JUDGMENT OF THE COURT (First Chamber)
6 April 2006 *

In Case C-274/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Hamburg (Germany), made by decision of 16 June 2004, received at the Court on 28 June 2004, in the proceedings

ED & F Man Sugar Ltd

v

Hauptzollamt Hamburg-Jonas,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, E. Juhász (Rapporteur) and E. Levits, Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2005,

after considering the observations submitted on behalf of:

— ED & F Man Sugar Ltd, by H.-J. Prieß and M. Niestedt, Rechtsanwälte,

— Hauptzollamt Hamburg-Jonas, by G. Seber, acting as Agent,

— the Commission of the European Communities, by G. Braun, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 29 September 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 11(1) and (3) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying

down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1), as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994 (OJ 1994 L 310, p. 57) ('Regulation No 3665/87').

2 The reference was made in the course of proceedings between ED & F Man Sugar Ltd ('ED & F Man Sugar') and the Hauptzollamt (Principal Customs Office) Hamburg-Jonas ('the Hauptzollamt') concerning the sanction imposed by the latter on ED & F Man Sugar, as provided for in the first subparagraph of Article 11(1)(a) of Regulation No 3665/87, following decisions to recover refunds granted in accordance with Article 11(3).

Legal background

Community law

3 The first, second, third and fifth recitals in the preamble to Regulation No 2945/94 are worded as follows:

'... the Community rules provide for the granting of export refunds on the basis of solely objective criteria, in particular concerning the quantity, nature and characteristics of the product exported as well as its geographical destination; ... in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified; ... to that end, provision should be made for the recovery of amounts unduly paid and sanctions to encourage exporters to comply with Community rules;

... to ensure the correct functioning of the system of export refunds, sanctions should be applied regardless of the subjective element of fault; ... it is nevertheless appropriate to waive the application of sanctions in certain cases notably in cases of an obvious error recognised by the competent authority and to provide for a higher sanction in cases of intent;

... where an exporter has supplied wrong information that wrong information could lead to an undue payment of the refund if the error is not discovered, whilst where the error is discovered it is entirely proportional to sanction the exporter for an amount in proportion to the amount which he would have received unduly if the error would not have been discovered ...'

...

... past experience and irregularities and notably fraud recorded in this context show that this measure is necessary and appropriate, that it will act as an adequate deterrent and that it is to be uniformly applied throughout the Member States'.

4 Article 3(1) and (5) of Regulation No 3665/87 provide:

'1. The day of export means the date on which the customs authority accepts the export declaration in which it is stated that a refund will be applied for.

...

5. The document used for export to enable products to qualify for a refund must include all information necessary for the calculation of the amount of the refund, and in particular:

(a) a description of the products in accordance with the nomenclature used for refunds;

(b) the net mass of the products or, where applicable, the unit of measurement to be taken into account in calculating the refund; and,

(c) in so far as is necessary for calculating the refund, particulars of the composition of the products or the relevant reference.

If the document mentioned in this paragraph is the export declaration, this document must also include these references and the reference refund code.'

5 The first subparagraph of Article 5(1) of Regulation No 3665/87 provides:

'Payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the customs territory of the Community but also — save where it has perished in transit as a result of force majeure — on its having been

imported into a non-member country and, where appropriate, into a specific non-member country within 12 months following the date of acceptance of the export declaration:

(a) where there is serious doubt as to the true destination of the product,

or

(b) where, by reason of the difference between the amount of the refund on the exported product and the amount of the import duties applicable to an identical product on the date of acceptance of the export declaration, it is possible that the product may be reintroduced into the Community.'

6 The first, second, third and fourth subparagraphs and the first sentence of the fifth subparagraph of Article 11(1) and Article 11(3) of Regulation No 3665/87 are worded as follows:

'1. Where it has been found that an exporter, with a view to the granting of an export refund, has requested a refund in excess of that applicable, the refund due for the relevant exportation shall be the refund applicable to the actual exportation reduced by an amount equivalent to:

(a) half the difference between the refund requested and the refund applicable to the actual exportation;

(b) twice the difference between the refund requested and the refund applicable, if the exporter has intentionally supplied false information.

The refund requested is deemed to be the amount calculated from the information supplied pursuant to Article 3 or Article 25(2). Where the rate of refund varies according to destination, the differentiated part of the refund requested shall be calculated from the information supplied pursuant to Article 47.

The sanction referred to under (a) shall not apply:

— in the case of force majeure,

— in exceptional cases characterised by circumstances beyond the control of the exporter, which occur after the acceptance by the competent authorities of the export declaration or the payment declaration, and provided that he, immediately after he took note of these circumstances but within the time-limit referred to in Article 47(2), notifies the competent authorities, unless the competent authorities have already established that the refund requested was incorrect,

— in cases of obvious error as to the refund requested, recognised by the competent authority,

— in cases where the request for the refund is in accordance with ... Regulation (EC) No 1222/94 ... and in particular Article 3(2) thereof, and has been calculated on the basis of the average quantities used over a specified period,

— in case of adjustment of the weight in so far as the deviation in the weight is due to a difference in the weighing method applied.

Where the reduction referred to under (a) or (b) results in a negative amount, the exporter shall pay that negative amount.

Where the competent authorities have established that the refund requested was incorrect and the exportation has not been effected and consequently no reduction of refund is possible, the exporter shall pay the amount equivalent to the sanction referred to under (a) or (b). ...

...

3. Without prejudice to the obligation to pay any negative amount as referred to in the fourth subparagraph of paragraph 1, where a refund is unduly paid, the beneficiary shall reimburse the amounts unduly received — which includes any sanction applicable pursuant to the first subparagraph of paragraph 1, — plus the interest calculated on the basis of the time elapsing between payment and reimbursement. ...

...'

National law

7 Paragraph 48 of the Law on Administrative Procedure (Verwaltungsverfahrensgesetz) of 25 May 1976 (BGBl. 1976 I, p. 1253), provides:

'Withdrawal of unlawful administrative acts

An unlawful administrative act may, even after it can no longer be challenged, be withdrawn either wholly or in part with prospective or retroactive effect. An administrative act by which a right or a legally significant advantage has been either conferred or confirmed (an administrative act conferring a benefit) may only be withdrawn under the conditions set out in subparagraphs 2 to 4.

...'.

8 Paragraph 51 of the Law on Administrative Procedure is worded as follows:

'Reopening of the procedure

An administrative body shall consider an application from an individual concerned requesting that an administrative act which is longer open to challenge be set aside or declared void, if:

1. the factual or legal circumstances on which the administrative act was based have changed in favour of the individual concerned; or

2. new evidence has come to light which would have led to a more favourable decision for the individual concerned; or

3. in accordance with Paragraph 580 of the Zivilprozessordnung (Rules on Civil Procedure) reasons exist to reopen the procedure.

...'

The main proceedings and the questions referred for a preliminary ruling

9 In February 1998 ED & F Man Sugar lodged four declarations with the competent customs office concerning the export to Poland of 100 tonnes of white sugar, in respect of which it applied for export refunds. By four decisions of 6 April 1998 the Hauptzollamt granted ED & F Man Sugar those refunds.

10 After enquiries carried out by the Zollkriminalamt Köln (Cologne Customs Investigation Service) uncovered evidence to show that white sugar which should have been exported to Poland, the Czech Republic and Switzerland had not reached the non-Member countries of destination, the Hauptzollamt concluded, from an examination of the documents produced by ED & F Man Sugar as proof of arrival, that the documents relating to the commercial transaction referred to in the preceding paragraph did not show that the goods exported to Poland had been placed in free circulation, but only that they had been placed under processing arrangements. ED & F Man Sugar stated that it was unable to provide further information as to the whereabouts of the consignment, since it could not obtain that information from the other contracting party. By four rectification decisions of 17 April 2000, the Hauptzollamt demanded, on the basis of the first subparagraph of

Article 11(3) of Regulation No 3665/87, in conjunction with the first subparagraph of Article 5(1)(a) thereof, reimbursement of the refunds paid to ED & F Man Sugar ('the reimbursement decisions') who repaid the amount claimed without appealing against those decisions.

11 Subsequently, pursuant to point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87, the Hauptzollamt, by four decisions of 5 June 2000 ('the decisions imposing a sanction'), imposed a sanction in respect of each decision on ED & F Man Sugar. The Hauptzollamt considered that because reimbursement decisions are final it was clear that ED & F Man Sugar had claimed a refund in excess of that applicable.

12 Following rejection by the Hautpzollamt of the notice of objection given by ED & F Man Sugar against the decisions imposing a sanction, the latter brought an action before the Finanzgericht (Finance Court) Hamburg, claiming that the Hauptzollamt was not entitled to impose a sanction on it since it should not have demanded reimbursement of the export refunds. In its judgment in Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, the Court of Justice held that, according to Article 5(1) of Regulation No 3665/87, proof that the goods have been released for home use in the non-Member country of destination can be required only prior to the payment of the export refund. In those circumstances the national court decided that an interpretation of Community law, in particular of Article 11(1) and (3) of Regulation No 3665/87, was necessary in the case before it.

13 The Finanzgericht Hamburg accordingly decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. In an appeal against a decision imposing a sanction on the basis of the first subparagraph of Article 11(1) of Regulation No 3665/87, are national authorities

and courts entitled to examine whether an exporter requested a refund in excess of that applicable if the reimbursement decision under the first subparagraph of Article 11(3) of Regulation No 3665/87 became final before the decision imposing the sanction was issued?

2. If the first question is answered in the negative: in an action challenging a decision imposing a sanction pursuant to the first subparagraph of Article 11(1) of Regulation No 3665/87 in the circumstances set out in [the order for reference], for the purpose of giving effect to an interpretation of Community law adopted in the meanwhile, may the question be examined whether the exporter requested an export refund in excess of that applicable?'

First question

14 As the Advocate General pointed out, in point 41 of his Opinion, unlike a reimbursement decision which is intended merely to withdraw a financial advantage that has been unduly obtained, a decision imposing a sanction leads to a significant reduction in the amount of refund applicable and, in some circumstances, where that reduction results in a negative amount, in the payment of a financial penalty.

15 In that connection, the Court has held on numerous occasions that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11; *Emsland-Stärke*, paragraph 56; and Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 52).

16 The first subparagraph of Article 11(1) of Regulation No 3665/87 provides for the imposition of a sanction where it has been found that an exporter, with a view to the granting of an export refund, has requested a refund in excess of that applicable.

17 It does not follow from that provision that that necessary condition for the application of a sanction decision can be deemed to be established by reason of the mere existence of a reimbursement decision issued on the basis of the first subparagraph of Article 11(3) of Regulation No 3665/87 or that it can be inferred from the mere fact that the economic operator has not contested the reimbursement decision.

18 The principles of legality and legal certainty require that, in the context of a review of the legality of a decision imposing a sanction adopted under the first subparagraph of Article 11(1) of Regulation No 3665/87, the national authorities and courts are able to examine whether the exporter has in fact requested a refund in excess of that applicable within the meaning of Article 11(1), regardless of the fact that a prior reimbursement decision issued on the basis of the first subparagraph of Article 11(3) has become final.

19 Having regard to the foregoing considerations, the answer to the first question must be that the first subparagraph of Article 11(1) of Regulation No 3665/87 must be interpreted as meaning that, in an appeal against a decision imposing a sanction on the basis of that provision, the national authorities and courts are entitled to examine whether the exporter requested a refund in excess of that applicable within the meaning of that provision, notwithstanding the fact that a reimbursement decision provided for in the first subparagraph of Article 11(3) of that regulation has become final before the decision imposing a sanction was issued.

Second question

20 In view of the answer given by the Court to the first question, there is no need to reply to the second question.

Costs

21 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The first subparagraph of Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products, as amended by Commission Regulation No 2945/94 of 2 December 1994, must be interpreted as meaning that, in an appeal against a decision imposing a sanction on the basis of that provision, the national authorities and courts are entitled to examine whether the exporter requested a refund in excess of that applicable within the meaning of that provision, notwithstanding the fact that a reimbursement decision provided for in the first subparagraph of Article 11(3) of that Regulation has become final before the decision imposing a sanction was issued.

[Signatures]