JUDGMENT OF THE COURT (Third Chamber)

2 April 2009 *

In Case C-459/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Finanzsenat, Außenstelle Graz (Austria), made by decision of 20 September 2007, received at the Court on 9 October 2007, in the proceedings

Veli Elshani

v

Hauptzollamt Linz,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Klučka, U. Lõhmus (Rapporteur), P. Lindh and A. Arabadjiev, Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 24 September 2008,

after considering the observations submitted on behalf of:

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Danish Government, by B. Weis Fogh, acting as Agent,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Finnish Government, by J. Heliskoski, acting as Agent,

— the Commission of the European Communities, by S. Schønberg and M. Šimerdová, acting as Agents, and by M. Núñez-Müller, Rechtsanwalt,

after hearing the Opinion of the Advocate General at the sitting on 4 November 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 202 and point (d) of the first paragraph of Article 233 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 has been made in the course of proceedings between Mr Elshani and the Hauptzollamt (Principal Customs Office) Linz ('the Hauptzollamt') concerning the incurrence and extinction of a customs debt.

Legal context

3 Article 4 of the Customs Code states:

'For the purposes of this Code, the following definitions shall apply:

…

(19)"Presentation of goods to customs" means the notification to the customs authorities, in the manner laid down, of the arrival of goods at the customs office or at any other place designated or approved by the customs authorities;

…'

4 Article 38 of the Customs Code states:

'1. Goods brought into the customs territory of the Community shall be conveyed by the person bringing them into the Community without delay, by the route specified by the customs authorities and in accordance with their instructions, if any:

(a) to the customs office designated by the customs authorities or to any other place designated or approved by those authorities;

…

2. Any person who assumes responsibility for the carriage of goods after they have been brought into the customs territory of the Community, inter alia as a result of transhipment, shall become responsible for compliance with the obligation laid down in paragraph 1.

…’

5 Article 40 of the Customs Code provides:

‘Goods which, pursuant to Article 38(1)(a), arrive at the customs office or other place designated or approved by the customs authorities shall be presented to customs by the person who brought the goods into the customs territory of the Community or, if appropriate, by the person who assumes responsibility for carriage of the goods following such entry.’

6 Article 202 of the Customs Code is worded as follows:

‘1. A customs debt on importation shall be incurred through:

(a) the unlawful introduction into the customs territory of the Community of goods liable to import duties …

…

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

3. The debtors shall be:

— the person who introduced such goods unlawfully,

…'

7 Article 203 of the 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.

…'

8 Article 233 of the Customs Code states:

'Without prejudice to the provisions in force relating to the time-barring of a customs debt and non-recovery of such a debt in the event of the legally established insolvency of the debtor, a customs debt shall be extinguished:

(a) by payment of the amount of duty;

(b) by remission of the amount of duty;

(c) where, in respect of goods declared for a customs procedure entailing the obligation to pay duties:

— the customs declaration is invalidated;

— the goods, before their release, are either seized and simultaneously or subsequently confiscated, destroyed on the instructions of the customs authorities, destroyed or abandoned in accordance with Article 182, or destroyed or irretrievably lost as a result of their actual nature or of unforeseeable circumstances or force majeure;

(d) where goods in respect of which a customs debt is incurred in accordance with Article 202 are seized upon their unlawful introduction and are simultaneously or subsequently confiscated.

In the event of seizure and confiscation, the customs debt shall none the less, for the purposes of the criminal law applicable to customs offences, be deemed not to have been extinguished where, under a Member State's criminal law, customs duties provide the basis for determining penalties or the existence of a customs debt is grounds for taking criminal proceedings.'

9 In relation to the introduction of goods into the Community, Article 163 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 2787/2000 of 15 December 2000 (OJ 2000 L 330, p. 1), provides:

'1. For the purposes of Article 32(1)(e) and Article 33(a) of the [Customs] Code, the place of introduction into the customs territory of the Community shall be:

…

(c) for goods carried by rail, inland waterway, or road, the place where the first customs office is situated;

…'

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

10 It is apparent from the case-file submitted to the Court that the regional police for the *Land* of Upper Austria carried out telephone surveillance in the Eferding area in connection with cigarette smuggling. Suspicions were raised about Mr Elshani and his brother, who were suspected of smuggling cigarettes from Kosovo to Austria in two tourist coaches.

11 As a result of that telephone surveillance, Mr Elshani was stopped very near to the town of Wels (Austria) in one of the coaches, in which 150 cartons of cigarettes had been concealed in the central aisle. The coach had not yet reached its destination, Eferding. The cigarettes were seized by the Austrian customs authorities, and subsequently confiscated and destroyed under official supervision.

12 The applicant in the main proceedings is responsible for the customs debt incurred in the course of the period between 19 and 21 May 2001. The exact date is to be determined on the basis of the moment at which, pursuant to a given itinerary leading first from Kosovo to Brindisi (Italy) via Albania, and then to Austria, those cartons were unlawfully introduced into the customs territory of the Community.

13 By decision of 13 November 2002, the Hauptzollamt claimed payment of import duties for those cartons in the amount of EUR 961.46 from the applicant in the main proceedings.

14 The applicant in the main proceedings challenged that decision on 13 December 2002. By decision of 7 July 2003, the Hauptzollamt rejected that challenge as unfounded.

15 Mr Elshani lodged an appeal against the Hauptzollamt's decision with the Unabhängiger Finanzsenat, Außenstelle Graz (Independent Tax Tribunal, Graz Division), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. The criterion for extinction [of the customs debt] laid down in point (d) of the first paragraph of Article 233 of [the Customs Code] does not refer to the time at which the customs debt is incurred but to a time after the customs debt is incurred, because it presupposes a customs debt "incurred" in accordance with Article 202 of the Customs Code. Is the expression "upon their unlawful introduction" within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code to be interpreted as meaning that:

— the introduction into the customs territory of the Community of goods in respect of which a customs debt is incurred in accordance with Article 202 of the Customs Code ends when they are introduced at the … customs office or at any other place designated by the customs authorities, but at the latest when they leave the premises of the … customs office or of the otherwise designated place, because the goods have thus entered the customs territory, with the result that seizure and confiscation of the goods after that time no longer results in the extinction of the customs debt,

or as meaning that:

— the introduction into the customs territory of the Community of goods in respect of which a customs debt is incurred in accordance with Article 202 of the Customs Code continues, adopting an economic approach, for as long as

their transport continues as a single process following the introduction of the goods into the customs territory, and the goods in the custom territory have not yet therefore reached their first destination and come to rest there, with the result that seizure and confiscation of the goods up to that time results in the extinction of the customs debt?

2. In the event of unlawful conduct for the purposes of Article 202 of the Customs Code which is discovered upon introduction, the customs debt must be extinguished. By contrast, seizure of goods directly upon their being removed from customs supervision, as unlawful conduct for the purposes of Article 203 of the Customs Code, results in no immediate extinction of the customs debt. Is point (d) of the first paragraph of Article 233 of the Customs Code to be interpreted as meaning that this extinction of the customs debt, which is restricted expressly to cases where the customs debt is incurred in accordance with Article 202 of the Customs Code, is nevertheless consistent with the principle of equal treatment of unlawful conduct?'

The questions referred for a preliminary ruling

The first question

16 By the first question, the referring court asks, in essence, whether Article 202 and point (d) of the first paragraph of Article 233 of the Customs Code are to be interpreted as meaning that the seizure of goods unlawfully introduced into the customs territory of the Community leads to the extinction of the customs debt only when it takes place before those goods leave the customs office or whether it still leads to such an extinction when it occurs later, during transport, but before the goods reach their first destination.

17 The Austrian Government contends that the expression 'upon their unlawful introduction' in point (d) of the first paragraph of Article 233 of the Customs Code constitutes an autonomous concept which encompasses a period of time which should not be confused with the moment of introduction into the customs territory *per se*, which ends once the border is actually crossed.

18 According to the Austrian and Finnish Governments, the introduction of goods in respect of which a customs debt is incurred in accordance with Article 202 of the Customs Code lasts, from an economic point of view, as long as their transport continues, this being regarded as a single process, until the goods arrive at their first destination, with the result that the seizure and confiscation of the goods still has the effect, up to that moment, of extinguishing the customs debt. That interpretation, it is submitted, is consistent with the economic role of customs duties and their purpose, which imply that the customs debt becomes extinct when the unlawfully introduced goods are seized and confiscated before they have entered into economic circulation.

19 In that regard, it should be noted that the introduction of goods into the customs territory of the Community, as it is governed by, inter alia, Articles 37 to 57 of the Customs Code — the provisions applicable to goods introduced into that territory until they have reached a customs point — ends, in the event of an introduction over land, by the mere crossing of the border by the goods and that concept is not the same as the concept of 'unlawful introduction' within the meaning of Article 202 of the Customs Code.

20 It is clear from Article 202(1) of the Customs Code that 'unlawful introduction', within the meaning of that provision, means, inter alia, any introduction contrary to Articles 38 to 41 of that code.

21 The Court has held that an importation of goods constitutes an unlawful introduction if it does not comply with the following stages laid down by the Customs Code. First, under Article 38(1) of that code, goods brought into the customs territory of the

Community must be conveyed without delay to the designated customs office or to a free zone. Secondly, under Article 40 of that code, when the goods arrive at the customs office they must be presented to customs. 'Presentation of goods to customs' is defined in Article 4(19) of that code as the notification to the customs authorities, in the manner laid down, of the arrival of goods at that customs office or at any other place designated or approved (Case C-195/03 *Papismedov and Others* [2005] ECR I-1667, paragraph 26).

22 It is clear from the actual wording of Articles 38 to 41 of the Customs Code that, for goods to be regarded as having been lawfully introduced into the customs territory of the Community, they must, on their arrival, be taken to a customs office or to a free zone and be presented to customs. The aim of the latter obligation, which falls on the person responsible for the introduction or on the person who assumes responsibility for the transport, is to ensure that the customs authorities are informed not only of the fact that the goods have arrived, but also of all relevant information about the type of article or product concerned and the quantity of those goods. It is that information which will enable the goods to be correctly identified, for the purposes of their tariff classification and, if appropriate, for the calculation of import duties (*Papismedov and Others*, paragraph 27).

23 In that regard, the Court has held that it is clear from the wording and the broad logic of Articles 4(19), 38(1) and 40 of the Customs Code that all goods introduced into the customs territory of the Community must be presented to customs. The fact that certain goods were concealed in secret compartments in the vehicle in which they were transported does not have the effect of releasing them from that obligation (Joined Cases C-238/02 and C-246/02 *Viluckas and Jonusas* [2004] ECR I-2141, paragraph 22).

24 It must be added that, as is clear from Article 163(1)(c) of Regulation No 2454/93, as amended by Regulation No 2787/2000, for the purposes of determining the customs value of the imported goods, 'the place of introduction into the customs territory of the Community' is to be, for goods carried over land, the place where the first customs office is situated.

25 It follows, as the Commission of the European Communities correctly contends, that the unlawful introduction of goods is completed at the moment at which those goods go beyond the first customs office situated inside the customs territory of the Community without those goods having been presented there.

26 Consequently, goods are the subject of an 'unlawful introduction' into the customs territory of the Community within the meaning of Article 202 of the Customs Code where, having crossed the external land border of the Community, the goods are in that territory beyond the first customs office, without having been conveyed to that office and without having been presented to customs, with the result that the customs authorities have not been notified of the fact that those goods have been introduced by the persons responsible for compliance with that obligation.

27 It is apparent, moreover, from the wording of Article 202(2) and (3) of the Customs Code that an importation of goods into the customs territory of the Community which takes place in the circumstances described in the last paragraph gives rise to a customs debt as against, among others, the person who carried out that importation at the very moment of the unlawful introduction, that is to say, at the time when it is undisputed that the formalities laid down in, inter alia, Articles 38 to 41 of the Customs Code have not been completed. Thus, the unlawful introduction and the incurrence of the debt occur simultaneously.

28 Since the seizure of the goods, upon their unlawful introduction, and their simultaneous or subsequent confiscation lead, under point (d) of the first paragraph of Article 233 of the Customs Code, to the extinction of the customs debt, the question arises as to the point in time from which that seizure should have the effect of releasing the debtor from his liability.

29 The objective of the extinction of the customs debt, laid down in point (d) of the first paragraph of Article 233 of the Customs Code, is to avoid the imposition of duty in the

case where the goods, although introduced unlawfully into the territory of the Community, could not have been placed on the market and therefore do not constitute a threat, in terms of competition, to Community goods.

30 In the context of the Customs Code, the seizure and confiscation of the goods upon their unlawful introduction, laid down in point (d) of the first paragraph of Article 233 of that code, constitutes — in the same way as the situations referred to in points (a) to (c) of the first paragraph of Article 233, namely payment of the amount of the duty, remission of the amount of the duty, the invalid nature of the customs declaration and, before their release, the seizure and confiscation, destruction, abandonment or irretrievable loss of the goods declared — a ground for the extinction of the customs debt which must be narrowly construed.

31 That analysis is confirmed by the case-law of the Court, which held in Case C-112/01 *SPKR* [2002] ECR I-10655, paragraph 31, that Article 233 of the Customs Code addresses the need to protect the Community's own resources. That objective may not be prejudiced by creating new grounds for the extinction of a customs debt. That is all the more necessary in relation to the determination of the moment of seizure of goods which is liable to lead to the extinction of the customs debt in relation to those goods.

32 In that regard, it should be pointed out that the presence of unlawfully introduced goods in the customs territory of the Community of unlawfully introduced goods comprises, of itself, a very high risk that those goods will end up forming part of the economic networks of the Member States and that, once those goods have gone beyond the area in which the first customs office is situated inside the customs territory, there is less likelihood that the customs authorities will, fortuitously, discover those goods in the course of spot checks.

33 It is at the customs offices, strategically located at the entry points along the external borders, that the authorities are best placed to exercise a strict level of control over goods entering the customs territory of the Community, in order to avoid both unfair

competition affecting Community producers and the loss of tax revenues which results from fraudulent importations.

34 It follows that the seizure of goods introduced into the customs territory of the Community in violation of the formalities laid down in Articles 38 to 41 of the Customs Code which takes place beyond the first customs office situated inside that territory and which occurs practically at random is not capable of leading to the extinction of the customs debt for the purposes of point (d) of the first paragraph of Article 233 of the Customs Code.

35 The Finnish Government contends that that interpretation of point (d) of the first paragraph of Article 233 of the Customs Code fails to respect the principle of equal treatment, inasmuch as the persons who have unlawfully introduced goods within the meaning of Article 202 of the Customs Code would find themselves in a different situation depending on whether their conduct is discovered at the border customs office or beyond that point.

36 According to well-established case-law, discrimination is defined as treating differently situations which are identical, or as treating in the same way situations which are different (see Case C-282/07 *Truck Center* [2008] ECR I-10767, paragraph 37 and the case-law cited).

37 In that regard, it must be pointed out that the difference in treatment established by point (d) of the first paragraph of Article 233 of the Customs Code, in relation to the extinction of the customs debt, according to whether the unlawfully introduced goods are seized upon that introduction or subsequently, concerns two situations which, as is clear from paragraphs 32 and 33 of the present judgment, are not objectively comparable as regards the risk that the presence of those goods in the customs territory of the Community entails for the interests of the Community.

38 In the light of the foregoing, the answer to the first question referred is that Article 202 and point (d) of the first paragraph of Article 233 of the Customs Code must be interpreted as meaning that, in order to lead to the extinction of the customs debt, the seizure of goods unlawfully introduced into the customs territory of the Community must take place before those goods go beyond the first customs office situated inside that territory.

The second question

39 By its second question, the referring court asks, in essence, whether point (d) of the first paragraph of Article 233 is contrary to the principle of equal treatment by reason of the fact that it limits the extinction of the customs debt to the situation where the goods are seized at the time of their unlawful introduction, excluding the situation where a seizure is carried out in other cases of unlawful conduct, such as the removal of goods from customs supervision referred to in Article 203 of the Customs Code.

40 According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 47 and the case-law cited).

41 Nevertheless, the Court has held that it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Acereda Herrera*, paragraph 48).

42 The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 19, and *Acereda Herrera*, paragraph 49).

43 In the present case, as is apparent from the very wording of the second question and the grounds given by the referring court in support of it, the question seeks to subject the validity of point (d) of the first paragraph of Article 233 of the Customs Code to the Court's assessment, on account of the fact that the failure of that provision to provide for the extinction of the customs debt in the circumstances referred to in Article 203 of the Customs Code as well, that is to say, when the goods are unlawfully removed from customs supervision, could constitute a breach of the principle of equal treatment.

44 It is, however, clear from the order for reference and the observations submitted to the Court that the unlawful removal of goods from customs supervision, referred to in Article 203 of the Customs Code as a fact causing a customs debt to be incurred, is not at issue in the main proceedings.

45 It must therefore be held, as the Austrian Government and the Commission have stated in their observations, that that question is clearly unrelated to the subject-matter of the dispute in the main proceedings, which concerns a debt incurred in accordance with Article 202 of the Customs Code following an unlawful introduction of goods into the customs territory of the Community.

46 There is therefore no need to reply to the second question referred.

Costs

47 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 202 and point (d) of the first paragraph of Article 233 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, must be interpreted as meaning that, in order to lead to the extinction of the customs debt, the seizure of goods unlawfully introduced into the customs territory of the Community must take place before those goods go beyond the first customs office situated inside that territory.**

2. **There is no need to reply to the second question.**

[Signatures]