Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

8 October 2020*

(Reference for a preliminary ruling — Customs union — Regulation (EEC) No 2913/92 — Community Customs Code — Article 121(1) — Inward processing procedure — Release for free circulation — Incurrence of a customs debt — Determination of the debt — Concept of 'taxation elements' — Taking account of a preferential tariff measure)

In Case C-330/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 19 April 2019, received at the Court on 23 April 2019, in the proceedings

Staatssecretaris van Financiën

v

Exter BV,

THE COURT (Seventh Chamber),

composed of A. Kumin (Rapporteur), President of the Chamber, T. von Danwitz and P.G. Xuereb, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Exter BV, by M. Boekhoud,

– the Netherlands Government, by M. Bulterman and M.H.S. Gijzen, acting as Agents,

– the European Commission, by F. Clotuche-Duvieusart and P. Vanden Heede, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 121(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, 'the Customs Code').

2 The request has been made in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) and Exter BV concerning the implementation of a preferential tariff measure.

Legal context

3 The Customs Code was repealed and replaced with effect from 1 May 2016 by Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1, and corrigenda OJ 2013 L 287, p. 90 and OJ 2016 L 267, p. 2, and OJ 2018 L 173, p. 35). However, in view of the date of the facts at issue in the main proceedings, the Customs Code remains applicable to the present case.

4 Article 20 of the Customs Code provided:

'1. Duties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the European Communities.

…

3. The Customs Tariff of the European Communities shall comprise:

(a) the combined nomenclature of goods;

…

(c) the rates and other items of charge normally applicable to goods covered by the combined nomenclature as regards:

– customs duties …

…

(d) the preferential tariff measures contained in agreements which the Community has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment;

(e) preferential tariff measures adopted unilaterally by the Community in respect of certain countries, groups of countries or territories;

(f) autonomous suspensive measures providing for a reduction in or relief from import duties chargeable on certain goods;

(g) other tariff measures provided for by other Community legislation.

…'

5 Article 114 of the code, under heading D entitled ‘Inward processing’, stated:

‘1. Without prejudice to Article 115, the inward processing procedure shall allow the following goods to be used in the customs territory of the Community in one or more processing operations:

(a) non-Community goods intended for re-export from the customs territory of the Community in the form of compensating products, without such goods being subject to import duties or commercial policy measures;

(b) goods released for free circulation with repayment or remission of the import duties chargeable on such goods if they are exported from the customs territory of the Community in the form of compensating products.

2. The following expressions shall have the following meanings:

(a) suspension system: the inward processing relief arrangements as provided for in paragraph 1 (a);

…

(c) processing operations:

– the working of goods, including erecting or assembling them or fitting them to other goods,

– the processing of goods,

and

– the repair of goods, including restoring them and putting them in order;

– the use of certain goods defined in accordance with the committee procedure which are not to be found in the compensating products, but which allow or facilitate the production of those products, even if they are entirely or partially used up in the process;

(d) compensating products: all products resulting from processing operations;

…’

6 Article 120 of the code provided:

‘The cases in which and the conditions under which goods in the unaltered state or compensating products shall be considered to have been released for free circulation may be determined in accordance with the committee procedure.’

7 Article 121 of the Customs Code reads as follows:

‘1. ‘Subject to Article 122, where a customs debt is incurred, the amount of such debt shall be determined on the basis of the taxation elements appropriate to the import goods at the time of acceptance of the declaration of placing of these goods under the inward processing procedure.

2. If at the time referred to in paragraph 1 the import goods fulfilled the conditions to qualify for preferential tariff treatment within tariff quotas or ceilings, they shall be eligible for any preferential tariff treatment existing in respect of identical goods at the time of acceptance of the declaration of release for free circulation.’

The dispute in the main proceedings and the question referred for a preliminary ruling

8 Exter is an undertaking in the food industry which processes protein hydrolysates ('hydrolysates') into a raw material to be used as the basis for making stock.

9 For that purpose, it was authorised, between 23 May 2012 and 23 May 2015, to use for the hydrolysates the inward processing customs procedure, applying the suspension system. During the period from 12 November 2012 to 17 June 2013, Exter placed a number of consignments of hydrolysates from Thailand under the inward processing customs procedure ('the goods at issue').

10 At the time of acceptance of the customs declarations, the normal rate of customs duties corresponding to the tariff subheading under which those goods were classified was 12.8%. However, by way of exception to the normal rate, until 31 December 2013 hydrolysates qualified for a preferential tariff measure, which reduced the normal rate for such goods to 8.9% if they came from a beneficiary country, such as Thailand, pursuant to Article 6(3) and Article 7 of Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences from 1 January 2009 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007 (OJ 2008 L 211, p. 1), as amended by Regulation (EU) No 512/2011 of the European Parliament and of the Council of 11 May 2011 (OJ 2011 L 145, p. 28).

11 After processing, Exter decided not to re-export some of the goods at issue, but to terminate the inward processing customs procedure. Between 4 February 2014 and 26 August 2014, it declared those goods for release for free circulation in batches.

12 In the declarations in question, Exter stated that the goods at issue came under the inward processing customs procedure applying the suspension system, described the goods as 'protein hydrolysates' and gave tariff subheading 2106 90 92 of 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 (OJ 1987 L 256, p. 1) in the versions resulting, successively, from Commission Regulation (EU) No 1006/2011 of 27 September 2011 (OJ 2011 L 282, p. 1) and Commission Implementing Regulation (EU) No 927/2012 of 9 October 2012 (OJ 2012 L 304, p. 1). Exter also asked the competent Netherlands customs authority ('the customs authority') to apply the preferential rate of 8.9% provided for in Regulation No 732/2008 when calculating the customs debt.

13 The preferential tariff measure referred to in paragraph 10 above was suspended for the period from 1 January 2014 to 31 December 2016. The suspension was therefore in place when Exter declared the goods at issue for release for free circulation. For that reason, the customs authority did not apply the preferential rate of 8.9% but determined the customs duties payable using the rate of 12.8%.

14 Proceedings were brought before the Gerechtshof Amsterdam (Court of Appeal, Amsterdam, Netherlands) concerning the question of whether the customs authority should have had regard to the preferential tariff measure in force for 2012 and 2013 when calculating the amount of the customs debt due in respect of the release for free circulation of the goods at issue in 2014. That court held that, in a situation such as that at issue in the main proceedings, the amount of the customs debt should be calculated in accordance with Article 121(1) of the Customs Code on the basis of the taxation elements appropriate to the import goods at the time of acceptance of the declaration of placing of those goods under the inward processing procedure. The court noted, inter alia, that it was common ground between the parties that, at the time the goods at issue were placed under the inward processing procedure, Exter satisfied all of the conditions to qualify for the preferential rate of 8.9%, had it, at that stage, declared the goods for release for free circulation and asked for the preferential tariff in question to be applied. The Gerechtshof Amsterdam (Court of Appeal, Amsterdam) concluded that, in those circumstances, the customs authority was obliged to apply the preferential rate of 8.9% when calculating the customs debts arising from the declarations of release of the goods for free circulation.

15 Hearing the appeal brought by the State Secretary for Finance, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has set out, in the order for reference, two possible interpretations of the wording of Article 121(1) of the Customs Code.

16 The referring court states, first, that Article 121(1) of the Customs Code could be interpreted as meaning that the concept of 'taxation elements' within the meaning of that provision includes the import duties and preferential tariff measures referred to in Article 20(3) of the code. According to that interpretation, the amount claimed, in respect of both the import goods in the unaltered state and the compensating products, would be the amount payable had the import goods immediately been released for free circulation and not placed under the inward processing customs procedure applying the suspension system. In the present case, that would mean that the goods at issue are subject, pursuant to Article 121(1) of the Customs Code, to import duties at the rates referred to in Article 20(3)(c), which were normally applicable to hydrolysates at the time of acceptance of the declarations placing those goods under the inward processing procedure, namely at the preferential rate of 8.9%, and therefore that Exter would have qualified for the application of that rate for 2014.

17 The second interpretation set out by the referring court is that the concept of 'taxation elements' within the meaning of the Customs Code does not refer to the normal or preferential rates. The referring court points out that a terminological distinction is made, at least in the Netherlands, when determining the amount of duties, levies or other charges legally payable between, on the one hand, applicable rates in the form of percentage rates or specific duties and any (preferential) tariff measures and, on the other hand, the taxation elements to which those rates and tariff measures are to be applied, such as the value, the weight or the quantity of the goods. It states that that interpretation safeguards the principle that customs duties are to be calculated in accordance with the legal and factual situation at the time when the customs debt was incurred. In the present case, that interpretation would mean that Exter would not have qualified for the application of the preferential tariff measure for 2014 given that, at the time when the customs debt had to be calculated, that is to say, the date of acceptance of the declaration of release for free circulation, that measure was suspended and thus the normal rate applied once more.

18 While the referring court favours the second of those interpretations, it considers that the accuracy of its analysis is not beyond reasonable doubt.

19 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 121(1) of the [Customs Code] mean that a preferential tariff measure for the application of which the import goods were eligible at the time of their placement under the inward processing procedure using the suspension system may also be taken into account when determining the amount of the customs debt incurred when the goods were released for free circulation, whether or not in the unaltered state, if that tariff measure was suspended on the date of acceptance of the declaration for release for free circulation?'

Consideration of the question referred

20 By its question, the referring court asks, in essence, whether Article 121(1) of the Customs Code must be interpreted as precluding the application of a preferential tariff measure leading to a reduced rate of customs duty, which was in force at the time of acceptance of the declaration of placing of goods under the inward processing procedure, but which was suspended at the date of acceptance of the declaration of release of those goods for free circulation.

21 Under Article 121(1) of the Customs Code, in an inward processing procedure, where a customs debt is incurred, the amount of such debt is to be determined on the basis of the taxation elements appropriate to the import goods at the time of acceptance of the declaration of placing of those goods under the inward processing procedure.

22 The referring court therefore questions whether the concept of 'taxation elements' is to be interpreted for the purpose of that provision as also referring to the normal and preferential rates of customs duties or whether it is limited to the taxation elements to which those rates are to be applied, such as the tariff classification, customs value, quantity, nature or origin of the goods.

23 It should be noted at the outset that the concept of 'taxation elements' is not defined by the Customs Code and that the code makes no reference to the law of the Member States for the purpose of determining the meaning and scope of that concept.

24 In that regard, it should be noted that, according to the Court's settled case-law, the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective of the legislation in question. Consequently, the concept of 'taxation elements' in Article 121(1) of the Customs Code must, first, be regarded as an autonomous concept of EU law, and, second, be interpreted in the light of the objective pursued by the legislation concerned and the context of that article (see, to that effect, judgment of 11 May 2017, *The Shirtmakers*, C-59/16, EU:C:2017:362, paragraphs 21 and 22).

25 As regards the objective of the inward processing procedure, Article 114(1) of the Customs Code provides, inter alia, that that procedure allows certain goods to be used in the customs territory of the Union in one or more processing operations, including non-Community goods intended for re-export from the customs territory in the form of compensating products, without such goods being subject to import duties or commercial policy measures. That form of inward processing procedure is described in Article 114(2)(a) of the code as the 'suspension system'. Under Article 114(2)(c) and (d) of the code, compensating products are all products resulting from processing operations, such as the working or the processing of goods.

26 The re-export of goods in the form of compensating products from the customs territory of the Union is a condition for the application of the inward processing procedure. It follows that that procedure may be lawfully applied only if the goods are in fact intended for re-export from the customs territory of the Union, as indicated in the provisions of Article 537 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001 (OJ 2001 L 141, p. 1), according to which anyone seeking to benefit from that procedure must have the 'intention of re-exporting' the goods concerned (see, to that effect, judgment of 4 June 2009, *Pometon*, C-158/08, EU:C:2009:349, paragraph 23).

27 In that context, the Court has stated that the inward processing procedure, which involves the suspension of customs duties, is an exceptional measure intended to facilitate the carrying out of certain economic activities (see, to that effect, judgment of 14 January 2010, *Terex Equipment and Others*, C-430/08 and C-431/08, EU:C:2010:15, paragraph 42). It is clear from all the rules which make up its legal structure that the very aim of inward processing is to exempt from customs duties only those goods which are brought into the customs territory of the Union purely on a temporary basis in order that they may be worked, repaired or processed, and then re-exported, thus preventing economic activity in the EU Member States from being penalised (judgment of 4 June 2009, *Pometon*, C-158/08, EU:C:2009:349, paragraph 24).

28 That being so, under Article 120 of the Customs Code goods in the unaltered state or compensating products may be released for free circulation, which leads to a customs debt being incurred in accordance with Article 121 of the code.

29 Regard should also be had to the fact that preferential tariff measures such as those at issue in the main proceedings are part of a scheme of generalised tariff preferences established by the Council of the European Union by means of a regulation that is intended to apply for a prescribed period. As the European Commission correctly states, if the concept of 'taxation elements' in Article 121(1) of the Customs Code did include the rate of customs duties applicable, an economic operator could elect to place goods under the inward processing procedure for longer in order to release them for free circulation only after the preferential rate has been suspended or lifted so that those goods are subject to a reduced rate of customs duties, whereas the same goods imported by a different operator at the time of release for free circulation would be subject to the normal rate. The possibility of such a distortion of competition being created would run counter to the objective of the inward processing procedure, as stated in paragraph 27 above.

30 As regards the context of Article 121(1) of the Customs Code, that provision should be read in the light of Article 121(2) of the code, which provides that if, at the time of acceptance of the declaration of placing of the import goods under the inward processing procedure, those goods fulfilled the conditions to qualify for preferential tariff treatment within tariff quotas or ceilings, they are to be eligible for any preferential tariff treatment existing in respect of identical goods at the time of acceptance of the declaration of release for free circulation.

31 Article 121(2) of the Customs Code would be superfluous if the concept of 'taxation elements' in Article 121(1) had to be interpreted as including normal and preferential rates of customs duties.

32 Accordingly, that concept must be interpreted as including not the normal and preferential rates of customs duties, but only the elements to which such rates apply.

33 As the referring court correctly states, that interpretation of the concept of 'taxation elements' is consistent with the principle that customs duties are to be calculated in accordance with the situation at the time when the customs debt is incurred.

34 In the light of all of the above considerations, the answer to the question referred is that Article 121(1) of the Customs Code must be interpreted as precluding the application of a preferential tariff measure leading to a reduced rate of customs duty, which was in force at the time of acceptance of the declaration of placing of goods under the inward processing procedure, but which was suspended at the date of acceptance of the declaration of release of those goods for free circulation.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 121(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as precluding the application of a preferential tariff measure leading to a reduced rate of customs duty, which was in force at the time of acceptance of the declaration of placing of goods under the inward processing procedure, but which was suspended at the date of acceptance of the declaration of release of those goods for free circulation.

[Signatures]