JUDGMENT OF THE COURT (Second Chamber)

20 November 2008 *

In Case C-375/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 13 July 2007, received at the Court on 3 August 2007, in the proceedings

Staatssecretaris van Financiën,

v

Heuschen & Schrouff Oriëntal Foods Trading BV,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, J. Makarczyk, P. Kūris and C. Toader (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: V. Trstenjak,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 22 May 2008,

after considering the observations submitted on behalf of:

— Heuschen & Schrouff Oriëntal Foods Trading BV, by H. de Bie, advocaat,

— the Netherlands Government, by C. Wissels, C. ten Dam and M. Mol, acting as Agents,

— the Greek Government, by K. Georgiadis, Z. Chatzipavlou and I. Pouli, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

— the Commission of the European Communities, by M. Patakia, assisted by F. Tuytschaever, advocaat,

after hearing the Opinion of the Advocate General at the sitting on 4 September 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns, first, the tariff heading applicable to the importation of rice paper and the possible invalidity of Commission Regulation (EC) No 1196/97 of 27 June 1997 concerning the classification of certain goods in the combined nomenclature (OJ 1997 L 170, p. 13) ('the Classification Regulation') and, secondly, the rights and powers of a national court before which an appeal against a decision concerning post-clearance recovery of import duties is brought, when the Commission of the European Communities has already made certain factual or legal assessments in respect of the import transactions in question.

2 The reference has been made in the course of proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) and Heuschen & Schrouff Oriëntal Foods Trading BV ('H & S') regarding the tariff classification of rice sheets, also called 'rice paper'.

Legal context

Community law

Legislation relating to the tariff classification of rice paper

3 Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1) established

a complete nomenclature of goods being imported and exported in the European Community ('the CN'). That nomenclature is set out in Annex I to Regulation No 2658/87.

4 Subheadings 1901 90 99 and 1905 90 20 of the CN, in the version resulting from Commission Regulation (EC) No 1624/97 of 13 August 1997 amending Annex I to Regulation No 2658/87 (OJ 1997 L 224, p. 16), were potentially applicable in the present case.

5 Headings 1901 and 1905 of the CN and the corresponding subheadings are as follows:

'1901	Malt extract; food preparations of flour, meal, starch or malt extract, not containing cocoa …, not elsewhere specified or included; food preparations of goods of headings Nos 0401 to 0404, not containing cocoa …, not elsewhere specified or included:
…	
1901 90 99	— — — Other:
…	
1905	Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products:
…	
1905 90	— Other:

…	
1905 90 20	— — Communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products.’

6 The Dutch version of the CN describes heading 1905 and the corresponding subheadings as follows:

‘1905	Brood, gebak, biscuits en andere bakkerswaren, ook indien deze producten cacao bevatten; ouwel in bladen, hosties, ouwels voor geneesmiddelen, plakouwels en dergelijke producten van meel of van zetmeel
…	
1905 90	— andere:
…	
1905 90 20	— — ouwel in bladen, hosties, ouwels voor geneesmiddelen, plakouwels en dergelijke producten, van meel of van zetmeel.’

7 In order to ensure uniform application of the CN within the Community, the Commission may, under the first indent of Article 9(1)(a) of Regulation No 2658/87, adopt regulations for the classification of specific goods in the CN.

8 According to the Annex to the Classification Regulation, 'Food preparation[s], in the form of dry, translucent sheets, of different sizes, made from rice flour, salt and water' are covered by subheading 1905 90 20. It is also stated in that annex that '[t]hese sheets are, after being soaked in water …, generally used to make the "wrappers" for spring rolls and similar products'.

9 The International Convention on the Harmonised Commodity Description and Coding System ('the HS'), concluded in Brussels on 14 June 1983, and the Protocol of Amendment thereto of 24 June 1986 ('the HS Convention') were approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).

10 Under Article 3(1) of the HS Convention, each Contracting Party undertakes to ensure that its customs tariff and statistical nomenclatures will be in conformity with the HS, to use all the headings and subheadings of the HS without addition or modification, together with their related codes, and to follow the numerical sequence of that system. The same provision provides that each Contracting Party must also undertake to apply the general rules for the interpretation of the HS and all the section, chapter and subheading notes of the HS, and not to modify their scope.

11 The Customs Cooperation Council, now the World Customs Organisation, established by the International Convention establishing that council, concluded at Brussels on 15 December 1950, is to approve, under the conditions laid down in Article 8 of the HS Convention, the Explanatory Notes and the Classification Opinions adopted by the HS Committee.

12 The explanatory note of the Commission relating to subheading 1905 90 20 of the CN refers to the 'HS Explanatory Notes to heading 1905, paragraph (B)'.

13 The HS explanatory note relating to heading 1905 reads as follows:

'…

(A) Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa.

…

(B) Communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products.

This heading covers a number of products made from flour or starch pastes, generally baked in the form of discs or sheets. They are used for various purposes.

…

Rice paper consists of thin sheets of baked and dried flour or starch paste. It is used for coating certain confectionary articles, particularly nougat. …'

Legislation relating to waiver of post-clearance entry in the accounts and to the remission of import duties

— Waiver of post-clearance entry of customs duties in the accounts

14 Article 220(2) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 (OJ 1997 L 17, p. 1), ('the Customs Code') provides:

'2. … 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;

…'

15 Article 869 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 1677/98 of 29 July 1998 (OJ 1998 L 212, p. 18), ('the Implementing Regulation') provides:

'The customs authorities shall themselves decide not to enter uncollected duties in the accounts:

…

(b) in cases in which they consider that the conditions laid down in Article 220(2)(b) of the [Customs] Code are fulfilled, provided that the amount not collected from the operator concerned in respect of one or more import or export operations but in consequence of a single error is less than [EUR] 50 000;

…'

16 Article 871 of the Implementing Regulation is worded as follows:

'In cases other than those referred to in Article 869, where the customs authorities either consider that the conditions laid down in Article 220(2)(b) of the Code are fulfilled or are in doubt as to the precise scope of the criteria of that provision with regard to a particular case, those authorities shall submit the case to the Commission, so that a decision may be taken in accordance with the procedure laid down in Articles 872 to 876. The case submitted to the Commission shall contain all the information required for a full examination. It must also contain a signed statement from the person concerned with the case to be brought before the Commission certifying that he has read the case and stating, either that he has nothing to add, or listing all the additional information which he considers should be included.

As soon as it receives the case the Commission shall inform the Member State concerned accordingly.

Should it be found that the information supplied by the Member State is not sufficient to enable a decision to be taken on the case concerned in full knowledge of the facts, the Commission may request that additional information be supplied.'

17 The first paragraph of Article 873 of the Implementing Regulation states:

'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 the circumstances under consideration are or are not such that the duties in question need not be entered in the accounts.'

— Repayment or remission of customs duties

18 Under Article 239 of the Customs Code:

‘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 …’

19 Article 905 of the Implementing Regulation provides:

'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.

However, except if the decision-making customs authority is in doubt, it can decide itself to grant repayment or remission of the duties in cases in which it considers that the conditions laid down in Article 239(1) of the Code are fulfilled, provided that the amount concerned per operator in respect of one or more import or export operations, but arising from one and the same special situation, is less than [EUR] 50 000.

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.

2. The case sent to the Commission shall include all the facts necessary for a full examination of the case presented. It shall also include a statement, signed by the applicant for repayment or remission, certifying that he has read the case and stating either that he has nothing to add or listing all the additional information that he considers should be included.

As soon as it receives the case the Commission shall inform the Member State concerned accordingly.

Should it be found that the information supplied by the Member State is not sufficient to enable a decision to be taken on the case concerned in full knowledge of the facts, the Commission may ask for additional information to be supplied.

…'

20 The first paragraph of Article 907 of the Implementing Regulation provides:

'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.'

National law

21 Article 8:72(4) of the Algemene Wet Bestuursrecht (General Law on administrative law) provides:

'If the court declares the appeal well founded, it may order the administrative authority to adopt a new decision or carry out a different measure in compliance with its judgment, or it may rule that its judgment takes the place of the annulled decision or the annulled part thereof.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 H & S is a Netherlands undertaking engaged in production and trade which supplies, among others, restaurant owners with Asian foodstuffs. It has been importing rice paper from Vietnam for that purpose for many years.

23 H & S was already importing that product in 1996 under subheading 1901 90 99 of the CN. That tariff classification was accepted on numerous occasions by the Netherlands customs authorities ('the customs authorities'), even after inspections and analyses carried out on samples of the imported consignments.

24 On 27 June 1997, the Commission adopted the Classification Regulation, which provides that the goods in question in fact come under subheading 1905 90 20 of the CN. That regulation was published in the *Official Journal of the European Communities* on 28 June 1997 and entered into force on 19 July 1997.

25 H & S, however, continued to classify the rice paper which it imported under subheading 1901 90 99. The customs authorities also continued to accept its declarations, on the last occasions on 14 July 1997 and 16 March 1998. Then, on 16 March 1998, the customs authorities became aware of the incorrect classification and

informed H & S that the goods were covered by the heading laid down by the Classification Regulation, namely subheading 1905 90 20 of the CN. Thereafter, H & S declared its foodstuffs under that heading.

26 In the course of 2000, the customs authorities informed H & S that they intended to proceed with post-clearance recovery of the duties which ought to have been paid under subheading 1905 90 20 of the CN in respect of the period from 25 November 1997 to 2 February 1998.

27 H & S thereupon applied for remission of those duties. The Commission, to which an application was submitted in accordance with Article 905 of the Implementing Regulation on 19 September 2002, adopted Decision REM 19/2002 on 17 June 2004 finding that remission of import duties was not justified in that particular case ('the decision of 17 June 2004'). That decision was disputed by H & S in an action for annulment brought on 23 September 2004 before the Court of First Instance of the European Communities. H & S appealed against the Court of First Instance's judgment of 30 November 2006 in Case T-382/04 *Heuschen & Schrouff Oriëntal Foods* v *Commission*, not published in the ECR, which dismissed that action, the appeal being registered at the Registry of the Court as Case C-38/07 P.

28 On 22 November 2000, the customs authorities sent H & S a notice for recovery of NLG 645 399.50 (EUR 292 869.52). In response to an objection lodged by H & S, the Inspector confirmed the demands for payment, with the exception of a sum of NLG 13 650.30, following the annulment of a customs declaration.

29 On 29 March 2001, H & S appealed to the Tariefcommissie (Customs and Excise Tribunal), which was replaced, in the course of the proceedings, by the Gerechtshof

te Amsterdam (Amsterdam Regional Court of Appeal). On 7 December 2004, the Gerechtshof te Amsterdam ruled that the appeal was well founded and set aside the Inspector's decision and the demands for payment. Although the Gerechtshof confirmed that the rice sheets were covered by subheading 1905 90 20 of the CN, it found that the erroneous application of subheading 1901 90 99 of the CN stemmed from an error on the part of the customs authorities which could not reasonably have been detected by H & S and which made possible, pursuant to Article 220 of the Customs Code, waiver of the post-clearance recovery of the duties thereby avoided.

30 The Staatssecretaris van Financiën appealed in cassation to the Hoge Raad against the application by the Gerechtshof te Amsterdam of Article 220 of the Customs Code, whilst H & S lodged a cross-appeal for a declaration that its goods were in fact covered by subheading 1901 90 99 of the CN.

31 According to the order for reference, it is common ground that the imported goods consist of rice flour, water and salt, which are blended and kneaded and then pressed and dried. Those goods are not intended for consumption without first being heat-treated.

32 As regards the cross-appeal, the referring court states that, according to the Explanatory Notes to the HS, heading 1905 of the CN is characterised less by the fact that it relates to baked goods than by the fact that it concerns goods which are thin in form.

33 However, it states, it is also possible to maintain, on the basis of the Court's case-law, that headings 1901 and 1905 of the CN are distinguishable on the ground that the former heading relates to unbaked goods whereas the latter concerns baked goods.

34 As the Classification Regulation places rice sheets unreservedly under heading 1905 of the CN, the Hoge Raad der Nederlanden takes the view that the Court of Justice must be asked to rule on the validity of that regulation.

35 As regards the main appeal, the Hoge Raad states that the Gerechtshof te Amsterdam accepted, in its decision of 7 December 2004, that the three criteria relating to the detectability of the error on the part of the customs authorities and necessary for the application of Article 220 of the Customs Code had been met, even though the Commission had decided, on 17 June 2004, that those same criteria had not been met as regards the assessment of the trader's diligence for the purposes of the application of Article 239 of the Customs Code and that decision was upheld by the Court of First Instance in its judgment in *Heuschen & Schrouff Oriëntal Foods* v *Commission*, which rejected H & S's action brought against the decision of 17 June 2004.

36 According to the Hoge Raad, the question is that of which decision a national customs authority must follow when the Commission and the national court adopt two divergent positions as regards the assessment of the abovementioned three criteria. More specifically, the matter in issue is that of defining the powers of the national court in relation to those of the Commission with respect to the application of those criteria.

37 The Hoge Raad observes that, if the customs authorities take the view that the conditions laid down by the Customs Code may be satisfied, they are required to transmit the case to the Commission, which is then to decide whether or not it is necessary to proceed to post-clearance recovery of the import duties (Article 220 of the Customs Code) or whether remission of those duties is justified (Article 239 of the Customs Code). If that it is done, the uniform application of Community law is ensured.

38 However, the position will be otherwise where the customs authorities decide that the conditions for the application of Article 220 of the Customs Code have not been satisfied. In those circumstances, they do not refer the matter to the Commission and, if the party concerned appeals against the decision of those authorities, it will then be for the national court to decide whether the conditions for dispensing with post-clearance recovery have or have not been met. The uniform application of Community law may then be ensured by the preliminary reference procedure. However, when the decision given by the national court may be subject to appeal, there will be no obligation on that court to stay the proceedings in order to refer a question to the Court of Justice for a preliminary ruling.

39 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do sheets as described in the Annex to [the Classification Regulation] come under heading 1905 of the [CN] if they are prepared from rice flour, salt and water and then dried, but do not undergo any heat treatment?

(2) In the light of the answer to Question 1, is [the Classification Regulation] valid?

(3) Must Article 871 of [the Implementing Regulation] be construed as meaning that if, under the first paragraph of Article 871(1) thereof, there is an obligation on the customs authority to transmit a case to the Commission before it can decide to

dispense with post-clearance recovery in that case, a national court ruling on an appeal by a tax debtor against the decision of the customs authority to proceed (in fact) with post-clearance recovery does not have the power to set aside that post-clearance recovery on the ground of its finding that the conditions laid down in Article 220(2)(b) [of the Customs Code] for (mandatorily) setting aside post-clearance recovery are satisfied, where that finding is not supported by the Commission?

(4) If the answer to Question 3 should be that the fact that the Commission has the power to take a decision in regard to demands for post-clearance recovery of customs duties does not involve any limitation on the jurisdiction of national courts which are called on to rule in an appeal concerning a demand for post-clearance recovery of customs duties, does Community law contain any separate provision which guarantees uniform application of Community law in the specific case where there is a discrepancy between the views of the Commission and those of the national court concerning the criteria to be applied in the context of Article 220 of the Customs Code for the purpose of determining whether a mistake on the part of the customs authority could have been detected by a tax debtor?'

The questions referred for a preliminary ruling

The first and second questions

40 By its first two questions, which it is appropriate to examine together, the Hoge Raad seeks to ascertain, in essence, whether sheets prepared from rice flour, salt and water, which are then dried, but do not undergo any heat treatment, are covered by subheading 1905 90 20 of the CN and, if necessary, whether the Classification Regulation is valid.

— Observations submitted to the Court

41 H & S takes the view that heading 1905 of the CN relates only to baked goods which may be consumed straight away, as the Court suggested in paragraph 12 of the judgment in Case C-12/94 *Uelzena Milchwerke* [1995] ECR I-2397. Consequently, it argues, the Classification Regulation should be declared invalid.

42 The Netherlands, Greek and Italian Governments and the Commission are of the opinion that heading 1905 of the CN does not relate specifically to goods which are baked or may be consumed immediately and that the classification of rice sheets under subheading 1905 90 20 is not contrary to the Combined Nomenclature. They therefore consider that the Classification Regulation is valid.

— The Court's reply

43 First of all, it must be borne in mind that the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in, inter alia, the wording of the relevant tariff heading and in the section or chapter notes (Case C-142/06 *Olicom* [2007] ECR I-6675, paragraph 16 and the case-law cited).

44 In that regard, both the notes which head the chapters of the Common Customs Tariff and the Explanatory Notes to the HS are important means of ensuring the uniform application of the Tariff and as such may be regarded as useful aids to its interpretation (*Olicom*, paragraph 17, and the case-law cited).

45 It is true, as submitted by the appellant in the main proceedings, that the Dutch version of the wording of heading 1905 of the CN, unlike a number of other language versions, does not expressly refer to sheets of flour or starch pastes and other similar products, which must be 'dried'. The Dutch version refers only to goods in the form of sheets.

46 However, according to settled case-law, the need for a uniform interpretation of Community regulations makes it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages (Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 46).

47 As regards heading 1901 of the CN on which H & S relies, that heading, as its wording expressly states, clearly relates only to food preparations of flour, meal, starch or malt extract not specified or included elsewhere in the CN. That heading is thus residual in nature and cannot cover goods the description of which corresponds to other headings of the relevant chapter of the CN. Furthermore, subheading 1901 90 99 of the CN, under which the goods at issue in the main proceedings were declared, corresponds to 'other' goods, that is to say, goods which cannot be classified under any other subheading of the residual heading 1901.

48 As the Advocate General stated at points 43 and 44 of her Opinion, the reference to 'rice paper' or to 'dried' goods is included expressly in the wording of several language versions of subheading 1905 90 20 of the CN.

49 Secondly, contrary to what H & S maintains in its written observations before the Court, none of the language versions refers to the requirement that the goods covered by that subheading must necessarily be baked. The only reference to the state of the goods covered by heading 1905 of the CN and, more particularly, by subheading 1905 90 20 thereof, concerns the fact that they must be in 'dried' form.

50 The Commission's explanatory note relating to subheading 1905 90 20 of the CN refers to the 'HS Explanatory Notes to heading 1905, paragraph (B)'. As the Netherlands Government has pointed out, those notes refer to a number of products made from flour or starch which are generally baked in the form of discs or sheets and are used for various purposes. Thus, according to the Commission's and the HS Explanatory Notes, the fact of being baked is not a characteristic which is necessary in order for a product to be classified under subheading 1905 90 20 of the CN.

51 Lastly, it cannot be inferred from paragraph 12 of *Uelzena Milchwerke* that the Court intended to restrict the application of heading 1905 of the CN to 'baked' goods alone. It is true that in paragraph 12 of that judgment the Court held that the classification of '[b]read, pastry, cakes, biscuits and other bakers' wares…' under heading 1905 and of '[s]weet biscuits; waffles and wafers' under subheading 1905 30 presupposed that the goods concerned had been cooked at least once. However, it is clear that that assessment related only to the first category of products in the wording of heading 1905, namely that of '[b]read, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa', which is covered by paragraph A of the HS explanatory note relating to heading 1905.

52 Having regard to the foregoing, the classification under subheading 1905 90 20 of the CN of foodstuffs prepared from rice flour, salt and water in the form of dried, translucent sheets or discs of various sizes is in accordance with the wording of that subheading.

53 The answer to the first two questions must therefore be that:

— sheets prepared from rice flour, salt and water which are then dried, but do not undergo any heat treatment, are covered by subheading 1905 90 20 of the CN;

— examination of the question referred has disclosed no factor of such a kind as to affect the validity of the Classification Regulation.

The third and fourth questions

54 By its third and fourth questions, which it is appropriate to deal with together, the Hoge Raad essentially asks whether, when the Commission has already decided in a particular case on the conditions for the application of the second indent of Article 239(1) of the Customs Code, a national court ruling on an appeal against a notice for recovery of import duties relating to the case is bound by that Commission decision when it assesses that case under Article 220 of the Customs Code.

— Observations submitted to the Court

55 H & S is of the opinion that a national court, ruling on the conditions for the application of Article 220 of the Customs Code to a particular case, cannot be bound by a Commission decision on that case under Article 239 of the Customs Code since the preliminary reference procedure ensures that Community law is applied uniformly.

56 The Netherlands, Greek and Italian Governments and the Commission take the view that such a Commission decision is binding on the national court and that, if it wishes to deviate from it, it must either stay the proceedings until a final judgment has been given by the Community Courts before which an action for the annulment of that decision has been brought or seek a preliminary ruling from the Court of Justice as to its validity.

— The Court's reply

57 It must be stated at the outset that the procedures provided for in Articles 220 and 239 of the Customs Code pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations (see Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 46, and *Söhl & Söhlke*, paragraph 54).

58 It follows that the conditions to which the application of those articles is made subject, that is to say, in particular, that no obvious negligence may be attributed to the person concerned in the case of the second indent of Article 239(1) of the Customs Code and that no error has been made by the customs authorities which could reasonably have been detected by the person liable in the case of Article 220 of the Customs Code, must be interpreted in the same manner (see, to that effect, *Söhl & Söhlke*, paragraph 54).

59 Consequently, as the Court has previously held, in order to determine whether or not a trader has demonstrated 'obvious negligence', within the meaning of the second indent of Article 239(1) of the Customs Code, it is appropriate to apply by analogy the criteria used in the context of Article 220 of the Customs Code to ascertain

whether or not an error committed by the customs authorities was detectable by a trader (see *Söhl and Söhlke*, paragraphs 55 and 56, and Case C-156/00 *Netherlands* v *Commission* [2003] ECR I-2527, paragraph 92).

60 Under the procedures provided for in Articles 871 and 905 of the Implementing Regulation, in cases other than those referred to in Articles 869 and 899 of that regulation, where the customs authorities consider that the conditions laid down respectively in Article 220(2)(b) and the second indent of Article 239(1) of the Customs Code have been satisfied, those authorities or the Member State to which they belong must submit the case to the Commission in order for it to determine whether those conditions have in fact been satisfied.

61 In that regard, it appears that, with the exception of the specific cases provided for by the legislation, the Community legislature intended to entrust to the assessment of the Commission those cases in which budgetary revenue payable as a matter of course ought to be waived, on the basis that customs duties levied on the importation of goods into Community territory constitute own resources of the budget of the European Communities. Such a finding is borne out by the powers conferred on the Commission by Articles 875 and 908(3) of the Implementing Regulation, pursuant to which the Commission may, under conditions which it is to determine, authorise one or more Member States to refrain from post-clearance entry of duties in the accounts and repay or remit duties in cases involving issues of fact and law comparable to those which the Commission has already examined in previous decisions.

62 As the Court has already stated, the objective of conferring on the Commission a power of decision in regard to the post-clearance recovery of customs duties is to ensure the uniform application of Community law. That is likely to be jeopardised in cases where an application to waive post-clearance recovery is allowed, since the assessment which a Member State may make in taking a favourable decision

is likely, in actual fact, owing to the probable absence of any appeal, to escape any review by means of which the uniform application of the conditions laid down in the Community legislation may be ensured. On the other hand, that is not the case where the national authorities proceed to effect recovery, whatever the amount in issue, because, in those circumstances, it is still open to the person concerned to challenge such a decision before the national courts (Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 42 and the case-law cited).

63 In such cases, it is thus for the national court to assess whether, having regard to the circumstances of the case, those conditions have been satisfied and, as a result, it will then be possible for the uniformity of Community law to be ensured by the Court of Justice through the preliminary ruling procedure (see, to that effect, Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535, paragraph 13, and *Conseil général de la Vienne*, paragraph 42 and the case-law cited).

64 However, where an application for remission of import duties has been submitted to the Commission by a Member State for the purposes of Article 239 of the Customs Code and the Commission has already adopted a decision containing assessments of fact and law in a particular case concerning import operations, such assessments bind all the authorities of the Member State to which it was addressed, in accordance with Article 249 EC, including the courts which have to assess the same case under Article 220 of the Customs Code (see, to that effect, Case C-413/96 *Sportgoods* [1998] ECR I-5285, paragraph 41).

65 Therefore, the requirements connected with the uniform application of Community law demand that, in respect of the same import transactions carried out by a trader, a Commission decision on the existence of 'obvious negligence' on the part of that trader cannot be deprived of effect by a subsequent decision of a national court ruling on whether or not the error committed by the national customs authorities was 'detectable' by that same trader.

66 A national court, such as the Gerechtshof te Amsterdam in the present case, ruling on an appeal against a notice for recovery of import duties, must therefore, when it becomes aware in the course of the proceedings before it that the matter has been referred to the Commission pursuant to Article 220 or Article 239 of the Customs Code, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of those articles (see, by analogy, Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 47, and Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 51). That means that the referring court, which may not substitute its own determination for that of the Commission, can stay proceedings pending the Commission's decision (see, to that effect, Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 48).

67 In any event, as the Court has pointed out in, inter alia, proceedings relating to Articles 81 EC and 82 EC, if a national court has doubts as to the validity or interpretation of an act of a Community institution it may, or must, in accordance with the second and third paragraphs of Article 234 EC, refer a question to the Court of Justice for a preliminary ruling (see *Masterfoods and HB*, paragraph 54).

68 If, as here in the main proceedings, the importer has, within the period prescribed in the fifth paragraph of Article 230 EC, brought an action for annulment of a Commission decision in respect of an application for remission of duties pursuant to Article 239 of the Customs Code, it is for the national court to decide whether to stay the proceedings until a definitive decision has been given in the action for annulment or to refer a question to the Court of Justice for a preliminary ruling as to validity (see, by analogy, *Masterfoods and HB*, paragraph 55).

69 By contrast, if the Commission takes a decision on a particular case under Article 239 of the Customs Code, it cannot be bound by a decision given previously by a national court ruling on the conditions for the application to that same case of Article 220 of the Customs Code (see, by analogy, *Masterfoods and HB*, paragraph 48).

70 Having regard to the foregoing, the answer to the third and fourth questions must be that:

— where an application for remission of import duties has been submitted to the Commission by a Member State under Article 239 of the Customs Code and the Commission has already adopted a decision containing assessments of fact and law in a particular case concerning import transactions, such assessments bind all the authorities of the Member State to which that decision was addressed, in accordance with Article 249 EC, including the courts which have to assess that case under Article 220 of the Customs Code;

— if the importer has, within the period prescribed in the fifth paragraph of Article 230 EC, brought an action for annulment of a Commission decision in respect of an application for remission of import duties pursuant to Article 239 of the Customs Code, it is for the national court to decide whether to stay the proceedings until a definitive decision has been given in the action for annulment or to refer itself a question to the Court for a preliminary ruling as to validity.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. Sheets prepared from rice flour, salt and water which are then dried, but do not undergo any heat treatment, are covered by subheading 1905 90 20 of the Combined Nomenclature 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, in the version resulting from Commission Regulation (EC) No 1624/97 of 13 August 1997.

2. **Examination of the question referred has disclosed no factor of such a kind as to affect the validity of Commission Regulation (EC) No 1196/97 of 27 June 1997 concerning the classification of certain goods in the combined nomenclature.**

3. **Where an application for remission of import duties has been submitted to the Commission of the European Communities by a Member State under Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996, and the Commission has already adopted a decision containing assessments of fact and law in a particular case concerning import transactions, such assessments bind all the authorities of the Member State to which that decision was addressed, in accordance with Article 249 EC, including the courts which have to assess that case under Article 220 of that regulation.**

If the importer has, within the period prescribed in the fifth paragraph of Article 230 EC, brought an action for annulment of a decision of the Commission of the European Communities in respect of an application for remission of import duties pursuant to Article 239 of that regulation, it is for the national court to decide whether to stay the proceedings until a definitive decision has been given in the action for annulment or to refer itself a question to the Court of Justice of the European Communities for a preliminary ruling as to validity.

[Signatures]