JUDGMENT OF THE COURT (Fifth Chamber)

22 May 2008 *

In Case C-165/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Vestre Landsret (Denmark), made by decision of 20 March 2007, received at the Court on 27 March 2007, in the proceedings

Skatteministeriet

v

Ecco Sko A/S,

THE COURT (Fifth Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet (Rapporteur) and M. Ilešič, Judges,

Advocate General: P. Mengozzi,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 21 February 2008,

* Language of the case: Danish.

after considering the observations submitted on behalf of:

— Ecco Sko A/S, by H.S. Hansen and T.K. Kristjánsson, advokater,

— the Danish Government, by J. Liisberg, acting as Agent, assisted by P. Biering, advokat,

— the Commission of the European Communities, by B. Stromsky 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 headings 6403 and 6404 of the Combined Nomenclature set out 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 2388/2000 of 13 October 2000 (OJ 2000 L 264, p. 1) ('the CN').

2 The reference was made in the course of proceedings between the Skatteministeriet (Danish Ministry of Taxation) and Ecco Sko A/S ('Ecco') on the tariff classification of a sandal.

Legal context

3 The Combined Nomenclature, introduced by Regulation No 2658/87, is based on the 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). It uses the six-digit headings and subheadings of the HS and only the seventh and eighth digits forming subdivisions are specific to it.

4 Part Two of the CN includes Section XII, entitled 'Footwear, headgear, umbrellas, sun umbrellas, walking sticks, seat-sticks, whips, riding-crops and parts thereof; prepared feathers and articles made therewith; artificial flowers; articles of human hair', which comprises four chapters, including Chapter 64, 'Footwear, gaiters and the like; parts of such articles'.

5 Chapter 64 of the CN contains inter alia the following headings and subheadings:

'6403	Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: …
6403 99	— — Other: …
	— — — — Other, with insoles of a length: …
	— — — — — of 24 cm or more:
6403 99 33	— — — — — — Footwear which cannot be identified as men's or women's footwear
…	
6404	Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: …
6404 19	— — Other: …
6404 19 90	— — — Other'

6 The footwear classified under CN subheading 6403 99 33 is subject to a customs duty of 8%, while for footwear under CN subheading 6404 19 90 it is 17%.

7 All the sections of the CN and all the chapters within each section are preceded by a number of notes, that is section or chapter notes. Note 4(a) to Chapter 64 of the CN reads:

'The material of the upper shall be taken to be the constituent material having the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet stays or similar attachments'.

8 Article 9(1) of Commission Regulation No 2658/87 provides that the Commission of the European Communities may introduce Additional Notes and Explanatory Notes into the Combined Nomenclature in order to ensure that the latter is uniformly applied.

9 Additional Note 1 to Chapter 64 of the CN, inserted by Commission Regulation (EEC) No 3800/92 of 23 December 1992 amending Regulation No 2658/87 (OJ 1992 L 384, p. 8), reads:

'Within the meaning of note 4(a), "reinforcements" is taken to mean all pieces of material (e.g., plastics or leather) attached to the external surface of the upper to give additional strength, whether or not also attached to the sole. After the removal of reinforcements, the visible material must have the characteristics of an upper and not lining.

Account is to be taken of sections covered by accessories or reinforcements when deciding on the composition of the upper.'

10 The Explanatory Notes to Chapter 64 of the CN, in the version applicable at the material date (OJ 2000 C 199, p. 1), refer, for the definition of the terms 'outer soles' and 'uppers', to the HS Explanatory Notes.

11 The HS Explanatory Notes are adopted by the HS Committee, a body set up in accordance with Article 6 of the International Convention referred to in paragraph 3 above, and approved, under the conditions laid down in Article 8 of that Convention, by the World Customs Organisation.

12 The General Explanatory Notes to Chapter 64, (D), second paragraph, reads:

'If the upper consists of two or more materials, classification is determined by the constituent material which has the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, protective or ornamental strips or edging, other ornamentation (e.g., tassels, pompons or braid), buckles, tabs, eyelet stays, laces or slide fasteners. The constituent material of any lining has no effect on classification.'

The main proceedings and the questions referred for a preliminary ruling

13 The dispute in the main proceedings concerns the tariff classification for a sandal in respect of which Ecco applied for tariff information in August 2001.

14 On 19 November 2001 the Danish tax authorities issued a binding tariff information (BTI) classifying the product in question under CN subheading 6404 19 90 as 'footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials'.

15 Considering that the sandal at issue in the main proceedings should have been classified under CN subheading 6403 99 33 as 'footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather', Ecco lodged an appeal against the BTI decision before the Landsskatteret (National Tax Tribunal).

16 As the Landsskatteret upheld that appeal, the Skatteministeriet appealed to the Vestre Landsret (Western Regional Court).

17 The Vestre Landsret describes the product at issue in the main proceedings as 'a sandal with a profiled outer sole of rubber with high edges. The tread of the outer sole has smaller inlaid pieces in various colours and materials. An inner sole/mid-sole consisting of a layer of EVA foam and a layer of latex foam covered with a textile material made of microfibre is glued to the outer sole. On the upper, at the front, on the instep flap and over the heel there are leather fastening straps with Velcro strips for adjusting the sandal to fit the foot, and on the instep flap and inside the heel part there are woven textile pull loops. The upper has openings at the toes, at the arch and on the outside of the foot, and also on the top side of the foot and both sides of the heel. The leather of the uppers has recesses in which stripes and the company logo made of rubber material are inserted. Both the leather and the textile material are attached to the mid-sole with glue. The leather, including the fastening straps and ornamentation, makes up 71% of the uppers' external surface area.'

18 As it took the view that the outcome of the dispute before it required an interpretation of the headings and notes of Chapter 64 of the CN, the Vestre Lansdret decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Annex I to … Regulation … No 2658/87 …, as amended by … Regulation … No [2388/2000] …, to be interpreted as meaning that footwear such as that in question in the main proceedings should be classified as footwear with uppers of leather under CN heading 6403 or as footwear with uppers of textile materials under CN heading 6404?

(2) Is Additional Note 1 to Chapter 64 of the CN, which was incorporated by … Regulation No 3800/92 …, compatible with Note 4(a) to Chapter 64 of the CN?'

The questions referred for a preliminary ruling

First question

Observations submitted to the Court

19 According to Ecco, the footwear at issue in the main proceedings, the leather of which makes up 71% of the uppers' external surface area, should, under Note 4(a) to Chapter 64 of the CN, on the face of it be classified as footwear with uppers of leather falling within CN heading 6403.

20 Moreover, the leather does not constitute either an accessory or a reinforcement within the meaning of Note 4(a) and, in particular, a leather upper perfectly usable without any underlying textile material cannot be described as 'pieces of material' within the meaning of Additional Note 1 to Chapter 64 of the CN.

21 Ecco concludes from this that the sandal at issue in the main proceedings should be classified under CN heading 6403 as footwear with 'uppers of leather'.

22 The Danish Government and the Commission, however, consider that the sandal at issue in the main proceedings should be classified as footwear with uppers of textile materials under CN heading 6404.

23 The Danish Government contends that although the leather has the greatest surface area of the upper of the sandal at issue in the main proceedings it must be regarded as constituting an accessory and/or reinforcement within the meaning of Additional Note 1 to Chapter 64 of the CN, since it gives additional strength and when the leather is removed the underlying material has the physical shape of a normal upper.

24 In the Commission's view, the textile material, unlike the leather, covers the whole of the sandal's external surface area and provides considerable rigidity and solidity. The textile material therefore has the natural shape of a shoe if the leather is removed and thus it helps to a great extent to give the sandal the characteristics of a shoe.

25 Like the Danish Government, the Commission also points out that the question of the classification of the goods at issue in the main proceedings was raised at the

meeting of the Customs Code Committee on 18 and 19 March 2003, at the end of which the Member States present agreed that sandals with uppers of textile material on which pieces of leather are sewn on the outside of the shoe should be regarded as having uppers of textile. According to the Danish Government, the Customs Code Committee reached that conclusion on the ground that the textile material was exposed on the sides of the upper and that, after the pieces of leather were removed, that material had the form of an upper, in accordance with Note 4(a) to Chapter 64 of the CN.

The Court's answer

26 By its first question, the referring court asks, in essence, whether the sandal at issue in the main proceedings should be classified as footwear with uppers of leather under CN heading 6403 or as footwear with uppers of textile materials under CN heading 6404.

27 It should be noted at the outset that 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 found in their objective characteristics and properties as defined in the wording of the relevant heading of the Combined Nomenclature and of the notes to the sections or chapters (see, inter alia, Joined Cases C-208/06 and C-209/06 *Medion and Canon Deutschland* [2007] ECR I-7963, paragraph 34).

28 It is clear from the wording of CN headings 6403 and 6404 that classification of the footwear at issue in the main proceedings under one or other of those headings depends on what material the upper of the footwear consists of.

29 In the present case, the upper of the sandal at issue in the main proceedings is mainly composed of leather and textile material. Both the leather and the textile material are attached to the intermediate sole with glue.

30 Note 4(a) to Chapter 64 of the CN states that the material of the upper must be determined by the constituent material having the greatest external surface area, no account being taken of accessories or reinforcements.

31 It is clear from the order for reference that the leather, including the fastening straps and ornamentation, makes up 71% of the upper's external surface area.

32 In those circumstances, it is necessary to establish whether the leather, which has the greatest external surface area, should be regarded as an upper or whether it should be regarded as a reinforcement within the meaning of Note 4(a) to Chapter 64 of the CN.

33 Additional Note 1 to Chapter 64 of the CN defines 'reinforcements' as all pieces of material attached to the external surface of the upper to give additional strength, whether or not also attached to the sole.

34 It should also be noted that, according to Additional Note 1 to Chapter 64 of the CN, after the removal of reinforcements, the visible material must have the characteristics of an upper and not lining.

35 It is apparent from the foregoing considerations that in order to classify the sandal at issue in the main proceedings under the CN, the referring court must decide whether, after removal of the leather, the textile material of the sandal shows the characteristics of an upper.

36 That will be the case if the textile material, without the pieces of leather, fulfils the function of an upper, that is to say, if it supports the wearer's foot so that person can use the shoe for walking.

37 In that regard, it should be pointed out that the textile material cannot be described as an upper solely on the ground that if the leather were removed it would retain the shape of an upper. Since a lining is designed to line the material covering it, it is quite conceivable that it would itself have the shape of an upper.

38 Moreover, the fact that the textile material is exposed underneath the leather and at the heel does not mean that it cannot be described as lining.

39 When it states that the constituent material of any lining has no effect on classification of footwear where the upper consists of two or more materials, the second paragraph of point (D) of the General Explanatory Notes to Chapter 64 of the HS Explanatory Notes acknowledges implicitly that, in places, the lining may be exposed, that is to say, not covered by the constituent material of the upper.

40 That interpretation is confirmed by the wording of Explanatory Note 1(b) to Chapter 64 of the CN, as it appears in the Explanatory Notes to the CN published by the

Commission on 28 February 2006 (OJ 2006 C 50, p. 1) and corrected on 28 October 2006 (OJ 2006 C 260, p. 18), which, although it was not applicable at the material time, states that 'the lining is not exposed on the outside surface of the footwear, with the exception of a padding e.g. around the collar'.

41 With regard to the sandal at issue in the main proceedings, it may be noted, first, that the textile of the upper appears to be made of a relatively unstable and elastic material and that removal of the leather would appear to deprive the sandal of its fastening straps, particularly at the upper part of the heel. Second, it should be noted that the textile material is in direct contact with the foot, which therefore means that the leather is not in contact with the foot. Third, the presence of exposed textile material around the leather and at the heel appears to be intended to make the shoe more comfortable to wear.

42 These factors suggest that if the leather were removed the textile material would no longer hold the foot and that therefore it does not have the characteristics of an upper and fulfils the function of a lining intended to ensure greater comfort for the wearer.

43 However, it is for the referring court to make the necessary findings in that regard.

44 If it were to conclude that the textile material by itself had the characteristics of an upper, the referring court should classify the sandal at issue in the main proceedings under CN heading 6404.

45 However, if it were to reach the opposite conclusion, the referring court should classify the sandal at issue in the main proceedings under CN heading 6403.

46 In the latter situation, either the leather itself has the characteristics of an upper, so that the sandal falls within CN heading 6403, or it does not have those characteristics, in which case the upper of the sandal should be considered to be made of both textile material and leather. Since, according to the referring court, the leather makes up 71% of the upper's external surface area, it will be considered to be the constituent material having the greatest external surface area for the purposes of Note 4(a) to Chapter 64 of the CN. Therefore, the sandal should also be classified under CN heading 6403.

47 Lastly, the opinion of the Customs Code Committee referred to in the observations submitted to the Court cannot prevent the classification of the sandal at issue in the main proceedings under CN heading 6403. It is settled case-law, as far as concerns the Committee's conclusions, that, although they constitute an important means of ensuring the uniform application of the Customs Code by the customs authorities of the Member States and as such may be considered as a valid aid to the interpretation of the Code, they do not have legally binding force (Case C-11/05 *Friesland Coberco Dairy Foods* [2006] ECR I-4285, paragraph 39). The Court even added that, where appropriate, it may be necessary to consider whether the content of such opinions is in accordance with the actual provisions of the Common Customs Tariff and whether they alter the meaning of such provisions (see, to that effect, Case 798/79 *Chem-Tec* [1980] ECR 2639, paragraph 11).

48 The answer to the first question should therefore be that the CN must be interpreted as meaning that a sandal such as that in question in the main proceedings, with an outer sole of rubber, whose upper is made up of two leather sections glued to the

inner sole and linked to each other by leather fastening straps covered with Velcro strips, with the leather making up around 71% of the upper's external surface area and the elastic textile material underneath the leather remaining exposed in places, falls within:

— CN heading 6404 if the textile material of the upper of the sandal, without the leather sections, fulfils the purpose of an upper, that is to say, provides sufficient support for the foot to enable the wearer to walk in the sandal;

— CN heading 6403 if the textile material of the upper of the sandal, without the leather sections, does not fulfil the purpose of an upper, that is to say, it does not provide sufficient support for the foot to enable the wearer to walk in the sandal.

Second question

Observations submitted to the Court

49 Ecco argues that Additional Note 1 to Chapter 64 of the CN may determine the classification resulting from the wording of the CN headings and from Note 4(a) to that chapter, but it cannot result in uppers which, were it not for that Additional Note, would be regarded as leather uppers being considered instead to be uppers of textile material.

50 It adds that, if Additional Note 1 to Chapter 64 of the CN widened the term 'reinforcements' so that the sandal in question in the main proceedings were regarded as having an upper of textile material, that provision would be incompatible with Note 4(a) to that chapter, and hence invalid. Ecco contends however that, interpreted correctly, that Additional Note does not lead to a result that is any different from that resulting directly from Note 4(a).

51 The Danish Government and the Commission request the Court to answer that Additional Note 1 to Chapter 64 of the CN is compatible with Note 4(a) to that chapter.

The Court's answer

52 In its second question, the referring court wishes in essence to ascertain whether Additional Note 1 to Chapter 64 of the CN is valid in the light of Note 4(a) to that chapter.

53 It appears from the order for reference that that question was raised as a result of the argument put forward by Ecco in the main proceedings that Additional Note 1 to Chapter 64 of the CN is incompatible with Note 4(a) to that chapter if the interpretation given to it leads to footwear, the greatest external surface area of which consists of leather with the shape of an upper, being classified under CN heading 6404 where the textile material underneath it also has the shape of an upper.

54 In that regard, suffice it to say, first, that Note 4(a) to Chapter 64 of the CN provides expressly that no account is to be taken of the constituent material of any reinforcements when deciding on the composition of the uppers of the footwear for purposes of classifying it under the CN. That stipulation is made without any reference to, or restriction on, the surface area covered by such reinforcements.

55 Second, it should be pointed out that Additional Note 1 to Chapter 64 of the CN, as its title indicates, merely provides some clarification of the term 'reinforcements' within the meaning of Note 4(a), and in particular regarding their purpose.

56 In those circumstances, there is no contradiction between the content of Note 4(a) to Chapter 64 of the CN and that of Additional Note 1 to that chapter such as to cast doubt on the latter's validity.

57 The answer to the second question should therefore be that Additional Note 1 to Chapter 64 of the CN is compatible with Note 4(a) to that chapter.

Costs

58 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 (Fifth Chamber) hereby rules:

1. **The Combined Nomenclature set out 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, as amended by Commission Regulation (EC) No 2388/2000 of 13 October 2000, must be interpreted as meaning that a sandal such as that in question in the main proceedings, with an outer sole of rubber, whose upper is made up of two leather sections glued to the inner sole and linked to each other by leather fastening straps covered with Velcro strips, with the leather making up around 71% of the upper's external surface area and the elastic textile material underneath the leather remaining exposed in places, falls within:**

   — **heading 6404 of the Combined Nomenclature if the textile material of the upper of the sandal, without the leather sections, fulfils the purpose of an upper, that is to say, provides sufficient support for the foot to enable the wearer to walk in the sandal;**

   — **heading 6403 of the Combined Nomenclature if the textile material of the upper of the sandal, without the leather sections, does not fulfil the purpose of an upper, that is to say, does not provide sufficient support for the foot to enable the wearer to walk in the sandal.**

2. **Additional Note 1 to Chapter 64 of the Combined Nomenclature, inserted by Commission Regulation (EEC) No 3800/92 of 23 December 1992 amending Regulation No 2658/87, is compatible with Note 4(a) to that chapter.**

[Signatures]