Case C-543/19

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:

16 July 2019

Referring court:

Finanzgericht Hamburg (Germany)

Date of the decision to refer:

1 July 2019

Applicant:

Jebsen & Jessen (GmbH & Co.) KG

Defendant:

Hauptzollamt Hamburg

Subject matter of the main proceedings

Exemption from anti-dumping duty — Effects of an incorrect reference in the original undertaking invoice to the decision leading to the exemption — Whether the subsequent submission of a corrected undertaking invoice is permissible.

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 of the Treaty on the Functioning of the European Union (TFEU).

Questions referred

1. Under the conditions of the dispute in the main proceedings, is the exemption from the anti-dumping duty introduced by Article 1 of Commission Implementing Regulation (EU) 2015/82 pursuant to Article 2(1) of that regulation precluded if an undertaking invoice pursuant to Article 2(1)(b) of that regulation does not specify Implementing Decision

(EU) 2015/87 referred to in point 9 of the annex to that regulation, but specifies rather Decision 2008/899/EC?

2. If Question 1 is answered in the affirmative: May an undertaking invoice that meets the requirements of the annex to Implementing Regulation (EU) 2015/82 be submitted in the context of a procedure for establishing whether anti-dumping duties are reimbursable in order to obtain exemption from the anti-dumping duty imposed in Article 1 of that regulation pursuant to Article 2(1) thereof?

Provisions of EU law cited

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Community Customs Code') as last amended by Regulation (EU) No 952/2013 of 9 October 2013, specifically Article 78.

Council Regulation (EC) No 2320/97 of 17 November 1997 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic, repealing Regulation (EEC) No 1189/93 and terminating the proceeding in respect of such imports originating in the Republic of Croatia, specifically Article 2(2).

Council Regulation (EC) No 1193/2008 of 1 December 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duties imposed on imports of citric acid originating in the People's Republic of China.

Commission Decision 2008/899/EC of 2 December 2008 accepting the undertakings offered in connection with the anti-dumping proceeding concerning imports of citric acid originating in the People's Republic of China, as amended by Commission Decision 2012/501/EU of 7 September 2012.

Commission Implementing Regulation (EU) 2015/82 of 21 January 2015 imposing a definitive anti-dumping duty on imports of citric acid originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009 and of partial interim reviews pursuant to Article 11(3) of Regulation (EC) No 1225/2009, specifically Articles 1 and 2 and point 9 of the annex.

Commission Implementing Decision (EU) 2015/87 of 21 January 2015 accepting the undertakings offered in connection with the anti-dumping proceeding concerning imports of citric acid originating in the People's Republic of China.

Brief summary of the facts and procedure

1 The applicant seeks exemption from anti-dumping duty on imports of citric acid from the People's Republic of China ('the PRC').

2 Anti-dumping duty on imports of citric acid originating in the PRC was originally levied on the basis of Regulation No 1193/2008. In order to be made exempt from this, Weifang Ensign Industry Co. Ltd. ('Weifang') submitted an undertaking offer to the Commission, which the latter accepted by Decision 2008/899 ('original undertaking offer').

3 The Commission initiated a review of the anti-dumping duty in November 2013. In the context of that review, Weifang submitted a new undertaking offer.

4 The applicant and Weifang agreed on the supply of a total of 360 tonnes of citric acid at a price of EUR 884.70 per tonne by way of three contracts dated 9, 13 and 15/16 January 2015, respectively. The minimum import price established for the first quarter of 2015 by the Commission on the basis of Weifang's undertaking offers was EUR 878.60 per tonne. The citric acid was shipped from the PRC on 30 January 2015.

5 The applicant declared the 360 tonnes of citric acid for release into free circulation under tariff heading 2918 1400 00 0 and TARIC additional code A882 via twelve customs declarations of 10 and 11 March 2015. At the request of the defendant, the applicant submitted the associated undertaking invoices of Weifang of 29 January 2015 ('original undertaking invoices'). They referred to, inter alia, 'Decision 2008/899/EC'.

6 As the original undertaking invoices referred to Decision 2008/899 and not to Implementing Decision 2015/87, which entered into force on 23 January 2015, the defendant refused the requested exemption from anti-dumping duty and, by twelve import duty assessment notices of 10 and 11 March 2015, imposed anti-dumping duty on the aforementioned imports on the basis of the general anti-dumping duty rate of 42.7%.

7 The applicant requested that the anti-dumping duty be reimbursed and, in that connection, submitted corrected undertaking invoices. The only difference between these invoices and the original undertaking invoices was that 'Decision 2008/899/EC' had been replaced by 'Implementing Decision (EU) 2015/87'.

8 The defendant refused reimbursement on the ground that the requirements for exemption from anti-dumping duty had not been met, owing to the incorrect reference to Decision 2008/899 in the original undertaking invoices. It stated that the decisive factor in this regard was the time of acceptance of the customs declaration. This, it argued, was also confirmed in the judgment of the Court of Justice of 17 September 2014, *Baltic Agro* (C-3/13, EU:C:2014:2227).

9 The applicant brought an action against this refusal before the referring court. It continues to seek full exemption from the anti-dumping duties and argues, inter alia, that the subsequent submission of a corrected undertaking invoice was permissible in any event.

Brief summary of the basis for the request

First question referred

10 The question arises as to whether the undertaking invoices submitted in the context of the verification of the customs declaration meet the requirements of Article 2(1)(b) of Implementing Regulation 2015/82. Pursuant to that provision, an undertaking invoice must be submitted in order to obtain exemption. This is a commercial invoice containing at least the elements and the declaration stipulated in the annex to that regulation. According to the wording of the undertaking invoices originally submitted, the requirements of point 9 of the annex to the regulation are clearly not met. They refer not to Implementing Decision 2015/87, but rather to Decision 2008/899. However, it is possible that, under the specific circumstances of the main proceedings, this incorrect reference does not preclude exemption from anti-dumping duty.

11 The rule of interpretation according to which provisions which provide for an exemption are to be interpreted strictly supports the argument that specifying a decision that is not valid at the time of import excludes the right to exemption from duty (judgments of 17 September 2014, *Baltic Agro*, C-3/13, paragraph 24, and of 22 May 2019, *Krohn & Schröder*, C-226/18, paragraph 46).

12 The referring court takes the view that this rule of interpretation must, however, be understood in the light of the principle of proportionality. In this connection, Advocate General Kokott stated in her Opinion of 6 September 2018 in the *Vetsch* case (C-531/17, point 50) that the incurrence of import VAT liability constitutes interference with the freedom to conduct a business under Article 16 of the Charter. The same must apply to the incurrence of anti-dumping duty. Pursuant to the second sentence of Article 52(1) of the Charter, a limitation of the freedom to conduct a business resulting from the refusal of exemption from anti-dumping duty may therefore be made only if it is necessary and genuinely meets objectives of general interest recognised by the European Union.

13 Even irrespective of whether the refusal of exemption from anti-dumping duty constitutes interference with a fundamental right of the applicant, the referring court takes the view that the exemption under Article 2 of Implementing Regulation 2015/82 must be understood in the light of the principle of proportionality. The case-law of the Court of Justice makes clear that the withdrawal of acceptance of an undertaking offer must be assessed against the principle of proportionality (judgment of 22 November 2012, *Usha Martin*, C-552/10 P, paragraph 32). The same must apply to the interpretation of a

provision of the law on anti-dumping duty under which exemption is granted. In line with this, the Court of Justice has recently emphasised in the context of preferential treatment in the application of anti-dumping duties that, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part (judgment of 12 October 2017, *Tigers*, C-156/16, paragraph 21, with reference to the judgment of 16 November 2016, *Hemming and Others*, C-316/15, paragraph 27; judgment of 14 July 2016, *Verband Sozialer Wettbewerb*, C-19/15, paragraph 23).

14 This is not precluded by recital 186 of Implementing Regulation 2015/82, to which the defendant referred. Although it is clear from that recital that the mere purchase of goods from a manufacturer whose undertaking offer has been accepted by the Commission does not necessarily lead to exemption from anti-dumping duty, that recital merely makes clear that the exemption depends on whether the conditions laid down in Article 2 of Implementing Regulation 2015/82 are met. As the recital presupposes the fulfilment of these conditions, it is unable to make any contribution to their interpretation.

15 It follows from the application of the principle of proportionality, firstly, that it is not the case that every deviation, however small, from the text stipulated in point 9 of the annex to Implementing Regulation 2015/82 leads to the loss of exemption. The parties to the main proceedings are also in agreement on this. The present Chamber takes the view that deviations from the wording stipulated in point 9 should not preclude exemption if they do not frustrate the purpose behind submission of the undertaking invoice.

16 The purpose behind submission of the undertaking invoice is to monitor effectively the compliance with the undertaking offer (judgment of 17 September 2014, *Baltic Agro*, C-3/13, paragraph 29; also recital 184 of Implementing Regulation 2015/82). The Court of Justice recently emphasised the particular importance of referring to the correct implementing decision in this context (judgment of 22 May 2019, *Krohn & Schröder*, C-226/18, paragraph 55). Thus, exemption should normally be granted only if the undertaking invoice refers to the decision accepting an undertaking offer which is valid at the time of import.

17 However, the referring court takes the view that, owing to the special circumstances of the present case, the reference to the decision that had ceased to be valid did not impair, and could not have impaired, the verification of compliance with the conditions of the undertaking offer. The reason for this is that, in this specific case, the ability of the German customs authorities to verify compliance with the conditions governing exemption had not been impaired.

18 In addition, the conditions of the undertaking offer which was valid when the goods were imported had been complied with. The Commission informed the referring court that the content of the two undertaking offers was virtually identical. In addition, according to the information provided to the referring court

by the Commission, it has been established in the present case that the import price of the citric acid in question here was higher than the minimum import price applicable to Weifang for the first quarter of 2015.

19 In the present case, moreover, the Commission did not see any reason to amend the minimum import price set for the first quarter of 2015 in accordance with the original undertaking offer after the new undertaking offer entered into force. Under these circumstances, for the referring court it appears disproportionate to refuse the exemption solely on account of the reference to Decision 2008/899, which was still valid when the contract was concluded, even though it has been established that the minimum import price applicable at the time of conclusion of the contract, invoicing and import had been exceeded.

20 The present case differs from the case that was the subject of the judgment of 17 September 2014, *Baltic Agro* (C-3/13). That case concerned the question of whether Baltic Agro AS could be regarded as the 'first independent customer in the Union' in the context of a provision that is comparable to Article 2(1)(a) of Implementing Regulation 2015/82 (paragraph 25 of the judgment), even though it had not acquired the product directly from the undertaking that had submitted the undertaking offer, but had acquired it, rather, from an intermediary. The Court of Justice answered that question in the negative. intermediaries could not be involved, as otherwise it would not be clear who could claim the exemption (paragraph 30 of the judgment). The reason for this was that the rules relating to direct sale served to make it possible 'to verify in a transparent manner compliance with the minimum price on import undertaken by the exporting producers' (Opinion of Advocate General Cruz Villalón of 3 April 2014 in the *Baltic Agro* case, C-3/13, point 32). It would not be possible to do this in the same manner in the case of an export involving intermediaries, given that any subsequent resale of the product taking place prior to import into the European Union could give rise to additional costs affecting those prices (*loc. cit.*). The verification of compliance with the undertaking offer was not impaired in the present case, however.

Second question referred

21 Were the Court of Justice to conclude that the reference to Decision 2008/899 in the undertaking invoices that were originally submitted precludes exemption from anti-dumping duty, the question then arises as to whether the corrected invoices that were subsequently submitted, which indisputably meet the requirements of Article 2(1)(b) of Implementing Regulation 2015/82, must still be taken into consideration.

22 The answer to this question hinges on the interpretation of Article 2(2)(a) of Implementing Regulation 2015/82. At first glance, the wording of this provision appears to be clear. It provides that the customs debt is incurred at the time of acceptance of the declaration for release into free circulation if it is established that one of the conditions for exemption of Article 2(1) is not fulfilled. The

submission of documents after acceptance of the customs declaration therefore appears to be precluded. Recital 11 of Implementing Decision 2015/87 could also be understood in this sense. Pursuant to the first sentence of that recital, when the request for release for free circulation is presented, an invoice containing at least the items of information listed in the annex to Implementing Regulation 2015/82 must be presented.

23 On closer examination, however, Article 2(1) of Implementing Regulation 2015/82 does not explicitly specify the latest point in time by which documents may be submitted. It expressly specifies only the time when the customs debt is incurred. It is incurred at the time of acceptance of the declaration of release for free circulation. This is the case if 'it is established […] that one or more of the conditions listed in [Article 2(1) of Implementing Regulation 2015/82] are not fulfilled'. No mention is made of the point in time at which this must be established. Recital 11 of Implementing Decision 2015/87 does not necessarily militate in favour of there being a specific point in time for the submission of documents either. Rather, it could also be understood as meaning that the exemption from anti-dumping duty must be claimed when the request for release for free circulation is presented; it thus makes no mention of the (last-possible) point in time for submitting the invoice.

24 Additional doubts surrounding the assumption that Article 2(2) of Implementing Regulation 2015/82 sets the acceptance of the customs declaration as the last-possible point in time for submitting documents arise if its wording is compared with that of other anti-dumping provisions. In the judgment of 12 October 2017, *Tigers* (C-156/16), the Court of Justice stated that the regulation in question in that case, unlike other anti-dumping regulations, did not contain a provision on the point in time at which a valid commercial invoice must be presented to the customs authorities (paragraph 25, with reference to point 60 of the Opinion of Advocate General Mengozzi). For example, Article 2(2) of Regulation No 2320/97 specifies the point in time at which the production certificate is to be submitted. This differs clearly from the wording of Article 2(2) of Implementing Regulation 2015/82.

25 The referring court is aware that, in the interpretation of EU legislation, the purpose of the provision must also be taken into account. The undertaking invoice must be presented in order to make it possible to verify 'that the shipment corresponds to the commercial documents' (second sentence of recital 11 of Implementing Decision 2015/87). In principle, therefore, the undertaking invoice must be in the possession of the customs authorities at the same time as the product.

26 However, it could be deduced from the principle of proportionality, which is also applicable, that individual items of information in the undertaking invoice may still be remedied or corrected, provided that the purpose pursued by that information can still be achieved. This should be the case with regard to evidence of compliance with an undertaking offer, since, pursuant to Article 2(1) of

Implementing Regulation 2015/82, such evidence is provided solely by way of self-declaration by the exporting producer.

27 A comparison with Article 78 of the Community Customs Code might support such an understanding of the time at which the obligation to submit documents arises. According to the case-law of the Court of Justice, the logic of that article is to bring 'the customs procedure into line with the actual situation' (judgment of 12 October 2017, *Tigers*, C-156/16, paragraph 31). It is not clear to the referring court why the same should not also apply to a reimbursement procedure. As indicated, the wording of Article 2(2) of Implementing Regulation 2015/82 does in any event not preclude the subsequent submission of documents.

28 Finally, the risk of circumvention in the present case was also not increased by the subsequent correction of the undertaking invoice. The reference to Decision 2008/899, which had ceased to be valid, was an isolated error which did not impair the examination of the other conditions governing exemption from anti-dumping duty. As the declaration stipulated by point 9 of the annex to Implementing Regulation 2015/82 in any event constitutes self-declaration by the exporting producer, the point in time at which it is submitted does not affect its veracity. The referring court takes the view that the substantive criterion as to whether the undertaking price has in fact been complied with must ultimately be decisive for the exemption from anti-dumping duty. That was indisputably the case here.