Case C-7/20

Request for a preliminary ruling

Date lodged:

9 January 2020

Referring court:

Finanzgericht Düsseldorf (Germany)

Date of the decision to refer:

11 December 2019

Applicant:

VS

Defendant:

Hauptzollamt Münster

FINANZGERICHT DÜSSELDORF (FINANCE COURT, DÜSSELDORF)

ORDER

In the case of

VS

applicant

[...]

v Hauptzollamt Münster [...]

defendant

concerning customs duties and import turnover tax

the Fourth Chamber [...]

[composition of the Chamber]

made the following order on 11 December 2019:

1. The proceedings are stayed.

2. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the second subparagraph of Article 267 of the Treaty on the Functioning of the European Union: **[Or. 2]**

   Is the second subparagraph of Article 71(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be interpreted as meaning that Article 87(4) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 establishing the EU Customs Code can be applied *mutatis mutandis* to the recovery of VAT (import turnover tax)?

No appeal lies against this order. **[Or. 3]**

Grounds:

I.

1. The applicant is resident in Germany. In October 2017, he brought his car with official Turkish registration plates from Turkey through Bulgaria, Serbia, Hungary and Austria to Germany without transporting and presenting the car to a customs office. The importation of the car was discovered in Germany during a police check on 26 February 2018. In March 2018, the applicant drove the car back to Turkey and sold it there.

2. The defendant, the Hauptzollamt (Principal Customs Office, ‘the HZA’), levied an import duty of EUR 1 589 and import turnover tax of EUR 3 321.01 against the applicant. It took the view that the applicant had unlawfully imported the car into the customs territory of the European Union. Following an unsuccessful complaint, the applicant brought an action before the Finanzgericht (Finance Court).

3. The applicant takes the view that there is no importation subject to duty because he used the car for a short period exclusively as a means of transport for purely private journeys. The applicant submits that there was an implied placing of the car under the customs procedure for temporary importation.

4. The HZA takes the view, however, that a customs debt on import was incurred under Article 79(1)(a) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (‘the UCC’, OJ L 269, p. 1) and that it was competent to assess the import duty in accordance with Article 87(4) of the UCC. Under Paragraph 21(2) of the German Umsatzsteuergesetz (Law on turnover tax, ‘the UStG’), as amended on 21 February 2005 (Bundesgesetzblatt I 2005, 386), those provisions can be applied *mutatis mutandis* to the recovery of turnover tax on imports (VAT).

II.

5. The resolution of the dispute depends — without prejudice to additional legal issues in relation to which the Chamber does not require clarification — on whether Article 87(4) of the UCC can be applied *mutatis mutandis* to turnover tax on imports (VAT). **[Or. 4]**

6. By importing the car into the customs territory of the Union, the applicant failed to fulfil his customs law obligations, in particular the obligation to convey the goods to the customs office (Article 135(1) of the UCC) and to present them to customs (Article 139(1) of the UCC). A customs debt on import was therefore incurred pursuant to Article 79(1)(a) of the UCC. The applicant is a debtor under Article 79(3)(a) of the UCC.

7. It is not the case that an implied declaration of the car for temporary importation was made by going through a customs office, pursuant to Article 141(1)(b) of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code ('the Delegated Regulation', OJ L 343, p. 1), on the basis of which the car could be deemed to have been conveyed and presented, pursuant to Article 218(a) of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code ('the UCC Implementing Regulation', OJ L 343, p. 558). This is because, under Article 219 of the UCC Implementing Regulation, the declaration (customs declaration) is considered not to have been lodged if the goods brought in do not meet the conditions as referred to in Articles 138, 139 and 140 of the Delegated Regulation. Pursuant to Article 139(1) in conjunction with Article 136(1)(a) of the Delegated Regulation, customs declarations for, inter alia, temporary admission can be lodged in respect of means of transport under Articles 208-212 of the Delegated Regulation. Under Article 250(2)(d) of the UCC in conjunction with Article 212(3)(a) of the Delegated Regulation, total relief from import duty in the case of temporary admission of means of transport is granted only if the means of transport are registered outside the customs territory of the Union in the name of a person established outside that territory. The applicant, however, is established in the customs territory of the Union since he is resident in Germany (see Article 5(31)(a) of the UCC).

8. The objections raised by the applicant to a customs debt on import having been incurred are irrelevant. The Chamber does not consider that the points of law raised by the applicant in that context require clarification since there can be no question of applying, by analogy, the provisions on temporary admission to **[Or. 5]** persons established in the customs territory of the Union. It follows from Article 250(2)(c) of the UCC that the temporary admission procedure may only be used if the holder of the procedure is established outside the customs territory of

the Union, unless an exception applies. The relevant exceptions can be found in Article 214 et seq. of the Delegated Regulation, and none of the conditions for an exception to apply are met in the present case. In view of those detailed and differentiated provisions, there is no unintended regulatory gap, which is a prerequisite for an application by analogy.

9. The customs debt was deemed to have been incurred in Germany pursuant to Article 87(4) of the UCC, because the customs authorities in Germany had established that the customs debt had been incurred under Article 79 of the UCC in another Member State, namely Bulgaria, and the amount of the duty corresponding to that debt was lower than EUR 10 000.

10. Clarification is sought as to whether, by applying the scheme of Article 87(4) of the UCC *mutatis mutandis*, VAT was also deemed to have been incurred in Germany.

11. The importation of goods is subject to VAT under Article 2(1)(d) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive', OJ L 347, p. 1). Under the first paragraph of Article 30 of the VAT Directive, 'importation of goods' means the entry into the Community of goods which are not in free circulation.

12. Under Article 60 of the VAT Directive, the place of importation is the Member State within whose territory the goods are located when they enter the Union. By way of derogation therefrom, the first paragraph of Article 61 of the VAT Directive states that, where, on entry into the Union, goods which are not in free circulation are placed under one of the arrangements or situations referred to in Article 156 of the VAT Directive, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the place of importation of such goods shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations. **[Or. 6]**

13. Under Article 70 of the VAT Directive, the chargeable event occurs and the tax becomes chargeable at the time of importation. Pursuant to the second subparagraph of Article 71(1) of the VAT Directive, where imported goods are subject to customs duties, the chargeable event occurs and VAT becomes chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable.

14. The importation of goods into Germany [...] is subject to turnover tax (import turnover tax) under Paragraph 1(4) of the UStG. Pursuant to Paragraph 21(2) of the UStG, the provisions on customs duties apply *mutatis mutandis* to import turnover tax — with certain exceptions which are not relevant to the present dispute.

15. Paragraph 21(2) of the UStG, in conjunction with Article 79(1)(a) of the UCC, could be interpreted to mean that the liability to import turnover tax, like the

customs debt on import, is deemed to have been incurred in Germany if, as in the present case, the conditions of Article 87(4) of the UCC are also met in relation to the import turnover tax.

16. In principle, the conditions for incurring a VAT liability are met. It is true that, according to the case-law of the Court of Justice on Articles 30, 60 and 61 of the VAT Directive, not every infringement of customs obligations which gives rise to a customs debt gives rise to a VAT liability. However, there is a requirement to pay VAT where, based on the particular unlawful conduct, it can be presumed that the goods brought into the territory of the Union entered the economic network of the Union and, consequently, that they may have undergone consumption, that is, the act on which VAT is levied (judgments of 2 June 2016, *Eurogate Distribution*, C-226/14 and C-228/14, EU:C:2016:405, paragraph 65; of 1 June 2017, *Wallenborn Transports*, C-571/15, EU:C:2017:417, paragraph 54; and of 10 July 2019, *Federal Express*, C-26/18, EU:C:2019:579, paragraph 44). Notwithstanding the subsequent re-exportation of the car from the customs territory of the Union, in the present dispute the car was initially used in the territory of the Union for several months and therefore entered the economic network of the Union and was not subject to any customs procedure during that period.

17. Therefore, resolution of the dispute depends on whether, based on the application *mutatis mutandis* of the customs provisions laid down in Paragraph 21(2) of the UStG **[Or. 7]** to import turnover tax, VAT on the importation was also deemed to have been incurred in Germany under Article 87(4) of the UCC, although the importation into the customs territory of the Union took place in Bulgaria. If, however, it is not possible to apply Article 87(4) of the UCC *mutatis mutandis* to VAT, the German customs authorities would not be competent to assess the VAT. In that regard, the action should be upheld as regards VAT.

18. According to settled case-law of the Bundesfinanzhof (Federal Finance Court, 'the BFH'), the second subparagraph of Article 71(1) of the VAT Directive establishes, in relation to importation, a close link between the law on turnover tax and customs legislation, which has been transposed into national law by Paragraph 21(2) of the UStG. The BFH concludes that Article 215(4) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, p. 1), which corresponds to Article 87(4) of the UCC, applies *mutatis mutandis* to the determination of competence for the recovery of VAT. This is intended to ensure that duties to be levied on imports can be collected simply and expediently by one and the same authority [...] [citation of relevant judgments of the BFH].

19. The Chamber has doubts about that interpretation of the VAT Directive because the competence to recover customs duty, excise duty and VAT must be analysed separately (judgment of 29 April 2010, *Dansk Transport og Logistik*, C-230/08, EU:C:2010:231, paragraph 102). The Chamber considers that there are matters which militate against the application *mutatis mutandis* of Article 87(4) of the UCC to VAT, namely that Articles 70 and 71 of the VAT Directive govern solely

the question of when the tax on import is incurred and not also the place of importation (Articles 60 and 61 of the UCC) and that no provision which derogates from Union law relating to the place of importation or the competence of the authorities to assess VAT may be derived from Paragraph 21(2) of the UStG, as a rule of national law.

[...] [Names of the judges involved in the decision]