JUDGMENT OF THE COURT (First Chamber)

2 June 2016 (*)

(References for a preliminary ruling — Value added tax — Customs warehousing — External transit procedure — Incurrence of a customs debt as a result of non-fulfilment of an obligation — Chargeability of value added tax)

In Joined Cases C?226/14 and C?228/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Finance Court, Hamburg) (Germany), made by decisions of 18 February 2014, received at the Court on 8 and 12 May 2014 respectively, in the proceedings

Eurogate Distribution GmbH

v

Hauptzollamt Hamburg-Stadt (C?226/14),

and

DHL Hub Leipzig GmbH

v

Hauptzollamt Braunschweig (C?228/14),

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, A. Borg Barthet (Rapporteur), M. Berger and S. Rodin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2015,

after considering the observations submitted on behalf of:

– Eurogate Distribution GmbH and DHL Hub Leipzig GmbH, by U. Schrömbges, Rechtsanwalt,

– the Hauptzollamt Hamburg-Stadt, by J. Thaler, acting as Agent,

– the Hauptzollamt Braunschweig, by F. Zimmerer, acting as Agent,

– the Greek Government, by K. Georgiadis and K. Karavasili, acting as Agents,

– the European Commission, by M. Owsiany-Hornung, M. Wasmeier and A. Caeiros, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2016,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 204 and 236 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 648/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 13) ('the Customs Code'), of Article 7, the second subparagraph of Article 10(3) and Article 17(2)(a) of 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), as amended by Council Directive 2004/66/EC of 26 April 2004 (OJ 2004 L 168, p. 35) ('the Sixth Directive'), and Articles 30 and 61 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 requests have been made in two sets of proceedings between, first, Eurogate Distribution GmbH ('Eurogate') and the Hauptzollamt Hamburg-Stadt (principal customs office of the City of Hamburg, Germany) and, second, DHL Hub Leipzig GmbH ('DHL') and the Hauptzollamt Braunschweig (principal customs office of Brunswick, Germany) concerning the obligation of those undertakings to pay the value added tax (VAT) arising from the incurrence of a customs debt on the basis of Article 204 of the Customs Code.

Legal context

EU law

3 The facts in the main proceedings occurred during 2006 and 2011. Consequently, the directive applicable in Case C?226/14 is the Sixth Directive and in Case C?228/14 the VAT Directive.

The Sixth Directive

4 Article 2 of the Sixth Directive provides:

'The following shall be subject to value added tax:

…

2. the importation of goods.'

5 Article 7 of that directive states:

'1. "Importation of goods" shall mean:

(a) the entry into the Community of goods which do not fulfil the conditions laid down in Articles [23 EC and 24 EC] or, where the goods are covered by the [ECSC Treaty], are not in free circulation;

(b) the entry into the Community of goods from a third territory, other than the goods covered

by (a).

2. The place of import of goods shall be the Member State within the territory of which the goods are when they enter the Community.

3. Notwithstanding paragraph 2, where goods referred to in paragraph 1(a) are, on entry into the Community, placed under one of the arrangements referred to in Article 16 (1) (B) (a), (b), (c) and (d), under arrangements for temporary importation with total exemption from import duty or under external transit arrangements, the place of import of such goods shall be the Member State within the territory of which they cease to be covered by those arrangements.

Similarly, when goods referred to in paragraph 1 (b) are placed, on entry into the Community, under one of the procedures referred to in Article 33a (1) (b) or (c), the place of import shall be the Member State within whose territory this procedure ceases to apply.'

6 Article 10(3) of the same directive provides:

'The chargeable event shall occur and the tax shall become chargeable when the goods are imported. Where goods are placed under one of the arrangements referred to in Article 7 (3) on entry into the Community, the chargeable event shall occur and the tax shall become chargeable only when the goods cease to be covered by those arrangements.

…'

7 Article 17 of the Sixth Directive reads as follows:

'1. The right of deduction shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) [VAT] due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

(b) [VAT] due or paid in respect of imported goods;

…'

8 According to Article 21 of that directive:

'The following shall be liable to pay [VAT]:

…

2. on import: the person or persons designated or accepted as being liable by the Member States into which the goods are imported.'

The VAT Directive

9 Article 2(1) of the VAT Directive states:

'The following transactions shall be subject to VAT:

…

(d) the importation of goods.’

10 Article 9(1) of that directive provides:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

…’

11 Pursuant to Article 30 of that directive:

‘“Importation of goods” shall mean the entry into the Community of goods which are not in free circulation within the meaning of Article 24 of the Treaty.

In addition to the transaction referred to in the first paragraph, the entry into the Community of goods which are in free circulation, coming from a third territory forming part of the customs territory of the Community, shall be regarded as importation of goods.’

12 Article 60 of the VAT Directive provides:

‘The place of importation of goods shall be the Member State within whose territory the goods are located when they enter the Community.’

13 Article 61 of that directive provides:

‘By way of derogation from Article 60, where, on entry into the Community, goods which are not in free circulation are placed under one of the arrangements or situations referred to in Article 156, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the place of importation of such goods shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations.

Similarly, where, on entry into the Community, goods which are in free circulation are placed under one of the arrangements or situations referred to in Articles 276 and 277, the place of importation shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations.’

14 Article 70 of that directive reads as follows:

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

15 Under Article 71(1) of the same directive:

‘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.’

16 Article 167 of the VAT Directive provides:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

17 Pursuant to Article 168 of that directive:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…

(e) the VAT due or paid in respect of the importation of goods into that Member State.’

18 Under Article 201 of that directive:

‘On importation, VAT shall be payable by any person or persons designated or recognised as liable by the Member State of importation.’

The Customs Code

19 Under Article 4(7) and (10) of the Customs Code:

‘For the purposes of this Code, the following definitions shall apply:

(7) “Community goods” means goods:

– wholly obtained in the customs territory of the Community under the conditions referred to in Article 23 and not incorporating goods imported from countries or territories not forming part of the customs territory of the Community. Goods obtained from goods placed under a suspensive arrangement shall not be deemed to have Community status in cases of special economic importance determined in accordance with the committee procedure,

– imported from countries or territories not forming part of the customs territory of the Community which have been released for free circulation,

– obtained or produced in the customs territory of the Community, either from goods referred to in the second indent alone or from goods referred to in first and second indents.

…

(10) “Import duties” means:

– customs duties and charges having an effect equivalent to customs duties payable on the importation of goods;

…’

20 Under Article 79 of the Customs Code:

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

…’

21 Under Article 89(1) of the Customs Code:

‘A suspensive arrangement with economic impact shall be discharged when a new customs-approved treatment or use is assigned either to the goods placed under that arrangement or to compensating or processed products placed under it.’

22 Article 91 of the Customs Code provides:

‘1. The external transit procedure shall allow the movement from one point to another within the customs territory of the Community of:

(a) non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures;

…

2. The movement referred to in paragraph 1 shall take place in one of the following ways:

(a) under the external Community transit procedure; or

…’

23 Article 92 of the Customs Code states:

‘1. The external transit procedure shall end and the obligations of the holder shall be met when the goods placed under the procedure and the required documents are produced at the customs office of destination in accordance with the provisions of the procedure in question.

2. The customs authorities shall discharge the procedure when they are in a position to establish, on the basis of a comparison of the data available to the office of departure and those available to the customs office of destination, that the procedure has ended correctly.’

24 Under Article 96 of the Customs Code:

‘1. The principal shall be the [holder of the procedure] under the external Community transit procedure. He shall be responsible for:

(a) production of the goods intact at the customs office of destination by the prescribed time limit and with due observance of the measures adopted by the customs authorities to ensure identification;

(b) observance of the provisions relating to the Community transit procedure.

2. Notwithstanding the principal’s obligations under paragraph 1, a carrier or recipient of goods who accepts goods knowing that they are moving under Community transit shall also be responsible for production of the goods intact at the customs office of destination by the prescribed time limit and with due observance of the measures adopted by the customs authorities to ensure identification.’

25 Article 98(1) of the Customs Code provides:

‘The customs warehousing procedure shall allow the storage in a customs warehouse of:

(a) non-Community goods, without such goods being subject to import duties or commercial

policy measures;

…’

26 Article 105 of the Customs Code states:

‘The person designated by the customs authorities shall keep stock records of all the goods placed under the customs warehousing procedure in a form approved by those authorities. Stock records are not necessary where a public warehouse is operated by the customs authorities.

…’

27 Pursuant to 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

(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

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.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil 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 have been placed, or to comply with the conditions governing the placing of the goods under that procedure.’

28 Under Article 236 of the Customs Code:

‘1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount

of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or *force majeure*.

Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative.'

The Implementing Regulation

29 Article 866 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1) ('the Implementing Regulation) provides:

'Without prejudice to the provisions laid down concerning prohibitions or restrictions which may be applicable to the goods in question, where a customs debt on importation is incurred pursuant to Articles 202, 203, 204 or 205 of the [Customs] Code and the import duties have been paid, those goods shall be deemed to be Community goods without the need for a declaration for entry into free circulation.'

German law

30 Paragraph 1 of the Umsatzsteuergesetz (Law on turnover tax; 'the UStG') of 21 February 2005 (BGB1. 2005 I, p. 386), in the version applicable at the relevant time, provides:

'(1) The following transactions shall be subject to the tax:

1. the supply of goods and other services for consideration within German territory by an undertaking in the context of its activities;

…

4. the importation of goods into Germany … (import turnover tax).

…'

31 Paragraph 5 of the UStG states:

'…

(2) The Federal Ministry for Finance may, by means of a regulation, order the exoneration from, or reduction of, the tax on …

…

5. goods which are imported only temporarily and which are scheduled to be re-exported under customs supervision;

…

(3) The Federal Ministry for Finance may, by means of a regulation, order the repayment or the part or full remission of import turnover tax by applying *mutatis mutandis* the conditions laid down in the legislation of the Council and Commission of the European Communities on the repayment

or remission of import duty.

…’

32 Under Paragraph 13 of the UStG:

‘(1) The tax shall be incurred

1. On supplies of goods and other services …

…

(2) Paragraph 21(2) shall be applicable to import turnover tax.

…’

33 Paragraph 15(1) of the UStG states:

‘A business may deduct the following amounts of input tax:

1. The tax lawfully due on the supply of goods and other services which are exported by another operator for his business;

2. Import turnover tax incurred on goods which are imported for his business under Paragraph 1(1)(4);

…’

34 Under Paragraph 21 of the UStG:

‘(1) Import turnover tax is a tax on consumption within the meaning of the General Tax Code (Abgabenordnung).

(2) The customs rules shall apply by analogy to import turnover tax, with the exception of the rules relating to inward processing in the reimbursement system and those relating to outward processing.

…’

35 Paragraph 1(2) of the Einfuhrumsatzsteuer-Befreiungsverordnung (Federal regulation on the exoneration from import turnover tax) of 11 August 1992 (BGBl. 1992 I, p. 1526), as applicable to the facts in the main proceedings (BGBl. 2004 I, p. 21), provides:

‘Subject to Paragraph 11, the following shall be exonerated from import turnover tax: the temporary importation of goods which

1. under Articles 137 to 144 of the Customs Code may be imported free of the import duties provided for in Article 4(10) of the Customs Code …

…

by applying *mutatis mutandis* the aforecited rules and the relevant implementing rules. The above shall not apply to the rules governing temporary application where there is exoneration in part from the import duties provided for in Article 4(10) of the Customs Code.’

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

Case C?226/14

36 Eurogate has been authorised to operate a private customs warehouse since 2006. An IT system is used to keep stock records in that warehouse.

37 As warehouse keeper, Eurogate took into its private customs warehouse non-Community goods from its customers with a view to forwarding them outside the territory of the European Union. At the time of the removal of the goods from the customs warehouse, customs declarations for their re-exportation were drawn up.

38 During a customs inspection on 31 January 2007, it was established that removals of the goods at issue were not entered in the stock records until 11 to 126 days after the removals took place, and were thus recorded late for the purposes of the first paragraph of Article 105 of the Customs Code, read in conjunction with Articles 529(1) and 530(3) of the Implementing Regulation.

39 By a notice of 1 July 2008, the Hauptzollamt Hamburg-Stadt sought payment of the customs duty and import VAT for the goods which were entered late in the stock records. Eurogate challenged that notice.

40 Following remission of a portion of the duties, granted by a notice of 11 August 2009, the Hauptzollamt Hamburg-Stadt, by a decision of 8 December 2009, dismissed the remainder of Eurogate’s challenge as unfounded, on the ground that the late entries in the stock records had to be regarded as constituting a failure on the part of Eurogate to fulfil its obligations under the customs warehousing procedure and that, consequently, that failure had given rise to a customs debt on the basis of Article 204(1) of the Customs Code.

41 Eurogate brought an action before the Finanzgericht Hamburg (Finance Court, Hamburg) for annulment of the notice of 1 July 2008, as amended by the notice of 11 August 2009 and confirmed by the decision of 8 December 2009, claiming, inter alia, that the late entries of the removals from the customs warehouse in the stock records do not constitute a failure to fulfil its obligations for the purposes of Article 204(1)(a) of the Customs Code inasmuch as, in accordance with Article 105 of the Customs Code and Article 530(3) of the Implementing Regulation, the obligation to record removals in the stock records has to be fulfilled only after the discharge of the customs warehousing procedure.

42 The issue of the determination of the customs duties was referred to the Court of Justice in a case which gave rise to the judgment of 6 September 2012 in *Eurogate Distribution* (C?28/11, EU:C:2012:533).

43 In paragraph 35 of that judgment, the Court held that Article 204(l)(a) of the Customs Code had to be interpreted as meaning that, in the case of non-Community goods, non-fulfilment of the obligation to enter the removal of the goods from the customs warehouse in the appropriate stock records, at the latest when the goods leave the customs warehouse, gives rise to a customs debt in respect of those goods, even if they have been re-exported.

44 In so far as concerns import VAT, Eurogate challenges the notice relating to that tax on the ground that, irrespective of the incurrence of the customs debt, the conditions for levying import VAT were not satisfied, since the goods concerned did not enter the economic network of the European Union.

45 The Hauptzollamt Hamburg-Stadt contests that argument by asserting that the incurrence of the customs debt also leads to the incurrence of the import VAT debt, since national law on turnover taxes and EU law on VAT refer to customs law.

46 In that regard, the national court points out that that line of argument is consistent with the case-law of the German courts with the result that the action should be dismissed on that basis, since none of the conditions for exoneration from import tax set out in Paragraph 5 of the UStG and Paragraph 1(2) of the Federal law on the exoneration from import turnover tax, in the version applicable to the facts in the main proceedings, has been satisfied.

47 However, the referring court harbours doubts, first, as to whether import VAT is necessarily due where an import customs debt is incurred under Article 204 of the Customs Code and, second, whether a warehouse keeper such as the applicant in the main proceedings may, where appropriate, be liable for payment of the VAT.

48 In those circumstances the Finanzgericht Hamburg (Finance Court, Hamburg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1) Is it contrary to the provisions of [the Sixth Directive] to impose import turnover tax on goods which have been re-exported as non-Community goods but for which a customs debt has been incurred under Article 204 of the Customs Code as a result of non-fulfilment of obligations — in this case, failure to fulfil within the proper time the obligation to enter the removal of the goods from a customs warehouse in the appropriate stock records at the latest at the time of their removal?

2) If Question 1 is answered in the negative:

Do the provisions of [the Sixth Directive] require import turnover tax to be imposed on the goods in such cases, or do the Member States have discretion in this respect?

and

3) Is a customs warehouse keeper who stores goods from a third country in his customs warehouse on the basis of a contract for services, while having no right of disposal over the goods, liable for payment of the import [VAT] incurred as a result of his non-fulfilment of obligations under Article 10(3)(2) of [the Sixth Directive] in conjunction with Article 204(1) of the Customs Code, even though the goods are not used for the purposes of his taxable transactions within the meaning of Article 17(2)(a) of [the Sixth Directive]?’

Case C?228/14

49 On 5 January 2011, an external transit procedure T1 was opened in respect of non-Community goods. Once the procedure had been opened the goods were to be transported within the prescribed period, and at the latest by 12 January 2011, to Macao (China) through the Hanover airport customs office (Germany) or the Leipzig Airport customs office (Germany). DHL, which is a carrier of goods within the meaning of Article 96(2) of the Customs Code, failed to present the goods at the Leipzig airport customs office before they were transported to Macao.

50 The transit procedure could not be completed in accordance with Article 366(2) of the Implementing Regulation because the necessary documents could not be presented.

51 On 8 August 2011, the Hauptzollamt Braunschweig issued DHL with an import VAT assessment notice, on the basis of Article 204(1)(a) of the Customs Code, in the amount of EUR 6 002.01, to which no objection was made.

52 On 29 February 2012, DHL applied for repayment of the import VAT paid on the basis of that assessment notice, in accordance with Article 236 of the Customs Code.

53 The Hauptzollamt Braunschweig rejected the application for repayment of the import duty and DHL's objection by decisions of 28 March and 5 July 2012.

54 DHL brought an action before the Finanzgericht Hamburg (Finance Court, Hamburg) claiming that no VAT could be levied on the goods in transit which had not entered the German economic network.

55 In those circumstances the Finanzgericht Hamburg (Finance Court, Hamburg) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is import VAT for goods which have been re-exported under customs supervision as non-Community goods but for which a customs debt has been incurred under Article 204 of the Customs Code as a result of non-fulfilment of obligations — in this case, failure to complete the external Community transit procedure within the proper time by presenting them to the competent customs office prior to shipment to the third country — to be considered as not legally owed within the meaning of Article 236(1) of the Customs Code in conjunction with the provisions of [the VAT Directive] in any case where the person held liable for the tax debt is the person who should have fulfilled that obligation even though he had no right of disposal over the goods?'

56 By order of the President of the Court of 14 October 2014, Cases C?226/14 and C?228/14 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

The first question in Case C?226/14

57 By its first question in Case C?226/14, the referring court asks, in essence, whether Article 7(3) of the Sixth Directive must be interpreted as meaning that VAT on goods which have been re-exported as non-Community goods is due where a customs debt is incurred exclusively on the basis of Article 204 of the Customs Code.

58 It should be pointed out, at the outset, that, pursuant to Article 2 of the Sixth Directive, supplies of goods or services effected for consideration within the territory of the country by a taxable person acting as such are subject to VAT.

59 It needs to be verified, first, whether goods such as those at issue in the main proceedings have been subject to importation within the meaning of Article 2(2) of the Sixth Directive.

60 According to Article 7(1)(a) of the Sixth Directive, ‘importation of goods’ means the entry into the European Union of goods which do not fulfil the conditions laid down in Articles 23 EC and 24 EC.

61 Article 7(3) of the Sixth Directive provides that, where such goods are, on entry into the European Union, placed under one of the arrangements referred to in Article 16(1)(B)(a), (b), (c) and (d) of that directive, their importation is effected in the Member State within the territory of which they cease to be covered by those arrangements.

62 In the case at hand, the goods at issue in the main proceedings, which were imported from a third country, were placed under the customs warehousing procedure in a Member State before being re-exported outside of the customs territory.

63 Consequently, those goods were placed, from their entry into the European Union and until the date they were re-exported, under one of the arrangements provided for in Article 16(1)(B)(c) of the Sixth Directive.

64 It should be pointed out that the Court of Justice held, in paragraph 35 of its judgment of 6 September 2012 in *Eurogate Distribution* (C?28/11, EU:C:2012:533) that in the case of non-Community goods, non-fulfilment of the obligation to enter the removal of the goods from the customs warehouse in the appropriate stock records, at the latest when the goods leave the customs warehouse, gives rise to a customs debt under Article 204(l)(a) of the Customs Code in respect of those goods, even if they have been re-exported.

65 However, in the case in the main proceedings, it is not disputed that the non-fulfilment of that obligation was noticed after the relevant goods had been re-exported. As a result, those goods were covered by the customs warehouse procedure until they were re-exported and it is not disputed that there was no risk of them entering the European Union’s economic network. As the Advocate General stated in point 97 of his Opinion, in addition to the customs debt, there may also be a requirement to pay VAT where, based on the particular unlawful conduct which gave rise to the customs debt, it can be presumed that the goods entered the economic network of the Union and, consequently, that they may have undergone consumption, that is, the act on which VAT is levied.

66 Thus, since the goods at issue in the main proceedings had not yet left those arrangements at the date they were re-exported, even though they had been physically introduced into the territory of the European Union, they cannot have been the subject matter of an ‘importation’ within the meaning of Article 2(2) of the Sixth Directive (see, to that effect, judgment of 8 November 2012 in *Profitube*, C?165/11, EU:C:2012:692, paragraph 46).

67 Consequently, in the absence of importation at the date of the facts of the dispute in the main proceedings, the goods at issue were not subject to VAT under Article 2(2) of the Sixth Directive (judgment of 8 November 2012 in *Profitube*, C?165/11, EU:C:2012:692, paragraph 48).

68 As the European Commission rightly points out, the judgment of 15 May 2014 in *X* (C?480/12, EU:C:2014:329) cannot call that response into question. In the case which gave rise to that judgment, Article 866 of the Implementing Regulation was applied pursuant to which, where a customs debt on importation is incurred pursuant to, inter alia, Articles 203 or 204 of the Customs Code and the import duties have been paid, the goods at issue are to be deemed to be

Community goods without the need for a declaration for entry into free circulation.

69 As the Advocate General stated in point 84 of his Opinion, the scope of Article 866 of the Implementing Regulation is restricted to goods which are in the customs territory of the Union and not goods which have been re-exported. However, it is apparent from paragraph 65 above that the goods at issue in the main proceedings had already left the customs territory of the Union and could thus not physically have entered its economic network.

70 Consequently, as the Advocate General stated in points 86 and 87 of his Opinion, Article 866 of the Implementing Regulation is irrelevant in these proceedings since the goods at issue, which were continuously subject to a suspensive procedure, gave rise to the incurrence of a customs debt only after they had been re-exported. Those goods were removed from the customs warehousing arrangement solely on account of their re-exportation and, thus, no import took place.

71 In the light of the foregoing considerations, the answer to the first question referred in Case C?226/14 is that Article 7(3) of the Sixth Directive must be interpreted as meaning that VAT on goods which have been re-exported as non-Community goods is not due where those goods have not been removed from the customs arrangement provided for in that provision at the date of their re-exportation but were removed from that arrangement as a result of their re-exportation, and that is the case even where a customs debt is incurred exclusively on the basis of Article 204 of the Customs Code.

The second and third questions in Case C?226/14

72 In view of the answer to the first question in Cases C?226/14, it is not necessary to answer the second and third questions referred in that case.

The question in Case C?228/14

73 By the question it refers in Case C?228/14 the national court asks, in essence, whether Article 236(1) of the Customs Code, read in conjunction with the provisions of the VAT Directive, must be interpreted as meaning that import VAT on goods which have been re-exported under customs supervision as non-Community goods, but for which a customs debt has been incurred as a result of non-fulfilment of an obligation under Article 204 of the Customs Code, is to be regarded as not legally owed where the person held liable for the tax debt is the person who should have fulfilled that obligation even though he had no right of disposal over the goods.

74 It should be noted as a preliminary point that, in Case C?228/14, the applicable directive is the VAT Directive. However, given that the provisions of that directive applicable to that case correspond to the articles of the Sixth Directive applicable in Case C?226/14, it is appropriate to refer *mutatis mutandis* to the Court’s analysis in paragraphs 58 to 61 above to assess, from the outset, whether the VAT is actually owed.

75 In that regard, the goods at issue in the main proceedings, which originated in a third country, were placed under the external transit procedure before being re-exported out of the customs territory.

76 Consequently, those goods were placed, from their entry into the European Union, under one of the arrangements provided for in the first paragraph of Article 61 of the VAT Directive.

77 It is apparent from the order for reference that non-fulfilment of the obligation to complete the external transit procedure by presenting the goods at issue in the main proceedings to the relevant customs office before transferring them to a third country led to the incurrence of a

customs debt on the basis of Article 204(1)(a) of the Customs Code, which is not disputed by the parties in the man proceedings. However, it must be found that those goods, which were re-exported without entering the economic network of the European Union, thus remained under the external transit procedure until the date at which they were re-exported.

78 Therefore, since the goods at issue in the main proceedings had not yet left that arrangement at the date of their re-exportation, even though they had been physically introduced into the territory of the Union, they cannot be considered to have been the subject matter of an ‘importation’ within the meaning of Article 2(1)(d) of the VAT Directive (see, to that effect, judgment of 8 November 2012, *Profitube*, C?165/11, EU:C:2012:692, paragraph 46).

79 Consequently, in the absence of importation at the date of the facts of the dispute in the main proceedings, the goods at issue were not subject to VAT under Article 2(1)(d) of the VAT Directive (judgment of 8 November 2012 in *Profitube*, C?165/11, EU:C:2012:692, paragraph 48).

80 The result is that, since the chargeable event for VAT purposes, namely the importation, under Article 2(1)(d) of the VAT Directive, is non-existent, the question as to who is liable for the tax debt no longer arises.

81 Moreover, the Court has already held 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 (judgment of 29 July 2010, *Pakora Pluss*, C?248/09, EU:C:2010:457, paragraph 47).

82 Consequently, Article 236(1) of the Customs Code, which provides that import duties are to be repaid in so far as it is established that, when they were paid, the amount of such duties was not legally owed, cannot include the repayment of the VAT.

83 In the light of the foregoing considerations, the answer to the question referred in Case C?228/14 is that Article 236(1) of the Customs Code, read in conjunction with the provisions of the VAT Directive, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, since VAT on goods which have been re-exported as non-Community goods is not due where those goods have not been removed from the customs arrangement provided for in Article 61 of the VAT Directive, and that is the case even where a customs debt is incurred exclusively on the basis of Article 204 of the Customs Code, nobody is liable for payment of the VAT. Article 236 of the Customs Code must be interpreted as not being applicable in situations relating to the repayment of VAT.

Costs

84 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. **Article 7(3) of 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, as amended by Council Directive 2004/66/EC of 26 April 2004, must be interpreted as meaning that value added tax on goods which have been re-exported as non-Community goods is not due where those goods have not been removed from the customs arrangement provided for in that provision at the date of their re-exportation but were removed from that arrangement as a result of their re-exportation, and that is the case even where a customs debt is incurred exclusively on the basis of Article 204 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 648/2005 of the European**

Parliament and of the Council of 13 April 2005.

2. **Article 236(1) of Regulation No 2913/92, as amended by Regulation No 648/2005, read in conjunction with the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, since value added tax on goods which have been re-exported as non-Community goods is not due where those goods have not been removed from the customs arrangement provided for in Article 61 of that directive, and that is the case even where a customs debt is incurred exclusively on the basis of Article 204 of Regulation No 2913/92, as amended by Regulation No 648/2005, nobody is liable for payment of the value added tax. Article 236 of Regulation No 2913/92 must be interpreted as not being applicable in situations relating to the repayment of value added tax.**

[Signatures]

* Language of the case: German.