JUDGMENT OF THE COURT (Sixth Chamber)

7 December 2000 *

In Case C-213/99,

REFERENCE to the Court under Article 234 EC by the Tribunal Fiscal Aduaneiro do Porto, Portugal, for a preliminary ruling in the proceedings pending before that court between

José Teodoro de Andrade

and

Director da Alfândega de Leixões,

intervener:

Ministério Público,

on the interpretation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) and, in particular, Articles 6, 53 and 243 thereof, and of the Community rules relating to value added tax,

* Language of the case: Portuguese.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet (Rapporteur), R. Schintgen and F. Macken, Judges,

Advocate General: N. Fennelly,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mr de Andrade, by R.G. Soares, advogado, Oporto,

— the Portuguese Government, by L.I. Fernandes, Director of the Legal Service in the Directorate-General for European Community Affairs in the Ministry of Foreign Affairs, Â.C. de Seiça Neves, a member of that service, and A. da Silva Teles, a member of the Legal Service of the Directorate-General for Customs and Special Consumer Taxes, acting as Agents,

— the Commission of the European Communities, by R. Tricot, of its Legal Service, acting as Agent, assisted by A. Castro, advogado, Oporto,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2000,

gives the following

Judgment

1 By order of 11 May 1999, received at the Court on 4 June 1999, the Tribunal Fiscal Aduaneiro do Porto (Customs Court, Oporto) referred to the Court for a preliminary ruling under Article 234 EC seven questions on the interpretation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Code'), in particular Articles 6, 53 and 243 thereof, and of the Community rules relating to value added tax ('VAT').

2 Those questions were raised in proceedings between Mr de Andrade and the Director da Alfândega de Leixões (Director of the Leixões Customs Office) regarding the collection of a surcharge for failure to meet the time-limit for clearing goods through customs.

The legal background

3 The Code provides, *inter alia*, in Article 49, that where goods have been presented to customs, a declaration for their release for free circulation, or an application for another customs-approved treatment or use, must be made within a period not exceeding 20 days or 45 days depending on the mode of transport. Where circumstances so warrant, the customs authorities may set a shorter period or authorise an extension of those periods. Article 50 of the Code makes clear that, until such time as they are assigned a customs-approved treatment or use, the goods are to be placed in temporary storage and Article 53 provides that the customs authorities are to take without delay all measures necessary, including

sale, to regularise the situation of the goods in respect of which the formalities have not been initiated within the periods determined in accordance with Article 49.

4 Under Portuguese law, Article 638 of the Regulamento das Alfândegas (Customs Regulations) provides that goods placed in storage under a customs procedure or another procedure are normally to be sold by the customs office when the warehousing periods have expired. Article 639 of the regulation provides, however, that the owners of those goods may still clear them through customs if they submit an application to do so within the six month period following the time at which the goods were entered for the public auction procedure. Goods which clear customs in that way are subject to all applicable charges and taxes, together with a further 5% of their value.

The main proceedings

5 The company Curtume Kiriazi Ltda, established in Brazil, despatched to Portugal seven palettes of cow-hide intended for sale to Mr de Andrade. Those goods were unloaded in the port of Alcântara at Lisbon, Portugal, on 11 June 1995 and were transported by rail to Leixões where they arrived on 20 June and were deposited at the railway station. On 24 July 1995 Mr de Andrade obtained an extension of 45 days for assignation of a customs-approved treatment or use. On 3 August 1995 the goods were transferred to the warehouses of Serviço Português de Contentores (Portuguese Container Services; 'SPC') at Sao Mamede de Infesta and were declared to the Leixões Customs Office on 15 September 1995 in order to be placed under the customs warehousing scheme. They remained in SPC's warehouses until the declarations of release for free circulation and consumption were accepted. Acceptance took place on 19 September 1995 for three palettes, 9 October 1995 for one palette, 19 October 1995 for another palette and 2 January 1996 for the two remaining palettes. The Leixões Customs Office then claimed and collected a total sum of PTE 3 473 724 comprising customs duties, stamp duty and VAT.

6 After the goods had been released for free circulation and consumption, the Leixões Customs Office instigated on 9 May 1996 the procedure provided for in the case of failure to comply with the time-limits, taking the view that the goods had entered national territory on 11 June 1995. On 22 January 1997, that office requested Mr de Andrade to pay a customs debt of PTE 905 483, including stamp duty and VAT, within 10 days, which he did on 3 February 1997.

7 Mr de Andrade brought an action before the Tribunal Fiscal Aduaneiro do Porto seeking annulment of the notice of assessment for the sum of PTE 905 483 and reimbursement of that amount, together with interest up to the effective date of repayment. In support of his application he asserted, *inter alia*, that the amount claimed did not represent the cost of any warehousing services provided by the customs authority and that the penalty was disproportionate, in so far as it was not determined by reference to the conduct of the owner of the goods but was calculated by reference to the value of those goods.

8 Considering that an interpretation of Community law was necessary to determine the dispute, the Tribunal Fiscal Aduaneiro do Porto decided to stay the proceedings and refer to the Court of Justice for a preliminary ruling the following questions:

'1. Is the national administrative customs procedure, in so far as it means that, automatically and without prior notice, goods not cleared by the end of the statutory periods are to be subject to the overdue-clearance procedure (sale) described above, compatible with Article 53 of the Customs Code, in particular Article 53(1)?

2. In so far as the national administrative customs procedure provides, as the only measure (applied automatically, as indicated above) to be taken by the national customs authorities, for recourse to the overdue-clearance procedure, the sole object of which is to ensure sale of the goods, may it not be

regarded as a disproportionate measure infringing taxpayers' rights of defence and classifiable as an obstacle to the free movement of goods, particularly since, being applied automatically, that measure may take effect forthwith, on the first day following the end of the statutory storage period, without the importer of the goods even being warned or advised?

3. By immediately putting up the goods for "sale" in the circumstances in question, without prior notification, does the national customs administrative procedure infringe Article 6(3) of the Community Customs Code?

4. Does the national customs administrative procedure, by not making any notification compulsory in the overdue-clearance procedure, as provided for in Article 638 et seq. of the Portuguese Customs Regulations, infringe Article 243 of the Community Customs Code?

5. In the event that the overdue-clearance charge provided for in Article 638 et seq. of the Portuguese Customs Regulations falls to be classified as a procedural administrative penalty (the view taken in the national case-law), is that charge subject to VAT?

6. If the hypothesis outlined in the fifth question (that the charge constitutes an administrative penalty) is accepted, may the fact that that charge is levied on an *ad valorem* (objective) basis, but without any reference to fault on the part of the agent or to charges actually borne by the customs authorities in respect of measures relating to precautionary supervision, warehousing and other matters, be regarded as constituting an infringement of the principle of proportionality?

7. If, on the contrary, the said charge is not in the nature of a penalty but in fact represents remuneration for services provided by the customs authorities, is the levying of VAT justified?'

The first question

9 By its first question, the national court is asking whether Article 53 of the Code precludes the automatic application, without prior notification, of a procedure such as that established by Portuguese legislation, which provides for the sale of goods in respect of which the statutory time-limits set for declaring them for release for free circulation or requesting another customs-approved treatment or use have expired ('the goods overdue for clearance').

10 Mr de Andrade submits that Article 53 of the Code precludes the goods overdue for clearance being automatically put up for sale without the party concerned being given notice. The Portuguese Government and the Commission maintain, to the contrary, that Article 53 does not preclude the automatic application of a sale procedure.

11 In that regard, it is sufficient to point out that Article 53 of the Code provides expressly that the customs authorities are, without delay, to take all measures necessary, including the sale of the goods, to regularise the situation of goods in respect of which the formalities have not been initiated within the requisite periods. That provision obliges those authorities to take the necessary measures, while leaving them a choice as to the type of measure and making clear that the sale of the goods is one of the measures possible.

12 As has been observed in paragraph 4 of this judgment, Portuguese legislation provides for a procedure under which goods overdue for clearance are put up for

sale. The parties concerned may prevent the sale taking place by paying all applicable charges and taxes, together with a certain percentage of the value of the goods.

13 The answer to the first question must therefore be that Article 53 of the Code does not preclude the automatic application, without prior notification, of a procedure such as that established by Portuguese legislation, which provides for goods overdue for clearance to be put up for sale.

The second and sixth questions

14 By its second and sixth questions, which may be examined together, the national court is essentially asking whether the automatic application of a procedure under which goods overdue for clearance are put up for sale or an *ad valorem* surcharge is levied in order to regularise their situation is contrary to the principle of proportionality.

15 According to Mr de Andrade, the imposition by the Portuguese authorities, as the sole measure designed to regularise the situation of goods overdue for clearance, of a sale procedure which is capable of entailing appropriation by the State and which takes place without the party concerned receiving any notification, precludes any assessment of whether that measure is necessary to achieve the objective pursued, and therefore does not comply with the requirements of the principle of proportionality. The same is true of the surcharge in respect of regularisation, the amount of which should not be determined by reference to the customs value of the goods in question but should be on a sliding scale determined by reference to the actual gravity of the fault and its consequences, as well as by the need to ensure that time-limits are observed.

16 The Portuguese Government contends that the obligation to pay a certain percentage of the value of the goods is designed to promote compliance with time-limits and that it is an alternative to sale. It contends that the measures thus provided for by national legislation are reasonable and comply with the principle of proportionality.

17 The Commission considers that, in so far as it creates an absolute presumption that the sale of goods is necessary in all situations, the Portuguese procedure applicable to goods overdue for clearance may seem disproportionate in relation to the nature of the offence that it is intended to penalise and the interests that it is intended to protect. As regards the levying of the duty in respect of regularisation on the value of the goods, however, the Commission submits that the mere fact that an administrative penalty is applied *ad valorem* does not in itself constitute a breach of the principle of proportionality.

18 Community legislation has not provided for a specific administrative penalty for failure to meet the time-limits prescribed for declaring goods for release for free circulation or for requesting another customs-approved treatment or use. As has been observed in paragraph 11 of the present judgment, the legislation requires the customs authorities, however, to take any measures necessary, including sale, in order to regularise the situation of goods.

19 It is settled case-law, confirmed in paragraph 20 of Case C-36/94 *Siesse* v *Director da Alfândega de Alcântara* [1995] ECR I-3573, that where Community legislation does not specifically provide for any penalty for an infringement or refers for that purpose to national legislation, Article 5 of the EC Treaty (now Article 10 EC) requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalty remains within their discretion, they must ensure in particular that infringements of Community law are penalised under conditions,

both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

20 As regards customs offences, the Court has pointed out that in the absence of harmonisation of the Community legislation in that field, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with Community law and its general principles, and consequently with the principle of proportionality (see *Siesse*, paragraph 21).

21 It is evident from Portuguese customs legislation that although goods are normally put up for sale by customs offices once time-limits have expired, the owners of the goods may still clear them through customs if they pay a surcharge equal to a certain percentage of the value of the goods. Therefore, contrary to the assertions made by Mr de Andrade and the Commission, sale is not the only measure contemplated for regularising the situation of goods overdue for clearance. The legislation cannot, therefore, be regarded as disproportionate on the sole ground that it provides for that measure alone.

22 As the Court of Justice observed in paragraph 22 of the judgment in *Siesse*, the purpose of a levy such as the surcharge at issue in the main proceedings, which is intended to penalise traders who have failed to comply with the prescribed formalities and time-limits, does not appear to be contrary to Community law. In the absence of such a measure, failure to comply with the prescribed formalities would in fact be without consequence for a trader authorised to regularise his position after the expiry of the time-limits. The penalty incurred is thus intended to encourage traders to act within the periods laid down.

23 Nor does it appear to be contrary to Community law to make the regularisation of the situation of the goods conditional upon such a payment by way of penalty.

Such a requirement is merely a safeguard measure intended to ensure the actual payment of the corresponding levy (see *Siesse*, paragraph 23).

24 The amount of such a penalty must be determined, in accordance with the case-law cited above, under conditions which are comparable to those applicable under national law to infringements of the same nature and gravity. As the Court stated in paragraph 24 of the judgment in *Siesse*, it is for the national court to determine whether the 5% levy provided for in the Portuguese rules on the value of goods overdue for clearance is consistent with those principles.

25 The answer to the second and sixth questions must therefore be that use of a procedure providing either for goods overdue for clearance to be put up for sale or for an *ad valorem* surcharge to be levied in order to regularise the situation of those goods is not in itself contrary to the principle of proportionality. It is for the national court to determine whether the surcharge applied in the present case complies with that principle.

The third and fourth questions

26 By its third and fourth questions, the national court is essentially asking whether Article 6(3) and Article 243 of the Code preclude use of a procedure of the kind at issue in the main proceedings which does not provide for interested parties to be given prior notice.

27 Mr de Andrade submits that the combined effect of Article 4(5) and Article 6(3) of the Code is that the use by the customs authorities of a procedure for the sale

of goods such as the procedure at issue in the main proceedings constitutes a decision which must set out the grounds on which it is based and must be sent to the party concerned. Furthermore, he submits that the procedure is contrary to Article 243 of the Code, which provides for a right of appeal against decisions taken by customs authorities.

28 By contrast, for the Portuguese Government the initiation of the sale procedure in respect of goods overdue for clearance is not the outcome of a decision of the administrative authorities but is the consequence in law of failing to comply with a time-limit. The case does not therefore fall within the scope of Article 6(3) of the Code, which obliges the customs authorities to provide reasons both for decisions rejecting requests and for those which are detrimental to the persons to whom they are addressed. The Portuguese Government also submits that Article 243 of the Code provides a right of appeal solely against decisions of the customs authorities, although it is clear, however, that during and on termination of the procedure, the parties concerned have various opportunities for appeal, and may, as has occurred in the case before the national court, appeal against the notice of assessment for the amount demanded in respect of regularisation of the situation of the goods.

29 The Commission takes the view that the Code requires there to be a written decision only where there has been a written request and that Article 6 relates only to decisions addressed to a particular person. Decisions could concern goods whose owner is unknown. However, in so far as it does not impose any requirement to give notification prior to the sale of the goods, even when the owner or importer is known to the customs authorities, the Portuguese procedure does not enable the owner or importer to exercise the right of appeal that is conferred on him by Article 243 of the Code.

30 Article 6(3) of the Code provides: 'Decisions adopted by the customs authorities in writing which either reject requests or are detrimental to the persons to whom

they are addressed shall set out the grounds on which they are based. They shall refer to the right of appeal provided for in Article 243.' The first subparagraph of Article 243(1) provides: 'Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.'

31 In the first place, the obligation imposed by Article 6(3) of the Code to set out the grounds on which the decision is based concerns only adverse decisions taken in writing which are in response to a request or are addressed to a particular person. In that regard, it is sufficient to note that the sale procedure was not, in the present case, preceded by any written decision at all and that, as has been made clear in the answer to the first question, the customs authorities are not bound by Article 53 of the Community Customs Code to take a written decision before carrying out that procedure.

32 Second, as regards the right of appeal laid down in Article 243 of the Code, it is sufficient to point out that it may be exercised at different stages of the procedure, in particular at the time when the goods are entered for the public auction procedure or even, as was so in the case before the national court, after receipt of the notice of assessment of the amount payable in order to regularise the situation of the goods.

33 Therefore the answer to the third and fourth questions must be that Article 6(3) and Article 243 of the Code do not preclude use of a procedure of the kind at issue in the main proceedings, which does not provide for interested parties to receive prior notification.

The fifth and seventh questions

34 By its fifth and seventh questions, the national court is asking whether the disputed surcharge in the main proceedings may be subject to VAT, depending on whether or not the surcharge is in the nature of a penalty.

35 Mr de Andrade, the Portuguese Government and the Commission submit that inasmuch as it is not related to any supply of services, the surcharge levied for failure to comply with the time-limit prescribed by Article 49 of the Code cannot be subject to VAT.

36 Under Article 2 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), both the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such and the importation of goods are subject to VAT.

37 As has been pointed out in paragraph 22 of the present judgment, a duty such as the disputed surcharge seeks to penalise the economic operators who have not complied with the prescribed formalities and time-limits. The duty constitutes, therefore, a penalty and not consideration for a supply of goods or services or the importing of goods. Such a penalty cannot by its nature be subject to VAT.

38 The answer to the fifth and seventh questions must therefore be that a surcharge intended to penalise a failure to comply with customs formalities cannot be subject to VAT.

Costs

39 The costs incurred by the Portuguese Government and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunal Fiscal Aduaneiro do Porto by order of 11 May 1999, hereby rules:

1. **Article 53 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code does not preclude the automatic application, without prior notification, of a procedure such as that established by Portuguese legislation, which provides for goods to be put up for sale where the statutory time-limits for making a declaration for release for free circulation or an application for another customs-approved treatment or use for the goods have expired.**

2. **Use of a procedure providing either for such goods to be put up for sale or for an *ad valorem* surcharge to be levied in order to regularise the situation of**

the goods is not in itself contrary to the principle of proportionality. It is for the national court to determine whether the surcharge applied in the present case complies with that principle.

3. Article 6(3) and Article 243 of Regulation No 2913/92 do not preclude use of a procedure, such as that at issue in the main proceedings, which does not provide for interested parties to receive prior notification.

4. A surcharge intended to penalise a failure to comply with customs formalities cannot be subject to value added tax.

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 7 December 2000.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber