JUDGMENT OF THE COURT (Second Chamber)

28 January 2010 *

In Case C-264/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Hof van Cassatie (Belgium), made by decision of 22 May 2008, received at the Court on 19 June 2008, in the proceedings

Belgische Staat

v

Direct Parcel Distribution Belgium NV,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), acting as President of the Second Chamber, K. Schiemann and L. Bay Larsen, Judges,

* Language of the case: Dutch.

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Direct Parcel Distribution Belgium NV, by K. Wille, advocaat,

— the Belgian Government, by J.-C. Halleux, acting as Agent,

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

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the Commission of the European Communities, by W. Roels, acting as Agent,

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

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 217(1) and 221(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code').

2 The reference was made in proceedings between the Belgische Staat (Belgian State) and Direct Parcel Distribution Belgium NV ('Direct Parcel') concerning post-clearance recovery of customs duties on imports.

Legal framework

The Customs Code

3 Article 217 of the Customs Code provides:

'1. Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called "amount of duty", shall be calculated by the customs authorities as

soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).

…

2. The Member States shall determine the practical procedures for the entry in the accounts of the amounts of duty. Those procedures may differ according to whether or not, in view of the circumstances in which the customs debt was incurred, the customs authorities are satisfied that the said amounts will be paid.'

4 Under Article 221(1) and (3) of the Customs Code:

'1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

…

3. 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.'

Legislation concerning own resources of the European Communities

5 Article 6 of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources (OJ 2000 L 130, p. 1) lays down inter alia rules concerning the entry of entitlements resulting from a customs debt in the accounts for own resources, with entry being conditional on the establishment of those entitlements in accordance with Article 2 of the regulation.

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

6 On 18 November 1999, Boeckmans België NV ('Boeckmans België') submitted a summary declaration to the customs and excise administration in Antwerp concerning a container-load of bakery products intended for delivery to Direct Parcel.

7 That container was delivered to Direct Parcel without the declaration presented to the administration having been cleared, with the result however that the container was not subject to customs control.

8 By letter of 26 May 2000, the administration informed Boeckmans België that the time-limit for clearance had already been well exceeded and that, as a result, a customs debt had been incurred.

9 By letter of 3 October 2000, the same administration proposed an amicable arrangement to Boeckmans België, to which it lodged an objection which was rejected on 10 January 2001.

10 Denying that it was liable for the abovementioned customs debt, on 2 February 2001 Boeckmans België issued a writ of summons against the Belgische Staat requiring it to appear before the rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp). By writ of 8 February 2001, Direct Parcel was joined by Boeckmans België as a party to the proceedings in respect of all the debts attributed to it by the Belgische Staat.

11 The Belgische Staat brought a counterclaim seeking that Direct Parcel and Boeckmans België be jointly ordered to pay the customs duties owed.

12 By judgment of 7 April 2004, the rechtbank van eerste aanleg te Antwerpen dismissed Boeckmans België's action and ordered it and Direct Parcel to pay the customs duties concerned.

13 By judgment of 7 November 2006, the hof van beroep te Antwerpen (Court of Appeal, Antwerp) set aside that judgment. It declared that the Belgische Staat's right to proceed to recover the customs debt concerned had lapsed, on the ground that the Belgische Staat had not provided any evidence of the prior entry in the accounts of the amount of that duty in accordance with Article 221(1) of the Customs Code.

14 The Belgische Staat therefore appealed to the referring court on a point of law against the judgment of the hof van beroep te Antwerpen, claiming that the failure to enter the

customs debt in the accounts, or its late entry in the accounts, did not preclude recovery of the debt by the customs authorities.

15 In those circumstances, the Hof van Cassatie (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the entry in the accounts referred to in Article 221 of the [Customs Code] the same as the entry in the accounts referred to in Article 217 [of that code], which consists in the amount of duty being entered by the customs authorities in the accounting records or on any other equivalent medium?

(2) If the first question is answered in the affirmative, how is the rule laid down in Article 217 of the [Customs Code] that the amount of duty is to be "entered … in the accounting records or on any other equivalent medium" to be construed? Are certain technical or formal minimum requirements attached thereto, or does [that article] leave the establishment of more detailed rules on the practice of entering the amount of duty in the accounts entirely to the Member States, without imposing any minimum requirements? Should that entry in the accounts be distinguished from the entry of entitlements in the accounts for own resources as referred to in Article 6 of [Regulation No 1150/2000]?

(3) Should Article 221(1) of the [Customs Code] be understood to mean that a notification of the amount of duty in accordance with appropriate procedures can be regarded as the communication to the debtor of the amount of duty by the customs authorities as referred to in Article 221(1) only if the amount of duty was

entered in the accounts before being brought to the debtor's attention? In addition, what is meant by the words "in accordance with appropriate procedures" used in [that article]?

(4) If the answer to the third question is affirmative, can an assumption be made to the advantage of the State that the amount of duty was entered in the accounts before being communicated to the debtor? Can the national court also proceed on the assumption that the declaration by the customs authorities that the amount of duty was entered in the accounts before being communicated to the debtor is true, or should those authorities submit written evidence of the entry of the amount of duty in the accounts to the national court as a matter of course?

(5) Must the entry of the amount of duty in the accounts required by Article 221(1) of the [Customs Code] precede its communication to the debtor on pain of the annulment or expiry of the right to proceed to recovery or post-clearance recovery of the customs debt? In other words, should [that article] be understood to mean that, if the amount of duty is brought to the attention of the debtor by the customs authorities in accordance with appropriate procedures, but without the amount of duty having been entered in the accounts by [those authorities] prior to that notification, the amount of duty cannot be recovered, unless [those authorities] again bring the amount of duty to the debtor's attention in accordance with appropriate procedures after the amount of duty has been entered in the accounts and in so far as that occurs within the limitation period laid down in [that article]?

(6) If the fifth question is answered in the affirmative, what is the consequence of the payment by the debtor of the amount of duty communicated to him without its having been previously entered in the accounts? Should this be regarded as an undue payment which he may recover from the State?'

Questions referred for a preliminary ruling

First question

16 With regard to the first question, it suffices to point out that the Court has already answered it in the affirmative in the order of 9 July 2008 in Case C-477/07 *Gerlach & Co.*, paragraphs 18 and 23.

17 Consequently, the answer to the first question is that Article 221(1) of the Customs Code must be interpreted as meaning that 'entry in the accounts' of the amount of duty to be recovered as referred to in that provision is the same as 'entry in the accounts' of that amount as defined in Article 217(1) of that code.

Second question

18 Regarding the second part of the second question, by which the referring court asks the Court of Justice whether 'entry in the accounts' within the meaning of Article 217(1) of the Customs Code must be distinguished from entry of entitlements in the accounts for own resources as referred to in Article 6 of Regulation No 1150/2000, the Court also responded to that point in the order in *Gerlach & Co.* (paragraphs 22 and 23).

19 Although, in that order, the Court ruled in those terms with regard to Article 6 of Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing

Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155, p. 1), that finding is fully applicable to Article 6 of Regulation No 1150/2000, the text of which is identical in substance to that of Article 6 of Regulation No 1552/89.

20 Consequently, 'entry in the accounts' within the meaning of Article 217(1) of the Customs Code must be distinguished from entry of established entitlements in the accounts for own resources as referred to in Article 6 of Regulation No 1150/2000.

21 With regard to the first part of the second question, on whether Article 217 of the Customs Code imposes technical or formal minimum requirements in respect of entry in the accounts of the amount of duty, it should be noted that it follows from the first subparagraph of Article 217(1) of the Customs Code that entry in the accounts consists in entry, by the customs authorities, of the amount of import duty or export duty resulting from a customs debt in the accounting records or on any other equivalent medium.

22 In accordance with Article 217(2) of that code, it is for the Member States to determine the practical procedures for that entry in the accounts, which may differ according to whether or not, in view of the circumstances in which the customs debt was incurred, the customs authorities are satisfied that the amount of duty resulting from that debt will be paid.

23 Thus, since Article 217 of the Customs Code does not lay down any practical procedures for 'entry in the accounts' within the meaning of that provision or, accordingly, any minimum requirements of a technical or formal nature, that entry in the accounts must be made in a way which ensures that the competent customs authorities enter the exact amount of the import duty or export duty resulting from a customs debt in the accounting records or on any other equivalent medium, so that, inter alia, the entry in the accounts of the amounts concerned may be established with certainty, including with regard to the person liable.

24 Moreover, the Court has already held that, having regard to the discretionary power conferred on them by Article 217(2) of the Customs Code, the Member States can provide that the entry in the accounts of the amount of duty resulting from a customs debt may be effected by the entry of that amount on the record which is drawn up by the competent customs authorities for the purpose of establishing an infringement of the applicable customs legislation, such as the authorities referred to in Article 267 of the General Law on Customs and Excise Duty, coordinated by the Royal Decree of 18 July 1977 (*Belgisch Staatsblad*, 21 September 1977, p. 11425), confirmed by the Law of 6 July 1978 on Customs and Excise Duty (*Belgisch Staatsblad*, 12 August 1978, p. 9013) (Case C-126/08 *Distillerie Smeets Hasselt and Others* [2009] ECR I-6809, paragraph 25).

25 Consequently, having regard to all of the foregoing, the answer to the second question is that 'entry in the accounts' within the meaning of Article 217(1) of the Customs Code must be distinguished from entry of established entitlements in the accounts for own resources as referred to in Article 6 of Regulation No 1150/2000. Since Article 217 of the Customs Code does not lay down any practical procedures for 'entry in the accounts' within the meaning of that provision or, accordingly, any minimum requirements of a technical or formal nature, that entry in the accounts must be made in a way which ensures that the competent customs authorities enter the exact amount of the import duty or export duty resulting from a customs debt in the accounting records or on any other equivalent medium, so that, inter alia, the entry in the accounts of the amounts concerned may be established with certainty, including with regard to the person liable.

The third question

26 The Court has pointed out that it follows from the wording of Article 221(1) of the Customs Code that entry in the accounts, which, pursuant to Article 217(1) of the code, consists in entry of the amount of duty by the customs authorities in the accounting

records or on any other equivalent medium, is required to take place before the communication to the debtor of the amount of import or export duty (see, inter alia, Joined Cases C-124/08 and C-125/08 *Snauwaert and Others* [2009] ECR I-6793, paragraph 21).

27 Such a chronological order in the procedure for entry in the accounts and communication of the amount of duty, which is affirmed in the very heading of Section 1 of Chapter 3 of Title VII of the Customs Code, namely 'Entry in the accounts and communication of the amount of duty to the debtor', must be observed if there are not to be differences in treatment as between the persons liable and if, moreover, the smooth operation of the customs union is not to be prejudiced (see, inter alia, *Snauwaert and Others*, paragraph 22).

28 The Court's conclusion was thus that Article 221(1) of the Customs Code must be interpreted as meaning that the amount of import or export duty due can be validly communicated to the debtor by the customs authorities, in accordance with appropriate procedures, only if the amount of that duty has been entered in the accounts beforehand by the authorities (see *Snauwaert and Others*, paragraph 23).

29 The Court has also held that Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duties is to be made to the debtor where national procedural rules of general application can be applied to that communication, which ensure that the debtor receives adequate information and which enable him, with full knowledge of the facts, to defend his rights (Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraph 54).

30 Consequently, the answer to the third question is that Article 221(1) of the Customs Code must be interpreted as meaning that the amount of import or export duty due can be validly communicated to the debtor by the customs authorities, in accordance with

appropriate procedures, only if the amount of that duty has been entered in the accounts beforehand by the authorities. The Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duty is to be made to the debtor where national procedural rules of general application can be applied to that communication, which ensure that the debtor receives adequate information and which enable him, with full knowledge of the facts, to defend his rights.

Fourth question

31 By this question, the referring court asks essentially whether Community law precludes the national court from proceeding on the assumption, based on the declaration by the customs authorities, that the amount of duty was entered in the accounts before being communicated to the debtor or whether Community law requires that those authorities submit to the national court as a matter of course written evidence of the entry of the amount of duty in the accounts.

32 In that regard, it is common ground that, on this point relating to the burden of proving 'entry in the accounts' of the customs debt within the meaning of Article 217 of the Customs Code, Community law does not make any specific provision.

33 In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights

which individuals derive from the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, paragraph 51, and Case C-478/07 *Budějovický Budvar* [2009] ECR I-7721, paragraph 88 and the case-law cited).

34 Those considerations also apply with regard, specifically, to evidential rules — and in particular the rules on the allocation of the burden of proof applicable to actions relating to a breach of Community law (see, inter alia, Case C-55/06 *Arcor* [2008] ECR I-2931, paragraph 191).

35 In order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring the person liable for the customs debt to prove that it was not entered in the accounts is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which the person liable could not possess, it is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document (see, by analogy, *Laboratoires Boiron*, paragraph 55).

36 Consequently, the answer to the fourth question is that Community law does not preclude the national court from proceeding on the assumption, based on the declaration by the customs authorities, that the 'entry in the accounts' of the amount of import or export duty within the meaning of Article 217 of the Customs Code took

place before that amount was communicated to the debtor, provided that the principles of effectiveness and equivalence are observed.

Fifth question

37 With regard to the question concerning the consequences of failure to enter the customs debt in the accounts before communicating that amount to the person liable, the Court has held that, while infringement of Article 221(1) of the Customs Code by the customs authorities of a Member State may hinder the recovery of the amount of the duties legally due or the collection of interest for late payment, the fact remains that such an infringement has no influence on the existence of those duties (see, inter alia, Case C-247/04 *Transport Maatschappij Traffic* [2005] ECR I-9089, paragraph 28).

38 The customs authorities therefore remain entitled to proceed with a new communication of that amount, in accordance with the conditions laid down by Article 221(1) of the Customs Code (order in *Gerlach & Co.*, paragraph 28).

39 Thus, the answer to the fifth question is that Article 221(1) of the Customs Code must be interpreted as meaning that the communication of the amount of duty to be recovered must have been preceded by the entry in the accounts of that amount by the customs authorities of the Member State concerned and that, if it has not been entered in the accounts in accordance with Article 217(1) of the Customs Code, that amount may not be recovered by those authorities, which however remain entitled to proceed

with a new communication of that amount, in accordance with the conditions laid down by Article 221(1) of the Customs Code and the limitation rules in force at the time the customs debt was incurred.

Sixth question

40 The Court has held that the amount of the import duties or export duties remains 'legally owed' for the purposes of the first subparagraph of Article 236(1) of the Customs Code even where that amount has not been communicated to the debtor in accordance with Article 221(1) of the code (*Transport Maatschappij Traffic*, paragraph 29).

41 Those considerations also apply where, although the amount of those duties was communicated to the person liable, that communication was not preceded by the entry in the accounts of that amount.

42 In such a case, as stated in paragraph 39 of the present judgment, the customs authorities remain entitled to proceed with a new communication of that amount, in accordance with the conditions laid down in Article 221(1) of the Customs Code and the limitation rules in force at the time the customs debt was incurred.

43 However, if a communication of that kind is no longer possible because the period prescribed by Article 221(3) of the Customs Code has expired, the debt is time-barred and, consequently, extinguished within the meaning of Article 233 of the code (*Molenbergnatie*, paragraphs 40 and 41).

44 In such a situation, the person liable must, in principle, be able to obtain repayment of the sums paid to settle that customs debt.

45 According to well-established case-law, the right to a refund of charges levied in a Member State in breach of the rules of Community law is the consequence and complement of the rights conferred on individuals by Community provisions as interpreted by the Court. The Member State is therefore required in principle to repay charges levied in breach of Community law (see, inter alia, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 110 and case-law cited).

46 In the absence of Community rules on the refund of charges levied though not due, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, *Test Claimants in the Thin Cap Group Litigation*, paragraph 111 and the case-law cited).

47 In the light of the above considerations, the answer to the sixth question is that, although the amount of import duty or export duty remains 'legally owed' within the meaning of the first subparagraph of Article 236(1) of the Customs Code, even where that amount was communicated to the person liable without having been entered in the accounts beforehand in accordance with Article 221(1) of that code, the fact remains that, if such communication is no longer possible because the period laid down in Article 221(3) of that code has expired, that person must in principle be able to obtain repayment of that amount from the Member State which levied it.

Costs

48 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 (Second Chamber) hereby rules:

1. **Article 221(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as meaning that 'entry in the accounts' of the amount of duty to be recovered as referred to in that provision is the same as 'entry in the accounts' of that amount as defined in Article 217(1) of that regulation.**

2. **'Entry in the accounts' within the meaning of Article 217(1) of Regulation No 2913/92 must be distinguished from entry of established entitlements in the accounts for own resources as referred to in Article 6 of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources. Since Article 217 of Regulation No 2913/92 does not lay down any practical procedures for 'entry in the accounts' within the meaning of that provision or, accordingly, any minimum requirements of a technical or formal nature, that entry in the accounts must be made in a way which ensures that the competent customs authorities enter the exact amount of the import duty or export duty resulting from a customs debt in the accounting records or on any other equivalent medium, so that, inter alia, the entry in the accounts of**

the amounts concerned may be established with certainty, including with regard to the person liable.

3. **Article 221(1) of Regulation No 2913/92 must be interpreted as meaning that the amount of import or export duty due can be validly communicated to the debtor by the customs authorities, in accordance with appropriate procedures, only if the amount of that duty has been entered in the accounts beforehand by the authorities. The Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duty is to be made to the debtor where national procedural rules of general application can be applied to that communication, which ensure that the debtor receives adequate information and which enable him, with full knowledge of the facts, to defend his rights.**

4. **Community law does not preclude the national court from proceeding on the assumption, based on the declaration by the customs authorities, that the 'entry in the accounts' of the amount of import or export duty within the meaning of Article 217 of Regulation No 2913/92 took place before that amount was communicated to the debtor, provided that the principles of effectiveness and equivalence are observed.**

5. **Article 221(1) of Regulation No 2913/92 must be interpreted as meaning that the communication of the amount of duty to be recovered must have been preceded by the entry in the accounts of that amount by the customs authorities of the Member State concerned and that, if it has not been entered in the accounts in accordance with Article 217(1) of Regulation No 2913/92, that amount may not be recovered by those authorities, which however remain entitled to proceed with a new communication of that amount, in accordance with the conditions laid down by Article 221(1) of Regulation No 2913/92 and the limitation rules in force at the time the customs debt was incurred.**

6. Although the amount of import duty or export duty remains 'legally owed' within the meaning of the first subparagraph of Article 236(1) of Regulation No 2913/92, even where that amount was communicated to the person liable without having been entered in the accounts beforehand in accordance with Article 221(1) of that regulation, the fact remains that, if such communication is no longer possible because the period laid down in Article 221(3) of that regulation has expired, that person must in principle be able to obtain repayment of that amount from the Member State which levied it.

[Signatures]