JUDGMENT OF THE COURT (Third Chamber)

27 September 2007 *

In Joined Cases C-208/06 and C-209/06,

REFERENCE for two preliminary rulings under Article 234 EC from the Finanzgericht Düsseldorf (Germany), made by decisions of 4 May 2006, received at the Court on 8 May 2006, in the proceedings

Medion AG (C-208/06)

v

Hauptzollamt Duisburg,

and

Canon Deutschland GmbH (C-209/06)

v

Hauptzollamt Krefeld,

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, U. Lõhmus, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 21 March 2007,

after considering the observations submitted on behalf of:

— Medion AG and Canon Deutschland GmbH, by H. Nehm, Rechtsanwalt,

— the French Government, by G. de Bergues and A.-L. During, acting as Agents,

— the Commission of the European Communities, by J. Hottiaux, acting as Agent, and B. Wägenbaur, Rechtsanwalt,

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

gives the following

Judgment

1 These references for preliminary rulings concern the interpretation of subheadings 8525 40 91 and 8525 40 99 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), as amended by Commission Regulation (EC) No 2263/2000 of 13 October 2000 (OJ 2000 L 264, p. 1), Commission Regulation (EC) No 2031/2001 of 6 August 2001 (OJ 2001 279, p. 1), and Commission Regulation (EC) No 1789/2003 of 11 September 2003 (OJ 2003 L 281, p. 1), ('the CN').

2 The references were made in the course of two disputes between, first, Medion AG ('Medion') and the Hauptzollamt Duisburg and, second, Canon Deutschland GmbH ('Canon') and the Hauptzollamt Krefeld, concerning the classification in the CN of camcorders imported into Germany by those two companies.

Legal background

3 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, adopted by

the International Convention concluded in 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 reproduces the headings and subheadings of the HS to 6 digits, with only the 7th and 8th figures creating subheadings which are unique to it.

4 Section XVI, in Part Two of the CN, contains Chapter 85, entitled 'Electrical machinery and equipment and parts thereof, sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles'.

5 Subheading 8525 40, entitled 'Still image video cameras and other video cameras; digital cameras' contains subheading 8525 40 91, entitled 'Other video camera recorders: Only able to record sound and images taken by the television camera' and subheading 8525 40 99, entitled 'Other video camera recorders: Other'.

6 The wording of subheadings 8525 40 91 and 8525 40 99 is identical in Regulations No 2263/2000, No 2031/2001 and No 1789/2003.

7 The camcorders classified under subheading 8525 40 91 are subject to a customs duty of 4.9%, while for camcorders under subheading 8525 40 99 it is 14%.

8 The General rules for the interpretation of the CN, which are set out in the Part One, Title I A, provide in particular:

'Classification of goods in the Combined Nomenclature shall be governed by the following principles:

...

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), presented on assembled or disassembled.

...'

9 The Commission of the European Communities publishes in the Official Journal of the European Union, at regular intervals and in accordance with Article 9(1) of Regulation No 2658/87, the 'Explanatory Notes to the Combined Nomenclature of the European Communities' ('the explanatory notes'). The explanatory notes relating to Regulation No 2263/2000 (OJ 2000 C 199, p. 1), applicable, in part, in Case C-209/06, stated under subheading 8525 40 99:

'others

This subheading covers apparatus combinations consisting of a video camera and a video recording or reproducing apparatus (so-called "camcorders") for the recording not only of images taken by the camera but also of television programmes. The images thus recorded can be reproduced by means of an external television receiver.

However, "camcorders" with which only the images taken by the video camera can be recorded and reproduced by means of an external television receiver fall within subheading 8525 40 91.'

10 The explanatory notes were amended following a Commission notice of 6 July 2001 (OJ 2001 C 190, p. 10). With respect to subheading 8525 40 99, the previous wording was repeated and the following intermediate paragraph was inserted:

'This subheading also includes "camcorders" in which the video input is obstructed by a plate, or in another way, or in which the video interface can be subsequently activated as video import by means of software. The apparatus is nevertheless designed to record TV programmes and other externally incoming video signals.'

11 The wording of the explanatory notes remained unchanged following Regulations No 2031/2001 and No 1789/2003.

The disputes in the main proceedings and the questions referred for preliminary rulings

Facts common to both cases

12 Medion and Canon imported into Germany digital camcorders with an 'IEEE 1394 interface' which enables the transfer of digital data. Those camcorders are equipped with a menu consisting of a series of buttons and a small colour 'LCD' screen.

13 It is clear from the descriptions of those products and their instruction manuals that the purchaser has the choice between seeing the video recordings made by the camera on the colour 'LCD' screen or transferring them, by means of appropriate cables, to other appliances, for example a television set, which offers a better quality and much larger image. That function is commonly designated 'DV-out'.

14 A number of other camcorders include the option to receive data from other appliances, and are then used as video recorders to record digital sequences from a computer, for example, video editing. That function, commonly called 'DV-in', was not alluded to by Medion and Canon when the camcorders at issue in the main proceedings were imported.

15 Furthermore, neither the manufacturers of those camcorders nor Medion and Canon offered subsequently to activate the DV-in function or to enable a third-party to do so, either in the product information for those camcorders or in their instruction manuals. By contrast, in the same period, the two companies imported camcorders in respect of which it was clearly stated that they possessed the DV-in function.

Case C-208/06

16 In February 2004, Medion asked the competent customs office in Essen-Stadthafen (Germany) for customs clearance for release into free circulation of a digital camcorder of the type MD 9069, declaring it to be classified under subheading 8525 40 91 of the CN. The customs office classified the camcorder as a product under subheading 8525 40 99 of the CN.

17 In its action before the Finanzgericht Düsseldorf, Medion submitted, essentially, that at the time of acceptance of the customs declaration the camcorder concerned did not have a DV-in function. It also stated that the manufacturer of that camcorder had informed it that the DV-in capability could be enabled only by reprogramming the 'erasable programmable read-only memory', which required either a new piece of equipment, or the motherboard to be changed by a qualified engineer. Medion added that it had received two binding tariff notifications from the Netherlands customs administration in which the camcorders were classified under subheading 8525 40 91 of the CN.

18 The Finanzgericht Düsseldorf commissioned an expert report on the question whether, and if so, how, the camcorder could be reconfigured, without modification of its hardware, so as to enable it to record sound and images taken from external apparatus.

19 Following presentation of the report, the national court considered the classification of the camcorder in dispute. It found that, at the material time when the customs debt arose, the camcorder did not have the characteristics relevant for the purposes of the classification, but that it had acquired them or could acquire them only subsequently as a result of reconfiguration.

20 It also observed that the question of classification of goods which do not have certain characteristics at the time of customs clearance, but which subsequently acquire them as a result of reconfiguration, has not been answered uniformly across the Community. It mentions, in that regard, the Netherlands binding tariff notifications relied on by Medion and a decision of the Commission de conciliation et d'expertise douanière française (French Customs and Excise Conciliation Commission) of 7 October 2003. The Finanzgericht Düsseldorf was therefore unsure as to the influence of subsequent configurations on the classification of the goods.

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

'Should a camcorder, which at the time of importation is unable to record video signals from an external source, be classified under subheading 8525 40 99 of the Combined Nomenclature if its video port can subsequently be reconfigured as a video input by means of activating certain switches even though the manufacturer and the seller have neither mentioned nor support this possibility?'

Case C-209/06

22 Between July 2001 and February 2002, Canon released for free circulation camcorder models MV 400, MV 425 and MV 3 MC. It declared those camcorders under subheading 8525 40 91 of the CN. During an investigation, the customs office in Krefeld (Germany) concluded that those camcorders were to be classified under subheading 8525 40 99 of the CN. An action was brought before the Finanzgericht Düsseldorf.

23 In support of its action, Canon emphasised the difference between the imported camcorders when equipped with and when not equipped with the DV-in function, and submitted that, as regards the camcorders at issue, that function can be activated only by modifying the hardware. Canon also submitted that if the classification in subheading 8525 40 99 were to be retained when the DV-in function is activated after clearance, that would be contrary to the key fundamental principle of customs tariff classification. Basing classification on activation after customs clearance would lead to uncertainty as to whether that activation had in fact taken place and, therefore, as to the classification of the goods.

24 The national court commissioned an expert report identical to that undertaken in the dispute concerning Medion.

25 Following presentation of the expert report, the Finanzgericht Düsseldorf decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

'Should a camcorder, which at the time of importation is unable to record video signals from an external source, be classified under subheading 8525 40 99 of the Combined Nomenclature, if its video port can subsequently be reconfigured as a video input by using certain software, even though the manufacturer and the seller have neither mentioned nor support this possibility?'

26 By order of the President of the Court of 26 June 2006, Cases C-208/06 and C-209/06 were joined for the purposes of the written and oral proceedings and the judgment.

The questions referred for a preliminary ruling

Observations submitted to the Court

27 Medion and Canon submit that the questions referred for a preliminary ruling should be answered in the negative. They put forward a number of reasons for which the camcorders at issue in the main proceedings should be classified under subheading 8525 40 91 and not subheading 8525 40 99.

28 First, they point out that, at the time of customs clearance, none of those camcorders had the capability to record external video signals. Canon takes the view that only the functionality of the software which was operational at the time of customs clearance can be regarded as an objective characteristic of the product.

29 Medion and Canon further submit that any modification, including modification of codes and parameters of the software controlling the DV function, which is made without the agreement of the manufacturer, constitutes, in their view, an infringement of their intellectual property rights.

30 Finally, Medion and Canon stated that the expert appointed by the national court had to go to great lengths in order to activate the DV-in function. At the hearing they added that, after activation of that function, the camcorders at issue can function as a video recorder only when they are connected to a personal computer, and cannot perform that function independently.

31 The French Government takes the view that the camcorders at issue must be classified under subheading 8525 40 99. The objective characteristics and properties of a product cannot be confined solely to the functions of that product which are ready to function at a particular moment, but cover all its potential functions. Therefore, even when disabled, a function such as the DV-in function must be regarded as an objective characteristic and property of such camcorders, so long as it is possible to activate it without modifying the hardware.

32 The Commission also considers that those camcorders are covered by the category 'Others' in subheading 8525 40 99. It submits that the classification in the CN depends on the functions that camcorders are capable of performing at the time of import, that is to say, on the potential functions that they possess objectively at that time.

Findings of the Court

33 It is clear from the wording of the questions, which it is appropriate to deal with together, that the national court asks, essentially, whether, for the classification of the camcorders, the possibility to activate the DV-in function may or must be taken into account if it has not been activated at the time of customs clearance, but if it may subsequently be activated manually or by the addition of software. It also asks whether there is any significance in the fact that the manufacturer neither pointed out nor supported the characteristics at the time of customs clearance.

34 First of all, that it is settled case-law that, in the interests of legal certainty and for 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 the notes to the sections or chapters (see, in particular, Case C-42/99 *Eru Portuguesa* [2000] ECR I-7691, paragraph 13; Case C-500/04 *Proxxon* [2006] ECR I-1545, paragraph 21; and Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 27).

35 In that regard, it is irrelevant whether the manufacturer of the product intended or not to emphasise a particular characteristic of that product.

36 Furthermore, the Court has held that the decisive criterion for the customs classification of goods under the common customs tariff must be sought in the objective characteristics and properties of the products at the time of their presentation for customs clearance (Case 175/82 *Dinter* [1983] ECR 969, paragraph 10, and Case C-33/92 *Gausepohl-Fleisch* [1993] ECR I-3047, paragraph 9). The objective characteristics and properties of products must be capable of being assessed at the time of customs clearance (see, to that effect, Case C-233/88 *van de Kolk* [1990] ECR I-265, paragraph 12; Case C-38/95 *Foods Import* [1996] ECR I-6543, paragraph 17; and Case C-14/05 *Anagram International* [2006] ECR I-6763, paragraph 26).

37 Furthermore, 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, and Case C-400/05 *B.A.S. Trucks* [2007] ECR I-313, paragraph 29).

38 Finally, the Court has held that it is clear from Article 2(a) of the General Rules for the interpretation of the CN that, for the purposes of customs classification, an incomplete or unfinished article is to be treated in the same way as a complete or

finished article, provided that it has the essential character of the complete or finished article (see Case C-280/97 *ROSE Elektrotechnic* [1999] ECR I-689, paragraph 18). The part of the product must be sufficiently large to give the product its essential character (see, to that effect, Case C-151/93 *Voogd Vleesimport en -export* [1994] ECR I-4915, paragraph 20, and Case C-401/93 *GoldStar Europe* [1994] ECR I-5587, paragraphs 26 to 28).

39 It is clear from the explanatory notes that what differentiates the camcorders covered by subheading 8525 40 91 from those under subheading 8525 40 99 is the capability of the latter, in addition to the recording of sounds and images with the integrated camera or microphone, to be able to record sounds and images where they originate from sources other than the integrated camera or microphone. The essential characteristic of a camcorder classified under subheading 8525 40 99 is therefore, in particular, the DV-in function, that is to say its capability to record video signals from external sources.

40 That capability may be accessible directly by the user where the manufacturer has provided for easy activation of the DV-in function, that activation being explained in the instruction manual provided to the purchaser of the apparatus. If the procedure is not mentioned in the instruction manual, it is necessary, in order for the DV-in function to constitute the essential characteristic of the camcorder, that the modification can be effected easily by a user who lacks any special skills, without the camcorder being subjected to modification of its hardware. It is therefore necessary that, before activation of the DV-in function, the camcorders have a structure containing the essential characteristics of that function and that the ways of enabling it to be active do not involve additional external hardware.

41 Furthermore, in order for a camcorder to be classified under subheading 8525 40 99, it is necessary, where the modification has been made and the DV-in function is activated, that the camcorder functions in the same way as another camcorder expressly designed for the DV-in function. In particular, it is necessary that the camcorder may, in the same way as an expressly designed DV-in camcorder, be used to record external video signals independently, without relying on external hardware or software.

42 In the main proceedings, it is clear from the documents on the file and, in particular, from the expert reports commissioned by the national court, that the modification of the camcorders in order to activate the DV-in function is relatively complicated. It required an internet search for the instructions for operating the buttons (for Medion's camcorders) or the purchase of software (for Canon's camcorders) and, for all the camcorders, connection to a personal computer and the use of a number of accessories such as a 'LANC'-cable. Furthermore, Medion and Canon submitted at the hearing that, even when the DV-in function is activated, it is still necessary to connect the camcorder to a personal computer in order for it to be able to operate in that mode.

43 In light of those considerations, it is for the national court to determine the degree of complexity of the modifications to be made in order to activate the DV-in function, and to establish the similarity and independent character of the functioning of the camcorders at issue in the main proceedings compared with camcorders presented as containing the DV-in function. If the national court takes the view that the activation of the DV-in function may easily be made by a user without special skills and without the camcorder being subjected to modification of its hardware, and if it establishes similar characteristics and independent functioning, the camcorders must be classified under subheading 8525 40 99. If those conditions are not fulfilled, the camcorders must be classified under subheading 8525 40 91.

44 Therefore, the answer to the questions referred must be that a camcorder may be classified under subheading 8525 40 99 of the CN only if the function for recording images and sounds from sources other than the integrated camera or microphone is active at the time of customs clearance or if, even though the manufacturer did not intend to promote that characteristic, that function may be activated subsequently by simple modification of the apparatus by a user who does not have special skills, without modification of the camcorder's hardware. Where the camcorder is activated subsequently, it is also necessary, first, that, once activated, it functions in a manner similar to that of another camcorder whose function for recording images and sounds from sources other than the integrated camera or microphone is active

at the time of customs clearance and, second, that it functions independently. The existence of those conditions must be capable of being ascertained at the time of customs clearance. It is for the national court to establish whether those conditions are fulfilled. If those conditions are not fulfilled the camcorder must be classified under subheading 8525 40 91 of the Combined Nomenclature.

Costs

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

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

A camcorder may be classified under subheading 8525 40 99 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, as amended by Commission Regulation (EC) No 2263/2000 of 13 October 2000, Commission Regulation (EC) No 2031/2001 of 6 August 2001, and Commission Regulation (EC) No 1789/2003 of 11 September 2003, only if the function for recording images and sounds from sources other than the integrated camera or microphone is active at the time of customs clearance or if, even though the manufacturer did not intend to emphasise that characteristic, that function may be activated subsequently by simple modification of the apparatus by a user who does not have special skills, without modification of the camcorder's hardware. Where the camcorder is

activated subsequently, it is also necessary, first, that, once activated, it functions in a manner similar to that of another camcorder whose function for recording images and sounds from sources other than the integrated camera or microphone is active at the time of customs clearance and, second, that it functions independently. The existence of those conditions must be capable of being ascertained at the time of customs clearance. It is for the national court to establish whether those conditions are fulfilled. If those conditions are not fulfilled the camcorder must be classified under subheading 8525 40 91 of the Combined Nomenclature.

[Signatures]