Case C-635/21

Request for a preliminary ruling

Date lodged:

15 October 2021

Referring court:

Finanzgericht Bremen (Germany)

Date of the decision to refer:

18 August 2021

Applicant:

LB GmbH

Defendant:

Hauptzollamt D

Finanzgericht Bremen (Finance Court, Bremen, Germany)

[…]

Order

In the case of

LB GmbH – Applicant –

[…]

v

Hauptzollamt D (Principal Customs Office, D, Germany)

– Defendant –

concerning customs duties (including customs tariffs)

on the basis of the hearing held on 18 August 2021, the Finance Court, Bremen – 1st Chamber – rules as follows, via …:

I. The proceedings are stayed pending the decision of the Court of Justice of the European Union ('the Court') on the request for a preliminary ruling.

II. The following question is referred to the Court for a preliminary ruling pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU):

Is the combined nomenclature in Annex I to 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 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2016 L 294 of 28 October 2016, p. 1), to be interpreted as meaning that 'air loungers' such as those in the present case and as described in more detail in the order come under subheading 9401 80 00?

[…] [information concerning appeals]

Grounds

I.

1 The parties are in dispute over the correct tariff classification of air loungers.

2 In July 2017, the applicant imported air loungers from China and declared them for release for free circulation under Combined Nomenclature (CN) codes 9404 9090 000 and 3926 9092 90 0. The goods were initially released in accordance with the declaration; at the same time, a sample was taken for purposes of an examination.

3 The air loungers are a type of 'air sofa' consisting of an inner tube made of plastic film and an outer covering made of textile fabric, which are sewn together in the closure area in such a way that air can flow into two chambers. The air loungers are inflated by pulling the open end through the air quickly and in a linear motion and then immediately closed by rolling the opening in several times and using the quick-closing fastener. The internal separation creates a kind of recess in which a person can sit or lie. The stability of the air loungers depends on how firmly they are inflated. According to the applicant's statement made at the hearing on 18 August 2021, after the air lounger has initially been completely inflated, it loses air within a few hours, thereby affecting stability and making it necessary to inflate it again.

4 According to the present Chamber's findings following its inspection of an inflated air lounger at the hearing, it is possible for someone to sit on it without tipping over if he or she sits on it with bent legs and in a central position – when viewing the longitudinal side – and laterally oriented to the left or to the right, keeping his or her feet on the ground. However, if the person extends his or her

legs forward, the air lounger starts to lean and the person tips forward. Crossing one leg also leads to an unstable sitting position. The present Chamber also considers that it is difficult to sit cross-legged on an air lounger without falling over or sliding off it. On the other hand, it is possible for someone to achieve a stable sitting position on an air lounger by placing his or her legs on the ground on the left- and right-hand side of it, that is to say, by adopting a sitting posture as if he or she were riding on the air lounger. However, that seating position remains stable only as long as the feet are kept on the ground.

5 In all three of the models imported by the applicant, the plastic part used for the inner film in each case is between 100 and 110 grams heavier than the textile fabric. In all three models, the value of the textile fabric is between USD 0.07 and 0.08 higher than the value of the interior plastic film in each case.

6 In its classification opinion of … 2018, the Bildungs- und Wissenschaftszentrum der Bundesfinanzverwaltung (Education and Science Centre of the Federal Revenue Administration, Germany; 'the BWZ') concluded that the air loungers at issue are to be classified under CN code 6306 9000 90 0 (third-country duty rate of 12%). On the basis of that expert opinion, the defendant Principal Customs Office ('the HZA') issued an import duty notification on … 2019 by which it imposed on the imports at issue in the present case further customs duties totalling EUR … by way of post-clearance recovery in accordance with Article 101 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ('the UCC'), read in conjunction with Article 105(4) thereof. By objection decision of … 2019, the defendant dismissed the applicant's objection as unfounded. By its action brought on … 2019, the applicant pursues its challenge against the – in its view – incorrect classification of the air loungers.

7 It submits that the air loungers at issue should be classified as seats under CN subheading 9401 80 00 or, in the alternative, under CN subheading 3926 9092 90 0.

8 According to the Harmonised System Explanatory Notes ('HSENs') to heading 9401, the latter covers all seats (subject to the exclusions mentioned therein). Furthermore, submits the applicant, there are no customs tariff rules or regulations that provide that furniture must have a certain shape or rigidity, for example. The goods have a seating surface and the [German] wording of the heading also covers the term '*Liegen*' [loungers/couches]. Even though that term is a noun, it is clear that the function of a '*Liege*' [lounger/couch] is to enable a person to lie on it. As long as a movable article placed on the floor or ground is used for sitting or lying down, it comes under heading 9401, irrespective of the material of which it is made, its size and weight. Finally, in the view of the applicant, the goods at issue in the present case are also used as articles of furniture in residential premises.

9 However, even if it were assumed that they are not seats, in line with the view taken by the defendant HZA, classification in accordance with Rule 3(b) of the

General Rules for the interpretation of the Combined Nomenclature ('GIRs') would lead to classification under CN code 3926 9092 90 0. This is because, in the present case, the plastic film is to be regarded as giving the goods their essential character, since they are filled with air. Therefore, the airtightness, which is guaranteed only by the plastic film, is of decisive importance for the intended use of the air loungers.

10 If, on the other hand, neither of the two materials were considered to give the goods their essential character, they would be classified under heading 9401, in accordance with GIR 3(c). This is because that heading would then be in competition with heading 6306 – that assumed by the defendant HZA – with the result that, in accordance with GIR 3(c), the heading which occurs last in numerical order in the nomenclature, namely heading 9401 in this case, would apply.

11 Against this, the defendant HZA takes the view that the goods at issue should be classified as 'camping goods of other textile materials' under code 6306 9000 90 0. This is because, according to the defendant HZA, they are neither furniture nor seats, since, according to Note 2 to Chapter 94, furniture is designed to be placed on the floor or ground. To that end, it requires a firm support surface or corresponding support points, which the air loungers do not have. By contrast, the air loungers have a certain degree of instability and lack a defined seating surface. Furthermore, submits the defendant HZA, they are not articles of furniture used to furnish a room, because they are not characterised by the fact that they are permanently erected or placed in one location.

12 As no other heading of Chapter 94 enters into consideration either, the goods must, according to the HZA, be classified on the basis of their constituent material. Accordingly, classification under Chapter 39 (articles of plastics) or Chapter 63 (other made-up textile articles) might in principle be possible. The defendant HZA submits that, in application of GIR 3(b), the air loungers are to be classified in Chapter 63, since it is the textile fabric that gives the goods their essential character in the present case. The criteria of nature, quantity and weight are not determinant in that respect. With regard to use, both the textile material and the plastic are of equal importance for the functionality of the goods. It is true that the plastic retains the air, but, without the textile coating, the plastic film would be worn down very quickly, for example when the air lounger is dragged over sand. Moreover, lying on the plastic film in swimwear would be uncomfortable. However, since the textile fabric determines the external appearance of the goods, it is to be regarded as giving them their essential character in the present case.

13 According to the defendant HZA, even if one were to assume that it is not possible to determine the material which gives the goods their essential character, one would arrive at a classification under heading 6306. This is because, in application of GIR 3(c), heading 6306 is the heading which occurs last in numerical order in the customs tariff nomenclature as compared with a heading in Chapter 39.

14 The defendant HZA states that the goods are sewn together on the longitudinal sides and are therefore ‘made up’ in accordance with Note 7(f) to Section XI. Since the goods in the present case are not ‘articles of apparel and clothing accessories’, the only remaining possibility is to classify them as ‘other made-up textile articles’ under Chapter 63. There, the goods are most precisely covered by heading 6306, under the generic term ‘camping goods’, and classified under code 6306 9000 90 0, on the basis of their constituent material.

15 The hearing in the case was held on 18 August 2021. In the course of the hearing, the present Chamber inspected a sample of the air lounger in question together with the parties.

II.

16 The present Chamber stays the proceedings […] and refers the question set out in the operative part of the order to the Court for a preliminary ruling under Article 267 TFEU.

17 The decisive factor for classification is whether the air loungers are seats within the meaning of heading 9401. If that question is answered in the negative, the Chamber takes the view that the air loungers are to be classified under subheading 6306 9000 90 0.

18 Legal framework

19 The chapters, headings and subheadings of the Combined Nomenclature that are at issue in the present case read as follows:

Heading 9401 reads as follows:

‘Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof’

Subheading 9401 80 00 00 0 reads as follows:

‘Other seats’

Chapter 39 covers: ‘PLASTICS AND ARTICLES THEREOF’

Heading 3926 reads as follows:

‘Other articles of plastics …’

Subheading 3926 9092 reads as follows: ‘Other, made from sheet’, and subheading 3926 9092 90 0 reads as follows: ‘Other’

Chapter 63 covers, inter alia: ‘OTHER MADE-UP TEXTILE ARTICLES’

Heading 6306 reads as follows:

‘Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods’

Subheading 6306 90 reads as follows: ‘Other’, while subheading 6306 9000 90 0 reads as follows: ‘Of other textile materials’.

20 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 or subheading of the CN and the notes to the sections or chapters (see the General Rules for the interpretation of the Combined Nomenclature [‘the General Rules’]; CJEU, judgments of 7 February 2002, *Turbon International*, C-276/00, EU:C:2002:88, paragraph 21; of 4 March 2004, *Krings*, C-130/02, EU:C:2004:122, paragraph 28; of 19 July 2012, *Rohm & Haas Electronic Materials CMP Europe*, C-336/11, EU:C:2012:500, paragraph 31). In addition, the Explanatory Notes on the Harmonised System drawn up by the Customs Cooperation Council and the Explanatory Notes on the CN drawn up by the Commission constitute an important aid to the interpretation of the scope of the various tariff headings, although they do not have legally binding force (CJEU, judgments of 7 February 2002, *Turbon International*, C-276/00, EU:C:2002:88, paragraph 22; of 4 March 2004, *Krings*, C-130/02, EU:C:2004:122, paragraph 28). The intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties (see CJEU, judgments of 26 May 2016, *Invamed Group*, C-198/15, EU:C:2016:362, paragraph 22; of 1 June 1995, *Thyssen Haniel Logistic*, C-459/93, EU:C:1995:160, paragraph 13; of 5 April 2001, *Deutsche Nichimen*, C-201/99, EU:C:2001:199, paragraph 20, and of 18 July 2007, *Olicom*, C-142/06, EU:C:2007:449, paragraph 18). However, the intended use of a product is a relevant criterion only where the classification cannot be made on the sole basis of the objective characteristics and properties of the product (CJEU, judgments of 28 April 2016, *Oniors Bio*, C-233/15, EU:C:2016:305, paragraph 33, and of 16 December 2010, *Skoma-Lux*, C-339/09, EU:C:2010:781, paragraph 47).

21 The question referred for a preliminary ruling.

22 The present Chamber is inclined to the view that the air loungers are not seats within the meaning of heading 9401.

23 First, the Chamber already has doubts as to whether the goods at issue are ‘furniture’ within the meaning of Chapter 94 at all. According to the HSENs to Chapter 94, General, second paragraph, (A), the term ‘furniture’ covers articles which are used, mainly with a utilitarian purpose, to equip private dwellings or gardens etc.; however, only articles which are intended to remain in those places with a certain degree of permanence serve to equip them. The present Chamber takes the view that this is not the case with regard to air loungers, which are specifically suitable for being taken along to different places and being used there

temporarily. This is because, even if they were to be used in a different way in individual cases, due to their objective characteristics such as their lightness and the fact that they can be inflated without using a pump or the like, they are easy to transport, can be set up easily and quickly and can be packed away just as easily and quickly. Lastly, due to the fact that they are relatively unstable and need to be re-inflated on a regular basis, they are suitable for permanent use as articles of furniture only to a limited extent.

24 Specifically, the present Chamber takes the view that the air loungers are not seats either, because they are not made primarily to be sat on. A seat is intended […] to enable [the user] to sit on it in a stable manner – possibly assuming various sitting positions. In that respect, it must at least be possible for the user to take his or her feet off the ground without thereby falling off the seat or tipping over together with it. The air loungers at issue in the present case do not guarantee this, however. As the present Chamber was able to ascertain in its inspection, stable sitting positions can be assumed on an air lounger only if the user's legs are bent and his or her feet are placed on the ground. However, that mere possibility to sit on an air lounger is not sufficient to attribute to them a fundamental intended purpose to the effect that they constitute seats.

25 The present Chamber is also unable to accept the applicant's argument that the further wording of heading 9401 – 'whether or not convertible into beds' – leads to classification under that heading. This is because the [German] text of heading 9401 does not use the verb '*liegen*' [to lie], but the noun '*Liegen*' [loungers/couches]. It can be seen from the English and French texts of heading 9401 that they do not use the term 'loungers/couches', but rather 'beds' and '*lits*' [beds], respectively. Since only the English and French texts of the HS Convention are binding […] [reference in legal literature], the applicant cannot rely on the use of the word '*Liegen*' [loungers/couches] in the German text of heading 9401. Rather, the term 'beds' must be taken as the basis. A bed is generally understood to be a piece of furniture used for sleeping, lying down or resting. A bed can fulfil that purpose only if it has a lying surface on which the entire body can be placed in all possible sleeping positions (sleeping on the back, stomach or side). The only way that a user can assume a reasonably safe lying position on the air loungers at issue in the present case is by lying on his or her back. However, the air loungers do not make it possible for the user to sleep normally, in the various possible positions.

26 Moreover, they would in any event have to be seats primarily. This is because the wording 'Seats …, whether or not convertible into beds' makes it unequivocally clear that the goods must primarily constitute seats in order to be classified under that heading.

27 The present Chamber is therefore inclined to the view that the air loungers at issue are to be classified in application of GIR 3. In that respect, the Chamber takes the view – contrary to that taken by the defendant HZA – that it is not possible to determine a material giving the product its essential character.

28 In the present case, the question as to the material giving the product its essential character cannot be answered by reference to either the nature or the bulk, quantity, weight or value of the material. First, the difference in value between the two materials under consideration (plastic film and textile fabric) is so negligible that it can be disregarded. The present Chamber takes the view that the same applies to the weight of the two materials. Accordingly, it is true that the textile fabric is slightly lighter than the plastic film used in each case, and thus could be considered to give the air loungers their essential character in light of the fact that they are specifically designed to be as light as possible. However, the Chamber takes the view that the difference is so negligible in that respect also that it cannot be regarded as decisive. The same applies to the bulk of the two materials. According to the applicant's submissions, slightly more plastic film than textile fabric was used to make the product; by contrast, the defendant HZA stated at the hearing that, in the product sample examined, slightly more textile fabric than plastic was used. The Chamber takes the view that the question of whether a little more textile or a little more plastic was in fact used can remain open. This is because such small differences are not sufficient to categorise one of the two materials as the one that gives the goods their essential character.

29 As regards the importance that the two materials under consideration have for the use of the air loungers, the Chamber takes the view that the two materials are equally important. Without the plastic film, the air loungers could not be used because they could not hold the air with which they are filled. However, they could not be sold without the surrounding fabric either, particularly because their lifespan would be considerably limited from the outset. The fabric covering is also essential for making the air loungers comfortable when the body comes into contact with them, especially in swimwear. It is also necessary for aesthetic reasons.

30 Contrary to the view taken by the defendant HZA, the present Chamber does not consider that the fabric is to be regarded as giving the goods their essential character solely on the basis of their external appearance. Rather, the Chamber proceeds on the assumption that both materials are equally important for the use of the air loungers.

31 As a result, the Chamber is inclined to the view that the goods at issue are to be classified under Chapter 63, in application of GIR 3(c). Since classification under a heading of Chapter 39 is the only other possible classification in addition to classification under Chapter 63, heading 6306 is the heading which occurs last in numerical order in the nomenclature.

32 However, the Chamber does not fail to recognise that the above view on classification holds only if it is established that the air loungers at issue in the present case are not seats within the meaning of heading 9401.

33 At the same time, the Chamber is aware that, at the time of the imports relevant in the present case, that is to say, in 2017, there were several sets of binding tariff

information (issued by other Member States for the most part and in respect of other undertakings in all cases) which had classified comparable goods as seats. It is irrelevant in this regard that those sets of binding tariff information are now no longer valid.

34 It is likewise irrelevant that the HSENs published in OJ C 119 of 29 March 2019, p. 1, state, in note 03.0 to Chapter 94, in relation to goods such as those at issue in the present case, that they are not furniture within the meaning of Chapter 94, but, depending on their constituent material, are camping goods of heading 6306 or articles of Chapters 39 or 40. This is because, first, those explanatory notes are not legally binding and, moreover, cannot have any retroactive effect.

35 Therefore, in the light of the binding tariff information issued during the period at issue, doubts remain as to whether classification of the air loungers at issue in the present case under heading 9401 as seats in that sense can be denied.