JUDGMENT OF THE COURT (Second Chamber)

22 February 2001 *

In Case C-187/99,

REFERENCE to the Court under Article 234 EC by the Supremo Tribunal Administrativo (Portugal) for a preliminary ruling in the proceedings pending before that court between

Fazenda Pública

and

Fábrica de Queijo Eru Portuguesa L^da^,

intervener

Ministério Público,

on the interpretation of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements (OJ 1985 L 188, p. 1) and, in particular, Article 11 thereof,

* Language of the case: Portuguese.

THE COURT (Second Chamber),

composed of: V. Skouris, President of the Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Fábrica de Queijo Eru Portuguesa L^{da}, by Á. Caneira, advogado,

— the Portuguese Government, by L. Fernandes, Â. Seiça Neves and T. Missionário, acting as Agents,

— the French Government, by K. Rispal-Bellanger and C. Vasak, acting as Agents,

— Commission of the European Communities, by R. Tricot and M. Afonso, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2000,

gives the following

Judgment

1 By judgment of 28 April 1999, received at the Court on 20 May 1999, the Supremo Tribunal Administrativo (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements (OJ 1985 L 188, p. 1) and, in particular, Article 11 thereof.

2 Those questions have been raised in proceedings between the cheese-making company Fábrica de Queijo Eru Portuguesa L^{da} ('Eru Portuguesa') and Fazenda Pública (the Treasury) concerning the rate of yield fixed under the inward processing relief arrangements for turning cheese imported by Eru Portuguesa into grated cheese.

The legislative framework

3 Article 1(2) and (3) of Regulation No 1999/85 provides:

'2. Without prejudice to Article 2, inward processing relief arrangements shall, under the conditions laid down by this Regulation, enable the following goods to be used in the customs territory of the Community in one or more processing operations:

(a) non-Community goods intended for re-export outside the customs territory of the Community in the form of compensating products, these goods not being subject to import duties;

(b) goods released for free circulation with refund or remission of the import duties levied on such goods if they are re-exported outside the customs territory of the Community in the form of compensating products.

3. For the purposes of this Regulation:

...

(h) "processing operations" means:

— the working of goods, including fitting or assembling them or adapting them to other goods,

— the processing of goods,

— the repair of goods, including their restoration,

— the use of certain goods, defined in accordance with the procedure laid down in Article 31(2) and (3), which are not to be found in the compensating products, but which allow or facilitate the production of those products, even if they are entirely or partially used up in the process;

(i) "compensating products" means all products resulting from processing operations;

...

(p) "rate of yield" means the quantity or percentage of compensating products obtained from the processing of a fixed quantity of import goods.'

4 Article 3 of Regulation No 1999/85, which is found in Title II thereof entitled 'Issue of the authorisation', provides:

'1. The use of inward processing relief arrangements shall be conditional on the issue, by the customs authority of the Member State in which the processing operations are to be carried out, of an inward processing authorisation, hereinafter referred to as "authorisation".

2. The authorisation shall be issued at the request of the person who carries out processing operations or who arranges for them to be carried out.

This person shall supply, with his application, the information required for issue for the authorisation.

3. The authorisation may cover one or more processing operations as the case may be.'

5 Articles 11 and 12 of Regulation No 1999/85, which also fall within Title II, are worded as follows:

'*Article 11*

1. The conditions under which the arrangements are used shall be set out in the authorisation.

2. The holder of the authorisation is required to notify the customs authority of all factors arising after the issue of the authorisation which are likely to influence its continuation or contents.

3. Where the circumstances under which the authorisation was issued are found to have changed, the customs authority shall amend the authorisation accordingly.

Article 12

Cases where the authorisation is to be revoked and cases where it is decided that it is null and void, as well as the consequences deriving therefrom, shall be determined in accordance with the procedure laid down in Article 31(2) and (3).'

6 Articles 15 and 17 of Regulation No 1999/85, which form part of Title III thereof entitled 'Functioning of the arrangements', provide:

'*Article 15*

1. Without prejudice to paragraph 2, the customs authority shall fix either the rate of yield of the operation or, where necessary, the method of determining such rate. This rate shall be determined on the basis of the actual circumstances in which the processing operation is, or is to be, carried out.

...

Article 17

The customs authority may take any measures of supervision or control which it considers necessary to ensure that the Regulation is implemented correctly by the holder of the authorisation or by the operator where this is a different person.'

7 Annex II to Council Regulation (EEC) No 3677/86 of 24 November 1986 laying down provisions for the implementation of Regulation (EEC) No 1999/85 on inward processing relief arrangements (OJ 1986 L 351, p. 1) contains both a model application for authorisation for inward processing and a model inward processing authorisation. Both models include an entry No 6, entitled 'Rate of yield' and 'Rate of yield or method by which the rate will be established' respectively. The footnotes to the entries state, in the case of the model

application for authorisation: 'Indicate the expected rate of yield or suggest how such rate should be established' and, in the case of the model authorisation: 'State the rate of yield or indicate how the customs authority empowered to check on the proper conduct of the processing operations is to determine the rate of yield. ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 The facts in the main proceedings, as set out by the national court in the judgment making the reference, may be summarised as follows.

9 In March and April 1988, Eru Portuguesa imported several drums and cases of cheese intended for processing. The cheese was imported under the inward processing arrangements under an authorisation issued by the Portuguese Customs authorities. That authorisation had fixed the rate of yield for turning the imported cheese into grated cheese at 97%, which was the rate which Eru Portuguesa had applied for.

10 Following an inspection carried out at Eru Portuguesa's premises by direction of the Secretary of State for Fiscal Matters of 31 August 1988, it was found that the rate of waste for that kind of cheese was only 1%, giving a rate of yield of 99%, and not 97% as stated in the authorisation. The inspection was completed on 12 June 1990.

11 With effect from 30 November 1988, Eru Portuguesa reduced the value of the grated cheese on the basis that the rate of waste was 1%. In addition, in its later applications for authorisation under the inward processing relief arrangements, it indicated a rate of yield of 99%, and a rate of waste of 1%, for grated cheese.

12 Following the determinations made at the time of the inspection, the customs authority calculated the duties due on the quantity of raw materials on the basis of a 2% over-declaration of waste and, in January 1992, it claimed payment of the duties from Eru Portuguesa.

13 Eru Portuguesa's action against the notice of assessment issued by the Chefe da Delegaçao Aduaneira do Jardim do Tabaco (competent customs authority) before the Tribunal Fiscal Aduaneiro (Customs Court), Lisbon, Portugal, was dismissed as unfounded. Eru Portuguesa then appealed to the Tribunal Tributário de Segunda Instância (Tax Court of Second Instance).

14 That court held that Article 11 of Regulation No 1999/85 regulates only the conditions on which the inward processing authorisation is issued and is not concerned with the rate of yield of the processing operation, which is connected with the functioning of the arrangements. From this it concluded that Article 11 does not entitle the customs authority unilaterally to alter the rate of yield fixed by it and that if the rate were to prove to be higher than that forecast, it could be increased only at the time of issue of a later authorisation. The court consequently held that the appeal was well founded and set aside the contested judgment and the disputed notice of assessment.

15 In the appeal which it brought before the Supremo Tribunal Administrativo against the judgment of the Tribunal Tributário de Segunda Instância, Fazenda Pública objected, in particular, to the court's interpretation of Article 11 of Regulation No 1999/85. In that regard, it submitted that Article 11 enables the customs authority to alter the rate of yield with immediate effect without waiting for a later authorisation where the circumstances under which the authorisation was issued are found to have changed.

16 In those circumstances, the Supremo Tribunal Administrativo decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 11 of Council Regulation (EEC) No 1999/85 of 16 July 1985 concerned with the conditions (obligations, rules) laid down in the document granting the beneficiary of the arrangements authorisation for the use (functioning) thereof?

2. Or, on the contrary, is it concerned with the conditions, requirements or bases for the issue of the inward processing authorisation?

3. Once the rate of yield has been fixed by the customs authority, may the latter unilaterally alter that rate on the ground that the holder of the authorisation, when making use of the arrangements, has in fact obtained a higher rate of yield than that initially envisaged and approved?

4. Do the principle of legal certainty and the rules on inward processing relief arrangements allow the competent customs authority unilaterally to alter the rate of yield fixed in the processing authorisation if it is proved that the said customs authority has been supervising and controlling the operation of the undertaking in question since the inception of the arrangements in Portugal (in 1986)?'

The first, second and third questions

17 By its first three questions, which it is appropriate to consider together, the national court is essentially seeking to ascertain whether Article 11 of Regulation No 1999/85 is to be interpreted as applying not only to the conditions or requirements for the issue of an authorisation under the inward processing relief arrangements but also to the conditions imposed by the authorisation on its holder for the use or functioning of those arrangements, and whether, consequently, the customs authority may unilaterally alter the rate of yield fixed by it at the time when the authorisation was issued where, while the arrangements are being used, the rate of yield obtained proves to be higher than the rate fixed in the authorisation.

18 It should be observed that Article 11(1) of Regulation No 1999/85 specifically provides for the conditions under which the arrangements are used to be set out in the authorisation.

19 Furthermore, by providing that the holder of the authorisation is required to notify the customs authority of all factors arising after the issue of the authorisation which are likely to influence its continuation or contents, Article 11(2) of Regulation No 1999/85 obliges the holder to inform the customs authority not only of any alterations concerning the conditions which must be fulfilled in order for the authorisation to be issued and retained, but also of any

alterations concerning the conditions fixed in the authorisation and under which the inward processing relief arrangements must operate.

20 As is clear from Article 15(1) of Regulation No 1999/85, those conditions include the rate of yield of the processing operation.

21 Furthermore, Article 15 also provides that the rate of yield is determined on the basis of the actual circumstances in which the processing operation is, or is to be, carried out.

22 It follows that, by providing that the customs authority is to amend the authorisation where the circumstances under which it was issued are found to have changed, Article 11(3) of Regulation No 1999/85 also applies to the conditions for use or functioning of the inward processing relief arrangements, including the rate of yield.

23 The above interpretation is also consistent with the objectives of the inward processing relief arrangements established by Regulation No 1999/85.

24 Thus, the Court of Justice has held that the inward processing relief arrangements were established so as not to put at a disadvantage internationally Community undertakings which use goods from non-member countries in order to manufacture products for export by giving them the possibility of acquiring such goods under the same conditions as undertakings from non-member

countries. Thus, that system allows goods imported from non-member countries to escape customs duties if they undergo certain working or processing operations in the Community and are then re-exported as compensating products outside the Community (Case C-437/93 *Hauptzollamt Heilbronn* v *Temic Telefunken* [1995] ECR I-1687, paragraphs 18 and 19).

25 Furthermore, it is clear from the fourth recital in the preamble to Regulation No 1999/85 that, in order to attain that objective while avoiding abuse of the system, it was necessary to lay down a set of rules constituting the inward processing relief arrangements.

26 That objective can be attained only if the Community undertakings benefiting from the inward processing relief arrangements in fact carry out the relevant export operations and do so in full compliance with the rules pertaining to those arrangements. As the French Government has rightly pointed out in its written observations, that would not be the case if, *inter alia*, the rate of yield for a processing operation did not correspond to the actual rate and if, in such circumstances, one part of the imports (in the present case, the part corresponding to the difference between the rate laid down and the actual rate) was not exported but was sold in the Community customs territory without import duty ever being paid on it.

27 Accordingly, the answer to the first three questions must be that Article 11 of Regulation No 1999/85 is to be interpreted as applying not only to the conditions or requirements for the issue of an authorisation under the inward processing relief arrangements but also to the conditions imposed by the authorisation on its holder for the use or functioning of those arrangements and that, consequently, the customs authority may unilaterally alter the rate of yield fixed by it at the time when the authorisation was issued where, while the arrangements are being used, the rate of yield proves to be higher than the rate fixed in the authorisation.

The fourth question

28 By its fourth question, the national court is essentially asking whether Regulation No 1999/85 or the principle of legal certainty precludes the customs authority from unilaterally altering the rate of yield fixed by it in the authorisation even where it is proved that the customs authority was supervising and controlling the the activities of the holder of the authorisation before the authorisation was issued.

29 It should be borne in mind, first, that the inward processing authorisation is issued at the request of the person who carries out processing operations or who arranges for them to be carried out. Under Article 3(2) of Regulation No 1999/85, that person is required to supply, with his application, all the information required for issue of the authorisation, including the rate of yield. In addition under Article 11(2) of the regulation the customs authority must be notified of all factors arising after the issue of the authorisation which are likely to influence its continuation or contents.

30 Second, under Article 17 of Regulation No 1999/85 the customs authority may take any measures of supervision or control which it considers necessary to ensure that the regulation is implemented correctly by the holder of the authorisation. Furthermore, as is clear from the answer to the first three questions, the customs authority may alter unilaterally the rate of yield fixed by it at the time when the authorisation was issued where, while the arrangements are being used, the rate of yield proves to be higher than the rate fixed in the authorisation.

31 Finally, Article 12 of Regulation No 1999/85 specifically prescribes the cases in which authorisation is revoked and those in which it is decided that it is null and void.

32 Accordingly, it is clear that the inward processing authorisation is issued only on the basis that its holder, when carrying out processing operations, observes the conditions to which grant of the authorisation was subject and that the customs authority may verify whether the conditions are being observed, since it is entitled to take any measures of supervision or control necessary for that purpose.

33 Therefore, the issue of the authorisation does not give rise, as regards the holder of the authorisation, to a legitimate expectation that the conditions set out in it will be retained where, while the arrangements are being used, those conditions are found to have changed.

34 That would also be the case if it were proved that before the issue of a new authorisation the customs authority, pursuant to Article 17 of Regulation No 1999/85, had taken measures of supervision or control *vis-à-vis* the applicant in order to check that the inward processing arrangements were operating correctly in respect of prior authorisations.

35 It is clear from the case-law of the Court that an economic operator is not entitled to expect that, when he has benefited from decisions of a national authority that do not comply with a clear and unequivocal rule of Community law, the same authority will adopt a further decision, or retain an existing decision unaltered, in breach of Community law (see, to that effect, Case C-325/96 *Fábrica de Queijo Eru Portuguesa* v *Sub-director Geral das Alfândegas* [1997] ECR I-7249, paragraph 22).

36 The answer to the fourth question must therefore be that neither Regulation No 1999/85 nor the principle of legal certainty precludes the customs authority from altering unilaterally a rate of yield fixed by it in the authorisation even if it is proved that the customs authority was supervising and controlling the activities of the holder of the authorisation before it was issued.

Costs

37 The costs incurred by the Portuguese and French Governments and by 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 (Second Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by judgment of 28 April 1999, hereby rules:

1. Article 11 of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements is to be interpreted as applying not only to the conditions or requirements for the issue of an authorisation under the inward processing relief arrangements but also to the conditions imposed by the authorisation on its holder for the use or functioning of those arrangements and, consequently, the customs authority may unilaterally alter the rate of yield fixed by it at the time when the authorisation was issued where, while the arrangements are being used, the rate of yield proves to be higher than the rate fixed in the authorisation.

2. Neither Regulation No 1999/85 nor the principle of legal certainty precludes the customs authority from altering unilaterally a rate of yield fixed by it in the authorisation even if it is proved that the customs authority was supervising and controlling the activities of the holder of the authorisation before it was issued.

Skouris Schintgen Colneric

Delivered in open court in Luxembourg on 22 February 2001.

R. Grass

Registrar

V. Skouris

President of the Second Chamber