

JUDGMENT OF THE COURT (Fourth Chamber)
4 March 2004 *

In Joined Cases C-238/02 and C-246/02,

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

Hauptzollamt Hamburg-Stadt

and

Kazimieras Viluckas (C-238/02),

Ricardas Jonusas (C-246/02),

on the interpretation of Article 4(19), Article 40 and the first indent of Article 202 (3) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1),

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of: J.N. Cunha Rodrigues, President of the Chamber, J.-P. Puissochet (Rapporteur) and F. Macken, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

the Commission of the European Communities by J.-C. Schieferer, acting as Agent,

having regard to the report of the Judge-Rapporteur,

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

gives the following

Judgment

1 By orders dated 7 May 2002, received by the Court on 28 June 2002 and 8 July 2002, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a

preliminary ruling under Article 234 EC three questions on the interpretation of Article 4(19), Article 40 and the first indent of Article 202(3) 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 These questions have been referred in a dispute between the Hauptzollamt (Principal Customs Office) Hamburg-Stadt ('the HZA') and Mr Viluckas (C-238/02) and Mr Jonusas (C-246/02) regarding a customs debt which arose as a result of the unlawful entry of goods into the Community.

Community legislation

- 3 Article 4(19) of the Customs Code provides:

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

...

(19) "Presentation of goods to customs" means the notification to the customs authorities, in the manner laid down, of the arrival of goods at the customs office or at any other place designated or approved by the customs authorities'.

4 Article 38(1) of the Code states:

‘Goods brought into the customs territory of the Community shall be conveyed by the person bringing them into the Community without delay, by the route specified by the customs authorities and in accordance with their instructions, if any:

(a) to the customs office designated by the customs authorities or to any other place designated or approved by those authorities;

...’.

5 Article 40 of that Code provides as follows:

‘Goods which, pursuant to Article 38(1)(a), arrive at the customs office or other place designated or approved by the customs authorities shall be presented to customs by the person who brought the goods into the customs territory of the Community or, if appropriate, by the person who assumes responsibility for carriage of the goods following such entry.’

6 Article 202 of the Code provides:

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

- (a) the unlawful introduction into the customs territory of the Community of goods liable to import duties, or

- (b) the unlawful introduction into another part of that territory of such goods located in a free zone or free warehouse.

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

3. The debtors shall be:

- the person who introduced such goods unlawfully,

- any persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful, and

- any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully.’

National legislation

- 7 Paragraph 21 of the Tabaksteuergesetz (Law on tobacco tax) of 21 December 1992 (BGBl 1992 I, 2150, in the version in Paragraph 1(13) of the Gesetz zur Änderung von Verbrauchsteuergesetzen und des EG-Amtshilfe-Gesetzes (Law amending the laws on consumer taxes and the Law on EU administrative assistance) of 12 July 1996 (BGBl 1996 I, 962), provides:

‘Where tobacco products are imported from a third country directly into the customs territory ... , the customs provisions shall apply by analogy to the incidence and extinguishment (other than by way of collection) of tax, and at the relevant time for assessment, to the identity of the tax debtor, to the tax proceedings and, as the case may be ... , to any remission, repayment or additional tax.’

- 8 Paragraph 8 of the Zollverordnung (German customs regulations) of 23 December 1993 (BGBl 1993 I, 2449) states:

‘Notification under Article 4(19) of the Customs Code may be made in any manner. Express notification must be given of any goods hidden or concealed in secret compartments.’

The main proceedings and the reference for a preliminary ruling

- 9 The defendants in the main proceedings, Mr Viluckas and Mr Jonusas, are Lithuanian nationals. They travelled to Germany on 3 August 1998 by ferry from Klaipeda to Travemünde in a lorry registered in Lithuania.
- 10 Mr Viluckas, the owner of the lorry, was acting as co-driver, and Mr Jonusas was driving the vehicle. The lorry was attached to a refrigerated trailer belonging to a third party. That trailer was laden with wooden pallets which had been cleared in Travemünde for external Community transit operations.
- 11 When the lorry was subsequently inspected at the Hamburg-Stillhorn West motorway service area and thereafter examined at a container inspection facility, 2 901 cartons of cigarettes (580 200 cigarettes) on which duty had not been paid were found in the ceiling of the refrigerated trailer, in a secret compartment specially made for the purpose.
- 12 By a tax notice dated 12 August 1998, amended by a tax amendment notice dated 14 December 1998, the HZA claimed from the defendants in the main proceedings, on the basis of the Customs Code, payment of tobacco tax in the sum of DEM 85 347.42.
- 13 By order dated 22 January 1999, the Amtsgericht (Local Court) Hamburg (Germany) refused to allow criminal proceedings to be instigated against the driver and the owner of the lorry on the ground of insufficient evidence of tax evasion. Mr Viluckas and Mr Jonusas maintained that the cigarettes had, unnoticed by them, been 'slipped in' by a third party before the trailer had been delivered for loading. The type of compartment was not such as to arouse suspicion.

- 14 The claims of the defendants in the main proceedings against the tax notice were rejected by two decisions of 25 March and 21 May 1999. By contrast, their legal action resulted in the setting aside of those administrative decisions. The Finanzgericht (Finance Court) held that neither Article 202 nor Article 203 of the Customs Code provided a basis for the HZA's tax notice.
- 15 The HZA lodged an appeal on a point of law on an alleged breach of Federal law, namely an incorrect application of the second sentence of Paragraph 8 of the Zollverordnung.
- 16 The Bundesfinanzhof considered that its decision depended on whether the Lithuanian nationals were, in terms of Article 202 of the Customs Code, the persons who had unlawfully introduced the goods into the customs territory of the Community and who thereby became the customs debtor.
- 17 Since doubts subsist concerning the interpretation of Article 202(1)(a) and the first indent of Article 202(3), in conjunction with Article 4(19) and Article 40 of the Customs Code, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 4(19) of the Customs Code to be interpreted as meaning that the notification to the customs authorities of the arrival at a particular place of goods introduced into the Community customs territory must refer expressly to goods which are hidden or concealed in secret compartments? [Cases C-238/02 and C-246/02]

2. If Question 1 is answered affirmatively:

Is Article 40 of the Customs Code to be interpreted as meaning that such notification must also be made by the driver of a lorry who was not aware and had no reason to be aware of the goods hidden or concealed in the lorry? [Case C-246/02]

or:

If Question 1 is answered affirmatively:

Is Article 40 of the Customs Code to be interpreted as meaning that such notification must also be made by the driver of a lorry, or a co-driver also entitled to drive it, who was not aware and had no reason to be aware of the goods hidden or concealed in the lorry? [Case C-238/02]

3. If Question 2 is answered affirmatively:

Is the identity of the person who actually gave the (incomplete) notification a material factor in determining who is the customs debtor under the first indent of Article 202(3) of the Customs Code? [Case C-238/02]

The questions

- 18 By its first two questions, which may be answered together, the Bundesfinanzhof asks essentially whether the presentation to customs of goods introduced into the Community, in terms of Article 4(19) of the Customs Code, concerns goods hidden in a secret compartment specially made for that purpose and whether the obligation to present goods as set out in Article 38 of the Code rests, as provided by Article 40 of the Code, with the drivers of a lorry who introduced the goods, although the goods were hidden in the vehicle without their knowledge.
- 19 The Commission states that Article 38 of the Customs Code specifies that goods brought into the customs territory of the Community must be conveyed without delay by the person bringing them into the Community to the customs office or to any other place designated or approved by those authorities and that it does not make any distinction between goods hidden or concealed and goods not hidden or concealed.
- 20 It considers, furthermore, that one of the aims of Article 4(19), Article 40 and Article 202 of the Customs Code is to impose individual responsibility on persons introducing into the customs territory of the Community a means of transport capable of carrying goods. As a result, Article 4(19) of the Customs Code should be interpreted as meaning that, in the notification to the customs authorities, all goods introduced into that territory are to be declared, including therefore hidden or concealed goods. Thus, the hidden cigarettes should have been declared to the customs authorities.
- 21 The Commission submits, finally, that not only the person driving the vehicle when it crossed the Community's external border should be considered as a

person having introduced goods, but also any person on board the vehicle who is also acting as co-driver.

- 22 It is clear from the wording and the broad logic of Articles 4(19), 38(1) and 40 of the Customs Code that all goods introduced into the customs territory of the Community must be presented to customs. The fact that certain goods were concealed in secret compartments in the vehicle in which they were transported does not have the effect of releasing them from that obligation.
- 23 Furthermore, it follows from the actual wording of Article 40 of the Customs Code that if the goods are introduced in a vehicle, the persons required to declare them are those in charge thereof at the time of entry and, in particular, the drivers, both the person driving and, if present in the vehicle, his co-driver or his replacement. The obligation to declare goods which is placed on the drivers would be imposed on another person present in the vehicle if it was found that the latter bore responsibility for introducing the goods.
- 24 The answer to the first two questions should therefore be that the presentation to customs of goods introduced into the Community, in terms of Article 4(19) of the Customs Code, concerns all goods, including those hidden in a secret compartment specially made for that purpose, and that the obligation to present goods as set out in Article 38 of the Code rests, as provided by Article 40 of the Code, with the driver and co-driver of a lorry who introduced the goods, even though the goods were hidden in the vehicle without their knowledge.

- 25 By its third question the Bundesfinanzhof essentially asks whether the person who introduced the goods into the customs territory of the Community without mentioning them in the notification of presentation to customs can be classed as a customs debtor within the meaning of the first indent of Article 202(3) of the Customs Code.
- 26 The Commission takes the view that the customs debtor, as defined by the above provision, is normally the person who introduces the goods and lodges an incomplete notification of presentation of the goods to customs, except where that person is, as in the main proceedings here, under the direction of another person on board the same vehicle.
- 27 The first indent of Article 202(3) of the Customs Code defines the customs debtor as the person who introduced the goods unlawfully.
- 28 As discussed in the reply to the first two questions, an introduction is considered unlawful when goods, including those concealed in a vehicle without its driver's knowledge, were not declared by that driver upon presentation to customs.
- 29 Consequently, even if other persons can be declared debtors in respect of the same goods on the basis of the other provisions of Article 202(3) of the Customs Code, the person who in practical terms introduced the goods without declaring them remains the debtor by virtue of the provisions of the first indent of Article 202(3).

- 30 The answer to the third question must therefore be that the person who has introduced goods into the customs territory of the Community without mentioning them in the notification of presentation to customs is a customs debtor within the meaning of the first indent of Article 202(3) of the Customs Code.

Costs

- 31 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by orders of 7 May 2002, hereby rules:

- (1) The presentation to customs of goods introduced into the Community, in terms of Article 4(19) of Council Regulation (EEC) No 2913/92 of 12

October 1992 establishing the Community Customs Code concerns all goods, including those hidden in a secret compartment specially made for that purpose. The obligation to present goods as set out in Article 38 of that Code rests, as provided by Article 40 of the Code, with the driver and co-driver of a lorry who introduced the goods, even though the goods were hidden in the vehicle without their knowledge.

- (2) The person who has introduced goods into the customs territory of the Community without mentioning them in the notification of presentation to customs is a customs debtor within the meaning of the first indent of Article 202(3) of the Community Customs Code.

Cunha Rodrigues

Puissochet

Macken

Delivered in open court in Luxembourg on 4 March 2004.

R. Grass

J.N. Cunha Rodrigues

Registrar

President of the Fourth Chamber