

Case C-192/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

27 February 2019

Referring court:

Gerechtshof Amsterdam (Netherlands)

Date of the decision to refer:

12 February 2019

Appellant:

Rensen Shipbuilding BV

Respondent:

Inspecteur van de Belastingdienst/Douane

Subject matter of the action in the main proceedings

Appeal to the Gerechtshof Amsterdam (Court of Appeal, Amsterdam) (Netherlands) following referral back by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of a dispute concerning import duties on ship hulls from the People's Republic of China. Following the referral, the only matter still in dispute is whether the hulls should be classified as sea-going vessels (8901 20 10 or 8901 90 10 of the CN; free of import duties) or as non-sea-going vessels (8901 20 90, 8901 90 91 or 8901 90 99 of the CN; rate of 1.7%).

Subject matter and legal basis of the request for a preliminary ruling

Request for a preliminary ruling under Article 267 TFEU on the interpretation of the term 'seagoing' in Additional note 1 to Chapter 89 of the Combined Nomenclature.

Question referred

Additional note 1 to Chapter 89 of the Combined Nomenclature provides that (inter alia) the CN subheadings 8901 20 10 and 8901 90 10, entitled ‘Seagoing’, are to be taken to apply only to vessels that are designed as seagoing. What should be understood by the term ‘seagoing’ in this context?

Provisions of EU law cited

Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (Combined Nomenclature): Additional note 1 to Chapter 89, general classification rules 1, 2(a) and 6

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (‘Community Customs Code’): Article 5(2)

Commission Regulation (EC) No 652/2007 of 8 June 2007 concerning the classification of certain goods in the Combined Nomenclature: Annex, point 3

Explanatory notes to the Combined Nomenclature of the European Union (OJ 2015 C 76, p. 1): explanatory note to Additional note 1 to Chapter 89

Provisions of national law cited

Koninklijk besluit van 8 maart 2007 betreffende binnenschepen die ook voor niet-internationale zeereizen worden gebruikt (België) (Royal Decree of 8 March 2007 on inland vessels that are also used for non-international sea voyages (Belgium))

Brief summary of the facts and the procedure in the main proceedings

- 1 In May and September 2009, the customs agent Cross Ocean C.V., as a direct representative within the meaning of Article 5(2) of the Community Customs Code, in the name and on behalf of Rensen Shipbuilding BV, shipbuilder, made declarations for the release of 27 hulls (‘hulls’) for free circulation. The hulls come from the People’s Republic of China.
- 2 Cross Ocean specified subheading 8901 90 10 of the Combined Nomenclature (‘CN’) on each declaration form. The declarations cite ‘hull’ as the goods description. Heading 8901 of the CN refers to vessels for the transport of persons and/or goods. Subheading 8901 90 10 relates in particular to seagoing vessels for the transport of goods (not being tankers). The rate of customs duty associated with that subheading is 0%. The hulls were released for free circulation subject to that rate.
- 3 Following a customs inspection of the declarations referred to in paragraph 1 at Rensen Shipbuilding in March 2012, the Inspector took the position that the hulls

should be regarded as hulls intended for the construction of inland vessels. The classification societies Bureau Veritas or Lloyd's Register issued a 'Certificate of Conformity' or a 'Certificate of Hull Construction' ('certificates') for 18 hulls. The certificates state that the hulls were built in accordance with shipbuilding standards for inland navigation. In addition, for 25 of the 27 hulls, an 'application for certification of inland vessels' was submitted to the Inspectie voor Verkeer en Waterstaat (Transport and Water Management Inspectorate), and in the Rensen Shipbuilding records a Rensen Shipbuilding contract was found for each hull with a buyer commissioning the construction and delivery of a vessel intended for use on European inland waterways.

- 4 The Inspector took the position that eight hulls had to be regarded as hulls intended for the construction of a tanker for inland navigation. According to the Inspector, such hulls had to be classified under subheading 8901 20 90 of the CN. The Inspector took the view that, of the remaining 19 hulls intended for the construction of a different type of cargo ship for inland navigation than a tanker, 13 should be classified under subheading 8901 90 99 of the CN as 'other vessels for the transport of goods, mechanically propelled', and six under subheading 8901 90 91 of the CN as 'other vessels for the transport of goods, not mechanically propelled'.
- 5 The rate of customs duty for the subheadings cited in paragraph 4 is 1.7%. By payment notification of 27 April 2012, the Inspector levied customs duties on Rensen Shipping in accordance with that rate.
- 6 By decision of 2 July 2013, the rechtbank Noord-Holland (District Court, Noord-Holland) (Netherlands) declared the action brought by Rensen Shipbuilding against the payment notification to be unfounded. The gerechtshof Amsterdam (Netherlands) confirmed that decision. In its judgment of 11 June 2015, the gerechtshof took as its starting point that, by the application of general classification rule 2(a) of the CN ('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'), the hulls should be classified as ships in Chapter 89 of the CN. It ruled that it follows from the commercial documents and certifications found in the Rensen Shipbuilding records that the (hulls) in question were designed and built (for) inland vessels for navigation on inland waterways. According to the gerechtshof, there is no question of seagoing vessels and the hulls must be classified in accordance with their nature under subheading 8901 20 90, 8901 90 91 or 8901 90 99 of the CN.
- 7 In its judgment of 30 June 2017, the Hoge Raad set aside the judgment of the gerechtshof Amsterdam and referred the case back to that gerechtshof, the referring court in this case.

Main submissions of the parties to the main proceedings

- 8 Rensen Shipbuilding relies on CN Additional note 1 to Chapter 89 of the CN, read in conjunction with the (last sentence of the) explanatory note of the European Union to that additional note. That explanatory note, in so far as is relevant here, reads as follows:

‘The expression “vessels, designed as seagoing” means vessels which, by reason of their construction and equipment, are capable of operating at sea even in bad weather (winds of about force 7 on the Beaufort scale).

[...]

The expression “seagoing vessels” means ships [...] which satisfy the above conditions, whether or not they are actually used mainly in coastal waters, in estuaries or on lakes, etc.’

- 9 According to Rensen Shipbuilding, the [additional] note, in combination with that explanatory note, should be interpreted as meaning that, for the purpose of classification as a seagoing vessel, the decisive factor is whether the hull is seaworthy, that is to say, suitable for navigating the sea, and not whether the fully completed ship is seagoing. In its assessment, the gerechtshof Amsterdam ought to have taken into account only the objective characteristics and properties of the hulls in the state in which they were at the time of importation, and not also the objective characteristics and properties of the ships which, on the basis of those hulls, were eventually delivered by Rensen Shipbuilding.
- 10 Rensen Shipbuilding claims that the hulls in question are suitable to be used as the hulls of seagoing vessels, because the hulls can indeed navigate the sea after being built into a ship. It has submitted expert statements to substantiate its claim. Two of the statements state that ships with dimensions such as those of the ships at issue in the present case should be capable of sailing up to about 21 miles from the coast under the aforementioned weather conditions.

Brief summary of the grounds for the referral

- 11 The Hoge Raad is of the opinion that, although the term hull [...] does not appear in the wording of the relevant headings of Chapter 89 of the CN, it follows from the World Customs Organization’s HS explanatory notes on Chapter 89 that, by the application of general classification rules 1 and 6, a ship’s hull must be classified under a subheading of 8901 20 or 8901 90 of the CN.
- 12 It follows from that view of the Hoge Raad that, for the purposes of the CN, a hull must be regarded as a ‘vessel’ and not as ‘an unfinished or incomplete vessel’ within the meaning of general classification rule 2(a). Consequently, for the purpose of determining the further CN subdivision under 8901 20 and 8901 90 respectively, namely ‘seagoing vessels’ or ‘other’, it is not significant that at the

time of importation there was an intention to build the hulls as inland vessels and that they have actually been built and used as inland vessels.

- 13 A finding that the hulls were not designed and built for navigating the high seas requires that it be established that, at the time of importation, the hulls did not have the objective characteristics and properties which would enable them to be used as the hull of a ship that would be able to transport cargo on the high seas in the severe weather conditions referred to in the CN explanatory note ('winds of about force 7 on the Beaufort scale'). It does not in itself follow from the certificates that the hulls cannot be classified as seagoing vessels under subheading 8901 20 10 or 8901 90 10. Although the certificates confirm that the hulls are suitable for inland navigation, the Hoge Raad does not understand why that justifies the conclusion that the hulls are not designed or built to be used as hulls of seagoing vessels.
- 14 It is common ground that the hulls are capable of being classified in the category 'other' (CN subheadings 8901 20 90, 8901 90 91 or 8901 90 99) because they are suitable for use as hulls for inland vessels (non-seagoing vessels). If it is established that the hulls are also suitable for use as hulls of seagoing vessels (CN subheadings 8901 20 10 or 8901 90 10), they should be classified under 'seagoing vessel'.
- 15 It is not in dispute between the parties that the hulls in question are unsuitable for use as hulls for vessels capable of crossing the oceans, laden, in the aforementioned weather conditions. The parties disagree on the question of how far from the coast it should be possible for a vessel to sail at sea in order for it to be 'seagoing' within the meaning of Additional note 1 of the CN to Chapter 89 of the CN.
- 16 One of the experts engaged by Rensen Shipbuilding mentions in his statement the use of inland vessels for sea voyages between the (non-coastal) port of Antwerp, on the one hand, and the Belgian coastal ports of Zeebrugge, Ostend and Nieuwpoort, on the other, via the Westerschelde and the North Sea. Constraints in terms of depth and wave conditions apply here. Article 3 of the [Belgian] koninklijk besluit betreffende binnenschepen die ook voor niet-internationale zee-reizen worden gebruikt van 8 maart 2007 provides that an 'inland vessel' may operate in that limited navigation area between the Westerschelde and the ports of the Belgian coast, on condition that it sails no further than five nautical miles from the coast. The expert makes the assumption in his statement that the route along the Dutch and Belgian coasts between the mouth of the Westerschelde (to the west of the Breskens-Vlissingen line) and the aforementioned Belgian coastal ports qualifies as 'the high seas'.
- 17 The classification society Lloyd's Register initially stated that it is clear from the 'Certificate of Hull Construction' and from the class notation awarded by it that the hulls at issue here are the hulls of an inland vessel. The hull of such a ship is not strong enough to withstand the impact of waves at sea. According to Lloyd's

Register, the Hoge Raad's assessment is theoretically correct, but in practice it is highly unlikely that a ship built according to the requirements for inland navigation will be strong enough to survive at sea with wind force 7 and the accompanying waves.

- 18 In a second statement, however, Lloyd's Register pointed out that the definition of seagoing vessels in legislative provisions differs from what is understood by seagoing vessels in the classification society sector. Lloyd's Register takes a seagoing vessel to refer only to a ship that can cross the oceans without problems, whereas it follows from the customs provisions that the definition of a seagoing vessel would also include a vessel that can navigate coastal waters, estuaries and lakes. The dimensions of the hulls that the Inspector has submitted are the dimensions of vessels that — according to Lloyd's Register — are referred to in common parlance as inland vessels, but are also suitable for navigating estuaries, large lakes and coastal waters.
- 19 In the light of the foregoing, the question arises as to what should be understood by the term 'seagoing'. From the wording of the explanatory note to Additional note 1 to Chapter 89 of the CN (see paragraph 8) it can be deduced that 'coastal waters, estuaries and lakes' do not form part of the high seas. However, in the absence of a definition of the term 'coastal waters', it is not yet clear how far a ship has to go out to sea in order to be on the 'high seas'. On the basis of that CN explanatory note, it could be argued that it is not the distance between the ship and the coast that is important, but only the possibility of operating the ship on the sea under the difficult weather conditions mentioned therein.
- 20 In its ruling of 14 December 1994, the Tariefcommissie (Tariff Commission) (formerly, the highest Netherlands court in customs matters) ruled that a hull that, upon completion, was allowed to sail up to 21 nautical miles from the coast — thus 9 miles beyond the international 12-mile boundary — and was awarded the class notation 'sea and river waters', should be classified as a seagoing vessel. According to the Tariefcommissie, the high seas therefore start 12 miles from the coast.
- 21 In Commission Regulation (EC) No 652/2007 of 8 June 2007 concerning the classification of certain goods in the Combined Nomenclature, the European Commission relies on a different interpretation of the term 'seagoing'. It can be inferred from point 3 of the annex to that regulation (at 8901 10 90) that the Commission takes the view that one can refer to 'a seagoing vessel' only if *all parts* of the sea can be navigated, without limiting the distance that may be sailed from the coast.
- 22 In the light of the foregoing, the gerechtshof Amsterdam has doubts regarding the question as to over which part of the sea a vessel should be able to transport cargo under the aforementioned severe weather conditions in order to qualify as a 'seagoing vessel' within the meaning of Chapter 89 of the CN. If the high seas only start more than 21 miles from the coast, there is no dispute between the

parties that the hulls in question do not have the objective characteristics and properties to be used as hulls for ships capable of carrying cargo on the high seas at wind force 7. If the high seas start less than 21 miles from the coast, then that matter is indeed in dispute between the parties and the Inspector must provide evidence of his claim that the hulls in question do not have the objective characteristics and properties to be used as hulls for ships that can transport cargo at wind force 7 over the part of the sea concerned.

WORKING DOCUMENT