JUDGMENT OF THE COURT (Eighth Chamber)

14 July 2011 *

In Case C-196/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Germany), made by decision of 7 April 2010, received at the Court on 19 April 2010, in the proceedings

Paderborner Brauerei Haus Cramer KG

v

Hauptzollamt Bielefeld,

THE COURT (Eighth Chamber),

composed of K. Schiemann, President of the Chamber, C. Toader and A. Prechal (Rapporteur), Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 24 March 2011,

after considering the observations submitted on behalf of:

— Paderborner Brauerei Haus Cramer KG, by Th. Rödder, Wirtschaftsprüfer/Steuerberater, and by J. Schönfeld and J. Bahns, Rechtsanwälte,

— the Greek Government, by G. Papadaki, Z. Chatzipavlou and M. Tassopoulou, acting as Agents,

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

— the European Commission, by L. Bouyon and B.-R. Killmann, acting as Agents,

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

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of the Combined Nomenclature of the Common Customs Tariff ('the CN'), 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 (EEC) No 2587/91 of 26 July 1991 (OJ 1991 L 259, p. 1) ('Regulation No 2658/87').

2 The reference has been made in proceedings between Paderborner Brauerei Haus Cramer KG ('Paderborner Brauerei') and Hauptzollamt (Principal Customs Office) Bielefeld concerning four tax assessment notices issued by the latter against Paderborner Brauerei imposing a spirits tax on a product described as a 'malt beer base' that Paderborner Brauerei had purchased during the course of 2002 and 2003.

Legal context

Directive 92/83/EEC

3 Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21)

established a common definition for alcohol and alcoholic beverages in order to ensure the correct application, within the internal market, of the minimum rates of excise duty applicable to those products within Member States.

4 Article 2 of Directive 92/83 provides:

'For the purposes of this Directive, the term "beer" covers any product falling within CN code 2203 or any product containing a mixture of beer with non-alcoholic drinks falling within CN code 2206, in either case with an actual alcoholic strength by volume exceeding 0.5 % vol.'

5 Article 20, first indent, of Directive 92/83 provides:

'For the purposes of this Directive the term "ethyl alcohol" covers:

— all products with an actual alcoholic strength by volume exceeding 1.2 % volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN'.

6 Article 26 of Directive 92/83 provides:

'References in this Directive to CN codes shall be to those of the version of the combined nomenclature in force when this Directive is adopted.'

7 Directive 92/83 was transposed in Germany by, inter alia, the Law on the monopoly in spirits (Gesetz über das Branntweinmonopol) and the Law on the taxation of beer (Biersteuergesetz). Paragraph 130(2) of the Law on the monopoly in spirits provides that spirituous goods (products) which come under heading 2208 of the CN, with an alcoholic strength by volume greater than 1.2 %, are subject to excise duty on alcohol. Paragraph 130(5) refers to the application of the CN in the version in force on 19 October 1992.

The CN

8 The CN, established by Regulation No 2658/87, is based on the international Harmonised Commodity Description and Coding System ('the HS') drawn up by the Customs Cooperation Council, now the World Customs Organisation ('the WCO'), adopted by the International Convention concluded in Brussels on 14 June 1983 and approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 concerning the conclusion of the International Convention on the Harmonised Commodity Description and Coding System and of the Protocol of Amendment thereto (OJ 1987 L 198, p. 1; 'the HS Convention'). The CN reproduces the headings and subheadings of the HS to six digits, with only the seventh and eighth figures creating further subheadings which are specific to it.

9 Under the terms of Article 12 of Regulation No 2658/87, the European Commission is required to adopt each year, by means of a regulation, a complete version of the CN together with the corresponding autonomous and conventional rates of duty of the Common Customs Tariff, as it results from measures adopted by the Council of the European Union or by the Commission.

10 The general rules for the interpretation of the CN ('the general rules'), which appear in Part One, Section I A, of the CN, provide, inter alia, as follows:

'(A) General rules for the interpretation of the [CN]

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.

…

(4) Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

…

(6) For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise.'

11 Section IV of the CN, in the version in force in 1992, was entitled 'Prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes'. That section contained, inter alia, a Chapter 22, entitled 'Beverages, spirits and vinegar'. Chapter 22 included headings 2203 ('Beer made from malt') and 2208 ('Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 % vol; spirits, liqueurs and other spirituous beverages; compound alcoholic preparations of a kind used for the manufacture of beverages').

12 Pursuant to the second indent of Article 9(1)(a) and Article 10 of Regulation No 2658/87, the Commission adopts Explanatory Notes for the CN, which are published in the *Official Journal of the European Union*.

13 There is no explanatory note for the CN relating to heading 2203.

14 The explanatory note for the CN relating to heading 2208 is worded as follows:

'Spirits, liqueurs and other spirituous beverages of heading 2208 are alcoholic liquids generally intended for human consumption and are prepared:

— either directly by distilling (with or without added flavouring) natural fermented liquids such as wine or cider, or previously fermented fruit, marc, grain or other vegetable products, or

— by simply adding various aromatic substances, and sometimes sugar, to alcohol produced by distillation

…

This heading does not cover alcoholic beverages obtained by fermentation (headings 2203 00 to 2206 00).'

The HS

15 Under Article 3(1) of the HS Convention, each Contracting Party undertakes to ensure that its customs tariff and statistical nomenclatures will be in conformity with the HS. Pursuant to that same provision, each Contracting Party also undertakes to apply the general rules for the interpretation of the HS and all the section, chapter and subheading notes of the HS, and not to modify the scope of the sections, chapters, headings and subheadings.

16 The WCO produces explanatory notes to the HS. These explanatory notes are published in the two official languages of the WCO, namely French and English.

17 The HS explanatory note relating to heading 2203, in the French version, states as follows:

'La bière est une boisson alcoolique qui s'obtient par la fermentation du moût préparé avec du malt d'orge ou de froment, qu'on a fait bouillir en présence d'eau avec

généralement du houblon. … L'addition de houblon a pour effet de développer des principes amers et aromatiques et de permettre une meilleure conservation du produit. …

…'

18 In the English version, the HS explanatory note relating to heading 2203 states, inter alia, as follows:

'Beer is an alcoholic beverage obtained by fermenting a liquor (wort) prepared from malted barley or wheat, water and (usually) hops. … The addition of hops imparts a bitter and aromatic flavour and improves the keeping qualities. …

… '

19 The HS explanatory note relating to heading 2208, in the French version, states:

'La présente position couvre, d'une part, et quel que soit leur degré alcoolique:

(A) Les eaux de vie …

(B) Les liqueurs …

(C) Toutes autres boissons spiritueuses …

D'autre part, la position comprend l'alcool éthylique non dénaturé d'un titre alcoométrique volumique de moins de 80 % vol, qu'il soit destiné à la consommation humaine ou à des usages industriels; même s'il est propre à la consommation, l'alcool éthylique se distingue des produits visés en A), B) et C) ci-dessus, par le fait qu'il est dénué de tout principe aromatique.

…'

20 In its English version, that note states as follows:

'The heading covers, whatever their alcoholic strength:

(A) Spirits …

(B) Liqueurs and cordials …

(C) All other spirituous beverages …

Provided that their alcoholic strength by volume is less than 80 % vol, the heading also covers undenatured spirits (ethyl alcohol and neutral spirits) which, contrary to those at (A), (B) and (C) above, are characterised by the absence of secondary constituents giving a flavour or aroma. These spirits remain in the heading whether intended for human consumption or for industrial purposes.

…'

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

21 Paderborner Brauerei is a brewery. In 2002 it purchased a total of 99 847.33 litres, and on 6 and 23 June 2003 a total of 74 745.41 litres, of a so-called 'malt beer base' from Alko International BV in the Netherlands, which it used to produce a mixed drink marketed under the designation 'Salitos Ice'.

22 According to the information provided by the Finanzgericht (Finance Court) Düsseldorf, the 'malt beer base' is produced from brewed beer with an alcoholic strength by volume of approximately 14 %, which is clarified and then subjected to ultrafiltration, by which the concentration of ingredients such as bitter substances and proteins is reduced. The 'malt beer base' also has an alcoholic strength by volume of 14 %. It is a colourless, clear liquid which smells of alcohol and has a slightly bitter taste.

23 The Hauptzollamt, taking the view that the 'malt beer base' ought to be classified under heading 2208 of the CN, claimed excise duty on the corresponding alcohol from Paderborner Brauerei under point 1 of Paragraph 130(2) of the Law on the monopoly in spirits. Consequently, by a decision of 1 August 2003, it imposed on Paderborner Brauerei spirits tax totalling EUR 182 141.49 in respect of the 'malt beer base' purchased by it in 2002 and, by three decisions of 14 July 2003, spirits tax totalling EUR 136 350.74 in respect of the 'malt beer base' purchased on 6 and 23 June 2003.

24 By decision of 19 June 2009, the Hauptzollamt rejected Paderborner Brauerei's objection to those decisions. Paderborner Brauerei thereupon brought proceedings before the Finanzgericht Düsseldorf.

25 In the action in the main proceedings, Paderborner Brauerei contends, in particular, that the 'malt beer base' should not be classified under heading 2208 of the CN. That product, it argues, was not obtained by distillation or the addition of a variety

of flavourings or sugar. Rather, it is a product obtained by fermentation, which has been classified in other Member States under heading 2203 of the CN. The product is made from malt and is used, as an intermediate product, for the production of a light beer-based mixed drink. Heading 2203 of the CN, it submits, does not require that the product concerned be a beverage which is intended for direct consumption.

26 Hauptzollamt Bielefeld contests the action and maintains its position that the 'malt beer base' must be classified under heading 2208 of the CN.

27 In those circumstances, the Finanzgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the [CN], in the version of Commission Regulation (EC) No 2031/2001 of 6 August 2001 [amending Annex I to Regulation (EEC) No 2658/87] (OJ 2001 L 279, p. 1) and in the version of Commission Regulation (EC) No 1832/2002 of 1 August 2002 (OJ 2002 L 290, p. 1), to be interpreted as meaning that a product described as a "malt beer base" with an alcoholic strength by volume of approximately 14 %, obtained from brewed beer which has been clarified and then subjected to ultrafiltration, by which the concentration of ingredients such as bitter substances and proteins has been reduced, is to be classified under heading 2208?'

The question referred for a preliminary ruling

28 As a preliminary point, it should be noted that, pursuant to Article 26 of Directive 92/83, the version of the CN to be applied in the main proceedings is that set out in Regulation No 2587/91, which was in force when that directive was adopted, and not the versions set out in Regulations No 2031/2001 and No 1832/2002, which the referring court cites in its question.

29 According to Paderborner Brauerei, the 'malt beer base', in so far as it consists of beer obtained by fermentation and then subjected to a physical filtration process, must be classified under heading 2203 of the CN, as the fermentation process is the crucial factor governing tariff classification. The distillation necessary as a production process for purposes of classification under heading 2208 of the CN is lacking. Furthermore, according to the HS explanatory note relating to heading 2208 of the CN, ethyl alcohol must be characterised by the 'absence of secondary constituents giving a flavour or aroma', whereas the 'malt beer base' does have a taste and therefore a flavour or aroma.

30 The Greek Government, the Netherlands Government and the Commission, by contrast, take the view that the 'malt beer base' must be classified under heading 2208 of the CN.

31 In that regard, it should be borne in mind that, 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 sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see, inter alia, Case C-142/06 *Olicom* [2007] ECR I-6675, paragraph 16, and Case C-370/08 *Data I/O* [2010] ECR I-4401, paragraph 29).

32 The explanatory notes drawn up by the Commission as regards the CN and by the WCO as regards the HS are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (*Olicom*, paragraph 17, and *Data I/O*, paragraph 30).

33 In the present case, it is apparent from the HS explanatory notes relating to heading 2203 of the CN that beer must be considered to be an alcoholic beverage. The classification of a product as a 'beverage' within the meaning of the CN depends on whether it is a liquid and is intended for human consumption (Case 114/80 *Dr Ritter* [1981] ECR 895, paragraph 9).

34 However, according to the information provided by the referring court, the 'malt beer base' is not an end product intended for consumption but rather an intermediate product for use in the production of the mixed drink marketed under the designation 'Salitos Ice'. Therefore, even though the 'malt beer base' is a liquid and is suitable for human consumption in the sense that it is drinkable, it is not, as an intermediate product, primarily intended for human consumption. In view of the fact that this product is not sold to consumers as an end product, it should not be considered to be an alcoholic beverage.

35 By contrast, the HS explanatory note relating to heading 2208 expressly states that that heading also covers ethyl alcohol, whether intended for human consumption or for industrial purposes. The fact that the 'malt beer base' is merely an intermediate product does not therefore lead to its exclusion from that heading.

36 While it is true that the explanatory notes to the CN relating to heading 2208 exclude from that heading alcoholic beverages obtained from fermentation, it need only be noted, in this case, that this does not concern the 'malt beer base', in so far as it is an intermediate product, because, as has been indicated in paragraph 34 of the present judgment, it is not an alcoholic beverage.

37 In any event, the 'malt beer base' is not obtained purely and simply by fermentation but is thereafter subjected to ultrafiltration. As a result of this additional treatment, the product in question, which is produced from brewed beer, loses the objective properties and characteristics particular to beer. It does not look like beer and it also does not have the bitter taste specific to beer. According to the information provided by the referring court, the 'malt beer base' is a colourless, clear liquid which smells of alcohol and has a slightly bitter taste and an alcoholic strength by volume of 14 %, which is used to produce a mixed drink marketed under the designation 'Salitos Ice'. These objective properties and characteristics do not correspond to those of beer coming under heading 2203 of the CN but do, by contrast, correspond to those of ethyl alcohol under heading 2208 or are, in any event, akin to those properties and characteristics.

38 Finally, with regard to the argument of Paderborner Brauerei that the HS explanatory note relating to heading 2208 states that ethyl alcohol has no aroma, whereas the 'malt beer base' smells of alcohol and has a slightly bitter taste, it must be observed at the outset that there is a degree of linguistic difference between the French and English versions, both official versions of the HS explanatory notes, in that regard.

39 However, neither of the two versions of that explanatory note requires that a product be completely devoid of taste or aroma in order for it to be classified as ethyl alcohol. In particular, according to both versions, ethyl alcohol is distinguishable from spirits, liqueurs and all other spirituous beverages coming under heading 2208 of the CN by reason of the presence in those products of distinctive flavouring substances or properties of taste (see, to this effect, Case 185/73 *König* [1974] ECR 607, paragraph 19).

40 Consequently, in contrast to those latter products, the taste and aroma of ethyl alcohol are neutral elements as regards the classification of a product under heading 2208 of the CN. The fact that the 'malt beer base' smells of alcohol and has a slightly bitter taste does not therefore prevent it from being classified under that heading.

41 In the light of all of the foregoing, the answer to the question referred is that Regulation No 2658/87 must be interpreted as meaning that a liquid described as a 'malt beer base', such as that in issue in the main proceedings, with an alcoholic strength by volume of 14% and obtained from brewed beer which has been clarified and then subjected to ultrafiltration, by which the concentration of ingredients such as bitter substances and proteins has been reduced, must be classified under heading 2208 of the CN.

Costs

42 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 (Eighth Chamber) hereby rules:

Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EEC) No 2587/91 of 26 July 1991, must be interpreted as meaning that a liquid described as a 'malt beer base', such as that in issue in the main proceedings, with an alcoholic strength by volume of 14 % and obtained from brewed beer which has been clarified and then subjected to ultrafiltration, by which the concentration of ingredients such as bitter substances and proteins has been reduced, must be classified under heading 2208 of the Combined Nomenclature set out in Annex I to that regulation, as amended.

[Signatures]