JUDGMENT OF THE COURT (Fourth Chamber)
8 March 1988 *

In Case 321/86

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

A. Töpfer & Co. GmbH, Hamburg,

and

Hauptzollamt (Principal Customs Office) **Hildesheim**

on the interpretation of Commission Regulation No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (Official Journal 1977, L 38, p. 20),

THE COURT (Fourth Chamber),

composed of: G. C. Rodríguez Iglesias, President of the Chamber), T. Koopmans and C. Kakouris, Judges,

Advocate General: J. Mischo
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of:

A. Töpfer & Co. GmbH by K. Landry, Rechtsanwalt, Hamburg,

Hauptzollamt Hildesheim by its director,

* Language of the Case: German.

the Commission of the European Communities by J. Sack, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 27 October 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 10 December 1987,

gives the following

Judgment

1 By an order of 25 November 1986, which was received at the Court on 19 December 1986, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Commission Regulation No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (Official Journal 1977, L 38, p. 20).

2 The dispute before the national court concerns the exportation by Töpfer, a company established in Hamburg, of a consignment of white sugar to Norway. Because that export took place without the issue of Control Copy T No 5 which Töpfer needed in order to obtain the export refund to which it was entitled, the company requested the Hauptzollamt Hildesheim, the customs office of departure for its sugar exports, to issue the necessary control copy retroactively. It claimed that a T No 5 form, completed by the undertaking itself, had been stamped and signed in the Danish customs office in Frederikshavn where the sugar was presented for export before being transported to Norway.

3 When the Hauptzollamt Hildesheim refused to comply with that request, Töpfer brought an action before the Finanzgericht, Hamburg. That court dismissed the action on the ground that retroactive issue of a control copy is only possible if all export formalities have been completed, which was not the case.

4 Töpfer appealed against that decision to the Bundesfinanzhof, relying on the Court's case-law, in particular the judgment of 6 October 1982 in Case 302/81 (*Eggers* v *Hauptzollamt Kassel* [1982] ECR 3443). It stated that according to that judgment customs authorities are required to issue Control Copy T No 5 retroactively where the failure to apply for or to issue the document when the goods were dispatched was beyond the control of the undertaking concerned and that undertaking can produce the supporting documents required for the issue of the control copy. In this case, the document was not issued because the driver of the lorry transporting the sugar failed to stop at a German customs office and presented himself directly to Danish customs.

5 The Bundesfinanzhof accepted that according to the case-law of the Court retroactive issue of the control copy must be considered permissible. However, it was uncertain whether such retroactive issue might not be conditional on the completion of dispatch or export formalities, apart from application for a control copy, which forms part of those formalities.

6 In order to resolve that issue the Bundesfinanzhof stayed the proceedings and submitted the following questions to the Court for a preliminary ruling:

'(1) In connection with the dispatch of goods for which export refunds are available on exportation, is the Community law in force in June 1979 and in particular Articles 10 and 12 of Commission Regulation (EEC) No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure to be interpreted to the effect that the retroactive issue of Control Copy T No 5 is dependent upon completion of the dispatch or export formalities?

(2) If the first question is answered in the affirmative: may the customs office of departure where the transit formalities (dispatch formalities) required by customs law were to be completed issue Control Copy T No 5 retroactively only if those formalities were completed at that office, or is it sufficient if the export formalities were completed at another customs office — even an office in another Member State?'

7 Reference is made to the Report for the Hearing for a fuller account of the legal background and the facts of the main proceedings and a summary of the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 It should first be observed that Commission Regulation (EEC) No 1209/75 of 3 May 1985 amending Regulation No 223/77 (Official Journal 1985, L 124, p. 19) adds an article 13 b to that latter regulation under which Control Copy T No 5 may be issued retroactively on condition, *inter alia*, that the person concerned furnishes proof that the control copy relates to the goods 'in respect of which the dispatch or export formalities were completed'. That provision was not yet applicable at the material time.

9 Furthermore, according to the judgment in Case 302/81 of 6 October 1982, on which the exporting undertaking relies, procedural flaws which are beyond the control of the person who should normally be able to obtain an advantage pursuant to Community provisions, such as an export refund, should not have unfavourable effects for that person.

10 In those circumstances, the essence of the first question submitted by the national court is whether outright omission to complete dispatch or export formalities may be considered to be a 'procedural flaw' within the meaning of the abovementioned case-law.

11 From the file on the case in the main proceedings, submitted by the national court, it is clear that:

(i) no dispatch formalities using forms T 1 or T No 5 were completed at the customs office of departure, the Hauptzollamt Hildesheim;

(ii) the advance fixing certificate for the export of the sugar was not stamped by that office after verification;

(iii) the transit of the goods through the customs post on the Danish-German border indicated in the T 1 form, namely Padborg, was not indicated;

(iv) the T 1 form, duly completed by the exporting undertaking, was not checked and stamped by the customs office of destination under the Community transit procedure, namely Frederikshavn;

(v) that customs office merely stamped Form T No 5 to indicate that the quantity of sugar indicated in that form had left Community territory.

12 Articles 10 and 12 of Regulation No 223/77, interpretation of which is requested, provide that proof that the conditions prescribed by a Community measure as to the destination of goods have been complied with is to be furnished by the production of Control Copy T No 5, which is issued, when the Community transit procedure is used, by the office of departure.

13 Under Commission Regulation No 192/75 of 17 January 1975 laying down detailed rules for the application of export refunds in respect of agricultural products (Official Journal 1975, L 25, p. 1), the same proof must be furnished for the grant of export refunds for white sugar. The purpose of that system, as the preamble to that regulation indicates, is to ensure that products leaving the Community are in fact those in respect of which customs export formalities were completed at the office of departure.

14 If, as in this case, no formalities have been completed at the office of departure, it is not possible to verify by any later checks carried out at the office of destination that the goods exported are in fact those for which the export refund has been fixed in advance.

15 It follows that the completion of formalities at the office of departure plays a vital role in the system for granting export refunds and cannot be replaced by checks carried out at the office of destination. Accordingly, failure to complete those formalities may not be regarded as a mere procedural flaw.

16 The answer to the first question must therefore be that the provisions applicable in June 1979 to the dispatch under the Community transit procedure of goods for which export refunds are available, in particular Articles 10 and 12 of Regulation No 223/77, must be interpreted as meaning that Control Copy T No 5 cannot be issued retroactively if the dispatch or export formalities have not been completed.

17 In its second question the Bundesfinanzhof goes on to ask whether Control Copy T No 5 may be issued retroactively if export formalities were completed not at the office of departure but at another customs office, in particular at an office in another Member State.

18 It follows from the considerations set out above in connection with the first question that dispatch or export formalities completed at the office of departure may not be replaced by checks carried out at the office of destination or at any other office in another Member State, and therefore the issue raised in the second question is resolved by the reply to the first.

Costs

19 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in reply to the questions submitted to it by the Bundesfinanzhof by order of 25 November 1986, hereby rules:

The provisions applicable in June 1979 to the dispatch under the Community transit procedure of goods for which export refunds are available, in particular Articles 10 and 12 of Regulation No 223/77 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure, must be interpreted as meaning that Control Copy T No 5 cannot be issued retroactively if the dispatch or export formalities have not been completed.

Rodríguez Iglesias Koopmans Kakouris

Delivered in open court in Luxembourg on 8 March 1988.

J.-G. Giraud
Registrar

G. C. Rodríguez Iglesias
President of the Fourth Chamber