JUDGMENT OF THE COURT (Fourth Chamber)

24 April 2008 *

In Case C-143/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Hamburg (Germany), made by decision of 15 February 2007, received at the Court on 13 March 2007, in the proceedings

AOB Reuter & Co.

v

Hauptzollamt Hamburg-Jonas,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, G. Arestis, R. Silva de Lapuerta, E. Juhász (Rapporteur) and J. Malenovský, Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— AOB Reuter & Co., by H.-J. Prieß and M. Niestedt, Rechtsanwälte,

— Hauptzollamt Hamburg-Jonas, by G. Seber, acting as Agent,

— the Commission of the European Communities, by F. Erlbacher and Z. Maršálková, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1), as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994 (OJ 1994 L 310, p. 57) ('Regulation No 3665/87').

2 The reference was made in the course of proceedings between AOB Reuter & Co ('AOB Reuter') and Hauptzollamt Hamburg-Jonas (Principal Customs Office, Hamburg-Jonas; 'the Hauptzollamt') concerning the application of sanctions following payment of a refund granted on the basis of documents forged by a third party.

Legal framework

3 The first, second, third and fifth recitals of the preamble to Regulation No 2945/94 state:

'… the Community rules provide for the granting of export refunds on the basis of solely objective criteria, in particular concerning the quantity, nature and characteristics of the product exported as well as its geographical destination; … in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified; … to that end, provision should be made for the recovery of amounts unduly paid and sanctions to encourage exporters to comply with Community rules;

… to ensure the correct functioning of the system of export refunds, sanctions should be applied regardless of the subjective element of fault; … it is nevertheless appropriate to waive the application of sanctions in certain cases notably in cases of an obvious error recognised by the competent authority and to provide for a higher sanction in cases of intent;

…, where an exporter has supplied wrong information that could lead to an undue payment of the refund if the error is not discovered, whilst, where the error is discovered it is entirely proportional to sanction the exporter for an amount in proportion to the amount which he would have received unduly if the error [had] not been discovered; … in the case where the wrong information was supplied intentionally it is equally proportional to provide for a higher sanction;

…

… past experience and irregularities and notably fraud recorded in this context show that this measure is necessary and appropriate, that it will act as an adequate deterrent and that it is to be uniformly applied throughout the Member States'.

4 Under Article 4(1) of Regulation No 3665/87:

'Without prejudice to the provisions of Articles 5 and 16, the refund shall be paid only upon proof being furnished [that] the products for which the export declaration was accepted have, within 60 days from the date of such acceptance of the export declaration, left the customs territory of the Community in the unaltered state.'

5 Article 11 of the Regulation provides:

‘1. Where it has been found that an exporter, with a view to the granting of an export refund, has requested a refund in excess of that applicable, the refund due for the relevant exportation shall be the refund applicable to the actual exportation reduced by an amount equivalent to:

(a) half the difference between the refund requested and the refund applicable to the actual exportation;

(b) twice the difference between the refund requested and the refund applicable, if the exporter has intentionally supplied false information.

The refund requested is deemed to be the amount calculated from the information supplied pursuant to Article 3 or Article 25(2). Where the rate of refund varies according to destination, the differentiated part of the refund requested shall be calculated from the information supplied pursuant to Article 47.

The sanction referred to under (a) shall not apply:

— in the case of force majeure,

— in exceptional cases characterised by circumstances beyond the control of the exporter, which occur after the acceptance by the competent authorities of the export declaration or the payment declaration, and provided that he, immediately after he took note of these circumstances but within the time-limit referred to in Article 47(2), notifies the competent authorities, unless the competent authorities have already established that the refund requested was incorrect,

— in cases of obvious error as to the refund requested, recognised by the competent authority,

…

Where the reduction referred to under (a) or (b) results in a negative amount, the exporter shall pay that negative amount.

Where the competent authorities have established that the refund requested was incorrect and the exportation has not been effected and consequently no reduction of refund is possible, the exporter shall pay the amount equivalent to the sanction referred to under (a) or (b). …

…

The sanctions shall be without prejudice to additional sanctions laid down at national level.

…

3. Without prejudice to the obligation to pay any negative amount as referred to in the fourth subparagraph of paragraph 1, where a refund is unduly paid, the beneficiary shall reimburse the amounts unduly received — which includes any sanction applicable pursuant to the first subparagraph of paragraph 1, — plus the interest calculated on the basis of the time elapsing between payment and reimbursement. …'

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

6 Between 18 October and 12 December 1995, AOB Reuter declared a total of 24 consignments of white sugar for export to Malta to the Hauptzollamt Landshut and requested payment of the corresponding export refunds. Those refunds, amounting in total to EUR 230 102.37, were granted to it on submission of exit confirmations for the goods.

7 AOB Reuter did not itself export the goods, exportation being effected by its Italian business partners using agent undertakings. AOB Reuter ensured the performance of the principal contractual obligation, that is, the export of the sugar from Community customs territory, by a bank guarantee. AOB Reuter released those securities on 27 June 1996 after obtaining proof that the exportation had been properly carried out in the form of stamped customs documents and those documents had been accepted by the Hauptzollamt.

8 On 5 November 1996, the Zollkriminalamt Köln (Cologne Criminal Investigation Office for Customs Matters) established that the exit confirmations on the customs documents had been forged. The Hauptzollamt therefore demanded, by amending notices of 7 July 1997, reimbursement of the export refunds which had been received by AOB Reuter. The latter repaid the amount in question.

9 On 19 January 1998, the Hauptzollamt adopted 24 decisions imposing sanctions on AOB Reuter. On 5 February 1998, AOB Reuter entered an objection to those decisions. That objection having been rejected, on 10 April 2003 AOB Reuter brought an action before the Finanzgericht (Finance Court) Hamburg for annulment of those sanction decisions.

10 That court considers that AOB Reuter did not supply any false information in its export declaration, given that it merely declared its intention to export to Malta the goods which gave rise to the refund. Exportation did not in fact take place owing to the fraudulent conduct of the contracting partner of AOB Reuter. According to the referring court, AOB Reuter cannot therefore be liable to the sanction provided for under Article 11(1) of Regulation No 3665/87 unless the failure to comply with the requirement concerning the departure of the goods from the Community customs territory is sufficient to justify application of that sanction.

11 Taking the view that the application of such a sanction depends on the interpretation of Article 11(1) of the regulation, the Finanzgericht Hamburg decided to stay proceedings and to refer to the Court of Justice the following question for a preliminary ruling:

‘Is it only the supply of false information by an exporter in its export declaration which is liable to sanction under Article 11(1) of … Regulation (EEC) No 3665/87 or is it the failure to comply with the material requirements for claiming a refund alone that is the subject of sanctions?’

Question referred for a preliminary ruling

12 By its question, the referring court asks essentially whether Article 11(1) of Regulation No 3665/87 must be interpreted as meaning that the sanction for which it provides is applicable against an exporter who has requested an export refund for goods, where, as a result of fraudulent conduct on the part of the exporter's contracting partner, those goods were not exported.

13 As a preliminary point, it should be recalled that the two features of the export refunds system are, first, that Community aid is not granted unless the exporter makes an application and, second, that the system is financed by the Community budget (Case C-309/04 *Fleisch-Winter* [2005] ECR I-10349, paragraph 31).

14 With regard to such an exporter, the Court, in the context of Regulation No 3665/87 and its system of sanctions, has already held that, as regards a Community aid scheme, the grant of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness (see, to that effect, Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 41, and *Fleisch-Winter*, paragraph 31).

15 With regard to the Community budget, the first recital in the preamble to Regulation No 2945/94 states that, '… in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified [and], to that end, provision should be made for … sanctions to encourage exporters to comply with Community rules.'

16 The nature of the sanction provided for in Article 11(1) of Regulation No 3665/87 emerges clearly both from its wording and from the case-law of the Court relating to that provision.

17 According to the second recital in the preamble to Regulation No 2945/94,'sanctions should be applied regardless of the subjective element of fault'. In reality, it is only the level of the sanction which increases if there is an intentional act, in accordance with Article 11(1)(b) of Regulation No 3665/87, whereas the sanction provided for in Article 11(1)(a) is applicable even if the exporter has not committed any fault. In the latter case, the sanction provided for in the first subparagraph of Article 11(1) is applicable, except in the cases listed exhaustively in the third subparagraph of Article 11(1).

18 In paragraph 41 of Case C-210/00 *Käserei Champignon Hofmeister*, the Court held that the sanction constitutes a specific administrative instrument forming an integral part of the scheme of aid which is intended to ensure the sound financial management of Community public funds and, in paragraph 44 of that judgment, that it cannot be said to be of a criminal nature.

19 It follows from the two preceding paragraphs that the liability on which the sanction provided for in Article 11(1)(a) of Regulation No 3665/87 is based is of an essentially objective nature.

20 In order to determine the conditions relating to the applicability of that sanction, it is necessary to examine the provisions of Article 11 in their entirety.

21 The first subparagraph of Article 11(1) of the regulation provides for the application of a sanction to an exporter who has requested a refund in excess of that applicable to the product actually exported.

22 The Court has held in the context of Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11, and corrigendum OJ 1999 L 180, p. 53), which replaced and repealed Regulation No 3665/87, but did not change its content in that regard, that the phrase 'an exporter … has applied for a refund in excess of that applicable' must be interpreted as meaning that the exporter is regarded as having applied for a refund exceeding that applicable not only where an overclaim is detected when the information which he has provided is taken into account, but also where it is established that he is not entitled to a refund, that is to say, that the amount of refund is zero (see, to that effect, Case C-27/05 *Elfering Export* [2006] ECR I-3681, paragraph 27).

23 It follows from that case-law that, in order to determine whether an exporter has requested a refund in excess of that applicable to the goods actually exported, it is not sufficient to take into account the facts known to the competent authorities at the time they examine the request; it is also necessary to take into consideration facts subsequent to that request, in particular those detected during checks carried out by those authorities.

24 The raison d'être and the effectiveness of the checks by the competent authorities could otherwise be jeopardised.

25 Should it prove to be the case that export of the goods on which a refund was granted did not take place, it is obvious that the exporter has requested a refund in excess of that applicable, since, in the absence of actual exportation, no refund is due.

26 In such a situation, the sanction applicable can therefore be based on the first subparagraph of Article 11(1) of Regulation No 3665/87 alone.

27 However, other express provisions of that article also require that a sanction be imposed on the exporter on the basis of findings made after acceptance of the export declaration.

28 Thus, according to the fifth subparagraph of Article 11(1) of Regulation No 3665/87, where the competent authorities have established that the exportation has not been effected and that no reduction of refund is possible, the exporter is to pay the amount equivalent to the sanction provided for under Article 11(1)(a) or (b). Article 11(3) of the regulation provides that, where a refund is unduly paid, the beneficiary is to reimburse the amounts unduly received, including any sanction applicable pursuant to the first subparagraph of Article 11(1).

29 According to the documents submitted to the Court of Justice by the referring court, the export operation on the basis of which AOB Reuter received a refund did not take place and, in those circumstances, the refund was paid unduly; moreover, AOB Reuter does not dispute the fact that it received such a refund unduly.

30 In those circumstances, it is necessary to apply the sanction provided for under Article 11(1)(a) of Regulation No 3665/87, unless one of the exceptions as exhaustively defined in the third subparagraph of Article 11(1) applies.

31 Therefore, the argument that only the supply of false information by the exporter in his export declaration can justify the application of that sanction cannot be accepted.

32 With regard to the exceptions provided for in the third subparagraph of Article 11(1) of Regulation No 3665/87, the case documents do not show that, in the case in the main proceedings, any of those conditions was fulfilled.

33 None the less, the referring court raises the question of the applicability of a sanction in situations such as that in the main proceedings having regard to the principles of legality, of legal certainty and of proportionality. AOB Reuter, which cites the same principles, takes the view that, in the present case, by taking out a bank guarantee, it took diligent precautions against possible default by its contractual partners.

34 First, with regard to the principles of legality and of legal certainty, it must be held that Article 11(1) of Regulation No 3665/87 constitutes a legal basis for the application of the sanction which is clear and sufficient.

35 Second, with regard to the principle of proportionality, it should be pointed out that, in the fifth recital in the preamble to Regulation No 2945/94, the legislature refers to past experience and, in particular, irregularities and fraud already recorded in the context of export refunds. The Court has already upheld the proportionate character of the sanction provided for in Article 11(1)(a) of Regulation No 3665/87, by holding that it does not infringe the principle of proportionality, since it cannot be considered to be inappropriate for attaining the objective pursued by the Community rules, namely to combat irregularities and fraud, and does not go beyond what is necessary to achieve that objective (Case C-210/00 *Käserei Champignon Hofmeister*, paragraph 68, and Case C-385/03 *Käserei Champignon Hofmeister* [2005] ECR I-2997, paragraph 31).

36 Third, with regard to the justification relied upon by AOB Reuter, it is sufficient to point out that it is not possible to add a new exception, based in particular on the absence of fault on the part of the exporter, to the exhaustive list contained in the third subparagraph of Article 11(1) of Regulation No 3665/87, and that the Court has already held that the fault or error of a contracting partner is an ordinary commercial risk and cannot be considered to be unforeseeable in the context of commercial transactions. The exporter is fully at liberty to select his trading partners and it is up to him to take the appropriate precautions, either by including the necessary clauses in the contracts which he concludes with them or by effecting appropriate insurance (see, to that effect, Case C-210/00 *Käserei Champignon Hofmeister*, paragraph 80, and the case-law cited).

37 Having regard to the above and in answer to the question raised, Article 11(1) of Regulation No 3665/87 must be interpreted as meaning that the sanction for which it provides is applicable against an exporter who has requested an export refund for goods, where those goods, as a result of fraudulent conduct on the part of the exporter's contracting partner, were not exported.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products, as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994, must be interpreted as meaning that the sanction for which it provides is applicable against an exporter who has requested an export refund on goods, where those goods, as a result of fraudulent conduct on the part of the exporter's contracting partner, were not exported.

[Signatures]