OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 18 SEPTEMBER 1980

My Lords,

These two cases come before the Court by way of references for preliminary rulings by the Corte Suprema di Cassazione. In each of them the appellant before that Court is the S.a.s. Prodotti Alimentari Folci (which I shall call "Folci") and the respondent is the Amministrazione delle Finanze dello Stato. The question at issue between them is as to the rate of customs duty chargeable on consignments of sliced and dried wild mushrooms imported by Folci from Yugoslavia in 1975 and 1976.

It is common ground that such mushrooms come within subheading 07.04 B of the Common Customs Tariff, which is in these terms:

"Dried, dehydrated or evaporated vegetables, whole, cut, sliced, broken or in powder, but not further prepared:

A. ...

B. Other".

The rate of duty under that subheading is 16 %.

Since 1971, however, the Community has operated a scheme of generalized preferences in favour of developing countries, of which Yugoslavia is listed as one. The Regulations governing that scheme for the years 1975 and 1976 were Council Regulation (EEC) No 3055/74 (the text of which as printed in the Official Journal must be read subject to the corrigendum published in OJ L 121/24 of 14. 5. 1975) and Council Regulation (EEC) No 3011/75 respectively. Annex A to each of those Regulations lists the products to which the scheme is to apply. Among them one finds, against CCT heading No 07.04:

"Dried, dehydrated or evaporated vegetables, whole, cut, sliced, broken or in powder but not further prepared:

ex B. Other:

— Whole mushrooms, dried, dehydrated or evaporated, excluding cultivated mushrooms

— Horse-radish (Cochlearia armoracia)".

Mushrooms within that description originating in a developing country are liable to duty at the reduced rate of 10 %.

Folci claims that the mushrooms it imported were within the description in Annex A. The Amministrazione delle Finanze dello Stato, pointing to the fact that those mushrooms were not whole but sliced, claims duty at the general rate of 16 %. In order to get over the fact that the mushrooms were sliced Folci contends that the word "whole" in Annex A must be interpreted as meaning not that each mushroom must be in one piece but that the entire mushroom (both cap and stalk) must be present albeit in pieces. In support of that contention Folci alleges that almost all the dried wild mushrooms imported into the Community from developing countries

are ceps (as were those that it imported) and that it is notorious that ceps cannot be dried without having first been sliced. Therefore, Folci argues, the concession in favour of dried wild mushrooms granted under the scheme would be denied any substantial effect if "whole" were interpreted as meaning "in one piece". The requirement that the entire mushroom should be present is explicable, Folci says, on the ground that the caps alone would be commercially a more valuable product, because the caps have more flavour.

The dispute between the parties came first before the Tribunale of Trieste in relation to an importation effected by Folci in February 1976. By a judgment dated 30 June 1976 the Tribunale decided it in favour of Folci. The Amministrazione delle Finanze dello Stato appealed to the Corte d'Appello of Trieste. That court, by a judgment dated 24 March 1977, allowed the appeal. It held that "whole" meant "in one piece". It did not accept that wild mushrooms could never be dried unless they were first sliced and observed that the interpretation adopted by the Tribunal would stand up only if, in the case of mushrooms that had been cut up, the presence of all their parts in the correct proportions could be ensured and checked, which was not the case.

The matter came before the Tribunale a second time in relation to importations effected by Folci during 1975 and in January 1976. On this occasion the Tribunale, by a judgment dated 27 May 1977, decided against Folci, in accordance with the decision of the Corte d'Appello. An appeal by Folci against that judgment was dismissed by the Corte d'Appello by a judgment dated 23 February 1978.

It is against the two judgments of the Corte d'Appello that Folci now appeals to the Corte Suprema di Cassazione. The question referred by that court to this Court is, shortly stated: which is the correct interpretation of the word "whole" in the context?

Before this Court the Italian Government drew attention to the fact that the word "whole" had not been present in the description of the preferred products contained in the respective Annexes A to the Regulations governing the scheme in 1973 and 1974 (Council Regulation (EEC) No 2767/72 and Council Regulation (EEC) No 3506/73 respectively), nor was it present in the corresponding description given in the Annexes A to the Regulation applicable in 1977 and subsequent years (i.e. Council Regulations (EEC) No 3206/76, No 2710/77, No 3161/78 and No 2792/79 respectively). That in itself did not further the argument, but the Court asked the Commission whether it could explain why the word "whole" was first omitted, then inserted, and lastly deleted. The Commission answered that in 1974, when considering the legislation for 1975, the Council decided to insert the word "whole" in order to avoid the risk that the reduced rate of duty might be applied to preserves containing pieces of cultivated mushrooms, it being difficult to distinguish, when mushrooms have been cut up, between pieces of wild mushrooms and pieces of cultivated mushrooms. In 1976, however, when it was preparing the legislation for 1977, the Commission was impressed by the fact that certain developing countries produced only preserved mushrooms cut

up into pieces. It considered that it was more important to enable them to benefit from the preferential scheme than to make absolutely certain that no pieces of cultivated mushrooms did so, which would be rare anyway. The Council adopted that view and the word "whole" was accordingly deleted.

One must in my opinion be very cautious in using information such as that given in that answer as an aid to the interpretation of a Council Regulation. It comes perilously close to using as an aid to the interpretation of legislation the views as to its meaning held by those who took part in its preparation, which, for the reasons I ventured to state in Case 136/79 *National Panasonic (UK) Ltd* v *Commission* (not yet reported), I do not think permissible. At most may one, in my opinion, deduce from such an answer what was, factually, the "mischief" at which the legislation was aimed.

The Italian Government also referred us to two documents prepared by the Commission for the Committee on CCT Nomenclature. The first was a report to that Committee, dated 9 December 1976, on the judgment of the Tribunale of Trieste of 30 June 1976 (i.e. its first judgment). The second was a report of a meeting of the Committee held in January 1977, at which, among other items, that judgment was considered. It records that "The view of all the delegates on this point was that the word 'whole' contained in the text in question precluded products falling within this tariff heading from being cut into pieces or sliced". Both documents are marked *"Restricted distribution"* (see Annexes 1 and 2 to the written observations of the Italian Government).

This Court has had on more than one occasion to consider the legal standing of opinions of the CCT Nomenclature Committee. I would refer in particular to Cases 69 & 70/76 *Dittmeyer* v *HZA Hamburg-Waltershof* [1977] 1 ECR 231, where the Committee's opinion had been issued in the form of a "classification slip", and to Case 11/79 the *Cleton* case [1979] ECR 3069 and Case 54/79 the *Hako-Schuh* case (26 February 1980, not yet reported), in both of which it had been published in the Explanatory Notes to the CCT Nomenclature (see in the *Dittmeyer* case paragraphs 3 and 4 of the judgment and my opinion at pp. 242-243, in the *Cleton* case paragraphs 12 and 13 of the judgment and my opinion at pp. 3087-3088, and in the *Hako-Schuh* case paragraph 6 of the judgment and the opinion of Mr Advocate General Mayras at pp. 6 and 7 of the typescript). Those authorities establish that opinions of the CCT Nomenclature Committee are not legally binding but are a valuable aid to interpretation so long as they are consistent with the CCT itself. This seems to be the first case, however, where the Court has been invited to have regard as an aid to interpretation to an opinion of the Committee expressed in a document having a restricted distribution. In my opinion it would be contrary to principle to take into account, as an aid to the interpretation to anything in a Council Regulation, material that is not published in any form and to which therefore private persons

(including traders) and their legal advisers can have no access.

Before us the Italian Government put forward an attractive argument additional to those that impressed the Corte d'Appello of Trieste. This was that, on Folci's interpretation of the text in question, the reduced rate of duty would apply (in 1975 and 1976) not only to mushrooms that were cut or sliced but also to those that were "broken" or "in powder". In the case of the latter at all events it would be impossible to tell whether the powder came from the caps or from the stalks.

But the consideration that seems to me decisive is one that was not mentioned in argument before us at all. It is that the ambiguity that the Corte Suprema di Cassazione asks this Court to resolve does not exist in all the versions of the text. The six versions, leaving out in each case the reference to horse-radish, are respectively as follows:

Danish: "Grønsager, tørrede, også snittede, knuste eller pulveriserede, men ikke yderligere tilberedte:

ex B. Andre varer:

— Svampe, hele, tørrede, undtagen dyrket champignon";

German: "Gemüse und Küchenkräuter, getrocknet, auch in Stücke oder Scheiben geschnitten, als Pulver oder sonst zerkleinert, aber nicht weiter zubereitet:

ex B. andere:

— ganze Pilze, getrocknet, ausgenommen Zuchtpilze";

French: "Légumes et plantes potagères desséchés, déshydratés ou évaporés, même coupés en morceaux ou en tranches ou bien broyés ou pulvérisés, mais non autrement préparés:

ex B. autres:

— Champignons entiers desséchés déshydratés ou évaporés, à l'exclusion des champignons de couche";

Italian: "Ortaggi e piante mangerecce, disseccati, disidratati o evaporati, anche tagliati in pezzi o in fette oppure macinati o polverizzati, ma non altrimenti preparati:

ex B. altri:

— Funghi interi disseccati, disidratati o evaporati esclusi i funghi di coltivazione";

Dutch: "Groenten en moeskruiden, gedroogd, gedehydreerd of geëvaporeerd, ook indien in stukken of in schijven gesneden, dan wel fijngemaakt of in poedervorm, doch niet op andere wijze bereid:

ex B. andere:

— gehele paddestoelen, gedroogd, gedehydreerd of geëvaporeerd met uitzondering van gekweekte paddestoelen";

English: "Dried, dehydrated or evaporated vegetables, whole, cut, sliced, broken or in powder but not further prepared:

ex B. Other:

— Whole mushrooms, dried, dehydrated or evaporated, excluding cultivated mushrooms".

I have left the English till last because, as Your Lordships see, its verbal structure is slightly different from that of the other five. The reason for that is that, whilst all six texts of CCT heading 07.04 are based on the wording of that heading in the Customs Cooperation Council (or "CCC") Nomenclature, the English text reproduces the English text of that Nomenclature, whilst the other five

reproduce or are modelled on the French text of it (the English and the French being, as Your Lordships know, the only authentic texts of the CCC Nomenclature).

The difference is that, in the English text, the word "whole" appears in heading 07.04 itself and does so in a way that makes it abundantly clear that it is used as an alternative to "cut, sliced, broken or in powder". It is thus impossible according to the English for a mushroom to be both "whole" and "sliced". In the other texts the word "whole" appears for the first time under " Ex B. Other" in Annex A to Regulation No 3055/74 and does so in a way that enables Folci's interpretation to be envisaged. All six texts must however be interpreted as meaning the same thing, so that that interpretation must necessarily, in my opinion, be rejected.

In the result I am of the opinion that Your Lordships should answer the questions referred to the Court by the Corte di Cassazione in the sense contended for by the Amministrazione delle Finanze dello Stato, which is supported by the Commission.