Case C-496/19

Request for a preliminary ruling

Date lodged:

25 June 2019

Referring court:

Commissione tributaria regionale della Campania (Italy)

Date of the decision to refer:

29 September 2017

Applicant and appellant:

Antonio Capaldo SpA

Defendant and respondent:

Agenzia delle dogane e dei monopoli — Ufficio delle dogane di Salerno

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[…]

THE COMMISSIONE TRIBUTARIA **REGIONALE** DI **CAMPANIA SEZIONE STACCATA DI SALERNO** SEZIONE 5 […]

[…]

(Regional Tax Court, Campania, Italy, Salerno Division, Fifth Chamber)

[…]

has made the following

ORDER

– in Appeal No 8959/2015

lodged on 7 September 2015

– against Judgment No 940/2015 Sez:14 of the Commissione Tributaria Provinciale di SALERNO (Provincial Tax Court, Salerno, Italy, Fourteenth Chamber)

against:

AGENZIA DOGANE – UFFICIO DELLE DOGANE DI SALERNO (Customs Agency, Italy — Salerno Customs Office)

brought by the appellant:

ANTONIO CAPALDO SPA

[…]

represented by:

MARIA ROSARIA SALZANO

and PIERLUIGI GIORDANO DOMENICO DE ROSA (lawyers)

[…]

Contested documents:

AVV. RETTIFICA no N. 5984 DOGANE DAZI (Rectification Notice No N. 5984 — Customs Duties)

AVV. RETTIFICA no N. 5984 DOGANE IVA IMP. (Rectification Notice No N. 5984 — Import VAT)

AVV. RETTIFICA no N. 5988 DOGANE DAZI (Rectification Notice No N. 5988 — Customs Duties)

– in Appeal No 10157/2015

lodged on 16 October 2015

– against Judgment No 3675/2015 Sez:10 of the Commissione Tributaria Provinciale di SALERNO (Provincial Tax Court, Salerno, Tenth Chamber)

against:

ANTONIO CAPALDO SPA

[Or.2]

[…]

represented by:

MARIA ROSARIA SALZANO

and PIERLUIGI GIORDANO DOMENICO DE ROSA

[…]

brought by the appellant:

AGENZIA DOGANE E MONOPOLI – UFFICIO DELLE DOGANE DI SALERNO (Customs and Monopolies Agency, Italy — Salerno Customs Office)

Contested documents:

IST.REV. ACC.TO no PROT. 35873/2014 DOGANE DAZI (Application for Review of Assessment No PROT. 35873/2014 — Customs Duties)

IST.REV. ACC.TO no PROT. 35873/2014 DOGANE IVA IMP. (Application for Review of Assessment No PROT. 35873/2014 — Import VAT)

– in Appeal No 10162/2015

lodged on 16 October 2015

– against Judgment No 2413/2015 Sez:2 of the Commissione Tributaria Provinciale di SALERNO (Provincial Tax Court, Salerno, Second Chamber)

against:

AGENZIA DOGANE E MONOPOLI – UFFICIO DELLE DOGANE DI SALERNO (Customs and Monopolies Agency — Salerno Customs Office)

brought by the appellant:

ANTONIO CAPALDO SPA

[…]

represented by:

MARIA ROSARIA SALZANO

and PIERLUIGI GIORDANO [DOMENICO DE ROSA] (lawyers)

[…]

Contested documents:

AVVISO DI ACCERTAMENTO no PROT. N. 1297/14 DOGANE DAZI (Assessment Notice No PROT. N. 1297/14 — Customs Duties) and AVVISO DI ACCERTAMENTO no PROT. N. 1297/14 DOGANE IVA IMP (Assessment Notice No PROT. N. 1297/14 — Import VAT).

[Or.3]

The proceedings

1. By an action notified within the prescribed time limit and in the proper form, the company Antonio Capaldo SpA ('Antonio Capaldo'), represented as stated above, challenged before the Commissione Tributaria Provinciale [di] Salerno (Provincial Tax Court, Salerno, Italy) ('the Tax Court') the decisions dismissing its applications for review of the assessment of Customs Dockets IMA No 1937S of 24 February 2011 and IMA No 1993C of 25 February 2011 ('the contested decisions').

2. In support of the action, Antonio Capaldo stated that it had imported gazebos from China some of which were made with an iron structure and others with an aluminium structure and that it had mistakenly declared them under tariff heading 6306 12 00 00 (for which the rate of duty was 12%).

   Following an internal audit carried out by a customs consultancy, it had found that the tariff heading attributed to the gazebos in question was incorrect, inasmuch as the gazebos with an iron structure should allegedly have been classified under tariff heading 7308 90 99 00 (for which the rate of duty was 0%, while the gazebos with an aluminium structure should theoretically have been classified under tariff heading 7610 90 99 00, for which the rate of duty was 6%).

   Accordingly, it made two applications for review of the assessment of the import dockets in question, seeking amendment of the tariff heading and reimbursement of the excess paid by way of customs duty and VAT.

3. By the contested decisions, the Ufficio delle Dogane di Salerno (Salerno Customs Office) ('the Customs Office') dismissed those applications, finding that:

   (a) in light of the Explanatory notes to the Customs Tariff Nomenclature (Section XI, tariff heading 6306, point 4), the tariff heading attributed had to be regarded as correct;

   (b) Rule 3 of the 'General Rules for the interpretation of the Combined Nomenclature' did not apply because the goods in question were 'specifically listed in the customs tariff'.

4. Antonio Capaldo referred to the Community and national legislation governing the procedure for the review of assessments, set out the principles governing the customs classification of goods and argued that the contested decisions were unlawful. In particular, it complained that:

(a) tariff heading 6306 12 00 00, which had been declared when the gazebos were imported, related (as could easily be ascertained from the TARIC database, available on the Customs Agency's website) **[Or.4]** to: '*Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods*';

(b) the error was therefore obvious, given that gazebos are not tarpaulins, awnings, tents, sails or camping goods;

(c) the gazebos were not, contrary to the Customs Office's assertions, specifically listed in the customs tariff, there being no specific tariff heading relating to them;

(d) the gazebos were in fact 'mixed' goods, in that they consisted in a supporting structure of iron/steel or aluminium and a material covering; they were therefore complex structures (d1) that included a real supporting structure to take the weight of the covering which, (d2) from an economic viewpoint, as shown by the annexed documentation, had to be regarded as more significant than the covering (given that, as a rule, the cost of an iron and/or steel structure represented more than 60% of the gazebo's value and that of an aluminium structure more than 80%);

(e) accordingly, the gazebos not being listed in the Customs Tariff but, based on the foregoing considerations, being composite goods consisting of different materials and made up of several components, the correct classification, in accordance with the General Rules for the interpretation of the Combined Nomenclature, should have been carried out by reference to the rule that '*mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale ... [are to] be classified as if they consisted of the material or component which gives them their essential character*';

(f) there could be no doubt in the case at hand that the essential character of the gazebos was conferred by their structure, given that (f1) the covering could be made of anything (cloth, plastic, bamboo, palm leaves, and so on), while (f2) the cost of the structure was, based on the [foregoing] considerations, clearly the main cost;

(g) accordingly, applying those General Rules, (g1) the gazebos with an iron supporting structure should have been classified, as requested, under tariff heading 7308 and (g2) the gazebos with an aluminium structure should have been classified under tariff heading 7610;

(h) it would also be necessary to reach the same conclusion if applying [Commission Regulation (EU) No 313/2011 of 30 March 2011 concerning the classification of certain goods in the Combined Nomenclature (OJ 2011 L 86, p. 55)], which, in the annex thereto, stated that the higher cost of one of the materials making up the product in question was likely to give the product its essential character and so determine its customs classification;

(i) in response to the arguments and documentation put forward, the Customs Office had indeed referred, in the contested decisions, to the 'Explanatory notes to the Customs Tariff **[Or.5]** Nomenclature (Section XI, tariff heading 6306, point 4)' and had found that 'the goods [were] specifically listed in the customs tariff', which therefore excluded the application of 'Rule 3 of the General Rules for the interpretation of the Combined Nomenclature'; however, it had not demonstrated or documented its own assumption; nor could it have done so, because, in those explanatory notes, there are no notes relating to subheading 06 of Chapter 63, still less to any point 4 thereof, since the notes in fact go straight from heading 6305 to heading 6307;

(j) nor could it have been regarded as useful to refer to the 'Explanatory Notes of the Swiss Federal Customs Administration' (in the body of which, under heading 6306 of Section XI, there was indeed a point 4, which stated that that heading was to include '*all ... Tents ..., shelters etc. including large marquees (e.g. circus tents), military tents with poles and stakes etc.*', because those notes also contained a paragraph relating exclusively to the tariff classification of gazebos; that paragraph carefully set out the differences between 'gazebo tents' (which have a simple tent-pole structure and generally a material covering) and 'pergola gazebos' (which, like those imported by Antonio Capaldo, have a real supporting structure to take the weight of the covering) and confirmed that, on the basis of Rule 3c for the interpretation of the Harmonised System, regardless of the material used for the covering, the gazebos should have been classified under heading 7308, where their supporting structure was made of iron, or heading 7610, where it was made of aluminium.

5. In its defence, the Customs Office reiterated its arguments and also stated that:

(a) the goods in question were of the same type as other goods that had been imported previously with a different customs docket and which had been the subject of a physical inspection without any objection being raised on the part of the customs agent representing the importer;

(b) the legislation relating to the review of assessments, in so far as it provided that the Customs Office 'could' review such assessments, meant that the decision to review was merely optional and, accordingly, not mandatory;

(c) the Explanatory Notes of the Swiss Federal Customs Administration (which had been referred to as a point of comparison) were not applicable in a Community context.

6. Antonio Capaldo disputed the reasoning of the Customs Office and replied that:

[Or.6]

(a) the fact that the goods in question were of the same type as other goods that had previously been the subject of a physical inspection at the time of importation

could not be regarded as precluding the procedure for the review of assessments (there being no such rule or practice at Community or national level);

(b) the optional nature of the decision to review could not be accepted as adequate grounds for arbitrarily leaving every decision regarding an application for review submitted by a party to the customs authorities, this being, in essence, a power/duty for which proper reasoning had to be given;

(c) the reference to the explanatory notes relating to the Swiss legislation had been made solely to explain and confirm the assertion that the Explanatory notes to the EU Combined Nomenclature, to which the Customs Office had referred, did not, as was stated in the application, contain any notes to heading 6306.

7. After hearing the parties, the [Tax Court] dismissed the action by Judgment No [940/2015] of 25 February 2015, essentially upholding the Customs Office's arguments and finding that:

(a) the tariff heading originally attributed could indeed relate to the imported gazebos, inasmuch as that heading related to tents and shelters;

(b) the Explanatory Notes of the Swiss Federal Customs Administration relied on by Antonio Capaldo could not be applied to the Member States;

(c) the imported goods were of the same type as other goods that had previously been physically inspected upon importation and that had been acknowledged as falling under tariff heading 6306 12 00 00.

8. Antonio Capaldo appealed against that ruling, arguing that it was entirely mistaken and seeking variation of the judgment.

9. By a separate appeal, also notified within the prescribed time limit and in the proper form, Antonio Capaldo likewise challenged Judgment No [2413/2015] of 26 February 2015, by which the Tax Court had dismissed, in substantially the same terms, a similar action.

10. By a separate appeal, the Customs Agency in turn challenged Judgment No [3675/2015] of 15 June 2015, by which, in identical circumstances, the same Tax Court, sitting in a different composition, had upheld Antonio Capaldo's action.

[Or.7]

11. At the public *inter partes* hearing on 29 September 2017, the legal representatives of the parties having again put forward their pleadings, the cases, which had been joined for the purposes of the decision, were reserved for judgment.

The grounds of the decision

1. The abovementioned appeals, which in subjective and objective terms are clearly linked, should henceforth be joined for the purposes of a single decision, given that they all call for the resolution of the same issues of fact and law.

2. Having full regard to the grounds of appeal argued by both sides, the referring court observes that the issues which it is called upon to examine concern:

   (a) the formal/procedural issue of whether the procedure for the review of assessments is available upon application by a party; the customs authority (with the support of two of the rulings that are now under appeal, but not of the separate ruling being appealed by the Customs Office) has argued that it is not, for two reasons: first, it is merely an option (and so the omission thereof or objection thereto by the customs authorities cannot be called into question); secondly and at the same time, recourse cannot be had to the procedure because goods of the same type have been acknowledged, without any objection being raised, as falling under tariff heading 6306 12 00 00;

   (b) the substantive issue of whether the tariff heading originally attributed to the goods may be justified by the similarity between gazebos and 'tents and shelters'.

3. As regards the first issue, in so far as concerns the extended application of the results of the examination of goods which have previously been the subject of a customs inspection, the Court of Justice (most recently in its judgment of 27 February 2014[, *Greencarrier Freight Services Latvia*, C-571/12]) has held that this may be justified '*where those goods are identical, which it is for the referring court to ascertain*'.

   In particular, '*a finding that the goods are identical may be based, inter alia, on the inspection of the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods and, in particular, on the particulars supplied by the customs declarant stating that the goods come from the same manufacturer and are identical as regards their name, appearance and composition to the goods covered by those earlier customs declarations*'.

[Or.8]

In so far as concerns the procedure for the review of assessments, this is governed by Article 11(1) of Legislative Decree No 374/1990, which provides that the customs office '*may review an assessment which has become final even if the trader has been given the freedom to dispose of the goods which were the subject of that assessment or if those goods have already left the customs territory*'.

In addition, pursuant to paragraphs (1) and (2) of Article 78 of [Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1)] (which is entitled '*Post-clearance examination of declarations*'), after releasing the goods the customs authorities may, '*on their own initiative or at the request of the declarant, amend the*

declaration' and, '*in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, [may] inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods*'.

Article 11(5) of Legislative Decree No 374/1990 provides that, '*where the review ... reveals inaccuracies, errors or omissions relating to the factors on which the assessment was based, the [customs] office shall make the corresponding rectification and shall give the trader concerned appropriate notice thereof*'.

That provision appears to be consistent with Article 78(3) of Regulation (EEC) No 2913/92, which provides that, '*where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall ... take the measures necessary to regularize the situation*'.

4. The Customs Office maintains that it applied that legislation correctly, in that it chose not to grant the application for review submitted by Antonio Capaldo on the basis that that company had not provided any new factual evidence to indicate inaccuracies, errors or omissions relating to the factors on which the assessment had been based (the catalogue photographs of the goods that had cleared customs in previous years, without any objection being raised, being allegedly insufficient in that regard).

Antonio Capaldo argues, to the contrary, that:

(a) all that is necessary under the legislation outlined above, for the purposes of the review procedure, is that the assessment has become final and that the (three-year) time limit has not expired; there is no reference to the manner in which the assessment was carried out, whether automatic or on the basis of documents or inspection of the goods, being such as to preclude the procedure;

(b) the fact that goods have previously been the subject of an inspection does not, accordingly, preclude the procedure for the review of assessments.

[Or.9]

5. The matters set out in the preceding paragraph would appear to be decisive for the purposes of resolving the dispute, the courts initially seised having taken divergent views and having found the remedy of review variously to be available or precluded once, as in the present case, the goods have been the subject of a physical inspection, without any objection being raised, upon importation.

Given that this issue, which has been assessed in different ways, calls for an interpretation of EU law, it appears appropriate to refer the case to the Court of Justice of the European Union, pursuant to Article 267 of the Treaty [on the

Functioning of the European Union], so that it may give a preliminary ruling on the following question:

‘*Where goods have been physically inspected upon importation, does this preclude initiating the procedure for the review of assessments referred to in Article 78 of Regulation (EEC) No 2913/92 establishing the Community Customs Code?*’

6. The remaining points of contention, the assessment of which is dependent upon the answer to the question referred for a preliminary ruling, will be addressed in the subsequent assessment of the substance of the case.

[…]

[…]

[…] [stay of proceedings and instructions for the registry]

[…] 29 September 2017

[…]