

JUDGMENT OF THE COURT (Second Chamber)

11 July 2013 (*)

(Community Customs Code – Regulation (EEC) No 2913/92 – Article 206 – Incurrence of a customs debt – Theft of goods placed under customs warehousing arrangements – Notion of ‘irretrievable loss of goods as a result of force majeure’ – Directive 2006/112/EC – Article 71 – Value added tax – Chargeable event – Chargeability of tax)

In Case C-273/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 30 May 2012, received at the Court on 4 June 2012, in the proceedings

Directeur général des douanes et droits indirects,

Chef de l’agence de poursuites de la Direction nationale du renseignement et des enquêtes douanières

v

Harry Winston SARL,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis (Rapporteur), J.-C. Bonichot, A. Arabadjiev and J. L. da Cruz Vilaça, Judges,

Advocate General: N. Wahl,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 21 March 2013,

after considering the observations submitted on behalf of:

- Harry Winston SARL, by X. Jauze, avocat,
- the French Government, by G. de Bergues, D. Colas and C. Candat, acting as Agents,
- the Czech Government, by M. Smolek and J. Vlášil, acting as Agents,
- the Estonian Government, by M. Linntam, acting as Agent,
- the Greek Government, by K. Paraskevopoulou and Z. Chatzipavlou, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,
- the European Commission, by C. Soulay 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 request for a preliminary ruling concerns the interpretation of Article 206 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 Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1) ('the Customs Code'), and of Article 71 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT directive').

2 The request has been made in the context of a dispute between the Directeur général des douanes et droits indirects (the Director-General of Customs and Indirect Taxes) and the Chef de l'agence de poursuites de la Direction nationale du renseignement et des enquêtes douanières (Head of the Investigation Agency of the National Directorate of Customs Information and Inquiries) (together 'the customs administration'), on the one hand, and Harry Winston SARL ('Harry Winston'), on the other hand, concerning the payment of customs duties and value added tax ('VAT') on goods which were stolen while placed under customs warehousing arrangements.

Legal context

European Union law

Directive 79/623/EEC

3 The ninth recital in the preamble to Council Directive 79/623/EEC of 25 June 1979 on the harmonisation of provisions laid down by law, regulation or administrative action relating to customs debt (OJ 1979 L 179, p. 31), which was repealed by the Customs Code, was worded as follows:

'... except where the amount of the customs debt is paid or subject to the operation of a time bar in accordance with the provisions in force, the reasons for [the] extinction [of the customs debt] must be based on the recorded fact that the goods have not been used for the economic purpose which justified the application of import or export duties'.

The Customs Code

4 Article 202(1) of the Customs Code provides:

'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, or
- (b) the unlawful introduction into another part of that territory of such goods located in a free zone or free warehouse.

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.'

5 Article 203 of the Customs Code provides:

‘1. A customs debt on importation shall be incurred through:

- the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

3. The debtors shall be:

- the person who removed the goods from customs supervision,

- any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

- any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and

- where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.’

6 Under Article 204 of the Customs Code:

‘1. A customs debt on importation shall be incurred through:

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or

...

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

...’

7 Article 206(1) of the Customs Code provides:

‘1. By way of derogation from Articles 202 and 204(1)(a), no customs debt on importation shall be deemed to be incurred in respect of specific goods where the person concerned proves that the non-fulfilment of the obligations which arise from:

- the provisions of Articles 38 to 41 and the second indent of Article 177, or

- keeping the goods in question in temporary storage, or

- the use of the customs procedure under which the goods have been placed,

results from the total destruction or irretrievable loss of the said goods as a result of the actual nature of the goods or unforeseeable circumstances or *force majeure*, or as a consequence of authorisation by the customs authorities.

For the purposes of this paragraph, goods shall be irretrievably lost when they are rendered unusable by any person.'

8 Article 233 of the Customs Code is worded as follows:

'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:

...

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

- the customs declaration is invalidated;
- 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*;

...'

The VAT directive

9 Article 2(1)(a) and (d) of the VAT directive states:

'The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

...

(d) the importation of goods.'

10 Article 70 of the VAT directive provides:

'The chargeable event shall occur and VAT shall become chargeable when the goods are imported.'

11 Article 71 of the VAT directive is worded as follows:

'1. Where, on entry into the Community, goods are placed under one of the arrangements or situations referred to in Articles 156, 276 and 277, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the chargeable event shall occur and VAT shall become chargeable only when the goods cease to be covered by those arrangements or situations.

However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and VAT shall become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable.

2. Where imported goods are not subject to any of the duties referred to in the second subparagraph of paragraph 1, Member States shall, as regards the chargeable event and the moment when VAT becomes chargeable, apply the provisions in force governing customs duties.'

12 Article 156(1)(c) of the VAT directive states that 'Member States may exempt ... the supply of goods which are intended to be placed under customs warehousing arrangements ...'

French law

13 The *Bulletin officiel des douanes* n° 6551 (Official Customs Notices No 6551) of 29 May 2002 provides as follows in Chapter 9, Title III:

'(A) Shortfall of goods established by the customs authorities or by the user

Articles 203 and 206 of [the Customs Code], Article 520-2 of [the provisions implementing the Customs Code]

12. Where goods are destroyed or irretrievably lost (theft, fire, flood ...), the trader must adduce evidence showing the quantity destroyed or lost.

...

14. The duties and taxes are payable on the quantity of goods which have disappeared except where the trader proves that it is a case of unforeseeable circumstances or *force majeure*.

...

(C) Exemption from duties and taxes

...

Unforeseeable circumstances or *force majeure*

Articles 203 and 206 of [the Customs Code] and Article 862 of [the provisions implementing the Customs Code]

1. If it considers that it has been a victim of *force majeure*, the warehousekeeper must send, to the supervising office, a written request for exemption from duties and taxes relating to goods which have been destroyed or lost, accompanied by all supporting documentation and evidence ...

...

4. However, it should be noted that the case-law of the Court of Justice (judgment in Joined Cases 186/82 and 187/82 *Esercizio Magazzini Generali and Mellina Agosta* [1983] ECR 2951) has established that the removal, by third parties and even in the absence of proof of negligence on the part of the debtor, of goods subject to customs duty does not extinguish the obligation relating to those goods. Thus, theft does not constitute a case of *force majeure* and does not lead to the extinction of the customs debt.

...'

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

14 Following an armed robbery with hostage-taking on 6 October 2007, in the course of which

items of jewellery placed under customs warehousing arrangements were stolen, the customs administration, by a collection notice of 16 November 2007, sought payment from Harry Winston of the customs duties and VAT applicable to those goods. Harry Winston, following an unsuccessful administrative complaint, brought proceedings against the customs administration with a view to having that notice set aside.

15 By a decision of 3 June 2009, the Tribunal d'instance du 10^e arrondissement de Paris (District Court of the 10th District of Paris) set aside the collection notice in relation to the VAT and, with regard to the customs duties, stayed the proceedings pending a ruling by the Court of Justice on two questions referred for a preliminary ruling concerning the interpretation of Article 206 of the Customs Code.

16 The customs administration appealed against that decision.

17 By judgment of 7 December 2010, the Cour d'appel (Court of appeal) first, upheld the decision of the Tribunal d'instance du 10^e arrondissement de Paris which had set aside the collection notice in relation to the VAT, and, secondly, varied the decision relating to the customs debt.

18 In relation to the customs duties, the Cour d'appel held, basing itself on the *Bulletin officiel des douanes* No 6551 of 29 May 2002, that the French authorities treated the theft of goods as equivalent to their destruction or irretrievable loss within the terms of Article 206 of the Customs Code, and that that doctrine exempted the trader if he proved that the irretrievable loss – in the present case, the theft – was the result of *force majeure*.

19 The Cour d'appel thus held that Harry Winston could have taken the view, relying on the principle of legitimate expectation, that it did not have to pay customs duties in this case, subject to demonstrating that that theft was the result of *force majeure*. In that regard, the Cour d'appel held that the armed robbery at issue, having been unforeseeable and unavoidable by reason of its brutality and criminal characteristics, fulfilled the conditions of *force majeure* and had led to an irretrievable loss of the goods.

20 With regard to the VAT, the Cour d'appel took the view that the Court of Justice had acted correctly in holding, in its judgment in Case C-435/03 *British American Tobacco and Newman Shipping* [2005] ECR I-7077, that the theft of goods does not constitute a 'supply of goods for consideration' within the meaning of Article 2 of the VAT directive and cannot, therefore, as such, be subject to VAT.

21 The customs administration appealed in cassation. It complained that the Cour d'appel, first, had failed to investigate, as it had been requested to do, whether the Court had not been correct to hold, in its judgment in *Esercizio Magazzini Generali and Mellina Agosta*, that the theft of goods subject to customs duties did not extinguish the obligations relating to them and, secondly, concerning the VAT, that it gave its ruling in reliance on the judgment in *British American Tobacco and Newman Shipping*, even though, in the present case, the chargeable event giving rise to the tax was not a 'supply of goods for consideration', within the meaning of Article 2(1)(a) of the VAT directive, but an 'importation' referred to in Article 2(1)(d) of that directive.

22 The Cour de cassation points out that two new factors, which have arisen since the judgment in *Esercizio Magazzini Generali and Mellina Agosta*, preclude a conclusive finding that that judgment is still, for certain, part of positive law. First, the Customs Code, adopted in 1992, did not repeat the requirement of the ninth recital in the preamble to Directive 79/623, referred to in the judgment in *Esercizio Magazzini Generali and Mellina Agosta*, which made the extinction of the customs debt conditional on the circumstance, whether actual or presumed, that the goods did not

find their way back to the economic circuit after the theft. Secondly, the Court held in its judgment in *British American Tobacco and Newman Shipping* that the theft of goods did not constitute a 'supply of goods for consideration' within the meaning of Article 2 of the VAT directive and could not therefore, as such, be subject to VAT.

23 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 206 of [the Customs Code] to be interpreted as meaning that the theft, in the circumstances of the present case, of goods held under customs warehousing arrangements constitutes the irretrievable loss of the goods and a case of *force majeure*, with the consequence that, in that situation, no customs debt on importation is deemed to have been incurred?

(2) Is the theft of goods held under customs warehousing arrangements such as to give rise to the chargeable event and to cause the [VAT] to become chargeable pursuant to Article 71 of the [VAT directive]?'

Consideration of the questions referred

The first question

24 First of all, even though, formally, the referring court has limited its question to the interpretation of Article 206 of the Customs Code, that does not prevent the Court from providing the referring court with all the elements of interpretation of European Union law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in those questions. The questions referred must be resolved in the light of all the provisions of the EC Treaty and of secondary legislation which may be relevant to the problem (see, to that effect, Joined Cases C-578/10 to C-580/10 *van Putten and Others* [2012] ECR, paragraphs 23 and 24 and the case-law cited).

25 It is common ground that Article 206 of the Customs Code, in situations which, coming within the scope of Articles 202 and 204(1)(a) of that code, ought in principle to have given rise to a customs debt, precludes, by derogation from those articles, such a debt from being incurred where the person concerned proves that the non-fulfilment of its obligations results from the destruction or irretrievable loss of the goods as a result of the actual nature of those goods or unforeseeable circumstances or *force majeure*, or as a consequence of authorisation by the customs authorities. It follows that Article 206 of the Customs Code is capable of applying only in situations where a customs debt is liable to be incurred pursuant to Articles 202 and 204(1)(a) of that code.

26 Article 202 of the Customs Code concerns the incurring of a customs debt in situations where goods have been unlawfully introduced into the customs territory of the European Union, a situation which does not correspond to the facts of the dispute in the main proceedings.

27 With regard to Article 204(1)(a) of the Customs Code, it is also not capable of applying to the present case because it refers to a customs debt on importation being incurred in cases of non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from the use of the customs procedure under which they are placed, in cases other than those referred to in Article 203 of that code. Articles 203 and 204 of the Customs Code have separate fields of application, the first referring to conduct resulting in an unlawful removal from customs supervision of goods and the second concerning failure to fulfil obligations and the conditions connected with different customs procedures.

28 In order to determine which of those two articles forms the basis on which a customs debt on importation is incurred, it is necessary first of all to consider whether in the factual situation in question there was an unlawful removal from customs supervision within the terms of Article 203(1) of the Customs Code. Only if that question has been answered in the negative is it possible that Article 204 of the Customs Code may apply (see Case C-337/01 *Hamann International* [2004] ECR I-1791, paragraph 30).

29 As regards, more specifically, the concept of unlawful removal from customs supervision, referred to in Article 203(1) of the Customs Code, it should be borne in mind that, in accordance with the Court's case-law, that concept must be interpreted as covering any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by the customs regulations (Case C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 55 and the case-law cited; Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 47 and the case-law cited; and Case C-300/03 *Honeywell Aerospace* [2005] ECR I-689, paragraph 19).

30 Such is the case where, in a situation such as that in the main proceedings, goods, placed under a suspensive procedure, have been stolen (see Case C-140/04 *United Antwerp Maritime Agencies and Seaport Terminals* [2005] ECR I-8245, paragraph 31).

31 Furthermore, the incurrence of a customs debt in such circumstances is justified by the fact that, since the goods were physically located in a customs warehouse in the European Union, they would be subject to customs duties if they did not benefit from the suspensive procedure of the customs warehouse. Therefore, a theft committed in a customs warehouse results in those goods being removed from the customs warehouse without having been cleared through customs. The Court's presumption in its judgment in *Esercizio Magazzini Generali and Mellina Agosta*, according to which, in the case of theft, the goods enter the economic circuit of the European Union, is therefore still relevant notwithstanding the fact that the Customs Code no longer contains the wording of the ninth recital in the preamble to Directive 79/623 referred to in that judgment.

32 In any event, as has been pointed out in paragraph 25 of the present judgment, Article 206 of the Customs Code does not preclude a customs debt from being incurred in cases of irretrievable loss of the goods as a result of *force majeure* in the event of the unlawful removal of the goods from customs supervision referred to in Article 203(1) of that code.

33 It follows from the foregoing that the theft of goods, which took place in circumstances such as those of the main proceedings, gives rise to a customs debt on importation pursuant to Article 203(1) of the Customs Code and that, as a result of what was stated in paragraph 28 of the present judgment, the theft of goods placed, as in the main proceedings, under customs warehousing arrangements does not come within the scope of Article 204(1)(a) of that code.

34 In those circumstances, since Articles 202 and 204(1)(a) of the Customs Code are not capable of applying to the main proceedings, it is unnecessary to interpret Article 206, which applies only in situations where a customs debt is liable to be incurred in accordance with those provisions.

35 With regard to the argument raised by the French Government requesting the Court to take account of Article 233(c) of the Customs Code, it should be pointed out that, during the hearing, Harry Winston and the European Commission stated, correctly, that that provision applied only to goods declared for a customs procedure entailing the obligation to pay duties and that, to the extent to which the customs warehouse procedure was a suspensive procedure, it did not fulfil that condition. It is for that reason unnecessary to consider the possibility of the customs debt being

extinguished, as provided for in Article 233(c) of the Customs Code, in the present case.

36 In the light of the foregoing, the answer to the first question is that Article 203(1) of the Customs Code must be interpreted as meaning that a theft of goods placed under customs warehousing arrangements constitutes an unlawful removal of those goods within the meaning of that provision, giving rise to a customs debt on importation, and that Article 206 of that code is capable of applying only to situations in which a customs debt is liable to be incurred pursuant to Articles 202 and 204(1)(a) of that code.

The second question

37 By its second question, the referring court asks the Court, essentially, whether Article 71 of the VAT directive must be interpreted as meaning that the theft of goods placed under customs warehousing arrangements gives rise to the chargeable event and causes VAT to become chargeable.

38 It is clear from the order for reference that the referring court takes the view that the chargeable event occurs and the tax becomes chargeable, in the main proceedings, only at the moment when the goods cease to be covered by customs warehousing arrangements, pursuant to the first subparagraph of Article 71(1) of the VAT directive.

39 However, as is, moreover, apparent from the written observations submitted to the Court by several Member States and by the Commission, it is necessary, in this case, to apply the second subparagraph of Article 71(1) of the VAT directive, according to which the chargeable event occurs and VAT becomes chargeable when the chargeable event in respect of those duties occurs and the customs duties become chargeable.

40 Article 70 of the VAT directive lays down the principle that the chargeable event occurs and the tax becomes chargeable at the moment when the goods are imported. Thus, Article 71(1) of the VAT directive provides, in particular in its first subparagraph, that, where, on entry into the European Union, goods are placed under customs warehousing arrangements, the chargeable event occurs and the tax becomes chargeable only when the goods cease to be covered by those arrangements. However, the second subparagraph of Article 71(1) covers the specific situation in which, for imported goods subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event occurs and the tax becomes chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable.

41 In this regard, it should be noted that import VAT and customs duties display comparable essential features since they arise from the fact of importation of goods into the European Union and the subsequent distribution of those goods through the economic channels of the Member States. This parallel nature is, moreover, confirmed by the fact that the second subparagraph of Article 71(1) of the VAT directive authorises Member States to link the chargeable event and the date on which the VAT on importation becomes chargeable with those laid down for customs duties (see, *inter alia*, Case C-343/89 *Witzemann* [1990] ECR I-4477, paragraph 18, and Case C-230/08 *Dansk Transport og Logistik* [2010] ECR I-3799, paragraphs 90 and 91).

42 In a case such as that at issue in the main proceedings, to the extent to which, in accordance with Article 203 of the Customs Code, a customs debt is incurred at the moment when the goods, placed under customs warehousing arrangements, are removed from customs supervision, that is to say, at the time of the theft of those goods, it must be held that the VAT became chargeable at the same time, pursuant to the second subparagraph of Article 71(1) of the VAT directive.

43 The judgment in *British American Tobacco and Newman Shipping* cannot cast doubt on that answer. Even though, in the case which gave rise to that judgment, the chargeable event under examination was the supply of goods for consideration, the chargeable event which is relied on by the customs administration in the main proceedings in the present case is the importation of goods. Therefore, the answer provided by the Court in the judgment in *British American Tobacco and Newman Shipping*, to the effect that the theft of goods cannot be regarded as a supply of goods for consideration and thus cannot be subject to VAT, is not capable of being transposed to the circumstances of the present case.

44 In the main proceedings in the present case, it was possible to identify the taxable amount because the importation of the goods constituted the chargeable event for VAT purposes. The theft of goods gave rise to a customs debt on importation and the chargeability of customs duties automatically resulted in the chargeability of the tax.

45 In the light of the foregoing considerations, the answer to the second question is that the second subparagraph of Article 71(1) of the VAT directive must be interpreted as meaning that the theft of goods placed under customs warehousing arrangements gives rise to the chargeable event and causes VAT to become chargeable.

Costs

46 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 203(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006, must be interpreted as meaning that a theft of goods placed under customs warehousing arrangements constitutes an unlawful removal of those goods within the meaning of that provision, giving rise to a customs debt on importation. Article 206 of that regulation is capable of applying only to situations in which a customs debt is liable to be incurred pursuant to Articles 202 and 204(1)(a) of that regulation.

2. The second subparagraph of Article 71(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the theft of goods placed under customs warehousing arrangements gives rise to the chargeable event and causes value added tax to become chargeable.

[Signatures]

* Language of the case: French.