JUDGMENT OF THE COURT (Fifth Chamber)
13 March 2003 *

In Case C-156/00,

Kingdom of the Netherlands, represented initially by M.A. Fierstra, acting as Agent, and, subsequently, by M.A. Fierstra and J. van Bakel, acting as Agent,

applicant,

v

Commission of the European Communities, represented by C. van der Hauwaert and R. Tricot, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Dutch.

APPLICATION for annulment of Commission Decision C (2000) 485 final of 23 February 2000 determining in a particular case that an application for remission of import duties is inadmissible in a specified amount and that there is no justification for remission of import duties in a separate amount,

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward, P. Jann, S. von Bahr (Rapporteur) and A. Rosas, Judges,

Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 May 2002, at which the Kingdom of the Netherlands was represented by N.A.J. Bel, acting as Agent, and the Commission by H.M.H. Speyart, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2002,

gives the following

Judgment

1 By application received at the Court Registry on 27 April 2000, the Kingdom of the Netherlands brought an action for annulment of Commission Decision C (2000) 485 final of 23 February 2000 determining in a particular case that an application for remission of import duties is inadmissible in a specified amount and that there is no justification for remission of import duties in a separate amount ('the contested decision').

Legal background

2 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, 'the Customs Code') codified the rules applicable to Community customs law. Provisions for implementation of the Customs Code were laid down in Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1, 'the implementing regulation'). These two pieces of legislation have been in force since 1 January 1994.

3 The relevant earlier rules, which are applicable to the facts of the present case prior to 1 January 1994, is referred to below in the part of the legal backgound relating to the Customs Code or in the part concerning the implementing regulation.

The Customs Code

4 Article 220 of the Customs Code provides for the possible subsequent entry in the accounts of a customs debt. According to Article 220(2)(b) of the Code, there is to be no subsequent entry in the accounts, save in certain situations specified in that provision which are not relevant to the present case, where:

'the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration'.

5 Article 221(1) and (3) of the Customs Code provide:

'1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

...

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three-year period.'

6 For the period prior to 1 January 1994, the provision corresponding to Article 221(1) and (3) was to be found in Article 2(1) 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). That provision was reproduced in substance in Article 221(1) and (3) of the Customs Code.

7 Pursuant to the second indent of Article 239(1) of the Customs Code, import duties may be remitted in situations 'resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned'. Remission may be made subject to special conditions.

8 Under Article 239(2) of the Customs Code, '[d]uties shall be... remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor'.

9 Article 239 of the Customs Code replaced Article 13 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). The first subparagraph of Article 13(1), as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986 (OJ 1986 L 286, p. 1), provided:

'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 implementing regulation

10 Article 569(1) of the implementing regulation provides:

'... where use is to be made of equivalent compensation, the equivalent goods must fall within the same eight-digit subheading of the CN Code, be of the same commercial quality and have the same technical characteristics as the import goods.'

11 Prior to the entry into force of the implementing regulation, the provision corresponding to Article 569(1) was Article 9 of Commission Regulation (EEC)

No 2228/91 of 26 June 1991 laying down provisions for the implementation of Regulation (EEC) No 1999/85 on inward processing relief arrangements (OJ 1991 L 210, p. 1), the terms of which were substantively reproduced in the implementing regulation.

12 Article 589(1) of the implementing regulation provides:

'Where a customs debt is incurred in respect of compensating products or goods in the unaltered state, compensatory interest shall be paid on the import duty applicable.'

13 The fifth indent of Article 589(2) of the implementing regulation provides that the customs debt does not give rise to the payment of such interest 'where the holder of the authorisation [for inward processing relief] requests release for free circulation and supplies proof that particular circumstances not arising from any negligence or deception on his part make it impossible or uneconomic to carry out the export operation under the conditions he had anticipated and duly substantiated when applying for the authorisation.'

14 Article 589(3) of the implementing regulation sets out the procedure to be followed in order to benefit from the provisions of the fifth indent of paragraph 2 of that article. Under that procedure, a request must be submitted to the customs authorities indicated by the Member State which issued the authorisation for inward processing relief. Those authorities are competent to grant the remission of compensatory interest when the amount serving as the basis for the calculation of the interest does not exceed a certain amount. Over that amount and if the customs authorities intend to grant the request, they must forward the request to the Commission, with the file containing all the supporting documents necessary for a complete examination of the case, so that the Commission may decide on whether or not the request is to be granted.

15 Prior to the entry into force of the implementing regulation, the provisions corresponding to Article 589(1), (2) and (3) were to be found in Article 62(1), (2) and (3) of Regulation No 2228/91, the terms of which were substantively reproduced in the implementing regulation.

16 Article 859 of the implementing regulation, contained in Part IV, entitled 'Customs Debt', provides that seven failures shall be considered to have no significant effect on the correct operation of the customs procedure, provided that they do not constitute an attempt to remove the goods unlawfully from customs supervision, that they do not imply obvious negligence on the part of the person concerned, and that all the formalities necessary to regularise the situation of the goods are subsequently carried out. The failures are listed and include exceeding certain time-limits, unauthorised handling of the goods placed under a customs procedure, and removal of the goods from the customs territory of the Community without completion of the necessary formalities.

17 The first subparagraph of Article 905(1) of the implementing regulation, concerning the decisions to be taken by the Commission when applying Article 239 of the Customs Code, provides as follows:

'[w]here the decision-making customs authority to which an application for... remission under Article 239(2) of the [Customs] Code has been submitted cannot take a decision... but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909.'

18 According to Article 907 of the implementing regulation, the Commission shall then decide whether or not the special situation which has been considered justifies remission.

19 Article 908(2) of the implementing regulation provides that, on the basis of the Commission's decision, the decision-making authority shall decide whether to grant or refuse the application made to it.

20 Prior to the entry into force of the implementing regulation, the provisions corresponding to Articles 905, 907 and 908 were to be found in Articles 6, 8 and 9, respectively, of Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4a, 6a, 11a and 13 of Regulation No 1430/79 (OJ 1986 L 352, p. 19). The implementing regulation reproduced in substance the terms of Articles 6, 8 and 9 of Regulation No 3799/86.

Facts and the contested decision

21 The undertaking incorporated under Netherlands law Cargill BV ('Cargill') is engaged in the production of starch and glucose syrup. It held an authorisation for inward processing which allowed it to import maize from non-member countries duty free, subject to the maize being processed into glucose, the main compensating product, as well as into a number of secondary compensating products, and being exported outside the Community customs territory. In the period 1992 to 1994, Cargill placed 65 000 t of maize under the inward processing procedure.

22 Under the inward processing authorisation, Cargill was entitled to use Community goods equivalent to the maize imported from non-member countries for the production of glucose intended for export.

23 In the course of inspections carried out in 1994 and 1995, the inspection department of the Netherlands Ministry of Agriculture, Nature Management and Fisheries ('inspection department') found that the main compensating product exported by Cargill had not been obtained entirely from imported maize, but as to 25% from imported maize and as to 75% from wheat of Community origin. The two products are not classified under the same CN Code tariff subheading.

24 As a result of those inspections, the Netherlands authorities enquired of the Commission whether it authorised equivalence between the maize imported from non-member countries and wheat of Community origin. By letter of 23 November 1995, the Commission replied that it could not allow such equivalence and referred, in particular, to differences in tariff protection between the two products in question.

25 By letter of 18 November 1996, the Commission asked the Netherlands authorities to draw up a list of all goods placed under the inward processing procedure for the benefit of Cargill during the period 1992 to 1995 and to report back to it on any cases of irregularity or fraud.

26 By letter of 3 December 1996, the Netherlands authorities claimed payment from Cargill of NLG 17 491 244.45, representing import duties owed by Cargill for the years 1992 to 1994, with compensatory interest.

27 Cargill lodged a complaint against that notice with the competent customs authorities. It also requested the customs authorities to suspend recovery of the customs debt in return for it providing security equal to the amount claimed, which was granted.

28 On 2 December 1997, Cargill applied to the customs authorities for repayment or remission of import duties.

29 By letter of 22 April 1999, the Netherlands Government forwarded that application to the Commission which, following a complete examination of the file, adopted the contested decision.

30 In point 14 of the contested decision the Commission found, first, that the application for remission was inadmissible in so far as it related to compensatory interest totalling NLG 732 093.78. It stated that that interest did not form an integral part of the customs debt and that it was not for the Commission to rule on a possible remission thereof. It was of the view that that decision fell to the national authorities.

31 Second, in point 15 of the contested decision, the Commission found that the application was also inadmissible in so far as it related to duties on imports in the amount of NLG 15 679 301.49 levied on imports effected prior to 3 December 1993, that is, more than three years before Cargill received notice from the Netherlands customs authorities on 3 December 1996. According to the Commission, those duties were time-barred under Article 221(3) of the Customs Code and could no longer be claimed from the undertaking in question.

32 Third, points 17 to 35 of the contested decision indicate that the application for remission was unfounded in so far as it related to the amount of duties not forming part of the time-barred customs debt, namely an amount of NLG 1 079 849.18. The Commission held that the practice followed by Cargill was not in accordance with the regulations in force or the terms of its authorisation for inward processing. It stated that Community wheat could not be used as equivalent compensation under an authorisation for inward processing relating to the processing of maize into glucose.

33 The Commission did observe, however, that the other applicable customs rules had been complied with. It also found that, for several years and in relation to considerable quantities of goods, the competent customs authorities had not objected to the practice followed by Cargill. The Commission took the view that all of those circumstances, taken together, were such as to give rise to a special situation within the meaning of Article 239 of the Customs Code. It held, however, that such a situation could only give rise to remission of import duties if there was no deception or obvious negligence attributable to the party concerned.

34 In that respect, the Commission found that, although Cargill had not engaged in any deception, it had shown obvious negligence.

Preliminary remarks

35 The Court notes, as a preliminary point, that some of the facts of the case relating to the customs debt occurred prior to 1 January 1994, that is, prior to the entry into force of the Customs Code and the implementing regulation, whereas some occurred after that date.

36 Accordingly, it is appropriate to refer not only to those two texts, but also, in keeping with the case-law of the Court, as regards the period prior to 1 January 1994, to the substantive rules contained in the legislation in force prior to implementation of the Customs Code (see Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 14).

The first plea

Arguments of the parties

37 By its first plea, the Kingdom of the Netherlands claims that the contested decision is contrary to Article 589 of the implementing regulation and, in the alternative, the obligation to state reasons laid down in Article 253 EC, in so far as it declares the part of the claim relating to remission of compensatory interest inadmissible.

38 The Kingdom of the Netherlands argues that, according to Article 589(1) of the implementing regulation, when a debt is incurred in respect of compensating products, compensatory interest is to be paid on the import duty applicable. It adds that, under Article 589(3), customs authorities who in certain situations intend to grant a request for that interest not to be applied must forward it to the Commission. If the Commission does not object within two months from the date of acknowledgement of receipt, the Member State in question is to grant the remission.

39 It follows that the compensatory interest is part of the customs debt and that the Commission could not decide that the request for remission of the compensatory interest was inadmissible, without conducting a further examination or, at the very least, giving further reasons.

40 The Kingdom of the Netherlands adds that, under Article 239 of the Customs Code, the Commission may authorise the remission of import duties, and that such a decision also entails consequences for the compensatory interest arising therefrom.

41 The Commission, by contrast, maintains that it is not competent to rule on an application for remission of compensatory interest.

42 It states, first, that the wording 'shall' in Article 589(1) of the implementing regulation, a provision which states that '[w]here a customs debt is incurred in respect of compensating products or goods in the unaltered state, compensatory interest shall be paid on the import duty applicable', means that the interest in question does not form an integral part of the customs debt as defined in Community law.

43 Next, the Commission submits that, under Article 589(3) of the implementing regulation, it is competent to rule on applications for remission of compensatory interest only in the situation referred to in the fifth indent of Article 589(2), that is, when the customs debt is incurred upon the release of the goods in question for free circulation. This is not the case here, however, since no one is denying that the imported maize was re-exported outside the Community customs territory after being processed into glucose.

44 Finally, with respect to Article 239 of the Customs Code, the Commission argues that, whilst that provision empowers it to rule on remission of customs debts, it does not empower it to rule on possible remissions of compensatory interest because such interest does not form an integral part of the customs debt. The Commission submits that, in accordance with the distribution of powers under Community customs law, in principle it is for the national authorities to take individual decisions, except when a specific competence is conferred on the Commission.

Findings of the Court

45 As a preliminary point, Article 589(1) of the implementing regulation establishes the general rule that, where a customs debt is incurred in respect of compensating products, compensatory interest is to be paid on the import duty applicable.

46 Article 589(2) of the implementing regulation lays down the exceptions to the general rule. The Kingdom of the Netherlands relies on the exception in the fifth indent of that provision, and on the procedure applicable in order to benefit from that exception contained in Article 589(3), in concluding that it was for the Commission to rule on the application for remission of compensatory interest.

47 However, the procedure laid down in Article 589(3), which, admittedly, provides for the participation of the Commission in certain cases, concerns only those cases where the goods are released for free circulation in the Community. Moreover, as rightly pointed out by the Commission, it is common ground that

the goods in question were not released for free circulation, but were exported outside the Community customs territory. It follows that the provision relied on by the Kingdom of the Netherlands in support of its first plea is not applicable to the present case and is, therefore, not relevant.

48 Turning to Article 239 of the Customs Code, the mere fact that a possible remission of customs duties following a decision by the Commission on the basis of Articles 905 and 907 of the implementing regulation has consequences for the compensatory interest applied on those duties by the customs authorities does not in any way imply that the Commission is empowered to proceed with the remission of that interest.

49 On the contrary, under Article 905 of the implementing regulation, the Commission is competent only to take a decision on the remission of import duties and may not rule on compensatory interest. What happens with that interest, applied by the customs authorities pursuant to Article 589(1) of the implementing regulation, simply follows from what happens with the customs duties, without its being necessary for the Commission to take any decision in that regard.

50 This reasoning applies *mutatis mutandis* to the rules applicable prior to 1 January 1994, that is, Article 62(1), (2) and (3) of Regulation No 2228/91, Article 13 of Regulation No 1430/79, as amended by Regulation No 3069/86, and Articles 6 and 8 of Regulation No 3799/86.

51 It follows that, contrary to the assertions of the Kingdom of the Netherlands, the Commission rightly declared the application for remission of compensatory interest inadmissible in point 14 of the contested decision.

52 Lastly, with regard to the allegedly insufficient reasoning for the contested decision in the light of the requirements of Article 253 EC, the Court notes that the Kingdom of the Netherlands merely alleged that insufficient reasons were given, without developing the point further in any way. It is, in any event, clear from point 14 of the contested decision that the Commission states its reasons for holding the application for remission of compensatory interest inadmissible and, in particular, makes it clear that it cannot rule on a possible remission of such interest and that it is for the national authorities to rule on such a point. Accordingly, the allegation of a supposed lack of reasons in the contested decision cannot be accepted.

53 The first plea must therefore be dismissed as unfounded.

The second plea

Arguments of the parties

54 By its second plea, the Kingdom of the Netherlands claims that the contested decision infringes Article 221 of the Customs Code by declaring the application for remission time-barred and thus inadmissible in so far as it pertains to the import duties due for the period prior to 3 December 1993.

55 The Kingdom of the Netherlands submits that the Commission misinterprets Article 221 of the Customs Code and misses the point that the issue of a time bar for a customs duty is a matter for a national court to rule on and not the Commission.

56 According to the Kingdom of the Netherlands, the Commission ignores the fact that the very wording of Article 221(3) of the Customs Code is to the effect that, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, the communication of the amount of the duties to the debtor may be made after the expiry of the three-year time period as from the time the debt was incurred.

57 It is for the national court, hearing an action contesting communication of a customs debt, to rule on whether the requirements are satisfied to allow the debt to be communicated after expiry of the three-year period established in the last sentence of Article 221(3) of the Customs Code. The time bar, and especially the ability to stop the time period from running and the manner in which it may possibly be interrupted, are not matters governed by Community law, but rather fall within the powers of review of the national court.

58 The Kingdom of the Netherlands does not share the Commission's point of view that decisions on remission must concern customs debts which may actually be recovered. There is no legal basis for such an interpretation.

59 Nor does it result from Article 908(2) of the implementing regulation that the Commission is in a position to decide whether the customs debt is time-barred or not, or that it is empowered to do so.

60 The Commission contends that a decision for the purposes of Article 239 of the Customs Code, read together with Article 905 of the implementing regulation, must concern a customs debt which may actually be recovered and not theoretical or hypothetical cases. It states that, when it examines a remission application and finds, on the basis of the information communicated to it, that the import duties do not or no longer exist, or that they may not or may no longer actually be recovered, for instance, when they have been liquidated or communicated after the expiry of the three-year time period, it must be allowed to abstain from taking a decision by declaring the application inadmissible.

61 The Commission maintains that the case-file from the national proceedings indicates that the requirements laid down in the second sentence of Article 221(3) of the Customs Code are not satisfied. Moreover, when it is clear, as in the present case, that the remission application concerns an amount of import duties which can no longer be communicated legally to the debtor and cannot therefore be legally recovered, the Commission must not take a decision on the remission application for such duties, but rather must dismiss it as inadmissible.

Findings of the Court

62 Under Article 221(1) of the Customs Code, the amount of duty owed is to be communicated to the debtor in accordance with appropriate procedures as soon as it has been entered in the accounts. Under Article 221(3), communication to

the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred, except where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due.

63 It follows from the overall scheme of the chapter of the Customs Code dealing with recovery of the amount of the customs debt, namely Chapter 3 of Title VII, which includes Article 221 concerning communication of the debt to the debtor, that the rules laid down in that chapter are addressed principally to the Member States and their customs authorities.

64 In the absence of any provision in the Customs Code or the implementing regulation empowering the Commission to apply the rule on the time limitation, the Court finds that it is for the Member States and their competent authorities to implement that rule and that the Commission is not empowered to rule on the question whether the recovery procedure for the customs debt was carried out in accordance with that rule.

65 Thus, when it takes a decision on an application for remission of customs duties referred by a Member State following an application submitted by the debtor to the competent customs authorities, the Commission is obliged to examine the application in question as it is and may not question the time periods within which the debt recovery procedure was instituted by the customs authorities.

66 Thus, in the present case, the Commission could not refuse to take a decision on the remission application or a portion thereof on the grounds that, in its view, the duties claimed were communicated too late to the debtor, contrary to Article 221(3) of the Customs Code.

67 This reasoning applies *mutatis mutandis* to the rules applicable for the period prior to 1 January 1994, namely Article 2(1) of Regulation No 1697/79.

68 Accordingly, the Kingdom of the Netherlands was right in complaining that the Commission had declared the remission application inadmissible in so far as it related to import duties due for the period prior to 3 December 1993, that is, more than three years before the import duties owing were communicated to Cargill.

69 In the light of the foregoing considerations, the Court upholds the second plea raised by the Kingdom of the Netherlands and annuls Article 1(1) of the operative part of the contested decision in so far as it declares inadmissible the amount of NLG 15 679 301.49 of the application for remission of import duties submitted by Cargill and referred to the Commission on 22 April 1999 by the Kingdom of the Netherlands.

The third plea

Arguments of the parties

70 By its third plea, the Kingdom of the Netherlands claims that the contested decision infringes Article 239 of the Customs Code and Article 905 of the implementing regulation. It claims, in the alternative, that it infringes the principle of proportionality and, further in the alternative, that it fails to comply with the obligation to state reasons laid down in Article 253 EC.

71 It does not dispute the Commission's assessment that the requirements for equivalent compensation were not satisfied.

72 The Kingdom of the Netherlands does, however, contest the Commission's assertion that Cargill displayed obvious negligence. Although Cargill did have extensive professional experience in the area of agricultural products, it does not necessarily follow that it should have realised that it could not use wheat instead of maize for the manufacture of glucose for export.

73 First, the implication of the Commission's position is tantamount to requiring more extensive knowledge on the part of Cargill than the customs authorities had. In fact, as the Commission itself states, the competent customs authorities raised no objections to Cargill's transactions, even though they had gone on over a number of years.

74 Second, the Kingdom of the Netherlands submits that Cargill could legitimately consider that the products used were equivalent, based on the viewpoint expressed by the Commission in a letter of 15 December 1994 addressed to the Netherlands authorities, which indicated that two different categories of maize could be considered equivalent for the purposes of manufacturing glucose. Following that reasoning, it submits that maize and wheat might legitimately be regarded as interchangeable raw materials.

75 Third, the Kingdom of the Netherlands maintains that Cargill's practice is common in Europe. Consequently, it is not possible to describe Cargill's conduct as 'negligent' and even less to attribute obvious negligence to it.

76 The Kingdom of the Netherlands submits that, in any event, the contested decision infringes the principle of proportionality in that the procedure led to a customs debt of NLG 17 491 244.45 whilst, for the whole of the period in question, Cargill made a modest profit estimated at NLG 710 700. It adds that the contested decision fails to give sufficient reasons in so far as it does not deal with the question of proportionality of the duties claimed.

77 The Commission contends that, in order to determine whether Cargill demonstrated obvious negligence, it is appropriate to refer to the criteria developed by the Court in its case-law relating to the application of Article 220(2) and Article 239(1) of the Customs Code.

78 The three relevant criteria are: the nature of the error, the professional experience of the traders concerned and the degree of care which they exercised.

79 First, as regards the nature of the error, it is necessary to consider the degree of complexity of the rules concerned.

80 The Commission submits that the legislation applicable to the present case is quite simple. The decisive question is whether Community wheat is a product equivalent to maize imported from non-member countries. It is necessary to refer to Article 114(2)(e) of the Customs Code, read together with Article 569(1) of the implementing regulation, and to examine in particular whether the goods originating from within the Community and the imported goods come under the same eight-digit subheading of the CN Code.

81 The Commission finds that the two types of goods in question do not come under the same tariff subheading and stresses that the lack of equivalence of those goods was all the more obvious given that each of the inward processing authorisations issued to Cargill stated expressly that the equivalent compensation scheme was authorised only for 'maize other than seed'. The authorisation for the period from 1 January 1994 to 31 December 1995 even mentions the tariff subheading under which the product comes: 1005 90 00.

82 The Commission further argues that the Kingdom of the Netherlands interprets out of context the letter it sent to it concerning the use of different categories of maize for the manufacture of glucose. It recalls that, in a letter of 8 August 1995, it indicated that equivalence had to be determined not on the basis of the finished goods, namely glucose, but rather on the basis of the import goods, namely maize.

83 Next, as regards the criterion concerning the trader's professional experience, the Kingdom of the Netherlands does not dispute that Cargill, an undertaking belonging to a large multinational, has had dealings with numerous customs schemes for many years and can therefore be assumed to be quite experienced in this area. This criterion is, accordingly, clearly satisfied.

84 Finally, turning to the criterion relating to the trader's diligence, the Commission submits that, even after the competent customs authorities drew Cargill's attention to the interpretation of the applicable legislation, Cargill did not ask them to inform it of their viewpoint in writing. It stresses that everything seems to indicate that Cargill resorted to the offending practice even more intensively, even after being informed of the customs authorities' criticisms in the first quarter of

1994. Thus, in August 1994 sizeable consignments of maize were imported for the purpose of being processed under the inward processing procedure. According to the Commission, this attitude demonstrates obvious negligence, even if the actions of the Netherlands customs authorities also raise a number of questions.

85 The Commission disagrees with the argument of the Kingdom of the Netherlands regarding the allegedly more stringent requirements imposed on importers than on customs authorities, based on the Court's case-law.

86 As regards the alleged infringement of the principle of proportionality, the Commission refers to Articles 859 and 860 of the implementing regulation, as interpreted by the Court. Since the facts of the present case do not come within any of the situations set out exhaustively in Article 859, this argument by the Kingdom of the Netherlands is, it submits, unfounded.

87 The Commission also disagrees with the alleged failure to give sufficient reasons in the contested decision, based on Article 253 EC, as interpreted by the Court.

88 In response to the alleged lack of diligence on the part of Cargill, the Kingdom of the Netherlands submits that the investigation by the inspection department concerned the period from April to October 1994. On 16 June 1994, the inspector sent the competent authority a request for interpretation of the rules pertaining to the equivalence between maize and wheat. He received a written reply on 29 June 1994. On 5 October 1994, the inspector discussed for the first time his findings from his inquiry with Cargill. The last consignment of imported

maize was placed under the inward processing procedure with application of the equivalence rule on 16 August 1994 at the latest. Then, by letter of 11 January 1995, the competent authority informed Cargill of the manner in which the inward processing procedure was to be applied, which was implemented as from 15 June 1995. Accordingly, the Commission's finding that Cargill's attitude stemmed from obvious negligence is unfounded.

89 With respect to the application for partial remission of the customs amounts claimed by reason of their being disproportionate, the Kingdom of the Netherlands asserts that it is not based on Article 859 of the implementing regulation but on grounds of equity, which in turn are based on Article 239(1) of the Customs Code and Article 905(1) of the implementing regulation, read together.

Findings of the Court

90 It is appropriate to examine separately the two branches of this plea: on the one hand, the absence of obvious negligence on the part of Cargill, and, on the other, infringement of the principle of proportionality and failure to give sufficient reasons in the contested decision.

The absence of obvious negligence

91 It is useful to recall, as a preliminary point, that the repayment or remission of import and export duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import

and export procedure and, consequently, the provisions which provide for such repayment or remission are to be interpreted strictly (Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 52).

92 In order to determine whether or not Cargill has demonstrated 'obvious negligence' within the meaning of the second indent of Article 239(1) of the Customs Code, as the Court has previously held, it is appropriate to apply by analogy the criteria used in the context of Article 220 of the Customs Code to ascertain whether or not an error committed by the customs authorities was detectable by a trader (see *Söhl & Söhlke*, paragraphs 55 and 56). The Commission was therefore correct in applying those criteria to the present case.

93 Turning to the first criterion, concerning the complexity of the applicable rules, it is appropriate to refer to the definition of the concept of equivalent goods as contained in Article 569(1) of the implementing regulation. Under that provision, equivalent goods must come under the same eight-digit subheading of the CN Code, display the same commercial quality and have the same technical characteristics as the import goods. These three conditions are cumulative (Case C-103/96 *Eridania Beghin-Say* [1997] ECR I-1453, paragraph 23).

94 Those rules were not difficult to apply to the present case, since it was sufficient to realise that the goods in question, namely maize imported from non-member countries and wheat originating from within the Community, did not come under the same subheading of the CN Code to conclude that they were not equivalent goods.

95 It follows that the argument of the Kingdom of the Netherlands concerning the alleged complexity of the applicable rules is unfounded.

96 As regards the second criterion, concerning the trader's experience, it is clear, as the Commission has rightly pointed out, that Cargill is a multinational undertaking with many years of experience in dealing with customs rules and particularly the rules of various customs schemes.

97 It follows that the second criterion has clearly been satisfied.

98 Turning to the third criterion, concerning the trader's diligence, the Court finds that, since the rules applicable to the present case are fairly straightforward, an experienced trader like Cargill should have been vigilant enough to be aware of the lack of equivalence between the goods in question. The Kingdom of the Netherlands cannot therefore successfully plead the failure by the competent authorities to detect the problem over a long period of time.

99 Moreover, in keeping with the settled case-law of the Court, if the trader concerned has doubts as to the correctness of the tariff classification of the goods in question he must make inquiries and seek the greatest clarification possible in order to ascertain whether or not his doubts are well founded (Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535, paragraph 22; and Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 24).

100 In the present case, it appears highly unlikely that Cargill could have had any doubt as to the lack of equivalence between the goods in question. In any event, if that were the case, it was for Cargill to seek the greatest clarification possible in order to ascertain whether or not its doubts were well founded.

101 It is clear that, by not making such inquiries and by merely waiting for a reaction from the Netherlands customs authorities to change the manner in which it classified its goods under the inward processing procedure, Cargill did not demonstrate the required diligence.

102 The Court finds therefore that the Commission did not infringe Article 239 of the Customs Code and Article 905 of the implementing regulation in finding, in paragraph 26 of the contested decision, that Cargill had demonstrated obvious negligence.

103 This reasoning applies *mutatis mutandis* to the rules applicable for the period prior to 1 January 1994, that is, Article 13 of Regulation No 1430/79, as amended by Regulation No 3069/86 and Article 6 of Regulation No 3799/86.

Infringement of the principle of proportionality and failure to state reasons in the contested decision

104 The Kingdom of the Netherlands argues that, by not acknowledging that the duties claimed by Cargill were disproportionate to the advantage obtained by

Cargill and that a partial remission was warranted, the Commission infringed the principle of proportionality and thereby also Article 239 of the Customs Code, read together with Article 905 of the implementing regulation.

105 The Court notes that Article 239 of the Customs Code, read together with Article 905 of the implementing regulation, does not in any way require that the amount of customs duties claimed from a trader must be limited to the advantage that trader may have derived from the irregularity committed.

106 As rightly pointed out by the Commission, the only cases where the competent authorities may consider that the deficiencies in the customs rules had no real impact on the functioning of the customs scheme and do not give rise to a customs debt are listed exhaustively in Article 859 of the implementing regulation. The second indent of that provision expressly excludes cases involving 'obvious negligence on the part of the person concerned'.

107 It follows that, by not limiting the amount of customs debt to the financial advantage allegedly obtained by Cargill, the Commission did not infringe the principle of proportionality or Article 239 of the Customs Code, read together with Article 905 of the implementing regulation.

108 This reasoning applies *mutatis mutandis* to the rules applicable for the period prior to 1 January 1994, that is, Article 13 of Regulation No 1430/79, as amended by Regulation No 3069/86 and Article 6 of Regulation No 3799/86.

109 Turning lastly to the plea of the Kingdom of the Netherlands alleging a failure to give sufficient reasons in the contested decision on the issue of proportionality of the duties claimed, contrary to Article 253 EC, suffice it to note that, since Article 239 of the Customs Code or Article 13 of Regulation No 1430/79, as amended by Regulation No 3069/86 do not in any way impose a requirement that the amount of duties claimed from the party concerned must be limited to the advantage obtained by it, the Court finds that the contested decision did not in any way infringe the obligation to state reasons laid down in Article 253 EC.

110 It follows that the third plea raised by the Kingdom of the Netherlands must be dismissed as unfounded.

111 In the light of the foregoing considerations, the Court, first, annuls the contested decision in so far as it declares inadmissible the amount of NLG 15 679 301.49 of the application for remission of import duties submitted by Cargill and referred to the Commission of the European Communities on 22 April 1999 by the Kingdom of the Netherlands and, second, dismisses the remainder of the action.

Costs

112 Under Article 69(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 costs and the Kingdom of the

Netherlands has been unsuccessful in its first and third pleas, and given the minimal practical impact of its second plea being accepted, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Annuls Commission Decision C (2000) 485 final of 23 February 2000 determining in a particular case that an application for remission of import duties is inadmissible in a specified amount and that there is no justification for remission of import duties in a separate amount in so far as it declares inadmissible the amount of NLG 15 679 301.49 of the application for remission of import duties submitted by Cargill BV and referred to the Commission of the European Communities on 22 April 1999 by the Kingdom of the Netherlands;**

2. **Dismisses the remainder of the action;**

3. **Orders the Kingdom of the Netherlands to pay the costs.**

Timmermans Edward Jann

von Bahr Rosas

Delivered in open court in Luxembourg on 13 March 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber