Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 13 February 2014[1]

Case C-480/12

Minister van Financiën
v
X BV

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Community Customs Code — Regulation (EEC) No 2913/92 — Scope of Articles 203 and 204(1)(a) — External transit procedure — Incurrence of the customs debt owing to non-fulfilment of an obligation — Late presentation at the office of destination — Implementing regulation — Regulation (EEC) No 2454/93 — Article 859 — Sixth VAT Directive — Article 10(3), first subparagraph — Concept of importation under the Sixth VAT Directive — Cessation of cover under the relevant customs arrangement — Link between incurrence of the customs debt and VAT — Concept of taxable transaction)

I – Introduction

1. The external Community transit procedure established by Regulation (EEC) No 2913/92,[2] and its Implementing Regulation,[3] is a customs regime governed by very strict conditions. It applies to non-Community goods moving between two points of the customs territory of the European Union with a view to being re-exported to a non-Member country. During transit, no customs duty, value added tax ('VAT') or excise duty is payable on the goods.

2. In the present case the Hoge Raad der Nederlanden (Netherlands) is asking the Court in its first question about the legal consequences, as regards incurrence of the customs debt, of irregularities arising in the course of external transit, in connection with the late presentation of the goods[4] at the office of destination, in regard to the Customs Code and in particular Article 203 (unlawful removal from customs supervision) and Article 204 (non-observance of the conditions governing application of

1 — Original language: French.

2 — Regulation of the Council 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'). The Customs Code was repealed by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1), of which some provisions entered into force on 24 June 2008, while others did so on 24 June 2013. In view of the date of the facts in the main proceedings, these are still governed by the rules set out in the Customs Code.

3 — 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), as amended by Commission Regulation (EC) No 2286/2003 of 18 December 2003 (OJ 2003 L 343, p. 1) ('the Implementing Regulation').

4 — In the main proceedings the item in question is a diesel engine which entered the Union before leaving it several months later having been incorporated into a ship.

the customs regime). I would point out at the outset that Article 859 of the Implementing Regulation lays down certain 'excusable' circumstances under which a failure under Article 204 of the Customs Code, as opposed to unlawful removal under Article 203 thereof, does not give rise to incurrence of a customs debt.

3. In the event that Article 204 of the Customs Code is applicable, the national court raises an issue in its second question about the interpretation of Sixth Directive 77/388/EEC,[5] in particular in regard to the relationship between the customs debt and the incurrence of the VAT debt and, more specifically, whether in circumstances such as those in the main proceedings VAT is payable on importation, when a customs debt is incurred under Article 204 of the Customs Code owing to expiry of the time-limit for presentation.

II – Legal background

A – *EU law*

1. External Transit Procedure

4. As far the external transit procedure is concerned, Articles 91, 92 and 96 of the Customs Code lay down respectively the definition, purpose and obligations of the principal under the procedure.

5. Article 356 of the Implementing Regulation concerns the time-limit by which the goods must be presented at the office of destination. Article 356(3), concerning late presentation of goods, provides:

'Where the goods are presented at the office of destination after expiry of the time limit prescribed by the office of departure and where this failure to comply with the time limit is due to circumstances which are explained to the satisfaction of the office of destination and are not attributable to the carrier or the principal, the latter shall be deemed to have complied with the time limit prescribed'.

2. Incurrence of the customs debt

6. Under Article 203 of the Customs Code, the customs debt is incurred when the goods are removed from customs supervision. Conversely, under Article 204(1)(a) of the Customs Code, a customs debt is incurred when one of the obligations arising from use of the customs procedure under which the goods have been placed has not been fulfilled.

7. Article 859 of the Implementing Regulation complements Article 204 aforesaid by defining the failures considered to have no significant effect on the correct operation of the customs procedure under Article 204(1) of the Customs Code. In that connection it requires the failures not to constitute an attempt to remove the goods from customs supervision; they must not imply obvious negligence on the part of the person concerned and all the formalities necessary to regularise the situation of the goods must subsequently be carried out. Article 859 provides as follows:

'…

5 — Council Directive 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'). That directive was repealed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). However, having regard to the date of the facts in the main proceedings the case is still governed by the Sixth Directive.

2. in the case of goods placed under a transit procedure, failure to fulfil one of the obligations entailed by the use of that procedure, where the following conditions are fulfilled:

   (a) the goods entered for the procedure were actually presented intact at the office of destination;

   (b) the office of destination has been able to ensure that the goods were assigned a customs-approved treatment or use or were placed in temporary storage at the end of the transit operation; and

   (c) where the time limit set under Article 356 has not been complied with and paragraph 3 of that Article does not apply, the goods have nevertheless been presented at the office of destination within a reasonable time.'

8. Under Article 860 of the Implementing Regulation, '[t]he customs authorities shall consider a customs debt to have been incurred under Article 204(1) of the [Customs] Code unless the person who would be the debtor establishes that the conditions set out in Article 859 are fulfilled'.

3. VAT

9. Under Article 2(2) of the Sixth Directive, the importation of goods is subject to VAT.

10. Under Article 7(1)(a) of the Sixth Directive, 'importation of goods' means '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'.[6] Under Article 7(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.

11. In accordance with Article 7(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.'

12. Pursuant to Article 10(3) of the Sixth Directive, the chargeable event is to occur and the tax is to become chargeable at the time the goods are imported. Where goods are placed under one of the arrangements referred to in Article 7(3) of that directive on entry into the Community, the chargeable event occurs and the tax becomes chargeable only when the goods cease to be covered by those arrangements.

13. Article 16 of the Sixth Directive lays down conditions and detailed rules under which the Member States may lay down particular exemptions connected with international trade in goods.

6 — Articles 9 and 10 of the EEC Treaty EEC have successively become Articles 23 and 24 EC and Articles 28 TFEU and 29 TFEU.

B – *Netherlands law*

14. Article 1(d) of the Law on turnover tax (Wet op de omzetbelasting) of 28 June 1968, in the version applicable in the main proceedings,[7] provides that a tax entitled 'turnover tax' is to be charged on the importation of goods.

15. Article 18(1)(c) of that Law provides that 'the importation of goods' is to be understood as the end of a customs arrangement in the Netherlands or goods ceasing to be covered in the Netherlands by a customs arrangement. Under Article 18(3), goods as defined by paragraph 1(a) and (b) are not considered to be imported where, on entry into the Netherlands, a customs arrangement applies to those goods or, after their entry into the Netherlands, the goods are placed under a customs arrangement. Nor is the ending in the Netherlands of a customs arrangement deemed to be equivalent to importation where that customs arrangement is followed by the application of another customs arrangement.

III – The dispute in the main proceedings, the questions referred for a preliminary ruling and the proceedings before the Court

16. On 26 October 2005, X BV ('X') lodged an electronic application for the placement of a diesel engine ('the engine') under the external Community transit customs procedure.[8] D BV ('D') was mentioned in the application as the consignee of the engine. The latest date by which the engine should have been presented at the office of destination was 28 October 2005.

17. A representative of D presented the engine to that office on 14 November 2005,[9] that is to say 17 days after expiry of that time-limit. On D's behalf a declaration of entry was made in respect of the engine under another customs arrangement, namely the inward processing procedure. It is not known why the time-limit for presentation was exceeded.[10]

18. The customs office of destination found that the external Community transit customs procedure had not been properly terminated. The inspector, who is the competent customs authority of the office of departure, subsequently informed X that that office had not received the return copy or the requisite electronic feedback for the declaration placing the goods under that procedure. He gave X the opportunity to provide proof of the customs procedure having none the less been completed properly. X did not adduce any fresh circumstances by way of elucidation.

19. The inspector concluded that the engine had not been presented at the customs office of destination in accordance with the statutory provisions and that, therefore, the engine had been removed unlawfully from customs supervision within the meaning of Article 203(1) of the Customs Code. On that basis he raised against X an additional assessment to customs duties and turnover tax in respect of the engine. He dismissed the application for reimbursement made by X. Notwithstanding an objection to that decision, the inspector upheld it.

7 — *Staatsblad* 1968, No 329.

8 — According to the order for reference, X has the status of an authorised consignor for the purposes of Article 398 of the Implementing Regulation, which enabled it to make the electronic application.

9 — According to the order for reference, D does not have the status of authorised consignee for the purposes of Article 406(1) of the Implementing Regulation. It follows that, under that provision, D is not exempt from the obligation to present the goods and copies 4 and 5 of the transit declaration to the office of destination.

10 — It should be stated that, according to X, Z received the engine and installed it in a ship in accordance with the intention of the parties. On 19 January 2006, X made a declaration concerning re-exportation and the vessel equipped with the engine left the European Union by way of Antwerp, Belgium.

20. X appealed against the inspector's decision to the Rechtbank Haarlem. That court held that merely exceeding the time-limit could not render Article 203 of the Customs Code applicable and, under Article 204 thereof, it considered that the conditions provided for in Article 859 of the Implementing Regulation were met. Consequently, that court declared the appeal well founded and ordered the inspector to repay the amounts of customs duty and turnover tax which had been paid. The inspector then appealed that judgment unsuccessfully to the Gerechtshof te Amsterdam. Finally the Ministry of Finance lodged an appeal before the Hoge Raad der Nederlanden, which decided on 12 October 2012 to stay the proceedings and to refer the following questions to the Court of Justice for preliminary ruling:

'(1) (a) Must Articles 203 and 204 [of the Customs Code], read in conjunction with Article 859 (in particular Article 859(2)(c)) [of the Implementing Regulation], be interpreted as meaning that the (mere) exceeding of the transportation time-limit set in accordance with Article 356(1) [of the Implementing Regulation] does not lead to a customs debt being incurred by reason of a removal from customs supervision within the meaning of Article 203 [of the Customs Code], but to a customs debt being incurred on the basis of Article 204 [of the Customs Code]?

(b) Does an affirmative answer to [part (a) of] Question 1 require that the persons concerned supply the customs authorities with information regarding the reasons for exceeding the time-limit or that they at least explain to the customs authorities where the goods were held during the time which elapsed between the time-limit set in accordance with Article 356 [of the Implementing Regulation] and the time at which they were actually presented at the customs office of destination?

(2) Must the Sixth Directive, in particular Article 7 of that Directive, be interpreted as meaning that VAT becomes chargeable when a customs debt is incurred exclusively on the basis of Article 204 [of the Customs Code]?'

21. Written observations were lodged by X, by the Netherlands, Greek and Czech Governments (the latter of which restricted its observations to the first question), and by the European Commission. The Netherlands Government and the Commission were represented at the hearing held on 6 November 2013.

IV – Analysis

A – *The provision governing incurrence of the customs debt where the time-limit applicable to the external transit procedure is exceeded*

1. Preliminary observations

22. In the first part of the first question referred for a preliminary ruling the national Court seeks, in essence, to ascertain whether exceeding the time-limit for transit applicable under the external Community customs procedure gives rise to a customs debt under Article 203 of the Customs Code or under Article 204 thereof.

23. The Netherlands Government is of the view that a customs debt on importation is incurred under Article 203 of the Customs Code owing to removal from customs supervision where goods placed under the external Community customs transit procedure are not presented within the time-limit for transit at the office of destination unless, under Article 356(3) of the Implementing Regulation, the principal produces evidence that the exceeding of the period is attributable neither to himself nor to the carrier. The Netherlands Government therefore considers that Article 204 of the Customs Code does not fall to be considered.

24. Conversely, the other parties are of the view that it is Article 204 of the Customs Code which is applicable. The Commission states that in the case of non-Community goods non-observance of the requirement to present them at the office of destination within the period provided for gives rise to a customs debt in regard to those goods under Article 204 of the Customs Code unless that failure has 'no significant effect on the correct operation of the temporary storage or the customs regime in question', as provided for in Article 859(2)(a) of the Implementing Regulation. The Czech Government adds that Article 203 of the Implementing Regulation none the less applies provided it is established that other circumstances show that the goods have been dealt with in such a way as to prevent the customs office of destination from carrying out its supervisory role in an appropriate fashion.

25. For reasons which I will set out, I am of the opinion that it is Article 204 of the Customs Code which should be applied in the present case.

26. I would, first of all, point out that a customs debt on importation may be incurred either as a consequence of a correct application of the detailed rules of the customs procedure in question or as a result of an irregularity. The present case falls under the latter hypothetical situation. EU customs law is based on the implied principle that the importation of the goods into the customs territory of the Union generates an objective obligation to pay customs duty unless a suspensory regime applies. Thus, a customs debt may be the result of either a regular or an irregular importation, inasmuch as the goods are not exempted either temporarily or definitively. [11]

27. However, as the Court pointed out in *Döhler Neuenkirchen*, [12] 'the incurrence of a customs debt does not … have the nature of a penalty, but must rather be regarded as the consequence of the finding that the conditions required to obtain the advantage derived from the application of the inward processing procedure in the form of a system of suspension have not been fulfilled. The procedure implies the granting of a conditional advantage, which cannot be granted if the applicable conditions are not respected, thereby making the suspension inapplicable and consequently justifying the imposition of customs duties'. I would add that both the external transit procedure and the inward processing procedure constitute exceptional measures intended to facilitate the carrying-out of certain economic activities. [13]

2. External transit : three scenarios

28. Three scenarios may be encountered in the context of the external transit procedure. Against that background it is easier to discern the issues raised by the first question posed by the referring Court.

11 — On the interrelationship between Articles 203 and 204 of the Customs Code see points 75 and 76 of the Opinion of Advocate General Kokott in Case C-195/03 *Papismedov and Others* [2005] ECR I-1667.

12 — Case C-262/10 *Döhler Neuenkirchen* [2012] ECR, paragraph 43.

13 — See, to that effect, *Döhler Neuenkirchen*, paragraph 40.

29. The first scenario that may be envisaged is where the external transit procedure is conducted in perfect conformity with EU law, and the goods are presented at the office of destination within the time-limit laid down. The external transit procedure is terminated, resulting in its clearance. In that case, no customs debt is incurred.

30. The second scenario is where the external transit procedure is conducted correctly, apart from the fact that the goods are presented at the office of destination after expiry of the time-limit. None the less, under Article 356(3) of the Implementing Regulation, where 'the failure to comply with the time limit is due to circumstances which are explained to the satisfaction of the office of destination and are *not attributable* to the carrier or the principal, the latter shall be deemed to have complied with the time limit prescribed.'[14] If that is the case, the external transit procedure comes to an end normally with subsequent clearance, and no customs debt is incurred either.

31. The third scenario is where the period laid down for the external transit procedure is not observed without any valid explanation being given to the office of destination. In other words, failure to observe the time-limit is attributable to the carrier or the principal. In such a case the conditions laid down for the application of the external transit procedure have not been observed and Article 356(3) of the Implementing Regulation cannot be relied on with the result that the external transit procedure has not come to an end normally and cannot be cleared.

32. In the second scenario, Article 356(3) of the Implementing Regulation lays down a certain number of conditions. In the first place it is clear that the principal[15] is ultimately responsible for providing the explanations required, if necessary. Secondly, and in any event, non- observance of the time-limit for presenting goods to the office of destination must be owing to circumstances 'not attributable to the carrier or principal' that is to say that they must be due to events beyond the control of the carrier or principal.

33. The Transit Manual drawn up by the Commission provides useful examples in regard to proof.[16] Those examples all refer to specific situations which are normally of short duration. In most cases they last for a matter of hours if not for several days. In the main proceedings it is for the national Court to verify whether Article 356(3) of the Implementing Regulation is intended to apply but, in light of the length of the period by which the time-limit was exceeded and if it is established that no valid explanation was provided, it seems to me that that Article cannot be applied.[17]

34. In the third scenario the question arises as to whether there is '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' giving rise to a customs debt on importation under Article 204(1)(a) of the Customs Code; alternatively, should Article 203(1) of that Code concerning 'the unlawful removal from customs supervision of goods liable to import duties' be applied.

14 — My emphasis.

15 — The principal, often a freight forwarder or customs agent, is the person responsible for the proper conduct of the procedure and liable for any duties arising as a result of any offence or irregularity committed in connection with it.

16 — According to that manual, the following documents may be provided as proof of the matters falling within Article 356(3) of the Implementing Regulation: receipt issued by the police (in respect of accident, theft …); receipt issued by health service (in respect of medical attendance …); receipt from the vehicle breakdown service (in respect of a vehicle repair); any proof of delay due to a strike, or any other unforeseen circumstances. See consolidated version of 2010 of that manual, part IV, chapter 4, point 5, entitled 'Presentation after expiry of time limit' (the document may be consulted online at http://ec.europa.eu/taxation_customs/customs/procedural_aspects/transit/index_en.htm).

17 — Furthermore, according to the transit manual, '[i]f incidents occur during the transportation of the goods the carrier must inform the nearest competent customs office immediately.' (See, part IV, chapter 3, point 3.1, entitled 'Formalities in the case of incidents during transport').

3. The interrelationship between Articles 203 and 204 of the Customs Code

35. The first question referred essentially raises the issue as to the demarcation of the respective scope of Articles 203 and 204 of the Customs Code in determining the legal basis of the customs debt in the present case. The Netherlands Government maintains that the fact that the goods' location was unknown for 17 days constitutes removal with the result that Article 203 of the Customs Code must be applied.

36. At first sight it is not easy to demarcate the respective scope of these two articles. The contribution made by the Court's case-law has been decisive.[18] In fact, the Court has stated that Articles 203 and 204 of the Customs Code apply to different aspects, the first to conduct resulting in 'unlawful removal' from customs supervision of goods and the second to 'failure to fulfil the obligations and conditions' in connection with different customs procedures.[19]

37. In order to determine which of the two articles causes a customs debt to be incurred, it is necessary first to consider whether in the factual situation in question there was removal from customs supervision for the purposes of Article 203(1) of the Customs Code. Only if that question is answered in the negative is it possible that Article 204 of the Customs Code may apply.[20]

38. With regard more particularly to the concept of removal from customs supervision provided for in Article 203(1) of the Customs Code, in accordance with the Court's case-law, that concept is to be interpreted as covering any act or omission the result of which is to prevent the competent customs authority, if only for a short time, from gaining access to goods under customs supervision and from carrying out the monitoring required by Community customs legislation.[21]

39. In the judgments of the Court interpreting the concept of removal from customs supervision, the theft of goods declared under a suspensory regime, such as storage, transit or temporary storage, constitutes a quite sizeable category.[22] In such a case the Court seems to proceed on the basis that, owing to the theft, the goods enter the economic networks of the Union.[23] The customs debt is thus incurred owing to removal from customs supervision in accordance with Article 203 of the Customs Code.

40. Removal, which is not defined in the legislation, is a vast concept. The Court has thus confirmed it to be applicable in other cases also, such as unauthorised removal from storage, incorrect particulars in a declaration or even, in the case of external transit, the fact that the goods were not presented at the office of destination at all.[24]

41. Unless I am mistaken, the Court has not had before it a case in which, in the context of the external transit procedure, presentation at the office of destination after expiry of the time-limit has in itself entailed the application of Article 203 of the Customs Code.

18 — See footnote 11 of this Opinion. I would observe that in Regulation No 450/2008, the distinction between Articles 203 and 204 of the Customs Code seems to have been abolished for the sake of simplification because the corresponding provisions are henceforth to be found in a single article, namely Article 46 of that regulation. Moreover, instead of the terms 'unlawful removal', 'non-fulfilment' and 'non-compliance' in Articles 203 and 204 of the Customs Code, the new Article 46 refers only to 'non-compliance'.

19 — See Case C-273/12 *Harry Winston* [2013] ECR, paragraph 27.

20 — See judgment in Case C-337/01 *Hamann International* [2004] ECR I-1791, paragraph 30) and judgment in *Harry Winston* (paragraph 28).

21 — See judgments in 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, and *Harry Winston*, paragraph 29.

22 — In regard to Article 203 of the Customs Code and cases of disappearance of goods (including theft), see judgments in Case C-66/99 *D. Wandel* [2001] ECR I-873, paragraphs 46 to 48 and 50), *Honeywell Aerospace*, paragraphs 12 and 18 to 20, Case C-140/04 *United Antwerp Maritime Agencies and Seaport Terminals* [2005] ECR I-8245, paragraph 15, and *Harry Winston*, paragraphs 14 and 30.

23 — See judgments in Joined Cases 186/82 and 187/82 *Esercizio Magazzini Generali and Mellina Agosta* [1983] ECR 2951, *United Antwerp Maritime Agencies and Seaport Terminals*, paragraph 31, and *Harry Winston* paragraph 31.

24 — See the case-law cited in footnote 22.

42. As I have indicated, the concept of removal is construed very widely under the Court's case-law.[25] Thus, where the location of goods placed under the external transit regime remains unknown for more than two weeks, inability to gain access is more than only 'temporary'.

43. None the less, in my view, it is the presumed absorption of the imported goods within the economic networks of the Union which, in accordance with the Court's case-law, justifies the application of Article 203 of the Customs Code, in particular in the case of the disappearance of the goods owing to theft or non-observance of the substantive rules of customs law entailing a risk of such absorption. Those are therefore cases distinct from those expressly provided for by Article 204 of the Customs Code and Article 859 of the Implementing Regulation.

44. Moreover, the external transit regime does not require the exact location of the goods during transport to be known to the customs authorities or the principal. That follows by implication from the wording of Article 356(3) of the Implementing Regulation. What is required is the presentation of the goods on the date fixed at the office of destination and the seals must not be broken. Moreover, the principal or the carrier must be in a position to communicate with the person tasked with the transport, such as the lorry driver. The Court's case-law on removal from customs supervision cannot therefore be interpreted in a way which is not compatible with the practical realities of external transit.

45. Thus, where the goods have been presented late at the office of destination it would seem that Article 204(1)(a) of the Customs Code should be applied. In fact, late presentation is one example 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', which constitutes one of the specific applications of that article. That view is corroborated by the fact that late presentation is one of the reasons expressly provided for in Article 859 of the Implementing Regulation. According to that article, such late presentation may be excused if the strict conditions laid down in it are observed.

46. I observe, in that regard, that, since exceeding the time-limit is expressly provided for in Article 859 of the Implementing Regulation, which applies only to the cases referred to in Article 204 of the Customs Code, that provision enacted by the legislature would be of no avail if exceeding the time-limit for presentation were to come within the concept of removal in Article 203 of the Customs Code. Thus, incurrence of the customs debt in the present case must be analysed in light of Article 204 of the Customs Code.

47. Accordingly, I propose that the Court should reply to Part (a) of the first question that Articles 203 and 204 of the Customs Code read with Article 859, in particular Article 859(2)(c) of the Implementing Regulation, must be interpreted as meaning that merely exceeding the transit time-limit laid down in accordance with Article 356(1) of the Implementing Regulation gives rise not to a customs debt for removal from customs supervision within the meaning of Article 203 of the Customs Code, but to a customs debt under Article 204 of the Customs Code.

B – *The obligation to provide information concerning the exceeding of the time-limit*

48. By the second part of the first question referred the national court seeks to determine whether, in order to establish that overrunning the time-limit generates a customs debt under Article 204 of the Customs Code, it is necessary for the parties concerned to provide information on the reasons why the time-limit has been exceeded or on the location of the goods during the period in question.

25 — See the case-law cited in footnote 21.

49. The Netherlands Government and the Commission suggest that the question should be answered in the affirmative. The Commission states that Article 356(3) of the Implementing Regulation should be interpreted as meaning that the person who presents the goods at the office of destination after the time-limit laid down by the office of departure has expired must duly justify, to the satisfaction of the customs office of destination, the circumstances giving rise to a failure to observe the time-limit.

50. Plainly, the person relying on one of the exceptions provided for in Article 356(3) of the Implementing Regulation must duly show that the conditions for its application are met. Otherwise, the customs authorities would have no legal interest in being informed as to the precise movements of the goods but would be entitled to establish incurrence of a customs debt under Article 204 of the Code and determine the amount of customs duties that the principal is required to pay.

51. Therefore, I propose that the Court should reply to Part (b) of the first question that, in order to rely on the exception provided for in Article 356(3) of the Implementing Regulation, the person concerned must provide the customs authorities with all information of such a nature as to establish that the conditions required have been met.

C – *The link between the customs debt incurred under Article 204 of the Customs Code and VAT*

1. Preliminary observations

52. By its second question referred the national Court is essentially seeking to ascertain whether VAT on importation is payable if a customs debt is incurred exclusively under Article 204 of the Customs Code. The underlying economic consideration is that the rate of VAT is quite often appreciably greater than the rates of customs duty applicable.

53. In my Opinion in *Eurogate Distribution*, I briefly touched on the question as to the link between custom duties and VAT.[26] In fact, under Article 204 of the Customs Code, it is entirely possible for a customs debt to be incurred even where the goods in question have left the Union or have never entered the economic networks of the Union.[27]

54. In the present case, the Netherlands Government is of the view that were the Court to find that a customs debt had arisen under Article 204 of the Customs Code, VAT would be payable because, in its view, the importation referred to in Article 204 of the Customs Code, which gives rise to a customs debt, is the same as the 'importation of goods' in Article 7(2) of the Sixth VAT Directive. The time when the goods cease to be covered by the customs arrangement is the time when the customs debt is incurred.[28] Similarly, the Greek Government also considers that the customs debt and VAT are linked.[29]

55. Conversely, the Commission maintains that if the invalidity in the main proceedings of the inward processing declaration relating to the engine concerned led to the goods no longer being covered by the temporary storage arrangement, VAT must be paid because the engine is no longer covered by one of the arrangements under Article 16 of the Sixth Directive. As long as the goods remain under that arrangement and irrespective of whether a customs debt is incurred under Article 204(1)(a) of the Customs Code, VAT is not payable. In its view, VAT on importation is not automatically payable where a customs debt is incurred solely under Article 204 of the Customs Code.

26 — See point 45 of my Opinion in Case C-28/11 *Eurogate Distribution* [2012] ECR.

27 — Ibid., point 48.

28 — In that connection, the Netherlands Government refers to paragraph 44 of the judgment in *Liberexim*.

29 — The Czech Government does not express a view on this question.

2. The link between the customs debt and VAT

56. It is first of all necessary to analyse the link between the customs debt and VAT in the light of the provisions of the Sixth Directive.

57. I would observe, first of all, that the fact that a customs debt incurred under Article 204 of the Customs Code constitutes a customs debt 'on importation' does not mean, contrary to the Netherlands Government's assertion, that liability to VAT on importation arises under the Sixth Directive. In fact the Customs Code has two forms of customs debt those on importation and those on exportation. [30] In my view, that purely terminological matter should have no effect on the legal assessment of the link that may exist between Article 204 of the Customs Code and Articles 7 and 10 of the Sixth Directive.

58. In the initial 1977 version, the second subparagraph of Article 10(3) of Directive 77/388 was worded as follows (emphasis added):

'Where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, *Member States may link the chargeable event and the date when the tax becomes chargeable with those laid down for these Community duties*.'

59. Conversely, in the version in Directive 91/680/EEC, [31] which is applicable to the present case, the third subparagraph of Article 10(3) of Directive 77/388 provides (emphasis added): [32]

'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 the tax shall become chargeable when the chargeable event for those Community duties occurs and those duties become chargeable*.'

60. It seems to me therefore that the option open to the Member States in the original version of the Sixth Directive was replaced by a mandatory provision in Directive 91/680, even if the preparatory documents afford no explanation in this regard. It is an important distinction to be borne in mind in the analysis of the case-law relating thereto. [33] In fact, the case-law interpreting the initial wording no longer appears transposable to situations governed by the amendment resulting from Directive 91/680, which applies in the present case. [34]

3. The situation in the present case

61. In the present case the Court's analysis in the *Profitube* case should be followed. [35]

62. As a preliminary point it should be remembered that, under 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.

30 — Article 4(10) and (11) of the Customs Code.

31 — Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).

32 — It should be noted that the wording of the third subparagraph of Article 10(3) of the Sixth Directive was reproduced with only minor adjustments of a linguistic nature in the second subparagraph of Article 71(1) of Directive 2006/112.

33 — As regards the link between customs duties and VAT in the original version of the Sixth Directive, see points 18 and 29 of the Opinion of Advocate General Jacobs in Case C-343/89 *Witzemann* [1990] ECR I-4477.

34 — In that regard, I note that paragraph 41 of the judgment in *Harry Winston* mentions that the Sixth Directive 'authorises' the Member States to link the chargeable event and the chargeability of VAT on importation to the equivalent events giving rise to customs duties. It is true that the Sixth Directive, in its original version, authorised that link to be made, but since the amendment by Directive 91/680 it would be more correct in my view to use a term such as 'requires'.

35 — Judgment in Case C-165/11 in *Profitube* [2012] ECR, paragraph 40 et seq.

63. It needs to be verified, first, whether goods in circumstances 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.

64. According to Article 7(1)(a) of the Sixth Directive, 'importation of goods' means the entry into the Community of goods which do not fulfil the conditions laid down in Articles 23 EC and 24 EC.[36] Article 7(3) of the Sixth Directive for its part provides that, where such goods are, on entry into the Community, 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.

65. In the present case, the goods in question originating in a non-Member State were placed under the external transit regime of one Member State and then under the inward processing procedure, under the suspensive system, before finally being re-exported.

66. Thus, as from their entry into the Community the goods were first placed under the external transit procedure and then under the inward processing procedure referred to respectively in the first subparagraph of Articles 7(3) and Article 16(1)(B)(c) of the Sixth Directive. Since the goods at issue had not ceased to be covered by those arrangements at the date of re-exportation, even though they had been physically introduced into the territory of the Union, they cannot have been the subject-matter of an 'importation' within the meaning of Article 2(2) of the Sixth Directive.[37] Similarly, failure to fulfil one of the obligations entailed in having recourse to the external transit procedure does not amount to importation within the meaning of that provision, notwithstanding the fact that such failure is capable of giving rise to a customs debt under Article 204 of the Customs Code.

67. In that respect, the fact that those goods changed customs arrangement does not confer on them the status of imported goods, the two customs arrangements concerned being referred to in Article 7(3) of the Sixth Directive.[38]

68. Consequently, given that the goods at issue were placed under suspensive customs arrangements and thus in the absence of importation on 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.

69. That interpretation is in conformity with the Court's earlier case-law on importation and the subsequent incurring of VAT.

70. I recall that VAT was not payable in *Dansk Transport og Logistik*.[39] That case concerned the introduction of cigarettes into the customs territory of the Union, but those cigarettes were immediately detained by the authorities and then destroyed by them. The cigarettes had therefore not entered into the economic networks of the Union and no importation within the meaning of the Sixth Directive and taken place.

36 — It follows from Article 24 EC (now Article 29 TFEU) that '[p]roducts coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges'.

37 — See, to that effect, judgments in Case C-305/03 *Commission* v *United Kingdom* [2006] ECR I-1213, paragraph 41, and in *Profitube*, paragraph 46.

38 — See to that effect *Profitube*, paragraph 47.

39 — Judgment in Case C-230/08, *Dansk Transport og Logistik* [2010] ECR I-3799.

71. Nor was VAT payable in *British American Tobacco and Newman Shipping*.[40] However, that case concerned goods that had already been presented at a bonded warehouse. Accordingly, the question raised in that case concerned not Article 2(2) of the Sixth Directive, which defines the concept of importation at issue in the present case, but paragraph 1 thereof concerning supply for a valuable consideration.

72. Another scenario was envisaged in *Harry Winston*[41] namely that of importation followed by theft from a customs warehouse. In that case the goods placed under customs warehousing arrangements ceased to be covered by those arrangements owing to the theft. Such cessation constitutes an event giving rise to the VAT debt, there being a presumption of the goods then being introduced into the economic networks of the Union.

73. I conclude by considering the Netherlands legislation at issue in the case in the main proceedings. Under Article 18(1) of the Law on turnover tax of 28 June 1968, in the version applicable in the main proceedings, 'importation of goods' is defined not only as the entry into the Netherlands of various goods from a non-Member State (see (a) and (b)), but also the end of a customs arrangement in the Netherlands or the exit in the Netherlands of goods from a customs arrangement' (see (c)). Thus the legislature expressly supplemented the list of events giving rise to VAT with the scenario provided for under (c). That choice, which was possible under the Sixth Directive in its initial version, and which was required as a result of the amendment made by Directive 91/680, seems to me to comply with the requirements of current EU legislation, as interpreted by the Court.

74. I therefore propose that the Court should reply to the second question as follows: the Sixth Directive and, in particular, the first subparagraph of Article 7(3) thereof, must be interpreted as meaning that VAT on importation is not payable if the goods do not cease to be covered by the customs arrangement, even if a customs debt is incurred under Article 204 of the Customs Code owing to a failure to fulfil one of the obligations entailed by use of the customs arrangement under which the goods were placed.

V – **Conclusion**

75. In view of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the Hoge Raad der Nederlanden:

(1) Articles 203 and 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 Council of 13 April 2005, read in conjunction with Article 859(2)(c) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, as amended by Commission Regulation (EC) No 2286/2003 of 18 December 2003, must be interpreted as meaning that merely exceeding the transit time-limit, laid down in accordance with Article 356(3) of Regulation No 2454/93, gives rise, not to a customs debt for removal from customs supervision within the meaning of Article 203 of the Regulation No 2913/92, but to a customs debt under Article 204 of that Regulation.

(2) Having regard to 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, and in particular the first subparagraph of Article 7(3), must be interpreted as meaning that value added tax on importation is not payable if the goods do not cease to be covered by the customs

40 — Judgment in Case C-435/03 *British American Tobacco and Newman Shipping* [2005] ECR I-7077.

41 — Cited above in footnote 19.

arrangement, even if a customs debt is incurred under Article 204 of Regulation No 2913/92, as amended by Regulation No 648/2005 owing to a failure to fulfil one of the obligations entailed by use of the customs arrangement under which the goods were placed.