

Case C-668/20

Request for a preliminary ruling

Date lodged:

8 December 2020

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

7 July 2020

Applicant and appellant in the appeal on a point of law:

GmbH

Defendant and respondent in the appeal on a point of law:

Hauptzollamt

BUNDESFINANZHOF (FEDERAL FINANCE COURT)

ORDER

In the case of

GmbH

applicant and appellant in the appeal on a point of law

[...]

v

Hauptzollamt

(Main

Customs

Office)

defendant and respondent in the appeal on a point of law

concerning classification

the Seventh Chamber **[Or. 2]**

made the following order at the hearing of 7 July 2020:

Operative Part

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Is subheading 1302 19 05 of the Combined Nomenclature ('the CN') to be interpreted as meaning that an extracted vanilla oleoresin diluted with ethanol and water consisting of approximately 90% (v/v) or 85% (m/m) ethanol, up to 10% (m/m) water, 4.8% (m/m) dry residue and 0.5% (m/m) vanilla is to be classified under that subheading even though, according to Note 1(ij) to Chapter 13 of the CN, heading 1302 of the CN does not apply to extracted oleoresins?

2. Do extracted oleoresins within the meaning of subheading 3301 90 30 of the CN include the goods described in the first question referred?

3. Is subheading 3302 10 90 of the CN to be interpreted as meaning that the goods described in the first question referred are to be classified as mixtures of odiferous substances and mixtures (including alcohol solutions) with a basis of one or more of these substances, of a kind used in the food industry?

4. Do flavours within the meaning of Article 27(1)(e) of Directive 92/83/EEC include goods of subheading 1302 19 05 of the CN or extracted oleoresins of subheading 3301 90 30 of the CN?

II. The proceedings are stayed pending a preliminary ruling by the Court on the questions referred.

Grounds

I.

- 1 On 10 February 2016, the applicant and appellant in the appeal on a point of law declared ... kg of 'mixtures of odiferous substances and mixtures with a basis of one or more of these substances, of a kind used as raw materials in the food industries, in this case ... vanilla extract' of duty-free subheading 3302 10 90 of the Combined Nomenclature ('the CN'), for release for free circulation.
- 2 The goods in question are a strongly aromatic, viscous, dark brown product sourced in Madagascar which is initially obtained from the vegetable product (vanilla bean) using a solvent (ethanol, according to the information provided by the applicant) [Or. 3] and then diluted with alcohol and water in Switzerland and imported into the EU. The diluted product is runny and golden brown and smells strongly of vanilla. The diluted product comprises approximately 90% (v/v) or 85% (m/m) ethanol, 4.8% (m/m) dry residue and up to 10% (m/m) water and has an average vanilla content of 0.5% (m/m).

- 3 Having initially imposed import turnover tax of EUR ..., the defendant and respondent in the appeal on a point of law (Main Customs Office, 'the HZA') subsequently imposed customs duty of EUR ... and duty on spirits of EUR ... by notice of 25 April 2016, having now assumed that the goods are covered by subheading 1302 19 05 of the CN (rate of duty 3%) and are thus also subject to duty on spirits.
- 4 The Finanzgericht (Finance Court, 'the FG') found that the subsequent imposition of customs duty and duty on spirits was lawful; that the imported goods are to be classified under subheading 1302 19 05 of the CN; that, although they are a mixture of vanilla oleoresin, alcohol and water, rather than pure vanilla oleoresin, as it is the vanilla oleoresin that determines the essential character of the goods, even vanilla oleoresin diluted with alcohol and water is to be classified under heading 1302 of the Harmonised System ('the HS'); that, moreover, processing related to standardisation of the goods has no effect on classification; that the vanilla extract imported by the applicant has not acquired the character of a foodstuff because of the addition of other substances, as alcohol and water will have already been used to extract the vanilla oleoresin; that, notwithstanding, vanilla oleoresin is explicitly listed under subheading 1302 19 05 of the CN; and that classification under subheading 3302 10 90 of the CN is out of the question, as vanilla oleoresin is not an odiferous substance.
- 5 The FG further found that ... vanilla extract is a product subject to duty on spirits, and that the exemption from duty for certain food flavourings does not apply, as ... vanilla extract is not obtained from more than one species of vegetable product.
- 6 The applicant lodged an appeal on a point of law against that judgment. It argues that the goods are to be classified under subheading 3302 10 90 of the CN; that heading 3302 of the CN includes mixtures with a basis of an odiferous substance, of a kind used as a raw material in industry; that substances of heading 3301 of the CN are odiferous substances in that sense and that heading also covers all extracted oleoresins; that the imported goods contain that sort of extracted oleoresin; and that, notwithstanding, the process of mixing the product obtained from Madagascar [Or. 4] with alcohol and water in Switzerland gives a preparation for the food industries. The applicant considers that heading 1302 of the CN does not apply as, according to Note 1(ij) to Chapter 13 of the CN, extracted oleoresins are explicitly excluded from heading 1302 of the CN.
- 7 In the applicant's opinion, the judgment of the lower court is based, furthermore, on misapplication of the law on duty on spirits. It argues that duty on spirits is not owed, irrespective of whether the imported goods are to be classified under subheading 3302 10 90 of the CN or under subheading 1302 19 05 of the CN; that the FG erred in law in restricting the exemption from duty for flavours of heading 1302 of the CN to flavours obtained from an intermixture of vegetable extracts; and that the administration is also of the opinion that goods of heading 3302 of the CN are exempt from duty on spirits.

II.

8 The Chamber has stayed the appeal on a point of law [...] and refers the following questions to the Court for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union [reiteration of questions set out in the operative part]:

9 [...]

10 [...]

11 [...]

12 [...]

III.

13 **[Or. 5]** The Chamber is of the opinion that the dispute has to be resolved on the basis of the Combined Nomenclature and in accordance with 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 (OJ 2015 L 285, p. 1). In particular, the resolution of the dispute hinges on the scope of headings 1302, 3301 and 3302 of the CN and subheadings 1302 19 05, 3301 90 30 and 3302 10 90 of the CN. The Chamber has doubts as to their interpretation which affect its ability to give judgment in the case in question. The resolution of the dispute also hinges on the scope of the exemption of flavours from duty on spirits in accordance with Article 27(1)(e) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21). However, the Chamber also has doubts as to its interpretation.

14 **Applicable EU law:**

Note 1(ij) to Chapter 13:

Heading 1302 applies, inter alia, to liquorice extract and extract of pyrethrum, extract of hops, extract of aloes and opium.

The heading does not apply to:

(...)

15

(ij) essential oils, concretes, absolutes, resinoids, extracted oleoresins, aqueous distillates or aqueous solutions of essential oils or preparations based on odoriferous substances of a kind used for the manufacture of

	beverages (Chapter 33).	
Heading 1302 of the CN:		
1302	Vegetable saps and extracts; pectic substances, pectinates and pectates; agar-agar and other mucilages and thickeners, whether or not modified, derived from vegetable products:	
	Vegetable saps and extracts:	
1302 11 00	Opium	
(...)		
1302 19	Other:	
1302 19 05	Vanilla oleoresin	
16		
	Explanatory Notes to heading 1301 of the Harmonised System (HSEN):	
	(D) Oleoresins are exudates consisting mainly of volatile and resinous constituents (...).	16.1 [Or. 6]
17		
	HSEN to heading 1302:	
	(A) Vegetable saps and extracts	01.0
	The heading covers vegetable saps (vegetable products usually obtained by natural exudation or incision) and extracts (vegetable products extracted from the original vegetable material by solvents), provided that they are not specified or included in more specific headings (...).	02.0
18		
	These saps and extracts differ from the essential oils, resinoids and extracted oleoresins of heading 3301, in that, apart from volatile odoriferous constituents, they contain a far higher proportion of other plant substances (e.g. chlorophyll, tannins, bitter principles, carbohydrates and other extractive matter).	02.5
19		
	The saps and extracts classified here include:	03.0
	(...)	
	(4) Pyrethrum extract, obtained mainly from the flowers of various pyrethrum varieties (...) with an organic solvent (...).	07.0
	(...)	
	(7) Ginseng extract, obtained by water or alcohol extraction (...).	10.0
	(...)	

(9) Podophyllum, a resinous substance extracted by alcohol from the dried rhizomes of <i>Podophyllum peltatum</i> .	13.0
(...)	26.1
(21) Vanilla oleoresin (sometimes erroneously known as ‘vanilla resinoid’ or ‘vanilla extract’).	
(...)	
The vegetable saps and extracts of this heading are generally raw materials for various manufactured products. They are excluded from the heading when, because of the addition of other substances, they have the character of food preparations, medicaments, etc.	29.1
(...)	
The heading excludes essential oils, resinoids and extracted oleoresins (heading 3301) (...).	36.2
Extracted oleoresins differ from the extracts provided for in this heading in that they (1) are obtained from natural cellular raw plant materials (almost always spices or aromatic plants), either by [Or. 7] organic solvent extraction or by super-critical fluid extraction, and (2) contain volatile odoriferous principles together with non-volatile flavouring principles, which define the characteristic odour or flavour of the spice or aromatic plant.	36.5
The heading further excludes the following vegetable products, classified under more specific headings (...):	37.0
a) Natural gums, resins, gum-resins and oleoresins (heading 1301).	38.1
(...)	
Explanatory Notes to heading 1302 of the Combined Nomenclature (CNEN):	
Vegetables extracts of heading 1302 are crude raw vegetables obtained by, for instance, solvent extraction, which are not further chemically modified or processed. However, inert additives (e.g. anti-caking agents) and processing related to standardisation, or physical treatment, such as drying or filtration, are allowed.	01.1

20

Explanatory Notes to Chapter 33:

1. This chapter does not cover:

(a) natural oleoresins or vegetable extracts of heading 1301 or 1302;

(...).

2. The expression ‘odoriferous substances’ in heading 3302 refers only to the substances of heading 3301, to odoriferous constituents isolated from those substances or to synthetic aromatics.

(...)

Heading 1301 of the CN:

3301 Essential oils (terpeneless or not), including concretes and absolutes; resinoids; extracted oleoresins; concentrates of essential oils in fats, in fixed oils, in waxes or the like, obtained by enfleurage or maceration; terpenic by-products of the deterpenation of essential oils; aqueous distillates and aqueous solutions of essential oils

(...)

3301 90 Other

3301 90 10 Terpenic by-products of the deterpenation of essential oils:
Extracted oleoresins:

3301 90 21 Of liquorice and hops

3301 90 30 Other [**Or. 8**]

(...)

21

HSEN to Chapter 33:

The essential oils and extracted oleoresins of heading 3301 are all extracted from plant materials. The method of extraction used determines the type of product obtained. For example, according to whether the steam distillation or an organic solvent process is employed, certain plants (e.g. cinnamon) can give either an essential oil or an extracted oleoresin. 01.2

22

HSEN to heading 3301:

(...)

Extracted oleoresins, also known in trade as 'prepared oleoresins' or 'spice oleoresins', are obtained from natural cellular raw plant materials (usually spices or aromatic plants), either by organic solvent extraction or by super-critical fluid extraction. These extracts contain volatile odoriferous principles (e.g. essential oils) and non-volatile flavouring principles (e.g. resins, fatty oils, pungency constituents), which define the characteristic odour or flavour of the spice or aromatic plant. The essential oil content of these extracted oleoresins varies considerably depending on the spice or aromatic plant. These products are used principally as flavouring agents in the food industry. 12.1

The heading excludes: 13.1

(a) Natural oleoresins (heading 1301). 14.1

(...)

Essential oils, resinoids and extracted oleoresins sometimes contain small quantities of solvent used in their extraction (e.g. ethyl alcohol), but this does not remove them from the scope of the heading. 17.1

23

Essential oils, resinoids and extracted oleoresins which have been merely standardised by the removal or addition of a portion of the principal ingredients remain classified in this heading provided the composition of the standardised product remains within the normal range found in that kind of product in its natural state. However, an essential oil, resinoid or extracted oleoresin which has been fractionated or otherwise modified (other than by the removal of terpenic hydrocarbons), so that **[Or. 9]** the composition of the resulting product is significantly different from that of the original product, is excluded (generally heading 3302). The heading further excludes products put up with added diluents or carriers such as vegetable oil, dextrose or starch (generally heading 3302).

18.3

(...)

In addition to the exclusions referred to above this heading also excludes: 29.0

(a) Vanilla oleoresin, sometimes erroneously known as ‘vanilla resinoid’ or ‘vanilla extract’ (heading 1302). 30.1

24

Heading 3302 of the CN:
3302

Mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis of one or more of these substances, of a kind used as raw materials in industry; other preparations based on odoriferous substances, of a kind used for the manufacture of beverages

3302 10 Of a kind used in the food or drink industries

3302 10 10 bis Of a kind used in the drink industries

3302 10 40

3302 10 90 Of a kind used in the food industries

25

HSEN to heading 3302:

This heading covers the following mixtures provided they are of a kind used as raw materials in the perfumery, food or drink industries (e.g. in confectionery, food or drink flavourings) or in other industries (e.g. soap-making): 01.0

(...)

(3) Mixtures of extracted oleoresins. 03.2

(...)

- (6) Mixtures of one or more odoriferous substances (essential oils, resinoids, extracted oleoresins or synthetic aromatics) combined with added diluents or carriers such as vegetable oil, dextrose or starch.
(...).
- 26 Article 27(1)(e) of Directive 92/83/EEC: 06.5
1. Member States shall exempt the products covered by this Directive from the [Or. 10] harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:
(...)
(e) when used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcohol strength not exceeding 1.2% vol.;
(...).
- 27 Article 43 of Council Directive 2008/118/EC of 16 December 2008 ('Directive 2008/118') concerning the general arrangements for excise duty and repealing Directive 92/12/EEC [...] (OJ 2009 L 9, p. 12):
1. The Commission shall be assisted by a committee referred to as the 'Committee on Excise Duty'.
- 28 Article 44 of Directive 2008/118:
The Committee on Excise Duty shall, in addition to its tasks under Article 43, examine the matters raised by its chairman, either on his own initiative or at the request of the representative of a Member State, concerning the application of Community provisions on excise duty.
- 29 Guideline CED 458 of the European Commission Committee on Excise Duty of 19 November 2003:
Questions concerning the application of the Community provisions on excise duties
- 30
- | | | |
|----|-------------------|--|
| 1. | <u>Origin:</u> | The Commission |
| | <u>Reference:</u> | Article 27(1)(e) of Directive 92/83/EEC |
| | <u>Subject:</u> | Intra Community movement of flavours covered by Article 27(1)(e) of Directive 92/83/EEC
CED 364 rev 1 and 432 |
- 31 The delegations accept almost unanimously that the exemption provided for in Article 27(1)(e) of Directive 92/83/EEC applies from the production stage or the importation onwards to flavourings of CN codes 1302 19 30, 2106 90 20 and 3302, in the versions in force at the time this guideline is adopted.
- 32 Subheading 1302 19 30 of the CN in the version in force on 19 November 2003:

1302 19 30 Intermixtures of vegetable extracts, for the manufacture of beverages or of food preparations [**Or. 11**]

33 Subheading 2106 90 20 of the CN in the version in force on 19 November 2003:

2106 90 20 Compound alcoholic preparations, other than those based on odoriferous substances, of a kind used for the manufacture of beverages

34 Heading 3302 of the CN in the version in force on 19 November 2003:

3302 Mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis of one or more of these substances, of a kind used as raw materials in industry; other preparations based on odoriferous substances, of a kind used for the manufacture of beverages

35 Applicable national law:

Paragraph 130 of the Gesetz über das Branntweinmonopol (Law on the Spirit Monopoly, 'the BranntwMonG') of 8 April 1922, as amended by the Law of 15 July 2009 (Federal Law Gazette ('BGBl') I, 1870):

(1) Spirits and goods (products) containing spirits are subject to duty on spirits in the tax territory (...).

(4) Goods containing spirits within the meaning of paragraph (1) differ from the alcoholic goods of Chapter 22 of the Combined Nomenclature; they are manufactured using spirit or contain spirit and their alcohol strength exceeds 1.2% by volume in the case of liquid goods or 1% by mass in the case of non-liquid goods.

(...)

36 Paragraph 152(1), point 5, of the BranntwMonG, as amended by the Law of 21 June 2013 (BGBl. I, 2221):

(1) Products shall be exempt from duty where they are used commercially

(...)

5. undenatured in the manufacture of flavours for flavouring

a) beverages with an alcohol strength not exceeding 1.2% vol.;

b) other foodstuffs, except spirits and other alcoholic beverages;

(...)

IV.

37 The Chamber has doubts as to the interpretation of the subheadings under which the imported goods might possibly be classified, that is subheadings 1302 19 05, 3301 90 30 and 3302 10 90 of the CN. **[Or. 12]**

38 1. According to the settled case-law of the Court, with which the referring court concurs, 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 in the section or chapter notes, and according to the general rules for the interpretation of the Combined Nomenclature ('GR') (judgment of 22 March 2017, *GROFA and Others*, C-435/15 and C-666/15, EU:C:2017:232, [...]).

39 The additional Explanatory Notes and classification opinions are an important aid for interpreting the various tariff headings, but do not have legally binding force (see judgment of 22 March 2017, *GROFA and Others*, EU:C:2017:232, [...]), hence why the referring Chamber has cited the Explanatory Notes in addition to the provisions of EU law. The intended use of a product may constitute a criterion if referred to as such in the wording of the provisions or the Explanatory Notes [...]. The decisive factor is whether the intended purpose is inherent in the product's objective characteristics and properties [...].

40 2. Based on its wording, heading 1302 of the CN covers vegetable saps and extracts; pectic substances, pectinates and pectates; agar-agar and other mucilages and thickeners, whether or not modified, derived from vegetable products.

41 It follows in addition from HSENs 01.1 and 02.0 to heading 1302 that that heading includes vegetable saps (vegetable products usually obtained by natural exudation or incision) and extracts (vegetable products extracted from the original vegetable material by solvents), provided that they are not specified or included in more specific headings. According to HSEN 02.5 to heading 1302, these saps and extracts differ from the essential oils, resinoids and extracted oleoresins of heading 3301, in that, apart from volatile odoriferous constituents, they contain a far higher proportion of other plant substances (e.g., chlorophyll, tannins, bitter principles, carbohydrates and other extractive matter).

42 (a) The goods imported by the applicant are obtained from the vegetable product (vanilla bean) in an initial processing step using a solvent (ethanol, according to the information provided by the applicant) **[Or. 13]**. They could therefore be regarded as a vegetable extract within the meaning of heading 1302 of the CN and the Explanatory Notes cited. This is confirmed by the examples cited in HSENs 03.0, 07.0, 10.0 and 13.0 to heading 1302, from which it may be deduced that extraction with a solvent (e.g. alcohol) does not preclude classification of the product under heading 1302 of the CN.

43 (b) However, the product is diluted with alcohol and water in a second processing step (again prior to import) to such an extent that those two

constituents account for approximately 95% (m/m) of the product. By contrast, the dry residue only accounts for 4.8% (m/m) and the vanilla content only accounts for 0.5% (m/m). The Chamber is of the opinion that this tiny proportion of plant substances suggests that the product has already lost all the characteristics of a vegetable extract at the time of importation.

- 44 On the other hand, it is impossible to deduce from heading 1302 of the CN and the associated Explanatory Notes the proportion of other plant substances below which the Nomenclature assumes that the product is still a vegetable extract and the proportion of other plant substances ingredients below which classification under heading 1302 of the CN is precluded and a higher processing step and different tariff heading (in this case heading 3301 or 3302 of the CN) are to be assumed. In any event, it follows from CNEN 01.1 to heading 1302, which does not have legally binding force, that processing related to standardisation does not preclude classification under heading 1302 of the CN. However, whether dilution with alcohol and water to the extent that applies in this case can still be regarded as standardisation even if, as argued by the applicant, its purpose is to adjust the vanilla strength to 0.5% (m/m) does not follow from that Note. It is also necessary to refer in this context to HSEN 29.1 to heading 1302, which states that vegetable saps and extracts are excluded from the heading when, because of the addition of other substances, they have the character of food preparations, medicaments, etc. Here again, the precise scope of heading 1302 of the CN is unclear.
- 45 (c) Furthermore, the referring Chamber also has doubts as to the scope of heading 1302 of the CN as, according to Note 1(ij) to Chapter 13, extracted oleoresins (in French ‘oléorésines d’extraction’) are explicitly excluded from heading 1302 of the CN. That is logical inasmuch as extracted oleoresins are covered by heading 3301 of the CN. HSEN 36.2 to heading 1302 also confirms that extracted oleoresins are covered by heading 3301 of the HS rather than by heading 1302. Extracted oleoresins differ from the extracts of heading 1302 of the CN in that they (1) are obtained from natural cellular raw plant materials [Or. 14] (almost always spices or aromatic plants), either by organic solvent extraction or by super-critical fluid extraction, and (2) contain volatile odoriferous principles together with non-volatile flavouring principles, which define the characteristic odour or flavour of the spice or aromatic plant (HSEN 36.5 to heading 1302).
- 46 As the FG held in this case that the vanilla oleoresin contained in ... vanilla extract is an extracted oleoresin, the product should therefore be excluded from heading 1302 of the CN in accordance with Note 1(ij) to Chapter 13. Consequently, based on the scheme of the nomenclature, its subheadings would also have to be disregarded (see also GR 6).
- 47 (d) In any event, a contradiction arises where goods such as those in this case are excluded from heading 1302 of the CN, inasmuch as vanilla oleoresin is explicitly listed in subheading 1302 19 05 of the CN. It also follows from HSEN 26.1 to heading 1302 of the CN (in Section (A) on vegetable saps and extracts)

that that heading covers vanilla oleoresin. However, if heading 1302 of the CN does not apply, its subheadings cannot apply either.

- 48 In any event, the remaining scope of subheading 1302 19 05 of the CN is unclear, as natural oleoresins are classified under heading 1301 of the CN (see also HSEs 37.0 and 38.1 to heading 1302) and extracted oleoresins are classified under heading 3301 of the CN. The HZA's finding that Note 1(ij) to Chapter 13 excluding extracted oleoresins from heading 1302 of the CN is intended to cover oleoresins other than vanilla oleoresins is not corroborated by the binding wording of that Note (see GR 1), which does not include any such differentiation.
- 49 An interpretation to the effect that vanilla oleoresins are vegetable extracts rather than oleoresins is equally unconvincing, as it raises the question of why a different name for vanilla extracts was chosen in subheading 1302 19 05 of the CN.
- 50 3. Although it might be possible to classify the contested goods under heading 3301 of the CN, the Chamber has doubts as to its interpretation. Heading 3301 of the CN covers 'essential oils (terpeneless or not), including "concretes" and "absolutes"; resinoids; extracted oleoresins; concentrates of essential oils in fats, in fixed oils, in waxes or the like, obtained by enfleurage or maceration; terpenic by-products of the deterpenation of essential oils; aqueous distillates and [Or. 15] aqueous solutions of essential oils'. Extracted oleoresins are explicitly listed in the wording of the heading and HSEN 01.2 to Chapter 33 confirms that heading 3301 of the CN also covers extracted oleoresins.
- 51 According to HSEN 12.1 to heading 3301, extracted oleoresins are obtained from natural cellular raw vegetables (mostly spices or aromatic plants) by extraction with organic solvents or super-critical fluids. These extracts contain volatile odoriferous principles (e.g. essential oils) and non-volatile flavouring principles (e.g. resins, fatty oils, pungency constituents), which define the characteristic odour or flavour of the spice or aromatic plant. The Chamber regards the concepts of 'Lösemittel' (see HSEN 02.0 to heading 1302) and 'Lösungsmittel' (see HSEN 12.1 to heading 3301) as synonymous terms for 'solvent' in this context.
- 52 (a) The product at issue in this case is obtained from the vanilla bean using a solvent (ethanol, according to the information provided by the applicant) and is subsequently diluted with alcohol and water. Thus, the product has the objective constituents that must be present in accordance with the wording of heading 3301 of the CN (see GR 1) and, consequently, the FG also refers to it (in part) as an extracted oleoresin.
- 53 Moreover, as stated previously, the product contained dry residue of just 4.8% (m/m) at the time of importation. This high grade of purity also suggests that it is no longer covered by heading 1302 of the CN and is to be classified under heading 3301 of the CN, as goods of heading 1302 of the CN contain a far higher proportion of other plant substances (see HSEN 02.5 to heading 1302).

- 54 (b) Nonetheless, the Chamber has doubts in this case as to whether ... vanilla extract should be classified under heading 3301 of the CN. Vanilla oleoresin is explicitly listed under subheading 1302 19 05 of the CN, meaning that it must be differentiated in relation to heading 1302 of the CN (see above). Furthermore, according to Note 1(a) to Chapter 33, that chapter does not cover vegetable extracts of heading 1302. It follows from HSENs 29.0 and 30.1 to heading 3301 that vanilla oleoresin is excluded from heading 3301. That suggests that products which, like ... vanilla extract, contain extracted vanilla oleoresin, may not be classified under heading 3301 of the CN. The differentiation between the extracted oleoresins of heading 3301 of the CN and the vegetable extracts of heading 1302 of the CN is therefore of critical importance in this case. **[Or. 16]**
- 55 4. On the other hand, the dividing line between heading 3301 of the CN and heading 3302 of the CN also raises questions. Heading 3302 of the CN covers 'mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis of one or more of these substances, of a kind used as raw materials in industry; other preparations based on odoriferous substances, of a kind used for the manufacture of beverages'.
- 56 It follows from HSENs 01.0, 03.2 and 06.5 to heading 3302 that this heading does not only cover mixtures of several extracted oleoresins. On the contrary, heading 3302 of the CN also covers mixtures on the basis of just one odiferous substance. Thus, they may be mixtures of one or more odiferous substances (essential oils, resinoids, extracted oleoresins or synthetic aromatics) combined with added diluents or carriers such as vegetable oil, dextrose or starch.
- 57 (a) Based on that finding, it might also be possible to classify ... vanilla extract under heading 3302 of the CN. The product contains extracted vanilla oleoresin and is thus based on an odiferous substance within the meaning of Note 2 to Chapter 33 of the CN and HSEN 06.5 to heading 3302. Furthermore, the vanilla oleoresin is diluted by adding alcohol and water. Due to the high alcohol strength (85% m/m), ... vanilla extract may have lost its character as an extracted oleoresin within the meaning of heading 3301 of the CN and have become an alcoholic solution within the meaning of heading 3302 of the CN, meaning that it would have to be classified within that heading under subheading 3302 10 90 of the CN.
- 58 (b) However, the referring Chamber also has doubts as to the interpretation of heading 3302 of the CN, as it is impossible to differentiate clearly between its scope and the scope of heading 3301 of the CN. It is impossible to deduce clear specifications from either the wording of heading 3302 of the CN or its interpretive Explanatory Notes as to the minimum quantity of additional water or additional alcohol which causes an extracted oleoresin to lose its classification under heading 3301 of the CN and to be classified under heading 3302 of the CN.
- 59 The referring Chamber also questions whether classification under heading 3302 of the CN is precluded by the fact that only constituents already used to obtain the

vanilla oleoresin from the vanilla beans are added in Switzerland to the vanilla oleoresin obtained in Madagascar and are therefore already present in smaller concentrations. HSEN 17.1 to heading 3301 points out that extracted oleoresins sometimes contain small quantities of organic solvent used in their extraction (e.g. ethyl alcohol), but this **[Or. 17]** does not remove them from the scope of the heading. However, even if extraction residues do not affect classification, the Chamber questions how the customs administration can be expected to recognise the proportion of ethanol which is (simply) an extraction residue and how much of the ethanol in the product was added once extraction had been completed. The HZA has noted in this context that it is impossible to determine even from investigation of the goods whether the ethanol is a residue from the extraction of the vanilla oleoresin or ethanol added thereafter. In light of the case-law of the Court cited earlier, which states that goods are classified based on their objective constituents (see above), and the need for legal certainty for importers and uniform application of the CN, the Chamber considers that this is a valid objection.

- 60 Moreover, even though it does not have legally binding force, HSEN 18.3 to heading 3301 might also suggest that the increase in the alcohol strength does not change the classification of the goods to heading 3302 of the CN as, according to that Explanatory Note, extracted oleoresins which are simply standardised by the removal or addition of a portion of the principal ingredients to achieve a particular strength are still classified under heading 3301 of the CN. That raises the objection that classification depends in principle on the objective constituents of the product and the wording of the heading, which means that the reason why ethanol was added to the product is irrelevant for classification purposes.

V.

- 61 The referring Chamber has doubts as to how the case should be appraised under EU law for the purposes of German law on the duty on spirits:
- 62 ... vanilla extract contains spirit and is therefore subject in principle to German duty on spirits in accordance with the first sentence of Paragraph 130(1), read in combination with Paragraph 130(4) of the BranntwMonG. However, doubt arises in this case as to whether the exemption under Paragraph 152(1), point 5, of the BranntwMonG, which is based on EU law, applies to imported ... vanilla extract.
- 63 1. Article 27(1)(e) of Directive 92/83 states that Member States shall exempt the products covered by this Directive from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse: **[Or. 18]** when used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcohol strength not exceeding 1.2% vol.

- 64 That provision was transposed into national law under Paragraph 152(1), point 5, of the BranntwMonG, which states that products are exempt from duty if used commercially and undenatured in the manufacture of flavours for flavouring a) beverages with an alcohol strength not exceeding 1.2% vol.; or b) other foodstuffs, except spirits and other alcoholic beverages.
- 65 2. Judgment on the dispute hinges in essence on which products qualify as duty-exempt flavours within the meaning of Article 27(1)(e) of Directive 92/83 and whether ... vanilla extract is a flavour in that sense. As the Directive does not define the concept of 'flavour', the referring Chamber has doubts as to the interpretation of that exemption from duty.
- 66 The European Commission Committee on Excise Duty addressed but was unable to agree on the definition of flavours at its meeting on 29 and 30 September 1993. The Commission took the view that it should always be permitted to use alcohol duty-free in the manufacture of products used to flavour foodstuffs and non-alcoholic beverages and, in particular, that the exemption from duty for flavours for certain refreshments (cola, lemonade) should be safeguarded, so that they can be purchased outside a duty suspension arrangement [...].
- 67 The European Commission Committee on Excise Duty addressed the exemption from duty for flavours again at a later date and summarised what it considered to be the necessary preconditions to exemption from duty under Article 27(1)(e) of Directive 92/83 in guideline CED 458 of 19 November 2003. The delegations to the Committee on Excise Duty accepted almost unanimously that the exemption provided for in Article 27(1)(e) of Directive 92/83 applies from the production stage or the importation onwards to flavourings of CN codes 1302 19 30, 2106 90 20 and 3302, in the versions in force at the time that guideline was adopted. Thus intermixtures of vegetable extracts, for the manufacture of beverages or of food preparations (subheading 1302 19 30 of the CN in the version in force on 19 November 2003), compound alcoholic preparations, other than those based on odoriferous substances, of a kind used for the manufacture of beverages (subheading 2106 90 20 of the CN in the version in force on 19 November 2003), mixtures of odiferous substances and mixtures (including alcohol solutions) with a basis of one or more of these substances, [Or. 19] of a kind used as raw materials in industry; other preparations based on odiferous substances, of a kind used for the manufacture of beverages (heading 3302 of the CN in the version in force on 19 November 2003), should be exempt from duty on spirits.
- 68 The Federal Republic of Germany agreed to this on 1 September 2014 and issued an administrative regulation instructing the customs administration to exempt goods of heading 3302 of the CN, goods of heading 2106 90 20 of the CN and intermixtures of vegetable extracts for the manufacture of beverages or of food preparations of heading 1302 of the CN from duty on spirits [...]. By contrast, goods of heading 3301 of the CN and vegetable extracts not intermixed within the meaning of heading 1302 of the CN are not exempt from duty on spirits.

- 69 On that basis, ... vanilla extract would not be exempt from duty on spirits were it to be classified under heading 3301 of the CN, even though goods of heading 3302 of the CN, which may contain more alcohol, are exempt from that duty. Were it to be classified under subheading 1302 19 05 of the CN, the exemption from duty for flavours would not apply because ... vanilla extract consists of just one vegetable extract, namely vanilla oleoresin, and, in the opinion of the referring Chamber, it is therefore not an intermixture of vegetable extracts. The other constituents (alcohol and water) are not vegetable constituents.
- 70 3. However, the referring Chamber has doubts as to whether the exemption from duty for flavours pursuant to Article 27(1)(e) of Directive 92/83 does in fact only apply to goods of the subheadings stipulated by the Committee on Excise Duty. Those doubts have arisen simply because no such restriction follows either from Directive 92/83 or from other provisions of EU law. On the contrary, Article 27(1)(e) of Directive 92/83 refers to flavours in general and does not restrict the exemption from duty to certain goods of the CN or to goods with certain properties. The exemption from duty is restricted only inasmuch as it presupposes certain intended uses and is limited to flavours with a certain maximum alcohol strength. Thus, based on the wording of Article 27(1)(e) of Directive 92/83, other flavourings, including non-intermixed vegetable extracts, would have to be covered by the exemption from duty, especially as, like flavours, such vegetable extracts can be used for the preparation of foodstuffs and beverages [Or. 20]. This would also prevent the outcome addressed, that duty on spirits should not be charged on goods of heading 3302 of the CN, which may contain a great deal of alcohol, but should be charged on goods of heading 3301 of the CN, which contain less alcohol.
- 71 Furthermore, the restriction on the exemption from duty to the subheadings of the CN cited in guideline CED 458 of 19 November 2003 is at odds with general language usage. The term 'flavour' (in Latin 'aroma', in Greek 'ároma') is defined both as a 'distinctive pleasant taste, spicy fragrance; strong, intense (fragrant) odour; distinctive natural taste or natural odour, especially of a savoury vegetable' and a '(synthetic) flavouring for food, aromatic condiment' (www.duden.de).
- 72 The referring court has doubts in this context as to whether the Committee on Excise Duty does in fact have the power to limit the scope of Article 27(1)(e) of Directive 92/83 or to interpret it narrowly in derogation from its wording ('Aromen', 'flavours', 'arômes') as, according to Article 44 of Directive 2008/118, the Committee on Excise Duty only examines matters concerning the application of Community provisions on excise duty. However, that does not imply that it has the power to amend secondary Community or EU law. On the contrary, the activity of the Committee on Excise Duty is intended simply to achieve the uniform application of existing EU law in the Member States and to assist the European Commission (Article 43(1) of Directive 2008/118).
- 73 However, that is certainly not achieved by guideline CED 458 of the Committee on Excise Duty on the exemption from duty of flavours, as Estonia and Romania

disagreed with it and the United Kingdom only agreed with it in part. Aside from the doubts expressed as to the interpretation of EU law on flavours, that means that there is also a risk that the law will not be applied uniformly.

WORKING DOCUMENT