

Case C-772/19

Request for a preliminary ruling

Date lodged:

22 October 2019

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

9 October 2019

Appellant in the appeal on a point of law:

Bartosch Airport Supply Services GmbH

Defendant authority:

Zollamt Wien (Vienna Customs Office)

[...]

Verwaltungsgerichtshof (Supreme Administrative Court) [...]

9 October 2019

The Supreme Administrative Court, [...] in the appeal on a point of law brought by Bartosch Airport Supply Services GmbH [...] against the judgment of the Bundesfinanzgericht (Federal Finance Court; ‘the BFG’) of 15 April 2019, [...] concerning binding tariff information (defendant authority before the Verwaltungsgericht (Administrative Court): Vienna Customs Office), made the following

Order:

The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

Is heading 8705 of the Combined Nomenclature to be interpreted as meaning that towbarless motor vehicles with a pulling winch with belt pulling device for

pulling aircraft and an electrohydraulic lifting device for pushing aircraft fall under this heading?

Grounds:

1 Facts:

By application of 23 February 2017, the appellant in the appeal on a point of law had requested the provision of binding tariff information for an ‘electrically operated, towbarless aircraft tow truck’ with classification under code 8705 9080 of the Combined Nomenclature.

2 With the binding tariff information of 8 May 2017, the Vienna Customs Office classified this product as an ‘other’ type of tractor under code 8701 92 90, against which the appellant in the appeal on a point of law lodged an appeal: The product at issue was a special purpose motor vehicle and not a tractor of [Or. 2] heading 8701. Towing motor vehicles were separately listed under heading 8705.

3 By preliminary appeal decision of 26 July 2017, the Vienna Customs Office dismissed the appeal as unfounded, whereupon the appellant in the appeal on a point of law requested that its appeal be ruled on by the Federal Finance Court.

4 With the contested judgment, the Federal Finance Court dismissed the appeal [...] as unfounded [...]. After presentation of the course of the procedure, the Court stated the following:

‘ ...

With the BTI of the Hauptzollamt Hannover (Hanover Main Customs Office), ..., a double-axle motor vehicle with a driver’s cabin, with a diesel engine with specific engine power, with a specific unladen weight, with a maximum speed of 32 km/h with empty running and 15 km/h in operation with an aircraft, equipped with a hydraulic device for lifting an aircraft via the nose wheel, used exclusively at airports for pulling or pushing commercial aircraft up to a certain weight, was classified in HS heading 8701 as an aircraft tractor without a towbar.

The vehicle at issue is designed for pulling and pushing aircraft with a weight up to 54 432 kg at airports. It consists of a metal platform with four wheels, has an electric engine with an engine power of 33.8 kW, drive, braking and steering devices and two drivers’ seats arranged opposite one another with operating levers on both sides and is equipped with a pulling winch with belt pulling device and an electrohydraulic lifting device. With the winch, the nose wheel of an aircraft is pulled onto the lifting device and then lifted by means of the hydraulic lifting device. The aircraft can be towed or pushed in this position.

Aircraft tractors without a towbar which are attached to the nose landing gear grasp the nose wheel of an aircraft and lift it up, in order to move the aircraft in

this way. The difference with the vehicle at issue lies in that, with the latter, the nose wheel is pulled onto the hydraulic lifting device by means of a winch, and the grasped nose wheel is not directly lifted. The lifting process takes place hydraulically in both cases. [Or. 3]

The aircraft tractor at issue therefore differs merely through the pulling winch with belt pulling device. In the opinion of the [appellant in the appeal on a point of law], this pulling winch necessitates classification in HS heading 8705.

...'

5 From a legal perspective, the Court's considerations were as follows:

‘According to the final paragraph of the HS Explanatory Notes to heading 8701, this heading does not include breakdown lorries equipped with cranes, trestles, winches, etc. (8705).

Heading 8705 involves special purpose motor vehicles, other than those principally designed for the transport of persons or goods, and mentions, for example, breakdown lorries, crane lorries, fire fighting vehicles, concrete-mixer lorries, road sweeper lorries, spraying lorries, mobile workshops and mobile radiological units.

According to the HS Explanatory Notes, this heading covers motor vehicles, specially constructed or adapted, equipped with various devices that enable them to perform certain non-transport functions, i.e. the primary purpose of a vehicle of this heading is not the transport of persons or goods.

According to point 1) of the HS Explanatory Notes to heading 8705, this heading includes motor breakdown lorries (trucks) consisting of a lorry (truck) chassis, with or without a floor, equipped with lifting gear such as non-rotating cranes, trestles, pulleys or winches, designed for lifting and towing broken-down vehicles.

If [the appellant in the appeal on a point of law] believes that the aircraft tractor at issue would have to be classified in heading 8705 as a breakdown lorry, it overlooks the fact that breakdown lorries under this heading are used to tow broken-down vehicles.

In the opinion of the BFG, the clear and broad definition of tractors in the Note to Chapter 87 and the HS Explanatory Notes to heading 8701 leaves no doubt about the classification of the aircraft tractor at issue in heading 8701. According to the HS Explanatory Notes, tractors equipped with winches are also to be classified in this heading.

The object at issue does not constitute a breakdown lorry of heading 8705, as it does not have the characteristic of lifting and towing broken-down vehicles, as required in the HS Explanatory Notes relating to heading 8705. The aircraft

tractor is also not remotely comparable to any of the specially constructed or adapted motor vehicles mentioned in heading 8705. **[Or. 4]**

The classification in nomenclature code 8701 9290 00 was therefore correct.’

6 In the appeal on a point of law lodged against that judgment, the appellant in the appeal on a point of law requests inter alia a request for a preliminary ruling on the classification of the vehicle at issue in one of the subheadings of heading 8705 90 of the Common Customs Tariff to be obtained.

7 EU law:

Council Regulation (EEC) No 2658/87 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 the regulation mentioned, Official Journal of the European Union L 282 of 28 October 2016, reads, in extract, as follows:

‘PART I – Preliminary Provisions

SECTION I

GENERAL RULES

A. General rules for the interpretation of the 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.

...

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, **[Or. 5]** even if one of them gives a more complete or precise description of the goods;

...

- (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.

...

- 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.

...

PART II – Schedule of Customs Duties

...

CHAPTER 87

VEHICLES OTHER THAN RAILWAY OR TRAMWAY ROLLING STOCK, AND PARTS AND ACCESSORIES THEREOF

Notes

1. This chapter does not cover railway or tramway rolling stock designed solely for running on rails.
2. For the purposes of this chapter, ‘tractors’ means vehicles constructed essentially for hauling or pushing another vehicle, appliance or load, whether or not they contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods. **[Or. 6]**

...

| CN code | Description | Conventional rate of duty (%) | Supplementary unit |
|------------|--|-------------------------------|--------------------|
| 1 | 2 | 3 | 4 |
| 8701 | Tractors (other than tractors of heading 8709): | | |
| 8701 10 00 | - Single axle tractors | 3 | p/st |
| 8701 20 | - Road tractors for semi-trailers: | | |
| 8701 20 10 | -- New | 16 | p/st |
| 8701 20 90 | -- Used | 16 | p/st |
| 8701 30 00 | - Track-laying tractors | Free | p/st |
| | - Other, of an engine power: | | |
| 8701 91 | -- Not exceeding 18 kW: | | |
| 8701 91 10 | --- Agricultural tractors and forestry tractors, wheeled | Free | p/st |
| 8701 91 90 | -- Other | 7 | p/st |
| 8701 92 | -- Exceeding 18 kW but not exceeding 37 kW: | | |
| 8701 92 10 | --- Agricultural tractors and forestry tractors, wheeled | Free | p/st |
| 8701 92 90 | --- Other | 7 | p/st |

...

| | | | |
|------|---|--|--|
| 8705 | Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries, crane lorries, fire fighting vehicles, concrete-mixer lorries, road sweeper lorries, spraying lorries, mobile workshops, mobile radiological units): | | |
|------|---|--|--|

...

| | | | |
|------------|------------------------------|-----|------|
| 8705 90 | - Other: | | |
| 8705 90 30 | -- Concrete-pumping vehicles | 3.7 | p/st |
| 8705 90 80 | -- Other | 3.7 | p/st |

...’ [Or. 7]

- 8 According to the case-law of the Court of Justice of the European Union, the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the Combined Nomenclature and of the notes to the sections or chapters. Next, 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, for instance, the judgment of 15 September 2005 in Case C-495/03, *Intermodal Transports BV*, paragraphs 47 and 55, and the judgment of 25 July 2018 in Case C-445/17, *Pilato SpA*, paragraphs 24 and 25).
- 9 According to the further case-law of the Court of Justice, the explanatory notes drawn up, as regards the Combined Nomenclature (CN), by the Commission and, as regards the Harmonised System (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. The content of the Explanatory Notes to the CN, which do not take the place of those of the HS but should be regarded as complementary to them, and consulted jointly with them, must accordingly be consistent with the provisions of the CN and may not alter their scope. Accordingly, where it is apparent that they are contrary to the wording of the headings of the CN and the section or chapter notes, the Explanatory Notes to the CN must be disregarded (see, for instance, the judgment of 14 April 2011 in Joined Cases C-288/09 and C-289/09, *British Sky Broadcasting Group plc and Pace plc*, paragraphs 63 to 65).
- 10 According to the HS Explanatory Notes in question, tractors of all kinds and for all intended purposes, regardless of the type of drive, apart from tractors of the type used on railway station platforms covered in heading 8709, belong to heading 8701. This heading does not include breakdown lorries equipped with cranes, trestles, winches, etc. (heading 8705). Heading 8705 covers a range of motor vehicles, specially constructed or adapted, equipped with various devices that enable them to perform certain [Or. 8] non-transport functions, i.e. the primary purpose of a vehicle of this heading is not the transport of persons or goods. This heading includes (point 1) motor breakdown lorries (trucks) consisting of a lorry (truck) chassis, with or without a floor, equipped with lifting gear such as non-rotating cranes, trestles, pulleys or winches, designed for lifting and towing broken-down vehicles.
- 11 The General rules for the interpretation of the Combined Nomenclature reproduced above suggest that heading 8705 (together with its subheadings) constitutes the more specific heading compared to heading 8701.
- 12 Basically, tractors within the meaning of heading 8701 are also motor vehicles with special purposes, namely hauling or towing.

- 13 Heading 8705 expressly lists various motor vehicles which are all principally not designed for the transport of persons or goods, but have completely different special intended purposes.
- 14 According to the decisive findings of the judgment of the Federal Finance Court of 15 April 2019, the vehicle that is the subject of proceedings is designed for hauling and pushing aircraft at airports, and is therefore likewise principally not designed for the transport of persons or goods. However, this vehicle does not perform any of those intended purposes expressly listed in heading 8705.
- 15 Subsumption under the term ‘Abschleppwagen’ in heading 8705, as argued for by the appellant in the appeal on a point of law, is militated against by the fact that the terms ‘break down lorries’ and ‘dépanneuses’ used in heading 8705 in the English and French versions of the regulation mentioned mean ‘Pannen-Abschleppwagen’, as also expressed by the Federal Finance Court with regard to the Harmonised System Explanatory Notes. **[Or. 9]**
- 16 The Supreme Administrative Court therefore has doubts regarding the interpretation of heading 8705 of the Combined Nomenclature and its differentiation from heading 8701.

Vienna, 9 October 2019

[...] [Signatures]