

JUDGMENT OF THE COURT (First Chamber)

16 November 2006*

In Case C-306/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te Amsterdam (Netherlands), made by decision of 13 July 2004, received at the Court on 19 July 2004, in the proceedings

Compaq Computer International Corporation

v

Inspecteur der Belastingdienst — Douanedistrict Arnhem,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, E. Juhász, K. Schiemann, M. Ilešič and E. Levits (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: C. Stix-Hackl,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 September 2005,

after considering the observations submitted on behalf of:

- Compaq Computer International Corporation, by R. Tusveld and G. van Slooten, belastingadviseurs,

- the Netherlands Government, by H.G. Sevenster and D.J.M. de Grave, acting as Agents,

- the German Government, by C.-D. Quassowski, acting as Agent,

- the Spanish Government, by M. Muñoz Pérez, acting as Agent,

- the United Kingdom Government, by M. Bethell, acting as Agent, and P. Harris, Barrister,

- the Commission of the European Communities, by X. Lewis, acting as Agent, and F. Tuytschaever, advocaat,

after hearing the Opinion of the Advocate General at the sitting on 26 January 2006,

gives the following

Judgment

- 1 The reference for a preliminary ruling from the Gerechtshof te Amsterdam, douanekamer (Amsterdam Regional Court of Appeal, Customs Chamber), concerns the interpretation of Article 32(1)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter ‘the Customs Code’).

- 2 This reference was made in the course of proceedings between Compaq Computer International Corporation (hereinafter ‘CCIC’) and the Inspecteur van de belastingdienst — Doanedistrict Arnhem (Head of the Arnhem Customs district, hereinafter ‘the customs authorities’) concerning the customs value of laptop computers put into free circulation in the European Community between 1 January 1995 and 31 December 1997.

Legal context

- 3 Article 29(1) of the Customs Code states:

‘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, provided:

...

(d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.'

4 Under paragraph 2 of that article, the transaction value between related undertakings can be accepted provided that the relationship between the undertakings concerned did not influence the price, that is to say that that value is very close to the market value of identical or similar goods at or around the same time.

5 Article 32(1) of the Customs Code states:

'In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:

...

- (b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:
- (i) materials, components, parts and similar items incorporated in the imported goods,
 - (ii) tools, dies, moulds and similar items used in the production of the imported goods,
 - (iii) materials consumed in the production of the imported goods,
 - (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods;
- (c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

...

6 Article 32(3) of the Customs Code states that '[n]o additions shall be made to the price actually paid or payable in determining the customs value except as provided in this article.'

7 Article 34 of the Customs Code provides:

'Specific rules may be laid down in accordance with the procedure of the [Customs Code] committee to determine the customs value of carrier media for use in data processing equipment and bearing data or instructions.'

8 Article 147 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 (OJ 1993 L 253, p. 1) as amended by Commission Regulation (EC) No 1762/95 of 19 July 1995 (OJ 1993 L 171, p. 8, hereinafter 'the implementing regulation'), states:

'1. For the purposes of Article 29 of the [Customs] Code, the fact that the goods which are the subject of a sale are declared for free circulation shall be regarded as adequate indication that they were sold for export to the customs territory of the Community. In the case of successive sales before valuation, only the last sale, which led to the introduction of the goods into the customs territory of the Community, or a sale taking place in the customs territory of the Community before entry for free circulation of the goods shall constitute such indication.

Where a price is declared which relates to a sale taking place before the last sale on the basis of which the goods were introduced into the customs territory of the Community, it must be demonstrated to the satisfaction of the customs authorities that this sale of goods took place for export to the customs territory in question.

The provisions of Articles 178 to 181a shall apply.

...

3. The buyer need satisfy no condition other than that of being a party to the contract of sale.'

9 Article 167 of the implementing regulation specifies:

'1. Notwithstanding Articles 29 to 33 of the [Customs] Code, in determining the customs value of imported carrier media bearing data or instructions for use in data processing equipment, only the cost or value of the carrier medium itself shall be taken into account. The customs value of imported carrier media bearing data or instructions shall not, therefore, include the cost or value of the data or instructions, provided that such cost or value is distinguished from the cost or value of the carrier medium in question.

2. For the purposes of this article:

- (a) the expression "carrier medium" shall not be taken to include integrated circuits, semiconductors and similar devices or articles incorporating such circuits or devices;

...'

- 10 Articles 178 to 181a specify, inter alia, the particulars and documents to be provided to the customs authorities for the checking of the declared customs value.

Facts of the main proceedings and the question referred for a preliminary ruling

- 11 CCIC, a company established under Netherlands law, is a subsidiary of Compaq Computer Company ('CCC'), a company established in the United States, sells Compaq data processing equipment in Europe and has, to that end, a distribution centre in the Netherlands.
- 12 Under a contract between CCC and Microsoft Corporation (hereinafter 'Microsoft'), Compaq computers may be equipped with software consisting of the MS-Dos and MS Windows operating systems ('the operating systems') and sold with those

systems, in return for a payment of USD 31 to Microsoft for every computer equipped with those operating systems.

- 13 CCC bought laptop computers from two Taiwanese computer manufacturers. As part of this sale, it was agreed that the operating systems would already be installed on the hard drives of the computers when they were delivered. To that end, CCC made these operating systems available free of charge to the manufacturers, who then installed them on those computers.
- 14 CCC then sold on to CCIC the laptop computers, which were dispatched free on board from Taiwan to the Netherlands. Upon their arrival, CCIC declared the computers for free circulation. When their customs value was being determined, in accordance with Article 29 of the Customs Code, the selling price between the Taiwanese manufacturers and CCC, which did not include the value of the operating systems, was used.
- 15 In 1999 the Landelijk Waardeteam van de Douane (customs authorities' National Valuation Team) conducted an investigation into CCIC to establish the accuracy of the declared customs value of the computers in question. The Team took the view that the value of the operating systems installed on these computers should be included in the customs value. Following that investigation, the customs authorities, on the basis of Article 32(1)(b) of the Customs Code, marked up the customs value of every computer by the value of the operating systems installed on those computers and sent two demands for payment to CCIC for the amounts of NLG 438 605.60 and NLG 2 194 982 respectively, the latter amount having subsequently been reduced to NLG 353 168.60, as additional customs duties on the imports of laptop computers declared for free circulation for the period from 1 January 1995 to 31 December 1997.

- 16 CCIC brought actions before the Gerechtshof te Amsterdam against the customs authorities' decisions to dismiss the objections lodged against those demands for payment. During those proceedings, the question was put to the Gerechtshof te Amsterdam whether, for the purposes of determining customs value, the customs authorities were justified in marking up the transaction value of the laptop computers by the value of the operating systems installed on those computers on the basis of Article 32(1)(b) of the Customs Code.
- 17 After having found that the conditions for the application of that provision were satisfied in the main proceedings, the referring court takes the view that operating systems, such as those at issue in the proceedings before it, are not, however, covered *stricto sensu* by paragraphs (i) to (iii) of that provision. However, because of the way in which they are presented, and in particular because of the fact that they are incorporated into the imported laptop computers, the referring court is in doubt as to whether the value of those systems should be taken into account when determining the customs value of the computers, given the rationale of Article 32(1)(b) of the Customs Code.
- 18 In that context the Gerechtshof te Amsterdam decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Where computers equipped with operating systems by the seller are imported, must the value of the software made available to the seller by the buyer free of charge be added to the transaction value of the computers pursuant to Article 32(1)(b) of the Community Customs Code where the value of the software is not included in the transaction value?'

The question referred for a preliminary ruling

- 19 At the outset, it should be recalled that, in the words of Article 29(1) of the Customs Code, the customs value of imported goods is to 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 the relevant provisions of the Customs Code.
- 20 As is clear from the findings of the national court, the computers at issue in the main proceedings were the subject of two successive transactions: the first between the Taiwanese manufacturers and CCC, and the second between CCC and CCIC.
- 21 It is apparent from the order for reference that, during the customs procedure, CCIC declared the transaction value of the first sale, in which CCC is the purchaser and the Taiwanese manufacturers are the sellers, as the customs value of the computers.
- 22 It is not disputed that the customs authorities accepted the transaction value of the contract between the Taiwanese manufacturers and CCC as a basis for determination of the customs value in accordance with Article 29 of the Customs Code, and that this decision was not questioned before the national court. In those circumstances, and as is clear from the question referred, the only question on which the Court is asked to rule is whether this transaction value must be adjusted under the provisions of Article 32(1)(b) of the Customs Code.

23 Whereas all the Governments which submitted observations to the Court argue that this adjustment is necessary for a variety of reasons, the Commission of the European Communities, maintaining that the transaction between CCIC and CCC is decisive, submits that Article 32(1)(b) of the Customs Code does not apply and that the adjustment provided for therein should not be made. CCIC draws the same conclusion, but for different reasons: it maintains that the operating systems at issue do not fall within any of the categories of Article 32(1)(b) of the Customs Code. It maintains that that provision covers only tangible assets. The operating systems fall within the scope of the provisions relating to the customs value of carrier media, that is to say of Article 34 of the Customs Code and Article 167 of the implementing regulation.

24 CCIC's arguments and the Commission's claims precluding the application of Article 32(1)(b) of the Customs Code cannot be accepted.

25 First, it is apparent from Article 167(2)(a) of the regulation implementing Article 34 of the Customs Code that goods consisting of integrated circuits, semiconductors and similar devices are excluded from the scope of Article 167.

26 It follows from the national court's findings that Article 34 of the Customs Code and Article 167(1) of the implementing regulation do not apply in the main proceedings. According to those findings, the operating systems, which are software, were installed on the hard drives of the imported computers, which are constituent elements of those computers and do not constitute, by themselves, the imported products. Such computers cannot be treated as mere carrier media for transporting

that software since the principal function of those computers is the processing of data and they contain devices which, under Article 167(2)(a) of the implementing regulation, cannot be classified as carrier media.

²⁷ Following this, it is necessary to point out that, in accordance with paragraph 22 above, in order to answer the referring court's question, the determination of the transaction value does not form part of the Court's considerations.

²⁸ According to the wording of Article 29(1) of the Customs Code, the transaction value is a value which is 'adjusted, where necessary, in accordance with Articles 32 and 33 ...'. 'Transaction value', therefore, must be interpreted as meaning a value which is adjusted once the conditions for an adjustment are met. Consequently, if the judicial and administrative authorities of a Member State have accepted as the transaction value the price which was fixed on the occasion of a sale prior to the one immediately before the determination of the customs value, that is the transaction value on which any adjustment must be made.

²⁹ When, in order to determine the customs value, a sale price is substituted for that which applied in the contract concluded by the Community purchaser, the logic of the provisions at issue requires that not only that price, but also the whole contractual relationship be taken into consideration. That means that, in this context, for the purposes of the application of Article 32(1)(b) of the Customs Code, 'buyer' must be interpreted as meaning the company that concluded the contract of which the sale price constitutes the transaction value.

- 30 In respect of the determination of the customs value in the main case, according to the case-law the Community legislation on customs valuation seeks to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values (Case C-11/89 *Unifert* [1990] ECR I-2275, paragraph 35, and Case C-15/99 *Sommer* [2000] ECR I-8989, paragraph 25). The customs value must thus reflect the real economic value of an imported good and, therefore, take into account all of the elements of that good that have economic value.
- 31 Furthermore, the Court has held that software is intangible property, the cost of acquiring which, when such property is incorporated in an item of goods, must be regarded as an integral part of the price paid or payable for the goods, and hence of the transaction value (see to that effect Case C-79/89 *Brown Boveri* [1991] ECR I-1853, paragraph 21).
- 32 The operating systems at issue in the main proceedings are software that was made available to the Taiwanese manufacturers free of charge by CCC, in order for it to be installed on the hard drives of the computers at the time of their manufacture. Furthermore, it is accepted that that software has a unitary economic value of USD 31 which was not included either in the value of the transaction between the Taiwanese manufacturers and CCC or in that of the transaction between CCC and CCIC.
- 33 It must therefore be held that, in such circumstances, the adjustment of the transaction value must be made.
- 34 The Spanish and United Kingdom Governments claim that the software containing the operating systems, as 'materials, components, parts and similar items', falls

under Article 32(1)(b)(i) of the Customs Code, whereas the Netherlands and German Governments are of the opinion that it should fall under subheading (iv) of that provision, as 'engineering'. However, the United Kingdom Government stated at the hearing that it might also be satisfied with the latter classification.

35 Such a classification has not been requested by the referring court, and is not necessary in order to determine the case in the main proceedings.

36 On the other hand, it should be noted that, depending on the classification of the contract between CCC and Microsoft, which is a matter for the national court, the application of Article 32(1)(c) of the Customs Code might be relevant.

37 Having regard to the foregoing, the answer to the question referred must be that in order to determine the customs value of imports of computers equipped by the seller with software for one or more operating systems made available by the buyer to the seller free of charge, in accordance with Article 32(1)(b) or (c) of the Customs Code, the value of the software must be added to the transaction value of the computers if the value of the software has not been included in the price actually paid or payable for those computers.

38 The same is true when the national authorities accept as the transaction value, in accordance with Community law, the price of a sale other than that made by the Community purchaser. In such cases, 'buyer' for the purposes of Article 32(1)(b) or (c) of the Customs Code must be understood to mean the buyer who concluded that other sale.

Costs

39 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 (First Chamber) hereby rules:

In order to determine the customs value of imports of computers equipped by the seller with software for one or more operating systems made available by the buyer to the seller free of charge, in accordance with Article 32(1)(b) or (c) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, the value of the software must be added to the transaction value of the computers if the value of the software has not been included in the price actually paid or payable for those computers.

The same is true when the national authorities accept as the transaction value, in accordance with Community law, the price of a sale other than that made by the Community purchaser. In such cases, 'buyer' for the purposes of Article 32(1)(b) or (c) of the Customs Code must be understood to mean the buyer who concluded that other sale.

[Signatures]