Case C-92/20

Request for a preliminary ruling

Date lodged:

25 February 2020

Referring court:

Finanzgericht Düsseldorf (Germany)

Date of the decision to refer:

5 February 2020

Applicant:

Rottendorf Pharma GmbH

Defendant:

Hauptzollamt Bielefeld

FINANZGERICHT DÜSSELDORF (Finance Court, Düsseldorf)

ORDER

In the case

Rottendorf Pharma GmbH, […]

– Applicant –

[…]

v

Hauptzollamt Bielefeld (Main Customs Office, Bielefeld) […]

– Defendant –

in the matter of duty

the 4th Chamber […]

made the following order following the hearing on 5 February 2020:

> The proceedings are stayed.
>
> The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union: **[Or. 2]**
>
> Is the second indent of Article 239(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code to be interpreted as meaning that, in a case such as that in the main proceedings, in which the non-Community goods imported by the person concerned were re-exported from the Community customs area and the circumstances that gave rise to the customs debt may not be attributed to obvious negligence on the part of the person concerned, the duty may be repaid?

This order is not open to appeal.

Grounds:

I.

1. The applicant manufactures and distributes medicinal products. In October 2008, the defendant Main Customs Office granted the applicant authorisation to export Community goods as an approved exporter.

2. In December 2014, the applicant declared 12.5 kg of ertugliflozin imported from the USA and intended for use in the manufacture of a medicinal product to the defendant Main Customs Office for release for free circulation. The defendant Main Customs Office accepted the customs declarations and charged the applicant duty of EUR 181 491.82, whereupon the applicant's employee responsible for the import then marked the imported ertugliflozin as Community goods in the applicant's data processing system, using the code 'IM'.

3. The applicant subsequently decided to process the imported ertugliflozin in an inward-processing procedure. It therefore asked the defendant Main Customs Office to grant it the necessary authorisation with retroactive effect. The defendant Main Customs Office granted the applicant authorisation with retroactive effect from 1 December 2014 for inward processing in the suspension system for the manufacture of medicinal products using the **[Or. 3]** imported ertugliflozin and declared the customs declarations accepted for release for free circulation to be null and void. It then advised the applicant that, in order to end inward processing, the processed products had to be presented to the Zollamt Beckum (Customs Office, Beckum) and either re-exported from the Community customs area under procedure code 3151 or placed under another customs procedure.

4. As the customs declarations for release for free circulation had been declared null and void, the defendant Main Customs Office repaid the duty charged to the applicant.

5. In March and April 2015, the applicant exported a total of 219 361 kg of medicinal products manufactured using the ertugliflozin and 4.31 kg of unprocessed ertugliflozin from the Community customs area to the USA. It declared the export of the processed products and the ertugliflozin under its authorisation as an approved exporter using procedure codes 1000 and 1041, as the employee responsible for handling the imports had omitted to mark the ertugliflozin as non-Community goods in its data processing system after the customs declarations for release for free circulation had been declared null and void. As a result, the processed products exported by the applicant and the ertugliflozin were not presented to the Customs Office, Beckum.

6. The defendant Main Customs Office charged the applicant duty of EUR 179 241.32, as the applicant had removed the ertugliflozin and the processed products from customs supervision.

7. The applicant submitted an objection to this. It also requested that the duty charged be repaid. It argued that it had mistakenly used the wrong procedure code for the initial inward-processing procedure, and that the goods had in fact been re-exported and had therefore not entered the Community economic circuit.

8. The defendant Main Customs Office dismissed the objection to the duty charged as unfounded. The Chamber dismissed the action subsequently brought by the applicant **[Or. 4]** by what is now a final judgment. It found that the customs debt had been incurred pursuant to Article 203(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) (‘the Customs Code’); that, as the procedure codes used had been those provided for the export of Community goods (1000 or 1041), rather than procedure code 3151, the processed products exported to the USA and the unprocessed ertugliflozin had been wrongly recognised as Community goods for customs purposes; that, although the export declarations submitted by the applicant with the incorrect procedure codes 1000 and 1041 could be corrected in application of Article 78(3) of the Customs Code as the applicant intended to declare re-exportation of non-Community goods following inward processing and the processed products and the ertugliflozin had been re-exported from the Community customs area, that did not change the fact that the non-Community goods were not presented to the Customs Office, Beckum prior to their actual re-exportation from the Community customs area, in breach of the authorisation granted; and that the actual re-exportation of the processed products and the ertugliflozin from the Community customs area did not prevent the customs debt from being incurred and did not result in the extinction of the customs debt.

9. The defendant Main Customs Office then refused to repay the duty in application of Article 239 of the Customs Code. It argued that the applicant had displayed

obvious negligence; that it could have avoided using the incorrect procedure code, which ultimately resulted in its incurring the customs debt, by simply reading the authorisations granted to it; that it had also been advised to use the correct procedure code; that no special circumstances existed; and that there had been no exceptional circumstances in the applicant's case, as compared to other traders.

10. After its objection was dismissed, the applicant brought an action, by which it argues that the re-exportation of the non-Community goods is a special circumstance, and that the cause of the customs debt incurred, that is the input error, could not have been avoided by reading the authorisations. **[Or. 5]**

11. The defendant Main Customs Office argues that an error on the part of one of the applicant's employees when entering the procedure code cannot be regarded as a special circumstance; that, furthermore, obvious negligence had been displayed; and that, precisely because the relevant provisions are so complex, the applicant's employee should have taken note of the terms of the authorisations.

II.

12. A decision in this dispute depends on the interpretation of the second indent of Article 239(1) of the Customs Code.

13. Special circumstances within the meaning of the second indent of Article 239(1) of the Customs Code may exist in the main proceedings. Generally speaking, special circumstances apply where the trader was in an exceptional situation compared to other traders, or where the relationship between the trader and the administration is such that it would have been inequitable to allow the trader to bear a loss which he normally would not have incurred (judgment of 29 April 2004, C-222/01, EU:C:2004:250, paragraphs 63 and 64).

14. The applicant may have been in an exceptional situation. The Court held in its judgment of 12 February 2004, C-337/01, EU:C:2004:90, paragraphs 34 and 35, that, although the re-exportation of non-Community goods does not preclude the conclusion that a customs debt has been incurred on the basis of Article 203(1) of the Customs Code, it is for the referring court to ascertain whether the conditions for repayment of import duty, as laid down in Article 239(1) of the Customs Code, are met. Advocate General Tizzano stated in his Opinion of 12 June 2003, C-337/01, EU:C:2003:344, point 68, that the complexity of the provisions applicable to the facts in that case and the experience of the traders justified the conclusion that it was a special situation in which repayment of the duty might be considered in accordance with Article 239 of the Customs Code.

15. The facts in the main proceedings were complex in view of the way in which the applicant was granted authorisation for inward processing with **[Or. 6]** retroactive effect. Prior to that, it had simply been granted authorisation in October 2008 to export Community goods as an approved exporter. Nonetheless, it submitted export declarations for the processed products and the ertugliflozin to the responsible Customs Office, Beckum. However, due to the input error made by

one of its employees, it used the wrong procedure code, as a result of which the non-Community goods were not presented prior to their re-exportation.

16. In the light of the statements made by the Court in its judgment of 12 February 2004, C-337/01, EU:C:2004:90, paragraphs 34 and 35, and by Advocate General Tizzano in his Opinion of 12 June 2003, C-337/01, EU:C:2003:344, point 68, the Chamber considers it possible, therefore, that special circumstances for the purposes of the second indent of Article 239(1) of the Customs Code might also exist in the main proceedings. That may also be borne out by the rules laid down in Article 900(1)(e) and (f) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1.

17. The Chamber is of the opinion that the applicant has not displayed obvious negligence that would preclude repayment of the duty charged by the defendant Main Customs Office. In examining the question whether the person concerned has displayed obvious negligence, account must be taken in particular of the complexity of the provisions non-compliance with which resulted in the customs debt being incurred and the experience of, and care taken by, the trader (judgments of 13 September 2007, C-443/05 P, EU:C:2007:511, paragraph 174, and of 20 November 2008, C-38/07 P, EU:C:2008:641, paragraph 40). With regard to the trader's experience, it is necessary to examine whether or not his business activities consist mainly in import and export transactions and whether he had already gained some experience in the conduct of such transactions (judgments of 13 September 2007, C-443/05 P, EU:C:2007:511, paragraph 188, and of 20 November 2008, C-38/07 P, EU:C:2008:641, paragraph 50).

18. The provisions non-compliance with which resulted in the customs debt being incurred were complex. The fact that authorisation for inward processing was granted with retroactive effect **[Or. 7]** put the applicant in a complex customs situation. Moreover, it was not an experienced trader in terms of inward processing. The defendant Main Customs Office's objection that, precisely because the relevant provisions are so complex, the applicant's employees should have taken note of the terms of the authorisations cannot, in the opinion of the Chamber, justify a conclusion that the applicant displayed obvious negligence. Rather, it was due to an error on the part of one of the applicant's employees that the goods were declared as non-Community goods under the wrong procedure code and not presented prior to their re-exportation. The employee responsible for processing imports had omitted to mark the ertugliflozin as non-Community goods in the applicant's data processing system once the customs declarations for release for free circulation had been declared null and void. That error could not have been avoided by reading the authorisations.

[Signatures] […]