

JUDGMENT OF THE COURT (Third Chamber)

22 June 2006 \*

In Case C-419/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour d'appel de Poitiers (France), made by decision of 21 September 2004, received at the Court on 30 September 2004, in the proceedings

**Conseil général de la Vienne**

v

**Directeur général des douanes et droits indirects,**

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet, S. von Bahr, U. Löhmus (Rapporteur) and A. Ó Caoimh, Judges,

\* Language of the case: French.

Advocate General: A. Tizzano,  
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 September 2005,

after considering the observations submitted on behalf of:

- Conseil général de la Vienne, by J.-M. Salva and R. Barazza, avocats,
- the French Government, by G. de Bergues and A. Colomb, acting as Agents,
- the Slovak Government, by R. Procházka, acting as Agent,
- the Commission of the European Communities, by J. Hottiaux and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2005,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Article 871 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for

the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (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').

- 2 The reference was made in the course of proceedings between the Conseil général de la Vienne (Local Council of the Vienne Department) and the Directeur général des douanes et droits indirects (Director-General of Customs and Indirect Taxes) regarding payment of a sum of EUR 221 286 corresponding to import duties which the latter regarded as having been eluded.

### **Legal context**

- 3 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) ('the Community Customs Code') is worded as follows:

'Except in the cases referred to in the second and third subparagraphs of Article 217 (1), subsequent entry in the accounts [of duty resulting from a customs debt] shall not occur where:

...

- (b) the amount of duty legally owed failed to be 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;

...'

4 As set out in Article 235 of the Community Customs Code:

'The following definitions shall apply:

...

(b) "remission" means either a decision to waive all or part of the amount of a customs debt or a decision to render void an entry in the accounts of all or part of an amount of import or export duty which has not been paid.'

5 The second and third subparagraphs of Article 236(1) of the Community Customs Code provide:

'Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.'

6 Article 869 of the implementing regulation states:

'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 [Community 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;

...'

7 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 [Community Customs] 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.’

### **The main proceedings and the question referred for a preliminary ruling**

- 8 The Conseil général de la Vienne, in its capacity as member of the supervisory board of the local semi-public company which operates the Parc du Futuroscope (‘Futuroscope’), on several occasions acquired audiovisual equipment from a Canadian supplier, IMAX Corporation (‘IMAX’). The Conseil général de la Vienne remains owner of that equipment, the operation of which was entrusted to Futuroscope.

- 9 During March and April 1993, the Conseil général de la Vienne imported a projection system called 'Solido' under a contract which it concluded, on behalf of Futuroscope, with IMAX. Under that contract, the purchase price of the equipment at issue amounted to USD 3 431 650. Furthermore, an additional royalty of FRF 1.80 (EUR 0.27) was to be paid to IMAX in respect of the purchase of each entry ticket to Futuroscope.
- 10 The Conseil général de la Vienne declared the sum of USD 3 431 650 as the value of the imported equipment. During an audit carried out by the French customs authorities ('the customs authorities') following customs clearance, it was found that the additional royalties levied on the entry tickets from 1993 to 1995 had not been declared as forming part of the customs value of that equipment. In July 1997, the inquiry was brought to an end with a formal infringement report which concluded that there had been a false declaration of the customs value of the equipment.
- 11 The Conseil général de la Vienne brought the matter before the Commission de conciliation et d'expertise douanière (Customs Assessment and Arbitration Board) which, in April 1999, found that the customs value of the imported equipment had been reduced by the amount of the additional royalties, in the sum of FRF 5 517 281. In September 1999, the Conseil applied to the Directorate-General of Customs and Indirect Taxes, on the basis of Articles 236 and 239 of the Community Customs Code, for remission of the customs debt claimed. The application was rejected in June 2000.
- 12 Subsequently, the Conseil général de la Vienne brought an administrative appeal before the Minister for the Economy, Finance and Industry. After re-examination of the file and on the instructions of that minister, the Directeur general des douanes et droits indirects informed the Conseil général de la Vienne on 16 July 2001 of his decision to refer the matter to the Commission. By note of 18 September 2001, the customs authorities sent to the Commission a letter in which they explained the reasons which had led to their incorporation of the amount of the additional royalties in the customs value of the imported equipment and asked whether the Commission shared that approach. That request has remained unanswered.

- 13 On 19 July 2001, the customs authorities brought an action against the Conseil général de la Vienne before the Tribunal d'instance de Poitiers (District Court, Poitiers) and sought an order against it for payment of the import duties regarded as having been eluded. By judgment of 20 December 2002, that court ordered the Conseil général de la Vienne to pay the sum claimed.
- 14 The Conseil général de la Vienne appealed against that judgment before the referring court. As it considered that the case before it requires an interpretation of Article 871 of the Community Customs Code (sic), the Cour d'appel de Poitiers (Court of Appeal, Poitiers) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 871 of the Community Customs Code (sic) relating to the recovery of the amount of the customs debt to be interpreted as establishing an essential and obligatory procedure, non-compliance with which will result in nullity, if the national customs authorities have expressed doubts, at any time during the recovery procedure concerning a person liable for payment acting in good faith, as regards the precise scope of the criteria relating to the recovery or the remission of duties resulting from a customs debt which has been eluded because it was not entered in the accounts on the date when that debt should have given rise to recovery (debt relating to the possible incorporation into the purchase price of audiovisual equipment supplied by a Canadian supplier of a flat-rate royalty compulsorily included in the entry price to the amusement park in which the equipment is operated, whether or not the visitor who paid the royalty made use of the equipment)?'

### **The question referred for a preliminary ruling**

#### *Admissibility*

- 15 The French Government submits that the reference for a preliminary ruling must be declared inadmissible.

- 16 First, it submits that recourse to Article 871 of the implementing regulation by the customs authorities of a Member State presupposes that they consider that the conditions laid down in Article 220(2)(b) of the Community Customs Code are fulfilled or that they are in doubt as to the precise scope of the criteria under that provision with regard to a particular case.
- 17 According to the French Government, the main proceedings do not relate to a request for remission of customs duties submitted in respect of the second situation provided for in the second subparagraph of Article 236(1) of the Community Customs Code, which applies when the amount of import duties has been entered in the accounts contrary to Article 220(2) of the Code, but concerns a dispute as to whether a customs debt was justified. The Conseil général de la Vienne applied for remission of import duties in respect of the first situation mentioned in the second subparagraph of Article 236(1) according to which remission of those duties is granted where, when they were entered in the accounts, the amount of such duties was not legally owed. The French Government adds that an operator cannot at the same time dispute the amount of a customs debt and request that a part of the amount not be subsequently entered in the accounts on the basis of an alleged error which was made by the customs authorities.
- 18 Secondly, the French Government observes that the request for an opinion sent to the Commission on 18 September 2001 by the customs authorities related to the customs value of the equipment imported in 1993 and sought to obtain confirmation of their analysis as regards the amount legally owed in the circumstances. If, on the other hand, the customs authorities had intended to refer the matter to the Commission on the basis of Article 871 of the implementing regulation, which would have entailed the matter's being removed from the competence of the Member State concerned, they would not have done so by means of a mere note, but should have sent the file to that institution.
- 19 In that regard, it must be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been

brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, *inter alia*, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27, and Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33).

20 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19).

21 That is not true of the case in the main proceedings.

22 In this case, it is true that an examination of the documents submitted to the Court in these proceedings, including the note of 18 September 2001 which the customs authorities sent to the Commission, seems to show that the main proceedings relate to a request for the remission of customs import duties in respect of the first situation provided for in the second subparagraph of Article 236(1) of the Community Customs Code, namely that in which the amount of customs duties was

not legally owed, and not in respect of the second situation provided for in that provision which justifies recourse to Article 871 of the implementing regulation by the national customs authorities.

- 23 However, it is important to note that it is in the light of, inter alia, those same documents that the Cour d'appel de Poitiers considered, first, that those authorities had been in doubt as to the precise scope of the conditions permitting the person liable for payment to benefit from the absence of subsequent entry in the accounts of customs duties which, according to those authorities, should have been declared by that person in the course of a number of consecutive years, but were not on the ground that it considered, without any allegation of bad faith on its part, that it was not liable for the duties claimed and, second, that the main proceedings could not be regarded unambiguously as a procedure for the remission of a customs debt because they could just as easily be regarded as a recovery procedure.
- 24 Furthermore, it must be borne in mind that the Court must take account, under the division of jurisdiction between the Community judicature and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see, inter alia, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10, and Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paragraph 46).
- 25 Therefore, it appears that the question referred for a preliminary ruling concerns the purpose of the case in the main proceedings, as set out by the national court, and that the answer to the question referred is likely to be of use to that court in deciding whether or not the customs authorities should have submitted the case to the Commission, under Article 871 of the implementing regulation, so that a decision might be taken by it.
- 26 It follows that the reference for a preliminary ruling is admissible.

*Substance*

- 27 Having regard to the facts of the main proceedings and to the wording of the question referred, its examination must relate only to the interpretation of Article 871 of the implementing regulation and not to whether the additional royalties paid to IMAX have to be incorporated in the customs value of the imported equipment.
- 28 The national court expressed no uncertainty in that regard and confined itself to asking the Court about the scope of the obligation imposed on the national customs authorities by Article 871 of the implementing regulation where they have expressed doubts, at any time during the recovery procedure or the procedure for remission of a customs debt, as regards the absence of subsequent entry in the accounts of uncollected customs duties in well-defined circumstances.
- 29 Therefore, it must be concluded that, by its question, the national court is essentially asking whether Article 871 of the implementing regulation is to be interpreted as meaning that it obliges the national customs authorities to submit a case to the Commission so that a decision may be taken by it where, at any time during the recovery procedure or the procedure for remission of a customs debt, those authorities have expressed doubts as regards the absence of entry in the accounts of customs duties which were not collected due to an omission on the part of an importer acting in good faith to declare royalties which should have been incorporated in the customs value of the imported goods, and given notice of their intention to refer the matter to the Commission.
- 30 Before answering the question thus reformulated, the version of Article 871 of the implementing regulation which is applicable *ratione temporis* to the facts of the main proceedings must be identified. In its observations, the French Government submits that it is the version of Article 871 stemming from Commission Regulation

(EC) No 1335/2003 of 25 July 2003 amending Regulation (EEC) No 2454/93 (OJ 2003 L 187, p. 16) which must form the subject-matter of the Court's interpretation and not that referred to by the national court, on the ground that the provision lays down a procedural rule and, therefore, is deemed to apply to all proceedings pending at the time when it entered into force.

31 The French Government submits, in that regard, that under the second paragraph of Article 2 of Regulation No 1335/2003 the amendments it makes to the implementing regulation are to be applied to all cases which had not been submitted to the Commission for a decision prior to 1 August 2003. Since the conditions laid down in Articles 869 and 871 of the implementing regulation for submitting cases to the Commission have been amended and, in particular, the threshold of the amount not collected from an operator has been raised to EUR 500 000, it follows that the customs authorities are not entitled to submit the case to the Commission because the sum claimed in the main proceedings is EUR 221 286.

32 Such an argument cannot be upheld.

33 While it is true that, according to well-established case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (see, inter alia, Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux v Commission* [1993] ECR I-3873, paragraph 22; Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 13; and Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 29), the fact remains that, as the Advocate General observed in points 33 and 34 of his Opinion, the new law applies immediately only in relation to situations which, although they arose at the time when the earlier legislation was in force, continue to produce effects when the new legislation becomes applicable.

34 Clearly, on 1 August 2003 when the amendments made to the implementing regulation by Regulation No 1335/2003 entered into force, the legal situation relevant in the present case no longer produced any effects. In that regard, it is apparent from the documents in the file that on 16 July 2001 the Directeur général des douanes et droits indirects informed the Conseil général de la Vienne of his decision to refer the matter to the Commission, that the Conseil général de la Vienne had proceedings brought against it before the Tribunal d'instance de Poitiers in July 2001 and that the customs authorities sent a request for an opinion to the Commission on 18 September 2001.

35 Consequently, in order to give the national court an answer enabling it to decide whether, as a result of having expressed, at any time during a recovery procedure or a procedure for remission, doubts concerning the absence of subsequent entry in the accounts of uncollected customs duties, the customs authorities should have submitted the case to the Commission so that a decision might be taken by it under Article 871 of the implementing regulation, the Court must interpret the provisions of the implementing regulation in the version thereof stemming from Regulation No 1677/98 which *inter alia* set, in respect of referrals to the Commission, the threshold of uncollected duties at EUR 50 000.

36 Article 220(2)(b) of the Community Customs Code sets out the conditions which must be satisfied if the national customs authorities are to be able not to make a subsequent entry in the accounts of the amount of a customs debt. As regards the procedure for remission of duties, Article 236 of the Code refers to the same conditions to the extent that it envisages, as one of the situations enabling the customs authorities to decide not to collect a customs debt, the fact that the amount thereof has been entered in the accounts contrary to Article 220(2).

37 Those conditions are threefold, namely, an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the good faith of the latter and compliance on the part of the person liable for payment with all the provisions laid down by the legislation in force as regards the customs declaration.

- 38 Those three conditions were already set out as such in Article 5(2) 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 on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1), a regulation which was repealed by the Community Customs Code. According to the settled case-law of the Court, those three conditions must be satisfied cumulatively (see, inter alia, Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 83; Case C-370/96 *Covita* [1998] ECR I-7711, paragraph 24; Case C-15/99 *Sommer* [2000] ECR I-8989, paragraph 35; and *Ilumitronica*, paragraph 37).
- 39 It follows from the wording of Article 871 of the implementing regulation read in conjunction with Article 869 thereof that, in a procedure for recovery of uncollected duties the amount of which reaches the threshold of EUR 50 000, if the national customs authorities are convinced that those conditions are not met they must proceed directly to recovery.
- 40 It is also apparent from those provisions that where the threshold of EUR 50 000 is reached the customs authorities may not act alone, but are required to bring the matter before the Commission and act in concert with it in two situations, namely, if they consider that in the circumstances of the case those conditions are fulfilled or if they are in doubt as to the precise scope of the criteria laid down in Article 220(2)(b) of the Community Customs Code with regard to a particular case. The same is true as regards a procedure for remission of customs duties initiated by the person concerned under Article 236 of that code in conjunction with Article 220(2)(b) thereof.
- 41 In the event of a case being brought before the Commission, the procedure laid down by the implementing regulation ends with a decision determining whether the circumstances examined make it possible not to effect subsequent entry in the accounts of the duties at issue or grant remission thereof. In the context of that procedure, the right to a hearing on the part of the persons concerned is in fact guaranteed and, under Article 873 of the implementing regulation, the Commission takes a decision after consulting a group of experts composed of representatives of all the Member States.

42 As the Court has stated with regard to Article 5 of Regulation No 1697/79, 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. It is then open to the person concerned to challenge such a decision before the national courts. 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 (Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535, paragraph 13; Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 33; and *Faroe Seafood and Others*, paragraph 34).

43 Therefore, as regards the second situation, namely a case where the customs authorities are in doubt, they are required to submit the case to the Commission only where that doubt relates to the precise scope of the criteria laid down in Article 220(2)(b) of the Community Customs Code with regard to a particular case and solely on the basis of the existence of such doubt. On the other hand, if subsequently such doubt disappeared, even after the national customs authorities had expressed their intention to refer the matter to the Commission, they would no longer be required to submit the case to the Commission, and should, acting alone, proceed to effect recovery or refuse remission.

44 In any event, where the doubts on the part of the national customs authorities relate to a matter other than that of the precise scope of the criteria laid down in Article 220(2)(b) of the Code with regard to a particular case, such as the possibility of not subsequently entering in the accounts customs duties not collected due to an omission on the part of an importer to declare royalties which should have been incorporated in the customs value of the imported goods, even though that importer

is acting in good faith, Article 871 of the implementing regulation does not apply and therefore those authorities are not required to submit the case to the Commission so that a decision may be taken by it.

<sup>45</sup> Since good faith on the part of the person liable for payment is only one of the conditions which must necessarily be met before absence of subsequent entry in the accounts of customs duties may be contemplated, it cannot, on its own, oblige the national customs authorities to refer the matter to the Commission under Article 871 of the implementing regulation.

<sup>46</sup> Consequently, the answer to the question referred for a preliminary ruling must be that Article 871 of the implementing regulation must be interpreted as meaning that, in the context of a recovery procedure or a procedure for remission of uncollected customs duties, the national customs authorities are not required to submit the case to the Commission for a decision where the doubts which they had had as regards the precise scope of the criteria laid down in Article 220(2)(b) of the Community Customs Code with regard to a particular case have dissipated, even after those authorities have expressed their intention to refer the matter to the Commission, or where the doubts relate to the subsequent entry in the accounts of customs duties which were not collected due to an omission on the part of an importer acting in good faith to declare royalties which should have been incorporated in the customs value of the imported goods.

## **Costs**

<sup>47</sup> 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 (Third Chamber) hereby rules:

**Article 871 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, as amended by Commission Regulation (EC) No 1677/98 of 29 July 1998, must be interpreted as meaning that, in the context of a recovery procedure or a procedure for remission of uncollected customs duties, the national customs authorities are not required to submit the case to the Commission for a decision where the doubts which they had had as regards the precise scope of the criteria laid down in Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code with regard to a particular case have dissipated, even after those authorities have expressed their intention to refer the matter to the Commission, or where the doubts relate to the subsequent entry in the accounts of customs duties which were not collected due to an omission on the part of an importer acting in good faith to declare royalties which should have been incorporated in the customs value of the imported goods.**

[Signatures]