Case C-791/22

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

Date lodged:

28 December 2022

Referring court:

Finanzgericht Hamburg (Germany)

Date of the decision to refer:

6 December 2022

Applicant:

G.A.

Defendant:

Hauptzollamt Braunschweig

Subject matter of the main proceedings

Cigarettes from third countries which were offered untaxed at a market in Poland and were sold on to a buyer in Germany – Directive 2006/112/EC – Community Customs Code – Possibility for the tax authorities in Germany to collect import VAT

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Is Directive 2006/112/EC and, in particular, Articles 30 and 60 thereof, infringed where Article 215(4) of Regulation (EEC) No 2913/92 is declared under a national provision to be applicable *mutatis mutandis* to import VAT?

Provisions of European Union law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 30, 60, 62, 70, 71

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Customs Code'), in particular Articles 40, 202, 215(4)

Provisions of national law relied on

Umsatzsteuergesetz (Law on turnover tax, UStG), in particular Paragraph 21(2), which provides that the rules governing customs duty apply *mutatis mutandis* to import turnover tax.

Succinct presentation of the facts and procedure

1 The applicant is contesting the assessment of import VAT on smuggled cigarettes. On 29 September 2012, at a market in Słubice (Poland), the applicant, who is resident in Poland, acquired a total of 43 760 cigarettes, to which only Ukrainian and Belarussian revenue stamps were affixed. Without informing the customs authorities, he transported those cigarettes to Germany, where he delivered them to his German buyer near Braunschweig on 2 October 2012. On making the delivery, the applicant was arrested and the cigarettes were seized and subsequently destroyed.

2 By tax notice of 3 February 2015, the defendant assessed import VAT for the cigarettes at EUR 2 006.38. The cigarettes had been unlawfully introduced into the customs territory of the European Union. The customs debt had therefore been incurred pursuant to Article 202(1)(a) of the Customs Code. Since the applicant should have been aware of this, he was a debtor under the third indent of Article 202(3) of the Customs Code. On the basis of the application *mutatis mutandis* of those customs rules in accordance with Paragraph 21(2) of the UStG, the tax debt had been incurred and the applicant had become a debtor in respect of import VAT. By his action, the applicant is contesting that tax notice.

Succinct presentation of the reasoning in the request for a preliminary ruling

3 The question referred for a preliminary ruling is substantively identical to the second question referred in Case C-368/21. The Court was not able to answer that question in the judgment of 8 September 2022, *Hauptzollamt Hamburg* (Place where VAT is incurred II) (C-368/21, EU:C:2022:647) because, having regard to the answer to the first question, it was not relevant to the decision.

4 In contrast with Case C-368/21, the referring court considers that the place of importation for VAT purposes of the goods at issue in this case cannot be in

Germany. Rather, the place of importation of the cigarettes is in Poland. The cigarettes are non-Union goods because they bore Ukrainian and Belarussian revenue stamps. They were introduced into Poland by an unknown route. They entered the economic network of the European Union there because they were offered for sale at a Polish market. Consequently, the cigarettes were not in transit like the parcels that were the subject of Case C-26/18 (judgment of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung*, C-26/18, EU:C:2019:579) or the vehicle at issue in Case C-368/21. There is absolutely no suggestion that the cigarettes were intended solely for consumption outside Poland. In fact, the cigarettes were also purchased by a person resident in Poland, the applicant. Only he took the decision to sell them on to Germany.

5 The referring court therefore considers that there are three taxable transactions:

(1) the importation of the cigarettes from a third country to Poland (Article 2(1)(d) of Directive 2006/112),

(2) the supply of the cigarettes to the applicant by the vendor at the market in Słubice (Article 2(1)(a) of Directive 2006/112),

(3) the intra-Community acquisition of the cigarettes in Germany by the applicant's customers (Article 2(1)(b)(iii) of Directive 2006/112).

6 The request for a preliminary ruling concerns only the taxation of the first transaction, the importation of the cigarettes to Poland. Because import VAT was incurred in Poland, however, the German customs authorities would be competent for the assessment of import VAT only if the import VAT were deemed to have been incurred in Germany by virtue of the fictitious event under Article 215(4) of the Customs Code *mutatis mutandis*. Under Paragraph 21(2) of the UStG, that provision of customs legislation is applicable *mutatis mutandis* to import VAT. The conditions laid down in Article 215(4) of the Customs Code are fulfilled *mutatis mutandis* in the case being referred. The defendant German customs authority has established that the import VAT debt was incurred through the unlawful introduction of the cigarettes into Poland from a third country under Article 202(1)(a) of the Customs Code *mutatis mutandis*. That import VAT debt amounts to less than EUR 5 000, namely EUR 2 006.38. The import VAT debt is thus deemed to have been incurred in Germany.

7 It is uncertain, however, whether the application *mutatis mutandis* of Article 215(4) of the Customs Code, as prescribed by Paragraph 21(2) of the UStG, infringes Directive 2006/112. In that case, it would seem that Article 215(4) of the Customs Code could not be applied *mutatis mutandis* to import VAT. There would be no objection under EU law to the application *mutatis mutandis* of Article 215(4) of the Customs Code if Directive 2006/112 itself prescribed the application of that provision of customs legislation in these circumstances, and even if the VAT Directive did not require the application

mutatis mutandis of Article 215(4) of the Customs Code, it would be permitted under EU law unless prohibited by the VAT Directive.

8 The only provision of Directive 2006/112 that might prescribe the application of Article 215(4) of the Customs Code to import VAT in this case is the second subparagraph of Article 71(1) of that directive. In contrast with Article 71(2) of the directive, that rule presupposes that goods are actually subject to customs duty. That is the case here because through the unlawful introduction of the cigarettes a customs debt has been incurred pursuant to Article 202(1)(a) of the Customs Code. Under subheading 2402 20 90 of the Combined Nomenclature, as amended by Regulation (EU) No 1006/2011 of 27 September 2011, the customs debt is calculated on the basis of a rate of duty of 57.6%. The second subparagraph of Article 71(1) of Directive 2006/112 stipulates for cases like this that 'the chargeable event shall occur and VAT shall become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable'. The chargeable event is defined in Article 62(1) of the directive as the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled. Under Article 62(2) of the directive, VAT becomes chargeable when payment of the VAT can be claimed.

9 In that provision the chargeable event for VAT and VAT becoming chargeable are, in abstract terms, linked in a certain respect with customs duty becoming chargeable. In the view of the referring court, this reference to customs legislation can be understood in two ways. Understood broadly, the provision refers to customs legislation for the purpose of all the conditions for the incurrence of VAT. Understood narrowly, the rule refers to customs legislation only with regard to the time when the chargeable event occurs and VAT becomes chargeable.

10 The German Bundesfinanzhof (Federal Finance Court) understands the second subparagraph of Article 71(1) of Directive 2006/112 to be a comprehensive reference to customs legislation. Based on that understanding, not only would the second subparagraph of Article 71(1) of Directive 2006/112 not prohibit the application *mutatis mutandis* of Article 215(4) of the Customs Code, but it would prescribe it. The question referred would therefore clearly have to be answered in the negative.

11 The referring court, on the other hand, tends towards the view that the second subparagraph of Article 71(1) of Directive 2006/112 refers to customs legislation only with regard to the *time* when the chargeable event for VAT occurs and VAT becomes chargeable. That understanding is corroborated by the wording, history and scheme of the rule.

12 The wording of the second subparagraph of Article 71(1) of Directive 2006/112 links the occurrence of the chargeable event for VAT and VAT becoming chargeable to customs legislation only with regard to the relevant time. The wording of the rule presupposes that a chargeable event for VAT has occurred and that VAT has become chargeable in accordance with Article 62 of the directive.

Such a narrow, wording-based understanding of the second subparagraph of Article 71(1) of the directive also makes sense because there are a number of provisions of customs legislation dealing with the time when the customs debt is incurred, such as Article 201(2), Articles 202-204, Article 209(2), Article 210(2) and Article 211(2) of the Customs Code. The application *mutatis mutandis* of those provisions of customs legislation to import VAT would mean that import VAT was also incurred at those times.

13 The evolution of the second subparagraph of Article 71(1) of Directive 2006/112 suggests, however, that the rule presupposes that a chargeable event for VAT has already occurred and VAT has already become chargeable. The relationship between custom duty and import VAT was regulated for the first time in Article 7 of Second Council Directive 67/228/EEC on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967 (I), p. 16). In Article 7(2) of that directive, the chargeable event and the date when payment of customs duties falls due are expressly linked with the chargeable event and the date when payment of VAT falls due. Similarly, Article 10(3) of the original version of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) states: ‘As regards imported goods, the chargeable event shall occur and the tax shall become chargeable at the time when goods enter the territory of the country as defined in Article 3. Where imported goods are subject to customs duties …, Member States may link the chargeable event and the date when the tax becomes chargeable with those laid down for these Community duties.’

14 Article 10(3) of the Sixth Directive was amended by Article 1(6) of Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1). That amended version is almost identical to the version of the second subparagraph of Article 71(1) of Directive 2006/112 applicable in this case. In that version, the link between the chargeable event and the chargeability of import VAT and customs duty is restricted to the time when the customs duty is incurred.

15 The schematic positioning of the second subparagraph of Article 71(1) of Directive 2006/112 also suggests that the reference does not extend to customs legislation addressing aspects other than the time when the duty is incurred. For example, the place of importation is addressed in Chapter 4 of Title V of the directive (Articles 60 and 61). That title explicitly regulates the ‘place of taxable transactions’. The second subparagraph of Article 71(1) of the directive, on the other hand, falls under Title VI of the directive, which addresses the ‘chargeable event and chargeability of VAT’.

16 The positioning of Article 71 within Chapter 4 of Title VI of Directive 2006/112 also suggests that the rule addresses only the time when VAT becomes

chargeable, but not the place. That chapter comprises two articles (Article 70 and Article 71). Article 70 establishes when the chargeable event occurs and VAT becomes chargeable in the case of importation. It is no surprise that it provides that this is when the goods are imported. Article 70 thus determines for importation what is laid down in Article 63 for the supply of good and services and in Article 68 of Directive 2006/112 for the intra-Community acquisition of goods: the time when the chargeable event occurs and VAT becomes chargeable.

17 Lastly, a further schematic consideration militates against a broad understanding of the second subparagraph of Article 71(1) of Directive 2006/112: if that provision did in fact contain a comprehensive reference to customs legislation, the provisions of Directive 2006/112 on import VAT would be obsolete. For imports which are subject to customs duties, all aspects of import VAT would be determined solely on the basis of customs legislation. For all other imports which are not subject to such duties, the application of customs legislation would follow from Article 71(2) of Directive 2006/112.

18 The referring court cannot infer clearly from the Court's case-law whether the second subparagraph of Article 71(1) of Directive 2006/112 also refers to customs legislation with regard to the place in which VAT debt is incurred. In its answer to the fourth question in the ruling in *Dansk Transport og Logistik*, the Court, on the one hand, underlines the autonomy of customs duty and import VAT (judgment of 29 April 2010, *Dansk Transport og Logistik*, C-230/08, EU:C:2010:231, paragraph 102). On the other hand, in the answer to the third question it makes clear that the chargeable event for customs duties and VAT and the chargeability of customs duties and VAT are essentially the same (paragraph 91).

19 In the judgment of 11 July 2013, *Harry Winston* (C-273/12, EU:C:2013:466, paragraph 41), the Court states with regard to the second subparagraph of Article 71(1) of Directive 2006/112: 'In this regard, it should be noted that import VAT and customs duties display comparable essential features since they arise from the fact of importation of goods into the European Union and the subsequent distribution of those goods through the economic channels of the Member States. This parallel nature is, moreover, confirmed by the fact that the second subparagraph of Article 71(1) of the VAT directive authorises Member States to link the chargeable event and the date on which the VAT on importation becomes chargeable with those laid down for customs duties …'

20 The second sentence of this passage could be construed to mean that the Court understands the second subparagraph of Article 71(1) of Directive 2006/112 as a comprehensive reference to customs legislation. However, the referring court has doubts whether the statements are to be understood in that way. The passage cites *mutatis mutandis* the judgment of 6 December 1990, *Witzemann* (C-343/89, EU:C:1990:445, paragraph 18), and merely substitutes Article 10(3) of the Sixth Directive with the second subparagraph of Article 71(1) of Directive 2006/112. The judgment in *Witzemann* in turn cites the judgment of 28 February 1984, *Einberger* (294/82, EU:C:1984:81, paragraph 18). Both of the cited judgments

were, however, delivered prior to the amendment of Article 10(3) of the Sixth Directive by Directive 91/680/EEC. Because the Court substituted the provisions in paragraph 41 of the judgment in *Harry Winston* but did not adapt its formulation to the wording of the second subparagraph of Article 71(1) of Directive 2006/112 (it states that the second subparagraph of Article 71(1) of the VAT Directive 'authorises' Member States, even though for a long time they have been 'obliged' by Directive 91/680/EEC), the referring court does not wish to base its judgment rashly on this statement made by the Court.

21 The significance of paragraph 41 of the judgment in *Harry Winston* is qualified, lastly, by the fact that, while the Court cites that passage in the judgment of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung* (C-26/18, EU:C:2019:579, paragraph 41), it concludes that the incurrence of customs duties does not necessarily give rise to the incurrence of import VAT. In this regard the referring court makes reference to point 91 of the Opinion of Advocate General Campos Sánchez-Bordona in *Eurogate Distribution and DHL Hub Leipzig* (C-226/14 and C-228/14, EU:C:2016:1), which correctly characterises the analytical framework within which the question referred in this case should also be answered.

22 In its subsequent judgments of 2 June 2016, *Eurogate Distribution* (C-226/14 and C-228/14, EU:C:2016:405), of 1 June 2017, *Wallenborn Transports* (C-571/15, EU:C:2017:417), and of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung* (C-26/18, EU:C:2019:579), the Court adopted this analytical framework and enquired in the specific case whether the incurrence of import VAT can be justified under the rules on VAT. These considerations would be pointless if the second subparagraph of Article 71(1) of Directive 2006/112 had to be understood as a comprehensive reference to customs legislation. If the rule cannot be understood to mean that the incurrence of the customs debt results almost automatically in the incurrence of the import VAT debt, there is no reason to consider that it requires the application *mutatis mutandis* of a rule on competence laid down in customs legislation to the rules on import VAT.

23 Furthermore, the referring court considers that the Court has not already answered the question referred for a preliminary ruling in the judgment of 3 March 2021, *Hauptzollamt Münster* (Place where VAT is incurred) (C-7/20, EU:C:2021:161).

24 Indications as to the interpretation of the second subparagraph of Article 71(1) of Directive 2006/112 are provided, lastly, by the judgment of 7 April 2022, *Kauno teritorinė muitinė* (C-489/20, EU:C:2022:277), in which the Court declined to apply Article 124(1)(e) of the Union Customs Code *mutatis mutandis* to import VAT.

25 The Court first reiterated the words familiar from the judgments in *Dansk Transport og Logistik* and *Harry Winston* that import VAT and customs duties display 'comparable' essential features and have a parallel nature, which is confirmed by the second subparagraph of Article 71(1) of Directive 2006/112

(judgment of 7 April 2022, *Kauno teritorinė muitinė*, C-489/20, EU:C:2022:277, paragraph 47). The Court does not, however, transpose the parallel nature to the extinguishment of the import VAT debt, unlike in paragraph 98 of the judgment in *Dansk Transport og Logistik*. Instead, it holds that the VAT Directive does not regulate the extinguishment of the customs debt relating to smuggled goods on the grounds set out in Article 124(1)(e) of Regulation No 952/2013 (judgment of 7 April 2022, *Kauno teritorinė muitinė*, C-489/20, EU:C:2022:277, paragraph 49).

26 Even though the present case does not concern the application *mutatis mutandis* to import VAT of grounds for extinguishment in customs law, but of rules on competence laid down in customs legislation, the referring court understands the judgment of 7 April 2022, *Kauno teritorinė muitinė* (C-489/20, EU:C:2022:277), to mean that the second subparagraph of Article 71(1) of Directive 2006/112 cannot be construed as a comprehensive reference to customs legislation. That is the only explanation why the Court cites that rule and mentions its consequences in terms of customs duties and VAT becoming chargeable in order then to identify a gap in the VAT Directive in respect of the extinguishment of the debt linked to VAT.

27 Lastly, the referring court is uncertain whether the rule on competence in Directive 2006/112 is definitive. If the Court were to concur with the narrow interpretation of the second subparagraph of Article 71(1) of that directive, this does not automatically mean, in the view of the referring court, that EU law would prohibit Germany from applying Article 215(4) of the Customs Code *mutatis mutandis* to import VAT. It is one question whether, in the second subparagraph of Article 71(1), the directive prescribes the application *mutatis mutandis* of Article 215(4) of the Customs Code. It is another question whether it prohibits this because it is to be considered definitive. This must be established by means of interpretation.

28 The place of importation is regulated in Articles 60 and 61 of Directive 2006/112. The fact that the competence to recover customs 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) could indicate that Articles 60 and 61 are definitive.

29 However, a different reading could also be inferred from the Court's case-law (judgments of 2 June 2016, *Eurogate Distribution*, C-226/14 and C-228/14, EU:C:2016:405, and of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung*, C-26/18, EU:C:2019:579). Just like those proceedings, the present case concerns the consequences under VAT law of an infringement of customs legislation and the question which Member State is competent for the collection of import VAT. The referring chamber understands those decisions to mean that the consequences under VAT law of an infringement of customs legislation are not regulated definitively in the VAT Directive. Thus, the Court was able in those cases to make importation for the purposes of VAT legislation dependent on the

unwritten element of the chargeable event, namely entry into the economic network of the European Union.

30 Against this background, it would be conceivable to consider Directive 2006/112 to be non-definitive also with regard to other aspects of claiming import VAT in so far as import VAT is incurred in connection with infringements of customs legislation. The wording of Article 60 of Directive 2006/112 offers latitude in this regard. Article 215(4) of the Customs Code, if applied *mutatis mutandis* to import VAT, does not establish a place of importation that runs counter to Article 60 of Directive 2006/112, but simply establishes, for the purposes of the effective collection of the chargeable VAT, the fictitious competence of a different Member State for the collection of VAT up to a limit of EUR 5 000.

31 However, the transfer of competences caused by Article 215(4) of the Customs Code *mutatis mutandis* could be contrary to the principle of territoriality which applies to VAT. According to the principle of territorial application of tax, revenues belong to the Member State in which final consumption occurred (judgment of 27 September 2007, *Collée*, C-146/05, EU:C:2007:549, paragraph 37). In the present case, after acquiring the cigarettes in Poland, the applicant sold them on to a buyer in Germany. Because they were offered for general sale in Poland, however, they entered the economic network there.

32 VAT differs in this respect from custom duty, for which the principle of territoriality within the European Union is immaterial. Regardless of the Member State in which customs duties are collected, they belong to the European Union. In the case of custom duty, effective collection, which is achieved by Article 215(4) of the Customs Code, is therefore paramount.