JUDGMENT OF THE COURT (Second Chamber)

23 September 2004 *

In Case C-414/02,

REFERENCE for a preliminary ruling under Article 234 EC

from the Verwaltungsgerichtshof (Austria), made by decision of 6 November 2002, received on 19 November 2002, in the proceedings brought by

Spedition Ulustrans, Uluslararasi Nakliyat ve. Tic. A.S. Istanbul

v

Finanzlandesdirektion für Oberösterreich,

* Language of the case: German.

THE COURT (Second Chamber),

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

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Finanzlandesdirektion für Oberösterreich, by F. Brenneis, acting as Agent,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Commission of the European Communities, by J.-C. Schieferer, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 202(3) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter 'the Customs Code').

2 The reference was made in the course of proceedings brought by Spedition Ulustrans, Uluslararasi Nakliyat ve. Tic. A.S. Istanbul (hereinafter 'Spedition Ulustrans') against the Finanzlandesdirektion für Oberösterreich (Regional Finance Directorate for Oberösterreich, hereinafter 'the Finanzlandesdirektion') concerning the payment of a customs debt arising from the unlawful introduction of goods into the Community customs territory.

Legal background

Community legislation

3 Article 201 of the Customs Code provides:

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

(a) the release for free circulation of goods liable to import duties, or

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.

3. The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.

Where a customs declaration in respect of one of the procedures referred to in paragraph 1 is drawn up on the basis of information which leads to all or part of the duties legally owed not being collected, the persons who provided the information required to draw up the declaration and who knew, or who ought reasonably to have known, that such information was false may also be considered debtors in accordance with the national provisions in force.'

4 Article 202 of the Customs Code provides:

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

(a) the unlawful introduction into the customs territory of the Community of goods liable to import duties, or

(b) the unlawful introduction into another part of that territory of such goods located in a free zone or free warehouse.

For the purpose of this article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

3. The debtors shall be:

— the person who introduced such goods unlawfully,

— any persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful, and

— any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully.'

5 Article 203 of the Customs Code provides:

'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,

— any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

— any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and

— where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.'

6 Article 213 of the Customs Code provides:

'Where several persons are liable for payment of one customs debt, they shall be jointly and severally liable for such debt.'

7 Under Article 221(1) of the Customs Code:

'As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.'

Austrian legislation

8 Paragraph 79(2) of the Zollrechts-Durchführungsgesetz (Act to implement customs law) (BGBl. 1994/659, hereinafter 'the ZollR-DG') provides:

'Where an employee or other person contracted by an undertaking incurs liability for a customs debt because that person has, in the discharge of the affairs of his

employer or the undertaking which engaged him, acted unlawfully with regard to customs obligations, the employer or undertaking shall simultaneously incur liability for that customs debt in so far as it has not become the customs debtor in respect thereof pursuant to any other provision.'

The main proceedings and the question referred for a preliminary ruling

9 On 5 December 1996, an employee of Spedition Ulustrans introduced four textile-winding machines into the Community customs territory. Arriving from Switzerland and driving a lorry registered in the name of Spedition Ulustrans, he went through the customs post at Höchst (Austria) without presenting to the customs the documents for the goods being carried.

10 By decision of 11 December 1996, pursuant to Article 221(1) of the Customs Code, the Hauptzollamt Feldkirch (Feldkirch Principal Customs Office, 'the Hauptzollamt') notified that employee of the amount of the import duties relating to the unlawfully imported goods, namely ATS 770 684 (comprising ATS 83 770 in customs duties and ATS 686 914 in import turnover tax).

11 By decision of 27 April 2000, which has become final, the Finanzlandesdirektion decided that the unlawful importation of those goods had given rise, under Article 202(1)(a) of the Customs Code, to a customs debt on the part of the driver of the same amount as that established by the Hauptzollamt.

12 By decision of 27 February 1997, under the combined provisions of Article 202(1)(a) of the Customs Code and of Paragraph 79(2) of the ZollR-DG, the Hauptzollamt had also notified Spedition Ulustrans of the amount of duty payable by it, as co-debtor for the same amount of duty as that claimed from its employee.

13 Spedition Ulustrans appealed against that decision. The appeal was rejected as unfounded by a decision of 11 September 1997. It then brought an action, before the Fourth Appeal Chamber of the Finanzlandesdirektion, which was also rejected by decision of 21 November 2000. The Finanzlandesdirektion held that at first instance the Hauptzollamt had rightly, pursuant to Paragraph 79(2) of the ZollR-DG, sent the demand for payment not only to the driver but also to Spedition Ulustrans, in its capacity as joint and several co-debtor, responsible, as employer, for ensuring that the employed driver's conduct fulfilled the specific requirements connected with the international carriage of goods.

14 Spedition Ulustrans then appealed to the Verwaltungsgerichtshof, claiming that, since it had not participated in the commission of the driver's offences, it could not legally be regarded as a debtor in respect of that duty.

15 The referring court makes two sets of remarks.

16 First, it states that current academic opinion is not unanimous on the meaning of 'debtor'. According to certain writers, the very wide extension by Paragraph 79(2) of the ZollR-DG of the meaning of 'debtor' to all employers or principals of an employee or agent who infringes customs regulations, without taking account of the subjective conditions set out in the second indent of Article 202(3) of the Customs

Code, makes it incompatible with that provision. The referring court adds that, according to other writers, the meaning of 'debtor', in cases of unlawful introduction of goods, depends on the definition of 'the person who introduced such goods unlawfully' within the meaning of the first indent of Article 202(3). That person is always, at least indirectly, the undertaking, because it has the legal custody of the transported goods, whereas the driver is only their temporary custodian. On that second view Paragraph 79(2) of the ZollR-DG is not incompatible with the second indent of Article 202(3) of the Customs Code but simply superfluous having regard to the first indent of Article 202(3) thereof.

17 Secondly, states the referring court, Spedition Ulustrans maintains that Paragraph 79(2) of the ZollR-DG is a 'rule on liability'. According to the appellant in the main proceedings, the national legislature remains free to enact such a rule unfettered by Community law.

18 It is in those circumstances that the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Paragraph 79(2) of the [ZollR-DG] (under which an employer or undertaking incurs liability for a customs debt at the same time as the employee or other person contracted by the undertaking incurs liability for the debt, if that person has, in the discharge of his employer's or the undertaking's affairs, acted unlawfully with regard to customs obligations), widen the meaning of the term "customs debtor" in a manner that is contrary to Article 202(3) of the Customs Code and therefore incompatible with Community law?'

The question referred for a preliminary ruling

Observations submitted to the Court

19 According to the Finanzlandesdirektion, the Customs Code entitles the customs authorities to have recourse to all the possibilities open to them under the 'provisions in force', including national regulations, to ensure the recovery of the customs debt. Article 201 et seq. of the Customs Code therefore operates only as minimum harmonisation of the meaning of 'debtor' and does not prevent the adoption of other provisions by the Member States, such as Paragraph 79(2) of the ZollR-DG, to pursue the recovery of the debt from the employer. That article applies only where the unlawful conduct takes place in the course of the undertaking's business, that is to say where the employee's or agent's intention was to act in the undertaking's interest and not his own.

20 The Austrian Government notes that, under Article 8(1) of Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42), Common Customs Tariff duties, which constitute the Communities' own resources, are collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which are, where appropriate, to be adapted to meet the requirements of Community rules. The Community legislature wished therefore to leave to the Member States the choice of the methods which they consider the most effective to ensure the collection of customs duties.

21 Paragraph 79(2) of the ZollR-DG is in that category. By making co-debtors of the employers or principals who derive an economic benefit from their employees' or agents' acts, that provision enables the customs debt to be recovered more effectively than if the latter, who are weak economically and often insolvent, were alone covered. In addition, Paragraph 79(2) of ZollR-DG is perfectly consistent with

the general principles of law common to all the Member States, in particular the principle of proportionality. It does not therefore entail an extension of the meaning of 'debtor' incompatible with Article 202(3) of the Customs Code.

22 According to the Commission, the automatic imputation of all an employee's conduct to his employer, taking no account of the employer's actual 'participation', within the meaning of the second indent of Article 202(3), falls outside that provision. If it were interpreted by national courts as meaning that it establishes an irrebutable presumption of the imputability of the employee's conduct to the employer, Paragraph 79(2) of the ZollR-DG should be declared incompatible with the provisions of the Customs Code.

The Court's reply

23 It is not for the Court, in proceedings brought under Article 234 EC, to rule on the compatibility of national legislation with Community law. On the other hand, the Court does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to rule on such compatibility (Case 30/70 *Scheer* [1970] ECR 1197, paragraph 4; Case 97/83 *Melkunie* [1984] ECR 2367, paragraph 7, and Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 23).

24 To that end, the referring court may be taken to be asking the Court of Justice whether Article 202(3) of the Customs Code is to be interpreted as meaning that it does not permit an employer to be regarded, on the basis of Paragraph 79(2) of the ZollR-DG, as a co-debtor of an employee's customs debt, when that employee has acted unlawfully with regard to customs obligations in the conduct of the employer's affairs.

25 In the first place, it is clear from the wording of Article 202(3) of the Customs Code that the Community legislature intended to give a broad definition of the persons capable of being regarded as debtors of the customs debt, in cases of unlawful introduction of goods subject to import duties, without thereby rendering the employer automatically a co-debtor of the employee's customs debt.

26 First, the first indent of Article 202(3) of the Customs Code refers to the 'person' who thus introduced the goods, without specifying whether that means a physical person, such as an employee of an undertaking, or a legal person, such as the company responsible for the unlawful introduction of the goods. Accordingly, while that provision can apply in any event to an employee who performs the actual operations of introduction, an employer can also be regarded as a 'debtor' of the customs debt, if it is a 'person' within the meaning of that provision, that is to say if it can be regarded as having been by its actions responsible for the unlawful introduction of the goods.

27 Next, the second indent of Article 202(3) refers to 'persons' in the plural, without further specifying whether that means physical or legal persons, who have 'participated' in the unlawful introduction of the goods, that is to say those who have taken some part in such introduction. Treatment as a 'debtor' within the meaning of that provision is therefore subject to the condition that those persons who participated in that introduction 'were aware of or should reasonably have been aware that such introduction was unlawful'. Such a condition rests therefore on matters of subjective assessment which are such as to exclude, in certain cases, treatment as a debtor.

28 Finally, the third indent of Article 202(3) of the Customs Code also envisages treating as 'debtors' persons, again without specifying whether they be natural or legal persons, who, after the unlawful introduction of the goods, that is to say after the operation which has given rise to the customs debt, acquired or held the goods and who were aware or should reasonably have been aware at the time of acquiring

or receiving the goods that they had been introduced unlawfully. The extension of the meaning of 'debtor' is therefore in that case, as for the application of the second indent of Article 202(3), subordinate to a subjective condition.

29 It follows from the examination of the first, second and third indents of Article 202 (3) of the Customs Code that the Community legislature has distinguished between cases covered by the first indent and those set out in the second and third indents. In the circumstances provided for by the first indent, the employer can be regarded as having itself unlawfully introduced the goods and as becoming, as a result, liable for the customs debt, either solely or jointly with its employee. In the circumstances covered by the second and third indents, the employer has only 'participated' in such introduction and can be regarded as a joint debtor only if certain subjective conditions are met.

30 In those circumstances, where it appears that the unlawful introduction of the goods cannot be attributed to the employer but is the act of the employee, the employer may be a debtor of the customs debt if he has participated in that introduction, which may be the case, in particular, if the unlawful introduction was made using the resources or staff of his business, and if he knew or should reasonably have known that such introduction was unlawful.

31 Article 202(3) of the Customs Code seeks to give a broad definition of the meaning of 'debtor', consistently with the rule of joint liability of debtors liable for the payment of the same customs debt, as set out in Article 213 thereof. However, it does not make the employer automatically co-debtor of the customs debt of an employee who has unlawfully introduced the goods.

32 Secondly, it follows from the development of the Community legislation which applies in this respect that the Community legislature wished the persons who are debtors of the customs debt to be determined under conditions guaranteeing each time a higher degree of harmonisation.

33 First of all there was Council Directive 79/623/EEC of 25 June 1979 on the harmonisation of provisions laid down by law, regulation or administrative action relating to customs debt (OJ 1979 L 179, p. 31). The second sentence of the fifth recital in the preamble to that directive stated already then that 'it is ... necessary to establish common rules for determining the moment when the customs debt is incurred, in order to ensure uniform application of the Community provisions in force on imports and exports'. However, that directive did not yet provide specific rules relating to the determination of the person liable for payment of the customs debt, but merely stated, in Article 1(2)(a), that 'customs debt' meant 'the obligation on a natural or legal person to pay the amount of the import ... or export duties'.

34 That directive was subsequently replaced by certain regulations, namely Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt (OJ 1987 L 201, p. 15) and Council Regulation (EEC) No 1031/88 of 18 April 1988 determining the persons liable for payment of a customs debt (OJ 1988 L 102, p. 5).

35 Regulation No 2144/87 stated, in the second recital in the preamble, that 'the rules governing the incurrence of a customs debt, the determination of its amount, when it becomes due and its extinction are so important for the proper functioning of the customs union that it is essential to ensure that such rules are implemented as uniformly as possible in the Community' and that, 'to this end, the present provisions of Directive 79/623/EEC should be embodied in a Regulation', leading to 'greater legal certainty for individuals'.

36 As regards Regulation No 1031/88, the fifth recital in the preamble stated that, 'in the case of a customs debt resulting from the unlawful introduction of goods into the customs territory of the Community ..., the person who committed the act which gave rise to the customs debt and any other persons who are also liable, under the provisions in force in the Member States, by reason of such an act having been committed should be held liable for payment of such debt'. Article 3 of Regulation No 1031/88 thus provided, in essence, that the persons liable for the payment of a customs debt in the case of unlawful introduction of goods were the person who introduced the goods and, 'under the provisions in force in Member States', any persons who participated in the unlawful introduction of the goods, any persons who acquired or held the goods in question and any other persons who are liable by reason of such introduction were to be 'jointly and severally liable for such debt'.

37 Article 202(3) of the Customs Code, which was substituted for the above-cited provisions of Regulations Nos 2144/87 and 1031/88, is even more specific than those regulations. It no longer refers to 'the provisions in force in Member States' and itself lays down the basic conditions to which the extension of the meaning of 'debtor' to the persons 'participating' in the unlawful introduction of goods is subject.

38 Admittedly, all those regulatory amendments were not intended to and did not even have the effect of depriving the Member States of the possibility of adopting measures to contribute effectively to the implementation of the objectives of the customs regulations, in particular the recovery of the customs debt. Nor did they prevent the Member States from prescribing, if appropriate, rules specifying, in compliance with those objectives and in accordance with the principle of proportionality, the conditions for applying the Community texts (with regard to a national provision increasing customs duties in the event of infringement of the Community customs regulations, see Case C-91/02 *Hannl + Hofstetter* [2003] ECR I-12077, paragraphs 18 to 20).

39 However, examination of the abovementioned texts shows clearly that the Community legislature intended, since the entry into force of the Customs Code, to lay down exhaustively the conditions for determining who are the debtors of the customs debt.

40 The provisions of a national law contradict that clearly manifested intention of the Community legislature and the very letter and purpose of Article 202(3) of the Customs Code, as described in this judgment, if, disregarding the subjective conditions set out in the second and third indents of Article 202(3), they automatically extend to the employer the employee's status as debtor, without it being established that the employer has taken part in the introduction of the goods, in particular when it knew or ought reasonably to have known that the said introduction was unlawful.

41 It is for the national court to assess whether Paragraph 79(2) of the ZollR-DG does so automatically extend the status of debtor of the customs debt. In undertaking that analysis, it will be for that court to interpret the said provision, in so far as possible, in the light of the text and purpose of Article 202(3) of the Customs Code. The following factors will, in particular, have to be taken into account in that assessment.

42 First, if Paragraph 79(2) of the ZollR-DG were interpreted as meaning that it establishes an irrebutable presumption that the employer is co-debtor of the employee's debt, that paragraph would be incompatible with Article 202(3) of the Customs Code. It is likewise if that provision applied only in cases in which the employee acts in the conduct of his employer's affairs. In such circumstances, the employer may not be responsible for the unlawful introduction of the goods and could therefore claim that he did not know or ought not reasonably to have known that such introduction was unlawful.

43 Also, while it is true that it is generally appropriate to recover the customs debt from the employer and that it is possible for that employer, under Article 239 of the Customs Code, to obtain repayment or remission of customs duties, those considerations do not establish that the extension of the status of debtor of the customs debt to the employer will, in all cases, be proportional to the objective pursued. Article 202(3) of the Customs Code enables the employer, in certain conditions, to escape the status of debtor of the customs debt, whereas the possible repayment or remission of duties only arises afterwards for the debtor, on the basis of other conditions (on the possibilities of remission of duties in cases of 'special circumstances', in the absence of any fault on the part of the person liable, see Case C-61/98 *De Haan* [1999] ECR I-5003).

44 Finally, if it were considered to be a provision specifying the conditions for applying the first indent of Article 202(3) of the Customs Code, Paragraph 79(2) of the ZollR-DG would still not be compatible with that code. Such an interpretation, in recognising very broadly that the employer is the 'person who has unlawfully introduced the goods' within the meaning of the first indent, would deprive the second indent of Article 202(3) of any purpose and would not enable the employer to avoid liability for the customs debt even where he had not taken part in that introduction and did not know of it.

45 It follows from all the preceding considerations that Article 202(3) of the Customs Code is to be interpreted as meaning that it does not preclude national legislation such as Paragraph 79(2) of the ZollR-DG which, in the event of unlawful introduction into the customs territory of the Community of goods subject to import duties, makes the employer co-debtor of the customs debt of the employee who introduced those goods in the conduct of the employer's affairs, so long as such legislation requires that the employer took part in the introduction of the goods and knew or ought reasonably to have known that such introduction was unlawful.

Costs

46 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 (Second Chamber) rules as follows:

Article 202(3) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code is to be interpreted as meaning that it does not preclude national legislation such as Paragraph 79(2) of the Zollrechts-Durchführungsgesetz (Act to implement customs law) which, in the event of unlawful introduction into the customs territory of the Community of goods subject to import duties, makes the employer co-debtor of the customs debt of the employee who introduced those goods in the conduct of the employer's affairs, so long as such legislation requires that the employer took part in the introduction of the goods and knew or ought reasonably to have known that such introduction was unlawful.

Signatures.