

JUDGMENT OF THE COURT (Third Chamber)
28 June 1990 *

In Case C-80/89

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Hamburg (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Erwin Behn Verpackungsbedarf GmbH, a company incorporated under the laws of the Federal Republic of Germany, having its registered office at Norderstedt, Federal Republic of Germany,

and

Hauptzollamt (Principal Customs Office) Itzehoe

on the validity of the Commission's decision of 4 November 1985 (COM(85) 1709 final) and on the interpretation of Article 5(1) 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 (Official Journal 1979, L 197, p. 1),

THE COURT (Third Chamber)

composed of: M. Zuleeg, President of Chamber, J. C. Moitinho de Almeida and F. Grévisse, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Principal Administrator

after considering the written observations submitted on behalf of

* Language of the case: German.

the Commission of the European Communities, by its Legal Adviser, Jörn Sack, acting as Agent, assisted by Renate Kubicki, an official in the Ministry of Justice of the Federal Republic of Germany seconded to the Commission under a scheme for exchanges with national civil servants, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument presented by the Commission at the hearing on 7 February 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 6 March 1990,

gives the following

Judgment

- 1 By order of 6 January 1989, which was received at the Court on 13 March 1989, the Finanzgericht Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the validity of the Commission's decision of 4 November 1985 (COM(85) 1709 final) and on the interpretation of Article 5(1) 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 (Official Journal 1979, L 197, p. 1),
- 2 Those questions were raised in proceedings in which Erwin Behn Verpackungsbedarf GmbH (hereinafter referred to as 'Behn') seeks the annulment of three notices issued by the Hauptzollamt (Principal Customs Office) Itzehoe, effecting post-clearance recovery of customs duties.

- 3 The operations in respect of which recovery of the duties was effected were the import into the Community of unbleached paper for large-capacity sacks falling under Common Customs Tariff ('CCT') subheading 48.01 C II (a) from the Kingdom of Spain, which had not at that time acceded to the Community, and other non-member countries. Each month the goods were declared for home use under the collective customs procedure provided for in Article 20 of Council Directive 79/695/EEC of 24 July 1979 on the harmonization of procedures for the release of goods for free circulation (Official Journal 1979, L 205, p. 19).

- 4 The Hauptzollamt assessed the customs duties on the paper imported from Spain and other non-member countries at the rates of 3 and 7.5% respectively on the basis of the declarations made by Behn which, to determine the amount of the import duties, had relied on the rates given in the current customs tariff published in the Federal Republic of Germany by the Federal Ministry of Finance.

- 5 However, the rates applicable to imports of unbleached paper for large-capacity sacks were, under the Community rules in force at the material time, 3.2% for imports from the Kingdom of Spain, by virtue of Regulation (EEC) No 1524/70 of the Council of 20 July 1970 on the conclusion of an Agreement between the European Community and Spain and on the provisions for its implementation (Official Journal, English Special Edition, Second Series I, External Relations (1), p. 269), and 8% for imports from other non-member countries by virtue of Council Regulation (EEC) No 3000/82 of 19 October 1982 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (Official Journal 1982, L 318, p. 1). By Amendment No 151/83 of 17 August 1983, received by the Hauptzollamt Itzehoe on 19 August 1983, the Federal Ministry of Finance amended the customs tariff manual, raising the rates to 3.2 and 8% respectively, as from 1 January 1983.

- 6 By three notices dated 19 and 26 October and 2 November 1983, the Hauptzollamt required Behn to pay an amount corresponding to the difference between the amount due at the rates of 3.2 and 8% and the amount initially paid, namely DM 4 866.40, on the basis of Article 2 of Regulation No 1697/79.

- 7 After Behn lodged an objection against those notices, on 3 July 1985 the Federal Republic of Germany submitted the case to the Commission under Article 4 of Commission Regulation (EEC) No 1573/80 of 20 June 1980 laying down provisions for the implementation of Article 5(2) of Council Regulation (EEC) No 1697/79 on the post-clearance recovery of import duties or export duties (Official Journal 1979, L 161, p. 1). By decision of 4 November 1985, the Commission ruled that the import duties in question should be recovered retroactively.

- 8 Behn then brought an action before the Finanzgericht Hamburg, stating that it had based its collective declarations on the rates set out in the current tariff and had used only those rates in its calculations.

- 9 The Finanzgericht Hamburg, entertaining doubts as to the validity of the Commission decision and the interpretation of Article 5(1) of Council Regulation No 1697/79, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the Commission's decision of 4 November 1985 — COM(85) 1709 final — concerning the post-clearance recovery of import duties on goods which the plaintiff imported in the period from January to September 1983 invalid? Does that invalidity affect only the duties assessed prior to 19 August 1983 or also the duties assessed on imports up to and including September 1983?

(2) If the Commission's decision of 4 November 1985 is valid:

how is Article 5(1) of Council Regulation (EEC) No 1697/79 of 24 July 1979 in the latest version in force to be interpreted:

- (a) do general administrative directives issued by departments not directly concerned with the collection of duties constitute information given by the competent authorities?

(b) if Question 2(a) is to be answered in the affirmative:

are administrative directives regarding the level of rates of duty binding on the authorities that are concerned with the collection of duties in so far as those authorities based the duties charged on the said rates?'

- 10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The validity of the Commission decision

- 11 It is apparent from the grounds of the order for reference that the doubts expressed by the Finanzgericht Hamburg concerning the validity of the Commission decision ordering post-clearance recovery relate only to whether the Commission was right to consider that the error committed by the Hauptzollamt could reasonably be detected by the person liable within the meaning of Article 5(2) of the Council regulation. In particular, it wonders whether the vigilance demanded of the person liable might not be excessive, in so far as the latter cannot be expected to be better informed than the Hauptzollamt as to the applicable rates. In that regard, the Finanzgericht states that the Hauptzollamt does not have the *Official Journal of the European Communities* at its disposal and also relies on the Federal Ministry of Finance customs tariff manual.
- 12 The Commission has stated that the German customs tariff manual serves purely as a guide and could not therefore be relied on as against the *Official Journal of the European Communities*, which contains the applicable Community rules, otherwise the direct and uniform application of the CCT would be jeopardized and a national tariff would be recognized as taking precedence over the Community customs rules for the time being in force. A trader who relies on an indicative document of that kind should therefore accept the risk of a conflict between that document and the applicable Community rules.

- 13 In its judgment of 12 July 1989 in Case 161/88 *Binder v Hauptzollamt Bad Reichenhall* [1989] ECR 2415, the Court stated that the applicable Community tariff provisions constituted the sole relevant positive law as from the date of their publication in the *Official Journal of the European Communities*, and everyone was deemed to know that law. A customs tariff manual like the German one, drawn up by the national authorities, is merely a guide for customs operations, as is apparent from the very terms of the introduction to it.
- 14 It follows that a trader whose business essentially comprises import and export transactions and who has accumulated some experience in that area must, by reading the relevant issues of the *Official Journal*, acquaint himself with the Community law applicable to the transactions which he undertakes. Such a trader may not, therefore, rely on the statement of rates contained in a national customs tariff manual in order to determine the applicable rate of duty.
- 15 An incorrect rate, of the kind involved in this case, could have been detected by a diligent trader through consultation of the *Official Journal of the European Communities* in which Council Regulations Nos 1524/70 and 3000/82 were both published. The rate of reduction applicable to the duties levied on goods from the Kingdom of Spain (60%) had been in force since 1973 and the goods in question were expressly mentioned in the CCT in force in 1983. An importer might therefore be expected to be in a position to discover the difference between the CCT and the German customs tariff manual.
- 16 Behn is a trader specializing in packaging materials and, as such, imports paper regularly. Moreover, for its customs declarations it is entitled to use the system of collective declarations, which is made available only to competent and experienced importers.

- 7 In those circumstances, the Finanzgericht Hamburg's view that a trader like Behn cannot be required to be better informed that the competent national authority cannot be accepted.
- 8 It must therefore be concluded that the Commission was right to consider that the error committed by the customs authority could reasonably have been detected by Behn, within the meaning of Article 5(2) of the Council regulation.
- 19 It must therefore be stated in reply to the national court that examination of the first question submitted to the Court has disclosed no factor of such a kind as to affect the validity of the Commission's decision of 4 November 1985 (COM(85) 1709 final) addressed to the Federal Republic of Germany.

The interpretation of Article 5(1) of the Council regulation

- 20 The national court's second question is whether Article 5(1) of the regulation covers a national customs tariff manual published by a Ministry of a Member State which sets out the provisions of national and Community law, in particular those relating to the Common Customs Tariff.
- 21 It must be remembered that Article 5(1) of the Council regulation is designed to limit the possibility of post-clearance recovery where the error derives either from 'information' given by the competent authority itself or from 'provisions of a general nature subsequently invalidated by a court decision'.
- 22 By thus making a distinction between the 'information' referred to in the first indent of Article 5(1) and the 'provisions of a general nature' referred to in the second indent of Article 5(1), the Community legislature clearly indicated that the word 'information' did not include indications given in a document of a general

nature addressed to unspecified persons but covered only indications given by the competent authority to a particular trader in a specific case.

- 23 That interpretation of 'information' is confirmed by the purpose of Article 5(1) of the Council regulation. As indicated in the second recital in the preamble to that regulation, that provision is intended to ensure the 'certainty which persons liable for payment have the right to expect from official acts having financial consequences'.
- 24 That principle of legal certainty may be relied on by a person liable to pay duty with respect to concrete information obtained from an authority which he has consulted in order to deal with a specific case, but not by a person who relies on an administrative directive of a general nature which, like the customs tariff manual involved in this case, is merely informational.
- 25 It must therefore be stated in reply to the second question that the first indent of Article 5(1) 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 must be interpreted as not referring to a tariff manual for national use which sets out the rules of national law and Community law, including those on the Common Customs Tariff.

Costs

- 26 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in reply to the questions submitted to it by the Finanzgericht Hamburg, by order of 6 January 1989, hereby rules:

- (1) Examination of the first question submitted to the Court has disclosed no factor of such a kind as to affect the validity of the Commission's decision of 4 November 1985 (COM(85) 1709 final) addressed to the Federal Republic of Germany.
- (2) The first indent of Article 5(1) 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 must be interpreted as not referring to a tariff manual for national use which sets out the rules of national law and Community law, including those on the Common Customs Tariff.

Zuleeg

Moitinho de Almeida

Grévisse

Delivered in open court in Luxembourg on 28 June 1990.

J.-G. Giraud
Registrar

M. Zuleeg
President of the Third Chamber