Case C-75/20

Request for a preliminary ruling

Date lodged:

13 February 2020

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the decision to refer:

29 January 2020

Applicant and appellant:

‘Lifosa’ AB

Defendant and respondent:

Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos

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[…]

LIETUVOS VYRIAUSIASIS ADMINISTRACINIS TEISMAS

(Supreme Administrative Court of Lithuania)

ORDER

29 January 2020

Vilnius

A chamber of the Supreme Administrative Court of Lithuania, […] [composition of the chamber]

has examined, at a sitting of the court under the written appeal procedure, the administrative case concerning an appeal by the applicant, the public limited company ‘Lifosa’, against the judgment of the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius) of 28 November 2017 in the

administrative case concerning the action brought by the applicant, the public limited company ‘Lifosa’, against the defendant, the Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos (Customs Department under the Ministry of Finance of the Republic of Lithuania) (interested third parties: Kauno teritorinė muitinė (Kaunas Customs Office) and the private limited company ‘Transchema’) for annulment of a decision and of a report.

The chamber

has established as follows:

I.

1. At issue in the present case is a tax dispute between the applicant, the public limited company ‘Lifosa’ (‘the applicant’, ‘the Company’), and the defendant, the Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos (Customs Department under the Ministry of Finance of the Republic of Lithuania; ‘the defendant’, ‘the Department’), concerning inspection report No 7KM320012M of the Kaunas Customs Office dated 9 February 2017 (‘the Report’), which inter alia adjusted the customs value of imported goods that was declared by the applicant.

Legal basis. EU law

2. Article 29(1) and (3) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) (‘the Community Customs Code’) provides:

‘1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided: … (b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued …

3. (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instrument and may be made directly or indirectly …’

3. Article 32(1) to (3) of the Community Customs Code provides inter alia:

[Or. 2]

‘1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods: … (e) (i) the cost of

transport … of the imported goods … to the place of introduction into the customs territory of the Community.

2. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.'

4. Article 164(c) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1) provides that 'in applying Article 32(1)(e) … of the [Community Customs] Code: … where transport is free or provided by the buyer, transport costs to the place of introduction, calculated in accordance with the schedule of freight rates normally applied for the same modes of transport, shall be included in the customs value.'

5. Article 70 ('Method of customs valuation based on the transaction value') of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1) ('the Union Customs Code') provides:

'1. The primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary.

2. The price actually paid or payable shall be the total payment made or to be made by the buyer to the seller or by the buyer to a third party for the benefit of the seller for the imported goods and include all payments made or to be made as a condition of sale of the imported goods.

3. The transaction value shall apply provided that all of the following conditions are fulfilled: … (b) the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued …'

6. Article 71 ('Elements of the transaction value') of the Union Customs Code provides:

'1. In determining the customs value under Article 70, the price actually paid or payable for the imported goods shall be supplemented by: … (e) the following costs up to the place where goods are brought into the customs territory of the Union: (i) the cost of transport … of the imported goods …

2. Additions to the price actually paid or payable, pursuant to paragraph 1, shall be made only on the basis of objective and quantifiable data.

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.'

7. Article 138 ('Transport costs') of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ 2015 L 343, p. 558) provides in paragraph 3 that, 'where transport is free of charge or provided by the buyer, the transport costs to be included in the customs value of the goods shall be calculated in accordance with the schedule of freight rates normally applied for the same modes of transport'.

Relevant facts

8. The applicant is a public limited company established in Lithuania, which, inter alia, produces fertilisers. From 1 January 2014 until 31 October 2016, in accordance with a contract concluded on 23 September 2011, the applicant acquired from the private limited company 'Transchema' ('"Transchema" UAB'), and imported into the customs territory of the European Union, various quantities of technical sulphuric acid ('the goods at issue') produced by the Belarusian undertaking 'Naftan' OAO ('the Producer').

9. For each acquisition, a supplementary contract was concluded in which, among other things, a specific price was agreed upon and it was also stipulated that the supply/acquisition was to be carried out in accordance with one of the international commercial terms drawn up by the International Chamber of Commerce ('Incoterms 2000'), namely DAF **[Or. 3]**, Belarus-Lithuania […], which means inter alia that the supplier (seller) pays all costs of transporting the goods to the place of destination.

10. It has also been established in the case that 'Transchema' UAB acquired the goods at issue from the Producer, which delivered them on DAF terms (Belarus-Lithuania) from the plant in the territory of Belarus to the Gudogai border crossing point.

11. The customs value of the imported goods at issue stated by the applicant in the declarations submitted by it was constituted by the amounts actually paid or payable by the applicant for those goods, corresponding to the amounts specified in the VAT invoices issued by 'Transchema' UAB.

12. After carrying out an inspection, on 9 February 2017 the Kaunas Customs Office adopted the Report adjusting the customs value of the goods at issue that was declared by the applicant so as to include the costs of transport of the goods at issue outside the customs territory of the European Union (Community). Accordingly, the applicant was subject to an additional assessment of EUR 25 876 in customs duties, EUR 412 in default interest on customs duties, EUR 187 152 in

import value added tax and EUR 42 492 in default interest on that tax, and a fine of EUR 42 598 (20%) was imposed.

13. The local tax authority took that decision after having found that the customs value of the goods at issue that was declared by the applicant was lower than the costs of their transport within the territory of Belarus which were actually incurred by the Producer in transporting them by rail from the plant owned by it to the border crossing point between the Republic of Belarus and the Republic of Lithuania.

14. The applicant filed a complaint against that decision of the local tax authority with the Department which, by decision of 25 May 2017 […], upheld the amounts additionally assessed in the Report.

15. Disagreeing with that decision of the defendant, the applicant brought an action before the Regional Administrative Court, Vilnius, emphasising inter alia that:

15.1. the costs of transport at issue were paid by the Producer under the terms of the contract and they were included in the price paid by 'Transchema' UAB for the goods;

15.2. the price of the goods at issue was determined by the following objective factors: (1) technical sulphuric acid is a by-product in the production process carried out by the Producer; (2) the Producer is unable to process or store that product (technical sulphuric acid); and (3) recovery of those products would entail very high costs, that is to say, although the price of the goods does not cover all the costs of transporting them incurred by the Producer, the price is reasonable and economically beneficial for the Producer, since the amount of ecological tax imposed in the Republic of Belarus that would be payable for the recovery of the goods at issue would exceed the sum of the declared customs value and of the transportation costs.

16. By judgment of 28 November 2017, the Regional Administrative Court, Vilnius, dismissed the Company's action as unfounded. Therefore, the applicant brought an appeal before the Supreme Administrative Court of Lithuania.

The chamber

finds as follows:

II.

17. The present case raises a question of interpretation of Articles 29(1) and 32(1)(e)(i) of the Community Customs Code and Articles 70(1) and 71(1)(e)(i) of the Union Customs Code. It is therefore necessary to make a reference to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling […] [reference to national law].

18. Specifically, the question arises in the present case as to whether those provisions must be interpreted as meaning that the transaction (customs) value must be adjusted to include all the costs actually incurred by the Producer in transporting the goods to the place where they were brought into the customs territory of the European Union (Community) when, as in the present case, (1) under the delivery conditions ('Incoterms 2000' – DAF) the obligation to cover those costs was borne by the Producer and (2) those costs of transport exceeded the price that was agreed upon and was actually paid (payable) by the buyer, but (3) the price actually paid (payable) by the buyer corresponded to the real value of the goods, even if that price was insufficient to cover all the costs of transport incurred by the Producer.

[Or. 4]

Preliminary observations

19. There is nothing in the case to indicate that the Producer assumed an obligation to transport the goods at issue free of charge to the place where they were brought into the customs territory of the European Union (Community), that is to say, that the agreed sale price did not include transport costs. However, the information contained in the file objectively confirms that the costs actually incurred by the Producer in transporting those goods up to that place exceeded the price actually paid by the buyer, within the meaning of Article 29(3)(a) of the Community Customs Code and Article 70(2) of the Union Customs Code. Since, as stated above, those goods were carried under conditions according to which the Producer was liable for covering all transport costs, the applicant and/or 'Transchema' UAB were under no obligation to contribute to those costs which exceeded that price.

20. It must also be emphasised that the tax authority does not question the fact that the customs value of the goods at issue had to be calculated in the manner laid down in Article 29 of the Community Customs Code and Article 70 of the Union Customs Code, that is to say, in accordance with the transaction value method. Moreover, there is nothing in the case to support the conclusion that the price actually paid by the applicant and/or 'Transchema' UAB to the Producer for the goods at issue was fictitious, having been set by fraud or abuse of law.

Substance of the question referred for a preliminary ruling

21. It should be noted first of all that, for the purposes of applying Article 29(1) of the Community Customs Code or Article 70(1) of the Union Customs Code, 'transaction value' must be interpreted as meaning a value which is adjusted once the conditions for an adjustment are met (judgment of 16 November 2006, *Compaq Computer International Corporation*, C-306/04, EU:C:2006:716, paragraph 28). In respect, in particular, of the adjustment referred to in Article 29(1) of the Community Customs Code, the Court of Justice has stated that the customs value must reflect the real *economic value* of imported goods and take into account all of the elements of those goods that have economic value (see

judgment of 11 May 2017, *Shirtmakers*, C-59/16, EU:C:2017:362, paragraph [28] and the case-law cited ('the judgment in *Shirtmakers*'); also see judgment of 15 July [2010], *Gaston Schul*, C-354/09, EU:C:2010:439, paragraph 29).

22. Article 32 of the Community Customs Code and Article 71 of the Union Customs Code refer specifically to the elements that must be added to the price actually paid or payable for the imported goods in order to determine their customs value (see, to that effect, judgment of 12 December 2013, *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraph 47).

23. The Court of Justice has already held that the concept of 'cost of transport' in Article 32(1)(e)(i) of the Community Customs Code is an autonomous concept of EU law (the judgment in *Shirtmakers*, paragraph 22). That concept must be interpreted broadly and includes all the costs, whether they are main or incidental costs, incurred in connection with moving the goods to the customs territory of the European Union (Community), and the decisive criterion for costs to be capable of being regarded as coming within the term 'cost of transport' within the meaning of Article 32(1)(e)(i) of the Community Customs Code is that they are connected with the movement of goods to the customs territory of the European Union (Community), irrespective of whether those costs are inherent in or necessary for the actual transport of those goods (the judgment in *Shirtmakers*, paragraphs 24 and 25; judgment of 6 June 1990, *Unifert*, C-11/89, EU:C:1990:237, paragraphs 29 to 31).

24. In the light of the foregoing, on the one hand, it may reasonably be inferred that, for the purposes of applying Article 32(1)(e)(i) of the Community Customs Code or Article 71(1)(e)(i) of the Union Customs Code, all (any) costs of transport actually incurred must be added to the transaction value, irrespective of who incurred them and what gave rise to those costs, if they or any part thereof have not been included in the price actually paid or payable. In other words, the mere fact that part of those costs of transport was not included in the price actually paid or payable by the applicant and/or 'Transchema' UAB means, in itself, that the transaction value and, accordingly, the customs value should be adjusted so that all the actual costs of transport are included, regardless of the fact that those costs were actually incurred only by the seller (the Producer).

[Or. 5]

25. That assessment seems to be supported by the provisions of the Commission implementing regulations referred to in paragraphs 4 and 7 of the present order requiring the transport costs to be included in the customs value of the goods where transport is free of charge. Indeed, it is appropriate to take the view that the fact that goods are transported to the buyer (importer) free of charge or that the buyer does not contribute to the costs of transport of goods should not be treated differently as far as the determination of the customs value is concerned.

26. On the other hand, the information submitted by the applicant in the case (in particular that mentioned in paragraph 15.2 of the present order), which is not contested by the defendant, indicates that the fact that the costs of transport were higher than the price actually paid to the Producer for the goods at issue may, in the present case, be justified by the individual circumstances of the sale of the goods at issue into the customs territory of the European Union (Community).

27. Indeed, at this stage of the proceedings, there is a basis for asserting that the goods at issue, namely technical sulphuric acid, are a by-product in the production process carried out by the Producer which it is unable to store or process. Moreover, recovery of that by-product in the Republic of Belarus would entail high costs. Consequently, it was economically beneficial (valuable) for the Producer to sell the goods at issue at the price paid by 'Transchema' UAB, even if that price did not cover all the costs incurred by the Producer in transporting those goods up to the customs territory of the European Union (Community).

28. Those facts, on the basis of the evidence gathered in the case, suggest that the price actually paid for the goods at issue corresponded to the real value of the goods, even if the agreed sale price did not cover all the costs of transport of the goods incurred by the Producer.

29. In those circumstances and in the light of the limitations set out in Article 32(3) of the Community Customs Code and Article 71(3) of the Union Customs Code, the chamber decides that, in order to dispel doubts which it has as to the interpretation of the provisions of EU legislation in question, it is appropriate to make a reference to the Court of Justice for a preliminary ruling.

Request for a preliminary ruling

30. The Supreme Administrative Court of Lithuania is the court of last instance for administrative cases (Article 21 of the Administracinių bylų teisenos įstatymas (Law on administrative proceedings)), so that, where a question of interpretation of legal measures adopted by the institutions of the European Union has arisen and that question has to be examined in order for the case to be decided, it must make a reference to the Court of Justice for a preliminary ruling (third paragraph of Article 267 TFEU), […] [reference to national law]).

31. In those circumstances, in order to dispel the doubts that have arisen as to the interpretation and application of the provisions of EU law relevant to the legal relationships at issue, it is appropriate to request the Court of Justice to interpret the EU rules in question. An answer to the questions set out in the operative part of the present order would be crucial for the present case because it would make it possible to identify unequivocally and clearly the actual extent of the applicant's tax obligations related to the importation of the goods at issue, in particular ensuring the primacy of EU law.

In view of the foregoing considerations and pursuant to the third paragraph of Article 267 of the Treaty on the Functioning of the European Union, […] [reference to national law], the chamber of the Supreme Administrative Court of Lithuania

decides as follows:

The proceedings on the substance are resumed.

The following question is referred to the Court of Justice of the European Union for a preliminary ruling: are Articles 29(1) and 32(1)(e)(i) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and Articles 70(1) and 71(1)(e)(i) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code to be interpreted as meaning that the transaction (customs) value must be adjusted to include all the costs actually incurred by the seller (producer) in transporting the goods to the place where they were brought into the customs territory of the European Union (Community) **[Or. 6]** when, as in the present case, (1) under the delivery conditions ('Incoterms 2000' – DAF) the obligation to cover those costs was borne by the seller (producer) and (2) those costs of transport exceeded the price that was agreed upon and was actually paid (payable) by the buyer (importer), but (3) the price actually paid (payable) by the buyer (importer) corresponded to the real value of the goods, even if that price was insufficient to cover all the costs of transport incurred by the seller (producer)?

The present administrative proceedings are stayed pending receipt of a preliminary ruling from the Court of Justice of the European Union.

[…]

[composition of the chamber]