JUDGMENT OF THE COURT (Second Chamber)
16 October 2003 *

In Case C-91/02,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Hannl + Hofstetter Internationale Spedition GmbH

and

Finanzlandesdirektion für Wien, Niederösterreich und Burgenland,

on the interpretation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), 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),

* Language of the case: German.

THE COURT (Second Chamber),

composed of: R. Schintgen (Rapporteur), President of the Chamber, V. Skouris and N. Colneric, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Hannl + Hofstetter Internationale Spedition GmbH, by P. Csoklich, Rechtsanwalt,

— the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland, by L. Lenitz, acting as Agent,

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

— the Italian Government, by I.M. Braguglia, acting as Agent,

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

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2003,

gives the following

Judgment

1 By order of 28 February 2002, received at the Court on 15 March 2002, the Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on 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 That question was raised in proceedings between Hannl + Hofstetter Internationale Spedition GmbH ('Hannl') and the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Tax Office for Vienna, Lower Austria and Burgenland, 'the Finanzlandesdirektion') on an increase in customs duty consisting in the charging of interest on arrears for the period between the incurrence of the customs debt and its subsequent entry in the accounts.

Legal background

Community legislation

3 Articles 201 to 205 and 209 to 211 of the Customs Code set out the chargeable events giving rise to a customs debt on importation and a customs debt on exportation.

4 Article 214 of the Customs Code provides:

'1. 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.

2. Where it is not possible to determine precisely when the customs debt is incurred, the time to be taken into account in determining the rules of assessment appropriate to the goods concerned shall be the time when the customs authorities conclude that the goods are in a situation in which a customs debt is incurred.

However, where the information available to the customs authorities enables them to establish that the customs debt was incurred prior to the time when they reached that conclusion, the amount of the import duty or export duty payable

on the goods in question shall be determined on the basis of the rules of assessment appropriate to the goods at the earliest time when existence of the customs debt arising from the situation may be established from the information available.

3. Compensatory interest shall be applied, in the circumstances and under the conditions to be defined in the provisions adopted under the committee procedure, in order to prevent the wrongful acquisition of a financial advantage through deferment of the date on which the customs debt was incurred or entered in the accounts.'

5 Article 218 of the Customs Code provides:

'1. Where a customs debt is incurred as a result of the acceptance of the declaration of goods for a customs procedure other than temporary importation with partial relief from import duties or any other act having the same legal effect as such acceptance the amount corresponding to such customs debt shall be entered in the accounts as soon as it has been calculated and, at the latest, on the second day following that on which the goods were released.

However, provided that payment has been secured, the total amount of duty relating to all the goods released to one and the same person during a period fixed by the customs authorities, which may not exceed 31 days, may be covered by a single entry in the accounts at the end of the period. Such entry in the accounts shall take place within five days of the expiry of the period in question.

2. Where it is provided that goods may be released subject to meeting certain conditions laid down by Community legislation which govern either determination of the amount of the debt or its collection, entry in the accounts shall take place no later than two days following the day on which the amount of the debt or the obligation to pay the duties resulting from that debt is determined or fixed.

However, where the customs debt relates to a provisional anti-dumping or countervailing duty, that duty shall be entered in the accounts no later than two months following publication in the *Official Journal of the European Communities* of the Regulation establishing a definitive anti-dumping or countervailing duty.

3. Where a customs debt is incurred under conditions other than those referred to in paragraph 1, the relevant amount of duty shall be entered in the accounts within two days of the date on which the customs authorities are in a position to:

(a) calculate the amount of duty in question, and

(b) determine the debtor.'

6 Under Article 220(1) of the Customs Code:

'Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time limit may be extended in accordance with Article 219.'

7 Article 229 of the Customs Code is worded as follows:

'The customs authorities may grant the debtor payment facilities other than deferred payment.

The granting of such payment facilities shall:

(a) be conditional on the provision of security. However, such security need not be required where to require it would, because of the situation of the debtor, create serious economic or social difficulties;

(b) result in credit interest being charged over and above the amount of duty. The amount of such interest shall be calculated in such a way that it is equivalent to the amount which would be charged for this purpose on the national money or financial market of the currency in which the amount is payable.

The customs authorities may refrain from claiming credit interest where to claim it would, because of the situation of the debtor, create serious economic or social difficulties.'

8 Article 232(1) provides:

'Where the amount of duty due has not been paid within the prescribed period:

(a) the customs authorities shall avail themselves of all options open to them under the legislation in force, including enforcement, to secure payment of that amount.

Special provisions may be adopted, in accordance with Committee procedure, in respect of guarantors within the framework of the transit procedure;

(b) interest on arrears shall be charged over and above the amount of duty. The rate of interest on arrears may be higher than the rate of credit interest. It may not be lower than that rate.'

9 Article 241 of the Customs Code provides:

'Repayment by the competent authorities of amounts of import duties or export duties or of credit interest or interest on arrears collected on payment of such duties shall not give rise to the payment of interest by those authorities. However, interest shall be paid:

— where a decision to grant a request for repayment is not implemented within three months of the date of adoption of that decision,

— where national provisions so stipulate.

The amount of such interest shall be calculated in such a way that it is equivalent to the amount which would be charged for this purpose on the national money or financial market.'

The national legislation

10 Article 108(1) of the Bundesgesetz betreffend ergänzende Regelungen zur Durchführung des Zollrechts der Europäischen Gemeinschaften (Federal Law relating to Additional Provisions for the Implementation of European Community Customs Law) of 23 August 1994 (BGBl. 1994/659) ('ZollR-DG') provides:

'Except in the cases referred to in sub-paragraph (2), where a customs debt is incurred under Articles 202 to 205, or 210, or 211 of the Customs Code, or in the event of subsequent recovery under Article 220 of the Customs Code, an increase in duty is to be paid, the amount of which shall correspond to the amount which would have been incurred as interest on arrears for the period between the incurrence of the customs debt and the entry in the accounts, or, in the event of subsequent recovery under Article 220 of the Customs Code, which corresponds to the amount which would have been incurred as interest on arrears for the period between the date on which the customs debt originally entered in the accounts was due and the subsequent entry in the accounts. The obligation to pay administrative charges under Article 105 is unaffected.'

The main proceedings and the question referred

11 On 17 December 1998 the Hauptzollamt Linz (Principal Customs Office, Linz) made a subsequent entry in the accounts, pursuant to Article 220(1) of the Customs Code, of customs duty payable by Hannl. The amount of the customs duty thus entered in the accounts was ATS 30 694. The same day the Hauptzollamt increased those duties by ATS 2 157, pursuant to Article 108(1) of the ZollR-DG.

12 The Hauptzollamt rejected the complaint made by Hannl against that decision and Hannl appealed to the Finanzlandesdirektion.

13 On 2 November 2000, the Finanzlandesdirektion dismissed that appeal and supplemented the operative part of the decision of the Hauptzollamt by specifying the amount of ATS 228 668 (ATS 30 694 customs duty and ATS 197 974 turnover tax on importation), the interest rate of 5.66% per annum and the periods of arrears of 15 November 1998 to 14 December 1998 and 15 December 1998 to 14 January 1999.

14 Hannl then appealed against that decision to the Verwaltungsgerichtshof, arguing that the imposition of the increase in duty under Paragraph 108(1) of the ZollR-DG is contrary to Community law. Given that the Customs Code, which is intended to harmonise customs law, contains no provisions on interest or other tax obligations other than Articles 229, 232(1) and 241, it argued that the Member States are not authorised to adopt national measures on the subject.

15 Taking the view that the solution of the dispute before it turned on an interpretation of Community law, that court decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is the increase in duty under Paragraph 108(1) of the ZollR-DG, which is payable in the event of the incurrence of a customs debt under Articles 202 to 205 or 210 or 211 of the Customs Code or in the event of subsequent recovery under Article 220 of the Customs Code and which corresponds to the amount which would have been incurred as interest on arrears for the period between the incurrence of the customs debt and the entry in the accounts, and in the case of subsequent recovery under Article 220 of the Customs Code between the date

when the customs debt originally entered in the accounts was due and the entry in the accounts of the customs debt to be subsequently recovered, contrary to Community customs provisions?'

The question referred

16 By its question, the referring court is asking essentially whether the Customs Code and the implementing regulation must be interpreted as precluding national legislation which provides for an increase in duty in the event of the incurrence of a customs debt under Articles 202 to 205 or 210 or 211 of the Customs Code or in the event of subsequent recovery under Article 220 of the Customs Code, corresponding to the amount which would have been incurred as interest on arrears for the period between the incurrence of the customs debt and its entry in the accounts or, in the case of subsequent recovery under Article 220 of the Customs Code, between the date when the customs debt originally entered in the accounts was due and the subsequent entry in the accounts of that debt.

17 It is settled case-law that where Community legislation does not specifically provide for any penalty for an infringement or refers for that purpose to national legislation, Article 10 EC requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalty remains within their discretion, they must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance

and which, in any event, make the penalty effective, proportionate and dissuasive (Case C-213/99 *De Andrade* [2000] ECR I-11083, paragraph 19).

18 As regards customs offences, the Court has pointed out that in the absence of harmonisation of the Community legislation in that field, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with Community law and its general principles, and consequently with the principle of proportionality (see *De Andrade*, cited above, paragraph 20).

19 As the Advocate General pointed out in point 36 of his Opinion, neither the Customs Code nor the implementing regulation provides for specific measures where the customs debt is incurred on the basis of Articles 202 to 205, 210 and 211 and 220 of the Customs Code, which all concern situations involving breach by the trader concerned of the Community customs legislation.

20 Against that background it must be concluded that the Member States are empowered to adopt appropriate measures to ensure respect for the Community customs legislation, provided that, as is clear from paragraph 18 of this judgment, those measures respect the principle of proportionality.

21 The principle itself of an increase in duty such as that at issue in the main proceedings, intended to ensure that traders respect the provisions of Community legislation, does not appear contrary to Community law. As the Austrian Government has observed, in the absence of such a measure, traders would have

an incentive to delay, through unlawful or negligent conduct, the entry in the accounts of a customs debt. The objective of the measure is to prevent disadvantage to traders who respect Community legislation and whose conduct ensures that the customs debt can be entered in the accounts and settled rapidly.

22 The amount of the increase must be determined, according to the case-law, under conditions which are comparable to those applicable under national law to infringements of the same nature and gravity and which, in any event, make the penalty effective, proportionate and dissuasive (Case C-36/94 *Siesse* [1995] ECR I-3573, paragraph 24, and *De Andrade*, paragraph 24). It is for the national court to determine whether the rate of increase at issue in the main proceedings, which does not appear disproportionate at first sight, is consistent with the rate applicable in national law for infringements of the same nature and gravity.

23 In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling must be that the Customs Code and the implementing regulation must be interpreted as not precluding legislation which provides for an increase in duty in the event of the incurrence of a customs debt under Articles 202 to 205 or 210 or 211 of the Customs Code or in the event of subsequent recovery under Article 220 of the Customs Code, corresponding to the amount which would have been incurred as interest on arrears for the period between the incurrence of the customs debt and the entry in the accounts or, in the case of subsequent recovery under Article 220 of the Customs Code, between the date when the customs debt originally entered in the accounts was due and the subsequent entry in the accounts of that debt, provided that the rate of interest is determined under conditions which are comparable to those applicable under national law to infringements of the same nature and gravity and which make the penalty effective, proportionate and dissuasive. It is for the national court to determine whether the rate of increase at issue in the main proceedings is consistent with those principles.

Costs

24 The costs incurred by the Italian and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the Verwaltungsgerichtshof by order of 28 February 2002, hereby rules:

1) **Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and 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 not precluding legislation which provides**

for an increase in duty in the event of the incurrence of a customs debt under Articles 202 to 205 or 210 or 211 of the Customs Code or in the event of subsequent recovery under Article 220 of the Customs Code, corresponding to the amount which would have been incurred as interest on arrears for the period between the incurrence of the customs debt and the entry in the accounts or, in the case of subsequent recovery under Article 220 of the Customs Code, between the date when the customs debt originally entered in the accounts was due and the subsequent entry in the accounts of that debt, provided that the rate of interest is determined under conditions which are comparable to those applicable under national law to infringements of the same nature and gravity and which make the penalty effective, proportionate and dissuasive. It is for the national court to determine whether the rate of increase at issue in the main proceedings is consistent with those principles.

Schintgen Skouris Colneric

Delivered in open court in Luxembourg on 16 October 2003.

R. Grass

Registrar

V. Skouris

President