

JUDGMENT OF THE COURT (Second Chamber)

16 July 2009\*

In Case C-126/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Hof van Cassatie van België (Belgium), made by decision of 26 February 2008, received at the Court on 25 March 2008, in the proceedings

**Distillerie Smeets Hasselt NV**

v

**Belgische Staat,**

**Louis De Vos,**

**Bollen, Mathay & Co. BVBA,** liquidator of Transterminal Logistics NV,

\* Language of the case: Dutch.

**Daniel Van den Langenbergh,**

**Firma De Vos NV**

and

**Belgische Staat**

v

**Bollen, Mathay & Co. BVBA, liquidator of Transterminal Logistics NV,**

and

**Louis De Vos**

v

**Belgische Staat,**

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composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk (Rapporteur), P. Kūris and L. Bay Larsen, Judges,

Advocate General: E. Sharpston,  
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Distillerie Smeets Hasselt NV, by J. Verbist, advocaat,
- the Belgian Government, by J.-C. Halleux, acting as Agent,
- the Commission of the European Communities, by S. Schønberg and M. van Beek, acting as Agents,

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

gives the following

## Judgment

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Articles 217(1) and 221(1) 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’).
  
- <sup>2</sup> The reference has been made in the course of proceedings between, first, Distillerie Smeets Hasselt NV and Belgische Staat (Belgian State), L. De Vos, Bollen, Mathay & Co. BVBA, in its capacity as liquidator of Transterminal Logistics NV, D. Van den Langenbergh and Firma De Vos NV, second, Belgische Staat and Bollen, Mathay & Co. BVBA, in its capacity as liquidator of Transterminal Logistics NV, and, third, L. De Vos and Belgische Staat, concerning post-clearance recovery of customs duty on imports.

## Legal context

### *Community law*

3 Article 217 of the Customs Code provides:

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

...

2. The Member States shall determine the practical procedures for the entry in the accounts of the amounts of duty. Those procedures may differ according to whether or not, in view of the circumstances in which the customs debt was incurred, the customs authorities are satisfied that the said amounts will be paid.’

4 Article 221(1) of the Customs Code provides:

‘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.’

*National law*

5 The determination and communication of the amount of import duty or export duty owed in the case of a customs offence are governed by Articles 267 to 272 of the General Law on Customs and Excise Duty (algemene wet inzake douane en accijnzen), coordinated by the Royal Decree of 18 July 1977 (*Belgisch Staatsblad* of 21 September 1977, p. 11425), confirmed by the Law of 6 July 1978 on Customs and Excise Duty (*Belgisch Staatsblad* of 12 August 1978, p. 9013) ('the AWDA').

6 Under Article 267 of the AWDA:

'Any record kept of offences, cases of fraud or infringements of the law shall be drawn up immediately, or as soon as possible, by at least two competent persons, one of whom shall be appointed or provided with authorisation to act by the administration of customs and excise duties.'

7 Article 268 of the AWDA provides:

'The record shall contain a concise and accurate account of the findings and of the grounds of the accusation, with an indication of the persons concerned and their occupation and of the date and place, and in compliance with the provisions of Article 176 for the individual cases specified therein.'

8 Article 270 of the AWDA provides:

‘Within five days of the record referred to in Article 267 being drawn up, the original marked “*ne varietur*” shall be submitted to an immediate superior of the reporting officers and a copy thereof shall be delivered to the offenders. If the offenders refuse the communication or are unknown, the notification shall be made to the mayor of the municipal area in which the infringement was established, or to his deputy.’

9 Article 271 of the AWDA states:

‘The offender, having been present at the time of imposition of the fine, shall be invited to attend the drawing-up of the record and, if he so wishes, to sign it and immediately to receive a copy thereof; in the event of his absence, a copy of the record shall be forwarded to the offender by letter registered at the post office.’

10 Under Article 272 of the AWDA:

‘The records kept by officers in respect of their acts and the performance of their duties shall be deemed to be wholly accurate until proof is provided to the contrary. Inaccuracies relating not to the facts but merely to the application of the law shall not deprive the record of its force, but shall be corrected in the writ of summons. The record will not constitute evidence in itself only in the case where it has been drawn up by one officer alone.’

## **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 11 The dispute in the main proceedings, as described by the national court, concerns the fraudulent clearance of consignments of ethyl alcohol covered by the inward processing procedure under the relevant provisions of the Customs Code. Those consignments evaded that customs procedure through their replacement by consignments of other products, in the present case water.
- 12 By judgment of 26 September 2006, the Hof van beroep te Antwerpen (Court of Appeal, Antwerp) *inter alia* ordered Distillerie Smeets Hasselt NV and L. De Vos jointly and severally to pay the import duty due as a result of that fraud.
- 13 Before the referring court, with which an appeal in cassation had been lodged against that judgment, Distillerie Smeets Hasselt NV submitted, in particular, that, having regard to the provisions of Articles 217(1) and 221(1) of the Customs Code, the appellate court could not take the view that the record drawn up by the reporting officers under the applicable national legislation constituted an ‘accounting record’ or ‘other equivalent medium’ within the meaning of Article 217(1) of the Customs Code.
- 14 In those circumstances, the Hof van Cassatie van België (Belgian Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Should Articles 217(1) and 221(1) of [the Customs Code] be construed as meaning that the ... entry of a customs debt in the accounts may also be lawfully effected through the entry of the amount [of duty resulting from that debt] in a record in accordance with the AWDA, drawn up by reporting officers and not by persons authorised to enter such



amounts in the accounts, and that such a record may be treated as an accounting record or other equivalent medium within the terms of Article 217(1) of [that Code]?’

## **The question referred for a preliminary ruling**

### *Admissibility of the reference for a preliminary ruling*

- 15 The Commission of the European Communities disputes the admissibility of the reference for a preliminary ruling on the ground that insufficient reasons are given for it.
- 16 It must be observed in that regard that, according to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions which it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, inter alia, Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 39; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 30; and Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 38).
- 17 The information provided in orders for reference must not only enable the Court to reply usefully but must also give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court’s duty to ensure that that opportunity is safeguarded, bearing in mind that under that provision only the orders for reference are notified to the interested parties (see, inter alia, *Albany*, paragraph 40; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 30; and *Wilson*, paragraph 39).

18 In the circumstances of the present case, firstly, the order for reference contains sufficient details to enable the governments of the Member States and the other interested parties to submit observations. It is, moreover, evident from the observations submitted by the Belgian Government and the Commission that they have been able effectively to take a position on the question referred by the national court.

19 Secondly, the Court takes the view that the information contained in the order for reference and the observations submitted to it are sufficient to enable it to provide a meaningful reply to the question referred.

20 It follows that the Court should reply to the question referred.

*The Court's reply*

21 By its question, the national court is seeking to ascertain whether the entry of the amount of duty resulting from a customs debt in a record such as that by which the national authorities confirm infringements of the AWDA may constitute an entry in the accounts of that amount within the terms of Articles 217 and 221 of the Customs Code.

22 In order to reply to that question, it should be recalled that it follows from the first subparagraph of Article 217(1) of the Customs Code that entry in the accounts consists of the entry, by the customs authorities, of the amount of import duty or export duty resulting from a customs debt in the accounting records or on any other equivalent medium.

- 23 In accordance with Article 217(2) of that Code, it is for the Member States to determine the practical procedures for that entry in the accounts, which may differ according to whether or not, in view of the circumstances in which the customs debt was incurred, the customs authorities are satisfied that the amount of duty resulting from that debt will be paid.
- 24 In that regard, it should be noted that when, as in the case in the main proceedings, the procedure for recovery of the amount of duty relates to a customs debt resulting from a finding by the competent national authorities of fraud committed against the applicable tax legislation, the outcome of such a procedure is, by its nature, uncertain, with the result that those authorities cannot be satisfied that that amount will be paid.
- 25 Therefore, regard being had to the discretionary power conferred on them by Article 217(2) of the Customs Code, Member States can provide that the entry in the accounts of the amount of duty resulting from a customs debt may be effected by the entry of that amount on the record which is drawn up by the competent customs authorities for the purpose of establishing an infringement of the applicable customs legislation, such as the authorities referred to in Article 267 of the AWDA.
- 26 In those circumstances, the answer to the question referred is that Article 217 of the Customs Code must be interpreted as meaning that Member States can provide that the entry in the accounts of the amount of duty resulting from a customs debt may be effected by the entry of that amount on a record which is drawn up by the competent customs authorities and establishes an infringement of the applicable customs legislation.

## Costs

<sup>27</sup> 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:

**Article 217 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as meaning that Member States can provide that the entry in the accounts of the amount of duty resulting from a customs debt may be effected by the entry of that amount on a record which is drawn up by the competent customs authorities and establishes an infringement of the applicable customs legislation.**

[Signatures]