JUDGMENT OF THE COURT (Third Chamber)

16 September 2004 *

In Case C-396/02,

REFERENCE for a preliminary ruling under Article 234 EC

from the Gerechtshof te Amsterdam (Netherlands), made by decision of, received on 11 November 2002, in the proceedings:

DFDS BV

v

Inspecteur der Belastingdienst — Douanedistrict Rotterdam,

* Language of the case: Dutch.

THE COURT (Third Chamber),

composed of: A. Rosas, acting for the President of the Third Chamber, R. Schintgen and K. Schiemann (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— DFDS BV, by R.G.A. Tusveld and G.J. van Slooten, advocaten,

— the Netherlands Government, by S. Terstal, acting as Agent,

— the Commission of the European Communities, by C. Schieferer and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of subheading 8704 10 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), in the versions resulting from Commission Regulations (EC) Nos 3115/94 of 20 December 1994 (OJ 1994 L 345, p. 1) and 3009/95 of 22 December 1995 (OJ 1995 L 319, p. 1) (hereinafter 'the CN').

2 The reference was made in the course of proceedings brought by DFDS BV (hereinafter 'DFDS'), established in Amsterdam (Netherlands), against the Inspecteur der Belastingdienst — Douanedistrict Rotterdam on the tariff classification of certain vehicles called 'Minitracs' in subheading 8704 10 19 of the CN as dumpers designed for off-highway use.

Legal background

3 The CN, established by Regulation No 2658/87, is designed to meet, at one and the same time, the requirements of both the Common Customs Tariff and the external trade statistics of the Community. It is based on the Harmonised Commodity Description and Coding System (hereinafter 'the HS') drawn up by the Customs Cooperation Council (now the World Customs Organisation), established by the

International Convention concluded at Brussels on 14 June 1983 (hereinafter 'the HS Convention') and approved on behalf of the Community, with its Protocol of Amendment of 24 June 1986, by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).

4 Heading 8704 forms part of Chapter 87 in Section XVII of Part II of the CN. That chapter concerns motor vehicles, tractors, cycles and other land-going vehicles, their parts and accessories. When the customs debts arose, in 1995 and 1996, heading 8704 as laid down by Regulations Nos 3115/94 and 3009/95, which are identical as regards that heading, was subdivided as follows:

CN code	Description
8704	Motor vehicles for the transport of goods:
8704 10	– Dumpers designed for off-highway use:
	– – With compression-ignition internal combustion piston engine (diesel or semi-diesel), or with spark-ignition internal combustion piston engine:
8704 10 11	– – – With compression-ignition internal combustion piston engine (diesel or semi-diesel) of a cylinder capacity exceeding 2 500 cm^3, or with spark-ignition internal combustion piston engine of a cylinder capacity exceeding 2 800 cm^3
8704 10 19	– – – Other
8704 10 90	– – Other
	– Other, with compression-ignition internal combustion piston engine (diesel or semi-diesel):
8704 21	– – Of a gross vehicle weight not exceeding 5 tonnes:
...	...
	– – – – With engines of a cylinder capacity not exceeding 2 500 cm^3:
8704 21 91	– – – – – New
...	...

5 The general rules for the interpretation of the CN, which are set forth in paragraphs 1 and 3(a) of Part I of Title I A thereof, which are identical in the versions applicable in 1995 and 1996, provide in particular:

'Classification of goods in the combined nomenclature 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.

...

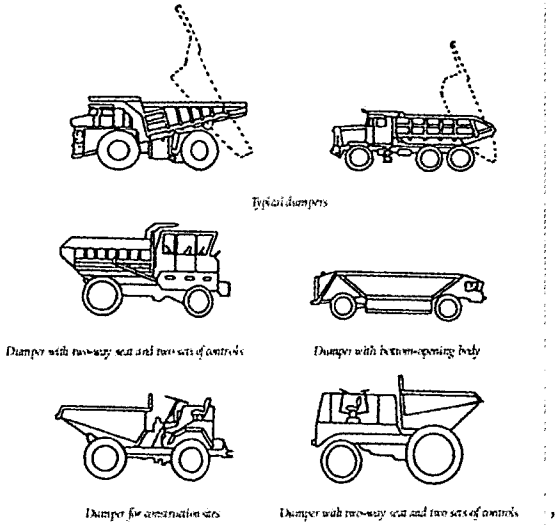
3. When ... goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

   (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. ...'

6 The explanatory notes to the CN of 5 December 1994 (OJ 1994 C 342, p. 1) contain, as regards 'Dumpers designed for off-highway use', and in particular subheadings 8704 10 10 to 8704 10 90, the following information:

'1. These subheadings mainly cover vehicles fitted with a front or rear tipping body or a bottom-opening body that have been specially designed to transport sand, gravel, earth, stones, etc. and are intended for use in quarries, mines or on building sites, at roadworks, airports and ports. Examples illustrating various types of dumper are given at the end of these notes.

2. These subheadings also cover smaller vehicles of the type used on construction sites for carrying earth, rubble, fresh cement and concrete, etc. These have a fixed or articulated chassis and two- or four-wheel drive, the dumper hopper being located above one axle and the driver's seat above the other. The driver's seat is not usually inside a cab.



7 Under Article 6(1) of the HS Convention, a committee entitled the Harmonised System Committee, composed of representatives of each contracting party, was set up under the auspices of the Customs Cooperation Council. Under Article 7(1) of the HS Convention, that Committee's task consists in particular of proposing amendments to that convention and preparing explanatory notes, classification opinions and other advice on the interpretation of the HS.

8 The explanatory note of the HS relating to heading 8704 states:

'This heading also covers:

(1) Dumpers; sturdily built vehicles with a tipping or bottom opening body, designed for the transport of excavated or other materials. These vehicles, which may have a rigid or articulated chassis, are generally fitted with off-the-road wheels and can work over soft ground. Both heavy and light dumpers are included in this group; the latter are sometimes characterised by a two-way seat, two seats facing in opposite directions or by two steering wheels, to enable the vehicles to be steered with the driver facing the body for unloading.

...'

9 As regards subheading 8704 10, the HS explanatory note contains the following:

'These dumpers can generally be distinguished from other vehicles for the transport of goods (in particular, tipping lorries) by the following characteristics:

— the dumper body is made of very strong steel sheets; its front part is extended over the driver's cab to protect the cab; the whole or part of the floor slopes upwards towards the rear;

...

It should be noted, however, that certain dumpers are specially designed for working in mines or tunnels, for example, those with a bottom-opening body. These have some of the characteristics mentioned above, but do not have a cab or an extended protective front part of the body.'

10 Commission Regulation (EEC) 396/92 of 18 February 1992 concerning the classification of certain goods in the combined nomenclature (OJ 1992 L 44, p. 9)

classified under points 3 and 4 in the Annex thereto, certain goods under heading 8704 as follows:

Description of goods	Classification (CN code)	Reasons
...	...	...
3. A vehicle (length 180 cm, breadth 87 cm, height 100 cm) with a single-cylinder, four-stroke petrol engine (400 cm^3 cylinder capacity), it consists essentially of a reinforced hopper with a 400 kg payload, and is equipped with manual tipping device and controls and rubber tracks. It has an unladen weight of 250 kg, a top speed of 6.8 km/h and develops 5.37 kw. The vehicle has three forward speeds and one in reverse. It is intended for transporting and dumping earth, sand, etc. mainly on building sites.	8704 10 19	Classification is determined by the provisions of general rules 1 and 6 for the interpretation of the combined nomenclature, as well as the texts of CN codes 8704, 8704 10 and 8704 10 19. By reasons of its design, in particular the presence of both a hopper and rubber tracks, and consequent place of use, this vehicle cannot be considered to be covered by CN code 8709.
4. A new vehicle (length 255 cm, breadth 108 cm, height 128 cm) with a single-cylinder, four stroke petrol engine (400 cm^3 cylinder capacity), consisting essentially of a reinforced hydraulically-tippable flatbed with gates at the tail and either side, it has a payload of 800 kg, an open driving cab with controls and rubber tracks. It has a top speed of 8.7 km/h, four forward speeds and three in reverse, and develops 7.46 kw. It is intended for transporting and dumping earth, sand, etc. mainly on building sites.... ...	8704 31 91 ...	Classification is determined by the provisions of general rules 1 and 6 for the interpretation of the combined nomenclature, as well as the texts of CN codes 8704, 8704 31 and 8704 31 91. By reason of its design, in particular the presence of both a tippable flatbed and rubber tracks, and consequent place of use this vehicle cannot be classified under heading 8709. The versatility and intricate construction of the tippable flatbed prevent this article being considered as a dumper covered by CN code 8704 10. ...

The main proceedings and the question referred for a preliminary ruling

11 DFDS, acting as customs agent on behalf of Maveco Maschinen Handelsgesellschaft mbH, established in Liechtenstein, in 1995 and 1996 declared certain type 709, 1005 and 1302 'Minitracs' for release into free circulation. Those Minitracs are vehicles specially designed for off-highway use and intended for the loading and unloading of materials. DFDS declared them under subheading 8704 10 19 of the CN covering dumpers designed for off-highway use.

12 Taking the view that such vehicles should have been declared under subheading 8704 21 91 of the CN, covering other motor vehicles for the transport of goods, for which the customs duties were higher, the Netherlands customs authorities issued a demand for payment to DFDS.

13 DFDS lodged an objection against that demand which was rejected as regards the type 1005 and 1302 vehicles. DFDS then brought an action before the Tariefcommissie, now, since 1 January 2002, the Douanekamer of the Gerechtshof te Amsterdam.

14 The referring court describes the products in question as follows:

'The Minitracs in question are vehicles intended for transporting and dumping rubble, earth, gravel, sand etc., mainly on building sites.

The Minitrac 1005 (length 257 cm, width 112 cm and height 138 cm) is fitted with a 7 kW diesel engine.

The Minitrac 1302 (length 264 cm, width 124 cm and height 138 cm) has a 9.5 kW diesel engine.

Both vehicles have a gear box with four forward and three reverse gears. The top speed of both vehicles is 7.3 km/h.

The vehicles are fitted with tracks, an (open) driver's cab with controls and a hopper which can dump its load by means of a hydraulic tipping system. The hopper consists of a structure with sides which can open and swing back on tipping. It is thus possible — without changing the position of the vehicle — to tip the load on three sides. Instead of a tipping hopper which can be tipped on three sides, the 1302 can also be fitted with a rear-tipping hopper which can rotate continuously through 180 degrees by means of an extra hydraulic cylinder, an extra hydraulic piston and a turning mechanism.

The Minitrac 1005 has an unladen weight of 830 kg and a payload of 1 000 kg.

The Minitrac 1302 has an unladen weight of 1 060/1 200 kg and a payload of 1 300/1 500 kg.'

15 The referring court is of the view that the classification of the goods in question under subheading 8704 10 of the CN is not, in principle, ruled out. However, it remains uncertain whether vehicles designed for off-highway use and intended for the transport of excavated or other materials can be excluded from the scope of subheading 8704 10 of the CN solely on account of the technical characteristics and construction features of the dumping mechanism, as a result of which goods can be dumped from the hopper in various ways with greater precision than with earlier models of the same type of vehicle.

16 It considers that it is appropriate to take account of Regulation No 396/92 which contains a description of subheading 8704 31 91 of the CN. The difference between subheadings 8704 21 and 8704 31 relates to engines. Vehicles under subheading 8704 21 have compression-ignition engines, while those under subheading 8704 31 have spark-ignition engines.

17 In those circumstances, the Gerechtshof te Amsterdam decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are vehicles which are designed for off-highway use and intended for the transport and dumping of materials, and, in particular, are equipped for that purpose with an intricate, versatile and precise tipping function, excluded from the scope of the term "dumper" contained in (sub)heading 8704 10 of the [Common Customs Tariff]?'

The question referred for a preliminary ruling

Observations submitted to the Court

18 DFDS submits that vehicles such as the Minitracs in question should be classified as dumpers under subheading 8704 10 of the CN. It points out that those Minitracs are classified as dumpers in Australia, Canada, the United States, Japan and the Czech Republic.

19 DFDS maintains that it is wrong to think that a tipping lorry has to be of a particular design or form and that the tipping of the hopper has to be by means of a simple system (mechanical or manual). The hopper and the tipping mechanism together fulfil a function and are to be regarded as a technical entity. As a result of technological developments, the tipping and rotating capabilities have been improved, so that the construction and mechanisms have become more complex. However, they are only design details. It is unimportant, in the end, how the tipping works: the essential point is that the tipping can be done in a limited space. From the point of view of their function, the goods should be classified as dumpers.

20 In conclusion, DFDS suggests that the answer to the question referred is that an intricate, versatile and precise tipping function does not exclude the classification of the Minitracs as dumpers within the meaning of subheading 8704 10 of the CN.

21 The Netherlands Government contends that the tariff classification made by the customs authorities is not contrary to the CN.

22 It observes that the explanatory notes of the HS show that a dumper can generally be distinguished from other vehicles for the transport of goods by a certain number of specific characteristics, in particular by the fact that a dumper is a robust vehicle but of relatively simple construction with a hopper made of very strong sheet steel the floor of which slopes. The vehicles at issue do not match that definition, in view of the fact that they have a flatbed hopper which opens on three sides and which is not made out of very strong sheet steel. That is confirmed by the explanatory notes of the CN which speak of 'vehicles fitted with a front or rear tipping body or bottom-opening body'.

23 The Netherlands Government adds that the Bundesfinanzhof (Federal Finance Court, Germany) has held that the 1302 and the 1005 Minitrac models in question do not correspond to the definition of dumpers.

24 The Commission adopts, in essence, the Netherlands Government's arguments. Dumpers covered by subheading 8704 10 of the CN are simple vehicles characterised by the fact that their hoppers are generally bucket-shaped tipping to the front or back, which can be tipped by hand and the bottom of which slopes fully or partly towards the rear. Those characteristics can be deduced from the CN's explanatory notes relating to subheadings 8704 10 10 to 8704 10 90, the explanatory notes of the HS concerning heading 8704 and subheading 8704 10 as well as from Regulation No 396/92 which is in conformity with the CN.

25 According to the Commission, since the Minitracs at issue are fitted with a mechanically sophisticated flatbed hopper, tippable hydraulically both sideways and to the rear, or with a backward-tipping hopper which can be rotated through 180 degrees by means of an extra hydraulic cylinder and piston and a rotating mechanism, they do not seem to come within subheading 8704 10 of the CN.

26 The Commission submits that the Court should reply to the question referred as follows:

'Trucks designed to be used off-highway and intended for the transport and dumping of materials, which are, for that purpose, equipped in particular with an intricate, versatile and precise tipping function, are to be excluded from the meaning of "dumper" in subheading 8704 10 [of the CN].

It is for the national court which has made a reference for a preliminary ruling to determine the correct classification according to all the information in its possession.'

The Court's reply

27 It is appropriate to recall at the outset that, according to the Court's 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, for example, Case C-276/00 *Turbon International* [2002] ECR I-1389, paragraph 21, and Joined Cases C-260/00 to C-263/00 *Lohmann and Medi Bayreuth* [2002] ECR I-10045, paragraph 30).

28 The explanatory notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the Customs Cooperation Council may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force (see Case C-405/97 *Mövenpick Deutschland* [1999] ECR I-2397, paragraph 18).

29 In addition, 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-459/93 *Thyssen Haniel Logistic* [1995] ECR I-1381, paragraph 13).

30 The sole criterion raised by the Netherlands Government and the Commission for rejecting the classification of the Minitracs at issue as dumpers within the meaning of subheading 8704 10 of the CN is the particularly advanced tipping mechanism of the hopper and its form adapted as a function of that mechanism.

31 The wording of that subheading requires that a vehicle meets two conditions to be classifiable thereunder, namely that it is a 'dumper' and is designed for use off-highway. While the second condition poses no problem in this case, the CN contains no additional specification relating to the definition of a 'dumper'.

32 It is clear from the descriptions of such vehicles in the explanatory notes on the CN and the HS that an essential characteristic of dumpers is to have a tipping hopper or an opening bottom for the transport of rubble and various materials. There is, by contrast, no indication in those notes that the form or functioning of the tipping hoppers can constitute, by themselves, decisive criteria for the classification of a vehicle as a dumper.

33 The HS explanatory note relating to heading 8704 describes dumpers as 'sturdily built vehicles'. Even assuming that the criterion of a vehicle's sturdiness is sufficiently objective to be accepted as a criterion of classification, it cannot however be deduced from such a criterion that an advanced tipping mechanism cannot be

sturdy or that the vehicle's sturdiness is to be judged in the light of the sturdiness of its dumping mechanism.

34 So far as subheading 8704 10 is concerned, the CN and HS explanatory notes emphasise expressly by the use of the adverbs 'generally' and 'mainly' that the criteria are mentioned merely as indications and do not constitute mandatory requirements. The fact that a vehicle is not fitted with a traditionally shaped hopper, or that such hopper can be tipped not only forwards or backwards but also sideways, cannot therefore by itself exclude the classification of the vehicle in question as a dumper.

35 More generally, in view of the intended purpose of dumpers, namely the transport and dumping of rubble and various materials, there is nothing in the facts of this case which could lead to the conclusion that modifications to the construction of such vehicles in order to make them better for their intended purpose (particularly by dumping with greater precision in a limited space) can result in their exclusion from classification as dumpers.

36 So far as concerns Point 4 of the Annex to Regulation No 396/92, which contains an interpretation by the Commission of subheading 8704 31 91, it is sufficient to state that it cannot serve as a basis for an interpretation of subheading 8704 10 of the CN which would run counter to the latter's wording as construed in the light of the CN's explanatory notes.

37 The reply to the question referred must therefore be that the fact that a flatbed vehicle is equipped with an intricate, versatile and precise tipping function does not exclude its classification as a dumper within the meaning of subheading 8704 10 of the CN.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) rules as follows:

The fact that a flatbed vehicle is equipped with an intricate, versatile and precise tipping function does not exclude its classification as a dumper within the meaning of subheading 8704 10 of the Combined Nomenclature set out in Annex I to Council Regulation (EEC) 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, in the versions resulting from Commission Regulations (EC) Nos 3115/94 of 20 December 1994 and 3009/95 of 22 December 1995.

Signatures.