JUDGMENT OF THE COURT (Fourth Chamber)

20 January 2005 *

In Case C-300/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Hessisches Finanzgericht, Kassel (Germany), made by decision of 25 April 2003, received at the Court on 11 July 2003, in the proceedings

Honeywell Aerospace GmbH

v

Hauptzollamt Gießen,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, J.N. Cunha Rodrigues (Rapporteur) and K. Schiemann, Judges,

* Language of the case: German.

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

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Honeywell Aerospace GmbH, by H. Stiehle, Rechtsanwalt,

— the Commission of the European Communities, by J.C. Schieferer and X. Lewis, acting as Agents,

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

gives the following

Judgment

1 The reference for a preliminary ruling concerns 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 Customs Code') and 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').

2 The reference was made in the context of proceedings between the company Honeywell Aerospace GmbH ('Honeywell') and the Hauptzollamt (Principal Customs Office) Gießen (Germany) concerning the incurrence of a customs debt.

Community legislation

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 control by the customs authority 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 96 of the Customs Code provides:

'1. The principal shall be the [holder] under 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;

...'

5 Article 203(1) and (2) of the Customs Code states:

'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 Article 215(1) to (3) of the Customs Code provides:

'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.'

7 Article 221(3) of the Customs Code provides:

'Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three-year period.'

8 According to Article 378(1) and (2) of the implementing regulation:

'1. 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.

2. Where no such proof is furnished and the said offence or irregularity is thus deemed to have been committed in the Member State of departure or in the Member State of entry as referred to in the first paragraph, second indent, the duties and other charges relating to the goods concerned shall be levied by that Member State in accordance with Community or national provisions.'

9 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. ...'

The main proceedings and the questions referred for a preliminary ruling

10 The order for reference shows that on 3 June 1994 the company ASA, Honeywell's predecessor, as approved consignor, placed a turbojet engine under the external Community transit procedure in Raunheim (Germany). According to the Community transit declaration, the goods were to be transported by lorry and presented at the office of destination in Rome (Italy) by 17 June 1994.

11 The Community transit procedure was not discharged since no return copy was received by the office of departure in Germany. In order to instigate the enquiry procedure, that office forwarded the top copy of the Community transit declaration to the competent Zentralstelle Such- und Mahnverfahren (headquarters for enquiry and enforcement proceedings, 'the ZSM') at the Hauptzollamt Fulda (Germany), the responsibilities of which were then taken over by the Hauptzollamt Gießen. In response to a letter of 10 February 1995 from the ZSM, ASA, by letter of 20 February 1995, stated that the place of the offence or irregularity had been established as being Italy.

12 By letters of 23 January and 26 June 1997, the Italian customs authorities responsible for the enquiry in Italy stated that the consignment had not been presented there, that the relevant Community transit declaration had not been produced either and that they had not been able to find out anything regarding the whereabouts of the consignment in Italy.

13 In a tax assessment dated 28 May 1997, the Hauptzollamt Fulda levied import duties, namely customs duties and import turnover tax. In the objection proceedings, the Hauptzollamt Fulda, by letter of 15 January 1999, stated that 'no proof of the regular discharge of the transit operation or proper alternative evidence under Article 380 of the Customs Code implementing regulation had been furnished ...'. Since it had not received any response to that letter by the time-limit prescribed, it dismissed the objection by decision of 17 August 1999.

14 It is also apparent from the order for reference that, in the context of the main proceedings, no evidence was furnished relating to the regular discharge of the Community transit procedure or the actual place where the offence or irregularity occurred. No formal demand was made by the ZSM to the principal, requesting the latter to produce, by the three-month time-limit referred to in Article 379(2) of the

implementing regulation, proof of the regularity of the Community transit operation or the place where the offence or irregularity was actually committed, failing which the offence or irregularity would be deemed to have been committed in the Federal Republic of Germany.

15 Before the national court, the claimant in the main proceedings argued inter alia that, in the absence of any mention of the three-month time-limit referred to in Article 379(2), it had not had the opportunity, by that time-limit, to establish the actual whereabouts of the consignment and to prove regular discharge of the Community transit procedure by way of alternative evidence as provided for in Article 380 of the implementing regulation. Consequently, no customs debt was incurred by the claimant and the tax assessment of 28 May 1997 and the decision of 17 August 1999 should be annulled.

16 Since it had doubts about the interpretation of the relevant Community law provisions, the Hessisches Finanzgericht (Hessian Finance Court), Kassel, decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'1. Is a customs debt deemed, under Article 215(2) or the first indent of Article 215 (3) of ... Regulation ... No 2913/92, as applicable until 9 May 1999, 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 (Article 215(2)) or at the place where the goods were placed under the customs procedure [which is not discharged] (first indent of Article 215(3)) even if a consignment placed under the external Community transit procedure is not presented at the office of destination and the place of the offence or irregularity cannot be established, but the customs authorities have failed, contrary to the last part of Article 378(1) and the first sentence of Article 379(2) of ... Regulation ... No 2454/93, as applicable until 30 June 2001, to indicate in the notification under Article 379(1) of that regulation the time-limit by which proof must be furnished to the office of departure of the regularity of the transit operation or the place where the offence or irregularity was actually committed?

2. If Question 1 is to be answered in the affirmative:

Does the recovery of duty by the competent customs authority under the third sentence of Article 379(2) of Regulation ... No 2454/93, as applicable until 30 June 2001, require the customs authorities to have indicated in the notification under Article 379(1) of that regulation the time-limit by which proof must be furnished to the office of departure of the regularity of the transit operation or the place where the offence or irregularity was actually committed?'

On the questions referred for a preliminary ruling

17 By its questions, which should be considered together, the national court seeks essentially to ascertain whether, where the office of departure of goods placed under the external Community transit procedure has failed to indicate in the notification provided for in Article 379(1) of the implementing regulation the three-month time-limit by which, in accordance with Article 379(2) of that regulation, proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed must be furnished to that office, that circumstance precludes a customs debt on importation within the meaning of Article 203 of the Customs Code from being incurred. If not, the national court seeks to know whether, although that circumstance does not prevent a customs debt from being incurred, it does not at least preclude that debt from being recovered from the principal by the office of departure.

18 Under Article 203(1) of the Customs Code, a customs debt on importation is to be incurred through the unlawful removal from customs supervision of goods liable to import duties (see, to that effect, inter alia Case C-66/99 *D. Wandel* [2001] ECR I-873, paragraph 50; C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 52; and Case

C-112/01 *SPKR* [2002] ECR I-10655, paragraphs 30 and 35). According to the very wording of Article 203(2), the debt is to be incurred at the moment of that removal.

19 As regards more specifically the concept of unlawful removal from customs supervision under Article 203(1) of the Customs Code, it should be borne in mind that, in accordance with the Court's case-law, that concept must be interpreted as covering any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Article 37(1) of the Customs Code (Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 47 and case-law cited therein).

20 Such is the case where, as in the main proceedings, the office of departure of the disputed consignment placed under the external Community transit procedure has concluded that the consignment has not been presented at the office of destination and that the customs procedure has not been discharged for the consignment in question.

21 Article 378(1) of the implementing regulation provides that, without prejudice to the rules on the determination of the place where a customs debt is to be incurred, laid down in Article 215 of the Customs Code, where, as in the main proceedings, a 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 is to 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) of the implementing regulation, proof of the regularity of the transit operation or of the place where the offence or irregularity was actually committed is furnished.

22 According to Article 379(1) of the implementing regulation, 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 is to 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. According to Article 379(2), the notification referred to in Article 379(1) is to 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 is to be three months from the date of the notification referred to in Article 379(1). If the said proof has not been produced by the end of that period, the competent Member State is to take steps to recover the duties and other charges involved.

23 Although, contrary to the line of argument advanced by Honeywell, failure to notify of the three-month time-limit referred to in Article 379(2) of the implementing regulation does not prevent a customs debt within the meaning of Article 203(1) of the Customs Code from being incurred, since, as stated in paragraph 18 of this judgment, the event from which the customs debt arises is the unlawful removal from the supervision of the customs authority of goods subject to import duties, by reason, inter alia, of the fact that the goods have not been presented at the office of destination, the notification of the said three-month time-limit to the principal nevertheless constitutes a prerequisite for the recovery of the customs debt by the customs authorities.

24 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. The time-limit is intended to protect the interests of the principal by allowing him three months in which to furnish, where appropriate, proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed (see, to that effect, *SPKR*, cited above, paragraph 38).

25 In those circumstances, the Member State to which the office of departure belongs may recover import duties only if, in particular, it has indicated to the principal that he has three months in which to furnish the proof requested and such proof has not been provided within that period (see, by analogy, Case C-233/98 *Lensing & Brockhausen* [1999] ECR I-7349, paragraph 31). Under Article 221(3) of the Customs Code, the amount of the customs debt must, in any event, have been notified within the limitation period of three years from when the debt was incurred.

26 Accordingly, the answer to the questions referred must be that Article 203(1) of the Customs Code in conjunction with Article 379 of the implementing regulation must be interpreted as meaning that a customs debt has been incurred where a consignment placed under the external Community transit procedure has not been presented at the customs office of destination, but that the Member State to which the office of departure belongs may take steps to recover the debt only if it has indicated to the principal that he has three months in which to furnish the proof requested and such proof has not been provided within that period.

Costs

27 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 (Fourth Chamber) rules as follows:

Article 203(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code in conjunction with Article 379 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 must be interpreted as meaning that a customs debt has been incurred where a consignment placed under the external Community transit procedure has not been presented at the customs office of destination, but that the Member State to which the office of departure belongs may take steps to recover the debt only if it has indicated to the principal that he has three months in which to furnish the proof requested and such proof has not been provided within that period.

[Signatures]