

JUDGMENT OF THE COURT (Third Chamber)

6 September 2012 (*)

(Community Customs Code – Regulation (EEC) No 2913/92 – Article 204(1)(a) – Customs warehousing procedure – Customs debt incurred through non-fulfilment of an obligation – Delayed entry in stock records of information concerning the removal of goods from a customs warehouse)

In Case C-28/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Germany), made by decision of 25 November 2010, received at the Court on 18 January 2011, in the proceedings

Eurogate Distribution GmbH

v

Hauptzollamt Hamburg-Stadt,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, G. Arestis (Rapporteur) and D. Šváby, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 1 December 2011,

after considering the observations submitted on behalf of:

- Eurogate Distribution GmbH, by U. Schrömbges and H. Bleier, Rechtsanwälte,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Albenzio, avvocato dello Stato,
- the European Commission, by L. Bouyon and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 204(1)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 13) ('the Customs Code').

2 That reference was made in proceedings between Eurogate Distribution GmbH ('Eurogate') and the Hauptzollamt Hamburg-Stadt (Principal Customs Office, City of Hamburg; the 'Hauptzollamt')

concerning a customs debt on importation imposed on Eurogate on the basis of the delayed entry in stock records of information relating to the removal of goods from a customs warehouse.

Legal context

The Customs Code

3 The customs warehousing procedure is a suspensive procedure and a customs procedure with economic impact within the meaning of Article 84(1)(a) and (b) of the Customs Code. The customs warehousing procedure is governed by the general provisions of Title IV, Chapter 2, Section 3(A), of the Customs Code and the particular provisions of Section 3(C), entitled ‘Customs warehouses’. Article 89 of the Code contains provisions concerning the discharge of suspensive procedures. Articles 98 and 99 of the Code provide definitions relating to customs warehouses. Article 105 of the Code sets out the obligation to keep stock records in the context of the customs warehousing procedure.

4 Article 89(1) of the Customs Code provides:

‘A suspensive arrangement with economic impact shall be discharged when a new customs-approved treatment or use is assigned either to the goods placed under that arrangement or to compensating or processed products placed under it.’

5 Articles 98 and 99 of the Customs Code provide as follows:

‘Article 98

1. The customs warehousing procedure shall allow the storage in a customs warehouse of:

(a) non-Community goods, without such goods being subject to import duties or commercial policy measures;

...

Article 99

A customs warehouse may be either a public warehouse or a private warehouse.

“Public warehouse” means a customs warehouse available for use by any person for the warehousing of goods;

“private warehouse” means a customs warehouse reserved for the warehousing of goods by the warehousekeeper.

The warehousekeeper is the person authorised to operate the customs warehouse.

The depositer shall be the person bound by the declaration placing the goods under the customs warehousing procedure or to whom the rights and obligations of such a person have been transferred.’

6 The first paragraph of Article 105 of the Customs Code provides:

‘The person designated by the customs authorities shall keep stock records of all the goods placed under the customs warehousing procedure in a form approved by those authorities. ...’

7 Title VII of the Customs Code, entitled ‘Customs debt’, contains, in Chapter 2, the provisions relating to incurrance of a customs debt. That Chapter contains, inter alia, Articles 201 to 205 which set out the events which give rise to the incurrance of a customs debt on importation.

8 Article 204 of the Customs Code provides:

‘1. A customs debt on importation shall be incurred through:

- (a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed,

...

in cases other than those referred to [concerning the removal from customs supervision of goods liable to import duties] unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure.'

The Implementing Regulation

9 In accordance with Articles 247 and 247a of the Customs Code, the provisions required for the implementation of the Code are to be adopted by the European Commission, assisted by the Customs Code committee. For that purpose, the Commission adopted Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 402/2006 of 8 March 2006 (OJ 2006 L 70, p. 35) (the 'Implementing Regulation').

10 Articles 529 and 530 of the Implementing Regulation contain provisions relating to the keeping of stock records in the customs warehouse.

11 Article 529(1) of that regulation provides:

'The stock records shall at all times show the current stock of goods which are still under the customs warehousing arrangements. At the times laid down by the customs authorities, the warehousekeeper shall lodge a list of the said stock at the supervising office.'

12 Article 530(3) of the Implementing Regulation provides:

'Entry in the stock records relating to discharge of the arrangements shall take place at the latest when the goods leave the customs warehouse or the holder's storage facilities.'

13 Article 859 of the Implementing Regulation provides:

'The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204(1) of the [Customs] Code, provided:

- they do not constitute an attempt to remove the goods unlawfully from customs supervision,
- they do not imply obvious negligence on the part of the person concerned, and
- all the formalities necessary to regularise the situation of the goods are subsequently carried out:
 1. exceeding the time limit allowed for assignment of the goods to one of the customs-approved treatments or uses provided for under the temporary storage or customs procedure in question, where the time limit would have been extended had an extension been applied for in time;

...

3. in the case of goods placed in temporary storage or under the customs warehousing procedure, handling not authorised in advance by the customs authorities, provided such handling would have been authorised if applied for;

...

5. in the case of goods in temporary storage or placed under a customs procedure, unauthorised movement of the goods, provided the goods can be presented to the customs authorities at their request;

6. in the case of goods in temporary storage or entered for a customs procedure, removal of the goods from the customs territory of the Community or their introduction into a free zone of control type I within the meaning of Article 799 or into a free warehouse without completion of the necessary formalities;

...

10. exceeding the time-limit allowed for temporary removal from a customs warehouse, provided the limit would have been extended had an extension been applied for in time.'

- 14 Under Article 860 of the Implementing Regulation, '[t]he customs authorities shall consider a customs debt to have been incurred under Article 204(1) of the [Customs] Code unless the person who would be the debtor establishes that the conditions set out in Article 859 are fulfilled'.

The facts in the main proceedings and the question referred for a preliminary ruling

- 15 Eurogate has been authorised to operate a private customs warehouse since 2006. The stock records for that customs warehouse are kept, in accordance with the authorisation, with the aid of a computer program.

- 16 As warehousekeeper, Eurogate took into its private customs warehouse non-Community goods from its customers with a view to forwarding them outside the territory of the European Union. At the time of the removal of the goods from the customs warehouse, customs declarations for their re-exportation were drawn up.

- 17 During a customs inspection on 31 January 2007, it was established that removals of the goods at issue were not entered in the stock records until 11 to 126 days after the removals took place, and were thus recorded late for the purposes of the first paragraph of Article 105 of the Customs Code, read in conjunction with Articles 529(1) and 530(3) of the Implementing Regulation.

- 18 By notice of 1 July 2008, the Hauptzollamt imposed import duties on the goods which had been recorded late. Eurogate challenged that notice.

- 19 Following remission of a portion of the duties, granted by notice of 11 August 2009, the Hauptzollamt, by a decision of 8 December 2009, dismissed the remainder of Eurogate's challenge as unfounded, on the ground that the delayed entries in the stock records were to be regarded as constituting a failure on the part of Eurogate to meet its obligations under the customs warehousing procedure and that, consequently, that failure had given rise to a customs debt on the basis of Article 204(1) of the Customs Code. In that respect, the referring court points out that the obvious negligence on the part of Eurogate precludes the conclusion that that infringement had no effect on the correct operation of the customs procedure with the result that, in the present case, the requirements of Article 859 of the Implementing Regulation are not met.

- 20 Eurogate subsequently brought an action before the Finanzgericht Hamburg (Finance Court, Hamburg) for annulment of the notice of assessment of 1 July 2008, as amended by the notice of 11 August 2009 and confirmed by the decision of 8 December 2009, claiming, inter alia, that the delayed

entries of the removals from the customs warehouse in the stock records do not constitute a failure to fulfil its obligations within the meaning of Article 204(1)(a) of the Customs Code inasmuch as, in accordance with Article 105 of the Customs Code and Article 530(3) of the Implementing Regulation, the obligation to record removals in the stock records has to be fulfilled only after the discharge of the customs warehousing procedure.

- 21 The Hauptzollamt responded to that argument that the keeping of the stock records is not an obligation that can be fulfilled after the discharge of the procedure. On the contrary, it argued, entries in the stock records must be made during the customs warehousing procedure or at the same time as the discharge of the procedure. According to the Hauptzollamt, the customs warehousing procedure was not terminated, in the present case, until after the removal of the non-Community goods upon their release for the transit procedure as a new customs-approved treatment or use.
- 22 The referring court has doubts concerning the interpretation according to which the non-fulfilment of the obligation to immediately enter the removal of goods in the stock records gives rise to a customs debt.
- 23 In that regard, the referring court points out that, if the analysis proposed by a section of German academic opinion on the basis of the wording of Article 204(1)(a) of the Customs Code is accepted, the view could be taken that, in the present case, the non-fulfilment of the obligation to immediately enter the removal of goods in the stock records took place ‘during’ the use of the customs procedure in question, and did not ‘arise’ from that use. Hence, no customs debt would have been incurred. Moreover, since the goods had already been assigned a new customs treatment or use when they left the customs warehouse and since the status of the goods is therefore no longer affected by the non-fulfilment of that obligation, the referring court is unsure whether a customs debt can still arise at all and whether it might not be possible to penalise certain breaches of the procedure in some other way.
- 24 Considering that the resolution of the dispute before it requires the interpretation of European Union law, the Finanzgericht Hamburg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘On a proper interpretation of Article 204(1)(a) of [the Customs Code], does infringement of the obligation, in the case of non-Community goods which were in the customs warehousing procedure and have been assigned a new customs-approved treatment or use upon discharge of that procedure, to record the removal of the goods from the customs warehouse in the appropriate computer program forthwith upon discharge of the customs warehousing procedure – rather than considerably later – cause a customs debt to arise in respect of the goods?’

The question referred for a preliminary ruling

- 25 By the question which it has referred for a preliminary ruling, the referring court asks, in essence, whether Article 204(1)(a) of the Customs Code is to be interpreted as meaning that non-fulfilment of the obligation to immediately enter the removal of non-Community goods from the customs warehouse in the appropriate stock records, where those goods are re-exported upon the discharge of the customs warehousing procedure, gives rise to a customs debt in respect of the goods concerned.
- 26 Under Article 204(1)(a) of the Customs Code, non-fulfilment of one of the obligations arising in respect of goods liable to import duties from the use of the customs procedure under which they are placed gives rise to a customs debt on importation.
- 27 It must be recalled that the customs warehousing procedure allows the storage in a warehouse of non-Community goods with a suspension of import duties on those goods. Those goods, although they are physically on the customs territory of the European Union, are nevertheless regarded as non-Community goods. Entitlement to benefit from such a procedure is linked to compliance with certain obligations which allow the customs authorities to verify the state of the stock at any time, in accordance with Article 529(1) of the Implementing Regulation. Among those obligations, the obligation to keep stock records of goods placed under the customs warehousing procedure, pursuant to Article 105 of the Customs Code, is considered to be an essential obligation connected with that

system (Case C-402/10 *Groupe Limagrain Holding* [2011] ECR I-10827, paragraphs 33 and 37). Non-fulfilment of the obligation to enter the removal of the goods in the appropriate stock records as soon as possible compromises customs supervision.

28 Moreover, it must be observed that the presence, on the customs territory of the European Union, of non-Community goods carries the risk that those goods will end up forming part of the economic networks of the Member States without having been cleared through customs, a risk which Article 204 of the Customs Code contributes to preventing, as noted by the Commission (see Case C-234/09 *DSV Road* [2010] ECR I-7333, paragraph 31).

29 In the present case, the authorisation granted to Eurogate for the management of a private customs warehouse was subject to the obligation to keep stock records of all the goods placed under the customs warehousing procedure. In the main proceedings, it is established that Eurogate had belatedly entered in those stock records the removal of goods which, moreover, had been re-exported regularly.

30 Eurogate submits that the failure at issue in the main proceedings cannot give rise to a customs debt with regard to Article 204 of the Customs Code since the obligation which it failed to fulfil falls to apply after the discharge of the customs procedure in question and since it does not constitute a substantive obligation connected with the customs warehousing procedure, so that its non-fulfilment is merely a simple customs irregularity. In response to that submission, the Commission contends that the customs warehousing procedure was not yet discharged at the time when Eurogate was required to enter the removal of goods from the customs warehouse in the appropriate stock records.

31 In that connection, the Court has held that no provision of the Customs Code or its Implementing Regulation supports the notion that it is necessary, as regards the effect of non-fulfilment of an obligation on the incurrance of a customs debt pursuant to Article 204 of the Customs Code, to distinguish between an obligation which must be carried out before the discharge of the relevant customs procedure and an obligation which must be carried out after such discharge, or between a 'principal' and 'secondary' obligation (see C-262/10 *Döhler Neuenkirchen* [2012] ECR, paragraph 38).

32 As the Advocate General observes in point 47 of his Opinion, the obligation to pay customs duties in such a case is not an administrative, fiscal or criminal sanction, but simply the consequence of a finding that the conditions required for the purpose of obtaining the advantage deriving from application of the customs warehousing procedure have not been satisfied, which renders the suspension inapplicable and, as a consequence, justifies the imposition of customs duties. The procedure implies the grant of a conditional benefit which cannot be granted if the related conditions are not respected.

33 Furthermore, delayed entry in the stock records is not included in the exhaustive list, contained in Article 859 of the Implementing Regulation, of failures considered to have no significant effect on the correct operation of the customs procedure in question.

34 In that respect, it must be pointed out that Article 859 of the Implementing Regulation contains a validly constituted and exhaustive set of rules on failures, within the meaning of Article 204(1)(a) of the Customs Code, which 'have no significant effect on the correct operation of the temporary storage or customs procedure in question' (C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 43).

35 In the light of the foregoing, the answer to the question referred is that Article 204(1)(a) of the Customs Code must be interpreted as meaning that, in the case of non-Community goods, non-fulfilment of the obligation to enter the removal of the goods from the customs warehouse in the appropriate stock records, at the latest when the goods leave the customs warehouse, gives rise to a customs debt in respect of those goods, even if they have been re-exported.

Costs

36 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:

Article 204(1)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005, must be interpreted as meaning that, in the case of non-Community goods, non-fulfilment of the obligation to enter the removal of the goods from the customs warehouse in the appropriate stock records, at the latest when the goods leave the customs warehouse, gives rise to a customs debt in respect of those goods, even if they have been re-exported.

[Signatures]

* Language of the case: German.