JUDGMENT OF THE COURT (Second Chamber)

23 February 2006 *

In Case C-201/04,

REFERENCE for a preliminary ruling under Article 234 EC, from the Hof van Beroep te Antwerpen (Belgium), made by decision of 27 April 2004, received at the Court on 5 May 2004, in the proceedings

Belgische Staat

v

Molenbergnatie NV,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk (Rapporteur) and R. Silva de Lapuerta, Judges,

* Language of the case: Dutch.

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Molenbergnatie NV, by E. Gevers and J. Gevers, advocaten,

— the Belgian Government, by D. Haven, acting as Agent,

— the Commission of the European Communities, by X. Lewis and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the provisions 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') governing the recovery of the amount of the customs debt.

2 The reference was made in the course of proceedings between the Belgische Staat (Belgian State) and Molenbergnatie NV, customs agent (the 'agent'), concerning post-clearance recovery of import and anti-dumping duties.

Legal context

3 Chapter 3 of Title VII of the Customs Code concerns the recovery of the amount of the customs debt which is defined in Article 4(9) of the code as being the obligation on a person to pay the amount of the import duties or export duties which apply to specific goods under the Community provisions in force.

4 Section 1 of Chapter 3, entitled, 'Entry in the accounts and communication of the amount of duty to the debtor', includes Articles 217 to 221.

5 Under Article 217(1) of the Customs Code:

'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:

(a) where a provisional anti-dumping or countervailing duty has been introduced;

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

(c) where the provisions adopted in accordance with the committee procedure waive the requirement for the customs authorities to enter in the accounts amounts of duty below a given level.

The customs authorities may discount amounts of duty which, under Article 221(3), could not be communicated to the debtor after the end of the time allowed.'

6 Article 220 of the code is worded as follows:

'1. 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.

2. Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where:

(a) the original decision not to enter duty in the accounts or to enter it in the accounts at a figure less than the amount of duty legally owed was taken on the basis of general provisions invalidated at a later date by a court decision;

(b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration;

(c) the provisions adopted in accordance with the committee procedure exempt the customs authority from the subsequent entry in the accounts of amounts of duty less than a certain figure.'

7 Article 221 of the Customs Code provides:

'1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

2. Where the amount of duty payable has been entered, for guidance, in the customs declaration, the customs authorities may specify that it shall not be communicated in accordance with paragraph 1 unless the amount of duty indicated does not correspond to the amount determined by the authorities.

Without prejudice to the application of the second subparagraph of Article 218(1), where use is made of the possibility provided for in the preceding subparagraph, release of the goods by the customs authorities shall be equivalent to communication to the debtor of the amount of duty entered in the accounts.

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three-year period.'

8 Chapter 4 of Title VII of the Customs Code is entitled 'Extinction of customs debt'. It consists of two articles, Article 233 of which states:

'Without prejudice to the provisions in force relating to the time-barring of a customs debt and non-recovery of such a debt in the event of the legally established insolvency of the debtor, a customs debt shall be extinguished:

(a) by payment of the amount of duty;

(b) by remission of the amount of duty;

(c) where, in respect of goods declared for a customs procedure entailing the obligation to pay duties:

— the customs declaration is invalidated in accordance with Article 66,

— the goods, before their release, are either seized and simultaneously or subsequently confiscated, destroyed on the instructions of the customs authorities, destroyed or abandoned in accordance with Article 182, or destroyed or irretrievably lost as a result of their actual nature or of unforeseeable circumstances or force majeure;

(d) where goods in respect of which a customs debt is incurred in accordance with Article 202 are seized upon their unlawful introduction and are simultaneously or subsequently confiscated.

In the event of seizure and confiscation, the customs debt shall, none the less for the purposes of the criminal law applicable to customs offences, be deemed not to have been extinguished where, under a Member State's criminal law, customs duties provide the basis for determining penalties or the existence of a customs debt is grounds for taking criminal proceedings.'

9 The Customs Code has been applicable, in accordance with the second paragraph of Article 253 thereof, since 1 January 1994.

10 Before that code came into force, the area was governed by Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1), which came into force on 1 July 1980, and by Council Regulation (EEC) No 1854/89 of 14 June 1989 on the entry in the accounts and terms of payment of the amounts of the import duties or export duties resulting from a customs debt (OJ 1989 L 186, p. 1), that latter applying to amounts of duty entered in the accounts from 1 July 1990.

11 Under Article 2 of Regulation No 1697/79:

'1. Where the competent authorities find that all or part of the amount of import duties or export duties legally due on goods entered for a customs procedure involving the obligation to pay such duties has not been required of the person liable for payment, they shall take action to recover the duties not collected.

However, such action may not be taken after the expiry of a period of three years from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to the said goods was incurred.

2. Within the meaning of paragraph 1 action for recovery shall be taken by notifying the person concerned of the amount of import duties or export duties for which he is liable.'

12 Article 1(2)(c) of Regulation No 1854/89 contained a definition of 'entry in the accounts' which was worded as follows:

'... the entry by the customs authority in the accounts books, or any other medium used in their stead, of the amount of import duties or export duties corresponding to a customs debt'.

13 Article 2(1) of Regulation No 1854/89 provided:

'Each amount of import duties or export duties resulting from a customs debt — hereinafter called "amount of duty" — shall be calculated by the customs authority as soon as it has the necessary data, and entered in the accounts by that authority.'

14 Article 5 of Regulation No 1854/89 was worded as follows:

'Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 3 and 4 or has been entered in the accounts at a level lower than the amount legally owed, the entry in the accounts of the amount of duty to be recovered or remaining to be recovered must take place within

two days of the date on which the customs authority noticed the situation and is in a position to calculate the amount legally owing and to determine the person liable for payment of that amount. This time-limit may be extended in accordance with Article 4.'

15 Article 6(1) of that regulation provided that:

'As soon as it has been entered in the accounts, the amount of duty shall be communicated to the person liable for its payment, in accordance with the appropriate procedures.'

16 The Customs Code has been amended, inter alia, by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17).

The main proceedings and the questions referred for a preliminary ruling

17 Between 9 April 1992 and 23 June 1994, the agent, acting for and on behalf of another company, declared imports of video cassettes into Belgium from Macao, via Hong Kong.

18 Under the generalised system of tariff preferences for goods originating in developing countries, those imports were exonerated from customs duties.

19 Following an investigation in Macao, the Committee on Origin established by Article 12 of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (OJ, English Special Edition 1968 (I), p. 165) decided to exclude those goods from the preferential tariff on the ground that they were actually of Chinese origin and were therefore subject to import duty for non-member countries, and to anti-dumping duty. The Member States were informed of the committee's decision on 10 August 1994.

20 By registered letter of 27 February 1995, the investigations inspectorate of the customs and excise authorities in Antwerp informed the agent about that investigation and notified him of the amounts of import and anti-dumping duties due.

21 According to the Belgian Government, the amounts of those duties were entered in the accounts on 7 March 1995.

22 By a communication of 29 September 1995, the regional directorate of customs and excise (the 'administration') notified the agent of the post-clearance recovery of those duties, pursuant to Article 220(1) of the Customs Code.

23 The administration, when challenged by the agent, did not alter its view and instituted proceedings against the latter on 3 July 2000. By judgment of 22 April 2002, the Rechtbank van eerste aanleg te Antwerpen (Antwerp Court of First Instance) declared the administration's claim to be unfounded, finding that it had proceeded in an improper manner to post-clearance recovery of the customs duties in question. Specifically, the court ruled that the three-year limitation period fixed by Article 221(3) of the Customs Code had expired when the agent was notified of the amount of outstanding duties in respect of a debt incurred on 9 April 1992. The administration appealed against that judgment.

24 In those circumstances, the Hof van Beroep te Antwerpen (Antwerp Court of Appeal) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do Articles 217 to 232 of the ... Customs Code ... — these being the provisions of Chapter 3 ("Recovery of the amount of the customs debt") of Title VII ("Customs debt"), the said Chapter 3 consisting of a Section 1 ("Entry in the accounts and communication of the amount of duty to the debtor" — Articles 217 to 221) and a Section 2 ("Time-limit and procedures for payment of the amount of duty" — Articles 222 to 232) — apply to the recovery of a customs debt which was incurred prior to 1 January 1994 but recovery of which was not undertaken or initiated prior to 1 January 1994?

(2) If so, must the notification prescribed in Article 221 of the ... Customs Code always take place after the amount of the duties has been entered in the accounts, or, in other words, must the notification prescribed in Article 221 of the ... Customs Code always be preceded by entry of the duties in the accounts?

(3) Does late notification of the amount of duties to the debtor — that is to say, notification made after expiry of the three-year period laid down in the original version of Article 221(3) of the ... Customs Code (in force prior to its replacement [effective from 19 December 2000] by Article 1.17 of Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [OJ 2000 L 311, p. 17]), even though the customs authorities were in fact in a position to determine, within that three-year period, the precise amount of the duties legally due — make it impossible to pursue recovery of the customs debt in question, lead to the cancellation of the customs debt in question, or have some other consequence in law?

(4) Must Member States determine the manner in which notification of the amount of duties, as laid down in Article 221 of the ... Customs Code, must be made to the debtor?

If so, can the Member State which has failed to specify how notification of the amount of duties as laid down in Article 221 of the ... Customs Code should be made to the debtor argue that any document in which the amount of the duties is set out and which (following entry in the accounts) was notified to the debtor may constitute notification to the debtor of the amount of duties, as prescribed in Article 221 of the ... Customs Code, even though that document does not in any way refer to Article 221 of the ... Customs Code or indicate that it relates to notification to the debtor of the amount of duties owed?'

The questions referred to the Court

The first and third questions

25 By the first question, the national court asks about the temporal application of the provisions of Articles 217 to 232 of the Customs Code, which form part of Chapter 3 of Title VII of that code and concern recovery of the amount of the customs debt, the Customs Code having been applicable, under the second paragraph of Article 253 thereof, since 1 January 1994.

26 The national court, by its third question, asks the Court to explain what effects follow from non-compliance with the time-limit imposed by Article 221(3) of the Customs Code.

27 The first point to be noted here is that, in the light of the grounds given in the national court's decision and as the Advocate General observes in point 47 of his Opinion, the first question, even if its wording refers to Articles 217 to 232 of the Customs Code as a whole, primarily concerns Article 221 of the code, as the national court is specifically asking whether that article applies to a customs debt incurred prior to 1 January 1994, the recovery of which has been undertaken after that date and before the entry into force of Regulation No 2700/2000.

28 As a result, in the light of the connection between the first and third questions as regards the analysis they require of the effects of Article 221 of the Customs Code, they should be dealt with together.

29 In respect of the first question, the Belgian Government submits that the articles referred to contain only substantive rules and are not therefore applicable to customs debts incurred prior to 1 January 1994.

30 The Commission of the European Communities and the agent, taking as a basis the judgment in Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 9, submit that those same articles, which contain both procedural and substantive rules, may not be considered in isolation with regard to the time at which they take effect since they form an indivisible whole. Nevertheless, their submissions vary. Thus, the Commission takes the view that only the provisions of Regulation No 1697/79 are to be applied to the post-clearance recovery of a customs debt incurred prior to 1 January 1994, recovery of which was initiated only after that date. The agent, for its part, puts forward the view that Articles 217 to 232 of the Customs Code should be applied to recovery of such a debt.

31 It must be recalled that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force (see, inter alia, *Salumi and Others*, paragraph 9; Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 22; Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 13; and Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 29).

32 At paragraph 11 of its judgment in *Salumi and Others*, the Court, by way of exception to the rule of interpretation recalled above, held that Regulation No 1697/79, which was intended to establish a body of rules covering the post-clearance recovery of customs duties, contained both procedural and substantive rules forming an indivisible whole, the individual provisions of which could not be considered in isolation with regard to the time at which they took effect. As the Advocate General observes in points 42 to 46 of his Opinion, the reason for such an exception was the replacement of the existing national rules with new Community rules, the aim of which was to achieve a consistent and uniform application of the Community legislation thus established in the area of customs.

33 In the present case, since the question raised is concerned exclusively with the time at which the Customs Code takes effect, the purpose of the code being to reproduce, with amendments in some areas, the existing Community legislation applicable in the field of customs law and in particular Regulations No 1697/79 and No 1854/89 previously in force, the earlier exception to the principle of interpretation recalled in paragraph 31 of this judgment is not applicable.

34 A distinction must therefore be made between substantive rules and procedural rules. It is, therefore, for the national court, in respect of the facts of the main proceedings to which the customs debts relate and which arose before the date on

which the code became applicable, to refer, on the one hand, to the substantive rules in the legislation in force prior to that date and, on the other hand, to the procedural rules in the Customs Code (see, to that effect, *De Haan*, paragraph 14, and Case C-156/00 *Netherlands* v *Commission* [2003] ECR I-2527, paragraphs 35 and 36).

35 Since the national court's question is primarily concerned with Article 221 of the Customs Code, it is appropriate, at this stage, to rule on the nature of the provisions of that article in the light of the distinction between substantive and procedural rules.

36 It is common ground that paragraphs 1 and 2 of Article 221 enact rules of an entirely procedural nature.

37 As regards the scope and, therefore, nature of the rule established by Article 221(3), that rule is precisely the subject of the national court's third question. That court thus raises the question of the effects of late notification of the amount of duties to the debtor — that is to say, notification made after expiry of the three-year period laid down by that provision, which reproduces in substance the provision set out at Article 2(1) of Regulation No 1697/79 (see, to that effect, *Netherlands* v *Commission*, paragraph 6).

38 The Belgian Government, the agent and the Commission maintain in this connection that notification of the amount of duties to the debtor after the expiry of the three-year period, whether this be under the Customs Code or under the legislation previously applicable, makes it impossible to pursue recovery of the debt. However, they submit that that impossibility of recovering the debt does not result in its extinction.

39 It is beyond question that expiry of the three-year period laid down in Article 221(3) of the Customs Code, for the customs authorities to notify the debtor of the amount of the customs debt, is a bar on the right of those authorities to recover the debt, unless it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due. However, the provision at issue at the same time enacts a rule governing the customs debt itself, and thus establishes a rule on limitation in respect of the debt.

40 Moreover, Article 233 of the Customs Code states that the list of the different causes of extinction of the customs debt set out at points a to d of that article is without prejudice, inter alia, to the provisions relating to the time-barring of the customs debt (see, to that effect, Case C-112/01 *SPKR* [2002] ECR I-10655, paragraphs 30 and 31).

41 It must therefore be held that, since on expiry of the period prescribed by Article 221(3) of the Customs Code the debt is time-barred and, consequently, extinguished, that provision enacts a substantive rule.

42 In the light of the foregoing, the first and third questions are to be answered as follows:

— Only the procedural rules set out in Articles 217 to 232 of the Customs Code apply to the recovery, commenced after 1 January 1994, of a customs debt incurred prior to that date.

— On expiry of the period prescribed by Article 221(3) of the Customs Code, an action for recovery of a customs debt is time-barred subject to the exception laid down in that article, which amounts to the debt itself being time-barred and, consequently, extinguished. In the light of the rule thus established, Article 221(3) must be considered, unlike Article 221(1) and (2), to be a substantive provision and cannot, therefore, be applied to recovery of a customs debt incurred prior to 1 January 1994. Where the customs debt was incurred prior to 1 January 1994, that debt can be governed only by the rules on limitation in force at that date, even if the procedure for recovery of the debt was commenced after 1 January 1994.

The second question

43 By its second question, the national court asks, on the assumption that Article 221 of the Customs Code is applicable, whether the notification of the amount of duties to the debtor required by Article 221(1) may take place before the 'entry in the accounts' itself.

44 It must be noted that the Customs Code reproduced in substance the provisions of Regulation No 1854/89 on the calculation of import and export duties with which the procedure for recovery of the customs debt is initiated, the provisions defining the concept of 'entry in the accounts', and those concerning the requirement to communicate the amount of duty, in accordance with appropriate procedures, as soon as it has been entered in the accounts.

45 The Belgian Government considers that there is no need to reply to that question given that the Customs Code is inapplicable. The Commission refers to Regulation

No 1697/79 and submits that entry of the amount of duty in the accounting records is not a necessary precondition for an action for recovery. The agent submits that notification of the amount of duty must always take place after entry in the accounts.

46 It follows from the wording of Article 221(1) of the Customs Code which, as the Advocate General observes in point 68 of his Opinion, is wholly unambiguous, that entry in the accounts, which consists of entry of the amount of duty by the customs authorities in the accounting records or on any other equivalent medium, is required to take place before the communication to the debtor of the amount of import or export duty.

47 Such a chronological order in the procedure for entry in the accounts and communication of the amount of duty, which is affirmed in the very heading of Title VII, Chapter 3, Section 1 of the Customs Code ('Entry in the accounts and communication of the amount of duty to the debtor'), must be observed if there are not to be differences in treatment as between the persons liable and if, moreover, the smooth operation of the customs union is not to be prejudiced. The same approach was adopted in Regulation No 1854/89, the fourth recital in the preamble to which referred to 'the periods within which the amounts of import duties or export duties entered in the accounts must be paid'.

48 That conclusion is not in any way inconsistent with the case-law of the Court to which the Commission refers, by virtue of which failure to observe the time-limits laid down for entry by the customs authorities of the amount of duty in the accounting records does not preclude post-clearance recovery, as failure to observe the time-limits prescribed for entry in the accounts can give rise only to the Member State concerned paying interest in respect of delay, in the context of making available own resources (see inter alia, in support of this, Case C-370/96 *Covita*

[1998] ECR I-7711, paragraphs 36 and 37, and *De Haan*, paragraph 34). Those judgments decide only as to the question of the effects of a delay in entry in the accounts and are concerned exclusively with relations between Member States and the Community.

49 As a result, the answer to the second question is that Article 221(1) of the Customs Code requires the amount of import or export duty to be entered in the accounts before it is communicated to the debtor.

The fourth question

50 By the fourth question, the national court is essentially asking whether Member States are required to determine the procedures in accordance with which notification of the amount of duties, under Article 221 of the Customs Code, must be made to the person liable for the customs debt.

51 The Belgian Government and the Commission submit that Member States are not required to regulate in their national legislation the manner in which notification of the customs debt is made. The agent submits that Member States must set out those procedures and, if they have not done so, only a document referring unambiguously to Article 221 of the Customs Code can be deemed to constitute communication within the meaning of that article.

52 In order to reply to the question raised, it should be noted that, according to the general principles on which the Community is based and which govern the relations

between it and the Member States, it is for the Member States, under Article 10 EC, to ensure that Community rules are implemented within their territories. In so far as Community law, including its general principles, does not include common rules to that effect then, when the national authorities implement Community rules, they are to act in accordance with the procedural and substantive rules of their own national law (see, in particular, Case C-285/93 *Dominikanerinnen-Kloster Altenhohenau* [1995] ECR I-4069, paragraph 26, and Case C-495/00 *Azienda Agricola Giorgio, Giovanni e Luciano Visentin and Others* [2004] ECR I-2993, paragraph 39).

53 Given the absence in the Community customs legislation of provisions on the meaning of 'appropriate procedures' or of any provision conferring power on entities other than the Member States and their authorities to determine those procedures, it must be held that the procedures are within the scope of the national legal systems of the Member States. Should the latter not have enacted specific procedural rules, it is the responsibility of the competent State authorities to guarantee a form of communication which allows persons liable for customs debts to have full knowledge of their rights.

54 In the light of the foregoing, the answer to the fourth question is that Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duties is to be made to the debtor where national procedural rules of general application can be applied to that communication, which ensure that the debtor receives adequate information and which enable him, with full knowledge of the facts, to defend his rights.

Costs

55 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 (Second Chamber) hereby rules:

1. **Only the procedural rules set out in Articles 217 to 232 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code apply to the recovery, commenced after 1 January 1994, of a customs debt incurred prior to that date.**

2. **Article 221(1) of Regulation No 2913/92 requires the amount of import or export duty to be entered in the accounts before it is communicated to the debtor.**

3. **On expiry of the period prescribed by Article 221(3) of Regulation No 2913/92, an action for recovery of a customs debt is time-barred subject to the exception laid down in that article, which amounts to the debt itself being time-barred and, consequently, extinguished. In the light of the rule thus established, Article 221(3) must be considered, unlike Article 221(1) and (2), to be a substantive provision and cannot, therefore, be applied to recovery of a customs debt incurred prior to 1 January 1994. Where the customs debt was incurred prior to 1 January 1994, that debt can be governed only by the rules on limitation in force at that date, even if the procedure for recovery of the debt was commenced after 1 January 1994.**

4. Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duties is to be made to the debtor where national procedural rules of general application can be applied to that communication, which ensure that the debtor receives adequate information and which enable him, with full knowledge of the facts, to defend his rights.

[Signatures]