JUDGMENT OF THE COURT (Third Chamber)

7 May 2009 *

In Case C-150/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 21 March 2008, received at the Court on 14 April 2008, in the proceedings

Siebrand BV

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues, J. Klučka (Rapporteur) and A. Arabadjiev, Judges,

* Language of the case: Dutch.

Advocate General: J. Kokott,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 4 March 2009,

after considering the observations submitted on behalf of:

— Siebrand BV, by G.J. Slooten, advocaat,

— the Netherlands Government, by C.M. Wissels and M. Noort, acting as Agents,

— the Greek Government, by I. Bakopoulos, O. Patsopoulou and M. Tassopoulou, acting as Agents,

— the United Kingdom Government, by V. Jackson, acting as Agent, assisted by K. Beal, Barrister,

— the Commission of the European Communities, by A. Sipos and W. Roels, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the Combined Nomenclature ('CN') 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 the course of proceedings between Siebrand BV, a company established in Kampen (Netherlands) ('Siebrand') and the Staatssecretaris van Financiën (State Secretary for Finance) relating to eight notices of additional assessment to excise duty on three alcoholic beverages produced by Siebrand, in respect of the period between July 2003 and February 2004.

Legal context

3 The notices of additional assessment at issue in the main proceedings were issued in accordance with the Netherlands Law on excise duties (Wet op de accijns), which transposed 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).

4 For the purposes of defining the categories of products subject to excise duty at the rate laid down in Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ 1992 L 316, p. 29), Article 26 of Directive 92/83 refers to the CN in force when Directive 92/83 was adopted.

The CN

5 The CN 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, established by the International Convention concluded at 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).

6 According to Article 3(1)(a) of Regulation No 2658/87, the CN is identical to the HS as regards the first six digits of the headings and subheadings.

7 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:

'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. … The classification of goods consisting of more than one material … 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 … goods …, 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 … which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material … which gives them their essential character in so far as this criterion is applicable.

…'

8 As regards the goods at issue in the main proceedings, the CN includes Section IV entitled 'Prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes'. That section includes, in particular, chapter 22 headed 'Beverages, spirits and vinegar'. Chapter 22, in turn, contains heading 2206: 'Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included', and heading 2208: 'Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages …'

9 In accordance with Article 9(1)(a), second indent, and Article 10 of Regulation No 2658/87, the Commission of the European Communities produces explanatory notes to the CN ('explanatory notes to the CN').

10 The explanatory note to the CN relating to heading 2206 states in regard to the 'other' products falling in subheadings 2206 00 31 to 2206 00 89:

'These subheadings include the products described in the HS Explanatory Notes to heading 2206, second paragraph, (1) to (10).'

11 The concept of beverages which are 'still, in containers holding', referred to in subheadings 2206 00 51 to 2206 00 89, is clarified in the explanatory note to the CN relating to heading 2206 as follows:

'These subheadings include beverages which are not the product of the natural fermentation of the must of fresh grapes but are produced from concentrated grape must. This must is stable and can be stored for use as required.

The fermentation process is usually started with yeast. Sugar may also be added to the must before or during fermentation. The product obtained by this process may finally be sweetened, fortified or blended.'

12 The explanatory note to 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.

The various spirituous beverages are described in the HS Explanatory Notes to heading 2208, third paragraph, (1) to ([17]).

As regards undenatured spirits, it should be noted that they remain classified in this heading even if they have an alcoholic strength of 80% vol or higher, whether or not the product is ready for consumption as a drink.

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

The HS

13 Under Article 3(1) of the international HS Convention of 14 June 1983, each contracting party undertakes to ensure that its customs tariff and statistical nomenclatures will be in conformity with the HS. The contracting parties must therefore use all of the headings and subheadings of the HS without addition or modification, together with their related codes, and follow the numerical sequence of that system. Article 3(1) states that the contracting parties also undertake 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 their scope.

14 The World Customs Organisation produces explanatory notes to the HS (the 'HS explanatory notes'). The HS explanatory note relating to heading 2206 of the CN states:

'This heading covers all fermented beverages other than those in headings 2203 to 2205.

It includes inter alia:

(1) Cider, an alcoholic beverage obtained by fermenting the juice of apples.

…

All these beverages may be either naturally sparkling or artificially charged with carbon dioxide. They remain classified in the heading when fortified with added alcohol or when the alcohol content has been increased by further fermentation, provided that they retain the character of products falling in the heading.

This heading also covers mixtures of non-alcoholic beverages and fermented beverages and mixtures of fermented beverages of the foregoing headings of Chapter 22, e.g., mixtures of lemonade and beer or wine, mixtures of beer and wine, having an alcoholic strength by volume exceeding 0.5% vol.

…’

15 The HS explanatory note relating to heading 2208 states:

‘The heading covers, whatever their alcoholic strength:

(A) Spirits produced by distilling wine, cider or other fermented beverages or fermented grain or other vegetable products, without adding flavouring; they retain, wholly or partly, the secondary constituents (esters, aldehydes, acids, higher alcohols, etc.) which give the spirits their peculiar individual flavours and aromas.

(B) Liqueurs and cordials, being spirituous beverages to which sugar, honey or other natural sweeteners and extracts or essences have been added (e.g., spirituous beverages produced by distilling, or by mixing, ethyl alcohol or distilled spirits, with one or more of the following: fruits, flowers or other parts of plants, extracts, essences, essential oils or juices, whether or not concentrated). These products also include liqueurs and cordials containing sugar crystals, fruit juice liqueurs, egg liqueurs, herb liqueurs, berry liqueurs, spice liqueurs, tea liqueurs, chocolate liqueurs, milk liqueurs and honey liqueurs.

(C) All other spirituous beverages not falling in any preceding heading of this Chapter.’

16 By way of example of the products referred to, the explanatory note mentions, inter alia:

‘…

(7) The liqueurs known as “crèmes”, because of their consistency or colour. They are generally of relatively low alcoholic content and very sweet (for example, creams of cocoa, bananas, vanilla, coffee). The heading also covers spirits consisting of emulsions of spirit with products such as egg yolk or cream.

(8) Ratafias. These are kinds of liqueurs obtained from fruit juice; they often contain a small quantity of added aromatic substances (ratafias of cherries, of black currants, of raspberries, of apricots, etc.).

…

(15) Fruit or vegetable juices containing added alcohol and of an alcoholic strength by volume exceeding 0.5% vol, other than products of heading 2204.

…

(17) Beverages formulated to simulate wine by mixing distilled spirits with fruit juice and/or water, sugar, colouring, flavouring or other ingredients, other than products of heading 2204.'

17 Paragraph VIII of the HS explanatory note relating to general rule 3(b) states that the factor which determines essential character may, as between different kinds of goods, be determined, for example, by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The main proceedings and the questions referred for a preliminary ruling

18 Siebrand is a company which produces alcoholic and non-alcoholic beverages. It produces, inter alia, three alcoholic beverages called 'Pina Colada', 'Whiskey Cream' and 'Apfel Cocktail' respectively. These are produced from a cider base to which distilled alcohol, water, sugar syrup, various aromas and colourings are added, and, in the case of Pina Colada and Whiskey Cream in particular, a cream base. The three beverages have an alcoholic strength by volume of 14.5%, of which 12% is attributable to the distilled alcohol and 2.5% to the alcohol obtained by the fermentation of apple concentrate.

19 Until 1 January 2003, the products in question were classified by the inspector of taxes ('the Inspector') under heading 2206 of the CN, which also determined the rate of excise duty applicable to them. However, in accordance with the decision of the Staatssecretaris van Financiën of 15 January 2003, the Inspector adopted the stance that, in view of the alcoholic strength by volume and the nature of the products in question, these beverages should be classified with effect from 1 January 2003 under heading 2208 of the CN. This resulted in a higher rate of excise duty.

20 Although the Inspector deferred the application of the new rate until 1 July 2003, he issued Siebrand with eight notices of additional assessment for the period between July 2003 and February 2004. Siebrand objected to those notices of assessment, but the Inspector maintained his stance in his decision on the objection.

21 Siebrand then brought an action before the Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem), which held that the products in question should be classified under heading 2208 of the CN.

22 Hearing the case on Siebrand's appeal against that judgment, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Can a beverage which contains a certain amount of distilled alcohol but which otherwise corresponds to the definition of heading 2206 of the [CN] be classified under that heading if the beverage in question is a fermented beverage which, as a result of the addition of water and particular ingredients, has lost the taste, smell and/or appearance of a beverage produced from a particular fruit or natural product?

2. In the event of a positive answer to Question 1, what criterion should govern the determination as to whether the beverage is nevertheless to be classified under heading 2208 of the CN on the ground that it contains distilled alcohol?'

The questions referred for a preliminary ruling

23 By its questions, which it is appropriate to consider together, the national court asks, in essence, whether fermented alcohol-based beverages corresponding originally to heading 2206 of the CN, to which a certain proportion of distilled alcohol, water, sugar syrup, aromas, colourings and, in some cases, a cream base have been added, resulting in the loss of the taste, smell and/or appearance of a beverage produced from a particular fruit or natural product, come under heading 2206 of the CN as fermented beverages or under heading 2208 of the CN as distillates.

24 In that regard, it is appropriate to bear in mind settled case-law, in accordance with which, 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 Joined Cases C-362/07 and C-363/07 *Kip Europe and Others* [2008] ECR I-9489, paragraph 26).

25 The notes preceding the chapters of the Common Customs Tariff, in common, moreover, with the explanatory notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the World Customs Organisation, may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force (*Olicom*, paragraph 17; Case C-486/06 *Van Landeghem* [2007] ECR I-10661, paragraph 25; and Case C-403/07 *Metherma* [2008] ECR I-8921, paragraph 48).

26 It must be pointed out that, according to the HS explanatory note relating to heading 2206 of the CN, the addition of alcohol to beverages coming under that heading does not preclude such beverages from retaining that classification provided that they retain the character of products coming under the heading, namely that of fermented beverages.

27 However, it is apparent from the order for reference that the beverages at issue in the main proceedings have lost the taste, smell and appearance of a beverage produced from a particular fruit or natural product, that is to say a fermented beverage. Such products cannot be classified in heading 2206 of the CN.

28 As regards the classification of such products, it should be borne in mind that, according to general rule 2(b), any reference in a heading to a material or substance is to be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. That is the case in regard to products such as those at issue in the main proceedings, which contain fermented alcohol and also distilled alcohol. Those substances come under different tariff headings.

29 General rule 3(a) states that when by application of rule 2(b) goods are prima facie classifiable under two or more headings, the heading which provides the most specific description is to be preferred to headings providing a more general description.

30 Where products such as those at issue in the main proceedings are composed of different materials and neither of the two headings mentioned above is more specific than the other, the sole provision to which recourse may be had for the purpose of classifying the goods at issue in the main proceedings is general rule 3(b) (see Case 253/87 *Sportex* [1988] ECR 3351, paragraph 7, and Case C-250/05 *Turbon International* [2006] ECR I-10531, paragraph 20).

31 Under general rule 3(b), in carrying out the tariff classification of goods it is necessary to identify, from among the materials of which they are composed, the one which gives them their essential character (see Case C-288/99 *VauDe Sport* [2001] ECR I-3683, paragraph 25; Case C-276/00 *Turbon International* [2002] ECR I-1389, paragraph 26; and Case C-250/05 *Turbon International*, paragraph 21).

32 Consequently, it is necessary to identify, from among the materials of which products such as those at issue in the main proceedings are composed, the one which gives them their essential character.

33 It is apparent from the order for reference that these products are made from cider, to which are added distilled alcohol, water, sugar in the form of syrup, various aromas and colourings and, in the case of Pina Colada and Whiskey Cream, a cream base. The end products have an alcoholic strength by volume of 14.5%, 2.5% from alcohol fermented from cider and 12% from added distillate.

34 As stated in paragraph VIII of the HS explanatory note in relation to general rule 3(b), the factor which determines essential character may, as between different kinds of goods, be determined, for example, by the nature of the material or component, by its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

35 So far as products such as those at issue in the main proceedings are concerned, a number of objective characteristics and properties may be taken into account in determining their essential character. Thus, first of all, it must be established that distilled alcohol accounts for not only more of their total volume but also more of their alcohol content than fermented alcohol.

36 Second, it is necessary to ascertain whether the particular organoleptic characteristics of those products correspond to those of the products classified in heading 2208 of the CN. The Court has consistently held that taste can constitute an objective characteristic or property of a product (see, to that effect, Case C-124/03 *Artrada and Others* [2004] ECR I-10297, paragraph 41, and Case C-196/05 *Sachsenmilch* [2006] ECR I-5161, paragraph 37).

37 In that regard, as has already been stated, products such as those at issue in the main proceedings have, as a result of the addition of water and other substances, lost the taste, smell and appearance of a beverage produced from a particular fruit or natural product, that is to say a fermented beverage. The particular organoleptic characteristics of those products, which define their essential character, therefore correspond to those of products classified in heading 2208 of the CN.

38 Finally, it is important to note that 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; Case C-396/02 *DFDS* [2004] ECR I-8439, paragraph 29; and Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36). It is common ground that the objective characteristics and properties of products such as those at issue in the main proceedings, including the form, colour and name under which they are marketed, correspond to those of a spirituous beverage.

39 It follows from this that the essential characteristics of beverages such as those at issue in the main proceedings correspond overall to those of a product coming under heading 2208 of the CN.

40 Taking the foregoing considerations into account, the answer to be given to the questions referred is that fermented alcohol-based beverages corresponding originally to heading 2206 of the CN, to which a certain proportion of distilled alcohol, water, sugar syrup, aromas, colourings and, in some cases, a cream base have been added, resulting in the loss of the taste, smell and/or appearance of a beverage produced from a particular fruit or natural product, do not come under heading 2206 of the CN but rather under heading 2208 thereof.

Costs

41 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:

Fermented alcohol-based beverages corresponding originally to heading 2206 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 (EEC) No 2587/91 of 26 July 1991, to which a certain proportion of distilled alcohol, water, sugar syrup, aromas, colourings and, in some cases, a cream base have been added, resulting in the loss of the taste, smell and/or appearance of a beverage produced from a particular fruit or natural product, do not come under heading 2206 of the Combined Nomenclature but rather under heading 2208 thereof.

[Signatures]