JUDGMENT OF THE COURT (Fifth Chamber)
4 March 2004 *

In Case C-130/02,

REFERENCE to the Court under Article 234 EC by the Finanzgericht München (Germany) for a preliminary ruling in the proceedings pending before that court between

Krings GmbH

and

Oberfinanzdirektion Nürnberg,

first, on the interpretation of the Combined Nomenclature of the Common Customs Tariff ('the CN') in the version set out in Commission Regulation (EC) No 2031/2001 of 6 August 2001, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2001 L 279, p. 1) and, second, on the validity of Commission

* Language of the case: German.

Regulation (EC) No 306/2001 of 12 February 2001 concerning the classification of certain goods in the Combined Nomenclature (OJ 2001 L 44, p. 25),

THE COURT (Fifth Chamber),

composed of: A. Rosas (Rapporteur), acting for the President of the Fifth Chamber, A. La Pergola and S. von Bahr, Judges,

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

after considering the written observations submitted on behalf of:

— Krings GmbH, by G. Kroemer, Rechtsanwalt,

— the Commission of the European Communities, by J.C. Schieferer, acting as Agent, assisted by M. Núñez Müller, Rechtsanwalt,

having regard to the report of the Judge-Rapporteur,

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

gives the following

Judgment

1 By decision of 27 February 2002, received at the Court on 9 April 2002, the Finanzgericht München (Munich Finance Court) referred to the Court for a preliminary ruling under Article 234 EC two questions, first, on the interpretation of the Combined Nomenclature of the Common Customs Tariff in the version set out in Commission Regulation (EC) No 2031/2001 of 6 August 2001, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2001 L 279, p. 1, 'the CN'), and second, on the validity of Commission Regulation (EC) No 306/2001 of 12 February 2001 concerning the classification of certain goods in the [CN] (OJ 2001 L 44 , p. 25).

2 Those questions were raised in proceedings between Krings GmbH, a company registered under German law ('Krings'), and the Oberfinanzdirektion Nürnberg (Germany) (Nuremburg Regional Finance Office) on the tariff classification of two mixtures intended for the production of beverages with a basis of tea.

Legal background

3 Chapter 9 of the CN, relating to coffee, tea, maté and spices, includes heading 0902 (tea, whether or not flavoured), which contains subheading 0902 40 00 entitled 'Other black tea (fermented) and other partly fermented tea'. The goods covered by that subheading are exempt from customs duty.

4 Chapter 21 of the CN, relating to miscellaneous edible preparations, includes the following headings:

Code NC	Description of goods	Conventional rate of duty (%)
1	2	3
2101	Extracts, essences and concentrates, of coffee, tea or maté and preparations with a basis of these products or with a basis of coffee, tea or maté; roasted chicory and other roasted coffee substitutes, and extracts, essences and concentrates thereof:	
[...]	[...]	[...]
2101 12	— — Preparations with a basis of these extracts, essences or concentrates or with a basis of coffee	
2101 12 92	— — — Preparations with a basis of these extracts, essences or concentrates of coffee	11,5
[...]	[...]	[...]
2101 20	— Extracts, essences and concentrates, of tea or maté, and preparations with a basis of these extracts, essences or concentrates, or with a basis of tea or maté:	
2101 20 20	— — Extracts, essences or concentrates	6
	— — Preparations:	
2101 20 92	— — — With a basis of extracts, essences or concentrates of tea or maté	6
2101 20 98	— — — Others	6,5 + EA
[...]	[...]	[...]
2106	Food preparations not elsewhere specified or included:	
[...]	[...]	[...]
2106 90 98	— — — autres	9 + EA

5 In accordance with Article 9 of 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), most recently amended by Regulation (EC) No 2559/2000, the Commission adopted Regulation (EC) No 306/2001.

6 Article 1 of Regulation No 306/2001 provides:

'The goods described in column 1 of the annexed table are classified within the Combined Nomenclature under the CN codes indicated in column 2 of the said table.'

7 That regulation contains an annex, points 2 and 3 of which provide as follows:

Description of goods (1)	Classification (CN code) (2)	Reasons (3)
[...]	[...]	[...]
2. A product known as 'lemon tea', in powdered form, for the preparation of tea, with the following composition (percentage by weight): — sugar: 90.1 — tea extract: 2.5 and small quantities of malto-dextrin, citric acid, lemon flavouring and an anti-caking agent	2101 20 92	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the Combined Nomenclature, and by the wording of CN codes 2101, 2101 20 and 2101 20 92
The product is intended to be consumed as a beverage after mixing with water		The product is considered to be a preparation based on tea extract with added sugar in accordance with the HS Explanatory Note to heading 2101, first paragraph, point 3
3. Liquid product for the preparation of tea with the following analytical composition (percentage by weight): — sugar: 58.1 (94% calculated on dry matter) — water: 38.8 — tea extract: 2.2 — trisodium citrate: 0.9	2101 20 92	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the Combined Nomenclature, and by the wording of CN codes 2101, 2101 20 and 2101 20 92
The product is intended to be consumed as a beverage after mixing with water		The product is considered to be a preparation based on tea extract with added sugar in accordance with the HS Explanatory Note to heading 2101, first paragraph, point 3
[...]	[...]	[...]

8 Points 1 to 3 of Section IV, Chapter 21 of the Explanatory Notes of the Harmonised Commodity Description and Coding System ('the Harmonised System'), entitled 'Miscellaneous Edible Preparations', relating to heading 2101 state:

'The heading covers:

(1) Coffee extracts, essences and concentrates. These may be made from real coffee (whether or not caffeine has been removed) or from a mixture of real coffee and coffee substitutes in any proportion. They may be in liquid or powder form, usually highly concentrated. This group includes products known as instant coffee. This is coffee which has been brewed and dehydrated or brewed and then frozen and dried by vacuum.

(2) Tea or maté extracts, essences and concentrates. These products correspond, *mutatis mutandis*, to those referred to in paragraph (1).

(3) Preparations with a basis of the coffee, tea or maté extracts, essences or concentrates of paragraphs (1) and (2) above. These are preparations based on extracts, essences or concentrates of coffee, tea or maté (and not on coffee, tea or maté themselves), and include extracts, etc., with added starches or other carbohydrates.'

9 As regards subheading 2101 12 of the Harmonised System, on Preparations with a basis of these extracts, essences or concentrates or with a basis of coffee, the Customs Cooperation Council adopted a Classification Opinion in the following terms:

'1. Preparation with a basis of coffee, composed of 98.5% soluble coffee (coffee brewed and then dehydrated) and 1.5% stevioside (non-calorific sweetener)'.

10 The general rules for the interpretation of the CN, which are set out in Part One thereof, under Title I, Part A, provide in particular:

'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:

2. ...

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a

given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

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.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.'

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

11 On 9 August 2000, Krings applied to the Oberfinanzdirektion Hamburg (Germany), responsible under the German customs authority for the application of Chapter 9 of the CN, for the issue of two binding tariff informations in respect of two mixtures for making beverages with a basis of tea. Krings claimed that those goods should be classified under subheading 0902 40 00 of the CN. The Oberfinanzdirektion Hamburg referred that application to the Oberfinanzdirektion Nürnberg, which is competent in respect of goods falling under Chapter 21 of the CN.

12 According to the information provided by Krings to the customs authorities, the goods in question each consist of a mixture of 64% granulated sugar, 1.9% extract of tea and water. One of those two mixtures also contains 0.8% citric acid.

13 The inspection carried out by the Zolltechnischen Prüfungs- und Lehranstalt München (Munich Testing and Training Establishment for Technical Customs Matters, 'the ZPLA') established that those mixtures were dark-brown, sweet, syrupy liquids, (the mixture containing citric acid was also acidic), which taste mildly of tea and have a caffeine content (HPLC) of 59mg/100g and 43mg/100g. On the basis of the caffeine content, the ZPLA calculated that those mixtures contained 1% to 2.4% by total weight and 0.7% to 1.7% by total weight of extract of tea respectively. On the basis of their low content of black-tea extract, it recommended that those products be classified under subheading 2106 90 98 of the CN (relating to Food preparations not elsewhere specified or included).

14 On 4 October 2000, the Oberfinanzdirektion Nürnberg issued two binding tariff informations numbered DE M/1895/00-1 and DE M/1896/00-1, classifying the goods in question under subheading 2106 90 98 of the CN.

15 By decision of 30 July 2001, the Oberfinanzdirektion Nürnberg dismissed Krings' complaints against those binding tariff informations. Krings then brought an action before the Finanzgericht München in which it claimed that the disputed goods ought to be classified under heading 2101 of the CN. According to Krings, Heading 2106 is a residual heading which is only to be taken into consideration where no other heading of the CN applies. Heading 2101 is applicable in the present case since, according to its wording it covers, inter alia, extracts, essences and concentrates of tea and preparations with a basis of those products. Krings therefore claims that the decision of 30 July 2001 and the binding tariff informations issued on 4 October 2000 should be annulled, and the Oberfinanzdirektion Nürnberg should be compelled to classify the goods under subheading 2101 20 92.

16 The Finanzgericht München considers that a classification of the disputed goods under heading 0902 of the CN is not possible since those goods do not contain tea, as mentioned in that heading, but merely extract of tea. It points out, moreover, that extracts, essences and concentrates of tea are expressly referred to in heading 2101 of the CN and that subheading 2101 20, within heading 2101, refers to 'extracts, essences and concentrates ... of ... tea ... and preparations with a basis of these products'. According to the Finanzgericht München, the wording 'with a basis of' means that the concentrates in the tea are the wholly essential ingredient in the preparation and do not merely predominate or determine its character. That interpretation is confirmed by the Explanatory Notes of the Harmonised System in relation to subheading 2101 12 and by the arrangement of the CN subheadings, in which other ingredients are only of secondary quantitative importance. In a classification opinion, a preparation with a basis of extract of coffee consisted of 98.5% soluble coffee and 1.5% sweetener. However, in the present case, the disputed goods contain only very small quantities of tea — 1.9% according to Krings — which in any event are not the 'basis' of the mixtures at issue.

17 The Finanzgericht München also refers to the settled case-law of the Court (see, inter alia, Case C-121/95 *VOBIS Microcomputer* [1996] ECR I-3047, paragraph 13), according to which 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 Common Customs Tariff and of the notes to the sections or chapters. In the main proceedings, the information provided by the manufacturer that a minimum amount of 1.9% extract of tea is added to the goods in question cannot be verified. According to an expert witness who gave evidence before the Finanzgericht München, it is only possible to make vague and very imprecise assessments of the amount of extract of tea in such preparations. The referring court considers that heading 2101 of the CN, by using the expression 'with a basis of ... concentrates ... of tea', nevertheless indicates that the good must contain a significant quantity of concentrates of tea. It is not enough that the extract of tea or even merely the flavour of tea is characteristic of the preparation.

18 The Finanzgericht München states in that regard that when the members of that court carried out a tasting of the disputed goods they were unable to detect a distinct tea flavour.

19 In its view, contrary to the opinion of the Bundesministerium für Finanzen (Austrian Federal Ministry of Finance) in a letter of 28 February 2002, placed on the file by Krings, it does not matter whether the disputed products meet the criteria laid down by national food law on preparations intended for the manufacture of drinks with a basis of tea. The Finanzgericht München does not consider it likely that, after it has been diluted to make it drinkable, the concentrated sugar-syrup at issue in the present case still has the required tea content. In any event, not every preparation which includes concentrate of tea falls within subheading 2101 20 92 of the CN merely because it contains that substance.

20 The Finanzgericht München considers, however, that it is not free to decide the dispute in the main proceedings accordingly because, in Regulation No 306/2001, the Commission classified similar products under subheading 2101 20 92 and

deemed the preparations in question, which have a basis of sugar and contain extract of tea, as being preparations 'with a basis of tea extract' with 'added sugar'. The Finanzgericht München therefore considers it necessary to refer to the Court for a preliminary ruling a question on the validity of that regulation.

21 In those circumstances the Finanzgericht München decided to stay the proceedings and refer to the Court for a preliminary ruling the following questions:

'1. Is the [CN] to be interpreted as meaning that mixtures of:

(a) 64% granulated sugar, 1.9% tea extract and water and

(b) 64% granulated sugar, 1.9% tea extract, 0.8% citric acid and water

are not preparations with a basis of extract of tea?

2. Is Regulation [No 306/2001] valid in respect of the products identified at points 2 and 3 of the table set out in the annex thereto?'

The questions referred

22 It should be noted as a preliminary point that the dispute in the main proceedings concerns the tariff classification of two mixtures intended for the production of beverages with a basis of tea and that, as the Finanzgericht München stated in its referral decision, similar goods have been classified in subheading 2101 20 92 of the CN (relating to preparations with a basis of extracts, essences or concentrates of tea or maté) by Regulation No 306/2001, adopted by the Commission in accordance with Article 9 of Regulation No 2658/87. In the present case, the national court considers that, on the basis of the low content of extract of tea in the disputed goods, they cannot be classified under subheading 2101 20 92 of the CN and, in that context, it questions the validity of Regulation No 306/2001.

23 It should also be stated that the two questions referred to the Court raise a problem of interpretation of subheading 2101 20 92 of the CN. Moreover, by the two questions referred for a preliminary ruling, the Finanzgericht München should be understood to be asking, essentially, whether Regulation No 306/2001 is valid in so far as it classifies under subheading 2101 20 92 of the CN certain goods whose content of extract of tea does not exceed 2.5% and 2.2% of the total weight respectively and whether that classification is applicable by analogy to two mixtures intended for the production of beverages with a basis of tea, both composed of 64% granulated sugar and 1.9% extract of tea and water, to which is added, in one of the mixtures, 0.8% citric acid.

24 In relation to the second question submitted by the referring court, Krings and the Commission submit that Regulation No 306/2001 complies with the CN and that the goods in issue in the main proceedings, similar to those covered by that regulation but with an even lower content of extract of tea, namely 1.9% of the total weight, also fall within subheading 2101 20 92 of the CN.

25 It should be pointed out in that connection that a classification regulation, such as, in this case, Regulation No 306/2001, is adopted by the Commission on the advice of the Customs Code Committee where the classification in the CN of a particular product is such as to give rise to difficulty or to be a matter for dispute (see Case C-119/99 *Hewlett Packard* [2001] ECR I-3981, paragraph 18).

26 According to the case-law of the Court, the Council has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, a broad discretion to define the subject-matter of tariff headings falling to be considered for the classification of particular goods. However, the Commission's power to adopt the measures mentioned in Article 9 of Regulation No 2658/87 does not authorise it to alter the subject-matter or the scope of the tariff headings (see, to that effect, Case C-267/94 *France* v *Commission* [1995] ECR I-4845, paragraphs 19 and 20, and Case C-309/98 *Holz Geenen* [2000] ECR I-1975, paragraph 13).

27 It is therefore necessary to consider whether subheading 2101 20 92 of the CN must be interpreted as covering goods having a low content of extract of tea, such as those described in points 2 and 3 of the table set out in the annex to Regulation No 306/2001.

28 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. The Explanatory Notes drawn up, as regards the CN, by the Commission and, as regards the Harmonised System, by the Customs Cooperation Council may be an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (see *VOBIS Microcomputer*, cited above, paragraph 13; Case C-405/97 *Mövenpick Deutschland* [1999] ECR I-2397, paragraph 18, and *Holz Geenen*, cited above, paragraph 14).

29 The wording of heading 2101 of the CN refers, inter alia, to preparations with a basis of extracts, essences or concentrates of tea. As Krings and the Commission rightly submitted, neither the wording of heading 2101 in the CN or in the Harmonised System, nor the structure of the subheadings prescribe the minimum tea content of the preparations referred to therein. Contrary to the opinion of the referring court, there is no objective factor which requires tea to be the main ingredient of such preparations. It suffices that extract or concentrate of tea is used in their manufacture as an essential ingredient, conferring on those food preparations their distinctive character.

30 In addition, according to the case-law of the Court, 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 *Holz Geenen*, cited above, paragraph 15).

31 The present case is concerned with products intended to be consumed as beverages with a basis of tea after simple mixing of the extract or concentrate of tea with water. According to Krings and the Commission, the composition of those products is adapted to their final consumption and complies with the rules followed by the manufacturers of beverages with a basis of tea. In those circumstances, the intended use of the disputed products supports their classification under subheading 2101 20 92 of the CN.

32 Consequently, the answer to the referring court's second question must be that examination of that question has not revealed any factors affecting the validity of Regulation No 306/2001, in so far as it classifies under subheading 2101 20 92 of the CN, in the version set out in Commission Regulation (EC) No 2031/2001 of 6 August 2001, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, the products described in points 2 and 3 of the table set out in the annex thereto.

33 As regards the first question, which asks whether the disputed products in the main proceedings must also be classified under subheading 2101 20 92 of the CN, it should be noted that a classification regulation is of general application in so far as it does not apply to an individual trader but, in general, to products which are the same as that examined by the Customs Code Committee. In the interpretation of a classification regulation, in order to determine its scope, account must be taken, inter alia, of the reasons given (*Hewlett Packard*, cited above, paragraphs 19 and 20).

34 It is true that Regulation No 306/2001 is not directly applicable to the disputed products in the main proceedings. It does not concern products identical to those covered by the regulation since, inter alia, they have a marginally lower extract of tea content, namely 1.9% of the total weight.

35 Nevertheless, as the Commission rightly submitted, the application by analogy of a classification regulation, such as Regulation No 306/2001, to products similar to those covered by that regulation facilitates a coherent interpretation of the CN and the equal treatment of traders.

36 According to the reasons given for the products described at points 2 and 3 of the table in the annex to Regulation No 306/2001, those products are to be considered as preparations based on tea extract with added sugar notwithstanding the fact that one of them is composed of 90.1% sugar and 2.5% extract of tea and the other of 58.1% sugar and 2.2% extract of tea. Those reasons apply also to the disputed products in the main proceedings, which are composed of 64% granulated sugar and 1.9% extract of tea.

37 The fact that the members of the referring court experienced difficulties in detecting the taste of tea in those products does not preclude their being classified under subheading 2101 20 92 of the CN. It should be pointed out that the binding

tariff informations relating to those products state that they taste mildly of tea. Moreover, neither the wording of heading 2101, nor the Explanatory Notes thereto disclose that a distinct taste of tea, coffee or maté is required in order for a product to be classified under that tariff heading.

38 Accordingly, the answer to the first question must be that the classification decided by the Commission in Regulation No 306/2001 in respect of the products identified at points 2 and 3 of the table set out in the annex to that regulation is applicable by analogy to two mixtures intended for the production of beverages with a basis of tea, both composed of 64% granulated sugar and 1.9% extract of tea and water, to which is added, in one of the two mixtures, 0.8% citric acid.

Costs

39 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Finanzgericht München by decision of 27 February 2002, hereby rules:

1. **Examination of the second question has not revealed any factors affecting the validity of Commission Regulation (EC) No 306/2001 of 12 February 2001**

concerning the classification of certain goods in the Combined Nomenclature, in so far as it classifies the products described in points 2 and 3 of the table set out in the annex thereto under subheading 2101 20 92 of the Combined Nomenclature of the Common Customs Tariff in the version set out in Commission Regulation (EC) No 2031/2001 of 6 August 2001, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

2. The classification decided by the Commission of the European Communities in Regulation No 306/2001 in respect of the products identified at points 2 and 3 of the table set out in the annex to that regulation is applicable by analogy to two mixtures intended for the production of beverages with a basis of tea, both composed of 64% granulated sugar and 1.9% extract of tea and water, to which is added, in one of the two mixtures, 0.8% citric acid.

Rosas La Pergola von Bahr

Delivered in open court in Luxembourg on 4 March 2004.

R. Grass V. Skouris

Registrar President