

Case C-330/19**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:**

23 April 2019

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

19 April 2019

Appellant in cassation:

Staatssecretaris van Financiën

Respondent in cassation:

Exter BV

Subject matter of the action in the main proceedings

On importation into the European Union, certain goods (hydrolysates) from Thailand were placed under the inward processing procedure by the application of the suspension system. At the time of importation, a preferential tariff measure applied, which was subsequently suspended. The imported goods were ultimately not re-exported, but placed under the ‘release for free circulation’ procedure. Since the preferential tariff measure had been suspended at that time, the tax authority determined the customs duties due on the basis of the normal tariff.

In the procedure in the main proceedings, the Staatssecretaris (State Secretary) challenges in cassation the view of the court of second instance that the customs debt should have been determined on the basis of the taxation elements appropriate to the import goods at the time of acceptance of the declarations placing those goods under the inward processing procedure, and that the customs duties therefore had to be reduced to the preferential tariff.

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

The question arises as to whether the applicable rate of import duties is an element that comes within the concept of taxation elements in Article 121(1) of the Community Customs Code ('CCC'). This gives rise to the question whether the import duties should be calculated on the basis of the preferential tariff measure applicable at the time when the goods were placed under the inward processing procedure by the application of the suspension system, or on the basis of the normal tariff, having regard to the fact that the preferential tariff measure was suspended when the goods were released for free circulation. Procedure under Article 267 TFEU.

Question referred for a preliminary ruling

Does Article 121(1) of the Community Customs Code mean that a preferential tariff measure for the application of which the import goods were eligible at the time of their placement under the inward processing procedure using the suspension system may also be taken into account when determining the amount of the customs debt incurred when the goods were released for free circulation, whether or not in the unaltered state, if that tariff measure was suspended on the date of acceptance of the declaration for release for free circulation?

Provisions cited

Article 4(9) and (10), Article 20(3)(c), (d), (e) and (f), and 20(4) and (5), Article 67, Article 79, second paragraph, Article 112, Article 114, Article 117(c), Article 121(1), Article 122, Article 135, Article 144, Article 151, Article 201(2), Article 214(1) of the CCC.

Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements

Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences from 1 January 2009

Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008

Commission Regulation (EU) No 1006/2011 of 27 September 2011 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff

Commission Implementing Regulation (EU) No 927/2012 of 9 October 2012 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff

Commission Implementing Regulation (EU) No 1213/2012 of 17 December 2012 suspending the tariff preferences for certain GSP beneficiary countries

Commission Implementing Regulation (EU) No 1001/2013 of 4 October 2013 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff

Brief summary of the facts and the procedure in the main proceedings

- 1 Between 23 May 2012 and 23 May 2015, Exter was allowed to use the ‘inward processing’ customs procedure for protein hydrolysates, a raw material in the food industry, by the application of the suspension system. Between 12 November 2012 and 17 June 2013, it placed eight consignments under that procedure.
- 2 At the time of importation, the hydrolysates were classified under subheading 2106 90 92 of the Combined Nomenclature, for which the normal customs duty tariff at that time was 12.8%.
- 3 However, until 31 December 2013 a tariff measure applied to hydrolysates under which the customs duty rate for goods from a beneficiary country, including Thailand, was reduced to 8.9%.
- 4 Between 1 January 2014 and 31 December 2016 inclusive, that preferential tariff measure was suspended. As a result, the normal tariff of 12.8% was applicable in that period.
- 5 After processing, Exter decided not to re-export some of the processed hydrolysates, but to terminate the inward processing customs procedure. Between 4 February 2014 and 26 August 2014, it declared those products for free circulation, stating that the goods were from Thailand and that it had the required certificates of origin. It asked the tax authority, when calculating the customs debt, to take into account the preferential tariff of 8.9% laid down in Regulation No 732/2008. The tax authority refused to do so because the tariff measure was suspended at the time of the declarations for release for free circulation, and applied the normal tariff rate of 12.8%.
- 6 In the appeal lodged by the tax authority, the court held that, in accordance with Article 121(1) of the CCC, the amount of the customs debt should have been determined on the basis of the taxation elements appropriate to the hydrolysates at the time of acceptance of the declarations placing those goods under the inward processing procedure. The court therefore reduced the applied tariff to the preferential tariff. The Staatssecretaris van Financiën (State Secretary for Finance) then lodged an appeal in cassation.

Main submissions of the parties to the main proceedings

- 7 The Staatssecretaris argues, contrary to the judgment of the court of second instance referred to in paragraph 6, that the applicable rate of import duties resulting from Article 20 of the CCC is not covered by the concept of taxation elements referred to in Article 121(1) of the CCC. If the tariff or a preferential tariff measure were to be covered thereby, then that court has disregarded the specific conditions that, under Article 20(4) of the CCC, apply to the application of a preferential measure.

Brief summary of the reasons for the referral

- 8 Exter terminated the inward processing customs procedure for the products, not by re-exporting the products, but by placing them under the ‘release for free circulation’ customs procedure.
- 9 Under the second paragraph of Article 79 of the CCC, the customs procedure for release for free circulation includes the charging of any duties legally due. Under Article 67 of the CCC, the date to be used for the purposes of all the provisions governing the customs procedure for which the goods are declared is the date of acceptance of the declaration by the customs authorities.
- 10 Under Article 201(1) and (2) of the CCC, a customs debt is incurred on the date of acceptance by the customs authorities of the customs declaration for release of goods for free circulation. Under Article 214(1) of the CCC, the amount of that customs debt is determined on the basis of the rules of assessment appropriate to those goods at the time when the customs debt in respect of them is incurred.
- 11 This means that, upon release for free circulation of compensating products, import duties are due under the Community provisions in force at the time of acceptance of the declaration. One of those Community provisions is Article 20(3)(c) of the CCC, from which the applicable tariff follows. It also means that, when the compensating products are released for free circulation, at the request of the declarant, any preferential tariff measures applicable at that time for access to the EU market [Article 20(3)(d), (e) and (f) of the CCC] may, in accordance with Article 20(4) of the CCC, replace the import duties referred to in Article 20(3) of the CCC.
- 12 Articles 121 and 122 of the CCC provide for two different calculation bases for situations where a customs debt is incurred for goods placed under the inward processing procedure.
- 13 Under Article 121(1) of the CCC, where a customs debt is incurred, the amount of such debt is, as a rule, to be determined on the basis of the taxation elements appropriate to the import goods at the time of acceptance of the declaration of placing of those goods under the inward processing procedure. That arrangement

applies regardless of whether the import goods have since been processed or treated.

- 14 By way of derogation from Article 121, Article 122 of the CCC provides that, at the request of the declarant, the compensating products are subjected to the import duties appropriate to them, the amount of the customs debt being determined by other criteria.
- 15 In the opinion of the court of second instance, Article 121(1) of the CCC provides for a derogation from the provisions mentioned in paragraphs 9 and 10 in the sense that, if a customs debt is incurred due to release for free circulation, the products that were placed under the inward processing procedure should be taxed at the rate of customs duty applicable to the import goods at the time when they were placed under the latter procedure, *in casu* a preferential tariff measure.
- 16 The plea put forward by the Staatssecretaris raises the question whether Article 121(1) of the CCC leads to a preferential tariff measure, which had in the meantime been suspended, being applied to the release for free circulation of goods previously placed under the inward processing procedure using the suspension system.
- 17 On the one hand, Article 121(1) of the CCC could be interpreted as meaning that the concept of taxation elements within the meaning of the CCC also covers the import duties and preferential tariff measures referred to in Article 20(3) of the CCC. The English-language version of that provision refers to ‘the rates and other items of charge’ [Dutch-language version: ‘percentages en andere heffingsgrondslagen’].
- 18 According to that interpretation, both the import goods in the unaltered state and the compensating products are subject to the amount that would be legally payable if the import goods had been immediately released for free circulation. By that interpretation, Article 121(1) of the CCC essentially leads to a charge based on the amount for which ‘relief from import duties’ had been granted at the time of placement under the inward processing procedure for import goods. Articles 3 and 16 of Directive 69/73/EEC provided for such an exemption. This view means that it is irrelevant whether the preferential tariff measure has in the interim been suspended or terminated, and that it is also irrelevant whether the normal tariff was again applicable at the time when the customs debt was calculated.
- 19 On the other hand, it could be argued that the concept of taxation elements within the meaning of the CCC, and thus also within the meaning of Article 121(1) thereof, has no bearing on normal or preferential rates. In general, when determining an amount of duties, levies or other charges legally due, a terminological distinction is made between, on the one hand, the applicable tariffs in the form of tariff percentages or specific duties and any (preferential) tariff measures, and, on the other hand, the taxation elements to which those rates and

tariff measures must be applied, such as the value, the weight or the quantity of the goods.

- 20 This interpretation establishes, by way of derogation from Article 214 of the CCC, the amount of import duties payable (the customs debt) on the basis of the elements (such as value, weight or quantity) that are appropriate for goods imported in an unaltered state, that is to say, in the state in which the import goods were on the date of acceptance of the declaration for placement under the inward processing procedure.
- 21 This interpretation limits the infringement of the principle that customs duties are to be calculated in accordance with the legal and factual situation at the time when the customs debt was incurred.
- 22 In the present case, this would mean that the interested party would not be entitled to the preferential tariff measure in 2014. Indeed, at the time when the customs debt had to be calculated (the date of acceptance of the declaration for release for free circulation), the preferential tariff measure was suspended and thus the normal rate applied once more.
- 23 The referring court prefers the explanation set out in paragraph 19 above. After harmonisation of the legal provisions regarding goods entering the customs territory and needing to be assigned a customs-approved treatment or use, the starting point for placement under the inward processing procedure is no longer that the goods are (conditionally) exempt from the import duties applicable at the time of importation, but that the duties are (still) levied at the time when the goods are released for free circulation in an (ir)regular manner.
- 24 In addition, it appears that Article 121(2) of the CCC is based on the premise that, under Article 201 of the CCC, there must be a preferential tariff measure in force at the time when the customs debt is incurred.
- 25 Under Article 20(5) of the CCC, preferential tariff measures in the form of tariff quotas and tariff ceilings can no longer apply when the import volume stipulated by the tariff quotas has been reached or, as regards tariff ceilings, when the measure is terminated by a ruling of the Commission due to the attainment of a certain volume of imports.
- 26 It is therefore possible that the reason for introducing the suspension measure no longer applies and that preferential treatment for imports of the goods in question is no longer justified due to the situation of the relevant industries which manufacture the same goods in the European Union.
- 27 The continued application of a reduced tariff would undermine the competitive position of the EU industries producing the same goods, which is not in line with the principle laid down in Article 117(c) of the CCC that, when the inward processing customs procedure is applied, the essential interests of Community producers should also be taken into account.

- 28 Finally, the referring court takes the view that the plea put forward by the Staatssecretaris correctly assumes that the preferential tariff measures referred to in Article 20(4) of the CCC are not, like the rates and items of charge referred to in Article 20(3)(c) of the CCC, automatically applicable, but that a declarant must request their application.
- 29 It should also be noted that the concept of items of charge is used in various articles of the CCC, such as in Articles 112, 135, 144, 151, 153, 158 and 214. The interpretation of that concept may therefore also have consequences for the application of those articles.

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