JUDGMENT OF THE COURT (Seventh Chamber)

13 December 2007 *

In Case C-526/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 22 December 2006, received at the Court on 27 December 2006, in the proceedings

Staatssecretaris van Financiën

v

Road Air Logistics Customs BV,

THE COURT (Seventh Chamber),

composed of U. Lõhmus (Rapporteur) President of Chamber, J. Klučka and A. Ó Caoimh, Judges,

* Language of the case: Dutch.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Road Air Logistics Customs BV, by K. Winters, advocaat, and by J. Hollebeek, adviseur,

— the Netherlands Government, by H.G. Sevenster and C. ten Dam, acting as Agents,

— the Commission of the European Communities, by J. Hottiaux, acting as Agent, assisted by F. Tuytschaever, avocat,

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 the first subparagraph of Article 236(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code').

2 The reference was made in legal proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) and the company Road Air Logistics Customs BV ('Road Air') regarding an application for repayment of customs duties.

Community legislation

3 According to Article 20(1) of the Customs Code:

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

4 The provisions concerning incurrence of the customs debt are contained in Chapter 2 of Title VII of the Community Customs Code. Those provisions describe inter alia the events giving rise to such a debt, specify the debtor, the moment when the debt is incurred and the place of its incurrence.

5 Article 203 of the Community 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.

...'

6 According to Article 214(1) of the Customs Code:

'Save as otherwise expressly provided by this Code and without prejudice to paragraph 2, the amount of the import duty or export duty applicable to goods shall be determined on the basis of the rules of assessment appropriate to those goods at the time when the customs debt in respect of them is incurred.'

7 Article 215 of the Customs Code, in the version applicable before 10 May 1999, states:

'1. A customs debt shall be incurred at the place where the events from which it arises occur.

2. Where it is not possible to determine the place referred to in paragraph 1, the customs debt shall be deemed to have been incurred at the place where the customs authorities conclude that the goods are in a situation in which a customs debt is incurred.

3. Where a customs procedure is not discharged for goods, the customs debt shall be deemed to have been incurred at the place where the goods:

— were placed under that procedure, or

— enter the Community under that procedure.

4. Where the information available to the customs authorities enables them to establish that the customs debt was already incurred when the goods were in another place at an earlier date, the customs debt shall be deemed to have been incurred at the place which may be established as the location of the goods at the earliest time when existence of the customs debt may be established.'

8 Regulation (EC) No 955/1999 of the European Parliament and of the Council of 13 April 1999 amending Regulation No 2913/92 with regard to the external transit procedure (OJ 1999 L 119, p. 1), applicable from 10 May 1999, replaced the text of Article 215 of the Customs Code with a new text which did not substantially amend the previous one. Paragraphs 1 to 3 of the article, on the one hand, and paragraph 4 of that article, on the other hand, were reproduced in paragraphs 1 and 2

respectively of the new version of Article 215. A new paragraph 3 was, however, introduced, stating as follows:

'The customs authorities referred to in Article 217(1) are those of the Member State where the customs debt is incurred or is deemed to have been incurred in accordance with this Article.'

9 The first subparagraph of Article 236(1) of the Community Customs Code provides:

'Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).'

10 Under Article 378(1) 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'):

'Without prejudice to Article 215 of the Code, where the consignment has not been presented at the office of destination and the place of the offence or irregularity cannot be established, such offence or irregularity shall be deemed to have been committed:

— in the Member State to which the office of departure belongs

or

— in the Member State to which the office of transit at the point of entry into the Community belongs, to which a transit advice note has been given,

unless within the period laid down in Article 379(2), to be determined, proof of the regularity of the transit operation or of the place where the offence or irregularity was actually committed is furnished to the satisfaction of the customs authorities.'

11 Article 379 of the implementing regulation provides:

'1. Where a consignment has not been presented at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure shall notify the principal of this fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration.

2. The notification referred to in paragraph 1 shall indicate, in particular, the time limit by which proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed must be furnished to the office of departure to the satisfaction of the customs authorities. That time limit shall be three months from the date of the notification referred to in paragraph 1. If the said proof has not been produced by the end of that period, the competent Member State shall take steps to recover the duties and other charges involved. In cases where that Member State is not the one in which the office of departure is located, the latter shall immediately inform the said Member State.'

The main proceedings and the question referred for a preliminary ruling

12 Over the period from April 1998 to October 1999 inclusive, Road Air made 31 Community transit declarations on behalf of a variety of clients for external and internal Community transit and, to this end, completed customs declarations T1 and T2. All those declarations indicated the Roosendaal (Netherlands) office as the customs office of departure.

13 Of the consignments which were not discharged, three concerned external Community transit to an office of destination in a Member State other than the Netherlands. In relation to two of those consignments, a shortfall was established by the office of destination. In the third case, the office of departure did not receive the fifth copy of the T1 declaration.

14 Between 24 June 1999 and 18 July 2001, the Tax and Customs Inspector, Roosendaal Office ('the Inspector') notified Road Air, with reference to those three consignments, of demands for payment of customs duties for infringement of the Community transit procedure. Contrary, however, to the requirements of Article 379 of the implementing regulation, the notifications given to Road Air did not mention that it could furnish proof of the place where the offence or irregularity was actually committed.

15 On 16 November 2001, Road Air applied under Article 236 of the Customs Code for repayment of the customs duties recovered and of the fines imposed on the basis of the demands for payment. The Inspector dismissed those applications. Following an objection, the Inspector's decision was confirmed by a ruling of 15 November 2002.

16 On 10 December 2002, Road Air appealed against that ruling to the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam). By judgment of 16 January 2004, that court partially allowed the appeal

17 The Staatssecretaris van Financiën appealed in cassation against the judgment of the Gerechtshof te Amsterdam to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). Road Air lodged a cross-appeal.

18 The national court points out that the Gerechtshof te Amsterdam found that Road Air was not in reality granted a period of three months in which to establish the place where the offence or irregularity was actually committed. Consequently, the Inspector did not comply with his obligation under Article 379 of the implementing regulation, meaning that he was not entitled to collect the customs duties in question in the main proceedings. The Gerechtshof te Amsterdam concluded from this that the amounts indicated in the demands for payment sent to Road Air were not legally owed within the meaning of Article 236(1) of the Customs Code.

19 The Hoge Raad der Nederlanden nevertheless considers that the case-law of the Court does not enable it to establish with sufficient certainty that the reasoning followed by the Gerechtshof te Amsterdam is well-founded. It raises in particular the question of the applicability, in the present case, of the case-law resulting from Case C-247/04 *Transport Maatschappij Traffic* [2005] ECR I-9089.

20 In those circumstances, the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Must the concept "not legally owed" in Article 236 of the Community Customs Code be construed as covering also the case in which the place where the customs

debt was incurred was not determined in accordance with the relevant provisions of the regulation implementing the Customs Code?'

Question referred for a preliminary ruling

21 By its question, the national court asks essentially whether the first subparagraph of Article 236(1) of the Customs Code must be interpreted to mean that the failure by the national customs authorities to determine, in accordance with Article 379 of the implementing regulation, the place where the customs debt was incurred, has the effect of rendering the amount of customs duties not legally owed.

22 As a preliminary point, it should be noted that the Court held in paragraph 29 and in the operative part of the judgment of *Transport Maatschappij Traffic* that, for the purposes of the first subparagraph of Article 236(1) of the Customs Code, import duties or export duties are legally owed where a customs debt has been incurred as provided in Chapter 2 of Title VII of that code and where the amount of those duties could be determined by the application of the Common Customs Tariff, in accordance with the provisions of Title II of that code.

23 It follows from the order for reference that the Hoge Raad der Nederlanden asked its question in the light of that case. Indeed, the national court asks whether the fact that Article 215 of the Customs Code features in Chapter 2 of Title VII of that code can mean that, where one of the conditions concerning the determination of the place where the offence or irregularity giving rise to a customs debt occurred is not fulfilled at the time of that determination, the criterion identified by the case cited in paragraph 22 of the present judgment is not met.

24 According to Road Air, it follows indisputably from the scheme of the Customs Code that all the provisions of Chapter 2 of Title VII of that code, including those concerning the determination of the place where the customs debt was incurred, are necessary for a finding that the debt in question was incurred.

25 That argument cannot be accepted. Articles 201 to 205 and 209 to 211 of Chapter 2 of the Customs Code refer to a variety of circumstances giving rise to a customs debt. Those provisions lay down, in each case, the moment when the debt is incurred. Neither any provision in that chapter nor the scheme of the Customs Code allows the conclusion that the failure to determine the place where the customs debt was incurred — that determination being governed by Article 215 of the Customs Code and by the implementing regulation — precludes that debt from being incurred.

26 In fact, it follows from the text of Article 215, from Articles 378 and 379 of the implementing regulation and from the case-law of the Court that the determination of the place where the customs debt was incurred allows the Member State with jurisdiction to recover customs duties to be identified (see, to that effect, Case C-233/98 *Lensing & Brockhausen* [1999] ECR I-7349, paragraph 30). It follows that, although it is in Chapter 2 of Title VII of the Customs Code, Article 215 of that code does not lay down prior conditions for the incurrence of a customs debt. The purpose of that provision is rather to determine territorial jurisdiction to recover the amount of the customs debt.

27 In accordance with Article 20(1) and 214(1) of the Customs Code, the concept of 'legally owed' relates to the amount of import duty or export duty applicable to goods, determined on the basis of the rules of assessment appropriate to those goods at the time when the customs debt in respect of them is incurred. Therefore, as soon as an event giving rise to the customs debt occurs, the amount of duties legally owed can be determined by application of the Customs Tariff of the Communities.

28 It is evident from the case file and the observations submitted to the Court that the goods in question in the main proceedings did not reach their destination and that there is no dispute as to the irregularity of the transit transactions. In that regard, it should be pointed out that, according to the Court's case-law, an irregularity which constitutes a removal of the goods from customs supervision will always, pursuant to Article 203(1) of the Customs Code, give rise to a customs debt (see, to that effect, Case C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 52).

29 It follows that, having regard to the case-law resulting from *Transport Maatschappij Traffic*, in a situation where the customs debt was incurred pursuant to Article 203(1) of the Customs Code and where it is possible to determine the amount of the import duty on the basis of the rules of assessment appropriate to the goods concerned by application of the Customs Tariff of the Communities, that amount is legally owed within the meaning of Article 236(1) of that code, even if the national customs authorities have not determined the place where the customs debt was incurred, in accordance with Article 379 of the implementing regulation.

30 Nevertheless, in order to provide the national court with a useful answer, it should be pointed out that, while the failure to determine the place where the customs debt was incurred does not preclude the incurrence of that debt, the fact remains that the notification to the principal of the three month time-limit referred to in Article 379(2) of the implementing regulation is a prerequisite for the recovery of that debt by the customs authorities (see, by analogy, Case C-300/03 *Honeywell Aerospace* [2005] ECR I-689, paragraph 23).

31 In fact, the Court has already held that it follows from the very wording of Articles 378(1) and 379(2) of the implementing regulation that notification by the office of departure to the principal of the time-limit by which the proof requested must be furnished is mandatory and must precede recovery of the customs debt (see, to that effect, *Lensing & Brockhausen*, paragraph 29; *Honeywell Aerospace*, paragraph 24; and Case C-44/06 *Gerlach* [2007] ECR I-2071, paragraph 33).

32 The Court, moreover, has emphasised that this time-limit is intended to protect the interests of the principal by allowing it three months in which to furnish, where appropriate, proof of the regularity of the transit operation or of the place where the offence or irregularity was actually committed (see, to that effect, Case C-112/01 *SPKR* [2002] ECR I-10655, paragraph 38; Case C-460/01 *Commission* v *Netherlands* [2005] ECR I-2613, paragraph 62; and *Gerlach*, paragraph 34).

33 It follows that the Member State to which the office of departure belongs can proceed to recovery of import duties only if it has first informed the principal that it has a period of three months in which to furnish the proof requested and if such proof has not been provided within that period (see, to that effect, *Lensing & Brockhausen*, paragraph 31, and *Gerlach*, paragraph 35).

34 In that regard, the Commission of the European Communities correctly points out that the consequence of an infringement of Article 379 of the implementing regulation is that the customs authorities may not proceed to recovery.

35 Having regard to all of the foregoing, the answer to the national court's question is that Article 236(1), first subparagraph, of the Customs Code must be interpreted to mean that the failure of the national customs authorities to determine, in accordance with Article 379(2) of the implementing regulation, the place where the customs debt was incurred does not have the effect of rendering the amount of customs duties not legally owed.

36 Nevertheless, the Member State to which the office of departure belongs can proceed to recovery of import duties only if, pursuant to Article 379(2) of the implementing regulation, it has first informed the principal that it has a period of three months in which to furnish proof of the place where the infringement or the irregularity was actually committed and such proof has not been provided within that period.

Costs

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

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

Article 236(1), first subparagraph, of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted to mean that the failure of the national customs authorities to determine, in accordance with Article 379 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92, the place where the customs debt was incurred does not have the effect of rendering the amount of customs duties not legally owed.

Nevertheless, the Member State to which the office of departure belongs can proceed to recovery of import duties only if, pursuant to Article 379(2) of Regulation No 2454/93, it has first informed the principal that it has a period of three months in which to furnish proof of the place where the infringement or the irregularity was actually committed and such proof has not been provided within that period.

[Signatures]