Case C-72/24 [Keladis I] [i]

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:

30 January 2024

Referring court:

Dioikitiko Protodikeio Thessalonikis (Greece)

Date of the decision to refer:

30 November 2023

Appellant:

HF

Respondent:

Anexartiti Archi Dimosion Esodon

Subject matter of the main proceedings

Action for annulment of the notices of assessment by which the appellant was declared jointly liable for smuggling offences, and which imposed on him increased taxes for those offences, declared him jointly and severally liable for the payment of the total amount of those increased taxes and charged to him, jointly and severally with the other co-authors of the offence, the amount of value added tax (VAT) evaded in each import declaration.

Subject matter and legal basis of the request

Reference for a preliminary ruling – Duty – Value added tax (VAT) – Customs value – Declaration of a customs value lower than the real value – Taxable amount for VAT – Transaction value – Determination – Method for determining the transaction value – Person liable for payment of import VAT

[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.

Questions referred for a preliminary ruling

1. Are the statistical values referred to as 'threshold values'/'fair prices', which are based on Eurostat's Comext statistical database and are derived from OLAF's information system (Anti-Fraud Information System, 'AFIS'), of which the Automated Monitoring Tool ('AMT') is an application, available to the national customs authorities through their respective electronic systems? Do they meet the requirement of accessibility for all economic operators, as referred to in the judgment of 9 June 2022, *Fawkes Kft.*, C-187/21? Do they contain solely aggregated data, as defined in Regulations Nos 471/2009 and 113/2010 on Community statistics relating to external trade with non-Member States, as in force at the relevant time?

2. In the context of *ex post* controls in which it is not possible to physically check the imported goods, may those statistical values in the Comext database, if regarded as generally accessible and as not containing aggregated data only, be used by the national customs authorities solely in order to substantiate their reasonable doubts as to whether the value declared in the declarations represents the transaction value, that is to say, the amount actually paid or payable for those goods, or may they also be used to determine the customs value of the goods, in accordance with the alternative method referred to in Article 30(2)(c) of the Community Customs Code (Regulation No 2913/[92]) [corresponding to Article 7[4](2)(c) of the Union Customs Code (Regulation No 952/2013); 'deductive method'] or possibly another alternative method? How does the fact that it cannot be established that identical or similar goods are involved in transactions at the relevant time, as defined in Article 152(1) of Regulation (EEC) No 2454/93 (the implementing regulation), affect the answer to that question?

3. In any event, is the use of those statistical values to determine the customs value of certain imported goods, which is equivalent to the application of minimum values, consistent with the obligations arising under the World Trade Organization (WTO) International Agreement on the Determination of Customs Valuation, otherwise known as the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, to which the European Union is a party, in view of the fact that that agreement expressly prohibits the use of minimum values?

4. In relation to the previous question, is the reservation in favour of the principles and general provisions of the aforementioned International Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, laid down in Article 31(1) of the Community Customs Code (Regulation No 2913/[92]) concerning the fall-back method for determining the customs value and, accordingly, the exclusion of the application of minimum values laid down in Article 31(2) [which does not appear in the corresponding provision of Article 74(3) of the Union Customs Code (Regulation No 952/2013)], valid only where that method is applied or does it govern all the alternative methods for determining customs value?

5. Where it is established that simplification through the grouping of headings, within the meaning of Article 81 of the Community Customs Code (Regulation No 2913/92) [now Article 177 of the Union Customs Code (Regulation No 952/2013)], was used on importation, is it possible to apply the alternative method set out in Article 30(2)(c) of the Community Customs Code (Regulation No 2913/1992) [corresponding to Article 70(2)(c) [Article 70(2)] of the Union Customs Code (Regulation No 952/2013)], irrespective of the disparity between the goods declared under the same TARIC code in the same declaration and the value fictitiously established as a result for those goods not belonging to that tariff classification code?

6. Finally, irrespective of the preceding questions, are the provisions in the Greek legislation concerning the determination of the persons liable for payment of import VAT sufficiently clear, pursuant to the requirements of EU law, in so far as they designate the 'deemed owner of the imported goods' as the person liable?

Provisions of European Union law and case-law relied on

Council Decision 87/369/EEC of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto (OJ 1987 L 198, p. 1)

Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1): Article 3(1) and Annex I

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1: recital 6, Article 4(10), Article 29(1), Articles 30, 31, 59, 62, 63, 68, 74, 78, 79, 81, 201, 213, Article 220(2) and Article 221(3) and (4) ('the CCC')

Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1): Article 19(1), Article 142(1), Articles 150, 151, 152 and 181a

Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), pursuant to which the European Community also concluded the 'Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994' (OJ 1994 L 336, p. 119)

Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1): Articles 23 and 24

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1: recitals 43 and 44 and Article 2(1), Articles 30, 70, 85, 201 and 211

Regulation (EC) No 471/2009 of the European Parliament and of the Council of 6 May 2009 on Community statistics relating to external trade with non-member countries and repealing Council Regulation (EC) No 1172/95 (OJ 2009 L 152, p. 23): Article 3(1), Article 4(1), Article 5(1), Articles 6 and 8

Commission Regulation (EU) No 113/2010 of 9 February 2010 implementing Regulation (EC) No 471/2009 of the European Parliament and of the Council on Community statistics relating to external trade with non-member countries, as regards trade coverage, definition of the data, compilation of statistics on trade by business characteristics and by invoicing currency, and specific goods or movements (OJ 2010 L 37, p. 1): Article 4(1) and (2)

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast) (OJ 2013 L 269, p. 1): Articles 71, 72, 74 and 177 ('the UCC')

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): Article 222

Judgments of the Court of Justice of 28 February 2008, *Carboni e derivati* (C-263/06, EU:C:2008:128); of 29 July 2010, *Pakora Pluss* (C-248/09, EU:C:2010:457); of 12 December 2013, *Christodoulou and Others* (C-116/12, EU:C:2013:825); of 16 June 2016, *EURO 2004. Hungary* (C-291/15, EU:C:2016:455); of 9 March 2017, *GE Healthcare* (C-173/15, EU:C:2017:195); of 9 November 2017, *LS Customs Services* (C-46/16, EU:C:2017:839); of 20 December 2017, *Hamamatsu Photonics Deutschland* (C-529/16, EU:C:2017:984); of 20 June 2019, *Oribalt Rīga* (C-1/18, EU:C:2019:519); of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung* (C-26/18, EU:C:2019:579); of 19 December 2019, *Amoena* (C-677/18, EU:C:2019:1142); of 18 June 2020, *Hydro Energo* (C-340/19, EU:C:2020:488); of 9 July 2020, *Direktor na Teritorialna direktsiya Yugozapadna Agentsiya 'Mitnitsi'* (C-76/19, EU:C:2020:543); of 19 November 2020, *5th AVENUE* (C-775/19, EU:C:2020:948); of 3 March 2021, *Hauptzollamt Münster (Place where VAT is incurred)* (C-7/20, EU:C:2021:161); of 22 April 2021, *Lifosa* (C-75/20, EU:C:2021:320); of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167), of 12 May 2022, *U.I. (Indirect customs representative)* (C-714/20, EU:C:2022:374), of 9 June 2022, *Baltic Master* (C-599/20, EU:C:2022:457); and of 9 June 2022, *FAWKES* (C-187/21, EU:C:2022:458)

Provisions of national law relied on

Nomos 2859/2000, Kyrosi Kodika Forou Prostithemenis Axias (Law 2859/2000, Codification of the Value Added Tax Code) (FEK A' 248/A/7.11.2000):

Article 1, Article 2(1) and Article 20(1)

Article 35(3): 'For the import of goods, the person liable to pay tax is the person deemed to be the owner of the imported goods, in accordance with the provisions of the customs legislation.'

Nomos 2960/2001, Ethnikos teloneiakos kodikas (Law 2960/2001, National customs code) (FEK A' 265/A/22.11.2001):

Article 1(1), Article 28(1) and (2),

Article 29(6): 'The person liable for payment of the customs debt is the declarant, the person in whose name a declaration of excise duty and other taxes is lodged, and any other person against whom the debt is incurred under the provisions of the customs legislation …'.

Article 31, Article 33(1), Article 142

Article 150: '1. Pursuant to Article 142(2) of the present Code and depending on the degree of participation of each person, and irrespective of any criminal prosecution brought against them, an increased tax of three to five times the amount of the customs duties corresponding to the subject matter of the customs offence shall, pursuant to Articles 152, 155 et seq. of the present Code, be imposed on each person who has participated in the offence in any way, jointly and severally, for all the participants. To that end, the customs duties shall be calculated in accordance with the provisions of the Community Customs Code and the relevant national provisions on incurring a customs debt. In the case of …undervaluation, the basis for the imposition of the aforementioned increased tax shall be the difference between the customs duties resulting from the value obtained at the time of customs clearance and the current transaction value. Where three times the amount of the duties and other taxes corresponding to the goods smuggled is less than one thousand five hundred euros (EUR 1 500), the fine shall be fixed at that amount in respect of excise goods and at half that amount in respect of other goods … Duties, taxes and other charges for which payment has been evaded, notwithstanding the fact that a customs debt has been legally incurred, may be charged separately by means of a reasoned notice of assessment. … 5. The notice of assessment issued shall be independent both of any parallel legal prosecution for a criminal offence and any judgment issued subsequently in criminal proceedings.'

Article 155

Succinct presentation of the facts and procedure in the main proceedings

1 The appellant is the owner of a clothing undertaking who, in the course of his commercial activity, purchased clothing imported from Turkey by a clothing importer.

2 In 2014, the clothing importer in question had established, as sole proprietor, a wholesale clothing undertaking with its headquarters in Thessaloniki. By the end of 2016, the undertaking had lodged hundreds of import declarations with a declared value of goods of around EUR 6 000 000. In 2016, the undertaking was subject to an audit by the customs authority following a complaint concerning the undervaluation of imported goods.

3 The audit revealed irregularities in the operation of the undertaking and the imports made by it. It was found, inter alia, that the alleged importer was an employee of another clothing retailer. Furthermore, the goods on which physical checks were conducted were found to correspond, in terms of quantity, to the figures given in each import declaration, but varied in quality, composition, size and design, as well as in value, from the declarations made. The value declared did not correspond to the import invoices attached to the declarations, the declared values being, according to the inspectors, manifestly lower than the actual values.

4 Following the control, the customs authority concluded that the undertaking was owned by the importer in name only, whereas the real operator was the aforementioned clothing trader. According to the inspection authorities, the smuggling ring operated as follows: economic operators interested in importing clothing from Turkey initially went to that country and made contacts with suppliers, whom they paid in cash. The agreement stipulated that the goods would not be exported directly by the seller, but would be delivered to a transport company which would undertake the transport to Greece. The goods were packaged in such a way as to mislead the Greek customs authorities as to their quality and value. For the customs clearance of the goods, another Turkish company issued an invoice with inaccurate values (constituting an undervaluation); the invoice included all the goods and listed the undertaking as the purchaser. The goods were described in general terms in the invoice in question, but the values shown were much lower than the prices actually paid by the Greek economic operators to the real Turkish suppliers.

5 After customs clearance, the goods were transported by another transport company to the actual purchasers throughout Greece. The fee for the transport from Turkey was paid by the final consignees in cash without a tax invoice being issued, while the VAT corresponding to the invoice issued by the undertaking was also paid in cash. The values indicated on the invoices for domestic sales were slightly higher than those declared on importation, while the quantities indicated on the majority of the invoices were inaccurate, since the majority of the consignees did not want the invoices to reflect the actual quantity received.

6 The Thessaloniki customs office determined that the total amount of tax and other charges evaded by almost all of the undertaking's imports was EUR 6 211 300.19.

7 In particular, it was found that in 2014 the appellant knowingly ordered, purchased, imported and received, together with the other main partners in the importer's undertaking, goods that had been undervalued, imported under nine declarations to which invoices containing inaccurate values for the goods had been attached . The appellant admitted that he had conducted the relevant transactions with the importer's undertaking, but denied that the goods had been undervalued and disputed the way in which the customs value of the goods had been calculated.

8 However, the customs authority took the view that all those involved as described above in the smuggling ring and the appellant, as the final consignee and purchaser of the goods, engaged, in concert, in intentionally carrying out the constituent elements of the offence of smuggling, consisting in undervaluing the goods on importation and in the possession of those goods which were released for consumption.

9 That led to the adoption of the notices of assessment contested by the appellant. Each notice stated that both the appellant, as the final consignee of the goods in each declaration and the actual importer, as well as the persons associated with the undertaking's activities, were guilty of the offence of smuggling. It was considered that they had acted in concert and colluded to deprive the Greek State of the tax charges levied on the goods imported from abroad, thereby evading payment of the relevant VAT and obtaining the corresponding direct financial benefit.

10 On the basis of the foregoing, the value of the goods imported under each declaration was reassessed and the amount of VAT evaded per importer and per declaration was calculated and charged jointly and severally to all the co-authors of the offence. In addition, a penalty consisting in increased taxes amounting to three times the amount of VAT evaded was imposed.

11 On appeal, the appellant was acquitted of the smuggling offence by a final judgment in 2021.

The essential arguments of the parties in the main proceedings

12 First of all, the appellant denies any involvement in the alleged smuggling and submits that there is no element of undervaluation, whereas the respondent contends that the appellant's allegations should be rejected as unfounded and unsubstantiated.

13 The appellant further submits that the referring court is bound by his acquittal, by final judgment, of the offence of smuggling. On the other hand, the respondent submits that the binding effect of the aforementioned final judgment of acquittal

with regard to the referring court is limited to the issue of smuggling and the increased taxes imposed as a result, maintaining that the part of the judgment charging the corresponding VAT on the goods covered by the declarations at issue is not binding on the referring court.

14 Furthermore, the appellant submits that the customs authority wrongly determined *a posteriori* the customs value of the goods at issue. Since the goods in each declaration were different (with different TARICs), the appellant submits that the customs authority unlawfully took into account the value of the goods under the TARIC code of the highest tariff heading as declared by the importer in the context of simplification through the grouping of headings. He claims that the simplification procedure was followed in a few cases only.

15 Furthermore, according to the appellant, the customs authority wrongly claims that it took into account the price of the goods representing the largest quantity in the declaration or the prices at which the products in question were sold during the same period. However, the appellant argues that the value taken into account was that of goods unrelated to those imported under the declarations at issue, and that he himself did not even trade in such goods.

16 In addition, the appellant maintains that the 'fair prices'/'threshold values' method, based on data extracted from the electronic database, the Community AFIS system and AMT, does not fall within any of the methods for calculating the customs value set out exhaustively in the Union Customs Code, is arbitrary and, therefore, that it was not lawful to use it. Such values may only be used as a basis for challenging the declared value and not in order to determine the customs value.

17 In particular, the appellant alleges that, at the time when the declarations at issue were submitted, in 2014, the 'fair prices' used were not even applicable. Even if it were considered legitimate to use those prices for the purposes of determining the customs value, it was not legitimate, in the present case, to use the prices of the goods with the highest tariff heading for all the goods imported under the declarations at issue. Moreover, the appellant submits that such an approach resulted in significant variations in the price of the same product in different declarations.

18 Consequently, according to the appellant, first, the customs value was determined in the present case on the basis of the TARIC codes in an unlawful manner and, second, in any event, no specific reasons were given for not using the transaction value or other alternative methods or for the method of calculating the customs value of the goods on importation.

19 According to the respondent, simplification through the grouping of headings was applied across the board to all the declarations at issue. It contends, moreover, that the customs value was not determined arbitrarily, but was based on the unit price method which was applied using a minimum tariff rate established on the basis of

50% of the fair price per kilogram of goods (and not per unit), obtained from the AMT electronic system using AFIS MAB.

20 Furthermore, the respondent maintains that the use of simplification through the grouping of headings does not preclude the application of the aforementioned method of determining the customs value. The reason why that method was applied is that, in the present case, the transaction value method for identical or similar goods could not be applied, first, on account of the incomplete description of each product in the relevant invoices and, second, because it was impossible to physically check them, as they had escaped seizure. However, even if it could be applied, that method would, in the respondent's view, lead to the determination of a higher value. With regard to the significant discrepancies between the various declarations for the value of the same product, the respondent contends that this is due, first, to the fact that the customs value is calculated per unit and not per kilogram, as is the case with threshold values and, second, to the tariff heading, under which they were grouped together, being considered as a single product.

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

21 The referring court considers, as a preliminary point, that although it is not bound by the aforementioned acquittal judgment as regards charging the appellant for the import VAT evaded it must, however, in accordance with the presumption of innocence, take that judgment into account in relation to the pleas alleging that the appellant was not aware that the imported goods at issue had been undervalued.

22 Further, the referring court considers that the determination of whether or not the customs authorities acted lawfully in establishing the undervaluation must, logically, precede the assessment of whether or not the appellant was aware of that undervaluation. That is because the question relates to the constituent elements of the alleged infringement, which concerns the question of whether the price actually agreed and paid, on which the duties and other taxes are calculated, was, in the present case, higher than that declared and shown on the invoices presented at the time of customs clearance. The referring court therefore focuses on examining the merits of the plea in law concerning the incorrect determination of the customs value by the customs authority.

23 In the light of the provisions of European customs law governing the question of the method for determining the customs value, the existing case-law of the Court of Justice on the calculation of the customs value of imported goods in the context of the possibility of using 'statistical values', and the integration of the relevant provisions of the CCC (now the UCC) into a broader framework of international legal rules and the corresponding obligations of the European Union, the referring court finds that the use of 'statistical values' in the formation of 'fair prices' and 'threshold values' is not unprecedented. The purpose of such use is to assist the competent national customs authorities, on the one hand, in detecting cases of fraud and evasion of duties and taxes on imports through the undervaluation and,

on the other hand, and by extension, in determining the customs value of imported goods.

24 In addition to the national statistical databases, there are also corresponding European databases, such as the Customs Information System under Regulation No 515/97 and Comext (managed by Eurostat), the data from which is fed into OLAF's Anti-Fraud Information System (AFIS), of which the Automated Monitoring Tool (AMT) is an application.

25 The national customs authorities have access to the above data through their own information systems, but the same does not apply to all economic operators. Furthermore, the statistical databases governed by Regulations Nos 471/2009, 1172/1995 and 113/2010 in principle contain aggregate data, which do not take into account the particular characteristics of the goods or the commercial level of sales, even though the determination of the statistical value is subject to an express reservation in favour of the application of the general principles laid down in the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (WTO Agreement on the Determination of Customs Valuation), excluding arbitrary or fictitious values.

26 In view of the foregoing, according to the referring court, 'statistical values' in the form of 'fair prices' may undoubtedly be used by the customs authorities in order to establish reasonable doubt as to the veracity of the declared transaction value, in conjunction with the other control verifications carried out by the customs control bodies. It should be noted in that regard that such 'statistical values' may be used by the European Union to determine the deficit in making 'own resources' available by Member States that do not conduct effective fraud detection checks (judgment of 8 March 2022, *Commission* v *United Kingdom*, C-213/19, ECLI:EU:C:2022:167).

27 However, given that the aforementioned judgment of the Court of Justice (see, by way of example, paragraph 412) also refers to the exclusive competence of the Member States to determine the customs value as the basis for calculating customs duties in accordance with the successive methods provided for in the CCC (and now in the UCC) and to the non-binding nature of the available risk criterion, the referring court has reasonable doubts as to whether those average statistical values ('threshold values') may be used as such for the purpose of determining the customs value of goods.

28 Moreover, doubts also arise as to whether the use of those values can specifically be included in the alternative method under Article 30(2)(c) of the [CCC], which, in accordance with the practice of the Greek customs authorities, was applied in the present case, despite the fact that that method also refers to 'identical' and 'similar' goods. Furthermore, it does not appear that the time frame to which the values in question refer is within the time limits laid down in Article 152(1)(b) of Regulation No 2454/1993.

29 The referring court's doubts are exacerbated by the fact that the exclusive use of the aforementioned values essentially leads to the customs value being determined on the basis of minimum values, which are by definition fictitious, running counter to the philosophy of determining the customs value prevailing in international trade. Furthermore, the referring court's doubts as to the correct interpretation and application of the applicable rules of EU law are compounded by the specific nature of the imports at issue, which were made using the procedure provided for in Article 81 of the CCC (now Article 177 of the UCC), consisting in the declaration of a single common TARIC code, namely the one under which the goods are subject to the highest rate of customs duty, in respect of all the goods in the same declaration falling within different codes.

30 In view of those doubts as to the interpretation and application of the relevant provisions of the CCC and Regulation No 2454/93, together with the wider importance of resolving those issues of interpretation, since they arise in a large number of similar cases already pending before the Greek courts, the referring court considers that it must defer its final judgment and refer the first five questions to the Court of Justice for a preliminary ruling.

31 Finally, in so far as the present case concerns the charging of VAT (only) (as it concerns goods imported from Turkey into Greece, to which no customs duties are applicable) to the final consignee of the goods in question, the referring court, taking into account the fact that each Member State is to determine the person or persons designated or recognised as liable to pay VAT, provided that the national provisions are sufficiently clear and precise and in accordance with the principle of legal certainty, harbours doubts as to whether the provisions of Law 2859/2000 and Law 2960/2001 satisfy that condition and concludes that it is necessary to refer the sixth question to the Court of Justice for a preliminary ruling.