JUDGMENT OF THE COURT (Fifth Chamber)

21 September 2000 *

In Joined Cases C-441/98 and C-442/98,

REFERENCES to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Diikitiko Protodikio, Thessaloniki (Greece), for a preliminary ruling in the proceedings pending before that court between

Kapniki Mikhailidis AE

and

Idrima Kinonikon Asphaliseon (IKA),

on the interpretation of Articles 9 and 12 of the EC Treaty (now, after amendment, Articles 23 EC and 25 EC) and Article 16 of the EC Treaty (repealed

* Language of the case: Greek.

by the Treaty of Amsterdam) in respect of charges having equivalent effect to customs duties and the conditions in which a charge collected in breach of Community law may be refunded,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, P.J.G. Kapteyn (Rapporteur), P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Kapniki Mikhailidis AE, by P. Yatagantzidis, K. Finokaliotis and E. Metaxaki, of the Athens Bar,

— Idrima Kinonikon Asphaliseon (IKA), by M. Pavlidi-Vasiliadi, of the Thessaloniki Bar,

— the Greek Government, by P. Mylonopoulos, Deputy Legal Adviser in the Special Legal Department for Community Legal Affairs in the Ministry of Foreign Affairs, and K. Paraskevopoulou-Grigoriou, Legal Representative in the State Legal Service, acting as Agents,

— the Commission of the European Communities, by M. Kondou-Durande and R. Tricot, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Kapniki Mikhailidis AE, represented by P. Yatagantzidis, K. Finokaliotis and E. Metaxaki; Idrima Kinonikon Asphaliseon (IKA), represented by D. Anastasopoulos, Deputy Legal Adviser in the State Legal Service, acting as Agent; the Greek Government, represented by K. Paraskevopoulou-Grigoriou; and the Commission, represented by M. Kondou-Durande and R. Tricot, at the hearing on 3 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 16 March 2000,

gives the following

Judgment

1 By two orders of 29 October 1998, received at the Court on 4 December 1998, the Diikitiko Protodikio (Administrative Court of First Instance), Thessaloniki, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions, identical in each of the two cases before it, relating to the interpretation of Articles 9 and 12 of the EC Treaty (now, after amendment, Articles 23 EC and 25 EC) and Article 16 of the EC Treaty (repealed

by the Treaty of Amsterdam) concerning charges having equivalent effect to customs duties and the conditions in which a charge which has been collected in breach of Community law may be refunded.

2 The questions were raised in two sets of proceedings between Kapniki Mikhailidis AE ('Mikhailidis') and Idrima Kinonikon Asphaliseon (Social Security Institution in Greece, 'the IKA') concerning the refund, as unduly paid, of charges paid on tobacco exports to other Member States and non-member countries between 1990 and 1995 by Mikhailidis and the two companies to which it succeeded.

National law

3 Article 6 of Law No 2348/1953 concerning the amendment, supplementation and repeal of provisions on the processing of tobacco leaves and concerning the amalgamation of the Tamio Asfaliseos Kapnergaton (Tobacco Workers' Insurance Fund; 'TAK') with the IKA (FEK (Greek Official Journal) A' 75; 'the 1953 Law') introduced a charge on tobacco products; under that provision:

'For the purpose:

(a) of continuing to pay pensions to persons already entitled to a pension from the TAK and to persons who become entitled to a pension in accordance with the provisions of this Law as well as, on their death, to persons entitled through them in accordance with the above, and

(b) of paying compensation to any employees of the TAK not affiliated to the IKA and not entitled to a pension until this Law enters into force,

a special account with the National Bank of Greece and Athens called "Special account for the benefit of pensioners of the Tobacco Workers' Insurance Fund, as amalgamated with the IKA" is hereby set up.

The revenue of that account shall be:

(a) ...

(b) the proceeds of the levy applied to the single tax on tobacco under Article 2(4)(b) of Law No 3460/28;

(c) the proceeds of the contribution, in accordance with the following article, on the value of exported tobacco.

...'

4 Article 7 of the 1953 Law, as replaced by Article 2 of Legislative Decree 2519/1953 (FEK A' 220), states:

'1. A special contribution shall be imposed on the value of tobacco exported outside the borders of the country:

(a) at 5% for exported tobacco from the 1952 harvest and

(b) at 3% for exported tobacco from the 1953 and 1954 harvests...

Those contributions shall be paid by the exporters immediately on export and collected by the State customs office through which the export takes place; every month the customs office shall pay the contributions into the special account set up under Article 6 of this Law...'.

5 Article 7 of the 1953 Law was extended so as to apply to harvests after 1954 by Article 9(1) of Legislative Decree 4104/1960 (FEK A' 147), which provides:

'The special contribution on the value of tobacco from the 1952, 1953 and 1954 harvests exported outside the borders of the country, laid down by Article 7 of Law No 2348/1953... as replaced by Article 2 of Legislative Decree 2519/1953, shall be extended to harvests after 1954, reduced to 1.5% in respect of tobacco from the 1955 and 1956 harvests, to 1% for the 1957 and 1958 harvests and to 0.5% for the harvests from 1959 onwards'.

6 Furthermore, Article 11(4) of Legislative Decree 4104/1960 provides:

'The "Special account for tobacco workers" set up under Article 6 of Law No 2348/1953 shall be abolished on promulgation of this decree; the rights and obligations in respect of the account are henceforth assumed by the Pensions Branch of the IKA, and the acts of the administration on the basis of which the IKA paid pensions and lump-sum compensation to insured persons and pensioners of the Tobacco Workers' Insurance Fund amalgamated with the IKA, shall have legal force'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

7 Mikhailidis is a Greek-law public limited company which carries on business in the tobacco sector and which came into being on the merger of two public limited companies, namely Kapniki A. Mikhailidis AE and M. Bogiatzoglou — Exagogikos Ikos Kapnon AE. On 18 and 21 August 1995 it applied to the local branch of the IKA seeking to obtain refunds of, respectively, GRD 336 068 769 and GRD 30 113 030 as unduly paid.

8 Those amounts represented charges which had been paid under Article 7 of the 1953 Law both by Mikhailidis and by the two companies to which it had succeeded. The charges were paid on the export of tobacco to Member States and non-Member countries between 1990 and 1995.

9 Following the rejection of both Mikhailidis' claims by the Director of the IKA, Mikhailidis lodged an objection before the local administrative committee of the same IKA branch in respect of both decisions. Those objections were also rejected by decisions of 15 and 20 November 1996.

10 Mikhailidis brought two actions in the Diikitiko Protodikio, Thessaloniki, for annulment of the second set of decisions, claiming that the charge levied under Article 7 of the 1953 Law ('the disputed charge'), which is paid to the customs office on the export of tobacco and then credited to the IKA for the benefit of the Tobacco Workers' Pension Branch, is a charge having equivalent effect to a customs duty on export and is incompatible with Community law inasmuch as it is imposed unilaterally on domestic tobacco products when they cross the frontier.

11 In those circumstances, the Diikitiko Protodikio, Thessaloniki, decided to stay proceedings and refer the following questions, identically formulated in both cases, to the Court of Justice for a preliminary ruling:

'1. Does a charge which is levied by a Member State on domestic goods exported to another Member State in proportion to their value constitute a charge having equivalent effect to customs duties on exports, having regard to the fact that that charge, which is invariably imposed on a particular category of domestic goods, in accordance with objective criteria and within the framework of a general system of taxation, is not imposed on domestic products which are distributed in the home market or on like goods which are imported into the country from another Member State? Alternatively is the abovementioned proportional contribution payable by tobacco exporters — which is levied and credited as income of the IKA, a social security institution, for the benefit of the Tobacco Workers' Pensions Branch — by reason of its objective, that is to say boosting the financial resources of the particular insurance branch, not inconsistent with Community law, in that it

constitutes in a broader sense a contribution in favour of an insurance body for the purpose of achieving the social security objectives in respect of the particular group of workers, who may be employed in undertakings like the plaintiff's, and are in any event entitled, even by means of the imposition of charges such as the one in this case, to social security, in accordance with the appropriate provisions of the Constitution of the particular Member State?

2. If the first part of the first question is answered in the affirmative, is a Member State in principle obliged to refund to a trader financial charges on the value of exported goods which must be regarded as levied in breach of Community law, on the basis that it is established that the person who was required to pay the charges at issue in fact passed them on to other persons, namely the purchasers of the goods, and it does not follow, nor does the trader claim, that that charge caused an increase in the price of the products and a reduction in the volume of his sales with the result that he suffered subsequent loss?'

12 By order of the President of the Court of Justice of 12 January 1999, the two cases C-441/98 and C-442/98 were joined for the purposes of the written and oral procedure and of the judgment.

The first question

13 By its first question, the national court is asking essentially whether an *ad valorem* charge on exported tobacco products, which is not imposed on the same products when they are distributed in the domestic market or imported from

another Member State, may, because of its social objective, escape classification as a charge having an effect equivalent to a customs duty on exports which is incompatible with Articles 9, 12 and 16 of the Treaty.

14 It follows from the general and absolute nature of the prohibition of all customs duties applicable to goods moving between Member States that customs duties are prohibited regardless of the purpose for which they were introduced and the destination of the revenue from them (see, *inter alia*, Joined Cases 2/69 and 3/69 *Sociaal Fonds voor de Diamantarbeiders* v *Brachfeld* [1969] ECR 211, paragraph 13).

15 As the Court has frequently held, any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12 and 16 of the Treaty, even if it is not imposed for the benefit of the State (see *Sociaal Fonds voor de Diamantarbeiders* v *Brachfeld*, paragraph 18; Case 158/82 *Commission* v *Denmark* [1983] ECR 3573, paragraph 18; Case C-426/92 *Germany* v *Deutsches Milch-Kontor* [1994] ECR I-2757, paragraph 50; and Case C-347/95 *Fazenda Pública* v *Ucal* [1997] ECR I-4911, paragraph 18).

16 In addition, although Community law does not detract from the powers of the Member States to organise their social security systems, they must nevertheless comply with Community law when exercising those powers (see, to that effect, Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paragraphs 21 and 23).

17 It follows that neither the social purpose for which the disputed charge was introduced nor the fact that its proceeds are paid to the IKA can prevent the charge from being classified as a charge having equivalent effect to a customs duty for the purposes of Articles 9, 12 and 16 of the Treaty.

18 The Greek Government and the IKA claim, however, that the disputed charge cannot be classified as a charge having equivalent effect to a customs duty given that it constitutes a revenue of a social character and that it is levied not only on exported tobacco but also on tobacco for domestic consumption. Therefore, the disputed charge is an integral part of a general system of internal taxation and is consistent with Community law by virtue of Article 95 of the EC Treaty (now, after amendment, Article 90 EC).

19 In that regard, it should be observed that, according to the case-law of the Court, a charge such as the disputed charge escapes classification as a charge having equivalent effect to a customs duty if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported or exported products alike (see, in particular, Case 132/78 *Denkavit* v *France* [1979] ECR 1923, paragraph 7).

20 Even though it appears from the question referred that the national court considers that the disputed charge is imposed only on exported tobacco products, the submissions of the Greek Government and the IKA should nevertheless be taken into account and consideration should be given to the conditions in which the charge might be capable of falling within the scope of Article 95 of the Treaty.

21 Although it falls to the national court to assess, on the basis of an examination of the scope of the domestic provisions referred to by the Greek Government and the IKA, whether the relevant conditions are satisfied, the Court of Justice has jurisdiction to provide the national court with all the guidance of interpretation which will enable it to carry out such an assessment for the purposes of deciding the case before it.

22 In that regard, it should be noted, first, that it is settled case-law that the essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax is that the former is borne solely by a product which crosses a frontier, as such, whilst the latter is borne by imported, exported and domestic products (see, to that effect, Case 90/79 *Commission* v *France* [1981] ECR 283, paragraph 13; and Case C-109/98 *CRT France International* v *Directeur Régional des Impôts de Bourgogne* [1999] ECR I-2237, paragraph 11).

23 Secondly, in order to relate to a general system of internal taxation, the charge to which the exported tobacco product is subject must impose the same duty on both domestic products and identical exported products at the same marketing stage and the chargeable event triggering the duty must also be identical in the case of both products. It is therefore not sufficient that the objective of the charge imposed on the exported products is to compensate for a charge imposed on similar domestic products — or which has been imposed on those products or a product from which they are derived — at a production or marketing stage prior to that at which the exported products are taxed. To exempt a charge levied at the frontier from being classified as a charge having equivalent effect when it is not imposed on similar national products or is imposed on them at different marketing stages, because that charge aims to compensate for a domestic fiscal charge applying to the same products, would make the prohibition on charges having an effect equivalent to customs duties empty and meaningless (see, to that effect, *Denkavit* v *France*, paragraph 8).

24 Therefore, a charge such as the disputed charge, which is levied at the frontier when the export operation takes place, is deemed to be a charge having equivalent effect to a customs duty, unless the allegedly comparable charge levied

on national products is applied at the same rate, at the same marketing stage and on the basis of an identical chargeable event.

25 In that regard, although it is for the national court alone to determine the exact effect of the national legislative provisions at issue in the main proceedings, it should be pointed out, as the Advocate General has done in points 28 to 32 of his Opinion, that the Greek Government and the IKA have not succeeded in removing serious doubts as to whether the allegedly comparable charge levied on domestic products, as described by the Greek Government, is applied at the same rate, at the same marketing stage and on the basis of a chargeable event identical to that giving rise to the disputed charge.

26 Therefore, the answer to be given to the first question must be that an *ad valorem* charge on exported tobacco products, which is not levied either on the same tobacco products when they are sold on the domestic market or on those imported from another Member State, cannot escape, by reason of its social objective, classification as a charge having equivalent effect to a customs duty on exports that is incompatible with Articles 9, 12 and 16 of the Treaty, unless the allegedly comparable charge levied on domestic products is applied at the same rate, at the same marketing stage and on the basis of a chargeable event which is identical to that giving rise to the disputed charge.

The second question

27 By its second question, the national court asks, in substance, (i) whether Community law allows a Member State to refuse to refund charges levied in breach of Community law when it has been established that the refund would

involve unjust enrichment and (ii) how proof of unjust enrichment may be established.

28 Mikhailidis submits that it should not have to bear the burden of proof. The Commission, which supports Mikhailidis on this point, observes that, according to the case-law of the Court, there is no presumption that taxes have been passed on to third parties and that it is not for the taxable person to prove the contrary.

29 By contrast, the IKA and the Greek Government contend (i) that a Member State is entitled to refuse to refund a charge levied in breach of Community law if it is established that that would give rise to unjust enrichment and (ii) that inasmuch as Mikhailidis has failed to show that the levying of the disputed charge caused an increase in the price of the products and a reduction in the volume of sales, it must be inferred that refunding the charge entails unjust enrichment. Therefore, the IKA and the Greek Government maintain that the competent authorities are not obliged to refund the disputed charge to the plaintiff in the main proceedings.

30 As a preliminary point, it is apparent from well-established case-law that the right to a refund of charges levied in a Member State in breach of rules of Community law is the consequence of, and complement to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties. The Member State is therefore obliged in principle to repay charges levied in breach of Community law (Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 12; and, most recently, Case C-343/96 *Dilexport* v *Amministrazione delle Finanze dello Stato* [1999] ECR I-579, paragraph 23).

31 As regards the first part of the second question, it is settled case-law that the protection of rights guaranteed in the matter by Community law does not require

an order for the recovery of charges improperly levied to be granted in conditions which would involve the unjust enrichment of those entitled (see, in particular, Case 68/79 *Just* v *Danish Ministry for Fiscal Affairs* [1980] ECR 501, paragraph 26).

32 It is therefore for the national courts to determine, in the light of the facts of each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons and, if so, whether reimbursement to the trader would amount to unjust enrichment (see, *inter alia*, Joined Cases C-192/95 to C-218/95 *Comateb and Others* v *Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165, paragraph 23).

33 However, a Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment. It follows that if the burden of the charge has been passed on only in part, it is for the national authorities to repay the trader the amount not passed on (*Comateb*, paragraphs 27 and 28).

34 Furthermore, even where it is established that the burden of the charge has been passed on in whole or in part to third parties, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment (*Comateb*, paragraph 29).

35 The Court has already observed on several occasions that it would be compatible with the principles of Community law for courts before which claims for repayment were brought to take into consideration the damage which the trader concerned might have suffered because measures such as the disputed charge had

the effect of restricting the volume of exports (*Just*, paragraph 26; and *Comateb*, paragraph 30).

36 As regards the second part of the second question, it should be borne in mind that any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of charges levied in breach of Community law are incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence (*San Giorgio*, cited above, paragraph 14).

37 In that regard, Community law precludes a Member State from making repayment of customs duties and taxes contrary to Community law subject to a condition, such as the requirement that such duties or taxes have not been passed on to third parties, which the plaintiff must show he has satisfied (*Dilexport*, paragraph 54).

38 Therefore, if under national law it were for Mikhailidis to show, as the IKA and the Greek Government maintain should be the case, that the disputed charge caused an increase in the price of the products and a reduction in the volume of exports, the provisions in question would have to be considered contrary to Community law (see, to that effect, *Dilexport*, paragraph 52).

39 As regards proof as to whether the disputed charge has been passed on to third parties, Mikhailidis asserts that the question at issue in the main proceedings is

whether the national court should base its findings solely on the documents provided by the competent authorities, which Mikhailidis had been obliged to submit to them for the purposes of paying the disputed charge, or whether it should also take into account the documents exchanged with the undertakings with which Mikhailidis entered into contracts.

40 Although the question of whether a tax has been passed on is a question of fact falling within the jurisdiction of the national court and although it is for that court alone to evaluate the evidence to that effect, the rules of evidence must not have the effect of making it virtually impossible or excessively difficult to secure repayment of a charge levied in breach of Community law.

41 It follows that, if the national court were confined to evaluating the evidence adduced by the competent authorities and were not able to take account of evidence submitted to it by the trader concerned in order to show that, notwithstanding the authorities' allegations to the contrary, the charge has not actually been passed on, or at least not entirely, the provisions in question would have to be considered contrary to Community law, given that the taxpayer must always be in a position to enforce the rights conferred on him by Community law.

42 Therefore the answer to the second question must be that, although Community law does not preclude a Member State from refusing repayment of charges levied in breach of its provisions where it is established that repayment would entail unjust enrichment, it does preclude any presumption or rule of evidence intended to shift to the trader concerned the burden of proving that the charges unduly paid have not been passed on to other persons and to prevent him from adducing evidence in order to refute any allegation that the charges have been passed on.

Costs

43 The costs incurred by the Greek Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Diikitiko Protodikio, Thessaloniki, by orders of 29 October 1998, hereby rules:

1. **An *ad valorem* charge on exported tobacco products, which is not levied either on the same tobacco products when they are sold on the domestic market or on those imported from another Member State, cannot escape, by reason of its social objective, classification as a charge having equivalent effect to a customs duty on exports that is incompatible with Articles 9 and**

12 of the EC Treaty (now, after amendment, Articles 23 EC and 25 EC) and Article 16 of the EC Treaty (repealed by the Treaty of Amsterdam), unless the allegedly comparable charge levied on domestic products is applied at the same rate, at the same marketing stage and on the basis of a chargeable event which is identical to that giving rise to a charge on exports of the kind introduced by Greek Law No 2348/1953.

2. Although Community law does not preclude a Member State from refusing repayment of charges levied in breach of its provisions where it is established that repayment would entail unjust enrichment, it does preclude any presumption or rule of evidence intended to shift to the trader concerned the burden of proving that the charges unduly paid have not been passed on to other persons and to prevent him from adducing evidence in order to refute any allegation that the charges have been passed on.

Edward Kapteyn Jann

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 21 September 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber