

Case C-125/24 [Palmstråle]ⁱ**Request for a preliminary ruling****Date lodged:**

15 February 2024

Referring court:

Högsta förvaltningsdomstolen (Sweden)

Date of the decision to refer:

13 February 2024

Appellant:

AA

Respondent:

Allmänna ombudet hos Tullverket

Request for a preliminary ruling under Article 267 TFEU concerning the interpretation of Article 143(1)(e) of Directive 2006/112/EC on the common system of value added tax (VAT Directive) and Articles 86(6) and 203 of Regulation (EU) No 952/2013 laying down the Union Customs Code (Union Customs Code)

Introduction

- 1 By its request for a preliminary ruling, the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) is seeking clarification as to how Article 143(1)(e) of the VAT Directive and Articles 86(6) and 203 of the Union Customs Code are to be interpreted in respect of the conditions under which the re-importation of goods is exempt from VAT. The question of interpretation has arisen in a case concerning non-compliance with customs rules upon re-importation.

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

Applicable provisions of EU law

VAT Directive

- 2 Article 2(1)(d) of the VAT Directive provides that the importation of goods is subject to VAT. Under Article 30 thereof, importation of goods means the entry into the Community of goods which are not in free circulation within the meaning of Article 24 of the Treaty.
- 3 Under Article 143(1)(e) thereof, Member States are to exempt the re-importation, by the person who exported them, of goods in the state in which they were exported, where those goods are exempt from customs duties.

Union Customs Code

- 4 Article 203(1) of the Union Customs Code provides that non-Union goods which, having originally been exported as Union goods from the customs territory of the Union, are returned to that territory within a period of three years and declared for release for free circulation must, upon application by the person concerned, be granted relief from import duty. Under paragraph 5 of that article, the relief is to be granted only if goods are returned in the state in which they were exported and, under paragraph 6 thereof, the relief must be supported by information establishing that the conditions for the relief are fulfilled.
- 5 Goods brought into the customs territory of the Union must, under Article 139(1)(a) of that code, be presented to customs immediately upon their arrival at the designated customs office or any other place designated or approved by the customs authorities or in the free zone by the person who brought the goods into the customs territory of the Union.
- 6 According to Article 79(1)(a) thereof, for goods liable to import duty, a customs debt on import is incurred through non-compliance with one of the obligations laid down in the customs legislation concerning, inter alia, the introduction of non-Union goods into the customs territory of the Union.
- 7 Article 86(6) of the same code stipulates that, where the customs legislation provides for a favourable tariff treatment of goods, or for relief or total or partial exemption from import or export duty pursuant to inter alia Article 203 thereof, such favourable tariff treatment, relief or exemption is also to apply in cases where a customs debt is incurred pursuant to Article 79 thereof, on condition that the failure which led to the incurrence of a customs debt did not constitute an attempt at deception.
- 8 According to recital 38 of the that code, it is appropriate to take account of the good faith of the person concerned in cases where a customs debt is incurred through non-compliance with the customs legislation and to minimise the impact of negligence on the part of the debtor.

Applicable national provisions

- 9 At the material time in the present case, the Mervärdesskattelagen (Law on value added tax) (1994:200) was applicable. That law has now been replaced by a new Mervärdesskattelagen (2023:200), but the previous law continues to apply, in so far as is relevant here, to circumstances relating to the time before the new law entered into force. The applicable provisions of the 1994 law are outlined below. The new law contains essentially similar provisions.
- 10 According to point 3 of the first paragraph of section 1 of Chapter 1, VAT is to be paid on the importation of goods into the country, which is liable for tax. Under section 1a of Chapter 2, 'importation' means that goods are brought into Sweden from a place outside the European Union.
- 11 The first paragraph of section 30 of Chapter 3 provides that imports which are exempt from tax in accordance with Law (1994:1551) on inter alia exemption from tax on importation are exempt from tax.
- 12 The first paragraph of section 5 of Chapter 2 of the Law on exemption from tax on inter alia importation states that exemption from tax is to be granted for Union goods which, after having been exported from the European Union to a third country, are brought into Sweden by the person who exported them, without their having been processed during the time they were exported from the European Union. According to the second paragraph thereof, exemption from tax is to be granted only if the goods are subject to relief from customs duty under, inter alia, Article 203 of the Union Customs Code. Goods which are exempt from customs duty under Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff are treated as if they were subject to customs duty.

Facts of the main proceedings

- 13 AA owns horses which are used in competitions in various countries. She exported two horses to Norway, that is to say, outside the customs territory of the Union. After the horses had participated in competitions, they were brought back into the Union through a border crossing from Norway to Sweden. AA did not stop at the customs post to present the goods brought in. Instead, she was stopped at the Tullverket (Customs Authority) road check shortly after she had passed the customs post.
- 14 The Customs Authority decided to charge AA VAT in the amount of SEK 41 178. No customs duty was levied. According to the Customs Authority, exemption from VAT on re-importation could not be granted because AA had not declared the horses for release for free circulation or applied for relief from customs duty.
- 15 AA appealed against the decision before the Förvaltningsrätten i Karlstad (Administrative Court, Karlstad, Sweden), which dismissed the appeal. The

Förvaltningsrätten found that the horses had not been presented to customs upon their arrival into Union customs territory, that a customs debt had therefore been incurred and that this meant that VAT was payable. The court then held that a fundamental requirement for the grant of exemption from VAT on re-importation is that the goods be declared for release for free circulation and that an application be made by the declarant. Because this had not happened, exemption from VAT could not be granted.

- 16 Both AA and the Allmänna ombudet hos Tullverket (General Representative of the Customs Authority, Sweden) appealed against the judgment of the Förvaltningsrätten before the Kammarrätten i Göteborg (Administrative Court of Appeal, Gothenburg, Sweden) and claimed that the decision to charge AA VAT should be annulled. The Kammarrätten dismissed the appeals on essentially the same grounds as those relied on by the Förvaltningsrätten.
- 17 AA appealed against the judgment of the Kammarrätten before the Högsta förvaltningsdomstolen, which granted leave to appeal. The public action in this case before the Högsta förvaltningsdomstolen is being brought by the General Representative of the Customs Authority. The General Representative – and not the Customs Authority – is thus the individual's opposing party. The Customs Authority has however been given the opportunity to submit observations in the case.
- 18 In the correspondence that was exchanged between the parties after leave to appeal had been granted, AA asserted that she had made an oral declaration to customs staff when she was stopped after passing the customs post. The General Representative countered that the officials who were working at the customs office on that day deny that any oral declaration was made.
- 19 AA did not indicate earlier in the proceedings that an oral declaration had been made. There must be special reasons for a circumstance relied on for the first time before the Högsta förvaltningsdomstolen to be taken into consideration by the court. The Högsta förvaltningsdomstolen will decide later whether the submissions made by AA regarding the oral declaration should be taken into consideration. The present request for a preliminary ruling, however, concerns only the events that have been examined in the lower courts, namely that the customs office was passed without the goods being presented and without a customs declaration or application for relief from customs duty being submitted.

Positions of the parties and the Customs Authority

AA

- 20 AA claims that the decision of the Kammarrätten should be altered such that the Customs Authority's decision to charge her VAT is annulled. She makes the following arguments.

- 21 She did not have anything to gain financially by not stopping at the customs office and declaring the entry of the horses but, in the animals' best interests, she wanted to be in time to catch a ferry to Finland, thereby shortening the journey time for them. Prior to the outward journey, she had ensured that the temporary exportation to Norway was correctly handled and she believed that the conditions for re-importation were thus also fulfilled. This was an error on her part and it is unreasonable that it should result in her being charged VAT by reason of re-importation.
- 22 Article 86(6) of the Union Customs Code should be interpreted as meaning that entitlement to relief from customs duty, and thus exemption from VAT, exists even if the procedural conditions in Article 203 are not fulfilled, provided that there is no question of an attempt at deception. Because the substantive conditions in Article 203 are fulfilled and there is no attempt at deception, she should not be charged VAT.

General Representative of the Customs Authority

- 23 The General Representative of the Customs Authority now takes the view that the decision to charge AA VAT was correct and therefore considers that her appeal against the judgment of the Kammarrätten should be dismissed. The General Representative makes the following arguments.
- 24 One requirement for the re-importation of the horses to be exempt from VAT is that they be subject to relief from customs duty. It is clear that the substantive conditions for relief from customs duty under Article 203 of the Union Customs Code are fulfilled and that there is no question of attempted fraud.
- 25 It is also a condition for relief under that Article 203 that the goods be declared for release for free circulation and that the person concerned apply for relief. Articles 86(6) and 203 do not contain any exceptions to those conditions. They should therefore be considered to apply also in cases where the customs debt under Article 79 is incurred through non-compliance with one of the obligations laid down in customs legislation.
- 26 It is not apparent from the file before the court that AA fulfilled the procedural conditions in Article 203 when the horses were brought into Union customs territory.

Customs Authority

- 27 The Customs Authority claims that the appeal should be dismissed and makes the following arguments. Because the goods were not declared for release for free circulation, they are not subject to relief from customs duty under Article 203. Their importation must therefore be liable for VAT.

The need for a preliminary ruling

- 28 It is apparent from the VAT Directive that the importation of goods from a third country into the Union is subject to VAT. According to Article 143(1)(e) of the directive, however, Member States are to exempt the re-importation, by the person who exported them, of goods in the state in which they were exported, where those goods are exempt from customs duties.
- 29 AA reimported the horses in the state in which they were when she exported them. The decisive factor in determining whether she is liable to pay VAT in respect of re-importation is therefore whether the horses are exempt from customs duties within the meaning of Article 143(1)(e).
- 30 Relief from import duty on re-importation is regulated in Article 203 of the Union Customs Code. It is common ground that the substantive conditions for relief laid down therein are fulfilled in this case. As has been mentioned in paragraph 19 above, however, this request for a preliminary ruling has arisen because AA failed, in breach of Article 139(1) of the Union Customs Code, to present the entry of the goods at the customs office and the procedural conditions for relief laid down in Article 203 – that the goods must be declared for release for free circulation and an application for relief must be submitted – were not fulfilled by her.
- 31 It is apparent from Article 79(1)(a) of the Union Customs Code that, for goods liable to import duty, a customs debt on import is 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. According to Article 86(6), however, the relief from import duty provided for in Article 203 must also apply in cases where a customs debt is incurred pursuant to Article 79, on condition that the failure which led to the incurrance of a customs debt did not constitute an attempt at fraud. In the case at issue, it is undisputed that AA did not make an attempt at deception.
- 32 AA asserts that Article 86(6) of the Union Customs Code should be interpreted as meaning that entitlement to relief from customs duty exists even if the procedural conditions in Article 203 are not fulfilled. On this interpretation, the horses are therefore subject to relief from customs duty, which means, pursuant to Article 143(1)(e) of the VAT Directive, that their re-importation should be exempt from VAT.
- 33 The General Representative submits, by contrast, that the procedural conditions laid down in Article 203 of the Union Customs Code must also be fulfilled in order for relief from import duty to be granted. Since those conditions are not fulfilled, exemption from VAT under Article 143(1)(e) of the VAT Directive should not be granted under this interpretation.
- 34 In the view of the Högsta förvaltningsdomstolen, it is unclear which of these interpretations is the correct one.

- 35 On the one hand, as the General Representative argues, the wording of Articles 86(6) and 203 merely provides that all the conditions laid down in Article 203 must be fulfilled for relief to be possible. Consequently, the wording in itself does not support the view that, in the situations covered by Article 79, the procedural conditions laid down in Article 203 do not also have to be fulfilled in order for relief to be granted.
- 36 On the other hand, it is a requirement in order for a customs debt under Article 79 to be incurred at all that there have been non-compliance with one of the obligations laid down in customs legislation. The question arises in which situations can an importer be at fault for such non-compliance yet simultaneously fulfil the procedural conditions laid down in Article 203. In any event, an infringement like the one at issue in this case – failure to present the entry of goods in contravention of Article 139(1) – is unlikely to occur without the importer also simultaneously failing to submit a customs declaration and apply for relief. An interpretation based strictly on the wording of the provisions would thus probably mean that Article 86(6) never applies in such a situation. It is questionable whether this is compatible with the purpose of the provisions (cf. recital 38 of the Union Customs Code).
- 37 The question of interpretation arising in this case does not appear to have been examined by the Court of Justice of the European Union and, in the view of the Högsta förvaltningsdomstolen, there is therefore not sufficient guidance for it to give judgment. It is thus necessary to obtain a preliminary ruling from the Court of Justice of the European Union.
- 38 In the light of the foregoing, the Högsta förvaltningsdomstolen requests an answer to the following question.

Question

- 39 Must Article 143(1)(e) of the VAT Directive and Articles 86(6) and 203 of the Union Customs Code be interpreted as meaning that both the substantive and the procedural conditions laid down in Article 203 must be fulfilled in order for relief from import duty – and thus exemption from VAT – to be granted on re-importation where a customs debt under Article 79 of the Union Customs Code has been incurred through non-compliance with the presentation obligation laid down in Article 139(1) of the Union Customs Code?