JUDGMENT OF THE COURT (Sixth Chamber)

5 December 2002 *

In Case C-379/00,

REFERENCE to the Court under Article 234 EC by the VAT and Duties Tribunal, London (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

Overland Footwear Ltd

and

Commissioners of Customs and Excise,

on the interpretation of Articles 29, 32, 33, 78 and 236 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1),

* Language of the case: English.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, C. Gulmann (Rapporteur), F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: J. Mischo,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Overland Footwear Ltd, by R. Cordara QC, and P. Key, Barrister, instructed by Bell Davies, Solicitors,

— the United Kingdom Government, by R. Magrill, acting as Agent, and S. Moore, Barrister,

— the Italian Government, by U. Leanza, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,

— the Commission of the European Communities, by R. Wainwright and R. Tricot, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Overland Footwear Ltd, the United Kingdom Government, the Italian Government and the Commission at the hearing on 31 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 12 March 2002,

gives the following

Judgment

1 By order of 24 March 2000, received by the Court on 16 October, the VAT and Duties Tribunal, London, referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Articles 29, 32, 33, 78 and 236 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, 'the Customs Code').

2 Those questions were raised in proceedings between Overland Footwear Ltd ('Overland') and the Commissioners of Customs & Excise ('the Commissioners') concerning the reimbursement of import duty.

Legal background

3 Article 29(1) of the Customs Code provides:

'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...'

4 Article 32(1) to (4) of the Customs Code 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.'

5 Article 33(e) of the Customs Code provides:

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

...

(e) buying commissions.'

6 According to Article 65 of the Customs Code:

'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:

...

(c) have released the goods.'

7 Article 78 of the Customs Code, which appears under the heading 'Post-clearance examination of declarations' 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.'

8 Article 236 of the Customs Code provides:

'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).

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 main proceedings and the questions referred

9 Overland is a company, established in the United Kingdom, which buys products manufactured outside the European Union, and then imports them and distributes them within the Union. Wolverine Far East ('Wolverine'), is Overland's buying agent in the Far East.

10 Overland pays Wolverine a buying commission of 4% of the selling price of the goods for its services as a buying agent. Overland pays this commission to the manufacturer of the goods, who passes it on to Wolverine on Overland's behalf.

11 Before 1 January 1998, the import declarations which Overland made when the goods at issue in the main proceedings were released for free circulation, gave as the customs value the figure appearing on the manufacturer's invoice, without deducting the 4% buying commission or making any mention of a buying commission. Customs duties were therefore also paid on the buying commission. According to Overland, the failure to distinguish the buying commission from the selling price of the imported goods was the result of an inadvertent omission.

12 Since 1 January 1998, with the agreement of the Commissioners, Overland has shown the buying commission and the selling price of imported goods separately on its import declarations. The Commissioners have not levied duty on the amounts shown as buying commission.

13 Overland submitted several applications for repayment to the Commissioners under Article 236 of the Customs Code, for a total amount of GBP 38 085.45 in respect of import duties paid on goods imported before 1998. It argued that a part of the value given on each declaration of customs value represented buying commission and that no duty was due on that part. The first three applications were granted by the Commissioners by letters of 5 May, 1 July and 24 July 1998 and repayment duly made.

14 However, following a further examination the Commissioners decided that their initial decision to repay was wrong, on the ground that the duties of which repayment was claimed were legally owed and had been repaid in error. By decisions of 30 November and 16 December 1998, the Commissioners required Overland to pay back the sum reimbursed. The Commissioners confirmed their demand by decisions adopted on 4 and 5 February 1999.

15 Overland brought an action against those decisions before the VAT and Duties Tribunal, London, which, in the circumstances, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'On the basis of Council Regulation (EEC) No 2913/92 ("the Customs Code"), 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 Customs 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 Customs Code?

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

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

The questions referred

16 In answering the questions referred, which should be considered together, it must be observed to begin with that:

— the dispute in the main proceedings concerns the decisions of the Commissioners which confirm previous decisions claiming payment of the customs duties reimbursed to Overland by those authorities;

— those decisions relate to import declarations by Overland which include in the customs value buying commissions within the meaning of Article 32(4) of the Customs Code. Accordingly, the value thus declared includes an element which is not dutiable provided that, pursuant to Article 33 of that Code, it is 'shown separately from the price actually paid or payable' for the imported goods, and

— in Overland's import declarations the buying commissions were not shown separately from the selling price to be paid for the goods, as Overland declared as the customs value the amount appearing on the various invoices which, although they included the buying commission, made no specific reference to it.

17 Articles 29, 32 and 33 of the Customs Code can be construed only as meaning that a buying commission which is included in the customs value declared and is not shown separately from the selling price of the goods in the import declaration must be considered to be part of the transaction value within the meaning of Article 29 of that code and is, therefore, dutiable.

18 For the reasons set out by the Advocate General at points 32 to 42 of his Opinion, the judgment in Case C-299/90 *Hepp* [1991] ECR I-4301, cited by Overland, is not such as to call that interpretation into question.

19 Given that the Commissioners thus correctly levied duty on the goods at issue in the main proceedings on their importation, taking account of the customs value declared even though that included buying commissions, it is necessary to determine the conditions under which a declarant in Overland's position, having become aware of a mistake in its customs declaration, is entitled to ask the competent authorities to amend or revise its declaration so that the authorities are obliged to reimburse the customs duties levied on buying commissions.

20 It is clear from Article 65 of the Customs Code that the declarant is no longer authorised to amend his declaration once the customs authorities have released the goods into free circulation, as they have in the case in the main proceedings.

21 Accordingly, Article 78 of the Customs Code, which appears under the heading 'Post-clearance examination of declarations' must be examined. Article 78(1) provides that the customs authorities may, if appropriate, at the request of the declarant, amend the declaration, that is to say revise it. Under Article 78(3), where revision indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, those authorities are to take the measures necessary to regularise the situation, taking account of the new information available to them.

22 In the present case, it is not necessary to determine whether or, as the case may be, under what conditions the customs authorities are obliged to make amendments at the request of the declarants pursuant to Article 78 of the Customs Code.

23 It is common ground that the Commissioners initially granted Overland's application for reimbursement. As such an application could not be dealt with without the customs authorities having reviewed the customs declarations in the light of the new information submitted by Overland, it must be held that those authorities agreed to undertake the revision of the declarations and, following that revision and in the light of its results, adopted the decisions necessary to

'regularise the situation' within the meaning of Article 78(3) of the Customs Code, taking account of the fact that the declarations were incomplete as a result of an inadvertent error by the declarant.

24 In a situation where the customs authorities have agreed to undertake revision of an import declaration and have adopted a decision 'regularising the situation' within the meaning of Article 78(3) of the Customs Code taking account of the fact that the declaration was incomplete as a result of an inadvertent error by the declarant, those authorities may not go back on that decision.

25 In the light of the foregoing observations, the questions referred must be answered as follows:

— Articles 29, 32 and 33 of the Customs Code must be construed as meaning that a buying commission which is included in the customs value declared and is not shown separately from the selling price of the goods in the import declaration must be considered to be part of the transaction value within the meaning of Article 29 of that code and is, therefore, dutiable.

— in a situation where the customs authorities have agreed to undertake revision of an import declaration and have adopted a decision 'regularising the situation' within the meaning of Article 78(3) of the Customs Code taking account of the fact that the declaration was incomplete as a result of an inadvertent error by the declarant, those authorities may not go back on that decision.

Costs

26 The costs incurred by the United Kingdom and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the VAT and Duties Tribunal, London, by order of 24 March 2000, hereby rules:

1. **Articles 29, 32 and 33 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be construed as meaning that a buying commission which is included in the customs value declared and is not shown separately from the selling price of the goods in the import declaration must be considered to be part of the transaction value within the meaning of Article 29 of that regulation and is, therefore, dutiable.**

2. **In a situation where the customs authorities have agreed to undertake revision of an import declaration and have adopted a decision 'regularising the situation' within the meaning of Article 78(3) of Regulation No 2913/92 taking account of the fact that the declaration was incomplete as a result of an inadvertent error by the declarant, those authorities may not go back on that decision.**

Puissochet Schintgen Gulmann

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 5 December 2002.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber