JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
5 June 1996 *

In Case T-75/95,

Günzler Aluminium GmbH, a company governed by German law, having its registered office at Ostfildern, Germany, represented by Jürgen Strauß, Rechtsanwalt, 11 Uhlandstraße, Stuttgart,

applicant,

v

Commission of the European Communities, represented by Claudia Schmidt, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's decision of 14 November 1994, document K(911)3006 final, concerning remission of import duties, which is addressed to the Federal Republic of Germany,

* Language of the case: German.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: C. P. Briët, President, B. Vesterdorf and A. Potocki, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 April 1996,

gives the following

Judgment

Legal background

1 Article 13(1) 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 Article 1(6) of Council Regulation (EEC) No 3069/86 of 7 October 1986 amending Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties (OJ 1986 L 286, p. 1), provides that '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'.

2 Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1) provides that 'the competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned'.

Facts

3 On 22 May 1990, 8 June 1990 and 26 June 1991, the applicant imported aluminium alloy bars from the former Federal Republic of Yugoslavia. Under the relevant sales contracts, the customs duties were to be paid by the Yugoslav sellers. It was therefore agreed, *inter alia*, that the price would not be paid until the customs assessment notice had been obtained so that, if appropriate, the amount of duty paid could be deducted from the price.

4 After those imports had been declared by the applicant, the competent German customs office issued assessment notices on 25 May 1990, 11 June 1990 and 26 June 1991, exempting the imports from customs duty.

5 Those exemptions were granted, however, as a result of an error on the part of the German customs authorities. The preferential provisions for Yugoslavia were no longer in force at the material times, as indicated in the *Official Journal of the European Communities* ('the Official Journal') (see Commission Regulation (EEC) No 1280/90 of 15 May 1990 reimposing the levying of customs duties from 19 May to

31 December 1990 (OJ 1990 L 126, p. 22) and Commission Regulation (EEC) No 1347/91 of 23 May 1991 re-establishing the levying of customs duties from 27 May to 31 December 1991 (OJ 1991 L 129, p. 21)).

6 The customs office then failed to submit a report to the central office responsible for monitoring quotas and ceilings. As a result, it was not until March and August 1991 (as regards the 1990 and 1991 imports respectively), following a subsequent verification of the customs declarations, that the exemptions from customs duties were discovered to have been wrongly granted.

7 On 23 April and 30 June 1992, the competent principal customs office sent the applicant customs duty reassessment notices for an amount totalling DM 29 429.79.

8 When the applicant learned of the intention to proceed with post-clearance recovery of the customs duties, it attempted to contact its Yugoslav trading partners, but was unable to do so as a result of the turmoil caused by the civil war which had broken out in the meantime.

9 The applicant then appealed to the competent German customs authorities for the waiver of post-clearance recovery of the customs duties in accordance with Article 5(2) of Regulation No 1697/79. In the alternative, it sought remission of import duties under Article 13 of Regulation No 1430/79. In its appeal, the applicant also sought and obtained an extension of time to pay under national law.

10 On 2 May 1994, the German authorities asked the Commission to decide whether remission of import duties was justified on the basis of Article 13 of Regulation No 1430/79. That request was received by the Commission on 16 May 1994. After consulting a group of experts made up of representatives from all the Member States, the Commission addressed its decision of 14 November 1994 ('the contested decision') to the Federal Republic of Germany, finding that remission of import duties was not justified because the applicant could not plead ignorance of legal provisions published in the Official Journal.

11 The contested decision was notified to the applicant by letter of 27 December 1994, received on 29 December 1994.

Procedure and forms of order sought

12 The applicant accordingly brought the present action by application lodged at the Registry of the Court of First Instance on 3 March 1995.

13 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry. By letter of 15 March 1996, however, it requested the parties to answer certain questions in writing and to produce certain documents. The Commission and the applicant replied to the questions put to them and submitted the documents requested by letters dated 27 and 29 March 1996 respectively.

14 The parties presented oral argument and answered questions from the Court at the hearing on 18 April 1996.

15 The applicant claims that the Court should:

— annul the Commission's decision of 14 November 1994; and

— require the Commission to adopt a new decision concerning Germany's request of 2 May 1994 concerning the repayment or remission of import or export duties, in compliance with the legal position adopted by the Court.

16 The Commission contends that the Court should:

— dismiss the action as unfounded; and

— order the applicant to pay the costs.

Admissibility

The second head of claim — seeking an order requiring the Commission to adopt a new decision concerning Germany's request of 2 May 1994

17 In addition to its claim for annulment, the applicant asks the Court to require the Commission to adopt a new decision concerning Germany's request of 2 May 1994 concerning the remission of import duties.

18 It is settled law that in an action for annulment brought under Article 173 of the EC Treaty, the Community Court cannot, without encroaching on the prerogatives of the administrative authority, order a Community institution to take the necessary measures to comply, as required by Article 176 of the Treaty, with a judgment by which a decision is annulled (see, most recently, Case T-346/94 *France-Aviation* v *Commission* [1995] ECR II-2841, paragraph 42).

19 The second head of claim, for an order requiring the Commission to adopt a new decision concerning Germany's request of 2 May 1994, is therefore inadmissible.

Substance

The first head of claim — seeking annulment

20 The applicant puts forward a single plea in law, alleging breach of the first subparagraph of Article 13(1) of Regulation No 1430/79, as amended by Regulation No 3069/86.

Arguments of the parties

21 The applicant argues, first, that when determining whether there is a 'special situation' within the meaning of Article 13 of Regulation No 1430/79, account must be taken of all the circumstances of the specific case, since the provision constitutes a general equitable rule. Article 13, moreover, gives the Commission a power of assessment, which means that its decision must be based on accurately and exhaustively established facts. The applicant claims that the Commission overlooked those requirements in the contested decision.

22 The mistakes in the customs documents were entirely due, the applicant submits, to negligence and error on the part of the German customs office. On receiving the assessment notices exempting the imports from customs duties without mentioning the possibility of a subsequent reassessment, the applicant paid the whole of the sales prices in good faith without, therefore, asserting its claim for reimbursement against its trading partners (see paragraph 3 above).

23 The applicant further points out that the customs office failed to inform the central office responsible for monitoring quotas and ceilings. As a result, the initial errors were not rectified until two years (for the consignments imported in 1990) and one year (for the 1991 consignment) later. At the hearing, the applicant added that two points were clear from the file lodged by the Commission at the Court's request: the director of the customs office had acknowledged that the central office would have discovered the errors at once if his office had submitted a proper report to it; and the reassessment notices were sent approximately 12 months after the discovery of the errors in March and August 1991.

24 Those inexplicable delays were the sole reason for the applicant's no longer being able, as a result of the civil war in the former Federal Republic of Yugoslavia, to claim reimbursement from its trading partners of the customs duties whose post-clearance recovery had been decided upon.

25 Secondly, the applicant submits that the concept of a 'special situation' is a legal one, the tenor of which must be interpreted in the light of the objective pursued by the charging of import duties. The Commission should therefore have examined the merits of the request by comparing the instant case with the situations in which remission of import duties is expressly provided for. In that context, remission of import duties is justified when the economic aim pursued by the importa-

tion of the goods can no longer be achieved as a result of circumstances beyond the importer's control.

26 That is precisely the situation here. The applicant would not have been penalized financially by post-clearance recovery if the customs office had applied the relevant rules properly or if the error had been rectified within a reasonable period, the competent Yugoslav central office being unable to accede to the well-founded claims for reimbursement as it had ceased to exist. Exemption from import duties should thus also be granted in the present case.

27 Thirdly, as regards the condition laid down in Article 13 of Regulation No 1430/79, that there must be no deception or obvious negligence on the part of the person concerned, the applicant submits that it incontrovertibly acted neither negligently nor fraudulently and that, moreover, it is settled law that only commercial traders whose activities essentially consist of import-export operations are under an obligation to ascertain, by reading the Official Journal, the Community duty applicable to the operations in question (see Case 161/88 *Binder* v *Hauptzollamt Bad Reichenhall* [1989] ECR 2415, paragraph 22). In the applicant's submission, since it has only occasionally engaged in import transactions and must therefore be regarded as a trader inexperienced in that sector, it could not reasonably be expected to be more knowledgeable than the customs authorities, still less in a position to review their actions.

28 In response to the Commission's assertion that the applicant may not have recourse to the equitable provision in Article 13 of Regulation No 1430/79 because it is entitled under German law to appeal against the reassessment notices (see Joined Cases 244/85 and 245/85 *Cerealmangimi and Another* v *Commission* [1987] ECR 1303, paragraph 17), the applicant states that it has exercised that right and on that very occasion sought remission of customs duties under Article 13 as an alternative and precautionary measure. Since it had no influence over the German authorities'

decision to settle first the application for remission of duty and send an appropriate request to the Commission with that end in view, that request cannot be refused on the ground that the national proceedings are still pending.

29 Finally, whilst Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79 may have the 'same aim', the applicant raises the question whether it may be inferred that the factual preconditions for the application of those two provisions are the same. In any event, it considers that it has not failed in its duty to exercise due care for the purposes of Article 5(2) of Regulation No 1697/79.

30 The Commission argues, first, that the remedy available under German law to challenge the validity of the reassessment notices of 23 April and 30 June 1992 bars the applicant from relying on Article 13 of Regulation No 1430/79, as a general equitable provision (see Case 283/82 *Schoellershammer* v *Commission* [1983] ECR 4219, paragraph 7, and *Cerealmangimi*, cited above, paragraph 10). Where such a remedy is available, there is no need to seek a decision on equitable grounds (see *Cerealmangimi*, paragraph 17).

31 If the applicant were none the less allowed to rely on Article 13 of Regulation No 1430/79, the Commission points out that the concept of a 'special situation' has not been defined. In the Commission's view, it must be interpreted in the light of the situations listed in Sections A to D of Regulation No 1430/79, taking into account the fact that it is an equitable provision.

32 As for the error made by the German customs authorities, the Commission argues that the exceptional situations expressly described in Regulation No 1430/79 refer to cases in which goods can no longer be used for the purpose for which they were

imported. That is not the case here. The mere fact that the imports have not yielded as much profit as expected cannot constitute a special situation.

33 As regards the alleged disappearance of the Yugoslav suppliers, the Commission observes that it is clear from the case-law that the fact that the applicant can no longer establish contact with its trading partners in the former Federal Republic of Yugoslavia is irrelevant (see Joined Cases 98/83 and 230/83 *Van Gend en Loos and Another* v *Commission* [1984] ECR 3763, paragraph 16, and Joined Cases C-121/91 and C-122/91 *CT Control and Another* v *Commission* [1993] ECR I-3873, paragraph 37).

34 It follows, in the Commission's view, that the present circumstances cannot constitute a special situation within the meaning of Article 13 of Regulation No 1430/79.

35 In any event, the Commission claims, the applicant displayed obvious negligence within the meaning of Article 13 of Regulation No 1430/79. The rules were simple enough for the error made to be easily detected (see Case C-64/89 *Hauptzollamt Gießen* v *Deutsche Fernsprecher* [1990] ECR I-2535 and, for the converse situation, Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paragraph 25). Nor, it adds, has the applicant referred to any difficulty in obtaining access to the Official Journal (see Case 160/84 *Oryzomyli Kavallas and Others* v *Commission* [1986] ECR 1633).

36 The applicant's alleged inexperience should have led it, the Commission claims, to examine the relevant provisions and publications with care. If the applicant wished to be sure that it would not be subject to post-clearance recovery of customs duties, it should not have placed blind confidence in the notice exempting it from payment of duties.

37 Finally, as regards the applicant's argument that an importer cannot be expected to have more extensive knowledge than the customs officials themselves, the Commission points out that it has already been rejected by the Court of Justice (see *Deutsche Fernsprecher*, paragraph 17).

Findings of the Court

38 It is, first of all, common ground that the imports in question were subject to customs duties under Commission Regulations No 1280/90 and No 1347/91. As regards the first two consignments, imported on 22 May and 8 June 1990 respectively, the levying of customs duties was reimposed, under Article 1 of Regulation No 1280/90, on imports into the Community of products of the kind in question originating in Yugoslavia, from 19 May to 31 December 1990. As regards the third consignment, imported on 26 June 1991, the levying of customs duties was reimposed, under Article 1 of Regulation No 1347/91, on imports into the Community of such products originating in Yugoslavia, from 27 May to 31 December 1991.

39 Furthermore, it was as a result of an error on the part of the competent German customs office that customs duties were not levied on the three consignments; the German authorities subsequently took action to recover the customs duties which the applicant had not been required to pay on importation. It appears from the file that the applicant has not yet paid those duties.

40 The application for waiver of such post-clearance recovery must therefore be assessed in accordance with Regulation No 1697/79, and in particular with Article 5(2) thereof, which provides that 'the competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which

were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned'. The object of Regulation No 1697/79, as stated in Article 1 thereof, is to determine the conditions under which post-clearance recovery is undertaken of import or export duties on goods entered for a customs procedure involving the obligation to pay such duties which have not been required of the person liable for payment (see Joined Cases 212/80 to 217/80 *Amministrazione delle Finanze dello Stato* v *Salumi and Others* [1981] ECR 2735, paragraph 7). It is clear, moreover, from the file submitted to the Commission by the German authorities that, following receipt of the customs duty reassessment notices, the applicant's principal request was for waiver of post-clearance recovery under Article 5(2) of Regulation No 1697/79.

41 In addition, Regulation No 1697/79, repealed with effect from 1 January 1994 by Article 251 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), was in force at the material times, the goods having been imported in 1990 and 1991 and the reassessment notices having been issued in 1992.

42 Article 5(2) of Regulation No 1697/79 lays down three conditions which must be met concurrently to enable the competent customs authorities to refrain from taking action for the post-clearance recovery of import duties: the duties must not have been collected as a result of an error made by the competent authorities, the person liable must have acted in good faith — that is to say that he could not reasonably have detected the error made by the competent authorities — and he must have observed all the provisions laid down by the rules in force as far as his customs declaration is concerned (see, most recently, Case C-292/91 *Weis* v *Hauptzollamt Würzburg* [1993] ECR I-2219, paragraph 14). When those conditions are fulfilled, the person liable is entitled to the waiver of post-clearance recovery (see *Weis*, paragraph 15). Conversely, if only one of the three conditions is not met, the request for waiver of post-clearance recovery is not justified.

43 In the present case, the Court considers it appropriate to focus on the second condition, as to whether or not the error could have been detected by the trader concerned. All the circumstances of the individual case must be assessed objectively, taking into account, in particular, the nature of the error, the professional experience of the trader concerned and the degree of care which he exercised (see Case C-250/91 *Hewlett Packard France* v *Directeur Général des Douanes* [1993] ECR I-1819, paragraph 28).

44 With regard to the nature of the error made by the German authorities in exempting the imports in question from customs duties, contrary to the rules in force, the Court considers that those rules were simple enough to be easily understood. It is clear from the unambiguous provisions of Regulations No 1280/90 and No 1347/91 that customs duties were reimposed at the time when the goods in question were imported.

45 With regard to the trader's professional experience, the Court rejects the applicant's argument that since it had only occasionally imported aluminium bars from abroad it must be regarded as an inexperienced trader and could not reasonably be expected to be more knowledgeable than the customs authorities, still less to review their actions.

46 It appears from the documents before the Court, and the applicant has not denied, that it imported aluminium bars on eleven occasions in 1990 and on eight in 1991, the value on each occasion being far from negligible. Although the applicant's activity does not essentially consist in import and export operations, it had none the less already gained some experience of importing the goods in question, having in the past carried out such transactions on which customs duties had been calculated (see *Deutsche Fernsprecher*, cited above, paragraph 21).

47 The argument that an importer cannot be expected to have more extensive knowledge than customs officials has been rejected by the Court of Justice, on the ground that to establish any such principle would make it practically impossible to effect post-clearance recovery since the error will perforce always have been committed by the official concerned through failure to examine a factual or legal situation in every respect. Article 5(2) of the Council Regulation would be divested of its purpose since it necessarily presupposes that the duties in question were not collected as a result of an error by the competent authorities themselves (see *Deutsche Fernsprecher*, paragraph 17).

48 Finally, the facts reveal that the applicant did not show the degree of care required of a trader. During the written procedure, the applicant stated that it had been agreed that any customs duties would be borne by its Yugoslav trading partners. Under that agreement, the purchase price was not to be paid until after the customs authorities had issued their assessment notice so that, if appropriate, the amount of the customs duties paid could be deducted from that price.

49 However, it appears from the applicant's reply to the written questions put by the Court that the purchase price for both of the consignments imported in 1990 was paid before the applicant had received the assessment notices from the customs office. The first consignment was imported on 22 May 1990 and the assessment notice issued on 25 May 1990. The applicant had nevertheless already paid up on 17 May 1990, before the customs declaration had even been submitted. The second consignment was imported on 8 June 1990 and the assessment notice issued on 11 June 1990, whereas the applicant had already paid up on 8 June 1990. The applicant itself thus took a financial risk which was not unavoidable under the contract terms, set out at paragraph 3 above. It cannot, therefore, claim to have entertained a legitimate expectation, subsequently frustrated, as to the validity of those assessment notices, the aim of Article 5(2) of Regulation No 1697/79 being, in particular, to protect the legitimate expectation of the person liable that all the information

and criteria on which the decision whether or not to recover customs duties is based are correct (see Case C-348/89 *Mecanarte* v *Chefe do Serviço da Conferência Final da Alfândega* [1991] ECR I-3277, paragraph 19).

50 Furthermore, as the Commission has rightly stated, the applicant should have examined the relevant provisions and publications if it wished to be certain of not being liable for duty after clearance. It is settled law that, as from the date of their publication in the Official Journal, the applicable Community provisions constitute the only relevant substantive rules, of which all are deemed to be aware (see Case C-80/89 *Behn* v *Hauptzollamt Itzehoe* [1990] ECR I-2659, paragraph 13, and *Binder*, cited above, paragraph 19). The error could have been detected by an attentive trader by reading the Official Journal in which the regulations had been published several days before the import transactions in question took place (see *Binder*, paragraph 20). Contrary to the applicant's opinion, that case-law does not apply only to commercial traders whose activities essentially consist of import-export operations.

51 It follows from all the foregoing that the German authorities' errors as to exemption from customs duties could reasonably have been detected, within the meaning of Article 5(2) of Regulation No 1697/79, by the applicant. Since the person liable is not entitled to waiver of post-clearance recovery of customs duties unless all the conditions set out in that provision are met, it would have been correct to refuse an application for waiver if the German authorities had asked the Commission to decide on the possible application of Article 5(2) of Regulation No 1697/79 rather than Article 13 of Regulation No 1430/79 (see paragraph 10 above).

52 Consequently, since it is apparent from the case-law that the question whether the error was capable of being detected, within the meaning of Article 5(2) of Regulation No 1679/79, is linked to the existence of obvious negligence or deception

within the meaning of Article 13 of Regulation No 1430/79 (see *Hewlett Packard France*, paragraph 46), the applicant's plea in law must be rejected as unfounded, since it has not established, in any event, the absence of obvious negligence within the meaning of Article 13 of Regulation No 1430/79.

53 Since the Commission considered the merits of the request in accordance with Article 13 of Regulation No 1430/79 and not Article 5(2) of Regulation No 1697/79 (see paragraph 40 above), it is necessary at this stage to examine what consequences might be drawn from that circumstance, even though the applicant has not put forward any plea in law in that regard.

54 It is clear from its wording that application of Article 13 of Regulation No 1430/79 is dependent on the concurrent fulfilment of two conditions — the existence of a special situation and the absence of obvious negligence or deception — so that remission of duties must be refused if either of those conditions is not met (see *Oryzomyli Kavallas*, cited above). In the contested decision, the Commission considered that the request was not justified on the ground that the reimposition of customs duties had been published in the Official Journal, which may be relied on as against any person liable, all persons being deemed to be aware of the provisions published therein. The Commission thus took the view, essentially, that the applicant had not demonstrated the absence of obvious negligence on its part, within the meaning of Article 13.

55 Even though the Commission should have assessed the applicant's request under Article 5(2) of Regulation No 1697/79 (see paragraph 40 above), Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79 pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle, namely the protection of legitimate expectations. It follows, as noted in paragraph 52 above, that the question whether the error was capable of being detected, within the meaning of Article 5(2) of Regulation No 1697/79, is linked to the exist-

ence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79. Although the Commission was wrong in law to examine the case before it under Article 13 of Regulation No 1430/79, that error was of a purely formal nature as it did not, in the specific circumstances of this case, have any decisive influence as to the outcome of the examination. There is accordingly no need to annul the contested decision on the ground that the Commission relied on the wrong legal basis.

56 In those circumstances, and since it has been established that the mistaken exemption of the imports in question from customs duties was reasonably capable of being detected by the applicant within the meaning of Article 5(2) of Regulation No 1697/79, the Commission was right in the contested decision to reject the request for waiver of post-clearance recovery of the customs duties.

57 This head of claim must therefore be rejected as unfounded and, consequently, the application must be dismissed in its entirety.

Costs

58 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for them, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application as inadmissible in so far as it seeks that directions be issued to the Commission;

2. Dismisses the remainder of the application as unfounded;

3. Orders the applicant to pay the costs.

Briët Vesterdorf Potocki

Delivered in open court in Luxembourg on 5 June 1996.

H. Jung C. P. Briët

Registrar President