OPINION OF ADVOCATE GENERAL MISCHO

delivered on 12 March 2002 [1]

1. Perhaps surprisingly, errors, or purported errors, made by an importer in declaring customs value do not always result in a reduction in the duty to be collected.

2. There are cases in which an importer declares a customs value higher than that he was obliged to declare under the relevant Community legislation and such cases are not always of the type dealt with by the Court of Justice, for example, in its judgment of 15 December 1987, [2] in which the extra cost in terms of customs duty was deliberately assumed to avoid more onerous burdens such as anti-dumping duty.

3. Sometimes, perhaps more often than we might imagine, an importer simply makes a mistake to his own disadvantage, without any wrongful intention. Indeed, in such circumstances, there is the possibility of having import duties paid in error reimbursed, originally provided for by Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, [3] and currently governed by Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [4] ('the Customs Code').

Facts of the case and questions referred for a preliminary ruling

4. It was an error of that type which Overland Footwear Ltd, formerly Overland Shoes Ltd ('Overland') made. This company, established in the United Kingdom, buys products manufactured outside the European Union, imports them and distributes them within the Union. For its purchases in the Far East it uses the services of a buying agent, Wolverine Far East ('Wolverine'), in remuneration for which it pays a buying commission corresponding

1 — Original language: French.
2 — Case 328/85 *Deutsche Babcock* [1987] ECR 5119.
3 — OJ 1979 L 175, p. 1.
4 — OJ 1992 L 302, p. 1.

to a fixed percentage of the selling price of the goods to their manufacturer, which in turn pays it on to Wolverine on behalf of Overland, thus acting as paying agent.

5. Only one figure appears on the invoice sent by the manufacturer to Overland, made up of the selling price and the buying commission to be paid to Wolverine, which was thus neither mentioned nor identified separately.

6. Before 1 January 1998, that is to say before Overland obtained the advice of an expert in customs matters, in the declarations which they made to the United Kingdom customs authorities (the Commissioners) when the goods were released for free circulation, the transporters instructed by Overland to deal with the customs clearance of the imported goods gave as the customs value the figure appearing on the seller's invoice, the only document in their possession, without mentioning the buying commission included in that invoice. Overland thus paid customs duties not only on the imported goods, as required by the Community legislation, but also on the buying commission.

7. Since 1 January 1998, although the invoices sent to it are in the same form as before, Overland has only declared as customs value the amount paid to the manufacturer, as, once the Commissioners had been informed of the situation, they accepted both the existence of a buying commission within the meaning of the Community legislation and its amount calculated as a percentage of the manufacturer's selling price.

8. In respect of imports made before that date Overland submitted applications for repayment to the Commissioners under Article 236 of the Customs Code, arguing that a part of the value given on each declaration of customs value represented buying commission due to Wolverine and that, therefore, it had paid duties which were, in part, not legally owed.

9. Initially some of those applications were granted and repayments were made but subsequently the Commissioners went back on the decision to repay on the ground that the duties collected were legally owed in full. They therefore required Overland to repay the amounts paid by way of reimbursement under Article 242 of the Customs Code.

10. Overland appealed against the decisions ordering it to repay those amounts before the VAT and Duties Tribunal, London.

11. The Tribunal, having established that the decision to be made on this action turned on the interpretation of certain provisions of Community law, in this case certain articles of the Customs Code, decided to refer the following questions to the Court for a preliminary ruling:

'On the basis of Council Regulation (EEC) No 2913/92, in particular Articles 29, 32 and 33 thereof, and the case-law of the Court, where, at the time of customs clearance, an importer inadvertently declares as the price paid or payable for the goods an amount inclusive of buying commission and inadvertently fails to show the buying commission separately on the import declaration from the price actually paid or payable but, after the goods have been released into free circulation, shows to the satisfaction of the Customs authorities that the declared price paid or payable for the goods included bona fide buying commission, which could have been properly deducted at importation, and makes a claim for repayment of the duty paid on the buying commission within three years of the date on which the amount of customs duty was communicated:

1. Could the bona fide buying commission be dutiable as part of the price actually paid or payable for the goods under Article 29 of the Code?

2. If the answer to the first question is negative, could the bona fide buying commission be deductible from the declared transaction value bearing in mind the provisions of Articles 32(3) and 33 of the Code?

3. In such circumstances are the customs authorities obliged under the Code, and in particular Article 78(3) thereof, to accept the amendment to the price paid or payable for the imported goods and thereby [a] reduced customs value?

4. Is the importer therefore entitled under the Code, and in particular Article 236 thereof, to a refund of the duty paid on the buying commission?'

Legal background

12. Before tackling those questions, I will set out the provisions of the Customs Code which were held by the referring court to be of relevance.

13. Article 29 provides:

'1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided...

...

3. (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instrument and may be made directly or indirectly.'

14. Article 32 provides:

'1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

(i) commissions and brokerage, except buying commissions,

...

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

4. In this Chapter, the term "buying commissions" means fees paid by an importer to his agent for the service of representing

him in the purchase of the goods being valued.'

15. Article 33 provides:

'Provided that they are shown separately [5] from the price actually paid or payable, the following shall not be included in the customs value:

...

(e) buying commissions;

...'

16. Article 78 provides:

'1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.

...

3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.

...'

17. Finally, Article 236 reads as follows:

'1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

5 — Translator's note: 'Shown separately' corresponds to 'distincts' in the French version of this provision. In the corresponding provision in the earlier customs legislation, the English term corresponding to 'distincts' is 'distinguished'.

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or force majeure. Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative.'

The first and second questions

18. By its first question the referring court is asking whether the bona fide buying commission could be dutiable as part of the price actually paid or payable for the goods under Article 29 of the Code.

19. In other words, is such commission part of the transaction value which Article 29 of the Customs Code takes as the customs value?

20. The answer to that question can only be in the negative. Such commission, which is not due to the seller but to a third party, the buying agent, as consideration for his services, is clearly not part of the 'price actually paid or payable for the goods' sold for export to the customs territory of the Community nor of the 'the total payment made or to be made by the buyer to... the seller' (Article 29(3)).

21. It is clearly for the same reason that Article 32(1)(a) provides that it should not be added to the price actually paid in order to determine customs value.

22. Finally, Article 33(e) expressly lists buying commissions among the expenses which are not included in customs value.

23. However, and it is on this point that the parties to the main proceedings differ, Article 33 requires that, if it is not to be

included in customs value, the buying commission must be 'shown separately' ['distinguished'] [6] from the price actually paid or payable for the imported goods.

24. What is the scope of this requirement? Does it render dutiable things which, in themselves, are not? This seems to me to be the point of the second question referred to the Court.

25. In Overland's view this requirement must be understood as relating to the facts of the commercial transactions made by the importer. It is necessary and sufficient, it submits, for the importer to have actually paid a third party acting as buying agent, as to which there is no dispute here.

26. Neither the fact that this commission was in fact invoiced by the seller nor the fact that the declaration of customs value submitted to the Commissioners makes no mention of it can alter in any way the incontrovertible fact that the commission was actually paid to Wolverine by the seller, and that it is thus impossible to take it into account as a part of the dutiable value.

27. The United Kingdom Government contends, disputing that interpretation, that if a buying commission can in fact never fall within the definition of customs value in Article 29 of the Customs Code, the provision in Article 33 of the Code, under which, for its exclusion to be effective, the buying commission must be shown separately [distinguished], [7] would be wholly otiose. It concludes that the term 'distinguished' must be taken to mean both 'distinguished' and 'shown separately'.

28. I, for my part, do not in the least dispute that an importer is bound, when he submits his customs declaration, to show explicitly both the existence and the amount of any buying commission and that the burden is on him to adduce evidence of such commission if the customs authorities so request.

29. If, at the time he makes the declaration, he does not have at his disposal all the necessary information, he always has the option, as the Commission rightly observes, of submitting an incomplete declaration under Article 254 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [8] (Article 254 et seq.).

30. If he does not take that precaution, that is to say, if he submits a declaration which

6 — Translator's note: See translator's note to point 15.

7 — Translator's note: See translator's notes to points 15 and 23.

8 — OJ 1993 L 253, p. 1.

includes a buying commission in the customs value declared but does not indicate the existence of that commission in any way, it is hard to see how the customs services are supposed to detect the existence of such commission, because, while we are, of course, entitled to expect customs staff to be perspicacious, we cannot expect them to have the gift of divination. Such an importer will thus quite simply be subject to Article 71 of the Customs Code, under which:

'1. The results of verifying the declaration shall be used for the purposes of applying the provisions governing the customs procedure under which the goods are placed.

2. Where the declaration is not verified, the provisions referred to in paragraph 1 shall be applied on the basis of the particulars contained in the declaration.'

31. That is also the approach of the Customs Code Committee (customs valuation section) which, in its Commentary No 5 on the meaning of the term 'distinguished' for the purposes of the provisions on the valuation of goods for customs purposes, takes for granted that the various elements, including buying commissions, which Article 33 of the Customs Code excludes from customs value, must be indicated in the appropriate box of the customs declaration form, and does not consider from what time those elements are actually, rather than artificially or notionally, distinct from the price to be paid for goods sold for export outside the customs territory of the Community.

32. Finally, I have to say that I do not think the judgment of the Court in *Hepp*, [9] a case in which I delivered the Opinion, is a precedent we can follow to solve the problem before us. In that judgment, which also concerned the inclusion of buying commission in customs value, the Court held, as Overland points out, that 'the manner in which the importer actually completes the administrative formalities regarding the customs declaration in no way changes the substance of the legal situation' (paragraph 19) and interpreted the Community legislation as not entitling the customs administration to add to the price paid for imported goods the buying commission to which the transaction carried out by the Community importer gave rise.

33. However, *Hepp* concerned an importer who used a buying agent to obtain supplies in the Far east, as Overland did. Like Overland, it filled in the customs documents incorrectly but, unlike Overland, it did not declare a customs value including a buying commission which it had had to pay. Its mistake was to declare as the seller

9 — Case C-299/90 [1991] ECR I-4301.

its buying agent, who bought goods from producers in its own name but on behalf of Hepp in order to sell them on to Hepp, issuing two invoices: one for the sale of the goods and one for its services as buying agent.

34. Having received a declaration of customs value showing only the invoice issued for the sale of the goods but knowing of the payments made by the importer by way of buying commission to someone that importer described as the seller, the customs authorities took the view that the amount of such commission should be included in the customs value, since a buying commission had to be paid to a third party in order to be excluded.

35. In other words, for the customs authorities this was a case of a reduction of customs value, justifying an adjustment to take account of actual customs value, as it should be established by application of the Community rules.

36. The Court held that in fact the buying agent, in view of the actual part he played in relations between the manufacturer and the importer, in which he did not assume any financial risk, should not, despite the indications given in the customs declaration, be considered as the seller and that, therefore, there was only one transaction, namely that concluded between the manufacturer and the importer, on the basis of which the customs value should be established.

37. It was against that background that the Court held that 'the price in the transaction between the manufacturer or supplier, on the one hand, and the importer, on the other, constitutes the customs value for the purposes of Article 3(1) of the basic regulation. The buying commission is not to be included in that value even when the importer has described the buying agent as the seller and has declared the price of the goods as invoiced by that agent' (paragraph 20).

38. Unlike Overland, Hepp did not indicate a customs value higher than that it should have declared, it had declared the customs value as it should be established under the Community legislation.

39. Its mistake had been merely to give information about the identity of the seller which could suggest that the customs value was not correct, given the payment of a buying commission in addition to the price of the goods.

40. Only two lessons can therefore be drawn from the Court's judgment, namely, first, that the fact that the buying agent acts in his own name does not automatically make him the seller of imported goods and, second, that an importer who has declared a correct customs value can rely on the economic facts to dispute an upward adjustment of the customs value thus declared, which the customs authorities wish to make in reliance on incorrect information given in the customs declaration giving rise to doubt about the existence of a buying commission paid to a third party within the meaning of the Community legislation.

41. However, nothing can be inferred from this judgment as to the possibility of an importer's relying, once the goods have been released for free circulation, on an error which led it to declare a customs value higher than that it was required to declare.

42. The absence of an obligation on the importer who has paid a buying commission to include it in the customs value does not imply an obligation on the customs administration to deduct from the customs value declared a buying commission which has not been mentioned in the declaration of customs value.

43. If *Hepp* is of no assistance, might the judgment in *Brown Boveri*[10] be of more relevance in confirming on all points the argument of the United Kingdom Government and the Commission, as they claim?

44. At first sight, this appears to be so. In that judgment, the Court held that '[i]t follows that, as the Court ruled in Case C-11/89 (*Unifert* [1990] ECR I-2275), once an importer has omitted in his customs declaration to distinguish the assembly costs from the price actually paid or payable, he may not amend his declaration or, consequently, the particulars regarding the customs value, after the customs authority has released the goods for free circulation — that is, after the material time for valuation for customs purposes' (paragraph 29).

45. It must be said, in passing, that this reference to the judgment in *Unifert* raises certain questions. Whereas in *Brown Boveri* and in the present case the question to be decided concerned the implications of the fact that the declaration of customs value does not show separately an element which the customs legislation allows to be excluded from customs value provided that it is shown separately, *Unifert* concerned, as Overland pertinently observes, a different question, that is to say whether an

10 — Case C-79/89 [1991] ECR I-1853.

importer who, although he was entitled, under Community legislation, to choose from a variety of permissible customs values, corresponding to various transactions made before customs formalities were completed, selected and declared the least advantageous of those values, may later select another which is more to his advantage.

46. The fact that the Court's reply to that question was that 'where, in successive sales of goods, more than one price actually paid or payable fulfils the requirements laid down in Article 3(1) of Regulation No 1224/80, any of those prices may be chosen by the importer for the purposes of determining the transaction value. If the importer has referred to one of those prices in the customs value declaration, he may not correct the declaration after the goods have been released for free circulation, in accordance with Article 8(1) of Council Directive 79/695/EEC' (paragraph 21) does not imply, at least in my view, that where an importer includes in customs value an element which, under Community legislation, should not be included, he may not subsequently rely on that error.

47. It is one thing to make an unfortunate choice when faced with several options, and it is quite a different thing to make an error in a declaration of customs value in the absence of any options. Unless, of course, we take the view, as the United Kingdom Government and the Commission suggest, that an error in filling in a declaration of customs value is no different from the error of choosing from among several options the one which is best eschewed, if one wishes to act in one's own best interests.

48. If we follow that line of reasoning, there would be no room left for mistakes, as all mistakes could be reduced to the unfortunate exercise of a right to choose between submitting a declaration of customs value strictly adhering to the rules for assessing that value and submitting a declaration which does not.

49. I do not think that the Court can endorse such sophistry, since it held in *Deutsche Babcock* that the Community customs legislation, here Regulation No 1430/79, allowed for mistakes made in good faith and for the correction of their consequences adversely affecting an importer.

50. I will, therefore, take the lesson to be drawn from the judgment in *Brown Boveri* to be simply that Council Directive 79/695/EEC of 24 July 1979 on the har-

monisation of procedures for the release of goods for free circulation [11] did not allow an importer who had failed to show separately on his customs declaration an element which was not to be included in that value, even though it was separate, to amend that declaration after the goods were released for free circulation by the customs authorities.

51. I do not think that this solution is undermined by the fact that the above directive is no longer in force. The provisions of its Article 8 are reproduced in Article 65 of the Customs Code. That article provides:

'The [declarant] shall, at his request, be authorised to amend one or more of the particulars of the declaration after it has been accepted by customs. The amendment shall not have the effect of rendering the declaration applicable to goods other than those it originally covered. However, no amendment shall be permitted where authorisation is requested after the customs authorities:

(a) have informed the declarant that they intend to examine the goods; or,

(b) have established that the particulars in question are incorrect; or,

(c) have released the goods.'

52. The fact that amendments are allowed seems to me to confirm that the Community legislature accepted that importers might make mistakes and need to correct them. The limitation in time of the option to amend seems to me to be perfectly justified.

53. It is, of course, necessary to prevent an importer who has produced an inaccurate declaration from evading the consequences of what may turn out to be fraud by amending his declaration at the last minute when the inaccuracy, which we can assume may not always be unintentional, is discovered or is about to be discovered by the administration.

54. I also understand perfectly that, once the goods are released, that is to say, once they are beyond the physical control of the customs agents, amendment carries too great a risk of fraud to be allowed at that stage, and that a flexible approach, allowing amendments, subject to strict conditions, to matters unrelated to the physical

11 — OJ 1979 L 205, p. 19.

characteristics of the goods could perhaps have been envisaged. However, no provision was made for such an approach.

55. Must we then apply to Overland the maxim *dura lex sed lex*, as the United Kingdom and the Commission do?

The third question

56. I think that conclusion would have been inescapable had the Customs Code not included Article 78 which provides, in paragraph 1:

'The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.'

57. There was no equivalent to that provision in the Community legislation preceding the Customs Code. That was confirmed by the Commission at the hearing. I am thus entitled to assume that it was introduced because a gap had been discovered in the previous 'system' in that the Community legislature realised that it was necessary to provide for the possibility of correcting customs declarations even after goods are released.

58. Article 78 may, on the face of it, appear to be inconsistent with Article 65 of the Code because it allows the amendment of something which, under that article, could no longer be amended. However, it is only an apparent inconsistency.

59. The rules governing amendment under Article 78 and amendment under Article 65 are different. While the latter can be effected unilaterally by the importer, the former is carried out by the customs authorities themselves.

60. It is true that both Article 65 and Article 78 refer to the declarant's request but I do not think that requesting the administration to do something is as straightforward an option as requesting authorisation to do something oneself.

61. Rather, it seems to me that the administration cannot refuse authorisation for a declarant to make an amendment, but it is certainly not bound to act on a request that

it amend a declaration made to it. Amendment under Article 65 is simply a matter of replacing one unilateral declaration with another, before the administration has checked the accuracy of the original declaration, and it is hard to see how the customs administration could refuse such a request on the ground that it is not founded.

62. Amendment under Article 78 is carried out by the administration either of its own motion or at the request of the importer, but only if it appears justified. That mandatory condition allows it to be effected after the goods have been released.

63. In my view, the exercise by the administration of that power of amendment cannot be exempt from judicial review and an importer who has made a request for amendment under Article 78, stating reasons, is entitled, if that request is refused, to challenge that refusal before the court. It seems inconceivable to me, despite the wording of Article 78(1) which uses the term 'may', that the customs authorities should have a full discretion on that point.

64. A refusal can be justified only if the customs administration is able to show that the reasons put forward by the importer in support of his request for amendment are not permissible. That would be the case, of course, if an error was alleged but appeared not to be one, for example because the declaration of a customs value higher than that which should have been declared is due to the importer's wish to evade measures laid down by Community legislation relating to imports at a low price. That might also be the case if it appeared that the error made was caused by inexcusable negligence, as, in my view, the principle must be established that an importer is bound by a duty to cooperate in good faith with the customs services and cannot adopt a cavalier attitude towards them.

65. There is no need to describe here all the instances in which a refusal to amend would be justified. It is sufficient to examine whether Overland was entitled to an amendment, in the circumstances of the case, if its application for repayment presented on the basis of Article 236 of the Customs Code should have been interpreted as necessarily implying a request for amendment of its declaration of customs value.

66. In my view there is no doubt on that point. As the national court stated, it seems that the Commissioners have always recognised that it was a genuine error, made in good faith, and excusable, so much so that, initially they made repayment of the amount levied in excess. Their change of

heart might be explained by one of the following three reasons. Either they took the view that a claim for repayment under Article 236 of the Customs Code could not be granted in the absence of a prior amendment of the declaration of customs value, which was, apparently, not expressly requested in this case, and I will consider the merits of this explanation below. Or, they may have considered, erroneously, that Article 65 precluded any amendment of that declaration after the goods were released, without considering whether it was appropriate, in this case, to rely on Article 78. Or, finally, they may have considered Article 78 but taken the view that it offered an option entirely at their discretion which, in the circumstances, they did not think they needed to make use of.

67. Be that as it may, the judgment in *Hepp* [12] serves to remind us that the aim of the Community legislation on customs valuation is to establish a fair, uniform and neutral system of customs valuation excluding the use of arbitrary or fictitious customs values. I therefore take the view that the competent national authority, once it is in possession of the explanations and justifications put forward by an importer and provided that it reaches the conclusion that it is faced with a mistake made in good faith, is bound to amend the customs valuation.

12 — See point 12.

68. Once that amendment has been made it is incumbent on it to apply Article 78(3) of the Customs Code, under which, 'where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them'.

69. Applying that provision should therefore result in the refunding of the overpayment.

The fourth question

70. However, the fact remains that, in this case, according to the information provided by the national court, Overland relied only on Article 236 of the Customs Code, in other words, it claimed repayment directly, without making a request for amendment under Article 78 of the Code.

71. As I said above, the Commissioners would have been entitled to consider that claim in the context of Article 78 since the application of that article would have had

the practical result sought by Overland, that is to say, repayment. Apparently, they did not do so and only considered it in the context of Article 236.

72. I must therefore consider whether, in such a case, the decision to demand recovery, pursuant to Article 242 of the Customs Code, of sums previously repaid, can be based on a correct interpretation of Community law. In my opinion, since the judgment in *Deutsche Babcock*, cited above, expressly takes the error made by the importer as a ground for repayment within the meaning of Regulation No 1430/79 and it is indisputable that Overland did not simply make an unfortunate choice from the options available to it, but genuinely made a mistake and cannot be accused of deception, it must be considered that the conditions laid down by Article 236(1) have been met in so far as an amount was paid that was not legally owed.

73. Moreover, it is not disputed that the claim for repayment was made within the period of three years prescribed by Article 236(2) of the Customs Code. The fact that this error was relied on directly to obtain the benefits of Article 236, with no prior argument in favour of a decision to amend the declaration of customs value under Article 78, cannot be used against Overland as to do so would be to insert an additional implied condition in Article 236 which it does not contain.

74. Two objections which might be raised against the argument set out above remain to be examined.

75. The first could be derived from the wording of Article 236 itself, which provides, in paragraph 1, that '[i]mport duties or export duties shall be repaid in so far as it is established that *when they were paid* [13] the amount of such duties was *not legally owed*'. [14] One might be tempted, as the United Kingdom Government was, to infer from that passage that the increased amount of customs duty (resulting from the inclusion of the buying commission in the customs value), which was certainly not legally owed according to the logic of the system, must none the less be considered as having been legally owed *when it was paid*, [15] because the buying commission was not, at that time, shown separately from the price of the goods.

76. In other words, can a mistake made at a key stage of a procedure make a trader subject to duty which is not justified in itself? Does the right to be charged duty on an amount not including the buying commission exist in absolute terms or does it depend entirely on taking a practical precaution?

13 — Emphasis added.
14 — Emphasis added.
15 — Emphasis added.

77. In support of this argument, we can invoke the principles that everyone is presumed to know the law and that a professional trader must show the greatest possible diligence.

78. In response, it might be argued that an importer is bound by the same duty of diligence as regards all the information he gives on his declaration, whether as regards quantities imported, tariff headings, additions and multiplications or amounts to be shown separately.

79. Therefore, if the amount of duty legally owed must be assessed solely according to the information given at the time of payment of that duty, that rule ought to be applicable to all the elements which affect the calculation of that amount.

80. That is not what the United Kingdom Government and the Commission argue; they submit, without really explaining, that different treatment must be given to so-called 'normal' errors and to errors consisting in failing to show items separately within the meaning of Article 33.

81. However, I am not convinced by that distinction which, as far as I can see, has no basis in the Customs Code. In any event, I cannot see how entering a figure of 50 tonnes on a customs declaration, when in fact only 5 tonnes of goods have been imported, is perfectly excusable whereas failing to deduct a buying commission from an invoice is not.

82. In my view, this is the true position: the rule that buying commissions must be shown separately is intended to facilitate customs clearance procedures. It seeks to establish a clear and simple procedure for customs agents and importers to follow, but it does not create an irrebuttable presumption as regards the duty legally owed.

83. Except in the case of errors which they detect themselves, customs agents carry out their duties on the basis of the information given to them, both as regards quantities and as regards the other elements included in the calculation of customs duty. If an importer wishes to avoid having too much customs duty imposed, it is in his interest to declare a quantity of goods which is not higher than that actually imported, just as it is in his interest to show separately the price paid to the seller and the buying commission. If he does not do so, he will pay too much duty and, when he discovers his mistake, he must embark on the procedure for amendment under Article 65 or 78, with all the additional delay and

expense that entails. However, all types of error can be amended in these procedures. There are not some errors which are susceptible of correction and others which are not.

84. I therefore take the view that what matters is the amount legally owed in fact and not the amount legally owed at the time of a payment made on the basis of an incorrect customs declaration. The expression 'amount legally owed when it was paid' only refers to the customs duties applicable at that time.

85. Second, one might none the less be tempted to object that an error of the type made by Overland is always incapable of remedy because the customs debt had been incurred and from that moment no amendment was possible. Let us look at what the legislation tells us in that regard.

86. According to Article 201(2) of the Customs Code, '[a] customs debt shall be incurred at the time of acceptance of the customs declaration in question'.

87. According to Article 63 of the Code, '[d]eclarations which comply with the conditions laid down in Article 62 shall be accepted by the customs authorities immediately, provided that the goods to which they refer are presented to customs.'

88. Article 235(a) defines repayment as 'the total or partial refund of import duties or export duties which have been paid'.

89. If duties have been paid, that is because the declaration was accepted and the customs debt incurred. The fact that Articles 235 and 236 provide for the possibility of repayment of duties already paid proves that repayment can be made even if a customs debt has already been incurred and that the fact that a customs debt has been incurred does not, in itself, constitute an obstacle to repayment. (The only condition attached to repayment is the absence of deliberate action; see Article 236(1).)

90. For all those reasons, I have reached the conclusion that the error consisting in not showing the buying commission separately from the price actually paid to the seller can still be rectified after the goods have been released and that, if the conditions under Article 236 are fulfilled, the importer is entitled to repayment of the amount he paid in excess because the buying commission was included in the customs value.

Conclusion

91. On conclusion of my argument, I propose that the Court should reply as follows to the questions referred by the VAT and Duties tribunal, London (United Kingdom):

First and second questions

Articles 29, 32 and 33 of the Customs Code should be interpreted as meaning that the buying commission is not dutiable as part of the price actually paid or payable for the goods, but can none the less give rise to the imposition of duty if it is not shown separately in the customs declaration.

Third question

If the competent authorities reach the conclusion that the buying commission was not shown separately from the price paid or payable as a result of an error by the person concerned and that deception on his part can be ruled out, they are bound, under Article 78 of the Customs Code, to agree to the amendment of the declaration and, therefore, a reduced customs value.

Fourth question

In the circumstances outlined in the reply to the third question, the importer is entitled, under the Customs Code, and Article 236 in particular, to repayment of the duty paid on the buying commission.