

Case C-822/19**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:**

5 November 2019

Referring court:

Curtea de Apel Alba Iulia (Romania)

Date of decision to refer:

9 October 2019

Appellants, defendants at first instance:

Direcția Generală Regională a Finanțelor Publice Brașov

Agenția Națională de Administrare Fiscală — Direcția Generală a Vămilelor — Direcția Regională Vamală Brașov — Biroul Vamal de Interior Sibiu

Respondent, applicant at first instance:

Flavourstream SRL

Subject matter of the main proceedings

Appeal lodged by the defendants at first instance, the Direcția Generală Regională a Finanțelor Publice Brașov (Regional Directorate of Public Finances, Brașov) and the Agenția Națională de Administrare Fiscală — Direcția Generală a Vămilelor — Direcția Regională Vamală Brașov — Biroul Vamal de Interior Sibiu (National Tax Administration Office — Directorate-General for Customs — Regional Directorate for Customs, Brașov — Customs Office of the Interior, Sibiu) against the judgment of the Tribunalul Sibiu (Regional Court, Sibiu) ordering the annulment of the decisions which imposed supplementary tax charges on the applicant at first instance, Flavourstream SRL, following the reclassification of certain imported products under another tariff subheading of the Combined Nomenclature.

Subject and legal basis of the request for a preliminary ruling

An interpretation of tariff subheadings 1702 90 95 and 2912 49 00 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff is requested pursuant to Article 267 TFEU.

Question referred

Must the nomenclature in Annex I to Regulation No 2658/87, as amended by Implementing Regulation 2016/1821, be interpreted as meaning that the product ‘AURIC GMO FREE’, which is at issue in the present case, is to be classified under tariff subheading 1702 90 95 or subheading 2912 49 00 of that nomenclature?

Provisions of European Union law relied on

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 Implementing Regulation (EU) 2016/1821 of 6 October 2016 amending Annex I to Council Regulation (EEC) No 2658/87 — Annex I, tariff subheadings 1702 90 95 and 2912 49 00

Provisions of national law relied on

Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code) — Article 140, which lays down a reduced rate of VAT for the supply of foodstuffs.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 5 June 2015, the respondent, applicant at first instance, submitted to the Biroul Vamal de Interior Sibiu a customs declaration concerning the importation of 3 300 kg of aqueous solution obtained by the thermal decomposition of dextrose, used in the food industry, and called ‘AURIC GMO FREE’.
- 2 The goods were imported from Canada under declared TARIC code 1702 90 95 00, a heading which includes ‘Sugar, syrups and other sugar products/other’. Customs duties amounted to RON 1 938 and VAT, at the rate of 9%, amounted to RON 19 025.
- 3 Subsequently, the respondent, applicant at first instance, was subject to an inspection by the Biroul Vamal de Interior Sibiu, which resulted in the issue of a rectification decision imposing additional tax charges (customs duties and VAT)

totalling RON 102 079 as a consequence of the finding that the product 'AURIC GMO FREE' had been wrongly classified under tariff subheading 1702 90 95 00.

- 4 At the time of the inspection laboratory analyses were carried out and, on the basis of the certificates of analysis, the customs inspection body established that that product actually falls under TARIC code 2912 49 00 90 relating to 'Aldehydes, whether or not with other oxygen function; cyclic polymers of aldehydes; paraformaldehyde/other', and that a higher tariff for customs duties and rate of VAT apply to the respondent, applicant at first instance.
- 5 The respondent, applicant at first instance, brought an action in tax proceedings against the decision of the inspection body, seeking annulment of the decisions imposing additional tax charges and an exemption from payment of the additional charges, interest and penalties for late payment due on account of the classification of the product under a different tariff subheading.
- 6 At first instance, the Tribunalul Sibiu — Secția a II-a civilă și de contencios administrativ (Regional Court, Sibiu — Chamber for Civil and Administrative Proceedings) upheld the action, annulled the contested decisions and exempted the applicant at first instance from payment of the additional tax charges laid down in those decisions.
- 7 In the judgment under appeal, the court of first instance ruled that the applicant had correctly classified the product 'AURIC GMO FREE' under tariff subheading 1702 90 95 00 and that the classification made by the appellants, defendants at first instance, under tariff subheading 2912 49 00 90 — aldehydes, was not correct. The court of first instance held that the data sheet drawn up by the producer showed that the product 'AURIC GMO FREE' is made from heat-treated sugar and used in the food industry to flavour food: it constitutes a 'food or foodstuff' within the meaning of the national law.
- 8 The court of first instance also based its decision on the definition of the term 'food' set out in Regulation (EC) No 178/2002 and the definitions of 'flavourings', 'flavouring substances' and 'food additives' provided by Regulations (EC) No 1334/2008 and No 1333/2008.
- 9 Consequently, the court found that the chemical expert's conclusions were correct, namely that the product 'AURIC GMO FREE' is an aqueous mix of chemical products: water-soluble aldehydes and ketones, obtained from enzymatic oxidation or thermal reactions of monosaccharides (natural food sweeteners) and used in the food industry as a colouring additive or smoke flavouring, as provided for in Lists B and C of Regulation (EC) No 1333/2008, under the designation E 150a plain caramel.
- 10 Therefore, that product in Annex I to Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, must be classified under Section IV, 'Prepared foodstuffs;

beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes’, TARIC code 1702 90 95 00.

- 11 The appellants, defendants at first instance, lodged an appeal against the judgment at first instance before the referring court, the Curtea de Apel Alba Iulia — Secția de contencios administrativ și fiscal (Court of Appeal, Alba Iulia — Chamber for Administrative and Tax Proceedings).
- 12 In their appeal, the appellants, defendants at first instance, criticised, inter alia, the fact that the court of first instance infringed the provisions of Regulation No 2658/87 on the tariff nomenclature, as well as the explanatory notes to the harmonised system relating to the general rules for the interpretation of the harmonised system, by classifying the product ‘AURIC GMO FREE’ under tariff subheading 1702 90 95 00, rather than tariff heading 2912 49 00 90.

The essential arguments of the parties to the main proceedings

- 13 **According to the respondent, applicant at first instance**, the product ‘AURIC GMO FREE’ is obtained from a sugar solution for food use (dextrose), which by means of controlled heating is broken down into simpler fragments, such as hydroxy-acetaldehyde, methylglyoxal and furfural. Although in conventional chemistry hydroxy-acetaldehyde is an aldehyde, in food chemistry it is used as a lower sugar which affects the aroma and consistency of foodstuffs following heating, and falls within the scope of Regulation (EC) No 1334/2008 of the European Parliament and of the Council of 16 December 2008. Hydroxy-acetaldehyde is in practice a lower sugar and essential key component in giving a foodstuff the aroma and consistency of browning and a brown colour. It is also a component which is found in high concentrations in smoke flavourings where these are produced from wood cellulose used to manufacture liquid smoke flavourings.
- 14 In its view, the product ‘AURIC GMO FREE’ is applied to foodstuffs such as meat, chicken or bread using an atomisation or pulverisation process and, after heating in the oven, it reacts with the food proteins, giving the products an aroma and consistency similar to that obtained from a browning process. The foodstuff will look as if it had been treated with sugar before being prepared. If dextrose or sugar had been added directly to a foodstuff, and it had been heated in the oven, the dextrose/sugar would have broken down into simpler fractions, such as hydroxy-acetaldehyde, reacting with the meat proteins. Use of the product ‘AURIC GMO FREE’, in which the sugar has already been broken down, is intended merely to reduce the processing time of the foodstuffs.
- 15 The respondent, applicant at first instance, also stated that the product ‘AURIC GMO FREE’ is considered to be a foodstuff since it is obtained from dextrose and, following a controlled heating process, used in the food processing industry. Since the product ‘AURIC GMO FREE’ is a sugar derivative and is reused in the food industry as a lower sugar solution, it must be classified under TARIC code

1702 90 95. The goods classification in Annex I to Implementing Regulation (EU) 2015/1754, includes in Section IV, 'Prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes', at point 17, 'Other, including invert sugar and other sugar and sugar syrup blends containing in the dry state 50% by weight of fructose' and it is therefore clear that the product 'AURIC GMO FREE' falls within that category.

- 16 **According to the appellants, defendants at first instance**, the chemical process for obtaining the product 'AURIC GMO FREE' involves the processing of the glucose solution (dextrose) into ethanol through yeast action and subsequently, by means of slight oxidation, the processing of the ethanol into acetaldehyde, which cannot lead to the classification of the final product — acetaldehyde — under tariff heading 1702 90 95 00 since that is the code under which the raw material, namely glucose, is classified. Given the fact that the two stages of processing to which the raw material has been subjected are irreversible, it is impossible for the final product to be classified under the tariff heading of the raw material, since the raw material and the finished product are two completely different products.
- 17 Moreover, while the product 'AURIC GMO FREE' — an aqueous solution of hydroxy-acetaldehyde — contains no sugar at all, as mentioned in the analysis reports, it is clear that it cannot be classified under the heading 'Other, including invert sugar and other sugar and sugar syrup blends containing in the dry state 50% by weight of fructose'. Therefore, the product 'AURIC GMO FREE' must be classified under TARIC code 2912 49 00 90 relating to 'Aldehydes, whether or not with other oxygen function; cyclic polymers of aldehydes; paraformaldehyde/other'.
- 18 In their view, the logic of grouping products in the Combined Nomenclature depends also, inter alia, on the material used to make the goods, the way in which they are used, that is to say the intended purpose or function of the product, and the degree to which the product is processed. Products with a low degree of processing, essentially natural products, are normally included in the initial part of the Combined Nomenclature, in the initial sections, while those with a greater, more complex, degree of processing, such as industrial products, are included in the final part. The same logic applies within the sections: the initial part describes the original product, followed by its derivatives.
- 19 In the light of such a method for establishing the tariff classification, the product 'AURIC GMO FREE' is derived from glucose (Chapter 17), as a result of yeast action it transforms into the intermediate product ethanol (Chapter 22) and by slight oxidation becomes the finished product — acetaldehyde (Chapter 29). It is clear that, as the degree of processing of the product increases, the TARIC chapter relating to each of stage of evolution of the product also implicitly changes in ascending order.

Succinct presentation of the reasons for the reference

- 20 The referring court states that the outcome of the dispute before it depends on the interpretation of the Combined Nomenclature, and more specifically the classification of the product ‘AURIC GMO FREE’ under tariff subheading 1702 90 95 or tariff subheading 2912 49 00.

WORKING DOCUMENT