Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

29 October 2015*

(Reference for a preliminary ruling — Community Customs Code — Regulation (EEC) No 2913/92 — Articles 203 and 204 — External Community transit procedure — Regulation (EEC) No 2454/93 — Articles 365, 366 and 859 — Incurrence of a customs debt — Whether or not goods are unlawfully removed from customs supervision — Non-fulfilment of an obligation — Failure to end the transit procedure — Removal of the goods from the customs territory of the European Union)

In Case C-319/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 13 June 2014, received at the Court on 3 July 2014, in the proceedings

B & S Global Transit Center BV

v

Staatssecretaris van Financiën,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby, A. Rosas, E. Juhász and C. Vajda, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 May 2015,

after considering the observations submitted on behalf of:

— B & S Global Transit Center BV, by B. Boersma, adviseur,

— the Netherlands Government, by M. Bulterman, M. Noort and C. Schillemans, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and A. Collabolletta, avvocato dello Stato,

— the European Commission, by L. Grønfeldt and H. Kranenborg, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2015,

* Language of the case: Dutch.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 203 and 204 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1) ('the Customs Code'), and of certain provisions 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) ('the implementing regulation'), namely Articles 365 and 859 of the implementing regulation, in the version following the adoption of Commission Regulation (EC) No 993/2001 of 4 May 2001 (OJ 2001 L 141, p. 1) (respectively 'Article 365 of the implementing regulation' and 'Article 859 of the implementing regulation'), and Article 366 of the implementing regulation, in the version following the adoption of Commission Regulation (EC) No 1192/2008 of 17 November 2008 (OJ 2008 L 329, p. 1) ('Article 366 of the implementing regulation').

2 The request has been made in proceedings between B & S Global Transit Center BV ('B & S') and the Staatssecretaris van Financiën (State Secretary for Finance) concerning the payment of customs duties for which B & S is alleged to be liable because it removed goods from customs supervision by failing to end the external Community transit procedures ('the transit procedures') under which it had placed those goods.

Legal context

The Customs Code

3 Article 37 of the Customs Code provides:

'1. Goods brought into the customs territory of the Community shall, from the time of their entry, be subject to customs supervision. They may be subject to customs control in accordance with the provisions in force.

2. They shall remain under such supervision for as long as necessary to determine their customs status, if appropriate, and in the case of non-Community goods and without prejudice to Article 82(1), until their customs status is changed, they enter a free zone or free warehouse or they are re-exported or destroyed in accordance with Article 182.'

4 Article 91(1) of that code is worded as follows:

'The external transit procedure shall allow the movement from one point to another within the customs territory of the Community of:

(a) non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures;

…'

5 Article 92 of that code provides:

'1. The external transit procedure shall end and the obligations of the holder shall be met when the goods placed under the procedure and the required documents are produced at the customs office of destination in accordance with the provisions of the procedure in question.

2. The customs authorities shall discharge the procedure when they are in a position to establish, on the basis of a comparison of the data available to the office of departure and those available to the customs office of destination, that the procedure has ended correctly.'

6 Article 96(1) of that code provides:

'The principal shall be the [holder of] the external Community transit procedure. He shall be responsible for:

(a) production of the goods intact at the customs office of destination by the prescribed time limit and with due observance of the measures adopted by the customs authorities to ensure identification;

(b) observance of the provisions relating to the Community transit procedure.'

7 Under Article 203 of the Customs Code:

'1. A customs debt on importation shall be incurred through:

— the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

3. The debtors shall be:

— the person who removed the goods from customs supervision,

…'

8 According to Article 204(1) of that code:

'A customs debt on importation shall be incurred through:

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed …

…

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.'

9 Under Article 239 of that code:

'1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:

— to be determined in accordance with the procedure of the committee;

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases.'

The implementing regulation

10 Article 365 of the implementing regulation, in force until 30 June 2009, provided:

'1. If copy No 5 of the transit declaration is not returned to the customs authorities of the Member State of departure within two months of the date of acceptance of the declaration, those authorities shall inform the principal and ask him to furnish proof that the procedure has ended.

1a. Where the provisions of Section 2 subsection 7 apply and the customs authorities of the Member States of departure have not received the "Arrival Advice" message by the time limit within which the goods must be presented at the office of destination those authorities shall inform the principal and ask him to furnish proof that the procedure has ended.

2. The proof referred to in paragraph 1 may be furnished to the satisfaction of the customs authorities in the form of a document certified by the customs authorities of the Member State of destination identifying the goods and establishing that they have been presented at the office of destination or, where Article 406 applies, to the authorised consignee.

3. The Community transit procedure shall also be considered as having ended where the principal presents, to the satisfaction of the customs authorities, a customs document issued in a third country entering the goods for a customs-approved treatment or use, or a copy or photocopy thereof, identifying the goods. Copies or photocopies must be certified as being true copies by the body which certified the original documents, by the authorities of the third countries concerned or by the authorities of one of the Member States.'

11 Article 366 of the implementing regulation, in force from 1 July 2008, provides:

'1. The proof that the procedure has ended within the time limit prescribed in the declaration may be furnished by the principal to the satisfaction of the customs authorities in the form of a document certified by the customs authorities of the Member State of destination identifying the goods and establishing that they have been presented at the office of destination or, where Article 406 applies, to an authorised consignee.

2. The Community transit procedure shall also be considered as having ended where the principal presents, to the satisfaction of the customs authorities, one of the following documents:

(a) a customs document issued in a third country entering the goods for a customs-approved treatment or use;

(b) a document issued in a third country, stamped by the customs authorities of that country and certifying that the goods are considered to be in free circulation in the third country concerned.

3. The documents mentioned in paragraph 2 can be replaced by copies or photocopies, certified as true copies by the body which certified the original documents, by the authorities of the third countries concerned or by the authorities of one of the Member States.'

12 Article 859 of the implementing regulation is worded as follows:

‘The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204(1) of the [Customs] Code, provided:

— they do not constitute an attempt to remove the goods unlawfully from customs supervision,

— they do not imply obvious negligence on the part of the person concerned, and

— all the formalities necessary to regularise the situation of the goods are subsequently carried out:

…

6. in the case of goods in temporary storage or entered for a customs procedure, removal of the goods from the customs territory of the Community or their introduction into a free zone of control type I within the meaning of Article 799 or into a free warehouse without completion of the necessary formalities;

…’

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

13 On 3 July 2006, 13 August 2007 and 18 December 2007, B & S, a provider of logistical services, submitted, as principal, electronic declarations for foodstuffs to be placed under the transit procedure. Those declarations designated each time the customs office of Moerdijk (Netherlands) as the office of departure, and, respectively, those of Bremerhaven (Germany), Antwerp (Belgium) and, again, Bremerhaven as the offices of destination.

14 On 4 August 2006, 26 September 2007 and 24 January 2008, the customs office of departure notified B & S that it had received neither the necessary return copies nor the electronic confirmations of receipt. Following that office’s request to furnish proof that those procedures had been correctly ended, B & S submitted a number of commercial transport documents, referred to as ‘bills of lading’.

15 In response to an enquiry notice issued by the tax inspector of the Netherlands fiscal authorities (Inspecteur van de Belastingdienst) (‘the Inspector’), the customs offices of destination stated that no goods or corresponding transit documents had been submitted to them. In those circumstances, and taking the view that the commercial documents produced by B & S did not comply with Article 365 or 366 of the implementing regulation, so that the transit procedures could not be regarded as having ended, the Inspector, relying on Article 203 of the Customs Code, issued, on 24 May 2007, 1 July 2008 and 4 November 2008 respectively, demands for payment of customs duties by B & S, on the ground that the latter had removed the goods concerned from customs supervision.

16 B & S submitted an objection to two demands for payment and a request for reimbursement concerning the third demand. In that context, B & S produced additional documents, in particular acknowledgments of receipt for the goods at issue, issued by the consignees thereof, namely United Nations (UN) forces in Abidjan (Côte d’Ivoire), North Atlantic Treaty Organisation (NATO) forces in Kabul (Afghanistan) and UN forces in Port-au-Prince (Haiti). The Inspector, not being satisfied with those new documents, decided to uphold the demands for payment.

17 B & S brought an action against the Inspector’s decisions before the Rechtbank Haarlem (District Court, Haarlem). That court annulled those decisions on the ground that the documents provided by B & S made it possible to establish the existence of a failure having no significant effect on the

correct operation of those procedures within the meaning of Article 204(1)(a) of the Customs Code, read in conjunction with Article 859(6) of the implementing regulation, since the documents provided by B & S proved that the goods had left the customs territory of the European Union.

18 The Inspector brought an appeal against that judgment of the Rechtbank Haarlem (District Court, Haarlem) before the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam). That court first of all found that the Inspector was correct to consider that none of the goods had been presented at the office of destination, for the purposes of Articles 92 and 96 of the Customs Code. Next, that court held that none of the documents produced by B & S satisfied the mandatory conditions laid down in Article 365(3) or 366(2) and (3) of the implementing regulation. Finally, referring to the judgment in *Hamann International* (C-337/01, EU:C:2004:90), it held that, despite the goods' leaving the customs territory of the European Union, the failure to end the transit procedures amounted to those goods being removed from customs supervision and led to a customs debt being incurred under Article 203 of the Customs Code.

19 B & S lodged an appeal on a point of law against that judgment before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). That court considers that the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) was correct to hold that the transit procedures at issue had not ended, for the purposes of Article 92 of the Customs Code, and could not be considered as having ended, for the purposes of Article 365(3) or 366(2) and (3) of the implementing regulation. However, that court considers that the judgment in *X* (C-480/12, EU:C:2014:329) could be interpreted as meaning that the incurrence of a customs debt under Article 203 of the Customs Code is precluded where it is established that the goods did not enter the economic network of the European Union without having been cleared through customs.

20 If a failure to fulfil the obligation to duly end the transit procedure does not amount to removal of the goods from customs supervision, the referring court is uncertain whether such a failure may be considered to have no significant effect on the correct operation of that procedure within the meaning of Article 204(1)(a) of the Customs Code, read in conjunction with the third indent and paragraph 6 of Article 859 of the implementing regulation.

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

'(1) Must Articles 203 and 204 of the Customs Code, read in conjunction with Article 859 (in particular paragraph 6) of the implementing regulation, be interpreted as meaning that, where the transit procedure has not ended, but documents have in fact been produced which make it possible to assume that the goods have left the customs territory of the European Union, the fact that that procedure has not ended does not lead to the incurring of a customs debt by reason of a removal of the goods from customs supervision within the meaning of Article 203 of the Customs Code but, in principle, to the incurring of a customs debt on the basis of Article 204 of that code?

(2) Must Article 859(6) of the implementing regulation be interpreted as meaning that that provision concerns exclusively the non-performance of (one of) the obligations associated with the (re)exportation of goods as set out in Articles 182 and 183 of the Customs Code? Alternatively, should the clause "without completion of the necessary formalities" be taken to mean that the "necessary formalities" also include the formalities that must be completed prior to the (re)exportation in order to bring to an end the customs procedure under which the goods have been placed?

(3) If the answer to Question 2 is in the affirmative, must the third indent of Article 859 of the implementing regulation be interpreted as meaning that the fact that the formalities referred to in Question 2 have not been completed does not, in a situation such as that in the present case — in which, on the basis of documentation, it has been shown that the goods left the

customs territory of the European Union subsequent to transit within the European Union — preclude the condition that "all the formalities necessary to regularise the situation of the goods are subsequently carried out" from being deemed to have been satisfied?'

Consideration of the questions referred

The first question

22 By its first question, the referring court asks, in essence, whether Articles 203 and 204 of the Customs Code must be interpreted as meaning that a failure to comply with the obligation to present goods placed under the transit procedure at the customs office of destination in principle leads to a customs debt being incurred on the basis of Article 204 of that code, and not Article 203 thereof, where the goods concerned have left the customs territory of the European Union and the holder under that procedure is unable to produce documents that comply with Article 365(3) or 366(2) and (3) of the implementing regulation.

23 It should be noted, first of all, that it is apparent from the information provided by the referring court (i) that the goods at issue in the main proceedings were not presented at their respective customs offices of destination and (ii) that the documents provided by B & S to the Inspector, referred to in paragraphs 14 and 16 of the present judgment, show that those goods in fact left the customs territory of the European Union. That court considers, however, that those documents do not satisfy the evidential requirements laid down in Article 365(3) or 366(2) and (3) of the implementing regulation.

24 The referring court concludes from those circumstances that the transit procedures at issue in the main proceedings have not ended under Article 92 of the Customs Code and also cannot be considered as having ended, within the meaning of Article 365(3) or 366(2) and (3) of the implementing regulation. Those findings have not been called into question by any of the parties to the proceedings before the Court.

25 It should be noted that Articles 203 and 204 of the Customs Code have different spheres of application. Whilst the first provision covers conduct leading to the goods being removed from customs supervision, the second covers failure to fulfil obligations and non-compliance with the conditions of the various customs procedures which have no effect on customs supervision (judgment in *DSV Road*, C-187/14, EU:C:2015:421, paragraph 22).

26 It is clear from the wording of Article 204 of the Customs Code that it applies only to situations which do not fall within the scope of Article 203 of that code (judgment in *DSV Road*, C-187/14, EU:C:2015:421, paragraph 23).

27 It follows therefrom that, in order to determine which of those two articles forms the basis on which a customs debt on importation is incurred, it is necessary first of all to consider whether in the factual situation in question there was an unlawful removal from customs supervision within the terms of Article 203(1) of the Customs Code. Only if that question is answered in the negative is it possible that Article 204 of the Customs Code may apply (judgment in *DSV Road*, C-187/14, EU:C:2015:421, paragraph 24).

28 With regard more particularly to the concept of removal from customs supervision, referred to in Article 203(1) of the Customs Code, it must be borne in mind that, in accordance with the Court's case-law, that concept is to be interpreted as covering any act or omission the result of which is to

prevent the competent customs authority, if only for a short time, from gaining access to goods under customs supervision and from carrying out the monitoring required under Article 37(1) of the Customs Code (judgment in *DSV Road*, C-187/14, EU:C:2015:421, paragraph 25).

29 It is sufficient, for there to be 'removal from customs supervision', for the goods in question to have been objectively removed from possible controls, whether or not such controls have actually been carried out by the competent authority (judgment in *SEK Zollagentur*, C-75/13, EU:C:2014:1759, paragraph 32).

30 In the light of the case-law cited in paragraphs 25 to 29 of the present judgment, it must be stated that a situation such as that at issue in the main proceedings, described in paragraphs 23 and 24 of the present judgment, comes within the scope not of Article 204 of the Customs Code, but of Article 203 thereof.

31 As the Advocate General observed in points 25 and 26 of his Opinion, the obligation, laid down in Article 96(1)(a) of the Customs Code, for the holder under a transit procedure to present the goods at the customs office of destination plays a crucial role for the functioning of customs supervision in the context of such a procedure since, in accordance with Article 92(2) of that code, their presentation enables the customs authorities to establish, on the basis of a comparison of the data available to the office of departure and those available to the customs office of destination, that the procedure has ended correctly.

32 Therefore, in a situation such as that in the main proceedings, a failure to comply with the obligation to present the goods at the customs office of destination before they leave the customs territory of the European Union prevents the competent authorities from performing one of the customs controls referred to in Article 37(1) of the Customs Code, namely that provided for in Article 92(2) of that code, a control which is decisive for the functioning of the transit procedure in that it enables those authorities to establish whether the transit procedure has ended correctly. Such a failure amounts to removal from customs supervision, for the purposes of Article 203 of the Customs Code, where the requirements of Article 365(3) or 366(2) and (3) of the implementing regulation, allowing such a procedure to be regarded as having ended notwithstanding the failure to present the goods at the customs office of destination, are also not fulfilled.

33 In so far as the European Commission maintains that removal from customs supervision is precluded in the present case because the goods at issue in the main proceedings were under the supervision of the customs authorities until they left the customs territory of the European Union, it must be stated that, by failing to fulfil its obligation under Article 96(1)(a) of the Customs Code to present those goods at their respective customs offices of destination before they left the customs territory of the European Union, B & S removed those goods from customs supervision before they had even left that territory.

34 Moreover, the mere fact that the goods at issue in the main proceedings left the customs territory of the European Union does not preclude a failure to comply with the obligation to present those goods at their respective customs offices of destination from being classified as 'removal from customs supervision', resulting in a customs debt being incurred on the basis of Article 203 of the Customs Code. The Court has already found there to be such removal notwithstanding the fact that the goods concerned do not improperly enter the economic network of the European Union.

35 Thus, in the judgment in *Hamann International* (C-337/01, EU:C:2004:90), the Court held, as is apparent in particular from paragraphs 21 to 24, 32 and 36 thereof, that, having regard to the circumstances of the case giving rise to that judgment, the failure to comply with the obligation to place goods under the transit procedure amounted to removal from customs supervision for the purposes of Article 203 of the Customs Code, even though the goods concerned had left the territory of the European Union. In the judgment in *SEK Zollagentur* (C-75/13, EU:C:2014:1759), the Court

considered, as follows in particular from paragraphs 18 and 33 of that judgment, that the temporary removal of the transit document from the goods listed therein had to be characterised as 'a removal of those goods from customs supervision', within the meaning of that article, even though the goods concerned had correctly entered the economic network of the European Union by being released for free circulation.

36 Moreover, it should be noted that, in a situation in which the goods have been taken out of the customs territory of the European Union, the financial nature of the import duties does not preclude a customs debt from being incurred on the basis of Article 203(1) of the Customs Code, since Article 239 of that code provides for the repayment or remission of duties legally owed, subject to certain conditions (see, to that effect, judgment in *Hamann International*, C-337/01, EU:C:2004:90, paragraph 34).

37 Finally, the finding in paragraph 30 of the present judgment can also not be called into question by the argument set out by the referring court and put forward by B & S that it follows from the judgment in *X* (C-480/12, EU:C:2014:329) that the failure to comply with the obligation to present the goods at issue in the main proceedings at their respective customs offices of destination does not lead to a customs debt being incurred on the basis of Article 203 of the Customs Code since the removal of those goods from the territory of the European Union eliminated the risk that they would improperly enter the economic network of the European Union.

38 It is apparent from paragraph 37 of that judgment and the facts set out relating to the case giving rise to the judgment that the latter concerned an instance in which the goods at issue were presented, although late, at the customs office of destination. The goods at issue in the main proceedings were, by contrast, not presented at their respective customs offices of destination enabling the authorities to establish that the transit procedure ended correctly.

39 As stated by the Advocate General, in points 30 and 31 of his Opinion, in the light of the case-law cited in paragraph 35 of the present judgment it cannot be deduced from the judgment in *X* (C-480/12, EU:C:2014:329) that the latter specifies a general rule to the effect that mere proof that goods have not improperly entered the economic network of the European Union suffices in itself to preclude a removal from customs supervision or the incurring of a customs debt under Article 203 of the Customs Code.

40 In the light of all the foregoing considerations, the answer to the first question is that Articles 203 and 204 of the Customs Code must be interpreted as meaning that a failure to comply with the obligation to present goods placed under the transit procedure at the customs office of destination leads to a customs debt being incurred on the basis not of Article 204 of that code, but of Article 203 thereof, where the goods concerned have left the customs territory of the European Union and the holder under that procedure is unable to produce documents that comply with Article 365(3) or 366(2) and (3) of the implementing regulation.

The second and third questions

41 It should be noted that Article 859 of the implementing regulation, which is the subject of the second and third questions, is not applicable to the situations referred to in Article 203 of the Customs Code. Therefore, in view of the answer given to the first question, there is no need to answer the second and third questions.

Costs

42 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 (Fifth Chamber) hereby rules:

Articles 203 and 204 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006, must be interpreted as meaning that a failure to comply with the obligation to present goods placed under the external Community transit procedure at the customs office of destination leads to a customs debt being incurred on the basis not of Article 204 of Regulation No 2913/92, as amended by Regulation No 1791/2006, but of Article 203 of Regulation No 2913/92, as amended by Regulation No 1791/2006, where the goods concerned have left the customs territory of the European Union and the holder under that procedure is unable to produce documents that comply with Article 365(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, in the version following the adoption of Commission Regulation (EC) No 993/2001 of 4 May 2001, or Article 366(2) and (3) of Regulation No 2454/93, in the version following the adoption of Commission Regulation (EC) No 1192/2008 of 17 November 2008.

[Signatures]