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Highlights & Insights on European Taxation

Please find below a selection of articles published this November in Highlights & Insights on European Taxation, plus one freely accessible article.

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– ***Zes Zollner Electronic*** **(C-640/21)**. Amendment of customs declaration. or invalidation of customs declaration. Court of Justice

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It is elementary that the interpretation of the legislation and the consideration of penalties and proportionality must always be carried out against a complete factual background of the case in question. Consequently, a full description of the facts of this case is essential to appreciate fully the issues which the Advocate General and the Court addressed. Yet there are some important factual elements of this case that are not fully expressed in the Opinion of the AG (26 January 2023, ECLI:EU:C:2023:56) or the Judgment (8 June 2023, ECLI:EU:C:2023:457) although they may be deduced from what is said.

The first element is that neither the CN heading nor the subheading of the goods in question are identified. We are told that the goods were electronic integrated circuits. These fall under CN 8542. All the goods under that heading enter the EU duty free. It would follow this was a case in which no EU customs duty was at risk.

The second factual element which is not fully described concerns the penalties imposed on the declarant.

We are told that Romanian law provided for a fine ranging from the equivalent of EUR 635 to EUR 1,693 for the administrative offence of removing from customs supervision goods which must be placed under a customs procedure and that the goods must be confiscated. The fine suffered by the declarant in this case was, therefore, the lowest possible (Opinion AG, paragraph

21). The goods could not be confiscated, it may be assumed, as they could not be identified.

There was, however, also a penalty imposed. According to paragraph 22 of the Opinion, an administrative offence is committed where goods can no longer be identified. In these circumstances the declarant must pay: 'the amount corresponding to the customs value of the goods, plus import duties and other duties legally owed, corresponding to the taxes determined at the time of release for free circulation of the goods.' This is said to be equivalent to confiscation. The declarant had to pay a sum equivalent to EUR 5,893 to satisfy this obligation (see the Opinion, para. 27 and the Judgment, para. 24).

It would, however, have been very helpful for everyone to have a breakdown of this second amount. The customs value of the goods was EUR 4,950. The penalty imposed was equivalent to EUR 5,893. There is, therefore, an additional sum equivalent to EUR 943.00 to be accounted for. It could not have been import duties as none were due. Romanian import VAT appears to have been chargeable at 19%. Given that the customs value was EUR 4,950, 19% of that sum is EUR 940.5. It is reasonable to assume, therefore, that the extra amount was import VAT. Again, the absence of any customs duty liability is underlined.

When one understands that the trader had put no customs duty at risk because none was chargeable, one understands why the referring court formulated its third question as it did, asking if the matter could be regularised without payment of penalties. This suggests the referring court had considerable sympathy for the declarant. The Opinion of the Advocate General suggests he did too. One may think that he strives unusually hard to construe the legislation in a way favourable to the declarant. When one looks at the facts in detail one sees why. Yet, as we are often told, hard cases make bad law.

Would the Court have been making bad law if it had followed the Advocate General's Opinion? In one respect in particular, its reasoning is doubtful. It noted that the Article 173.3 of the Union Customs Code (UCC) allowed an amendment for the declarant 'to comply with his or her obligations relating to the placing of the goods under the customs procedure concerned.' The Court stated that as goods could only be placed under a customs procedure if they have been declared, it followed that the provision could not relate to goods which had not been declared (paragraph 40).

There is, however, no reason to construe 'relating to' to a past event. The phrase 'relating to' is very broad. It would allow for an amendment to relate to the placing of goods under a customs procedure whether that be in the past, the present or the future.

For all that, the natural reading of the words of Article 173.1 which prevents declarations being applicable to goods 'other than' those originally covered, would indeed seem to indicate that a quantity of goods excluded from the original declaration cannot be encompassed by an amendment. Although the Advocate General's approach is attractive, perhaps the most principled way in which to assist the trader is in relation to penalties.

On this matter, the Advocate General is on considerably stronger ground. The penalty imposed on the trader does indeed seem disproportionate. No duty was lost. No own resources were at risk. The trader had contacted the authorities of its own volition within a reasonable time. Are these really circumstances deserving of not one but two penalties?

Many will agree with the Advocate General that the penalties imposed were disproportionate. Whether or not they would be counter-productive may be open to debate. What is clear, however,

is that engaging in international trade as an EU trader may be a highly risky activity. The risks that traders run, particularly small and medium-sized traders, are often insufficiently appreciated. As this case shows, the honest trader who calls attention to its own deficiencies may find the system does not encourage it to continue in international business. A customs system that does not encourage small businesses to engage in international trade may well not be as helpful as it should be to the broader community of which it forms an essential part.

Some other authorities in the EU may have imposed a penalty. Others may not. The variability of penalties between Member States is indeed one of the concerns arising in the present customs union. It is an issue that the proposal for a new Union Customs Code seeks to address (see Proposal for a Regulation of the European Parliament and of the Council establishing the Union Customs Code and the European Union Customs Authority, and repealing Regulation (EU) No 952/2013, COM(2023) 258 final, 17.5.23).

Title XIV (Articles 245 to 254) of the Proposal is headed ‘Common Provisions on Customs Infringements and on Non-criminal Sanctions’. The provisions contain a list of matters which constitute customs infringements. They list extenuating, mitigating and aggravating circumstances as well as containing an article on limitation. They set out union customs infringements, contain general requirements for sanctions and specify minimum non-criminal sanctions.

The facts of this case show as well as any case will why it is important for EU customs law to contain provisions on sanctions. As was noted above, in his Opinion, the Advocate General referred to ‘a simple clerical error’. If that is the proper description of what occurred in this case, then it is worth reflecting that Article 246.4 of the Proposal, published after the Advocate General’s Opinion and only shortly before the Court’s judgment, states:

‘Clerical or minor errors shall not constitute a customs infringement unless the

customs authority can establish that they were committed intentionally, or as a result of obvious negligence or manifest error.’

It is reasonable to suppose that ZZE would agree with that.

Timothy Lyons

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