JUDGMENT OF THE COURT (Eighth Chamber)

15 July 2010 *

In Case C-354/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 14 August 2009, received at the Court on 3 September 2009, in the proceedings

Gaston Schul BV

v

Staatssecretaris van Financiën,

THE COURT (Eighth Chamber),

composed of C. Toader, President of the Chamber (Rapporteur), P. Kūris and L. Bay Larsen, Judges,

* Language of the case: Dutch.

Advocate General: J. Mazák,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

— the European Commission, by B.-R. Killmann and W. Roels, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 33 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code').

2 The reference has been made in the course of proceedings between Gaston Schul BV ('Gaston Schul') and the Staatssecretaris van Financiën (Netherlands State Secretary for Finances) concerning a measure for post-clearance recovery of a customs debt.

Legal context

European Union legislation

3 Article 29(1) of the Customs Code provides:

'The customs value of imported 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 Community, adjusted, where necessary, in accordance with Articles 32 and 33 …

…'

4 Article 33 of the Customs Code is worded as follows:

'Provided that they are shown separately from the price actually paid or payable, the following shall not be included in the customs value:

(a) charges for the transport of goods after their arrival at the place of introduction into the customs territory of the Community;

(b) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation of imported goods such as industrial plant, machinery or equipment;

(c) charges for interest under a financing arrangement entered into by the buyer and relating to the purchase of imported goods, irrespective of whether the finance is provided by the seller or another person, provided that the financing arrangement has been made in writing and, where required, the buyer can demonstrate that:

— such goods are actually sold at the price declared as the price actually paid or payable, and

— the claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided;

(d) charges for the right to reproduce imported goods in the Community;

(e) buying commissions;

(f) import duties or other charges payable in the Community by reason of the importation or sale of the goods.'

5 Article 220(1) of the Customs Code provides:

'Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time-limit may be extended in accordance with Article 219.'

The dispute in the main proceedings and the question referred for preliminary ruling

6 In its capacity as a customs agent, Gaston Schul brought before the Netherlands authorities, from 1998 to 2000, several declarations for release of fish products into free circulation.

7 That company made those declarations, in its name and on its behalf, on the instructions of an Icelandic carrier which, in turn, was acting on the instructions of an Icelandic exporter.

8 Those declarations were accompanied by requests for the application of a preferential zero rate on the ground that the goods in question originated in the EEA. Gaston Schul attached copies of the invoices issued by the Icelandic exporter, which referred to DDP (Delivered Duty Paid) as a delivery term and stated that '[t]he exporter of the products covered by this document … declares that, except where otherwise clearly indicated, these products are of EEA preferential origin'. The DDP delivery term was also mentioned on the customs declarations.

9 An investigation into the origin of the goods in question subsequently established that they in fact came from third countries and that the preferential rate had therefore been incorrectly applied.

10 The Staatssecretaris van Financiën accordingly proceeded with the post-clearance recovery of customs duties and, by notices of assessment of 7, 11 and 28 June 2001, requested Gaston Schul to pay those duties.

11 That administration calculated the amount of the duties to be recovered by taking as the customs value the transaction price, as it appeared on the import declarations, without deducting the amount of the customs duties to be recovered.

12 The Staatssecretaris van Financiën subsequently rejected the complaint by which Gaston Schul sought to reduce its liability by requesting that the amount of customs duties subsequently calculated be deducted from the contractual price.

13 The Rechtbank te Haarlem (Haarlem District Court) ruled that the action brought against the rejection of that complaint was unfounded. As the ruling of that court was upheld on appeal, Gaston Schul appealed in cassation to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

14 The Hoge Raad begins by noting that, in the case in the main proceedings, the seller and the buyer had agreed that the customs duties were to be borne by the seller. However, at the time of conclusion of the contract, they were mistaken as to the origin of the goods and, consequently, as to the amount of customs duties legally owed.

15 In order to resolve the dispute before it, the Hoge Raad considers it essential to establish whether, in circumstances such as those in the main proceedings, the requirements of Article 33 of the Customs Code have been satisfied.

16 In this respect, the Hoge Raad der Nederlanden refers, first, to Advisory Opinion 3.1, entitled 'Meaning of "are distinguished" in the interpretative note to Article 1 of the Agreement: duties and taxes of the country of importation' of the Technical Committee on Customs Valuation of the World Customs Organisation and, second, to Commentary No 5 of the Customs Code Committee (Customs Valuation Section) ('Commentary No 5').

17 Thus, in examining whether, where the price paid or payable includes an amount corresponding to the duties and taxes of the country of importation, those duties and taxes should be deducted in those instances where they are not shown separately on the invoice and where the importer had not otherwise claimed a reduction in this respect, the aforementioned Technical Committee expressed the view that, '… [s]ince the duties and taxes of the country of importation are by their nature distinguishable from the price actually paid or payable, they do not form part of the customs value'.

18 In addition, Paragraphs 8 to 10 of Commentary No 5 state:

'8. Guidance on the meaning of the term "shown separately" in regard to import duties and other charges payable by reason of the importation or sale of the goods has been given in an Advisory Opinion by the WCO Technical Committee on Customs Valuation. This Advisory Opinion No 3.1 states that duties and taxes of a country of importation do not form part of the customs value, in so far as, by their nature, they are distinguishable from the price actually paid or payable. They are, in fact, a matter of public record.

9. In this context "shown separately" has effectively the same meaning as "distinguishable". The facts on which the Advisory Opinion is based state that duties/taxes were not shown separately on the invoice; but, obviously, it must be presumed in the context of the Advisory Opinion that some clear indication exists on the invoice or on some other accompanying document that the price actually paid or payable includes these charges.

10. In keeping with paragraph 4 above, the amount to be excluded from the customs value should be specified in the DV 1 declaration.'

19 The national court takes the view that the documents referred to in paragraph 16 of the present judgment do not suffice to establish that, in a situation such as that in the main proceedings, the conditions laid down in Article 33 of the Customs Code have been fulfilled.

20 Pleading thus in favour of the exclusion of the import duties from the customs value is the fact that, according to paragraph 9 of Commentary No 5, the Customs Code does not require that the amount of those duties be stated expressly on the invoice. It suffices that the invoice or some other accompanying document states clearly that those duties are included in the price.

21 In addition, even on the assumption that the seller and the buyer take the view that customs duties are payable in respect of a certain importation, it may be difficult for them to know in advance the exact amount of those duties, particularly where there is doubt as to the tariff classification of the goods in question.

22 Furthermore, the inclusion of import duties in the customs value would, in a situation such as that in the main proceedings, result in the payment of import duties not only on the actual economic value of goods, but also on import duties.

23 On the other hand, arguing against the exclusion of import duties from the customs value is the fact that, in the light of the same paragraph 9 of Commentary No 5, it would seem to be important that the parties to the contract should indicate that they

were aware that the price was in fact intended to cover those duties. In the present case, however, since the parties had an inaccurate impression of reality, there is no way of knowing at what price the seller would have agreed to sell had it been aware of the origin of the goods.

24 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'In the case of subsequent entry in the accounts within the meaning of Article 220 of the Community Customs Code, must it be assumed that the condition laid down in Article 33 [of that code], under which import duties are not to be included in the customs value, is satisfied where the seller and buyer of the goods concerned have agreed on the delivery term "delivered [duty] paid" and this is stated in the customs declaration, even if in determining the transaction price they – wrongly – assumed that no customs duties would be owed upon importation of the goods into the Community and consequently no amount of customs duties was stated in the invoice or in or with the declaration?'

The question referred for a preliminary ruling

25 By its question, the national court seeks to ascertain, in essence, whether the condition set out in Article 33 of the Customs Code, to the effect that import duties must be 'shown separately' from the price actually paid or payable for the imported goods, is met in the case where the parties to the contract have agreed that those goods are to be delivered DDP and have incorporated that information in the customs declaration but, by reason of a mistake as to the preferential origin of those goods, have not indicated any amount of import duties.

26 For the purpose of answering that question, it is necessary to examine the scope of the condition set out in Article 33 of the Customs Code, according to which the customs duties must be 'shown separately' from the price actually paid or payable for the imported goods, with regard to the situation of the parties to the contract in a case such as that at issue in the present proceedings.

27 It should first be pointed out that, according to settled case-law, the objective of the European Union legislation on customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values (see Case C-256/07 *Mitsui & Co. Deutschland* [2009] ECR I-1951, paragraph 20 and the case-law cited).

28 According to Article 29(1) of the Customs Code, the customs value of imported goods is, in principle, their transaction value, that is to say, the price actually paid or payable for the goods when sold for export to the customs territory of the Community.

29 Furthermore, that 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 Case C-306/04 *Compaq Computer International Corporation* [2006] ECR I-10991, paragraph 30, and *Mitsui & Co. Deutschland*, paragraph 20).

30 In this context, Article 33(f) of the Customs Code allows for exclusion, from the customs value, of the import duties applicable in the European Union, but makes that exclusion subject to compliance with the condition that the amount of those duties be 'shown separately' from the price actually paid or payable for the imported goods.

31 The Netherlands Government takes the view that, in circumstances such as those at issue in the main proceedings, that condition is not satisfied because, in light of the available evidence, the customs authorities were unable to distinguish the import duties from the price actually paid or payable for the imported goods.

32 In its judgments in Case C-79/89 *Brown Boveri* [1991] ECR I-1853; Case C-379/00 *Overland Footwear* [2002] ECR I-11133; and Case C-468/03 *Overland Footwear* [2005] ECR I-8937, the Court ruled that charges such as buying commissions and assembly charges can be regarded as having been 'shown separately' only to the extent to which they are stated in the import declaration separately from the price actually paid or payable for the imported goods. That case-law is, according to the Netherlands Government, fully applicable in the case of the exclusion of import duties from the customs value of those goods.

33 According to the Netherlands Government, since the parties to the contract did not state the amount of the import duties on their invoices or declarations by reason of an error as to the preferential origin of the goods imported, the condition laid down in Article 33 of the Customs Code has not been fulfilled.

34 In this respect, it should be noted, first, that it is evident from the decision for reference that, in the case in the main proceedings, even if the parties to the contract wrongly assumed that no import duty would be owed, the agreement between the seller and the buyer must be interpreted as meaning that, in accordance with the DDP clause, the custom duties are to be borne by the seller and that, consequently, the import duties which may be payable are included in the price actually paid or payable for the imported goods.

35 That interpretation is supported by the fact that, as has been pointed out both by the Netherlands Government and the European Commission, the DDP clause places the seller under a maximum obligation pursuant to which it undertakes to bear all the charges and risks connected with the delivery of the goods in the State of importation. Thus, the seller bears, inter alia, the charges relating to customs clearance and pays any difference which may arise between, first, the amount of customs duties which it had estimated at the time of conclusion of the contract as being legally owed and, second, the amount calculated by the customs authorities, without being able to claim from the buyer, in the event of a difference, a price increase or a compensatory payment.

36 Second, it is important to bear in mind that, pursuant in particular to Articles 217 and 220 of the Customs Code, it is the authorities of the State of importation which are responsible for the calculation of import duties. However, as the transaction value is correctly stated in the import declarations and the rate of customs duty applicable can be determined in the light of the origin of the goods, the Court finds that those authorities are in a position to calculate the amount of import duties legally owed and, consequently, to separate the value of those duties from the price actually paid or payable for the imported goods.

37 In addition, as the Commission has argued, unlike the other charges referred to by Article 33 of the Customs Code, such as buying commissions or assembly charges, the existence and amount of which are based solely on the intention of the parties to the contract and can be know to the customs authorities only in so far as they are expressly set out in the customs declaration and accompanying documents, import duties are mandatorily regulated by the European Union customs tariff. Consequently, the risk that fictitious or inflated costs may be submitted in order fraudulently to reduce the customs value of the imported goods is excluded in a situation such as that at issue in the main proceedings.

38 Moreover, it is quite evident that if, in such a situation, the deduction of import duties higher than those initially estimated by the seller, established during a subsequent check, results in a decrease in the customs value of the imported goods, that value cannot, however, be regarded as arbitrary or fictitious, but must, on the contrary, be regarded as an indication of the real economic value of those goods, taking into account the specific legal circumstances of the contracting parties.

39 Even if, as the Netherlands Government submits, the seller, in cognisance of the correct amount of the import duties when the contract was concluded, chose to raise the price of the goods rather than to reduce its profits, such a situation does not, in a case such as that of the main proceedings, alter the fact that the seller gave a commitment to bear in full the customs clearance costs and the consequences of any errors of fact or of law which it committed in the calculation of the import duties, without being able to claim from the buyer a price increase or any other compensatory payment.

40 In the light of the foregoing, the answer to the question referred is that the condition specified in Article 33 of the Customs Code, to the effect that import duties must be 'shown separately' from the price actually paid or payable for the imported goods, is satisfied in the case where the parties to the contract have agreed that those goods are to be delivered DDP and have incorporated that information in the customs declaration but, by reason of a mistake as to the preferential origin of those goods, have failed to state the amount of the import duties.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

The condition specified in Article 33 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, to the effect that import duties must be 'shown separately' from the price actually paid or payable for the imported goods, is satisfied in the case where the parties to the contract have agreed that those goods are to be delivered DDP ('Delivered Duty Paid') and have incorporated that information in the customs declaration but, by reason of a mistake as to the preferential origin of those goods, have failed to state the amount of the import duties.

[Signatures]