

Case C-340/19,
Request for a Preliminary Ruling

Date lodged:

29 April 2019

Referring court:

Augstākā tiesa (Senāts) (Supreme Court, (Latvia))

Date of the decision to refer:

18 April 2019

Appellant in the appeal on a point of law:

Valsts ieņēmumu dienests

Respondent in the appeal on a point of law:

SIA ‘Hydro Energo’

Latvijas Republikas Senāts (The Supreme Court of the Republic of Latvia)

DECISION

Riga, 18 April 2019

The Court [...] [composition of the referring court]

has examined, in the written procedure, the administrative proceedings initiated by the action brought by SIA ‘Hydro Energo’ seeking the annulment of the decision of 10 September 2014 adopted by the Valsts ieņēmumu dienests (State Tax Authority), and which now concern the appeal on a point of law brought by the State Tax Authority challenging the judgement of the Administratīvā apgabaltiesa (Regional Administrative Court) of 13 April 2017.

Background*Factual circumstances*

- [1] In April 2012, the applicant at first instance, SIA ‘Hydro Energo’ applied for the release for free circulation of goods, which were declared under subheading 7403 21 00 of the Combined Nomenclature as: refined copper and copper alloys,

unwrought – copper-zinc base alloys (brass). The basic rate of import duty for that heading is set at 0%.

In the course of checking that the data in the customs declaration was correct, the State Tax Authority found that the goods declared by the applicant at first instance were hot-rolled brass sheets. Given that heading 7403 does not include rolled products, the goods declared by the applicant at first instance were classified under subheading 7407 21 10 of the Combined Nomenclature as: copper bars, rods and profiles – of copper-zinc base alloys (brass) – bars and rods. The basic rate of import duty for that heading is set at 4.8%.

By decision [...] of 10 September 2014, the State Tax Authority ordered the applicant at first instance to pay an additional amount to the revenue authorities in respect of the established customs duties plus default interest.

- [2] The applicant at first instance brought an action for annulment of that administrative act.
- [3] By judgment of 13 April 2017 the Administratīvās apgabaltiesa (Regional Administrative Court) upheld the action and annulled the decision of the State Tax Authority. The court based its reasoning on the expert opinion of 19 September 2013 provided by the laboratory for non-destructive testing methods of the Riga Technical University, which stated that the copper content of the sample submitted is 98.82% but the zinc content is 0.56%. It is also stated in that opinion that the sample submitted is a copper cast semi-finished product. In that state, that material cannot be used in a mechanic way or for the production of products which are to be pressed. That is also evidenced by the giant pores, holes and cracks which are visible in the cross-section of the sheet.

The Administratīvās apgabaltiesa found that that metal satisfies the definition of refined copper, because the product contains at least 97.5% of copper by weight, while the other elements in its content do not exceed the limits specified in the table in Chapter 74(1)(a) of Commission Regulation (EU) No 1006/2011 of 27 September 2011, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff ('Regulation No 1006/2011').

Having regard to the fact that the goods in question are rectangular in shape, the Administratīvās apgabaltiesa classified those goods under subheading 7403 13 00 of the Combined Nomenclature (refined copper and copper products, unwrought – refined copper – billets), by taking into account their inherent objective characteristics, their chemical composition and their shape.

The goods do not have a uniform solid cross-section along their whole length, as is required under Chapter 74(1)(d) of Regulation No 1006/2011 in order to satisfy the definition of bars and rods.

In response to the argument put forward by the State Tax Authority that heading 7403 does not include rolled products, the Administratīvās apgabaltiesa submitted that the decisive criterion for the purposes of classification are the objective characteristics of the goods and the properties which are specified in the Combined Nomenclature heading. According to the Administratīvās apgabaltiesa, the description of heading 7403 13 00 (billets) does not preclude the type of processing (rolling or other), which enables the product to obtain the characteristics specified in the description of a heading where it has the characteristics which are typical of products that are classified under other headings. As a result of processing, the product in question has a rectangular shape, however it is still uneven and porous, and contains cracks which prevents it from being used as anything other than a semi-finished product for the purposes of further processing; therefore importance must also be attached to how the product is intended to be used. This is confirmed both by the concept (billet) which is referred to in the heading in question, and by what is provided for in Chapter 74(1)(d) of Regulation No 1006/2017, namely that even wire-bars and billets with their ends tapered or otherwise worked simply to facilitate their entry into machines for bars and rods are to be taken to be unwrought copper of heading 7403.

- [4] The State Tax Authority brought an appeal on a point of law against that judgment based on the following objections.

Given that the product in question is hot-rolled, based on the explanatory notes on the Harmonized Commodity Description and Coding System, it cannot be classified under heading 7403.

There is no basis to lend credibility to what has been stated in the expert opinion, because it differs from the information given in the certificates on quality from the manufacturers about the chemical composition of the goods and there has been no evidence to suggest that the sample product provided by the applicant at first instance was taken from the declared shipment.

The question whether the product is made from refined copper or copper alloys is not relevant for the purposes its classification in one or other Combined Nomenclature heading, since it must first be assessed whether the product matches the description of the heading in question. In doing so, only subheadings at the same level are comparable.

Both jets and continuously cast bars and rods are often used for the same purposes as rolled, drawn or extruded bars. Therefore, the subsequent purpose of the product is irrelevant. Furthermore, the definition of bars and rods does not list the permissible variations, which enables bars and rods to be considered as products of a rectangular shape, given that, in practice, the shapes produced are usually not ideal. Consequently, a uniform solid cross-section does not refer solely to products which have an ideal shape and which are not perforated.

Legal Grounds

Applicable law

- [5] The classification of products in the European Union is governed by Council Regulation No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff ('Regulation No 2658/87').

Article 12 of Regulation No 2658/87 provides that the Commission is to adopt each year by means of a Regulation a complete version of the combined nomenclature together with the corresponding autonomous and conventional rates of duty of the Common Customs Tariff, as it results from measures adopted by the Council or by the Commission. That Regulation is to be published not later than 31 October in the *Official Journal of the European Communities* and will apply from 1 January of the following year.

At the time when the applicant at first instance imported the declared goods, Commission Regulation No 1006/2011 had been approved. Chapter 74 of that regulation refers to the following copper and copper product nomenclature headings:

CN code	Description	Conventional rate of duty (%)	Supplementary unit
(1)	(2)	(3)	(4)
[..]			
7403	Refined copper and copper alloys, unwrought		
	-- Refined copper		
[..]			
7403 13 00	-- Billets	Free	—
[..]			
	-- Copper alloys		
7403 21 00	-- Copper-zinc base alloys (brass)	Free	—
[..]			
7407	Copper bars, rods and profiles		
7407 10 00	-- Of refined copper	4,8	—
	-- Of copper alloys		
7407 21	-- Of copper-zinc base alloys (brass)		
7407 21 10	--- Bars and rods	4,8	—
[..]			

In accordance with Note 1(d) of Chapter 74 of Regulation No 1006/2011:

'Bars and rods:

Rolled, extruded, drawn or forged products, not in coils, which have a uniform solid cross-section along their whole length in the shape of circles, ovals, rectangles (including squares), equilateral triangles or regular convex polygons (including 'flattened circles' and 'modified rectangles', of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel). Products with a rectangular (including square), triangular or polygonal cross-section may have corners rounded along their whole length. The thickness of such products which have a rectangular (including 'modified rectangular') cross-section exceeds one-tenth of the width. The expression also covers cast or sintered products, of the same forms and dimensions, which have been subsequently worked after production (otherwise than by simple trimming or descaling), provided that they have not thereby assumed the character of articles or products of other headings.

Wire-bars and billets with their ends tapered or otherwise worked simply to facilitate their entry into machines for converting them into, for example, drawing stock (wire-rod) or tubes, are however to be taken to be unwrought copper of heading 7403.'

- [6] Part One of Section I subsection A of Regulation No 1006/2011 contains general rules for the interpretation of Combined Nomenclature:

'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.

2(a) 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. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled;

(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.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

[...]

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise’.

Reasons for the uncertainty as to the interpretation of EU law

- [7] According to the accompanying documents in the present case, the goods imported by the applicant at first instance are hot-rolled brass sheets (ingots). Their nominal dimensions are 26 x 210 x 700 mm. Given that the products have a rectangular shape and that their thickness exceeds one-tenth of the width, the State Tax Authority classified them as brass bars and rods under heading 7407 21 10 of the Combined Nomenclature. The State Tax Authority further observes that, in accordance with the explanatory notes on the Harmonized Commodity Description and Coding System, rolled products are not included under the heading 7403 (copper and copper alloys, unwrought).

For its part, the applicant at first instance claims that the products in question do not satisfy the definition of bars and rods within the meaning of the Combined Nomenclature because those products do not have a uniform solid cross-section along their whole length, namely the cross-section of the side of the sheets shows giant pores, holes and cracks. The applicant at first instance further states that the product is rolled in a rectangular shape solely for the purpose of facilitating its transportation and that the products are not intended for anything other than re-

melting. The applicant at first instance justifies its final claim by relying on Chapter 74(1)(d) of the Combined Nomenclature which states that wire-bars and billets with their ends tapered or otherwise worked simply to facilitate their entry into machines for converting them into, for example, drawing stock (wire-rod) or tubes, are however to be taken to be unwrought copper under heading 7403. In other words, the applicant at first instance states that in classifying products as heading 7403 or 7407 of the Combined Nomenclature, importance must be attached not only to the shape and preliminary treatment of those products but also their degree of processing and their potential use. Therefore the applicant at first instance claims that the goods fall under heading 7403 21 00 of the Combined Nomenclature (copper and zinc alloy (brass)).

The Administratīvās apgabaltiesa agreed with the argument put forward by the applicant at first instance that the products do not satisfy the definition of bars and rods because they do not have a uniform solid cross-section along their whole length. At the same time, that court found that, taking into account the evidence adduced in the present case, based on its chemical composition the product in question is refined copper and not copper alloys (brass); therefore it classified the product under heading 7403 13 00.

- [8] The question regarding the chemical composition of the products relates to the assessment of the facts, which is a matter for the national court. However, the main question in the present case is whether the products satisfy the definition of bars and rods within the meaning of the Combined Nomenclature.

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 Combined Nomenclature and in the section or chapter notes (judgment of the European Court of Justice of 4 March 2015, C-547/13, *Oliver Medical* ...EU:C:2015:139, paragraph 45).

Although the State Tax Authority correctly points out that the goods in question possesses many of the objective characteristics which match the characteristics for bars and rods under Chapter 74(1)(d) of the Combined Nomenclature, which would enable those goods to be classified under heading 7407, the applicant at first instance rightly expresses doubts as to whether those goods also match the requirement of having a uniform solid cross-section along its whole length, because the cross-section of the product in question has noticeable giant pores, holes and cracks.

- [9] The State Tax Authority refers to the explanatory notes on the Harmonized Commodity Description and Coding System. According to those notes, heading 7403 includes sintered products which are obtained from powders by pressing or sintering them. In the sintered state, the products are porous and of low strength and are normally rolled, extruded, forged, etc., to achieve useful density. These

rolled, etc., products are excluded from heading 7403, but for example headings 7407, 7409).

Given that the products in the present case, according to the accompanying documents, are rolled, that fact may be an additional ground for their classification under heading 7407.

The explanatory notes drawn up by the European Commission as regards Combined Nomenclature and by the World Customs Organisation as regards the Harmonised Commodity Description and Coding System are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (judgment of the European Court of Justice of 4 March 2015, C-547/13, *Oliver Medical* ...EU:C:2015:139, paragraph 46).

However, under Point 1 of the general rules for the interpretation of Combined Nomenclature, the legal classification is determined according to the terms of the headings and any relative section or chapter notes. Therefore the explanatory notes are not sufficient to refute the doubts raised about whether the products have a uniform solid cross-section along their whole length, which is required under Chapter 74(1)(d) of the Combined Nomenclature.

[10] In order to answer that question it is necessary to interpret provisions of EU law. Under Article 267 of the Treaty on the Functioning of the European Union, the Court of Justice is to have jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions of the European Union. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is to bring the matter before the Court.

It does not appear to the Senāts that the Court of Justice of the European Union has already ruled on the matter at issue. Having regard to the foregoing, the Senāts has decided that a question must be referred to the Court of Justice of the European Union for a preliminary ruling.

[11] For that reason, proceedings are stayed until the Court of Justice of the European Union rules on the question referred for a preliminary ruling.

Operative Part:

In accordance with Article 267 of the Treaty on the Functioning of the European Union, [...] the Senāts

orders

That the following question be referred to the Court of Justice of the European Union for a preliminary ruling:

Must the Combined Nomenclature, as set out in Annex I of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, amended by Commission Regulation (EU) No 1006/2011 of 27 September 2011, be interpreted as meaning that heading 7407 (Copper bars, rods and profiles) includes copper or copper alloy ingots in a rectangular shape, the thickness of which exceeds one-tenth of the width and which are hot-rolled, but which have irregular pores, holes and cracks in their cross-section?

[...]

WORKING DOCUMENT