

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 16 December 1997 *

A — Introduction

they been correctly declared and the two quotas in question had already been exhausted when the error was discovered.

I. *The Issues*

3. The provision in Article 2(1) here in issue states that:

1. In these proceedings the Appeals and Objections Committee of the Højesteret (Danish Supreme Court) seeks a preliminary ruling on the interpretation of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment of goods entered for a customs procedure involving the obligation to pay such duties, since repealed,¹ and on the legal effect of a Commission decision taken after consultation of the Customs Code Committee.

'Where the competent authorities find that all or part of the amount of import duties or export duties legally due on goods entered for a customs procedure involving the obligation to pay such duties has not been required of the person liable for payment, they shall take action to recover the duties not collected.

...'

2. Essentially, the issue here is whether an undertaking which declared goods incorrectly on importation, thereby obtaining exemption from customs duties, must pay the normal duty *ex post facto* in the case where the goods would also have been exempt from duty had

II. *The main proceedings*

4. According to the referring court, the facts of the case before it are as follows: over a

* Original language: German.
1 — OJ 1979 L 197, p. 1.

period of several years, Sportgoods A/S ('the Respondent') imported football boots from Thailand. On five occasions between 1 March 1990 and 20 January 1992, the boots from Thailand were declared incorrectly under tariff subheading 6403 19 00 of the Combined Nomenclature. That subheading, covering sports footwear with uppers of leather, is set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff,² amended by Commission Regulations (EEC) No 2886/89 of 2 August 1989,³ No 2472/90 of 31 July 1990⁴ and No 2587/91 of 26 July 1991⁵ — each one a regulation 'amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff'.⁶ However, since the boots in question had plastic uppers, they ought to have been declared under subheading 6402 19 00:⁷ 'sports footwear with plastic uppers'.⁸ The incorrect declaration resulted from a mistake by the Respondent's forwarding agent.

5. Under the terms of the EC tariff preferences for developing countries in force when the imports occurred, goods from Thailand

falling within the two tariff subheadings were exempt from customs duty. Accordingly, no import duty was collected or paid, nor would any have been payable had the goods been declared under the correct tariff subheading.

6. The five consignments of sports footwear had already been imported when the exemptions were discontinued — on 3 March 1992 in one case, and on 27 March 1992 in the other — as a result of the import ceilings for the two subheadings being reached.⁹

7. The incorrect declarations came to light during an inspection by the tax authorities at the end of 1992. The authorities thereupon sought post-clearance payment of duty in respect of the five consignments. The appellate authority upheld that decision on the ground that preferential treatment had ceased to be available for goods originating in Thailand by the time any adjustment could have been made, since the import ceiling had been

2 — OJ 1987 L 256, p. 1.

3 — OJ 1989 L 282, p. 1.

4 — OJ 1990 L 247, p. 1.

5 — OJ 1991 L 259, p. 1.

6 — The full text of the subheading is: '6403: Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: Sports footwear ... 6403 19 00 Other'.

7 — See footnotes 2 to 5.

8 — The full text of the heading is: '6402: Other footwear with outer soles and uppers of rubber or plastics: Sports footwear ... 6402 19 00: Other.'

9 — Commission Regulation (EEC) No 513/92 of 28 February 1992 re-establishing the levying of customs duties on products falling within CN codes 6401, 6402, 6404 and 6405 90 10, originating in Thailand, to which the preferential tariff arrangements set out in Regulation No 3831/90 apply (OJ 1992 L 55, p. 88), and Commission Regulation (EEC) No 719/92 of 23 March 1992 re-establishing the levying of customs duties on products falling within CN code 6403, originating in Thailand, to which the preferential tariff arrangements set out in Council Regulation (EEC) No 3831/90 apply (OJ 1992 L 78, p. 9).

reached and the duty accordingly re-introduced.

Objections Committee to refer the following questions to the Court for a preliminary ruling:

8. The Respondent finally instituted proceedings before the Østre Landsret (Eastern Regional Court), which stayed the written procedure pending a decision from the Commission of the European Communities on whether remission of import duties was justified in the circumstances described above. Experts from all Member States met to examine the case in the General Customs Provisions Section of the Customs Code Committee. The Commission eventually decided that remission of the import duties in question was not justified.

9. The Østre Landsret, however, found that there was no legal basis for post-clearance recovery. The appeal by Skatteministeriet (the Ministry of Fiscal Affairs) against that judgment finally brought the case before the Appeals and Objections Committee of the Højesteret.

10. The dispute as to the legal effects of the Commission's decision, and the uncertainty as to the lawfulness of undertaking post-clearance recovery pursuant to Regulation No 1679/79, prompted the Appeals and

'(1) Must Article 2(1) of Council Regulation (EEC) No 1697/79 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1) be interpreted as meaning that post-clearance recovery may be effected only in cases in which there is a difference in the amount of duty involved, but not in cases of incorrect declarations of headings which have not had any bearing on the amount?

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

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

or that:

B — Analysis

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

I. Questions 1 and 2

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

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

11. These questions seek to ascertain whether Regulation No 1697/79, which lays down the rules governing the post-clearance recovery of import duties which have not previously been required to be paid, covers the present case, and thus requires post-clearance recovery to be undertaken. Article 1 states that the regulation is to determine the conditions for undertaking post-clearance recovery of import or export duties for which, 'for whatever reason, payment has not been required' in respect of goods entered for a customs procedure involving the obligation to pay such duties. Article 2 lays down the rules governing such post-clearance recovery: import duties 'legally due', payment of which has not been required of the person liable for payment, may be recovered. The goods in question must have been entered for a customs procedure involving the obligation to pay such duties. However, it is unclear whether this case at all involves import duties which were payable, but payment of which was not required.

12. The Respondent's view is that it could not possibly have been liable to pay import duties, since — as is not disputed — it would have enjoyed exemption from customs duties

(for shoes with plastic uppers) even if the goods had been correctly declared. Skatteministeriet reaches a different conclusion, since it also takes into account the position at the time when the inspection by the fiscal authorities was carried out. Both quotas (for shoes with leather, and for those with plastic uppers) had at that time been exhausted, and in both instances the exemption from duty had accordingly ceased to apply.

13. But should one take account of this late position in order to decide whether post-clearance recovery is permissible? To resolve that issue one must first establish which import duties are 'legally due' within the meaning of Article 2(1).

14. The Respondent's view is that the term denotes the import duties due at the time of the declaration. Article 3(a) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt¹⁰ provides that the moment when a customs debt on importation is incurred is deemed to be, *inter alia*, the moment when the competent authorities accept the entry of the goods for free circulation or the time of any other act which, in accordance with the provisions in force, has the same effect in law as such acceptance. Accordingly, for a customs debt it is the time of acceptance of the customs declaration that is conclusive, not the time of any subsequent event such as an inspection; what counts is

how much the person liable for payment should have paid at the time of importation. Accordingly, the import duties legally due are the duties due when the customs declaration for the goods is accepted.

15. That conclusion is also supported by the Court's case-law, such as *Pascoal & Filhos*,¹¹ a case involving imports of cod into Portugal. Since the imports carried a certificate of origin in Greenland, no duty was initially levied. However, the authorities of the exporting State subsequently reported that the certificate in question was not valid. The Court accordingly held that post-clearance recovery of the customs duties was permissible.¹² It proceeded from the premiss that a customs debt arises when the competent authorities accept the declaration of goods for free circulation, basing itself on Directive 79/623/EEC on the harmonisation of provisions laid down by law, regulation or administrative action relating to customs debt,¹³ and in particular on Article 3(a) thereof.¹⁴

16. The Respondent derives further guidance for the interpretation of the term 'import

11 — Case C-97/95 *Pascoal & Filhos v Fazenda Pública* [1997] ECR I-4209.

12 — Case 97/95, cited in footnote 11, paragraph 36 et seq.

13 — Council Directive 79/623/EEC of 25 June 1979 on the harmonisation of provisions laid down by law, regulation or administrative action relating to customs debt (OJ 1979 L 179, p. 31).

14 — Case C-97/95, cited in footnote 11; paragraph 10.

10 — OJ 1987 L 201, p. 15.

duties ... legally due' from Commission Regulation (EEC) No 3040/83 of 28 October 1983 laying down provisions for the implementation of Articles 2 and 14 of Council Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties.¹⁵ Article 1(1) thereof provides:

'For the purposes of Article 2 of Regulation (EEC) No 1430/79, "the amount lawfully payable" means the amount of the import duties which, under the rules in force at the time of acceptance of the entry for release for free circulation, including provisions relating to the grant of a reduced or zero rate of duty, would have been payable in respect of the goods concerned if all the particulars and documents necessary for the implementation of such rules had been duly declared and produced and had in fact been taken into account by the competent authorities in the calculation of the duties.'

17. Of course, Council Regulation (EEC) 1430/79 of 2 July 1979 on the repayment or remission of import or export duties¹⁶ does not bear directly on the present case. It deals, not with the post-clearance recovery of duties not previously required to be paid, but rather with the refund or remission of duties. Article

2(1) provides that the preconditions for such repayment or remission are that the amount of duties entered in the accounts relates to goods in respect of which a customs debt has either not arisen or has been settled other than by payment or prescription, or exceeds for any reason the amount lawfully payable. That regulation therefore does not concern situations where a customs debtor is required to make a post-clearance payment, but rather those where duties already paid are refunded or an existing liability to pay remitted. However, there is no discernible reason why the material time for the purposes of determining the duties legally due should be any different from that in Regulation No 1697/79. Both regulations deal with questions relating to customs debt. The fact that the duties in question are referred to in one regulation (Regulation No 1697/79) as 'legally due' and in the other (Regulation No 1430/79) as 'lawfully payable' is immaterial. After all, payment may lawfully be required only of what is legally due.

18. That is why, even if Regulation No 1430/79 does not apply to the present case of (putative) post-clearance recovery, the regulation implementing it (Regulation No 3040/83) may none the less provide some guidance as to how the term 'import duties or export duties legally due' should be interpreted. The import duties in question are, it provides, those which would have been payable under the rules in force at the time when the goods were accepted for entry.

¹⁵ — OJ 1983 L 297 p. 13.

¹⁶ — OJ 1979 L 175 p. 1.

19. Skatteministeriet disagrees. As I have already stated, it considers that all the circumstances arising up to the time when the adjustment was effected should be taken into account. Initial scrutiny by the competent authorities, it argues, had to proceed exclusively on the basis of the declarations by the importer and the normal checks; accordingly, only the circumstances of fact and law obtaining at the time of the declaration could have been considered. However, since an incorrect declaration has considerable economic significance, post-clearance recovery must be permitted.

20. In principle, of course, that proposition is irrefutable. It should, indeed, be borne in mind that the possibility of post-clearance recovery was introduced because the competent authorities' first inspection is effected solely on the basis of the importer's declaration. Should those details subsequently prove to have been incorrect, it must be possible for any underpaid duty to be recovered retroactively. Moreover, the same conclusion follows from the recitals in the preamble to Regulation No 1697/79. It is stated there that the amount of duties required to be paid may prove to be lower than the amount which was legally due, either as a result of an error of, *inter alia*, calculation on the part of the competent authorities, or because those authorities used inaccurate or incomplete information, particularly as regards the nature,

quantity, value, origin or end-use of the goods in question. The recital in question continues:

'... because of the essentially economic nature of the import duties or export duties in force in the Community, failure to collect the correct duties has prejudicial consequences for the Community economy; ... it is therefore justified to permit the competent authorities to make post-clearance recovery of the duties remaining due, where they establish that such an error has been made.'¹⁷

21. Here, too, the sole criterion is whether the facts declared when the goods were entered were or were not correct at that time. There is no requirement that account be taken of any subsequent changes. Rather, it is the errors subsequently discovered in the original declarations which must be considered.

22. This becomes clear if one considers the following situation: an importer imports a product free of duty on the basis of an incorrect declaration, even though no customs exemption exists in respect of the product in question. Later, the customs authorities dis-

17 — First recital in the preamble to Regulation No 1697/79.

cover the error. However, at the time when the error is detected preferential customs treatment has come into force for that very product, providing for exemption from customs duty. There would surely be no question of waiving post-clearance recovery in that case merely because it had in the interim become possible to import the product free of duty. When the product was imported no exemption was in force. The material legal position is the one which obtained at that time. The converse situation (that is to say, the present case) cannot, however, be treated any differently. Once again, the material time is the time at which the goods were imported into the Community market.

has not been entered in the accounts and provides that:

‘Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time-limit may be extended in accordance with Article 219.’

23. I must also disagree with Skatteministeriet when it cites Article 220(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code¹⁸ and reads it as requiring circumstances which arise subsequently to be taken into account. First, that regulation partially replaced the regulation at issue here, and consequently cannot apply to the present case.¹⁹ Second, Article 220(1) in no way requires circumstances which arise subsequently to be taken into account. It lays down rules governing the case in which the amount of duties

Indeed, it follows from Article 201(2) of the Customs Code that it, too, treats the time of acceptance of the entry as the material time.

24. It is thus not apparent from the provisions of Regulation No 1697/79 alone that there is any requirement to undertake post-clearance recovery in the circumstances of the present case. It is not disputed that at the material time, when the customs declaration was accepted (which was formally in order but inaccurate as to the facts), the product in question enjoyed exemption from customs duty under the customs quota for tariff heading 6402 (‘Shoes with plastic uppers’),

¹⁸ — OJ 1992 L 302, p. 1.

¹⁹ — Article 251 of Regulation No 2913/92.

which had not yet been exhausted. Given the customs exemption then in force, no customs debt could arise. It follows that no customs debt can be the subject of post-clearance recovery.

25. The Commission's view, however, is that a higher customs debt had already arisen at the time of the declaration. It also takes the view that the time of the acceptance of the declaration is determinant as to whether or not a customs debt arises, and accepts that time as also being the material time for the purpose of determining whether any preference applies. However, it does not read the provisions in force as permitting any exemption from duty to be accorded in respect of the goods actually imported, that is to say, sports footwear with plastic uppers. Only sports footwear with leather uppers could, it argues, have enjoyed such an exemption. That formalistic approach leads the Commission to conclude that a customs debt did arise.

26. I cannot, however, accept that approach, which separates the declaration of the goods from the granting of the tariff preference. Post-clearance recovery involves determining what would have been payable had the goods been declared correctly at the time of entry. In the present case, nothing would have had to be paid. It is not permissible to ask, as the Commission does, whether exemption from duty would have had to have been granted in the case of an inaccurate declaration. The question is rather what the situation would have been had the importer or transport undertaking declared the goods correctly. Of

course, in the normal course of events footwear with plastic uppers cannot enjoy an exemption intended for footwear with leather uppers. However, if the boots had been declared correctly as footwear with plastic uppers, the corresponding exemption could have been granted. Once again, Regulation No 3040/83 is in point; as I have already indicated, it may be consulted in regard to determining the material time. Article 1 thereof provides that in regard to the duties payable it is the rules in force at the time of acceptance of the entry for release into free circulation, 'including provisions relating to the grant of a reduced or zero rate of duty', which are conclusive.

27. That is why even the judgment in *Wünsche*,²⁰ cited by the Commission, argues rather against the latter's view. The case in question concerned protective measures applicable to imports of preserved mushrooms which stipulated that an additional amount be levied on imports exceeding a certain quantity. In the case before the national court, wild mushrooms were imported accompanied by the appropriate licences, with the result that no additional amount was levied. However, experts' reports subsequently established that the goods were cultivated mushrooms, not wild ones. Although the importer thereupon

20 — Case C-26/90 *Hauptzollamt Hamburg-Jonas v Wünsche* [1991] ECR I-4961.

produced the corresponding licences for cultivated mushrooms, the additional post-clearance amount was levied notwithstanding. The Court held that this additional amount also had to be levied in cases where preserved mushrooms had been released into free circulation in the Community and it had been discovered, after their release into free circulation, that they were not accompanied by a valid import licence.

28. Although the circumstances of *Wünsche* are not directly comparable with the present case, it is apparent from that judgment that the time of the customs declaration was taken to be the material time. It was the fact that no valid licences had been produced at that time that made post-clearance recovery possible. In the present case, however, the exemption existed at the time of declaration, and hence no duty would have been payable. There was no need to submit a licence subsequently in order to obtain exemption from duty.

29. The fact thus remains that, taking the time of acceptance of the customs declaration as the material time, no customs debt arose. The Commission itself does not dispute that that is the material time. There is no need to consider the possibility further mooted by the Commission of recovery being waived or the duties being remitted, since no customs debt can be deemed to have arisen.

30. One might possibly reach a different conclusion on the ground that customs ceilings had been established in this case and had already been exhausted when the fiscal inspection was made, that is to say, when the incorrect declaration was discovered. Thus, Skatteministeriet in particular argues that Regulation No 1697/79 is interpreted too narrowly if one considers only whether or not an incorrect declaration at the time of the entry will affect the amount of duty payable. Skatteministeriet further refers to the Commission decision on the remission of the customs debt, in which it stated that the individual tariff headings were not interchangeable, since they served different purposes and varied in their commercial significance.

31. Skatteministeriet contends, finally, that it is also apparent from Regulation No 3040/83 that where quotas exist it is not only the time when the customs declaration was accepted that can be regarded as being the material time. It follows from Article 1(2) of that regulation that even if an exemption was in force at the time of acceptance of the entry of the goods into free circulation, such an exemption could be granted only if the maximum quantities for entry into free circulation of the goods in question had not been reached.

32. The Respondent, too, considers that in interpreting Regulation No 1697/79 it is appropriate to take account of whether a preference scheme exists. It focuses on the purpose of such a scheme: where — as here — it is for the benefit of developing countries, the purpose is to contribute to their

development. Accordingly, it is important to ensure that such a preference is capable of being granted.

any loss of customs revenue was sustained. In both cases, taking the time of acceptance of the customs declaration as the material time results, as I have demonstrated, in a zero customs debt. Accordingly, if one considers only the amount that would have been payable, no economic disadvantage is discernible.

33. Skatteministeriet raises a further aspect of the granting of tariff preferences. It argues that if no post-clearance recovery of duty was undertaken, despite the quota being exhausted, the Community would be placed at an economic disadvantage.

34. I shall consider the latter argument first. As is apparent from the recitals in the preamble to Regulation No 1697/79, the justification for post-clearance recovery lies precisely in the fact that inadequate recovery of duty has an adverse effect on the economy of the Community. The dual function of customs duties should be borne in mind when considering this: they protect the Community economy and also represent a source of revenue for it. Granting exemptions from customs duty in order to protect developing countries entails renouncing some of that revenue. When a set quota is exceeded, a further loss of customs revenue may be sustained.

35. However, the question that arises in the present case is whether, as a result of the incorrect details in the customs declaration,

36. A different result might possibly be reached by considering what customs duties the Community waives in the two situations. The amount waived would depend on the level of the normal rate of duty. Where the rate for the goods actually exempt is lower than that for the goods wrongly entered against that quota, the Community might sustain a loss, having waived an amount greater than that provided for. Looking to the amount of duty waived creates no problems in the case of a single quota. However, if, as in the present case, two parallel quotas are involved, each of which provides for complete exemption, it is not apparent how an amount to be paid retroactively could be determined. If one applies the provisions of Regulation No 1697/79, which, as I have demonstrated, takes the time of acceptance of the customs declaration as the material time, one reaches the conclusion that in both cases the rate of duty payable was zero. Regulation No 1697/79 does not provide for the difference between the two rates of duty to be collected or recovered post-clearance. It merely refers to amounts of duty that are due but have not been collected.

37. Were one to follow Skattesministeriet and refuse exemption from duty altogether pursuant to the provisions of Regulation No 3040/83, the Community might possibly receive an amount of duty greater than it was entitled to. It is questionable whether that would be a desirable outcome under Regulation No 3040/83. That regulation is admittedly not directly in point; none the less, it may furnish guidance on how to conduct post-clearance recovery where a tariff preference exists. However, it, too, is predicated on the existence of a single tariff preference, rather than the situation obtaining in the present case, where a preference would have existed even if the declaration had been correct. In the former situation, the Community clearly sustains an easily quantifiable loss if a customs debt is remitted following re-introduction of the normal Community rate of duty; disallowing the 'retroactive' exemption obviates this.

38. Moreover, the issue in Regulation No 3040/83 is whether an entitlement — exemption from duty — may still be allowed after the quota has been exhausted. In the present case, however, the exemption has in principle already been granted. Here, too, it is a moot point whether the person liable to pay the duties in question can be excluded from one quota simply in order to cover the difference between the amounts of unpaid duty, where the consequence is that he cannot be granted access retroactively to what would have been the appropriate quota for him. As I have already shown, he would then have to pay the full amount of duty, and the Community would receive more than it was entitled to. The only circumstances in which that would not occur are if both quotas were completely

recalculated. However, it is apparent from Regulation No 3040/83 that, far from being adjusted retroactively, quotas are, if anything, actually increased — see Article 1(2), third subparagraph, which provides that in the event of an error on the part of the competent authority the duty is to be remitted even if the quota has by then been exhausted.

39. That the quota is increased in such circumstances follows from Council Regulation (EEC) No 3896/89 of 18 December 1989 applying generalised tariff preferences for 1990 in respect of certain industrial products originating in developing countries,²¹ the regulation which established the preferences at issue here. They were extended by Council Regulation (EEC) No 3831/90 of 20 December 1990 applying generalised tariff preferences for 1991 in respect of certain industrial products originating in developing countries²² and by Council Regulation (EEC) No 3587/91 of 3 December 1991 extending into 1992 the application of Regulations (EEC) No 3831/90, No 3832/90, No 3833/90 and No 3835/90 applying generalised tariff preferences for 1991 in respect of certain products originating in developing countries.²³ Thus, the 25th recital in the preamble to Regulation No 3896/89, which corresponds to the 30th recital in the preamble to Regulation No 3831/90, provides

21 — OJ 1989 L 383, p. 1.

22 — OJ 1990 L 370, p. 1.

23 — OJ 1991 L 341, p. 1.

that, having regard to the rules applying to the repayment or remission of import or export duties, and in particular to Regulation No 1430/79 and Regulation No 3040/83, a procedure should be laid down to regularise imports actually made within the fixed duty-free amounts and preferential tariff limits opened under that regulation, and that, in order to ensure that such regularisations do not lead to tariff ceilings being considerably exceeded, it is appropriate to foresee that the Commission can take measures to stop the import charges. It follows that the regularisations may lead to the ceilings being exceeded: in other words, even where the customs debt is remitted, the individual quotas are not re-opened. It follows further that, while such exceeding of a ceiling should be avoided as far as possible, it is none the less accepted in certain cases. It should be recalled in this connection that in such cases the Community incurs a financial disadvantage. Even in those situations (not comparable with the present case), that disadvantage is tolerated.

40. In the light of the above considerations there is no apparent justification for retroactively depriving the Respondent of the exemption already granted solely in order to make good a possible loss arising from the difference in the amounts of duty not collected. It should be remembered that the Respondent was already entitled to an exemption when the declaration was made.

41. A distinction should be drawn between this case and the case of an importer declaring goods incorrectly under a heading in respect of which an exemption was in force, where he would have had to pay duty at the normal rate if the goods had been declared correctly. In such a case it would be appropriate to undertake post-clearance recovery of the difference between the duty actually paid (zero) and the duty payable under the provisions in force; the two-quota problem in the present case would not arise.

42. Post-clearance recovery would, however, also be appropriate in a situation involving, as in the present case, two quotas of varying size, each attracting a different level of exemption, where goods were wrongly declared in the category with the higher level of exemption. There, too, the amount to be recovered post-clearance can be quantified as being the difference between the duty actually paid and the — higher — duty payable.

43. It remains to consider whether the purpose served by the tariff preferences might make post-clearance recovery necessary. The exemption applied to sports footwear with leather uppers and to sports footwear with plastic uppers. The incorrect declaration led to sports footwear with plastic uppers being imported against the quota for sports footwear with leather uppers. It is unclear whether

that ran counter to the purpose served by the preferences accorded.

plastic uppers would be imported at the preferential rate of duty than was provided for under the regulation.

44. The parties to the main action address those questions only inasmuch as they consider the effects of undertaking, or omitting to undertake, post-clearance recovery on the observance of the preference limits.

45. Thus, the Respondent submits that the purpose of the system of preferences for developing countries is to contribute to the latter's development; it is therefore very important that a preference should be accorded. If post-clearance recovery were undertaken in the present case, fewer football boots with leather uppers would be imported and the quantity set for that particular product would not be reached.

46. Against this, Skatteministeriet points out that such a preferential rate of duty for developing countries was the outcome of lengthy negotiations. The level of the maximum import amount thereby set was in no way fortuitous. Community law must be interpreted and applied in such a way as to ensure that the quantity of goods imported at the preferential rate of duty does not exceed the precise quantity agreed on and specified in the regulations in question. Were post-clearance recovery of the duty to be waived in the present case, the result would be that more football boots with

47. My first point in response to Skatteministeriet's submissions is that — as I have already demonstrated — in certain circumstances it is quite possible that an increase in the preferential duty, or, as the case may be, the maximum import quantity, will be tolerated. It should be noted that the arguments adduced by each party refer to only one of the two maximum import quantities. The question which must be answered here, however, is precisely whether it is possible to allow football boots with plastic uppers to be imported against the quota for sports footwear with leather uppers while observing both ceilings and their respective objectives.

48. Thus, it follows, *inter alia*, from the preamble to Regulation No 3896/89²⁴ that the purpose of generalised tariff preferences is to improve access for developing countries to the markets of the preference-giving countries.²⁵ In order to give the beneficiary countries a more equitable access to the preferential advantages, the Community decided to

²⁴ — Cited in footnote 21.

²⁵ — Second recital.

apply preferential treatment which took account of the particular situation of each of the beneficiaries. This was effected by country-specific ceilings for particular goods. Selective treatment of individual countries was determined by the sensitivity of the sectors, the Community market situation of the products in question, and the degree of industrial development and competitiveness of the countries concerned.²⁶ It follows that the tariff preferences are granted in such a way as to enable individual countries to derive maximum benefit from them. If one considers the tariff ceiling for Thailand, it will be noted that the ceiling for footwear with leather uppers is considerably higher than that for footwear with plastic uppers.²⁷

49. In that connection, Skatteministeriet refers to the Commission decision on the possibility of remitting the customs debt in this case. In that decision the Commission established that the two quotas pursued different economic objectives and consequently could not be interchanged. It concluded that the customs debt could therefore not be remitted.

26 — Fifth recital.

27 — Under Regulation No 3896/89, for instance, the tariff ceiling for heading 6402 ('Other footwear with outer soles and uppers of rubber or plastic') was ECU 1 100 000, while the ceiling for heading 6403 ('Footwear with outer soles of rubber, plastic, leather or composition leather') was ECU 4 000 000.

50. However, it must be pointed out in this regard that the Commission, as it states itself, in adopting that decision, proceeded on the basis that a question as to remission of a customs debt is posed only when such a customs debt exists. Accordingly, the Commission addressed only the question whether an existing customs debt might be remitted. In such circumstances, Regulation No 3040/83, which contains specific rules governing the remission of an existing customs debt where a customs quota exists, may be applied directly. That is the basis on which the person liable to pay the duty can be refused exemption. However, in the present case, as I have already demonstrated, no customs debt arose.

51. Admittedly, as Skatteministeriet submits, a waiver of post-clearance recovery will entail more footwear with plastic uppers being imported than was intended, and less footwear with leather uppers (the case-file does not indicate that the quota for footwear with leather uppers was re-opened and further duty-free imports allowed). Thus, the quota for footwear with leather uppers was not fully exhausted, while that for footwear with plastic uppers was exceeded. Even if the intention that a particular quantity of leather footwear be supplied was not complied with in this case, the differences between the two quotas are so small as to preclude any presumption that Thailand suffered any harm. The quotas concerned the same category of products (in both cases, [sports] footwear, the only differences concerning some of the material); the quotas expired practically simultaneously, and the same — total — exemption from customs

duty was granted in both cases. Even if Thailand were to have sustained any loss, it must have been so slight, for the reasons indicated, as to preclude any need to re-apportion the quotas.

problem arises in all cases involving post-clearance recovery, it must be pointed out that in the present case, in contradistinction to ordinary instances of post-clearance recovery, even at the time of importation, no customs debt had arisen.

52. Nor would the Community suffer if there were no post-clearance recovery or re-opening of the quota. The amount of the customs revenue lost as a result of the difference in the rates of the duty waived in each case is not such as to justify a re-allocation of the quotas.

55. While no direct legal consequences follow from the particular circumstances of the present case described above, they do suggest that considerations of fairness — exceptionally — justify allowing the importation of sports footwear with plastic uppers against the quota for sports footwear with leather uppers, and renouncing post-clearance recovery.

53. There are also considerations of fairness and proportionality to be borne in mind. At most, a loss might be sustained by a leather footwear supplier denied retroactive access to the quota by a decision not to re-allocate. However, one may assume that he will have already sold the footwear which he imported, with the duty he paid being added to the price; he will probably have sustained virtually no loss at all.

56. The final matters to be considered in regard to Questions 1 and 2 concern two arguments raised by the Respondent. First, there is the argument that post-clearance recovery in the present case would infringe the principle of the prohibition of unjust enrichment. Here I should point out that it is only by way of exception — on the basis of considerations of fairness and proportionality, given the slight differences between the relevant quotas — that it is possible for goods to be imported against a quota for other goods. In a case where it is not possible for such a facility to be granted, and where both quotas have been exhausted, it may well be that it is no longer possible to grant the exemption from duty. In that case there would surely be no instance of unjust enrichment,

54. Conversely, if the quota were re-allocated and the duty recovered post-clearance, the Respondent would suffer a loss. Here, too, it must be assumed that the imported footwear has already been sold, in which case it is no longer possible to add the duty — paid much later — to the price of the goods. Even if that

since the basis for the payment of the duties would have been the general customs rules, which had only been temporarily suspended for the duration of the preferential treatment.

57. The Respondent also points out that the circumstances obtaining at the time of the subsequent fiscal inspection may not be taken into account, since the time at which it occurred was purely a matter of chance. However, since the incorrect declaration and the discovery of the error in the course of the inspection must be attributed to the Respondent, the latter must, if appropriate, also accept the consequences arising from the point in time at which the inspection took place.

58. Finally, there is the fact that in the present case, exceptionally, post-clearance recovery may be waived.

59. However, one possible consequence of such a solution might be that future importers would no longer deem it necessary to declare their goods in the correct category. However, in view of the exceptional nature of the present case and the solution proposed as a consequence thereof, it will continue to be the case that importers may not presume that post-clearance recovery will be waived in cases where goods are declared incorrectly.

60. Accordingly, the answer to the questions from the referring court should be that, in the context of Article 2(1) of Regulation No 1697/79, post-clearance recovery is possible only where loss or harm is sustained by reason of the fact that an amount requiring to be levied has not been paid.

61. The Commission, however, in its written observations, concludes that the difference between the amounts is immaterial. My view is that the Commission's reasoning is predicated on the assumption that a customs debt arose at the time when the customs declaration was accepted. It does not therefore address the issue of whether post-clearance recovery should likewise be undertaken where, as here, there was no difference in the amount, because no customs debt arose.

62. In answering the second question it should be pointed out that the words 'import duties or export duties legally due' in Article 2(1) of Regulation No 1697/79 are to be interpreted as meaning that the question whether an amount was owed is to be determined on the basis of the circumstances of fact and law obtaining at the time when the competent authorities accepted a declaration containing an incorrect tariff heading. Attention should, however, be drawn to cases in which goods are granted exemption from duty on the basis of an incorrect declaration, where they would also have enjoyed such exemption if correctly declared. If the quotas in question are dis-

similar, and hence non-interchangeable, then, even if the amount remains the same, the goods would have to be declared against the correct quota.

II. Question 3

63. The purpose of this question is to ascertain the legal effect of a decision addressed to a Member State by the Commission of the European Communities following consultation with the Customs Code Committee, in which the Commission and the Committee have decided that the Member State is not entitled to remit import duties. The second part of the question, related to the first, asks whether a court in the Member State concerned may still, despite that decision, conclude that there was no legal basis for post-clearance recovery of the import duties.

64. The Respondent's view is that the Commission's decision is immaterial to the issue of post-clearance recovery. The Committee's decision concerned the question of remission; it expressed no view on post-clearance recovery. If a procedure is submitted to the Commission for a decision on whether import duties should be remitted in certain specified

circumstances, discussion of the issue presupposes the existence of a case requiring a decision on whether remission is possible. In order for the Commission to be able to adopt a decision, it must assume that there is a legal basis for the payment of import duties. Skatteministeriet itself requested the Commission to adopt a decision on whether it was possible to *remit* import duties in the circumstances of the case described. Thus, no ruling whatsoever was sought from the Commission on whether, under the circumstances which obtained, there was any legal basis for *post-clearance recovery*.

65. Skatteministeriet, however, submits that under Article 189 of the EC Treaty a decision addressed to the Kingdom of Denmark is binding on Denmark. The decision to disallow remission naturally presupposed as a matter of law that post-clearance recovery was possible. The Commission's decision implied a finding that there was a legal basis for post-clearance recovery. Skatteministeriet further claims that a national court may not assume that the necessary connection between EC provisions and the decision of a Community institution does not exist. If that were not the case, the Danish customs and fiscal authorities would be under a legal duty vis-à-vis the Communities to refuse remission of the import duties, but would have no legal basis on which their post-clearance recovery could be effected.

66. Skatteministeriet finally points out that to presume that a national court might find that in a situation such as the present there was no legal basis for post-clearance recovery would in fact be tantamount to the Commission decision being declared invalid and devoid of legal effects. That, it argues, is manifestly incompatible with the decision in *Foto-Frost*,²⁸ in which the Court held that there were no circumstances in which a national court might *ex proprio motu* declare a Community legal measure to be invalid.

67. The Commission, too, has cited Article 189 of the EC Treaty. However, it also contends that it is a precondition for the refund or remission of any import duties that post-clearance recovery of those duties must be possible. Hence, a request that the Commission examine whether remission would be possible was meaningful only if post-clearance recovery could indeed be effected. It was necessary to resolve that issue before addressing the question of remission. In its decision of 18 July 1994, the Commission had not adopted a position on whether post-clearance recovery was possible. It had proceeded from the premiss that remission was only sought where a debt existed. Had the Commission been asked in addition for an opinion on the question of post-clearance recovery, and had it concluded that recovery was not possible, it would have rejected the request for remission as unfounded.

68. The Commission also states that national courts may not declare acts of the Communities to be invalid. However, it rightly points out that the Court's case-law distinguishes between the fact of an amount (of duty) being owed and the question of remission. The Commission refers on that point to the judgment in *Cerealmangimi and Italgrani*, in which the Court drew a distinction between the possibility of releasing economic operators from the payment of duties owed and the actual principle that the debt is payable. The Commission had refused remission of duties in a decision, but, as the Court went on to hold, it remained possible for the issue of the obligation to pay to be raised before the competent (Italian) court.²⁹ Accordingly, the Commission is correct when it states that, if a court interpreting Regulation No 1697/79 concludes that in a specific case there is no legal basis for post-clearance recovery, that does not necessarily mean that it is at the same time declaring invalid a Commission decision refusing remission of an (existing) customs debt; in such a case, however, the Commission's decision would be devoid of purpose. That view is correct.

69. Accordingly, the answer to the third question from the referring court should be that a decision, such as that in the present case, addressed by the Commission to a Member State following consultation with the Customs Code Committee, produces legal effects

28 — Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

29 — Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani v Commission* [1987] ECR 1303, paragraphs 8 to 12.

in regard to the remission of import duties only if the Member State has asked the Committee to decide whether the remission of import duties is justified under specified circumstances, and the Commission and Committee decide that such is not the case. However, the specific terms of the decision may

provide otherwise. If the decision does not also adopt a position on the question of post-clearance recovery, a ruling by a court in the Member State concerned that there is no legal basis for post-clearance recovery of the import duties is compatible with the legal effects produced by the decision.

C — Conclusion

70. In the light of the foregoing I propose that the questions in the reference be answered in the following terms:

- (1) Post-clearance recovery under Article 2(1) of Council Regulation (EEC) No 1697/79 is possible only where a loss has been sustained by reason of the fact that an amount requiring to be levied has not been paid.
- (2) The words 'legally due' (referring to import duties and export duties) in Article 2(1) of Regulation No 1697/79 are to be interpreted as meaning that, in determining whether or not a customs debt has arisen, the material circumstances of fact and law are those obtaining at the time when the competent authority accepted the customs declaration.
- (3) The decision addressed to a Member State by the Commission of the European Communities following consultation with the Customs Code Committee, in which the Commission decides that there is no entitlement to remission of import duties — the Member State having asked the Committee to decide whether such remission was justified under more precisely defined circumstances — is binding only where the legal and factual circumstances are such

that it is possible for import duties to be levied. It does not oblige a court to take, or refrain from taking, a decision on whether any legal basis subsists at all, save only in those cases where the decision itself expressly provides otherwise. If the Commission decision addresses neither the question of post-clearance recovery nor that of the legal basis, it is open to a court in the Member State concerned to decide that there is no legal basis for post-clearance recovery of the import duties.