JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
4 July 2002 *

In Case T-239/00,

SCI UK Ltd, established in Irvine (United Kingdom), represented by L. Allen, Barrister,

applicant,

v

Commission of the European Communities, represented by R. Tricot and R. Wainwright, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision of 29 June 2000 (C (2000) 1684 final) to the effect that repayment to the applicant of import duties is not justified,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: M. Vilaras, President, V. Tiili and P. Mengozzi, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 February 2002,

gives the following

Judgment

Legal background

1 Article 13(1) and (2) 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), provides:

'1. Import 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. Repayment or remission may be made subject to special conditions.

2. Import duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which those duties were entered in the accounts by the authority responsible for their collection.

However, the competent authorities may permit that period to be exceeded in exceptional cases where there is good reason for doing so.'

2 Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4a, 6a, 11a and 13 of Regulation No 1430/79 (OJ 1986 L 352, p. 19) lists the special situations for the purposes of Article 13(1) of the latter regulation which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned as well as those situations which are not regarded as special. Article 4 of Regulation No 3799/86 provides, in particular, the following:

'For the purposes of Article 13(1) of the basic Regulation [No 1430/79], and without prejudice to other situations to be considered case by case as part of the procedure laid down in Articles 6 to 10 [of this Regulation]:

...

2. The following situations shall not by themselves be special situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned:

...

(c) production, even in good faith, for the purpose of securing preferential tariff treatment of goods entered for free circulation, of documents subsequently found to be forged, falsified or not valid for the purpose of securing such preferential tariff treatment.'

Background to the dispute

3 On 23 January 1990, the Commission adopted Regulation (EEC) No 165/90 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect (OJ 1990 L 20, p. 5).

4 By Regulation No 165/90, the Commission accepted, *inter alia*, price undertakings offered by certain exporters of DRAMs, listed in the regulation and including NEC Corporation ('NEC') and Matsushita Electronics Corporation ('Matsushita').

5 Article 1(4) of Regulation No 165/90 provides that DRAMs are exempt from the duty specified in that article, provided that they are produced and exported to the Community by companies which have given an undertaking which has been accepted.

6 On 23 July 1990, the Council adopted Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of DRAMs originating in Japan and collecting definitively the provisional duty (OJ 1990 L 193, p. 1). The price undertakings accepted by the Commission under Regulation No 165/90 were confirmed. The third indent of Article 1(4) of Regulation No 2112/90 provides that, in order to be exempt from the anti-dumping duty, DRAM imports must be accompanied by documentation the format of which is indicated in Annex III to that regulation and which is to be provided by the manufacturers whose undertakings have been accepted under the Regulation ('the price undertaking documents').

7 In accordance with a contract entered into with Commodore International Ltd, the applicant was to manufacture computers and computer components for the subsidiary of its contractual partner in the United Kingdom. The contract provided, *inter alia*, that the applicant was to purchase DRAMs from Commodore Japan Ltd ('CJL'), which was free to source DRAMs from third parties of its choice. All documents necessary for the import declaration of the goods were supplied to the applicant by CJL. The import declaration of the DRAMs was to be made by the applicant.

8 Between August and December 1992, 19 shipments of DRAMs originating in Japan and manufactured by NEC and Matsushita were purchased from CJL by the applicant.

9 Each of those shipments was accompanied by a price undertaking document issued by NEC or Matsushita and supplied to the applicant by CJL. The documentation, signed by authorised employees of NEC and of Matsushita, was in the format contained in Annex III to Regulation No 2112/90.

10 The shipments were likewise accompanied by CJL invoices indicating the quantity and the name of the manufacturer of the DRAMs supplied, that is, NEC or Matsushita, as well as a statement that the DRAMs originated in Japan. The statements matched those made on the price undertaking documents accompanying the goods.

11 The applicant declared the goods to the United Kingdom customs authorities. On the basis of the price undertaking documents, the goods were exempt from the anti-dumping duty and the applicant paid the import duties due thereon.

12 In early March 1995, officers from the United Kingdom Customs Fraud Division visited the applicant's premises in connection with the importation of the 19 DRAM shipments. The applicant was informed that extensive examination of documentation used to clear the DRAMs had shown that some of the documents were invalid for various reasons and that the goods were therefore subject to anti-dumping duty.

13 As a consequence, the United Kingdom Customs Administration sought post-clearance payment of the anti-dumping duties and import VAT amounting to GBP 1 725 503.56.

14 The applicant applied to the customs authorities for review of the decision to collect the duties.

15 With respect to 13 of the 19 price undertaking documents declared invalid, valid replacement price undertaking documents were provided by NEC and Matsushita. The anti-dumping duty debt relating to those 13 shipments was cancelled.

16 With respect to the six remaining documents, it transpired that the corresponding orders originally placed with NEC by CJL had been cancelled. Since NEC did not retrieve the six price undertaking documents concerned, which it had issued, it was concluded that CJL had fraudulently used those documents to ship other DRAMs of NEC to the applicant.

17 The debt in respect of which the applicant received a final demand to pay amounted to GBP 675 102.18 ('the anti-dumping duties at issue'). That debt was paid by the applicant on a 'without prejudice' basis on 9 March 1998.

18 The customs authorities have informed the applicant that no action will be taken against it as a result of the investigation carried out by the Customs Fraud Division.

19 Between the importation in 1992 and the raising of the matter by Customs in 1995, Commodore International Ltd and its subsidiaries, including CJL, had been placed in liquidation.

20 By letter of 27 August 1999, the United Kingdom of Great Britain and Northern Ireland asked the Commission to decide under Article 13 of Regulation No 1430/79 whether the anti-dumping duties at issue could be repaid.

21 By letter of 18 April 2000, the Commission advised the applicant that it would not approve such repayment. The applicant responded in a letter dated 16 May 2000.

22 On 29 June 2000, the Commission adopted a decision addressed to the United Kingdom of Great Britain and Northern Ireland, to the effect that repayment of the anti-dumping duties at issue was not justified (C (2000) 1684 final, 'the contested decision').

Procedure and forms of order sought

23 By application lodged at the Registry of the Court of First Instance on 28 August 2000, the applicant brought the present action.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure. In the context of measures of organisation of procedure, the parties responded to written questions posed by the Court.

25 Having heard the parties, the Court, by decision of 10 January 2002, referred the case to a Chamber of three Judges in accordance with Article 51(1) of its Rules of Procedure.

26 The oral arguments of the parties and their replies to the questions posed by the Court were presented at the hearing on 6 February 2002.

27 The applicant claims that the Court should:

— annul the contested decision;

— order the defendant to pay the costs.

28 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

29 The applicant bases its application on the single plea in law of manifest error of assessment in applying Article 13 of Regulation No 1430/79.

Arguments of the parties

30 The applicant submits that the two conditions laid down in Article 13 of Regulation No 1430/79, namely the existence of special circumstances and the absence of any obvious negligence or deception, are satisfied. Referring to the case-law of the Court, the applicant points out that Article 13 of Regulation No 1430/79 is a general equitable provision designed to cover situations other than those which arose most often in practice and for which special provision could be made when the regulation was adopted. It also notes that 'special circumstances' refers to an external cause, the consequences of which are unforeseeable and inevitable despite the exercise of all due care by the party concerned.

31 The applicant asserts that the price undertaking documents were issued and signed by two of the Japanese producers named in the anti-dumping regulation as having offered an undertaking to the Commission which was accepted. The documents were therefore authentic.

32 The applicant points out that it had no opportunity to check the validity of the price undertaking documents supplied to it because it had no contractual or commercial relationship with the Japanese producers in this case. In addition, it

submits that NEC breached its obligation to effectively monitor the operation of its undertaking agreement because it failed to recover the six price undertaking documents it had already issued to CJL when the order was cancelled. CJL consequently had the opportunity to make fraudulent use of the six authentically issued price undertaking documents to supply other DRAMs of NEC to the applicant. This clearly establishes the existence of an external cause which arose despite the exercise of all due care by the applicant.

33 Moreover, the applicant contends that the Commission breached its obligation to ensure the correct operation of the price undertaking measures. It argues that, in implementation of the undertakings, the Japanese producers were required to report all transactions to the Commission involving DRAMS produced for sale for export to the Community. That information was compared with the subsequent customs declarations for clearing the goods for free circulation in the Community. The comparison was a material task carried out by the Commission as one of its duties to ensure the correct operation and effective monitoring of the undertakings and to protect Community producers from 'grey imports' and circumvention of the measures. In not detecting the fraudulent use of the six price undertaking documents, the Commission failed to comply with its obligations.

34 Finally, the applicant points out that the manner in which the documents were fraudulently used was such that it was not possible for it to detect and, indeed, was also beyond any commercial or legal control which the applicant could reasonably have been expected to carry out. It produced the documents to Customs in good faith and had a legitimate expectation that the DRAMs were exempt from anti-dumping duties. It therefore considers that its conduct does not amount to negligence within the meaning of Article 13 of Regulation No 1430/79. In addition, it notes that United Kingdom Customs considered that it was not involved in the alleged fraud but was really an innocent victim of a fraud committed against it by CJL.

35 In conclusion, the applicant submits that the effect of collecting anti-dumping duties in these circumstances is to penalise a wholly innocent importer. It is also inequitable to require the applicant to bear a loss which it would not have incurred had the Commission and the Japanese producer properly carried out their obligations, as clearly defined in the price undertakings.

36 The defendant does not dispute the facts and accepts that the question must be examined in the light of Article 13 of Regulation No 1430/79.

37 The defendant argues that the applicant has not established the existence of a special situation. Submitting documents subsequently found to be falsified or invalid does not in itself constitute a special situation justifying the repayment of import duties even where such documents were presented in good faith. Referring to Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 82 et seq., the defendant asserts that this type of risk is inherent in a customs agent's work and is therefore a trade risk he must accept.

38 The defendant considers that the fact that the applicant was found not to be involved in the alleged fraud is irrelevant.

39 As regards the applicant's assertion that it was up to the Commission to ensure that the system of price undertakings was operating properly, the defendant points out that there is no machinery under the applicable regulations which requires or allows the Commission to check generally that certification issued by the companies which have given undertakings matches that presented to the

customs authorities. The defendant argues that it is the customs authorities of the Member States and not the Commission which have the task of verifying the authenticity and validity of the certification presented on importation for the purpose of obtaining exemption from anti-dumping duties.

40 The defendant points out that, for the purposes of deciding whether there is a special situation, it is important to determine the situation of the other operators engaged in the same business (Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraphs 21 and 22). In the defendant's view, a prudent trader, aware of the rules, should be able to assess the risks inherent in the market which he is considering and balance the risks connected with certain exporters against the price required for the goods bought from more reliable exporters (Case 827/79 *Acampora* [1980] ECR 3731, paragraph 8).

41 The defendant notes that the authenticity of the relevant documents is not sufficient to justify repayment or remission (Joined Cases 98/83 and 230/83 *Van Gend & Loos* v *Commission* [1984] ECR 3763, paragraphs 13 and 20).

42 The defendant asserts that the second limb of the test in Article 13 of Regulation No 1430/79 should be considered only if the existence of a special situation has been established. It also considers that this article is not intended to protect customs agents against the consequences of their clients going into liquidation.

43 Finally, the defendant submits that this case cannot be considered to be exceptional since a large number of post-clearance verifications have similar consequences for other operators. The repayment or remission of import duties

constitutes an exception to the normal import procedure and, consequently, the provisions which provide for such repayment or remission are to be interpreted strictly and in such a way that the number of cases of repayment or remission remains limited.

Findings of the Court

44 According to the case-law, Article 13(1) of Regulation No 1430/79 constitutes a general equitable provision designed to cover situations other than those which arose most often in practice and for which special provision could be made when the regulation was adopted (see Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 41 and the case-law cited therein).

45 That provision makes the repayment of import duties subject to the fulfilment of two cumulative conditions, namely the existence of a special situation and the absence of deception or obvious negligence on the part of the economic operator (see Cases C-370/96 *Covita* [1998] ECR I-7711, paragraph 29, and C-61/98 *De Haan* [1999] ECR I-5003, paragraph 42).

46 It should also be noted that the second subparagraph of Article 13(1) of Regulation No 1430/79 authorises the Commission to determine the situations and conditions in which import duties may be repaid or remitted, 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.

47 The special situations arising from circumstances in which no deception or obvious negligence is attributable to the person concerned and in which, as a result, the requested repayment or remission may be made are defined in Article 4(1) of Regulation No 3799/86. Article 4(2) on the other hand defines the situations which by themselves do not constitute a sufficient ground for the competent authorities of the Member States to grant repayment or remission.

48 In particular, according to Article 4(2)(c) of Regulation No 3799/86, 'production, even in good faith, for the purpose of securing preferential tariff treatment of goods entered for free circulation, of documents subsequently found to be forged, falsified or not valid for the purpose of securing such preferential tariff treatment' does not constitute a sufficient ground for the competent authorities of the Member States to grant repayment or remission.

49 The parties agree that, in the present case, no deception or manifest negligence can be attributed to the applicant. It is necessary, therefore, to consider only whether the criteria of the first condition are satisfied, that is to say, whether a special situation exists.

50 According to settled case-law, Article 13 of Regulation No 1430/97 is intended to be applied where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred (Cases 58/86 *Coopérative Agricole d'approvisionnement des Avirons* [1987] ECR 1525,

paragraph 22; T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 132; T-50/96 *Primex Produkte Import-Export and Others* v *Commission* [1998] ECR II-3773, paragraph 115, and *Mehibas Dordtselaan*, cited above, paragraph 77).

51 It is likewise settled case-law that in assessments relating to the repayment of import duties the Commission has a discretion (Case T-346/94 *France-Aviation* v *Commission* [1995] ECR II-2841, paragraph 34), and that it is required to exercise it by actually balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith not to incur damage beyond normal commercial risk. Consequently, when examining whether an application for remission is justified, it cannot simply take account of the conduct of importers. It must also assess the impact of its own conduct on the resulting situation even if it is at fault (*Eyckeler & Malt*, cited above, paragraph 133, and *Primex Produkte Import-Export*, cited above, paragraph 116).

52 Thus, it is for the Commission to assess in each case whether a situation, such as the one in this case, is special for the purposes of the applicable Community rules.

53 In the present case, the price undertaking documents were supplied to the applicant by CJL. The documents came from NEC, which is mentioned in the first indent of Article 1(4) of Regulation No 2112/90 as one of the exporters having offered an undertaking which had been accepted by the Commission. Furthermore, the CJL invoices included the name of NEC against the relevant quantity of DRAMs supplied. The quantities matched those reported by NEC on the accompanying price undertaking documents supplied by NEC to CJL to accompany the goods initially destined for the applicant. In addition, the CJL invoices included a statement that the DRAMs originated in Japan. Finally, the

price undertaking documents provided by NEC were signed by authorised employees of that company and, in accordance with the price undertaking procedures, each of the documents contained the required statement that the products had been 'produced and sold for export to the European Community'.

54 In fact the orders for certain exports to the Community originally placed with NEC by CJL had been cancelled. Nevertheless, NEC did not retrieve the six price undertaking documents which it had issued to CJL for the original order, and it was concluded that CJL fraudulently used those documents to ship other DRAMs manufactured by NEC to the applicant. As a result, those documents were regarded as invalid since they did not apply to the imports in question.

55 In that respect, it is clear that the importer is responsible both for payment of the import duties and for the regularity of the documents presented by him to the customs authorities, and that the adverse consequences of wrongful acts of his contractual partners cannot be borne by the Community. The possibility that price undertaking documents are subsequently discovered to be invalid is a trade risk inherent in the importation business (see, by analogy, *Mehibas Dordtselaan*, paragraph 83). Moreover, the importer may seek damages against the traders involved in the fraudulent use of the documents in question. Finally, a prudent trader aware of the rules must assess the risks inherent in the market which he is considering and accept them as normal trade risks (Case C-97/95 *Pascoal & Filhos* [1997] ECR I-4209, paragraphs 57 to 61).

56 As the Court of Justice declared in *Van Gend & Loos*, cited above (paragraph 13), post-clearance verifications would be largely deprived of their usefulness if the use of false certificates — in this case, false price undertaking documents — could, of itself, justify granting a remission. The Court has also declared that the opposite result could discourage traders from adopting an inquiring attitude and make the public purse bear a risk which falls mainly on traders (*SEIM*, cited above, paragraph 45).

57 As the Court stated in Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 114, it is the responsibility of traders to make the necessary arrangements in their contractual relations to guard against the risks of an action for post-clearance payment. In the present case, the applicant concedes that it never wished to intervene or assume any responsibility with respect to the choice of sellers or manufacturers with which CJL entered into agreements. Accordingly, it must be held that the applicant ran a risk in concluding a contract which did not confer on it any control over supply sources.

58 Therefore, as the Commission rightly submits, the presentation of documents subsequently found to be invalid cannot in itself constitute a special situation justifying repayment of import duties even where such documents were presented in good faith (see, to that effect, *Van Gend & Loos*, paragraph 16; *Eyckeler & Malt*, paragraph 162; and *Primex Produkte Import-Export*, paragraph 140).

59 A different conclusion, namely that there was a special situation, would only be possible in the event of serious failures by the Commission or the customs

authorities, facilitating the fraudulent use of the price undertaking documents (see, to that effect, *Eyckeler & Malt*, paragraph 163 et seq., and *Primex Produkte Import-Export*, paragraph 141 et seq.). It is therefore necessary to consider whether the applicant has demonstrated the existence of such failures.

60 In that regard, the applicant asserts that the Commission acted in breach of its obligation to provide for appropriate procedures to ensure proper compliance with and the efficient monitoring of price undertakings. It submits that the Commission should have compared all transactions concerning DRAMs manufactured for sale for export to the Community and notified by the Japanese manufacturers with the subsequent customs declarations of the goods for release into free circulation in the Community. It claims that that check can only be carried out by the Commission. It adds that, if the Commission had properly carried out its obligations to monitor and administer price undertakings, the fraudulent use of the price undertaking documents in question would have been detected well before the party committing the fraud, CJL, was liquidated in 1994.

61 It appears from the parties' responses to the questions posed by the Court at the hearing that the Commission checks compliance with the reference price laid down in the price undertakings on the basis of quarterly reports on the cost and global quantity of DRAMs exported to the Community which are provided by the manufacturers of those DRAMs in respect of which price undertakings have been accepted. Moreover, the manufacturers concerned must provide reports on all their sales to the Community twice a year. Those reports are examined in order to ensure that there are no manifest problems relating to the price undertakings. Therefore, the Commission is not provided with information on each importation. Consequently, there is no procedure which would permit the Commission to check regularly that the undertaking documents drawn up by undertakings correspond to actual imports.

62 Accordingly, it would be unreasonable to require the Commission to monitor not only compliance with the price undertakings but also the consistency of each price undertaking document with the importation effected thereunder. In any case, such monitoring could be based only on post-clearance checks.

63 The applicant's argument that the situation in the present case is comparable to those in *Eyckeler & Malt* and Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others* v *Commission* [2001] ECR II-1337 must be rejected: the circumstances which led to the judgments in those cases were different to those of the present case.

64 In *Eyckeler & Malt*, the Commission, by not monitoring effectively the use of a quota, seriously failed to fulfil its obligation to ensure the proper application of that quota and to make sure that it was not exceeded using falsified certificates. That obligation was a consequence of, in particular, specific provisions and the fact that only the Commission had — or was in a position to request — the data necessary in order to monitor effectively the use of the quota (*Eyckeler & Malt*, paragraphs 165 to 174). Furthermore, in that case, the Commission could have provided the national authorities with a special means of detecting falsifications in good time. The Commission had likewise failed to react to findings that the quota concerned had been exceeded (paragraphs 175 and 176).

65 In *Kaufring*, cited above, the Court of First Instance held that there was a special situation because the Commission's monitoring of the application of the provisions of the Agreement establishing an Association between the European Economic Community and Turkey was deficient and because 'the Commission

failed to fulfil its obligation of diligence in not informing Community importers (including the applicants) at the earliest possible date of the potential risks they incurred in importing colour television sets from Turkey'.

66 In the present case, the Commission fulfilled its responsibilities. The applicant has not shown how the Commission could have detected the fraudulent use of the price undertaking documents at the time of the importation. Given that — despite being used fraudulently — the documents were authentic and given that the Commission could have compared the price undertaking documents with the importations effected thereunder only after the importation had taken place, it could not have prevented their fraudulent use. Furthermore, according to the information provided by the parties, this is an isolated case.

67 Accordingly, the applicant has not shown that there were serious failures by the Commission or the customs authorities which facilitated the fraudulent use of the price undertaking documents.

68 The single plea in law must therefore be rejected.

Costs

69 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's

pleadings. Since the applicant has been unsuccessful, it must, having regard to the form of order sought by the defendant, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the defendant's costs in addition to its own.**

Vilaras Tiili Mengozzi

Delivered in open court in Luxembourg on 4 July 2002.

H. Jung
Registrar

M. Vilaras
President