JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
16 July 1998 *

In Case T-195/97,

Kia Motors Nederland BV, a company incorporated under Netherlands law, established in Vianen (Netherlands),

and

Broekman Motorships BV, a company incorporated under Netherlands law, established in Rotterdam (Netherlands),

represented by Annetje-Theckla Ottow, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Claude Medernach, 8-10 Rue Mathias Hardt,

applicants,

v

Commission of the European Communities, represented by Hendrik Van Lier, Legal Adviser, acting as Agent, and by Marc van der Woude, of the Brussels Bar, and Rita Wezenbeek-Geuke, of the Rotterdam Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Dutch.

APPLICATION for annulment of the Commission's decision of 8 April 1997 addressed to the Kingdom of the Netherlands and concerning an application for repayment of import duties,

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

composed of: V. Tiili, President, C. P. Briët and A. Potocki, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 12 May 1998

gives the following

Judgment

Legal background

1 Article 20(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; hereinafter 'the Customs Code') provides that '[d]uties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the European Communities'. Article 20(3) states that '[t]he Customs Tariff of the European Communities shall comprise: ...

(d) the preferential tariff measures contained in agreements which the Community has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment; (e) preferential tariff measures adopted unilaterally by the Community in respect of certain countries, groups of countries or territories ...'.

2 Article 66 of 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: hereinafter 'the implementing regulation') provides that '[f]or the purposes of the provisions concerning generalised tariff preferences granted by the Community to certain products originating in developing countries, the following shall be considered as products originating in a country entitled to those preferences ... provided that these products have been transported direct to the Community within the meaning of Article 75: (a) products wholly obtained in that country ...'.

3 Article 75 of the implementing regulation states that '[t]he following shall be considered as transported direct from the exporting beneficiary country to the Community: (a) products transported without passing through the territory of any other country except, when Article 70 applies, another country of the same regional group; (b) products transported through the territories of countries other than the exporting beneficiary country or, when Article 70 applies, other than the territory of the other countries of the same regional group, with or without transhipment or temporary warehousing within those countries, provided that transport through those countries is justified for geographical reasons or exclusively on account of transport requirements and that the products ... have remained under the supervision of the customs authorities of the country of transit or warehousing, ... have not entered into commerce or been released for home use there, and ... have not undergone operations other than unloading, reloading or any operation intended to keep them in good condition'.

4 According to the second paragraph of Article 76 of the implementing regulation, '[i]f originating products exported from the beneficiary country to another

country are returned, they shall be considered as non-originating unless it can be demonstrated to the satisfaction of the competent authorities that ... the goods returned are the same goods as those exported, and ... they have not undergone any operations beyond that necessary to preserve them in good condition while in that country'.

5 Article 77(1) of Commission Regulation (EC) No 3254/94 of 19 December 1994 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community customs code (OJ 1994 L 346, p. 1) provides that '[o]riginating products within the meaning of this Section shall be eligible, on importation into the Community, to benefit from the tariff preference ... provided they have been transported directly within the meaning of Article 78 ...'.

6 Article 78(1) of that regulation provides that '[t]he following shall be considered as transported direct from the exporting beneficiary country to the Community ... (b) goods constituting one single consignment transported through the territory of countries other than the exporting beneficiary country or the Community, with, should the occasion arise, transhipment or temporary warehousing in those countries, provided that the goods have remained under the surveillance of the customs authorities in the country of transit or of warehousing and have not undergone operations other than unloading, reloading or any operation designed to preserve them in good condition ...'.

7 Articles 235 to 242 of the Customs Code determine the conditions under which import duties may be repaid or remitted.

8 Article 236(1) of the Customs Code provides that '[i]mport duties ... shall be repaid in so far as it is established that ... when they were entered into the accounts the amount of such duties was not legally owed ...'. Article 236(2) provides that '[import duties] ... shall be repaid ... upon submission of an application to the

appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor'. Article 235(a) of the Customs Code states that 'repayment' means 'the total or partial refund of import duties ... which have been paid'.

9 Article 239(1) of the Customs Code provides that '[i]mport duties ... may be repaid ... in situations other than those referred to in Articles 236, 237 and 238 ... to be determined in accordance with the procedure of the committee ... resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions'. According to Article 239(2), application for repayment must be made within 12 months from the date on which the amount of the duties was communicated to the debtor.

10 Article 899 of the implementing regulation permits the national customs authority to which an application for repayment is submitted to repay the duties where it establishes that the conditions for repayment laid down in the legislation are satisfied. Article 905 of the implementing regulation adds that '[w]here the decision-making customs authority to which an application for repayment or remission under Article 239(2) of the Code has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909'.

11 According to Article 906 of the implementing regulation, the Commission must include consideration of the case on the agenda of a meeting of the Customs Code Committee as soon as possible. Article 907 of that regulation provides that '[a]fter consulting a group of experts composed of representatives of all Member States,

meeting within the framework of the Committee to consider the case in question, the Commission shall decide whether or not the special situation which has been considered justifies repayment ... That decision shall be taken within six months of the date on which the case referred to in Article 905(2) is received by the Commission. Where the Commission has found it necessary to ask for additional information from the Member State in order to reach its decision, the six months shall be extended by a period equivalent to that between the date the Commission sent the request for additional information and the date it received that information'.

12 According to Article 908(2) of the implementing regulation, '[t]he decision-making authority shall decide whether to grant or refuse the application made to it on the basis of the Commission's decision notified ...'.

13 Article 243 of the Customs Code provides that any person directly and individually concerned by a decision taken by a customs authority pursuant to customs legislation has the right to lodge an appeal against that decision in the Member State where the decision has been taken.

Facts

14 The applicant Kia Motors Nederland distributes Kia vehicles of Korean origin in the Netherlands. The applicant Broekman Motorships is a customs agent, which makes declarations on behalf of its clients, which are contractually bound to reimburse the customs duties paid by it on their behalf.

15 It is not disputed by the parties that, at the material time, preferential tariff measures within the meaning of Article 20 of the Customs Code were applicable to the importation of vehicles from South Korea into the Community.

16 In the spring of 1994 an importer established in Turkey, IHLAS Industry and Foreign Trade (hereinafter 'IHLAS'), ordered a shipment of 300 company cars from Kia Motors Corporation (hereinafter 'Kia Motors'), a car manufacturer established in South Korea. However, before the vehicles arrived IHLAS realised that it would not be able to sell them in Turkey on account of the poor economic climate. When the vehicles arrived, IHLAS placed them under customs supervision and contacted Kia Motors in order to find a solution. The vehicles remained under customs supervision and were therefore not cleared through customs in Turkey.

17 When Kia Motors Nederland became aware of that situation, it expressed an interest in distributing the vehicles in question in the Kingdom of the Netherlands and purchased them. In the interests of efficiency, the vehicles were not physically taken back by Kia Motors before being delivered to Kia Motors Nederland, but were sent directly from Turkey to the Kingdom of the Netherlands on 1 July 1994. Broekman Motorships made the import declaration on behalf of Kia Motors Nederland. In the declaration, dated 18 July 1994, it claimed the preferential tariff applicable to vehicles originating in South Korea. It produced a certificate of origin for that purpose, issued by the South Korean authorities.

18 On 5 October 1994 the Netherlands customs authorities imposed non-preferential import duties on Broekman Motorships, amounting to HFL 474 584.30. They refused to grant the preferential tariff on the ground that the vehicles had not been 'transported direct' within the meaning of Article 75(1) of the implementing regulation. Kia Motors Nederland paid the sum charged to Broekman Motorships, which forwarded it to the customs authorities.

19 On 10 July 1995 Kia Motors Nederland submitted an application for repayment to the customs controller of the district of Rotterdam on the basis of Article 239 of the Customs Code and Article 899 et seq. of the implementing regulation. In its application it explained that the vehicles had not been cleared through customs in Turkey nor had they undergone any transformation there. It also stated that it was indisputable that the vehicles had originated in South Korea and had been transported direct from Turkey to the Netherlands for the clear purpose of avoiding unnecessary transport costs. It considered that, in those circumstances and in view of the purpose of the preferential measures, the requirement that the goods should be 'transported direct' was satisfied even though the vehicles had not strictly been transported direct from South Korea to the Netherlands and that there was thus a special situation justifying the repayment of the duties imposed.

20 By letter of 30 November 1995 the customs controller of the district of Rotterdam requested additional information in order to submit an application to the Commission pursuant to Article 239 of the Customs Code and Article 905 of the implementing regulation. He requested, *inter alia*, the production of a certificate from the Turkish authorities confirming that the vehicles had not been altered in any way when they were in Turkey. He also expressed some reservations in respect of the certificate of origin annexed to the application for repayment, on the ground that the value of the shipment of vehicles indicated on that certificate was different from that indicated on IHLAS' invoices. The controller requested a reply to his letter within three months.

21 By letter dated 28 March 1996 the controller received additional documents, including, in particular, statements by the customs authorities confirming that the vehicles had not been cleared through customs in Turkey and a declaration by Kia Motors that the certificate of origin did indeed relate to the 300 vehicles transported to Rotterdam via Turkey. The authenticity and accuracy of the certificate of origin were also confirmed by the Seoul Metropolitan Government. IHLAS, for its part, stated in writing that the vehicles had not been altered in any way in Turkey.

22 By letter dated 1 October 1996 the Director of Customs in Rotterdam submitted the applicants' application for repayment to the Commission pursuant to Article 239 of the Customs Code and Article 905 of the implementing regulation.

23 By decision of 8 April 1997 addressed to the Kingdom of the Netherlands (hereinafter 'the contested decision'), the Commission declared that the requested repayment of the import duties was not justified. The contested decision was adopted after consultation of 'a group of experts composed of representatives of all Member States'. In its decision the Commission states, first, that the Kingdom of the Netherlands asked it to rule on the application for repayment in question and that it received that application on 14 October 1996. It then states that the preferential tariff could not be applied to the importation in question on the ground that 'the products in question were transported via Turkey' and 'since transport through that country was not justified either for geographical reasons or exclusively on account of transport requirements within the meaning of Article 75(1) of the [implementing] regulation, the preferential arrangements could not be granted'. It adds, finally, that its conclusion cannot be altered by the entry into force, shortly after the importation of the vehicles in question into the Kingdom of the Netherlands, of Regulation No 3254/94, since it does not have retroactive effect.

24 By letter of 9 April 1997 the Commission communicated the contested decision to the Netherlands Permanent Representation to the European Union. On the basis of the Commission's decision, the customs controller of the district of Rotterdam adopted a decision, on 28 April 1997, rejecting Kia Motors Nederland's application. A copy of the Commission's decision was annexed to that decision.

Procedure and forms of order sought

25 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 27 June 1997, the applicants brought the present proceedings.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory measures of inquiry. The parties presented oral argument and their replies to the Court's questions at the hearing in open court on 12 May 1998.

27 The applicants claim 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 applicants to pay the costs.

Law

29 The applicants rely on four pleas in law in support of their application. The first plea alleges infringement of Article 190 of the Treaty, the second infringement of Article 75 of the implementing regulation, the third infringement of Article 76 of the implementing regulation and the fourth infringement of Article 239 of the Customs Code.

The first plea, alleging infringement of Article 190 of the Treaty

Arguments of the parties

30 According to the applicants, the contested decision is based on the simple assertion that the requirements of Article 75 of the implementing regulation were not satisfied. The Commission thus failed to enquire, in particular on the basis of the supporting documents annexed to the application for repayment, whether there were special circumstances which could justify repayment. The applicants state in that respect that, according to the settled case-law of the Court of Justice, it is for the Commission to indicate in each case whether or not such circumstances exist and to give reasons for its decision on that point (Joined Cases 98/83 and 230/83 *Van Gend & Loos* v *Commission* [1984] ECR 3763).

31 According to the defendant, the contested decision satisfies the requirements laid down by case-law with respect to the duty to state reasons. In particular, the Commission indicated all the matters of fact and of law on which it based its assessment. The decision states, *inter alia*, that the goods in question had not been 'transported direct' within the meaning of Article 75 of the implementing regulation, since they had been transported via Turkey without justification for geographical reasons or for reasons relating to the requirements of that transport. The defendant contends that, in those circumstances, the applicants were able to acquaint themselves with the reasons for the decision and to defend their rights.

32 Next, according to the defendant, the decision corresponds strictly to the application for repayment as formulated by the Director of Customs in Rotterdam. In particular, the arguments presented in that application related to the application of Article 75 of the implementing regulation by the Netherlands customs authorities.

Findings of the Court

33 The Court notes, as a preliminary point, that Article 239 of the Customs Code constitutes a 'general equitable provision' within the meaning of the case-law relating to the corresponding provision previously in force, Article 13(1) 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 Article 1(6) of Council Regulation (EEC) No 3069/86 of 7 October 1986 amending Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties (OJ 1986 L 286, p. 1), which provided that '[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' (see, for that case-law, Case 58/86 *Coopérative Agricole d'Approvisionnement des Avirons* [1987] ECR 1525, paragraph 22 and, most recently, Case T-42/96 *Eyckeler and Malt* v *Commission* [1998] ECR II-401, paragraph 132). The similarity between Article 239 of the Customs Code and Article 13 of Regulation No 1430/79 is apparent, in particular, from the fact that the latter provision applies to 'situations other than those referred to by Articles 236, 237 and 238 [of the Customs Code]' which, according to Article 905 of the implementing regulation, must be regarded as being 'special situation[s]'. Furthermore, the parties to the present dispute maintain that Article 239 of the Customs Code should receive the same interpretation as Article 13 of Regulation No 1430/79.

34 Next, it should be recalled that, according to settled case-law, the statement of reasons required by Article 190 of the Treaty must disclose clearly and unambiguously the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to acquaint themselves with the reasons for the measure and the Community judicature to exercise its power of review. It is also clear from that case-law that it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, for example, Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraphs 62 and 63).

35 The Court notes that, of all the legal rules governing the repayment of import duties (see paragraphs 1 to 13 above) only Article 905 grants the Commission power to adopt a decision. That provision enables it to adopt a position on applications for repayment made pursuant to Article 239 of the Customs Code and submitted to it by the national customs authorities. As the Court of Justice has held in proceedings brought on the basis of Article 13 of Regulation No 1430/79, it is for the Commission to indicate in respect of each application for repayment submitted to it whether or not special circumstances within the meaning of that provision exist and to give reasons for its decision on that point (*Van Gend & Loos* v *Commission*, cited above, paragraph 18).

36 In the present case the Commission considered that the situation was not the result of special circumstances, but failed to state the reasons which led it to that conclusion. In its decision the Commission found that the importation in question did not satisfy the condition relating to direct transport laid down in Article 75 of the implementing regulation and that the application for repayment was consequently unfounded. As the defendant itself pointed out in its written pleadings, applications submitted to the Commission under Article 239 of the Customs Code in conjunction with Article 905 of the implementing regulation are not concerned with whether or not the provisions of substantive customs law, such as Article 75 of the implementing regulation, have been correctly applied by the national customs authorities. Under Article 236 of the Customs Code such a question falls within the exclusive competence of the national customs authorities, whose decisions may be challenged before the national courts pursuant to Article 243 of the Customs Code; those courts may make a reference to the Court of Justice pursuant to Article 177 of the Treaty.

37 The defendant was asked at the hearing whether, quite independently of the applicants' failure to comply with the formal conditions laid down in Article 75 of the implementing regulation, there were special circumstances which could have justified repayment, from an equitable point of view, and, more specifically, was asked about the response it had given to that question in the contested decision. It referred to the recital in the preamble to that decision, according to which 'the entry into force, several months after the importation in question on 18 July 1994, of the more flexible provisions of Regulation (EEC) No 3254/94, amending Regulation (EEC) No 2454/93 does not give rise to a situation such as that referred to in Article 239 of Regulation (EEC) No 2913/92, since those provisions are merely

the embodiment of a new Community commercial policy in respect of countries benefiting from the generalised system of preferences. Since that new commercial policy has no retroactive effect, it does not alter the policy previously applied by the Community authorities until the time it entered into force'. The Court considers that, by that recital, the Commission simply intended to point out that the formal conditions in Article 75 of the implementing regulation should be applied to the importation in question, notwithstanding the subsequent entry into force of more flexible criteria (see, for those criteria, paragraph 6 above). That part of the reasoning of the contested decision, like all the other parts of the decision, therefore relates to the question whether or not the importation of the vehicles in question into the Kingdom of the Netherlands satisfied the requirement that they should be 'transported direct'. It should be recalled that that question falls outside the scope of Article 239 of the Customs Code.

38 It follows that, in the statement of the reasons for the contested decision, the Commission in fact attempted to explain why it considered that the import duties imposed on the applicants by the Netherlands customs authority were legally payable, whilst the operative part of that decision, rejecting the application submitted on the basis of Article 239 of the Customs Code, answers the question whether the fact that the vehicles had been placed under customs supervision in Turkey and were therefore still of Korean origin at the time they were imported into the Kingdom of the Netherlands enabled the applicants to be exempted, pursuant to the general equitable provision, from payment of the duties which were, according to the formal legislative provisions, legally payable (see, to that effect, Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303, paragraph 11). It must consequently be concluded that, in view of all the legal rules governing the matter, the Commission failed to state the reasons for its decision.

39 That conclusion is not altered by the defendant's argument that sufficient reasons were given for the contested decision in so far as the arguments put forward in the application for repayment also referred to Article 75 of the implementing regulation. In that respect, it must be borne in mind that the statement of the reasons for a decision must always be such as to enable the Community judicature to exercise its power of review. That condition is not satisfied in the present case. The Commission based its decision to reject the application for repayment on grounds

which the Court is not able to review. The defendant itself stated, during the written procedure, that it is not for the Court to rule on questions raised by the requirement that goods should be 'transported direct', since decisions concerning the interpretation and application of Article 75 of the implementing regulation are subject to national remedies.

40 It follows from all the foregoing that the plea alleging infringement of Article 190 of the Treaty is well founded. The contested decision must consequently be annulled, without it being necessary to rule on the other pleas.

Costs

41 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and the applicants have asked for costs, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1) Annuls the Commission's decision of 8 April 1997, addressed to the Kingdom of the Netherlands and concerning an application for repayment of import duties;

2) Orders the Commission to pay the costs.

Tiili Briët Potocki

Delivered in open court in Luxembourg on 16 July 1998.

H. Jung V. Tiili

Registrar President