JUDGMENT OF THE COURT (Fifth Chamber)

2 April 2009 *

In Case C-134/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 20 March 2008, received at the Court on 2 April 2008, in the proceedings

Hauptzollamt Bremen,

v

J. E. Tyson Parketthandel GmbH hanse j.,

THE COURT (Fifth Chamber),

composed of M. Ilešič, President of the Chamber, A. Borg Barthet (Rapporteur) and E. Levits, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: R. Grass,

having regard to the written procedure,

having regard to the observations submitted on behalf of the Commission of the European Communities by S. Schønberg and C. Hermes, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(2) of Council Regulation (EC) No 2193/2003 of 8 December 2003 establishing additional customs duties on imports of certain products originating in the United States of America (OJ 2003 L 328, p. 3).

2 The reference was made in the course of proceedings between the Hauptzollamt Bremen (Principal Customs Office, Bremen) ('the Hauptzollamt') and J.E. Tyson Parketthandel GmbH hanse j. ('Tyson Parketthandel') regarding the levy of an additional customs duty on a consignment of floorboards from the United States.

Community legal context

3 Recitals 3, 5 and 6 in the preamble to Regulation No 2193/2003 state:

'(3) It is considered that, initially, the imposition in stages of additional import duties of up to a 17% *ad valorem* on imports of selected products originating in the United States of America is an appropriate countermeasure, in view of the failure of the United States of America to implement the DSB [the World Trade Organisation (WTO) Dispute Settlement Body] recommendations. After the abovementioned level of additional duties is reached, the Commission should present a proposal to the Council for further action in the light of developments.

...

(5) Products for which an import licence with an exemption from, or a reduction of, duty has been issued prior to the date of entry into force of this regulation should not be subject to these additional customs duties.

(6) Products for which it can be proved that they have been exported from the United States of America to the Community prior to the date of first application of the additional customs duties should not be subject to these additional customs duties.'

4 The first indent of Article 2(1) of Regulation No 2193/2003 provides:

'An *ad valorem* duty additional to the customs duty applicable under Regulation (EEC) No 2913/92 shall be imposed on the products originating in the United States of America listed in the Annex to this regulation, as follows:

— 5% from 1 March 2004 to 31 March 2004.'

5 Article 4(1) and (2) of that regulation provides:

'1. Products listed in the Annex for which an import licence with an exemption from or a reduction of duty has been issued prior to the date of entry into force of this regulation shall not be subject to the additional duty.

2. Products listed in the Annex for which it can be demonstrated that they are already on their way to the Community on the date of entry into force of this regulation, and whose destination cannot be changed, shall not be subject to the additional duty.'

6 Article 5 of Regulation No 2193/2003 provides:

'This regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.'

7 The Regulation was published in the *Official Journal of the European Union* on 17 December 2003.

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

8 On 5 March 2004, Tyson Parketthandel declared for release for free circulation a consignment of cherry-wood floorboards in subheading 4409 20 98 of the Combined Nomenclature constituting 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), as amended by Commission Regulation (EC) No 1789/2003 of 11 September 2003 (OJ 2003 L 281, p. 1), a consignment from the United States which had been loaded for shipping in that country on 20 February 2004.

9 By a tax notice of the same date, the Hauptzollament determined import duties, that is to say an additional customs duty and value added tax on importation, against Tyson Parketthandel. The additional customs duty was charged as an *ad valorem* duty at a rate of 5% in accordance with the first indent of Article 2(1) of Regulation No 2193/2003.

10 Tyson Parketthandel filed an objection against that tax notice in so far as it related to the additional customs duty only and that objection was rejected.

11 Tyson Parketthandel brought an action against the decision rejecting its objection before the Finanzgericht Bremen (Finance Court, Bremen), which set aside the tax notice determining the import duties imposed on that company to the extent that an additional customs duty had been determined and taken into account when determining the value added tax on importation. The Finanzgericht Bremen held that the transitional provision in Article 4(2) of Regulation No 2193/2003 was to be interpreted, taking into account the wording of recital 6 in the preamble to that regulation, as meaning that no additional customs duty was to be charged on products which were already on their way to the Community prior to the date of first application of the provisions on additional customs duties, that is to say prior to 1 March 2004, and whose destination could not be changed.

12 In the appeal on a point of law ('Revision') which it lodged against that judgment of the Finanzgericht Bremen, the Hauptzollamt claims that Article 4(2) of Regulation No 2193/2003 must not be interpreted in a manner contrary to its wording, which is unambiguous.

13 In its order for reference, the Bundesfinanzhof (Federal Finance Court) states that the clear and unambiguous wording of Article 4(2) of Regulation No 2193/2003 and a comparison of the German language version with the English and French language versions of that provision suggest that the provision should be applied in accordance with its wording. Nevertheless, in view of recital 6 in the preamble to Regulation No 2193/2003, the national court is uncertain as to whether the wording of Article 4(2) of that regulation actually corresponds to the intention of the Community legislature.

14 Taking the view that the resolution of the dispute before it depends on the interpretation of Article 4(2) of Regulation No 2193/2003, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 4(2) of … Regulation … No 2193/2003 … to be interpreted, contrary to its wording, as meaning that products for which it can be demonstrated that they are on their way to the Community on the date of first application of the additional duties and whose destination cannot be changed are not affected by the additional duty?'

The question referred for a preliminary ruling

15 The national court's doubts as regards the interpretation to be given to that provision arise from the fact that the wording of recital 6 in the preamble to Regulation No 2193/2003 suggests that products for which it can be proved that they have been exported from the United States to the Community prior to the date of first application of the additional customs duties — that is to say, under Article 2(1) of that regulation, before 1 March 2004 — should not be subject to those duties. Consequently, such wording gives rise to a certain ambiguity between the intention therein expressed by the Community legislature and the clear wording of Article 4(2) under which products for which it can be demonstrated that they are already on their way to the Community on the date of entry into force of that regulation, that is to say, under Article 5 thereof, on 17 December 2003, are not to be subject to those duties.

16 In that regard, it must be borne in mind, first, that the preamble to a Community act has no binding legal force and cannot be validly relied on either as a ground for derogating

from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording (see, inter alia, Case C-136/04 *Deutsches Milch-Kontor* [2005] ECR I-10095, paragraph 32 and the case-law cited).

17 Secondly, neither the *travaux préparatoires* for Regulation No 2193/2003 nor a comparison of the various language versions thereof show that the wording of Article 4(2) of that regulation contains a drafting error.

18 Lastly, it must be pointed out that Article 4(2), the wording of which is, moreover, unambiguous, is consistent with the system established by Regulation No 2193/2003. As the Commission observed, traders must be able to rely on the fact that products they have exported from the United States to the Community prior to the date of publication and of entry into force of that regulation will not be subject to the additional customs duties imposed by that regulation. By contrast, that expectation is not legitimate with regard to products which were exported after that date in so far as traders could not, as of that date, have been unaware that additional customs duties would be applicable under the provisions of that regulation.

19 It follows from the foregoing that recital 6 in the preamble to Regulation No 2193/2003 cannot be relied on to interpret Article 4(2) in a manner clearly contrary to the wording of that provision.

20 Consequently, the answer to the question referred is that Article 4(2) of Regulation No 2193/2003 must be interpreted in a manner consistent with its wording, namely that products for which it can be demonstrated that they are already on their way to the Community on the date of entry into force of that regulation, and whose destination cannot be changed, are not to be subject to the additional duty.

Costs

21 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:

Article 4(2) of Council Regulation (EC) No 2193/2003 of 8 December 2003 establishing additional customs duties on imports of certain products originating in the United States of America must be interpreted in a manner consistent with its wording, namely that products for which it can be demonstrated that they are already on their way to the European Community on the date of entry into force of that regulation, and whose destination cannot be changed, are not to be subject to the additional duty.

[Signatures]