JUDGMENT OF THE COURT (First Chamber)
21 October 1999 *

In Case C-233/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesfinanzhof, Germany, for a preliminary ruling in the proceedings pending before that court between

Hauptzollamt Neubrandenburg

and

Lensing & Brockhausen GmbH

on the interpretation of Article 36 of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (OJ 1977 L 38, p. 1) as amended by Council Regulation (EEC) No 474/90 of 22 February 1990 with a view to abolishing lodgement of the transit advice note on crossing an internal frontier of the Community (OJ 1990 L 51, p. 1), and of Article 11*a* of Commission Regulation (EEC) No 1062/87 of 27 March 1987 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1987 L 107, p. 1) as amended by Commission Regulation (EEC) No 1429/90 of 29 May 1990 (OJ 1990 L 137, p. 21),

* Language of the case: German.

THE COURT (First Chamber),

composed of: L. Sevón President of the Chamber, P. Jann and M. Wathelet (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Lensing & Brockhausen GmbH, by H. Nehm, Rechtsanwalt, Düsseldorf,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and C.-D. Quassowski, Regierungsdirektor in that ministry, acting as Agents,

— the Commission of the European Communities, by R. Tricot, of its Legal Service, and K. Schreyer, a national civil servant seconded to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Lensing & Brockhausen GmbH, represented by H. Nehm, the Danish Government, represented by J. Molde, Head of Division in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by J.C. Schieferer, of its Legal Service, acting as Agent, and K. Schreyer, at the hearing on 3 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 1 July 1999,

gives the following

Judgment

1 By order of 28 April 1998, received at the Court on 2 July 1998, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 36 of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (OJ 1977 L 38, p. 1) as amended by Council Regulation (EEC) No 474/90 of 22 February 1990 with a view to abolishing lodgement of the transit advice note on crossing an internal frontier of the Community (OJ 1990 L 51, p. 1), and of Article 11*a* of Commission Regulation (EEC) No 1062/87 of 27 March 1987 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1987 L 107, p. 1) as amended by Commission Regulation (EEC) No 1429/90 of 29 May 1990 (OJ 1990 L 137, p. 21).

2 Those questions were raised in proceedings between Lensing & Brockhausen GmbH and the Hauptzollamt (Principal Customs Office) Neubrandenburg concerning the recovery of customs duty and value added tax (VAT) on import.

3 On 8 July 1992 Lensing & Brockhausen, customs agents, asked the Hauptzollamt to clear a consignment of steel sections from Poland for the external Community transit procedure. The T 1 declaration gave as consignee Ateliers

Metalgroup de Marcinelle, Belgium, and as office of destination Charleroi, Belgium.

4 The consignment was to be produced by 16 July 1992 at the latest. By letter of 22 January 1993 the Hauptzollamt informed Lensing & Brockhausen that the transit procedure had not been completed and asked for help in clarifying the situation. An inquiry notice sent to the office of destination on 3 May 1993 was not answered. When that office also failed to react to a formal letter of 12 October 1994, the Hauptzollamt issued a tax assessment for customs duty and VAT on import on 19 January 1995.

5 On 5 February 1995 Lensing & Brockhausen objected, relying on a CMR waybill as proof that Ateliers Metalgroup had received and paid for the steel sections.

6 By letter of 6 September 1995 the Belgian authorities confirmed that the consignment had not been produced to the office of destination and reported that Ateliers Metalgroup had stated that the goods in question had been delivered to DVL Industries. According to the Belgian authorities' information, it was not possible to establish whether the goods declared on the transit document had in fact been the subject of customs formalities. DVL Industries was said to have been declared bankrupt in the meantime.

7 By decision of 2 January 1996 the customs duty and VAT on import were reduced to DEM 6 544.90 by the German authorities, the remainder of the objection being rejected.

8 Lensing & Brockhausen then brought proceedings in the Finanzgericht (Finance Court), arguing that a receipt for the goods had been given by Ateliers

Metalgroup on 9 July 1992, within the time-limit prescribed for their production, as was shown by the CMR waybill. In those circumstances the right to recover duty belonged exclusively, in its submission, to the Member State on whose territory the offence had been detected; it was thus irrelevant that the Belgian customs authorities had not been able to recover the duty from the consignee. The Finanzgericht gave judgment in favour of Lensing & Brockhausen, holding that it was for the Belgian customs authorities, not the German authorities, to require payment of the duty.

9 The Hauptzollamt appealed on a point of law to the Bundesfinanzhof, arguing in particular that the conditions for a refund under the third subparagraph of Article 36(3) of Regulation No 222/77 were not satisfied.

10 The purpose of Article 36 of Regulation No 222/77 is to determine the competent State for recovery of duty on entry, where an offence or irregularity has been committed in the course of a Community transit operation. Under Article 36(1), where the offence or irregularity 'has been committed in a particular Member State, the recovery of duties or other charges which may be chargeable shall be effected by that Member State in accordance with its provisions laid down by law, regulation or administrative action, without prejudice to the institution of criminal proceedings'.

11 For cases in which the place of the offence or irregularity cannot be established, Article 36(2) and (3) sets out a series of presumptions which enable conflicts of jurisdiction to be avoided.

12 Thus under Article 36(3):

'When the consignment has not been produced at the office of destination and the place of the offence or irregularity cannot be established, such offence or irregularity shall be deemed to have been committed:

— in the Member State to which the office of departure belongs, or

— in the Member State to which the office of transit at the point of entry into the Community belongs and to which a transit advice note has been given,

unless, within a period to be determined, proof is furnished to the satisfaction of the competent authorities, of the regularity of the transit operation or of the place where the offence or irregularity has actually been committed.

If, in the absence of such proof, the said offence or irregularity remains deemed to have been committed in the Member State of departure or in the Member State of point of entry as referred to in the second indent, the duties and other taxes relating to the goods concerned shall be levied by that Member State in accordance with its laws, regulations and administrative provisions.

If, before expiry of the period of three years from the date of registration of the T 1 declaration, the Member State where the said offence or irregularity was actually committed is determined, that Member State shall, in accordance with its laws, regulations and administrative provisions, recover the duties and other taxes (apart from those levied, pursuant to the second subparagraph, as own

resources of the Community) relating to the goods concerned. In this case, once the proof of such recovery is provided, the duties and other taxes initially levied (apart from those levied as own resources of the Community) shall be refunded.

...'

13 The Bundesfinanzhof was uncertain as to the interpretation of Article 36 of Regulation No 222/77 in conjunction with Article 11a of Regulation No 1062/87.

14 Article 11a lays down the procedure to be followed where a consignment has not been produced to the office of destination:

'1. Where a consignment has not been produced at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure shall notify the principal of this fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration.

2. The notification referred to in paragraph 1 must indicate, in particular, the time-limit by which the proof of the regularity of the transit operation or of the place where the offence or irregularity has actually been committed must be furnished to the office of departure to the satisfaction of the competent authorities.

This time-limit shall be three months from the date of the notification referred to in paragraph 1. If the required proof has not been produced by the end of this period, the competent Member State shall take steps to recover the duties and other charges involved. In cases where this Member State is not the one in which the office of departure is located, the latter shall immediately inform that Member State.'

15 In the order for reference the Bundesfinanzhof states that the office of departure did not fix, with regard to the principal, the time-limit referred to in Article 11a of Regulation No 1062/87 within which proof could be furnished of the regularity of the transit operation or the place where the offence was actually committed.

16 While Regulation No 222/77 was repealed by Article 46(1) of Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit (OJ 1990 L 262, p. 1), the transit procedure at issue in the main proceedings was commenced in 1992, before the Commission adopted transitional provisions pursuant to Article 46(2) of Regulation No 2726/90 applicable to Community transit operations commenced before 1 January 1993. Such measures were introduced by Commission Regulation (EEC) No 1214/92 of 21 April 1992 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1992 L 132, p. 1), applicable from 1 January 1994.

17 Under the first paragraph of Article 129 of Regulation No 1214/92, 'carriage' begun, in accordance with the provisions of Regulations No 222/77 and No 1062/87 'on the last day that precedes the date of application of this Regulation, will be continued after that date under the conditions laid down in those Regulations'.

18 In those circumstances, since it was uncertain as to the inferences to be drawn from failure to comply with the procedure under Article 11*a* of Regulation No 1062/87, in particular where because of the expiry of the limitation period

the duty on import can no longer be levied in the Member State where the offence is eventually proved to have been committed, the Bundesfinanzhof stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is the first subparagraph of Article 36(3) of Regulation (EEC) No 222/77 in conjunction with Article 11*a*(2) of Regulation (EEC) No 1062/87 to be interpreted as meaning that, in the event of failure to produce a consignment at the office of destination, the Member State of departure has jurisdiction to recover duty on import only where the period of three months laid down in the second subparagraph of Article 11a(2) of Regulation (EEC) No 1062/87 has previously been set for the principal and he has not furnished the proof required by that provision?

2. If Question 1 is to be answered in the affirmative: Is the third subparagraph of Article 36(3) of Regulation (EEC) No 222/77 to be interpreted as being applicable also in a case in which a customs office of the Member State of departure has recovered duty due in respect of goods cleared for the transit procedure without having set a time-limit in accordance with the second subparagraph of Article 11*a*(2) of Regulation (EEC) No 1062/87, with the result that the Member State of departure may refund the duty which it has assessed and levied without jurisdiction only if it is proved that the Member State in which the offence or irregularity was actually committed has recovered the duty? Is a distinction to be drawn between duty levied as own resources of the Community and other (national) taxes?'

Admissibility of the questions

19 Lensing & Brockhausen question the relevance of the questions for the outcome of the main proceedings. They submit that the facts of the case must be assessed in the light of Article 36(1) of Regulation No 222/77, not of the provisions to which the questions relate.

20 In their submission, Article 36(1) applies where there has been an offence against the rules of the Community transit procedure and the Member State in which the offence was committed is known, while Article 36(3) applies where there has been an offence and it is not known in which Member State it was committed. In the present case the offence can only have been committed in Belgium, and Article 36(1) of Regulation No 222/77 should consequently be applied.

21 That argument cannot be accepted. As the Advocate General observes in point 19 of his Opinion, Article 36(3) concerns precisely cases where, as here, the place of the offence is not known to the competent authorities at the time when it is detected, even if it later proves possible to determine that place.

22 The national court's questions must therefore be answered.

Question 1

23 By its first question, the national court essentially asks whether Article 36(3) of Regulation No 222/77 in conjunction with Article 11a(2) of Regulation No 1062/87 must be interpreted as meaning that the Member State to which the office of departure belongs may recover duty on import only if it has indicated to the principal that he has three months in which to prove where the offence or irregularity was actually committed and such proof has not been provided within that period.

24 Lensing & Brockhausen, the Danish Government and the Commission submit that the question should be answered in the affirmative, by reason of the wording

and purpose of the first subparagraph of Article 36(3) of Regulation No 222/77 in conjunction with Article 11*a* of Regulation No 1062/87.

25 In their submission, it follows that that provision could not, in the case in point in the main proceedings, justify the intervention of the Member State of departure, where the competent authorities of that State had failed to require the principal to provide proof, within three months, of the place where the offence had been committed. In those circumstances the German customs authorities were not entitled to recover the duty on import.

26 The German Government, on the other hand, contends that compliance with the three-month period referred to in Article 11*a*(2) of Regulation No 1062/87 does not constitute a mandatory condition for establishing the presumption that the offence was committed in the Member State of departure and so recognising the jurisdiction of that State. Any other interpretation would lead to the result that where such a period was not fixed no Member State would be competent to recover customs duty and other taxes, so that despite the existence of an offence duly found to have been committed, recovery would not be ensured, which would be contrary to the intention of the Community legislature.

27 On this point, it must be noted, first, that under Article 36(3) of Regulation No 222/77 when the consignment has not been produced at the office of destination and the place of the offence or irregularity cannot be established, that offence or irregularity is deemed to have been committed in the Member State to which the office of departure belongs, unless 'within a period to be determined' proof is furnished of the regularity of the transit operation or of the place where the offence or irregularity has actually been committed.

28 Article 11*a*(2) of Regulation No 1062/87 prescribes that the office of departure's notification to the principal is to 'indicate, in particular, the time-limit by which the proof of the regularity of the transit operation or of the place where the offence or irregularity has actually been committed must be furnished to the office of departure', and that that 'time-limit [is to] be three months ...'.

29 It thus follows from the wording of Article 36(3) of Regulation No 222/77 and Article 11*a*(2) of Regulation No 1062/87 that the indication by the office of departure of the time-limit within which proof of the place of the offence may be furnished by the principal is obligatory.

30 Second, that requirement makes it possible to invite the principal to produce any evidence he may have within a mandatory time-limit, with a view to determining without delay the State with jurisdiction to recover duty under the conditions laid down in Article 36(1) and (3) of Regulation No 222/77.

31 Accordingly, the answer to Question 1 must be that Article 36(3) of Regulation No 222/77 in conjunction with Article 11*a*(2) of Regulation No 1062/87 is to be interpreted as meaning that the Member State to which the office of departure belongs may recover duty on import only if it has indicated to the principal that he has three months in which to prove where the offence or irregularity was actually committed and such proof has not been provided within that period.

Question 2

32 By its second question, the national court essentially asks whether the third subparagraph of Article 36(3) of Regulation No 222/77 is to be interpreted as applying also to a case in which the Member State to which the office of departure belongs has recovered duty due in respect of goods cleared for the Community transit procedure even though the principal has not been set a time-limit for furnishing proof of the place where the offence or irregularity was actually committed, in accordance with Article 11*a*(2) of Regulation No 1062/87, and whether in such a case the refund of the duty irregularly

recovered is subject to the condition that the duty due from the principal has been paid in the Member State where the offence was committed.

33 Under the third subparagraph of Article 36(3) of Regulation No 222/77, if before the expiry of the period of three years from the date of registration of the T 1 declaration the Member State where the offence or irregularity was actually committed is determined, that State acquires jurisdiction to recover the duty and other taxes, apart from those levied as own resources of the Community. In that case, once proof of such recovery is provided, the duty and taxes initially levied on the basis of the presumption that the Member State to which the office of departure belongs has jurisdiction are to be refunded, apart from those levied as own resources of the Community.

34 In the main proceedings, it appears from the case-file that Lensing & Brockhausen produced proof within the time-limit that the offence had been committed in Belgium, so that that Member State in any event definitively acquired sole jurisdiction to levy the duty on the entry of the goods.

35 According to the German Government, the Member State of departure which has levied duty on import, even though the time-limit referred to in the second subparagraph of Article 11*a*(2) of Regulation No 1062/87 has not been notified to the principal, is entitled to refuse to refund that duty until the principal furnishes proof that it has actually been levied in the competent Member State.

36 That argument cannot be accepted. It is implicit from the wording of the third subparagraph of Article 36(3) of Regulation No 222/77 that application of that

provision presupposes that the authorities of the Member State to which the office of departure belongs are authorised to recover the duty and other taxes. From the answer to Question 1 it follows that as the principal had not been notified of the three-month period referred to in Article 11*a*(2) of Regulation No 1062/87 those authorities could not validly have acquired jurisdiction to levy the duty on the entry of the goods. They cannot therefore oppose the refund of sums which they were not authorised to recover and, as the Advocate General observes in points 70 and 71 of his Opinion, no distinction should be drawn between duty levied as own resources of the Community and other duties and taxes.

37 The answer to Question 2 must therefore be that the third subparagraph of Article 36(3) of Regulation No 222/77 is to be interpreted as not applying to a case in which the Member State to which the office of departure belongs has recovered duty in respect of goods cleared for the Community transit procedure even though the principal has not been set a time-limit for furnishing proof of the place where the offence or irregularity was actually committed, in accordance with Article 11*a*(2) of Regulation No 1062/87, and in such a case the refund of the duty irregularly recovered is not subject to the condition that the duty due from the principal has been paid in the Member State where the offence was committed.

Costs

38 The costs incurred by the German and Danish 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 (First Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 28 April 1998, hereby rules:

1. Article 36(3) of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit, as amended by Council Regulation (EEC) No 474/90 of 22 February 1990 with a view to abolishing lodgement of the transit advice note on crossing an internal frontier of the Community, in conjunction with Article 11a(2) of Commission Regulation (EEC) No 1062/87 of 27 March 1987 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure, as amended by Commission Regulation (EEC) No 1429/90 of 29 May 1990, is to be interpreted as meaning that the Member State to which the office of departure belongs may recover duty on import only if it has indicated to the principal that he has three months in which to prove where the offence or irregularity was actually committed and such proof has not been provided within that period.

2. The third subparagraph of Article 36(3) of Regulation No 222/77 as amended by Regulation No 474/90 is to be interpreted as not applying to a case in which the Member State to which the office of departure belongs has recovered duty in respect of goods cleared for the Community transit procedure even though the principal has not been set a time-limit for

furnishing proof of the place where the offence or irregularity was actually committed, in accordance with Article 11a(2) of Regulation No 1062/87 as amended by Regulation No 1429/90, and in such a case the refund of the duty irregularly recovered is not subject to the condition that the duty due from the principal has been paid in the Member State where the offence was committed.

Sevón Jann Wathelet

Delivered in open court in Luxembourg on 21 October 1999.

R. Grass L. Sevón

Registrar President of the First Chamber