OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 2 March 1989 *

Mr President,
Members of the Court,

1. In Case 378/87 the Court must rule on an action brought by Top Hit Holzvertrieb GmbH (previously known as Intras Holzimport GmbH), a company in the course of being wound up, against a decision adopted by the Commission of the European Communities on the basis 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] Article 5(2) reads as follows:

'The competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which 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 having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declarations are concerned.

The cases in which the first subparagraph can be applied shall be determined in accordance with the implementing provisions laid down in accordance with the procedure provided for in Article 10.'

2. I refer to the Report for the Hearing for the facts of the present case. I would simply mention that between October 1980 and December 1981 the applicant imported 105 consignments of unassembled wooden shelves originating in Romania which were first declared to be 'wooden construction elements' and, from May 1981, 'unassembled wooden shelving'. In spite of numerous physical inspections by the customs agents, the goods were classified during the whole of that period under subheading 44.28 D II of the Common Customs Tariff and admitted free of import duties under the generalized system of preferences.

3. On 10 December 1981, in reply to a request made by Top Hit at the suggestion of the German customs authorities, the Oberfinanzdirektion (Principal Revenue Office), Berlin, decided in an official tariff classification notification that the goods in question were to be regarded as furniture falling under subheading 94.03 B. Consequently, as they were no longer eligible for preferential tariff treatment, the Hauptzollamt (Principal Customs Office) Köln-Deutz (hereinafter referred to as 'the Hauptzollamt') issued an amended tax notice on 19 October 1983 requiring the applicant to pay import duties amounting to DM 244 590.29 in post-clearance recovery in accordance with Article 2 of Council Regulation No 1697/79 of 24 July 1979.

4. On 15 November 1983 Top Hit raised an objection against that amended notice in

* Original language: French.
1 — OJ L 197, 3.8.1979, p. 1

which it requested that on the basis of Article 5(2) of the aforementioned regulation no action should be taken for the post-clearance recovery of the import duties.

5. Pursuant to Article 6 of Regulation No 1573/80 [2] the Federal Republic of Germany referred that application to the Commission of the European Communities. By the contested decision of 16 September 1985 (REC 5/85) the Commission declared that there should be post-clearance recovery of the import duties in question. As always in such a case, only the Member State which had made the reference to the Commission was the addressee of the decision within the meaning of Article 189. Moreover, the decision was not forwarded for information to the applicant company either by the Commission or by the German customs authorities.

6. I shall consider the admissibility and the merits of the action in turn.

A — Admissibility

7. Although it raised no formal objection pursuant to Article 91 of the Rules of Procedure, the Commission considered that the action was inadmissible since the period laid down in the third paragraph of Article 173 of the EEC Treaty had not been observed. In the Commission's view, that period began to run no later than 13 May 1986; through the letter which the Hauptzollamt sent it on that date the applicant had knowledge of the Commission's contested decision and more particularly of the fact that the decision concerned both the application under Article 13(1) of Regulation No 1430/79 [3] and that based on Article 5(2) of Regulation No 1697/79.

8. On the other hand Top Hit submits that it was only from the Hauptzollamt's decision of 21 October 1987 that it learned that the Commission had adopted, pursuant to Article 5(2) of Regulation No 1697/79, a decision which concerned it directly and individually.

9. To assess the question of admissibility it is necessary to consider some of the correspondence which passed between the applicant and the Hauptzollamt.

10. In the fourth paragraph of page 3 of the final decision of the Hauptzollamt of 21 October 1987 we read:

'Since *in view of its substance* [4] the objector's letter of 22 November 1983, which set out the grounds for its objection, could be regarded as a request for remission of the import duties demanded, made pursuant to Article 13 of Regulation (EEC) No 1430/79 (existence of special circumstances and grounds of equity), the complaint procedure was suspended at the suggestion of the Hauptzollamt Köln-Deutz of 5 October 1984 . . . approved by letter from the objector of 29 October 1984, pending a decision on the application for equitable treatment.'

2 — Commission Regulation No 1573/80 of 20 June 1980 laying down provisions for the implementation of Article 5(2) of Council Regulation No 1697/79 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 (OJ L 161, 26.6.1980, p. 1).

3 — Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ L 175, 12.7.1979, p. 1).

4 — Not stressed in the original text.

11. The complaint procedure in question can only be that based on Article 5(2) of Regulation No 1697/79 concerning post-clearance recovery.

12. It is a fact that the Commission based its decision of 16 September 1985 finding that remission of the duties in question (as well as their non-recovery) was not justified, which is challenged in the present proceedings, not only on the basis of the abovementioned article but also on the basis of Article 13 of Regulation No 1430/79.

13. By a decision of 21 January 1986 the Hauptzollamt therefore rejected the request for remission of the import duties and declared that the conditions laid down in the first paragraph of Article 13 of Regulation (EEC) No 1430/79 were not satisfied in the present case. The grounds of that decision are essentially identical to those of the Commission's contested decision. In addition, there is the following statement:

'Finally I would point out that in refusing the request I have taken full account of the decision adopted by the Commission of the European Communities on 16 September 1985 — REC 5/85 (Com(85) 1457 final). I also refer in this regard to Article 173 of the Treaty of 25 March 1957 establishing the European Economic Community.'

14. The application which we are now considering does not, however, relate to that aspect of the Commission's decision.

15. Finally, by letter dated 13 May 1986 (or 15 May according to the French translation since the date on the original is barely readable) the Hauptzollamt informed the applicant that *there was no longer any reason for suspending the complaint procedure.* It also stated:

'having regard to the said decision (Commission Decision REC 5/85 of 16 September 1985), the question whether in the present case the conditions for adopting a measure pursuant to Article 5(2) of Regulation (EEC) No 1697/79 are satisfied must essentially also be answered on the basis of the grounds which led to the rejection of the request made under the first paragraph of Article 13 of Regulation (EEC) No 1430/79'.

16. The Hauptzollamt did not, however, reach a decision on the complaint on the basis of the latter article but continued as follows:

'In those circumstances I should be obliged if you would inform me no later than 30 June 1986 whether you wish to reconsider and possibly add to the grounds of your objection.'

17. The object of that letter was thus clearly to inform the applicant that the objection procedure, which had been suspended at the customs authorities' suggestion, would be resumed.

18. Ultimately it was only by a 'Einspruchsentscheidung' (decision on an objection) of 21 October 1987 that the Hauptzollamt formally refused to waive post-clearance recovery of the import duties, adopting in that regard the reasons given in the Commission's decision. As in the decision of 21 January 1986, it was stated in conclusion:

'when the present decision was adopted full account was taken of the decision of the Commission of the European Communities of 16 September 1985 — REC 5/85 (Com(85) 1457 final).'

19. The situation is therefore rather confused. It could be argued on the basis of the letter of 13 May 1986 that the applicant ought to have realized even then that the Commission's decision was extremely important to its case and that it ought to have tried to procure it.

20. On the other hand, however, that letter was not at all clear and it could give the impression that the Hauptzollamt was now going to consider, on the basis of the reasons given in the Commission's decision, whether in the present case the conditions for adopting a measure pursuant to Article 5(2) were satisfied. After all, the Hauptzollamt asked the applicant to supplement if necessary the grounds of its objection. The applicant could thus have gained the impression that the Commission's decision did not specifically concern its case and was simply to serve as a reference basis for the Hauptzollamt's own considerations. It is moreover astonishing that the Hauptzollamt then took another 17 months before reaching a final decision. Yet it would have been a simple matter to annex the Commission's decision to the letter of 13 May 1986! I would hope that this may be done in the future in all cases of this kind. It cannot reasonably be expected of a taxpayer, even one assisted by a lawyer, whose sole dealings have been with the national authorities and who finds in a letter from those authorities a reference to a decision of the Commission, that he should immediately seek out the Commission department which could obtain a copy of that decision for him, when it is clear from the letter in question that the national authorities, far from considering the proceedings terminated, are reopening them.

21. Moreover, the last paragraph of Article 173 of the Treaty provides that: 'The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be'. In the present case the Commission has not shown that the applicant had knowledge of the precise wording of its decision at a given moment. [5]

22. The action was brought within a period of two months from the adoption of the Hauptzollamt's decision of 21 October 1987 which concluded the complaint procedure initiated under Article 5(2) of Regulation No 1697/79. In those circumstances, I consider that the action should be regarded as admissible.

B — Substance

23. In the *Foto-Frost* judgment [6] the Court held:

'Article 5(2) of Regulation No 1697/79 lays down three specific requirements which must be fulfilled before the competent authorities may waive the post-clearance recovery of duties. That provision must be

5 — The reference to the decision cannot be regarded as notification of the decision itself since it does not provide any information as to its precise contents. See the judgment of 5 March 1980 in Case 76/79 *Könecke* v *Commission* [1980] ECR 665, paragraph 7 at p. 677.

6 — Judgment of 22 October 1987 in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

interpreted as meaning that if all those requirements are fulfilled *the person liable is entitled*[7] to the waiver of the recovery of the duty in question.'

24. Those requirements are as follows:

(i) the non-collection of duties must have occurred as a result of an error on the part of the competent authorities themselves;

(ii) the person liable must have acted in good faith, that is to say that it must not have been possible for him to detect the error made by the customs authorities;

(iii) the person liable must have observed all the provisions laid down by the rules in force as far as his customs declaration is concerned.

25. Let us consider whether those three requirements are satisfied in the present case.

The error of the competent authorities

26. As curious as it may seem, no heading or subheading of the Common Customs Tariff refers expressly to 'shelving' or 'racking', although numerous other products are listed in detail, such as, for example, 'objets d'étagère' (Heading 44.27).

27. Although they had numerous opportunities to carry out physical inspection of the goods, the customs authorities continued to classify them under subheading:

44.28 Other articles of wood:

D. Other

II. Other,

instead of assigning them to subheading:

94.03 Other furniture and parts thereof

B. Other furniture.

28. The explanatory description 'unassembled pinewood shelving', added from 20 May 1981 to the original description 'wooden construction elements, pine/spruce' and used only from 4 June 1981, did not influence the customs office's view as to the correct classification.

29. In its decision of 16 September 1985 the Commission did not deny that the competent authorities had themselves made an error and during the proceedings it admitted that the error had been 'gross and persistent'. I therefore do not need to dwell further on that point.

Second condition

(1) The question of the importer's good faith seems to me to be dealt with in the fourth and seventh recitals in the preamble to the Commission's decision

30. In the fourth[8] recital the Commission states as follows:

7 — Not stressed in the judgment.

8 — In my view, the description of the facts on p. 2 of the decision is part of the first recital.

'The customs declaration of the importer of the goods was, however, not without ambiguity for the customs office responsible for determining the heading or subheading under which they fell. That is *particularly the case*[9] with the description of the goods used until May 1981, which was "wooden construction elements, pine/spruce" and the reference to subheading 44.28 D II. It was also claimed that the goods were intended for the construction of rabbit hutches and small greenhouses.'

31. At the end of the seventh recital there is the following passage:

'it is not to be excluded that the importer declared the goods under subheading 44.28 D II of the Common Customs Tariff because a tariff preference was applicable to goods falling under that heading which did not apply to goods falling under Heading 94.03'.

32. Had the shelving been classified under Heading 94.03 it is certain that a customs duty of 18% would have been payable since Romania, just like China, did not enjoy, in relation to that heading, the duty exemption provided in favour of other developing countries under the generalized system of preferences. Such exemption is, on the other hand, provided for in the case of products falling under Heading 44.28.

33. With regard to the attitude adopted by Top Hit, the Commission's decision makes no distinction between the first period, which extended from October 1980 to April 1981, and the second period, which began in May 1981. Let us consider Top Hit's attitude during the first period.

34. (a) Top Hit maintains that the classification of the goods was carried out at the time of the first importation in October 1980 by its agents in agreement with officials from the customs office and on the basis of a sample which it supplied. On the invoices issued by the supplier, Comtrade of Vienna, which seems to be a subsidiary of a Romanian company, the goods were described as 'vorgefertigte Holzkonstruktionen, EG Zolltarifnummer BRD 4423 300 0', that is to say 'wooden prefabrications, tariff Heading of the European Community, Federal Republic of Germany 4423 300 0'. The Common Customs Tariff at the time contained a Heading 44.23 worded as follows:

'Builders' carpentry and joinery (including prefabricated and sectional buildings and assembled parquet flooring panels).'

35. Since the goods were prefabricated articles intended to be assembled, to a layman classification under that heading might have seemed more appropriate than classification under the 'catch-all' Heading 44.28: Other articles of wood, D. Other, II. Other.

36. It appears, however, that as regards Heading 44.28 there existed for Romania, under the generalized preferences regu-

9 — Not stressed in the original text.

lation, complete exemption, whereas as regards Heading 44.23 the exemption was subject in 1981 to a ceiling of 6 117 000 European units of account, or DM 15 500 783 per annum and per country of exportation.[10] Even if exports from Romania to the Federal Republic of Germany probably did not exceed DM 3 000 000 (on the basis of the average value of the customs declarations and assuming that there were 80 consignments in 1981), exports may have taken place to other countries of the Community so that there may well have been a risk that the ceiling could be exceeded.

37. The possibility cannot be excluded that this state of affairs may have led Top Hit itself to suggest classification under Heading 44.28 unless it had been pointed out to it that classification under Heading 44.23 was in any event excluded for other reasons. It is, of course, obvious that it was not in Top Hit's interests to have the shelving classified under Heading 94.03. There is thus some doubt about Top Hit's good faith during that first period.

38. (b) In the recital to its decision which has already been cited the Commission states also 'that in addition it was claimed that the goods were intended for the construction of rabbit hutches or small greenhouses'.

39. I consider, however, that the Commission has not been able to show that such an assertion had already been made in 1980 or 1981. In its rejoinder the Commission refers for evidence to Annex 6 to the applicant's reply. The document in question is a request for a classification decision binding the customs authorities, attached to such a decision of the Oberfinanzdirektion Munich. It relates to products called Rosi 1, 2 and 3, consisting of three kinds of racks, planed only, impregnated in order to withstand weathering and intended to be covered either by 'plexiglas' (artificial glass) to be used as small greenhouses or by wire meshing to be used as cages for small animals.

40. At first the customs authorities in question issued a binding classification decision classifying the goods under subheading 44.28 D II. Subsequently, that binding classification notice was replaced by another. This suggests that the classification of such goods causes problems even to specialists. Since, however, the request for classification in question was not lodged until 18 October 1982 in any event, it cannot serve as evidence that the applicant indicated that use of the goods in 1980 or 1981 in respect of products which had not been treated to withstand weathering. On that point the reasons stated for the Commission's decision are not therefore sufficiently substantiated.

41. (c) Let us now consider the position during the second period. When in the customs declaration of 14 May 1981 the transport undertaking for the first time declared the goods — in accordance with the wording of the supplier's invoice — to be 'wooden prefabrications' and referred to Heading 44.23, the customs authority observed, on the part of the document which it had to complete, that the goods were unassembled pinewood shelves consisting of two vertical members and five

10 — Council Regulation No 3322/80 of 16 December 1980 establishing a multi-annual scheme of generalized tariff preferences and its application for 1981 in respect of certain industrial products originating in developing countries (OJ L 354, 29.12.1980, pp 114 and 135) One unit of account was worth DM 2.53405 — see OJ L 315, 24.11.1980, p. 13

planks, all planed, not in the nature of furniture, with six screws and groundpins as accessories. It allotted them the code number 44.28.99990 (see Annex 4 to the application). Moreover, it seems that in that consignment the various elements of the shelving (vertical members, cross-pieces and shelves) were for the first time no longer delivered on separate palettes but in parcels containing all the individual parts of a complete rack.

42. After that date the goods were always declared as unassembled pinewood shelving falling under Heading 44.28 until a binding classification notice issued by the customs authorities classified them under subheading 94.03 B.

43. In my view, one can hardly consider a firm which gives its products a description corresponding precisely to their characteristics to be acting in bad faith. That charge would be justified only if the firm must have known that the goods ought not to have been classified under Heading 44.28. That leads me to the second limb of the second condition of Article 5(2) of Regulation No 1697/79, namely that the error in classification should not be discernable.

(2) Could the error in classification made by the customs authorities have reasonably been discerned by the person liable to pay duties?

44. The problem which arises in this regard is not, as the Commission maintains, whether furniture falls under Heading 94.03 even when imported in separate pieces but whether planed wooden shelves intended, because of their lack of finishing, to be placed in cellars, workshops or garages, must nevertheless be regarded as furniture.

45. Certainly, the man on the Clapham omnibus would hardly regard such objects as furniture. Nevertheless, could a firm specializing in the sale of articles made of wood and a customs agent be unaware that, under the Common Customs Tariff, that is indeed so?

46. During the first period the German customs authorities, on at least some 40 occasions, expressly found that the goods matched the description given by the applicant and that they came under Heading 44.28 by writing on the form the words 'wie angemeldet festgestellt' and not 'wie angemeldet angenommen' ('found as declared' and not 'accepted as declared').

47. Moreover, the Commission has not denied that, according to the commentary to the Common Customs Tariff published by the German authorities, 'shelving' is to be classified under Chapter 44 so long as it is not furniture (see p. 10 of the application).

48. Moreover, the applicant was not assumed to be aware of the Customs Cooperation Council classification notice providing that *metal* racks standing on the ground and intended for the *display of goods* (meaning in a sales area) belong under Heading 94.03.

49. Finally, the Commission has not disputed the applicant's statement that an internal inspection by the German customs authorities led, on 30 July 1981, to the approval of the classification in question by the 'Vorprüfungsstelle Bund bei der Oberfinanzdirektion Köln' (application, p. 10).

50. It follows from all the foregoing that the tariff classification of the goods in question, even when expressly declared to be 'wooden shelving', was genuinely open to doubt. The error made was not 'reasonably detectable' by the person liable to pay the duties since even the customs authority responsible for checking the activities of the clearance offices did not detect it. Even a firm specializing in dealing in a certain kind of product cannot be expected to have greater oversight than better-informed customs officials, especially when such officials have in fact inspected the goods in question on numerous occasions.

51. I therefore consider that it has not been established in any event that from 15 May 1981 the applicant showed bad faith in declaring its goods as shelving falling under subheading 44.28 D II. In finding in the fourth recital to its decision that

'the customs declaration of the importer of the goods was . . . not free from ambiguity for the customs authorities responsible for determining the tariff heading or subheading under which they fell. That was *particularly so* for the description of the goods used until May 1981',

the Commission wrongly treated the importer's attitude in the same way during the first and second periods whereas it was clearly different.

Observation of all the provisions laid down by the rules in force concerning the customs declarations

52. We have seen that in any event from May 1981 Top Hit declared its product in terms corresponding to its precise characteristics but gave a wrong tariff heading. I have also reached the conclusion that it could not reasonably have detected that error.

53. To maintain that an importer has not correctly observed the provisions laid down in relation to the clearance of goods if he declares a wrong tariff heading amounts to imposing on him a 'duty of infallibility' which is not required of customs agents since Article 5(2) requires 'an error made by the competent authorities themselves'.

54. Moreover, paragraph 12 of the German 'Zollgesetz' provides that where the person liable to pay duties is unable to indicate the appropriate tariff heading or where he has doubts about the correct heading, the customs authorities must give him such assistance as is necessary. According to the Schwarz-Wockenfoth commentary,[11] in such a case the customs authority must classify the goods itself. It may be asked

11 — Schwarz-Wockenfoth: *Zollrecht mit Einfuhrumsatzsteuerrecht, EWG-Zollrecht und EWG-Marktordnungsrecht*, 2. Auflage, 10. Ergänzungslieferung, September 1988, Carl Heymanns Verlag KG, Köln, Berlin, Bonn, München (commentary on paragraph 12, point 14).

whether that was not the case in this instance since on numerous occasions the customs authority physically checked the goods not only after May 1981 but also during the first period and each time confirmed the tariff heading indicated by the applicant.

55. Moreover, at the hearing the Commission did not deny that a person liable to pay duties does not infringe his obligations concerning the customs declaration if he errs in good faith about the tariff heading under which goods should be classified. It also recognized that ultimately it is the customs authority which is responsible for determining the tariff heading or subheading under which the goods should be classified, as appears *expressis verbis* in the fourth recital in the preamble to the contested decision.

Conclusion

56. According to the second recital in the preamble to Council Regulation No 1697/79, the taking of action for post-clearance recovery is under no circumstances justified where the original determination of import duties has been established on the basis of elements of taxation expressly recognized by the customs authorities as complying with those declared by the person liable for payment, where it is shown that the latter had acted in good faith and had complied in all respects with the rules in force for completing his customs declaration.

57. It follows from the foregoing arguments that those conditions were satisfied in this case, at any rate as regards imports which took place after 14 May 1981 and before 10 December 1981, the date on which the applicant company requested the German customs authorities to issue a binding tariff notification. Since Top Hit's application is admissible in any event, the Commission's decision of 16 September 1985 (REC 5/85) must therefore be declared void in so far as it rejects the applicant's request for waiver of post-clearance recovery in respect of the imports effected during the aforementioned second period.

58. Consequently, the Commission must be ordered to pay the costs.