ORDER OF THE COURT (Eighth Chamber)

9 December 2010 *

In Case C-193/10,

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

**KMB Europe BV**

v

**Hauptzollamt Duisburg**,

* Language of the case: German.

THE COURT (Eighth Chamber),

composed of K. Schiemann, President of the Chamber, L. Bay Larsen and A. Prechal (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: A. Calot Escobar,

the Court proposing to give its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

**Order**

1 This reference for a preliminary ruling concerns the interpretation of heading 8521 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 1549/2006 of 17 October 2006 (OJ 2006 L 301, p. 1) ('the CN').

2 The reference has been made in proceedings between KMB Europe BV ('KMB Europe'), applicant in the main proceedings, and Hauptzollamt Duisburg (Duisburg Principal Customs Office), defendant in the main proceedings, concerning the tariff classification of MP3 media players.

## Legal context

3 Part One of the CN contains preliminary provisions. In Section I of Part One, which contains general rules, subsection A, entitled 'General rules for the interpretation of the [CN]', provides:

'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 Part Two of the CN contains a Section XVI, entitled 'Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, tel-

evision image and sound recorders and reproducers, and parts and accessories of such articles', which is preceded by notes. Under Note 3 to that section:

'Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.'

5 Section XVI includes 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'. That chapter contains, inter alia, heading 519, entitled 'Sound recording or sound reproducing apparatus', and subheading 8519 89 00, entitled 'Other', as well as heading 8521, entitled 'Video recording or reproducing apparatus, whether or not incorporating a video tuner', and subheading 8521 90 00, entitled 'Other'.

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

6 On 5 April 2007, KMB Europe applied to the Zollamt Emmerich (Emmerich Customs Office) for the release for free circulation of a consignment of electronic apparatus of Chinese origin from Hong Kong (China), which it applied for as MP3 players under subheading 8519 89 90 of the CN. The Zollamt took samples of goods from the consignment and cleared them in accordance with the application, charging the specified duty at the rate of 2 %.

7 According to the findings of the national court, the goods in question in the main proceedings are sets of goods packed in single cardboard boxes and consist of the following parts:

— apparatus described on the packaging as an MP3 media player, in a housing of 90 mm length, 40 mm width and 8 mm height. The housing contains an equaliser, an LC display (27 x 28 mm, diagonal measurement 38 mm or 1.65 inches) a flash memory (with 512 MB or 1 GB, depending on the model), accumulators, a headphone terminal, a USB 2.0 terminal and operating devices;

— a USB cable;

— one pair of headphones;

— a mains part with charging function;

— a carrying cord;

— a CD with programmes. With one of the programmes, videos and other common (file) formats may be converted into the AMV format; and

— operating instructions.

8 It is also apparent from the findings of the national court that the MP3 media player can:

— play sound files, particularly in (file) formats MP1, MP2, MP3, WMA, WMV, ASF and WAV;

— record sound files by means of a built-in microphone in formats WAV and ACT;

— make its memory available to a PC as an additional memory, via the USB connection;

— show images in the (file) format JPEG; and

— play videos in the licence-free format AMV with resolution of 208 x 176 pixels and frame frequency of 16 frames per second or smaller resolution with lower frame frequency.

9 The Zollamt Emmerich sent the samples to the Oberfinanzdirektion Köln, Zolltechnische Prüfungs — und Lehranstalt (Customs Laboratory and Training College of the Principal Revenue Office, Cologne) for examination. That body stated, in its report of 16 May 2007, that the goods were video apparatus under subheading 8521 90 00

of the CN. The Hauptzollamt Duisburg confirmed that assessment and charged KMB Europe a total of EUR 16 752.77 post-clearance customs duty by a decision of 25 July 2007.

10 After the dismissal of its appeal, KMB Europe brought the matter before the referring court, before which it disputes the classification of the goods in question in the main proceedings under heading 8521 of the CN.

11 Before that court, the Hauptzollamt Duisburg argues that the apparatus in question in the main proceedings correspond to the definition in heading 8521, which requires only that video apparatus be capable of recording or reproducing images and sounds. In its submission, those apparatus are not made up of a combination of apparatus for reproducing sound and apparatus for reproducing images, with the result that neither Note 3 to Section XVI of the CN nor General Rule 3(b) apply.

12 KMB Europe submits, by contrast, that the apparatus in question in the main proceedings fall under heading 8519 of the CN. Those apparatus have two functions, the audio function being the principal function. The video function is only secondary and very limited.

13 Considering that the outcome of the dispute before it requires the interpretation of heading 8521 of the CN, the Finanzgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is heading 8521 of the [CN] to be interpreted as meaning that apparatus such as the MP3 media player [in question in the main proceedings] is not to be classified

under that heading because account must be taken of its principal function as sound reproducing apparatus or because its capability of reproducing individual pictures and films is limited by a small display with small resolution and low frame frequency?'

**The question referred for a preliminary ruling**

14 Under the first subparagraph of Article 104(3) of the Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, give its decision by reasoned order in which reference is made to the relevant case-law.

15 The Court considers that that is the situation in the present case.

16 By its question, the national court asks, in essence, whether heading 8521 of the CN is to be interpreted as meaning that MP3 media players such as those at issue in the main proceedings are not to be classified under that heading.

17 It should be borne in mind that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be 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 Joined Cases C-522/07 and C-65/08 *Dinter and Europol Frost-Food* [2009] ECR I-10333, paragraph 29 and the case-law cited).

18 As regards the wording of heading 8521 of the CN, it should be noted that that heading refers to video recording 'or' reproducing apparatus. It follows that MP3 media players such as that at issue in the main proceedings may not be considered as being excluded from the scope of that heading on the sole ground that they can only reproduce videos and cannot record them.

19 Furthermore, no specific criterion as to quality is laid down in the title of heading 8521. It follows that the limited capability of MP3 media players, such as those at issue in the main proceedings, of reproducing individual pictures or films on a small display with small resolution and low frequency may not, in itself, be enough to exclude such players from the scope of that heading, since, as is apparent from the order for reference, it is common ground that animated images with a musical accompaniment in the form of a short film are easily identifiable.

20 Concerning the question as to whether MP3 media players, such as those at issue in the main proceedings, could, where appropriate, fall under heading 8521 of the CN, having regard to their principal function as apparatus for the reproduction of sound, it must be borne in mind that the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see, inter alia, Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 23 and case-law cited).

21 As is apparent from the description of the MP3 media players provided in paragraphs 7 and 8 of this order, the intended use of such players is not only to play videos and the sound that accompanies them, but also to play sound files independently of playing any videos. That use, inherent in the apparatus at issue in the main proceedings since it results from their objective properties and, in particular, from the different formats in which they are capable of playing sound files, is such that those apparatus are precluded from entirely corresponding to the wording in heading 8521 of the CN.

22 Moreover, it should be noted that, due to that function as players of sound files, the MP3 media players at issue in the main proceedings may a priori also come within the wording in heading 8519, which refers to sound recording and/or reproducing apparatus.

23 In those circumstances, consideration should also be given to Note 3 to Section XVI of the CN in order to classify the MP3 media players under that section.

24 According to that note, machines designed for the purpose of performing two or more complementary or alternative functions are to be classified according to the principal function which characterises the unit as a whole.

25 As is apparent from the order for reference, the principal function of MP3 media players such as those at issue in the main proceedings is, according to the findings of the national court, as sound-recording and reproduction apparatus, due to the poor quality of the video function.

26 Consequently, the answer to the question referred is that heading 8521 of the CN must be interpreted as meaning that MP3 media players, such as those at issue in the main proceedings, of which the national court finds that the principal function which characterises the apparatus as a whole is the recording and reproduction of sounds, are not to be classified under that heading.

**Costs**

27 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:

**Heading 8521 of the Combined Nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87/EEC of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EC) No 1549/2006 of 17 October 2006, must be interpreted as meaning that MP3 media players, such as those at issue in the main proceedings, of which the national court finds that the principal function which characterises the apparatus as a whole is the recording and reproduction of sounds, are not to be classified under that heading.**

[Signatures]