JUDGMENT OF THE COURT (Fifth Chamber)

29 April 2004 *

In Case C-222/01,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

British American Tobacco Manufacturing BV

and

Hauptzollamt Krefeld,

on the interpretation of the Community rules concerning the incurring, remission and repayment of a customs debt,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans (Rapporteur), acting for the President of the Fifth Chamber, A. La Pergola and S. von Bahr, Judges,

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— British American Tobacco Manufacturing BV, by H. Glashoff, Steuerberater,

— the Commission of the European Communities, J.-C. Schieferer, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of British American Tobacco Manufacturing BV and the Commission at the hearing on 6 February 2003,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2003,

gives the following

Judgment

1 By order of 24 April 2001, received at the Court on 5 June 2001, the Bundesfinanzhof referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of the Community rules concerning the incurring, remission and repayment of a customs debt.

2 Those questions arose in a dispute between British American Tobacco Manufacturing BV ('BAT') and the Hauptzollamt Krefeld ('the Hauptzollamt') concerning the refusal by the latter of BAT's application for repayment of excise duties levied by reason of presumed breaches of the Community transit system.

Community law background

The rules on Community transit

3 Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (OJ 1977 L 38, p. 1), most recently amended by Council Regulation (EEC) No 474/90 of 22 February 1990 (OJ 1990 L 51, p. 1) (hereinafter referred to as 'Regulation No 222/77'), provides in Article 11:

'For the purposes of this Regulation:

(a) "principal"

means the person who, in person or through an authorised representative, requests permission, in a declaration in accordance with the required customs formalities, to carry out a Community transit operation and thereby makes himself responsible to the competent authorities for the execution of the operation in accordance with the rules;

...

(c) "office of departure"

means the customs office where the Community transit operation begins;

...

(e) "office of destination"

means the customs office where the goods must be produced to complete the Community transit operation;

...'

4 According to Article 12(1), (4) and (6) of Regulation No 222/77:

'1. Any goods that are to be carried under the procedure for external Community transit shall be covered, in accordance with the conditions laid down in this Regulation, by a T 1 declaration. ...

...

4. The T 1 declaration shall be signed by the person who requests permission to effect an external Community transit operation or by his authorised representative, and at least three copies of it shall be produced at the office of departure.

...

6. The T 1 declaration shall be accompanied by the transport document.

The office of departure may dispense with production of this document during the customs formalities. However, the transport document must be produced whenever required by the customs authorities in the course of carriage.'

5 Under Article 13 of Regulation No 222/77, 'the principal shall be responsible for:

(a) the production of the goods intact at the office of destination within the prescribed time-limit and with due observance of the measures adopted by the competent authorities to ensure identification;

(b) the observance of the provisions relating to the Community transit procedure and to transit in each of the Member States in the territory of which carriage of the goods is effected.'

6 Article 17(1) of Regulation No 222/77 provides:

'The office of departure shall register the T 1 declaration, prescribe the period within which the goods must be produced at the office of destination, and take such measures for identification as it considers necessary.'

7 Article 18(1) and (4) of Regulation No 222/77 provides:

'1. As a general rule, identification of the goods shall be ensured by sealing.

...

4. The office of departure may dispense with sealing if, having regard to other possible measures of identification, the description of the goods in the T 1 declaration or in the supplementary documents makes them readily identifiable.'

8 According to Article 19(1):

'The copies of the T 1 document delivered to the principal or to his representative by the office of departure must accompany the goods.'

9 Article 20 states:

'Copies of the T 1 document shall be produced in each Member State as required by the customs authorities, who may satisfy themselves that the seals are unbroken. The goods shall not be inspected unless some irregularity is suspected which could result in abuse.'

10 Article 25(1) provides:

'If seals are broken in the course of carriage without the carrier so intending, he shall, as soon as possible, request that a certified report be drawn up in the Member State in which the means of transport is located, by the customs authority if there is one nearby or, if not, by any other competent authority. The authority concerned shall, if possible, affix new seals.'

11 Finally, under Article 36(1) of Regulation No 222/77:

'When it is found that, in the course of a Community transit operation, an offence or irregularity has been committed in a particular Member State, the recovery of duties or other charges which may be chargeable shall be effected by that Member State in accordance with its provisions laid down by law, regulation or administrative action, without prejudice to the institution of criminal proceedings.'

12 Regulation No 222/77 came into force on 1 July 1977, and was repealed with effect from 1 January 1993 pursuant to Articles 46 and 47 of Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit (OJ 1990 L 262, p. 1). However, by the effect of the first paragraph of Article 129 of Commission Regulation (EEC) No 1214/92 of 21 April 1992 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1992 L 132, p. 1), carriage operations begun before 1 January 1993 are to be continued after that date under the conditions laid down by Regulation No 222/77 and the rules enacted for its implementation.

The rules on the incurring and extinction of customs debt

13 Article 1(2)(a) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt (OJ 1987 L 201, p. 15) defines the latter as 'the obligation on a person to pay the amount of the import duties (customs debt on importation) or export duties (customs debt on exportation) which apply under the provisions in force to goods liable to such duties'.

14 According to Article 2(1)(c) and (d) of Regulation No 2144/87, 'a customs debt on importation shall be incurred by:

...

(c) the removal of goods liable to import duties from the customs supervision involved in the temporary storage of the goods or their being placed under a customs procedure which involves customs supervision;

(d) the non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or non-compliance with a condition to which the placing of the goods under that procedure is subject, unless it is established that these failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.'

15 Article 3(c) and (d) of Regulation No 2144/87 provides:

'The moment when a customs debt on importation is incurred shall be deemed to be:

...

(c) in the cases referred to in Article 2(1)(c), the moment when the goods are removed from customs supervision;

(d) in the cases referred to in Article 2(1)(d), either the moment when the obligation, non-fulfilment of which causes the customs debt to be incurred, ceases to be met, or the moment when the goods were placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure was not in fact fulfilled;

...'

16 Finally, under Article 8(1) of Regulation No 2144/87:

'Without prejudice to the provisions in force concerning the withdrawal of action to recover the amount of a customs debt in the event of the time bar for that debt having lapsed, and also concerning the non-recovery of such amounts due to the establishment by judicial process of the insolvency of the debtor, a customs debt shall be extinguished:

(a) by payment of the amount of the import or export duties payable on the goods in question or, where appropriate, by remission of that amount pursuant to the Community provisions in force;

(b) by confiscation of the goods. ...'

The rules on the determination of the persons liable for payment of a customs debt

17 Article 4 of Council Regulation (EEC) No 1031/88 of 18 April 1988 determining the persons liable for payment of a customs debt (OJ 1988 L 102, p. 5) provides:

'1. Where a customs debt has been incurred pursuant to Article 2(1)(c) of Regulation (EEC) No 2144/87, the person who removed the goods from customs supervision shall be liable for payment of such debt.

Under the provisions in force in the Member States, the following shall also be jointly and severally liable for payment of such debt:

(a) any persons who participated in the removal of the goods from customs supervision and any persons who acquired or held them;

(b) any other persons who are liable by reason of such removal.

2. The person required to fulfil, in respect of goods liable to import duties, the obligations arising from their temporary storage, or from the use of the customs procedure under which they have been placed, shall also be jointly and severally liable for payment of the customs debt.'

18 Article 5 of Regulation No 1031/88 provides:

'Where a customs debt has been incurred pursuant to Article 2(1)(d) of Regulation (EEC) No 2144/87, the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed or to comply with the conditions to which the placing of the goods under that procedure is subject, shall be liable for payment of such debt.'

The rules on repayment or remission of import or export duties

19 Article 1(2)(c) and (d) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986 (OJ 1986 L 286, p. 1) (hereinafter referred to as 'Regulation No 1430/79') provides:

'For the purposes of this regulation:

...

(c) "repayment" means the total or partial refund of import or export duties which have been paid;

(d) "remission" means the complete or partial waiving of import or export duties which have been entered in the accounts of the authority responsible for their collection but which have not yet been paid.'

20 Article 2(1) of Regulation No 1430/79 provides:

'Import duties shall be repaid or remitted in so far as the competent authorities are satisfied that the amount of such duties entered in the accounts:

— relates to goods in respect of which a customs debt has either not arisen or has been settled other than by payment or prescription,

— exceeds for any reason the amount lawfully payable.'

21 Finally, in accordance with Article 13(1) of the same regulation:

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

The situations in which the first subparagraph may be applied, and the detailed procedural arrangements to be followed for this purpose, shall be determined in accordance with the procedure laid down in Article 25. Repayment or remission may be made subject to special conditions.'

National legal background

22 Article 10(1) of the Tabaksteuergesetz 1980 (Law concerning Excise Duties on Tobacco, of 13 December 1979, BGBl. 1979 I, 2118, in the version which applied at the time of the facts in the main proceedings; 'the TabStG') provided:

'Where tobacco products or cigarette paper are imported into the territory in which the tax is levied, the provisions for customs duties shall apply mutatis mutandis to the incurrence of tax and the date which is relevant for its assessment, to the identity of the person liable to pay the tax, personal liability, additional tax in the event of failure to comply with tax rules, the taxation procedure, and, where the tax is not paid through the use of revenue stamps, to the time of payment, deferment of payment, remission and repayment. This shall apply even where customs duties are not to be levied.'

The dispute in the main proceedings and the questions referred

23 On 9 July 1992, Rothmans Manufacturing BV ('Rothmans'), a company established in Zevenaar (Netherlands), on the instructions of a Swiss company in the group to which it also belongs, arranged for a consignment of 11 000 000

'Golden American' brand cigarettes to be cleared under the external Community transit procedure. The time-limit within which the goods had to be presented to the customs authorities again was fixed by the office of departure — the Zevenaar customs office — at 16 July 1992. The transit document issued on that occasion did not contain any information regarding the nationality or identity of the means of transportation. The firm in St Petersburg (Russia), referred to in that document as the consignee of the goods, was not consistent with the corresponding information on the delivery note and the invoice.

24 According to information provided by the driver of the lorry on which the cigarettes were transported, the customs and transport documents were taken from him, and returned, three times during transport. He was not, however, able to indicate whether those documents had been exchanged or modified during those temporary withdrawals which were carried out, according to him, by East Europeans.

25 On 16 July 1992, the lorry was taken with its trailer to the forwarding agency's yard, where it was opened by the driver with the aid of bolt cutters borrowed from an employee of that agency, then partially unloaded. The content of the cargo was then randomly sampled. The sampling revealed that all boxes contained cigarettes without revenue stamps, which led to the arrest of the driver and his mate. Customs officers, who had initially been observing the unloading incognito, carried out a body search of the driver, in the course of which they discovered a torn-off Netherlands lead customs seal. They then seized the lorry and its load with a view to subsequent confiscation and later destroyed the cigarettes.

26 The order for reference shows that the arrest of the smuggling ring was made possible through its having been infiltrated by a customs investigation officer. The latter had himself been offered for sale, through an intermediary for unidentified

East European sellers, a container full of 'Golden American' cigarettes, intended for export to Poland and said not to bear any revenue stamps. Payment and delivery arrangements were agreed at a subsequent meeting between the undercover agent and the seller, during which it was agreed that the cigarettes were to be delivered on 16 July 1992 on the premises of a specified forwarding agency in Nettetal-Kaldenkirchen (Germany). At that meeting, on the request of the agent, the seller had shown him from a distance a trailer registered in Poland which was said to contain the cigarettes. Not having been allowed to approach the trailer, however, the agent had not been able to see the customs seals.

27 Considering, in those circumstances, that the breaking of the seals and subsequent unloading of the cigarettes from the lorry constituted removal of the goods from customs supervision, the Hauptzollamt, by tax assessment of 7 August 1992, claimed from Rothmans as 'principal' pursuant to Paragraph 10(1) of the TabStG, the sum of DEM 1 436 776 in excise duty on tobacco.

28 On 24 November 1992, Rothmans applied to the Hauptzollamt for remission of those duties, pleading, in particular, the existence of a 'special situation' within the meaning of Article 13(1) of Regulation No 1430/79. That application was rejected by a decision of the Hauptzollamt of 14 January 1993, amended by a decision of 4 May 1993 issued following a complaint by Rothmans. The latter then brought an action before the Finanzgericht Düsseldorf (Germany) for repayment of the excise duty levied in the meantime by the Hauptzollamt, but that action was also rejected on the ground that Regulation No 1430/79, to which Paragraph 10(1) of the TabStG made reference, did not confer any right to repayment on Rothmans.

29 In that respect, the Finanzgericht held, first, that Article 2(1) of Regulation No 1430/79 could not be relied on by Rothmans, since a customs debt had been incurred by the removal of goods in transit from customs supervision, arising in

this case from the mere temporary removal of the transit and transport documents. It went on to hold that the customs debt was not extinguished following the confiscation of the cigarettes by the customs services, since, on that point, Paragraph 10(1) of the TabStG did not refer to the corresponding Community provisions on the extinction of the customs debt.

30 Nor, in the view of the Finanzgericht, could Rothmans rely on Article 13 of Regulation No 1430/79, since the conduct of the persons entrusted by Rothmans with the task of carrying out the Community transit operation revealed, at the very least, the existence of deception which ruled out remission or repayment of duties paid. Even if no such deception were found to exist, the conditions for remission or repayment of import duties would still not have been met in this case, since neither the weaknesses of the Community transit system nor the intervention of the undercover agent constituted special situations within the meaning of Article 13. According to the Finanzgericht, there was no relation between the incurring of the customs debt following the removal of the transit documents and the activities of the undercover agent.

31 Considering in those circumstances that the Finanzgericht Düsseldorf had misinterpreted the scope of Regulation No 1430/79, Rothmans — which was succeeded by BAT, during the proceedings, on 1 January 2000 — appealed on a point of law to the Bundesfinanzhof, making essentially two arguments.

32 Concerning, first, Article 2 of Regulation No 1430/79, BAT argues, first, that the temporary removal of transit documents, the breaking of the seals and the subsequent unloading of the goods do not constitute removal of those goods from customs supervision, since, in the latter two cases, customs officers uninterruptedly observed the carrying out of the operation. BAT further argues that, even if a customs debt had been incurred by reason of the happening of one of the events

referred to above, there should in any event be repayment of the duties paid, since Paragraph 10(1) of the TabStG expressly referred to the Community provisions on the remission and repayment of customs duties and because those latter provisions — particularly the first indent of Article 2(1) of Regulation No 1430/79 — provide for repayment or remission of import duties where the customs debt is extinguished otherwise than by payment or prescription. In BAT's submission, that is precisely the case here, since the cigarettes were confiscated, and confiscation is one of the ways in which the customs debt can be extinguished.

33 Concerning, secondly, Article 13 of Regulation No 1430/79, BAT argues that the presence and the conduct of the customs officers in this case, the confiscation of the cigarettes and the impossibility of passing the tax due on to third parties undeniably constitute special circumstances for the purposes of that provision, justifying repayment of duties paid. Such repayment is excluded only if the party concerned has itself used deception, BAT submits, and in this case no deception can be directly attributed to it. For that reason, and in the absence of a Community or national principle of vicarious liability, the Hauptzollamt should therefore repay the duties paid.

34 Whilst the Bundesfinanzhof rejects BAT's argument that a reference for a preliminary ruling would be pointless on account of the simple fact of the customs debt being extinguished following confiscation of the cigarettes by customs, since, in its view, Paragraph 10(1) of the TabStG does not refer to the Community provisions on the extinction of the customs debt, it nevertheless, in its order for reference, has the same questions as BAT as to whether, in this case, the conditions for incurring a customs debt are satisfied and as to whether there might not be special circumstances justifying repayment of duties.

35 Concerning, first, the Finanzgericht's view that the temporary removal of transport and transit documents constitutes 'a removal of goods from customs supervision', the Bundesfinanzhof notes that that latter concept has been defined by the Court of Justice, in paragraph 47 of its judgment in Case C-66/99 *Wandel* [2001] ECR I-873 as 'any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from monitoring them'. In this case, the temporary removal of the transit document did not have any impact on the goods themselves and did not affect the ability of the customs authorities to identify them, since those authorities did not at any time demand presentation of the transit document or establish that that document could not have been presented to them, on their request, without considerable delay.

36 Concerning, next, the breaking of the seals attached by the Netherlands customs and the subsequent unloading of the goods in the yard of the forwarding agency, the Bundesfinanzhof agrees with the Finanzgericht that such events do, in principle, constitute a removal of goods from customs supervision. It doubts, however, whether such a classification can be upheld in circumstances such as those at issue in the main proceedings. In the first place, the operation took place after a meeting arranged by the smugglers with an undercover customs agent and, secondly, it was continuously observed by customs officers. The customs authorities were therefore able at all times to put their hands on the goods, which, moreover, is what actually happened, with the seizure of the cigarettes followed by their destruction.

37 Finally, should it be held that a customs debt was in fact incurred following the happening of one of the events referred to above, the Bundesfinanzhof considers, unlike the Finanzgericht, that there are special circumstances in this case which justify repayment of the duties paid by BAT. In the first place, the infringement of the Community transit system was provoked by the activities of the undercover agent, with the result that the principal found itself, in accordance with the case-law of the Court — and, in particular, the judgments in Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041 and Case C-61/98 *De Haan* [1999] ECR I-5003 — in

an exceptional situation as compared with other operators engaged in the same business. The findings of the Finanzgericht also showed that BAT itself had not committed any fault or shown any obvious negligence, only the persons who carried out the carriage on its behalf being possibly guilty of blameworthy conduct.

38 Considering, in those circumstances, that resolution of the dispute before it depended on an interpretation of Community law, the Bundesfinanzhof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Are goods which have been cleared for Community transit removed from customs supervision if the transit document T 1 is temporarily removed from the consignment?

(2) If the Court answers Question 1 in the negative:

Have goods cleared for Community transit been removed from customs supervision if the customs seal affixed to ensure their identification was opened and the goods were partially unloaded, without the consignment first being duly produced for customs, even though the operation was arranged with the persons in question by customs investigation officers operating incognito and observed in every detail by those officers?

(3) If the Court answers one of Questions 1 and 2 in the affirmative:

Do special circumstances exist within the meaning of Article 13 of Regulation No 1430/79 if a customs investigation officer acting undercover has provoked infringements of the Community transit procedure? Does the deception or obviously negligent conduct of persons used by the principal in fulfilling the obligations assumed by him under the Community transit procedure preclude repayment to him of the duties incurred by the removal from customs supervision of goods cleared for Community transit?'

The admissibility of the questions referred

39 Given that the dispute in the main proceedings concerns the repayment of excise duties due under national legislation alone, it needs to be examined at the outset whether the questions referred, which concern Community customs rules, are admissible.

40 It is sufficient to recall in that respect that, where the Court has dealt in the past with cases in which the Community rules to be interpreted applied only by virtue of a reference made by domestic law, the Court has consistently held that where, in relation to purely internal situations, domestic legislation adopts solutions which are consistent with those adopted in Community law in order, in particular, to ensure a single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, to that effect, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 37; Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28; and Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraph 34).

41 In this case, domestic legislation has indisputably aligned itself, for the resolution of internal situations, with the solutions used in Community law, since the TabStG has made a complete reference to Community law as regards both the conditions in which a customs debt is incurred and the provisions concerning its remission and repayment. This finding is not affected by the fact that that legislation did not make such a reference to Community law in relation to the conditions in which a customs debt is extinguished.

42 In those circumstances, the questions referred are admissible.

Question 1

43 By its first question, the referring court essentially asks whether goods placed under the Community external transit system are removed from customs supervision within the meaning of Article 2(1)(c) of Regulation No 2144/87 in the case where the T 1 transit document for those goods is temporarily removed, particularly where such removal has not had any consequences for the goods themselves and has not affected the ability of the customs authorities to identify them, those authorities having neither demanded the transit document in question nor established that it could not have been presented to them, at their request, without considerable delay.

44 In BAT's submission, this question must be answered in the negative, since temporary removal of the transit document does not give rise to unlawful handling of the goods being carried or prevent them from being produced once again at the office of destination and being examined by that office.

45 The Commission argues, on the other hand, that such temporary removal of the transit and transport documents does constitute a removal of the goods concerned from customs supervision, since, contrary to the requirements of, in particular, Articles 12(6), 19(1) and 20 of Regulation No 222/77, those documents cannot be presented at the first request of the competent customs authorities. Apart from the particular hypothesis referred to in Article 18(4) of that regulation, customs control cannot therefore be effective unless customs officers are able, at any time during the transit procedure, to check simultaneously the customs sealing and the transit and transport documents.

46 The Court notes, by way of preliminary observation, that, whereas the Community legislature has included amongst the scenarios capable of giving rise to a customs debt on importation the removal of goods from customs supervision which is involved where the goods are temporarily stored or placed under a customs procedure which involves such supervision (see Article 2(1)(c) of Regulation No 2144/87), it has not defined that concept of removal or listed the conditions the non-observance of which will in any event cause a customs debt to be incurred.

47 When dealing with cases concerning goods placed under the Community external transit system, on the one hand, or goods placed under the customs warehousing system, on the other, the Court has held that that concept of removal from customs supervision should be interpreted as covering any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Community customs legislation (*Wandel*, paragraph 47; Case C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 55; Case C-337/01 *Hamann International* [2004] ECR I-1791, paragraph 31).

48 Having regard to that case-law, it is necessary to examine the objectives pursued by the Community system of external transit and, more particularly, the role played in that context by the T 1 transit document, in order to assess whether or not the removal of the latter from the goods to which it relates affects the monitoring abilities of the customs authorities.

49 It should be noted in that respect that, as is shown, in particular, by the fifth and sixth recitals in the preamble to Regulation No 222/77, the Community external transit system is a system designed to increase the fluidity of movements of goods within the Community by allowing carriage of those goods from the place of entry into the Community to their destination or, in the case of passage through the Community, to the customs office at the point of exit, without renewed customs formalities when the goods cross from one Member State to another.

50 To that end, Regulation No 222/77 provides, inter alia, for the lodging with the office of departure of a declaration signed by the person applying to carry out the transit operation in question or his authorised representative. That declaration is formally registered by that office, which prescribes the period within which the goods must be presented once again to customs and takes the identification measures which it considers necessary (see, respectively, Articles 12(1) and (4) and 17(1) of Regulation No 222/77).

51 Articles 19(1) and 20 of Regulation No 222/77 stipulate, in addition, that carriage of goods under the Community external transit system is to be effected under cover of copies of the T 1 document issued by the office of departure to the principal or his representative, who are required, in each Member State, to present those copies on any requisition by the customs service.

52 In the light of those provisions — and of the wording of Article 13(a) of Regulation No 222/77, whereby the principal is required, amongst other things, to present the goods once again, intact, at the office of destination — the T 1 transit document under cover of which carriage of goods under the Community external transit system is effected undeniably plays an essential role in the proper functioning of that system. Thus a removal of that document, even if only temporary, is likely to undermine the very objectives of that system since, contrary to the requirements of Article 20 of Regulation No 222/77, it prevents the presentation of that document on any possible requisition by the customs service. Such removal also complicates the identification both of the goods which are subject to the transit procedure and of the customs regime applicable to them.

53 In such circumstances, the temporary removal of the T 1 transit document from the goods to which it relates must be characterised as a 'removal' of those goods from customs supervision. In accordance with the interpretation given by the Court in its judgments in *Wandel*, *Liberexim* and *Hamann International*, such removal does constitute an act which has the effect of preventing the competent customs authority, even if only temporarily, from having access to goods under customs supervision and carrying out the controls prescribed by Community customs legislation.

54 Concerning, moreover, the observation of the referring court that, in this case, the removal of the transit document did not have any material consequence on the ability of the customs authorities to identify the goods, since they did not actually demand presentation of that document at any time or establish that it could not have been presented to them without considerable delay, it is sufficient to note that, in accordance with consistent Community case-law, removal of goods from customs supervision presupposes only that certain objective conditions are met, such as absence of the goods from the approved place of storage at the time when the customs authorities intend to carry out an examination of them (*Wandel*, paragraph 48; *Liberexim*, paragraph 60).

55 As the Advocate General has pointed out in point 30 of his Opinion, it is therefore sufficient, for there to be 'removal from customs supervision', for the goods in question to have been objectively removed from possible controls, whether or not such controls have actually been carried out by the competent authority.

56 In the light of the above considerations, the answer to the first question must be that, in so far as the temporary removal of the T 1 transit document from the goods to which it relates prevents the presentation of that document at any possible requisition by the customs service, such a removal constitutes a removal of those goods from customs supervision within the meaning of Article 2(1)(c) of Regulation No 2144/87 even if the customs authorities have not demanded presentation of the document or established that it could not have been presented to them without considerable delay.

Question 2

57 Since the second question was raised only in the event of the first question being answered in the negative, there is no need to provide an answer.

The first part of Question 3

58 In the first part of its third question, the referring court essentially asks whether the fact that the infringements of the Community transit system originate in the conduct of an undercover agent belonging to the customs services constitutes a special situation within the meaning of Article 13(1) of Regulation No 1430/79 which may, in appropriate cases, justify the remission or repayment of the duties paid by the principal.

59 BAT argues that this question should be answered in the affirmative, since, in this case, the conduct of agents of the customs investigation service went far beyond the limits of the normal commercial risk which an economic operator has to bear. It argues in that respect that, whilst the breaking of the seals and the subsequent unloading of the goods were doubtless inevitable for reasons connected with the effectiveness of the investigation, the customs administration was nevertheless required to take the necessary measures to prevent any possible damage which might be caused to it. Since no such measures were taken in this case, and BAT did not itself participate in the infringement, BAT found itself, as principal, in an exceptional situation as compared with other operators engaged in the same business, with the result that, in accordance with the case-law of the Court, the duties it paid should be refunded.

60 The Commission argues, on the other hand, that such repayment is justified only if the removal of goods from customs supervision, and the incurring of the customs debt accordingly, arises merely from the breaking of the seals and the subsequent unloading of the goods under the observation of officials of the customs investigation service. In this case, however, there is much evidence in the documents before the Court to suggest that the infringement of the Community transit system took place before the seals were broken, in that the principal itself produced cigarettes and placed them under the Community external transit system in unusual circumstances, following instructions received from a Swiss company belonging to the same group as itself. Therefore, the Commission maintains, the referring court, which has to rule as to the possible existence of a special situation justifying the repayment of duties paid by BAT, should first assess whether the transit procedure at issue in the main proceedings originates solely in the action of the undercover customs agent or in the pre-existing intention of BAT to sell cigarettes without in any way being concerned as to the legality of the transit operation concerned.

61 In this connection, it should be noted that, in accordance with the first subparagraph of Article 13(1) of Regulation No 1430/79, import duties may be

repaid or remitted in situations resulting from special circumstances in which no deception or obvious negligence may be attributed to the person concerned.

62 As the Court has emphasised a number of times, Article 13(1) of Regulation No 1430/79 constitutes a general equitable provision designed to cover situations other than those which arose most often in practice and for which special provision could be made when the regulation was adopted (see, in particular, Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303, paragraph 10, and Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 41).

63 The Court has held that that article is intended to apply where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which he normally would not have incurred (Case 58/86 *Coopérative agricole d'approvisionnement des Avirons* [1987] ECR 1525, paragraph 22).

64 In a case concerning the omission of customs authorities to inform a principal of the existence of a risk of fraud in which the latter was not involved, but which was capable of causing him to incur a customs debt, the Court held that, whilst Community law does not impose on customs authorities which have been informed of a possible fraud in connection with external transit arrangements any obligation to warn a principal that he could incur liability for customs duty as a result of the fraud, the demands of an investigation conducted by the customs authorities or the police may nevertheless constitute, in the absence of any deception or negligence on the part of the person liable, and where that person has not been informed that the investigation is being carried out, a special situation within the meaning of Article 13(1) of Regulation No 1430/79. Although it may be legitimate for the national authorities, in order better to dismantle a network, identify perpetrators of fraud and obtain or consolidate evidence, deliberately to

allow offences or irregularities to be committed, to place on the person liable the burden of the customs debt arising from the choices made in connection with the prosecution of offences is inimical to the objective of fairness which underlies the relevant Community rules in that it puts that person in an exceptional situation in comparison with other operators engaged in the same business (see, to that effect, *De Haan*, paragraphs 36 and 53).

65 Such a conclusion applies even more strongly where the infringements of the Community transit system have been committed or provoked by the customs authorities themselves. Where the removal of goods from the customs supervision implied by their being placed under the Community external transit system is the result of the conduct of an undercover agent belonging to the customs investigation services, and no deception or obvious negligence may be attributed to the principal, which is a matter for the national court to verify, the principal is likewise in an exceptional situation as compared with other operators carrying on the same business, which may, in appropriate cases, justify the remission or repayment of duties paid.

66 In the light of the considerations above, the answer to the first part of the third question must therefore be that the fact that infringements of the Community transit system originate in the conduct of an undercover agent belonging to the customs services constitutes a special situation within the meaning of Article 13(1) of Regulation No 1430/79, which may, in appropriate cases, justify the remission or repayment of duties paid by the principal, provided no deception or obvious negligence may be attributed to him.

The second part of Question 3

67 In the second part of the third question, asked in the event that the intervention of an undercover agent of the customs services may be regarded as constituting a

special situation within the meaning of Article 13(1) of Regulation No 1430/79, the national court asks, finally, whether the repayment of duties envisaged by that provision is excluded where there is deception or obvious negligence not on the part of the principal himself but on the part of the persons he has engaged to carry out his obligations contracted under the Community external transit system.

68 It should be noted in that respect that, in accordance with the case-law of the Court, and the *De Haan* judgment in particular, the fact that deception or obvious negligence has been committed by persons that the principal has engaged to carry out his obligations contracted under the Community external transit system does not in itself exclude the repayment of duties paid by the principal. In *De Haan*, the Court held that the conditions justifying repayment of duties paid by the principal, to whom no deception or obvious negligence was attributable, were met, notwithstanding that a member of the principal's staff appeared to be involved in the irregularities committed during the transit procedure.

69 A similar conclusion must, a fortiori, be drawn where irregularities are committed by persons outside the principal's undertaking, whom the principal has engaged to carry out his obligations arising from the placing of the goods under the Community external transit system. In principle, therefore, such irregularities do not exclude the repayment of duties paid by the principal where no deception or obvious negligence is attributable to him.

70 In this case, however, the information supplied by the referring court does not allow it to be concluded with certainty that that latter condition has been fulfilled, since, as noted, in particular, in paragraph 23 of this judgment, the transit

document issued by the office of departure gave no indication as to the nationality or identity of the means of transportation to be used, while the company mentioned in that document as the consignee of the goods did not correspond with the information either on the delivery note or on the invoice.

71 In the light of those factors, it is therefore for the national court to assess whether deception or obvious negligence may be attributed to the principal, taking account of its obligations under the relevant Community rules, and in particular under Article 13(a) of Regulation No 222/77 which requires it to produce the goods intact at the office of destination within the prescribed time-limit and with due observance of the measures adopted by the competent authorities to ensure identification, and taking account also of the professional experience of the principal, the degree of care with which it chose the persons to whom it entrusted the transport of the goods, and, where relevant, the diligence it showed when any irregularities were found.

72 In that context, particular attention should also be given to the nature of the goods transported, since, as the Court has already held, the cigarette market particularly lends itself to the development of unlawful trade (see Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 87).

73 In the light of the considerations above, the answer to the second part of the third question must be that deception or obvious negligence on the part of persons whom the principal has engaged to carry out obligations contracted under the Community external transit system does not, in itself, exclude repayment to the principal of duties incurred as a result of the removal of goods placed under that

system from customs supervision, provided no deception or obvious negligence is attributable to the principal.

Costs

74 The costs incurred by the Commission, which has 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 Bundesfinanzhof by order of 24 April 2001, hereby rules:

1. **In so far as the temporary removal of the T 1 transit document from the goods to which it relates prevents the presentation of that document at any**

possible requisition by the customs service, such a removal constitutes a removal of those goods from customs supervision within the meaning of Article 2(1)(c) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt even if the customs authorities have not demanded presentation of the document or established that it could not have been presented to them without considerable delay

2. The fact that infringements of the Community transit system originate in the conduct of an undercover agent belonging to the customs services constitutes a special situation within the meaning of Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986, which may, in appropriate cases, justify the remission or repayment of duties paid by the principal, provided no deception or obvious negligence may be attributed to him.

Deception or obvious negligence on the part of persons whom the principal has engaged to carry out obligations contracted under the Community external transit system does not, in itself, exclude repayment to the principal of duties incurred as a result of the removal of goods placed under that system from customs supervision, provided no deception or obvious negligence is attributable to the principal.

Timmermans La Pergola von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President