

JUDGMENT OF THE COURT (Second Chamber)

20 October 2005 \*

In Case C-468/03,

REFERENCE for a preliminary ruling under Article 234 EC from the VAT and Duties Tribunal, London (United Kingdom), made by decision of 29 September 2003, received at the Court on 6 November 2003, in the proceedings

**Overland Footwear Ltd**

v

**Commissioners of Customs & Excise,**

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, C. Gulmann (Rapporteur), R. Schintgen and J. Klučka, Judges,

\* Language of the case: English.

Advocate General: M. Poiares Maduro,  
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 14 April 2005,

after considering the observations submitted on behalf of:

- Overland Footwear Ltd, by R. Cordara QC,
  
- the United Kingdom Government, by K. Manji, acting as Agent, assisted by S. Moore, barrister,
  
- the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,
  
- the Commission of the European Communities, by X. Lewis, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2005,

gives the following

### Judgment

- 1 The reference for a preliminary ruling concerns the interpretation of Articles 29, 32, 33, 78 and 236 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (JO 1992 L 302, p. 1; ‘the Customs Code’).
  
- 2 The reference was made in a dispute between Overland Footwear Ltd (‘Overland’) and the Commissioners of Customs & Excise (‘the Commissioners’) concerning the refund of import customs duties paid on buying commissions included in the declared customs value. It follows an earlier reference for a preliminary ruling by the national court in the same case, and which gave rise to the judgment of 5 December 2002 in Case C-379/00 *Overland Footwear* [2002] ECR I-11133).

### Legal context

- 3 Article 29(1) of the Customs Code provides:

‘The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33 ...’

4 Article 32 of the Code provides:

'1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

(i) commissions and brokerage, except buying commissions,

...

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

4. In this Chapter, the term "buying commissions" means fees paid by an importer to his agent for the service of representing him in the purchase of the goods being valued.

...'

5 Article 33(e) provides:

‘Provided that they are shown separately from the price actually paid or payable, the following shall not be included in the customs value:

...

(e) buying commissions

...’

6 Article 65 provides:

‘The declarant shall, at his request, be authorised to amend one or more of the particulars of the declaration after it has been accepted by customs. The amendment shall not have the effect of rendering the declaration applicable to goods other than those it originally covered.

However, no amendment shall be permitted where authorisation is requested after the customs authorities:

...

(c) have released the goods.’

Article 78, under the heading ‘Post-clearance examination of declarations’, provides:

‘1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.

2. The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods. Such inspections may be carried out at the premises of the declarant, of any other person directly or indirectly involved in the said operations in a business capacity or of any other person in possession of the said document and data for business purposes. Those authorities may also examine the goods where it is still possible for them to be produced.

3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.’

8 Article 236 provides:

‘1. Import duties ... shall be repaid in so far as it is established that when they were paid 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 ... shall be granted when the facts which led to the payment ... of an amount which was not legally owed are the result of deliberate action by the person concerned.

2. Import duties ... shall be repaid ... upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or force majeure.

...’

**The dispute in the main proceedings, the previous reference and the questions now referred**

- 9 At the time of the facts in the main proceedings, Overland, an undertaking established in the United Kingdom, bought products, mainly shoes, manufactured outside the Community and then imported and distributed them in the Community. Wolverine Far East ('Wolverine') was its buying agent in the Far East.
- 10 Overland paid Wolverine a buying commission of 4% of the selling price of the goods for its services as a buying agent. It paid that commission to the manufacturer of the goods, which passed it on to Wolverine on Overland's behalf.
- 11 Before 1 January 1998, import declarations submitted by Overland when entering the goods in question for free circulation indicated as the customs value the amount shown on the manufacturer's invoice. That amount included the buying commission, which was not shown separately. Import customs duties were therefore calculated and paid on that commission also.
- 12 Since 1 January 1998, with the agreement of the Commissioners, Overland has shown the buying commission and the selling price of imported goods separately on its import declarations. Since that date, the Commissioners have not levied duty on the amounts shown as buying commission.
- 13 Under Article 236 of the Customs Code, Overland has sent the Commissioners four applications for repayment of a total of GBP 38 085.45 in import duties paid in



respect of goods imported before 1998. It has argued that part of the value shown on each import declaration corresponded to a buying commission, on which no duties were payable.

- 14 The first three applications, seeking refunds totalling GBP 4 384.29, were allowed by letters of 5 May, 1 July and 24 July 1998, and refunds were made. However, after a re-examination, the Commissioners concluded that their decisions to allow the refunds to Overland had been wrong, on the ground that the duties in question were legally owed. By decisions of 30 November and 16 December 1998, they claimed repayment from Overland of a total of GBP 4 384.29. They confirmed that claim by decisions of 4 and 5 February 1999.
- 15 By letter of 29 October 1998, the Commissioners rejected Overland's fourth application, seeking repayment of GBP 33 701.16. By a second decision of 5 February 1999, they confirmed that rejection.
- 16 Overland brought an action before the VAT and Duties Tribunal, London, against the decision of 4 February 1999 and the two decisions of 5 February 1999.
- 17 By order of 24 March 2000, the VAT and Duties Tribunal, London, decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'On the basis of Council Regulation (EEC) No 2913/92 ("the Customs Code"), in particular Articles 29, 32 and 33 thereof, and the case-law of the Court, where, at the time of customs clearance, an importer inadvertently declares as the price paid or

payable for the goods an amount inclusive of buying commission and inadvertently fails to show the buying commission separately on the import declaration from the price actually paid or payable but, after the goods have been released into free circulation, shows to the satisfaction of the Customs authorities that the declared price paid or payable for the goods included bona fide buying commission, which could have been properly deducted at importation, and makes a claim for repayment of the duty paid on the buying commission within three years of the date on which the amount of customs duty was communicated:

- (1) Could the bona fide buying commission be dutiable as part of the price actually paid or payable for the goods under Article 29 of the Customs Code?
  
- (2) If the answer to the first question is negative, could the bona fide buying commission be deductible from the declared transaction value bearing in mind the provisions of Articles 32(3) and 33 of the Customs Code?
  
- (3) In such circumstances are the customs authorities obliged under the Customs Code, and in particular Article 78(3) thereof, to accept the amendment to the price paid or payable for the imported goods and thereby reduced customs value?
  
- (4) Is the importer therefore entitled under the Customs Code, and in particular Article 236 thereof, to a refund of the duty paid on the buying commission?

18 In the introductory part of that order, the national court explained that Overland had brought an action against three decisions of the Commissioners 'each upholding a decision to demand payment, pursuant to Article 242 of the [Customs Code], of duty earlier repaid to [Overland] in error pursuant to Article 236 of that code'. It added that the 'points at issue' were entirely governed by Community law.

19 Having described the facts behind the dispute before it, the national court stated that the first three applications for refund submitted by Overland to the Commissioners had given rise to repayment of the customs duties in question. It stated that the fourth application had been rejected.

20 It then referred to the decisions adopted by the Commissioners on 30 November and 16 December 1998, which ordered Overland to repay the sums previously refunded following its first three applications.

21 The national court then summarised the arguments of the parties concerning the relevant provisions.

22 Its reference for a preliminary ruling gave rise to the judgment in *Overland Footwear*, cited above, in which the Court of Justice ruled that:

- Articles 29, 32 and 33 of the Customs Code must be construed as meaning that a buying commission which is included in the customs value declared and is not shown separately from the selling price of the goods in the import declaration must be considered to be part of the transaction value within the meaning of Article 29 of that code and is, therefore, dutiable.

- in a situation where the customs authorities have agreed to undertake revision of an import declaration and have adopted a decision ‘regularising the situation’ within the meaning of Article 78(3) of the Customs Code taking account of the fact that the declaration was incomplete as a result of an inadvertent error by the declarant, those authorities may not go back on that decision.
- 23 In paragraph 22 of that judgment, the Court held that it was not necessary to determine whether or, as the case may be, under what conditions, the customs authorities were obliged to make amendments at the request of the declarants pursuant to Article 78 of the Customs Code.
- 24 In that respect, it stated, in paragraph 23 of the judgment, that the Commissioners had initially granted Overland’s application for refund, after having necessarily carried out a review of the customs declarations in the light of the new information submitted by Overland. It inferred that those authorities had agreed to undertake the revision of the declarations and, following that revision and in the light of its results, had adopted the decisions necessary to ‘regularise the situation’ within the meaning of Article 78(3) of the Customs Code, taking account of the fact that the declarations were incomplete as a result of an inadvertent error by the declarant.
- 25 In paragraph 24 of the judgment, the Court concluded that, in such circumstances, those authorities could not go back on their decisions.
- 26 By order of 29 September 2003, the VAT and Duties Tribunal, London, decided once again, in relation to the dispute before it, to stay the proceedings and refer to the Court of Justice for a preliminary ruling.

27 In that decision, the national court states that, without fault on its part, the Court of Justice based its judgment in *Overland Footwear* on an incorrect premiss, so that the answers given to the questions referred do not help to resolve the dispute.

28 It states that, by letters of 7 and 8 July 1999, the Commissioners had informed Overland that they were withdrawing the decisions demanding repayment of the total of GBP 4 384.29 on the ground that, in accordance with Article 221(3) of the Customs Code, notification to the debtor of the amount of customs duties could not be made after the expiry of three years from the date on which the customs debt arose.

29 It states that, therefore, at the date of the first decision to refer, the only dispute subsisting between the parties concerned the decision to reject Overland's fourth application, seeking the refund of GBP 33 701.16, a decision also being challenged in the proceedings brought before it.

30 The national court notes that those facts were not sufficiently brought to the notice of the Court of Justice.

31 It therefore holds that the premisses which the latter took into account in paragraph 23 of the *Overland Footwear* judgment, to the effect that:

— the Commissioners initially granted Overland's application for refund,

- the customs authorities had therefore agreed to undertake the revision of the declarations and adopted the decisions necessary to 'regularise the situation',

could not apply in relation to the fourth application for refund, since the latter had been rejected by the Commissioners and had not given rise to a refund.

- <sup>32</sup> In those circumstances, the VAT and Duties Tribunal, London, decided that it was necessary to re-submit to the Court of Justice, in identical terms, the questions which were contained in the order for reference of 24 March 2000.

## **The questions**

### *Preliminary observations*

- <sup>33</sup> The first order for reference of 24 March 2000 indicated that the action brought by Overland was directed against three decisions of the Commissioners, each confirming a decision claiming repayment of import customs duties which had previously been wrongly refunded to the applicant pursuant to Article 236 of the Customs Code.

34 The rejection of the fourth application for refund was referred to, in passing, only in the context of the statement of the chronology of the facts which preceded the bringing of proceedings in the main action. The order for reference did not, therefore, expressly state that the rejection decision was among the decisions being challenged.

35 Finally, the same order did not refer to the withdrawal, during the proceedings, of the decisions requiring the repayment of the total sum of GBP 4 384.29.

36 Therefore, for the reasons stated by the national court in its second decision to refer, the judgment in *Overland Footwear* did not give a reply enabling the solution of the dispute in the main proceedings, as they existed at the date of the first decision to refer.

37 The same questions therefore need to be examined in the light of the facts that are now at the disposal of the Court.

*The first and second questions*

38 In its judgment in *Overland Footwear*, the Court ruled, in reply to the first two questions referred by the national court, that Articles 29, 32 and 33 of the Customs Code had to be interpreted as meaning that a buying commission included in the declared customs value and not distinguished from the sale price of the goods in the customs declaration was to be regarded as forming part of the transaction value within the meaning of Article 29 of the Code and therefore dutiable.

39 As the Advocate General has pointed out in paragraphs 23 to 25 of his Opinion, the fact that the dispute in the main proceedings concerns only the Commissioners' decision to reject Overland's fourth application seeking refund of a sum of GBP 33 701.16 GBP and that that sum had not, initially, been refunded by the customs authorities has no impact on the premisses which the Court took into consideration in order to formulate its reply.

40 That fact, concerning Overland's four refund applications, is subsequent to the relevant facts, namely the customs declaration and the application of import duties.

41 The question whether a buying commission, when included by the importer in the customs value without being distinguished from the sale price, may also be included in the basis for assessment of customs duties arose in the same way in relation both to the first three refund applications and to the fourth application.

42 In that regard, since:

- under Article 62(1) of the Customs Code, it is for the applicant to enter in his declaration 'all the particulars necessary for implementation of the provisions governing the customs procedure for which the goods are declared',



- under Article 71 of the Code, the provisions governing that procedure shall be applied on the basis of the particulars contained in the declaration in the event that the declaration is not verified, or where any verification that has been made does not cast doubt on those particulars,

the customs authorities could lawfully tax the goods on the basis of the declared customs value, including any buying commission which the applicant erroneously included in the declaration and the existence of which the authorities could not have suspected in the absence of information on the point.

- 43 In those circumstances, notwithstanding the facts brought to the Court's attention in the second decision to refer, the answer to the first two questions must be in identical terms to those used in the judgment in *Overland Footwear*, as cited in paragraph 38 of this judgment.

### *The third and fourth questions*

- 44 In its third and fourth questions, which the Court will examine together, the national court effectively asks whether Articles 78 and 236 of the Customs Code must be interpreted as meaning that, after the release of the imported goods, the customs authorities, when presented with an application by the applicant for revision of its customs declaration in respect of those goods, are required to carry out the revision sought and that, if they find, on concluding the revision, that the declared customs value mistakenly included a buying commission, they are required to regularise the situation by reimbursing the import duties applied to that commission.

- 45 Article 78(1) of the Customs Code provides that the customs authorities 'may', on their own initiative or at the request of the declarant, amend the declaration, that is to say re-examine it.
- 46 Where the declarant applies for a revision, its application must be examined by the customs authorities, at least in relation to the question whether or not there is cause to carry out such a revision.
- 47 In making that first assessment, the customs authorities are to take into account, in particular, the possibility of reviewing the statements contained in the declaration to be revised and in the application for revision.
- 48 For example, they may refuse to carry out a revision where the facts to be verified require physical verification and, following the release of the goods, the latter can no longer be presented to them.
- 49 If, on the other hand, the verifications to be carried out do not require presentation of the goods, for example where the application for revision envisages only the examination of accounting or contractual documents, a revision is possible in principle.

- 50 At the conclusion of their assessment, the customs authorities must thus, subject to the possibility of a subsequent court action, either reject the declarant's application by reasoned decision or carry out the revision applied for.
- 51 If the application is accepted, they re-examine the declaration and assess whether the declarant's claims are well founded, in the light of the facts notified.
- 52 If the revision indicates that the provisions governing the customs procedure in question were applied on the basis of incorrect or incomplete information, the customs authorities must, in accordance with Article 78(3) of the Customs Code, take the measures necessary to regularise the situation, taking account of the new information available to them.
- 53 Where it finally becomes apparent that the import duties paid by the declarant exceed those that were legally owed at the time of their payment, the measure necessary to regularise the situation can consist only in reimbursement of the overpaid amount.
- 54 That reimbursement is made in accordance with Article 236 of the Customs Code if the conditions laid down by that provision are fulfilled, in particular that there has been no manipulation by the declarant and that the application for reimbursement has been submitted within the time-limit, which is in principle three years.

- 55 The German and United Kingdom Governments maintain that Article 78(3) of the Customs Code applies only in cases such as erroneous classification of the goods, arithmetical errors, the use of incorrect currency codes or the indication of incorrect quantities.
- 56 In their submission, that provision does not apply where a buying commission has not been shown separately from the price of the goods. In that case, they argue, the commission forms an integral part of the customs value, so that customs duties applied to that commission were legally owed.
- 57 According to the German Government, by not indicating the buying commission in its customs declaration, Overland had made a choice. Having freely exercised its choice, the trader had not committed an error.
- 58 The United Kingdom Government argues that to apply Article 78(3) of the Customs Code in circumstances such as those in this case would entirely undermine Article 65 of the Code. Whilst Article 78 does derogate from the prohibition under Article 65, that derogation is of a limited nature.
- 59 The German and United Kingdom Governments consider that Article 236 of the Customs Code does not apply to a situation such as that in the main proceedings either. The import duties applied to the buying commission were legally owed at the time of their payment, within the meaning of that provision.

60 Those arguments cannot be accepted.

61 It should be noted that Article 65 of the Customs Code prohibits a declarant from amending his declaration after the release of the goods. That prohibition existed before the Customs Code entered into force on 1 January 1994.

62 Article 78 of the Customs Code expressly introduced, from that date, the possibility of the customs authorities revising a customs declaration on an application by the declarant submitted after the release of the goods.

63 Article 78(3) does not make a distinction between errors or omissions which are capable of correction and others which are not. The words 'incorrect or incomplete information' must be interpreted as covering both technical errors or omissions and errors of interpretation of the applicable law.

64 Therefore, to apply Article 78 of the Customs Code to a situation such as that in this case cannot be regarded as undermining Article 65 either wholly or even in part. In reality, the two provisions envisage two separate procedures, applying, respectively, before and after the release of the goods, to amendments capable of being made to

the information taken into account in determining the customs value and, hence, import duties.

- 65 Article 65 of the Customs Code permits the declarant himself to amend his customs declaration unilaterally, so long as the goods have not been released. That right is explained by the fact that, until release, the customs authorities can, if necessary, easily check the accuracy of the amendments by physically examining the goods. In addition, amendment may take place at a time when the amount of the import duties has not yet been determined by the customs authorities.
- 66 Article 78 of the Customs Code establishes a more restrictive procedure. It applies after release of the goods, to a time when their presentation may be impossible and the import duties have already been determined. It thus entrusts the carrying out of a revision applied for by the declarant to the customs authorities, and makes such a revision subject to their assessment as regards both its principle and its result.
- 67 Moreover, the fact that, as a matter of form, a customs declaration does not contain separate reference to a buying commission, which is nevertheless distinct from the price of the goods, can only mean that that commission is validly regarded as dutiable and that, consequently, import duties applied to it are legally owed.

- 68 That fact, where there is a possibility of subsequently revising a customs declaration at the declarant's request, cannot have as its consequence that duties legally charged by reason of simple rules of evidence are subsequently assimilated to duties legally owed within the meaning of Article 236(1) of the Customs Code, despite the production of sufficient evidence.
- 69 It should finally be noted that, in any event, an error consisting in an involuntary omission cannot be regarded as the exercise of a choice, which is by definition voluntary.
- 70 It follows that Articles 78 and 236 of the Customs Code apply to the case of a customs declaration which erroneously included a buying commission in the customs value.
- 71 The answer to the third and fourth questions must therefore be that, on a proper interpretation of Articles 78 and 236 of the Customs Code:
- after the release of the imported goods, the customs authorities, presented with an application from the declarant seeking revision of his customs declaration in relation to those goods, are required, subject to the possibility of a subsequent court action, either to reject the application by a reasoned decision or to carry out the revision applied for;

- where they find, at the conclusion of that revision, that the declared customs value erroneously included a buying commission, they are required to regularise the situation by reimbursing the import duties applied to that commission.

## Costs

- 72 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. Articles 29, 32 and 33 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as meaning that a buying commission included in the declared customs value and not distinguished from the sale price of the goods in the customs declaration is to be regarded as forming part of the transaction value within the meaning of Article 29 of the Code and therefore dutiable.



**2. On a proper interpretation of Articles 78 and 236 of Regulation No 2913/92:**

- after the release of the imported goods, the customs authorities, presented with an application from the declarant seeking revision of his customs declaration in relation to those goods, are required, subject to the possibility of a subsequent court action, either to reject the application by a reasoned decision or to carry out the revision applied for;**
  
- where they find, at the conclusion of that revision, that the declared customs value erroneously included a buying commission, they are required to regularise the situation by reimbursing the import duties applied to that commission.**

[Signatures]