OPINION OF ADVOCATE GENERAL COSMAS

delivered on 28 May 1998 *

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* Original language: Greek.

I — Introduction

In this case the Court is asked to give a preliminary ruling on two questions referred to it by the German Bundesfinanzhof (Federal Finance Court). Those questions relate to the interpretation of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code. [1]

II — Facts and procedure

1. In January 1994 approximately 3 200 000 cigarettes, most of which belonged to third parties, were stolen from a warehouse in the former East Germany managed by the applicant for review in the main proceedings (hereinafter 'the plaintiff'). Subsequently, the Hauptzollamt (Principal Customs Office), the respondent in the main proceedings, claimed from the plaintiff, as the person liable, the customs and other import duties arising from the importation of the cigarettes into Germany. [2] The action brought against the assessment to duty was dismissed with binding effect. In addition, the Hauptzollamt rejected the plaintiff's application for concessionary remission of the import duties on grounds of equity. The plaintiff then brought an action for annulment before the Finanzgericht (Finance Court) challenging the refusal to refer the application for remission to the Commission in accordance with Community customs law; that action was unsuccessful. The Finanzgericht held in particular that Community law entirely ousted the provisions of national law allowing tax concessions on equitable grounds. It found that the conditions for referring the case to the Commission were not met because there was no 'special situation' within the meaning of Article 905(1) of Commission Regulation (EEC) No 2454/93 [3] (hereinafter 'the implementing regulation').

2. The plaintiff submitted before the referring court that at first instance the Finanzgericht had misinterpreted the above provision of Community law inasmuch as discretion was to be exercised before making a decision on an application for remission under Article 905 of the implementing regulation and the imprecise legal term 'special situation' used by the Community legislature had to be interpreted in the light of the national provisions governing the application of the principle of equity. The plaintiff adds that Article 900(1)(a) of the implementing regulation contains merely an indicative list of the special cases where import duties must be remitted. He considers that, because of its special features, his case must be added to those exceptions. He relies in that regard on a series of special

1 — OJ 1993 L 253, p. 1.

2 — The customs duties were DEM 58 206.87 and the duties amounted in total to DEM 485 703.99.

3 — Cited in footnote 1 above.

circumstances which, in his view, justify the remission of the assessed duties.

3. The referring court considered that the interpretation of the provisions of Community law on customs duties relevant for deciding this case was not obvious and it therefore referred two questions to the Court for a preliminary ruling. The first is concerned with defining the field of application of Articles 900(1)(a) and 905(1) of the implementing regulation, in particular in cases where the applicant pleads the theft of imported non-Community goods; the second relates to the interpretation of the term 'special situation' used by the Community legislature in Article 905(1) of the implementing regulation.

III — Questions referred for a preliminary ruling

'1. Is Article 905(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the regulation establishing the Community Customs Code (OJ 1993 L 253, p. 1) to be interpreted as meaning that the decision-making customs authority is not to accept that there is a "special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned" if on the theft of goods from a customs warehouse (non-Community goods) the conditions in Article 900(1)(a) of Regulation No 2454/93 for remission of customs duty to the owner of the warehouse are not met?

2. If Question 1 is answered in the affirmative:

Does the same apply in a case of hardship where theft was not an insurable risk and the levying of customs duty would destroy the warehouse owner's business, or may it be found on such facts that there is a 'special situation' under Article 905(1) of Regulation No 2454/93 which should be referred to the Commission for decision?'

IV — Legal Framework

4. The basic provision dealing with the question of the repayment or remission of import

duties is Article 239 of the Community Customs Code, [4] which provides:

'1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:

— to be determined in accordance with the procedure of the committee;

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

2. 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 the amount of the duties was communicated to the debtor.

However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases.'

5. The provisions required for the implementation of that provision were adopted, pursuant to Article 249 of the Community Customs Code, in the abovementioned Commission Regulation (EEC) No 2454/93. [5] The relevant provisions are contained in Chapter 3 ('Specific provisions relating to the application of Article 239 of the Code') of Title IV ('Repayment or remission of import or export duties') of Part IV ('Customs debt') of the implementing regulation. It should be noted that the Community legislature distinguishes between decisions to be taken by the customs authorities of the Member States (Section 1 of the abovementioned Chapter 3, that is to say Articles 899 to 904) and those to be taken by the Commission (Section 2 of that chapter, that is to say Articles 905 to 909). More precisely, the relevant provisions for

4 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

5 — See footnote 1 above.

answering the questions referred for a preliminary ruling in this case are as follows:

'Chapter 3

Specific provisions relating to the application of Article 239 of the Code

Section 1

Decisions to be taken by the customs authorities of the Member States

Article 899

Without prejudice to other situations to be considered case by case in accordance with the procedure laid down in Articles 905 to 909, where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239 (2) of the Code:

— is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import duties concerned.

"The person concerned" shall mean the person or persons referred to in Article 878(1), or their representatives, and any other person who was involved with the completion of the customs formalities relating to the goods concerned or gave the instructions necessary for the completion of these formalities,

— is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import duties concerned.

Article 900

1. Import duties shall be repaid or remitted where:

(a) non-Community goods placed under a customs procedure involving total or partial relief from import duties or goods released for free circulation with favour

able tariff treatment by reason of their end-use are stolen, provided that the goods are recovered promptly and placed again in their original customs situation in the state they were in when they were stolen;

...

Article 904

Import duties shall not be repaid or remitted where the only grounds relied on in the application for repayment or remission are, as the case may be:

(a) re-export from the customs territory of the Community of goods previously entered for a customs procedure involving the obligation to pay import duties, for reasons other than those referred to in Article 237 or 238 of the Code or in Article 900 or 901, notably failure to sell;

(b) destruction, for any reason whatsoever, save in the cases expressly provided for by Community legislation, of goods entered for a customs procedure involving the obligation to pay import duties after their release by the customs authorities;

(c) presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be forged, falsified or not valid for that purpose, even where such documents were presented in good faith.

Section 2

Decisions to be taken by the Commission

Article 905

1. Where the decision-making customs authority to which an application for repayment or remission under Article 239(2) of the Code has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might

constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909.

The term "the person concerned" shall be interpreted in the same way as in Article 899.

In all other cases, the decision-making customs authority shall refuse the application.

...'

V — Views put forward in the preliminary reference proceedings

6. It is useful first of all to set out the views expounded by the litigants in the main proceedings and other parties who have submitted written observations in this case. Three approaches to interpreting the legislation are suggested to the Court.

7. (i) The plaintiff asserts that Article 900 of the implementing regulation does not exhaustively cover the question of remission of import duties on the ground that goods have been stolen; that is to say, there are cases of remission on grounds of theft which fall within Article 905(1) of that regulation. Furthermore, interpreting Article 905(1) in the light of national law, the 'special situation' forming the basis for the application of Article 905(1) may consist in the fact that the debtor would be financially ruined if he were forced to pay the duties; in that case the duties must be remitted on grounds of equity.

8. (ii) The French Government maintains that the mere theft of goods does not in itself constitute a 'special situation' within the meaning of Article 905(1) of the implementing regulation capable of leading to the remission of import duties, first, because the conditions laid down by Article 900(1)(a) of that regulation are not met and, secondly, because the applicant for remission does not establish that the stolen goods did not enter the commercial channels of the Community. Nor does the risk of financial ruin, even if due to the fact that the applicant for remission was unable to insure his goods against theft, constitute a 'special situation' within the meaning of the implementing regulation. In the alternative, should the risk of financial ruin be considered to constitute a 'special situation', the French Government suggests that the Court should rule that a failure to insure against theft amounts to obvious negligence on the part of the trader liable to pay the duties, there then being no question of remitting them. The

Italian Government reaches similar conclusions. It takes the view that the theft of the goods does not in this case constitute a 'special situation' justifying remission of duty. According to the Italian Government, a negative reply must also be given to the plaintiff's request that the risk of his financial ruin if the duties are levied be regarded as a special situation justifying remission, having regard to the uninsurability of the stolen goods.

9. (iii) By contrast, the Commission suggests to the Court that it should rule, on the one hand, that in the event of theft of non-Community goods the fact that the conditions for applying Article 900(1)(a) of the implementing regulation are not fulfilled does not automatically preclude Article 905 from coming into play, provided of course that the conditions for applying that latter provision are met, and, on the other hand, that where goods are stolen, neither the lack of insurance against their theft nor the risk that levying the duties will cause the financial ruin of the person concerned automatically prove that 'no deception or obvious negligence may be attributed to the person concerned' within the meaning of Article 905.

The Commission states that, in any event, the application of Article 905(1) of the implementing regulation involves an assessment as to whether certain evidence 'might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned' and not as to whether it in fact constitutes a special situation justifying the remission of duties as the national court mistakenly considers. The Commission maintains that this case must be assessed in accordance with the above approach to the interpretation of Article 905 and not by seeking to ascertain whether the remission to the applicant of the duties set out in the assessment is justified on grounds of equity.

VI — My answer to the questions referred for a preliminary ruling

(A) *Defining the field of application of Articles 900 and 905 of Regulation (EEC) No 2454/93*

10. The Community legislature has established a specific and clear procedure for applying Article 239 of the Community Customs Code relating to the repayment or remission of import or export duties. In accordance with Article 899 of the implementing regulation, applications for repayment or remission are submitted to the appropriate customs authority of the Member States. The national body is called on, first, to exercise its own powers and take a positive or negative decision where the conditions laid down by Articles 899 to 904 are fulfilled, failing which it is to examine the application in the light of

Article 905 and assess whether or not it is necessary to transmit the case to the Commission so that the latter, which has the power of decision under Articles 906 to 909, may make a decision. A fundamental distinction is thus drawn by the legislation between the powers of the national customs authorities and those of the Commission. [6]

11. After the application for the repayment or remission of import or export duty has been submitted, the national customs authorities are called on to examine the case first in the light of Articles 899 to 904 of the implementing regulation and then, where the case does not fall within the scope of those provisions, in the light of Article 905. I consider that to be the only appropriate order for examining the conditions enumerated in the relevant provisions of the implementing regulation. First of all, legal logic requires an administrative body to examine first whether it may deal with an issue by exercising its own exclusive power of decision before dealing with it under its concurrent, ancillary and — in any event — non-decision-making powers.

12. Furthermore, the above approach to the examination of applications for the remission of import duties is clearly more in line with the general scheme of the provisions of the implementing regulation and with the will of the Community legislature. In particular, it is not without significance that the provisions of Articles 899 to 904 come before those of Article 905. Also, in Article 899, which is placed at the beginning of the chapter headed 'Specific provisions relating to the application of Article 239 of the [Community Customs] Code' and contains the general guidelines addressed to the national customs authorities for the handling of cases for the remission of duty, those authorities are called on to grant or to reject the applications in question where the conditions set out in Articles 900 to 904 are met, without prejudice merely to '... other situations to be considered case by case in accordance with the procedure laid down in Articles 905 to 909 ...'. Finally, it is expressly stated in Article 905(1) that the question of the application of that provision is raised 'where the decision-making customs authority ... cannot take a decision on the basis of Article 899'.

13. Thus, the customs authorities must examine first of all whether an application falls within the cases set out in Articles 900 to 903 of the implementing regulation; if it does and, in addition, the conditions laid down by Article 899 are satisfied, they are to remit the assessed duties. Next, if the application falls outside the cases set out in Articles 900 to 903, it is necessary to investigate whether it falls within Article 904 of the implementing regulation and, if it does, it must be rejected, in accordance with the final indent of Article 899. Once that first stage of the examination has been completed, the national authority then considers the application in the light of Article 905.

6 — See point 19 et seq. of this Opinion.

14. So far as concerns the instant case, the fact that the applicant for remission invoked the theft of the goods in respect of which the import duty was assessed should have led the Hauptzollamt to deal with the application initially from the point of view of Article 900(1)(a) of the implementing regulation in conjunction with Article 899. Article 900 deals with the repayment or remission of import duties in respect of non-Community goods which have been stolen. However, an important condition in order for the relevant facts to fall within Article 900(1)(a) is not met. As is apparent from the facts set out by the national court in its order for reference, the stolen goods could not be 'recovered promptly and placed again in their original customs situation in the state they were in when they were stolen'. The Hauptzollamt was therefore right not to take a decision under Articles 899 and 900(1)(a) remitting the import duties in question. However, nor could that customs authority, in the exercise of the power of decision conferred on it by Article 899, take a decision itself not to remit those duties, since the grounds upon which the application for remission was made are not listed in Article 904.

15. Thus, once the national customs authority 'cannot take a decision' [7] remitting or refusing to remit duties, application of the procedure set out in Article 905 et seq. of the implementing regulation comes into consideration; under that procedure the power of decision rests with the Commission and only a subsidiary role is assigned to the national customs authorities.

16. It is worth pointing out at this juncture that the procedures under Articles 899 to 904 of the implementing regulation, on the one hand, and Articles 905 to 909, on the other, are absolutely distinct from each other. As the plaintiff and the Commission correctly note, the fact that the situation of the applicant for remission does not fall within any of the cases enumerated in Articles 900 to 903 can in no way also result in the automatic rejection of his application under Article 905. The latter provision introduces into Community law a general equitable provision precisely for individual circumstances which cannot independently be brought within any of those cases which the Community legislature has provided for in detail in Articles 900 to 903 (to the advantage of the person liable to pay the duty) and Article 904 (to his detriment). In the instant case, therefore, the fact that the theft of the goods invoked by the applicant for remission does not satisfy the conditions laid down in Article 900(1)(a) of the implementing regulation for the assessed duty to be remitted by the national customs authority independently does not automatically mean that those same circumstances, upon which the application by the person owing the assessed duty is based, cannot lead to the remission of that duty pursuant to the procedure laid down in Article 905 et seq. of the implementing regulation.

7 — That is the wording used by the Community legislature in Article 905(1) of the implementing regulation.

17. That solution also prevailed in *Schoellershammer* [8] where the Court was concerned with the repayment or remission of import or export duty under Regulation No 1430/79. [9] The Court was asked to rule on the application of Articles 3, 4 and 13 of that regulation and held: 'In the light of the preamble to the regulation, Article 13 appears to the Court to be a general equitable provision designed to cover situations other than those which had most often arisen in practice and for which special provision could be made when the regulation was adopted. It is clear from the conditions which must be satisfied by persons wishing to benefit from Articles 3 and 4 that those provisions were not drawn up to cover the particular situation in which the applicant finds itself. In those circumstances, the Court sees no reason in this case to exclude the possibility of applying Article 13.' [10]

Bundesfinanzhof to the Court for a preliminary ruling. However, inability on the part of the national customs authority to 'take a decision' under Articles 899 to 904 of the implementing regulation is not the only precondition for the referral of the application to the Commission under Article 905(1). The national authority is asked to assess whether '... the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned ...' before it transmits the case to the Commission. The entirely justified doubts of the national court, which resulted in its referring the questions in this case to the Court for a preliminary ruling, relate precisely to the interpretation of that precondition. I elaborate upon that issue in the continuation of my analysis.

(B) *Division of powers between the national customs authorities and the Commission under Article 905 et seq. of the implementing regulation*

18. The foregoing analysis yields a general answer to the first question referred by the

(a) Discretion of the national customs authorities under Article 905(1) of the implementing regulation

19. I consider that particular emphasis must be laid on this aspect of the interpretation of Article 905 so that the answer given to the

8 — Case 283/82 *Schoellershammer* v *Commission* [1983] ECR 4219.

9 — By that regulation the Community legislature had introduced, before the Community Customs Code was drawn up, a system for the repayment or remission of duties corresponding to that found in Regulations Nos 2913/92 and 2454/93 which are at issue in this case. In particular, Articles 3 and 4 of Regulation No 1430/79 list special cases in which duty may be repaid or remitted; those provisions occupy the same position under the scheme of Regulation No 1430/79 as that occupied by Articles 899 to 904 in Regulation No 2454/93. At the same time the Community legislature lays down the general equitable provision in Article 13 of Regulation No 1430/79, which thus corresponds to Article 905 et seq. of Regulation No 2454/93.

10 — *Schoellershammer*, paragraph 7.

national court in reply to the questions referred by it for a preliminary ruling is as useful as possible for settling the dispute before it. As the Commission correctly points out, the role which the Community legislature confers on the national customs authorities in connection with the application of the general equitable provision enacted in Article 905 does not consist in making an exhaustive selection of the cases where remission of the assessed duties is justified on grounds of equity but in making an initial selection of those applications which prima facie could be brought within the general equitable provision. Those applications are then referred to the Commission, which alone is competent to decide the issue. That, moreover, is the reason why Article 905(1) expressly provides that the national customs authority is to transmit the case to the Commission where '... the application is supported by evidence which *might* [11] constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned ...'.

20. Thus, the national authority is not asked to consider the application submitted to it with a view to reaching a definitive decision as to whether or not the applicant's case constitutes a 'special situation' justifying the remission of the duties on grounds of equity; its competence does not extend beyond assessing whether the evidence relied on by the applicant relates to 'circumstances in which no deception or obvious negligence may be attributed to the person concerned' and which might be regarded as a 'special situation'. The question as to whether that situation justifies the remission of duties will be decided by the Commission in accordance with Articles 905 to 909 of the implementing regulation.

21. As the Commission observes, correctly in my view, when the national court begins its consideration of Article 905(1) of the implementing regulation it appears, in its interpretation, to proceed from an incorrect starting point in that it takes the view that the national customs authorities are required, when assessing the case, to conclude with certainty whether or not the circumstances invoked by the applicant for remission constitute a 'special situation' within the meaning of that article. At first instance the Finanzgericht appears likewise to have relied on the same incorrect basis in its interpretation.

22. It must therefore be emphasised, in the context of answering the questions referred

11 — Emphasis added. The clear will of the Community legislature that, in order for the case to be transmitted to the Commission, the national customs authorities need not be convinced that there is a 'special situation', but merely have to establish that such a 'special situation' may exist, is likewise clear from the other language versions of that provision: '... la demande est assortie de justifications *susceptibles* de constituer une situation particulière ...'; '... die Begründung des Antrags [*läßt*] auf einem besonderen Fall *schließen* ...'; '... η αίτηση συνοδεύεται από αποδεικτικά στοιχεία που *μπορούν* να αποτελέσουν ειδική κατάσταση ...'.

for a preliminary ruling, that the assessment under Article 905(1) by the national customs authority (the Hauptzollamt) of the facts and law which the plaintiff has relied on before it — namely the very fact of the theft itself, the place where it occurred, the fact that the goods were uninsured and the risk of financial ruin in the event of payment of the duties — must not have the objective of reaching a definitive decision as to whether those factors constitute a special situation justifying the remission of duties; it must be examined, on the other hand, whether those factors relate to circumstances in which no deception or obvious negligence may be attributed to the person concerned and which might be regarded as a 'special situation' to be considered subsequently by the Commission with regard to whether the remission of duties is justified. [12]

(b) Interpretation of Article 905 et seq. on the basis of their history and of the scheme of the legislation

The above conclusion is also borne out by the interpretation of the relevant Community provisions on the basis of their history and of the scheme of the legislation.

12 — Moreover, if the Commission considers that the information forwarded to it is insufficient, it may ask the national customs authorities for additional information, as expressly provided in the final subparagraph of Article 905(2) of the implementing regulation.

(i) Historical approach

23. It is useful first of all to examine how the Community legislation evolved until Article 905(1) of the implementing regulation, which is in force today, was adopted. As already mentioned, [13] there was also formerly a general equitable provision in Article 13 of Council Regulation (EEC) No 1430/79, [14] which laid down that 'import duties may be repaid or remitted in situations resulting from special circumstances in which no negligence or deception may be attributed to the person concerned'. It is to be noted that the preamble to that regulation stated: '... only those special situations most frequently encountered in practice may at the present stage be covered by regulations relating to repayment or remission of import duties; ... it is advisable to make provision for the use of a *Community procedure* [15] in order to define, where appropriate, other situations which also warrant repayment or remission of import duties'. Article 13 was subsequently amended by Council Regulation No 3069/86. [16] The preamble to the amending regulation stated: '... experience has shown that there is no reason why responsibility for deciding on such applications for repayment or remission cannot *be assumed by the Member States themselves*, [17] provided it is established that, where the procedural requirements have not been observed, the substantive conditions laid down for repayment or remission have been met and

13 — See point 17 above.

14 — 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).

15 — Emphasis added.

16 — 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).

17 — Emphasis added.

that the circumstances are such that no deception or serious negligence may be attributed to the person concerned; ... Article 13 should be amended accordingly'. The new Article 13(1) provided: 'Import duties may be repaid or remitted in special situations ... which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.' [18]

24. After the adoption of the Community Customs Code, the Community legislature returned to the question of the general equitable provision. It repealed the abovementioned provisions and adopted the relevant provisions of Article 905 et seq. of the implementing regulation. In the pertinent chapter of the implementing regulation, powers were divided clearly between the national authorities and the Commission with a view to strengthening the role of the latter, in particular in cases where the general equitable provision has to be applied to the facts in order for the application for remission to be dealt with and a wide discretion is conferred on the decision-making administrative body.

25. I consider that it follows from the successive amendments of the customs legislation that the will of the authors of the implementing regulation was to give precedence to the Commission over the national customs authorities. To be precise, the implementing regulation establishes a distinction between two categories of cases:

— first, cases which are exhaustively covered by legislation, that is to say are not to be dealt with under the general principle of equity. In those instances the indefinite concept of equity has been transformed into concrete special provisions [19] and the discretion of the decision-making body is particularly restricted. Those applications are assigned to the national customs authorities;

— secondly, cases which the legislature was unable to foresee in advance and thus cover exhaustively. Those cases must be considered in the light of the general principle of equity and the competent administrative body then enjoys a very wide discretion. Such cases are thus assigned to the Commission, in the interests of the optimal application of Community law.

18 — It should be noted that the body applying Article 13 of Regulation No 1430/79, both before and after its amendment, is called on to assess whether a special situation justifies the remission of duty and not whether a circumstance *might* constitute a special situation. In other words, Article 13 of Regulation No 1430/79 corresponds to Article 907 of the regulation implementing the Community Customs Code and not to Article 905 with which we are concerned in the instant case. Article 905(1) of the implementing regulation establishes a preliminary stage in the assessment of applications for remission which precedes the stage to which Article 13 of Regulation No 1430/79 and Article 907 of the implementing regulation relate.

19 — Namely Articles 900 to 904 of the implementing regulation.

(ii) Approach based on the scheme of the legislation

26. The argument derived from interpreting the implementing regulation on the basis of the scheme of the legislation is also particularly significant. In the Community customs system it is for the Commission to take the definitive decision regarding application of the general equitable provision in cases not expressly provided by Articles 900 to 904 of the implementing regulation. The case must therefore finally come to that body for its consideration, unless the applicant for remission relies on circumstances in which deception or obvious negligence may be attributed to him or his application is entirely without foundation; however, where the application is supported by evidence which *might* constitute a 'special situation' within the meaning of Article 905(1) of the implementing regulation the case must be transmitted to the Commission. The use by the provision's author of the expression 'might constitute a special situation' means that the national customs authorities must refuse applications which are manifestly inadmissible or unsubstantiated and therefore could not be granted by the Commission, even if it exercised the discretion which it enjoys to its limits and applied the general equitable provision in the most favourable manner possible for the applicant. If, however, there is even a slim possibility that the application by the person liable to pay the duties will be granted, the national customs authorities are required to transmit the case to the Commission.

27. Otherwise, that is to say if the national customs authorities interpret and apply Article 905(1) in such a way that they consider the substance of cases in depth and decide themselves whether the general equitable provision should be applied in favour of applicants for remission, there is the risk of systematic refusal of the applications in question, no longer by the body on which the power of decision has been conferred (namely the Commission) but by those bodies which, according to the true meaning of the Community provision, are merely to undertake an initial sorting out of the applications without considering fully the substance of the cases.

28. Upsetting the balance intended by the Community legislature in the division of powers between the national customs authorities and the Commission results in prejudice to the Community customs system at a more general level. The instant case is an ideal example of those consequences. The national customs authority (that is to say the Hauptzollamt) refuses an application for the remission of import duty because it decides that the circumstances put forward by the applicant do not constitute a 'special situation' justifying the application of the general equitable provision under the procedure laid down in Articles 905 to 909 of the implementing regulation; the national court of first instance reaches the same conclusion. The court seised with the application for review, that is to say the Bundesfinanzhof, proceeds from the same starting point in its interpretation of Article 905(1) of the regulation and asks the Court what constitutes a 'special situation', within the meaning of that article, justifying the remission of duties on the grounds of equity. If the Court answers that question, it decides the case as to its substance and denies it to its natural adjudicator, that is to say the Commission.

29. However, the issue which should have been decided by the Hauptzollamt, then reviewed by the national courts and possibly have formed the subject-matter of a question referred to the Court for a preliminary ruling relates to what *might* constitute 'a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned'. If the national customs authority investigates whether it is possible, and not whether it is certain, that a special situation exists, the objective of its legal assessment is shifted significantly and its power to refuse an application for the remission of duty in accordance with the final subparagraph of Article 905(1) of the implementing regulation is correspondingly restricted. As regards the substance of the case, on the other hand, that is to say as regards whether the grounds for applying the general equitable provision exist in a particular case, it is the Commission which has competence to decide at the administrative level; its decision may challenged by bringing an action before the Court of First Instance and, where appropriate, by appealing to the Court of Justice.

(C) *The question as to what might constitute 'a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned' within the meaning of Article 905(1) of the implementing regulation*

30. I consider that the above analysis reveals with clarity the interpretative framework within which Article 905(1) of the implementing regulation is to be applied in each individual case. I will merely repeat that the issue is not whether the circumstances relied on by the applicant for remission constitute a special situation justifying application of the general equitable provision but whether those circumstances might be considered in the particular case to amount to a special situation not brought about by deception or obvious negligence attributable to the person concerned.

(a) Generally

31. It is necessary, in my view, to make three further observations at this point.

32. First, a purely Community rule is laid down in Article 905(1) of the implementing regulation and, contrary to the plaintiff's view, no purpose is served when interpreting it to refer to the provisions of German law laying down the general principle of equity in tax cases. The Community provisions concerning the remission of duty on grounds of equity,

which are contained in Article 905 et seq. of the implementing regulation, are to be interpreted independently and autonomously from the corresponding national rules.

33. Secondly, the theoretical distinction between 'personal' and 'factual' grounds justifying application of the equitable provision, that is to say the division of the circumstances which the person liable to pay the duties may rely on in order to secure their remission into 'subjective' and 'objective' circumstances, is without practical significance when interpreting and applying Article 905 et seq. of the implementing regulation. The Community legislature uses particularly indefinite concepts in the wording of the relevant Community provisions, thereby allowing the applicant for remission to rely on any kind of circumstance which could possibly form the basis of his application.

34. Thirdly, the question of the correct interpretation and application of Article 905(1) of the implementing regulation has not yet been dealt with sufficiently in administrative practice and in case-law. It should also be noted, with regard to the examination of the matters relied on each time by the applicant for remission which is carried out in order to establish whether those matters might constitute a special situation resulting from circumstances in which no deception or obvious negligence is present, that, while experience gained to date from the application of analogous provisions of customs law [20] and the relevant case-law of the Court may provide useful reference points, they nevertheless are not of decisive importance for settling the specific question of the scope of Article 905(1) of the implementing regulation. Until now the Court has ruled in cases where the issue was whether or not a particular circumstance justified the remission of duty and not whether a situation in which there was no deception or obvious negligence on the part of the person concerned *might* constitute a special situation. [21] The value of the case-law in interpreting and applying Article 905(1) correctly is therefore relative.

35. Accordingly, there are two fundamental principles which apply when applications for the remission of duty are assessed in accor-

20 — Such as Article 13 of Regulation No 1430/79, both before and after its amendment by Regulation No 3069/86.

21 — See Joined Cases 98/83 and 230/83 *Van Gend & Loos* v *Commission* [1984] ECR 3763; Joined Cases C-121/91 and C-122/91 *CT Control and JCT Benelux* v *Commission* [1993] ECR I-3873; Joined Cases 186/82 and 187/82 *Ministero delle Finanze* v *Esercizio Magazzini Generali and Mellina Agosta* [1983] ECR 2951, paragraph 14; Case C-250/91 *Hewlett Packard France* v *Directeur Général des Douanes* [1993] ECR I-1819; and Case C-446/93 *SEIM* v *Subdirector-Geral das Alfândegas* [1996] ECR I-73. It should be noted that the Court usually adopts a strict approach with regard to the grounds which applicants for the remission of duty put forward to justify the application of the equitable provision; in one instance, however, it accepted the possibility that there may be a situation justifying the remission of duties. In *Hewlett Packard France*, cited above, the Court held that the fact that a trader had relied on incorrect information supplied to a company belonging to the same group as the person liable by a competent customs authority in a Member State other than that of the customs authority competent to effect post-clearance recovery could constitute a special situation of the kind referred to in Article 13 of Regulation No 1430/79 (paragraph 47).

dance with the procedure laid down by Article 905 et seq. of the implementing regulation:

— first, the applicant may rely on any kind of circumstance whose effect is that he might be in a 'special situation', provided of course that there was no deception or obvious negligence on his part; in other words, it cannot be argued that a category of circumstances, for example circumstances more linked to the applicant's person, is by definition incapable of constituting a 'special situation' even though no deception or obvious negligence may be attributed to him;

— secondly, each application must be considered individually. The first paragraph of Article 907 of the implementing regulation clearly establishes the particular and specific nature of the examination: 'After consulting a group of experts composed of representatives of all Member States, meeting within the framework of the Committee to consider the *case in question*, the Commission shall decide whether or not the *special situation which has been considered* justifies repayment or remission.' The preliminary examination carried out by the national authorities under Article 905(1) of the implementing regulation must, in my view, be of an analogous nature. [22]

(b) In this case

In accordance with the above line of argument, I consider that the following comments must be made on the instant case.

36. In my view, the order for reference made by the national court fails to set out exhaustively the legal and factual aspects of the dispute before it and thus provide a full picture of the circumstances relied on by the plaintiff in order to secure the remission of the import duties to which he was assessed; it therefore cannot be concluded with certainty whether or not the plaintiff's case might amount to a 'special situation' within the meaning of Article 905(1) of the implementing regulation. Nor does the Court have jurisdiction to rule on the substance of the case, which remains exclusively for the national court to assess; the Court merely interprets the Community provisions which are relevant for disposing of the main proceedings. In that light, I believe that the task of the Court in this case is largely completed, even though the legal analysis of

22 — For the need to deal individually with each application submitted, see also point 75 of my Opinion in *SEIM*, cited above in footnote 21.

the pertinent Community provisions has not led to an express answer to the matters with which the national court is at first sight concerned. In any event, in order for the examination to be exhaustive and the national court to be provided with the most useful possible reply to the questions referred by it, I consider it necessary to make the following supplementary observations.

37. According to the order for reference, the plaintiff contended that he was in a special situation justifying the application of Article 905(1) of the implementing regulation because: (i) the goods to which the duties related had been stolen; (ii) the goods were uninsurable; (iii) the goods had been stored within a geographical area pregnant with particular danger; and (iv) payment of the duties imposed would lead to his financial ruin.

38. First of all, the theft of the goods is a circumstance which prima facie might constitute a 'special situation' within the meaning of Article 905(1), inasmuch as the trader affected is in a situation which is different and distinct from that of traders carrying on the same activity who have not been the victims of theft. It is, of course, a precondition that not only deception but also obvious negligence cannot be attributed to the trader concerned. It would in any event be difficult, in accordance with the case-law of the Court to date, [23] to accept that theft is a sufficient ground for the remission of the duty which the applicant is liable to pay. However, as I have explained in detail above, the issue in the instant case is not the assessment of what amounts to a ground for remission but what might be considered under Article 905 of the implementing regulation to be a special situation not due to deception or obvious negligence on the part of the persons concerned.

39. In that regard, the plaintiff's view is, I believe, reinforced by the argument that the goods by their nature — cigarettes are bulk goods which cannot be identified — could not be located with certainty after the theft, for the purposes of Article 900(1) of the implementing regulation. [24] Thus, since the goods are products which cannot be identified and it is objectively not possible to apply the favourable provision contained in Article 900(1)(a) of the implementing regulation, the plaintiff maintains that the relevant provisions of Article 905(1) of that regulation must be interpreted less strictly and must result in his application being accepted and referred to the Commission. On the face of it, that view is not illogical.

23 — See the strict interpretation adopted by the Court in *Ministero delle Finanze* v *Esercizio Magazzini Generali*, cited above in footnote 21.

24 — The plaintiff surmises, furthermore, that the cigarettes stolen from him are among the large quantities of contraband cigarettes found and seized in Germany.

40. On the other hand, his assertion that the lost cigarettes were untradable after their theft because they could not be put on the market and that there is therefore no question of loss of duty clearly does not stand up. As both the French and Italian Governments and the Commission correctly point out, theft does not automatically transform stolen goods into products which cannot be traded, thereby justifying cancellation of the customs debt. The Court has expressly held that 'in the case of theft, it may be assumed that the goods pass into the Community commercial circuit'. [25]

41. In any event I consider, in the context of the questions referred for a preliminary ruling in this case which are designed to ascertain the correct interpretation of Article 905(1) of the implementing regulation, that the plaintiff is wrong in his assertion that the theft he suffered automatically justifies the remission of the duties imposed on him; however, the French and Italian Governments are also mistaken in their view that the theft of goods, even if not due to deception or obvious negligence on the part of the person concerned, can never be considered to be a 'special situation' within the meaning of Article 905(1) because, in accordance with case-law and practice to date, circumstances of that kind do not justify the remission of duties on grounds of equity. The question whether or not the theft suffered by the plaintiff ultimately justifies the remission of the duties imposed on him will be decided by the Commission under the procedure set out in Article 907 of the implementing regulation. However, the assessment by the national customs authority as to whether the same circumstances might constitute a special situation not attributable to deception or obvious negligence on the part of the plaintiff does not turn on whether those circumstances justify the remission of duty by the Commission. Such legal reasoning is mistaken in its method. Accordingly, the plaintiff's submission regarding the theft of his goods remains to be considered by the national customs authorities, but they must examine that situation in the light of the correct interpretation of Article 905(1), as derived from the preceding analysis.

42. The plaintiff also invokes the fact that the stolen goods were not insurable against the risk of theft. I am not in a position, on the basis of the information contained in the order for reference, to express a clear view as to whether that argument satisfies the conditions laid down by Article 905(1) of the implementing regulation so as to justify the transmission of the case to the Commission for further consideration; nor do I intend to substitute my analysis for that of the national authorities which by law have the competence for deciding those issues. It is, however, important that those authorities examine whether the lack of insurance in respect of the goods may be attributed to deception or obvious negligence on the part of the person concerned, in which case the application is to be refused automatically. On the other hand, the rejection of the above submission as a possible justification for transmitting the case to the Commission cannot, in my view, be based simply on the fact that, as the French and Italian Governments and the Commission rightly point out, it is unlikely that that argument will provide grounds justifying the

25 — See *Ministero delle Finanze* v *Esercizio Magazzini Generali*, cited above in footnote 21, paragraph 14.

remission of the import duties when the Commission examines, under the procedure set out in Article 907 of the implementing regulation, whether the application is well founded. [26]

43. Weaker, in my view, is the plaintiff's contention that a 'special situation' exists because of the particular risks attached to the storage of goods in warehouses situated in the former East Germany. That argument, which concerns the relationship between an activity and a specific geographical area, could affect an indefinite number of traders carrying on the same activity, a fact which appears by definition to prevent the creation of a 'special' situation linked only to the applicant. [27]

44. Finally, I consider that, as the French and Italian Governments and the Commission correctly point out, a special circumstance capable of justifying the remission of the duties cannot be considered to result from invoking the possibility of financial ruin if the duties imposed are paid; the person liable to pay duty can merely be granted payment facilities, as laid down in Article 229 et seq. of the Community Customs Code. [28] However, it does not automatically follow that the applicant's financial difficulties cannot constitute a 'special situation' not due to deception or obvious negligence within the meaning of Article 905(1) of the implementing regulation; accordingly, the question of the national customs authorities' transmitting the case to the Commission pursuant to that provision remains open.

45. In conclusion, only general guidance can be given to the national court with regard to the question whether the facts of the case before it fall within Article 905(1) of the implementing regulation. It must in any event be emphasised that, when the national customs authorities consider applications for the remission of duty within the framework of Article 905(1) of the implementing regulation, the possibility that a 'special situation' exists may be deduced from the overall assessment of the evidence and circumstances relied on by the applicant, and the case must be transmitted to the Commission in the case of doubt.

26 — It is in fact accepted in analogous cases that circumstances of that kind are linked to the entrepreneurial risk inherent in the nature of the activity carried on by the trader liable to pay the duties. It is worth referring here to three judgments of the Court: first, *Schoellershammer*, cited above in footnote 8, concerning an application for remission on the ground that the goods were erroneously entered for free circulation; secondly, *Hewlett Packard France*, cited above in footnote 21, concerning an application for the repayment of duties imposed because of an error by the competent authorities themselves which could not reasonably be detected by the person liable to pay them; thirdly, *CT Control and JCT Benelux*, cited above in footnote 21, concerning an application for the repayment of duties because of the subsequent withdrawal of the import certificates by the competent customs authority.
However, the Court held in *Hewlett Packard France*, at paragraph 47, that it was possible for the repayment of the duties to be justified on the basis of the specific circumstances in which the error came about for the applicant (see footnote 21 above).

27 — See, on this point, Case 58/86 *Coopérative Agricole d'Approvisionnement des Avirons* v *Receveur des Douanes* [1987] ECR 1525, in particular paragraph 22. In that case the applicant for the repayment of import duties had invoked the particular circumstances in which maize is imported into Réunion; the Court rejected the submission in question.

28 — As the Commission and the French and Italian Governments correctly state, an analogous point was previously put to the Court in *Van Gend & Loos*, cited above in footnote 21. In its judgment the Court held that the argument that the applicants for remission were unable to recover their loss from their clients because the latter had gone into liquidation did not constitute a ground for the remission of duty.

VII — Conclusion

46. In view of the foregoing, I propose that the Court should answer the questions referred to it for a preliminary ruling as follows:

(1) Where the conditions for the repayment or remission of import duties in the event of the theft of goods, set out in Article 900(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, and, generally, the conditions set out in Articles 899 to 904 of that regulation, are not fulfilled, the national customs authorities must consider the application for remission in the light of Article 905(1) thereof.

(2) Where the case of an applicant for remission who invokes the theft of the goods on which the duty has been imposed cannot be brought within the scope of Article 900(1)(a) of the implementing regulation, the same facts are not *de jure* precluded from being considered to be facts which 'might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned' within the meaning of Article 905(1) of that regulation.

(3) When the national customs authorities consider an application for the remission of customs duties within the framework of Article 905(1) of the implementing regulation, they must assess the matters raised in order to establish whether they 'might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned' and, if so, they are to transmit the case to the Commission. Situations which are not special, are not fully proven or are due to deception or obvious negligence on the part of the person concerned do not warrant the transmission of the case to the Commission but the rejection of the application. In any event, the national customs authorities may not base the rejection of the application solely on the fact that, on their assessment, the applicant's situation does not amount to one justifying the remission or the repayment of the import duties imposed on him.