JUDGMENT OF THE COURT (Sixth Chamber)

7 April 2011 *

In Case C-153/10,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the Hoge Raad der Nederlanden (Netherlands), made by decision of 12 March 2010, received at the Court on 1 April 2010, in the proceedings

Staatssecretaris van Financiën

v

Sony Supply Chain Solutions (Europe) BV, formerly Sony Logistics Europe BV,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of the Chamber, A. Rosas and P. Lindh (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: P. Mengozzi,
Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 3 February 2011,

after considering the observations submitted on behalf of:

— Sony Supply Chain Solutions (Europe) BV, formerly Sony Logistics Europe BV, by P. De Baere, advocaat,

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

— the Czech Government, by M. Smolek and K. Havlíčková, 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 Articles 12(2) and (5), 217(1) and 243 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 OJ 1997, L 17, p. 1 and the corrigendum OJ 1997 L 179, p. 11 ('the Customs Code'), and Articles 10 and 11 of 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, as amended by Commission Regulation (EC) No 12/97 of 18 December 1996 (OJ 1997 L 9, p. 1) ('the implementing regulation').

2 The reference has been made in proceedings between the Staatssecretaris van Financiën and Sony Logistics Europe BV, now Sony Supply Chain Solutions (Europe) BV ('SLE') concerning the payment of customs duties on video game consoles.

Legal context

The Customs Code

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

'For the purposes of this Code, the following definitions shall apply:

…

(5) "Decision" means any official act by the customs authorities pertaining to customs rules giving a ruling on a particular case, such act having legal effects on one or more specific or identifiable persons; this term covers inter alia a binding tariff information within the meaning of Article 12.

…'

4 Article 5 of the Customs Code states:

'1. Under the conditions set out in Article 64(2) and subject to the provisions adopted within the framework of Article 243(2)(b), any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules.

2. Such representation may be:

— direct, in which case the representative shall act in the name of and on behalf of another person,

or

— indirect, in which case the representatives shall act in his own name but on behalf of another person.

…

4. A representative must state that he is acting on behalf of the person represented, specify whether the representation is direct or indirect and be empowered to act as a representative.

A person who fails to state that he is acting in the name of or on behalf of another person or who states that he is acting in the name of or on behalf of another person without being empowered to do so shall be deemed to be acting in his own name and on his own behalf.

…'

5 Article 12 of the Customs Code provides:

'…

2. The customs authorities shall issue binding tariff information or binding origin information on written request, acting in accordance with the committee procedure.

Binding tariff information or binding origin information shall be binding on the customs authorities only in respect of goods on which customs formalities are completed after the date on which the information was supplied by them.

…

5. Binding information shall cease to be valid:

(a) in the case of tariff information:

…

(iii) where it is revoked or amended in accordance with Article 9, provided that the revocation or amendment is notified to the holder.

…

6. The holder of binding information which ceases to be valid pursuant to paragraph 5 (a)(ii) or (iii) or (b)(ii) or (iii) may still use that information for a period of six months from the date of publication or notification, provided that he concluded binding contracts for the purchase or sale of the goods in question, on the basis of the binding information, before that measure was adopted. However, in the case of products for which an import, export or advance-fixing certificate is submitted when customs formalities are carried out, the period of six months is replaced by the period of validity of the certificate.

…'

6 Article 64(1) of the Customs Code states:

'Subject to Article 5, a customs declaration may be made by any person who is able to present the goods in question or to have them presented to the competent customs authority, together with all the documents which are required to be produced for the application of the rules governing the customs procedure in respect of which the goods were declared.'

7 Article 217 of the Customs Code provides:

'1. Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called "amount of duty", shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).

The first subparagraph shall not apply:

…

(b) where the amount of duty legally due exceeds that determined on the basis of binding information.

…'

8 Article 243 of the Customs Code is worded as follows:

'1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.

Any person who has applied to the customs authorities for a decision relating to the application of customs legislation and has not obtained a ruling on that request within the period referred to in Article 6 (2) shall also be entitled to exercise the right of appeal.

…

2. The right of appeal may be exercised:

(a) initially, before the customs authorities designated for that purpose by the Member States;

(b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.'

The implementing regulation

9 Under Article 5 of the implementing regulation:

'For the purpose of this Title:

(1) 1. binding information: means tariff information or origin information binding on the administrations of all Community Member States when the conditions laid down in Articles 6 and 7 are fulfilled;

…'

10 Article 10(1) and (2) of the implementing regulation states as follows:

'1. Without prejudice to Articles 5 and 64 of the [Customs] Code, binding information may be invoked only by the holder.

2. (a) Tariff matters: the customs authorities may require the holder, when fulfilling customs formalities, to inform the customs authorities that he is in possession of binding tariff information in respect of the goods being cleared through customs.

…'

11 Article 11 of the implementing regulation states:

'Binding tariff information supplied by the customs authorities of a Member State since 1 January 1991 shall become binding on the competent authorities of all the Member States under the same conditions.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Sony Computer Entertainment Europe Ltd. ('SCEE'), a company established in the United Kingdom, is responsible for the marketing, selling and distribution of games machines, peripherals and software throughout the European Union. Those games machines include the game console 'Playstation 2 Computer Entertainment System' ('PS2').

13 SCEE and SLE are part of the same group of companies, in which SLE provides logistical services to other companies in the group. On 1 April 1997, SCEE and SLE concluded an agreement which provides that SLE is to assist SCEE with the import and warehousing of European stocks of games machines, including the PS2. SLE is responsible for making customs declarations for those game machines.

14 From November 2000 until May 2001 SLE imported PS2 games machines into the Netherlands and made for SCEE, but in its own name and on its own behalf, customs declarations with respect to those goods. It stated that PS2s were to be classified under tariff subheading 9504 10 00 of the Combined Nomenclature in Annex I to 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) ('the CN'), in the version resulting from Commission Regulation (EC) No 2204/1999 of 12 October 1999 (OJ 1999 L 278, p. 1), as regards the imports during 2000 and Commission Regulation (EC) No 2263/2000 of 13 October 2000 (OJ 2000 L 264, p. 1) as regards those in 2001. Tariff subheading 9504 10 00 entailed payment of customs duties of 2.2 % in 2000 and 1.7 % in 2001. The Netherlands customs authorities requested payment from SLE of the corresponding customs duties.

15 SLE therefore brought an appeal against that request claiming that PS2s should in fact have been classified under tariff subheading 8471 49 90 of the CN. It should be stated that the goods classified under that subheading are exempt from customs duties.

16 In that appeal, SLE based its arguments on proceedings between SCEE and the United Kingdom customs authorities. On 19 October 2000, the latter issued SCEE with a binding tariff information ('BTI') for the PS2, classifying it under tariff subheading 9504 10 00 of the CN.

17 SCEE then brought an action before the English courts challenging that classification. Following those proceedings, the United Kingdom customs authorities, on 12 June 2001, issued SCEE with an amended BTI and classified the PS2 in tariff subheading 8471 49 90 of the CN with effect from 19 October 2000.

18 Before the Netherlands customs authorities SLE relied on the amended BTI issued to SCEE.

19 By decision of 11 December 2007, the Gerechtshof te Amsterdam held that SLE could rely, before the Netherlands customs authorities, on the amended BTI issued to SCEE by the United Kingdom customs authorities even with respect to the customs declarations submitted between 19 October 2000 and 12 June 2001. Accordingly, the Gerechtshof te Amsterdam decided that PS2s were to be classified under tariff subheading 8471 49 90 of the CN.

20 The Staatssecretaris van Financiën brought an appeal in cassation against the decision of 11 December 2007 before the Hoge Raad der Nederlanden.

21 That court has doubts regarding the value of the amended BTI between 19 October 2000 and 12 June 2001 as to whether SLE is able to rely on it and with respect to the legitimate expectations that the importer could rely on given that the Netherlands customs authorities were required, in accordance with their own rules, to take account of a BTI issued to a third party for the same goods.

22 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Must Community law, and in particular Article 12(2) and (5) and Article 217(1) of the [Customs Code] and Article 11 of the [implementing regulation], in conjunction with Article 243 of the [Customs Code], be interpreted to mean that a person involved in proceedings concerning customs duties which have been imposed

may challenge their imposition by producing binding tariff information issued in another Member State for the same goods, which information was still the subject of a legal dispute at that time, but was eventually revised?

2. If the answer to Question 1 is in the affirmative, can the person declaring the goods to customs in his own name and for his own account successfully rely in a case such as this, when making customs declarations for release for free circulation, on binding tariff information whose holder is not that person, but an associated firm on whose instructions that person made the customs declarations?

3. If the answer to Question 2 is in the negative, does Community law preclude a person in a case such as this from successfully relying on a national policy decision in which the national authorities raise the expectation that, in respect of the tariff classification of the goods declared, it can rely on tariff information issued to a third party for the same goods?'

Consideration of the questions referred for a preliminary ruling

The second question

23 By its second question, which it is appropriate to consider first of all, the referring court asks whether the Customs Code and the implementing regulation must be interpreted as meaning that a customs declarant, who makes customs declarations in

his own name and on his own behalf, may rely on a BTI whose holder is not him but an associated firm on whose instructions he made the customs declarations.

24 It must be recalled as a preliminary point that the purpose of a BTI is to provide the trader with legal certainty where there is a doubt as to the tariff classification of goods in the existing customs nomenclature (see Case C-199/09 *Schenker* [2010] ECR I-12311, paragraph 16), thereby protecting him against any subsequent change in the position adopted by the customs authorities with regard to the classification of those goods (see Case C-315/96 *Lopex Export* [1998] ECR I-317, paragraph 28).

25 It is clear from the combined provisions of Article 12(2) of the Customs Code and Articles 10 and 11 of the implementing regulation that a BTI may be relied on only by its holder vis-à-vis the customs authorities that issued it and vis-à-vis those of other Member States.

26 In that connection, the Court has held that a BTI creates rights only for the holder (Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 27).

27 However, Article 10 of the implementing regulation states that the right to invoke a BTI is reserved for its holder, without prejudice to Articles 5 and 64 of the Customs Code. The latter govern the customs declaration where that is made by a person other than the importer. It follows that the rule that the BTI may be invoked only by its holder does not prohibit the holder from making the declaration through the intermediary of a third party.

28 Article 64 of the Customs Code simply states that a written customs declaration may be made by any person who is able to present the goods in question or to have them presented to the competent customs authority, together with the accompanying documents, subject to Article 5 thereof.

29 Article 5 of the Customs Code lays down the rules relating to representation before the customs authorities in order to perform the acts and formalities laid down by customs rules. The BTI obtained by the representative will subsequently be invoked by the operator on behalf of whom the representative acted. Likewise, the representative, acting on behalf of the holder of the BTI, may invoke it vis-à-vis the customs authorities of Member States other than the State which issued it.

30 The Customs Code lays down exhaustive rules regarding the right to representation before the customs authorities. Article 5(2) thereof states that the latter may be direct or indirect. Where the representation is direct, the representative acts in the name of and on behalf of another person. Where it is indirect, he acts in his own name but on behalf of another person. In addition, the Member States may decide that on their territory the representative must be a customs agent.

31 Furthermore, the second subparagraph of Article 5(4) of the Customs Code provides that the person who fails to state that he is acting in the name of or on behalf of another person or who states that he is acting in the name of or on behalf of another person without being empowered to do so is to be deemed to be acting in his own name and on his own behalf. It follows that the representation must be express and cannot be implied.

32 It is clear both from the order for reference and SLE's submissions to the Court that SLE imported PS2s in its on name and on its own behalf given that, at the time the

imports were made, that is from November 2000 until May 2001, the Kingdom of the Netherlands authorised representation only by customs agents.

33 It follows that, since SLE did not act as SCEE's representative, it could not rely, vis-à-vis the Netherlands customs authorities, on a BTI of which SCEE was the holder.

34 In that connection, the fact that SCEE and SLE were part of the same group of companies or that the second was the fiscal representative of the first in the Netherlands, did not confer on SLE the status of representative within the meaning of Article 5 of the Customs Code.

35 It follows from those considerations that the answer to the second question is that Article 12(2) of the Customs Code and Articles 10 and 11 of the implementing regulation must be interpreted as meaning that a person who makes customs declarations in his own name and on his own behalf cannot rely on a BTI of which he is not the holder, but which is held by an associated company on whose instructions he made those declarations.

The first question

36 By its first question, the referring court asks whether Articles 12(2) and (5) and 217(1) of the Customs Code and Article 11 of the implementing regulation, read in conjunction with Article 243 of the Customs Code, must be interpreted as meaning that, in

proceedings concerning the imposition of customs duties, an interested party may challenge their imposition by producing a BTI issued, for the same goods, in another Member State. The referring court also asks whether account must be taken of that BTI where, at the time of the import, the validity of that BTI was still disputed and it was revised only after those imports.

37 According to Article 243 of the Customs Code, any person has the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation and which concern him directly and individually. It follows from Article 4(5) of the Customs Code that a BTI is a decision within the meaning of Article 243.

38 The dispute in the main proceedings concerns the tariff classification of goods and the subsequent payment of customs duties. In support of its claims, SLE invokes a BTI issued to SCEE by the customs authorities of another Member State. Therefore, it appears that that dispute may indeed be regarded as an appeal within the meaning of Article 243 of the Customs Code.

39 As is clear from paragraphs 33 and 35 of this judgment, a person cannot rely on a BTI of which he is not the holder, except where that person acts as a representative.

40 Under Article 12(2) of the Customs Code and Article 11 of the implementing regulation a BTI is binding on the customs authorities only where it is invoked by the holder or his representative. If that is not the case, the court, seised in accordance with Article 243(2) of the Customs Code, and to which a BTI is submitted cannot give that BTI the legal effects attaching to it.

41 However, a BTI may be relied on as evidence by a person other than its holder. Given that there is no legislation at European Union level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in proceedings similar to those laid down in Article 243 of the Customs Code is in principle admissible (see, to that effect, Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, paragraph 29).

42 Furthermore, the Court has held that the fact that the customs authorities of another Member State have issued a BTI for specific goods to a person not party to the dispute, before a court against whose decisions there is no judicial remedy under national law, which seems to reflect a different interpretation of the CN headings from that which that court considers it must adopt in respect of similar goods in question in that dispute, most certainly must cause that court to take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the CN (see *Intermodal Transports*, paragraph 34).

43 It follows from that case-law that a BTI issued to a third party may be taken into consideration as evidence by a court seised of a dispute relating to the classification of goods and the subsequent payment of customs duties.

44 In light of those considerations, the answer to the first question is that Article 12(2) and (5) and 217(1) of the Customs Code and Article 11 of the implementing regulation, read in conjunction with Article 243 of the Customs Code, must be interpreted as meaning that, in proceedings relating to the imposition of customs duties, an interested party may challenge that imposition by submitting as evidence a BTI issued in respect of the same goods in another Member State although the BTI cannot produce the legal effects attaching to it. It is, however, for the national court to determine

whether the relevant procedural rules of the Member State concerned provide for the possibility of producing such types of evidence.

The third question

45 By its third question, the referring court asks essentially, whether the Customs Code and the implementing regulation must be interpreted as meaning that a national policy decision, which allows the national authorities to refer, for the purpose of the tariff classification of declared goods, to a BTI issued to a third party for the same goods, may raise, on the part of those importers, a legitimate expectation that they can rely on that policy.

46 It must be stated that, according to the order for reference, at the material time the Netherlands customs manual provided that 'only the holder may rely on a BTI. … [and that i]n every case, the goods offered must correspond in every respect to the description of the goods in the BTI. If an importer refers to a valid BTI of which he is not the holder, but makes a declaration for precisely the same goods as those described in the BTI, the classification must none the less correspond to that given in the BTI'.

47 The Court has held that the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of European Union law; nor

can the conduct of a national authority responsible for applying European Union law, which acts in breach of that law, give rise to a legitimate expectation on the part of a trader of beneficial treatment contrary to European Union law (Case 316/86 *Krücken* [1988] ECR 2213, paragraph 24, Joined Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraph 35, and Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 31).

48 Article 12 of the Customs Code regulates very closely the conditions of issue, the legal value and the period of the validity of a BTI. Furthermore, Article 10(1) of the implementing regulation clearly states that the BTI may be invoked only by its holder or the representative acting on behalf of the holder.

49 It appears that the Netherlands customs authorities responsible for applying European Union law attributed to a BTI the same legal value whether it was invoked by a third party or its holder. Therefore, those authorities, by applying the customs manual, acted in a manner which was inconsistent with European Union law and that conduct could not give rise to a legitimate expectation on the part of traders.

50 Therefore, the answer to the third question is that Article 12 of the Customs Code and Article 10(1) of the implementing regulation must be interpreted as meaning that a national policy which allows national authorities to refer, for the purpose of the tariff classification of declared goods, to a BTI issued to a third party for the same goods, could not give rise, on the part of traders, to a legitimate expectation that they could rely on that policy.

Costs

51 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 (Sixth Chamber) hereby rules:

1. **Article 12(2) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996, and Articles 10 and 11 of 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, as amended by Commission Regulation (EC) No 12/97 of 18 December 1996, must be interpreted as meaning that a person who makes customs declarations in his own name and on his own behalf cannot rely on a binding tariff information of which he is not the holder, but which is held by an associated company on whose instructions he made those declarations.**

2. **Articles 12(2) and (5) and 217(1) of Regulation No 2913/92, as amended by Regulation No 82/97, and Article 11 of Regulation No 2454/93, read in conjunction with Article 243 of Regulation No 2913/92, as amended by Regulation No 12/97, must be interpreted as meaning that, in proceedings relating to the imposition of customs duties, an interested party may challenge that imposition by submitting as evidence a binding tariff information issued in respect of the same goods in another Member State although the binding**

tariff information cannot produce the legal effects attaching to it. It is, however, for the national court to determine whether the relevant procedural rules of the Member State concerned provide for the possibility of producing such types of evidence.

3. **Article 12 of Regulation No 2913/92, as amended by Regulation No 82/97, and Article 10(1) of Regulation No 2454/93, as amended by Regulation No 12/97, must be interpreted as meaning that a national policy which allows national authorities to refer, for the purpose of the tariff classification of declared goods, to a binding tariff information issued to a third party for the same goods, could not give rise, on the part of traders, to a legitimate expectation that they could rely on that policy.**

[Signatures]