

**Case C-782/23**

**Request for a preliminary ruling**

**Date lodged:**

19 December 2023

**Referring court:**

Lietuvos vyriausiasis administracinis teismas (Lithuania)

**Date of the decision to refer:**

13 December 2023

**Applicant at first instance and appellant:**

‘Tauritus’ UAB

**Defendant at first instance and respondent:**

Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos

**Intervener:**

Kauno teritorinė muitinė

[...]

**LIETUVOS VYRIAUSIASIS ADMINISTRACINIS TEISMAS**

**(Supreme Administrative Court of Lithuania)**

**ORDER**

13 December 2023

[...] The Chamber, in extended composition, of the Supreme Administrative Court of Lithuania [composition of the court],

has examined, at a sitting of the court under the written appeal procedure, the administrative case concerning the appeal lodged by the appellant, the private limited company Tauritus, against the judgment of the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania) of

19 January 2022 in the administrative case relating to the action brought by the appellant, the private limited company Tauritus, against the respondent, the Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos (Customs Department under the Ministry of Finance of the Republic of Lithuania), with the Kauno teritorinė muitinė (Kaunas Customs Office) acting as intervener, for the annulment of decisions.

The Chamber, in extended composition,

has established as follows:

I.

- 1 The present case concerns a tax dispute between the appellant, the private limited company Tauritus, ('the Company') and the respondent, the Customs Department under the Ministry of Finance of the Republic of Lithuania ('the Department'). The present dispute relates, inter alia, to the part of inspection report No 7KM320048M of 14 September 2017 ('the Report') of the Kaunas Customs Office by which the Company was made subject to an assessment and ordered to pay default interest of EUR 4 853 in respect of import value added tax ('VAT').

*Legal basis: European Union law*

- 2 Article 15(2)(a) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ('the Union Customs Code') provides that:

'2. The lodging of a customs declaration ... shall render the person concerned responsible for all of the following:

(a) the accuracy and completeness of the information given in the declaration, notification or application; ...'

- 3 Article 70 of the Union Customs Code states, inter alia:

'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; ...'

- 4 Article 173(3) of the Union Customs Code provides that 'upon application by the declarant, within three years of the date of acceptance of the customs declaration, the amendment of the customs declaration may be permitted after release of the goods in order for the declarant to comply with his or her obligations relating to the placing of the goods under the customs procedure concerned.'
- 5 Article 128(1) 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 ('the Implementing Regulation') provides that 'the transaction value of the goods sold for export to the customs territory of the Union shall be determined at the time of acceptance of the customs declaration on the basis of the sale occurring immediately before the goods were brought into that customs territory'.
- 6 Article 133 of the Implementing Regulation provides that 'where the sale or price of imported goods is subject to a condition or consideration the value of which can be determined with respect to the goods being valued, such value shall be regarded as part of the price actually paid or payable ...'.
- 7 According to Article 85 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, 'in respect of the importation of goods, the taxable amount shall be the value for customs purposes, determined in accordance with the Community provisions in force'.

#### *Relevant facts*

- 8 In accordance with an order of 26 May 2017, the Kaunas Customs Office carried out a tax inspection of the Company for the period from 1 October 2015 to 30 April 2017, in the course of which it established that, during the period covered by the inspection, the Company, inter alia, purchased various quantities of diesel and jet fuel from various suppliers and imported them into the territory of the Republic of Lithuania.
- 9 The contracts concluded with the suppliers and the pro forma invoices issued to the Company set out the price provisionally payable by the Company for the purchase of the goods ('the provisional price').
- 10 When declaring the release for free circulation and domestic use of the fuel purchased and imported, the Company declared the provisional price in its import declarations as the customs value of the goods. Accordingly, in its declarations the Company specified a customs valuation code '6' for the goods at issue, that is to say, it determined the value by applying the 'fall-back' method set out in

Article 74(3) of the Union Customs Code and in Article 144 of the Implementing Regulation.

- 11 Under the terms of the contracts with the suppliers, the provisional price was subsequently adjusted to take account of circumstances that arose after the importation of the goods, such as the average fuel prices on the market for the relevant period and the average exchange rate for the relevant period. That revised price ('the final price') was agreed between the Company and its suppliers by means of supplementary agreements (annexes to the contracts), on the basis of which the suppliers issued revised invoices (depending on the abovementioned fluctuations in the market prices, the final price was in some cases higher than the provisional price and in other cases lower).
- 12 After receiving those revised invoices from the suppliers, the Company, on its own initiative, applied for an adjustment of the value of the goods declared in the abovementioned import declarations.
- 13 The inspection also established that during the period from 29 September 2016 to 1 February 2017, the Company submitted thirteen import declarations ('the declarations at issue') to the Customs Office, in which the provisional price agreed with the suppliers was indicated as the customs value of the imported fuels ('the goods at issue'). On 6 February 2017 and 15 March 2017, the suppliers issued to the Company revised invoices ('the revised invoices') indicating final prices for the imported fuels that were higher than the customs value declared in the declarations at issue.
- 14 Unlike in other cases, the Company did not apply to the customs authorities for an adjustment of the customs value of the goods in the declarations at issue and did not pay the additional import VAT to the State budget before the start of the tax inspection (26 May 2017).
- 15 For its part, the Kaunas Customs Office, applying the method of customs valuation referred to in Article 70(1) of the Union Customs Code, accepted the final price indicated in the revised invoices as the customs value of the goods at issue and, *inter alia*, made the Company subject to an additional assessment and ordered it to pay default interest in respect of import VAT for the period from the date of acceptance of the declarations at issue by the customs authorities to the date of the Report (14 September 2017).
- 16 The tax dispute regarding that decision of the local tax authority was examined by the Department, the Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Tax Disputes Commission under the Government of the Republic of Lithuania) and the Regional Administrative Court, Vilnius, which all held that the calculation of the default interest at issue was justified.
- 17 By decision of 17 June 2020, the Supreme Administrative Court of Lithuania, which heard the appellant's appeal, referred the tax dispute back to the Department for re-examination, holding, in essence, that the tax authority had

unjustifiably calculated the customs value of the goods at issue by applying the ‘transaction value’ method. That court held, in essence, that the application of Article 70(1) of the Union Customs Code could not be based on a final price that was not and could not have been known at the time of the importation of the goods at issue and at the time of lodging the original declarations.

- 18 By decision of 31 December 2020, the Department, after re-examining the appellant’s complaint against the part of the Report at issue, upheld that part of the decision of the Kaunas Customs Office, that is to say, upheld the appellant’s obligation to pay the default interest at issue.
- 19 That (central) tax authority took the view, inter alia, that the facts examined in the judgments of the EU judicature, which were relied upon in the adoption of the abovementioned decision of 17 June 2020, were different from the facts of the present tax dispute and, therefore, inter alia, considered that, after receiving the revised invoices with the final price from the suppliers, the Company was under an obligation to apply for an adjustment of the import declarations at issue, that is to say, to calculate the customs value of the goods in accordance with Article 70(1) of the Union Customs Code, by accepting the final price indicated in the revised invoices as the transaction value. According to the Department, since the Company failed to fulfil that obligation before the start of the tax inspection, the Kaunas Customs Office was justified in adjusting the declarations at issue as described above and calculating the default interest from the date of lodging the original declarations with the customs authorities.
- 20 Since, by its decision of 19 January 2022 the Regional Administrative Court, Vilnius, upheld the position of the Department and dismissed the Company’s action, the appellant brought an appeal before the Supreme Administrative Court of Lithuania.

The Chamber, in extended composition,

finds as follows:

## II.

- 21 In the light of the administrative practice of the national tax authority, which is clearly illustrated by the circumstances of the tax dispute at issue, the present case raises the question of the interpretation of Article 70 and Article 173(3) of the Union Customs Code. It is therefore necessary, in the present case, to refer the matter to the Court of Justice of the European Union (‘the Court of Justice’) for a preliminary ruling on the interpretation of those EU rules [...] [grounds for referral to the Court of Justice].

### *Preliminary remarks*

- 22 At this stage of the proceedings, it is important to note that, first, although the dispute in the present case concerns only the amount of the default interest

charged to the appellant, the amount of the default interest directly relates to the amount of the tax arrears and the moment when the obligation to discharge the tax liability arises. Consequently, for example, if it is found that the customs value, that is to say, also the taxable value, has been incorrectly determined, it would not be possible in the present case to declare that (part of) the default interest at issue is justified.

- 23 Second, as mentioned above, in the present case, the Kaunas Customs Office regarded the final prices of the goods at issue, as agreed by the appellant with the suppliers after the release of the goods at issue, as the transaction value, that is to say, accepted the declared provisional price, which was subsequently revised (adjusted) to reflect the final price, as the transaction value.

23.1. That final price, as acknowledged by the Kaunas Customs Office and the Department itself, was not and could not have been known on the date of acceptance of the declaration by the customs office (the submitted contracts with the suppliers and the appellant's explanations, which are not disputed by the tax authority, confirm that, when the final price was determined, the provisional price was revised (adjusted) on the basis of the average of the market prices made publicly available by specific agencies and the average fluctuations in the exchange rates during the period in question).

23.2. Moreover, the data collected during the tax inspection also objectively confirm that the final price increased in some cases and in other cases it decreased in relation to the provisional price (the provisional price agreed by the Company with its suppliers on the date of acceptance of the declaration could subsequently be adjusted downwards or upwards).

- 24 Third, there is no evidence in the present case that the transactions at issue involved fraud, abuse of rights or any other form of tax evasion.

*The (non-)application of the 'transaction value' method of customs valuation*

- 25 First of all, it is necessary to ascertain whether Article 70 of the Union Customs Code must be interpreted as meaning that paragraph 1 thereof does not apply where, at the time of acceptance of the customs declaration and on the basis of the sale occurring immediately before the goods were brought into the customs territory, only the price provisionally payable is known, which is subsequently (that is to say, after the declaration has been lodged and the goods have been released for free circulation) adjusted upwards or downwards in the light of circumstances beyond the control of the parties to the transaction and unknown at the time of lodging the declaration.

- 26 In that regard, it should be noted that it may reasonably be assumed from Article 70 of the Union Customs Code and Article 128(1) of the Implementing Regulation that, in order to apply the 'transaction value' method of customs

valuation, the price actually paid or payable must be known (or capable of being ascertained) at the time of lodging the declaration with the customs authority.

- 27 Moreover, Article 70(3)(b) of the Union Customs Code explicitly provides that the method in question is not applicable where the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued. In the present case, the subsequent adjustment of the provisional price forms (formed) part of the ‘conditions of sale’ of the goods at issue for the purposes of, inter alia, that provision of the Union Customs Code (see, to that effect, inter alia, judgment of the Court of Justice of 19 November 2020, *5th AVENUE Products Trading*, C-775/19, EU:C:2020:948, paragraphs 38 to 42). However, as mentioned above, the final price was not known at the time of lodging the declarations at issue and could have been increased or decreased subsequently, that is to say, it is considered that the impact of the condition of sale in question on the final price actually payable was not and could not have been assessed at the time of the release of those goods for circulation.
- 28 It is also considered that requiring the declarant to apply the ‘transaction value’ method where the price actually paid or payable for the goods sold for export cannot be established (is not known) at the time of lodging the declaration would be incompatible with the obligation laid down in Article 15(2)(a) of the Union Customs Code. Moreover, indicating in the declaration a provisional price, which is subsequently adjusted downwards or upwards, could result in an arbitrary or fictitious customs value, which would be incompatible with the application of the method of customs valuation at issue (see, to that effect, for example, judgment of the Court of Justice of 9 June 2022, *Baltic Master*, C-599/20, EU:C:2022:457, paragraphs 26 and 27 and the case-law cited).
- 29 It should also be noted that, in paragraph 35 of its judgment of 20 December 2017 in *Hamamatsu Photonics Deutschland* (C-529/16; EU:C:2017:984), the Court of Justice ruled that ‘... an agreed transaction value, composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, [may not] form the basis for the customs value, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down’. Although, as the Department observes, the facts underlying the case [...] that gave rise to the judgment in *Hamamatsu Photonics Deutschland* are different from the facts of the present case, that assessment was based on the general principles of interpretation of law set out in paragraphs 24 to 33 of that judgment, which leads to the conclusion that, also in the present case, the ‘transaction value’ method could not have been applied to the Company at the time of lodging the declarations at issue (the original declarations).

*The obligation to amend the declared customs value of the goods released for free circulation*

- 30 The present case also raises the question whether Article 173(3) of the Union Customs Code must be interpreted as meaning that the declarant is not under an obligation to apply to the customs authorities for an adjustment of the customs value determined and declared in accordance with Article 74 of that code where the price actually payable for the goods, as referred to in Article 70(1) of that code, which was not and could not have been known at the time of lodging the declaration, becomes apparent after those goods have been released for free circulation.
- 31 In the present case, the Kaunas Customs Office and the Department decided, in essence, that, after receiving the revised invoices, the Company was under an obligation to apply for the amendment of the declarations at issue and to calculate the customs value of the goods in accordance with the procedure laid down in Article 70(1) of the Union Customs Code, indicating as the transaction value the final price agreed upon after the lodging of the declarations and the release of the goods for free circulation. Since the Company did not apply to the competent customs office, the Kaunas Customs Office itself adjusted the customs value as described above.
- 32 In that respect, it should be noted, first of all, that Article 173(2) of the Union Customs Code lays down the general rule that after the goods have been released, as is the case in the present case, the declarant (importer) is no longer permitted to amend the customs declaration. By way of exception, Article 173(3) of that code provides that, upon application by the declarant, the amendment of the customs declaration may be permitted after release of the goods in order for the declarant to comply with his or her obligations relating to the placing of the goods under the customs procedure concerned.
- 33 In the light of those provisions, it should be noted that, on the one hand, 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, to that effect, *inter alia*, judgment of the Court of Justice of 22 April 2021, *Lifosa*, C-75/20, EU:C:2021:320, paragraph 24 and the case-law cited). On the other hand, it is not apparent from Article 173(3) of the Union Customs Code that that provision establishes an obligation on the part of the declarant and not a right to apply for the amendment of the declaration, and the word ‘amendment’ also implies that there are errors or inaccuracies in the declaration that need to be corrected. In that respect, it is uncertain whether the non-application of a method of customs valuation that could not have been used at the time of lodging the declaration can be regarded as such an error or inaccuracy.
- 34 It is also apparent from the case-law of the Court of Justice, *inter alia*, that, in accordance with the principle of the irrevocability of a declaration once it has been accepted, the details of the declaration may be amended only in the cases

strictly defined by EU legislation (see, to that effect, for example, judgment of 17 September 2014, *Baltic Agro*, C-3/13, EU:C:C:2227, paragraph 43 and the case-law cited), and the possibility of amending a declaration provided for in Article 173(3) of the Union Customs Code must be interpreted strictly (judgment of 8 June 2023, *Zes Zollner Electronic*, C-640/21, EU:C:2023:[457], paragraph 43).

- 35 In that regard, it should be noted that Article 176[(1)](c) of the Union Customs Code entrusts the European Commission with the task of laying down the procedure for amending a customs declaration after the release of the goods in accordance with Article 173(3). However, the Implementing Regulation, which, as follows from recital 39 thereof, was adopted, inter alia, for the purpose of specifying ‘... the situations in which a customs declaration can be amended after the release of the goods ...’, does not provide for the amendment of the declaration in a situation such as that in the present case, namely where changes made to supply contracts after the lodging of the declaration result in the price actually payable for the goods becoming apparent. On the contrary, by way of example, Article 130(3) of the Implementing Regulation explicitly prohibits the taking into account of discounts arising from amendments to the contract subsequent to the time of acceptance of the customs declaration.

### III.

1. [...] [obligation to make the request pursuant to the third paragraph of Article 267 TFEU]

2. 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 provisions 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 make it possible, while in particular ensuring the primacy of EU law, to assess the scope of the appellant’s import VAT liability and the moment when that liability arose, that is to say, the circumstances to which, inter alia, the tax authority’s ability to impose default interest in respect of that tax is directly linked.

In the light of the foregoing considerations [...] [reference to provisions of procedural law] [...] the present Chamber

orders as follows:

[...] [standard procedural wording]

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

(1) Must Article 70 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code be interpreted as meaning that paragraph 1 thereof does not apply to a situation, such as that in the present case, where, at the time of acceptance of the customs declaration and on the basis of the sale occurring immediately before the goods were brought into the customs territory, only the price provisionally payable is known, which is subsequently (that is to say, after the declaration has been lodged and the goods have been released for free circulation) adjusted upwards or downwards in the light of circumstances beyond the control of the parties to the transaction and unknown at the time of lodging the declaration?

(2) Must Article 173(3) of Regulation (EU) No 952/2013 be interpreted as meaning that the declarant is not under an obligation to apply to the customs authorities for an adjustment of the customs value determined and declared in accordance with Article 74 of that regulation where, as in the present case, the price actually payable for the goods, as referred to in Article 70(1) of that regulation, which was not and could not have been known at the time of lodging the declaration, becomes apparent after those goods have been released for free circulation?

[...] [standard procedural wording and composition of the court] [...]