Case C-509/19

Request for a preliminary ruling

Date lodged:

4 July 2019

Referring court:

Finanzgericht München (Germany)

Date of the decision to refer:

6 June 2019

Applicant:

BMW Bayerische Motorenwerke AG

Defendant:

Hauptzollamt München (Germany)

[...]

Finanzgericht München (Finance Court, Munich)

Order

In the matter of

BMW Bayerische Motorenwerke AG

Applicant

[...]

against

Hauptzollamt München

Defendant

[...]

concerning

Customs (leap-frog action, ‘Sprungklage’)

the 14th Chamber of the Finanzgericht München (Finance Court, Munich) [...]

made the following order on the basis of the hearing of 6 June 2019: **[Or. 2]**

A. The following question is referred to the Court of Justice of the European Union (‘the Court’) for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union:

Should the development costs for software that has been produced in the European Union, made available to the seller by the buyer free of charge and installed on the imported control unit be added to the transaction value for the imported product pursuant to Article 71(1)(b) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1) if they are not included in the price actually paid or payable for the imported product?

B. The proceedings are stayed pending a preliminary ruling from the Court on the question referred.

[...] **[Or. 3]**

1. Facts

The applicant imported control units of various manufacturers from third countries and had the goods released for free circulation. In the context of a customs inspection, the Hauptzollamt (Principal Customs Office, ‘the HZA’) established that the applicant had made standard software components available to third-country suppliers free of charge, which were installed on the imported control units by those suppliers. The software is made available on a portal of the applicant and obtained by the third-country manufacturers by means of download. It was developed by commissioned undertakings in the EU or by the applicant itself and is owned by the latter; the applicant did not have to pay licence fees for the software.

The software, which is intended to ensure smooth communication of systems and applications in a motor vehicle, is required to execute various technical processes to be carried out by the control unit during vehicle use. In accordance with the agreements made with the applicant, the suppliers must perform a functionality test prior to the delivery of the control units. The test protocol to be produced accordingly is supposed to document the fact that the interaction between the control unit and the software functions smoothly. Without this functionality test by the supplier, it would not be possible to ascertain whether any errors that may have arisen were caused upon delivery, during transport or in the course of

implementation of the software. The entire procedure is the subject of contracts with the third-country manufacturers and not only guarantees the functionality of the imported unit, but is also part of the quality assurance process and serves to secure warranty claims.

The development costs of the software were not declared in the customs value in the customs declarations.

After the customs inspection, the HZA took the view that the costs of developing the software should be added to the customs value pursuant to Article 71(1)(b)(i) of the Union Customs Code and, by notice of assessment for import duties of 25 September 2018, established duty of EUR 2 748.08 for the goods placed in free circulation in January 2018. The applicant brought a leap-frog action against this, to which the HZA consented on 23 October 2018 […].

The applicant states that the present problem could be solved easily if the outward processing customs procedure were available for software. In this respect, there was a **[Or. 4]** legislative lacuna in customs law in respect of assists that did not have the status of a product.

The applicable provisions of the Union Customs Code originated from a time when installed software did not exist or existed only to a very limited extent. It therefore primarily shared the view ultimately taken by the Commission in the ‘Compaq’ request for a preliminary ruling [see [...] [judgment of 16 November 2006, *Compaq Computer International Corporation*, C-306/04, EU:C:2006:716], paragraph 24) that Article 71(1)(b) of the Union Customs Code was not applicable and the adjustment provided for therein should not be made.

It was also recognised that the legal view taken by the Commission was not reflected in the abovementioned judgment of the Court. Nevertheless, in that judgment the latter did not make a decision regarding the question of under which point of Article 71(1)(b) of the Union Customs Code the development costs of software that has been provided could supplement the customs value. If the software were to be covered by Article 71(1)(b)(iv) of the Union Customs Code, supplementation would not come into consideration, because the software had not been developed elsewhere than in the Union.

The applicant requests that the HZA’s notice of assessment for import duties of 25 September 2018 be annulled.

The HZA requests that the action be dismissed.

It is true that intellectual assists were covered by Article 71(1)(b)(iv) of the Union Customs Code. However, such assists must be distinguished from intangible components installed in the imported goods in order for them to work, for example, the wash programme in a washing machine or the software in an on-board computer in a car. Unlike, for example, a patent, a model or a design, an intangible component was not directly necessary for the production of the product.

Although the software was produced in the EU, it did not come within Article 71(1)(b)(iv) of the Union Customs Code because it was not necessary for the production of the imported control units. **[Or. 5]**

An intangible assist is a constituent part of the end product, since it is integrated into it, enhances its capabilities or even adds a new functionality and thereby contributes not insignificantly to the value of the imported product. The product to be supplied on which the contracting parties agreed was therefore also important. A computer together with an operating system provided by the buyer would be incomplete without the latter. The situation in the present case was different because the software was not necessary for the production of the control units, as the addition or removal of the software would not entail a change to the [hardware]. All that remained, therefore, was he supplementation pursuant to Article 71(1)(b)(i) of the Union Customs Code.

[...]

2. Relevance of the questions referred

The present case concerns the question of whether the price paid by the applicant for the goods imported from a third country (control units with implemented software) is to be taken as the basis for the transaction value or whether the development costs of software produced in the EU, implemented in the third country and made available to the buyer of the control units free of charge should supplement the purchase price in accordance with Article 71(1)(b) of the Union Customs Code.

3. Applicable EU law

Article 70(1) of the Union Customs Code reads:

‘The primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary.[’]

Article 71(1) of the Union Customs Code states:

‘In determining the customs value under Article 70, the price actually paid or payable for the imported goods shall be supplemented by:

(a) …. **[Or. 6]**

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:

(i) materials, components, parts and similar items incorporated into the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods; and

(iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Union and necessary for the production of the imported goods;

(c) to (e) ….[’]

Article 71(3) of the Union Customs [...] [Code] is worded as follows:

[‘]No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.’

4. Question referred

The referring court is inclined to share the view taken by the Netherlands and German Governments and by the United Kingdom Government (see [...] [judgment of 16 November 2006, *Compaq Computer International Corporation*, C-306/04, EU:C:2006:716], paragraph 34), according to which the software in question falls under Article 71(1)(b)(iv) of the Union Customs Code, as ‘engineering’ or ‘development’, whereby supplementation of the costs cannot take place if it was undertaken in the EU.

According to the settled case-law of the Court, the objective of EU law on customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values. The customs value must thus reflect the real economic value of imported goods and therefore take into account all of the elements of such goods that have economic value (see, in that sense, [...] [judgment of 9 March 2017, *GE Healthcare*, C-173/15, EU:C:2017:195]). **[Or. 7]**

Pursuant to Article 70 of the Union Customs Code, the customs value of imported goods is fundamentally determined by their transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, subject to the adjustments to be made pursuant to Article 71 of the Union Customs Code (which corresponds to Article 32 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006).

In the present case, the applicant agreed a purchase price with the third-country sellers of the product in question, which it took as the basis for the customs value

declaration. It made the software available to the buyer and therefore to the manufacturer of the subsequently imported control units free of charge; it is undisputed that the value of the software is therefore not included in the purchase price of the completed control units.

The acquisition costs are not correctly reflected by the purchase price actually paid within the meaning of Article 70 of the Union Customs Code, inter alia, if the buyer has made goods or services available to the seller free of charge or at reduced cost in connection with the production and sale of the goods, and it can therefore be assumed that the production costs of the product — and therefore the purchase price — are lower in the amount of the value of those goods or those services [...].

Article 71 of the Union Customs Code governs which additions must be made to the price actually paid or payable for the imported goods in order to determine their customs value. The provision contains an exhaustive rule; pursuant to Article 71(3) of the Union Customs Code, no additions must be made to the purchase price actually paid or payable except as provided in that provision. If, therefore, none of the additions criteria has been satisfied in respect of certain acquisition costs incurred in addition to the purchase price actually paid or payable, then the transaction value determined pursuant to Article 70 of the Union Customs Code remains applicable.

Clarification is therefore required as to whether the costs of the software produced in the EU in this case correspond to a category of assists that are listed in subparagraphs (i) to (iv) of Article 71 of the Union Customs Code, since it is undisputed that no royalties or licence fees, which could constitute additions pursuant to Article 71(1)(c) of the Union Customs Code, were incurred for the software. **[Or. 8]**

Accordingly, additions to the transaction value pursuant to either Article 71(1)(b)(i) or Article 71(1)(b)(iv) of the Union Customs Code come into consideration in the present case. Unlike in the request from the Netherlands ruled on by the Court of Justice in 2006 (see [...] [judgment of 16 November 2006, *Compaq Computer International Corporation*, C-306/04, EU:C:2006:716]), the decisive question in the present case is whether the development costs for the software fall within the term ‘engineering, development undertaken elsewhere than in the Union and necessary for the production of the imported goods’ or are to be regarded as ‘components, parts and similar items incorporated into the imported goods’, because the development costs for the software were incurred in the EU in the present case.

The Court did not need to address this distinction in [...] [in the judgment of 16 November 2006, *Compaq Computer International Corporation*, C-306/04, EU:C:2006:716]), because the software (operating system) made available to the seller free of charge at that time was obtained from the USA by the buyer, meaning that the value of the software had to be added irrespective of whether it is

regarded as ‘materials, components, parts and similar items incorporated into the imported goods’ or ‘engineering, development necessary for the production of the imported goods’.

In the case of the distinction of the assists in question here, it should be noted that one of the provisions (subparagraph (i)) clearly relates to assists that are items (materials, components and parts) and the other relates to intellectual (intangible) assists (e.g. engineering and development) (subparagraph (iv)).

If one were to assume, like the administration, that tangible assists can also include intangible assists — which, based on the wording of the provision, is doubtful — the distinction would have to be made on the basis of whether the engineering or development was necessary for the production of the imported goods.

Thus, Article 71(1)(b)(iv) of the Union Customs Code can cover intangible assists that are made available to the seller of the imported goods, such as production know-how, design or development costs of software if they are actually necessary for the production of the imported goods.

The decisive questions here are what is the object of delivery and what engineering or development is necessary for its production. As correctly stated by the HZA itself, what is decisive in this regard is **[Or. 9]** the object of delivery that formed the basis for the contracting parties and what was agreed upon by them.

The deliveries of control units with installed control software constitute the object of the imports and the basis of the agreement between the applicant and its sellers. The fact that the software had already been implemented in the third country was of decisive importance for the sale between the applicant and the seller. The functionality test required under the contracts is a part of the production process. It was only via this process, along with the application of the desired technology, that the functionality and utility of the control units had been guaranteed for the applicant.

Interpreting the concept of intellectual assists in this way is in line with the spirit and purpose of the provision, pursuant to which the intellectual services attributable to the economy of the importing country (here: the EU) are to be privileged over those attributable to a third country. This also takes account of the fact that access to outward processing arrangements cannot be authorised in the case of intellectual assists, unlike in the case of assists consisting of materials, components or parts (see Article 256 of the Union Customs Code). In this way, intellectual assists and tangible assists originating in the European Union are treated equally.

[...]