JUDGMENT OF THE COURT (Fifth Chamber)

16 January 2003 *

In Case C-422/00,

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

Capespan International plc

and

Commissioners of Customs & Excise,

first, on the interpretation of Articles 28 to 36 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), Articles 141 to 181a of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), and Article 5 of Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables (OJ 1994 L 337, p. 66), and, secondly, on the validity of Commission Regulation (EC) No 1498/98 of 14 July 1998 amending Regulation No 3223/94 (OJ 1998 L 198, p. 4),

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, D.A.O. Edward, P. Jann and S. von Bahr, Judges,

Advocate General: P. Léger,
Registrar: M.-F. Contet, Administrator,

after considering the written observations submitted on behalf of:

— Capespan International plc, by G. Salmond, Solicitor,

— the United Kingdom Government, by R. Magrill, acting as Agent, and by N. Paines QC,

— Commission of the European Communities, by C. Brown and K. Fitch, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Capespan International plc, represented by G. Salmond, of the United Kingdom Government, represented by G. Amodeo,

acting as Agent, and by C. Vajda QC, and the Commission, represented by C. Brown and K. Fitch, at the hearing on 27 February 2002,

after hearing the Opinion of the Advocate General at the sitting on 13 June 2002,

gives the following

Judgment

1 By order of 19 October 2000, which was received at the Court on 14 November 2000, the VAT and Duties Tribunal, London, referred to the Court for a preliminary ruling under Article 234 EC five questions concerning, first, the interpretation of Articles 28 to 36 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), hereinafter 'the Community Customs Code', Articles 141 to 181a of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), and Article 5 of Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables (OJ 1994 L 337, p. 66), and, secondly, on the validity of Commission Regulation (EC) No 1498/98 of 14 July 1998 amending Regulation No 3223/94 (OJ 1998 L 198, p. 4),

2 Those questions were raised in the course of proceedings between Capespan International plc (hereinafter 'Capespan') and the Commissioners of Customs & Excise ('the Commissioners') concerning the method of calculating the customs value of certain fruit imported from non-Member States and coming within the scope of Regulation No 3223/94.

Legal framework

Customs legislation

3 The Community Customs Code contains general rules on the imposition of customs duties on imports into the customs territory of the Community. Those general rules are supplemented by implementing provisions contained in the regulation implementing that code.

4 In Article 20(1), the Community Customs Code provides that import duties are calculated on the basis of the Common Customs Tariff established each year.

5 Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1) contains in Annex I thereto, which is amended each year, the combined nomenclature and the table of duties under the common customs tariff. The version of Annex I relevant to the present case is for 1997 Commission Regulation (EC) No 1734/96 of 9 September 1996 amending Annex I to Regulation No 2658/87 (OJ 1996 L 238, p. 1) and, for 1998, Commission Regulation (EC) No 2086/97 of 4 November 1997 amending Annex I to Regulation No 2658/87 (OJ 1997 L 312, p. 1).

6 Annex I to Regulation No 2658/87 contains the combined nomenclature and the table of duties relating to 'products to which an entry price applies' (see third part of Annex I entitled 'tariff annexes', section I on 'agricultural annexes', and Annex 2 concerning 'products to which an entry price applies').

7 The main proceedings concern consignments of apples and other fruits imported into the Community from non-Member States. The duties applicable to those products depend on their variety and their entry price and on the date on which they are imported into the Community. The duties are divided into two parts, the first representing an *ad valorem* duty, the second being a specific duty expressed in ecus per 100 kg net weight (according to the tariff classification) and calculated on the basis of the entry price to which it is inversely proportional.

8 Articles 28 to 36 of the Community Customs Code lay down the general rules concerning determination of the customs value of goods which serves as the basis for calculating *ad valorem* duties.

9 Article 29(1) thereof establishes the basic principle whereby that value is established at the place where the goods are introduced into the customs territory of the Community. The calculation is made on the basis of the transaction value, that is to say, the 'price actually paid or payable for the goods when sold for export to the customs territory of the Community', provided that that price is or may be regarded as having been agreed between an independent seller and buyer. None the less, the price must be subject to certain adjustments which are described at Articles 32 and 33 of the Community Customs Code. Moreover, if the transaction value cannot be definitively established prior to entry of the goods into the Community, an importer may, if he observes certain conditions, provide a provisional indication of the value of the products in accordance with Article 254 of the regulation implementing the Community Customs Code.

10 Where the customs value cannot be determined under Article 29 of the Community Customs Code, Article 30 thereof sets out a series of other methods to be applied successively for that purpose.

11 As regards determination of the value of perishable goods, Article 36 of the Community Customs Code provides that, upon request by the importer, simplified rules may be applied instead of the rules described at paragraphs 8 and 9 hereof. Those are the rules set out in Articles 173 to 177 of the regulation implementing the Community Customs Code.

The agricultural legislation and the entry price mechanism introduced by Regulation No 3223/94

12 Until 1994 imports of fresh fruit and vegetables coming within the scope of Regulation No 3223/94 were subject to a system of reference prices. Under that system, in addition to *ad valorem* duty payable under the Community Customs Code, specific duty could be levied on products of a certain origin where the average price of all imports of that provenance was lower than a specific reference price.

13 Those specific duties were proportional to the difference between the reference price and the average price referred to above. That system sought to ensure that the price of imports placed on the Community market was analogous to that charged, by virtue of the operation of the common organisation of the markets in fruit and vegetables, for products of the same kind cultivated within the Community.

14 The system of reference prices was called in question by the signature on 15 April 1994 of the Final Act concluding the multilateral trade agreements of the Uruguay round of the Agreement establishing the World Trade Organisation (WTO), and all the agreements and memoranda in Annexes 1 to 4 thereto approved on behalf of the European Community by Council Decision 94/800/EC

of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). In fact, following concessions made by the Community in the Agreement on Agriculture concluded in the context of the Uruguay round, the system of reference prices was replaced by the entry-price system.

15 The system of entry prices is governed by Regulation No 3223/94 and is based on Article 23(2) of Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organisation of the market in fruit and vegetables (OJ English Special Edition 1972 (II), p. 437, hereinafter 'the basic regulation'), as amended by Annex XIII of Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay round of multilateral trade negotiations (OJ 1994 L 349, p. 105, hereinafter 'the amended basic regulation').

16 Under Article 23 of the amended basic regulation:

'1. Save as otherwise provided for in this Regulation, the rates of duty in the Common Customs Tariff shall apply to the products listed in Article 1(2).

2. Should the application of the rates of duty in the Common Customs Tariff depend on the entry price of the imported consignment, the veracity of this price shall be checked using a flat-rate import value calculated by the Commission depending on the origin and product on the basis of the weighted average prices for the products in question on Member States' representative import markets or on other markets where applicable.

3. Where the declared entry price of the consignment in question is higher than the flat-rate import value, increased by a margin set in accordance with paragraph 5 which may not exceed the flat-rate value by more than 10%, the lodging of a security equal to the import duties determined on the basis of the flat-rate import value shall be required.

4. If the entry price of the consignment in question is not declared at the time of customs clearance, the application of the rates of duty in the Common Customs Tariff depends on the flat-rate import value or the application of the relevant provisions of customs legislation under conditions to be determined in accordance with paragraph 5.

5. Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 33.'

17 That article was to a large extent reproduced as Article 32 of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ 1996 L 297, p.1, hereinafter 'the new basic regulation') which repealed and replaced the basic regulation.

18 The system of entry prices introduced by Regulation No 3223/94 allows for the imposition on fruit and vegetables of specific customs duties, in addition to *ad valorem* duty, where the price of such products on entry into the Community is below a standard import value which is calculated by the Commission each working day for each product and each origin. The standard import value is equal to the weighted average of representative prices, less a standard amount of ECU 5 per 100 kg, and the *ad valorem* customs duties (Article 4(1) of Regulation No 3223/94).

19 The rules for determining the entry price of fruit and vegetables are laid down in Article 5(1) of Regulation No 3223/94. The entry price of products is used for determining their classification in the common customs tariff and any specific duties payable. Article 5(1) of Regulation No 3223/94 offers the importer of fruit and vegetables the choice between three methods for determining the entry price of consignments. At the importer's option, the entry price must be equal:

(a) either to the fob [free on board] price of the products in their country of origin plus the costs of insurance and freight up to the borders of the Community customs territory, where that price and those costs are known at the time the declaration of release of the products for free circulation is made [Article 5(1)(a) of Regulation No 3223/94];

(b) or to the customs value calculated in accordance with Article 30(2)(c) of the Community Customs Code [Article 5(1)(b) of Regulation No 3223/94], that is to say the value determined on the basis of the unit price at which the imported products or identical or similar products are sold in the Community;

(c) or to the standard import value determined by the Commission and applicable to the product and origin in question.

20 Regulation No 3223/94 was amended by Regulation No 1498/98 with effect from 18 July 1998. The latter regulation added paragraph 1b to Article 5 of Regulation No 3223/94.

21 Paragraph 1b aforesaid provides:

'Where the entry price is calculated on the basis of the price fob of the products in the country of origin, the customs value shall be calculated on the basis of the relevant sale at that price.

When the entry price is calculated in accordance with one of the procedures provided for in paragraph 1(b) or (c) or paragraph 1a(b), the customs value shall be calculated on the same basis as the entry price.'

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

22 Capespan is an importer of fruit established in the United Kingdom. During the period between 18 March 1997 and 24 August 1998 it imported consignments of fruit, in particular apples, from South Africa, which were subject to the system of entry prices introduced by Regulation No 3223/94.

23 Believing that it was entitled to base itself on Article 29 of the Community Customs Code in order to determine the customs value of the imported fruit, Capespan made incomplete customs declarations under Article 254 of the regulation implementing the Community Customs Code by giving a provisional indication of the value of the imported fruit. The definitive transaction value regarded by Capespan as necessary in order to calculate the definitive value for the purposes of Article 29 of the Community Customs Code was not in fact known before the end of the period during which the fruit was imported.

24 A dispute then arose between Capespan and the Commissioners as to the determination of the value of the fruit coming within the scope of Regulation No 3223/94.

25 By letter dated 23 September 1998 the Commissioners notified Capespan of the incorrectness of its approach, stating that the customs value of the fruit in question had to be determined in accordance with the methods provided for in Article 5 of Regulation No 3223/94. Only the method set out in Article 5(1)(c) thereof — standard import value as determined by the Commission — could be used by Capespan with the result that future imports of goods coming under Regulation No 3223/94 should no longer be declared for customs subject to payment of a provisional amount but that their value was to be declared directly by using the method of standard import value.

26 Capespan lodged a complaint against that decision by the Commissioners but they upheld their decision by two further decisions of 25 November and 3 December 1998. Those decisions also stated that application of the methods for determining the value mentioned in Article 5 of Regulation No 3223/94 allowed Capespan to make complete declarations concerning the customs value of the products imported and that it had to cease submitting incomplete declarations under Article 254 of the Community Customs Code.

27 Capespan appealed against those decisions to the VAT and Duties Tribunal, London.

28 In the course of the proceedings before that tribunal, the parties to the main proceedings agreed that in principle Capespan was entitled to use any of the methods mentioned in Article 5(1) of Regulation No 3223/94 to determine the

entry price of the imported products. However, Capespan does not agree that the method used to determine that price must also be used to determine the customs value of those products.

29 Before the referring court Capespan argued that:

— the fruit imported should be valued according to the sequential rules of valuation set out in Articles 28 to 36 of the Code and the rules set out in Articles 141 to 181a of the regulation implementing that code;

— it is wrong to interpret Regulation No 3223/94 as providing a method of determining customs valuation which departs from the valuation rules identified in the first indent above;

— it is not correct to equate customs value with entry price, as the Commissioners do;

— Regulation No 1498/98 is invalid, since the Commission has exceeded its powers by adopting this measure which requires the value of goods of the type listed in the Annex to Regulation No 3223/94 to be equal to their entry price;

— Capespan was in principle entitled to use any of the methods set out in Article 5(1) of Regulation No 3223/94 to determine entry price and therefore could not be obliged to use the standard import value; and

— it was entitled to make incomplete declarations, which did not require it to give an indication of customs value at the time of importation, in accordance with the provisions of Articles 254 to 259 of the Implementing Regulation.

30 Contrary to the view taken by Capespan, the Commissioners are contending before the referring court that, in principle, an importer may use either of the options provided for in Article 5(1) of Regulation No 3223/94. However, in their view, Capespan cannot in practice use the first option, because the fruit which it imports is sold at a provisional price adjusted at the end of the season, so that the entry price is not known at the time of importation. As far as the Commissioners are concerned, Capespan can in practice use the second option but must then lodge a security calculated in accordance with the standard import value and must establish the customs value in accordance with Article 30(2)(c) of the Community Customs Code as adapted by Article 5 of Regulation 3223/94. Capespan should therefore pay duty calculated on that value. Finally, in the Commissioners' view, there is no difficulty in principle or in practice with Capespan using the third option provided for in Article 5(1) of Regulation No 3223/94.

31 The Commissioners dispute that Capespan is entitled, as it claims to be:

(a) to use the standard import value to determine the entry price of its products for the purposes of determining their classification in the Common Customs Tariff (and thus whether the additional duty specified therein is payable) but not to declare any customs value at the time of importation; and subsequently

(b) to declare a customs value based on the import contract price once the contract price has been finalised at the end of the growing season, with the

effect that duty is calculated using the contract price but the applicability or otherwise of the additional duty is determined by the level of the standard import value at the time of importation and not by the level of the contract price.

32 In fact, in the Commissioners' view, if it were permissible to proceed in that way, an importer in Capespan's position would be able to avoid the measures of control prescribed by Article 5(2) of Regulation No 3223/94. Such an importer could sell fruit in the Community at prices lower than those sought to be achieved under that regulation without paying additional duty. Fruit that had in actual fact been imported at a low price which ought to attract the additional duty would be able to be imported without payment of that duty and with the additional benefit of *ad valorem* duty at a rate commensurate with that lower price.

33 Under those circumstances the VAT and Duties Tribunal, London, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(i) For products listed in the Annex to Commission Regulation (EC) No 3223/94... , as replaced by Commission Regulation (EC) No 1890/96, and entered into the European Community from 18 March 1997 but before 18 July 1998, being the date upon which Commission Regulation (EC) No 1498/98... amending Article 5 of Regulation No 3223/94 is expressed to have entered into force, is the customs value of such products to be determined in accordance with

(a) the rules set out in Chapter 3 of Title II (namely Articles 28 to 36) to Council Regulation (EEC) No 2913/92... and the rules set out in Title V (namely Articles 141 to 181a) to Commission Regulation (EEC) No 2454/93...; or

(b) Article 5 of Regulation 3223/94?

(ii) If the customs value is not to be determined in accordance with either of the above, what is the correct basis for the determination of the customs value of such products?

(iii) Is Regulation No 1498/98, amending with effect from 18 July 1998 Article 5 of Regulation No 3223/94... valid?

(iv) If Regulation No 1498/98 is not valid, how is the customs value of products of the type identified in question (i), which are entered into the European Community from 18 July 1998, to be determined?

(v) Whether or not Regulation No 1498/98 is valid, does Regulation No 3223/94 preclude the giving of a provisional indication of customs value in accordance with Article 254 of the Implementing Regulation?'

First question

34 In its first question the referring court is essentially asking whether the customs value of fruit and vegetables coming within the scope of Regulation No 3223/94 must, in respect of the period between 18 March 1997 and 17 July 1998 inclusive, be determined in accordance with the methods set out in the

Community Customs Code and its implementing regulation or in accordance with the rules provided for in Article 5 of Regulation No 3223/94.

Observations submitted to the Court

35 Capespan maintains that the customs value of the fruit which it imported during the relevant period must be calculated in accordance with the rules laid down in the Community Customs Code and its implementing regulation and that that value cannot be determined in accordance with the entry price calculated in accordance with Article 5(1) of Regulation No 3223/94.

36 It claims that the system for determining customs value differs from that provided for in Article 5(1) of Regulation No 3223/94 for determination of the entry prices on which classification is based.

37 According to Capespan, whereas the rules laid down in the Community Customs Code and its implementing regulation provide that the customs value must be determined on the basis of the transaction value of the goods and where the latter cannot be determined the customs value must be determined by the successive application of other rules, the entry price cannot be determined on the basis of the transaction value and the successive stages required for customs valuation where the latter cannot be determined under the preceding rule.

38 It adds that the rules on customs valuation provided for in the Community Customs Code and its implementing regulation mirror the provisions of Article VII of the General Agreement of Tariffs and Trade 1994 ('GATT 1994') and the Agreement on the Implementation of that Article VII, which are both annexed to

the agreement establishing the WTO. Thus, under Article 249(1) of the Community Customs Code the provisions required for its implementation are to be adopted 'in compliance with the international commitments entered into by the Community'.

39 With regard to the application of Regulation No 3223/94 to the determination of customs value, Capespan maintains that, before it was amended by Regulation No 1498/98, there was no provision in Regulation No 3223/94 under which the customs value of goods imported into the Community and to which that regulation applied had to equate to the entry price determined in accordance with Article 5 thereof.

40 That may be accounted for by the fact that Regulation No 3223/94 is not intended to alter the manner in which customs value is determined. In fact it cannot be inferred either from the recitals in the preamble to that regulation or from its wording that its objective was to alter the manner in which customs value was determined.

41 In that regard Capespan states that the principal objective of Regulation No 3223/94 is to adapt the Community import arrangements for fruit and vegetables to the Uruguay Round and the Agreement on Agriculture, in accordance with the Community's international legal obligations, and that the function of entry price is to achieve tarification and classification of products in accordance with that price and to determine their customs value.

42 In order to assert that determination of the entry price serves to identify the tariff classification of imported products, Capespan also relies on the fourth recital in the preamble to that regulation under which the entry price constitutes the basis on which products are classified in the Common Customs Tariff and on Article 5(1) thereof the first sentence of which begins with the words 'the entry price on the basis of which the products listed in the Annex are classified in the Customs Tariff of the European Communities...'.

43 Capespan goes on to claim that Article 23(2) of the amended basic regulation does not concern the way in which customs value is to be determined and contains no provision under which the entry price must be used for the determination of that value. It merely indicates the way in which the entry price is to be verified by reference to a standard import value enabling a guarantee to be paid and the way in which the rates of duty under the Common Customs Tariff must be applied where the entry price is not declared at the time of customs clearance.

44 According to Capespan, it is contrary to the principle according to which an implementing regulation must be interpreted, as far as possible, in conformity with the provisions of the basic regulation which it supplements for Regulation No 3223/94 to be interpreted in such a way that the entry price, which determines classification, may also be used to determine customs value.

45 Finally, Capespan cites the difference between Community customs and agricultural legislation which sometimes overlap but none the less pursue different objectives. The agricultural legislation is based on Article 43 of the EC Treaty (now, after amendment, Article 37 EC) and comprises the basic regulation, the amended basic regulation and the new basic regulation. The customs legislation is based on Article 9 of the EC Treaty (now, after amendment, Article 23 EC) and includes the Community Customs Code and its implementing regulation. Capespan considers that the latter legislation takes precedence in regard to customs valuation. In that regard it relies on Article 28 of the Community Customs Code under which the provisions of Chapter 3 of Title II of the Code (namely Articles 28 to 36 thereof) 'determine the customs value for the purposes of applying the Customs Tariff of the European Communities and non-tariff measures laid down by Community provisions governing specific fields relating to trade in goods'. Consequently, Article 5 of Regulation No 3223/94 cannot legitimately be used in order to determine customs value.

46 Capespan acknowledges that the Community Customs Code states in Article 1 thereof that the Code is to apply, without prejudice to special rules laid down in

other fields, to trade between the Community and third countries. Under the terms of the fourth recital in the preamble to that Code those special rules include the specific provisions of the common agricultural policy. None the less, Capespan maintains that the scope of those specific provisions does not include customs valuation.

47 Conversely, the United Kingdom Government and the Commission consider that, during the period prior to the entry into force of the amendments made to Regulation No 3223/94, the customs value of the goods at issue in the main proceedings had to be determined on the basis of the entry price of the products into the Community in accordance with the provisions of Article 5(1) of that regulation.

48 As far as the United Kingdom Government is concerned, it disputes that the customs value must be determined solely in accordance with the Community Customs Code and its implementing regulation. In its view, it is incorrect to assert, as Capespan does, that the legislation adopted in implementation of the common agricultural policy is not capable of altering the manner in which the goods are valued for customs purposes; if such were the case, it would be incompatible with the 1994 GATT.

49 The Government claims in that regard that the common organisation of the market in fruit and vegetables, today governed by the new basic regulation, is based on Articles 42 of the EC Treaty (now Article 36 EC) and 43 of the Treaty. Paragraph 3 of that latter provision authorises the Council to establish a common organisation of the market, such as is provided for in Article 40(2) of the EC Treaty (now, after amendment, Article 34(1) EC). Article 40(3) provides that that organisation may include 'common machinery for stabilising imports or exports'.

50 The United Kingdom Government notes in that regard that, amongst the provisions of the new basic regulation concerning imports and exports, Article 32 contains a certain number of provisions concerning customs duties. Noting, in particular, that under paragraph 1 of that article the rates of duty in the common customs tariff are to apply 'save as otherwise provided for in this Regulation', the United Kingdom Government infers from this that the new basic regulation amends the common customs tariff.

51 It also maintains that Article 32(2) of the new basic regulation refers to situations in which application of the common customs tariff duty rate depends on the entry price of the imported consignment. In that case, the Commission must determine a flat-rate import value, and the veracity of the entry price declared must be checked by reference to that value. If the entry price of the consignment in question is not declared at the time of customs clearance, the common customs tariff duty rate applied depends on the flat-rate import value or is arrived at by application of the relevant customs legislation provisions 'under conditions to be determined in accordance with paragraph 5' of the relevant provisions of the customs legislation. Thus, the United Kingdom Government considers that the Council authorised the Commission to alter the detailed rules governing application of the customs legislation by adding further conditions to it.

52 The United Kingdom Government goes on to maintain that Regulation No 3223/94 alters customs legislation on several points. First, Article 5 restricts application of the valuation methods established by Articles 29 to 31 of the Community Customs Code by limiting the number of methods applicable to the transaction value method corresponding in reality to Article 29 of the Community Customs Code and to a modified version of the method laid down in Article 30(2)(c) of that code. Secondly, Article 5 replaces the simplified procedure provided for in Article 36 of the Community Customs Code and Articles 173 to 177 of its implementing regulation with the standard import value calculated in accordance with Regulation No 3223/94 itself.

53 The United Kingdom Government rejects the interpretation of Regulation No 3223/94 whereby the entry price and the customs value of a consignment may be different so that the same consignment has an entry price and an import value which is not the same as that price. It considers that such an interpretation would make a nonsense of the provisions of the common agricultural policy.

54 In fact, in its view, even before the amendment by Regulation No 1498/98 of Regulation No 3223/94, it is clear from the terms of Article 5 thereof that the entry price of a product was intended to be the same as its import value.

55 According to the United Kingdom Government, if that were not the case, it would be difficult to understand why the methods laid down by Regulation No 3223/94 for determining the entry price are modified versions of the methods provided for by the Community Customs Code and its implementing regulation for determining import value.

56 The United Kingdom Government likewise considers that it would be impossible to explain why the Commission made provision in Article 5(1)(a) and (b) for the calculation of the security to be lodged where the declared transaction price of the consignment is greater than the standard import value or where the importer opts for valuation in accordance with the modified version in Article 30(2)(c) of the Community Customs Code.

57 In both those situations, Regulation No 3223/84 requires the lodging of a security calculated in accordance with the modified version of Article 248 of the regulation implementing the Community Customs Code. The security is to be calculated on the basis of the duty that would have been paid had the product

been classified on the basis of the standard import value. Given that the duty paid would have consisted of both a per kilogramme and an *ad valorem* element, it is clear, the United Kingdom Government submits, that in those circumstances the standard import value is to be taken as constituting both the entry price and the import value.

58 The United Kingdom Government supports the arguments deployed by the Commissioners in the main proceedings. In its view, the importer has the three options set out in Article 5(1)(a) to (c) of Regulation No 3223/94 and is not given the further option of making a provisional declaration of the transaction price.

59 That interpretation is confirmed by the amendment made to Regulation No 3223/94 by Regulation No 1498/98. It was in any event the only possible construction of the Regulation as it stood before that amendment.

60 Finally, as far as the United Kingdom Government is concerned, even if the WTO Agreement and the agreements associated with it have direct effect for the purposes of the main proceedings, which is not accepted, the interpretation which it supports is not inconsistent with that agreement, contrary to Capespan's assertion. In the United Kingdom Government's submission, the agreement on the implementation of Article VII of GATT provides at Article 7 for determination of customs value using data available in the country of importation. In its view, if the provisions of Regulation No 3223/94 were inconsistent with the WTO agreement, then so would Articles 173 to 176 of the Community Customs Code, which Capespan is not suggesting.

61 Likewise, the Commission submits first of all that, although the rules set out in the Community Customs Code are in principle of general application, it is none the less the case that Article 38(2) of the EC Treaty (now, after amendment, Article 32(2) EC) provides that 'save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the common market (including, *inter alia*, the Common Customs Tariff) shall apply to agricultural products'. Of those provisions Article 39(1)(c) of the EC Treaty (now, after amendment, Article 33(1)(c) EC) provides that one of the objectives of the common agricultural policy is to stabilise the markets and the third subparagraph of Article 34(2) provides that 'any common price policy shall be based on common criteria and uniform methods of calculation'.

62 It infers from this that it is in conformity with the Treaty for special rules concerning agricultural products to displace the general rules of the Community Customs Code.

63 The Commission then raises the question whether the three methods for determining the entry price which are set out in Article 5(1)(a) to (c) of Regulation No 3223/94 may be regarded as having replaced the valuation rules under the Community Customs Code for the products covered by Regulation No 3223/94. It submits that those three methods are based very closely on the Community Customs Code and that, outside the periods when Regulation No 3223/94 applies, the valuation system established by the Code continues to apply.

64 The Commission infers from this that, rather than creating a separate and entirely new system for determining entry prices, Regulation No 3223/94 reproduced the valuation system set out under the Community Customs Code with slight

modifications based on the particular nature of the products covered by the entry price regime.

65 It considers that, inasmuch as the special provisions of Regulation No 3223/94 govern determination of the entry price and thus of the tariff classification, to continue to require importers to calculate a separate customs value under the Code, applying to the same goods, in order to establish the *ad valorem* customs duty, would lead to considerable confusion and unnecessary bureaucracy.

66 Finally, the Commission maintains that, if importers were permitted to choose one method for calculating the entry price of goods whilst being permitted or required to use a different method to calculate the customs value on which *ad valorem* duty is based, they would seek to manage their affairs so as to maximise entry prices and minimise customs values. In so doing they would deprive the Community of revenue and could potentially have a prejudicial effect on the fresh fruit market and thus on the functioning of the common organisation of the market in fruit and vegetables.

67 The Commission infers from this that the exception provided for in relation to the applicability of the rules adopted in order to establish a common market in agricultural products, which is mentioned in Article 38(2) of the Treaty, allows the introduction of derogations to the general customs rules.

68 Indeed that possibility is contemplated by the same provision of the basic regulation as that on which Regulation No 3223/94 is based, namely Article 23(1) of the amended basic regulation which expressly provides that '[s]ave as otherwise provided for in this Regulation, the rates of duty in the common

customs tariff shall apply to the products listed in Article 1(2)'. Thus, provisions adopted pursuant to the basic regulation and its replacement may derogate from the general provisions of the Community Customs Code.

Reply by the Court

69 First, in order to determine whether the applicable rules for determining the customs value of fruit and vegetables coming within the scope of Regulation No 3223/94 are the general rules provided for by the Community Customs Code and its implementing regulation or the special rules provided for in Regulation No 3223/94, it is to be noted that the latter regulation seeks to modify the rules for determining customs value in regard to fruit and vegetables.

70 As the United Kingdom Government and the Commission assert, Article 5(1) of Regulation No 3223/94 essentially reproduces the different methods for determining customs value provided for in the Community Customs Code and its implementing regulation, at the same time adapting them to the particular nature of fruit and vegetables.

71 On the one hand, indeed, the particular nature of that sector may be summarised as follows. Since the fruit and vegetables sector is characterised by a very appreciable fluctuation in supply and demand, prices of those products may vary considerably. Moreover, fruit and vegetables are often imported into the Community on consignment whereby the goods are stored before being sold. Thus, the sales price of such products is rarely known at the time when they are declared for customs purposes on Community territory.

72 In that regard it is important to note that the third recital in the preamble to Regulation No 3223/94 states that 'most of the perishable fruit and vegetables listed in the Annex to this Regulation are supplied on consignment and this creates special difficulties for determining their value' and that the fourth recital sets out the three rules for determining the entry price of products covered by that regulation, which are elucidated in Article 5(1) thereof.

73 On the other hand, in view of the characteristics of the fruit and vegetables sector, the rules laid down in Article 5(1) of Regulation No 3223/94 for determining the customs value of fruit and vegetables imported into the Community from non-Member States are based on the general rules provided for in the Community Customs Code and its implementing regulation.

74 Thus, the method for calculating the entry price provided for in Article 5(1)(a) of Regulation No 3223/94 is comparable to that appearing in Article 29(1) of the Community Customs Code. In both cases the value determined must correspond to the fob price of the products in their country of origin plus the costs of insurance and freight up to the borders of the Community customs territory. As regards the second method for calculating the entry price, Article 5(1)(b) of Regulation No 3223/94 expressly provides that the entry price is to correspond to the customs value calculated in accordance with Article 30(2)(c) of the Community Customs Code, that is to say the unit price at which the imported goods or identical or similar imported goods are sold within the Community. As for the third method for determining the entry price provided for in Article 5(1)(c) of Regulation No 3223/94, it is comparable to that set out in Articles 173 to 177 of the regulation implementing the Community Customs Code since, in both cases, the standard value is equal to the weighted average of the prices recorded for products imported on to the import markets of the Member States.

75 Moreover, Article 5(1) of Regulation No 3223/94 contains no methods comparable to those set out in Article 30(2)(a), (b) and (d) of the Community

Customs Code inasmuch as those methods are either rarely used or are immaterial for the purpose of determining the customs value of fruit and vegetables since either they presuppose that the sales price is known prior to the export of the goods in question to the Community or they are based on the cost of the raw materials and of the manufacture of the imported products.

76 Furthermore, Regulation No 3223/94 itself expressly provides that, during the periods stated in the annex thereto, the method for determining customs value provided for by the simplified rules of the regulation implementing the Community Customs Code is replaced by one of the three methods for determining the entry price of the fruit and vegetables, namely that based on the standard import value. In fact, under the terms of Article 4(2) of Regulation No 3223/94 'where a standard value is established for the products and for the periods of application given in the Annex in accordance with this Regulation, the unit value within the meaning of Articles 173 to 176 of [the regulation implementing the Community Customs Code] shall not apply. It shall be replaced by the standard import value referred to in paragraph 1.'

77 Second, under Article 23(5) of the amended basic regulation 'detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 33' of the basic regulation which provides for a special procedure authorising the Commission to adopt the necessary implementing measures after obtaining the opinion of the management committee for fruit and vegetables. The last recital in the preamble to Regulation No 3223/94 states that the measures provided for under it are in accordance with the opinion of that committee.

78 Accordingly the Commission was authorised to enact special rules for calculating the customs value of fruit and vegetables and, thus, to adopt Regulation No 3223/94.

79 Third and lastly, it should also be stated that provisions contained in agricultural legislation may legitimately establish special rules by reference to those contained in the Community Customs Code.

80 Indeed, the Community Customs Code states in Article 1 thereof that it applies 'without prejudice to special rules laid down in other fields'. Moreover, in accordance with the fourth recital in the preamble thereto it is applicable 'without prejudice to specific provisions laid down in other fields' and 'such specific rules may exist or be introduced in the context, inter alia, of legislation relating to agriculture'.

81 It follows that, in light of the provisions of the Community Customs Code, agricultural legislation may contain specific provisions concerning the customs value of products with the result that Regulation No 3223/94 in particular may legally contain specific rules for calculating the customs value of fruit and vegetables.

82 The reply to the first question must therefore be that the customs value of fruit and vegetables coming within the scope of Regulation No 3223/94 must, in respect of the period between 18 March 1997 and 17 July 1998 inclusive, be determined in accordance with the rules for calculating entry price provided for in Article 5 of that regulation.

The second question

83 In view of the reply given to the first question the second question is no longer relevant.

The third question

84 In its third question the referring court is essentially asking whether Regulation No 1498/98 is valid.

Observations submitted to the Court

85 Capespan maintains that Regulation No 1498/98, which added paragraph 1b to Article 5 of Regulation No 3223/94, cannot provide that the customs value of fruit and vegetables coming within the scope of that regulation must be determined on the same basis as that of the entry price of products into the Community and that it is invalid for the reasons set out below.

86 First, according to Capespan, in adopting Regulation No 1498/98 the Commission exceeded the powers conferred on it by the Council since it extended the scope of the enabling regulation adopted by the Council, namely the new basic regulation.

87 In that regard Capespan claims first that the new basic regulation does not contain any provision stipulating that the customs value of fruit and vegetables must be determined on the basis of the entry price. Next, it maintains that the methods for calculating the entry price, provided for in Article 5(1) of Regulation No 3223/94 are not in conformity with Article 29(1) of the Community Customs Code. Finally, Capespan considers that Regulation No 1498/98 does not contain an adequate statement of reasons in light of the requirements of Article 190 of the EC Treaty (now Article 253 EC).

88 Secondly, Capespan submits that the Commission acted in breach of the Community's international obligations.

89 Thirdly and finally, although Regulation No 1498/98 was adopted in accordance with the procedure provided for in Article 46 of the new basic regulation, Capespan considers that measures implementing the Community Customs Code must be adopted in accordance with the procedure for which Article 249 provides.

90 Conversely, the United Kingdom Government maintains that Regulation No 1498/98 is not vitiated by invalidity. It maintains that Article 32 of the new basic regulation authorises the Commission to prescribe the conditions for applying the customs legislation to the products at issue in the main proceedings by legislative instrument adopted under Article 46 of that regulation, and that the provisions of Regulation No 1498/98 are not incompatible with the WTO Agreement. Moreover, since the latter regulation is not invalid, the fourth question submitted does not arise.

91 As for the Commission, it considers that the amendment made to Regulation No 3223/94 by Regulation No 1498/98 merely sought to dispel doubts concerning the existing situation and therefore had no material impact. Consequently, the question of the validity of Regulation No 1498/98 has no bearing on the outcome of the main proceedings.

Reply by the Court

92 First, it is appropriate to consider Capespan's argument that the Commission exceeded the powers conferred on it by the Council in the new basic regulation, in the manner described at paragraph 86 above.

93 In that regard, as is apparent from paragraph 81 above, the Commission is authorised to enact special rules for calculating the customs value of fruit and vegetables. Moreover, it follows from the fourth recital in the preamble to and Article 1 of the Community Customs Code that the rules of that code and in particular those relating to customs value apply without prejudice to specific provisions contained in particular in the agricultural legislation.

94 Next, as has been stated at paragraph 74 above, the rules for calculating entry price are comparable to the methods for determining customs value provided for in Articles 29 to 36 of the Community Customs Code and Articles 173 to 177 of its implementing regulation.

95 Finally, in regard to the reasoning on which Regulation No 1498/98 is based, it is clear from its recitals that the Commission considered it necessary expressly to incorporate in the text of Regulation No 3223/94 the principle and detailed rules under which the customs value of fruit and vegetables must be established on the basis of the entry price of products.

96 In fact, the second recital in the preamble to Regulation No 1498/98 states that 'setting an entry price requires that the rules for calculating the customs value as defined in Article 29(1) of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code... be applied in such a way as to ensure the consistency of the two methods of calculation;... this should also be specified in the text of Regulation (EC) No 3223/94, in particular to facilitate the preparation of the customs declarations'.

97 Accordingly, Regulation No 1498/98 contains an adequate statement of reasons in light of the requirements of Article 190 of the Treaty.

98 Secondly, as to Capespan's argument concerning breach of the Community's international obligations, it has already been stated at paragraph 74 above, that the rules set out in Article 5(1) of Regulation No 3223/94 for determining the entry price of the imported products are broadly comparable to the methods for determining customs value provided for in Articles 173 to 177 of its implementing regulation.

99 Yet, in its written and oral observations Capespan in no way maintained or demonstrated that those methods for determining customs value were incompatible with Article VII of GATT 1994 and with the agreement on implementation of that article.

100 Consequently, as the Advocate General pointed out at paragraph 74 of his Opinion, it has not been demonstrated in what manner the rules for calculating the entry price, which are in conformity with the provisions of the Community Customs Code and its implementing regulation, conflict with Article VII of GATT 1994 and with the agreement on implementation of that article.

101 Thirdly and finally, it is likewise appropriate to reject Capespan's argument based on infringement of essential formal requirements in regard to the detailed arrangements for adoption of measures implementing the Community Customs Code.

102 In that regard it should be recalled that, in light of the provisions of the Community Customs Code, agricultural legislation may contain specific provisions concerning the customs value of products with the result that Regulation No 3223/94, in particular, may lawfully contain specific provisions for calculating the customs value of fruit and vegetables. Under those conditions, it is logical for the measures implementing such specific provisions to be adopted in conformity with the procedure provided for by the enabling regulation.

103 Thus, in the fruit and vegetables sector the Commission was not entitled to adopt Regulation No 1498/98 under any procedure other than that provided for in Article 46 of the new basic regulation.

104 The reply to the third question must therefore be that consideration of the question referred has disclosed no factor capable of affecting the validity of Regulation No 1498/98.

Fourth question

105 In view of the answer given to the third question, it is unnecessary to reply to the fourth question.

Fifth question

106 In its fifth question the referring court is essentially asking whether, on a proper interpretation of Article 5 of Regulation No 3223/94, an importer who is not in a

position to make a definitive declaration of customs value at the time of customs clearance of fruit and vegetables coming under the scope of Regulation No 3223/94 may give a provisional indication of that value under Article 254 of the regulation implementing the Community Customs Code.

107 As the Advocate General pointed out at paragraphs 80 to 84 of his Opinion, the question as to whether an importer may give a provisional indication of customs value does not arise in the case of the first and third methods for determining the entry price of the products set out in Article 5(1) of Regulation No 3223/94.

108 The first method under that article for determining the entry price is based on the fob price of the products in the country of origin plus the costs of insurance and freight up to the borders of the Community customs territory. Article 5(1)(a) of Regulation No 3223/94 states that that method may be used only 'where that price and those costs are known at the time the declaration of release of the products for free circulation is made'. Consequently, when the first method for determining the entry price of the imported products is used, their definitive value is known at the time of customs clearance and there is no interest in allowing the importer to give a provisional indication of their customs value.

109 As for the method provided for in Article 5(1)(c) of Regulation No 3223/94, which is based on the standard import value, there is no interest in allowing the importer to give a provisional indication of the customs value of the products.

110 In the final analysis there is only one situation in which it may be useful to the importer to give a provisional indication of the customs value of the products and to make an incomplete declaration under Article 254 of the regulation implementing the Community Customs Code, namely when use is made of the second method for determining the entry price provided for in Article 5(1)(b) of Regulation No 3223/94. Since in that case the value of the products may be determined on the basis of the unit price relating to sales of identical or similar imported products, the price of the products forming the subject-matter of the declaration is not necessarily known at the time when they are cleared through customs.

111 Under Article 76 of the Community Customs Code the importer may in certain cases omit certain particulars from the declaration referred to in Article 62 of the Code. Thus, where the goods are liable to *ad valorem* duties, an importer who is not able to declare a definitive customs value may, under the second indent of Article 254 of the regulation implementing the Community Customs Code, provide a provisional indication of that value on the basis of the information available to him. In that case, Article 257(3) of that regulation provides that the customs authorities are to enter immediately in the accounts the amount of duties determined on the basis of the provisional value and demand, if necessary, the lodging of a security adequate to cover the difference between that amount and the amount to which the goods may definitively be liable.

112 The reply to the fifth question must therefore be that, on a proper construction of Article 5 of Regulation No 3223/94, an importer who is not in a position to make a definitive declaration of customs value at the time of customs clearance of fruit and vegetables coming under the scope of that regulation may give a provisional indication of that value under Article 254 of the regulation implementing the Community Customs Code only where the value of the abovementioned products

is determined according to the method provided for in Article 5(1)(b) of Regulation No 3223/94 aforesaid.

Costs

113 The costs incurred by the United Kingdom Government and 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions submitted to it by the VAT and Duties Tribunal, London, by order of 19 October 2000, hereby rules:

1. **The customs value of fruit and vegetables coming within the scope of Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables**

must, in respect of the period between 18 March 1997 and 17 July 1998 inclusive, be determined in accordance with the rules for calculating entry price provided for in Article 5 of that regulation.

2. Consideration of the third question referred has disclosed no factor capable of affecting the validity of Commission Regulation (EC) No 1498/98 of 14 July 1998 amending Regulation No 3223/94.

3. On a proper construction of Article 5 of Regulation No 3223/94, an importer who is not in a position to make a definitive declaration of customs value at the time of customs clearance of fruit and vegetables coming under the scope of that regulation may give a provisional indication of that value 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 only where the value of the abovementioned products is determined according to the method provided for in Article 5(1)(b) of Regulation No 3223/94.

Wathelet Timmermans Edward

Jann Von Bahr

Delivered in open court in Luxembourg on 16 January 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber