JUDGMENT OF THE COURT (Sixth Chamber)
25 February 1999 *

In Case C-86/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Reiner Woltmann, trading as 'Trans-Ex-Import',

and

Hauptzollamt Potsdam,

on the interpretation of Article 905(1) 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),

THE COURT (Sixth Chamber),

composed of: G. Hirsch, President of the Second Chamber, acting as President of the Sixth Chamber, G. F. Mancini, J. L. Murray (Rapporteur), H. Ragnemalm and R. Schintgen, Judges,

Advocate General: G. Cosmas,
Registrar: R. Grass,

* Language of the case: German.

after considering the written observations submitted on behalf of:

— Mr Woltmann, trading as 'Trans-Ex-Import', by Peter H. Eggers, Rechtsanwalt, Berlin,

— the French Government, by Kareen Rispal-Bellanger, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Foreign Affairs Secretary in that Directorate, acting as Agents,

— the Italian Government, by Professor Umberto Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato,

— the Commission of the European Communities, by Jürgen Grunwald, Legal Adviser, and Michel Nolin, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 May 1998,

gives the following

Judgment

1 By order of 26 November 1996, received at the Court on 27 February 1997, the Bundesfinanzhof (Federal Finance Court) referred to the Court of Justice for a

preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 905(1) 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 Regulation').

2 Those questions were raised in proceedings brought by Mr Woltmann, trading as 'Trans-Ex-Import', for the annulment of a decision of the Hauptzollamt (Principal Customs Office) Potsdam concerning the remission of customs duties and import taxes.

Legal background

3 Article 239(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 (OJ 1992 L 302, p. 1, hereinafter 'the Code'), read in conjunction with Article 249 of the Code, empowers the Commission to consider cases of remission and reimbursement of import or export duties. That power is conferred on it by the Regulation.

4 Article 239 provides:

'1. Import duties or export duties may be repaid or remitted 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.

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

...'

5 The situations referred to in Article 239 of the Code are described in detail in Section IV, Title IV, Chapter 3, of the Regulation; that chapter is entitled 'Specific provisions relating to the application of Article 239 of the Code' and corresponds to Articles 899 to 909.

6 Article 899 of the Regulation provides:

'Without prejudice to other situations to be considered case by case in accordance with the procedure laid down in Articles 905 to 909, where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239(2) of the Code:

— is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import duties concerned.

"The person concerned" shall mean the person or persons referred to in Article 878(1), or their representatives, and any other person who was involved with the completion of the customs formalities relating to the goods concerned or gave the instructions necessary for the completion of these formalities,

— is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import duties concerned.'

7 Article 900(1)(a) of the Regulation provides:

'1. Import duties shall be repaid or remitted where:

(a) non-Community goods placed under a customs procedure involving total or partial relief from import duties or goods released for free circulation with favourable tariff treatment by reason of their end-use are stolen, provided that the goods are recovered promptly and placed again in their original customs situation in the state they were in when they were stolen'.

8 Article 905 of the Regulation explains how the customs authority is to consider the situation of the person concerned where it does not fall within any of the situations covered by Articles 900 to 904 of the Regulation. Article 905(1) states:

'Where 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.

The term "the person concerned" shall be interpreted in the same way as in Article 899.

In all other cases, the decision-making customs authority shall refuse the application.'

9 Following the theft of about 3.2 million cigarettes, belonging mainly to third parties, which occurred at a warehouse which the plaintiff in the main proceedings is authorised to manage in the new *Länder*, the customs authorities required the latter to pay the sum of DEM 485 703.99 in respect of import taxes payable on the cigarettes, of which DEM 58 206.87 was accounted for by customs duties. According to the plaintiff in the main proceedings, the stolen goods were not insurable against storage risks.

10 The objection lodged against the notice of assessment was dismissed, with the result that the notice became enforceable.

11 The request made by Mr Woltmann for remission of import duties and taxes on grounds of fairness was rejected by the customs authorities. The proceedings for annulment, based on the contention that the request for remission should have been forwarded to the Commission in accordance with Community customs law, were also dismissed. The Finanzgericht (Finance Court) held that Community law took precedence over the principles of domestic law relating to fairness. It also held that the conditions for referring the matter to the Commission, laid down in Article 905(1) of the Regulation, were not fulfilled in that there was no 'special situation'.

12 The plaintiff in the main proceedings appealed on a point of law against that decision to the Bundesfinanzhof, which considers that the judgment to be delivered by it depends on the interpretation of certain provisions of Community law.

13 It therefore referred to the following questions to the Court for a preliminary ruling:

'1. Is Article 905(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the regulation establishing the Community Customs Code (OJ 1993 L 253, p. 1) to be interpreted as meaning that the decision-making customs authority is not to accept that there is a "special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned" if on the theft of goods from a customs warehouse (non-Community goods) the conditions in Article 900(1)(a) of Regulation No 2454/93 for remission of customs duty to the owner of the warehouse are not met?

2. If Question 1 is answered in the affirmative:

Does the same apply in a case of hardship where theft was not an insurable risk and the levying of customs duty would destroy the warehouse owner's business, or may it be found on such facts that there is a "special situation" under Article 905(1) of Regulation No 2454/93 which should be referred to the Commission for decision?'

14 It is clear from the case-file in the main proceedings that the essential object of the national court's questions, which it is appropriate to consider together, is to ascertain whether a national customs authority is entitled to consider that there is no special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned where uninsurable goods stored in a warehouse have been stolen and the levying of customs duties on those goods would render the undertaking concerned insolvent.

15 At the outset, it should be borne in mind that, under Article 177 of the Treaty, the Court has no power to apply rules of Community law to a particular case but may only provide a national court with information on the interpretation of Community

law which may be useful to it in assessing the effects of a provision of national law (see in particular Case 100/63 *Kalsbeek* v *Sociale Verzekeringsbank* [1964] ECR 565, at 572, and Case 137/84 *Ministère Public* v *Mutsch* [1985] ECR 2681, paragraph 6).

16 It must next be pointed out that, where the request for repayment or remission of customs duties is based on grounds corresponding to any of the cases mentioned in Articles 900 to 903 and the request involves no deception or obvious negligence on the part of the person concerned, the customs authority is required to grant repayment or remission of the amount of the import duties in question. On the other hand, where that request is based on grounds corresponding to any of the cases covered by Article 904, the customs authority is required to refuse the request.

17 It follows that the procedure provided for in Articles 905 to 909 of the Regulation must be followed whenever the national customs authority is not in a position, on the basis of Articles 899 to 904 of the Regulation, to grant or refuse the remission of customs duties.

18 It is clear from the scheme of Section IV, Title IV, Chapter 3, of the Regulation that Article 905 introduces into Community customs law a general fairness clause intended to cover exceptional situations which, in themselves, do not fall within any of the cases provided for in Articles 900 to 904 of the Regulation.

19 Where the customs authority is not in a position, on the basis of the grounds adduced, to take a decision to remit duties on the basis of Article 899 of the Regulation, it is then required to verify whether there is any evidence of the existence of a special situation within the meaning of Article 905(1) of the Regulation, which does not entail any deception or manifest negligence on the part of the person concerned and, if need be, to forward the file to the Commission, which will, on the basis of the information placed before it, consider whether a special situation exists such as to justify the remission of duties.

20 In any event, it is not for the national authority to determine whether the situation in question constitutes a special situation of the kind provided for in Article 905(1) of the Regulation justifying a remission of duties by the Commission.

21 In undertaking its examination, in the light of the objective of fairness underlying Article 239 of the Code, the customs authority must confine itself to verifying whether the circumstances relied on are liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business.

22 It follows that the answer to the questions submitted must be that factors 'which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned' exist, necessitating examination of the file by the Commission, where, having regard to the objective of fairness underlying Article 239 of the Code, factors liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business are found to exist and the conditions laid down in Article 900(1)(a) of the Regulation, for remission of customs duties in favour of an applicant, are not fulfilled.

Costs

23 The costs incurred by the French and Italian Governments and 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 (Sixth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 26 November 1996, hereby rules:

Factors 'which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned', within the meaning of Article 905(1) 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 exist, necessitating examination of the file by the Commission, where, having regard to the objective of fairness underlying Article 239 of Regulation (EEC) No 2913/92 of 12 October 1992, factors liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business are found to exist and the conditions laid down in Article 900(1)(a) of Regulation No 2454/93, for remission of customs duties in favour of an applicant, are not fulfilled.

Hirsch Mancini Murray

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 25 February 1999.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber