JUDGMENT OF THE COURT (Fourth Chamber)
29 June 1995 *

In Case C-437/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Hauptzollamt Heilbronn

and

Temic Telefunken Microelectronic GmbH

in the presence of the **Bundesministerium der Finanzen**

on the interpretation of Article 18(2)(d), the first subparagraph of Article 18(3) and the first indent of Article 21(1)(a) of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements (OJ 1985 L 188, p. 1),

THE COURT (Fourth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, C. N. Kakouris and J. L. Murray (Rapporteur), Judges,

* Language of the case: German.

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator

after considering the written observations submitted on behalf of:

— Temic Telefunken Microelectronic GmbH, by Otto Wilser, Tax Adviser,

— the Commission of the European Communities, by Francisco Fialho, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Temic Telefunken Microelectronic GmbH at the hearing on 19 January 1995,

after hearing the Opinion of the Advocate General at the sitting on 23 February 1995,

gives the following

Judgment

1 By order of 5 October 1993, received at the Court on 5 November 1993, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 18(2)(d), the first subparagraph of Article 18(3) and the first indent of Article 21(1)(a) of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements (OJ 1985 L 188, p. 1, hereinafter 'Regulation No 1999/85').

2 Those questions were raised in proceedings between Hauptzollamt Heilbronn (Principal Customs Office, Heilbronn, hereinafter 'the Hauptzollamt') and the

company Temic Telefunken Microelectronic (hereinafter 'Temic') concerning the application of the system of processing under customs control to precious metals contained in defective integrated circuits following an inward processing operation.

3 The conditions for authorizing, carrying out and discharging inward processing relief arrangements are governed by Regulation No 1999/85 and Commission Regulation (EEC) No 2228/91 of 26 June 1991 laying down provisions for the implementation of Regulation (EEC) No 1999/85 on inward processing relief arrangements (OJ 1991 L 210, p. 1, hereinafter 'Regulation No 2228/91').

4 Inward processing relief arrangements enable goods imported from non-member countries to escape customs duties if they undergo in the Community certain working or processing operations defined in Article 1(3)(h) of Regulation No 1999/85 and are then re-exported as compensating products outside the Community.

5 According to points 2. and 3. of Article 1 of Regulation No 2228/91, compensating products are divided into two categories: main compensating products, for the production of which use of the inward processing arrangements was authorized, and secondary compensating products, which are products other than main compensating products and which are a necessary by-product of the processing operation.

6 Under Article 18(1) of Regulation No 1999/85 inward processing relief arrangements are in principle finally discharged when the compensating products are exported outside the Community. However, Article 18(2) provides:

'Inward processing relief arrangements shall also be finally discharged for imported goods when the compensating products are:

...

(b) placed under a new inward processing relief arrangement;

(c) released for free circulation;

(d) placed under the system of processing under customs control;

...'

7 The first subparagraph of Article 18(3) provides that: 'The final discharge of the relief arrangements under the conditions referred to in paragraph 2(c) to (f) shall be subject to the authorization of the customs authority, which shall grant this authorization where circumstances so warrant.'

8 According to Article 20(1) of Regulation No 1999/85, where goods are released into free circulation the amount of that customs debt is to be determined on the basis of the taxation elements appropriate to the import goods at the time of acceptance of the declaration of placing of those goods under inward processing relief arrangements. However, the first indent of Article 21(1)(a) provides for a derogation in the case of compensating products. Those products are to be subject to the import duties appropriate to them where they are 'released for free circulation and appear on the list adopted in accordance with the procedure laid down in Article 31(2) and (3) and to the extent that they correspond proportionately to the exported part of the compensating products not included in that list. However, the holder of the authorization may ask for the products to be taxed under the conditions referred to in Article 20'.

9 The system of processing under customs control referred to in Article 18(2)(d) of Regulation No 1999/85 was established by Council Regulation (EEC) No 2763/83 of 26 September 1983 on arrangements permitting goods to be processed under customs control before being put into free circulation (OJ 1983 No L 272, p. 1 hereinafter 'Regulation No 2763/83').

10 Article 1(2) of that regulation provides that under the arrangements for the processing of goods under customs control non-community goods are to be allowed into the customs territory of the Community for the purposes of processing which alters their description or state, without being subject to import duties, and the products resulting from the processing may be put into free circulation at the rate of the import duty appropriate to them. According to Article 2(1), however, those arrangements concern only goods set out on a special list and in the case of the processing operations mentioned there.

11 Temic regularly imports into the Community unmeasured electronic components from the Far East.

12 In February 1991, the Hauptzollamt granted to Temic authorization for inward processing under Regulation No 1999/85 for its own account for the purpose of testing (measuring), selecting and marking unmeasured integrated circuits. Those operations produce two categories of product: useable circuits intended for re-export ('A' goods) and defective circuits ('B' goods).

13 By a new authorization of 9 August 1991, the Hauptzollamt allowed Temic to place the goods concerned under the system of processing under customs control provided for by Regulation No 2763/83 for the purpose of recovering precious metals contained in circuits which proved to be defective when measured. However, that authorization covered only a limited number of B goods which was proportional to the quantity of main compensating products exported.

14 Following unsuccessful pre-litigation procedures, Temic appealed to the Finanzgericht Baden-Württemberg against the limit placed on the processing authorization granted on 9 August 1991. Following that appeal the Finanzgericht annulled

the authorization and ordered the Hauptzollamt to issue a new authorization without that limitation. It held that such a limitation was not provided for under the system of processing under customs control and was also not lawful under the inward processing relief arrangements. Moreover, in its view, processing under customs control was equivalent to export by way of discharge of the inward processing relief arrangements. Under that system, a limitation for the purpose of release into free circulation and the payment of duties without grant of rebates was prohibited.

15 The Hauptzollamt then appealed on a point of law to the Bundesfinanzhof. It argued that considerations and requirements specific to the inward processing relief arrangements had to be taken into account. It followed from the first indent of Article 21(1)(a) of Regulation No 1999/85 that, where secondary compensating products such as B goods are released into free circulation, only the proportion of B goods corresponding to the quantity of main compensating products exported, that is to say the quantity of A goods exported, was subject to the duties applicable to secondary compensating products.

16 Taking the view that the outcome of the proceedings before it depended on the interpretation of Articles 18 to 21 of Regulation No 1999/85, the Bundesfinanzhof decided to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 18(2)(d) and the first subparagraph of Article 18(3) of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements (OJ 1985 L 188, p. 1) be interpreted as meaning that a quantitative limitation may be set on discharge of the relief arrangements by authorization to place the products under the system of processing under customs control?

(2) Must the "circumstances" warranting authorization (Article 18(3), first paragraph, second half of the sentence, of the said regulation) be understood as meaning that the authorization must be restricted in accordance with the first indent of Article 21(1)(a) of that regulation, that is to say, in such a way that

for certain secondary compensating products to be processed under customs control, a corresponding quantity of main compensating products must be exported?

(3) If question 2 is answered in the negative:

Can the "circumstances" referred to above be interpreted as meaning that a limitation of the type described in question 2 is permissible even if it is not strictly prescribed?'

17 By those three questions the referring court is essentially seeking to ascertain whether Article 18(2)(d), the first subparagraph of Article 18(3) and the first indent of Article 21(1)(a) of Regulation No 1999/85 are to be interpreted as meaning that a quantitative limitation may be attached to an authorization for application of the system of processing under customs control as a way of discharging the inward processing relief arrangements.

18 It appears from the preamble to Regulation No 1999/85 that the inward processing relief arrangements were established so as not to put at a disadvantage internationally Community undertakings which use goods from non-member countries in order to manufacture products for export by giving them the possibility of acquiring such goods under the same conditions as undertakings from non-member countries.

19 Thus, that system allows goods imported from non-member countries to escape customs duties if they undergo certain working or processing operations in the Community and are then re-exported as compensating products outside the Community.

20 Although the exportation of compensating products is the main way of discharging the inward processing relief arrangements, Article 18(2) of Regulation No

1999/85 provides for other ways of discharge which include (point (c)) the release of the compensating products into free circulation and (point (d)) their placing under the system of processing under customs control, which is the situation in this case.

21 The first subparagraph of Article 18(3) of Regulation No 1999/85 provides that the alternative ways of discharge referred to in points (c) to (f) are to be subject to the authorization of the customs authority and that this authorization is to be granted where circumstances so warrant.

22 Neither Regulation 1999/85 nor Regulation No 2228/91 defines the kind of 'circumstances' which would warrant authorization of the alternative ways of discharging the inward processing relief arrangements provided for in points (c) to (f) of Article 18(2).

23 However, it is clear from the general scheme of Regulation No 1999/85 that the Community legislature intended undertakings to be free to choose ways of discharging the inward processing relief arrangements other than re-export, subject to the reservation, however, that their choice does not lead to abuse.

24 It must therefore be held that a customs authority may not refuse authorization for the alternative ways of discharging the inward processing relief arrangements provided for in points (c) to (f) of Article 18(2) of Regulation No 1999/85 except where it can show that those ways of discharge are liable to produce actual abuse, for example where the beneficiary gains an unjustified customs advantage.

25 Moreover, it must be pointed out, as the Advocate General does in paragraph 11 of his Opinion, that the formulation of the first subparagraph of Article 18(3) of Regulation No 1999/85 neither requires nor entitles the customs authority to attach any quantitative limit to the authorization.

26 In providing that the customs authority may grant authorization for other ways of discharge where circumstances so warrant, the first subparagraph of Article 18(3) of Regulation No 1999/85 hardly leaves the customs authority any discretion to restrict the scope of that authorization but makes its grant somewhat automatic: if the customs authority finds that alternative ways of discharging the inward processing relief arrangements provided for in points (c) to (f) of Article 18(2) are not likely to lead to abuse by, for example, conferring an unjustified customs advantage on the beneficiary, it must grant the authorization; if not, it can only refuse it.

27 As to the first indent of Article 21(1)(a) of Regulation No 1999/85 and the rule contained therein, to the effect that the re-exported compensating products should be proportional to the compensating products which remain on the customs territory, it has no effect on the interpretation adopted above. First of all, that provision concerns a question quite different from that at issue in the main proceedings since it relates to the calculation of the amount of import duties to which the compensating products are subject. Secondly, it can apply only to compensating amounts released directly into free circulation and not to compensating products placed under the system of processing under customs control referred to in Article 18(2)(d) of Regulation No 1999/85. In the case of the latter products, it is Article 21(1)(b) which determines the method of calculating the import duties. However, that provision merely refers to the rules applicable in the framework of the customs procedure in question, namely Articles 11 and 12 of Regulation No 2763/83, which entails no proportionality rule like that laid down in the first indent of Article 21(1)(a).

28 In view of the foregoing, the answer to the questions submitted by the Bundesfinanzhof must be that Article 18(2)(d), the first subparagraph of Article 18(3) and the first indent of Article 21(1)(a) of Regulation No 1999/85 are to be interpreted as meaning that a quantitative limitation may not be attached to an authorization to use the system of processing under customs control as a way of discharging the inward processing relief arrangements.

Costs

29 The costs incurred by the Commission of the European Communities, 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 (Fourth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof (Seventh Chamber) by order of 5 October 1993, hereby rules:

Article 18(2)(d), the first subparagraph of Article 18(3) and the first indent of Article 21(1)(a) of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements are to be interpreted as meaning that a quantitative limitation may not be attached to an authorization to use the system of processing under customs control as a way of discharging the inward processing relief arrangements.

Kapteyn Kakouris Murray

Delivered in open court in Luxembourg on 29 June 1995.

R. Grass
Registrar

P. J. G. Kapteyn
President of the Fourth Chamber