OPINION OF ADVOCATE GENERAL COSMAS

delivered on 29 June 1995 *

1. The questions referred to the Court by the Tribunal Tributário de Segunda Instância (Customs Court of Second Instance), Lisbon, for a preliminary ruling under Article 177 of the EC Treaty arose in the context of proceedings brought by the Sociedade de Exportação e Importação de Materiais Lda (hereinafter 'SEIM') before the Tribunal Tributário de Segunda Instância, Lisbon.

2. The national court seeks a determination of the legal nature of a decision refusing an application for remission of import or export duties payable and for an interpretation of the provisions laying down the conditions of acceptance of such a request in the light of the general principle of equity governing the relevant legislation.

3. Specifically those questions concern the interpretation of Article 7(1) of Commission Regulation (EEC) No 1574/80 of 20 June 1980, [1] of Article 1(2)(d) and Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979, [2] as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986, [3] Article 5(2) of Commission Regulation (EEC) No 3799/86 of 12 December 1986, [4] together with the validity of Article 4(2)(c) of aforementioned Regulation No 3799/86.

I — Relevant legislation and case-law

4. Council Regulation No 1430/79 lays down the conditions under which the competent authorities are to repay import or export duties erroneously levied or are to remit them (Article 1(1)).

* Original language: Greek.

1 — Commission Regulation (EEC) No 1574/80 of 20 June 1980 laying down provisions for the implementation of Articles 16 and 17 of Council Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties (OJ 1980 L 161, p. 3).

2 — 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). That regulation was repealed by Council Regulation (EEC) No 2913/92 of 12 October 1992 on the common customs code (OJ 1992 L 302, p. 1).

3 — Council Regulation (EEC) No 3069/86 of 7 October 1986 amending Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties (OJ 1986 L 286, p. 1).

4 — Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4*a*, 6*a*, 11*a* and 13 of Council Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties (OJ 1986 L 352, p. 19).

5. Article 1(2)(d) of Regulation No 1430/79 defines the expression 'remission' 'as the complete or partial waiving of import or export duties which have been entered in the accounts by the authority responsible for their collection, but which have not yet been paid'.

6. Title I of the regulation in question determines the cases (A, B, C, D and E) and the procedure for repayment of import duties erroneously levied on the remission thereof.

7. Article 13(1) and (2) of Regulation No 1430/79, as amended by Council Regulation No 3069/86 of 7 October 1986 (Article 1(6)), lays down certain situations which may give grounds for the repayment of import duties erroneously levied or for the remission of import duties. More particularly it provides:

'1. Import duties may be repaid or remitted in special situations other than those referred to in Sections A to D, which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

The situations in which the first subparagraph may be applied, and the detailed procedural arrangements to be followed for this purpose, shall be determined in accordance with the procedure laid down in Article 25. Repayment or remission may be made subject to special conditions.

2. Import duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which those duties were entered in the accounts by the authority responsible for their collection.

However, the competent authorities may permit that period to be exceeded in exceptional cases where there is good reason for doing so.'

8. Article 13 of Regulation No 1430/79 constitutes a general equitable provision, as the Court has emphasized on several occasions. [5] It has also determined the limits

5 — See, for example, judgments in Case 283/82 *Papierfabrik Schoellershammer* v *Commission* [1983] ECR 4219, paragraph 3, and in Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303, paragraph 10.

of its applicability in order to prevent misuse which would in the final analysis run counter to the wishes of the Community legislature. It has also stated that it is within the competence of the national courts to examine whether all the preconditions for the application of Article 13 are met, that is to say the absence of negligence and fraud on the part of the person concerned and compliance with the procedural rules. [6]

9. Commission Regulation No 3799/86 contains, amongst other provisions, those concerning the applicability of Article 13 of Council Regulation No 1430/79.

10. Title I. B. I. thereof provides for 'special situations which do, and those which do not, constitute grounds for the repayment or remission of import duties'. Article 4 is as follows:

'For the purposes of Article 13(1) of the basic regulation, [7] and without prejudice to other situations to be considered case by case as part of the procedure laid down in Articles 6 to 10:

(1) ...

(2) The following situations shall not by themselves be special situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned:

(a) ...

(b) ...

(c) Production, even in good faith, for the purpose of securing preferential tariff treatment of goods entered for free circulation, of documents subsequently found to be forged, falsified or not valid for the purpose of securing such preferential tariff treatment.'

11. Consequently, the list contained in Article 4 is not exhaustive but indicative, which is why the Court considered that it was for the competent authorities to assess in each case whether a particular situation not

6 — Judgment in Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 47).

7 — That is to say Regulation No 1430/79.

referred to in that list constituted a special situation within the meaning of the applicable Community legislation. [8]

12. Article 16 of Regulation No 1430/79 determines the procedure to be observed on lodging an application for remission of import duties payable:

'Applications for repayment or remission of import or export duties must be submitted to the customs office where the duties in question were entered in the accounts, unless the competent authorities designate another office for this purpose.

Applications must be accompanied by all the evidence in the applicant's possession, so that the competent authorities may decide on the application taking due account of the reasons put forward by him. Where they consider it necessary, the competent authorities may lay down a time-limit for the production by the applicant of additional evidence.'

13. Article 18 of Regulation No 1430/79 determines the authorities competent to decide on applications for the repayment or remission of import or export duties payable:

'In all cases the authorities competent to decide on applications for the repayment or remission of import or export duties shall be those of the Member States where those duties were entered into the accounts.'

14. Moreover, Commission Regulation (EEC) No 1574/80 of 20 June 1980 lays down the provisions for the implementation of Articles 16 and 17 [9] of Regulation No 1430/79. Article 7(1) determines as follows:

'When the decision-making authority possesses all the necessary information, it shall give its decision on the application at the earliest opportunity and notify the applicant in writing of that decision.'

15. Finally, section B. II of the abovementioned Regulation No 3799/86 contains a series of procedural provisions which allocate as between the Commission and the national customs authorities competence to take decisions in order to resolve differences

8 — See the *Hewlett Packard France* judgment cited in footnote 6, paragraph 39, and point 10 of the Opinion by Advocate General Tesauro in the same case.

9 — Article 17 refers to the case where the goods are located in another Member State from that in which the relevant import or export duties were entered in the accounts.

in connection with the acceptance or not of applications for repayment or remission of import duties, thereby determining the decisions to be taken by the competent authorities of the Member States (Article 5) and by the Commission (Article 6). These provisions are as follows:

Article 5

'1. ...

2. Where the competent authority of a Member State establishes that the grounds on which an application is made under Article 13(2) of the basic Regulation [10] are based solely on one of the situations described in Article 4(2) it shall not repay or remit the amount of import duties concerned.'

Article 6

'1. Where the competent authority of a Member State cannot decide, by reference to Article 4, whether an application for repayment or remission under Article 13(2) of the basic Regulation [11] should be granted, it shall refuse the application if it is not supported by evidence of a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

In all other cases it shall submit the case to the Commission for a decision, in accordance with the procedure laid down in Articles 7 to 10. The relevant documents submitted to the Commission shall contain all the information required to enable a comprehensive examination of the case to be carried out.

As soon as it receives the relevant documents the Commission shall inform the Member State concerned accordingly.

Should it be found that the information supplied by the Member State is not sufficient to enable a decision to be taken on the case

10 — That is to say Regulation No 1430/79.

11 — That is of Regulation No 1430/79.

concerned in full knowledge of the facts, the Commission may request that additional information be supplied.

2. ...'

II — The facts

16. SEIM ordered certain goods from a West German company and imported them into Portugal, producing the certificate of origin for the goods (EUR 1) issued by the German customs authorities which certified that the goods had been manufactured in the Federal Republic of Germany. For that reason the goods were imported free of duty in accordance with the common customs regime applicable.

17. Subsequently, the German customs authorities invalidated the certificates of origin on the ground that they considered them to have been improperly issued, and notified the Portuguese authorities thereof. The definitive inspection department of the Oporto customs authority took action for the post-clearance recovery of import duties which resulted in an assessment of ESC 7 660 587 as the amount payable.

18. On receipt of the demand for payment, and not being granted deferment, authorization to pay by instalments or any other payment facility, SEIM refused to pay the amount in question and brought an action for the annulment of the notice of assessment before the Tribunal Fiscal Aduaneiro (Customs Court of First Instance), Oporto.

19. At the same time, SEIM submitted an application to the Director of the Oporto customs office claiming that the preconditions in Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 [12] were met whereby:

'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 declaration is concerned.

...'

12 — Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance 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). That regulation was repealed by Council Regulation (EEC) No 2913/92 of 12 October 1992 on the common customs code, mentioned in footnote 2 above.

SEIM submitted therefore that the competent authorities were entitled not to claim post-clearance recovery of the amount sought to be recovered on the ground that the person concerned acted in good faith. It requested that its application be transferred to the Directorate-General for Customs so that that Directorate might refer the matter to the Commission of the European Communities for a decision on whether to collect the amount in question, in accordance with the provisions of Commission Regulation (EEC) No 1573/80 of 20 June 1980. [13]

20. On 28 February 1989 the Directorate-General for Customs, construing SEIM's application for the post-clearance recovery issue to be submitted to the Commission for a decision as an application for remission (of the import duties assessed), rejected that application by decision of the Deputy Director-General, who relied in summary on the following arguments:

— the error made by the customs authorities of the exporting country in improperly issuing the EUR 1 movement certificates is not an error for the purposes of Article 5(2) of Regulation No 1697/79;

— whether the criteria for the application of Article 5(2) of Regulation No 1697/79 are satisfied is a matter to be verified by the competent authorities of the Member State which assessed the amount due;

— the authorities which issue the EUR 1 movement certificates are entitled to carry out post-clearance checks;

— Article 5(2) covers cases of errors committed by the competent authorities of the Member State assessing the amount payable at an amount lower than the amount due. Acceptance of documents attached to the declaration which subsequently prove to be inaccurate or invalid constitutes a typical instance where there is no error on the part of the customs authorities.

21. By application brought before the Tribunal Tributário de Segunda Instância SEIM sought the annulment of that decision on the grounds that:

— the conditions laid down for the competent authorities to refrain from action for post-clearance recovery of the amount claimed are satisfied, in accordance with Article 5(2) of Regulation No 1697/79;

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

— a decision of that kind, given the sum claimed (greater than ECU 2 000), is a matter for the Commission of the European Communities, in accordance with Commission Regulation No 1573/80;

— the same result would be achieved if recourse were had to Article 13(1) of Council Regulation No 1430/79 of 2 July 1979.

22. In its defence to the action for annulment, the defendant claimed that it was competent to effect post-clearance recovery since it is only in the event of a decision not to effect recovery that the Commission intervenes, that is to say when the duty recoverable exceeds ECU 2 000.

23. The prosecuting authority considered that SEIM's application to the Oporto Customs Directorate constituted an additional application for relief and that, consequently, the contested decision given on its application simply confirmed the notice of assessment of duties. For that reason it suggested that the application be rejected.

24. SEIM replied that it did not dispute the assessment but rather the decision rejecting its application for the opening of the procedure for the remission of the amount assessed which would require a decision by the Commission. It is that measure, it emphasized, which entailed an appeal to a higher authority and which was accordingly open to challenge.

25. The national court observes that, although SEIM was requesting a decision not to proceed with recovery and was not applying for remission of the amount of import duties assessed, which it moreover did not pay, the Directorate-General for Customs considered that an application for remission had been made, since that was how he construed SEIM's request for the file to be submitted to the Commission for a decision as to whether to effect post-clearance recovery of the import duties.

III — The preliminary questions

26. In order to resolve the questions which in its view arose, the national court submitted the following four questions to the Court for a preliminary ruling:

'(a) Having regard to the considerations set out in section II of this order for reference, to the system of post-clearance recovery laid down in Council Regulation (EEC) No 1697/79 of 24 July 1979 and to the system of remission of duties assessed but not yet paid set out

in Council Regulation (EEC) No 1430/79 of 2 July 1979, does a decision of the national customs authority dismissing an application for remission of duties in accordance with *Article 7(1) of Commission Regulation (EEC) No 1574/80 of 20 June 1980* involve the application of substantive tax provisions or provisions of Community administrative law, or was it adopted by the customs service acting as a tax authority or as an administrative authority properly so called? What is the legal nature of that decision?

(b) Is the phrase referring to *duties which have not yet been paid* in Article 1(2)(d) of Regulation No 1430/79 to be interpreted restrictively as meaning duties whose payment has been deferred?

(c) Since the applicant has relied on facts which are capable of being classified for legal purposes under any of the detailed arrangements for special situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned (Article 13(1) of Regulation No 1430/79, as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986), was the national customs authority required by Article 5(2) of Commission Regulation (EEC) No 3799/86 of 12 December 1986 to assess the application for remission of import duties from the point of view of the general principle of equity set out in Article 13(1)?

(d) Is Article 4(2)(c) of Regulation No 3799/86 of 12 December 1986 invalid inasmuch as it restricted special cases of remission of payment beyond that which is necessary in order to safeguard other Community interests, thereby infringing Article 13(1) of Regulation No 1430/79?'

IV — Replies to the preliminary questions

A — *The first question*

27. In the first question the Court is asked to state the legal nature of the decision given on an application for repayment or remission of import or export duties under Article 7(1) of Regulation No 1574/80. In other words the question asked is whether it is a decision going to the substance given in pursuance of provisions of substantive customs law or whether it is a procedural decision given in pursuance of procedural rules of administrative law. The decision by the national court as to whether it has jurisdiction under national law depends on the answer to that question.

28. In its observations to the Court the Commission raises the question of the admissibility of the preliminary question. It considers that the question submitted does not seek the interpretation of the relevant provision of the regulation so as to ensure the uniform application of Community law but that the Court is asked to rule at large on the legal nature of a decision rejecting an application for remission in order to determine under national law the court with jurisdiction in the matter.

In support of its arguments the Commission relies on the judgment in *Foglia* v *Novello* [14] in which it was held that the Court's mission is to contribute to the administration of justice within the Member States by means of the interpretation of a provision of Community law which is required to be applied and not in formulating advisory opinions on general or hypothetical questions. [15]

29. The Portuguese Government also considers that the question submitted to the Court does not concern the application of Community legislation since the classification of a decision adopted under Article 7 of Regulation No 1574/80 is solely a question of internal law and, consequently, does not fall to be decided by the Court.

14 — Judgment in Case 244/80 *Foglia* v *Novello* [1981] ECR 3045.

15 — See *Foglia* v *Novello*, cited above, paragraphs 18 and 20.

30. As explained in part II of the order for reference Portuguese law distinguishes between customs duty cases which come within the jurisdiction of the Tribunal Fiscal Aduaneiro and administrative matters concerning taxation in which the referring court has jurisdiction. To the first category belong all cases concerning the assessment of taxes in the exercise of fiscal powers whilst the second category comprises all those cases which although they do not concern the notice of assessment itself are connected with it and concern the administrative powers of the customs authorities, that is to say relate to applications against administrative measures concerning customs matters.

31. In the present case a question arises concerning the interpretation of provisions of Community law with a view to resolving a problem of national law concerning the allocation of jurisdiction amongst the courts of a Member State. More specifically, the national court is of the view that it is essential to determine the legal classification of the decision of the national authorities rejecting the application for remission adopted under rules of Community law in order to resolve the question of national law concerning the determination of the court with jurisdiction in the matter at issue.

32. A particular feature of the present case is that although the provision to be interpreted, Article 7(1) of Commission Regulation No 1574/80, does not apply directly, its interpretation will not amount to the formulation of an advisory opinion on a general

or hypothetical question unrelated to the subject-matter of the main proceedings, as the Commission maintains in its observations; on the contrary, the interpretation sought is directly linked to the solution of the question pending before the national court; [16] it is therefore right for us to proceed in that direction.

33. The question of the Court's jurisdiction to decide on questions concerning the classification of a decision adopted by national authorities under Community legislation, in order to enable the national court to determine which Court has jurisdiction under national law, was already before the Court in the *Bozzetti* case. [17] Examining the question of the legal classification — whether fiscal or other — of the co-responsibility levy in the context of the common organization of the market in milk, the Court held that 'it was not for it to intervene in order to resolve any questions of jurisdiction which may arise, within the national judicial system, as regards the definition of certain legal situations based on Community law'. The Court went on to say that: 'the way in which the co-responsibility levy is defined under Community law is not without significance as regards national law. There is therefore some purpose in informing the national court of the rules of Community law which may help to solve the problem of jurisdiction with which it is faced.' [18]

34. I come now to the question whether it is possible under existing Community legislation governing the remission of import and export duties to determine the legal nature of the function performed and the decision adopted by the national authority in rejecting an application for remission of duty lodged by the person liable in payment of the amount assessed. To that end it is necessary to examine the set of provisions concerning the creation and extinction of the customs debt in order to see whether it is possible to determine the legal nature of the decision refusing an application for remission of import duties under Article 7(1) of Regulation No 1574/80 which is of concern to the national court.

35. Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt which was applicable at the time when the debt was incurred [19] provides (Article 2) that the debt is incurred by:

16 — See *Foglia* v *Novello*, paragraph 21, cited above in footnote 14, and the judgments in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 39 and 40, and in Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraphs 22 and 23.

17 — Judgment in Case 179/84 *Bozzetti* [1985] ECR 2301, paragraphs 17 and 18.

18 — See also *Foglia and Novello* (cited above at footnote 14), paragraph 21, the *Dzodzi* judgment (cited above in footnote 16), paragraphs 39 and 40, the judgment in *Gmurzynska-Bscher* (cited above in footnote 16), paragraph 20, and the judgments in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, and Case C-83/91 *Meilicke* [1992] ECR I-4871.

19 — Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt, OJ 1987 L 201, p. 15.

'(a) the placing of goods liable to import duties in free circulation ...;

(b) the unlawful introduction into the customs territory of the Community of goods liable to import duties ...'.

Article 7 of that regulation provides that the moment in time to be taken into account in determining the amount payable is the time when the customs debt is incurred.

36. Once the fact giving rise to the customs debt occurs, such as the placing in free circulation of goods subject to import duties, the customs authority proceeds *ex post facto* to assess the amount payable. That decision arises as part of the customs function and constitutes in fact the core of that function.

37. Under Article 8(1)(a) of Regulation No 2144/87 a customs debt is extinguished:

'by payment of the amount of the import ... duties payable on the goods in question or, where appropriate, by remission of that amount pursuant to the Community provisions in force'.

38. It follows from the abovementioned provisions of Regulation No 2144/87, from the provisions of Regulation No 1697/79 on post-clearance recovery of import or export duties, and from the provisions of Regulation No 1430/79 on the repayment or remission of import duties that, from the moment of assessment of the amount of import duties payable, the decision in question begins a life cycle which ends with the approval of the application for remission of the amount in question.

39. More particularly, where an application for remission of import duties is lodged, the deciding authority, as a rule the customs authority which assessed the duties payable, as laid down in Article 16 of Regulation No 1430/79, in examining the application for remission has the power to decide to approve it and set aside the decision imposing the duties, that is to say, not to recover

the import duties assessed, either wholly or in part, as laid down in Article 1(2)(c) of Regulation No 1430/79 in conjunction with the provisions of Regulation No 1574/80, or to reject the application. All the actions taken by the deciding authority at that stage of the examination of the application concern the customs duty liability itself. Nor do they differ in regard to the type of function exercised (customs duty or administrative), from the actions it takes when examining the matter with a view to the imposition of post-clearance recovery import duties. Thus in both cases it is acting in the exercise of its customs function under the relevant legislation, and is applying substantive customs law.

40. I am assisted in reaching that conclusion also by an examination of the effects of the relevant decision taken by the authority, as they appear from the definition given to remission by Regulation No 1430/79 (Article 1(2)(d)). It appears from that decision, in conjunction with the aforementioned Article 8 of Regulation No 2144/87, that the positive decision to accept the application for remission constitutes an act of contrary effect (*contrarius actus*) to the decision to effect post-clearance recovery of duty (in accordance with Regulation No 1697/79), since acceptance of the relevant application concerns the customs obligation of the importer and results in the extinction of the debt in respect of all or part of the duties assessed but not paid.

41. Judged by its effects, the decision to reject an application for remission forms part of the overall procedure commencing with the imposition of (in this case post-clearance recovery) customs duties which in the end does not have any effect on and does not alter the obligation to pay the post-clearance amount determined by the authorities. But I do not believe that it is possible under the aforementioned Community legislation to differentiate according to its effects the refusal decision from a decision approving an application for remission because in both cases the same rules of Community customs law are being applied and the deciding authority is acting within the context of the function assigned to it by the relevant provisions of Community law, that is to say customs law. [20]

42. Accordingly I suggest the following reply be given to the first question:

'A decision under Article 7(1) of Commission Regulation (EEC) No 1574/80 of 20 June 1980 laying down provisions for the implementation of Articles 16 and 17 of Council Regulation (EEC) No 1430/79 on

20 — That solution also seems to carry conviction with the national court which in paragraph 43 of its order for reference states: 'It seems to this court that an authority which rejects an application for remission of customs duties which have been assessed but not yet paid is acting as a public tax authority and is applying substantive tax provisions to a specific case. Indeed the provisions laying down the conditions for remission (e. g. Articles 2 and 13(1) of Regulation No 1430/79) define in negative terms the incidence of import duties laid down in Council Regulation No 1697/79 of 24 July 1979.'

the repayment or remission of import or export duties, rejecting an application for repayment or remission of duties payable, is adopted in pursuance of rules of substantive customs law in the context of the customs function exercised by the customs authorities. It is for the national court to draw the consequences from that finding in order to determine whether it has jurisdiction in the matter.'

B — *The second question*

43. The national court asks whether Article 1(2)(d) of Regulation No 1430/79 which refers to *duties which have not yet been paid* is to be interpreted restrictively as meaning duties whose payment has been deferred.

44. The national court in its order for reference (paragraph 63), and the Portuguese Government in its observations, emphasize that an application for remission of payment can be made only where payment has been deferred.

45. The principal argument in support of that viewpoint is drawn from the preamble to Regulation No 1430/79. The second recital mentions that 'the amount of the import duties paid or deferred may prove to be higher than that legally due ... owing to the application of inaccurate or incomplete tax criteria, in particular with regard to the type, value or origin adopted for determining this amount ... in these cases, it is justifiable either to repay or remit the sums not due'.

46. The national court relies on one further argument in order to support the abovementioned view. The national court is strengthened in its view by the provision contained in Article 2(2) of Regulation No 1430/79 of a three-year period for the submission of an application for remission or repayment, whereas during the relevant period in which the dispute arose under the auspices of Council Regulation 78/453/EEC [21] a grant of the period for deferred payment was 30 days (Article 3) and was always subject to the provision of appropriate security by the person concerned (Article 2).

What appears therefore to be preoccupying the national court is how to reconcile the recognition of the importer's right to request remission of his debt within a long period with safeguarding the purpose of deferment

21 — Council Directive 78/453/EEC of 22 May 1978 on the harmonization of provisions laid down by law, regulation or administrative action concerning deferred payment of import duties or export duties (OJ 1978 L 146, p. 19).

which is to facilitate payment of the amount of import duties payable.

47. The Commission maintains that the reference in the second recital to 'the amount of the import duties ... deferred' [22] is merely a reference to a situation provided for and governed by Directive 78/453 and had no other purpose than to point to an existing system alongside which the new system established by Regulation No 1430/79 was to take its place, whereby deferment of payment is to facilitate payment of the amount of duties payable in order to ensure equal treatment of economic operators in the levying of import and export duties.

48. To begin with it is strange that the national court refers to Article 2(2) of Regulation No 1430/79 and not to Article 13(2) of the same regulation on which, without invoking it, the examination of the application submitted by SEIM is based.

Evidently that elucidation does not alter the nature of the problem before the Court.

49. The argument relied on by the Portuguese Government and adopted by the national court cannot be accepted. From the wording of the provision contained in Article 1(2)(d) of Regulation No 1430/79 it may be observed that 'remission' means 'the complete or partial waiving of import or export duties which have been entered in the accounts by the authority responsible for their collection, but which have not yet been paid'. Thus, on a literal construction of the provision laying down the conditions for remission it would appear that it is not necessary for there to have been a prior deferment of payment in order to enable the person liable to apply for remission.

50. That solution is also reinforced by an examination of the preconditions laid down in the first subparagraph of Article 13(2) of Regulation No 1430/79, as amended, which expressly provides that 'import duties shall be ... remitted upon submission of an application to the appropriate customs office within 12 months from the date on which those duties were entered in the accounts by the authority responsible for their collection'. However, if we assume as a necessary precondition for the submission of an application for remission the prior grant of deferment of payment, Article 13(2) which is clear in terms and does not impose any such condition would be infringed. This point is also emphasized by the Commission in its observations.

51. Moreover, in order to give a reply to the national court's question concerning the difficulty of reconciling the periods laid down

22 — It is already stated in the first recital that pursuant to Council Directive 78/453/EEC, 'payment of these import duties may, subject to conditions, be deferred'.

for the grant of deferment and for approval of an application for remission, I consider it necessary to examine the purposes underlying deferment and remission respectively.

52. When the competent authority assesses the amount of duties on the importation of products and their placing in free circulation, the importer is as a matter of principle obliged to comply with the assessment and to pay the amount due. Under Directive 78/453 deferment of payment may be granted after assessment of the amount due, on provision of a guarantee, as a facility for the person liable so that he may pay the amount without being pressed, though the obligation to pay remains.

53. The objective of the abovementioned Article 13 of Regulation No 1430/79, which provides for the repayment or remission of import duties under certain conditions, is to limit post-clearance payment of import duties to cases in which such payment is justified and compatible with a fundamental principle, such as the principle of the protection of legitimate expectations. [23]

54. In examining the two procedures (deferment and remission), we observe that it is the intention of the Community legislature that they should function independently, and neither should impinge on the autonomy of the other. The provision of a brief time-limit for deferment is not in contradiction with the determination of a different period (longer in this case) for the submission of an application for remission of an amount of import duties payable. For that reason as well I cannot regard the prior grant of deferment as a precondition of remission. If it were so, the acceptance of a narrow construction of Article 1(2)(d) of Regulation No 1430/79 would have the consequence of frustrating the purpose pursued by the procedure for the approval of an application for remission of import duties, given that the submission of the application for remission would have had to be made within the shorter period for deferment of payment.

55. Consequently, the second preliminary question should be answered as follows:

'Article 1(2)(d) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties does not require deferment of payment to precede acceptance of an application for remission of the amount of import duties payable.'

23 — See the judgment in *Hewlett Packard France*, mentioned above in footnote 6, paragraph 46.

C — *The fourth question*

56. For reasons of logic I have brought forward the examination of the fourth question because I consider it essential to resolve the issue raised in it by the national court before then proceeding to reply to the third question.

57. In the fourth question raised by the national court, the Court is asked to state whether Article 4(2)(c) of Regulation No 3799/86 is invalid inasmuch as it restricted the special cases of remission of payment beyond that necessary in order to safeguard other Community interests, thereby infringing Article 13(1) of Regulation No 1430/79.

58. The essence of the problem raised by the last preliminary question in which doubt is cast on the validity of Article 4(2)(c) of Commission Regulation No 3799/86 centres on whether that provision went further than permitted by the terms of the enabling provision contained in Article 13(1) of Council Regulation No 1430/79. The second subparagraph of Article 13(1) empowers on the Commission to adopt measures whilst at all times observing the limits set by the higher-ranking general principle of proportionality in the light of which that enabling provision must be construed. Thus, there must be no disproportion as between the objective pursued by Article 4(2)(c) of Regulation No 3799/86 and the measure adopted.

59. In fact it may be inferred from the Court's case-law [24] that the principle of proportionality demands the existence of a reasonable connection between the objectives pursued by the Community in the general interest and the measures adopted which affect the rights of citizens. Thus, the means must be necessary and appropriate and the disadvantages may not outweigh the advantages so that there is, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.

60. The purpose of that provision of Commission Regulation No 3799/86 is not to frustrate the effectiveness of post-clearance verification of the legality of documents produced for the grant of preferential customs treatment of goods cleared for placing into free circulation. The means used is the rejection by the customs authorities of any application for remission based simply on the production in good faith of documents which subsequently may prove to be false or falsified or invalid for the grant of preferential customs treatment.

24 — See for example the judgments in Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21, and in Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, paragraph 18.

61. Under those circumstances, the means chosen by the Commission appears in principle to be appropriate and necessary in order to achieve the objective sought by the abovementioned provision of Article 4(2)(c) of Regulation No 3799/86 because the way to ensure the effectiveness of the whole system of post-clearance checks is in fact to provide the competent authorities with the possibility of rejecting applications for remission based on the bona fide production of documents issued unlawfully.

62. An examination of the case-law also points in that direction. Before the adoption of the Commission Regulation in question, in the case of *Van Gend & Loos* v *Commission* the Court tried an action for the annulment of two Commission decisions adopted on two applications by the applicant companies to the relevant national authorities for the remission of import duties payable by them. The applicants founded their application on the provisions of Article 13(1) of Regulation No 1430/79 pleading, *inter alia*, ignorance of the fact that the certificates were not valid. The Court held that: 'It cannot be denied that verifications carried out after importation would be largely deprived of their usefulness if the use of false certificates could, of itself, justify granting a remission.' [25] That case-law is evidently mirrored by Commission Regulation No 3799/86 in the relevant provision contained in Article 4(2)(c).

25 — Judgment in Joined Cases 98/83 and 230/83 *Van Gend & Loos* v *Commission* [1984] ECR 3763, paragraph 13.

63. I now turn to an examination of the final element of the principle of proportionality in order to complete the examination of the validity of Article 4(2)(c) of Commission Regulation 3799/86, namely whether the disadvantages of that provision outweigh its advantages. My examination centres on whether the Commission's measure is disproportionate in relation to the enabling provision contained in Council Regulation No 1430/79.

64. Reverting to the actual text of Article 4 of Commission Regulation No 3799/86, I would observe that at first sight it may be regarded as restricting the meaning of 'situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned ...'. The Commission pointed out as much in its observations. However, to the extent to which it provides that other situations could be taken into account in assessing the degree of responsibility or the risk assumed by the importer in presenting albeit in good faith certificates subsequently found to be invalid it was clearly within the limits of competence laid down in Article 13(2) of Regulation No 1430/79.

65. I consider that it may be inferred from the foregoing analysis that the core of the 'right to remission' is not affected by Article

4(2)(c) of Regulation No 3799/86, nor is the general rule of equity enshrined in Article 13(1) of Regulation No 1430/79 affected, as the national court asserts; it is an implementing provision which prevents that article from being interpreted in too broad a manner which in the end would not correspond to the wishes of the Community legislature. That is borne out by the phrase 'and without prejudice to other situations to be considered case by case' which prefaces Article 4 of Regulation No 3799/86, and also by the phrase 'the following situations shall not by themselves be special situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned'. Moreover, both the Commission and the Portuguese Government in their observations stress these points in order to demonstrate the validity of Regulation No 3799/86.

66. Accordingly, I suggest that the following reply should be given to the fourth preliminary question:

'Article 4(2)(c) of Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4*a*, 6*a*, 11*a* and 13 of Council Regulation (EEC) No 1430/79 is warranted by the terms of Article 13(1) of Council Regulation (EEC) No 1430/79 and does not infringe the principle of proportionality.'

D — *The third question*

67. The Court is asked to rule whether, given that SEIM relied on facts capable from a legal point of view of falling within the special situations resulting from circumstances in which there is no deception or obvious negligence on its part, the national customs authority was obliged in accordance with Article 13(1) of Regulation No 1430/79 and in accordance with Article 5(2) of Commission Regulation No 3799/86 to consider the application for remission of import duties payable in the light of the general equitable provision contained in the abovementioned Article 13(1).

68. Article 4(2)(c) of Commission Regulation No 3799/86 created a bar in providing that for an application for remission of import duties payable to be accepted it was not sufficient in itself for the importer concerned, even acting in good faith, to produce for preferential treatment of goods cleared for free circulation documents subsequently found to be forged, falsified or not valid for the purpose of securing such preferential tariff treatment. The problem arising centres on the question whether, irrespective of that bar, the competent authorities are entitled to examine the application for remission submitted in the light of the general equitable provision contained in Article 13 of Regulation No 1430/79.

69. At the outset I would point out that as the Court has consistently held, [26] the aforementioned Article 13 which contains a general equitable provision is intended to limit the post-clearance payment of import duties to the extent to which such payment is justified and compatible with the fundamental principle of the protection of legitimate expectations. The Court does not refer to a general principle but simply to a general provision and that leads me, after considering the arguments of the Portuguese Government and of the Commission, to examine the validity of that provision in the present case with particular attention avoiding any generalization which could create confusion.

70. To begin with, the basic point of contention for the Portuguese Government is the reclassification by the competent authorities of SEIM's application for a decision not to proceed with the recovery of import duties assessed under Article 5(2) of Regulation No 1697/79 as an application for remission under Article 13(1) of Regulation No 1430/79; that reclassification, according to the national court, is justified by the investigative system operating in the national legal order. That question does not raise particular problems because the Court has consistently held that it is not competent under the preliminary ruling procedure to interpret provisions of national law — more specifically those determining the competences of administrative bodies — or to decide whether they are compatible with Community law. [27]

71. According to the submissions of the Portuguese Government, since the national authority was not entitled to reclassify the application submitted by SEIM, much less was it obliged to examine it under Article 13 of Regulation No 1430/79. Even if it was obliged to conduct that examination the decision would be in the negative because Article 4(2)(c) of Commission Regulation No 3799/86 does not permit the automatic acceptance of an application for remission where documents are produced, even in good faith, which are subsequently found to be forged, falsified or not valid for the purpose of securing preferential tariff treatment of imported goods.

72. I consider that the first part of the aforementioned objections by the Portuguese Government does not stand scrutiny and I am to that extent in agreement with the Commission.

73. It is a fact that Article 4(2)(c) of Commission Regulation No 3799/86 provided for a bar precluding the automatic approval of

26 — See *Schoellershammer* v *Commission*, paragraph 3, cited above in footnote 5, and *Cerealmangimi and Italgrani* v *Commission*, paragraph 10, also cited above in footnote 5.

27 — See for example judgment in Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 8.

an application for remission where invalid documents are produced, even in good faith.

74. When an application for remission of import duties is submitted the national customs authority is entitled to examine it in the light of the general equitable provision contained in Article 13(1) of Regulation No 1430/79, as amended, provided that the application submitted is formulated in such a way as to clearly show that the preconditions for the application of that article are satisfied, including those contained in the subsequent implementing provisions of Commission regulations (principally Article 2 et seq. of Regulation No 1574/80 in conjunction with Article 4 et seq. of Regulation No 3799/86).

75. Certainly, since the list contained in Article 4 of Regulation No 3799/86 is not exhaustive but indicative, as the Court has held, [28] it is on each occasion for the competent authorities to assess whether an actual situation not mentioned in that list is of a special nature within the meaning of the applicable Community legislation. Thus, in cases other than those described in Article 4(2)(c) of Commission Regulation No 3799/86, it is for those authorities to assess the application submitted in the light of the general equitable provision, examining all the matters referred to by the interested party which satisfy the requirements of Article 13.

76. Moreover, under the terms of Article 5(2) of Regulation No 3799/86 the national authority is the sole authority competent to verify whether the grounds relied on correspond without doubt to one of the situations provided for in Article 4(2) and, in the affirmative, to reject the application for remission of import duties or, under Article 6(1) of the same regulation, to submit the application to the Commission for a decision.

77. In conclusion I consider that the answer to the third preliminary question should be as follows:

'Where a company, in an application for remission of import duties, relies not only on the bona fide production of documents subsequently found to be forged, falsified or not valid for the purpose of securing preferential tariff treatment, but also on facts which may bring the application within one of the situations in which there is no deception or obvious negligence on the part of that company, the national customs authority is obliged to assess that application in the light of the general equitable provision contained in Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties.'

28 — See the *Hewlett Packard France* judgment, paragraph 39, mentioned above in footnote 6, and point 10 of the Opinion of Advocate General Tesauro in that case.

V — Conclusion

78. In the light of the foregoing I propose that the Court should give the following replies to the questions submitted for a preliminary ruling:

(1) A decision under Article 7(1) of Commission Regulation (EEC) No 1574/80 of 20 June 1980 laying down provisions for the implementation of Articles 16 and 17 of Council Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties, rejecting an application for repayment or remission of duties payable is adopted in pursuance of rules of substantive customs law in the context of the customs function exercised by the customs authorities. It is for the national court to draw the consequences from that finding in order to determine whether it has jurisdiction in the matter.

(2) Article 1(2)(d) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties does not require deferment of payment to precede acceptance of an application for remission of an amount of import duties payable.

(3) Article 4(2)(c) of Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4*a*, 6*a*, 11*a* and 13 of Council Regulation (EEC) No 1430/79 is warranted by the terms of Article 13(1) of Council Regulation (EEC) No 1430/79 and does not infringe the principle of proportionality.

(4) Where a company, in an application for remission of import duties, relies not only on the bona fide production of documents subsequently found to be forged, falsified or not valid for the purpose of preferential tariff treatment,

but also on facts which may bring the application within one of the situations in which there is no deception or obvious negligence on the part of the company, the national customs authority is obliged to assess that application in the light of the general equitable provision contained in Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties.