JUDGMENT OF THE COURT (First Chamber)

2 October 2003 *

In Case C-411/01,

REFERENCE to the Court under Article 234 EC by the Tribunal d'instance de Metz (France) for a preliminary ruling in the proceedings pending before that court between

GEFCO SA

and

Receveur principal des douanes,

on the interpretation of Articles 145 to 151 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: French.

THE COURT (First Chamber),

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

Advocate General: A. Tizzano,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— GEFCO SA, by F. Goguel, lawyer,

— the French Government, by G. de Bergues and A. Colomb, acting as Agents,

— the Portuguese Government, by L. Fernandes, J. Serra de Andrade and Â. Seiça Neves, acting as Agents,

— the Commission of the European Communities, by R. Tricot, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of GEFCO SA, represented by F. Goguel, of the French Government, represented by A. Colomb, and of the Commission, represented by B. Stromsky and X. Lewis, acting as Agents, at the hearing on 27 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 26 March 2003,

gives the following

Judgment

1 By order of 8 October 2001, received at the Court on 17 October 2001, the Tribunal d'instance de Metz (District Court, Metz) referred to the Court for a preliminary reference under Article 234 EC a question on the interpretation of Articles 145 to 151 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 That question was raised in proceedings between GEFCO SA ('GEFCO'), an undertaking operating as a customs agent, and the customs authorities concerning a customs debt incurred in a triangular outward processing operation.

Legal framework

3 Article 65 of the Customs Code provides:

'1. The [declarant] shall, at his request, be authorised to amend one or more of the particulars of the declaration after it has been accepted by customs. The amendment shall not have the effect of rendering the declaration applicable to goods other than those it originally covered.

However, no amendment shall be permitted where authorisation is requested after the customs authorities:

...

(c)... have released the goods.'

4 Article 78 of the Customs Code, which appears under the heading 'Post-clearance examination of declarations', states:

'1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.

...

3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.'

5 Article 87 of the Customs Code provides:

'1. The conditions under which the procedure in question is used shall be set out in the authorisation.

2. The holder of the authorisation shall notify the customs authorities of all factors arising after the authorisation was granted which may influence its continuation or content.'

6 The outward processing procedure is governed by Articles 145 to 160 of the Customs Code.

7 Article 145(1) of the Customs Code provides that the outward processing procedure is to allow Community goods to be exported temporarily from the customs territory of the Community in order to undergo processing operations and the products resulting from those operations to be released for free circulation with total or partial relief from import duties.

8 Article 148(1)(b) of the Customs Code states that authorisation for outward processing is to be granted only where it is considered that it will be possible to establish that the compensating products have resulted from processing of the temporary export goods.

9 Under Article 150(2) of the Customs Code, the total or partial relief from import duties provided for in Article 151 thereof is not to be granted where one of the conditions or obligations relating to the outward processing procedure is not fulfilled, unless it is established that the failures have no significant effect on the correct operation of the said procedure.

10 Article 151(1) of the Customs Code provides that the total or partial relief from import duties provided for in Article 145 thereof is to be effected by deducting from the amount of the import duties applicable to the compensating products released for free circulation the amount of the import duties that would be applicable on the same date to the temporary export goods if they were imported into the customs territory of the Community from the country in which they underwent the processing operation or last processing operation.

11 Article 151(2) of the Customs Code states that the amount to be deducted pursuant to paragraph 1 of that article is to be calculated on the basis of the quantity and nature of the goods in question on the date of acceptance of the declaration placing them under the outward processing procedure and on the basis of the other items of charge applicable to them on the date of acceptance of the declaration relating to the release for free circulation of the compensating products.

12 Article 220 of the Customs Code, on the entry in the accounts and communication to the debtor of the amount of duty resulting from a customs debt, provides:

'1. Where the amount of duty resulting from a customs debt... has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts)....

2.... subsequent entry in the accounts shall not occur where:

...

(b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration'.

13 At the material time, the provisions for the implementation of the outward processing procedure provided for in the Customs Code consisted of Articles 748 to 787 of Commission Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation No 2913/92 (OJ 1993 L 253, p. 1, 'the implementing regulation')

14 The combined nomenclature ('the CN') in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EC) No 1734/96 of 9 September 1996 (OJ 1996 L 238, p. 1), is a nomenclature of goods designed to satisfy both the requirements of the common customs tariff and those of the Community's external trade statistics. It provides for headings consisting of eight digits, corresponding to the tariff category of each product.

Main proceedings and question referred to the Court

15 In 1995 Hewlett Packard Italiana SpA obtained outward processing authorisation from the Italian authorities permitting the temporary export of electronic cards from Italy to China or Japan for installation in printers, which were to be reimported as compensating products into Community customs territory, more specifically into France.

16 The tariff heading indicated on the temporary export authorisation for the electronic cards was that declared by Hewlett Packard Italiana Spa, namely CN heading 8473 30 90. The information notice entitled 'Notice INF 2', drawn up at

that undertaking's request, set out as reference tariff heading for those components CN heading 8473, that is to say, a heading containing the first four digits of the heading declared.

17 It is apparent from the file that both the temporary export authorisation and Notice INF 2 were accompanied by a detailed description of the technical design of the electronic cards.

18 The electronic cards were exported from Italy to China and Japan. The printers incorporating the cards were imported into the Community by GEFCO, which acted on behalf of its customer, Hewlett Packard France, itself acting on behalf of Hewlett Packard Europe. When the printers were imported, GEFCO declared the cards under CN tariff heading 8473 30 10 and not CN heading 8473 30 90, which was declared when they were temporarily exported.

19 That discrepancy in the tariff headings was established by the French customs authorities, in a report of 3 December 1998, and an inquiry was opened. The inquiry revealed that Hewlett Packard Europe had given instructions that the re-imported goods should be declared under CN tariff reference 8473 30 10, but that, owing to an error, the goods had continued to be declared on temporary export under CN reference 8473 30 90, until at least November 1996.

20 From 1 January 1996, goods under CN tariff heading 8473 30 90 were subject to customs duty of 1.6% and those under CN tariff heading 8474 30 10 to customs duty of 3.3%.

21 By a report of 21 June 1999, the Italian authorities confirmed that the correct customs classification of the electronic cards was CN tariff heading 8473 30 10 and that the entry on the documentation relating to the temporary export of the cards was incorrect.

22 According to the French customs authorities, GEFCO altered the tariff reference without obtaining the relevant consent of the Italian customs authorities. GEFCO did not request an expert appraisal to show that the tariff heading declared on export was incorrect. Consequently, the authorities served on GEFCO, on 26 September 2000, a notice of infringement demanding payment of a customs debt corresponding to the difference between the customs duties applicable to the electronic cards according to the tariff code declared in France and those resulting from the application of the tariff code declared in Italy.

23 GEFCO claimed that the tariff heading indicated on the declarations and export authorisations was the consequence of material errors, since the Italian declarant had not been advised until November 1996 that the tariff heading applicable since 1 January 1996 was CN heading 8473 30 10 and no longer CN heading 8473 30 90.

24 Those arguments failed to convince the French customs authorities and by decision of 19 October 2000 the principal collector of customs duties served on GEFCO an order to pay the sum of FRF 8 795 672 representing unpaid customs duty and value added tax.

25 On 8 November 2000, GEFCO lodged an objection to that order and brought proceedings before the Tribunal d'instance de Metz. GEFCO claimed that the duty payable should be calculated on the basis of the tariff heading declared to the French customs authorities when the goods were reimported, since that tariff heading was materially correct. Articles 150(2) and 151(2) of the Customs Code make no reference to the nature declared on export and according to their spirit those provisions relate rather to the precise nature of the goods.

26 The national court observes that neither the Customs Code nor Articles 748 to 796 of the implementing regulation state whether 'nature of the goods' refers to the precise tariff reference of the product or to that stated in the export declaration. That information is required for the purpose of determining whether, in the main proceedings, GEFCO could unilaterally alter the tariff reference.

27 In those circumstances, the Tribunal d'instance de Metz decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Upon triangular outward processing, is an operator prohibited, on a proper interpretation of Articles 145 to 151 of the Community Customs Code (Regulation (EEC) No 2913/92), from deducting, on release of compensating products for free circulation, the amount of the import duties which would be applicable to the temporary export goods in accordance with their correct tariff heading where their tariff heading declared on their exportation was different because it was incorrect?'

The question referred to the Court

Observations submitted to the Court

28 GEFCO claims, first of all, that the question clearly relates to a discrepancy between the tariff headings resulting from an administrative error and that its good faith is not impugned. In the main proceedings, copies of the temporary export declarations were attached to the import declarations, so that the discrepancy between the tariff heading declared on export and that declared on import should have been revealed by a careful examination of the import declarations.

29 In GEFCO's submission, the French customs authorities appear to consider that the first subparagraph of Article 151(2) of the Customs Code refers to the nature declared when the goods are placed under the outward processing procedure. However, there is nothing in that subparagraph to justify such an interpretation. GEFCO maintains that it is more likely that that provision requires that the actual nature of the goods be taken into consideration rather than the nature declared when the latter subsequently proves to be incorrect.

30 GEFCO further refers to Article 150(2) of the Customs Code, which provides that total or partial relief from import duties is not to be granted where one of the conditions or obligations relating to the outward processing procedure is not fulfilled, unless it is established that the failures have no significant effect on the correct operation of the said procedure The essential condition of the correct operation of the procedure is that it must be possible to establish that the compensating products have resulted from processing of the temporary export goods. There is no basis for the contention that the material error made in respect of the tariff heading upon the temporary export of the goods at issue in the main proceedings had the slightest impact on the proper functioning of the applicable customs procedure.

31 GEFCO contends that the penalty which would result from the analysis proposed by the French customs authorities would be disproportionate to the gravity of an infringement such as that at issue in the main proceedings. It refers, in that regard, to the case-law of the Court in Case 203/80 *Casati* [1981] ECR 2595, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377 and Case 68/88 *Commission* v *Greece* [1989] ECR 2965.

32 GEFCO concludes that on a proper interpretation the Customs Code does not prevent it from deducting from the import duties on the compensating products the amount of the import duties which would be applicable to the temporary export goods on the basis of their correct tariff heading.

33 The French Government maintains that only the tariff heading indicated on the temporary export authorisation can be used to determine the taxation applicable under the outward processing procedure. It recognises that a change of tariff heading is possible in two situations, but submits that these do not apply in the case before the national court. GEFCO did not notify the customs authorities, pursuant to Article 87(2) of the Customs Code, that the tariff heading of the temporary export goods should be altered. Nor did it amend the particulars of the temporary export declaration in accordance with the first paragraph of Article 65 thereof.

34 The French Government contends that it is the authorisation issued by the customs authorities that determines the conditions under which the outward processing procedure may be used. Consequently, when the goods are re-imported, the economic operator can only deduct the duties corresponding to the tariff heading indicated on that authorisation.

35 The French Government concludes that, in circumstances such as those to which the question referred to the Court relates, Articles 145 to 151 of the Customs Code do not allow an importer who has not informed the customs authorities of any developments subsequent to the grant of outward processing authorisation, who has not amended the particulars of the temporary export declaration after it has been accepted by the customs authorities and who, consequently, has not obtained authorisation indicating the change in tariff heading, to deduct the amount of the import duty which would apply to the temporary export goods on the basis of their correct tariff heading.

36 The Portuguese Government maintains that since the temporary export goods were classified in the declaration under tariff heading 8473 30 90 of the CN and since that classification was confirmed by the customs agent when the goods were exported, GEFCO cannot as a matter of principle unilaterally alter that heading without having sought and obtained authorisation to do so.

37 The Portuguese Government raises the question whether in the circumstances of the main proceedings there was an error on the part of the customs authorities. If so, it will be necessary to consider, in accordance with Article 220(2)(b) of the Customs Code, whether the error could not reasonably have been detected by the person liable for payment and whether the latter acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

38 In the Portuguese Government's submission, it is also important to have an overall view and to take account of the principle of proportionality. The incorrect

customs declarations were duly accepted by the Italian authorities for a certain period and there is no indication in the file that GEFCO did not act in good faith.

39 In conclusion, the Portuguese Government states that the competent customs authorities must allow temporary export goods to be regarded as having been classified under the correct tariff heading provided that certain conditions are satisfied, namely good faith and absence of manifest negligence or deliberate ploys attributable to the economic operator and also compliance with all the provisions of the rules in force as regards the customs declaration. Nor must there be any doubt as to the nature of the goods concerned. It is also necessary to take into consideration the error made by the undertaking and by the competent authorities and to determine according to the relevant criteria whether that error was capable of being detected. It is for the national court to ascertain whether those conditions are satisfied.

40 The Commission observes that use of the outward processing procedure is subject to authorisation on the part of the customs authorities. It is for the national court to ascertain whether, in the main proceedings, the authorisation on which the economic operator relies excludes the temporary export goods from its scope, regard being had to their real tariff heading.

41 According to the Commission, there is a presumption that a declaration which is mistaken as to the nature of the goods concerned constitutes a failure having a significant effect on the correct operation of the outward processing procedure for the purposes of Article 150(2) of the Customs Code. However, that presumption is not irrebuttable. It is for the economic operator to prove that the incorrect declaration as to the nature of the goods did not have such an effect.

42 The Commission concludes that, in the absence of a failure having significant effect on the correct operation of the customs procedure in question, if a customs control establishes beyond doubt the correct tariff heading of the temporary export goods and if their export was authorised by the customs authorities, the economic operator is authorised to deduct the amount of the import duties which would be applicable to the temporary export goods on the basis of their correct tariff heading, where the tariff heading declared on export is different owing to an error.

The Court's answer

43 The national court is asking essentially whether Articles 145 to 151 of the Customs Code are to interpreted as meaning that an economic operator who has declared goods under an incorrect tariff heading when they were temporarily exported from the Community territory under the outward processing procedure may not, when the compensating products are released into free circulation, deduct the amount of the import duties which would apply to the temporary export goods on the basis of their correct tariff heading.

44 In order to answer that question, it is appropriate first of all to consider whether, as the Portuguese Government envisages, Article 220(2)(b) of the Customs Code might be applicable in the main proceedings.

45 Under that provision, subsequent entry in the accounts of the amount of duty legally owed is not to occur where the amount of duty to be recovered or which

remains to be recovered was not determined correctly as a result of an error on the part of the competent authorities themselves which could not reasonably have been detected by the person liable for payment.

46 As the Advocate General correctly observes at points 53 and 54 of his Opinion, the error in designating the tariff heading of the temporary export goods at issue in the main proceedings is not to be attributed to either the French customs authorities or the Italian customs authorities, but is primarily due to the Italian declarant, Hewlett Packard Italiana SpA, which used an incorrect tariff heading in its own temporary export declarations. It is apparent from the file, moreover, that the error was quite easily detected by GEFCO.

47 It must be held, therefore, that the conditions for the application of Article 220(2)(b) of the Customs Code are not satisfied in the main proceedings.

48 Accordingly, the circumstances of the main proceedings must be examined solely from the aspect of the provisions governing the outward processing procedure, in particular Article 150(2) of the Customs Code. Under that paragraph, total or partial relief from import duties is not to be granted where one of the conditions or obligations relating to the outward processing procedure is not fulfilled, unless it is established that the failures have no significant effect on the correct operation of the procedure.

49 In the main proceedings, the tariff heading used in the temporary export declaration and reiterated in the export authorisation was incorrect. It is apparent from the file that those documents were not formally amended. It is not disputed

by any of the parties who have submitted observations that in such circumstances all the conditions and obligations relating to the outward processing procedure were not fulfilled.

50 Those parties are divided as to whether, in the absence of a formal amendment of the relevant customs documents, the economic operator is entitled to adduce proof that the incorrect declaration had no significant effect on the correct operation of the outward processing procedure for the purposes of Article 150(2) of the Customs Code.

51 It must be stated that to prohibit in all circumstances the economic operator from adducing such proof would be to deprive Article 150(2) of the Customs Code of its practical effect. One of the objectives of the outward processing procedure is to prevent customs duties from being charged on goods exported from the European Community for outward processing (see, to that effect, Case C-142/96 *Wacker Werke* [1997] ECR I-4649, paragraph 21). As the Advocate General correctly observes at point 66 of his Opinion, an interpretation which did not permit the proof in question to be adduced would be likely to compromise the attainment of that objective, since operators would be charged a higher rate of duty that would not be justified.

52 Since such proof is admissible, it is for the person responsible for paying the customs debt to adduce it. That person must prove to the competent national authorities that the incorrect temporary export declaration had no significant effect on the correct operation of the customs arrangements in issue. In particular, such proof must make it possible to establish without the slightest ambiguity that the compensating products have resulted from processing of the temporary export goods.

53 As the Commission correctly submits, an incorrect declaration generally has a significant effect on the correct operation of the outward processing procedure. However, that is not necessarily the case where the customs authorities themselves have established the inaccuracy of the content of the relevant customs documents and a correct classification can easily be made by adducing proof of the actual nature of the temporary export goods.

54 It should be borne in mind that in the circumstances of the main proceedings, the Italian customs authorities confirmed that the correct tariff heading of the temporary export goods was that declared by GEFCO. Furthermore, the temporary export authorisation contained a number of points on which the correct nature of the goods could have been established.

55 In the light of the foregoing considerations, the answer to the question referred to the Court must be that:

— Articles 145 to 151 of the Customs Code must be interpreted as meaning that an economic operator who has declared goods under an incorrect tariff heading at the time of their temporary exportation from Community territory under the outward processing procedure is not prohibited, even in the absence of a formal amendment of the temporary export declaration,

from adducing proof that the incorrect declaration had no significant effect on the correct operation of the procedure for the purposes of Article 150(2) of the Customs Code;

— such proof must make it possible to establish, without the slightest ambiguity, that the compensating products have resulted from processing of the temporary export goods;

— it is for the national court to determine, in the light of all the circumstances of the main proceedings, whether or not the economic operator has adduced that proof;

— if so, the amount of the import duty which would be applicable to the temporary export goods on the basis of their correct tariff heading may be deducted when the compensating products are released for free circulation.

Costs

56 The costs incurred by the French and Portuguese 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 proceedings 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 question referred to it by the Tribunal d'instance de Metz by order of 8 October 2001, hereby rules:

1. **Articles 145 to 151 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as meaning that an economic operator who has declared goods under an incorrect tariff heading at the time of their temporary exportation from Community territory under the outward processing procedure is not prohibited, even in the absence of a formal amendment of the temporary export declaration, from adducing proof that the incorrect declaration had no significant effect on the correct operation of the procedure for the purposes of Article 150(2) of the Customs Code.**

2. **Such proof must make it possible to establish, without the slightest ambiguity, that the compensating products have resulted from processing of the temporary export goods.**

3. **It is for the national court to determine, in the light of all the circumstances of the main proceedings, whether or not the economic operator has adduced that proof.**

4. **If so, the amount of the import duty which would be applicable to the temporary export goods on the basis of their correct tariff heading may be deducted when the compensating products are released for free circulation.**

Wathelet Jann Rosas

Delivered in open court in Luxembourg on 2 October 2003.

R. Grass

Registrar

M. Wathelet

President of the First Chamber