OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 6 October 2005 [1]

I — Introduction

1. The questions submitted to the Court of Justice by the Gerechtshof Amsterdam (hereinafter 'the referring court') concern the validity of Additional Note 1 to Chapter 10 of the Combined Nomenclature and interpretation of the concept of good faith pursuant to the fourth subparagraph of Article 220(2)(b) of the Community Customs Code.

2. These issues are raised before the referring court in a legal action between BV Algemene Scheeps Agentuur Dordrecht (hereinafter 'ASAD') and the Inspecteur van de Belastingdienst (hereinafter 'the inspector'). ASAD imported rice into the Community which was declared as 'semi-milled' and was therefore afforded exemption from customs duty. However, the inspector ultimately classified the rice as 'husked' rice and issued the demand for payment against which ASAD is appealing in the main proceedings.

3. The referring court considers the validity of Additional Note 1 to Chapter 10 of the Common Customs Tariff to be doubtful because, contrary to the requirements of the Harmonised System, it lays down possible additional conflicting conditions for the classification of rice as husked or semi-milled. If the Additional Note should nevertheless be valid, the question that then faces the referring court is whether, on account of that justified doubt as to its validity, the person liable for payment of the duty is to be considered to have been acting in good faith within the meaning of the fourth subparagraph of Article 220(2)(b) of the Customs Code as the obligation to pay a subsequently levied customs debt would then lapse.

II — Legal framework

4. The legal framework of this case consists of the Harmonised System, the Common Customs Tariff and the Community Customs Code.

1 — Original language: German.

A — *International law: the Harmonised System*

5. The Harmonised System (hereinafter 'the HS') was concluded as an international convention within the framework of the World Customs Organisation. It is a multifunctional nomenclature that is able to take all internationally traded goods into account. The Community is a party to the convention. [2]

6. Excerpts from Article 3(1) of the HS read as follows:

'3. Obligations of Contracting Parties

(1) Subject to the exceptions enumerated in Article 4:

(a) Each Contracting Party undertakes, ... that ... its Customs Tariff ... nomenclatures shall be in conformity with the Harmonised System. It thus undertakes that, in respect of its Customs Tariff ... nomenclatures:

(i) it shall use all the headings and subheadings of the Harmonised System without addition or modification, together with their related numerical codes;

(ii) it shall apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonised System; and

(iii) it shall follow the numerical sequence of the Harmonised System;'

7. In Part II, Section II, Chapter 10, the HS under heading 1006 provides for the following subheadings in the binding English version:

'10.06 — RICE

2 — See the International Convention on the Harmonised Commodity Description and Coding System (OJ 1987 L 198, p. 3).

1006.10 — Rice in the husk (paddy or rough)

1006.20 — Husked (brown) rice

1006.30 — Semi-milled or wholly milled rice, whether or not polished or glazed

1006.40 — Broken rice'

8. The similarly binding French version reads:

'10.06 — RIZ

10.06.10 — Riz en paille (riz paddy)

1006.20 — Riz décortiqué (riz cargo ou riz brun)

1006.30 — Riz semi-blanchi ou blanchi, même poli ou glacé ...

1006.40 — Riz en brisures'

9. The Customs Cooperation Council (hereinafter 'the CCC') issues Explanatory Notes to the HS. The English version relating to heading 1006 gives inter alia the following definition:

'(1) Rice in the husk (paddy or rough rice), that is to say, rice grain still tightly enveloped by the husk.

(2) Husked (brown) rice (cargo rice) which, although the husk has been removed ... is still enclosed in the pericarp. ...

(3) Semi-milled rice, that is to say, whole rice grains from which the pericarp has been partly removed.

(4) Wholly milled rice (bleached rice), whole rice grains from which the pericarp has been removed ...

(5) Broken rice, i.e., rice broken during processing.'

10. The French version of these Explanatory Notes reads:

'1) Le riz en paille (riz paddy ou riz vêtu), c'est-à-dire le riz dont les grains sont encore revêtus de leur balle florale qui les enveloppe très étroitement.

2) Le riz décortiqué (riz cargo ou riz brun) qui, dépouillé des balles florales ... conserve encore sa pellicule propre péricarpe. ...

3) Le riz semi-blanchi, à savoir, le riz en grains entiers dont le péricarpe a été partiellement enlevé.

4) Le riz blanchi, riz en grains entiers dont on a enlevé le péricarpe ...

5) Les brisures de riz, consistant en grains brisés au cours des opérations antérieures.'

B — *Community law*

1. The Common Customs Tariff

11. The Common Customs Tariff is based on the HS. It is also intended, in its 'Combined Nomenclature' (hereinafter 'the CN'), to take all internationally traded goods into account. In the CN the Common Customs Tariff has adopted the structure of the HS but contains further subdivisions for Community tariff and statistical purposes. The headings (the first four digits) and the first subheadings up to the sixth digit of the Customs Tariff are based upon the HS. The other subdivisions are based solely upon Community secondary law.

12. During the relevant period the CN listed inter alia the following subheadings under heading 1006 in Part II (Customs Tariff), Section II (Vegetable Products), Chapter 10 (Cereals):

'1006 Rice:

1006 10 — Paddy rice:

...

1006 20	— Husked rice ("cargo rice" or "brown rice"):
	— — parboiled
	— — Other:
	...
	— — — Long grain:
	...
1006 20 98	— — — — Of a length/width ratio equal to or greater than 3
1006 30	— Semi-milled or wholly milled rice, whether or not polished or glazed:
	— — Semi-milled rice:
	...
	— — — Other:
	...
	— — — — Long grain:
	...
1006 30 48	— — — — — Of a length/width ratio equal to or greater than 3
	— — wholly milled rice:
	...
1006 40 00	– Broken rice.'

13. Additional Note 1 to Chapter 10 of the CN (hereinafter 'Additional Note 1') gives the following definitions (excerpts only):

'1. The following terms shall have the meanings hereunder assigned to them:

...

(d) "paddy rice" (subheadings 1006 10 ...: rice which has retained its husk after threshing;

(e) "husked rice" (subheadings 1006 20 ...: rice from which only the husk has been removed. Examples of rice falling within the definition are those with the commercial descriptions "brown rice", "cargo rice" ...;

(f) "semi-milled rice" (subheadings 1006 30 ...: rice from which the husk, part of the germ and the whole or part of the outer layers of the pericarp, but not the inner layers, have been removed;

(g) "wholly milled rice" (subheadings 1006 30 ...: rice from which the husk, the whole of the outer and inner layers of the pericarp, the whole of the germ in the case of long ... grain rice, ... have been removed ...;

(h) "broken rice" (subheading 1006 40): grain fragments the length of which does not exceed three quarters of the average length of the whole grain.'

2. The Community Customs Code

14. The Community Customs Code consolidates general, non-tariff customs duty law and governs the manner in which duty is to be levied. In addition to general rules and procedural provisions, it also contains the law on liability to pay duty. Article 220(2)(b) of the Community Customs Code forms part of the law on liability to pay duty and has been worded as follows since 19 December 2000 (excerpts only): [3]

'Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where: ...

(b) the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

3 — See Regulation (EC No 2700/2000 of the European Parliament and of the Council of 16 November 2000 amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 2000 L 311, p. 17).

Where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the authorities of a third country, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected within the meaning of the first subparagraph.

The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where, in particular, it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

The person liable may plead good faith when he can demonstrate that, during the period of the trading operations concerned, he has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled.

The person liable may not, however, plead good faith if the European Commission has published a notice in the *Official Journal of the European Communities*, stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country.'

III — Facts, main proceedings and questions referred to the Court for a preliminary ruling

15. On 10 August 2001 the customs forwarding agent, ASAD, declared 1 134 500 kilograms of rice for free circulation. In the declaration it described the rice as 'long grain, semi-milled rice of a length/width ratio equal to or greater than 3' and classified it under subheading 1006 30 48 00 of the CN. ASAD gave Aruba as the country of origin and claimed the preferential tariff applicable to rice classified under tariff subheading 1006 30 48 00 originating in Aruba.

16. As evidence of origin, ASAD submitted three movement certificates EUR.1, two of which were stamped by the competent Aruban authorities. As a description of the goods, the certificates EUR.1 state 'cargo rice of ACP origin Guyana which had been processed in Aruba, in accordance with the provisions and annex II of the EEG Council's decision 1991 No. 91/482/EEG' [sic].

17. Following the declaration, the competent customs authorities took random samples for examination at the customs laboratory with regard to their nature and composition. On 17 August 2001 the inspector notified ASAD that verification of the

declaration was being suspended pending the result of that examination. Attached to this 'notice of suspended verification' was a demand for payment in the sum of zero.

18. The analysis of a first sample came to the conclusion that it consisted of approximately two thirds husked rice and one third semi-milled rice. The analysis of a second sample showed that more than half consisted of husked rice and the rest was semi-milled rice with traces of paddy. When both analyses were carried out, the rules governing analysis were applied; these were based on the Additional Note 1 at issue and gave inter alia the following definitions under the heading 'Differentiating between husked, semi-milled and wholly milled rice using a microscope':

'Husked rice: rice from which only the husk has been removed;

Semi-milled rice: rice from which the husk, part of the pericarp and at least part of the germ has been removed.'

19. Based on these findings, the customs laboratory recommended to the inspector that the rice should be classified under commodity code 1006 20 98 of the CN ('husked rice'). On 27 November 2001 the inspector followed that recommendation, classified the rice under that commodity code and sent a demand for payment of customs duties in the sum of NLG 541 394.80 (EUR 245 674.25) to ASAD.

20. ASAD continued to take the view that the rice should be classified under commodity code 1006 30 48 of the CN ('semi-milled rice') or that Article 220(2)(b) of the Community Customs Code should at least preclude the demand for payment; it lodged an unsuccessful objection and brought subsequent judicial proceedings against the demand for payment.

21. The referring court is assuming that at least part of the pericarp had been removed from the whole of the rice. It therefore takes the view that under the HS and the CCC Explanatory Notes the rice should be classified under tariff subheading 1006.30 of the HS. It considers that the sample examinations did not come to the same conclusion because Additional Note 1(f) and the rules governing analysis based on it also require part of the germ to be removed. Because of the different requirements, the court considers the conditions for tariff subheading 1006.30 of the HS to have been fulfilled but not those for tariff subheading 1006 30 48 of the CN. The additional criterion created 'tariff subheading jumping'.

22. However, when the HS Convention was concluded the Community undertook not to alter the scope of the subheadings of the HS. Since the Additional Note is therefore in conflict with the HS, its validity is doubtful because of the Community's obligations under international law.

23. If Additional Note 1 should be valid, the referring court is questioning whether ASAD was entitled to rely on it to claim the preferential tariff for semi-milled rice from Aruba. In the opinion of the referring court, it was possible for ASAD to have had doubts as to the validity of Additional Note 1 because of the priority of the HS. The question whether ASAD adequately ensured that the conditions for preferential treatment had been fulfilled, so that the demand for payment was precluded by good faith within the meaning of Article 220(2)(b) of the Community Customs Code, must therefore be governed by the principle of due care.

24. By an order of 28 June 2004, which was received by the Court of Justice on 22 July 2004, the Gerichtshof Amsterdam adjourned the proceedings and is seeking a preliminary ruling from the Court of Justice on the following questions:

(1) Is Additional Note (EC) 1 to Chapter 10 of the Common Customs Tariff, as set out in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, valid in so far as it lays down requirements in respect of the term 'semi-milled rice' that differ from those laid down in the Customs Cooperation Council's Explanatory Note to subheading 1006 of the Harmonised System?

(2) If the answer to the first question is in the affirmative, is it possible for an appellant to plead good faith pursuant to the fourth subparagraph of Article 220(2)(b) of the Community Customs Code in a situation where the appellant was or ought to have been aware of Additional Note (EC) 1(f) to Chapter 10 of the CN but did not know or may at least have had doubts as to whether that note was valid in the light of the different description set out in the Customs Cooperation Council's Explanatory Note to subheading 1006 of the Harmonised System?

25. ASAD, the inspector, the Commission and the Netherlands Government have submitted written observations in the proceedings before the Court of Justice.

IV — Legal appraisal

A — *The first question: the validity of Additional Note 1*

26. In the first question the referring court essentially seeks to establish whether Additional Note 1 is invalid on grounds of incompatibility with the HS.

27. The Community is a party to the International Convention on the Harmonised System. It is therefore bound by its provisions. Under Article 300(7) EC, international law obligations of the Community enjoy an 'intermediate status', that is to say, they take effect subject to primary law, but take precedence over Community secondary law. Community secondary law must therefore be interpreted in line with the requirements of the HS. The CN is based on a regulation and is therefore classified as Community secondary law.

28. Under Article 3(1)(a) of the HS Convention, the Community undertakes to use the headings and subheadings of the HS without modifying their scope. [4] The Community has therefore given an undertaking in international law not to draw up any rules on the classification of goods that result in classification in the CN under a different subheading to the relevant HS subheading.

29. The question here is whether the effect of Additional Note 1 is such that rice from which more than just the husk has been removed should be classified under subheading 1006 20 of the CN even though it would be classified in the HS under subheading 1006.30. If Additional Note 1 were therefore to create such 'tariff subheading jumping', the doubts expressed by the referring court as to its validity would be justified.

1. Classification of rice under the HS

30. The HS does not provide any definition of its subheadings 1006.10 to 1006.40. However, it must be inferred from the descriptions and layout of the subheadings that subheading 1006.10 of the HS is intended to cover untreated paddy rice, subheading 1006.20 of the HS is intended to cover husked rice from which only the husk has been removed, subheading 1006.30 of the HS is intended to cover all other treated rice and subheading 1006.40 of the HS is intended to cover broken rice that results from treatment of the rice. [5]

4 — See point 6 of this Opinion.

5 — See points 7 and 8 of this Opinion.

31. It is apparent, in particular, from the wording of subheading 1006.20 of the HS, the English version of which gives the description 'brown rice' and the French version of which also states 'riz brun' (brown rice) and 'riz cargo' (cargo rice), that only rice from which just the husk has been removed and which still contains the whole of its pericarp is to be classified under this subheading. Otherwise, the rice would no longer be brown. Furthermore, this reflects both common understanding and established trade practices, as argued inter alia by the Commission.

32. From the listing of both semi-milled and wholly milled rice and from the irrelevance of further treatment — such as polishing or glazing — to its classification, it follows that subheading 1006.30 of the HS is intended to encompass all other treated rice that does not constitute broken rice under subheading 1006.40 of the HS.

33. The wording and layout of the subheadings of the HS therefore indicate that rice is to be classified under subheading 1006.30 of the HS as soon as more than just the outer husk has been removed. Removal of just part of the pericarp therefore leads to classification under subheading 1006.30 of the HS.

34. This interpretation is confirmed by the CCC Explanatory Notes. [6] These state that subheading 1006.20 of the HS covers rice from which the husk has been removed but which is, in the English version: 'still enclosed in the pericarp', or which still retains its pericarp (in the French version: 'conserve encore sa pellicule propre'). Furthermore, semi-milled rice is defined there as whole rice grains from which the pericarp has been partly removed. This fits perfectly with the above interpretation.

35. It is settled case-law that the CCC Explanatory Notes may be an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force. [7]

2. Classification of rice under the CN

36. Subheadings 1006 10, 1006 20, 1006 30 and 1006 40 of the CN use the same wording and system as the HS subheadings. It must therefore firstly be noted that the

6 — See points 9 and 10 of this Opinion.

7 — See Case C-328/97 *Glob-Sped* [1998] ECR I-8357, paragraph 26, and Case C-201/96 *LTM* [1997] ECR I-6147, paragraph 17.

classification of rice according to the wording and system of subheadings in the CN is identical to its classification under the HS.

37. Additional Note 1 to the CN also certainly offers explanatory definitions for rice in its various stages of treatment.

38. The definitions for paddy rice and husked rice in letters (d) and (e) of Additional Note 1 are identical to those of the CCC and to the interpretation of the HS subheadings. In particular, for subheading 1006 20 'husked rice' is defined as rice from which *only* the husk has been removed. Nor does Additional Note 1(e) therefore classify rice that has undergone further treatment — for example, rice from which part of the pericarp has also been removed — under subheading 1006 20.

39. Conversely, however, the definitions in Additional Note 1(f) and (g) appear to indicate differences from the requirements of the HS and the CCC Explanatory Notes. For semi-milled rice, Additional Note 1(f) appears to require part of the germ to be removed in addition to the removal of the husk and part of the pericarp, thereby laying down an additional criterion.

40. However, such an interpretation would be inconsistent with the system of subheadings and inconsistent with Additional Note 1(e). It would mean that rice from which part of the pericarp has been removed but where the germ has not been touched would not have any classification. More than just the husk would have been removed, so that the rice could no longer be deemed husked brown rice. However, not enough would have been removed for it to be classified as semi-milled rice.

41. However, legislation should, if possible, be interpreted in such a way as to avoid inconsistencies and prevent conflict with higher-ranking law. A different interpretation, which avoids such inconsistencies and conflicts, is therefore preferable.

42. Thus, mention of the germ in Additional Note 1(f) can also serve to distinguish semi-milled rice from 'wholly milled rice'. It is then clear that removal of part of the germ does not preclude classification of the rice as semi-milled rice. It is also apparent from Additional Note 1(g) that in the case of wholly milled rice the germ must have been completely removed.

43. If reference to the germ is taken as the criterion for clarifying the distinction

between semi-milled rice and wholly milled rice, there is no threat of 'tariff subheading jumping' since both types of rice are to be classified under the same subheading 1006 30. Any possible gaps in classification are also avoided and the system of subheadings and notes is maintained.

44. Additional Note 1(f) must therefore be interpreted as meaning that mention of the removal of part of the germ does not constitute another requirement for classification of rice as 'semi-milled' as distinct from 'husked', but simply makes it clear that removal of part of the germ does not immediately lead to its classification as 'wholly milled'.

3. Conclusion

45. Under both the CN and the HS, rice from which more than just the husk has been removed is to be classified under subheading 1006 30. Additional Note 1 does not lay down any requirements for classification which differ from those in the HS and does not create 'tariff subheading jumping'. There cannot therefore be any doubt as to the validity of Additional Note 1.

B — *The second question: requirements in relation to good faith in the fourth subparagraph of Article 220(2)(b) of the Customs Code*

46. The referring court submits its second question in the event of Additional Note 1 being valid. That condition is fulfilled. When stating that condition, however, the referring court was assuming that in the case of rice such as that in the main proceedings Additional Note 1 would result in classification under subheading 1006 20 98 and would therefore not only be in conflict with the HS but would also justify the demand for payment sent to ASAD the subject of the main proceedings. It is only in that eventuality that the further question arises as to whether ASAD can plead good faith pursuant to the fourth subparagraph of Article 220(2)(b) of the Community Customs Code in order to avoid payment. According to the above findings, however, this is not the case. Hence, there is no need to answer the second question referred to the Court for a preliminary ruling.

V — Conclusion

47. In the light of the above analysis, I propose that the Court answer the first question referred by the Gerechtshof Amsterdam as follows:

Examination of the first question referred to the Court has revealed no factor of such a kind as to affect the validity of Additional Note 1 to Chapter 10 of the Combined Nomenclature, as set out in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff. It lays down no requirements of the concept of 'semi-milled rice' that differ from those under the Harmonised System and the Customs Cooperation Council's Explanatory Notes.