OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 15 June 1988 *

Mr President,
Members of the Court,

A — Facts

1. This case turns on the question whether import duties paid by Frydendahl Pedersen A/S, the applicant, should be refunded when the parties agree that they were wrongly paid.

2. On 28 September 1984 Frydendahl Pedersen A/S applied to a Danish customs office for the refund of import duties (customs duties) on fishing nets paid in the period between 8 October 1980 and 14 June 1984 amounting to DKR 1 756 932 together with interest thereon. It considered that the customs office had wrongly interpreted the relevant Community provisions.

3. On 11 June 1986 the Danish authorities submitted the case to the Commission, the defendant in these proceedings, for authorization to repay the duties levied.

4. The application was received by the defendant on 19 June 1986.

5. On 12 September 1986 the Committee on Duty-Free Arrangements examined the case. Subsequently, the Commission considered that further information was needed. In a telex message of 7 October 1986 it therefore asked the Danish authorities to withdraw the case and to supply further information. The Danish authorities complied with that request and re-submitted the case to the defendant on 28 October 1986.

6. On 26 February 1987 the defendant adopted the contested decision (REM: 29/86), addressed to the Danish Government, in which it stated that the repayment of the said import duties was not justified.

7. The applicant consequently requests the Court to

(i) declare that decision void;

(ii) order the defendant to pay the costs of the proceedings.

* Translated from the German.

8. The defendant requests the Court to

dismiss the application and order the applicant to pay the costs.

9. I shall examine the parties' submissions as far as is necessary in the course of my opinion. For the rest I would refer to the contents of the Report for the Hearing.

B — Opinion

10. The applicant seeks a declaration that the decision addressed to the Kingdom of Denmark by the defendant stating that the repayment of import duties paid by the applicant is not justified is void. Since the applicant is thus directly and individually concerned, it is entitled to bring proceedings under the second paragraph of Article 173 of the EEC Treaty.

11. First of all, I would point out once again that, according to Section II A of the Preliminary Provisions of the Common Customs Tariff, the import duties (customs duties) which the applicant asked to have refunded *should not have been paid* for the reason that customs duties had been suspended. Thus, the only question to be examined is whether the *conditions* for the repayment of those duties were fulfilled.

12. In examining the submissions put forward by the applicant, I think it is necessary to depart from the order in which the applicant presented them in its application and to examine first whether the contested decision is not void because the time-limit was exceeded.

13. 1. *The time-limit rules laid down in Article 7 of Commission Regulation No 1575/80*

14. Article 7 of Commission Regulation No 1575/80 [1] which, according to Articles 12 and 13 of Commission Regulation No 3799/86 [2] of 12 December 1986 was in force until 31 December 1986, provided as follows:

'If the Commission fails to take a decision within the period referred to in Article 5 (namely, four months of the date on which the application is received by the Commission) [3] or fails to notify a decision to the Member State in question within the period referred to in Article 6, the decision-making authority shall grant the application.'

15. Since the Danish authorities had, in accordance with Article 3 of Regulation No 1575/80, submitted the case to the defendant on 19 June 1986, according to Article 7 of that regulation a decision should have been taken by 18 October 1986

1 — Commission Regulation No 1575/80 of 20 June 1980 laying down provisions for the implementation of Article 13 of Council Regulation No 1430/79 on the repayment or remission of import or export duties (OJ 1980, L 161, p. 13).

2 — Commission Regulation 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).

3 — In the version contained in Commission Regulation No 945/83 of 21 April 1983 (OJ 1983, L 104, p. 14).

at the latest and the Member State notified of the decision by 18 November 1986.

16. Since the Commission's negative decision was adopted only on 26 February 1987, it was possibly already illegal on the ground that it constituted a breach of Article 7 of Commission Regulation No 1575/80.

17. On that point the defendant has explained that the time-limit rules contained in Regulation No 1575/80 proved to be unsatisfactory in individual cases. They were therefore replaced by new rules which basically extended the time-limit to six months and in addition suspended the period if further information was requested by the Commission.

18. For the purposes of applying Regulation No 1575/80 a practice had developed whereby the Member State was asked to withdraw its request and re-submit it, so that the prescribed period would begin to run again.

19. I concur with the applicant's submission that such a course of action is not permissible. The provisions of Articles 5 and 7 of Regulation No 1575/80 are meant to enable the persons concerned to obtain clarification of their legal position within a reasonably short period of time. No provision is made for extending or suspending the period allowed.

20. Since the period of *three* months laid down in the original version of Regulation No 1575/80 had, in the Commission's opinion, proved to give rise to difficulties, in Regulation No 945/83 that period was *extended to four months.* In the preamble to that regulation the Commission explained that in order to maintain a balance between the interests of the administration and those of the persons concerned, a limit should be set to such an extension by increasing the period to four months. That balancing of interests provided for in the regulation had to be respected as long as it was applicable. It was indeed open to the Commission, pursuant to Article 25 (2) of Regulation No 1430/79,[4] to amend the administrative procedure and the time-limit rules on its own initiative as it then did when it adopted Regulation No 3799/86. However, before the administrative provisions were amended the Commission was bound by the provisions in force. To have a Member State withdraw and then re-submit a case in order to render ineffective the time-limit rule adopted for the benefit of the person concerned therefore appears to be an unacceptable circumvention of the provisions of Regulation No 1575/80.

21. Since the contested decision of 26 February 1987 likewise cannot be construed as the revocation of an implied decision of authorization, because there is no reference to either the existence of an implied decision or any explanation on the question of revocation, the application must succeed on the abovementioned grounds alone. I shall therefore deal with the plaintiff's remaining submissions only as a subsidiary issue.

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

2. *Repayment of import duties pursuant to Article 13 of Regulation No 1430/79*

22. Even an express decision taken by the defendant ought to have been to the effect that the import duties paid by the applicant were to be refunded.

23. According to Article 13 of Regulation No 1430/79, import duties *may* be repaid *in situations resulting from special circumstances* in which no negligence or deception may be attributed to the person concerned.

24. In view of the fact that the suspension of customs duties on the fishing nets imported by the applicant did not initially appear in the Danish version of the Common Customs Tariff, but was only included in the version in force from 1978, it cannot be disputed that there was a situation resulting from special circumstances. After all, the erroneous language version of the Danish customs authorities for which the Community was responsible had been the cause of a mistaken interpretation of the Common Customs Tariff.

25. Since, pursuant to Article 155 of the EEC Treaty, it is the Commission's duty to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied, it ought to have expressly informed the Danish authorities by 1977 at the latest, when the Danish version was discovered to be incorrect and rectified accordingly, to ensure that the Common Customs Tariff was applied correctly in Denmark, if need be by bringing an action against that State for failing to fulfil its obligations. The fact that the Commission failed to do so must also be be regarded as a 'special circumstance' within the meaning of Article 13 of Regulation No 1430/79.

26. Moreover, it cannot be contended that the applicant acted *negligently.* Although the Common Customs Tariff and Regulation No 2695/77 [5] had been properly formulated, even in the Danish version, in the period within which the import duties repayable were levied, the applicant cannot be blamed for relying on the Danish legal provisions which did not contain the relevant suspension of duties. In my opinion, the applicant was entitled to expect that the national legal provisions correctly reproduced the Community customs law in force, especially since the relevant provisions had never been criticized by the defendant.

27. The defendant's submission that the application for repayment made by the applicant could not be granted because the applicant never expressly *applied for duty exemption* cannot be accepted either. The extensive correspondence conducted by the applicant with the Danish authorities and submitted to the Court must be regarded at least as an implied application for duty exemption. The fact that the applicant did not rely expressly on the Preliminary Provisions of the Customs Tariff or on the

5 — Commission Regulation No 2695/77 of 7 December 1977 determining the conditions under which goods for certain categories of aircraft and ships are eligible upon importation for a favourable tariff arrangement (OJ 1977, L 314, p. 14).

two Commission Regulations Nos 1535/77 and 2695/77, the duty exemption following only from their combined provisions, cannot be held against the applicant either. After all, in its contested decision of 26 February 1987 the Commission did not refer to all the legal provisions on which the application for exemption from duties was to be based: it mentioned only Commission Regulation No 2695/77, whereas the need for an application follows from Article 3 of Regulation No 1535/77.

28. Even upon an express application of Article 13 of Regulation No 1430/79 the import duties paid by the applicant must be refunded. In view of the special circumstances for which the Community is responsible, the Commission does not enjoy any discretion. That result is not gainsaid by the judgment of the Court of Justice of 12 March 1987 in Joined Cases 244 and 245/85.[6] It is true that in that judgment the Court stated that the applicants could 'only properly rely ... on arguments seeking to show the existence ... of special circumstances ... and not on arguments seeking to show that the decision ... was unlawful', and 'that errors or omissions on the part of the administrative authorities cannot give rise to the application of the general equitable provision provided for in the first paragraph of Article 13 of Regulation No 1430/79 unless such errors or omissions imposed upon a trader a financial obligation which he had no legal means of contesting'.[7]

29. However, those dicta can hardly be applied to the present case. After all, the parties to the national administrative procedure had no reason to submit the question of the legality of the levying of the import duties to the courts, because all parties concerned proceeded on the basis of a mistaken interpretation of the Common Customs Tariff arising from the initial incorrect text which had also affected administrative practice after 1978. Since, from the applicant's point of view, there was no obvious reason to challenge the customs decisions in question, its position was *de facto* comparable to that of a trader who has no legal remedy.

3. *The legal basis of the contested decision*

30. The applicant submits that the Commission's decision which, according to its wording, was adopted on the basis of Council Regulation No 3069/86[8] and Commission Regulation No 3799/86, is founded on an incorrect legal basis, because Council Regulation No 3069/86 was not applicable to applications submitted before 1 January 1987. The Commission replies that the decision shows clearly that the applicant's case was examined with reference to the old rules; the reference to Council Regulation No 3069/86 was merely an indication of the most recent amendment to Regulation No 1430/79.

6 — Judgment of 12 March 1987 in Joined Cases 244 and 245/85 *Cerealmangimi SpA and Others* v *Commission* [1987] ECR 1303.

7 — Paragraphs 13 and 17.

8 — 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).

31. If one bears in mind the fact that Commission Regulation No 3799/86 was adopted on the basis of Regulation No 1430/79 in the version contained in Regulation No 3069/86 but that the latter regulation, according to the second paragraph of Article 2 thereof, applies, as regards the provisions in question, only to applications for repayment submitted to the competent authorities on or after 1 January 1987, the applicant must be regarded as correct in its view that the basic Council regulation and a Commission regulation given as the legal basis were not yet applicable. The wording of the decision does not therefore tally with the defendant's argument that in reality the contested decision was adopted on the basis of the provisions previously applicable.

32. At all events, either the Commission's decision of 26 February 1987 is founded on an incorrect legal basis, or it is founded on the appropriate basis to which it does not, however, refer. In my opinion, that question can be left unresolved, since in both cases there is an infringement of Article 190 of the EEC Treaty. After all, that provision requires Community measures to state the reasons which led the institution to adopt them so as to make possible review by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community institutions have applied the Treaty.[9] This is especially important for traders who have not taken part in all the administrative procedure preparatory to the individual decision.

33. The abovementioned requirements were, however, not satisfied by the contested decision.

4. *The validity of Commission Regulation No 3799/86*

34. The applicant is of the opinion that Commission Regulation No 3799/86 is invalid inasmuch as it applies *retroactively* to all applications which had not been dealt with on 1 January 1987. The defendant denies that the said regulation has retroactive effect.

35. Since Commission Regulation No 3799/86 was adopted on the basis of Council Regulation No 1430/79 in the version contained in Regulation No 3069/86, which, as already mentioned, provides in the second paragraph of Article 2 that the *new provisions which are of importance in this case* are to apply to applications for repayment or remission of import or export duties submitted to the competent authorities on or after 1 January 1987, it must be assumed that Commission Regulation No 3799/86 is also applicable only to the applications referred to in the second paragraph of Article 2 of Council Regulation No 3069/86. Consequently, that regulation cannot be considered to have retroactive effect and to that extent the applicant's submission cannot be sustained.

9 — See the judgment of 7 July 1981 in Case 158/80 *REWE-Handelsgesellschaft Nord mbH and Others* v *Hauptzollamt Kiel* [1981] ECR 1805, and the judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1805.

C — Opinion

36. In the result I propose that the Court decide as follows:

(1) The Commission's decision of 26 February 1987 (REM: 29/86) is declared void;

(2) The Commission is to bear the costs of the proceedings.