

Case C-248/09

Pakora Pluss SIA

v

Valsts ieņēmumu dienests

(Reference for a preliminary ruling from the Augstākās tiesas Senāts Administratīvo lietu departaments)

(Act of Accession to the European Union – Customs union – Transitional measures – Goods free from customs duties when entered for free circulation – Goods in transport in the enlarged Community on the date of accession of the Republic of Latvia – Export formalities – Import duties – VAT)

Summary of the Judgment

1. *Customs union – Goods free from customs duties when entered for free circulation – Act of Accession 2003*

(*Act of Accession 2003, Annex IV, Chapter 5, paragraph 1; Commission Regulation No 2454/93, Art. 448*)

2. *Customs union – Goods free from customs duties when entered for free circulation – Act of Accession 2003*

(*Annex IV, Chapter 5, paragraph 1; Council Regulation No 2913/92; Commission Regulation No 2454/93*)

3. *Customs union – Import duties – Scope – Value added tax*

(*Council Regulation No 2913/92, Art. 4(10); Council Directive No 77/388, Art. 2(2), 11, B(3)(a), and 21(2)*)

1. Since the goods were in transport in the enlarged Community on the date of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, the procedure provided for in Annex IV, Chapter 5, paragraph 1 of the Act of Accession applies to the exclusion of the customs procedures. It follows that, in such a situation, the procedure provided for in Annex IV, Chapter 5, paragraph 1 of the Act of Accession being exhaustive, Article 448 of Regulation No 2454/93 laying down provisions to the implementation of Council Regulation No 2913/93 establishing the Community Customs Code, as amended by Regulation No 2787/2000 concerning simplified procedures for maritime transport in the context of the Community transit rules, is not applicable. Therefore, the actions provided for in Article 448 of implementing Regulations No 2454/93 cannot be subscribed for the export formalities referred to in Annex IV.

(see paras 32-35, operative part 1)

2. Regulation No 2913/92 establishing the Community Customs Code, as amended by

Regulation (EC) No 82/97 and Regulation No 2454/93, as amended by Regulation No 2787/2000, are applicable in the new Member States as from 1 May 2004, but the procedure provided for in Annex IV, Chapter 5, paragraph 1 of the Act of Accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic cannot be relied on where the export formalities set out therein have not been completed with respect to goods in transport in the enlarged Community at the date of accession of those new Member States of the European Union.

(see para. 41, operative part 2)

3. Article 4(10) of Regulation No 2913/92 establishing the Community Customs Code, as amended by Regulation No 82/97, must be interpreted as meaning that import duties do not include the value added tax to be levied on the importation of goods. When goods are imported, the obligation to pay the value added tax is imposed on the person or persons designated or accepted as being liable by the Member State into which the goods are imported.

(see paras 47, 49, 52, operative part 3-4)

JUDGMENT OF THE COURT (First Chamber)

29 July 2010 (*)

(Act of Accession to the European Union – Customs union – Transitional measures – Goods free from customs duties when entered for free circulation – Goods in transport in the enlarged Community on the date of accession of the Republic of Latvia – Export formalities – Import duties – VAT)

In Case C-248/09,

REFERENCE for a preliminary ruling under Article 234 EC, from the Augstākās tiesas Senāts Administratīvo lietu departaments (Latvia), made by decision of 26 June 2009, received at the Court on 7 July 2009, in the proceedings

Pakora Pluss SIA

v

Valsts ieņēmumu dienests,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, E. Levits, M. Ilešič, M. Safjan (Rapporteur) and M. Berger, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Pakora Pluss SIA, by I. Petrova, management committee member,
- the Valsts ieņēmumu dienests, by D. Jakobs, acting as Agent,
- the Latvian Government, by K. Draviņa and K. Krasovska, acting as Agents,
- the Commission of the European Communities, by A. Sauka and B. R. Killmann, acting as Agents,

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

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(10) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 (OJ 1997 L 17, p. 1) ('the Customs Code'), Article 448 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 2787/2000 of 15 December 2000 (OJ 2000 L 330, p. 1) ('the implementing regulation'), and Annex IV, Chapter 5, point 1 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33) ('the Act of Accession').

2 The reference was made in the course of proceedings between Pakora Pluss SIA ('Pakora Pluss') and the Valsts ieņēmumu dienests (Latvian tax authority, 'the VID') concerning the payment of customs duties and value added tax ('VAT') for which that company was liable on account of the shipping to Latvia, on 3 May 2004, of a motor vehicle from Germany.

Legal background

European Union legislation

The Customs Code

3 Under Article 4(10) of the Customs Code, 'Import duties' means:

- 'customs duties and charges having an effect equivalent to customs duties payable on the importation of goods,
- import charges introduced under the common agricultural policy or under the specific arrangements applicable to certain goods resulting from the processing of agricultural products.'

4 Article 79 of the Customs Code is worded as follows:

‘Release for free circulation shall confer on non-Community goods the customs status of Community goods.

It shall entail application of commercial policy measures, completion of the other formalities laid down in respect of the importation of goods and the charging of any duties legally due.’

5 Article 161 of the Customs Code provides :

‘1. The export procedure shall allow Community goods to leave the customs territory of the Community.

Exportation shall entail the application of exit formalities including commercial policy measures and, where appropriate, export duties.

2. With the exception of goods placed under the outward processing procedure or a transit procedure pursuant to Article 163, and without prejudice to Article 164, all Community goods intended for export shall be placed under the export procedure.

...

4. The case in which and the conditions under which goods leaving the customs territory of the Community are not subject to an export declaration shall be determined in accordance with the committee procedure.

5. The export declaration must be lodged at the customs office responsible for supervising the place where the exporter is established or where the goods are packed or loaded for export shipment. Derogations shall be determined in accordance with the committee procedure.

6 Article 162 of the Customs Code provides :

‘Release for export shall be granted on condition that the goods in question leave the customs territory of the Community in the same condition as when the export declaration was accepted.’

The implementing regulation

7 According to Article 448 of the implementing regulation:

‘1. A shipping company may be authorised to use a single manifest as a transit declaration if it operates a significant number of regular voyages between the Member States (simplified procedure – level 2).

By way of derogation from Article 373(1)(a), shipping companies need not be established in the Community if they have a regional office there.

2. On receipt of an application for authorisation, the customs authorities shall notify the other Member States in whose territories the ports of departure and destination are situated.

Provided no objection is received within sixty days of the date of notification, the customs authorities shall issue the authorisation.

This authorisation shall be valid in all the Member States concerned and shall apply only to Community transit operations between the ports to which it refers.

3. For the purposes of the simplification, the shipping company may use a single manifest for all goods carried; where it does so, it shall enter against the relevant items in the manifest:

- (a) the “T1” symbol where the goods are placed under the external Community transit procedure;
- (b) the “TF” symbol where the goods are placed under the internal Community transit procedure in accordance with Article 340c(1);
- (c) the letters “TD” for goods already placed under a transit procedure, or carried under the inward processing, customs warehouse or temporary admission procedure. In such cases, the shipping company shall also enter the letters “TD” in the corresponding bill of lading or other appropriate commercial document as well as a reference for the procedure used, the reference number and date of the transit declaration or transfer document and the name of the issuing office;
- (d) the letter “C” (equivalent to “T2L”) for goods whose Community status may be demonstrated;
- (e) the letter “X” for Community goods to be exported and which are not placed under a transit procedure.

The manifest must also include the information provided for in Article 447(4).

4. The Community transit procedure shall be deemed to be concluded when the manifest and the goods are presented to the customs authorities at the port of destination.

The records kept by the shipping company in accordance with Article 373(2)(b) shall contain at least the information referred to in the first subparagraph of paragraph 3.

Where necessary, the customs authorities at the port of destination shall transmit the relevant details of manifests to the customs authorities at the port of departure for verification.

5. Without prejudice to the provisions of Articles 365 and 366, Articles 450a to 450d and Title VII of the Code, the following notifications shall be made:

- (a) the shipping company shall notify all offences and irregularities to the customs authorities;
- (b) the customs authorities at the port of destination shall notify the customs authorities at the port of departure and the authority which issued the authorisation of all offences and irregularities at the earliest opportunity.’

The Act of Accession

8 Article 2 of the Act of Accession states:

‘From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.’

9 According to Article 22 of the Act of Accession:

‘The measures listed in Annex IV to this Act shall be applied under the conditions laid down in that Annex.’

10 Annex IV to the Act of Accession is entitled ‘List referred to in Article 22 of the Act of Accession’. Chapter 5 thereof, entitled ‘Customs Union’, provides:

‘... [The Customs Code and the implementing regulation] shall apply to the new Member States subject to the following specific provisions:

1. Notwithstanding Article 20 of Regulation (EEC) No 2913/92, goods which on the date of accession are in temporary storage or under one of the customs treatments and procedures referred to in Article 4(15)(b) and (16)(b) to (g) of that Regulation in the enlarged Community, or which are in transport within the enlarged Community after having been the subject of export formalities, shall be free of customs duties and other customs measures when entered for free circulation on condition that one of the following is presented:

(a) proof of preferential origin properly issued prior to the date of accession under one of the Europe Agreements (listed below) or the equivalent preferential agreements concluded between the new Member States themselves, and which contains a prohibition of drawback of, or exemption from, customs duties on non-originating materials used in the manufacture of the products for which a proof of origin is issued or made out (‘no?drawback’ rule);

(b) any of the proofs of Community status referred to in Articles 314c and 315 of Regulation (EEC) No 2454/93.

...’

Sixth Directive

11 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) repealed and replaced, with effect from 1 January 2007, the existing European Union VAT legislation, in particular, 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). However, Directive 2006/112, which entered into force after the material facts, is not applicable.

12 Article 2(2) of the Sixth Directive 77/388, as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1) (‘the Sixth Directive’), provides that the importation of goods is to be subject to VAT.

13 Article 7(1)(a) of the Sixth Directive, entitled ‘Imports’, provides:

‘1. “Importation of goods” shall mean:

(a) the entry into the Community of goods which do not fulfil the conditions laid down in Articles 9 and 10 of the Treaty establishing the European Economic Community ...’

14 Article 11(B)(3)(a) of the Sixth Directive concerning the importation of goods, provides:

‘3. The taxable amount shall include, in so far as they are not already included:

(a) taxes, duties, levies and other charges due outside the importing Member State and those

due by reason of importation, excluding the VAT to be levied;

...'

15 Article 21 of the Sixth Directive, entitled 'Persons liable to pay tax to the authorities', states in subparagraph (2), that VAT is payable by the person or persons designated or accepted as being liable by the Member States into which the goods are imported.

National legislation

16 In accordance with Article 2(2)(3) of the Law on value added tax (likums par pievienotās vērtības nodokli, Latvijas Vēstnesis, 1995, No 49), in the version applicable on the date of the material facts ('Law on VAT'), imports of goods are transactions subject to VAT in the course of economic activities.

17 Article 2(8) of the Law on value added tax states :

'In transactions for the import of goods, the taxable value shall be the customs value of the goods, the value of the transport services from the border of the European Union to their destination (or to the first place of trans-shipment in the territory of the Republic of Latvia stated in the accompanying documents), the customs and excise duties and other direct and indirect taxes due, where that is provided for by specific legal acts, except for VAT, and it also includes the value of the services referred to in a legislative provision of this Law, if that value is not included in the customs value.

...'

18 Article 12(2) of the Law on value added tax, which concerns the conditions for recovery of the tax, provides:

'When goods are imported, the tax shall be payable by any person who releases the goods for free circulation. The tax on imported goods shall be chargeable simultaneously with the customs duties.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 It is clear from the order for reference that, on 30 April 2004, a cargo manifest was drawn up in Germany for the shipping of a motor vehicle to Latvia. VAT at the rate of 0% was applied to that operation in Germany.

20 On 3 May 2004, Pakora Pluss, as the principal, began the Community transit procedure for the vehicle. The customs procedure was not completed.

21 On 1 March 2006, by decision of the Valsts ieņēmumu dienesta galvenā muitas pārvalde (Customs Directorate General of the VID), Pakora Pluss was ordered to pay the Treasury a sum by way of customs duties and other taxes on the ground that it had not submitted any documents proving that it had completed the customs procedure. That decision was confirmed by the VID on 21 April 2006.

22 By judgment of 9 August 2007, the Administratīvā rajona tiesa (District Administrative Court) upheld the action brought by Pakora Pluss against that decision.

23 By judgment of 22 July 2008, the Administrative Tribunal of Riga (Regional Administrative Court) set aside that decision.

24 Pakora Pluss brought an appeal on a point of law before the Augstākšā tiesa Senāts Administratīvo lietu departaments (Administrative Affairs Division of the Senate of the Supreme Court). It submitted, in particular, that the appeal court had applied Articles 447 and 448 of the implementing regulation, relating to the transit between the Member States, whereas the cargo manifest at issue had been drawn up before the accession of the Republic of Latvia to the European Union. Furthermore, the appeal court had incorrectly applied Article 96 of the Customs Code by incorrectly designating it as the principal responsible for the payment of VAT.

25 In those circumstances, the Augstākšā tiesa Senāts Administratīvo lietu departaments decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Can export formalities be regarded as completed for the purpose of [Annex IV, Chapter 5,] paragraph 1 of the Act of Accession, if a cargo manifest has been filled in but the actions required by Article 448 of Regulation No 2454/93 have not been performed (the German customs authorities had not given the Latvian customs authorities proper notification of the shipping company’s request)?

2. If they cannot, then in circumstances such as those in question can the rules governing the customs procedure (Regulations Nos 2913/92 and 2454/93) be regarded as quite inapplicable?

3. If the answer to the first question is affirmative, must Annex IV, Chapter 5, paragraph 1, of the Act of Accession ... be interpreted as meaning that, when goods moving in the enlarged Community after being the subject of export formalities are not put into free circulation, they are not free of customs duties or other customs measures, even though it is beyond doubt that those goods have the status of Community goods? In other words, is it in the circumstances of the case decisive that the customs procedure of release for free circulation has been completed?

4. Is VAT to be included in the definition of import duties laid down in Article 4(10) of Regulation No 2913/92?

5. If it is, is the obligation to pay VAT, which is charged as a customs duty on the import of goods, imposed on the principal or on the final consumer of the goods? Are there any circumstances that might permit that obligation to be shared?’

The questions referred for a preliminary ruling

The first question

26 By its first question, the referring court asks essentially whether Annex IV, Chapter 5, paragraph 1 of the Act of Accession must be interpreted as meaning that the export formalities referred to therein have been completed where a cargo manifest has been drawn up, but the actions provided for in Article 448 of the implementing regulation have not been performed.

27 In that connection, it should be recalled that Annex IV, Chapter 5, paragraph 1 of the Act of Accession provides in particular that goods which, on the date of accession, are in transport within the enlarged Community after having been the subject of export formalities, are to be free of customs duties and other customs measures when entered for free circulation on condition that proof of preferential origin properly issued prior to the date of accession or any of the proofs of Community status referred to in Articles 314(c) and 315 of the implementing regulation is

presented.

28 Thus, Annex IV, Chapter 5, paragraph 1 of the Act of Accession authorises the import of goods, in transport within the enlarged Community on 1 May 2004 into a new Member State, free of customs duties and other customs measures only if three cumulative conditions are fulfilled.

29 First, the goods which leave the European Union customs territory to go to a State which is not yet a member of the European Union must be subject to the export procedure. The formalities to be fulfilled are therefore those laid down in Articles 161 and 162 of the Customs Code on exports.

30 Second, transport being completed after the date of accession, the goods imported into a Member State of the European Union must be released for free circulation in order to obtain the customs status of Community goods under the conditions laid down in Article 79 of the Customs Code.

31 Third, the proof of preferential origin or proofs of Community status, as laid down in Articles 314(c) and 315 of the implementing regulation, must be produced.

32 Since the goods were in transport in the enlarged Community on the date of accession the procedure provided for in Annex IV, Chapter 5, paragraph 1 of the Act of Accession applies to the exclusion of other customs procedures.

33 It follows that, in such a situation, the procedure provided for in Annex IV, Chapter 5, paragraph 1 of the Act of Accession being exhaustive, Article 448 of the implementing regulation, which concerns the simplified procedures specific to shipping between the Member States under the Community transport procedure, is not applicable.

34 Therefore, the actions provided for in Article 448 of the implementing regulation cannot be substituted for the export formalities referred to in Annex IV, Chapter 5, paragraph 1 of the Act of Accession, even where a cargo manifest has been drawn up in the circumstances described in the order for reference.

35 In the light of the foregoing considerations, the answer to the first question is that Annex IV, Chapter 5, paragraph 1 of the Act of Accession must be interpreted as meaning that, in order to ascertain whether the export formalities referred to therein have been completed, it is irrelevant that the actions provided for in Article 448 of the implementing regulation were performed, even where a cargo manifest has been drawn up.

The second question

36 Since the answer to the first question is negative, the second question must be examined.

37 That question should be understood as meaning that it concerns essentially the extent to which the Customs Code and the implementing regulation are applicable to the new Member States of the European Union when the export formalities laid down in Annex IV, Chapter 5, paragraph 1 of the Act of Accession were not performed with respect to goods in transport in the enlarged Community on the date of accession of those new Member States.

38 In that connection, it must be observed that Annex IV, Chapter 5 of the Act of Accession states that the Customs Code and the implementing regulation 'shall apply to the new Member States subject to ... specific provisions', which include paragraph 1 of that chapter.

39 It is clear from that provision, read in conjunction with Article 2 of the Act of Accession, that,

as from 1 May 2004, the Customs Code and the implementing regulation were applicable in the new Member States, except where on the date of their accession to the European Union the goods were in transport in the enlarged Community. In that case Annex IV, Chapter 5, paragraph 1 of the Act of Accession applies.

40 However, where the export formalities have not been completed for the goods in transport in the enlarged Community, the procedure provided for in Annex IV, Chapter 5, paragraph 1 of the Act cannot be relied on.

41 Therefore, the answer to the second question is that the Customs Code and the implementing regulation are applicable in the new Member States as from 1 May 2004, but the procedure provided for in Annex IV, Chapter 5, paragraph 1 of the Act of Accession cannot be relied on where the export formalities set out therein have not been completed with respect to goods in transport in the enlarged Community at the date of accession of those new Member States of the European Union.

The third question

42 Since the third question was referred only if the answer to the first question was affirmative, there is no need to answer it.

The fourth question

43 By that question, the referring court asks essentially whether Article 4(10) of the Customs Code must be interpreted as meaning that import duties include VAT to be levied on the importation of goods.

44 According to Article 4(10) of the Customs Code, customs duties include customs duties and charges having an effect equivalent to customs duties payable on the importation of goods.

45 Furthermore, Article 2(2) of the Sixth Directive provides that the importation of goods is to be subject to VAT. Article 11(b)(3)(a) thereof states in particular that taxes, duties, levies and other charges due outside the importing Member State and those due by reason of importation, excluding the VAT to be levied, are included in the taxable amount in so far as they are not already included.

46 It is clear from those provisions that the import duties, within the meaning of Article 4(10) of the Customs Code, are included in the taxable amount of VAT to be levied on the importation of goods.

47 Therefore, the answer to the fourth question is that Article 4(10) of the Customs Code must be interpreted as meaning that import duties do not include the VAT to be levied on the importation of goods.

The fifth question

48 By the fifth question the referring court asks essentially whether, when goods are imported, the obligation to pay VAT is imposed on the principal or the final consumer or whether that obligation may be shared.

49 As a preliminary point, it should be stated that, even if VAT is not included in the import duties, within the meaning of Article 4(10) of the Customs Code, it is due on the importation of goods in accordance with Article 2(2) of the Sixth Directive.

50 Therefore, although the fifth question was referred only if the answer to the fourth question was negative, the Court considers it appropriate to answer that question.

51 In that connection, it should be stated that, according to Article 21(2) of the Sixth Directive, VAT is payable by the person or persons designated or accepted as being liable by the Member States into which the goods are imported.

52 Therefore, the answer to the fifth question is that, when goods are imported, the obligation to pay the VAT is imposed on the person or persons designated or accepted as being liable by the Member State into which the goods are imported.

Costs

53 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 (First Chamber) hereby rules:

1. Annex IV, Chapter 5, paragraph 1 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded must be interpreted as meaning that, in order to ascertain whether the export formalities referred to therein have been completed, it is irrelevant that the actions provided for in Article 448 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, as amended by Commission Regulation (EC) No 2787/2000 of 15 December 2000, were performed, even where a cargo manifest has been drawn up.

2. Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996, and Regulation No 2454/93, as amended by Regulation No 2787/2000, are applicable in the new Member States as from 1 May 2004, but the procedure provided for in Annex IV, Chapter 5, paragraph 1 of the Act of Accession cannot be relied on where the export formalities set out therein have not been completed with respect to goods in transport in the enlarged Community at the date of accession of those new Member States of the European Union.

3. Article 4(10) of Regulation No 2913/92, as amended by Regulation No 82/97 must be interpreted as meaning that import duties do not include the value added tax to be levied on the importation of goods.

4. When goods are imported, the obligation to pay the value added tax is imposed on the person or persons designated or accepted as being liable by the Member State into which the goods are imported.

[Signatures]

* Language of the case: Latvian.