OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 28 March 1990 *

Mr President,
Members of the Court,

1. In these proceedings the Court has once again been called on to interpret Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes. [1]

2. The appellant in the main proceedings is the German subsidiary of the Unifert group. The group's purchases of fertilizer in non-member countries are usually made through Ferdis SA of Brussels, which resells the fertilizers, uncleared, to the group's various subsidiaries.

In its customs value declarations, the appellant stated that Ferdis was the seller and referred to the invoices issued to it by Ferdis.

Those declarations contained a 'reconstructed' price, calculated by multiplying the actual weight of the goods established upon unloading, which was less than the weight stipulated in the contract, by the price per tonne, without regard to the price actually paid.

The appellant also excluded from its declaration demurrage charges and a so-called buying commission paid to Ferdis and amounting to 6% of the amount invoiced for each particular consignment.

As a result of an inspection at the appellant's premises, the Hauptzollamt requested payment of DM 172 099.60 in supplementary duties.

Unifert challenged that request before the Finanzgericht (Finance Court), which dismissed the action. Unifert then appealed to the Bundesfinanzhof (Federal Finance Court), which referred the following questions to the Court for a preliminary ruling:

'(1) (a) Can the transaction value within the meaning of Article 3(1) of Regulation (EEC) No 1224/80 also be the price stipulated in a contract of sale between persons resident in the Community?

(b) If Question 1(a) is answered in the affirmative:

may the person concerned choose the price to be taken as the basis for customs valuation purposes if prices stipulated in other contracts of sale fulfil the requirements of Article 3(1) of Regulation No 1224/80? Is the person concerned bound by his choice once exercised?

(c) If Question 1(a) is answered in the affirmative:

* Original language: Italian.

1 — OJ 1980, L 134, p. 1.

does this price also include a so-called buying commission?

(2) Are demurrage charges (compensation for delays in loading) transport costs within the meaning of Article 8(1)(e) of Council Regulation No 1224/80?

(3) Is the full price paid or payable the transaction value within the meaning of Article 3 of Regulation No 1224/80 if before the material time short shipments are found which are within an agreed weight discrepancy allowance and do not lead to a reduction of the purchase price?'

3. The first group of questions concerns mainly the interpretation of Article 3 of Regulation No 1224/80.

Article 3, which constitutes one of the essential provisions of Regulation No 1224/80, provides in its first paragraph that the customs value of imported goods is, in principle, the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community. [2]

Article 3(3)(a), as amended by Council Regulation (EEC) No 3193/80 [3] then explains that the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller.

4. It is evident from the wording of the provision alone that the essential element for determining the transaction value is the reference to a contract relating to goods intended for import into the customs territory of the Community, while the place of residence of the parties to the contract of sale is entirely irrelevant.

The conclusion must therefore be that the price stipulated in a contract of sale relating to goods purchased in a non-member country and resold before completion of the requisite customs formalities, in other words before their importation into the customs territory of the Community, may legitimately be used for determining the customs value of the goods in question, irrespective of the place of residence of the parties to the contract.

5. Moreover, that appears consistent with Article 6 of Commission Regulation (EEC) No 1495/80 of 11 June 1980 implementing certain provisions of Articles 1, 3 and 8 of Council Regulation (EEC) No 1224/80 on the valuation of goods for customs purposes, [4] as amended by Commission

2 — Article 3(1) is based on Article 1(1) of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (OJ 1980, L 71, p. 107).

3 — OJ 1980, L 333, p. 1.

4 — OJ 1980, L 154, p. 14.

Regulation (EEC) No 1580/81,[5] which states that the fact that the goods which are the subject of a sale are declared for free circulation in the Community must be regarded as adequate indication that they were sold for export to the customs territory of the Community, and that that indication also applies in the case of successive sales before valuation; each price resulting from those sales may be taken as a basis for valuation.

6. In my view, Article 6 also provides a sufficiently clear answer to Question 1(b) since, in the case of successive sales, the importer is in principle at liberty to choose the price which must be taken as a basis for determining the customs value.

7. However, with regard to the possibility of the trader correcting his choice, it must be pointed out that, under Article 8(1)(a) and (b) of Council Directive 79/695/EEC of 24 July 1979 on the harmonization of procedures for the release of goods for free circulation,[6] such corrections must be requested before the goods are released for free circulation and may no longer be allowed where the request is made after the customs authority has informed the declarant that it intends to examine the goods or that it has itself established that the particulars in question are incorrect.

8. Nor do I consider pertinent the reference made by Unifert to Article 2 of Council Regulation (EEC) No 1430/79,[7] which provides that import duties are to be repaid or remitted in so far as it is established that the amount of such duties exceeds the amount lawfully payable, or its reference to Article 10(2) of Directive 79/695/EEC, relating to possible subsequent verification by the competent authorities and to the possible consequences thereof as regards any change in the amount of import duty.

Those rules apply to the case of an inaccurate customs declaration or an incorrect application of the customs rules, and it is not possible to deduce from them any right on the part of the trader to correct his declaration after the release of the goods in circumstances where, as in the present case, neither the choice of the price to be taken as a basis for determining the customs value nor the application of the customs rules were in any way invalid.

9. With regard to the inclusion of the buying commission — itemized separately in the invoice and calculated as a percentage of the price of the goods — in the price stipulated in the contract of sale, it should be recalled firstly that Article 8(1)(a) of Regulation No 1224/80 excludes buying commissions from the list of sums to be added to the price actually paid or payable for the imported goods.

However, Article 8(4) gives a narrow definition of the term 'buying commission' as a

5 — OJ 1981, L 154, p. 36.

6 — OJ 1979, L 205, p. 19. Under Article 27 of Directive 79/695/EEC, as amended by Council Directive 81/853/EEC (OJ 1981, L 319, p. 1), the Member States were required to take the measures necessary to comply with the directive not later than 1 July 1982.

7 — OJ 1979, L 175, p. 1.

fee paid by an importer to his agent for the service of representing him in the purchase of the goods being valued.

10. In order to apply the Community customs rules correctly, regard must be had to the reality of the relations between the contracting parties and it is for the national authorities, and where applicable for the national court, to determine whether in a particular case, regardless of the words used by the parties themselves, the commission in question actually constitutes a sum paid in return for that specific service or whether it simply represents a part of the purchase price which must, as such, be taken into account for calculating the transaction value of the goods.

11. With regard to the inclusion of demurrage charges in the cost of transport within the meaning of Article 8(1)(e)(i) of Regulation No 1224/80, it must be pointed out that those charges are collected on the basis of the transport contract and are directly connected with the transport of the goods by sea, which could not be effected without payment of such sums.

In my view, therefore, irrespective of their controversial legal nature, demurrage charges are covered by the concept of the cost of transport within the meaning of the abovementioned provision.

12. The final question asked by the Bundesfinanzhof must, in my opinion, also be answered in the affirmative. However, further clarification is necessary in that regard.

It is true that the price actually paid for the goods constitutes the transaction value, even when the quantities shipped are less than those purchased if the discrepancy is within the limits of an expressly agreed weight allowance, since in that case the price agreed is valid even when there are limited variations in weight and that price was established expressly to take account of such a possibility; however, in my view, a different reply must be given where the weight discrepancy established at the time the goods are shipped exceeds the limits of the allowance.

13. In that second case, Article 4 of Regulation No 1495/80, as amended by Regulation No 1580/81, becomes relevant. Article 4 states that, in the event that part of the goods are lost or when the goods have been damaged before entry into free circulation, the price actually paid or payable must be apportioned proportionately.

Thus, in such a case, subject to the quantity falling within the allowance, the price actually paid or payable must be reduced in proportion to the damage suffered, irrespective of payment of the full agreed price.

14. Moreover, that interpretation of the provision is borne out by the Court's statement in *Repenning*,[8] according to

8 — See the judgment in Case 183/85 *Hauptzollamt Itzehoe* v *Repenning* [1986] ECR 1873. It should be pointed out that the facts of the case occurred before the entry into force of the abovementioned amendment to Article 4 of Regulation No 1495/80.

which: 'Article 3(1) of Council Regulation No 1224/80 must be interpreted as meaning that where goods bought free of defects are damaged before being released for free circulation the price actually paid or payable, on which the transaction value is based, must be reduced in proportion to the damage suffered'.

15. In the light of the foregoing considerations I therefore propose that the Court should give the following replies to the questions referred by the Bundesfinanzhof:

'(1) The price stipulated in a contract of sale between persons resident in the Community may be regarded as the transaction value within the meaning of Article 3 of Regulation No 1224/80 when the seller, having purchased the goods in a non-member country, resells them before completion of the customs formalities necessary for the importation of the goods into the customs territory of the Community.

(2) Where prices stipulated in other contracts of sale also satisfy the conditions laid down in Article 3 of Regulation No 1224/80, the importer may, pursuant to Article 6 of Regulation No 1495/80, choose the price which is to be taken as the basis for determining the customs value. However, under Article 8 of Directive 79/695/EEC he may not correct his declaration after having obtained the release of the goods for free circulation.

(3) In order for a buying commission which is mentioned separately on the invoice not to be included in the selling price of the goods, it must actually be a fee paid by an importer to his agent for the service of representing him in the purchase of the goods, in accordance with Article 8(4) of Regulation No 1224/80.

(4) Demurrage charges, consisting in mooring charges incurred in the event of a delay in loading, form part of the cost of transport within the meaning of Article 8(1)(e)(i) of Regulation No 1224/80.

(5) Where, before the material time, it is found that the quantities are lower than those purchased but fall within the agreed weight allowances and do not give rise to a reduction in the purchase price, the full price paid or payable for the goods constitutes the transaction value within the meaning of Article 3 of Regulation No 1224/80.'