JUDGMENT OF THE COURT (Second Chamber)
9 March 2006 *

In Case C-293/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te Amsterdam (Netherlands), made by decision of 14 June 2004, received at the Court on 9 July 2004, in the proceedings

Beemsterboer Coldstore Services BV

v

Inspecteur der Belastingdienst — Douanedistrict Arnhem,

THE COURT (Second Chamber),

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

* Language of the case: Dutch.

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Beemsterboer Coldstore Services BV, by Jan van Nouhuys, advocaat,

— the Inspecteur der Belastingdienst — Douanedistrict Arnhem, by G. Wijngaard, acting as Agent,

— the Netherlands Government, by H.G. Sevenster and C. Wissels, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by G. Albenzio, avvocato dello Stato,

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

after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 220(2)(b) 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'), both in its original version and in that resulting from Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17).

2 The questions have been raised in the course of proceedings between Beemsterboer Coldstore Services BV ('Beemsterboer'), a company established under Netherlands law, and the Inspecteur der Belastingdienst — Douanedistrict Arnhem (Customs Inspector of Arnhem Customs District) (the 'Inspector') concerning the post-clearance recovery of import duties.

Legal context

The Customs Code

3 Article 220 of the original version of the Customs Code states:

'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:

...

(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;

...'

4 Article 220(2)(b) of the Customs Code was amended with effect from 19 December 2000 by Regulation No 2700/2000 and now reads as follows:

'the amount of duty legally owed was not 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.

Where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the authorities of a third country, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected within the meaning of the first subparagraph.

The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where, in particular, it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

The person liable may plead good faith when he can demonstrate that, during the period of the trading operations concerned, he has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled.

The person liable may not, however, plead good faith if the European Commission has published a notice in the *Official Journal of the European Communities*, stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country.'

The Agreement between the European Communities and the Republic of Estonia on free trade and trade-related matters

5 The Agreement on free trade and trade-related matters between the European Community, the European Atomic Energy Community and the European Coal and

Steel Community, of the one part, and the Republic of Estonia, of the other part, signed on 18 July 1994 (OJ 1994 L 373, p. 2) (the 'Free Trade Agreement'), includes a Protocol 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation, which was amended by Decision No 1/97 of the Joint Committee between the European Communities and the Republic of Estonia of 6 March 1997 (OJ 1997 L 111, p. 1) ('Protocol 3').

6 Article 16(1) of Protocol 3, entitled 'General requirements' and included in Title V on proof of origin, provides:

'1. Products originating in the Community shall, on importation into Estonia, and products originating in Estonia shall, on importation into the Community, benefit from this Agreement upon submission of ...:

(a) a movement certificate EUR.1 [the "EUR.1 certificate"], a specimen of which appears in Annex III;

...'.

7 Article 17 of that protocol, entitled 'Procedure for the issue of a movement certificate EUR.1', includes a paragraph 3, which is worded as follows:

'The exporter applying for the issue of [an EUR.1] ... certificate ... shall be prepared to submit at any time, at the request of the customs authorities of the exporting country where the [EUR.1] ... certificate ... is issued, all appropriate documents

proving the originating status of the products concerned as well as the fulfilment of the other requirements of this Protocol.'

8 According to Article 28(1) of Protocol 3, entitled 'Preservation of proof of origin and supporting documents':

'The exporter applying for the issue of [an EUR.1] ... certificate ... shall keep for at least three years the documents referred to in Article 17(3).'

9 Article 32 of Protocol 3, entitled 'Verification of proofs of origin', provides:

'1. Subsequent verifications of proofs of origin shall be carried out at random or whenever the customs authorities of the importing country have reasonable doubts as to the authenticity of such documents, the originating status of the products concerned or the fulfilment of the other requirements of this Protocol.

...

3. The verification shall be carried out by the customs authorities of the exporting country. For this purpose, they shall have the right to call for any evidence and to carry out any inspection of the exporter's accounts or any other check considered appropriate.'

The main proceedings and the questions referred for a preliminary ruling

10 In 1997, Hoogwegt International BV ('Hoogwegt') purchased consignments of butter from the Estonian company AS Lacto Ltd ('Lacto'). Those consignments were declared on their entry to the Netherlands by Beemsterboer, a customs agent, acting on behalf of Hoogwegt. Estonia was given as the country of origin of the goods, which were thus put into free circulation at the preferential tariff on the basis of the Free Trade Agreement referred to above. In order to prove the origin of the butter, each customs declaration was accompanied by an EUR.1 certificate issued by the customs authorities in Estonia at the request of Lacto.

11 In March 2000, following indications of fraud concerning butter placed on the market between the European Union and Estonia, a delegation established by the Commission of the European Communities, in cooperation with the national customs authorities, carried out an investigation in this connection.

12 In the course of the inquiry, it became apparent that Lacto had not kept the original documents confirming the origin of the butter exported.

13 By decision of 14 July 2000, the Tallinn (Estonia) customs inspectorate declared the EUR.1 certificates to be void and withdrew them. After Lacto had lodged an objection with the Estonian Customs Board, the decision to withdraw those certificates was declared to be unlawful on formal grounds.

14 As it was impossible to establish the origin of the butter, the Netherlands customs authorities took action for post-clearance recovery against Beemsterboer. After the objection it submitted against the notice for recovery had been dismissed, Beemsterboer brought an appeal before the referring court.

15 Those were the circumstances in which the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the new text of Article 220(2)(b) of the ... [Customs Code] applicable to a case in which the customs debt was incurred and post-clearance recovery undertaken before the provision entered into force?

(2) If the first question is answered in the affirmative: is an EUR.1 certificate which cannot be shown actually to be incorrect because the origin of the goods for which the certificate was issued could not be ascertained upon subsequent verification, the goods being denied preferential treatment solely for that reason, an "incorrect certificate" within the meaning of the new text of Article 220(2)(b) of the ... [Customs Code] and, if such is not the case, can an interested party still usefully rely on that provision?

(3) If the second question is answered in the affirmative: who bears the burden of proving that the EUR.1 certificate is based on an incorrect account of the facts provided by the exporter or, alternatively, who must prove that evidently the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment?

(4) If the first question is answered in the negative: can an interested party usefully appeal against Article 220(2)(b) of the ... [Customs Code], as this provision read prior to 19 December 2000, in a situation in which it cannot subsequently be ascertained whether, at the time of issue, the customs authorities had good grounds for issuing an EUR.1 certificate and were right to issue one?'

The questions

The first question

16 By its first question, the referring court asks the Court of Justice whether Article 220 (2)(b) of the Customs Code, in the wording following from Regulation No 2700/2000, applies to a customs debt which was incurred and the post-clearance recovery of which was commenced before that regulation entered into force.

17 The Netherlands Government, the Inspector and the Italian Government submit that that question should be answered in the negative. Having noted the rules on the application *ratione temporis* of substantive rules in Community law, the Netherlands Government is of the view that Article 220(2)(b) of the Customs Code is an ordinary substantive rule and therefore cannot be given retroactive effect. The Italian Government maintains that the new wording of Article 220(2)(b) of the Customs Code applies only to debts incurred after 19 December 2000, the date on which Regulation No 2700/2000 came into force.

18 The Commission suggests answering the first question in the affirmative and points out that, in the light of the grounds set out in the *travaux préparatoires* for

Regulation No 2700/2000, the provisions added to Article 220(2)(b) of the Customs Code were intended to make that provision clear with a view to increasing legal certainty, rather than to modify it. Beemsterboer submits that the new wording of Article 220 of the Customs Code clarifies a rule which existed prior to 19 December 2000, and as a result that provision should be applied retroactively.

19 According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force (see 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; Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 29; and Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405, paragraph 19).

20 In that regard, to the extent to which Article 220(2)(b) of the Customs Code governs the conditions under which a person liable avoids the post-clearance recovery of import duties as the result of an error on the part of the customs authorities, it enacts a substantive rule. As a result, that provision should not, in principle, apply to situations existing before it entered into force.

21 However, the substantive rules of Community law may exceptionally be interpreted as applying to situations existing before their entry into force in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them (see Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 9; Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22; and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 119).

22 It is apparent from recital (11) in the preamble to Regulation No 2700/2000 that the purpose of the amendment of Article 220(2)(b) of the Customs Code was to define, for the particular case of preferential arrangements, the concepts of error by the customs authorities and good faith of the person liable for payment. Thus, without having recourse to an amendment of the substance, the aim of that article is to explain the above concepts, which were already contained in the initial version of Article 220 and defined by the case-law of the Court (see, inter alia, Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraphs 92 and 97; Case C-15/99 *Sommer* [2000] ECR I-8989, paragraphs 35 to 37; order in Case C-30/00 *William Hinton & Sons* [2001] ECR I-7511, paragraphs 68 to 73, and *Ilumitrónica*, paragraphs 42 and 43).

23 It must accordingly be held that the new version of Article 220(2)(b) of the Customs Code is essentially an interpretative provision, and it is appropriate to apply it to situations existing before its entry into force.

24 However, acknowledging that a provision of substantive law has such an effect must not undermine the fundamental principles of the Community, in particular the principles of legal certainty and the protection of legitimate expectations, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it (see, to that effect, *Salumi and Others*, paragraph 10; Case 21/81 *Bout* [1982] ECR 381, paragraph 13; *GruSa Fleisch*, paragraph 22; and Case C-376/02 *'Goed Wonen'* [2005] ECR I-3445, paragraph 33).

25 In that regard, it should be noted, firstly, that it is apparent from the first article of the amended proposal for a European Parliament and Council Regulation (EC)

amending Regulation No 2913/92 establishing the Community Customs Code (document COM(1999) 236 final), and the explanatory memorandum thereto, that the new version of Article 220(2)(b) of the Customs Code aims to improve legal certainty, dividing the risk of uncertainty between the importer and the system and specifying the obligations of the customs authorities. Secondly, as the Advocate General observes in point 32 of her Opinion, the new text strengthens the protection of the legitimate expectations of the traders concerned in the event of errors on the part of the customs authorities relating to the preferential status of goods from non-member countries.

26 Therefore, neither the principle of legal certainty nor that of the protection of legitimate expectations precludes the application of the provision in question to situations existing before its entry into force.

27 In the light of the foregoing, the answer to the question raised must be that Article 220(2)(b) of the Customs Code, as amended by Regulation No 2700/2000, applies to a customs debt which was incurred and the post-clearance recovery of which was commenced before that regulation entered into force.

The second question

28 The second question is divided into two parts. In the first part of its question, the Gerechtshof te Amsterdam essentially asks whether, in so far as the origin of goods for which the EUR.1 certificate has been issued can no longer be confirmed following subsequent verification, that certificate is an 'incorrect certificate' within

the meaning of the version of Article 220(2)(b) of the Customs Code resulting from Regulation No 2700/2000. In the second part of its question, the Gerechtshof asks, if such is not the case, whether an interested party can still usefully rely on that provision.

29 The first point to note is that it follows from the provisions of Protocol 3 that products originating in the Community or in Estonia benefit from the preferential arrangement provided for in the agreement, upon submission of an EUR.1 certificate which constitutes proof of that origin.

30 Nevertheless, it remains possible, under Article 32 of that protocol, to carry out subsequent verifications of proofs of origin where the customs authorities of the importing country have reasonable doubts as to the authenticity of such documents, the originating status of the products concerned or the fulfilment of the other requirements of that protocol.

31 As appears from the decision making the reference, it had become apparent, as a result of a subsequent verification carried out at Lacto, that the latter had not kept the original documents proving the origin of the relevant products and that the origin of the butter which it had exported could not be determined on the basis of the information available.

32 In this connection, the Court has already held that the aim of subsequent verification is to check whether the statement of origin in an EUR.1 certificate which has been issued is correct (Case C-12/92 *Huygen and Others* [1993] ECR I-6381, paragraph 16, and Case C-97/95 *Pascoal & Filhos* [1997] ECR I-4209, paragraph 30).

33 The person liable cannot entertain a legitimate expectation with regard to the validity of EUR.1 certificates by virtue of the fact that they were initially accepted by the customs authorities of a Member State, since the role of those authorities in regard to the initial acceptance of declarations in no way prevents subsequent verifications from being carried out (*Faroe Seafood and Others*, paragraph 93).

34 Therefore, where a subsequent verification does not confirm the origin of the goods as stated in the EUR.1 certificate, it must be concluded that the goods are of unknown origin and that the EUR.1 certificate and the preferential tariff were thus wrongly granted (*Huygen and Others*, paragraphs 17 and 18, and *Faroe Seafood and Others*, paragraph 16).

35 In those circumstances, the answer to the first part of the second question must be that, inasmuch as the origin of the goods referred to in an EUR.1 certificate can no longer be confirmed following subsequent verification, that certificate must be considered to be an 'incorrect certificate' within the meaning of Article 220(2)(b) of the Customs Code, as amended by Regulation No 2700/2000.

36 In view of the answer to the first part of the second question, it is unnecessary to answer the second part of that question.

The third question

37 The third question concerns the interpretation of the third subparagraph of Article 220(2)(b) of the Customs Code, as amended by Regulation No 2700/2000.

38 The referring court first wishes to establish who bears the burden of proving that an EUR.1 certificate was based on an incorrect account of the facts provided by the exporter.

39 It must be stated in this respect that, in accordance with generally accepted rules on the allocation of the burden of proof, it is the responsibility of the customs authorities which wish to rely on the beginning of the third subparagraph of Article 220(2)(b) of the Customs Code to carry out post-clearance recovery to adduce, in support of their claim, evidence that the issue of incorrect certificates was due to an inaccurate account of the facts provided by the exporter.

40 However, as appears from the findings made by the national court in the decision making the reference, it was impossible in the present case for the customs authorities to establish whether the information provided for the issue of an EUR.1 certificate was correct or not, since the exporter had not retained possession of the supporting documents, notwithstanding the obligation flowing from Article 28(1) of Protocol 3 to keep for at least three years the appropriate documents proving the originating status of the products concerned.

41 It is the responsibility of traders to make the necessary arrangements in their contractual relations in order to guard against the risks of an action for post-clearance recovery (*Pascoal & Filhos*, paragraph 60).

42 In addition, in order to attain the objective behind subsequent verification, namely to check the authenticity and accuracy of the EUR.1 certificate, the onus is in this instance on the person liable for the duty to prove that those certificates drawn up by the authorities of a non-member country were based on an accurate account of the facts.

43 It is settled case-law, in any event, that the European Community cannot be made to bear the adverse consequences of the wrongful acts of the suppliers of importers (*Pascoal & Filhos*, paragraph 59).

44 The referring court secondly wishes to establish who bears the burden of proving that the customs authorities which issued the EUR.1 certificate evidently were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

45 Suffice it to hold in that regard that the person who relies on the exception set out at the end of the third subparagraph of Article 220(2)(b) of the Customs Code bears the burden of proving that it was evident that the authorities which issued that certificate were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

46 In the light of the foregoing, the answer to the third question must be that the person who relies on the third subparagraph of Article 220(2)(b) of the Customs Code, as amended by Regulation No 2700/2000, must adduce the evidence necessary for his claim to succeed. It is therefore in principle for the customs authorities which wish to rely on the beginning of the third subparagraph of that Article 220(2)(b) in order to carry out post-clearance recovery to adduce evidence that the incorrect certificates were issued because of the inaccurate account of the facts provided by the exporter. Where, however, as a result of negligence wholly attributable to the exporter, it is impossible for the customs authorities to adduce the necessary evidence that the EUR.1 certificate was based on the accurate or inaccurate account of the facts provided by the exporter, the burden of proving that that certificate issued by the authorities of the non-member country was based on an accurate account of the facts lies with the person liable for the duty.

The fourth question

47 In view of the answer to the first question, it is unnecessary to rule on the fourth question.

Costs

48 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. **Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000, applies to a customs debt which was incurred and the post-clearance recovery of which was commenced before that regulation entered into force.**

2. **Inasmuch as the origin of the goods referred to in a movement certificate EUR.1 can no longer be confirmed following subsequent verification, that certificate must be considered to be an 'incorrect certificate' within the meaning of Article 220(2)(b) of Regulation No 2913/92, as amended by Regulation No 2700/2000.**

3. **The person who relies on the third subparagraph of Article 220(2)(b) of Regulation No 2913/92, as amended by Regulation No 2700/2000, must adduce the evidence necessary for his claim to succeed. It is therefore in principle for the customs authorities which wish to rely on the beginning of the third subparagraph of that Article 220(2)(b) in order to carry out post-clearance recovery to adduce evidence that the incorrect certificates were issued because of the inaccurate account of the facts provided by the exporter. Where, however, as a result of negligence wholly attributable to the exporter, it is impossible for the customs authorities to adduce the necessary evidence that the movement certificate EUR.1 was based on the accurate or inaccurate account of the facts provided by the exporter, the burden of proving that that certificate issued by the authorities of the non-member country was based on an accurate account of the facts lies with the person liable for the duty.**

[Signatures]