JUDGMENT OF THE COURT (Third Chamber)

18 October 2007 *

In Case C-173/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Commissione tributaria regionale di Genova (Italy), made by decision of 13 February 2006, received at the Court on 3 April 2006, in the proceedings

Agrover Srl

v

Agenzia Dogane Circoscrizione Doganale di Genova,

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, J. Klučka, A. Ó Caoimh, P. Lindh (Rapporteur) and A. Arabadjiev, Judges,

* Language of the case: Italian.

Advocate General: V. Trstenjak,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 February 2007,

after considering the observations submitted on behalf of:

— Agrover srl, by G. Leone, avvocato,

— the Italian Government, by I. M. Braguglia, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

— the Commission of the European Communities, by J. Hottiaux and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 216 and 220 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17; 'the Customs Code').

2 The reference was made in an action for annulment brought by Agrover Srl ('Agrover') against notices of recovery of customs duties issued by the Agenzia Dogane Circoscrizione Doganale di Genova (Genoa customs authorities).

Legal context

3 The Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, signed in Brussels on 16 December 1991, was approved on behalf of the European Communities by Decision 93/742/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 347, p. 1). Protocol 4 to that Agreement, concerning the definition of the concept of 'originating products' and methods of administrative cooperation, as amended by Decision No 3/96 of the Association Council between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, of 28 December 1996 (OJ 1997 L 92, p. 1; 'Protocol 4'), contains in Article 15, entitled 'Prohibition of drawback of, or exemption from, customs duties', the following provisions:

'1. (a) Non-originating materials used in the manufacture of products originating in the Community, in Hungary or in one of the other countries referred to in Article 4 for which a proof of origin is issued or made out in accordance with the provisions of Title V shall not be subject in the Community or Hungary to drawback of, or exemption from, customs duties of whatever kind.

...

2. The prohibition in paragraph 1 shall apply to any arrangement for refund, remission or non-payment, partial or complete, of customs duties or charges having an equivalent effect, applicable in the Community or Hungary to materials used in the manufacture and to products covered by paragraph 1(b) above, where such refund, remission or non-payment applies, expressly or in effect, when products obtained from the said materials are exported and not when they are retained for home use there.

3. The exporter of products covered by a proof of origin shall be prepared to submit at any time, upon request from the customs authorities, all appropriate documents proving that no drawback has been obtained in respect of the non-originating materials used in the manufacture of the products concerned and that all customs duties or charges having equivalent effect applicable to such materials have actually been paid.

...'

4 Article 114(1) of the Customs Code provides, inter alia, that the inward processing procedure is to allow the use in the customs territory of the Community in one or more processing operations non-Community goods intended for re-export from that territory in the form of compensating products, without such goods being subject to import duties or commercial policy measures. That form of inward processing procedure is called the 'suspension system' (Article 114(2)(a) of the Customs Code). It follows from Article 114(2)(c) and (d) of that code that compensating products are all products resulting from processing operations, such as the working or the processing of goods.

5 Article 115(1)(a) of the Customs Code also allows compensating products to be obtained from 'equivalent goods', defined in Article 114(2)(e) of that code as 'Community goods which are used instead of the import goods for the manufacture of compensating products', provided that those goods are technically and commercially equivalent to the import goods. This is the 'equivalent compensation' system. Article 115(1)(b) of the Customs Code provides, in addition, that compensating products obtained from equivalent goods may be exported from the Community before importation of the goods of non-member country origin ('prior exportation' or 'EX/IM' system).

6 Under Article 115(3) of the Customs Code, recourse to equivalent compensation has the effect of changing customs status: 'the import goods shall be regarded for customs purposes as equivalent goods and the latter as import goods'.

7 Article 216 of the Customs Code provides:

'1. In so far as agreements concluded between the Community and certain third countries provide for the granting on importation into those countries of preferential tariff treatment for goods originating in the Community within the meaning of such agreements, on condition that, where they have been obtained under the inward processing procedure, non-Community goods incorporated in the said originating goods are subject to payment of the import duties payable thereon, the validation of the documents necessary to enable such preferential tariff treatment to be obtained in third countries shall cause a customs debt on importation to be incurred.

2. The moment when such customs debt is incurred shall be deemed to be the moment when the customs authorities accept the export declaration relating to the goods in question.

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

4. The amount of the import duties corresponding to this customs debt shall be determined under the same conditions as in the case of a customs debt resulting from the acceptance, on the same date, of the declaration for release for free circulation of the goods concerned for the purpose of terminating the inward processing procedure.'

8 Article 220(2) of the Customs Code provides:

'Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where:

...

(b) the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

...'

The main proceedings and the questions referred for a preliminary ruling

9 Agrover is a company established in Italy which has an inward processing authorisation for paddy rice. In December 2000 it exported to Hungary wholly-milled rice of Community origin on three occasions and subsequently, in February 2001, imported equivalent quantities of husked rice from Thailand on a duty-free basis.

10 On 26 January 2004 the Italian authorities took the view that, on the basis of Article 216 of the Customs Code, those operations were not eligible for the inward processing procedure. The authorities considered that exemption from duties could have been granted only if the compensating importations had related to goods imported from a country having concluded a preferential agreement with the Community, which the Kingdom of Thailand had not. The Italian authorities therefore recovered the duties relating to the importation of rice (EUR 73 767.88). Agrover challenged that decision before the Commissione tributaria provinciale di Genova (Provincial Tax Court of Genoa). By judgment of 2 July 2004, that court dismissed Agrover's action. Agrover appealed against that judgment to the court making the reference.

11 It is in those circumstances that the Commissione tributaria regionale di Genova (Regional Tax Court of Genoa) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can Article 216 of the ... Customs Code ... apply where a Community product (rice) previously exported under the inward processing procedure with an

EUR.1 certificate to a non-member country (with which an agreement on preferential tariff treatment is in force) gives rise to the application of customs duties at the time of the subsequent compensating reimportation of the same (or equivalent) goods from a so-called "non-agreement" non-member country?

(2) If duties under Article 216 of the ... Customs Code are not levied at the time of the compensating importation, may the customs authorities seek to recover them a posteriori, or does the exemption referred to in Article 220 of the ... Customs Code apply?'

The questions referred for a preliminary ruling

The first question

Observations submitted to the Court

12 Agrover and the Commission of the European Communities take the view that Article 216 of the Customs Code does not apply to inward processing operations with prior exportation, which the Italian Government disputes.

13 Agrover submits that Article 216 presupposes that the non-Community goods have been 'incorporated' in a compensating product. That provision does not therefore apply where, as in the main proceedings, the compensating product was exported before importation of the goods of non-member country origin. That interpretation

is supported by Article 15 of Protocol 4, which prohibits the drawback of customs duties only for 'non-originating materials used in the manufacture of products originating in [inter alia] the Community'. Agrover adds that application of Article 216 of the Customs Code would change completely the balance of the operations in question in the main proceedings and would cause it a loss of about EUR 210 per tonne of rice.

14 The Commission notes that Article 216 of the Customs Code relates to goods 'originating in the Community'. However, the effect of the reversal of customs status as a consequence of Article 115(3) of that code is that an EX/IM operation cannot be treated in the same way as exportation of goods to a non-member country with which there is a preferential tariff agreement. Moreover, the fact that Article 216(2) of the Customs Code determines the time the customs debt is incurred as the date on which the customs authorities accept the export declaration shows that that provision is manifestly inapplicable to EX/IM operations. In the light of that legal fiction, the Italian authorities ought not to have stamped the EUR.1 certificate for the rice originating in the Community which was to be exported to Hungary but, on the contrary, ought to have considered that rice to come from Thailand for export to Hungary under the EX/IM inward processing procedure.

15 According to the Italian Government, Agrover's argument entails excessive concurrent advantages in connection with the same operation, since both the previously exported product and the product of non-member country origin would be exempt from all customs duties. The uncertainty concerning the interpretation of Article 216 of the Customs Code was removed by the Customs Code Committee which, in a document TAXUD/724/2003 of 20 March 2003, concluded that that provision applied in all cases of inward processing of rice with prior exportation and equivalent compensation.

The Court's answer

16 By its first question, the national court asks, essentially, whether Article 216 of the Customs Code applies to inward processing operations with prior exportation.

17 According to the Court's settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (Case 292/82 *Merck* [1983] ECR 3781, paragraph 12, and Joined Cases C-554/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 39) and also the provisions of Community law as a whole (Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 20). Moreover, the primacy of international agreements concluded by the Community over secondary Community legislation requires that the latter, in so far as possible, be interpreted in conformity with those agreements (Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25 and the case-law cited).

18 As regards the objective of Article 216 of the Customs Code, it is apparent that that provision is designed to ensure compliance with the Community's international obligations under certain preferential agreements (see, in that regard, the seventh recital in the preamble to Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt (OJ 1987 L 201, p. 15), concerning the provisions of Article 9(1) of that regulation, which were later reproduced in Article 216 of the Customs Code). Pursuant to 'no drawback' clauses, those agreements may provide that, in respect of compensating products obtained in the Community under the inward processing procedure, the application of preferential tariff treatment which they introduce is subject to the payment of import duties relating to the products of non-member countries contained or used in those products.

19 Accordingly, a no drawback clause such as that provided for in Article 15 of Protocol 4 has the effect of depriving the holder of an inward processing authorisation of entitlement to the suspension of import duties on goods of non-member country origin used for processing purposes where the compensating product is exported to the 'partner' country. In accordance with the objective of bilateral economic integration pursued by a preferential agreement such as the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, those no drawback clauses encourage the use of goods originating in the customs territory of the parties to the agreement by making goods of non-member country origin used in inward processing operations subject to the payment of import duties. They thereby prohibit the cumulation of customs advantages which could result from concurrent application of the inward processing procedure and preferential tariffs.

20 Those considerations show that, in adopting Article 216 of the Customs Code, the legislature intended that the objective of economic integration inherent in preferential agreements should prevail over that of promotion of exports by Community undertakings pursued by the inward processing customs procedure (see, to that effect, Case C-437/93 *Temic Telefunken* [1995] ECR I-1687, paragraph 18, and Case C-103/96 *Eridania Beghin-Say* [1997] ECR I-1453, paragraph 26).

21 It is true that the wording of Article 216 of the Customs Code expressly provides only that non-member country goods 'incorporated' in originating compensating products are to be made subject to customs duties. However, in the light of the purpose and general scheme of that provision, it must be considered that it is also intended to apply in cases of prior exportation of the compensating products.

22 The literal interpretation of Article 216 of the Customs Code put forward by Agrover cannot therefore be accepted since, in respect of all inward processing operations in which the compensating product is exported first, it effectively renders

redundant the international commitments of the Community deriving from no-drawback clauses and grants the holder of an inward processing authorisation a cumulation of customs advantages which the legislature sought to avoid.

23 Finally, the Commission's argument that the reversal of the customs status of the goods, provided for in Article 115(3) of the Customs Code, is incompatible with an interpretation of Article 216 of that code authorising the application of the latter to EX/IM operations must be rejected. Contrary to what the Commission appears to contend, Article 115(3) has the purpose and effect not of changing the customs origin of the goods in question, but of reversing their customs status for the purpose of the application of the inward processing procedure.

24 In that regard, the detailed rules for the implementation of Article 115(3) of the Customs Code where there is prior exportation are set out in Article 572 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), as amended by Commission Regulation (EC) No 3665/93 of 21 December 1993 (OJ 1993 L 335, p. 1), which provide that the change in customs status is to take place 'in respect of the exported compensating products, at the time of acceptance of the export declaration and on condition that the import goods are entered for the procedure' of inward processing and 'in respect of the import goods and equivalent goods, at the time of release of the import goods declared for [that] procedure.' As to EX/IM operations, Article 577 of that regulation provides, further, that the procedure is to be discharged 'when the customs authorities have accepted the declaration in respect of the non-Community goods'.

25 Under those provisions, in respect of an EX/IM operation it is thus not until the time when the goods of non-member country origin have been imported that the

customs authorities are able to determine whether all the conditions for the inward processing procedure have been fulfilled and whether Article 216 of the Customs Code precludes the suspension of import duties.

26 The answer to the first question must therefore be that Article 216 of the Customs Code applies to the inward processing operations referred to in Article 115(1)(b) of that code in which the compensating products have been exported outside the Community prior to the importation of import goods.

The second question

27 By its second question, the national court asks, essentially, whether an undertaking in a situation such as Agrover's is entitled, under Article 220(2)(b) of the Customs Code, to the waiver of the subsequent recovery of the import duties on the goods originating from a non-member country which has not concluded an agreement with the Community providing for the grant of preferential tariff treatment.

28 Agrover submits that it ought to have obtained exemption from payment under Article 220(2)(b) of the Customs Code on the basis of errors attributable to the customs authorities. It complains that the latter issued an EUR.1 certificate and gave differing interpretations of Article 216 of that code. Agrover maintains that it always acted in good faith and provided those authorities with all the information required to obtain an exemption from import duties. It claims that the fact that the customs authorities did not contest those imports constitutes an error such as to prevent the subsequent entry of the duties in the accounts, relying in that respect on Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819.

29 The Italian Government takes the view that the conditions for the application of Article 220(2)(b) of the Customs Code are not fulfilled in this case.

30 It must be noted that, under Article 220(2)(b) of the Customs Code, the competent authorities are not to make subsequent entry of the import duties in the accounts unless three cumulative conditions are fulfilled. First, it is necessary that the duties were not levied as a result of an error on the part of the competent authorities themselves, secondly, that the error made by them was such that it could not reasonably have been detected by a person liable for payment acting in good faith and, finally, that that person complied with all the provisions laid down by the legislation in force as regards the customs declaration (see, by analogy, Case 161/88 *Binder* [1989] ECR 2415, paragraphs 15 and 16; Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 83; order in Case C-299/98 P *CPL Imperial 2 and Unifrigo* v *Commission* [1999] ECR I-8683, paragraph 22, and order in Case C-30/00 *William Hinton & Sons* [2001] ECR I-7511, paragraphs 68, 69, 71 and 72). If those conditions are fulfilled, the person liable is entitled to the waiver of the subsequent recovery of the duty (Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 12).

31 As regards the first of those conditions, it should be noted that Article 220(2)(b) of the Customs Code is intended to protect the legitimate expectation of the person liable for payment that all the information and criteria on which the decision to recover or not to recover customs duties is based are correct. The legitimate expectations of the person liable attract the protection provided for in that article only if it was the competent authorities 'themselves' which created the basis for those expectations. Thus, only errors attributable to acts of the competent authorities create entitlement to the waiver of subsequent recovery of customs duties (see, by analogy, *Mecanarte*, paragraphs 19 and 23).

32 As regards the second of the conditions referred to above, whether an error of the competent customs authorities was detectable must be assessed having regard to the nature of the error, the professional experience of the operators concerned and the

care which they exercised. The nature of the error must be assessed in relation to the complexity or sufficient simplicity of the rules concerned and the period of time during which the authorities persisted in their error (Case C-499/03 P *Biegi Nahrungsmittel and Commonfood* v *Commission* [2005] ECR I-1751, paragraphs 47 and 48 and the case-law cited).

33 As to the third condition, the person making the declaration must supply the competent customs authorities with all the necessary information as required by the Community rules, and by any national rules supplementing or transposing them, in relation to the customs treatment requested for the goods in question (*Faroe Seafood and Others*, paragraph 108).

34 In accordance with the allocation of tasks laid down in Article 234 EC, under which the Court's role is merely to provide the national court with the criteria for interpretation which it needs in order to dispose of the case before it, it is for that court to apply those rules and to assess, on the basis of all the concrete aspects of the case before it, and in particular the evidence adduced for that purpose by the applicant in the main proceedings, whether each of the conditions necessary for entitlement to the waiver of subsequent recovery of import duties, on the basis of Article 220(2)(b) of the Customs Code, is fulfilled.

35 Accordingly, the answer to the second question must be that where, at the time of discharge of an inward processing operation (suspension system) with equivalent compensation and prior exportation, the competent authorities have not contested, on the basis of Article 216 of the Customs Code, the exemption from import duties of the goods of non-member country origin, they must waive subsequent entry in the accounts of those import duties, pursuant to Article 220(2)(b) of that code, if three cumulative conditions are fulfilled. First, it is necessary that those duties were not levied as a result of an error on the part of the competent authorities themselves,

secondly, that that error was such that it could not reasonably have been detected by a person liable for payment acting in good faith and, finally, that that person complied with all the provisions laid down by the legislation in force as regards the customs declaration. It is for the national court to assess whether that is the case in the circumstances in the main proceedings, on the basis of all the concrete aspects of the case before it, and in particular the evidence adduced for that purpose by the applicant in the main proceedings.

Costs

36 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 (Third Chamber) hereby rules:

1. **Article 216 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000, applies to the inward processing operations referred to in Article 115(1)(b) of that regulation in which the compensating products have been exported outside the European Community prior to importation of import goods;**

2. **Where, at the time of discharge of an inward processing operation (suspension system) with equivalent compensation and prior exportation, the competent authorities have not contested, on the basis of Article 216 of Regulation No 2913/92, as amended by Regulation No 2700/2000, the exemption from import duties of the goods of non-member country origin, they must waive subsequent entry in the accounts of those import duties, pursuant to Article 220(2)(b) of that regulation, if three cumulative conditions are fulfilled. First, it is necessary that those duties were not levied as a result of an error on the part of the competent authorities themselves, secondly, that that error was such that it could not reasonably have been detected by a person liable for payment acting in good faith and, finally, that that person complied with all the provisions laid down by the legislation in force as regards the customs declaration. It is for the national court to assess whether that is the case in the circumstances in the main proceedings, on the basis of all the concrete aspects of the case before it, and in particular the evidence adduced for that purpose by the applicant in the main proceedings.**

[Signatures]