External community transit - remission of import duties

BAT BV v Hauptzollamt Krefeld
Case C-222/01, ECJ, 29 April 2004

Jason Chuah

School of Law

This is an electronic version of an article published in the Journal of International Maritime Law, 10 (3). pp. 291-294, 2004, and is reprinted her with the permission of the publisher.

EUROPEAN UNION

EXTERNAL COMMUNITY TRANSIT – REMISSION OF IMPORT DUTIES

Jason Chuah

BAT BV v Hauptzollamt Krefeld
Case C-222/01, ECJ, 29 April 2004

Rothmans Manufacturing BV ('Rothmans'), a company established in Zevenaar (the Netherlands), on the instructions of a Swiss company in the group to which it also belongs, arranged for a consignment of 11,000,000 'Golden American' brand cigarettes to be cleared under the external Community transit procedure. The time limit within which the goods had to be presented to the customs authorities again was fixed by the office of departure, the Zevenaar customs office, as 16 July 1992. During the journey, the driver claimed, transit and transport documents were removed and returned to him three times.

The lorry driver and other associates of his had been under customs surveillance for some time. A German customs officer was offered for sale, through an intermediary for unidentified East European sellers, a container full of 'Golden American' cigarettes, intended for export to Poland and said not to bear any revenue stamps. Payment and delivery arrangements were agreed at a subsequent meeting between the undercover agent and the seller, during which it was agreed that the cigarettes were to be delivered to the premises of a specified forwarding agency in Nettetal-Kaldenkirchen (Germany). It would appear that following this arrangement, the lorry and its trailer were subsequently taken to the yard on 16 July 1992, the agreed delivery date. At that meeting, at the agent's request, the seller showed him at a distance a trailer registered in Poland which was said to contain the cigarettes. Not having been allowed to approach the trailer, however, the agent was not able to see the customs seals.

Subsequently, the driver and his mate unloaded some of the cigarettes. German customs officers, who had initially been observing the unloading incognito, carried out a body search of the driver, in the course of which they discovered a torn-off Netherlands lead customs seal. They then seized the lorry and its load with a view to subsequent confiscation and later destroyed the cigarettes. The driver and his mate were also arrested.

The Hauptzollamt deemed, in those circumstances, that the breaking of the seals and subsequent unloading of the cigarettes from the lorry by the driver and/or his associates constituted removal of the goods from customs supervision and claimed from BAT (successors of Rothmans), as the 'principal',[1] the sum of DM 1,436,776 in excise duty on tobacco. BAT applied to the Hauptzollamt for remission of those duties, pleading, in particular, the existence of a 'special situation' within the meaning of Article 13(1) of Regulation No 1430/79. That article 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. The situations in which the first subparagraph may be applied, and the detailed

[1] Article 11, Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit ([1977] OJ L38/1), as amended by Council Regulation (EEC) No 474/90 of 22 February 1990 ([1990] OJ L51/1) ('Regulation No 222/77') provides that 'principal' means 'the person who, in person or through an authorized representative, requests permission, in a declaration in accordance with the required customs formalities, to carry out a Community transit operation and thereby makes himself responsible to the competent authorities for the execution of the operation in accordance with the rules'. That Article has now been repealed. See Arts 94 and 96, Council Regulation 2913/92 which now provide for the responsibilities and role of the principal in connection with external Community Transit.

procedural arrangements to be followed for this purpose, shall be determined in accordance with the procedure laid down in Article 25. Repayment or remission may be made subject to special conditions.

BAT argued that the presence and the conduct of the customs officers, the confiscation of the cigarettes and the impossibility of passing the tax due on to third parties must necessarily constitute special circumstances for the purposes of that provision, justifying repayment of duties paid. BAT submitted that such repayment should be excluded only if the party concerned had itself used deception and pointed out that no deception could be directly attributed to it. For that reason, and in the absence of a Community or national principle of vicarious liability, it was argued, the Hauptzollamt should repay the duties paid.

The matter was soon taken up before the Bundesfinanzhof. The Bundesfinanzhof decided that in order to deal with BAT's claim, it was necessary to refer the following questions to the European Court of Justice for a preliminary ruling:

(1) Are goods which have been cleared for Community transit removed from customs supervision if the transit document T1 is temporarily removed from the consignment?

(2) If the court answers question 1 in the negative:
Have goods cleared for Community transit been removed from customs supervision if the customs seal affixed to ensure their identification was opened and the goods were partially unloaded, without the consignment first being duly produced for customs, even though the operation was arranged with the persons in question by customs investigation officers operating incognito and observed in every detail by those officers?

(3) If the court answers one of questions 1 and 2 in the affirmative:
Do special circumstances exist within the meaning of Article 13 of Regulation 1430/79 if a customs investigation officer acting undercover has provoked infringements of the Community transit procedure? Does the deception or obviously negligent conduct of persons used by the principal in fulfilling the obligations assumed by him under the Community transit procedure preclude repayment to him of the duties incurred by the removal from customs supervision of goods cleared for Community transit?

It should be noted that the regulations referred to in this case have all been superseded and replaced by Council Regulation 2913/92 of 12 October 1992 establishing the Community Customs Code and Commission Regulation 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation 2913/92 establishing the Community Customs Code. This preliminary ruling, however, should have implications for the application of the new Code.

On the first issue, Article 2, Regulation 2144/87 (now Article 203 Regulation 2913/92) provided, *inter alia*, that a customs debt on importation would be incurred through the unlawful removal from customs supervision of goods liable to import duties, and the time it is incurred is the moment when the goods are removed from customs supervision. It was argued by BAT that the goods could not be said to be removed from customs supervision where the T1 transit document for those goods had been temporarily removed. That was particularly so, BAT submitted, where such removal did not have any consequences for the goods themselves and had not affected the ability of the customs authorities to identify them; those authorities having neither demanded the transit document in question nor established that it could not have been presented to them, at their request, without considerable delay.

The Commission, however, submitted that such temporary removal of the transit and transport documents did constitute a removal of the goods concerned from customs supervision, because under the circumstances, those documents could not have been presented at the first request of the competent customs authorities.[2] The Commission argued that customs control could not be effective unless customs officers are able, at any time during the transit procedure, to check

[2] See Arts 12(6), 19(1) and 20 of Reg 222/77.

simultaneously the customs sealing and the transit and transport documents. This is indeed bolstered by Article 357 Regulation 2454/93[3] which provides generally that goods placed under the Community transit procedure should not be released unless they are sealed. A waiver of the sealing requirement would only be given if 'having regard to other possible measures for identification, the description of the goods in the transit declaration or in the supplementary documents make them readily identifiable'.[4] The law also required the carrier to make the necessary entries in the transit documents and present them to the customs authorities of the Member State in whose territory the means of transport is located (en route to the place of destination) if the seals are broken in the course of a transport operation for reasons beyond the carrier's control or in the event of any incident or accident capable of affecting the ability of the principal or carrier to comply with his obligations.[5]

The first question is a particularly interesting and important question as the ECJ had not in the past pronounced on the definition of the concept of removal or listed the conditions the non-observance of which will cause a customs debt to be incurred. The ECJ ruled that the temporary removal of the TI transit document from the goods to which it relates must be characterized as a 'removal' of those goods from customs supervision. The ECJ acknowledged that there was no precedent, either judicial or legislative, on the solution to the problem, but as is conventional with the court's approach where there is no precedent, it looked back at the purpose of the law. In this case, the court, therefore, thought it vital to evaluate the role played by the TI transit document, in order to assess whether or not the removal of the latter from the goods to which it related affected the monitoring abilities of the customs authorities. The role of the TI is to place on the principal the responsibility to ensure that the goods arrive intact and the court concluded that the removal of that document, even if only temporary, would seriously undermine the very objectives of that system.[6] It prevents the presentation of that document in the event of any requisition by the customs service. Such removal would, according to the court, also complicate the identification both of the goods which are subject to the transit procedure and of the customs regime applicable to them. On that basis, the court found that there had been a removal of the goods from customs supervision. The test, it would follow, was an objective test – namely, whether the conditions laid down in the Regulation were met and not whether, subjectively, there had been a *de facto* loss of customs supervision. As the first issue was answered in the negative, the court saw no reason to deal with the second question formulated by the German tribunal.

As far as the third question and Article 13 of Regulation 1430/79 are concerned, it should first be noted that that Article has now been repealed and the new equivalent provision is set out in Article 239, Regulation 2913/92. The new Article states:

> Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 –
>
> – to be determined in accordance with the procedure of the committee;
> – resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the committee procedure. Repayment or remission may be made subject to special conditions.

It is immediately obvious that the word 'special' has been omitted from the new Article in relation to situations where repayment or remission might be made. It was regrettable that the ECJ did not find it necessary to deal with how the omission should be dealt with. It was content to confine itself to the old law and how it affected the position of the principal in the present case. Although that was technically appropriate, the rationale behind the giving of preliminary rulings under Article 234 is to

[3] Which replaces Art 18, Reg 222/77.
[4] Art 357(4).
[5] Art 360(1)(a) and (e), Reg 2454/93 (which replaces Art 25, Reg 222/77).
[6] Para 52 of the judgment.

provide clarification of the law and to guide future conduct and application of EU law. It was thus an opportunity missed.

On Article 13, the ECJ ruled that there was indeed a special situation under which the customs authorities were bound to repay the debt incurred by the principal provided no deception or obvious negligence can be attributed to him. It considered that as the infringement of the Community transit system was to some degree caused by the customs authorities themselves (by inducing the sale of the cigarettes to the undercover officer), it would be 'inequitable to require the trader to bear a loss which he normally would not have incurred'.[7] The emphasis in the court's jurisprudence[8] has been that the exception in Article 13 must be special – those situations which normally arise in practice are deemed to be properly addressed by other provisions in the Regulation. It is anticipated that Article 13 covered only those situations which are unusual and where it would be inequitable to require the trader to pay.[9] Case C-86/97 *Trans-Ex-Import*[10] required, for example, the finding of exceptional circumstances. It appears from the *travaux préparatoires* that the removal of the word 'special' does not necessarily mean that the position would be fundamentally different, for, after all, as the argument goes, since the new law specifically refers to the repayment or remission of debt where Articles 236, 237 and 238 do not apply, it would only be in exceptional circumstances that Article 239 (the new law) will apply. That argument, however, ignores the fact that under the old Article 13, the provisions equivalent to Articles 236, 237 and 238 were also expressly referred to.

It is arguable that nothing more than fairness or equity need be the principal test in the new law as it is no longer explicitly required that unusual or exceptional circumstances be shown. It could further be argued that as the object of Article 239 is fairness, whether the circumstances are exceptional or unusual should really not be significant. They may contribute to the finding that under the circumstances of a particular case, it would be unfair not to permit a repayment or remission of the customs debt, but it would not be necessary to identify and define a particular set of circumstances as a special situation.[11] The test is to ask whether the circumstances are such that, as between the trader and the national authorities, the principal is being required to bear a loss which he, contractually (in his guarantee to the authorities) and legitimately, would not normally have anticipated.

As for the condition that the principal should not be guilty of deception or obvious negligence, the court held that the fact that there was deception or obvious negligence on the part of persons the principal has engaged to carry out his obligations does not necessarily mean that the principal himself could not be protected by Article 13. It is for the national authorities to assess whether deception or obvious negligence may be attributed to the principal. The authorities should have regard to how the principal ensures compliance at the office of destination, the professional experience of the principal, the degree of care with which it chose the persons to whom it entrusted the transport of goods and the diligence it showed when irregularities (if any) were found. The test, it would appear, has both an objective and subjective element.

Finally it might be noted that it is up to the national tribunal to rule on whether there is enough evidence to justify the repayment or remission of duties paid on grounds of fairness or equity. The issue of evidence is, thus, of immense importance. In the present case, for example, it should follow that if the national authorities found that the infringement of the Community external transit system occurred before the seals were broken and that the principal took undue risks in the transport of the goods, or that the infringement was not caused solely by the activities of the undercover officers, Article 13 could not be activated.

---

[7] Para 63. See also Case 58/86 *Coopérative agricole d'approvisionnement des Avirons* [1987] ECR 1525, para 22).

[8] See, in particular, Case 58/86 (ibid), Joined Cases 244/85 and 245/85 *Cerealmangini and Italgrani v Commission* [1987] ECR 1303 and Case C-446/93 *SEIM* [1996] ECR I-73.

[9] Paras 36 and 53, Case C-61/98 *De Haan* [1999] ECR I-5003.

[10] [1999] ECR I-1041.

[11] See the Commission's argument as summarized by the ECJ in para 60.