Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

3 March 2016*

(Reference for a preliminary ruling — Common Customs Tariff — Combined Nomenclature — Headings 2304, 2308 and 2309 — Classification of a soya protein concentrate)

In Case C-144/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 13 March 2015, received at the Court on 26 March 2015, in the proceedings

Staatssecretaris van Financiën

v

Customs Support Holland BV,

THE COURT (Ninth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, C. Vajda and K. Jürimäe, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Customs Support Holland BV, by A. Jansen and J. Biermasz, advocaaten,

— the Netherlands Government, by M. Bulterman and B. Koopman, acting as Agents,

— the European Commission, by A. Caeiros and H. Kranenborg, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of headings 2304, 2308 and 2309 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 948/2009 of 30 September 2009 (OJ 2009 L 287, p. 1) ('the CN').

2 The request has been made in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) and Customs Support Holland BV concerning the classification, in the CN, of a soya protein concentrate marketed under the name 'Imcosoy 62' and used as an ingredient in compound feeds for very young calves.

Legal context

The CN

3 The customs classification of goods imported into the European Union is governed by the CN.

4 Article 12 of Regulation No 2658/87, as amended by Council Regulation (EC) No 254/2000 of 31 January 2000 (OJ 2000 L 28, p. 16), provides that the European Commission is required to adopt each year a regulation reproducing the complete version of the CN and the associated rates of customs duty, as they result from measures adopted by the Council of the European Union or by the Commission. That regulation is to be published not later than 31 October in the *Official Journal of the European Union*, to apply from 1 January of the following year. It is apparent from the file submitted to the Court that the version of the CN applicable to the facts in the main proceedings is that for the year 2010, resulting from Regulation No 948/2009.

5 The first part of the CN, relating to preliminary provisions, includes Section I, on 'General Rules', part A of which, entitled 'General rules for the interpretation of the Combined Nomenclature', provides inter alia as follows:

'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.

...

3. When, by application of rule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

   (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

…'

6 The second part of the CN includes Chapter 23, entitled 'Residues and waste from the food industries; prepared animal fodder', which includes headings 2304, 2308 and 2309.

7 CN heading 2304 reads as follows:

'2304 00 00	Oilcake and other solid residues, whether or not ground or in the form of pellets, resulting from the extraction of soya-bean oil.'

8 CN heading 2308 reads as follows:

'2308 00	Vegetable materials and vegetable waste, vegetable residues and by-products, whether or not in the form of pellets, of a kind used in animal feeding, not elsewhere specified or included:
... 2308 00 90	... - Other.'

9 CN heading 2309 reads as follows:

'2309	Preparations of a kind used in animal feeding:
... 2309 90	... - Other ...
2309 90 31	- - Other, including premixes: - - - Containing starch, glucose, glucose syrup, maltodextrine or maltodextrine syrup of subheadings 1702 30 50, 1702 30 90, 1702 40 90, 1702 90 50 and 2106 90 55 or milk products: - - - - Containing starch, glucose, glucose syrup, maltodextrine or maltodextrine syrup: - - - - - Containing no starch or containing 10% or less by weight of starch: - - - - - - Containing no milk products or containing less than 10% by weight of such products.'

10 Under Note 1 of Chapter 23 of the CN, heading 2309 of the CN includes 'products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material, other than vegetable waste, vegetable residues and by-products of such processing'.

Explanatory notes to the harmonised commodity description and coding system

11 The Customs Cooperation Council, now the World Customs Organisation (WCO), was established by the convention creating that council, concluded in Brussels on 15 December 1950. The Harmonised Commodity Description and Coding System ('the HS') was drawn up by the WCO and established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983 and approved, with its amending protocol of 24 June 1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). The CN takes the six-digit headings and subheadings from the HS. Only the seventh and eighth figures creating further subheadings are specific to it.

12 The Explanatory Notes to the HS are drawn up within the WCO in accordance with the provisions of that convention.

13 The Explanatory Note concerning heading 2304 of the HS states:

‘This heading covers oil-cake and other solid residues remaining after the extraction of oil from soya beans by solvents or in a press or rotary expeller. These residues constitute valuable animal foods.

…

This heading excludes:

…

(b) Protein concentrates obtained by the elimination of certain constituents of defatted soya-bean flour (used as additives in food preparations) and textured soya-bean flour (heading 21.06).’

14 The Explanatory Note concerning heading 2308 of the HS states:

‘Provided they are not included in any other more specific heading of the Nomenclature and are of a kind used in animal feeding, this heading covers vegetable products, vegetable waste, and residues and by-products from the industrial processing of vegetable materials in order to extract some of their constituents.

…’

15 The Explanatory Note concerning heading 2309 of the HS states:

‘This heading covers sweetened forage and prepared animal feeding stuffs consisting of a mixture of several nutrients designed:

…

(2) to achieve a suitable daily diet by supplementing the basic farm-produced feed with organic or inorganic substances (supplementary feed); or

(3) for use in making complete or supplementary feeds.

…

B.– Preparations for supplementing (balancing) farm-produced feed (feed supplements)

Farm produced feed is usually rather low in proteins, minerals or vitamins. The preparations devised to compensate for these deficiencies, so as to ensure a well-balanced animal diet, consist of proteins, minerals or vitamins plus additional-energy feeds (carbohydrates) which serve as a carrier for the other ingredients.

Although, qualitatively, these preparations have much the same composition as those described in paragraph (A), they are distinguished by a relatively high content of one particular nutrient.

…

C.– Preparations for use in making the complete feeds or supplementary feeds described in (A) and (B) above

These preparations, known in trade as “premixes”, are, generally speaking, compound compositions consisting of a number of substances (sometimes called additives) the nature and proportions of which vary according to the animal production required. …

This heading excludes:

(a) Pellets made from a single material, or from a mixture of several materials which is classified as such in one specific heading, even with an added binder (molasses, starchy substances, etc.) in a proportion not exceeding 3% by weight (headings 07.14, 12.14, 23.01, etc.).

…

(d) Vegetable waste, residues and by-products of heading 23.08.

…’

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

16 It is apparent from the order for reference that Imcosoy 62 is a soya protein concentrate obtained following two industrial processes.

17 According to the order for reference, after being dehulled, ground and steamed, the soya beans first undergo an oil-extraction process, after which what remains is so-called soya meal. This meal is then treated with ethanol and water to extract the residual fat, reduce the content of components other than proteins, primarily carbohydrates or food fibre, and eliminate certain harmful substances. The soya protein concentrate obtained in this way does not contain any trace of the ethanol used. It consists, inter alia, of proteins, representing 62% by weight, and starch, representing less than 10% by weight.

18 According to the order for reference, because of its high concentration of carbohydrates, soya meal, although used in animal feed, cannot be used as an ingredient in compound feeds for very young calves. By contrast, the soya protein concentrate obtained from soya meal can constitute an ingredient in compound feeds for very young calves due to its reduced concentration of carbohydrates and food fibre.

19 On 7 September 2010, in response to a request from Customs Support Holland BV, the Netherlands customs authorities issued a Binding Tariff Information which classified Imcosoy 62 under CN subheading 2309 90 31.

20 On 3 April 2012, the Rechtbank Haarlem (District Court, Haarlem), dealing with an action brought by Customs Support Holland BV, declared that action to be well-founded and held that Imcosoy 62 had to be classified under subheading 2304 00 00 of the CN. The Netherlands customs authorities appealed against that judgment to the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam), which declared the appeal to be unfounded. The Staatssecretaris van Financiën thereupon brought an appeal on a point of law before the referring court against the judgment of the Gerechtshof Amsterdam.

21 In the order for reference, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) takes the view, first, that CN heading 2304 covers only products resulting directly from the oil-extraction process and, second, that, although soya meal is a direct result of the oil-extraction process and must therefore be considered to come under CN heading 2304, by contrast, the purpose of processing soya meal to obtain the soya protein concentrate is not to extract soya bean oil but to make the residues from that extraction suitable for a particular use in animal feeding. The referring court infers from this that the soya protein concentrate is processed into a different kind of product.

22 The referring court is of the view that a product can be classified under CN heading 2309 only if it results from a final processing of a product, with the exception of agglomerated products or a mixture of a product with other products. In addition, it must be suitable for use solely in animal feeding.

23 In that regard, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) notes that the extraction of carbohydrates, food fibre and harmful substances from soya meal constitutes final processing which makes the product thus processed suitable for use as an ingredient in compound feeds for very young calves. However, it states that, according to the Explanatory Note to HS heading 2309, that heading is not to be applied to a product made from a single material, or from a mixture of several materials which is classified as such in one specific heading, or to by-products covered by HS heading 2308. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) does not therefore rule out the possibility that the soya protein concentrate, composed of soya meal from which certain specific components have been extracted, does not come under CN heading 2309.

24 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must heading 2304 of the CN be interpreted as meaning that that tariff heading also covers a soya protein concentrate obtained following the removal of residual fats, carbohydrates (or food fibres) and harmful substances from solid residues (so-called soya meal) resulting from the extraction of oil from soya beans, which, by means of that removal, has been made suitable for use as an ingredient in compound feeds for very young calves?

(2) If Question 1 is answered in the negative, is CN heading 2308 or CN heading 2309 then applicable to a soya protein concentrate obtained in the manner described in Question 1?’

Consideration of the questions referred

25 By its two questions, which should be considered together, the referring court asks, in essence, whether the CN must be interpreted as meaning that a soya protein concentrate, such as that at issue in the main proceedings, comes under headings 2304, 2308 or 2309 of that nomenclature.

26 In order to answer the questions referred, it must be stated, first, that the general rules for the interpretation of the CN provide that the classification of goods is to be determined according to the terms of the headings and any section or chapter notes, the titles of sections, chapters and sub-chapters being provided for ease of reference only (see judgments in *Lukoyl Neftohim Burgas*, C-330/13, EU:C:2014:1757, paragraph 33, and in *Baby Dan*, C-272/14, EU:C:2015:388, paragraph 25).

27 Second, according to settled case-law, 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 CN and of the notes to the sections or chapters (see, inter alia, judgments in *Proxxon*, C-500/04, EU:C:2006:111, paragraph 21, and in *Vario Tek*, C-178/14, EU:C:2015:152, paragraph 21 and the case-law cited).

28 As regards the Explanatory Notes to the HS, it must be added that, although they do not have legally binding force, they are an important means of ensuring the uniform application of the Common Customs Tariff and, as such, may be regarded as useful aids to its interpretation (see, to that effect, judgments in *Kloosterboer Services*, C-173/08, EU:C:2009:382, paragraph 25, and in *Agroferm*, C-568/11, EU:C:2013:407, paragraph 28). However, they cannot alter the content of the CN notes (see, to that effect, judgment in *Duval*, C-44/15, EU:C:2015:783, paragraph 24).

29 Furthermore, the intended use of a product may also constitute an objective criterion for classification if it is inherent to that product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (judgments in *Swiss Caps*, C-410/08 to C-412/08, EU:C:2009:794, paragraph 29, and in *Agroferm*, C-568/11, EU:C:2013:407, paragraph 41).

30 In the present case, with regard to CN heading 2308, it should be noted that, as is clear from its wording, heading 2308 is a residual heading. It is therefore appropriate, having regard to General Rule 3(a) for the interpretation of the CN, to examine, first of all, whether a product such as that at issue in the main proceedings may come under CN heading 2304 or heading 2309.

31 As regards CN heading 2304, it should be noted that, as stated by the referring court, Imcosoy 62 is not the residue, within the meaning of CN heading 2304, of the process by which oil is extracted from soya beans, but a derivative of that residue, obtained following a distinct and subsequent process, specifically implemented in order to produce that protein concentrate and during which some of the constituent elements of the soya meal are removed.

32 Moreover, the Explanatory Note to HS heading 2304 specifies that, inter alia, protein concentrates obtained by the elimination of certain constituents of defatted soya-bean flour, used as additives in food preparations, are excluded from that heading.

33 First, it is clear from the order for reference that Imcosoy 62 is a protein concentrate, intended to be used as an ingredient in feeds for very young calves, and that that product is obtained from soya meal, at the end of a process in which, firstly, the remaining fat from that meal and certain harmful substances are extracted from it and, secondly, the amount of components other than proteins is reduced. It follows that the product at issue in the main proceedings is a protein concentrate which is obtained by the elimination of certain components of soya meal and which is intended to be added to food preparations.

34 Second, the soya meal, from which Imcosoy 62 is obtained, must be considered to be a defatted product, even though a presence of trifling quantities of oil may still be detected residually (see, to that effect, judgment in *Fancon*, 129/81, EU:C:1982:91, paragraphs 10 and 14).

35 It follows that a protein concentrate, such as that at issue in the main proceedings, cannot be considered to come under CN heading 2304.

36 As regards CN heading 2309, it follows from the case-law of the Court that the term 'preparation' under that heading means either the processing of a product, or a mixture with other products. For it to come under CN heading 2309, the product at issue in the main proceedings must still, firstly, be suitable only for animal feeding and, secondly, have been finally processed or result from a mixture of different substances (see, by analogy with regard to heading 2307 of the Common Customs Tariff of 1965, which preceded CN heading 2309, judgments in *Henck*, 36/71, EU:C:1972:25, paragraphs 4 and 12, and in *van de Poll*, 38/72, EU:C:1972:127, paragraph 5).

37 It is clear from the description of the production process in the order for reference that Imcosoy 62 is a product which has undergone final processing and is suitable only for animal feeding.

38 Furthermore, it follows from Note 1 to Chapter 23 of the CN that heading 2309 thereof includes products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material, other than vegetable waste, residues and by-products of such processing.

39 It is common ground that Imcosoy 62 is a product derived from vegetable material, namely soya meal. Furthermore, Imcosoy 62 cannot be treated in the same way as waste, a residue or a by-product of the process applied to the soya meal, since the very purpose of that process is to obtain that product.

40 In order to come under CN heading 2309, a soya protein concentrate such as Imcosoy 62 must still result from a process whereby the vegetable material from which it is derived has lost its essential characteristics.

41 In that regard, it is apparent from the order for reference that the process for transforming soya meal, which results in Imcosoy 62, has a specific animal-related purpose since it is intended to create a protein concentrate which, unlike soya meal, may be ingested by very young calves. Thus, the characteristics and objective properties of such a product and, in particular, the elimination or deliberate reduction of certain of the components of the soya meal in order to make that product suitable for inclusion in the feed for a particular type of animal, support the view that that product satisfies the conditions required for classification under CN heading 2309.

42 This interpretation is supported by the Explanatory Note to HS heading 2309, according to which that heading specifically covers preparations intended to remedy the lack of protein in basic animal feeds.

43 Finally, the CN does not contain any more specific heading under which a preparation such as Imcosoy 62, obtained from soya meal and intended only for animal feeding, may be classified.

44 It follows that a product such as that at issue in the main proceedings must be classified under CN heading 2309.

45 That conclusion is not called into question by the Explanatory Note to HS heading 2309, which, as noted by the referring court, excludes, inter alia, from that heading, firstly, agglomerated products consisting of either a single material or a mixture of several materials, but classified, as such, under one specific heading, and, secondly, vegetable waste, residues and by-products referred to in HS heading 2308.

46 As regards, first, the exclusion, by that Explanatory Note, of agglomerated products consisting of either a single material or a mixture of several materials classified, as such, under one specific heading, it should be noted that Imcosoy 62 is composed, in particular, of proteins and starch, such that that product cannot be considered to be an agglomerated product consisting of a single material. Imcosoy 62 also cannot be classified as an agglomerated product consisting of a mixture of several materials classified, as such, under one specific heading. Admittedly, that product is derived from soya meal, which is classified, as such, under CN heading 2304 (judgment in *Fancon*, 129/81, EU:C:1982:91, paragraph 15). However, that derived product does not contain all the components of soya meal and cannot itself be classified under CN heading 2304, for the reasons set out in paragraphs 31 to 35 of the present judgment.

47 As regards, second, the exclusion by the same Explanatory Note of vegetable waste, residues and by-products referred to in HS heading 2308, it should be noted that the HS Explanatory Notes are not binding, unlike Note 1 to Chapter 23 of the CN, which excludes from heading 2309 of the CN only vegetable waste, residues and by-products which result from the treatment intended to manufacture the product classified in that heading. As has been stated in paragraph 39 of the present judgment, a protein concentrate, such as Imcosoy 62, cannot be covered by such an exclusion.

48 In addition, the residual nature of HS heading 2308 means that a product which corresponds in full to a more specific HS and CN heading, as is the case of Imcosoy 62 in relation to CN heading 2309, having regard, in particular, to its use exclusively for animal feeding, cannot be classified under CN heading 2308.

49 Consequently, the answer to the questions referred is that the CN must be interpreted as meaning that a soya protein concentrate, such as that at issue in the main proceedings, comes under heading 2309 of that nomenclature.

Costs

50 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 (Ninth Chamber) hereby rules:

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 948/2009 of 30 September 2009, must be interpreted as meaning that a soya protein concentrate, such as that at issue in the main proceedings, comes under heading 2309 of that nomenclature.

[Signatures]