

Case C-591/23

Request for a preliminary ruling

Date lodged:

25 September 2023

Referring court:

Finanzgericht Düsseldorf (Germany)

Date of the decision to refer:

23 August 2023

Applicant:

ZCC Europe GmbH

Defendant:

Hauptzollamt Düsseldorf

[...]

FINANZGERICHT DÜSSELDORF (DÜSSELDORF FINANCE COURT)

O R D E R

In the case of

ZCC Europe GmbH, [...] Düsseldorf,

– Applicant –

[...]

v

Hauptzollamt (Principal Customs Office)
Düsseldorf, [...] Düsseldorf, [...]
– Defendant –

concerning

customs duty and VAT on imports

the Fourth Chamber [...]

[...]

made the following order on the basis of the hearing of 23 August 2023:

The proceedings are stayed.

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

Is Commission Implementing Regulation (EU) 2021/910 of 31 May 2021 concerning the classification of certain goods in the Combined Nomenclature (OJ 2021 L 199, p. 4) valid?

This order is not open to appeal.

Grounds

I.

- 1 In 2008, the applicant declared metal carbide sticks of cermets imported from the People's Republic of China ('the PRC') for release for free circulation. It declared the goods, described in the commercial invoices as 'cemented Carbide rods', under Combined Nomenclature (CN) subheading 8209 00 80.
- 2 The metal carbide sticks consisted of a mixture of tungsten carbide with a proportion of cobalt as the binding substance. They were sintered and then mechanically polished. They were of varying lengths, mostly between 100 and 300 mm, and of varying diameters between 2 and 40 mm. They had a uniform round cross-section and flush ends. Some of them moreover had one to three cooling channels. The applicant sold the metal carbide sticks to tool manufacturers which, in further processing steps, transformed the sticks into tools for the machining of metals.
- 3 Following an on-the-spot inspection, the defendant principal customs office took the view that the metal carbide sticks of cermets should be classified not under the subheading given by the applicant but under CN subheading 8113 00 90. Accordingly, the defendant principal customs office sought post-clearance recovery of customs duty. The present Chamber rejected the applicant's subsequent action against the post-clearance recovery of customs duty by its judgment of 19 April 2017. Upon the appeal on a point of law brought by the applicant, the German Bundesfinanzhof (Federal Finance Court, 'the BFH') set aside the judgment of the present Chamber and referred the case back to the Finanzgericht Düsseldorf (Düsseldorf Finance Court) [...]. As grounds, the BFH held that, although the metal carbide sticks had the characteristics of CN heading 8113, which was designed as a residual heading, since they were articles of cermets, it was nonetheless for the finance court to ascertain whether the characteristics of the more specialised CN heading 8209 were present.
- 4 After the case was referred back, the present Chamber sought a report from the expert. In his report of 4 December 2019, the expert came to the conclusion that the metal carbide sticks in question were usually transformed into tools possessing geometrically defined cutting edges. He wrote that the types of metal carbide from which the sticks were made were tool materials specially developed for demanding metal-machining processes. The sticks with cooling channels were, in his view, an unequivocal indication of their use for drills or shank type milling cutters. He found that the other sticks, because of their geometry and the choice of materials, had clear characteristics of shank tools such as drills, shank type milling cutters and thread cutters.
- 5 On the basis of that report, the present Chamber by its judgment of 18 March 2020 (4 K 3162/18 Z) set aside the notice of assessment challenged by the applicant.

- 6 Commission Implementing Regulation (EU) 2021/910 of 31 May 2021 concerning the classification of certain goods in the Combined Nomenclature (OJ 2021 L 199, p. 4) ('CIR 2021/910') entered into force on 27 June 2021. It classified cermet sticks with a uniform round cross-section under CN subheading 8113 00 90. Recital 5 of that regulation states that the measures provided for are in accordance with the opinion of the Customs Code Committee. The Committee had at its 215th meeting, held from 14 to 16 December 2020, expressed the view that, with regard to the BFH judgment of 7 August 2018 and the judgment of the present Chamber of 18 March 2020, a classification regulation was necessary in order to provide legal certainty and legal clarity as well as to ensure uniform tariff classification of the article in question in the EU.
- 7 On 27 August and on 7 and 13 September 2021, the applicant declared metal carbide sticks of cermets imported from the PRC for release for free circulation under CN subheading 8209 00 80. The metal carbide sticks corresponded to the metal carbide sticks it had declared for release for free circulation in 2008, which were the subject of the BFH judgment of 7 August 2018 (VII R 20/17) and the judgment of the present Chamber of 18 March 2020 (4 K 3162/18 Z).
- 8 With reference to CIR 2021/910, the defendant principal customs office classified the goods declared by the applicant under CN subheading 8113 00 90. Accordingly, it imposed customs duty and import VAT on the applicant, applying a duty rate of 5%.
- 9 In the objection it filed against that decision, the applicant argued as follows: the metal carbide sticks it declared can only be used for tools and not for other purposes. Therefore, CIR 2021/910 does not apply to those goods. Irrespective of that, CIR 2021/910 is unlawful because it does not merely provide clarification but alters the wording of CN subheading 8209 00 80 and the BFH judgment of 7 August 2018. Moreover, no clarification is required, since the aforementioned BFH judgment has already clarified the legal situation.
- 10 The defendant principal customs office rejected the objection as unfounded.
- 11 In the action it then brought, the applicant essentially repeats the arguments it put forward in the objection procedure.
- 12 The defendant principal customs office has opposed the action and argues as follows: the metal carbide sticks are covered by CIR 2021/910. That regulation is binding on customs authorities. Moreover, the Polish, Dutch and Irish customs authorities have in the meantime issued binding tariff information classifying comparable metal carbide sticks under CN subheading 8113 00 90.

II.

- 13 The present Chamber stays the action pending before it [...] and refers the question set out in the operative part of the present order to the Court of Justice of the European Union ('the Court') for a preliminary ruling pursuant to the second

paragraph of Article 267 of the Treaty on the Functioning of the European Union. The outcome of the dispute depends on whether CIR 2021/910 is valid.

- 14 The present Chamber has no doubt that the metal carbide sticks at issue, which correspond to the metal carbide sticks the applicant declared for release for free circulation in 2008, which were the subject of the BFH judgment of 7 August 2018 (VII R 20/17) and the judgment of the present Chamber of 18 March 2020 (4 K 3162/18 Z), should be classified under CN subheading 8209 00 80. In the present case, the CN is applicable in the version resulting from Commission Implementing Regulation (EU) 2020/1577 of 21 September 2020 (OJ 2020 L 361, p. 1).
- 15 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 CN and of the section or chapter notes (Court judgments of 12 July 2012, C-291/11, ECLI:EU:C:2012:459, paragraph 30, and of 28 October 2021, C-197/20 and C-216/20, ECLI:EU:C:2021:892, paragraph 31). The intended use of a product may also 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 (Court judgments of 22 September 2016, C-91/15, ECLI:EU:C:2016:716, paragraph 56, and of 28 October 2021, C-197/20 and C-216/20, ECLI:EU:C:2021:892, paragraph 31).
- 16 The intended use of the metal carbide sticks for tools within the meaning of CN subheading 8209 00 ('baguettes [...] pour outils' and 'Stäbchen [...] für Werkzeuge' in the French and German versions of the subheading) is inherent to the goods in the view of the present Chamber. Classification under CN subheading 8113 00 90 as simply articles of cermets is therefore ruled out. This is because heading 8113 does not include sticks for tools of cermets, which should be classified under heading 8209 (see Explanatory Notes on the Harmonized System, heading 8113, last paragraph, point (b)).
- 17 It is apparent from the expert report of 4 December 2019 sought by the present Chamber in proceedings 4 K 3162/18 Z that the metal carbide sticks in question, because of their geometry, the choice of materials and the presence of cooling channels in some of them, are intended for tools possessing geometrically defined cutting edges. For classification under CN subheading 8209 00, it suffices that the main intended use of the metal carbide stick is for tools (Court judgment of 5 September 2019, C-559/18, ECLI:EU:C:2019:667, paragraph 28).
- 18 At the same time, CIR 2021/910 may preclude the classification of the metal carbide sticks at issue under CN subheading 8209 00 80. By that regulation, the Commission classified cermet sticks with a uniform round cross-section under CN subheading 8113 00 90. The present Chamber has no doubt that the classification regulation is intended in particular to cover the metal carbide sticks which the applicant declared for release for free circulation in 2008, which were the subject

of the BFH judgment of 7 August 2018 (VII R 20/17) and the judgment of the present Chamber of 18 March 2020 (4 K 3162/18 Z). That is evident in particular from the minutes of the 215th meeting of the Customs Code Committee, held from 14 to 16 December 2020. According to the minutes, the adoption of CIR 2021/910 was necessary in the light of ‘a legally binding national judgment’ in order to provide legal certainty and legal clarity as well as to ensure uniform tariff classification of the article in question in the EU.

- 19 The present Chamber questions the validity of CIR 2021/910. The Court has repeatedly held that the European Parliament and the Council of the European Union have conferred upon the Commission broad discretion to define the subject matter of tariff headings falling to be considered for the classification of particular goods. However, the Commission’s power to adopt the measures referred to in Article 57(4) of Regulation (EU) No 952/2013 of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1) does not authorise it to alter the subject matter and the scope of the tariff headings (Court judgments of 22 February 2018, C-545/16, ECLI:EU:C:2018:101, paragraph 23 and of 19 December 2019, C-677/18, ECLI:EU:C:2019:1142, paragraph 37).
- 20 The Commission may with CIR 2021/910 have altered the subject matter or scope of CN subheading 8209 00 80. According to the case-law of the BFH (judgment of 7 August 2018, VII R 20/17), classification under that subheading is not precluded by the fact that the sticks of cermets still require further processing before they can be used for tools. Moreover, the Commission acknowledged in the Description of the goods and Reasons to CIR 2021/910 that the articles in question may be used for tools if further processed. It appears likely, in the light of the expert report of 4 December 2019 sought by the present Chamber in proceedings 4 K 3162/18 Z, that the Commission’s assertion in the Description of the goods and Reasons to CIR 2021/910 that, based on their degree of processing and simple form and shape, the cermets sticks could be used for a wide range of uses is incorrect.

[...]

[Signatures]