Case C-599/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date of receipt:

13 November 2020

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the request for a preliminary ruling:

3 November 2020

Applicant:

UAB ‘Baltic Master’

Other party:

Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos

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Subject matter of the main proceedings

Determination of the customs value of imported goods. Recognition of the buyer and the seller of the goods as related persons.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of provisions of Council Regulation No 2913/92 and of Commission Regulation No 2454/93; third paragraph of Article 267 TFEU.

Questions referred

1. Must Article 29(1)(d) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and Article 143(1)(b), (e) or (f) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code be interpreted as meaning that the buyer and the seller are deemed to be related persons in cases where, as in the present case, in the absence of documents (official data) proving business partnership or control, the circumstances surrounding the conclusion of transactions are, however, on the basis of objective evidence, characteristic, not of the performance of economic activities under normal conditions, but rather of cases in which (1) there are particularly close business relations based on a high level of mutual trust between the parties to the transaction, or (2) one party to the transaction controls the other or both parties to the transaction are controlled by a third party?

2. Must Article 31(1) of Regulation (EEC) No 2913/92 be interpreted as prohibiting determination of the customs value on the basis of information contained in a national database relating to one customs value of goods which have the same origin and which, although not similar, within the meaning of Article 142(1)(d) of Regulation (EEC) No 2454/93, are ascribed to the same TARIC heading?

Provisions of EU law cited

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, 19.10.1992, p. 1) ('the Community Customs Code'): Article 29(1)(d), Article 30(2)(b) and Article 31.

Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, 11.10.1993, p. 1) ('the Implementing Regulation'): Article 142(1)(d), Article 143(1)(b), (e), and (f), Article 151(3) and Annex 23.

Commission Regulation (EC) No 1031/2008 of 19 September 2008 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2008 L 291, 31.10.2008, p. 1).

Commission Regulation (EC) No 948/2009 of 30 September 2009 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2009 L 287, 31.10.2009, p. 1).

Provisions of national law cited

Rules for the application of Regulation No 2913/92 and Regulation No 2454/93 in the Republic of Lithuania, approved by Resolution No 1332 of the Government of the Republic of Lithuania of 27 October 2004 (hereinafter also 'the Rules approved by Resolution No 1332'):

Point 12

'In applying the methods for determining the customs value by reference to the transaction value of identical or similar goods and Article 31 of the Community Customs Code, the customs authorities shall use the data on the customs value of goods collected in the database for the valuation of goods for customs purposes operated by the Customs Department. The procedure for the selection of data from that database, use of those data and formalisation of the decision to determine the customs value of the goods in accordance with the data collected in the specified database shall be established by the General Director of the Customs Department.'

The Rules governing control of the customs valuation of imported goods, approved by Order No 1B-431 of the Director of the Customs Department attached to the Ministry of Finance of the Republic of Lithuania of 28 April 2004 (hereinafter also 'the Rules of the Customs Department'):

Point 7

'Customs officers shall use the database for the customs valuation of goods for customs purposes, which is to be compiled in accordance with the procedure established by the Customs Department, for the following purposes: 7.1. to compare the customs value of the goods being imported and that of previously imported goods and to verify the reality of the customs value of the goods; 7.2. to choose information about the values and prices of the goods for the application of other methods of customs valuation or for the calculation of any additional guarantee or security.'

Point 24

'If the decision referred to in Point 20.4 of the Rules [of the Customs Department] is adopted (to apply the method for determining the customs value by reference to the transaction value of identical or similar goods), it is mandatory to follow Article 150 of the provisions implementing the Community Customs Code. If it is impossible to give effect to the requirements of Article 150 of the provisions implementing the Community Customs Code during customs clearance, the customs value of the goods shall be determined in accordance with Article 31 of the Community Customs Code (Method 6). When determining the customs value of the goods using Method 6, the applicable price of the goods shall be close to the price of identical or similar goods; however, more flexible application of the requirements established for these methods is permissible (for example, the "90 days" requirement could be applied more flexibly, the goods may also be

manufactured in a country other than that of the goods for which the customs value is being determined, the price of the export country may be applied, and so forth)'.

Brief description of the facts and procedure in the main proceedings

1 Between 2009 and 2012 the applicant imported into Lithuania various quantities of goods of Malaysian origin bought from 'Gus Group LLC' (hereinafter also referred to as 'the seller'), which the applicant described in the declarations as 'parts of air-conditioning machines' and which it declared under a single goods (TARIC) code, indicating the total weight of those parts in kilograms (hereinafter also referred to as 'the disputed goods'). In those declarations, the applicant indicated the transaction value, that is to say, the price indicated in the invoices issued to the applicant, as being the customs value of the disputed goods.

2 After carrying out repeated checks on the applicant's activities concerning the importation of those goods, the Vilniaus teritorinė muitinė (Vilnius Regional Customs Authority) ('the Customs Authority') refused to accept the transaction value indicated in the import declarations. The Customs Authority determined the customs value of the goods in accordance with Article 31 of the Community Customs Code, referring for this purpose to the data available in the customs information system for determining the value of goods for customs purposes (hereinafter also referred to as the 'PREMI database').

3 In deciding to determine the matter in this way, the Customs Authority took the view, inter alia, that the applicant and the seller had to be treated as being related persons for the purposes of the application of Article 29(1)(d) of the Community Customs Code, and that the customs value of the disputed goods could not be determined by any of the methods indicated in Articles 29 and 30 of that Code.

4 The applicant appealed against the report of the Customs Authority to the Muitinės departamentas prie Lietuvos Respublikos Vyriausybės (Customs Department attached to the Ministry of Finance of the Republic of Lithuania) ('the Department'). Having examined the applicant's complaint, the Department, by its decision, upheld the report of the Customs Authority. The applicant appealed against that decision to the Mokestinių ginčų komisja prie Lietuvos Respublikos Vyriausybės (Tax Disputes Commission attached to the Government of the Republic of Lithuania). That body upheld the contested decision of the Department.

5 The applicant brought an appeal against the decision of the Tax Disputes Commission before the Vilniaus apygardos administracinis teismas (Vilnius Regional Administrative Court), and also asked that a request be submitted to the Court of Justice of the European Union for a preliminary ruling on the interpretation of certain provisions of Articles 29, 30 and 31 of the Community Customs Code and of Article 143 of the Implementing Regulation.

6 The Vilniaus apygardos administracinis teismas (Vilnius Regional Administrative Court) rejected the applicant's complaint. Following an examination of the applicant's appeal, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) upheld the judgment delivered at first instance.

7 Following a ruling by the European Court of Human Rights that the courts of the Republic of Lithuania had failed to provide adequate reasons for their refusal to refer a question to the Court of Justice of the European Union for a preliminary ruling and had, consequently, breached Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Judgment of 16 April 2019, *Baltic Master v Lithuania* (application No 55092/16), paragraphs 40 to 43), the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) re-opened the procedure in the administrative proceedings.

Succinct reasons for the request for a preliminary ruling

The first question referred for a preliminary ruling

8 In order to establish whether it was reasonable not to rely on the transaction value when determining the customs value of the disputed goods in the present case, the question first arises as to whether the applicant and the seller of the disputed goods can be deemed to be related persons within the meaning of Article 29(1)(d) of the Community Customs Code.

9 It follows from Article 29(1)(d) and 29(2)(a) of the Community Customs Code that, where the buyer and the seller are related, the transaction value is to be accepted provided that the relationship between the buyer and the seller did not influence the price.

10 As regards the recognition of persons as being 'related', Article 143(1) of the Implementing Regulation, which clarified the wording of Article 29(1)(d) of the Community Customs Code, provides an exhaustive list of cases in which persons are deemed to be related.

11 There is no documentation in the present case which would directly prove the existence of any relations between the seller and the applicant referred to in Article 143(1) of the Implementing Regulation. There are no official data that would allow those entities to be deemed *legally recognised* partners in business within the meaning of Article 143(1)(b) of the Implementing Regulation or that would confirm the existence of any of the elements of direct or indirect ownership (control) referred to in Article 143(1)(e) and (f) of that regulation.

12 On the other hand, it has been found in the present case that (1) the seller and the applicant are linked by long-term commercial transactions; (2) the goods were supplied without the conclusion of any contracts of sale which would provide for the delivery, payment or return of the goods and other conditions specific to such transactions; (3) the goods were delivered without any advance payment and

despite the fact that the applicant owed significant amounts to the seller in respect of previous supplies; (4) no provision was made for enforcement or risk-mitigation measures (advance payments, sureties, guarantees, default interest, and so forth) that are normal in the ordinary course of business, notwithstanding the particularly high value of the disputed transactions; (5) there is no evidence to suggest that the seller in general exercised any control over payment and other obligations; (6) cases were identified in which persons working for the applicant's company acted on behalf of the seller under an authorisation and used its corporate stamp.

13 In the view of the present Chamber, all of the factual circumstances provide reasonable grounds for believing that the seller and the applicant in the present case are linked by particularly close connections, as a result of which the transactions of those persons were concluded and executed under conditions that are not characteristic in the ordinary course of business and there are no other objective circumstances capable of justifying the economic logic of such transactions.

14 It should be noted in this regard that patterns of conduct of economic entities similar to those in the present case are generally typical in cases where one party to the transaction controls the other or both are controlled by a third party. Therefore, although there is no official evidence as to the *de jure* existence of such control, the present Chamber is of the opinion that the circumstances of the present case may possibly justify the seller and the applicant being regarded as *de facto* related parties within the meaning of Article 29(1)(d) of the Community Customs Code and Article 143(1)(e) and/or (f) of the Implementing Regulation.

15 In the main proceedings, the Customs Authority also found that there were grounds for recognising the applicant and the seller as related persons in accordance with Article 143(1)(b) of the Implementing Regulation, that is to say, as legally recognised partners in business.

16 The Court of Justice, in its case-law, has not interpreted the concept of legally recognised partners in business, and the content of this provision raises certain questions for the present Chamber.

17 According to the commonly understood concept of partnership in business, it can be assumed that such a legal form of business brings together several mutually independent entities, which in turn are not controlled by a third party. This form of legal relationship is characterised by, inter alia, the unified orientation of the partnered entities to economic benefit (profit), and with sharing investment and operational management functions in agreed proportions.

18 In the present case, the circumstances of the transactions concluded between the seller and the applicant, as set out above, taking into account, in particular, the long-standing mutual business practices of those economic entities, could be regarded as proving particularly close relations based on a high level of trust that

is not characteristic in the ordinary course of business. These circumstances suggest that the business relationship between the seller and the applicant may *de facto* be equivalent to a business partnership within the meaning of Article 143(1)(b) of the Implementing Regulation. However, it is not clear whether such an assessment is justified, in particular as the wording of that provision, which must be interpreted strictly, states clearly that the persons must be '… legally recognized …'.

The second question referred for a preliminary ruling

19 In the present case, the Customs Authority determined the customs value of the goods imported by the applicant by using the transaction data for goods of a separate importer under the same designation (parts of air-conditioning machines), classified under the same TARIC code 8415 90 00 90 with the same origin, Malaysia (and the same manufacturer), with a transaction value of LTL 56.67/kg. This was the only case of exports from Malaysia under the same TARIC code 8415 90 00 90 recorded in the PREMI database in 2010. The Customs Authority applied the transaction value of that case to the values of the goods declared by the applicant over the period from 2009 to 2011.

20 At this stage of the proceedings, the present Chamber considers that the applicant has failed to prove that the value of the disputed goods almost does not differ from one of the values indicated in Article 29(2)(b) of the Community Customs Code. In order to determine the value of the goods imported by the applicant, the Customs Authority established that it was not possible to use the transaction value of identical and similar goods for customs valuation according to the country of origin, that is to say, the PREMI database does not contain information on transactions that meet the requirements for identical and similar goods as they are understood in accordance with the relevant provisions of the Community Customs Code and the Implementing Regulation. It was also impossible to determine the value using the deductive value method because the applicant had failed to provide the documents and information required to apply that method. It was also not possible to calculate the value of the goods using the computed value method, since, in accordance with Article 153(1) of the Implementing Regulation, the Customs Authority may not require a non-Community person to provide the data necessary to determine that value. In other words, the value of the goods imported by the applicant could not be determined by consistently applying Articles 29 and 30 of the Community Customs Code. In such a case, the customs value of the imported goods has to be determined in accordance with the provisions of the third indent of Article 31(1) of the Community Customs Code.

21 Therefore, in accordance with the abovementioned rules and Point 12 of the Rules approved by Resolution No 1332 and Points 7 and 24 of the Rules of the Customs Department, the Customs Authority established that the value determined in the single case of exportation from Malaysia in 2010 of goods recorded under the same TARIC code was to be regarded as the customs value of the goods which the applicant imported and declared in the period from 2009 to 2011. In the present

case, there is no evidence to suggest that the Customs Authority made any effort to obtain any additional information relevant to the matter in question from the competent authorities of other Member States.

22 In the opinion of the present Chamber, the determination of the customs value of the goods on the basis of the single case of which the Customs Authority was aware does not in itself constitute a ground for questioning the accuracy and validity of the results obtained. Such a conclusion is also supported by Articles 150(3) and 151(3) of the Implementing Regulation, the content of which shows that the value of a single transaction for the sale of identical (Article 150) or similar (Article 151) goods is sufficient to determine the customs value of imported goods.

23 On the other hand, the present Chamber considers that the importance of a *proper* classification of goods should be emphasised in this regard; therefore, particular emphasis must be placed on the concepts of identical and similar goods as defined in Article 142(1)(c) and (d) of the Implementing Regulation.

24 In the circumstances of the present case, only the concept of similar goods is relevant. Article 142(1)(d) of the Implementing Regulation defines similar goods as goods produced in the same country which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the trade marks covering the goods and services are some of the factors that are to be taken into account in determining whether goods are similar.

25 The collected data allow the reasonable conclusion to be drawn that the disputed goods and the goods with which the Customs Authority compared those disputed goods in order to determine their customs value, even though they were declared by different importers under the same designation (parts of air-conditioning machines), were classified under the same TARIC code 8415 90 00 90, and the same Malaysian origin (the same manufacturer) was indicated, were, however, not similar in the light of the elements of that concept set out in Article 142(1)(d) of the Implementing Regulation.

26 It should be noted that, in accordance with the provisions of Regulations No 1031/2008 and No 948/2009, the Explanatory Notes to the Nomenclature of the Harmonised Commodity Description and Coding System (HSENs, 2007), General Rules 1 and 6 for the Interpretation of the Combined Nomenclature, the titles of chapters and sections, headings and subheadings, parts of air-conditioning machines come under subheading 8415 90 of the CN. However, this subheading may cover very diverse parts of air-conditioning systems having differing purposes, which obviously may have different values.

27 In other words, the circumstances established in the case suggest that the TARIC code, which is intended to combine similar goods for customs-classification purposes, was too general (abstract) in the present instance.