

Anonymised version

Translation

C-489/20-1

Case C-489/20

Request for a preliminary ruling

Date lodged:

2 October 2020

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the decision to refer:

30 September 2020

Appellant:

UB

Respondent:

Kauno teritorinė muitinė

Administrative proceedings [OMISSIS]

LIETUVOS VYRIAUSIASIS ADMINISTRACINIS TEISMAS

(Supreme Administrative Court of Lithuania)

ORDER

30 September 2020

[OMISSIS]

A Chamber of the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) [OMISSIS] [names of the judges] has examined, at a sitting of the court under the written appeal procedure, the administrative case concerning the appeal lodged by the appellant, UB, against the judgment of the Vilniaus apygardos administracinis teismas (Regional

Administrative Court, Vilnius) of 30 October 2018 in the administrative case relating to the action brought by the appellant, UB, against the respondent, the Kauno teritorinė muitinė (Kaunas Customs Office) (interested third party – the Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos (Customs Department attached to the Ministry of Finance of the Republic of Lithuania) seeking the annulment of certain decisions.

The Chamber

has established the following:

I.

1. The present case concerns a tax dispute between the appellant, UB ('the appellant'), and the respondent, the Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos (Customs Department attached to the Ministry of Finance of the Republic of Lithuania; 'the Department') * relating to Decision No 8PM190020 of the Kauno teritorinė muitinė (Kaunas Customs Office) (local tax administration) of 21 March 2018 concerning the calculation of the tax obligation to customs ('the contested decision'), by which the appellant was required to pay excise duty and import value added tax (VAT) in addition to default interest on those taxes.

Legal basis. EU law

2. Article 79 ('Customs debt incurred through non-compliance') of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the EU Customs Code ('the EU Customs Code') provides, inter alia, in its paragraph 1(a) that, 'for goods liable to import duty, a customs debt on import shall be incurred through non-compliance with ... one of the obligations laid down in the customs legislation concerning the introduction of non-Union goods into the customs territory of the Union ...'
3. Article 124 ('Extinguishment') of the EU Customs Code provides in its paragraph 1(e) that '... a customs debt on import or export shall be extinguished in any of the following ways: ... where goods liable to import or export duty are confiscated or seized and simultaneously or subsequently confiscated ...'
4. Article 198 ('Measures to be taken by the customs authorities') of the EU Customs Code provides in its paragraph 1(a) that '[t]he customs authorities shall take any necessary measures, including confiscation and sale, or destruction, to

* Translator's note: the introductory paragraph of the Lithuanian text refers to the Kaunas Customs Office as being the respondent and refers to the Customs Department attached to the Lithuanian Ministry of Finance as being an interested third party. Following a query made to the national court, the latter has confirmed that the respondent is indeed the Kaunas Customs Office. The national court has not, however, submitted an amended version of paragraph 1 of the original text.

dispose of goods ... where one of the obligations laid down in the customs legislation concerning the introduction of non-Union goods into the customs territory of the European Union has not been fulfilled, or the goods have been withheld from customs supervision ...’

[OR. p. 2]

5. Article 2(b) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (‘the Excise Duty Directive’) provides that ‘[e]xcise goods shall be subject to excise duty at the time of ... their importation into the territory of the Community.’
6. ‘Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.’ (Article 7(1) of the Excise Duty Directive)
7. Article 7(2) of the Excise Duty Directive provides, inter alia, that ‘[f]or the purposes of this Directive, “release for consumption” shall mean any of the following: ...
 - (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.’
8. Article 2(1)(d) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘the VAT Directive’) provides that ‘[t]he following [transaction] shall be subject to VAT: ... the importation of goods.’
9. ‘The chargeable event shall occur and VAT shall become chargeable when the goods are imported.’ (Article 70 of the VAT Directive)

Legal basis. National law

10. Article 93 (‘Cessation of the tax obligation’) of the Lietuvos Respublikos mokesčių administravimo įstatymas (Law of the Republic of Lithuania on tax administration) (as amended by Law No IX-2112 of 13 April 2004) provided in its paragraph 2(3) that ‘any obligation with respect to the taxes administered by the Customs shall also cease ... if the goods are detained *at the time of their illegal entry* and, at that same time or later, seized.’
11. In order to address a change of approach on the part of the national legislature with regard to the moment at which the obligation to pay excise duty and import VAT is extinguished, it should be noted that Article 93(2) of the Law on tax administration [OMISSIS] was repealed on 1 January 2017, and the following provisions of national legislation, which were adopted, inter alia, in the light of the EU Customs Code, entered into force:

– Article 20(2) of the Lietuvos Respublikos akcizų įstatymas (Law of the Republic of Lithuania on excise duty) (as amended by Law No XII-2696 of 3 November

2016), providing that ‘the obligation to pay excise duty to customs shall be extinguished *mutatis mutandis* in the cases specified in points (d) to (g) of paragraph 1 of Article 124 of the EU Customs Code ...’;

– Article 121(2) of the Lietuvos Respublikos pridėtinės vertės mokesčio įstatymas (Law of the Republic of Lithuania on value added tax) (as amended by Law No XII-2697 of 3 November 2016), providing that ‘the obligation to pay import VAT to customs shall be extinguished *mutatis mutandis* in the cases specified in points (d) to (g) of paragraph 1 of Article 124 of the EU Customs Code ...’

Relevant facts

12. The appellant, acting in a group of accomplices, organised the unlawful importation (smuggling) of goods subject to excise duty from Belarus into the territory of Lithuania – on 22 September 2016, at a remote location, 6 000 packets of cigarettes (‘the goods at issue’) were thrown across the State border and recovered. Subsequently, the motor vehicle transporting those goods within the territory of the State was forcibly stopped by border officers, and the cigarettes found in the vehicle were seized.
 13. By penal order of 23 January 2017 adopted by the Vilniaus apygardos teismas (Regional Court, Vilnius) in criminal proceedings, the appellant was convicted of a criminal act under national criminal law, and a fine of EUR 16 947 was imposed on him; it was also decided to confiscate the goods at issue, and the competent authorities were instructed to destroy them.
 14. By the contested decision, in the light of that penal order, the Kaunas Customs Office recognised the appellant (jointly and severally with other persons) as being liable for payment of a customs debt and recorded a tax obligation consisting of EUR 10 237 in excise duty and EUR 2 679 in import VAT, together with, respectively, EUR 1 674 and EUR 438 corresponding to default interest on those taxes. It should be noted that, in the light of Article 124(1)(e) of the EU Customs Code, that local tax administration did not calculate and record a customs debt on import in respect of the appellant (it took the view that the customs debt had been extinguished).
- [OR. p. 3]**
15. Having examined the appellant’s complaint, the Department, by Decision No 1A-199 of 9 May 2018, confirmed the decision of the Kaunas Customs Office.
 16. The appellant brought an action before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius), arguing in particular, essentially, that, given the existence of the ground for the extinction of the customs debt under Article 124(1)(e) of the EU Customs Code, his obligation to pay excise duty and import VAT on the goods at issue which had been unlawfully introduced into the customs territory of the European Union had also been

extinguished. That reasoning of the appellant was based on, inter alia, the interpretation given by the Court of Justice of the European Union ('the Court of Justice') in its judgment of 29 April 2010 in *Dansk Transport og Logistik*, C-230/08, EU:C:2010:231 ('the judgment in *Dansk Transport og Logistik*).

17. By judgment of 30 October 2018, the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius) dismissed the appellant's action as unfounded. That court took the view, inter alia, that grounds for the extinction of the obligation to pay excise duty and/or import VAT are not covered by the EU Customs Code, and, in refusing to assess the appellant's arguments relating to the interpretation given in *Dansk Transport og Logistik*, it noted in particular that that judgment of the Court of Justice had been delivered for the purpose of interpreting Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Community Customs Code'), the provisions of which were not relevant to the present case.
18. As he disagreed with that judgment of the court of first instance, the appellant has appealed to the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania).

The present Chamber

finds as follows:

II.

19. The present case raises a question of interpretation of Article 124(1)(e) of the EU Customs Code, of Articles 2(b) and 7(1) of the Excise Duty Directive and of Articles 2(1)(d) and 70 of the VAT Directive. It is therefore necessary to submit a request to the Court of Justice for a preliminary ruling [OMISSIS] [National procedural provision].
20. Specifically, questions arise with regard to the appellant's obligation to pay excise duty and/or import VAT in respect of unlawfully imported goods subject to excise duty which have been subsequently seized and confiscated in a case where the customs debt has been extinguished on the basis of Article 124(1)(e) of the EU Customs Code.

The content of Article 124(1)(e) of the EU Customs Code

21. It is first of all necessary to establish with certainty that, in circumstances such as those at issue in the present case, the seizure and subsequent confiscation of goods constitute a ground for the extinction of the customs debt under Article 124(1)(e) of the EU Customs Code. If the view were to be taken that the dispute is not covered by that provision of the EU Customs Code, the question concerning the exemption of the appellant from payment of excise duty and import VAT on the ground in question would become irrelevant.

22. On the one hand, the provision of the EU Customs Code in question is linguistically clear: a customs debt is extinguished ‘where goods ... are confiscated or seized and simultaneously or subsequently confiscated ...’ Unlike point (d) of the first paragraph of Article 233 of the Community Customs Code, which is no longer in force (‘where goods ... are seized *upon their unlawful introduction* and are simultaneously or subsequently confiscated’), Article 124(1)(e) of the EU Customs Code does not explicitly refer to the moment at which goods are seized. This suggests that the moment of seizure referred to in the provision in question is not relevant, and that the customs debt is extinguished on the ground in question in the case where the goods are, *inter alia*, seized already after they have been unlawfully introduced into the customs territory of the European Union (that is to say, they are seized outside the area in which the first customs office within that territory is situated).
23. On the other hand, the seizure and confiscation of goods, mentioned in Article 124(1)(e) of the EU Customs Code, constitute a ground for the extinction of a customs debt which must be narrowly construed (see, to that effect, judgment of 2 April 2009, *Elshani*, [C-459/07, EU:C:2009:224] (‘the judgment in *Elshani*’), paragraph 30). In addition, in the context of interpreting EU legal rules establishing grounds for the extinction of a customs debt [OR. p. 4], the Court of Justice has emphasised the need to protect the European Union’s own resources (see, to that effect, judgments of 14 November 2002, *SPKR*, C-112/01, EU:C:2002:663, paragraph 31, and of 17 February 2011, *Berel and Others*, C-78/10, EU:C:2011:93, paragraph 46), and to ensure that goods introduced unlawfully into the customs territory of the European Union do not constitute a threat, in terms of competition, to EU goods (see, to that effect, judgment in *Elshani*, paragraph 29). These objectives are also mentioned in Article 3 of the EU Customs Code.
24. In this regard, it should be noted that, as already emphasised in paragraph 52 of the judgment in *Dansk Transport og Logistik*, ‘the presence of unlawfully introduced goods in the customs territory of the [European Union] comprises, of itself, a very high risk that those goods will end up forming part of the economic networks of the Member States and that, once those goods have gone beyond the area in which the first customs office is situated inside the customs territory, there is less likelihood that the customs authorities will, fortuitously, discover those goods in the course of spot checks ...’ Furthermore, the formal (linguistic) approach set out in paragraph 22 of the present order would also imply that, on the ground in question, the customs debt is also extinguished in the event of the seizure and confiscation of, for example, goods which have already been transferred, sold or used in other economic activities after their unlawful introduction, that is to say, the customs debt would become extinct in the event of the seizure and confiscation of goods which have already entered the economic networks of the Member States and which have even been used in the economic chain of transactions (that is to say, those goods have entered into competition with EU goods). In such a case, remission of customs duties by the customs authorities in respect of confiscated goods would effectively mean that persons

who have unlawfully imported goods would retain an advantage that is not compatible with EU law (for example, a competitive advantage in terms of price and/or income in relation to other (bona fide) economic operators), something which would be, inter alia, inconsistent with the objective of protecting the European Union from unfair and illegal trade, as set out in Article 3(b) of the EU Customs Code.

25. It is therefore appropriate to ask the Court of Justice, first of all, whether Article 124(1)(e) of the EU Customs Code is to be interpreted as meaning that the customs debt is extinguished where, in a situation such as that in the present case, smuggled goods are seized and subsequently confiscated after they have already been unlawfully introduced into the customs territory of the European Union.

Extinction of the obligation to pay excise duty and/or import VAT

26. In the event that the first question is answered in the affirmative, the question then arises in the present case as to whether the fact that the appellant's customs debt in respect of the goods at issue has been extinguished on the basis of Article 124(1)(e) of the EU Customs Code implies that he has an obligation to pay excise duty and/or import VAT on those smuggled goods which were unlawfully introduced into the customs territory of the European Union.
27. In that respect, the appellant points out that, in paragraphs 84 and 98 of the judgment in *Dansk Transport og Logistik*, in the light of (1) the similarities between customs duties and excise duties in that they arise from the importation of goods into the [European Union] and their subsequent distribution through the economic channels of the Member States, and (2) the fact that the chargeable event for, and the chargeability of, customs duty and import VAT occur in parallel, and in order to ensure a coherent interpretation of the EC (EU) legislation, the Court of Justice found that *excise duty and VAT are extinguished in the same way as customs duty* (the same grounds for the extinction of the obligations apply).
28. As a separate point, it should be noted that the *travaux préparatoires* relating to the legislation cited in paragraph 11 of the present order suggest that those national provisions relating to the extinction of the obligation to pay excise duty and import VAT are laid down in accordance with the approach that the extinction of the customs debt under Article 124(1)(d) to (g) of the EU Customs Code also implies the extinction of the obligation to pay excise duty and VAT, administered by the customs authorities, in respect of imported goods.
29. However, the present Chamber has doubts as to whether the same assessment (set out in paragraphs 84 and 98 of the judgment in *Dansk Transport og Logistik*) can be applied in the case of Article 124(1)(e) of the EU Customs Code, where the seizure of smuggled goods, as in the present case, takes place, not at a customs office, but already within the European Union's customs (Member State) territory.

30. Indeed, the assessment by the Court of Justice in *Dansk Transport og Logistik* was in principle linked to the application of Article 202 and point (d) of the first paragraph of Article 233 of the Community Customs Code, pursuant to which, in order to lead to the extinction of the customs debt, **[OR. p. 5]** *the seizure of goods unlawfully introduced into the customs territory of the Community must take place before those goods go beyond the first customs office situated inside that territory* (also see, to that effect, the above judgment in *Elshani*, paragraph 38).
31. As is apparent from the content of the judgment in *Dansk Transport og Logistik*, and in particular from paragraphs 73, 74, 84 to 86, 91 to 93, 98 and 99 thereof, the comparability of excise duties and (import) VAT with customs duties in terms of extinction was, in essence, based on non-occurrence of the chargeable event (the assessment that goods are not regarded as having been imported for taxation purposes) where the seizure of goods takes place before those goods leave the area in which the first customs office inside the customs territory of the European Community (European Union) is situated.
32. Despite the comparability of the imposition of customs duty, excise duty and import VAT (also see, to that effect, judgments of 28 February 1984, *Einberger*, 294/82, EU:C:1984:81, paragraph 18; of 11 July 2013, *Harry Winston*, C-273/12, EU:C:2013:466, paragraph 41; and of 10 July 2019, *Federal Express Corporation*, C-26/18, EU:C:2019:579, paragraph 41), the Excise Duty Directive and the VAT Directive do not contain any provisions concerning the extinction of these tax obligations in situations where smuggled goods are unlawfully introduced (released for consumption) and subsequently seized and confiscated.
33. As previously mentioned, under Article 7(1) of the Excise Duty Directive excise duty becomes chargeable at the time, and in the Member State, of release for consumption. Article 7(2)(d) [of that directive] provides that ‘release for consumption’ is to mean ‘the importation of excise goods, including irregular importation, unless the excise goods are placed, *immediately* upon importation, under a duty suspension arrangement.’ It should be recalled that the Court of Justice has already stated, in paragraph 45 of its judgment of 8 February 2018 in *Commission v Greece*, C-590/16, EU:C:2018:77 (‘the judgment in *Commission v Greece*’), that the concepts of ‘departure’ and ‘release for consumption’ which determine the time at which excise duty becomes chargeable should be interpreted in a uniform manner in all Member States.
34. In the context of interpreting provisions of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, the Court of Justice has already held that, after the occurrence of the chargeable event for the purposes of excise duty (‘release for consumption’), the obligation to pay excise duty continues to exist even if the excise goods concerned are seized and subsequently confiscated (*Dansk Transport og Logistik*, paragraphs 80, 84 and 85). For its part, the present Chamber does not see any reason for a different interpretation of the provisions of the Excise Duty Directive currently in force,

and it does not take the view that the new rules of the EU Customs Code relating to the extinction of a customs debt might suggest a different assessment.

35. Since, in accordance with Article 7(1) of the Excise Duty Directive, excise duty becomes chargeable at that precise time, it is appropriate to take the view that exemption from excise duty in respect of smuggled goods which have been unlawfully introduced would be contrary to that provision (see, by analogy, for example, judgment in *Commission v Greece*, paragraphs 46 and 56). Therefore, it may reasonably be inferred that the fact that excise goods are seized and subsequently confiscated after their ‘release for consumption’ has no bearing on the obligation to pay excise duty on those goods which arose at the time of the chargeable event in question.
36. The provisions of the VAT Directive must essentially be treated in the same way – the seizure and subsequent confiscation of smuggled goods which have been unlawfully introduced into the customs territory of the European Union do not affect the obligation to pay (import) VAT on those goods (see, to that effect, by analogy, judgment in *Dansk Transport og Logistik*, paragraphs 91, 92 and 94).
37. In the present case, the goods at issue entered the economic network of the European Union and, consequently, they could have undergone consumption, with the result that the chargeable event for VAT purposes did occur (on this point, see, for example, judgments of 2 June 2016 in the joined cases *Eurogate Distribution and DHL Hub Leipzig*, C-226/14 and C-228/14, EU:C:2016:405, paragraph 65, and of 1 June 2017, *Wallenborn Transports*, C-571/15, EU:C:2017:417, paragraph 54).
38. In those circumstances, and given that the legislature essentially adopts a different position in national law, the Court of Justice is also asked whether Articles 2(b) and 7(1) of the Excise Duty Directive and Articles 2(1)(d) and 70 of the VAT Directive are to be interpreted as meaning that the obligation to pay excise duty and/or VAT is **not extinguished** where, as in the present case, smuggled goods are seized and subsequently confiscated after **[OR. p. 6]** they have been unlawfully introduced into the customs territory of the European Union, even if the customs debt has been extinguished on the ground provided for in Article 124(1)(e) of the EU Customs Code.

III.

39. The Lietuvos vyriausiosios administracinės teisėms (Supreme Administrative Court of Lithuania) is the court of final instance for administrative cases [OMISSIS], with the result 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 submit a request to the Court of Justice for a preliminary ruling (third paragraph of Article 267 TFEU) [OMISSIS]).

40. 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 in the present dispute, 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 is crucial for the present case because it would also make it possible to take an unequivocal and clear decision on the appellant's obligation to pay excise duty and VAT and related amounts in respect of the goods at issue, thereby in particular ensuring the primacy of EU law, and would also make it possible to guarantee uniform national case-law.

In view of the foregoing considerations [OMISSIS] [references to the legal basis for the referral] [OMISSIS] the present Chamber

decides as follows:

[OMISSIS] [procedural matter]

The following questions of significance for the present case are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Is Article 124(1)(e) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [OMISSIS] to be interpreted as meaning that a customs debt is extinguished where, in a situation such as that in the present case, smuggled goods were seized and subsequently confiscated after they had already been unlawfully introduced (released for consumption) into the customs territory of the European Union?

2. If the first question is answered in the affirmative, are Articles 2(b) and 7(1) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC and Articles 2(1)(d) and 70 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be interpreted as meaning that the obligation to pay excise duty and/or VAT is not extinguished where, as in the present case, smuggled goods are seized and subsequently confiscated after they have already been unlawfully introduced (released for consumption) into the customs territory of the European Union, even if the customs debt has been extinguished on the ground provided for in Article 124(1)(e) of Regulation (EU) No 952/2013?

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

[OMISSIS] [procedural matter and names of the judges]