Case 160/84

Oryzomyli Kavallas OEE and Others
v
Commission of the European Communities

(Remission of import duties — General equitable provision in Article 13 of Council Regulation No 1430/79 of 2 July 1979)

Summary

European Communities' own resources — Repayment or remission of import duties — Article 13 of Regulation No 1430/79 — When applicable

(Council Regulation No 1430/79, Art. 13, as amended by Regulation No 1672/82)

OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 13 March 1986 *

Mr President,
Members of the Court,

In Case 160/84, the Court is asked to rule on an application brought by private companies against a decision adopted by the Commission under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (Official Journal L 175, p. 1).

That article, as amended by Council Regulation No 1672/82 of 24 June 1982 (Official Journal L 186, p. 1), provides that:

'(1) Import duties may be repaid or remitted in situations other than those referred to in Sections A to D which result from special circumstances in which no negligence or deception may be attributed to the person concerned.'

* Translated from the French.

In its judgment of 15 December 1983 in Case 283/82,[1] the Court decided that Article 13 'appears . . . to be a general equitable provision designed to cover situations other than those which had most often arisen in practice and for which special provision could be made when the regulation was adopted.'

But what are the circumstances which gave rise to the present action?

I — The facts of the case

1. With a view to importing from non-member countries two consignments of rice of 600 tonnes and 400 tonnes respectively, the applicant companies, which have their registered offices in the city of Kavala, which is east of Salonika, telephoned the competent section of the Ministry of Agriculture on 26 August 1981 to find out the rate of levy applicable and to inquire what supporting documents were required for importation.

They were informed that the rate of levy was DR 381 per tonne, that an application should be made for permission to import and that letters of guarantee from a bank should be lodged in order to obtain the import licence.

2. On 27 August 1981, the applicants submitted applications for licences to the same section of the Ministry. At the same time, they lodged the required letters of guarantee from a bank.

The applicants claim that they did not fill in box 15 of the licence, which stated 'advance fixing requested: yes □ no □', because they did not understand what it meant. The official of the Ministry of Agriculture from whom the applicants sought an explanation did not understand the meaning of those words either and in the end filled in the form himself, in the applicants' place, by marking a cross against the word 'no'.

3. When the consignments of rice arrived on 28 September 1981, the customs office informed the applicants that the levy on importation was not DR 381 per tonne but DR 3 811 per tonne because the applicants had submitted an import certificate rather than an advance fixing certificate. The applicants then asked that the rice be placed in a customs warehouse until the Ministry of Agriculture could clear up the matter.

4. On the expiry of the time-limit beyond which the goods could no longer be kept in customs warehouses, that is to say, on 27 September 1983, two years after they had been placed therein, the applicants cleared through customs 997 tonnes of rice, on which the rate of levy on that date was DR 11 487.54 per tonne.

5. The applicants therefore applied for remission of that part of the levy exceeding the amount which would have been due on the basis of the rate of levy which was in force on 26 August 1981, namely DR 381 per tonne (that is to say, DR 11 452 296 minus DR 379 832 = DR 11 072 464).

6. In a letter addressed to the Commission on 30 November 1983, the Greek Ministry of Finance applied for remission of the import duties under Article 13 of Regulation (EEC) No 1430/79. In that application, the Ministry of Finance stated that the conduct of the undertakings concerned did not involve any negligence or deception, that 'the officials of the competent section clearly did not grasp the difference between an ordinary import licence and an advance fixing certificate' and that 'the competent section of the Ministry of Agriculture did not inform the undertakings of the difference between ordinary import licences and advance fixing certificates'.

1 — *Papierfabrik Schoellershammer H. A. Schoeller* v *Commission* [1983] ECR 4219.

7. In its decision of 25 April 1984, the Commission refused the application for remission of duties on the following grounds:

'... it is not possible to treat the two companies concerned as if they had applied for and obtained advance fixing certificates; ... the rate of the import levy on rice fluctuated considerably during the period from 26 August 1981 to 27 September 1983; ... it is not for the Community to assume the commercial risk resulting from changes in the rate of the import levy while the rice was held in a customs warehouse;

... the companies showed themselves to be negligent in undertaking a transaction concerning a fairly large quantity of rice without obtaining adequate information about the legislation governing the system of import and export licences and advance fixing certificates for agricultural products; ... the difference between import licences and advance fixing certificates is immediately clear from the text of the Community Regulations in force in this matter.'

8. By an application received at the Court Registry on 25 June 1984, the applicants brought an action for a declaration that the Commission decision of 25 April 1984 was void. In a separate document, received at the Court Registry on the same day, the applicants made an application under Article 185 of the EEC Treaty for suspension of the operation of the contested decision. That was granted to them by two successive orders of the President of the Court which suspended operation of the decision pending the Court's judgment.

9. By order of 14 February 1985, the Court issued letters rogatory for the hearing of four witnesses by the competent Greek judicial authority. Those witnesses were duly heard.

II — Legal considerations

1. The Commission does not contend that the application is inadmissible. It is in fact clear from the circumstances of the case that the contested decision, although addressed to the Hellenic Republic, is of direct and individual concern to the applicants. It is thus not necessary to spend any time on the question of admissibility.

2. With regard to the substance of the case, the question of law which arises is whether the applicants have in fact established the existence of special circumstances and the absence of negligence or deception on their part, so as to be able to benefit from the provisions of Article 13 of Regulation No 1430/79.

However, since the application in question is for the annulment of the Commission decision of 25 April 1984, in which the Commission decided that remission of import duties was not justified in the applicants' case, the first question to be considered is whether the Commission correctly applied Article 13 of Regulation No 1430/79.

In its decision the Commission does not refer to any *deception* on the part of the applicants.

It is therefore not necessary to consider that possibility.

However, as can be seen from the second of the two recitals in the preamble quoted above, the decision does allege the existence of *negligence*. That is the question which must first be considered.

3. It is difficult to deny that the difference between ordinary import licences and advance fixing certificates is sufficiently clear in the regulations applicable to this case and, in particular, in Article 13 of Council Regulation No 1418/76 of 21 June 1976 on the common organization of the market in rice (Official Journal L 166 of 25 June 1976, p. 1) and Article 8 of Commission Regulation No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal L 338 of 13 December 1980, p. 1).

However, it seems that at the time at which the applications for licences were lodged, none of the regulations in question was available in Greek.

There was certainly a Greek special edition of the Official Journal, all 40 volumes of which carry 31 December 1980 as the date of publication.

However, the evidence heard pursuant to the letters rogatory showed that the various sections of the Greek Ministry of Agriculture only received that edition of the Official Journal in instalments from March or April 1981 until the collection was complete at the end of the summer of 1981. In the meantime, they made use of foreign language texts and private translations into Greek. Certain translations were typed, others handwritten (according to the evidence of Mr Blanas and Mrs Georgopoulou).

It is thus impossible to say with certainty when the regulations which are relevant to this case were available, in their official version, to the officials of the Ministry of Agriculture.

Mrs Georgopoulou also stated in her evidence that at that time the Community regulations, even in the form of provisional translations, had not been sent to the external services of the Greek Ministries.

Finally, it is clear from the information available at the Office for Official Publications of the European Communities that the Greek language edition of the Official Journal in which Regulation No 3183/80 was contained was not published until 15 October 1981.

4. In the present case, the applicants sought information from the competent authorities on the law applicable and the procedures to be followed.

Even in the light of the evidence taken from the witnesses, the Court still has no knowledge of the exact tenor of the conversations conducted at the Ministry of Agriculture in this case.

What is certain is that the applicants' representative was required to fill in an application form.

The title of that form is as follows:

'Import licence or advance fixing certificate.'

Box 15 of that form reads as follows:

'Advance fixing requested: YES □ NO □.'

The applicants stated that the difference between an advance fixing certificate and an import licence was not clear from the clumsy and badly-translated text of the application form.

The expression 'advance fixing requested' was translated into Greek as 'προκαθορισμός ζητηθείς' whereas, according to the applicants, it should have been 'προκαθορισμός αιτούμενος'.

The linguists whom I have consulted consider that the use of the term 'αιτούμενος' would have been preferable, although 'ζητηθείς' is in no way incorrect.

However, the most important expression, namely 'advance fixing', was certainly correctly translated by 'προκαθορισμός'.

It seems to me that the real problem is whether the expression 'advance fixing', in Greek or in any other Community language, permits a person who encounters it for the first time to obtain a sufficiently clear idea of what is meant.

In my view, it does not. An individual reading the text of the form must certainly realize that he is being asked to make a choice, perhaps an important one, but what choice?

Does advance fixing concern the quantity of the product which he proposes to import or the levy? If it concerns the levy, is it the levy applicable on the day of the application or that applicable at a future date which must be definitively chosen? If it is the levy applicable on the day of the application, for how long is the choice valid?

When they were faced with that form, it may well be that the applicants said to themselves: 'We do not want to fix in advance, we want to import' and did not linger any further over the question.

They may also have asked the official to explain the meaning of the expression 'advance fixing'.

At that point, there are two possibilities.

Either, the official explained to them the difference between the two systems and also pointed out to them that if they opted for advance fixing, the security required was five times the amount which would have to be put up in the case of an ordinary importation.

That being so, it is possible that the applicants would decide not to tie up such a large amount and to take the risk that the levy would not change before the goods arrived. If that was the case, then they took a commercial risk and ought to bear the consequences of it. However, that hypothesis seems rather improbable, since even for advance fixing the security required was only DR 223 000 and would be reimbursed once the goods had been imported.

Alternatively — and this is the claim made by the applicants and the Greek administration — the official with whom they dealt was unable to reply to their question.

In that case, there was a failure on the part of the administration.

The memorandum sent by the Greek Ministry of Finance addressed to the Commission on 30 November 1983 states that 'the officials of the competent section clearly did not grasp the difference between an ordinary import licence and an advance fixing certificate' and that 'the competent section of the Ministry of Agriculture did not inform the undertakings of the difference between ordinary import licences and advance fixing certificates'.

Furthermore, it can be seen from the sworn testimony of Mr Blanas, who, at the material time, was head of the Licensing department of the Foreign Trade Section in the Ministry of Agriculture, that the official who dealt with the applicants was new and inexperienced. The head of section himself was absent.

The same witness's evidence, as well as that of Mrs Georgopoulou, shows that no circular or other document had been distributed to the officials of the Ministry of Agriculture explaining the meaning of the expression 'advance fixing'.

Finally, it is common ground that the competent section of the Ministry of Agriculture had never before issued an advance fixing certificate in respect of imports even though it had already dealt with exports in which the the amount to be reimbursed had been fixed in advance.

It appears logical to conclude therefore that at the time at which the representatives of the two companies visited the competent section they were not received by an official capable of informing them as to the difference between an ordinary import licence and an advance fixing certificate.

However, this was the first occasion on which the applicants themselves had imported goods since Greece's accession to the Community.

According to their own statements, the representatives of the two companies did not put 'yes' or 'no' against the line marked 'advance fixing requested'.

It was in fact the official himself who put a cross in the 'no' box.

The evidence taken from witnesses did not provide any clarification on that point.

That aspect of the problem must therefore be disregarded and consideration must be given to whether the applicants were negligent in not giving up their plans to import the goods until such time as they had succeeded, by one means or another, in obtaining an explanation as to the meaning of the expression 'advance fixing'.

However, could traders who were obliged to make a special trip from Kavala to Athens for the purpose of carrying out those formalities reasonably be expected to do so? (It was not until afterwards that the Greek administration made provision for applications for import licences to be lodged in Kavala itself.)

In his commentary on Regulation No 1430/79, Manfred Muller expresses the view that 'in order to arrive at practical results, only grossly negligent conduct (das grob fahrlässige Verhalten) on the part of the person liable to pay the levy should be regarded as "negligence' within the meaning of Article 13'.[2]

In this case, it seems to me that, in the light of all the circumstances set out above, the fact that the applicant companies made enquiries solely with the competent administration and, when they failed to obtain a reply to their question, did not make systematic efforts to obtain information from other sources does not constitute negligence within the meaning of Article 13 of Regulation No 1430/79, interpreted in such a way.

After all, the applicants should normally have been able to obtain an immediate reply from the administration to the question which they had asked.

What is at issue here is not so much the applicants' lack of knowledge as the administration's lack of knowledge, which compounded that of the applicants.

If it was only in the applicants' statements that the inability of the official concerned to provide a proper answer was alleged, it obviously could not be accepted.

However, the Court in fact has before it a written statement from a government department of the Member State in question as well as the sworn statements made by officials.

If the Court accepted the conclusion suggested above, would it create a dangerous precedent? I do not think so.

2 — Manfred Müller, Erstattung und Erlaß von Eingangs-Ausfuhrabgaben, in Rudolf Regul (Editor), *Gemeinschaftszollrecht*, Nomos Verlag, Baden-Baden, 1982, page 1341, paragraph 3.

It would certainly be quite unacceptable to permit Member States generally to enable their nationals to avoid payment of levies by admitting that they had not provided them with correct information. That would result in an inconsistent application of the relevant Community rules and, consequently, in discrimination between undertakings.

However, administrations are generally very reluctant to admit, let alone certify, a lack of knowledge on the part of their officials, especially as they then run the risk that actions for damages will be brought against them. (The two Kavala companies have already initiated such proceedings before the competent Greek court.)

It seems to me that once the administrations of the new Member States become aware of the present case, they will be encouraged to give clear and detailed instructions to their officials rather than relying on the possibility of pleading that their officials were not sufficiently prepared.

It remains to be considered whether the applicants are to be criticized for not having placed the rice in free circulation as soon as it arrived, even if that involved making immediate application for reimbursement of part of the levy.

They would thus have been able to sell the rice while it was still of good quality, pay a levy which was only one-third of that which they finally paid in 1983 when the rice was removed from the warehouse and, in my opinion, avoid incurring a loss.

The applicants state that they chose not to adopt that solution because they were convinced that they would be able to reach an agreement rapidly with the administration which would permit them to pay only the rate of levy applicable on the day on which they submitted their application for a licence.

It must be admitted that they could not have had any interest in seeking to gain time. The trend of the levies was clearly upward, interest on the money borrowed in order to purchase the goods (USD 480 000) was building up and the quality of the rice was deteriorating.

Should allowance be made for their inexperience in regard to the Community machinery or, on the contrary, should they be regarded as not having acted like careful traders?

For its part, the Court has a fairly exacting standard as regards the care which is required of professional traders.

Thus, in its judgment of 13 November 1984 in Joined Cases 98 and 230/83 (*Van Gend en Loos and Bosman* v *Commission* [1984] ECR 3763) the Court decided that the fact that a customs agent was misled by invalid certificates of origin, even where they were issued by the customs authorities of the countries named in them, did not constitute a 'special circumstance' within the meaning of Article 13 of Regulation No 1430/79 because that fact was one of the professional risks which such a trader ran.

Should the Court decide to declare the Commission's decision void, it would normally be up to the Commission to consider whether or not it would be justified in finding the applicants guilty of a certain lack of care and in remitting only the difference between the levy of DR 381 per tonne applicable on the day on which the application for a licence was submitted and that of DR 3 811 per tonne applicable on the day on which the goods arrived. However, in the present case it seems to me that that would not be equitable because the

Commission can confirm, by checking with the Office for Official Publications which is subject to its authority, that at the time at which the applicants decided not to put the rice into free circulation (27 September 1981), none of the regulations applicable to the case had been published in the Greek language version of the Official Journal.

Lastly, it is necessary to consider whether there are 'special circumstances' in this case.

The existence of 'special circumstances'

In Case 85/78 (*Bundesanstalt für Landwirtschaftliche Marktordnung* v *Hirsch* [1978] ECR 2517) the Court decided that 'in view of the continual variations in the rate of levy, if errors relied upon by traders were taken into consideration it would be possible to call in question unilaterally, on the basis of those fluctuations, the undertakings given by importers .... An importer cannot, within the context of the organization of the market established by Regulations Nos. 19 and 130, rely upon an error made by him as regards the option of choosing between the rate of levy in force at the date of lodging the application and that in force at the date of importation'.

Indeed, all sorts of exaggerated claims and speculation would be possible if importers were to be allowed to rely on an oversight or error committed at the time when the application for the licence was being filled in.

The Greek authorities were therefore justified in this case in rejecting the applicants' request to 'correct' the import licence in order to turn it into an advance fixing certificate. That would have constituted an improper application of the procedure for correcting licences.

Similarly, there can be no question of accepting that ignorance of Community law can of itself constitute a 'special circumstance'.

Lastly, it cannot be accepted that there is a sort of general 'period of grace' in favour of new Member States during which ignorance of the applicable law and procedural errors, on the part of both national administrations and traders, will be overlooked more or less automatically.

However, it seems to me that there is in this case a series of factors which, when taken together, are of such a nature as to constitute 'special circumstances'.

Let me summarize those factors once again:

(i) The applicants are medium-sized companies whose registered office is located several hundred kilometers from Athens;

(ii) This was the first occasion on which they had imported goods after Greece's accession to the Community, which had taken place only a few months before;

(iii) Their representatives had to make a special trip to Athens to complete the formalities connected with the importation;

(iv) The competent section of the administration had never before issued an import licence in which the levy was fixed in advance;

(v) No official circular or instructions had been issued to explain to officials the basic principles of the Community rules;

(vi) It appears from information obtained from the Office for Official Publications of the Communities that at the material time none of the regulations at issue in this case had been

published in the Greek edition of the Official Journal;

(vii) The Ministry of Finance provided a written assurance to the effect that 'the officials of the competent section clearly did not grasp the difference between an ordinary import licence and an advance fixing certificate' and that 'the competent section did not inform the undertakings of the difference between ordinary import licences and advance fixing certificates';

(viii) A witness stated on oath that the official who dealt with the applicants was new and inexperienced.

The last three factors are, in my view, the most important.

It should also be noted that in its defence the Commission does not exclude the possibility that a fault committed by the administration might constitute a 'special circumstance' within the meaning of Article 13. The Commission merely denies that the Greek public services can be criticized in this instance. However, the Greek administration has itself made the admission set out above.

In certain of its decisions, the Commission has accepted an administrative failure as justification for the reimbursement or non-recovery of customs duties.

Thus, a decision of 27 July 1981 (No REM 7/81) adopted pursuant to Article 13 of Regulation No 1430/79 granted a remission of customs duties on the ground that the customs office at which the export formalities had been carried out should have required the person making the declaration to fill in an application for an outward processing authorization because the company's statements in its export declaration clearly showed that it intended to re-import the object after it had been repaired abroad.

It is interesting to note that in this case, the Commission criticized the national administration for not actually having drawn the attention of a private individual to an administrative procedure which he ought to have followed.

In two other cases (Decision No REM 12/82 of 25 October 1982 and Decision No REM 23/84 of 14 September 1984), the Commission regarded as a 'special circumstance' the fact that wrong information given by a customs office led a private individual not to carry out a formality which he could easily have carried out if he had been correctly informed.

Finally, in the context of Regulation No 1697/79 on the post-clearance recovery of import duties or export duties, the Commission accepted that a malfunction in the computer used by a national administration to ascertain the extent to which a tariff quota had been exhausted could be regarded as a 'special circumstance' and justify a decision not to proceed with the post-clearance recovery of customs duties normally due (decision of 3 December 1984, ref. REC 3/84).

It is true that in two of the cases cited above, the goods were re-exported to places outside the Community. However, unlike the other provisions of Regulation No 1430/79, Article 13 does not require that condition to be fulfilled.

Thus the examples cited also tend to prove that a series of factors such as those to be found in this case, including in particular a failure on the part of the administration, may be regarded as a 'special circumstance' within the meaning of Article 13 of Regulation No 1430/79.

It must not be forgotten that the Court has described Article 13 as 'an equitable provision' (see page 1634).

The stricter conditions required by the Court to establish the existence of *force majeure* are thus not applicable here.

Finally, it remains for me to say a word about the other ground for rejection advanced by the Commission in its decision of 25 April 1984 according to which 'it is not possible to treat the two companies concerned as if they had applied for and obtained advance fixing certificates'. That line of argument is not convincing because the question is precisely whether or not there are 'special circumstances'. If there are, it is perfectly possible to regard the two companies as having applied for and obtained advance fixing certificates.

The argument to the effect that 'it is not for the Community to assume the commercial risk resulting from changes in the rate of the import levy while the rice was held in a customs warehouse' depends on whether the applicants actually took a commercial risk and speculated on a reduction in the levy — as for the reasons set out above, I do not believe they did — or whether they left the goods in the warehouse because they thought that a satisfactory solution to their problem would shortly be found.

In conclusion, I consider that in this case there are 'special circumstances' within the meaning of Article 13 of Regulation No 1430/79 and that the Commission was wrong to consider that the applicants were guilty of negligence in not obtaining sufficient information concerning the rules in force.

I therefore propose that the Court should declare void the Commission decision of 25 April 1984 on the ground that it constitutes an incorrect application of the above-mentioned Article 13 and order the Commission to pay the costs.