JUDGMENT OF THE COURT (Fifth Chamber)

11 January 2001 *

In Case C-1/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale Civile e Penale di Genova (Italy) for a preliminary ruling in the proceedings pending before that court between

Kofisa Italia Srl

and

Ministero delle Finanze,

Servizio della Riscossione dei Tributi — Concessione Provincia di Genova — San Paolo Riscossioni. Genova SpA,

on the interpretation of Articles 243 and 244 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Kofisa Italia Srl, by G. Leone, avvocato,

— the Italian Government, by U. Leanza, acting as Agent, and I.M. Braguglia, Avvocato dello Stato,

— the United Kingdom Government, by R.V. Magrill, acting as Agent, and S. Moore, Barrister,

— the Commission of the European Communities, by R. Tricot and P. Stancanelli, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Kofisa Srl, represented by G. Leone, of the Italian Government, represented by G. De Bellis, Avvocato dello Stato, and of the Commission, represented by P. Stancanelli, at the hearing on 22 June 2000,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2000,

gives the following

Judgment

1 By order of 18 December 1998, received by the Court on 4 January 1999, the Tribunale Civile e Penale di Genova (District Court, Genoa) referred two questions on the interpretation of Articles 243 and 244 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community customs code (OJ 1992 L 302, p. 1, hereinafter 'the Customs Code'.

2 Those questions were raised in proceedings between Kofisa Italia Srl (hereinafter 'Kofisa') and the Ministero delle Finanze (Ministry of Finance) and the Servizio della Riscossione dei Tributi — Concessione Provincia di Genova — San Paolo Riscossioni Genova SpA (agent of the Tax Collection Service in the Province of Genoa) concerning the recovery of value added tax (hereinafter 'VAT') levied on importation.

Legal background

Community legislation

3 Title VIII of the Customs Code, entitled 'Appeals', consists of Articles 243 to 245.

4 Article 243 of the Customs Code provides:

'1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.

Any person who has applied to the customs authorities for a decision relating to the application of customs legislation and has not obtained a ruling on that request within the period referred to in Article 6(2) shall also be entitled to exercise the right of appeal.

The appeal must be lodged in the Member State where the decision has been taken or applied for.

2. The right of appeal may be exercised:

(a) initially, before the customs authorities designated for that purpose by the Member States;

(b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.'

5 Article 244 of the Customs Code provides:

'The lodging of an appeal shall not cause implementation of the disputed decision to be suspended.

The customs authorities shall, however, suspend implementation of such decision in whole or in part where they have good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

Where the disputed decision has the effect of causing import duties or export duties to be charged, suspension of implementation of that decision shall be subject to the existence or lodging of a security. However, such security need not be required where such a requirement would be likely, owing to the debtor's circumstances, to cause serious economic or social difficulties.'

6 Article 245 of the Customs Code provides:

'The provisions for the implementation of the appeals procedure shall be determined by the Member States.'

National legislation

7 Article 70 of Presidential Decree No 633 of 26 October 1972 on the introduction and regulation of value added tax (GURI No 292 of 11 November 1972, Suppl. Ord. No 1, hereinafter 'the 1972 decree'), provides:

'The tax relating to imports shall be charged, calculated and levied on each operation. As regards disputes and penalties, the provisions of the customs legislation on duties levied at the border shall be applied.'

8 The enforced recovery of taxes and other State revenue is governed by Presidential Decree No 43 of 28 January 1988 (GURI No 49, 29 February 1988, Suppl. Ord. No 2). In accordance with the provisions to which it refers, the authority competent to stay the enforcement procedure for the purpose of the recovery of direct and indirect taxes is the Direttore Regionale delle Entrate. Competence in relation to the recovery of customs duties, on the other hand, is conferred by Article 27 of Legislative Decree No 105 of 26 April 1990 (GURI No 106, 9 May 1990, Suppl. Ord.) and Article 32 of Presidential Decree No 287 of 27 May 1992 (GURI No 116, 20 May 1992, Suppl. Ord.), on the Direttore Compartimentale delle Dogane.

9 Under the national law in force at the material time, the ordinary courts did not have jurisdiction to hear and determine applications for suspension of implementation of recovery decisions.

Main proceedings and questions referred to the Court

10 Kofisa is a company operating as a buyer, seller and intermediary on the international markets in machinery and products in the metallurgical, mechanical, textile and food sectors.

11 On 10 November 1997 the Genoa Customs Office sent Kofisa a claim for payment of the sum of ITL 782 393 152 plus interest, a total of ITL 1 112 526 600, by way of VAT levied on importation, on the ground that Kofisa had misapplied the ceiling on imports. Kofisa challenged that claim before the Tribunale Civile e Penale di Genova without first lodging an administrative appeal.

12 While those proceedings were pending, the agent of the tax collection service of the Province of Genoa served a notice on Kofisa for recovery of the above-mentioned sum, plus interest and costs.

13 Kofisa then made a fresh application to the Tribunale Civile e Penale di Genova for a declaration that the recovery was unlawful and also for suspension of implementation of the demand for payment and the recovery notice pending the decision of the court as to the existence of the tax debt in question.

14 In the context of the latter action, the Tribunale observed that, although the main dispute concerned VAT levied on importation and not customs duties, Article 70 of the 1972 decree refers, in regard to disputes and penalties relating to VAT levied on importation, to the provisions of the customs legislation on duty levied at the border.

15 Being uncertain as to whether Kofisa was entitled to initiate proceedings directly before it without having initially lodged an appeal with the customs authorities, and as to whether it had jurisdiction to grant the application to suspend implementation of the measures in question, the Tribunale considered that an interpretation of Articles 243 and 244 of the Customs Code was necessary to enable it to resolve the dispute.

16 Relying on Case C-130/95 *Giloy* v *Hauptzollamt Frankfurt am Main-Ost* [1997] ECR I-4291, the national court considered that the Court had jurisdiction in the present case to answer questions on those provisions of the Customs Code.

17 In those circumstances, the Tribunale Civile e Penale di Genova decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. May the appeal referred to in Article 243(2) of Regulation (EEC) No 2913/92 be brought directly before the judicial authority without the matter having first been referred to the customs authorities?

2. Is the power to suspend implementation of the contested decision provided for in Article 244 of Regulation (EEC) No 2913/92 conferred exclusively on the customs authorities or also on the judicial authority before which an appeal has been brought?'

Jurisdiction of the Court

18 The Italian Government contends that the Court has no jurisdiction to rule on the questions referred to it, since the subject-matter of the main proceedings is VAT levied on importation and not customs duties. The Customs Code cannot apply to VAT levied on importation by virtue of Article 70 of the 1972 decree, since that provision refers solely to national provisions on duties levied at the border and is to be found in a provision adopted in 1972, when neither the Customs Code nor any Community provisions concerning customs obligations existed.

19 The Commission also contends that the situation in Italian law is different from that in *Giloy*, cited above. It refers to a series of Italian laws and regulations which show that, in relation to the implementation of decisions aimed at the recovery of unpaid amounts, the system applicable in customs matters was inspired by the system applicable in direct and indirect tax matters, including VAT, and not vice versa. Furthermore, the administrative authority competent to suspend implementation of the decisions concerned is not the same in customs matters and in direct and indirect tax matters.

20 According to settled case-law, the procedure provided for in Article 177 of the Treaty is a means of cooperation between the Court of Justice and national courts. It follows that it is for the national courts alone which are seised of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court (see *Giloy*, cited above, paragraph 20).

21 Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle,

obliged to give a ruling. Neither the wording of Article 177 nor the aim of the procedure established by that article indicates that the framers of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision where the domestic law of a Member State refers to that Community provision in order to determine the rules applicable to a situation which is purely internal to that State (*Giloy*, cited above, paragraph 21).

22 A reference by a national court can be rejected only if it appears that the procedure laid down by Article 177 of the Treaty has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that Community law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court (*Giloy*, cited above, paragraph 22).

23 In the present case, the national court, relying on Article 70 of the 1972 decree, affirms that, as regards the disputes and penalties relating to VAT levied on importation, national law refers to the provisions of the customs legislation on duties levied at the border.

24 Within its field of application, the Customs Code replaced the relevant national legislation with effect from 1 January 1994.

25 In that regard, the Italian Government has not relied on any provision of national law which states that the national provisions on customs matters which fell within the scope of and were therefore superseded by the Customs Code continue to apply to VAT levied on importation.

26 The reference thus made to the customs provisions, and therefore to the Customs Code, cannot be called in question by the fact that, as regards the specific question of suspension of implementation, the provisions applicable to customs matters are inspired by those applicable to VAT matters.

27 Nor can it be called in question by the fact that the administrative authority competent to suspend implementation of a contested decision is different according to whether customs matters or direct and indirect taxation matters are concerned. First, it cannot be precluded that the two different authorities must apply the same rules of procedure. Second, it is common ground that the same judicial authority has jurisdiction in both areas and that the questions referred by the national court concern the appeal before that judicial authority.

28 It must therefore be held that, in accordance with the national court's interpretation of national law, the reference to the relevant legislation in Article 70 of the 1972 decree must be taken to include Articles 243 and 244 of the Customs Code as well.

29 The present case must therefore be distinguished from Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, where the Court held that it did not have jurisdiction to give a preliminary ruling on a question on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (JO 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — text of the Convention as amended — p. 77).

30 The national legislation at issue in the main proceedings does not merely take the Customs Code as a model and does not expressly provide that the national authorities may adopt amendments designed to give rise to divergence between the national provisions and the corresponding Community provisions.

31 Furthermore, there is nothing in the file to indicate that the national court is empowered to depart from the Court's interpretation of the provisions of the Customs Code.

32 Where, as in the case pending before the national court, in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law so as to provide for one single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (*Giloy*, cited above, paragraph 28).

33 It follows that the Court has jurisdiction to answer the questions referred to it.

First question

34 By its first question, the national court asks whether the appeal against the decisions of the customs authorities referred to in Article 243 of the Customs Code may be brought directly before the judicial authority or whether it must initially be brought before the customs authority.

35 Article 243(2) of the Customs Code provides that the right of appeal may be exercised initially before the customs authorities and subsequently before an independent body, which may be a judicial authority.

36 There is nothing in the wording of that provision to indicate that the appeal before the customs authority is a mandatory stage prior to lodging an appeal before the independent body.

37 In that regard, it should be pointed out that Article 243 of the Customs Code forms part of Title VIII, on appeals.

38 Unlike a considerable number of the substantive provisions of the Customs Code, the provisions in that title concern only a number of essential aspects relating to the protection of the traders concerned, but do not lay down detailed rules governing the appeals procedure. Article 245 of the Customs Code provides that the provisions for the implementation of the appeals procedure are to be determined by the Member States.

39 It must therefore be concluded that, in adopting only the broad outlines of the appeals procedure, the Community legislature did not preclude that national law might authorise a trader, in appropriate circumstances, to lodge an appeal directly before an independent authority.

40 That interpretation is borne out by the fact that the Community legislation actually adopted differs in that regard from proposal 90/C 128/1 for a Council Regulation establishing a Community customs code submitted to the Council by the Commission on 21 March 1990 (OJ 1990 C 128, p. 1), which contained detailed provisions on appeals and which, in Article 249, expressly provided that in principle an appeal to the judicial authorities was to be subject to a prior appeal to the customs authorities.

41 The reasons which may have led the Community legislature merely to regulate certain general aspects of the right of appeal are expressed, in particular, in

point 2.50 of Opinion 91/C 60/03 on the proposal for a Council Regulation (EEC) establishing the Community Customs Code and the proposal for a Council Regulation (EEC) determining the cases and the special conditions under which the temporary importation arrangements may be used with total relief from import duties adopted by the Economic and Social Committee on 18 December 1990 (OJ 1991 C 60, p. 5). That points states: 'What makes harmonisation of rights of appeal special however is not only the differences between national procedures, which are in some cases considerable, but also the fact that they often apply uniformly to the whole field of national administrative and tax law so that the harmonisation of rights of appeal for the purposes of customs law only will fragment hitherto uniform national appeals procedures.'

42 Nor is there anything in the Community legislation to support the conclusion that it authorises a trader to bypass an appeal before the customs authority and appeal directly to the independent body, where under the applicable national law an appeal to the customs authority is mandatory.

43 The answer to the first question must therefore be that Article 243 of the Customs Code is to be interpreted as meaning that it is for national law to determine whether a trader must initially bring an appeal before the customs authority or whether he may appeal directly to the judicial authority.

Second question

44 By its second question, the national court asks whether Article 244 of the Customs Code confers the power to suspend implementation of a contested decision exclusively on the customs authorities or whether it also confers such power on the judicial authorities.

45 In that regard, it follows from the clear wording of Article 244 of the Customs Code that that provision confers that power exclusively on the customs authorities.

46 However, that provision cannot restrict the right to effective judicial protection. The requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Case 222/86 *Unectef* v *Heylens and Others* [1987] ECR 4097, paragraph 14, and Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 14).

47 In the exercise of their control, it is for the national courts, pursuant to the principle of cooperation laid down in Article 5 of the EC Treaty (now Article 10 EC), to ensure the legal protection which persons derive from the direct effect of provisions of Community law (Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19).

48 With more specific regard to the possibility of suspending implementation of a decision of a customs authority, it should be pointed out that a court seised of a dispute governed by Community law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law (*Factortame*, cited above, paragraph 21).

49 The answer to the second question must therefore be that Article 244 of the Customs Code is to be interpreted as meaning that it confers the power to suspend implementation of a contested decision exclusively on the customs authorities. However, that provision does not limit the power of the judicial authorities seised of a dispute pursuant to Article 243 of that Code to order such suspension in order to comply with their obligation to ensure the full effectiveness of Community law.

Costs

50 The costs incurred by the Italian Government, the United Kingdom Government and 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 (Fifth Chamber),

in answer to the questions referred to it by the Tribunale Civile e Penale di Genova by order of 18 December 1998, hereby rules:

1. Article 243 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code is to be interpreted as meaning that it is for national law to determine whether a trader must initially lodge an appeal before the customs authority or whether he may appeal directly to the judicial authority.

2. Article 244 of Regulation No 2913/92 is to be interpreted as meaning that it confers the power to suspend implementation of a contested decision exclusively on the customs authorities. However, that provision does not limit the power of the judicial authorities seised of a dispute pursuant to

Article 243 of that regulation to order such suspension in order to comply with their obligation to ensure the full effectiveness of Community law.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 11 January 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber