Case C-73/24 [Keladis II] [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:

WI

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 her increased taxes for those offences, declared her jointly and severally liable for the payment of the total amount of those increased taxes and charged to her, 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

[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. Where reasonable doubts arise as to whether the declared customs value of imported goods is their actual transaction value, but during the post-release control it is impossible to determine the transaction value on the basis of the methods set out in Article 30(2)(a) and (b) of Regulation (EC) No 2913/1992 and Article 74(2) of Regulation No 952/2013 (transaction value of identical and similar goods) because, on the one hand, the goods have escaped seizure and therefore it is impossible to physically check them and, on the other hand, the description of the goods in the documents accompanying the import declaration is general and vague, is an administrative practice under which, in the context of the 'deduction method' provided for in those provisions, 'threshold values', which are defined in the Automated Monitoring Tool (AMT) system of the Union Anti-Fraud Programme (AFIS) and determined by means of statistical methods, are used as the basis for determining the transaction value of the goods, compatible with the provisions of Article 30(2)(c) of Regulation No 2913/92 and of Article 74(2)(c) of Regulation No 952/2013?

2. If the first question is answered in the negative, is it permissible to use the aforementioned 'threshold values' in the context of any of the other methods described in Articles 30 and 31 of Regulation No 2913/92 and Article 74(1) to (3) of Regulation No 952/2013, in view, in particular, of the reasonable flexibility that must on the one hand distinguish the application of the 'fall-back method' under Article 31 of Regulation No 2913/92 and Article 74(3) of Regulation No 952/2013 and, on the other hand, the express prohibition on determining the customs value on the basis of minimum customs values, which is provided for in relation to that 'fall-back method' (Article 31(2)(f) of the Community Customs Code ('CCC') and Article 144(2)(f) of Regulation 2015/2447)?

3. If the answer to both of the preceding questions is in the negative, is it permissible under EU law not to charge VAT evaded to an importer who is subsequently found to have imported (and indeed systematically imported) goods at prices lower than those determined as the minimum commercially viable prices, where the customs authorities are unable, during the post-release control, to determine the customs value of the imported goods by any of the methods described in Articles 30 and 31 of Regulation No 2913/92 and Article 74(1) to (3) of Regulation No 952/2013, or is it permissible, in that case, as a last resort, to charge them on the basis of the statistically determined minimum acceptable prices, as has already been accepted in the case of charging by the Commission of loss of own resources to a Member State that did not carry out the appropriate customs checks (see judgment of the Court of Justice of 8 March 2022, *Commission* v *United Kingdom*, C-213/19, EU:C:2022:167)?

4. If the answer to the second or third question above is in the affirmative: must the statistically determined minimum values represent imports that took place at or around the same time as the imports subject to the checks and, if so, what is the maximum permitted interval between the imports used to derive the statistical

result and the imports checked? For example, may the 90 days provided for in Article 152(1)(b) of Regulation No 2454/93 and in Article 142(2) of Regulation 2015/2447 be applied by way of analogy?

5. If the answer to any of the first three questions is in the affirmative as regards the use of 'threshold values' in order to determine the transaction values of imported goods: where the procedure for simplifying the drawing up of customs declarations by grouping the TARIC codes of the goods, provided for in Article 81 of Regulation No 2913/92 and Article 177 of Regulation No 952/2013, has been adopted on importation, is an administrative practice whereby the customs value of all goods imported under each import declaration is calculated on the basis of the 'threshold value' determined for the product in question, the TARIC code of which has been recorded in the import declaration, since the customs authority considers that it is bound, on the basis of Article 222(2)(b) of Regulation 2015/2447, by the grouping carried out by the importer, consistent with the principle prohibiting the determination of arbitrary or fictitious customs values? Or, on the contrary, must the value of each product be determined on the basis of its own tariff heading even if the code is not recorded in the import declaration, in order to avoid the risk of arbitrary customs duties being imposed?

Provisions of European Union law and case-law relied on

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1: Articles 29(1), 30, 31, 78 and 81 ('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 142(1), Article 150(1), Article 151(1), Articles 152, 181a, and Annex 23

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): Article 48, Article 70(1), Article 74 and Article 177(1) ('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 1(2), Article 128(1), Article 140, Article 141(1), Articles 142, 144 and 222

Judgments of the Court of Justice of 28 February 2008, *Carboni e derivati* (C-263/06, EU:C:2008:128); 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 November 2017, *LS Customs Services* (C-46/16, EU:C:2017:839); of 20 June 2019, *Oribalt Rīga* (C-1/18, EU:C:2019:519); 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 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 2960/2001, Ethnikos teloneiakos kodikas (Law 2960/2001, National customs code) (FEK A' 265/A/22.11.2001):

Article 28(1) to (3), Article 29(1) and (2), Articles 31 and 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. …'

Article 155

Succinct presentation of the facts and procedure in the main proceedings

1 In 2014, a clothing importer 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.

2 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.

3 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, whose employee was the appellant in the present case. According to the control 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 understatement of value); 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.

4 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 and without invoice 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.

5 The Thessaloniki customs office determined that the total amount of tax and other charges evaded by almost all the undertaking’s imports was EUR 6 211 300.19. As regards, in particular, the appellant’s involvement in the aforementioned smuggling ring, the inspection report states that she was declared to be an office employee of the undertaking and that she was a direct colleague of the clothing trader, that she was fully aware of his activities, and that she accepted and carried out his orders, whereas the appellant denied that any infringement had been committed or that she had been involved in any way.

6 That led to the adoption of the notices of assessment contested by the appellant. Each notice found that both the final consignee of the goods in each declaration, as the actual importer, as well as the appellant and the other four persons associated with the undertaking’s activities, including the importer and the clothing trader, were guilty of the offence of smuggling. It was considered that they had acted in concert and had colluded to deprive the Greek State of the tax charges levied on the goods imported from abroad, thereby evading payment of

the relevant VAT for the goods that the final consignee received, and obtaining the corresponding direct financial benefit.

7 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 was imposed of increased taxes amounting to three times the amount of VAT evaded.

The essential arguments of the parties in the main proceedings

8 The appellant disputes the allegation that the goods were undervalued. In particular, she submits that the determination of the value of the goods using 'fair prices' or 'threshold values' was not lawful because the latter, as statistical data on import prices, could only be used as a basis for questioning the declared value and not as the method for determining the customs value, since such a determination may only be made on the basis of the methods laid down in the UCC.

9 Furthermore, the appellant argues that, in any event, the price was unlawfully determined on the basis of the TARIC code declared in each declaration in the context of the simplification procedure, since that code was declared by the importer at the suggestion of the customs officials in order to speed up the marketing of the goods declared, and did not correspond to the goods actually imported. She therefore submits that the inspectors erred in failing to carry out a physical check on the goods concerned, relying solely on the declared codes to arrive at a characterisation of the type of goods imported.

10 Moreover, the appellant states that only certain declarations included an application for tariff headings to be grouped, and that therefore in the others there is not even a factual basis for determining the value on the basis of a single TARIC code. Furthermore, in many cases, at the time of importation of the goods referred to in the declarations at issue, a physical check had taken place that did not find any discrepancy between the nature and quality of the imported goods and the declared values thereof, while the customs authorities subsequently proceeded to determine their value on the basis not of the goods actually imported but of other goods with a different TARIC code, and therefore with a higher 'threshold value'.

11 According to the appellant, such a method establishes an artificially high price for each product, with the result that the customs authority's finding relating to undervaluation cannot be substantiated, since in the present case the imports concerned goods which were sold at particularly low prices.

12 The respondent denies those allegations and contends that the method used to determine the value of the goods was lawful and appropriate. In particular, in all the declarations at issue the alleged importer requested the application of the simplified 'grouping of headings' procedure, pursuant to Article 177 of the UCC.

Those requests were accepted in all the declarations, so that the goods were treated from that point on as a single item, falling under the highest heading.

13 Next, after the undervaluation of the goods had been established by the auditor, the tariff heading declared in the declaration during the simplification procedure was used as the basis of calculation for determining the tax charges evaded.

14 As the respondent states, the contested notices did not apply the methods of determination based on the transaction value of identical and similar goods (Article 30(2)(a) and (b) of the CCC and Article 74(2) of the UCC): that was impracticable, given that the goods had escaped seizure and the description on the invoices accompanying the import declarations was general and vague.

15 Instead, the method set out in Article 30(2)(c) of the CCC ('deductive method') was applied. Specifically, a determination was made as to the value of the unit price at which the imported goods or identical or similar goods were sold in the customs territory of the European Union in the greatest aggregate quantity to persons not related to the sellers within the European Union, at or about the same time as the importation of the goods being valued.

16 In applying that method, the customs authority, having access to the AMT system of AFIS, took into account the 'threshold values' contained in that system, which are set at 50% of the reasonable price per kilogram of goods, and ultimately coming to a determination of the customs value that was the same as the 'threshold value'. In particular, the customs authority considered that, since those prices (namely half the average reasonable prices of the imported goods, based on the processing of the statistical data available to the Union on imports into its territory) are the determining factor in establishing a minimum value below which no legitimate commercial transaction for the goods in question can be viable, where the price indicated on the invoice is below that threshold, there is a presumption that the goods have been undervalued.

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

17 According to the referring court, where the customs authorities have reasonable doubts as to whether the declared transaction value corresponds to the price actually paid and therefore to the customs value of the imported goods, they may reject the declared value and determine the price on the basis of one of the methods described in Article 30 of the CCC and Article 74 of the UCC, respectively. In the present case, the referring court finds, on the basis of the evidence produced, that such doubts could reasonably have arisen in the minds of the customs authorities.

18 However, this raises the question as to how the customs value of the goods should be determined in order, first, to establish whether the value has actually been understated in each individual case of importation of goods and, second, to charge the taxes evaded (import VAT) and the related increased taxes.

19 The customs authority applied the 'deductive method', in which it took the 'threshold values' into account. However, the statistical method for determining corrected average prices and minimum acceptable prices was first developed as a risk analysis tool and not as a method for determining the customs value of specific goods in the context of post-release controls. Furthermore, the referring court notes that, as a purely statistical method, that method for determining minimum import prices can lead to a percentage of false positives, namely cases in which values are not in fact being understated.

20 On that basis, the referring court considers that the 'threshold values' defined in the AMT system cannot be used for the purpose of determining the customs value *a posteriori* under the 'deductive method', particularly in view of the fact that, according to the wording of those provisions, the unit selling price of the imported goods or of identical or similar goods must be determined. Consequently, the problem of the impossibility of physically checking the imported goods in order to determine whether they are identical or similar also arises in the application of that method. Such an impossibility also precluded the application of the methods provided for in Article 30(2)(b) and (c) of the CCC and Article 74(2)(b) and (c) of the UCC.

21 Similarly, according to the referring court, 'threshold values' cannot be used in the context of any of the other methods for determining the transaction value referred to in Articles 30 and 31 of the CCC and Article 74 of the UCC. In particular, it follows from those provisions that the computed value method presupposes knowledge of the precise characteristics of the goods in question, while the application of the 'fall-back method' expressly prohibits the determination of the customs value on the basis of minimum customs values.

22 Furthermore, it is clear from those provisions of both the CCC and the UCC that the customs authorities are limited, as regards the calculation of the customs value of goods in the context of post-release controls, to applying the methods expressly described in Articles 30 and 31 of the CCC and Article 74 of the UCC. Consequently, the 'threshold value' cannot be used to charge to a particular importer *a posteriori* the amount by which the declared value falls short of the 'threshold value'.

23 On the basis of those assumptions, the contested notices should be annulled, since, according to the express admission of the customs authority, the determination of the customs value of the imported goods was ultimately based on the 'threshold values' included in the AMT system.

24 However, the referring court is not without its doubts regarding the view set out above, which is based on an interpretation of the relevant provisions of EU customs law in the absence of any case-law of the Court of Justice in a case with the same characteristics as the present case. In particular, the interpretative assumption above that 'threshold values' cannot be used has the effect of preventing an importer who is subsequently found to have imported (and indeed

systematically imported) goods at prices below those determined as the minimum commercially viable prices from being penalised for the customs duties evaded.

25 That is because, in the present case, the impossibility of physically checking all the goods, given the considerable period of time that has elapsed and the fact that such goods are immediately placed on the market, makes it impossible to calculate their actual transaction value and thus to establish that they have been undervalued.

26 It could therefore also be argued (in line with the position taken by the Greek customs authority) that, in the case of individual importers being charged, the value of the imported goods may, as a last resort, be determined on the basis of 'threshold values', as determined statistically by the competent institutions of the European Union.

27 However, if that interpretation were to be accepted, the referring court finds that it is not clear from the contested notices exactly what the 'threshold value' used for each declaration was, or whether it was derived from statistical processing of imports taking place at or about the same time as the goods being valued. The requirement of a temporal link between the unit price and the importation of the goods in question arises expressly with regard to the application of the method described in Article 30(2)(b) and (c) of the CCC and Article 74(2)(b) and (c) of the UCC, set at a maximum interval of 90 days. However, where another method for determining the customs value is applied, there is no express definition of the maximum interval after importation of the goods for the prices taken as a basis for the statistical formation of the 'threshold values'.

28 Furthermore, the grouping of tariff heading codes, which is binding on both the customs authority and the importer so that, thereafter, they treat the goods imported under each import declaration as a single item, is a practice which, in the context of the post-release control concerning the calculation of the transaction value, may lead to the determination of a fictitious value for the goods grouped under the TARIC code. That is because it cannot be ruled out that the 'threshold value' corresponding to the goods of the TARIC code indicated in the import declaration may be a multiple of the 'threshold value' of other goods imported under the same import declaration.

29 Thus, the simplification procedure may wrongly create the impression that certain goods, for which the actual transaction value is in fact indicated in the import declaration, have been undervalued. The same problem would, moreover, arise even if the transaction value of the imported goods were determined on the basis of TARIC codes being grouped without recourse to 'threshold values', through the application of any of the methods for determining the transaction value provided for in Articles 30 and 31 of the CCC and Article 74 of the UCC.

30 Accordingly, in the view of the referring court, in so far as the transaction value of the goods referred to in the declarations at issue was determined on the basis not

of the value of the product itself but of the goods corresponding to the TARIC code indicated in the import declaration, the contested notices are invalid on that ground as well. However, as the customs authority points out, under Article 222(2)(b) of Regulation 2015/2447, goods which are the subject of an application for simplification are thereafter regarded as constituting a single item. Moreover, the Court has already recognised (judgment of 9 June 2022, *Baltic Master*, C-599/20, EU:C:2022:457, paragraphs 52 to 54) that it cannot be considered unreasonable for the customs authorities to choose to rely, in order to determine the transaction value of the goods, on information submitted by the declarant himself, even if, in so doing, a single value is determined for goods which, although ascribed to the same TARIC code, are not homogeneous. It could therefore be argued that the practice of the customs authorities described above is indeed based on the provisions of EU customs law.

31 It follows from the foregoing that, since the import declarations at issue run from April 2014 to December 2016, it is necessary to interpret both the provisions of the CCC and Regulation No 2454/93 and the corresponding provisions of the UCC and Regulation 2015/2447. That interpretation is neither obvious nor free from reasonable doubt, given that the Court has yet to rule on whether the use of minimum acceptable prices or 'threshold values' is permitted for the determination of the value of imported goods, or on the issue of whether the grouping of TARIC codes is binding on the customs authorities in the context of a post-release control.

32 In the light of the foregoing and the fact that there are hundreds of similar cases pending before the referring court in which the same legal question arises, the questions set out above must be referred to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU.