

Case C-714/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

24 December 2020

Referring court:

Commissione tributaria provinciale di Venezia (Italy)

Date of the decision to refer:

17 November 2020

Applicant:

U.I. Srl

Defendant:

Agenzia delle Dogane e dei monopoli – Ufficio delle dogane di Venezia

Subject matter of the main proceedings

Actions brought by U.I. Srl against two tax assessments, issued by the defendant, rectifying certain import declarations submitted by the applicant in its own name and on behalf of two import companies and assessing the import VAT for which the applicant is alleged to be jointly and severally liable.

Subject matter and legal basis of the reference for a preliminary ruling

Interpretation of Article 201 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and of Article 77(3) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

Questions referred for a preliminary ruling

1. In providing that, ‘on importation, VAT shall be payable by any person or persons designated or recognised as liable by the Member State of importation’, is Article 201 of Directive 2006/112/EC of 28 November 2006 to be interpreted as meaning that the Member State of importation is required to issue a State provision relating to import VAT (domestic-law tax: Court of Justice, Case C-272/13 of 14 July 2013) that expressly identifies the persons liable to pay import VAT?

2. Is Article 77(3) of Regulation (EU) No 952/2013 of 9 October 2013 ([Union Customs Code]), which concerns customs debts on import and which provides that, ‘in the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor’, to be interpreted as meaning that the indirect representative is liable not only for customs duties, but also for import VAT merely as a result of being a ‘declarant’ for customs purposes in its own name?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Article 201.

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, in particular Article 77(3), read together with Article 5(18).

Provisions of national law relied on

Decreto del Presidente della Repubblica del 26 ottobre 1972, n. 633 (Istituzione e disciplina dell’imposta sul valore aggiunto) (Decree No 633 of the President of the Republic of 26 October 1972 establishing and regulating value added tax), in particular:

Article 1, ‘Taxable transactions’:

‘Value added tax shall be imposed on supplies of goods and services carried out in the territory of the State in the exercise of a business, trade or profession and on imports effected by any person’.

Article 17, ‘Persons liable to tax’:

‘1. The tax is payable by persons supplying taxable goods or providing taxable services, who must pay that tax to the Treasury, cumulatively for all transactions carried out and net of the deduction provided for in Article 19, in accordance with the detailed rules and the terms laid down in Title II. ...’.

Article 67, 'Imports':

'1. The following transactions relating to goods brought into the territory of the State which originate from countries or territories not within the territory of the Community and which have not previously been released for free circulation in another Member State of the Community, or which come from territories regarded as being outside the Community in accordance with Article 7, shall constitute imports:

- (a) releases for free circulation;
- (b) inward processing operations as referred to in Article 2(b) of Council Regulation (EEC) No 1999/85 of 16 July 1985;
- (c) temporary admission operations relating to goods intended to be re-exported without processing which, in accordance with the laws of the European Economic Community, do not benefit from full exemption from import duties;
- (d) ...

2. Transactions for reimporting goods that have been temporarily exported outside the European Economic Community and transactions for the reintroduction of goods previously exported outside the Community shall also be subject to tax.

2a. For imports as referred to in paragraph 1(a), payment of the tax shall be suspended in the case of goods intended to be transferred to another Member State of the European Union, including after undergoing the forms of handling listed in Annex 72 to Commission Regulation (EEC) No 2454/93 of 2 July 1993, as amended, subject to prior authorisation by the customs authority.

2b. ...'.

Article 70, 'Application of tax', in particular, paragraph 1:

'1. The tax on imports shall be established, assessed and levied for each transaction. With respect to disputes and penalties, the provisions of the customs legislation on border duties shall apply'.

Decreto legislativo dell'8 novembre 1990, n. 374 (Riordinamento degli istituti doganali e revisione delle procedure di accertamento e controllo in attuazione delle direttive n. 79/695/CEE del 24 luglio 1979 e n. 82/57/CEE del 17 dicembre 1981, in tema di procedure di immissione in libera pratica delle merci, e delle direttive n. 81/177/CEE del 24 febbraio 1981 e n. 82/347/CEE del 23 aprile 1982, in tema di procedure di esportazione delle merci comunitarie) (Legislative Decree No 374 of 8 November 1990 reorganising the customs institutions and revising the procedures for assessment and review in the context of the implementation of Directives 79/695/EEC of 24 July 1979 and 82/57/EEC of 17 December 1981,

relating to procedures for the release of goods for free circulation, and Directives 81/177/EEC of 24 February 1981 and 82/347/EEC of 23 April 1982 on procedures for the export of Community goods), in particular Article 3, ‘Assessment and levying of duties and costs’:

‘1. Customs duties shall be established, assessed and levied in accordance with the provisions of the Consolidated Law on Customs, approved by Decree No 43 of the President of the Republic of 23 January 1973 and other customs laws unless otherwise provided by specific laws relating to customs duties.

2. The duties, charges and other taxes on imports and exports provided for by Community regulations shall be established, assessed and levied in accordance with the provisions of those regulations and, where those regulations refer to the rules of the individual Member States or make no relevant provision, in accordance with the provisions of the Consolidated Law on Customs, approved by Decree No 43 of the President of the Republic of 23 January 1973 and other customs laws’.

Decreto del Presidente della Repubblica del 23 gennaio 1973, n. 43 (Approvazione del testo unico delle disposizioni legislative in materia doganale) (Decree No 43 of the President of the Republic of 23 January 1973 approving the Consolidated Law on Customs), in particular:

Article 34, ‘Customs duties and border duties’:

“‘Customs duties’ means all duties which customs are required to levy pursuant to a law in connection with customs transactions. Customs duties include “border duties”, which are duties on imports and exports, charges and other taxes on imports and exports provided for by Community regulations and related rules of application, as well as, in the case of imported goods, monopoly dues, border surcharges and any other consumer tax or surcharge payable to the State’.

Article 38, ‘Taxable persons. Right of retention’:

‘Liability to pay customs duties shall fall on the owner of the goods, in accordance with Article 56, and, jointly and severally, on any persons on whose behalf the goods are imported or exported. In order to ensure satisfaction of the debt represented by those duties, the State has, in addition to the privileges established by law, a right of retention over the goods which are subject to those duties. The right of retention may also be exercised in order to satisfy any other claim by the State relating to goods which are the subject of a customs transaction’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The company U.I. Srl (the applicant in the main proceedings) had carried out a number of customs transactions pursuant to specific powers of attorney conferred on it by two import companies, namely A. SpA, in insolvency, and U.C. Srl. It had

submitted the relevant declarations in its own name and on behalf of those two companies.

- 2 The Agenzia delle Dogane e dei monopoli – Ufficio delle dogane di Venezia (Customs and Monopolies Agency – Venice Customs Office; ‘the Customs Agency’) (the defendant in the main proceedings) had found, in the course of tax inspections, that the ‘declarations of intent annexed to each import declaration’ were ‘unreliable’ because they were based on the allegedly mistaken assumption that the relevant export companies were established exporters.
- 3 The import transactions which were the subject of the tax inspections were therefore not exempted from VAT, because the import companies A. SpA and U.C. Srl had not ‘carried out transactions which could be used to establish the VAT ceiling’.
- 4 According to the Customs Agency, in accordance with Article 77(3) of Regulation No 952/2013, read together with Article 5(18) thereof, as well as Article 199 of Regulation No 2454/1993 and Article 201 of Regulation No 2913/1992 establishing the Community Customs Code, the import companies referred to above and their indirect customs representative – the applicant in the main proceedings – are liable jointly and severally for payment of that tax.
- 5 Accordingly, the Customs Agency had drawn up two inspection reports, in response to which the applicant had, in due time, submitted its observations. The Customs Agency had rejected the arguments set out in those observations and issued two tax assessments which were notified to the applicant on 15 May 2017 and 6 February 2018. Those tax assessments rectified the import declarations submitted by the applicant and assessed the VAT due at EUR 173 561.22 and EUR 786 046.24 respectively, plus interest.
- 6 By two separate actions, the applicant challenged those tax assessments before the referring court, the Commissione tributaria provinciale di Venezia (Provincial Tax Court, Venice, Italy), claiming that they should be annulled and, in the alternative, that the questions which it has formulated should be referred to the Court of Justice of the European Union for a preliminary ruling.
- 7 The referring court has stayed the proceedings and made the present request for a preliminary ruling.

Essential arguments of the parties in the main proceedings

- 8 U.I. Srl submits that it cannot be held liable for payment of the import VAT claimed in the contested tax assessments, because the scope of Article 77(3) of Regulation No 952/2013, which relates to customs duties, cannot be extended so as to apply to VAT, and no provision of Italian law provides for joint and several liability on the part of an indirect customs representative for the payment of import VAT.

- 9 In addition, that alleged liability is contrary to the principle of EU law contained in Article 201 of Directive 2006/112, in accordance with which VAT on imported goods is payable by the persons ‘designated’ or ‘recognised’ as liable by the Member State of importation.
- 10 The Customs Agency, on the other hand, contends that the event which gave rise to the VAT liability is, like the event which gave rise to the customs debt, the fact of ‘importation’, as identified in the customs legislation. Reference should also be made to that event for the purpose of determining the origin of the import VAT liability and, consequently, identifying the persons liable to pay that VAT. In the present case, according to the case-law of the Corte di cassazione (Court of Cassation, Italy), the persons liable to pay that tax are the importer and its indirect customs representative, and they are jointly and severally liable.

Succinct presentation of the reasoning in the reference for a preliminary ruling

- 11 The referring court recalls, first of all, the case-law of the Court of Cassation, according to which, having regard also to the case-law of the Court of Justice of the European Union, liability to pay import VAT arises at the time when goods are presented to customs in order to be brought into the territory of the European Union, as is the case with customs duties, import VAT being a tax that must be assessed and levied at the time when the chargeable event, namely the fact of importation, occurs.
- 12 Therefore, in the event that a declaration of intent, in which it is falsely asserted that the importer habitually carries out intra-Community transactions, is invalid, as it is in the present case, both the importer and the importer’s indirect representative become liable to pay the VAT, jointly and severally, since the representative submits to the customs authority the declaration of intent, which, pursuant to the power of attorney conferred on that representative, becomes its own.
- 13 In conclusion, even though import VAT is not, strictly speaking, counted as a ‘border’ duty, or as a customs duty, but rather as a ‘domestic-law’ tax, and thus as different from those duties, it shares with them the same tax point (judgments of the Court of Justice of 5 May 1982, *Schul*, C-15/81, paragraph 21, and of 11 July 2013, *Harry Winston*, C-273/12, paragraph 41), as is contemplated by Article 34 of Presidential Decree No 43/1973.
- 14 Next, the principle has been developed in the recent case-law of the Court of Cassation that, in the event of the release for free circulation of goods originating outside the European Union and intended to be placed in a tax warehouse, the person making the customs declaration will not be liable for any failure to pay tax relating to the removal of the goods, but will be liable where the imported goods are supplied for consumption immediately after customs transit.

- 15 The approach taken by the Court of Cassation, as described above, is not followed by the ordinary tax courts. They have held that, in the absence of any express provision of national law identifying the persons ‘designated’ as liable to pay import VAT, in accordance with Article 201 of Directive 2006/112, the rules relating to customs debts that govern the joint and several liability of the importer and the importer’s indirect customs representative, for the purposes of EU legislation, cannot be interpreted broadly.
- 16 According to the referring court, the reference to the Court of Justice of the European Union is necessary for three reasons. In the first place, it is necessary, in order for the referring court to give judgment in the case, for it to have an interpretation of the provisions mentioned in the questions referred for a preliminary ruling, *inter alia*, so that it can assess the conformity of the national legislation with EU legislation. In the second place, that interpretation will be of general interest for the uniform application of EU law. Lastly, the national case-law of the ordinary courts, on the one hand, and of the Court of Cassation, on the other, provide conflicting interpretations of the rules of EU law at issue.
- 17 The interpretation provided by the Court of Justice of the European Union regarding the scope and meaning of Article 201 of Directive 2006/112, and in particular the meaning of the terms ‘designated’ and ‘recognised’, with reference to ‘persons’ liable to pay VAT to the Member State of importation, will be decisive for the resolution of the dispute.
- 18 If those terms are to be interpreted narrowly, the national legislature would need to identify expressly the persons liable to pay import VAT. If this is the case, the referring court will have to find that the national legislation solely designates the importer as being liable to pay import VAT.
- 19 If, on the other hand, the terms in question are to be understood in a broad sense, the referring court will need to apply broadly the national legislation relating to taxes and duties other than import VAT, such as customs duties, and consequently find not only the importer liable, but also other persons, jointly and severally with the importer, even though they are not expressly ‘designated’ or ‘recognised’ as being liable to pay VAT (in particular, indirect customs representatives).
- 20 The interpretation of Article 77(3) of Regulation No 952/2013 (Union Customs Code) is just as decisive for the resolution of the dispute.
- 21 If in fact the application of that provision must be limited to customs duties, the recognition of any liability on the part of indirect customs representatives to pay import VAT would be precluded, both in the case where imported goods are placed in a tax warehouse and are not intended for immediate sale and in the case where they are supplied for consumption immediately after customs transit.