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In case no. 6670-19, **Mars Logistics** (Appellant) v. the **Public Representative at Swedish Customs** (Respondent), the Supreme Administrative Court delivered the following judgment on 7 October 2021.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the claim for a request for a preliminary ruling from the European Court of Justice.

The Supreme Administrative Court rejects the Public Representative's appeal.

The Supreme Administrative Court overturns the decision of Swedish Customs regarding value added tax.

BACKGROUND

1. As a main rule, in conjunction with the importation of goods into Sweden from a country outside the EU, duty and value added tax are levied. Duty is levied by Swedish Customs and value added tax is levied either by Swedish Customs or the Swedish Tax Agency.
2. The EU has entered into an agreement with Turkey according to which certain goods which are in free circulation in Turkey are subject to preferential tariffs treatment which entails that they can be imported into the Union duty-free. The fact that the goods are in free circulation may be certified by means of a so-called A.TR. movement certificate.
3. In conjunction with non-compliance with obligations in accordance with customs legislation, e.g. erroneous transit procedures, a customs debt arises. This is established by Swedish Customs. In certain cases, the customs debt may be

calculated by the application of the preferential rules which would have applied had no customs debt arisen. Such preferential treatment presupposes that the omission which occasioned the customs debt did not constitute an attempt at deception. In the event the customs debt arises as a consequence of importation, it is, as a rule, the party who is liable to pay customs duty who is liable to pay value added tax.

4. Mars Logistics, with its registered office in Turkey, had principal responsibility for the transit procedure when four containers containing television sets were transported to Sweden from Turkey via Italy. The goods were not declared to customs upon entry into Sweden in January 2017, but were transported directly to the importer, Grundig Nordic AB. Following an inquiry from Swedish Customs, Grundig, through a representative, submitted customs declarations in February 2017. By virtue of the fact that the goods were removed from customs supervision, a customs debt arose. In March 2017, Swedish Customs took a decision to levy on Mars Logistics duty in a total amount of approximately SEK 600,000 and value added tax in a total amount of approximately SEK 1,200,000.
5. Mars Logistics appealed the decisions of Swedish Customs and adduced A.TR. movement certificates which showed that the goods were in free circulation in Turkey and thereby not subject to duty. The Administrative Court in Malmö reversed the appealed decisions. The court observed that a customs debt had arisen, but that the goods were duty-free since A.TR. movement certificates had been presented.
6. Swedish Customs appealed to the Administrative Court of Appeal in Gothenburg. The administrative court of appeal granted the appeal in part and affirmed the decision of Swedish Customs regarding value added tax, but otherwise rejected the appeal. Since there was no reason to question the correctness of the A.TR. movement certificates and nothing came to light which demonstrated that Mars Logistics had intentionally removed the goods from customs supervision, the

administrative court of appeal was of the opinion that the customs debt could be calculated in accordance with the duty applicable in conjunction with the importation of Turkish goods which had been in free circulation in Turkey, i.e. SEK 0. The fact that the customs debt amounted to SEK 0 does not mean that a customs debt did not arise, and the company was therefore liable to pay the value added tax relating to the importation.

CLAIMS, ETC.

7. *The Public Representative at Swedish Customs* claims that the decision of Swedish Customs regarding duty is to be affirmed and is of the opinion that the judgment of the administrative court of appeal regarding value added tax is correct. The Public Representative also claims that a preliminary ruling is to be requested from the European Court of Justice and states the following.
8. No customs declaration has been submitted. The customs debt arose in the absence of a connection with the goods being placed under a customs procedure. Mars Logistics was not the declarant and was not able to apply for and be granted preferential tariff measures. Accordingly, duty should be charged in the manner decided by Swedish Customs. The question in the case constitutes such an interpretation issue on which the European Court of Justice should render a preliminary ruling.
9. *Mars Logistics* contests the Public Representative's claims, and claims that the payment obligation for value added tax is to be overturned and states the following.
10. The company has acted as representative for the product owner. The product owner is also to be regarded as liable to pay value added tax. However, as opposed to the company, the product owner is entitled to a deduction of value added tax. Levying on the company the value added tax is in contravention of the basic principle of neutrality.

REASONS FOR THE RULING

The question in the case

11. The question in the case is the manner in which a customs debt, which arose due to non-compliance with customs legislation, is to be calculated when the goods are covered by preferential tariff measures in accordance with the provisions of an agreement regarding the customs union entered into by the EU with Turkey. This also involves a question of value added tax.

Legislation, etc.

Union law provisions regarding duties

12. Article 56 (1) of Regulation (EU) No. 952/2013 laying down the Union Customs Code states that import duties are to be based on the Common Customs Tariff. Pursuant to Article 56 (2) (d) of the Union Customs Code, the Customs Tariff shall, *inter alia*, cover preferential tariff measures contained in agreements which the Union has concluded with certain countries. Article 56 (3) states that where the goods concerned fulfil the conditions included in the measures laid down, *inter alia*, in point (d) of paragraph 2, the provisions of that section – upon application by the declarant – shall apply instead of those pursuant to agreement or as follows from the Combined Nomenclature. Such application for preferential tariffs may be made retrospectively, provided that the time-limits and conditions laid down in the relevant measure or in the Code are complied with.
13. *Declarant* is defined in Article 5 (15) as the person lodging a customs declaration or the person in whose name such declaration is lodged.
14. As regards goods liable to import duty, according to Article 79 (1) (a), a customs debt on import shall be incurred through non-compliance with, for example, an obligation laid down in customs legislation concerning the introduction of non-

Union goods into the customs territory of the Union and removal from customs supervision or movement of such goods within that territory.

15. The debtor for a customs debt which arises in accordance with Article 79 (1) (a) is, according to Article 79 (3), one of the following persons. Any person who is required to fulfil the obligation concerned in accordance with Article 79 (1) (a) and any person who is aware or should reasonably have been aware that an obligation under the customs legislation was not fulfilled and who acted on behalf of the person who is obliged to fulfil the obligation, or who participated in the act which led to the non-fulfilment of the obligation. Furthermore, the debtor can be any person who acquired or held the goods in question and who is aware or should reasonably have been aware at the time of acquiring or receiving the goods that an obligation under the customs legislation was not fulfilled.
16. Article 86 (6) states that where the customs legislation provides for a favourable tariff treatment of goods, or for relief or total or partial exemption from import or export duty pursuant to, *inter alia*, points (d) to (g) of Article 56 (2), such favourable tariff treatment, relief or exemption shall also apply in cases where a customs debt is incurred pursuant to, *inter alia*, Article 79, on condition that the failure which led to the incurrence of a customs debt did not constitute an attempt at deception.

The agreement between the EU and Turkey regarding a customs union

17. On 22 December 1995, the Association Council for the EU in Turkey took Decision No 1/95 on implementing the final phase of the Customs Union (96/142/EC). According to Articles 2 and 3, the Agreement applies to products which are not agricultural products and which have been manufactured in the Community or Turkey and are in free circulation in the Community or Turkey. The Agreement contains provisions regarding preferential tariffs and is covered by Article 56 (2) (d) of the Union Customs Code.

18. On 26 September 2006, the EC-Turkey Customs Cooperation Committee took Decision No. 1/2006 laying down detailed rules for the application of Decision No. 1/95 of the EC-Turkey Association Council (2006/646/EC). In order for preferential duty to apply, it is necessary, according to Article 5, that the conditions for preferential duty treatment be met which is to be proved by documentary evidence issued at the exporter's request by the customs authorities of Turkey or of a Member State. The documentary evidence referred to in Article 5 shall, according to Article 6, be the A.TR. movement certificate.

Value added tax

19. According to Chapter 1, section 1, first paragraph (3) of the Value Added Tax Act (1994:200) imports of goods into Sweden are subject to value added tax.
20. Chapter 2, section 1 of the Customs Act (2016:253) states that value added tax in conjunction with importation shall be established and paid in accordance with the procedures applicable to duties unless otherwise prescribed.
21. According to section 2, value added tax shall not be charged in accordance with the Customs Act but, rather, in accordance with the Tax Procedures Act (2011:1244), *inter alia*, where the declarant is a representative, the person on whose behalf the representative acts is registered for value added tax in Sweden at the time of the decision regarding the determination of duties and acts in the capacity of a taxable person in accordance with the Value Added Tax Act upon importation.

The Court's assessment

Duty

22. Mars Logistics was principally responsible for the transit procedure when Grundig imported four containers of TV sets from Turkey via Italy. The transit procedures were to have been concluded not later than 11 and 13 January 2017, but transportation was delayed and the goods were delivered to Grundig first on 18 or 19 January. The goods were not presented to Swedish Customs in conjunction with entry into Sweden and they were thereby removed from customs supervision. In this way, a customs debt arose for which Swedish Customs designated Mars Logistics as debtor.
23. Declarations were received by Swedish Customs on 15 February 2017 following a request from Swedish Customs. They were submitted by a representative for Grundig. In March 2017, Swedish Customs took a decision to levy on Mars Logistics duty and value added tax.
24. Article 86 (6) of the Union Customs Code states that where goods are covered by an exemption from duty in accordance with Article 56 (2) (d) such exemption shall also apply in cases where a customs debt is incurred pursuant to Article 79 on condition that the failure which led to the incurrence of a customs debt did not constitute an attempt at deception.
25. It follows from the agreement between the EU and Turkey that the relevant goods were covered by an exemption from duty provided that the goods were in free circulation in Turkey, which is to be certified with A.TR. movement certificates. In conjunction with the appeal of Swedish Customs' decision, Mars Logistics submitted and adduced such certificates. There is no reason to question the certificates or whether the failure to declare the goods upon entry into Sweden took place by mistake. Accordingly, the customs debt will be established at SEK 0.

26. The Supreme Administrative Court finds that there is no uncertainty regarding the purport of the Union law regime applicable in the case. The Public Representative's claim that a preliminary ruling is to be obtained from the European Court of Justice is thus rejected.
27. In summary, the appeal by the Public Representative is rejected.

Value added tax

28. Value added tax is not to be charged in accordance with the Customs Act where there is a declarant and the declarant is registered for value added tax in Sweden at the time of the decision regarding duty and acts in the capacity of a taxable person in accordance with the Value Added Tax Act. Prior to the decision taken by Swedish Customs, Grundig submitted a declaration and accordingly there was a declarant at that time. Nothing has come to light other than that Grundig is registered for value added tax in Sweden and acts in the capacity of a taxable person. Against this background, value added tax is not to be established by application of the Customs Act. Thus, it was incorrect of Swedish Customs to take the decision to impose value added tax. The company's appeal will therefore be granted and Swedish Customs' decision regarding value added tax shall be overturned.

Justices Jäderblom, Knutsson, Nymansson, Baran (dissenting) and Gäverth have participated in the ruling.

Judge Referee: Camilla Wernkvist.

DISSENTING OPINION

Justice Baran dissented in respect of the issue of whether value added tax is to be charged and is of the opinion that Mars Logistics' appeal is to be rejected and states the following.

1. It follows from Chapter 2, sections 1 and 2 of the Customs Act that value added tax is to be charged in accordance with the procedure applicable to duty where there is no declarant. This means that Swedish Customs is the taxing authority and the tax which is related to the good is established and collected by Swedish Customs in accordance with the regime applicable to duty.
2. According to Article 158 (1) of the Union Customs Code, all goods intended to be placed under a customs procedure for release for free circulation in accordance with Article 201 are covered by a customs declaration which is adapted to the procedure in question. In the event the customs declaration complies with the conditions laid down for placement of goods under a customs procedure, it shall, according to Article 172.1, be accepted by the customs authorities immediately provided that the goods to which they refer have been presented to customs.
3. Goods brought into the customs territory of the Union shall, according to Article 139 (1) of the Union Customs Code be presented to customs immediately upon their arrival at, *inter alia*, the designated customs office by the person who brought the goods into the customs territory of the Union, the person in whose name or on whose behalf the person who brought the goods into the territory acts, or the person who assumed responsibility for carriage of the goods after they were brought into the customs territory of the Union. According to Article 233, the holder of the Union transit procedure shall be responsible for presentation of the goods intact at the customs office of destination within the prescribed time limit.
4. According to Article 79 (1) of the Union Customs Code, goods liable to import duty shall incur a customs debt through non-compliance with, *inter alia*, one of

the obligations laid down in the customs legislation concerning the introduction of non-Union goods into the customs territory of the Union. According to Article 79 (3), in conjunction with non-compliance with the obligation, any person who is required to fulfil the obligations concerned and any person who acquired or held the goods in question and who was aware of should reasonably have been aware at the time of acquiring or receiving the goods that an obligation under the customs legislation was not fulfilled is a debtor.

5. It is apparent from the investigation that Mars Logistics which had assumed the responsibility for transporting the goods in question had not presented them upon arrival to the customs office of destination. Accordingly, the goods cannot be deemed to be covered by a customs declaration in the sense referred to in the customs legislation.
6. Accordingly, it was correct of Swedish Customs to designate the company as customs debtor and to calculate the customs debt as a consequence of non-compliance in accordance with 79 (1) of the Union Customs Code (*cf.* Government Bill 2013/14:16, p. 26 f.). The fact that the customs debt has been calculated to be SEK 0 in accordance with the provisions of Article 86.6 does not mean that a customs debt has not come about.
7. Based on the above, it follows that Mars Logistics, which had been designated by Swedish Customs as customs debtor due to the non-compliance with the obligation in accordance with customs legislation, is liable to make payment of the value added tax relating to the import.