JUDGMENT OF THE COURT (Third Chamber)

5 October 2006 *

In Case C-100/05,

REFERENCE for a preliminary ruling under Article 234 EC by the Gerechtshof te Amsterdam (Netherlands), made by decision of 18 February 2005, received at the Court on 28 February 2005, in the proceedings

ASM Lithography BV

v

Inspecteur van de Belastingdienst-Douane Zuid/kantoor Roermond,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, J.-P. Puissochet, U. Lõhmus (Rapporteur) and A. Ó Caoimh, Judges,

* Language of the case: Dutch.

Advocate General: M. Poiares Maduro,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2006,

after considering the observations submitted on behalf of:

— ASM Lithography BV, by E.H. Mennes and L.E.C. Kanters, belastingadviseurs,

— the Netherlands Government, by H.G. Sevenster, M. de Mol and M. de Grave, acting as Agents,

— the Commission of the European Communities, by J. Hottiaux, acting as Agent, and F. Tuytschaever, advocaat,

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

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 121(1), 122(c) and 236 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 This reference was made in the course of proceedings between ASM Lithography BV ('ASM Lithography') and the Inspecteur van de Belastingdienst-Douane Zuid/kantoor Roermond (the head of the Tax Inspectorate-Customs South/Roermond office) ('the Inspector') regarding an application for repayment of customs duties concerning goods released for free circulation between October 1998 and July 2000.

Legal context

3 Article 114 of the Customs Code provides:

'1. Without prejudice to Article 115, the inward processing procedure shall allow the following goods to be used in the customs territory of the Community in one or more processing operations:

(a) non-Community goods intended for re-export from the customs territory of the Community in the form of compensating products, without such goods being subject to import duties or commercial policy measures;

(b) ...

2. The following expressions shall have the following meanings:

(a) suspension system: the inward processing relief arrangements as provided for in paragraph 1(a);

...

(d) compensating products: all products resulting from processing operations;

...'

4 As set out in Article 121(1) of the Customs Code:

'Subject to Article 122, where a customs debt is incurred, the amount of such debt shall be determined on the basis of the taxation elements appropriate to the import goods at the time of acceptance of the declaration of placing of these goods under the inward processing procedure.'

5 Article 122 of the Customs Code provides:

'By way of derogation from Article 121, compensating products:

(a) shall be subject to the import duties appropriate to them where:

— they are released for free circulation and appear on the list adopted in accordance with the committee procedure, to the extent that they are in proportion to the exported part of the compensating products not included in that list. However, the holder of the authorisation may ask for the duty on those products to be assessed in the manner referred to in Article 121;

— they are subject to charges established under the common agricultural policy, and provisions adopted in accordance with the committee procedure so provide;

(b) shall be subject to import duties calculated in accordance with the rules applicable to the customs procedure in question or to free zones or free warehouses where they have been placed under a suspensive arrangement or in a free zone or free warehouse.

However,

— the person concerned may request that duty be assessed in accordance with Article 121;

— in cases where the compensating products have been assigned a customs-approved treatment or use referred to above other than processing under customs control, the amount of the import duty levied shall be at least equal to the amount calculated in accordance with Article 121;

(c) may be made subject to the rules governing assessment of duty laid down under the procedure for processing under customs control where the import goods could have been placed under that procedure;

...'

6 Article 130 of the Customs Code provides:

'The procedure for processing under customs control shall allow non-Community goods to be used in the customs territory of the Community in operations which alter their nature or state, without their being subject to import duties or commercial policy measures, and shall allow the products resulting from such operations to be released for free circulation at the rate of import duty appropriate to them. Such products shall be termed processed products.'

7 As set out in Article 236 of the Customs Code:

'1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

...

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

...'

8 Council Decision 97/359/EC of 24 March 1997 concerning the elimination of duties on information technology products (OJ 1997 L 155, p. 1) approved, on behalf of the Community, the Agreement on trade in information technology products and the Communication on its implementation. That agreement, made up of the Ministerial Declaration of 13 December 1996, adopted at the first Conference of the World Trade Organisation in Singapore, and its annexes and attachments sought to consolidate and eliminate, at the latest as of 1 January 2000, the customs duties relating to certain information technology products.

9 Following that Ministerial Declaration which, in its annex, encouraged participants to eliminate unilaterally the customs duties before 1 January 2000, the Council of the European Union adopted Council Regulation (EC) No 2216/97 of 3 November 1997 amending Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff and autonomously suspending collection of Common Customs Tariff duties in respect of certain information technology products (OJ 1997 L 305, p. 1).

10 Article 3 of Regulation No 2216/97 inserted a footnote (z) in the third column of Annex I, Part Two, to Regulation No 2658/87 for certain CN codes which reads as follows:

'(z): Autonomous suspension for an indefinite period.'

11 Commission Regulation (EC) No 1677/98 of 29 July 1998 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1998 L 212, p. 18) added to the list of goods eligible for the procedure for processing

under customs control appearing in the first column of Annex 87 to Commission Regulation (EEC) No 2454/93 of 2 July 1993 (OJ 1993 L 253, p. 1) certain electronic components which may be subject to the processing into information technology products which is mentioned in the second column of that annex.

12 Under Annex III to Regulation No 1677/98 '[t]he following point is added to Annex 87:

	Column 1	Column 2
Order No	Goods for which processing under customs control is authorised	Processing which may be carried out
"18	Any electronic type of components, parts, assemblies (including sub-assemblies), or materials (whether or not electronic), which are vital to the electronic working performance of the processed product	Processing into information technology products falling within: 1. ... 2. a CN subheading provided for in Articles 1, 2 or 3 of Council Regulation (EC) No 2216/97 ... where an autonomous suspension of duty operates on the date of authorisation ..."

The main proceedings and the questions referred for a preliminary ruling

13 ASM Lithography develops and manufactures devices (wafer steppers) which are used for the production of chips in the information technology industry. In the context of its activities it buys, outside the Community, parts and partially

assembled elements which are used in the manufacture of wafer steppers and step and scan systems or as sub-assemblies, or are supplied to purchasers as spare parts.

14 With effect from 1 January 1988 and on the basis of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements (OJ 1985 L 188, p. 1), repealed by the Customs Code, ASM Lithography received an authorisation for inward processing, applying the suspension system, of unlimited duration.

15 ASM Lithography sells some of the compensating products outside the Community. It is required to submit periodically to the customs authorities an application for discharge of the procedure in respect of the goods in the unaltered state and of the compensating products exported.

16 As for the other compensating products and the goods imported into the State, they are released for free circulation. In so far as they were products relating to information technology, the majority of them were eligible for the system suspending the collection of customs duties pursuant to Regulation No 2216/97. As from August 1998, Regulation No 1677/98 added electronic components to the goods eligible for the procedure for processing under customs control.

17 For the period from October 1998 to July 2000, ASM Lithography provided a monthly statement of the compensating products which had been released for free circulation setting out, inter alia, the invoice relating to the import goods, the tariff applicable, the administrative codes for the country of destination, origin and consignment, the customs value and also the customs duty owed.

18 ASM Lithography calculated the amount of duty owed in accordance with Article 121 of the Customs Code, on the basis of the taxation elements appropriate to the goods concerned at the time when they were placed under the inward processing procedure. It is apparent from the information submitted during the preliminary ruling procedure that, if that company had relied, on the basis of Article 122(c) of the Customs Code, on the application of Regulation No 2216/97 in conjunction with Regulation No 1677/98, the calculation of that duty would have been based on the taxation elements of the compensating products and customs duty would have been chargeable on only 2% to 3% of the components concerned, whilst 97% to 98% of the imported goods would have been subject to a zero tariff.

19 On the basis of the statements provided by ASM Lithography, the Inspector drew up demands for payment stating that 'the duty is owed under Article 204(1)(a) of the [Customs Code] on account of waiver of the exemption in respect of the authorisation [for inward processing]' and that 'this demand for payment is provisional'. The customs debt had been determined by application of Article 121(1) of the Customs Code and corresponded to the amount calculated by ASM Lithography in its monthly statements.

20 After having paid the amount of its debt, ASM Lithography submitted to the Inspector, on 26 April 2001, pursuant to Article 236 of the Customs Code, an application for repayment of a total of NLG 2 105 393.20 (EUR 955 385.78) in respect of import duties — an application which was rejected. The objection made at a later stage was declared unfounded by decision of 2 May 2002.

21 ASM Lithography subsequently brought an action before the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal). That court observes that when the compensating products in question were released into free circulation, ASM Lithography did not specifically request that they be made subject to the rules laid down in connection with the procedure for processing under customs control pursuant to Article 122(c) of the Customs Code and that it was only after a demand for payment, against which the applicant lodged no objection, had been drawn up

pursuant to Article 121(1) of that code that the applicant submitted a request that those rules be applied.

22 The Gerechtshof te Amsterdam is uncertain, however, whether, in such a case, the calculation of the amount of the customs debt is to be made pursuant to Article 121(1) of the Customs Code or by application of Article 122(c) thereof, and for that reason has decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) With regard to compensating products such as those here in issue, which are considered to have been released for free circulation, must the customs debt be determined on the basis of the taxation elements referred to in Article 122(c) of the Community Customs Code even where the person concerned has made no prior and express request in that regard?

(2) If the answer to Question 1 is in the negative, is it necessary to grant a subsequent application — after notification of the amount by way of duty arising from the customs debt which is determined on the basis of the taxation elements referred to in Article 121(1) of the Community Customs Code — for (re)calculation of the amount of customs debt on the basis of the taxation elements referred to in Article 122(c) of the Community Customs Code which is made in connection with an application for repayment pursuant to Article 236 of the Community Customs Code?'

The questions referred for a preliminary ruling

The first question

23 By that question, the national court asks whether Article 122(c) of the Customs Code is to be interpreted as meaning that, at the time of determining the amount of

the customs debt resulting from the release for free circulation of compensating products, the national customs authorities are bound to apply the rules of assessment relating to the procedure for processing under customs control where the import goods could have been placed under that procedure although the company concerned made no express request in that regard.

24 Articles 121 and 122 of the Customs Code set out two different bases of calculation of the customs debt for goods imported under the inward processing procedure.

25 Article 121 of the Customs Code contains a general rule applicable to all the goods imported under such a procedure according to which, when a customs debt arises, the amount of that debt is determined on the basis of the taxation elements appropriate to the import goods at the time of acceptance of the declaration of placing of those goods under the inward processing procedure.

26 By contrast, Article 122 of the Customs Code contains derogations from that rule in so far as it sets out a list of specific cases in which the amount of the customs debt is determined, as regards compensating products, according to different criteria from that laid down in Article 121.

27 It follows from the wording of Articles 121 and 122 of the Customs Code that, as the latter of those articles applies by way of derogation from the former, the customs authorities are bound, as a rule, when import goods placed under the inward processing procedure are released for free circulation, to determine the customs

debt in accordance with Article 121. As the Netherlands Government correctly points out in its observations, there can be derogation from that obligation only in one of the cases provided for in Article 122 of that code.

28 At the hearing, ASM Lithography submitted that, for the purposes of the application of Article 122 of the Customs Code and, in particular, of the rule set out in Article 122(c), no prior request by the person concerned is necessary. The rules set out in Article 122 are applicable only to specific cases, unlike that laid down in Article 121 of the Customs Code, the former being a lex specialis the application of which should take precedence over the latter.

29 That argument cannot be accepted.

30 Article 122(a) to (c) of the Customs Code mentions several situations which may apply to compensating products for the purposes of determining the amount of import customs duty owed. It is apparent from the very wording of the provisions of Article 122(a) and (b) that, when one of the situations referred to in those provisions applies to the compensating products, the application by the national customs authorities of the rules set out in those provisions is mandatory, although the person concerned may, in certain circumstances, request that duty be assessed in accordance with Article 121 of the Customs Code.

31 By contrast, that is not true of the rule in Article 122(c) of the Customs Code. As it is worded, that provision does not impose any obligation on the national customs authorities but merely lays down a rule the application of which is optional in so far as it provides that, by way of derogation from Article 121, compensating products may be made subject to the rules governing assessment of duty laid down under the procedure for processing under customs control where the import goods could have been placed under that procedure.

32 It follows that, for the purposes of determining the amount of a customs debt when compensating products are released for free circulation, Article 122(c) of the Customs Code does not compel the national customs authorities to apply automatically the rules governing assessment of duty laid down under the procedure for processing under customs control as that provision applies, even when those rules are more favourable for the person concerned, only if he expressly requests it. It is not apparent from the provisions of the Customs Code that the Community legislature intended to impose upon the national authorities a duty of care as regards persons owing payment of duty, in accordance with which those authorities must look after the interests of the latter by applying the most favourable rules governing assessment of duty.

33 That interpretation is borne out by the wording of Article 62(1) of the Customs Code, according to which, as regards the declaration for the goods to be placed under a customs procedure, it is for the declarant to indicate on his declaration 'all the particulars necessary for implementation of the provisions governing the customs procedure for which the goods are declared'. A similar obligation to provide the customs authorities with all the necessary information is incumbent on any declarant within the meaning of Article 4(18) of the Customs Code.

34 The answer to the first question must therefore be that Article 122(c) of the Customs Code is to be interpreted as meaning that, at the time of determining the amount of the customs debt resulting from the release for free circulation of compensating products, unless the person concerned has expressly made a request to that effect, the national customs authorities are not bound to apply the rules of assessment relating to the procedure for processing under customs control where the import goods could have been placed under that procedure.

The second question

35 By that question, the national court asks, in essence, whether Article 236 of the Customs Code is to be interpreted as meaning that the national customs authorities must allow an application for repayment of import duties entailing a recalculation on their part of the amount of a customs debt by applying Article 122(c) of that code, although the amount of that debt has already been calculated by applying Article 121 of the code and has been communicated to the person concerned.

36 In its observations, the Netherlands Government submits, in that regard, that, as the customs authorities correctly applied Article 121 of the Customs Code, the customs debt was legally owed when it was paid and that, in any event, where a choice is left to the person concerned with regard to the method of calculation of that debt, that person should not be able to rely on Article 236 of the Customs Code to request subsequently the application of another method of calculation resulting in an outcome more favourable for him.

37 That argument cannot be accepted.

38 It is apparent from the wording of Article 236 of the Customs Code that the national customs authorities have to repay duties in so far as it is established that, inter alia, when they were paid they were not legally owed.

39 It is true that, as is apparent from the answer given to the first question, the national customs authorities are entitled to determine the amount of the customs debt in accordance with Article 121 of the Customs Code where the person concerned does not expressly request that the compensating products be made subject to the rules governing assessment of duty laid down under the procedure for processing under customs control where the import goods could have been placed under that procedure.

40 It follows from this that, in such circumstances, the imported goods may legitimately be considered as being subject to import duties and accordingly those duties have been lawfully collected. That applies even more so in the present case where, when it provided the monthly statements of the compensating products which had been released for free circulation, ASM Lithography calculated the amount of the duties owed on the basis of Article 121 of the Customs Code and the Netherlands customs authorities drew up the demand for payment, for the same amount as that calculated by that undertaking, by applying the same provision.

41 However, the fact that in the present case the customs duties were, when they were paid, lawfully collected on account of the absence of a request by ASM Lithography for application of Article 122(c) of the Customs Code cannot have the consequence that those duties must subsequently be assimilated, despite a later request being made to that effect, to duties legally owed for the purposes of Article 236(1) of the Customs Code since, firstly, the absence of a request at the time when the customs duties were paid is the result of an error consisting in an involuntary omission which cannot be regarded as the definitive exercise of a choice, which is by definition voluntary, and, secondly, it is common ground that the duties legally owed following such a request would have been lower than the amount paid or even zero (see, to that effect, Case C-468/03 *Overland Footwear* [2005] ECR I-8937, paragraphs 68 and 69).

42 Accordingly, if the conditions laid down by Article 236 of the Customs Code are fulfilled, namely, in particular, that there has been no manipulation by the declarant and that the application for repayment has been submitted within the time-limit of three years, that provision is applicable if a request for repayment of import duties is submitted following a declaration of release for free circulation made by an undertaking in which it has, in error, calculated the amount of the debt on the basis of Article 121 of that code instead of requesting that, under Article 122(c) of the code, the amount be determined according to the rules governing assessment of duty laid down under the procedure for processing under customs control. It is for the national court to verify whether those conditions have been fulfilled.

43 It is clear from the above that Article 236 of the Customs Code is to be interpreted as meaning that the national customs authorities must allow a request for repayment of import duties where it transpires that, following an error by the person concerned and not through the exercise of a choice, the amount of the customs debt has been determined by applying Article 121 of that code and has already been the subject of a communication to the person concerned, even if that request entails a recalculation by those authorities of the amount of the debt by applying Article 122(c) of the Customs Code.

Costs

44 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 122(c) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code is to be interpreted as meaning that, at the time of determining the amount of the customs debt resulting from the release for free circulation of compensating products, unless the person concerned has expressly made a request to that effect, the national customs authorities are not bound to apply the rules of assessment relating to the procedure for processing under customs control where the import goods could have been placed under that procedure.**

2. **Article 236 of Regulation No 2913/92 is to be interpreted as meaning that the national customs authorities must allow a request for repayment of import duties where it transpires that, following an error by the person concerned and not through the exercise of a choice, the amount of the customs debt has been determined by applying Article 121 of that regulation and has already been the subject of a communication to the person concerned, even if that request entails a recalculation by those authorities of the amount of the debt by applying Article 122(c) of that regulation.**

[Signatures]