OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 10 December 1987 *

Mr President,
Members of the Court,

1. It is clear from the facts and observations submitted by the parties in the main proceedings and by the Commission, as related in the Report for the Hearing, that the questions referred to the Court by the Bundesfinanzhof [Federal Finance Court] amount in effect to asking whether the principles laid down in the judgment of 6 October 1982 in Case 302/81 (*Eggers* v *Hauptzollamt Kassel* [1982] ECR 3443), are also applicable to a situation such as that in issue in the main proceedings.

2. In that judgment the Court ruled that:

'The Member States are both entitled and required to issue retroactively Control Copy T No 5 provided for by Article 10 of Regulation No 223/77 in order to enable proof to be furnished pursuant to Article 11 (2) of Regulation No 1380/75 concerning the payment by the exporting Member State of compensatory amounts which should be granted by the importing Member State where the failure to apply for or to issue the document when the goods were consigned was beyond the control of the person concerned and that person is able to produce the supporting documents required for the issue of the control copy.'

3. It drew that conclusion from the:

'general principle whereby procedural flaws which are beyond the control of the person to whom compensatory amounts should normally be granted must not have effects which are unfavourable to him' (paragraph 8).

4. In its order referring questions to the Court the Bundesfinanzhof considers that that principle should also be applied where, as in this case, the retroactive issue of the control copy is requested for the purposes of obtaining an export refund.

5. Subject to what will be said below regarding completion of customs dispatch formalities, I cannot but share that point of view. It suffices in that respect to refer to Article 13 (2) of Regulation (EEC) No 192/75 of the Commission of 17 January 1975 laying down detailed rules for the application of export refunds in respect of agricultural products (Official Journal 1975, L 25, p. 1), in force at the material time, [1] which provided expressly that a fresh Control Copy T No 5 is to be issued where the first has gone astray and is not returned to the office of departure or relevant central body within three months of its issue 'owing to circumstances beyond the control of the party concerned'. It was on the basis of Article 11 (5) of Regulation No 1380/75 of the Commission of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts (Official Journal 1975, L 139, p. 37), as amended by Regulation No 1498/76 of 25 June 1976 (Official Journal 1976, L 167, p. 28), the wording of which is identical to that of the aforementioned Article 13, that the Court extended the possibility of the retroactive

* Translated from the French.

1 — That regulation was later replaced by Regulation No 2730/79 of 29 November 1979, Official Journal 1979, L 317, p. 1. Article 13 became Article 30 of the new regulation.

issue of the control copy to cases where it had not been applied for or issued.

6. As that has already been established, the first question referred to the Court seeks to ascertain whether retroactive issue is also possible in a case such as the present where *no dispatch or export formalities were completed.*

7. Customs dispatch formalities are those formalities which must be completed whenever goods are to move within the Community between two points situated in different Member States. They are governed by Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (Official Journal 1977, L 38, p. 1) and essentially consist in the completion of a T 1 or T 2 document.

8. Customs export formalities are those formalities which must be completed when the goods are to leave Community territory. They consist mainly in the completion of an export declaration and an export certificate for agricultural products which fall under a common market organization.

9. Where the export takes place from a port or airport, dispatch formalities need not be completed.

10. Since in the present case both dispatch and export formalities had to be completed, either expression may be used.

11. With regard to the first question referred to the Court by the Bundesfinanzhof, the Commission suggests a negative reply. That is hardly surprising, having regard to Regulation No 1209/85 of 3 May 1985 amending for the 13th time Regulation No 223/77 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure and amending for the third time Regulation No 1664/81 (Official Journal 1985, L 124, p. 19), which the Commission adopted in order in particular to comply with the judgment of the Court in Case 302/81, cited above, by amending the provisions on the issue of the control copy accordingly (see the second recital in the preamble). It did so by inserting in the abovementioned Regulation No 223/77 of 22 December 1976 (Official Journal 1977, L 38, p. 20) a new Article 13 b, which provides *inter alia* that the control copy can be issued retroactively only on condition that 'the person concerned furnishes proof that the Control Copy T No 5 relates to the goods in respect of which the dispatch or export formalities were completed'.

12. There is no point, in my opinion, in discussing the question whether that provision is retroactive, since the Court inferred the possibility of retroactive issue of Control Copy T No 5 from a general principle of law. It nevertheless remains to be determined whether that general principle, when applied in the area of export refunds, precludes a requirement that export formalities should have been completed or whether, conversely, at the material time the specific nature of the rules in that area made compliance therewith obligatory.

13. In that respect I should like first of all to make two points concerning the *Eggers* judgment.

14. *1.* Contrary to what Töpfer maintains in its written observations to the Court, it is by

no means certain that in the *Eggers* case no customs formalities at all were completed. Indeed, in her Opinion Advocate General Mrs Rozès expressly noted that only the transit and export declaration and not form T No 5 had been presented to the German customs office ([1982] ECR 3455, first paragraph). Similarly, the Court's judgment contains no reference to export or dispatch formalities and merely indicates, in paragraph 2, that the export took place 'without the issue of Control Copy T No 5'. Moreover, in the questions referred to the Court by the Bundesfinanzhof no importance is attached to the question whether or not the other formalities were completed.

15. 2. According to the judgment in *Eggers*, the person concerned is only entitled to the retroactive issue of Control Copy T No 5 *'provided that he is able to produce the supporting documents required in order to obtain it'*.

16. It is clear that where no customs document such as a dispatch or export declaration has been completed by the competent authorities in the Member State of departure, it will be very difficult, if not impossible, to produce such proof.

17. As far as the present case is concerned, let us note first of all that the Community legislature considered that:

'... in the interest of users and with a view to rendering as easy as possible the task of national government authorities responsible for supervising the movement of goods, the simultaneous application of several administrative procedures should be avoided; ... therefore, the Community transit procedure should always be used whenever supervision is necessary in respect of the use or destination of goods;' (ninth recital in the preamble to Regulation No 222/77).

18. The present case is one where supervision in respect of the destination of goods is necessary, because we are concerned not with free movement of goods within the Community but with the protection of the Community's financial resources. The issue in the main proceedings is in substance the granting of export refunds.

19. Article 1 (2) (b) of Regulation No 222/77 provides more precisely that 'The procedure for external Community transit shall apply to movement of the following goods:

...

(b) goods which, though satisfying the conditions laid down in Articles 9 and 10 of the Treaty establishing the European Economic Community, have been subject to customs export formalities for the grant of refunds for export to third countries pursuant to the common agricultural policy.'

20. Article 12 (1) provides generally that any goods to be carried under the procedure for external Community transit must be covered by a T 1 declaration, a specimen of which is annexed to Regulation No 223/77. At least three copies of that declaration are to be produced at the *office of departure* (Article 12 (3)) which is to register it, 'prescribe the period within which the goods must be produced at the office of destination, and take such measures for identification as it considers necessary' (Article 17 (1)). As a general rule

identification is actually ensured by sealing (Article 18 (1)). It is the task of the office of destination to check the goods and to send a copy of the T 1 document, duly endorsed, to the office of departure without delay (Article 26 (1)).

21. Furthermore, Article 15 (1) of Regulation No 222/77 stipulates that:

'Where the goods, before they can be dealt with under the external Community transit procedure, are required to be the subject of an export or re-export declaration, that declaration and the Community transit declaration shall be combined on a form T 1 . . . '.

22. Article 4 of Commission Regulation No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (Official Journal 1977, L 38, p. 20) provides in the same connection that in such a case the Community transit declaration and the copy or copies required for purposes of export or re-export are to be delivered at the same time at the customs office of the Member State of departure.

23. The function and use of Control Copy T No 5 are defined in Articles 10 to 14 of Regulation No 223/77. Article 10 [2] provides as follows:

'Proof that the conditions prescribed by a Community measure as to the use and/or destination of goods imported into, exported from, or moving within the Community have been complied with, shall be furnished by the production of Control Copy T No 5.'

In the present case the 'Community measure' is the grant of a refund and the prescribed 'use' is the export of the goods out of Community territory.

24. In those circumstances, Article 7 [3] of Regulation No 192/75 provides that:

'If, before leaving the geographical territory of the Community or before reaching one of the destinations specified in Article 3, a product for which customs export formalities have been completed crosses Community territory other than that of the Member State in whose territory such formalities took place, proof that the product has left the geographical territory of the Community or reached the intended destination shall be furnished by production of the control copy . . . '.

25. Although it is therefore quite true that in the context of an external Community transit operation giving rise to entitlement to export refunds, form T No 5 is regarded as proof that goods have been exported from the geographical territory of the Community, that can only be the case, under the actual terms of the abovementioned provisions, for products in respect of

2 — That article corresponds to Article 1 of Regulation (EEC) No. 2315/69 of the Commission of 19 November 1969 on the use of Community transit documents for the purpose of applying Community measures for verifying the use and/or destination of goods (Official Journal, English Special Edition 1969 (II), p. 515), which was repealed by Regulation No 223/77 (Article 83).

3 — That article became Article 11 of Regulation No 2730/79 of 29 November 1979; see footnote 1.

which customs export formalities have in fact been completed. Form T No 5 serves as proof that the process begun by completion of customs export formalities has run its course.

26. That is understandable because in the area of export refunds special importance is attached to the completion of those formalities. Pursuant to Article 2 (1) and (3) of Regulation No 192/75, for example, the rate of the refund applicable and the quantity, nature and characteristics of the product exported are determined on the day on which the customs export formalities are completed as defined in Article 2 (2). Indeed, that day is defined as being 'the day on which the customs authority accepts the document by which the declarant states his intention to export the products in question and *qualify for a refund*'. The exporter must thus state his intention to qualify for a refund, at the same time as customs formalities are completed.

27. Furthermore, pursuant to Article 4, the day on which customs export formalities are completed constitutes the starting point for the period within which the product in question must have left the geographical territory of the Community or reached its destination in order to qualify for an export refund.

28. Finally, the advance payment of all or part of the refund against the lodging of security can only take place when those formalities have been completed (Article 12 (1)), and the *refund is paid by the Member State on whose territory they were completed* (Article 13 (1)).

29. I would add that as far as the product in question in this case is concerned, namely white sugar, the first subparagraph of Article 10 (2) of Regulation No 192/75 states in addition that 'the exporter shall be required to declare that the product in question was produced from sugar beet or sugar-cane harvested in the Community'. That is because pursuant to Article 15 (1) of Regulation (EEC) No 766/68 of the Council of 18 June 1968 laying down general rules for the production refund on sugar used in the chemical industry (Official Journal, English Special Edition 1968 (I), p. 155) no export refund may be granted unless the sugar meets that condition.

30. Control Copy T No 5 is added to all those formalities solely to confirm 'that products leaving the Community or in transit to a particular destination are in fact those which were the subject of customs export formalities' (seventh recital in the preamble to Regulation No 192/75). It therefore serves as proof of the fact that goods which leave the geographical territory of the Community are the same as those in respect of which customs formalities were completed with a view to the grant of export refunds and which have just crossed one or more Member States other than that in which they began the journey.

31. In a case such as the present where, as the oral procedure enabled the Court to establish, it is clear that no customs formalities were completed on the territory of the Federal Republic of Germany, the Member State of departure, either at the Hildesheim customs office or at an office on the border with Denmark, form T No 5 can at best certify that certain goods, without further identification, left the geographical territory of the Community; it can in no

way constitute proof that those goods are actually those which should qualify for export refunds.

32. In its judgment of 5 February 1987 in Case 288/85 (*Hauptzollamt Hamburg-Jonas* v *Plange Kraftfutterwerke GmbH & Co.* [1987] ECR 611), the Court stated that:

'The grant of the refund constitutes an advantage for the trader which is justified if certain conditions concerning the characteristics of the product exported and the method of exportation are fulfilled. When checks reveal that that has not been the case, the refund is not due to the exporter . . . ' (paragraph 11).

33. It follows from the foregoing that completion of customs export formalities constitutes an absolutely indispensable precondition for the grant of export refunds and failure both to complete those formalities and to obtain the issue of Control Copy T No 5 cannot subsequently be remedied.

34. Consequently I suggest that the Court reply to the Bundesfinanzhof's first question as follows:

'In June 1979 Control Copy T No 5 provided for in Article 10 of Commission Regulation (EEC) No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure could not be issued retroactively in respect of the export to non-member countries of products on which refunds were payable when the prescribed customs dispatch or export formalities had not been completed.'

35. I turn now to the Bundesfinanzhof's second question, which reads as follows:

'If the first question is answered in the affirmative: may the customs office of departure where the transit formalities (dispatch formalities) required by customs law were to be completed issue Control Copy T No 5 retroactively only if those formalities were completed at that office, or is it sufficient if the export formalities were completed at another customs office — even an office in another Member State?'

36. At first sight that question may appear surprising. It is submitted only in the event of an affirmative reply to the first question, that is to say if the retroactive issue of Control Copy T No 5 requires that customs dispatch formalities have been completed. In the present case it would seem to have been established that those formalities were not completed, which, moreover, constitutes the main reason for the first question.

37. Nevertheless, it appears from the grounds of the order referring the questions

to the Court that the Bundesfinanzhof has doubts whether the office of departure, in this case the Hauptzollamt Hildesheim, the defendant in the main proceedings, is actually competent as a matter of principle to issue form T No 5 retroactively where the customs dispatch formalities (namely endorsement of the T 1 declaration) were not completed there, even if *some* export formalities were completed either at the border between the Federal Republic of Germany and Denmark or at the point of exit from the geographical territory of the Community, on the border between Denmark and Norway. In that respect the Bundesfinanzhof explains that as far as the main proceedings are concerned it is not important which office other than Hildesheim might possibly have such competence.

38. In the event, the Frederikshavn customs office completed the last section of Copy T No 5, namely that entitled 'Control as to use and/or destination' (Überwachung der Verwendung und/oder der Bestimmung), although the section 'Examination by office of departure' (Prüfung durch die Abgangszollstelle) was left blank.

39. I think it is that action by the Frederikshavn office that the Bundesfinanzhof has in mind when it speaks of completion of export formalities, which it distinguishes firmly from completion of customs dispatch formalities.

40. The action of the Frederikshavn office constitutes an export formality only in everyday language, not for the purposes of Community customs legislation; for the latter it constitutes a simple supervisory measure which has no effect in this case because the previous examination, which should have taken place at the point of departure, did not take place.

41. Let us examine that problem. Pursuant to Article 12 (1) of Regulation No 223/77 it is for the office of departure, at which the T 1 declaration must also be produced (see Article 12 (3) of Regulation No 222/77), to issue Control Copy T No 5. Under Article 12 (3) and (4), the original of form T No 5 is to accompany the goods in transit under the same conditions as the T 1 declaration and, like one copy of the T 1 declaration, is to be sent forthwith after appropriate endorsement by the office of destination to the office of departure.

42. It is thus clear that the conditions of issue and use of the two types of document are parallel.

43. It also follows from what I have said in regard to the first question that in order to qualify for export refunds the goods must have been the subject of the prescribed customs dispatch formalities.

44. Finally, in Article 11 of Regulation No 222/77 on Community transit the office of departure is defined as 'the customs office where the Community transit operation begins'. That definition refers to what actually occurs, not what ought to have occurred.

45. The inevitable conclusion is that where customs dispatch formalities have not been completed at the customs office where they ought normally to have been completed, that office cannot be considered to be the office of departure and may not therefore issue Control Copy T No 5 retroactively.

46. If customs dispatch formalities have been completed in another customs office of the Member State of departure, then that office might possibly be considered to be the office of departure and hence competent to issue the control copy.

47. Where all the prescribed formalites for the exportation of goods to a non-member country are completed in a customs office of the Member State of exit, the question of the retroactive issue of Control Copy T No 5 cannot arise. Article 7 of Regulation No 192/75 only requires the production of that document as proof of exportation outside the Community if the goods to which it relates have crossed the territory of one or more Member States other than that in whose territory the customs export formalities took place. Moreover, pursuant to Article 13 (1) of Regulation No 192/75 export refunds are to be paid by the authorities of the Member State in which those formalities were completed.

48. Consequently, I suggest that the Court should reply to the Bundesfinanzhof's second question as follows:

'If customs dispatch or export formalities have not been completed at the office of departure which would normally be competent to issue Control Copy T No 5, that office may not issue it retroactively.'