JUDGMENT OF THE COURT (First Chamber)
22 September 1988 *

In Case 148/87

Th. Frydendahl Pedersen A/S, of Hvide Sande (Denmark), represented by A. Torbøl, of the Copenhagen Bar, with an address for service in Luxembourg at the Chambers of Stanbrook and Hoopers, 7, Val-Sainte-Croix,

applicant,

v

Commission of the European Communities, represented by J. Sack, its Legal Adviser, and I. Langermann, a member of its Legal Department, with an address for service in Luxembourg at the office of Georgios Kremlis, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission's decision of 26 February 1987 finding that the repayment of import duties is not justified is void,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, R. Joliet and F. A. Schockweiler, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 4 May 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 June 1988,

gives the following

* Language of the Case: Danish.

Judgment

1 By an application lodged at the Court Registry on 12 May 1987, Th. Frydendahl Pedersen A/S, having its registered office at Hvide Sande, Denmark, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission's decision of 26 February 1987, finding that the refund of import duties paid by the applicant amounting to DKR 1 756 932 and forming the subject-matter of a request by Denmark dated 28 October 1986 was not justified, is void.

2 The applicant is a Danish company whose business is to supply nets for fishing vessels. On 28 September 1984 it applied to the Holstebro Customs Office for a refund of sums paid during the period from 8 October 1980 to 14 June 1984 as import duties on fishing nets, together with interest thereon, claiming that over those four years the said customs office had wrongly interpreted the relevant Community provisions.

3 On 11 June 1986 the Danish authorities submitted to the Commission a request for the application of Article 13 of Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (Official Journal 1979, L 175, p. 1). That article provides that import duties may be repaid or remitted in situations resulting from special circumstances in which no negligence or deception may be attributed to the person concerned.

4 By a decision of 26 February 1987 addressed to the Danish authorities, the Commission stated that the request by the company concerned for repayment was not justified.

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 In support of its action the applicant claims that the decision in question is illegal primarily because its legal basis, Commission Regulation No 3799/86 of 12 December 1986, laying down provisions for the implementation of Articles 4 a, 6 a, 11 a and 13 of Council Regulation No 1430/79 (Official Journal 1986, L 352, p. 19) is illegal, alternatively because the decision was wrongly based on Council Regulation No 3069/86 of 7 October 1986 amending Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties (Official Journal 1986, L 286, p. 1), which it claims was inapplicable to requests for repayment submitted, as in the present case, before 1 January 1987. In the further alternative, the applicant claims that the decision in question is illegal because it was taken after the period prescribed in Commission Regulation No 1575/80 of 20 June 1980 laying down provisions for the implementation of Article 13 of Council Regulation No 1430/79 (Official Journal 1980, L 161, p. 13) as amended by Commission Regulation No 945/83 of 21 April 1983 amending for the second time the abovementioned Regulation No 1575/80 (Official Journal 1983, L 104, p. 14) had expired; and, in the final alternative, because the conditions for the grant of a refund were fulfilled.

7 The first submission to be examined is that alleging that the decision in question is unlawful because the prescribed time-limit was exceeded.

8 The applicant claims that the four-month period laid down in the second paragraph of Article 5 of Regulation No 1575/80, as amended by Regulation No 945/83, was exceeded by the Commission in the present case. The application for repayment was forwarded by the Danish authorities to the Commission on 11 June 1986. Since the Commission believed that supplementary information was required before the case could be dealt with, it asked the Danish authorities to withdraw their initial request and to re-submit it some time later. The Danish authorities did so, submitting a fresh request on 28 October 1986. In the event, the Commission's decision of 26 February 1987, notified to the applicant by the Danish Minister for Fiscal Affairs on 13 March 1987, was adopted after the prescribed four-month period had elapsed and was thus unlawful.

9 The Commission does not dispute that version of the facts as recounted by the applicant. However, to justify its position it contends that strict compliance with the four-month period laid down in the abovementioned provision would lead to an unsatisfactory legal situation inasmuch as the period sometimes proves to be

inadequate for a thorough examination of a case and Article 7 of Regulation No 1575/80 provides that if the Commission fails to take a decision within that period, the (national) decision-making authority is to grant the application. It was to remedy that situation that the practice of asking the national authorities to withdraw their initial request and to re-submit it some time later began. Although no mention is made of that method in the relevant regulation, it is contrary neither to its letter nor to its spirit, because a Member State is always entitled to withdraw a request. Furthermore, if the Commission does not have sufficient information available, it is obliged to reject an application. In the present case, its request for further information was intended precisely to avoid a negative decision possibly leading to an immediate action before the Court.

10 In those circumstances, it is first necessary to examine the question whether the practice followed by the Commission in the present case for the purpose of gathering further information, namely that of asking the Member State concerned to withdraw the request which it had previously submitted and to re-submit it later, constitutes a misuse of procedure.

11 As regards that question, it should be noted that the Commission itself acknowledged in its defence that, in order to remedy the 'unsatisfactory' legal situation explained above, it had adopted, pursuant to Article 25 (2) of Council Regulation No 1430/79, new rules in Regulation No 3799/86, which took effect on 1 January 1987, extending to six months the four-month period previously applicable. Those new rules provide, in addition, for a further extension 'where the Commission has found it necessary to request additional information from the Member State'.

12 However, in the case now before the Court, instead of asking for further information in good time and adopting the decision within the period laid down, the Commission asked the Danish authorities, in a telex message of 7 October 1986, to withdraw their request and to re-submit it at a later date. It must therefore be assumed that the real purpose of the practice complained of was to avoid the consequences provided for in Article 7 of Regulation No 1575/80 should no decision be taken within the prescribed period. Consequently, it must be held that the Commission thereby committed a misuse of procedure.

13 In those circumstances and without there being any need to examine the applicant's other submissions, it must be held that the Commission's decision of 26 February 1987, which was not adopted within the prescribed four-month period which started to run from the time when the request was submitted by the Danish authorities on 11 June 1986, must be declared void because it was adopted on the basis of a procedure which was vitiated in its entirety. The applicant is accordingly entitled to be repaid the import duties forming the subject-matter of that request.

Costs

14 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Declares the Commission's decision of 26 February 1987 (REM: 29/86) void;

(2) Orders the Commission to pay the costs.

Bosco Joliet Schockweiler

Delivered in open court in Luxembourg on 22 September 1988.

J.-G. Giraud
Registrar

G. Bosco
President of the First Chamber