JUDGMENT OF THE COURT (Fifth Chamber)
19 October 2000 *

In Case C-15/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Finanzgericht Bremen (Germany) for a preliminary ruling in the proceedings pending before that court between

Hans Sommer GmbH & Co. KG,

and

Hauptzollamt Bremen

on the interpretation of:

— Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1), as amended by Council Regulation (EEC) No 3193/80 of 8 December 1980 (OJ 1980 L 333, p. 1),

* Language of the case: German.

— Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1),

— Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986 (OJ 1986 L 286, p. 1),

and on the validity of Commission Decision C(95) 2325 final of 28 September 1995,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting as President of the Fifth Chamber, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Hans Sommer GmbH & Co. KG, by J. Sparr, Rechtsanwalt, Hamburg,

— the Commission of the European Communities, by J.C. Schieferer, of its Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2000,

gives the following

Judgment

1 By order of 4 August 1998, received at the Court on 20 January 1999, the Finanzgericht Bremen (Finance Court, Bremen) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions on the interpretation of:

— Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1), as amended by Council Regulation (EEC) No 3193/80 of 8 December 1980 (OJ 1980 L 333, p. 1) (hereinafter 'Regulation No 1224/80'),

— Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a

customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1),

— Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986 (OJ 1986 L 286, p. 1) (hereinafter 'Regulation No 1430/79'),

and on the validity of Commission Decision C(95) 2325 final of 28 September 1995.

2 Those questions arose in proceedings between Hans Sommer GmbH & Co. KG ('Sommer') and the Hauptzollamt Bremen (Principal Customs Office, Bremen) ('the Hauptzollamt') following the latter's decision to include in the customs value of consignments of honey from the former USSR the costs associated with analysis of the honey by the importer in Germany.

Legal background

3 Article 3 of Regulation No 1224/80 provides:

'(1) The customs value of imported goods determined under this article shall be the transaction value, that is, the price actually paid or payable for the goods

when sold for export to the customs territory of the Community adjusted in accordance with Article 8 ...

...

(3) (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller ...

...'.

4 Article 15(1) of Regulation No 1224/80 provides:

'(1) The customs value of imported goods shall not include the cost of transport after importation into the customs territory of the Community provided that such cost is distinguished from the price actually paid or payable for the imported goods.'

5 Article 5(2), first subparagraph, of Regulation No 1697/79 provides:

'[T]he competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which were not collected as the result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned.'

6 Under Article 13(1) of Regulation No 1430/79:

'[I]mport duties may be repaid or remitted in special situations other than those referred to in sections A to D, which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

The situations in which the first subparagraph may be applied, and the detailed procedural arrangements to be followed for this purpose, shall be determined in accordance with the procedure laid down in Article 25. ...'

7 The procedural arrangements to be followed are prescribed, since 1 January 1994, by Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1). According to Article 905 thereof, when the decision-making customs authority which has received a claim for repayment or remission is not in a position to decide the matter itself, the Member State is to transmit the case to the Commission.

8 Pursuant to Article 907 of the same regulation '... the Commission shall decide whether or not the special situation which has been considered justifies repayment or remission.'

9 Article 908(1) and (2) provides that the decision is to be notified to the Member State concerned and the customs authority is to grant or refuse the application on the basis of that decision.

The main proceedings and the national court's questions

10 Sommer had bought honey, originating in the former USSR, from Kessler & Co. Agrarprodukten-Handelsgesellschaft mbH ('Kessler') before the honey had been cleared through customs.

11 The goods, delivered pursuant to contracts of sale c.i.f. Hamburg, were also the subject of supplementary agreements stipulating 'costs of completing the transaction', calculated at a flat rate per tonne of honey. Those costs, invoiced separately by Kessler, included the expenses of unloading, taking possession of the goods until storage, removal from the warehouse by lorry, FOT costs, the costs of taking and analysing samples, and warehousing charges.

12 In its declarations of value for customs purposes, Sommer declared only the prices which had been agreed with Kessler in the contracts of sale c.i.f. Hamburg.

13 On an initial inspection, the customs authorities had not objected to this practice. Following a subsequent inspection, the Hauptzollamt decided that the flat-rate

charges invoiced under the supplementary agreements should be included as part of the price for the purposes of customs valuation. By an amended demand dated 29 July 1992, it therefore required payment by Sommer of DEM 96 352.77 by way of customs duties on importations made between 1989 and 1991.

14 Sommer appealed to the Finanzgericht Bremen which, by a judgment dated 12 April 1994, annulled the contested demand on the ground that although the costs of completing the transaction were part of the customs value, post-clearance recovery of the customs duties was precluded by Article 5(2) of Regulation No 1697/79.

15 After delivery of that judgment the Hauptzollamt formed the view that it was not in a position to withdraw four other post-clearance recovery demands dated 29 April, 26 August and 9 September 1992, for a total of DEM 33 948.72, against which Sommer had also lodged objections. At the request of the Hauptzollamt, the Federal Ministry of Finance, by letter dated 27 March 1995, sought a Commission decision on the interpretation of Article 13(1) of Regulation No 1430/79.

16 In Decision C(95) 2325, addressed to the Federal Republic of Germany, the Commission stated that the repayment of import duties was not justified.

17 By decisions dated 20 February 1996, the Hauptzollamt rejected the objections lodged by Sommer against the four post-clearance recovery demands of 29 April, 26 August and 9 September 1992, and also against a fifth demand of the same kind dated 2 December 1994.

18 Sommer appealed once more to the Finanzgericht Bremen, which, taking the view that the case raised questions of the interpretation of Community law, decided to stay proceedings and to refer the following four questions to the Court of Justice for a preliminary ruling:

'(1) Does the transaction value, within the meaning of Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1) as amended by Council Regulation (EEC) No 3193/80 of 8 December 1980 (OJ 1980 L 333, p. 1), of consignments of honey imported from 1989 to 1991 from the USSR include the "expenses" (Spesen) or the "costs of completing the transaction" (Abwicklungskosten), which the German importer invoices to the buyer on the basis of separate contractual agreements, if the importer is obliged to take samples after importation in order to establish the quality of the honey in accordance with the applicable German regulations and to supply the chemical results of those analyses?

(2) If Question 1 is answered in the affirmative:

Is Commission Decision C(95) 2325 of 28 September 1995 null and void?

(3) If Question 2 is answered in the affirmative:

Must the authorities refrain from post-clearance recovery of duty pursuant to Article 5(2) of Regulation (EEC) No 1697/79 if, at a previous on-the-spot inspection of importations, they raised no objection to the exclusion of flat-rate expenses from the customs value of similar transactions and it does not appear that the trader could have been in doubt about the correctness of the result of the inspection?

(4) If Question 3 is answered in the negative:

Do the circumstances described in Question 3 amount to a special situation within the meaning of Article 13 of Regulation No 1430/79 justifying the remission of duties?'

The first question

19 By this question the national court is asking essentially whether the costs of analyses designed to establish the conformity of the imported goods with the national legislation of the importing Member State, which the importer invoices to the buyer in addition to the price of goods, must be regarded as an integral part of their 'transaction value' within the meaning of Article 3(1) of Regulation No 1224/80.

20 Sommer submits that the question should be answered in the negative. It argues that those costs are in respect of services supplied in the Community by undertakings established there and relate to goods which have already been sold for export to the Community customs territory. It is therefore necessary to apply the case-law of the Court to the effect that, subject to the adjustments provided for in Article 8 of Regulation No 1224/80, payment for services provided to the buyer on the purchase of imported goods is not included in the customs value of the goods (Case C-21/91 *Wünsche* [1992] ECR I-3647, paragraph 16).

21 The national court and the Commission observe that the seller undertook to deliver honey of a quality specified in the contract of sale by reference to a 'detailed analysis made by the seller in accordance with the applicable German

legislation'. The analysis costs should therefore be regarded as pertaining to a 'condition of sale of the imported goods' and, accordingly, are part of the customs value of those goods in accordance with Article 3(3)(a) of Regulation No 1224/80.

22 In answering the first question, it should be borne in mind that under the system established by Regulation No 1224/80 the concept of 'transaction value', that is to say, as a general rule, the price actually paid or payable for the goods, forms the basis for calculating the customs value. That calculation must therefore be made on the basis of the conditions on which the individual sale was made (Case 65/85 *Hauptzollamt Hamburg-Ericus* v *Van Houten* [1986] ECR 447, paragraph 13).

23 It is apparent from the national court's findings that in the contracts of sale Kessler undertook to deliver to Sommer honey satisfying the quality requirements laid down by German legislation. It follows that the analyses performed after importation in order to establish the quality of the honey were necessary in order for the goods to be delivered in accordance with the provisions of the contracts.

24 The costs pertaining to those analyses must therefore be regarded as part of the 'payments made or to be made as a condition of sale of the imported goods by the buyer to the seller ... to satisfy an obligation of the seller' within the meaning of Article 3(3)(a) of Regulation No 1224/80 and, accordingly, as an integral part of the customs value.

25 That interpretation is in conformity with the objective of the Community legislation on customs valuation, which, as may be seen from the sixth recital in the preamble to Regulation No 1224/80, is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values (Case C-11/89 *Unifert* [1990] ECR I-2275, paragraph 35).

26 As the Advocate General points out in paragraph 42 of his Opinion, goods whose quality is certified by the seller have a greater economic value than goods for which there is no such certificate. When calculating the customs value, it is therefore justified to take into account the costs of paying to obtain that certification.

27 The answer to the first question must therefore be that the costs of analyses designed to establish the conformity of imported goods with the national legislation of the importing Member State, which the importer invoices to the buyer in addition to the price of the goods, must be regarded as an integral part of their 'transaction value' within the meaning of Article 3(1) of Regulation No 1224/80.

The second and third questions

28 The national court's second question inquires as to the validity of Decision C(95) 2325 in which the Commission stated that repayment of import duties in accordance with Article 13(1) of Regulation No 1430/79 was not justified in a situation such as that in point in the main proceedings. If that decision is invalid, it asks, in its third question, whether in such a situation the national authorities must refrain from post-clearance recovery of duty pursuant to Article 5(2) of Regulation No 1697/79.

29 Consequently, the second question must be understood to the effect that the national court is asking essentially whether Decision C(95) 2325, in which the Commission found that it was not necessary to apply Article 13(1) of Regulation

No 1430/79, precludes the application in the same circumstances of the provisions of Article 5(2) of Regulation No 1697/79.

30 Decision C(95) 2325 was adopted following a request by the Federal Republic of Germany, to which it was notified in accordance with the procedure laid down in Articles 905 to 908 of Regulation No 2454/93. In that decision, in accordance with the first paragraph of Article 907 of that regulation, the Commission determined solely on the question whether or not the special situation submitted to it for its consideration justified repayment or remission of the duties at issue in the main proceedings.

31 The Court has already held that when the Commission has delivered a decision addressed to a Member State holding that there was, in a specific case, no justification for granting remission of import duties pursuant to the provisions of Regulation No 1430/79, and when that decision does not contain any legal or factual indication relating to the legal basis for effecting post-clearance recovery of the import duties concerned under Regulation No 1697/79, a national court may rule on the latter question, having recourse, if appropriate, to the procedure under Article 177 of the Treaty (Case C-413/96 *Skatteministeriet* v *Sportgoods* [1998] ECR I-5285, paragraph 43).

32 In those circumstances, there is no need to examine the validity of Decision C(95) 2325 and it must be verified whether the conditions under which Article 5(2) of Regulation No 1697/79 allows the national authorities to refrain from post-clearance recovery of import duties are satisfied in a situation such as that in point in the main proceedings.

33 The national court is of the view that Sommer was justified in concluding, after a previous inspection, that the costs of the analyses carried out by the importer did not form part of the customs value of the imported goods, and that the error on

the part of the customs authority could not reasonably have been detected by Sommer.

34 The Commission submits, on the other hand, that Sommer was not acting in good faith and that it ought to have detected the error.

35 It should be pointed out in that regard that Article 5(2) of Regulation No 1697/79 makes waiver of post-clearance recovery by the national authorities subject to three cumulative conditions (see, in particular, the judgment in Case C-370/96 *Covita* v *Greek State* [1998] ECR I-7711, paragraph 24). Provided that all those conditions are fulfilled, the person liable is entitled to waiver of post-clearance recovery (see, in particular, Case C-250/91 *Hewlett Packard France* v *Directeur Général des Douanes* [1993] ECR I-1819, paragraph 12).

36 First, non-collection of the duties must have been as a result of an error made by the competent authorities themselves (see, in particular, the judgment in *Covita*, cited above, paragraph 25). In that regard, the national court refers expressly in its third question to the fact that on the occasion of a previous on-the-spot inspection of the imports, the authorities had raised no objection to the non-inclusion of flat-rate expenses in the customs value of similar transactions.

37 Next, the error made by the competent authorities must be such that it could not reasonably be detected by the person liable acting in good faith, despite his professional experience and the diligence which he ought to show (see, in particular, the judgment in *Covita*, cited above, paragraph 26). It is for the national court to determine, in the light of those criteria, whether or not the error

could have been detected (see, in particular, the judgment in *Hewlett Packard France*, cited above, paragraph 22).

38 It is clear from the order for reference that the national court, after its examination of the facts and its assessment of the law in the course of which it took into consideration the three criteria laid down in the case-law of the Court of Justice, reached the conclusion, repeated in the wording of the third question, that 'it does not appear that the trader could have been in doubt about the correctness of the results of the inspection'.

39 Finally, the person liable must have complied with all of the provisions laid down by the rules in force as far as his customs declaration is concerned (see, in particular, the judgment in *Covita*, cited above, paragraph 28). It is not disputed that this requirement is satisfied in the case in the main proceedings.

40 The answer to the third question must therefore be that the customs authorities of a Member State must refrain from post-clearance recovery of duty pursuant to Article 5(2) of Regulation No 1697/79 if, at a previous on-the-spot inspection of importations, they raised no objection to the non-inclusion of flat-rate expenses in the customs value of similar transactions and it does not appear that the trader, who had complied with all of the provisions laid down by the rules in force as far as his customs declaration is concerned, could have been in doubt about the correctness of the results of the inspection.

The fourth question

41 Having regard to the answer to the third question, there is no need to answer the fourth question.

Costs

42 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Finanzgericht Bremen by order of 4 August 1998, hereby rules:

1. **The costs of analyses designed to establish the conformity of imported goods with the national legislation of the importing Member State, which the importer invoices to the buyer in addition to the price of the goods, must be regarded as an integral part of their 'transaction value' within the meaning of**

Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes, as amended by Council Regulation (EEC) No 3193/80 of 8 December 1980.

2. The customs authorities of a Member State must refrain from post-clearance recovery of duty pursuant to Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment of goods entered for a customs procedure involving the obligation to pay such duties, if, at a previous on-the-spot inspection of importations, they raised no objection to the non-inclusion of flat-rate expenses in the customs value of similar transactions and it does not appear that the trader, who had complied with all of the provisions laid down by the rules in force as far as his customs declaration is concerned, could have been in doubt about the correctness of the results of the inspection.

Edward Jann Sevón

Delivered in open court in Luxembourg on 19 October 2000.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber