JUDGMENT OF THE COURT (Seventh Chamber)

19 April 2007 *

In Case C-229/06,

REFERENCE for a preliminary ruling under Article 234 EC, from the Finanzgericht Hamburg (Germany), made by decision of 26 April 2006, received at the Court on 22 May 2006, in the proceedings

Sunshine Deutschland Handelsgesellschaft mbH

v

Hauptzollamt Kiel,

THE COURT (Seventh Chamber),

composed of J. Klučka, President of the Chamber, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Sunshine Deutschland Handelsgesellschaft mbH, by P. Klose, Rechtsanwalt,

— the Netherlands Government, by H.G. Sevenster and P. van Ginneken, acting as Agents,

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

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 subheadings 1209 91 90 and 1212 99 80 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 1789/2003 of 11 September 2003 (OJ 2003 L 281, p. 1) ('the CN').

2 The reference has been made in proceedings between Sunshine Deutschland Handelsgesellschaft mbH ('Sunshine') and Hauptzollamt (Principal Customs Office) Kiel (Germany) on the subject of the CN classification of shelled pumpkin seeds which have lost their ability to germinate and are intended for the baking industry.

Legal context

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) and established by the International Convention concluded at 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). The CN takes six-digit headings and subheadings

from the HS, only the seventh and eighth digits forming subdivisions that are specific to it.

4 Part 2 of the CN has a Section II entitled 'Vegetable products', which is comprised of several chapters, including chapter 12 entitled 'Oil seeds and oleaginous fruits; miscellaneous grains, seeds and fruit; industrial or medicinal plants; straw and fodder'.

5 Heading 1209 entitled 'Seeds, fruit and spores, of a kind used for sowing' contains a subheading 1209 91 entitled 'Vegetable seeds', which itself contains the subheading 1209 91 90 ('Other').

6 Heading 1212 entitled '... fruit stones and kernels and other vegetable products ..., of a kind used primarily for human consumption, not elsewhere specified or included' contains a subheading 1212 99 entitled 'Other', which itself contains a subheading 1212 99 80 ('Other').

7 The general rules of interpretation of the CN, which are in Part 1, Section I, A, of the CN, state, inter alia:

'Classification of goods in the Combined Nomenclature 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.

...'

8 The explanatory notes to the CN published by the Commission of the European Communities in accordance with Article 9(1) of Regulation No 2658/87, in the version applicable at the date of the facts in the main proceedings (OJ 2002 C 256, p. 1), provide the following information:

'... 1209 Seeds, fruits and spores of a kind used for sowing

...

1209 91 90 Other

This subheading includes the seeds of pumpkins cultivated as vegetables when used for sowing, for eating (e.g., in salads), in the food industry (e.g., in bakery products) or for medicinal purposes.

...

1212	... fruit stones and kernels and other vegetable products ..., of a kind used primarily for human consumption, not elsewhere specified or included

...

1212 99 80	Other

In addition to the products cited ..., this subheading includes:

...

Pumpkin seeds (heading 1207 or 1209) are not included in this subheading ...'

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

9 Sunshine has as its business the marketing of foodstuffs. It imports, from inter alia China, shelled pumpkin seeds which have lost their ability to germinate and are intended for the baking industry for use in bread.

10 On 4 March 2004 it made a customs declaration at the customs office in Mölln (Germany) and requested the entry into free circulation of a consignment of shelled pumpkin seeds, citing subheading 1209 91 90 of the CN, for which a conventional duty rate of 3% is prescribed. That customs office accepted the customs declaration and by decision of 10 March 2004 fixed the customs duties at EUR 825.95, this amount being eventually reduced to EUR 782.09.

11 Having learned that, by a judgment of 23 May 2004, the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal) (Netherlands) had decided that shelled pumpkin seeds intended for use in human foodstuffs should be classified under subheading 1212 99 80 of the CN, and were thus exempt from customs duty, Sunshine requested reimbursement of the duties it had paid following the decision of the Mölln customs office.

12 By decision of 16 February 2005 the Hauptzollamt Kiel rejected the request for reimbursement, confirming that the goods should be classified under subheading

1209 91 90. Following the dismissal of the objection which it had filed against that decision, Sunshine brought the matter before the Finanzgericht (Finance Court) Hamburg (Germany).

13 Before this court, Sunshine requested reimbursement of the customs duties, arguing that the goods should be classified under subheading 1212 99 80 of the CN, relying on the judgment of 23 May 2004 of the Gerechtshof te Amsterdam and on binding tariff information from the Netherlands customs administration of 24 February 2005, according to which shelled pumpkin seeds should be classified under the latter subheading.

14 In its decision to refer, the Finanzgericht Hamburg states that, in a judgment of 21 July 2005, it decided, on the basis of the explanatory notes to the CN, that shelled pumpkin seeds which are not intended for sowing but for use in the baking industry should be classified under subheading 1209 91 90 of the CN. The Finanzgeright Hamburg considers, however, that the position taken by the Netherlands Gerechtshof and the Netherlands customs administration is justifiable in so far as it seems that, according to the wording, heading 1209 of the CN concerns seeds, fruits and spores of a kind used for sowing and this wording is not inconsistent with that of the subheadings. The Finanzgericht Hamburg is therefore unsure as to whether the explanatory notes regarding heading 1209 are not contrary to the actual wording of that heading and whether these notes should not be set aside. It recalls, on this point, that, according to the case-law of the Court, though they may be an important aid to the interpretation of the scope of the various tariff headings, the explanatory notes drawn up by the Commission do not have legally binding force (Case C-143/96 *Knubben Speditions* [1997] ECR I-7039, paragraph 14).

15 It is in these circumstances that the Finanzgericht Hamburg decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Should shelled pumpkin seeds from pumpkins cultivated as vegetables, which have lost their ability to germinate and are intended for use in the baking industry, be classified under subheading 1209 91 90 of the Combined Nomenclature (CN) or under subheading 1212 99 80 of the CN?'

The question referred for a preliminary ruling

Observations submitted to the Court

16 Sunshine argues that, according to the case-law of the Court, the decisive criterion for the classification of goods for customs purposes is to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN. It cites paragraph 14 of the judgment in Case C-309/98 *Holz Geenen* [2000] ECR I-1975, in which the Court confirmed that the explanatory notes to the CN are an important aid to interpretation of the CN but do not have legally binding force.

17 Sunshine also points out that the Court has ruled that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product

(Case C-459/93 *Thyssen Haniel Logistic* [1995] ECR I-1381, paragraph 13), that inherent character being capable of being assessed on the basis of the product's objective characteristics and properties (*Holz Geenen*, paragraph 15).

18 Heading 1209 concerns seeds and the subheadings cover only goods intended for use as seeds. The seeds at issue in the main proceedings have lost their ability to germinate. The explanatory notes to the CN alone state that shelled pumpkin seeds which are intended for use in the food industry or for medicinal purposes should be classified under subheading 1209 91 90. There is, therefore, Sunshine submits, a contradiction between the wording of the CN and the explanatory notes relating to it.

19 Moreover, consideration of the explanatory notes to the CN suggests that the criterion determining classification of different pumpkin seeds in the various subheadings is their intended use, if this is inherent.

20 Thus, it submits, classification under subheading 1212 99 80 alone is possible. The goods at issue in the main proceedings are 'other vegetable products ... not elsewhere specified or included' within the meaning of heading 1212, notwithstanding the wording of the explanatory notes to the CN.

21 The Netherlands Government also takes the view that the goods at issue in the main proceedings should be classified under subheading 1212 99 80 of the CN. Those

seeds have lost their ability to germinate and can only be used as food. They are therefore kernels for human consumption within the meaning of heading 1212.

22 According to the Netherlands Government, it follows from the explanatory notes to the CN that seeds coming under subheading 1209 91 90, even if they can be used as food, must also be capable of being sown. This quality, however, is lacking in the goods at issue in the main proceedings. It is for this same reason that pumpkin seeds which may be sown are, according to the explanatory notes to the CN, excluded from subheading 1212 99 80.

23 The Commission, like Sunshine and the Netherlands Government, considers that the goods at issue should be classified under subheading 1212 99 80 of the CN. Because of the laconic wording of the two relevant subheadings, it is necessary to refer to the headings themselves.

24 Heading 1209 concerns only seeds, that is to say, the elements which allow the creation of a new plant. Furthermore, those seeds must be capable of being sown. In this instance, the pumpkin seeds at issue in the main proceedings have lost their ability to germinate. Heading 1212 is the residual heading. As they are not classifiable under other headings, the pumpkin seeds at issue in the main proceedings come under heading 1212.

25 The Commission points out that the explanatory notes to the CN in regard to heading 1209 were taken from the English version of the CN, which suggests that

seeds need not be exclusively intended for sowing but must simply have an identical constitution to that of seeds used for sowing. On the other hand, the other language versions state that the seeds must be capable of being sown. In light of these significant linguistic differences, the Commission proposes that account not be taken of the explanatory notes to the CN.

Reply of the Court

26 It is first necessary to point out that it is settled case-law 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 the section and chapter notes (see, inter alia, Case C-42/99 *Eru Portuguesa* [2000] ECR I-7691, paragraph 13; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 47; Case C-445/04 *Possehl Erzkontor* [2005] ECR I-10721, paragraph 19; and Case C-500/04 *Proxxon* [2006] ECR I-1545, paragraph 21).

27 Second, the Court has already held that the explanatory notes to the CN and those to the HS are, for their part, an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those notes must therefore be consistent with the provisions of the CN and cannot alter their scope (see *Intermodal Transports*, paragraph 48; *Possehl Erzkontor*, paragraph 20; and *Proxxon*, paragraph 22).

28 Finally, it must be borne in mind that, according to the Court's case-law, 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-201/99 *Deutsche Nichimen* [2001] ECR I-2701, paragraph 20; Case C-130/02 *Krings* [2004] ECR I-2121, paragraph 30; and Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 23; and *Proxxon*, paragraph 31).

29 In the present case, it should be noted that the wording of subheadings 1209 91 90 and 1212 99 80 contain only the word 'Other', and therefore it is necessary to refer to the headings themselves, that is to say headings 1209 and 1212.

30 As the Commission has observed, it is apparent from the wording of heading 1209 ('Seeds, fruits and spores, of a kind used for sowing') that this heading relates only to plant matter having the ability to germinate and create a new plant. By contrast, heading 1212, which covers, inter alia, 'fruit stones and kernels and other vegetable products ..., of a kind used primarily for human consumption, not elsewhere specified or included', is a residual category covering plant seeds which are intended, not to be sown, but for human consumption.

31 Therefore, the explanatory notes to the CN, which exclude pumpkin seeds from subheading 1212 99 80 and place them under heading 1209, can only be understood as meaning that those pumpkin seeds of a kind used for sowing alone are excluded, and not seeds, such as those in the present case, which have been shelled and have lost their ability to germinate. There is otherwise no need to take account of those

explanatory notes, which include under subheading 1209 91 90 pumpkin seeds intended for human consumption or for the food industry.

32 In light of those considerations, the reply to the question referred must be that subheading 1212 99 80 of the CN must be interpreted as meaning that shelled pumpkin seeds which have lost their ability to germinate and which are intended for use in the baking industry come under that subheading.

Costs

33 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 (Seventh Chamber) hereby rules:

Subheading 1212 99 80 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 1789/2003 of 11 September 2003, must be interpreted as meaning that shelled pumpkin seeds which have lost their ability to germinate and which are intended for use in the baking industry come under that subheading.

[Signatures]