

JUDGMENT OF THE COURT (Second Chamber)

12 February 2004 \*

In Case C-337/01,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

**Hamann International GmbH Spedition + Logistik**

and

**Hauptzollamt Hamburg-Stadt,**

on the interpretation of Article 203(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302,

\* Language of the case: German.

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THE COURT (Second Chamber),

composed of: V. Skouris, acting for the President of the Second Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: A. Tizzano,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- Hamann International GmbH Spedition + Logistik, by M. Zitzmann, Steuerberaterin,
- the Hauptzollamt Hamburg-Stadt, by M. Nagel, acting as Agent,
- the Commission of the European Communities, by J.-C. Schieferer, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Hamann International GmbH Spedition + Logistik, represented by M. Zitzmann, of the Hauptzollamt Hamburg-Stadt,

represented by T. Cirener, acting as Agent, and of the Commission, represented by J.-C. Schieferer, at the hearing on 5 February 2003,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2003,

gives the following

### **Judgment**

- 1 By order of 17 July 2001, received at the Court on 10 September 2001, the Bundesfinanzhof referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 203(1) 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 That question was raised in proceedings between Hamann International GmbH Spedition + Logistik (‘Hamann’) and the Hauptzollamt Hamburg-Stadt (Hamburg Tax Office, ‘the Hauptzollamt’) concerning the repayment of customs duties and taxes levied on imports.

## Legal framework under Community law

3 Article 4 of the Customs Code provides:

‘For the purposes of the present Code, the following definitions shall apply:

...

(13) “Supervision by the customs authorities” means action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed.

(14) “Control by the customs authorities” means the performance of specific acts such as examining goods, verifying the existence and authenticity of documents, examining the accounts of undertakings and other records, inspecting means of transport, inspecting luggage and other goods carried by or on persons and carrying out official inquiries and other similar acts with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed.

(15)“Customs-approved treatment or use of goods” means:

...

(c) their re-exportation from the customs territory of the Community;

(16)“Customs procedure” means:

...

(b) transit;

(c) customs warehousing;

...

(h) exportation.

...’

4 Article 37 of the Customs Code provides:

‘1. Goods brought into the customs territory of the Community shall, from the time of their entry, be subject to customs supervision. They may be subject to control by the customs authority in accordance with the provisions in force.

2. They shall remain under such supervision for as long as necessary to determine their customs status, if appropriate, and in the case of non-Community goods and without prejudice to Article 82(1), until their customs status is changed, they enter a free zone or free warehouse or they are re-exported or destroyed in accordance with Article 182.’

5 In accordance with Article 89(1) of the Customs Code, a suspensive arrangement with economic impact shall be discharged when a new customs-approved treatment or use is assigned either to the goods placed under that arrangement or to compensating or processed products placed under it.

6 Article 91(1) of the Customs Code provides:

‘The external transit procedure shall allow the movement from one point to another within the customs territory of the Community of:

- (a) non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures;

...'

- 7 Article 101 of the Customs Code provides:

‘The warehousekeeper shall be responsible for:

- (a) ensuring that while the goods are in the customs warehouse they are not removed from customs supervision;

...'

- 8 Under Article 110 of the Customs Code:

‘Where circumstances so warrant, goods placed under the customs warehousing procedure may be temporarily removed from the customs warehouse. Such removal must be authorised in advance by the customs authorities, who shall stipulate the conditions on which it may take place.

While they are outside the customs warehouse the goods may undergo the forms of handling referred to in Article 109 on the conditions set out therein.’

9 Article 183 of the Customs Code provides:

‘Goods leaving the customs territory of the Community shall be subject to customs supervision. They may be the subject of checks by the customs authorities in accordance with the provisions in force. They shall leave the said territory using, where appropriate, the route determined by the customs authorities and in accordance with the procedures laid down by those authorities.’

10 Article 203(1) and (2) of the Customs Code reads as follows:

‘1. A customs debt on importation shall be incurred through:

— the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

...’

11 Article 204(1) of the Customs Code provides:

‘A customs debt on importation shall be incurred through:

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed,

or

(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.’

12 Under Article 239(1) of the Customs Code:

‘Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:

- to be determined in accordance with the procedure of the committee;
  
- resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.’

<sup>13</sup> Article 859 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 (OJ 1993 L 253, p. 1, hereinafter ‘the implementing regulation’), provides:

‘The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204(1) of the Code, provided:

- they do not constitute an attempt to remove the goods unlawfully from customs supervision,
  
- they do not imply obvious negligence on the part of the person concerned, and

— all the formalities necessary to regularise the situation of the goods are subsequently carried out:

...

5. in the case of goods in temporary storage or placed under a customs procedure, unauthorised movement of the goods, provided the goods can be presented to the customs authorities at their request;

...’

14 Article 860 of the implementing regulation reads as follows:

‘The customs authorities shall consider a customs debt to have been incurred under Article 204(1) of the Code unless the person who would be the debtor establishes that the conditions set out in Article 859 are fulfilled.’

15 The situations referred to in Article 239(1) of the Customs Code are described in detail in Section IV, Title IV, Chapter 3, of the implementing regulation; that chapter is entitled ‘Specific provisions relating to the application of Article 239 of the Code’ and corresponds to Articles 899 to 909 of that regulation.

16 Article 899 of that regulation provides:

‘Without prejudice to other situations to be considered case by case in accordance with the procedure laid down in Articles 905 to 909, where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239(2) of the Code:

— is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import duties concerned.

“The person concerned” shall mean the person or persons referred to in Article 878(1), or their representatives, and any other person who was involved with the completion of the customs formalities relating to the goods concerned or gave the instructions necessary for the completion of these formalities,

— is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import duties concerned.’

17 Article 900(1)(a) of the implementing regulation provides:

‘Import duties shall be repaid or remitted where:

- (a) non-Community goods placed under a customs procedure involving total or partial relief from import duties or goods released for free circulation with favourable tariff treatment by reason of their end-use are stolen, provided that the goods are recovered promptly and placed again in their original customs situation in the state they were in when they were stolen.’

18 Article 905 of the same regulation explains how the customs authority is to consider the situation of the person concerned where it does not fall within any of the situations covered by Articles 900 to 904 of the regulation. Article 905(1) provides:

‘Where the decision-making customs authority to which an application for repayment or remission under Article 239(2) of the Code has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909.’

The term “the person concerned” shall be interpreted in the same way as in Article 899.

In all other cases, the decision-making customs authority shall refuse the application.’

- <sup>19</sup> Article 512 of the implementing regulation, as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001 (OJ 2001 L 141, p. 1), which is not applicable to the main proceedings, provides:

‘1. Transfer between different places designated in the same authorisation may be undertaken without any customs formalities.

2. Transfer from the office of entry to the holder’s or operator’s facilities or place of use may be carried out under cover of the declaration for entry for the arrangements.

3. Transfer to the office of exit with a view to re-exportation may take place under cover of the arrangements. In this case, the arrangements shall not be discharged until the goods or products declared for re-exportation have actually left the customs territory of the Community.’

## Main proceedings and the question referred for a preliminary ruling

- 20 In a tax notice of 5 March 1996, the Hauptzollamt ordered the company which succeeded Hamann to pay customs duties amounting to DEM 6 283.30 and import duties amounting to DEM 4 488.08 on the grounds that goods imported from Canada and subjected to the customs warehousing procedure had been removed from the warehouse without being declared to the customs authorities.
- 21 On 7 March 1997 Hamann applied for reimbursement of those amounts, attaching certified copies of customs clearance documentation to its application. On 23 April 1997, it submitted further documents concerning the goods in question and drew the Hauptzollamt's attention to the fact that, at the time of their exit from Community customs territory, some of the goods had been accompanied by a notice of removal from storage.
- 22 By a decision of 30 April 1997, the Hauptzollamt refused that request on the grounds that the goods in question had been, at least temporarily, removed from customs supervision because they had not been placed under the external transit procedure under which they had to be placed when they were transferred from the customs warehouse at the point of entry to the customs office at the point of exit.
- 23 Since its appeal against that decision had been refused, Hamann brought an action before the Finanzgericht Hamburg (Germany). It asserted amongst other things that the notice of removal from customs storage in respect of the first consignment of goods had been drawn up on 26 or 30 October 1995 and that the

second consignment had been removed from storage on 27 November 1995, that the relevant export declarations had been submitted and that the external transit procedure had been opened for the first lot of goods in Padborg, Denmark, and at the German-Polish border for the second lot of goods.

24 On 14 September 2000, the Finanzgericht dismissed the action on the grounds that the customs debt had, for the purposes of Article 203(1) of the Customs Code, been incurred because the goods had been removed from customs warehousing without arrangements having been made by the undertaking for continuing customs supervision by placement of the goods under the external transit procedure. The Finanzgericht also held that Article 203 of the Customs Code prevailed over Article 204 of that code and that therefore the latter provision did not apply.

25 Hamann brought an action for review (Revision) of that decision before the Bundesfinanzhof, arguing that the Finanzgericht had wrongly found that a customs duty had been incurred for the purposes of Article 203 of the Customs Code and not Article 204 of that code. It had also erred in finding that Article 203 of the Customs Code prevailed over Article 204. In addition, the implication of Article 204 of the Customs Code, read in conjunction with Article 859(5) of the implementing regulation, was that in a situation such as the one in question here, no customs debt had been incurred. The export of the goods without having placed them under the external transit procedure did not constitute removal from customs supervision, or even an attempt at such removal, but rather was merely an operational error which had no effect on the proper conduct of the customs warehousing procedure.

26 That being so, the Bundesfinanzhof, taking the view that the case depended on an interpretation of the relevant Community rules, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is there a removal from customs supervision resulting in the incurring of a customs debt under Article 203(1) of Regulation No 2913/92 solely by virtue of the fact that third-country goods placed in customs warehousing, intended for re-export from the customs territory of the Community, were not cleared to be placed under the external transit procedure immediately on removal from the customs warehouse?’

### The question

- 27 By this question, the national court asks, essentially, if there is, for the purposes of Article 203(1) of the Code, removal from customs supervision when, before the entry into force of Regulation No 993/2001, non-Community goods which were subject to the customs warehousing procedure and intended for re-export from the customs territory of the Community were removed and transported from the customs warehouse to the customs office at the point of exit without having been placed under the external transit procedure.
- 28 In order to answer the question as thus reformulated, it is appropriate to note, as a preliminary point, that Articles 203 and 204 of the Customs Code have different spheres of application. Whilst the first provision covers conduct leading to the goods’ being removed from customs supervision, the second covers failure to fulfil obligations and non-compliance with the conditions of the various customs schemes which have no effect on customs supervision.
- 29 It is clear from the wording of Article 204 of the Customs Code that it applies only to situations which do not fall within the scope of Article 203 of the same code.

- 30 Accordingly, in order to determine which of the two articles causes a customs debt to be incurred, it is necessary first to consider whether in the factual situation in question there was removal from customs supervision for the purposes of Article 203(1) of the Customs Code. Only if that question has been answered in the negative is it possible that Article 204 of the Customs Code may apply.
- 31 Regarding more specifically the concept of removal from customs supervision in Article 203(1) of the Customs Code, it should be borne in mind that, according to the Court's case-law, that concept must be understood as encompassing any act or omission the result of which is to prevent the competent customs authority, if only for a short time, from gaining access to goods under customs supervision and from monitoring them as provided for in Article 37(1) of the Customs Code (Case C-66/99 *D. Wandel* [2001] ECR I-873, paragraph 47, and Case C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 55).
- 32 In the light of that interpretation, it is clear that, in a situation such as that at issue in the main proceedings, when, as the Bundesfinanzhof has stated in its order for reference, the customs authorities are not able to ensure customs supervision between the time when the goods were removed from the customs warehouse and when they were presented at the customs office at the point of exit, there has been removal from customs supervision for the purposes of Article 203(1) of the Customs Code.
- 33 That finding is not altered by the fact that Article 512 of the implementing regulation, as amended by Regulation No 993/2001, no longer provides for an obligation to place goods such as those at issue in the main proceedings under the external transit procedure when they are transferred to the customs office at the point of exit, since that provision entered into force only after the facts at issue in the main proceedings occurred and does not apply retroactively.

- 34 Moreover, the financial nature of the import duties does not preclude a customs debt from being incurred on the basis of Article 203(1) of the Customs Code in a situation such as that at issue in the main proceedings. As pointed out by the Commission, Article 239 of that code provides for the repayment or remission of duties legally owed, subject to certain conditions.
- 35 In the main proceedings, it is for the national court to ascertain whether the conditions for repayment of the duties at issue, as laid down in Article 239 of the Customs Code, are met.
- 36 In the light of the foregoing considerations, the question referred must be answered as follows: Article 203(1) of the Customs Code is to be interpreted as meaning that there is removal from customs supervision for the purposes of that provision when, before the entry into force of Regulation No 993/2001, non-Community goods which were subject to the customs warehousing procedure and intended for re-export from the customs territory of the Community have been removed and transported from the customs warehouse to the customs office at the point of exit without having been placed under the external transit procedure and the customs authorities have been unable, if only for a short time, to ensure customs supervision of those goods.

## Costs

- 37 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the Bundesfinanzhof by order of 17 July 2001, hereby rules:

**Article 203(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code is to be interpreted as meaning that there is removal from customs supervision for the purposes of that provision when, before the entry into force of Commission Regulation (EC) No 993/2001 of 4 May 2001 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Regulation No 2913/92, non-Community goods which were subject to the customs warehousing procedure and intended for re-export from the customs territory of the Community have been removed and transported from the customs warehouse to the customs office at the point of exit without having been placed under the external transit procedure and the customs authorities have been unable, if only for a short time, to ensure customs supervision of those goods.**

Skouris

Schintgen

Colneric

Delivered in open court in Luxembourg on 12 February 2004.

R. Grass

V. Skouris

Registrar

President

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