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Judgment of the Court (First Chamber) of 29 June 2000. - Tullihallitus v Kaupo Salumets and others. - Reference for a preliminary ruling: Tampereen käräjäoikeus - Finland. - Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Sixth Directive - Tax on importation - Scope - Contraband importation of ethyl alcohol. - Case C-455/98.

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Keywords

1. Common Customs Tariff - Customs duties - Application to ethyl alcohol imported as contraband from a non-member country

(Council Regulation No 2913/92)

2. Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Tax on importation - Application to ethyl alcohol imported as contraband from a non-member country

(Council Directive 77/388)

3. Tax provisions - Harmonisation of laws - Excise duties - Directives 92/12 and 92/83 - Application to ethyl alcohol imported as contraband from a non-member country

(Council Directive 92/12 and 92/83)

Summary

While illegal imports or supplies of goods which by their very nature or because of their special characteristics cannot be lawfully marketed or introduced into economic channels, such as narcotic drugs or counterfeit currency, are not subject to the taxes and customs duties normally payable under Community legislation, the principle of fiscal neutrality prevents any general distinction between lawful and unlawful transactions, apart from such cases where any competition between a lawful economic sector and an unlawful sector is precluded.

Ethyl alcohol imported as contraband from a non-member country is not a product whose marketing is prohibited by its very nature or because of its special characteristics. Nor may ethyl alcohol be regarded as a product which is outside economic channels, since competition is possible between the contraband product and that traded in lawful economic channels, in that there is a lawful market in alcohol which is precisely the target of contraband products.

Sixth Directive 77/388, Directive 92/12 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, Directive 92/83 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages, and Regulation No 2913/92 establishing the Community Customs Code must therefore be interpreted as meaning that their provisions on liability to tax and tax debts apply also to contraband importation into Community customs territory of ethyl alcohol from non-member countries.

(see paras 19-20 and operative part)

Parties

In Case C-455/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tampereen Käräjäoikeus, Finland, for a preliminary ruling in the proceedings pending before that court between

Tullihallitus

and

Kaupo Salumets and Others

on the interpretation of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21) and Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1),

THE COURT (First Chamber),

composed of: L. Sevón, President of the Chamber, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: A. Saggio,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Tallbak, by J. Vuorilahti, lawyer practising in Tampere,*
- Mr Heikkinen and Mr Koivula, by T. Vähätalo, lawyer practising in Tampere,*
- Mr Kortelainen and Mr Lempinen, by J. Ojala, lawyer practising in Helsinki,*
- the Finnish Government, by H. Rotkirch and T. Pynnä, Valtionasiamiehet, acting as Agents,*
- the Greek Government, by K. Georgiadis, Legal Agent in the State Legal Service, and E.-M. Mamouna, of the Special Department for Community Legal Matters of the Ministry of Foreign Affairs, acting as Agents,*
- the Italian Government, by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by I.M. Braguglia, Avvocato dello Stato,*
- the Commission of the European Communities, by R. Tricot and K. Leivo, of its Legal Service, acting as Agents,*

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Tallbak, represented by J. Vuorilahti, Mr Heikkinen and Mr Koivula, represented by T. Vähätalo, the Finnish Government, represented by T. Pynnä, the Greek Government, represented by V. Kyriazopoulos, Deputy Legal Adviser in the State Legal Service, acting as Agent, and the Commission, represented by R. Tricot and E. Paasivirta, of its Legal Service, acting as Agent, at the hearing on 3 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2000,

gives the following

Judgment

Grounds

1 By order of 8 December 1998, received at the Court on 14 December 1998, the Tampereen Käräjäoikeus (Tampere District Court), Finland, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter the Sixth Directive), Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21) and 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 the Finnish Tullihallitus (Customs Administration) and Mr Salumets and other persons prosecuted for smuggling into Finland ethyl alcohol from a non-member country.

Community legislation

3 Article 202 of the Customs Code provides:

1. 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,

...

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

...

Article 212 of the Customs Code provides:

The customs debt referred to in Articles 201 to 205 and 209 to 211 shall be incurred even if it relates to goods subject to measures of prohibition or restriction on importation or exportation of any kind whatsoever. However, no customs debt shall be incurred on the unlawful introduction into the customs territory of the Community of counterfeit currency or of narcotic drugs and psychotropic substances which do not enter into the economic circuit strictly supervised by the competent authorities with a view to their use for medical and scientific purposes ...

4 Under Article 2 of the Sixth Directive:

The following shall be subject to value added tax:

...

2. the importation of goods.

5 Article 1(1) of Directive 92/12 provides:

This Directive lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community.

Article 3(1) of that directive provides:

This Directive shall apply at Community level to the following products as defined in the relevant Directives:

...

- alcohol and alcoholic beverages,

...

Under Article 6(1) of that directive:

Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

Release for consumption of products subject to excise duty shall mean:

...

(c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

6 Article 19(1) of Directive 92/83 provides:

Member States shall apply an excise duty to ethyl alcohol in accordance with this Directive.

Article 27(1) of that directive provides:

Member States shall exempt the products covered by this Directive from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

(a) when distributed in the form of alcohol which has been completely denatured in accordance with the requirements of any Member State, such requirements having been duly notified and accepted in accordance with paragraphs 3 and 4 of this Article. This exemption shall be conditional on the application of the provisions of Directive 92/12/EEC to commercial movements of completely denatured alcohol;

...

National legislation

7 Under the Alkoholilaki (Law on alcohol), No 1143/1994, only traders in possession of an import licence or holders of a licence for personal use are authorised to import ethyl alcohol into Finnish territory.

8 Under the Valmisteverotuslaki (Law on excise duty), No 1469/1994, alcohol and alcoholic drinks introduced into Finland from another Member State or imported from a non-member country are subject to excise duty.

9 Under the Arvonlisäverolaki (Law on value added tax (VAT)), No 1501/1993, goods imported into Finnish territory from a State which is not a member of the Community are subject to VAT.

The main proceedings and the question referred for a preliminary ruling

10 It appears from the documents in the case that the defendants in the main proceedings were convicted by the Käräjäoikeus and sentenced to fines and imprisonment for having smuggled into Finland during 1996 and 1997 about 100 000 litres of ethyl alcohol from Estonia. It is common ground that some of the alcohol thus unlawfully imported was already bottled, while the remainder was bottled in Finland, in a former stable, in unhygienic conditions.

11 The Käräjäoikeus separated from the criminal proceedings the application by the Tullihallitus for Mr Salumets and his accomplices to be ordered, pursuant to the Laki alkoholi- ja alkoholijuomaverosta (Law on tax on alcohol and alcoholic drinks), No 1471/1994, to pay customs duty, VAT, excise duty and alcohol duty which should have been paid by the importers when the goods entered Community territory, amounting to approximately FIM 38 000 000.

12 The Käräjäoikeus, hearing that application, expressed doubt as to whether the provisions of the Customs Code and the tax directives mentioned in paragraph 1 above apply also to ethyl alcohol imported as contraband.

13 In particular, that court is uncertain whether the unlawful importation into Finland of ethyl alcohol, which is not intended as such for human consumption and the market for which is much

smaller than for other alcoholic drinks because of the system of authorisation governing such imports in Finland, ought not to be treated in the same way as the unlawful supply of narcotic drugs and the importation of counterfeit currency, which, according to the Court's case-law, are not subject to customs duty or VAT.

14 Those were the circumstances in which the Tampereen Käräjäoikeus stayed proceedings and referred the following question to the Court for a preliminary ruling:

Are the European Community tax directives Council Directive 92/12/EEC of 25 February 1992, Council Directive 92/83/EEC of 19 October 1992 and Council Directive 77/388/EEC of 17 May 1977 and the Customs Code (Council Regulation (EEC) No 2913/92 of 12 October 1992) to be interpreted as meaning that the provisions concerning tax liability and customs debts apply to the smuggling of ethyl alcohol?

15 The defendants in the main proceedings submit that those directives and the Customs Code are not applicable to the importation of contraband ethyl alcohol. Because of its high alcohol concentration, ethyl alcohol may not be regarded as an alcoholic drink intended for consumption. Such an operation must therefore be treated in the same way as the import of narcotic drugs, which cannot be marketed and are therefore not subject to customs duty or VAT. Moreover, the smuggling of alcohol does not constitute an economic activity within the meaning of the EC Treaty and is therefore wholly outside the Community rules.

16 The defendants in the main proceedings refer to Case 50/80 Horvath v Hauptzollamt Hamburg-Jonas [1981] ECR 385, Case 221/81 Wolf v Hauptzollamt Düsseldorf [1982] ECR 3681, Case 294/82 Einberger v Hauptzollamt Freiburg [1984] ECR 1177, Case 269/86 Mol v Inspecteur der Invoerrechten en Accijnzen [1988] ECR 3627 and Case 289/86 Happy Family v Inspecteur der Omzetbelasting [1988] ECR 3655, which concern the unlawful importation of narcotic drugs into the Community or their unlawful supply for consideration within a Member State. They submit that in those judgments the Court held that no customs debt or liability to turnover tax respectively arises on the unlawful importation into the Community or the unlawful supply for consideration within a Member State of narcotic drugs, in so far as those products are not within economic channels strictly controlled by the competent authorities for use for medical and scientific purposes. That case-law was extended to the importation of counterfeit currency by Case C-343/89 Witzemann v Hauptzollamt München-Mitte [1990] ECR I-4477, paragraph 20.

17 The Finnish, Greek and Italian Governments and the Commission, however, rely on other judgments in which the Court held that VAT is due normally where goods marketed unlawfully compete with products which are the subject of lawful operations. That is the case with counterfeit perfumes (Case C-3/97 Goodwin and Unstead [1998] ECR I-3257), the unlawful operation of games of chance (Case C-283/95 Fischer v Finanzamt Donaueschingen [1998] ECR I-3369) and the export of computer systems in unlawful circumstances (Case C-111/92 Lange v Finanzamt Fürstenfeldbruck [1993] ECR I-4677). It follows in particular from paragraph 16 of Lange that the principle of fiscal neutrality precludes a generalised differentiation between lawful and unlawful transactions, except where, because of the special characteristics of certain products, all competition between a lawful economic sector and an unlawful sector is precluded.

18 According to those Governments and the Commission, narcotic drugs and counterfeit currency are products which may not be introduced into economic channels because of their intrinsic character of illegal goods. Ethyl alcohol, however, does not have that character, although its import and sale are subject to authorisation in Finland. It can be sold under unlawful conditions much more cheaply than lawful alcoholic drinks for the same purposes of consumption. In those circumstances, alcohol imported as contraband is fully in competition with alcohol products on lawful sale, and so a customs and tax debt arises. In the cases mentioned in the previous paragraph, the Court adopted a very restrictive interpretation of the exceptions to the principle of fiscal neutrality.

19 The Court notes, first, that the *Horvath*, *Wolf*, *Einberger*, *Mol*, *Happy Family* and *Witzemann* judgments, which concerned narcotic drugs and counterfeit currency, refer to goods which by their very nature and because of their special characteristics cannot be lawfully marketed or introduced into economic channels. Moreover, it is settled case-law that the principle of fiscal neutrality prevents any general distinction between lawful and unlawful transactions. Consequently, the mere fact that conduct amounts to an offence does not entail exemption from tax; that exemption applies only in specific circumstances where, owing to the special characteristics of certain goods or services, any competition between a lawful economic sector and an unlawful sector is precluded (see *Lange*, paragraph 19, *Fischer*, paragraph 28, *Goodwin and Unstead*, paragraph 9, and Case C-158/98 *Staatssecretaris van Financiën v Coffeeshop Siberië* [1999] ECR I-3971, paragraphs 14 and 21).

20 That is not the case with the ethyl alcohol at issue in the main proceedings. As submitted by the Governments which presented written observations and by the Commission, ethyl alcohol is not a product whose marketing is prohibited by its very nature or because of its special characteristics.

21 The circumstances in which the goods were imported in the present case cannot alter that assessment. An intrinsically lawful product such as ethyl alcohol may not be equated with a narcotic drug for reasons connected with its origin, quality or purity.

22 Also immaterial is the fact that ethyl alcohol in the pure state is subject in the Member State concerned to a special system of authorisation both for its production and marketing and for its import and export (see, to that effect, *Lange*, paragraph 17).

23 Moreover, as the Commission also observed, competition between contraband alcohol and alcohol traded in lawful economic channels cannot be ruled out, in that there is a lawful market in alcohol which is precisely the target of contraband products. Consequently, ethyl alcohol may not be regarded as a product which is outside economic channels. It is therefore subject to the taxes and customs duty normally payable under the Community rules.

24 Accordingly, the answer to the national court's question must be that the Sixth Directive, Directives 92/12 and 92/83, and the Customs Code must be interpreted as meaning that their provisions on liability to tax and tax debts apply also to contraband importation into Community customs territory of ethyl alcohol from non-member countries.

Decision on costs

Costs

25 The costs incurred by the Finnish, Greek and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

Operative part

On those grounds,

THE COURT (First Chamber)

in answer to the question referred to it by the Tampereen Käräjäoikeus by order of 8 December 1998, hereby rules:

Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages and Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as meaning that their provisions on liability to tax and tax debts apply also to contraband importation into Community customs territory of ethyl alcohol from non-member countries.