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THE BURDEN OF PROOF IN THE CONTEX OF A POST-CLEARANCE RECOVERY OF CUSTOMS DUTIES

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Abstract

This paper considers issues of post-clearance recovery of customs duties. Based on a certain legal case the main conditions to be taken into account to decide on whom the burden of proof lays are discussed. The paper also gives an example of a judgement taken by the European Court of Justice concerning a certificate of origin.

Key words: burden of proof, clearance, recovery of customs duties, judgement, certificate of origin.

Introduction

Whenever the customs administrations want to recover customs duties a posteriori in form of a post-clearance recovery, the question comes up, who has to prove the fulfillment of the conditions for such a recovery.

Even in cases, where the conditions are clearly stated in the legal provisions like the Community Customs Code (Regulation 2913/92 of 12 October 1992) doubts may arise which parts of the condition has to be proved by the customs administration and which part by the economic operator.

Recently the European Court of Justice brought some light into the dark by a judgment from 8 November 2012 in the Case C-438/11.[1]

1. Basic Facts of the Case

A company imported shoes into the European Union. To the customs declaration certificates were attached, attesting the origin of Macao. On the basis of these documents the Main Customs Office granted a preferential rate of customs duties to the importing company.

After having received some information that in other cases than this one certain

[1] Official Journal C 9/18 from 12.1.2013,

goods for which a certificate from Macao was presented the good in fact had their origin in China, the customs office asked the competent authorities of Macao, to verify the certificates of origin for the imported shoes in accordance with Article 94 of Regulation 2454/93 from 2 July 1993 (Community Customs Code Implementing Provision), as amended by Regulation 1602/2000.

The competent authorities of Macao confirmed that they had issued those certificates of origin, However they were unable to verify the accuracy of the content of those certificates, given the fact that the exporting company had given up business. Nevertheless the Macao authorities did not invalidate the certificates.

The Main Customs Office took the view that the origin of Macao was not proved and claimed on the basis of Article 220 par. 2 letter b) Community Customs Code the recovery of the difference between the preferential rate of the customs duties and the normal rate.

And in this respect it had to be decided on whom the burden of proof lays and whether or not there were any legitimate expectations on the side of the importer which had to be protected.

Should it be the person liable for the duty who had to prove that the facts on which the certificate of origin was issued were presented correctly by the exporter or should it be the customs authority, who had to prove that those facts were incorrect?

Or as a mixture of both, should it be only the importer in cases where the exporter did something wrong?

2. Legal background

As the European Court of Justice had ruled in a previous judgment, the European Union should not bear the consequences of wrongful acts of exporters in Third Countries. However in cases like this, it cannot be said anymore, IF there were any wrongful acts in the Third Country. Is it really justified to refuse the importer the protection of his legitimate expectation into the certificate of origin?

In the court decision mentioned before, the European Court of Justice took the view that the burden of proof is on the side of the importer in cases, where due to carelessness on the part of the exporter it cannot be verified that the certificates are based on a correct account of the facts provided by the exporter.

There is no doubt that in cases where the origin of a good cannot be verified, this good is of an unknown origin with the consequence that no preferential treatment is justified. Issuing an incorrect certificate of origin is regarded in accordance with Article 220 par. 2 letter b, 2nd and 3rd subpar. Community Customs Code as an error of those authorities, unless the exporter had made an incorrect account of the fact. In such a case the post-clearance recovery must be carried out unless the Third-Country-Authority knew or ought to have known that the goods did not meet the conditions for a preferential treatment.

Allocating the burden of proof on the importer would mean that for avoiding a post-clearance recovery, he had to prove that the exporter gave a correct account of the facts to the competent authority. This would be a derogation from the principle that the customs authority, who wants to make a post-clearance recovery in accordance with

Article 220 II b Community Customs Code has to give evidence that the accounts of the facts were inaccurate.

And in the present case no negligence of the exporter can be identified, in particular as there was no obligation for the exporter to keep documents because the agreement in Regulation 980/2005, which was the legal basis for the preferential treatment, did not foresee such an obligation.

But does this mean that the importer is freed from all risks as regards the verification and determination of the origin of the goods?

It is up to the trader to make the necessary arrangements with the contractor to protect himself against the risks of an action for post-clearance recovery[2], id est receiving the evidence confirming that the goods come from the beneficiary county, including documents establishing the origin.

In the present case the European Court of Justice stated that even ceasing business activities could constitute improper behavior on the part of the exporter, because the cessation could be used as means of concealing the real origin of goods.

Even in cases where the Third-County-Authority has not invalidated the certificates of origin, that does not mean in itself that these certificates have to be accepted.

Whereas for association agreements of free trade arrangements the European Court of Justice had held that the system of administrative cooperation can function only if the authorities of the importing country accepts the determination made by the exporting state[3], this principle would not apply where the preferential scheme had been established by a unilateral EU-measure. In such a case determinations of the exporting state on the status of the origin would not be binding for the European Union when the importing state has doubts as to the true origin of the goods.

The European Court of Justice held that even in situations like the present case, the burden of proving that the certificate of origin was based on a correct account of the facts provided by the exporters rests with the person liable for payment.

Even if this person has introduced the goods in good faith, it makes no difference because the Court takes the view that a prudent trader must assess the risks inherent in the market and accepts them as usual trade risks.

3. The wording of the Court-decision

Article 220 (2) (b) of Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No. 2700/2000 of the European Parliament and of the Council of 16 November 2000, must be interpreted as meaning that if, owing to the fact that the exporter has ceased production, the competent authorities of the non-member country are unable, through a subsequent verification, to determine whether the certificate of origin Form A that they had issued is based on a correct account of the facts by the exporter, the burden of proving that the certificate was based on a correct account of the facts by the exporter rests with the person liable for payment.

[2] Case C-293/04, ECJR 2006, 2263
[3] Case C-299/98, ECJR I-8683
[4] Cases C-218/83, ECJR 27, 23/04-25/04, ECJR I-1265, C-442/08, ECJR I-6457

4. Some critical remarks

The judgment of the European Court of Justice had brought legal security of economic operators and customs authorities.

However it may be allowed to add some critical remarks.

The Court bases its decision on the argument, that the European Union cannot be made to bear the adverse consequences of the wrongful acts of suppliers of importers.

However in the present case it is not established that there were any wrongful acts. The Court only takes it as granted although the judgment itself declares that no obligation could have been breached by not keeping any documents.

Next to that the Court holds that the assessments made by the authorities of the exporting state cannot be binding upon the European Union under the scheme of generalized tariff preferences established unilateraly by the European Union in cases where the importing state has doubts as to the true origin of the goods. This opinion cannot be based on the legal text of Article 220 par. 2 letter b Community Customs Code. The protection of the good faith of the importer is possible whenever the participation of the Third-Country-Authority is based on a system of administrative cooperation. Such a system is ruled out for the generalized preference system in Article 93 pp of the Community Customs Code Implementing Provisions. The Court itself has mentioned in its judgment that the Main Customs Authority based its request for verification of the certificates of origin on Article 94 Community Customs Code Implementing Provisions. That means that in the present case the importing state should have been bound on the determination of the exporting state.

The Court holds, that a contrary approach would deprive the customs authorities of the importing state of the possibility of requesting proof that the certificate of origin was based on a correct or incorrect account fo the facts by the exporter and that it would undermine the objective of the subsequent verifications which is to check at a later stage the accuracy of the origin of the goods.

However it seems that this conclusion is not justified. The fact that the importing state is bound on the determination of the exporting state does not mean that the importing state is deprived of the possibility of requesting the proof of origin from the exporting state, but only that even there are doubts on the part of the importing country these doubts cannot lead to the fact that the certificate cannot be accepted.

Summary and concluding remarks

Finally the Court makes reference to old judgments from 1980 (Case 827/79) and 1997 (Case 97/95) and 1999 (Case C-299/98 P) by establishing that a prudent trader has to assess the risks inherent in the market which he is considering and has to accept them as normal trade risks. In this respect it has to be mentioned that all of these judgments were issued BEFORE the amendment of the Community Customs Code came into force, which established a greater protection of good faith by subpar. 2 to 5 of par. 2 letter b of Article 220. For this reason this argument cannot be taken into consideration any more.

Although the judgment brought some legal certainty, the reason behind it are questionable.

Endnotes

1. Official Journal C 9/18 from 12.1.2013.
2. Case C-293/04, ECJR 2006, 2263.
3. Case C-299/98, ECJR I-8683.
4. Cases C-218/83, ECJR 27, 23/04-25/04, ECJR I-1265, C-442/08, ECJR I-6457.

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ORGANIZING THE INTERNATIONAL RELATIONS OF THE NATIONAL TAX AND CUSTOMS ADMINISTRATION OF HUNGARY 2010-2012

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Abstract

The paper considers the integration of the international relations of the National Tax and Customs Administration in the process of their merging into a single agency to ensure the effectiveness and efficiency of tax collection. The specific stages of the integration process are analyzed and the priority directions of development of the international relations of the National Tax and Customs Administration of Hungary are identified.

Key words: integration, strategic planning, coordination, international relations, taxes, revenues, the National Tax and Customs Administration.

Introduction

In more than half of the Member States of the European Union (15 countries altogether) there is one single administration responsible for collecting both taxes and customs duties. The integration of these two fields is predominantly justified by reasons of effectiveness and the most cost-efficient method of collecting state revenues. The process of merger was either accelerated or slowed down by changes in the location, by the abolishment of the external customs borders of the EU and consequently by the reduction of the traditional customs control tasks.

Among the very first measures of the Government of Hungary established after the parliamentary elections of 2010 was announcing the merger of the Tax and Financial