OPINION OF ADVOCATE GENERAL TESAURO

delivered on 22 October 1992 *

Mr President,
Members of the Court,

1. The preliminary ruling sought by the Tribunal d'Instance of the Seventh Arrondissement, Paris, relates to the interpretation of Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties; [1] and, in the alternative, Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties. [2]

2. I refer to the Report for the Hearing for matters of detail but will briefly summarize the events giving rise to the dispute in the main proceedings.

Hewlett Packard France (hereinafter 'HP-France') imported into France in the three-year period 1986-1988 computer keyboards from Singapore. Relying on 'binding' customs information issued to the German subsidiary of Hewlett Packard by the Munich Finance Office, HP-France declared the keyboards in question for release for free circulation under tariff heading 85.55C, covering 'spare parts for computers'. Since goods classified under that tariff heading qualified for a suspension of customs duties, [3] HP-France was exempted from duty on them.

Following a subsequent verification, the French customs authorities informed HP-France that the keyboards in question should have been classified under heading 84.53B, covering 'processing units for electronic computers', and therefore that there would be post-clearance recovery of the duties due for 1986. [4]

HP-France, relying on the applicable Community provisions, asked the customs authorities not to apply any penalty and to forward their file to the Commission in

* Original language: Italian.

1 — OJ 1979 L 197, p. 1.

2 — OJ 1979 L 175, p. 1.

3 — See Annex II to Council Regulation (EEC) No 3599/85 of 17 December 1985 applying generalized tariff preferences for 1986 in respect of certain industrial products originating in developing countries (OJ 1985 L 352, p. 1).

4 — It should be noted that, at the material time, goods within heading 84.53B also qualified for a suspension of duties, but subject to a shared (annual) tariff ceiling. That limit was reached for 1986, giving rise to reintroduction of the collection of duty (see Commission Regulation No 1236/87 of 4 May 1987, OJ 1987 L 177, p. 5) for transactions carried out during that year and settled after the tariff ceilings were exceeded: it is precisely for this reason that the recovery procedure initiated by the French authorities relates only to the imports made in 1986.

order to secure a non-recovery decision under Article 5(2) of Regulation No 1697/79. In the absence of any response from the French authorities, HP-France commenced proceedings before the Tribunal d'Instance of the Seventh Arrondissement, Paris, for annulment of the implied decision rejecting its application for non-recovery of the duty in question.

3. The national court has asked this Court to give a preliminary ruling as to whether, in view of the circumstances invoked by the plaintiff in the main proceedings, namely the existence of a binding notice issued by the Munich Revenue Office classifying the goods in question under heading 84.55C and the absence of any objection from the French customs authorities regarding that classification (notwithstanding the fact that each import declaration expressly referred to the heading declared, next to the correct commercial description of the goods), the applicant is entitled to a waiver of post-clearance recovery of the duty at issue pursuant to Article 5(2) of Regulation No 1697/79 or, in the alternative, remission of import duties pursuant to Article 13 of Regulation No 1430/79.

It should be observed at the outset that, when called on to give a ruling under Article 177, the Court has no jurisdiction to apply a Community provision to a specific case but must confine itself to providing the national court, on the basis of the information before it, with the requisite interpretative guidance to allow it to decide the case. [5] In other words, when faced with questions that go beyond its jurisdiction under Article 177, the Court is required to extract from the information provided by the national court, in particular the grounds of the order for reference, the matters of Community law which call for interpretation, having regard to the subject-matter of the dispute. [6]

In the present case, the question submitted must be construed as meaning that the national court wishes to determine whether the conditions laid down in Article 5(2) of Regulation No 1697/79 or, in the alternative, those in Article 13 of Regulation No 1430/79, are satisfied where a company has relied, for the purposes of tariff classification, on incorrect (binding) information provided to its fellow subsidiary by the competent customs authority in another Member State and the customs authorities responsible for collection have made no objection regarding that tariff classification.

4. That said, it should be noted as a preliminary point that Article 5(2) of Regulation No 1697/79 makes a decision by the competent authorities not to effect post-clearance recovery of the duties payable subject to the simultaneous fulfilment of three conditions: namely, the 'duties ... were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter for his part having acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned'. I would also point out that the Court has

5 — See the judgment in Case C-332/88 *SA Alimenta* [1990] ECR I-2077, paragraph 9.

6 — Judgment in Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9.

consistently held that that provision 'must be interpreted as meaning that if all the conditions laid down by [it] are fulfilled the person liable is entitled to the waiver of the recovery of the duty in question'. [7]

The first condition laid down by that provision, therefore, is that the non-collection of the duties must be attributable to an error made by the competent authorities themselves. Accordingly, it is necessary to determine whether the phrase 'error made by the competent authorities' extends to: (a) an error not attributable to the customs authorities responsible for collection of the duty but to those in another Member State which provided incorrect (binding) information to a fellow subsidiary of the company concerned; (b) the fact that the authorities competent to effect recovery raised no objection regarding classification of the keyboards, even though a comparison between the heading declared and the explicit commercial description of the goods in question would have disclosed a contradiction.

5. As regards point (a), I would observe at the outset that according to the literal wording of Article 5(2) only an error made by the actual authorities responsible for collection can be taken into account for the purposes of waiving recovery of the duty. However, such a restrictive interpretation was set aside by the Court itself which, in *Mecanarte*, [8] held that 'any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duty and which may thus cause the person liable to entertain legitimate expectations' must be regarded as a competent authority for the purposes of the provision in question, and that 'this applies in particular to the customs authorities of the exporting Member State which deal with the customs declaration'.

The Court thus recognized that account may be taken of an error made by customs authorities other than those responsible for effecting recovery. It is true, as is apparent from the judgment cited above, that such an error must be relevant to the collection of the duty and therefore be such as to cause the trader in question to entertain legitimate expectations. The Commission maintains that that condition is not satisfied in the present case since the information in question was given not to HP-France but to its German fellow subsidiary, and that only the latter is therefore entitled to rely on it.

Of course, only the German subsidiary of Hewlett Packard can rely on the 'binding' information as such: in other words, only it can rely on Article 5(1) of Regulation No 1697/79, pursuant to which post-clearance recovery of customs duties is not permitted where they have been calculated on the basis of information which was binding on the authorities which provided it. In the present case, on the other hand, it is necessary to ascertain whether such information may be relied on, for the purposes of applying Article 5(2) of the same regulation, by persons other than the addressee.

7 — See, most recently, the judgment in Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 12.

8 — Cited above, paragraph 22.

Before answering that question, I think it is appropriate to refer to Council Regulation (EEC) No 1715/90 of 20 June 1990 on the information provided by the customs authorities of the Member States concerning the classification of goods in the customs nomenclature, [9] a harmonizing regulation which provides, *inter alia*, that the Commission is to determine, by means of an implementing regulation, that a binding notice issued in one Member State has the same legal significance in all the other States: in other words, it is also binding on the competent authorities in all the other Member States. That legislative development can be accounted for by the concern to avoid discriminatory treatment within the Community and is clearly based on the premise that the classification of goods should not vary from one Member State to another. Against that background, I consider that, once the Commission has adopted such an implementing regulation, it will not be reasonable to deny the relevance of an error made by the competent customs authorities in one Member State *vis-à-vis* economic agents established in other Member States, who will then be able to rely on it — if the other conditions laid down in Article 5(2) are fulfilled — to ensure that duties are not recovered from them.

That said, I cannot fail to point out that under the legislation in force at the material time, the error committed by the competent German customs authorities could not be regarded as an 'error made by the competent authorities themselves' for the purposes of Article 5(2) of Regulation No 1697/79.

9 — OJ 1990 L 160, p. 1.

6. I shall therefore now consider whether the fact that those authorities raised no objection regarding the customs heading indicated by the trader in question in relation to the goods concerned may be regarded as an error made by the competent authorities. As is apparent from the judgment in *Foto-Frost*, [10] whilst it is true that, where duty has been calculated on the basis of unchecked particulars given in the customs declaration, the declaration may be subjected to subsequent verification and the amount of duty calculated rectified, it is also true that, if the post-clearance check does not disclose any information additional to that provided in the customs declaration, the failure to collect the duties is in principle attributable to an error by the customs authorities. In other words, for there to be an error on the part of the competent authorities which is relevant for the purposes of non-recovery, it is sufficient if those authorities, despite the size and number of the transactions carried out by the trader in question, fail to challenge the classification adopted by that trader, having regard to the information provided in the customs declaration.

That is confirmed, albeit indirectly, by Article 2 of Directive 82/57, [11] which is applicable to the present case, pursuant to which traders are required to describe the goods 'in terms that are sufficiently precise to enable the customs authority to *determine forthwith and unambiguously that they correspond to the tariff heading or subheading*

10 — Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 24; see also the judgment in Case 378/87 *Top Hit* [1989] ECR 1359, paragraph 19.

11 — Commission Directive of 17 December 1981 laying down certain provisions for implementing Council Directive 79/695/EEC on the harmonization of procedures for the release of goods for free circulation (OJ 1982 L 28, p. 38).

declared'. [12] Now, it is common ground that in all the customs declarations presented by HP-France the word 'keyboards' was entered beside the declared customs heading and the imports in question were made over a fairly long period, without the customs authorities raising the slightest objection regarding the tariff heading indicated. It follows that the failure to require duties which, moreover, at the material time did not in fact have to be collected, is certainly attributable to an error on the part of the competent authorities themselves.

7. Let us consider the second condition laid down in Article 5(2) of Regulation No 1697/79, namely that the error concerned must be one which could not reasonably have been detected by the person liable. In that connection, it should be borne in mind as a preliminary point that the Court has consistently held that it is incumbent on the national court to ascertain whether that condition is fulfilled, having regard to the nature of the error, the experience of the trader concerned and the diligence shown by him. [13] However, the Court has laid down a number of criteria to be followed by the national court in so doing.

As regards the nature of the error, it has indicated that it is necessary to ascertain whether the rules in question are sufficiently simple or are complex. In a case such as this one, it must certainly be noted that the very fact that it became necessary, in view of the differences of opinion existing in the Member States regarding the tariff classification of 'keyboards' and therefore in order to ensure uniform application of the combined nomenclature, to adopt an *ad hoc* regulation, [14] which finally 'prescribed' the customs heading in which to classify the goods in question, constitutes significant evidence, first, of the complexity of the problem in hand [15] and, secondly, the lack of negligence on the part of the trader in question. [16]

As regards the business experience of the trader concerned, the Court has held that it must be established whether the person concerned is a professional trader and 'particularly whether he had in the past carried out similar transactions on which customs duties had been correctly calculated'. [17] It is certainly true that HP-France is a professional trader, so much so that, as pointed out by the Commission, it has had recourse to the procedure for combined declarations; however, as is apparent from the documents before the Court, until the objection was raised by the French authorities, it had always imported the goods in question under the same tariff heading, namely 84.55C.

8. Finally, that brings us to the third condition, whereby the economic agent must have acted in good faith and observed all the provisions laid down by the rules in force regarding customs declarations. As is apparent from the relevant case-law of the

12 — Emphasis added.

13 — See most recently the judgment in Case C-187/91 *Belovo* [1992] ECR I-4937, paragraph 17.

14 — Commission Regulation (EEC) No 1288/91 concerning the classification of certain goods in the customs nomenclature (OJ 1991 L 122, p. 11).

15 — See judgment in Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535, paragraph 20.

16 — Judgment in *Belovo*, cited above, paragraph 18.

17 — *Deutsche Fernsprecher*, cited above, paragraph 21; see also *Belovo*, paragraph 19.

Court, [18] the declarant is required to provide the customs authorities with all the necessary information required by the Community legislation and by such national provisions as supplement or implement that legislation. For that purpose, as the Court itself has pointed out, [19] it is certainly not permissible to call for anything other than the information which the person liable may reasonably possess or obtain, and therefore it is sufficient for such information, even if incorrect, to have been provided in good faith.

Hewlett Packard France correctly indicated the name of the goods in question, but not the tariff classification, since it relied on binding information supplied by the competent German customs authorities to its fellow subsidiary. Moreover, the declared customs heading appeared clearly and explicitly next to the description of the goods in question, so that the customs authorities could certainly, and ought to, have established immediately and unambiguously that the declared tariff heading was inappropriate.

As regards, more particularly, the requirement of good faith, I do not think that it can reasonably be called in question in a case where, as here, the trader in question would not, at the material time, have paid any duty even if it had classified the goods in question under the tariff heading subsequently found to be correct. Nor do I feel that I can share the Commission's view that, in order to satisfy the condition at issue, Hewlett Packard France should in any event have sought a classification opinion from the French authorities. It need hardly be re-stated that the relevant legislation does not require economic agents to seek a classification opinion: that procedure is one of which a trader may (and must) avail himself when he has doubts as to the tariff classification of goods.

9. The conclusion which I have reached makes it unnecessary to consider whether, in a case like this one, the conditions laid down in Article 13(1) of Regulation No 1430/79 for the remission of duty are satisfied. However, for the sake of completeness and just in case the Court does not follow the line which I advocate, I think I should consider the matter. But not before emphasizing that an application for the remission of duties entered in the account but not paid under Article 13 of Regulation No 1430/79 can, in my opinion, be lodged at the same time as a request for non-recovery under Article 5(2) of Regulation No 1697/79. The two regulations just referred to do not in fact operate in the alternative but cover two different situations. There is thus no reason why a trader should not, by applications lodged on the same date, ask whether, in the event of non-recovery not being granted, there might be grounds for remission of the duties (which ought otherwise to be recovered).

Article 13(1) of Regulation No 1430/79 provides that import duties may be repaid or remitted in special situations 'which result from circumstances in which no deception or

18 — See *Top Hit*, cited above, paragraphs 22-26.

19 — *Mecanarte*, cited above, paragraph 29.

obvious negligence may be attributed to the person concerned'. The French Government's view is that the present case does not even come within the scope of Regulation No 1430/79 which, it says, covers cases where the authorities allow repayment or remission of import duties where they have been improperly levied or miscalculated, whereas in the present case they should have been, but were not, collected. It is clear that Regulation No 1430/79 is not concerned solely with cases where there is no actual customs debt or where the latter exceeds what is legally due; more particularly, it should be noted that Article 13 concerns a whole set of circumstances in which it is subsequently found that the duties should not have been paid or that they were in some way unlawful.

10. In that connection, I would observe first that the present case is not one of the 'typical' cases listed in Article 4 of Commission Regulation No 3799/86 of 12 December 1986, [20] which make available the repayment or remission of import duties under Article 13 of Regulation No 1430/79. It is clear, therefore, that the procedure extends to case-by-case evaluation of other circumstances which may arise; however, the overall logic of the system seems to me to be such as to exclude any reliance on Article 13 in order to evade decisions to recover duties which were lawfully due but were not collected, except — specifically — in cases where those duties, if actually paid when due, would then have met the conditions for repayment. And it is undisputed that if Hewlett Packard France had declared the keyboards under the heading subsequently found to be correct, it would not have paid any duty since those goods enjoyed preferential treatment under a shared tariff ceiling.

The tariff ceiling laid down for 1986, as can easily be inferred from the fact that the Commission regulation which reintroduced the collection of duties was adopted on 4 May 1987, was exceeded during 1987, which means that the collection (or, rather, recovery) of duties related and relates only to those imports actually made in 1986 but in respect of which accounts were finalized only after 4 May 1987. And that is precisely what happened in Hewlett Packard France's case.

However, that situation cannot be regarded as constituting a 'special situation', unless one calls in question the validity of the entire system, as expressly provided for by the abovementioned Council Regulation No 3599/85 which, in fact, allows the Commission to adopt — even after the end of the relevant period — measures to bring to an end allocations to preferential tariff quotas; and the Commission exercised that power by adopting Regulation No 1236/87.

In short, the fact that the economic agent in question would not have paid any duty if, at the material time, it had declared the goods in question under what was later found to be the correct customs heading is not sufficient to constitute a special situation within the meaning of Article 13(1) of Regulation

20 — OJ 1986 L 352, p. 19.

No 1430/79: the excedence of the tariff ceilings and the consequent reintroduction of the duty is a normal risk to which economic agents are exposed, including those who have not enjoyed preferential treatment following an error which was not discovered until after the tariff ceilings were exceeded.

11. In the present case, therefore, it only remains to be established whether the fact that the economic agent in question relied on binding information provided by the competent customs authorities of another Member State may constitute special circumstances.

I shall merely observe that, as recognized by the Commission itself in its written observations, an error by such authorities may indeed constitute a 'special situation', above all against the background of the situation as a whole: 'binding' information was supplied to a subsidiary in the same group as the economic agent concerned and the latter initially imported the goods in question from the Member State whose customs authorities provided the binding information.

As regards, next, the existence of the other conditions laid down in Article 13(1) of Regulation No 1430/79, namely the absence of deception or obvious negligence, I shall merely refer back to what I said concerning Article 5(2) of Regulation No 1697/79.

12. In the light of the foregoing considerations, I suggest that the Court give the following answers to the questions referred to it by the Tribunal d'Instance of the Seventh Arrondissement, Paris:

(1) The first subparagraph of Article 5(2) of Council Regulation No 1697/79 is to be interpreted as meaning that no error is committed by the competent authorities where binding information is provided by the customs authorities of another Member State, which are not competent to collect duty from an economic agent other than the person liable; however, an error by the authorities responsible for collection, within the meaning of that provision, arises where such authorities, notwithstanding the number and volume of the imports made by the person liable, have raised no objection regarding the classification of the goods in question when comparison of the heading declared with the explicit commercial description of the goods should have made it possible to establish whether or not they corresponded.

(2) The first subparagraph of Article 5(2) of Council Regulation No 1697/79 must be interpreted as meaning that it is incumbent on the national court to establish whether the error could reasonably have been detected by the person liable, having regard to the nature of the error, the business experience of the trader concerned and the diligence displayed by him. The person liable must have provided the customs authorities with all the necessary information provided for by the Community legislation on customs declarations and any national implementing legislation or supplementary provisions; for the purposes of such compliance, it is sufficient for that information, although incorrect, to have been supplied in good faith.

In the alternative, I suggest that the Court give the following answer:

The conditions laid down in Article 13(1) of Regulation No 1430/79 are satisfied where, in the absence of any deception or obvious negligence, the trader in question relied on binding information provided by the competent customs authorities to a fellow-subsidiary.