JUDGMENT OF THE COURT (Fifth Chamber)
24 September 1998 *

In Case C-413/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Højesteret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Skatteministeriet

and

Sportgoods A/S

on the interpretation of Article 2(1) 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 (OJ 1979 L 197, p. 1) and on the legal effect of a decision delivered by the Commission following consultation with the Customs Code Committee,

* Language of the case: Danish.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J. C. Moitinho de Almeida, D. A. O. Edward (Rapporteur) and L. Sevón, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Skatteministeriet, by Karsten Hagel Sørensen, of the Copenhagen Bar, acting as Kammeradvokat,

— Sportgoods A/S, by Jan Martens and Robert Mikelsons, of the Copenhagen Bar,

— the Commission of the European Communities, by Hans Christian Støvlbæk and Fernando Castillo de la Torre, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1997,

gives the following

Judgment

1 By decision of 20 December 1996, received at the Court on 27 December 1996, the Højesteret (Danish Supreme Court) referred for a preliminary ruling under Article 177 of the EC Treaty three questions concerning the interpretation of Article 2(1) 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 (OJ 1979 L 197, p. 1) ('the regulation in issue') and on the legal effect of a decision delivered by the Commission following consultation with the Customs Code Committee.

2 Those questions have arisen in a dispute between Skatteministeriet (the Danish Ministry of Fiscal Affairs) and Sportgoods A/S, a company incorporated under Danish law, concerning the post-clearance recovery of customs duties on imports of five consignments of football boots from Thailand.

Community law

3 Pursuant to Article 1(1) of both Council Regulation (EEC) No 3896/89 of 18 December 1989 applying generalised tariff preferences for 1990 in respect of certain industrial products originating in developing countries (OJ 1989 L 383, p. 1) and Council Regulation (EEC) No 3831/90 of 20 December 1990 applying generalised tariff preferences for 1991 in respect of certain industrial products originating in developing countries (OJ 1990 L 370, p. 1) — extended, for 1992, by Council

Regulation (EEC) No 3587/91 of 3 December 1991 (OJ 1991 L 341, p. 1) — a tariff suspension was accorded for the products referred to in Annex I within the framework of fixed duty-free amounts and ceilings.

4 The products there referred to included those originating in Thailand and coming under Common Customs Tariff headings 6402 ('Other footwear with outer soles and uppers of rubber or plastics') and 6403 ('Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather').

5 In accordance with Article 7 of both Regulation No 3896/89 and Regulation No 3831/90, which features in Section II concerning the administration of the Community tariff ceilings, as soon as the individual ceilings are reached at Community level, the levying of customs duties on imports of the products in question originating in each of the countries and territories concerned may be reintroduced at any time.

6 Article 9 of both Regulation No 3896/89 and Regulation No 3831/90, as extended by Regulation No 3587/91, which features in the same section, provides as follows:

'1. The Commission shall reintroduce the levying of customs duties in respect of any of the countries or territories referred to in Article 1(2), under the conditions laid down in Articles 7 and 8, by means of a Regulation.

In the case of such reintroductions, Spain and Portugal shall reintroduce the levying of customs duties that they shall apply to third countries on the date in question.

2. By means of a Regulation, the Commission may, even after 31 December [1990 for Regulation No 3896/89 and 1992 for Regulation No 3831/90, as extended by Regulation No 3587/91], take measures to stop quantities being charged against one or other preferential tariff limit, if, particularly as a result of regularisations of imports actually made during the period referred to in Article 1(1), these limits are exceeded.

The Member State which makes such regularisation shall communicate the figures of import charges relating to this as and when it occurs to the Commission. The Commission, on receiving these communications, shall inform the other Member States thereof.'

7 The levying of customs duties was re-established for imports of products originating in Thailand and coming under tariff headings 6402 and 6403 with effect from, respectively, 3 March 1992 and 27 March 1992 by Commission Regulation (EEC) No 513/92 of 28 February 1992 re-establishing the levying of customs duties on products falling within CN codes 6401, 6402, 6404 and 6405 90 10, originating in Thailand, to which the preferential tariff arrangements set out in Regulation No 3831/90 apply (OJ 1992 L 55, p. 88) and Commission Regulation (EEC) No 719/92 of 23 March 1992 re-establishing the levying of customs duties on products falling within CN code 6403, originating in Thailand, to which the preferential tariff arrangements set out in Regulation No 3831/90 apply (OJ 1992 L 78, p. 9).

8 With regard to the post-clearance recovery of the customs duties, Article 2(1) of the regulation in issue, which was in force at the time when the goods were imported, provided as follows:

'Where the competent authorities find that all or part of the amount of import duties or export duties legally due on goods entered for a customs procedure

involving the obligation to pay such duties has not been required of the person liable for payment, they shall take action to recover the duties not collected.

...'

The dispute in the main proceedings

9 Over the period from 1 March 1990 to 20 January 1992, Sportgoods imported five consignments of sports boots with imitation leather uppers which ought to have been classified under tariff subheading 6402 19 00 of the Combined Nomenclature of the Common Customs Tariff in force at that time, set out in Annex I to 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) ('the Combined Nomenclature'), as amended by Commission Regulation (EEC) No 2886/89 of 2 August 1989 (OJ 1989 L 282, p. 1), Commission Regulation (EEC) No 2472/90 of 31 July 1990 (OJ 1990 L 247, p. 1) and Commission Regulation (EEC) No 2587/91 of 26 July 1991 (OJ 1991 L 259, p. 1), as 'Other footwear with outer soles and uppers of rubber or plastics: Sports footwear: Other'.

10 However, as the result of an error by the forwarding agent acting for Sportgoods, the five consignments were classified, in the declarations for release into free circulation, under tariff subheading 6403 19 00 of the Combined Nomenclature as 'Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: Sports footwear: Other'.

11 Since, at the time when the competent authorities accepted the declaration for release of the goods into free circulation, this latter tariff subheading qualified for tariff preferences within the framework of the tariff ceilings provided for under Regulations No 3896/89 and No 3831/90, no customs duty was demanded or paid when the boots in question were imported.

12 At the end of 1992, the Told-og Skatteregion Horsens (Horsens Regional Customs and Tax Authority) discovered the tariff-classification error in the five declarations during an inspection. Since the customs exemptions had by that time ceased to apply to the tariff subheading under which the goods in question ought to have been declared, the Danish authorities sought post-clearance payment of customs duties calculated for the five consignments in a total amount of DKR 271 249.40.

13 Following confirmation of that decision on 27 May 1993 by the Told-og Skattestyrelse (National Customs and Tax Board), Sportgoods brought proceedings against Skatteministeriet before the Østre Landsret (Eastern Regional Court).

14 The Østre Landsret suspended the written procedure in order to request the Commission to rule whether the remission of import duties, pursuant to the provisions of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), which was in force at that time, was justified in circumstances such as those of the case before it.

15 By Decision C(94) 1854 final of 18 July 1994, finding that remission of import duties is not justified in an individual case, the Commission replied in the negative.

16 By judgment of 22 September 1995, the Østre Landsret nevertheless held that the post-clearance recovery at issue had no legal basis inasmuch as Article 2(1) of the regulation in issue did not extend to incorrect declarations of tariff headings which did not have financial repercussions.

17 Skatteministeriet appealed against that judgment to the Højesteret, which, forming the view that the dispute raised issues of interpretation of Community law, decided to stay the proceedings and refer the following questions to the Court:

'1. Must Article 2(1) of Council Regulation (EEC) 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 1979 L 197, p. 1) be interpreted as meaning that post-clearance recovery may be effected only in cases in which there is a difference in the amount of duty involved, but not in cases of incorrect declarations of headings which have not had any bearing on the amount?

2. Must the words "... legally due ..." in Article 2(1) of Council Regulation No 1697/79 be interpreted on the assumption that:

— it is the factual and legal circumstances at the time when the competent authorities receive a declaration containing an incorrect tariff heading that are conclusive for determining whether an amount is due?

or that:

— it is the factual and legal circumstances at the time when the competent authorities establish that a declaration contained an incorrect tariff heading that are conclusive for determining whether an amount is due?

3. (a) What is the legal effect of a decision by the European Commission, after consultation with the Customs Code Committee, addressed to a Member State following a request by a Member State to the Committee that it take a decision on whether there was, in specified circumstances, justification for granting remission of import duties, and in which the Commission and the Committee decided that there was no justification for granting remission of import duties referred to in the Member State's request to the Committee?

(b) Is it compatible with the legal effects described in the answer to Question 3(a) for a court in the Member State concerned to rule in a judgment that the necessary legal basis for post-clearance recovery of import duties was lacking?'

The first and second questions

18 By its first and second questions, which should be examined together, the Højesteret is asking in substance whether Article 2(1) of the regulation in issue, which was applicable at the time of the facts in the main proceedings, is to be construed as meaning that, where a post-clearance inspection has revealed an error in the tariff classification of goods indicated in a declaration for release into free circulation, and where the levying of customs duties on products covered by the heading under which those goods ought to have been classified was suspended at the date on which that declaration was accepted but had been re-established when the error was

detected, the factual and legal situation to be taken into account by the customs authorities in order to recalculate the amount of customs duty legally due is that prevailing when the declaration was accepted or when the error in tariff classification was discovered.

19 Skatteministeriet takes the view that the factual and legal situation prevailing when the competent authorities find that a declaration contained an error as to the tariff heading is conclusive with regard to the existence of a customs debt and post-clearance recovery of customs duties.

20 Sportgoods, however, argues that, since at the date on which the declaration for release into free circulation was accepted a customs exemption applied for goods originating in Thailand and coming under tariff subheading 6402 19 00 of the Combined Nomenclature, no customs debt could have arisen, and there is thus no legal basis for post-clearance recovery of the customs duties.

21 In the Commission's view, the date on which the declaration for release into free circulation is accepted determines when the customs debt arises. Where, as in the main proceedings, it is confirmed that that debt has arisen, the authorities are in principle obliged, under Article 2(1) of the regulation in issue, to recover the customs duty which should have been levied, taking account, where appropriate, of the re-establishment of the normal duty.

22 In those circumstances, it is necessary to consider in turn the operative date for determining the amount of the customs debt, the application of the rules governing generalised tariff preferences and, in so far as may be appropriate, the obligation to take action to recover uncollected customs duties.

The operative date for determining the amount of the customs debt

23 First of all, under Articles 2(1)(a) and 3(a) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt (OJ 1987 L 201, p. 15), which was in force at the time of the facts in the main proceedings, a customs debt on importation arises at the moment when the competent authorities accept the entry of the goods for free circulation.

24 Second, it is clear from Article 11(1) of Council Directive 79/695/EEC of 24 July 1979 on the harmonisation of procedures for the release of goods for free circulation (OJ 1979 L 205, p. 19), which was in force when the goods in question were imported, that, without prejudice to special rules applicable under general or specific community legislation, import duties were to be levied in accordance with the rates and amounts in force at the date of acceptance of the declaration, and that the same date was to be the operative date for determining other particulars material to the calculation of duty on the goods and for applying any other provisions governing the release of goods for free circulation.

25 It follows that, in principle, when the customs authorities discover, in the course of an inspection, an error in the tariff classification of goods indicated in a declaration of release for free circulation, they must recalculate, in the light of the new information at their disposal, the amount of customs duties legally due at the date when that declaration was accepted.

The application of the rules governing generalised tariff preferences

26 Under Article 1(1) of both Regulation No 3896/89 and Regulation No 3831/90, tariff suspension was granted, at the date on which the declaration for release into free circulation was accepted, only within the framework of fixed duty-free amounts and ceilings.

27 In accordance with the provisions of Section II of each of those regulations, although a customs debt arose on the date on which the declaration for release into free circulation was accepted, its levying was to be suspended within the limits of the tariff ceilings fixed by those regulations. Once those tariff ceilings had been reached for the goods in question, customs duties could be levied once again.

28 In this case, it is common ground that, once the tariff ceilings had been reached, Regulations No 513/92 and No 719/92 re-established the levying of customs duties on imports of products originating in Thailand and coming under tariff headings 6402 and 6403 with effect from 3 March 1992 and 27 March 1992 respectively, and thus before the tariff classification error in question had been discovered.

29 It does, admittedly, appear from the preambles to Regulation No 3896/89 (24th to 27th recitals) and Regulation No 3831/90 (30th to 33rd recitals) that it was unavoidable, in the administration of the tariff ceilings provided for under those regulations, that the ceilings would be somewhat exceeded since different authorities were simultaneously responsible for it.

30 It is also true that a case such as the present concerns simply the reclassification of a quantity of football boots which, whether under the subheading mistakenly indicated in the declaration for release into free circulation or under the correct sub-

heading, were entitled to a tariff suspension at the time when that declaration was accepted.

31 However, the problem should be viewed rather in the context of the overall scheme of the system of tariff suspensions in question, which requires the strictest possible adherence to the ceilings established.

32 If it were to be accepted that ceilings may be exceeded retroactively where goods are reclassified following the discovery of an error by the importer in the tariff classification of goods after the ceiling provided for the subheading under which the goods should have been classified has been reached and the levying of customs duties on imports of the goods in question has been re-established, that would have to be accepted irrespective of the quantity and value of the goods in question and irrespective of whether, at the time when the declaration was accepted, a tariff suspension applied to both of the subheadings concerned or only to one of them.

33 Such an interpretation would negate the effectiveness of both the regulation establishing the tariff ceilings and that re-establishing the levying of customs duties. Furthermore, the fact that a request could be made for the ceilings to be exceeded retroactively could give rise to abuse.

34 It follows that if, at the time when the amount of customs duty is being recalculated, the tariff ceiling has been reached and the levying of customs duties has been re-established, the imports can no longer benefit from the tariff suspension.

35 It should be added that, since a tariff suspension cannot have retroactive effect, an importer cannot benefit from such a suspension introduced after the declaration for release into free circulation has been accepted.

The obligation to take action to recover uncollected customs duties

36 Where, after recalculating the amount of the customs debt on the basis of the rates applicable on the date when the declaration for release into free circulation was accepted, the customs authorities find that the imports in question can no longer benefit from tariff suspension, the customs duties thus recalculated are legally due.

37 To the extent that the person liable has not been required to pay those customs duties, the customs authorities must, in accordance with the provisions of the regulation in issue, take steps to recover any uncollected duties.

38 In the light of the foregoing, the answer to the first and second questions must be that Article 2(1) of the regulation in issue, which was applicable at the time of the facts in the main proceedings, must be construed as meaning that, where a post-clearance inspection has revealed an error in the tariff classification of goods indicated in a declaration for release into free circulation, and where the levying of customs duties on products covered by the heading under which those goods ought to have been classified was suspended at the date on which that declaration was accepted but had been re-established when the error was detected, the customs authorities must not take account of that suspension in order to recalculate the amount of the customs duties legally due on the date on which the declaration was accepted.

The third question

39 According to Skatteministeriet, the Commission, in its decision of 18 July 1994, implicitly ruled that there was a legal basis for post-clearance recovery of the

customs duties in question; that decision, it claims, is binding on national courts, which cannot therefore hold that there is no such legal basis.

40 The Commission, taking the same view as Sportgoods, contends that it did not express a view in its decision of 18 July 1994 as to the existence or otherwise of any legal basis for effecting post-clearance recovery of the import duties; such a basis does, however, constitute a prior and distinct condition for seeking repayment or remission of the customs duty under Regulation No 1430/79. Accordingly, nothing prevents national courts from interpreting the regulation in issue and, if appropriate, ruling that no such legal basis exists. To do so would not amount to a declaration that the Commission's decision was invalid.

41 Here, it is sufficient to note, first, that the Commission, as it points out, did not express a view in its decision of 18 July 1994 as to the existence or otherwise of a legal basis for effecting post-clearance recovery of the customs duties concerned under the regulation in issue. The decision does not contain any legal or factual indication in this regard such as to bind all the authorities, including the courts, of the State to which it was addressed.

42 Second, the obligation on the customs authorities to take action to recover uncollected customs duties derives from the regulation in issue. It was not necessary in this case for the Commission to rule, by decision, whether there was a legal basis for proceeding to such recovery under that regulation.

43 The answer to the third question must therefore be that, when the Commission, after consultation with the Customs Code Committee, has delivered a decision addressed to a Member State holding that there was, in a specific case, no justification for granting remission of import duties pursuant to the provisions of Regulation No 1430/79, and when that decision does not contain any legal or factual indication relating to the legal basis for effecting post-clearance recovery of the

import duties concerned under the regulation in issue, a national court may rule on the latter question, having recourse, if appropriate, to the procedure under Article 177 of the Treaty.

Costs

44 The costs incurred by the Commission, which has 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 referred to it by the Højesteret by decision of 20 December 1996, hereby rules:

1. **Article 2(1) 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 must be construed as meaning that, where a post-clearance inspection has revealed an error in the tariff classification of goods indicated in a declaration for release into free circulation, and where the levying of customs duties on products covered by the heading under which those goods ought to have been classified was suspended at the date on which that declaration was accepted but**

had been re-established when the error was detected, the customs authorities must not take account of that suspension in order to recalculate the amount of the customs duties legally due on the date on which the declaration was accepted.

2. When the Commission, after consultation with the Customs Code Committee, has delivered a decision addressed to a Member State holding that there was, in a specific case, no justification for granting remission of import duties pursuant to the provisions of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, and when that decision does not contain any legal or factual indication relating to the legal basis for effecting post-clearance recovery of the import duties concerned under Regulation No 1697/79, a national court may rule on the latter question, having recourse, if appropriate, to the procedure under Article 177 of the EC Treaty.

Gulmann Wathelet Moitinho de Almeida

Edward Sevón

Delivered in open court in Luxembourg on 24 September 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber