/2004

15 In accordance with Article 1 of Regulation No 729/2004, the goods described in column 1 of the table set out in the annex to that regulation are classified under the corresponding CN codes indicated in column 2 of that table.

16 In the words of recital 5 in the preamble to that regulation, the measures provided for are in accordance with the opinion of the Customs Code Committee.

17 The corrigendum of 7 May 2004 attaches a new annex to Regulation No 729/2004 which does not mention any of the goods described in the original annex to that regulation.

18 The goods described in column 1 of the table reproduced in the annex to Regulation No 729/2004, as rectified, are the following:

'…

5. A walker-rollator consisting of a tubular aluminium frame on four wheels, with front swivel wheels, handles and brakes. It includes a seat/carrying tray and a wire basket. The product can be folded for transport.

The product is designed to assist persons who have difficulty in walking. It enables a person to move forward by pushing the walker-rollator, thus providing support.'

19 It is apparent from column 2 that the 'walker-rollator' described in point 5 of that table is to be classified under subheading 8716 80 00 of the CN in accordance with the following reasons set out in column 3:

'Classification is determined by general rules 1 and 6 for the interpretation of the [CN], and by the wording of CN codes 8716 and 8716 80 00.

The product is not considered to be an orthopaedic appliance of heading 9021 since it does not meet the terms of Note 6 to Chapter 90.

The product is not considered to be a carriage for disabled persons of heading 8713'.

20 In the words of recital 5 in the preamble to Regulation No 729/2004, as rectified, '[t]he Customs Code Committee has not delivered an opinion within the time-limit set by its chairman as regards products Nos 1, 2, 4, and 5 in the annexed table'.

21 Recital 6 in the preamble to Regulation No 729/2004, as rectified, states that '[t]he measures provided for in [the] Regulation are in accordance with the opinion of the Customs Code Committee as regards product No 3 in the annexed table'.

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

22 On 17 August 2007, Premis Medical lodged a request with the Inspecteur for binding tariff information with respect to the walker-rollator consisting of an aluminium frame on four wheels, with two swivel wheels at the front, with handles and brakes, designed to help people who have difficulty walking ('the walker-rollator') which, it claimed, should be classified under subheading 9021 90 90 of the CN.

23 On 12 October 2007, the Inspecteur issued a binding tariff information classifying the product at issue under subheading 8716 80 00 of the CN, against which Premis Medical lodged an objection on 21 November 2007.

24 On 15 February 2008, for the purpose of the release into free circulation of a consignment of walker-rollators, Premis Medical made a declaration under subheading 8716 80 00 of the CN, which led to a request for payment of customs duties submitted by the Inspecteur. On 5 March 2008, the applicant lodged an objection to that request for payment.

25 By letters of 9 and 23 May 2008, Premis Medical brought an appeal before the Rechtbank Haarlem (Haarlem District Court) against the two decisions of the Inspecteur rejecting its objections.

26 The referring court takes the view that, by replacing the list of goods referred to in the annex to Regulation No 729/2004, the corrigendum of 7 May 2004 altered the scope of application of that regulation. With regard to the classification of the walker-rollator in the CN, the referring court considers, first, that the explanatory note of the CN relating to heading 9021 thereof significantly restricts the concept of 'appliances to compensate for a defect or disability' and that, therefore, that explanatory note must be disregarded. Next, it states that the walker-rollator is an appliance designed to compensate for a defect, disability or walking difficulty and that it is held manually. The referring court takes the view, moreover, that the walker-rollator does not satisfy the definition of 'vehicle' within the meaning of heading 8716 of the CN, the essential feature of which is that it is designed to transport people or goods.

27 In those circumstances, the Rechtbank Haarlem decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is … Regulation … No 729/2004 … [as rectified] … valid in the sense that the annex contained in the corrigendum is the valid annex? If so:

2. Is … Regulation … No 729/2004 … [as rectified] … invalid on the ground that the Commission has restricted the scope of heading 9021 [of the CN] in that regulation? If the regulation is valid:

3. Is … Regulation … No 729/2004 … [as rectified] … invalid on the ground that the Commission has incorrectly classified the walker-rollator in the CN?'

Consideration of the questions referred

28 By its questions, taken together, the referring court asks, in essence, whether Regulation No 729/2004, as rectified, is valid, first, in so far as the corrigendum at issue replaced the goods mentioned in the table included in the annex to Regulation No 729/2004, and, secondly, in so far as point 5 of the table included in that annex classifies the walker-rollators at issue in the main proceedings under subheading 8716 80 00 of the CN.

29 First of all, it should be noted that, once an act has been formally adopted, only simple corrections of spelling and grammar may be made to the text thereof (see Case 131/86 *United Kingdom* v *Council* [1988] 905, paragraph 35, and Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 68).

30 In order to assess whether the corrigendum of 7 May 2004 constitutes a simple correction of a clerical error not affecting the content of Regulation No 729/2004, it should be noted that, according to settled case-law, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also its context and the aims pursued by the legislation of which it forms part (see Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 21 and the case-law cited).

31 In that regard, it must be pointed out that, in general, the wording of a tariff classification regulation refers to goods described in an annex to the regulation for the purposes of classifying those goods in the CN.

32 In the present case, the annex to Regulation No 729/2004, in its initial version, refers to goods of an entirely different nature to those referred to in the annex to Regulation No 729/2004, as rectified. In that regard, the Commission states that, in the initial version of Regulation No 729/2004, the annex to another regulation concerning the classification of certain goods in the CN was mistakenly reproduced as an annex to Regulation No 729/2004 and that the corrigendum published on 7 May 2004 sought merely to correct that mistake.

33 However, the amendments made by the corrigendum of 7 May 2004 concern not only the annex to Regulation No 729/2004 but also the recitals in the preamble to that regulation.

34 In the words of recital 5 in the preamble to Regulation No 729/2004, in its initial version, all of the measures provided for in that regulation were in accordance with the opinion of the Customs Code Committee. By contrast, in the words of recital 5 in the preamble to Regulation No 729/2004, as rectified, a number of goods referred to in the annex, including the walker-rollator, had not been the subject of an opinion delivered by that committee within the time-limit set.

35 It follows that, in adopting Regulation No 729/2004, on 15 April 2004, the Commission cannot have had in mind the tariff classification of the walker-rollators subsequently mentioned in the annex to Regulation No 729/2004, as rectified.

36 In the light of those factors, it must be held that the corrigendum published on 7 May 2004 goes beyond a mere correction of a clerical error and in reality amended the content of Regulation No 729/2004 by making that regulation applicable to walker-rollators.

37 Secondly, it is necessary to examine whether the Commission was validly able to classify walker-rollators under heading 8716 of the CN by means of Regulation No 729/2004, as rectified.

38 It should be noted that Regulation No 729/2004, as rectified, was adopted on the basis, in particular, of Article 9(1)(a) of Regulation No 2658/87, which establishes the CN, which is itself based on the HS.

39 However, it is evident from a combined reading of the first indent of Article 9(1)(a) and Article 10(1) of Regulation No 2658/87 that the Commission, assisted by the Customs Code Committee, may adopt measures with regard to the application of the CN.

40 Although, according to settled case-law, the Commission has, for that purpose, a broad discretion to define the subject-matter of tariff headings, it is not, however, authorised to alter the subject-matter of the tariff headings which have been defined on the basis of the HS (see Joined Cases C-304/04 and C-305/04 *Jacob Meijer and Eagle International Freight* [2005] ECR I-6251, paragraph 22 and the case-law cited, and Case C-15/05 *Kawasaki Motors Europe* [2006] ECR I-3657, paragraph 35).

41 It is therefore appropriate to examine whether, in the present case, by classifying goods such as the walker-rollators under heading 8716 of the CN instead of under heading 9021 thereof, the Commission altered the content of those two tariff headings.

42 In that regard, it is appropriate to bear in mind the settled case-law which states 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 the case-law cited, and Joined Cases C-362/07 and C-363/07 *Kip Europe and Others* [2008] ECR I-9489, paragraph 26).

43 Furthermore, 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, inter alia, Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 23 and case-law cited).

44 In the present case, according to the description set out in the order for reference, the walker-rollator consists of an aluminium frame on four wheels, with two front swivel wheels, handles and brakes and it includes a seat and basket. The product can easily be folded for transport. As Premis Medical confirmed at the hearing, there is no standard walker-rollator, as the device can be purchased without a basket and without a seat. Likewise, the carrying capacity, the height and width of the seat, and the weight and diameter of the wheels can vary.

45 Furthermore, it is common ground that that product is designed to assist persons who have difficulty in walking and enables such persons to move forward by pushing the walker-rollator, which provides support.

46 With regard to heading 8716 of the CN, which covers, inter alia, 'other vehicles, not mechanically propelled', it is apparent from the HS explanatory notes relating to that

heading that, in order to be classified under that heading, a vehicle with one or more wheels must be designed to transport persons or goods. However, it appears that the walker-rollator does not correspond to those characteristics, since it was specially designed to allow persons suffering from a defect of the legs, muscles or joints to walk by themselves.

47 In that regard, the mere fact that that walker-rollator may at the same time allow those persons to carry goods and, should the need arise, to rest by sitting on the seat does not call that finding into question. On the assumption that that walker-rollator, which is specially designed to assist people in walking, may serve several different functions, as the Commission contends, it must be classified in accordance with its main overall function.

48 With regard to heading 9021 of the CN, which, in the view of the applicant in the main proceedings, ought to have been chosen by the Commission for the purposes of the tariff classification at issue, it should be noted that the instruments and appliances coming within Chapter 90 of the CN are characterised, in general, by the finish of their manufacture and their high degree of precision (see, to that effect, Joined Cases C-260/00 to C-263/00 *Lohmann and Medi Bayreuth* [2002] ECR I-10045, paragraph 37).

49 More particularly, that heading refers to, inter alia, 'orthopaedic appliances, including crutches' and to 'other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability'.

50 The wording itself of that provision does not preclude walker-rollators, in so far as they compensate for a defect on the part of their users who use them for the purpose of walking safely, from being classified under heading 9021 of the CN.

51 With regard to the comparison of the walker-rollator with 'crutches' as 'orthopaedic appliances', it should be noted at the outset that the main function of crutches is to compensate for a defect or disability of the lower limbs so that a person suffering from such a handicap is able, with the help of the crutches, to walk alone. It is in that sense that the crutches are essential to a person with a mobility handicap (see Case C-148/93 *3M Medica* [1994] ECR I-1123, paragraph 15).

52 The main function of a walker-rollator is also to support a person when walking. Even though, unlike crutches, it involves the use of the two lower limbs, it compensates, in the same way as crutches, for a defect or disability consisting generally of an inability on the part of a person concerned to coordinate movement of the lower limbs whilst maintaining the balance which walking requires.

53 It follows that a walker-rollator allows a person to compensate for a lack of the balance necessary to enable that person to walk alone. To the extent to which the ability to compensate for the lack of balance whilst walking is inherent in the act of walking itself, such a walker-rollator fulfils a function similar to that of crutches.

54 In other words, a walker-rollator allows a person to be securely mobile on his or her own legs whereas, without that support, as without the support of crutches, that person, in the light of his or her state of health, could not be so mobile.

55 The fact that a walker-rollator may serve the same function as crutches is a relevant factor for the purposes of its classification under heading 9021 of the CN.

56 Such a classification is not precluded by the explanatory notes of the CN relating to heading 9021 of the CN, according to which those appliances must 'actually take over or substitute for the function of the defective or disabled part of the body' and do not include 'appliances which simply alleviate the effects of the defect or disability'.

57 It must be held that a walker-rollator takes over or substitutes for the function of the defective or disabled part of the body within the meaning of the explanatory notes of the CN relating to heading 9021 of the CN to the extent to which that product allows the person concerned to compensate for the lack of balance necessary for walking. Furthermore, as Premis Medical stated at the hearing, a walker-rollator is specially adapted to the specific needs of the person using it.

58 Consequently, by classifying walker-rollators under subheading 8716 80 00 of the CN, the Commission restricted the scope of heading 9021 of the CN and extended that of heading 8716 of the CN, and thus exceeded the limits of its powers of appraisal.

59 The answer to the questions referred, therefore, is that Regulation No 729/2004, as rectified, is invalid in so far as, first, the corrigendum extended the scope of application of the initial regulation to walker-rollators consisting of an aluminium frame on four wheels, two of which are front swivel wheels, handles and brakes, and designed to assist persons who have difficulties in walking and, secondly, it classifies those walker-rollators under subheading 8716 80 00 of the CN.

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 (Third Chamber) hereby rules:

Commission Regulation (EC) No 729/2004 of 15 April 2004 concerning the classification of certain goods in the Combined Nomenclature, in the version resulting from a corrigendum published on 7 May 2004, is invalid in so far as, first, that corrigendum extended the scope of application of the initial regulation to walker-rollators consisting of an aluminium frame on four wheels, two of which are front swivel wheels, handles and brakes, and designed to assist persons who have difficulties in walking and, secondly, it classifies those walker-rollators under subheading 8716 80 00 of the Combined Nomenclature.

[Signatures]