

DECISION NUMBER: C00166

CUSTOMS DUTIES — tariff classification — alternative medicine products imported from USA — whether to be classified as organic chemicals (Ch 29), pharmaceutical products (Ch 30) or miscellaneous edible preparations (Ch 21) of the Common Nomenclature — all correctly classified under Ch 21

CUSTOMS DUTIES — post-clearance demand — remission or repayment — Council Reg 2913/92/EEC, art 239 — Commission Reg 2454/93/EEC, art 905 — whether conditions for remission satisfied — no

MANCHESTER TRIBUNAL CENTRE

NUTRI (IMPORTS & EXPORTS) LTD

Appellant

-and-

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Tribunal: Mr Colin Bishopp (Chairman)
Professor Roy Spector MD PhD FRCP FRCParth
Mr Praful Davda FCA

Sitting in public in London on 18, 19 & 20 June 2002

Hugh McKay of Counsel instructed by Titmuss Sainer Dechert, solicitors, for the Appellant

Phillipa Whipple of Counsel instructed by the Soloicitor for Customs and Excise for the Respondents

DECISION

Introduction

1. The appellant, Nutri (Imports & Exports) Limited, imports into the United Kingdom a variety of products, generally and conveniently referred to as alternative or supplementary medicinal products, which it distributes within the United Kingdom and also re-exports to other European countries. The appellant's products are sold to the public (at least, within the United Kingdom) only by, or through the agency of, professionals engaged in the supplementary and alternative medicine fields. The products with which we are concerned (which are representative of a range of about two hundred in the appellant's catalogue) were all imported into the United Kingdom from the United States, and therefore from outside the European Union; correspondingly they were liable to import duty on arrival.

2. The Commissioners do not accept that the customs tariff classifications declared by the appellants on importation were correct. Between 23 March 1998 and 2 April 1998 they issued five post-clearance demand notes (commonly referred to as C18s), relating to eleven products imported by the appellants. The aggregate amount of duty claimed was £345,672.18, being the difference between the amount of duty paid, calculated in accordance with the appellant's declarations, and the amount properly due if the respondents are right in their view of the correct classification. Put very briefly, the appellant's case is that the products are vitamins or, alternatively, pharmaceutical products; the respondents say they are food supplements.

3. The appellant instructed a consultant, Michael Galloway, who challenged the post-clearance demands, and at the same time sought binding tariff information rulings (BTIs) in respect of each of the eleven products. On 19 June 1998 the Commissioners wrote to Mr Galloway giving a BTI decision of code 210690 92 for each of the eleven products. That was the code to which each product had been allocated for the purpose of the post-clearance demands and the Commissioners' letter went on to review and uphold those demands. The appellant now seeks to challenge both the BTIs and the post-clearance demands. We shall return to the system of tariff classification on which they depend later in this decision.

4. In addition, the appellant has sought to persuade the Commissioners to refer to the European Commission its claim for remission of the bulk of the duty comprised in the post-clearance demands, which it has not yet paid, and the repayment of a smaller sum, making up the difference, which it has paid. Those requests, by this time pursued by the appellant's solicitors, were finally refused by letters of 5 July and 7 September 1999 respectively. The appellant also appeals against those refusals. It had originally sought to rely on Article 220(2)(b) of Council Regulation 2913/92/EEC (which relates to the correction of errors in entries in the customs accounts dealing with imports) but this ground of appeal was not pursued.

5. The appellant was represented at the hearing by Hugh McKay of counsel, instructed by its solicitors, Titmuss Sainer Dechert, and the Commissioners by Philippa Whipple of counsel, instructed by their solicitor's office. We had a considerable volume of documentation and a number of authorities, to which we will turn in due course. We had the statements of, and heard evidence from, Norman Eddie, one of the founders of the appellant, from Kenneth Eddie, his son, and from the appellant's accounts manager, Christine Eyres. We had a statement from Norman Eddie's wife, Barbara, but she did not give evidence. Miss Whipple called an expert, Dr Eric Longstaff, whose report was in the bundle of documents, but led no other oral evidence. We also had a copy of the report of Professor Arnold Beckett, who had been instructed by the appellant but on whose evidence it no longer sought to rely. Both counsel provided very helpful skeleton arguments.

6. Although, as we understood it, one of the eleven products (known commercially as Core Level Health Reserve) had been imported under the same code as most of the appellant's other products, it was accepted by the time the BTIs were applied for that it was correctly classified under tariff code 210690 92, in which code the BTI applicable to that product was subsequently issued, and it is not necessary for us to consider it in any detail.

7. The appeals have reached the tribunal pursuant to section 16 of the Finance Act 1994, since they are appeals against decisions reached by the Commissioners on undertaking a review in accordance with section 15 of the same Act: the Commissioners' letters to which we have referred were all written following such reviews. These are not ancillary matters falling within Schedule 5 to the 1994 Act, and our jurisdiction is therefore not limited by subsection 16(4). Accordingly we can, if we so decide, substitute our own decision for that of the Commissioners, though we have also the power granted by subsection 16(4) to require the Commissioners to conduct a further review.

The evidence

8. Mr Norman Eddie told us that in about April 1981 he, his wife and two of his sons, Kenneth and Norman, decided to enter into partnership and carry on the business of importing health products from the United States. He and his wife had hitherto run a business called the Natural Health Clinic in Cheadle, Cheshire. Mr Eddie is an osteopath and naturopath and his wife an acupuncturist, and they had already been importing such products for use at their clinic for some years. The family partnership was eventually incorporated, in about 1984, as the company which is the appellant.

9. Mr Eddie said that when he and his wife began importing the products, they had encountered a good deal of difficulty in their dealings with Customs' local offices, initially at Stockport and latterly at Cheadle, largely because, he said, the staff were unfamiliar with the necessary documentation. At this stage – that is, when Mr and Mrs Eddie were importing the products only for use in their own clinic – they undertook all of the work of dealing with Customs themselves. It was only after the family business was formed that they began to

use import agents. Eventually, after several visits and exchanges of paperwork, most of which were dealt by his wife, Mr Eddie was referred to the Customs staff at Manchester Airport, and went there himself. The officers at the airport appeared to be satisfied with the documentation which he provided, and suggested that the products (consisting then of a range of about 120 items of which, Mr Eddie said, he gave full details) should be classified on importation under what was then tariff heading 29.38 but is now heading 29.36, whose brief description encompasses provitamins and vitamins. As we have indicated, we shall return to the detail of the tariff system.

10. The suggested classification, he said, was communicated only orally and it did not cross his mind at the time to seek written confirmation from Customs of their view of the correct classification, still less a BTI – indeed, even now he did not really understand what that entailed. However, relying on what he had been told, he and his wife had begun importing all of the products they used in their clinic under the single heading, then 29.38, and the partnership had adopted the same practice when it began to make the importations. In the early years, he recalled, almost all of the appellant's consignments had been inspected by Customs on arrival.

11. He accepted that the range of products imported by the family partnership, and later by the appellant, had changed and grown over the years, by addition and substitution, but he had retired some years ago and could not now recall the detail of the changes, nor whether any contact had been made with Customs for guidance as new products were added. He did, however, recall that every consignment had to be collected from Manchester Airport and that, after the appellant had become established the consignments were still inspected from time to time by Customs officers. In his time, the partnership or the appellant had always been required to pay the requisite import duty before the goods were released.

12. Mrs Eyres told us that she had been employed as its accounts manager by the appellant and, before its incorporation, by the preceding partnership for an aggregate period of twenty years. In that time she had dealt with the paperwork and administration relating to the appellant's imports, and had been responsible for the payments which needed to be made both to the American exporters and to the appellant's import agents, including payments of import duty. The great majority of the products the appellant imported arrived in the country at Manchester Airport, though occasionally consignments were imported through Heathrow or Liverpool airports.

13. She was aware that consignments were often inspected by Customs officers; usually she received a telephone call from the import agents warning her that there would be a delay in releasing a consignment, because of the inspection, and when the consignment arrived it was obvious that an inspection had taken place because the boxes had been opened and then resealed by the inspecting officers using adhesive tape with Customs' markings on it.

14. She remembered in particular an inspection which took place on 1 September 1992. She had taken a telephone call from the appellant's import agents (while Mrs Eyres had been with the appellant, it had always used a large, well established import agency) to the effect that the consignment would not be cleared through Customs and released until a representative of the company had met the Customs officers at the airport. Mr Kenneth Eddie attended. When he returned he told Mrs Eyres, she said, that the officers had accepted that all but three of the products included within that consignment were correctly coded for tariff purposes, under code 293690 90. The three products which had been singled out (none of which is a product we must consider for the purposes of this appeal) were kept back while they were examined in detail. In due course the appellant was notified of the Government Chemist's findings which were to the effect that those products should be differently coded. Thereafter the three products were declared on importation using the codes which Customs had specified. Mrs Eyres arranged with the American exporters that the products would in future be separately invoiced in order that they could be readily identified. Those items were rather different from the products which are relevant to the appeal, one being a high energy drink designed to be consumed after vigorous sports, one a protein supplement and the last a gel to be rubbed onto sprained joints. They were classified thereafter under tariff heading 21.06 (the first two products) and heading 30.04 (the gel).

15. Several of the products imported by the appellant contained material of animal origin and in July 1993, Mrs Eyres said, the appellant was informed by its agents that Customs required, as a condition of their clearing the consignments imported by the appellant, that those consignments in which any such products were included be accompanied by a US Department of Agriculture licence and a veterinary certificate issued in the United States when they reached Manchester, and that on arrival they should be inspected at the airport, before release, by a veterinary surgeon. It was Mrs Eyres who made the appropriate arrangements when such a consignment arrived. The veterinary inspections caused both delay and expense, and were correspondingly unwelcome, but the appellant accepted that they were necessary. By contrast, the appellant did receive some good news in December 1994, when the duty on products classified under tariff code 293690 90 (under which almost all of the products which it imported were still classified) was reduced to nil.

16. Mrs Eyres was aware that there were three "routes" by which imports were cleared through Customs. The first, "Route 1", involved examination of the accompanying documents and their checking against the goods in order to ascertain that the goods appeared to correspond with the declarations made in respect of them, but no examination of the goods themselves; "Route 2" involved an examination of the goods; and "Route 3", the quickest of the three methods, and available only to established traders and for consignments of comparatively low value, involved examination of the documentation only after the consignment had been cleared. Those consignments which bore signs of an

inspection but where no queries had been raised were, she understood, Route 1 entries. As far as she could recall the only one of the appellant's consignments which had been subjected to a Route 2 inspection, in which the goods themselves had been inspected, was that in 1992 which she had already mentioned, although many others had undergone the veterinary inspections to which she had also referred. The remaining consignments came in by Route 3.

17. After having first told us that all of the appellant's products had been declared within Chapter 29 Mrs Eyres agreed, after she was asked to consider some of the documentation within the bundles, that not all of the appellant's products had in fact been classified under Chapter 29. Understandably, her recollection of precisely how the different products had been classified about ten years previously was rather hazy but she accepted, on reflection, that there might have been more than the three products identified in 1992 which had been imported under different codes. She agreed, too, that although the company had followed advice where it had been given, and had always complied with Customs' requirements, it had not actively sought any advice and she now accepted that it probably should have taken greater care in classifying its products.

18. Mr Kenneth Eddie told us that he had been an active member of the appellant and its predecessor partnership since the business had been started, being now one of its only two shareholders and directors. He had not been involved in his father's clinical practice and had not dealt with the imports of products used in that practice before the family partnership was formed, but he knew that the products imported by the appellant were similar to those which had been imported by his father before the partnership was formed. Contrary to what his father had told us, Mr Eddie recalled that import agents had been used by his father from the outset, and that the agents had been involved in the initial discussions with Customs about the correct classification of the products.

19. The partnership and, after its formation, the appellant had borrowed from his father's earlier experience. Because the products were similar in kind they had been similarly declared on importation, using what was then tariff code 293880 00, and was now code 293690 90. The same code (in its original or revised number) had been adopted for new or modified products as they were added to the appellant's catalogue.

20. The products were imported from the USA and were sold within the United Kingdom either to registered medical practitioners, dentists, osteopaths, chiropractors, nutritionists and other complementary therapists or, at their direction, to patients: supplies were made to a patient only in response to an order placed by a health practitioner. There were no sales within the United Kingdom direct to the public without professional involvement, and the appellant's products were not stocked by pharmacies. Around 20% of the products imported by the appellant were exported onwards to other European countries.

21. The majority of the appellant's imports were obtained from an American company, Nutri West: these products were all classified on entry under heading 29.36, until the appellant was instructed otherwise by Customs. Some products were obtained from other suppliers and were not all declared under that heading. Some were declared under heading 21.06 as food supplements, and others under Chapter 30 as pharmaceutical products.

22. None of the products imported and sold by the appellant was a licensed medicine, within the meaning of the Medicines Act 1968, and the appellant made no medicinal claims for any of its products, either on the packaging itself or in its promotional literature. They were, however, held out as "health products" and the appellant's catalogue and the written material included with its products did give some indication of the purpose of that product, when it might be of benefit and to whom, written in somewhat general terms; and it also provided recommended dosages, and in some cases identified persons for whom, or circumstances in which, it would be inappropriate to consume the particular product. Mr Eddie said that the health practitioner who prescribed the product would usually give more specific guidance to his patient about dosage and similar matters.

23. We saw a copy of the appellant's catalogue and had samples, with their packaging, of two of the products which are the subject of this appeal. We understood that that packaging was typical of that used by the appellant for all of its products. The catalogue – which appears to be directed primarily at the health professionals to whom Mr Eddie referred – lists the ingredients of each product in considerable detail, even specifying, in most cases, the composition of the inactive ingredients used for the purpose of making the product up into tablets or capsules. This degree of detail was reflected in the packaging we saw.

24. Mr Eddie is correct in stating that no medicinal claims are made, although in many, but by no means all, cases indications are given of the purpose for which a particular product might be taken. In those cases where an indication is given, few reading it would have any difficulty understanding what was meant, since they are not written in technical language. They are, however, non-committal – we suspect deliberately so – and often very vague. There are, as far as we can tell in every case, dosage recommendations and occasional warnings, for example that a particular product should not be taken when pregnant.

25. Mr Eddie confirmed that consignments often arrived at the appellant's premises with evidence, from the resealing tape, that boxes had been opened and the contents inspected by Customs; he thought that about one consignment in five had been opened. Despite that frequency, on only two occasions prior to that which led to this appeal had Customs raised any enquiries of him.

26. The first occasion was in 1992 when Mr Eddie had attended at Manchester Airport, in response to the telephone call taken by Mrs Eyres, to discuss the classification of the products included within the consignment about

which Customs were concerned. He had been accompanied by a representative of the appellant's import agency. He told us, in confirmation of Mrs Eyres' evidence, that on that occasion Customs had singled out three of the products included within the consignment, which they believed had been incorrectly classified in Chapter 29 of the tariff system, and which should, as to two products, be classified in Chapter 21 and in the case of the other in Chapter 30. The officers told him, he said, that they were content that all of the other products included within the consignment were correctly classified, and those products were released.

27. The second occasion was in March (rather than July, as Mrs Eyres recalled) 1993, when he was first informed that veterinary certificates and inspections were required before products containing ingredients of animal derivation could be imported; several of the items imported by the appellant were of this type and it already had a MAFF licence permitting it to import such goods. Thereafter, veterinary inspections were a frequent occurrence.

28. Mr Eddie accepted that consignments might be stopped for a multitude of reasons, and not only for the checking of their tariff classification, but since Customs had clearly examined the goods sufficiently closely to conclude that veterinary certificates and inspections were required the officers must have been aware of the contents of the consignment. There was no suggestion on the first occasion when a veterinary inspection was required, or subsequently, that any of the products included within the consignment and classified under Chapter 29 had been incorrectly declared on importation, and Mr Eddie assumed that Customs had enough information to satisfy themselves that the tariff code the appellant had used was correct. He told us that he took the absence of any adverse comment as approval of the appellant's practice.

29. The consignment which gives rise to this appeal arrived at Manchester Airport in late January or at the beginning of February 1998. On 2 February 1998 two Customs officers called at the company's premises to see Mr Eddie, in order to discuss with him the consignment which was then awaiting clearance. The officers said that samples of the products had been taken for analysis and asked Mr Eddie why they had been classified under code 293690 90; he gave the explanation which we have set out. He asked the officers, he told us, what they considered the correct classification to be and they said they did not know; they merely took the view that it was not 293690 90.

30. The post-clearance demands were issued shortly after and at this stage Mr Eddie engaged Mr Galloway, who entered into correspondence with Customs on the appellant's behalf and requested the BTIs. It was Mr Galloway too who challenged the post-clearance demands and who requested the review which is the subject of this appeal.

31. Mr Eddie and Mr Galloway later attended a meeting at the respondents' offices in Southend, where they met Mr Stephen Palmer (the author of the review letter dealing with the classification issues) and three officers who were identified as classification experts. Mr Eddie said that all four conceded that the

classification of the appellant's products was difficult, a "grey area" as Mr Eddie put it. Despite that, they were unwilling to withdraw the post-clearance demands, or to reconsider the BTIs which had by then been given. We mention for completeness that we had no evidence before us from Mr Palmer or any of the other officers, nor indeed from Mr Galloway.

32. The aggregate of the post-clearance demands – almost £350,000 – was a very large sum of money when set against the appellant's annual turnover of around £3 million and, although most of the money had not yet been paid, Mr Eddie told us that the fact that the company had to reserve for the possible liability was causing it significant financial difficulty. The prices of its products had previously been set on the assumption that no duty was payable and, although its prices had been amended as soon as the appellant became aware of the problem facing it, there was no means by which it could recover from its customers the duty for which it had not allowed in the prices at which it had sold the products included in the consignments covered by the demands.

33. Mr Eddie accepted that the responsibility for correctly declaring the products which it imported was the appellant's and, ultimately, his, in his capacity as its managing director, though he conceded that he had effectively delegated the task, and had not actively concerned himself with the matter. When he joined the partnership he taken it that his father's earlier discussions with Customs had led to a correct, agreed classification and had given the matter no further thought at the time. It was apparent that thereafter he had relied upon Customs to detect and point out any errors. Indeed, he laid some stress upon the fact that at no time before the arrival of the particular consignment with which we are concerned, save for the occasion in 1992 with which he had already dealt, did Customs suggest that the tariff code 293690 90 which the appellant and the predecessor partnership had been using – in all for a period of about seventeen years including the time when heading 29.38 was in use – was incorrect.

34. He had regarded the 1992 examination as an audit by Customs of the appellant's product range even though, as he acknowledged, not all of the products imported by the company were included in that consignment (it comprised about three quarters of the appellant's then range). Rather reluctantly, he agreed that it would in fact have been prudent, particularly since three of the products included within the consignment were found to be wrongly classified, to have had all of the company's products checked, and to have obtained some written confirmation that the declarations the company was making were correct. He recognised that he was by no means familiar with the process of tariff classification and agreed that he had never considered the Official Journal nor indeed any information published by Customs and Excise dealing with the subject.

35. He was aware now, as a result of the problems which the appellant had encountered, that the tariff heading which it had used for the great majority of its products was entitled "provitamins and vitamins" while, as he conceded,

about a quarter of the products it imported contained no vitamins at all, and another quarter contained vitamins only in small, incidental quantities.

36. Although both Mrs Eyres and Mr Eddie told us that the appellant had been represented for many years by a large and well-established import agent, we heard little evidence about the agency's role in the appellant's classification of its imports. Mr Eddie junior had the impression, though it was contrary to his father's evidence, that agents had been involved in the original discussions with Customs. Mr Eddie junior told us that he had been told by one of the clerks at the import agency the appellant used, who was a former Customs officer, that it was correctly classifying the goods, but there was no written confirmation of the advice and we do not know how closely the clerk had examined the goods concerned. Overall, we were left with the distinct impression that there had, in fact, been very little involvement by the agents, and that they had concerned themselves mainly with processing the paperwork relating to the appellant's imports. There was, in particular, no evidence before us that the appellant had ever taken specific professional advice on the correct tariff classification until after the post-clearance demands were received.

37. We observe that in his statement Mr Eddie refers to the appellant's products as "nutritional products", a point on which Miss Whipple laid some emphasis. Although that is, in essence, the description for which the respondents argue, we do not read too much into Mr Eddie's use of the phrase, which we suspect derives in some measure from his inability to make any medicinal or similar claim for the products. We think, incidentally, that Miss Whipple overstates the position in saying that Mr Eddie "disavows any medicinal claims for his products"; in our view he merely declines to make any. However, as will be seen, the important consideration is not whether any particular claim is made.

38. We have mentioned that the appellant did not rely on the report of Professor Arnold Beckett which it had obtained, but a copy of the report was before us and we should deal with it briefly. Professor Beckett is highly qualified and has considerable experience in the field of pharmacology. His report is distinctly critical of Customs' approach to the matter, mainly because of their failure, as Professor Beckett perceives it, to correct the appellant's declarations at a much earlier stage. In that comment we think he is straying from his field.

39. It is impossible to discern from his report what Professor Beckett considers the correct classification of the various products to be, though he appears at least to favour Chapter 21 for most, if not all, of them while doubting whether the detailed code 210690 92, as the BTIs state, is correct for every product. He is in no doubt that the appellant's proposed classifications, under Chapters 29 and 30, are incorrect. Though we have borne these views in mind, we found Professor Beckett's report of little help in our consideration of the correct tariff classifications, and have left it otherwise out of account.

40. Dr Eric Longstaff, who gave evidence for the respondents, is a chartered biologist, a Fellow of the Institute of Biology and a Fellow of the Royal College of Pathologists. He is in addition a registered toxicologist. He has particular experience in the pharmaceutical industry, in which he works as a consultant. Although the tone of some of Dr Longstaff's evidence reflected his background in that industry, we thought, we found his evidence of great help.

41. He had not examined any of the products which we are required to consider in the context of this appeal but had relied upon their descriptions in the appellant's catalogue, and particularly the lists of ingredients. He had considered the tariff classification system, in the shape of the Combined Nomenclature ("CN") (we will return to the CN in due course), and had examined Customs' application of the CN, as their approach was revealed by their review letter dealing with the classification issue. He was aware that none of the appellant's products the subject of this appeal had a Medicines Act licence and that they were products for use in what is commonly known as "alternative medicine", a concept of which he was somewhat contemptuous. He readily accepted that substances extracted from plants frequently have medicinal qualities (aspirin, for example, was originally extracted from the willow tree) and was not critical of the appellant's products on the basis that they were often so derived, but rather because their efficacy had not been tested by rigorous research such as that to which conventional medicines were subjected.

42. Dr Longstaff conceded in cross-examination that, when preparing his report, he had not considered the General Rules for the Interpretation of the Harmonized System ("GIRs") (to which we will return in some detail later), without which the CN cannot be properly interpreted. Mr McKay suggested that this failure seriously undermined the validity of his conclusions. It is certainly a regrettable omission on Dr Longstaff's part, though he was able to correct it as he gave his evidence, and we are satisfied that, taking his report and his oral evidence together, what he told us does reflect the GIRs.

43. We will deal with Dr Longstaff's evidence about those of the appellant's products which are the subject of this appeal when we turn to consider them individually in detail. Before we do that, it is necessary to consider the correct approach to their classification.

The classification issue: the correct approach

44. As is well known, the system for levying duty on goods imported into the European Union is uniform in each Member State: duty is charged on goods on their entry into the EU at the same rate and in the same way regardless of the point of entry. The procedure is regulated by Council Regulation 2658/87, which contains the rules for applying and interpreting the CN, which is set out as annex 1 to the regulation. The CN consists of Chapters, identified by a two digit number. The first four digits of the code, composed of the Chapter number followed by a two digit sub-Chapter code, together form the heading number. That four-digit code is sufficient for many purposes, but

further refinement and precision is possible by adding additional pairs of digits, to a maximum of 10 digits in all.

45. The detail of the classification is such that it is by no means always obvious into which heading, or more detailed code, a given product falls, and there are frequently instances where either one of two, and sometimes more, classifications are possible. These difficulties are addressed by the GIRs, of which there are six. Those of particular relevance to this appeal are Rules 1, 2(b), 3 and 6. Rule 1 reads:

"The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions."

Rule 6 expands on this provision:

"For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and *mutatis mutandis* to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule the relative section and chapter notes also apply, unless the context otherwise requires."

Rule 2(b) reads:

"Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3."

46. Rule 3 is provided in order to resolve conflicts where more than one classification might be possible:

"When by application of Rule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows –

- (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

- (b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;
- (c) when goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

47. The rules have their own explanatory notes, but the only one of those notes we need mention for the purposes of this decision is that relating to rule 2(b) which, so far as material, is as follows:

"Rule 2(b) concerns mixtures and combinations of materials or substances, and goods consisting of two or more materials or substances. The headings to which it refers are headings in which there is a reference to a material or substance ... and headings in which there is a reference to goods of a given material or substance... It will be noted that the Rule applies only if the headings or the Section or Chapter Notes do not otherwise require ..."

Notes such as this – the Harmonised System Explanatory Notes (HSEN) – are not binding but are regarded as important aids to interpretation.

48. Before proceeding to apply the CN and the GIRs to the individual products, we think it useful to examine the approach which the courts and this tribunal have adopted. We also examine the requirements of the various headings advanced by the parties.

49. In *Bioforce GmbH v Oberfinanzdirektion München (No 1)* (Case C—177/91) [1993] ECR I—45 ("*Bioforce*") the Court of Justice was required to consider a product whose importer claimed it came within heading 30.04, which applies to certain types of "medicaments ... for therapeutic or prophylactic uses". The Court said, at paras 8 and 9 of its judgment:

"8 ... the decisive criterion for the classification of goods for Customs purposes is to be sought, regard being had to the requirements of legal certainty, in their objective characteristics and properties, as defined in the wording of the headings of the Common Customs Tariff.

"9 It should therefore be considered whether the product in question has the objective characteristics and properties defined in heading 30.04 of the Common Customs Tariff, which must be interpreted in the light of medical developments."

50. It went on to find (at para 12) that the product in question had "clearly defined therapeutic and, above all, prophylactic characteristics, the effect of which is concentrated on precise functions of the human organism" and that its ability to satisfy that test brought it within heading 30.04.

51. The Court of Justice developed this approach in *Glob-Sped AG v Hauptzollamt Lörrach* (Case C—328/97) ECR [1998] I—8357. The court was there required to consider the correct tariff classification of two vitamin preparations and said this:

"26 It is settled case-law that, in the interests of legal certainty and for ease of verification, 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 the wording of the relevant heading of the CN. There are also explanatory notes drawn up, as regards the CN, by the Commission and, as regard the Harmonised Commodity Description and Coding System, by the Customs Cooperation Council, which may be an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (see, in particular, Case C—201/96 *LTM v FIRS* [1997] ECR I—6147, paragraph 17).

"27 It is therefore necessary to examine whether the products at issue in the main proceedings exhibit the objective characteristics and properties defined under CN heading 30.04, which, as the Court held in paragraph 13 of the judgment in *Bioforce*, cited above, must be interpreted in the light of medical developments.

"28 In that regard, as the documents before the Court show, it is undisputed that the vitamin C content of the products in question is much greater than what is necessary or recommended for general dietary purposes. Furthermore, besides assisting the immune system of the human organism to resist infections in cases of, *inter alia*, asthenia or severe strain, such doses of vitamin C, which the human body is incapable of making for itself, are also recommended as treatment for allergic reactions and severe traumatisms, of the kind which may result from an injury or a surgical operation, or to combat deficiency-related illnesses, such as scurvy or Moeller-Barlow disease."

52. This theme is reflected in two decisions of the High Court in England, *Commissioners of Customs and Excise v Cedar Health Limited* (1998, unreported), a decision of Laws J; and *Unigreg Ltd v Customs and Excise Commissioners* (1998, unreported), a decision of Moses J.

53. In the former, the court was required to consider a tonic drink which its importers claimed was properly classified under heading 30.04 but which the Commissioners considered fell within heading 22.06. It is not necessary for us to deal with the characteristics of those two headings at this stage, though we will need to consider heading 30.04 in some detail later. The importance of the case lies in the judge's clear and detailed examination of the CN and of the approach to be adopted, which we have borne very much in mind. After considering the jurisprudence of the European Court of Justice in rather more detail than we have found necessary here, the judge went on to say "the only question for me, as I can see the matter, is whether or not it is clear from the

Court of Justice's jurisprudence that the requirement that the product's effect must be concentrated on precise functions of the human organism is to be treated as a condition of the products falling within 30.04." He went on to answer that question in the affirmative, describing the approach of the Court of Justice as "tight, certain and focussed."

54. In *Unigreg*, again, the importer sought to have its product classified under heading 30.04 while (as in this case) the Commissioners advanced heading 21.06. The product there, unlike this appellant's products, was licensed to be sold only through registered pharmacies. It was held out as being effective in the correction of vitamin and mineral deficiencies, particularly for those suffering from dietary insufficiency and its Medicines Act licence permitted it to be sold for the treatment of such conditions. The tribunal found that the product had the capacity to alleviate such conditions but it nevertheless found that it was a food supplement, and not a pharmaceutical product within heading 30.04. In the course of his judgment, Moses J said

"... the fact that a product has a broad spectrum of prophylactic or preventative functions does not disqualify it from being classified under heading 30.04. That proposition is not in dispute, but it is a proposition which must be based on a finding that the product does have specific effects, even though they may be a number of specific effects.

"The difficulty in this case is that on the findings of the tribunal this product had no specific effect at all. It has not been shown to have an effect or even effects concentrated on precise functions of the human organism."

55. Later, he said:

"I accept that the mere fact that vitamins play a part in providing nutrition does not prevent vitamins and minerals from classification as a medicament. The HSEN to 30.04, which I have cited, demonstrates that a product may be a food supplement containing or even consisting of minerals and vitamins which promote general health and well-being and within 30.04, provided always that they have an indication as to the use for the prevention of any disease or ailment. The difficulty which *Unigreg* faces is that on the evidence before the Tribunal there was, in the words of the HSEN, no indication as to use for the prevention or treatment of any specific disease or ailment at all."

56. Those findings led almost inevitably to the conclusion that, as the judge put it, "this product is not classified as a medicament because, on the facts found, it made good deficiencies in nourishment. Such a product has not been shown to have a clearly defined therapeutic and prophylactic active effect on precise functions of the human organism."

57. We derive from these cases the principle that the first consideration must always be the objective characteristics of the product, and the examination must be rigorous. Not only must it contain material which meets

the description of the relevant heading but, where that heading refers to a use, or purpose, it must be demonstrable that the product has the capacity to be put to that use, or to achieve its prescribed purpose. The importer's claimed use or purpose must be judged against the product's objectively ascertained characteristics; and if it cannot be demonstrated that the product is capable of the claimed use or of achieving the claimed purposes, a tribunal must put the importer's assertion to one side. And, taking pharmaceutical products as an example, it is not enough that any effect the product might have is incidental; its medicinal effect, if it is to come within heading 30.04, must be central.

58. We should mention, before leaving this topic, a comment made by the tribunal in *Unigreg* (1997, Decision No C00054), at para 47 of its decision, and on which Miss Whipple relied. Moses J made no comment about the passage, but it seems to us to fit in with his own reasoning, and we think he can be taken to have tacitly approved it. The tribunal said:

"We conclude therefore that the fact that the product is a medicine under the Medicines Act or a medical product under Directive 65/65 is not of itself relevant. We do observe however that given the width of the concept of medicinal products in Directive 65/65, if a product is not capable of coming within that legislation it is in practice unlikely to be a medicament under the tariff."

The possible classifications

59. We were not invited to determine for ourselves what the correct classification of each of the appellant's products was, regardless of the parties' views, but only to choose between the Commissioners' conclusions, recorded in the BTIs, or the appellant's proposals. As to the latter, in some cases two alternative possible classifications were advanced, the first being that used on importation and the other that proposed on the appellant's behalf by Mr Galloway.

60. The respondents' proposed classification is within Chapter 21, entitled "Miscellaneous Edible Preparations". Heading 21.06 is "Food preparations not elsewhere specified or included". This heading has only two sub-headings, numbered 10 and 90. Sub-heading 10 is "Protein concentrates and textured protein substances", while subheading 90 is merely "Other". This sub-heading begins by describing five classes of goods, followed by "other". Within this class, and identified by the further digits, 92 (making the full code 210690 92, which the respondents contend is correct) appears the description "Other, containing no milk fats, sucrose, isoglucose, glucose or starch or containing, by weight, less than 1.5% milk fat, 5% sucrose or isoglucose, 5% glucose or starch". Mr McKay accepted, for the appellant, that the products in question were not protein concentrates or textured protein substances and that they came within the latter description and, despite Professor Beckett's criticisms, he did not argue that the respondents' proposal was incapable of being right; his contention was that other classifications were more appropriate.

61. The appellant's preferred classification, under which each of the imported products had been declared, was within Chapter 29, and specifically heading 29.36. Chapter 29 is entitled "Organic chemicals" and heading 29.36 is

"Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent."

62. Heading 29.36 has several sub-headings, listing individually several (though not all) vitamins identified by their familiar alphabetic notation, and their respective derivatives, followed by sub-heading 90, "Other, including natural concentrates". The final two digits proposed by the appellant, 90, add the words: "Inter-mixtures, whether or not in any solvent." As will be seen, three of the products we must consider were essentially vitamin preparations and, at first glance, this heading does seem to contain the obvious classification, at least for those products. Other products, while not primarily vitamin preparations, did have a significant vitamin content and (taking into account the provisions of GIR rule 2(b) regarding admixtures) heading 29.36 was a possible candidate for those products too.

63. However, the notes to Chapter 29 limit its application. The notes have binding force: see GIR rule 1. Note 1, excised of the irrelevant, reads:

"Except where the context otherwise requires, the headings of this chapter apply only to:

- (a) separate chemically defined organic compounds, whether or not containing impurities
- (b) mixtures of two or more isomers of the same organic compound
...
- (d) the products mentioned in (a), (b) or (c) dissolved in water;
- (e) the products mentioned in (a), (b) or (c) dissolved in other solvents provided that the solution constitutes a normal and necessary method of putting up these products adopted solely for reasons of safety or for transport and that the solvent does not render the product particularly suitable for specific use rather than general use;
- (f) the products mentioned in (a), (b), (c), (d) or (e) above with an added stabiliser (including an anti-caking agent) necessary for their preservation or transport;
- (g) the products mentioned in (a), (b), (c), (d), (e) or (f) with an added antidusting agent or a colouring or odoriferous substance added to facilitate their identification or for safety reasons, provided that the additions do not render the product particularly suitable for a specific use rather than for general use ..."

64. Dr Longstaff told us he had concluded from those notes that Chapter 29 is intended to apply to chemicals transported in bulk, and before they are made up into end products suitable for retail sale. He considered that a particular vitamin, for example, could and probably would be within Chapter 29 if it was imported in powder form in a drum, in order that after importation it could be made up into tablets. The prohibition on adding substances which made the chemical suitable for specific rather than for general use must, he thought, point to that conclusion. The appellant's products, by contrast, were already made up in a form suitable for consumption, for the most part already in the packaging in which they would be supplied to the customer, although a few were imported as bulk supplies of tablets which were then packaged in smaller quantities, in the United Kingdom, in readiness for retail sale.

65. The added materials listed in the appellant's catalogue, necessary though they might be for the purpose of incorporating the chemicals into tablets, were not required for safety, identification or preservation, nor were they necessary for transport. For that reason alone (whatever other objections he might have), Dr Longstaff did not consider that any of the products whose classification was disputed could properly be classified under any part of Chapter 29. He acknowledged Mr McKay's point that the chapter notes do not refer explicitly to chemicals transported in bulk, and conceded that his conclusion was based on inference, but said he could interpret note 1 to Chapter 29 in no other way.

66. We agree with Dr Longstaff's conclusion which, so far as we can tell from his report, also appears to reflect Professor Beckett's view. It seems to us clear from the provisions of note 1 that it is to be applied strictly. If so, it is sufficient that the tableting materials are not within the permitted categories of added materials. In addition, it seems to us clear that the purpose of adding such materials is to make the basic ingredients "suitable for specific use rather than general use", that specific use being consumption as tablets. That being so, we do not need to determine whether it is a necessary inference that goods within Chapter 29 must be imported in bulk, though we incline to the view that Dr Longstaff is right on that point.

67. After the appellant had received the post-clearance demands and had sought advice, it recognised that it could not persist in its assertion that its classification of all of the goods under heading 29.36 was correct. In the correspondence which was before us it argued, through Mr Galloway, that of the eleven items to which the demands relate, three were correctly classified under 29.36 (though there were differences in the complete code from that used on importation), while of the others, one was properly regarded as a food supplement and should be under heading 21.06 (on this product they conceded that Customs were correct and we will not deal with it individually below), three were appropriate to heading 30.04, two to heading 30.03, one to 30.01 and one to 29.32.

68. Chapter 30 is entitled "Pharmaceutical Products." None of the notes to the chapter is of relevance to this case, although we observe with interest that a further note was added in 2001, and therefore after the importations with which

we are concerned, providing that products which satisfy an expanded and formalised *Bioforce* test come within heading 30.04. We will deal with the individual requirements of the various further headings advanced for the appellant as we deal with the products to which it contends those headings are appropriate.

The products

69. We proceed now to examine each of the disputed products in turn. In each case we will identify the product by its trade name and, so far as it is useful to do so, will list its ingredients. We take the ingredients from the appellant's catalogue; it was not suggested that the lists it contained were incorrect or incomplete, or in any other way inaccurate. We then consider the competing arguments before setting out our conclusion on the correct classification, with our reasons. While we must bear in mind Mr Kenneth Eddie's evidence that the appellant can make no medicinal claim for any of its products, it does not necessarily follow that they have none. We should record that neither Miss Whipple (with one exception, to which we will refer later) nor Dr Longstaff laid much emphasis on the absence of any such claim (nor, indeed, Mr Eddie's description of the products as nutritional, though Miss Whipple was to remind us of it) and we confine ourselves to an objective appraisal of the products.

70. The first product to be considered is **Vitamin B-6 200 mg**, supplied in packages of 90 tablets, each tablet containing 200mg of vitamin B6 (pyridoxine), with various tableting agents. This product had been imported under the code used for almost all of the appellant's products, that is the generic "other" classification within heading 29.36, although after Mr Galloway became involved it was suggested that a more specific classification of 293625 (which relates exclusively to Vitamin B6 and its derivatives) would be appropriate. It was imported in packages suitable for its final sale.

71. Dr Longstaff's evidence was that pyridoxine is stable and easily transported in bulk powder form; there would be no adverse consequences if it were packed, without additives, in drums. None of the substances used for tableting was necessary for safety, transport, preservation or identification. It could not, therefore, come within heading 29.36, or indeed within Chapter 29 at all. We agree with that conclusion. Furthermore, it seems to us that this product is not saved by rule 3(b), dealing with mixtures, nor by rule 2(b), because, first, we take the notes to Chapter 29 to amount to an absolute prohibition on inclusion within that chapter if non-permitted ingredients are added and, second, note I (b) of the chapter notes clearly indicates that any permitted mixed products are limited to those which individually come within the same code. Even if (which we doubt) the tableting agents could come within Chapter 29, they are plainly not within heading 29.36, still less are they different isomers of vitamin B6.

72. The appellant has not claimed that this product could be classed within Chapter 30 as a pharmaceutical product, though Dr Longstaff had considered

the possibility that such a classification might be appropriate. Such an approach is necessary if GIR rule 3 is to be applied correctly. However, there was no evidence, he said, that a dose of vitamin B6 of this magnitude would have any particular therapeutic effect. Mr McKay did not advance any evidence or argument to the contrary and it seems to us clear that this product fails the *Bioforce* test, which excludes it from heading 30.04 and, for reasons with which we will deal as we reach more of the products for which Chapter 30 headings have been advanced, from the other possible headings of that chapter.

73. Dr Longstaff's view was that this was no more than a food supplement which is properly classified in Chapter 21. Since the normal means by which the human body obtains supplies of vitamin B6 is by ingesting it as a constituent of food and there would be no need (absent evidence of any particular therapeutic or prophylactic effect) to consume these tablets if the consumer had an otherwise adequate diet, it seems to us that the conclusion that the tablets constitute a food supplement is irresistible. Support for that conclusion can, we think, be derived from the suggested method of taking it, that is one tablet daily with food.

74. Superficially, rule 3(a) of the GIRs suggests that, this being essentially a vitamin product, heading 29.36 – which, it will be recalled, is entitled "provitamins and vitamins" – is the most appropriate, since it affords a more specific description than heading 21.06, "food preparations not elsewhere specified or included". However, the opening words of rule 3, "When ... goods are, prima facie, classifiable under two or more headings ..." excludes this product from the scope of rule 3(a) since, in our view, of the three possible headings, two are excluded for the reasons given by Dr Longstaff, with which we agree. Rule 3(b) does not help the appellant in this context if the product fails the *Bioforce* test and rule 3(c) does not arise; thus only one possibility remains. We agree with Dr Longstaff that code 210690 92 is appropriate for this product.

75. **C-1000-TR** is described as "vitamin C time release with bioflavonoids". Each tablet contains 1000mg of vitamin C and 110mg of lemon bioflavonoids, together with tableting agents. This product, too, is sold in packs of 90 tablets, and the recommended dosage is one tablet per day, taken with food. After Mr Galloway was consulted the appellant's proposed classification was amended to 293627, appropriate to vitamin C and its derivatives. This product too seems to us to be excluded from Chapter 29 because it is imported in a tableted form; it was conceded that none of the tableting agents was required for any of the purposes permitted by the notes to Chapter 29.

76. Although a classification within Chapter 30 had not been proposed, Dr Longstaff again considered that possibility. He accepted that 1000mg of vitamin C was a large dose which, in some patients, might be prescribed for therapeutic purposes, rather than as a dietary supplement, but there was no indication of a therapeutic or prophylactic purpose in this case, and he doubted whether it could properly be regarded as a pharmaceutical product. The appellant led no evidence which might indicate that the *Bioforce* test was

satisfied; indeed, we had no evidence of any therapeutic or prophylactic purpose "concentrated on precise functions of the human organism".

77. Despite Dr Longstaffs concession that this product might have some therapeutic value, we have concluded that there is no real distinction to be drawn between this product and the vitamin B6 tablets, and for the same reasons we are satisfied that the correct classification must be under code 210690 92.

78. **B-Complex.** As its name suggests, this product contains several different B-complex vitamins, with minerals. It is imported in tablet form, and therefore also has tableting agents. Again, the recommendation was that one tablet should be taken each day with food. In this case, the appellant did not seek to amend its original classification of 293690, which is appropriate to intermixtures, which this plainly is. However, and for the same reasons as before, we accept that the incorporation of tableting agents, not required for any of the permitted purposes, excludes this product from Chapter 29. Dr Longstaffs unchallenged evidence was that none of the substances contained within the tablets was included at a level which constituted a therapeutic dose and the appellant led no evidence to the contrary; thus Chapter 30 is also excluded. For the same reasons as those we have given in connection with the preceding products we agree that this product too is properly classified as a food supplement under code 210690 92.

79. **St John's-Dep** is described in the appellant's literature as "a combination of synergistic nutrients and herbs that have been shown to be beneficial in helping to maintain the health of the nervous system." Its principal constituent is "St John's Wort (hypericin)", of which it contains 400mg per tablet. The catalogue also states that "St John's Wort has been used for many centuries for a wide variety of ailments including nervous disorders and depression." It does not, however, claim that this particular tablet is effective in treating depression or any other ailment. The remaining ingredients consist of various vegetable and herb extracts, some vitamins and minerals and tableting agents.

80. This product, too, cannot be bought within Chapter 29 (within which, like the other products, it had been declared on importation) because it was imported in the form of tablets and there was no evidence before us that these were required for any of the permitted reasons.

81. The appellant's revised proposal, following Mr Galloway's involvement, was that it should be classified under heading 30.04, as a medicament, and specifically within code 300450 10, which covers "other medicaments containing vitamins or other products of heading 29.36, put up in forms or in packings of a kind sold by retail". It appears to us that, although vitamins are by no means the predominant ingredients, they are contained in the product and, provided it can be said to be a medicament, it could come within that code. Here, unlike in Chapter 29, the requirement is that the product

should be in a form suitable for retail sale, which this is. The essential question, therefore, is whether this product can be considered to be a medicament.

82. Dr Longstaff accepted that hypericin was the active ingredient of St John's Wort and that it was of some therapeutic value in the treatment of depression, though none of the other ingredients, he said, in unchallenged evidence, had any known therapeutic purpose. Nevertheless, he could not accept this product as a medicament because, although the amount per tablet of St John's Wort was specified, the concentration of hypericin, which was merely a constituent of St John's Wort, was not; and it would therefore not be possible for a medical practitioner to prescribe the product with any confidence. He doubted, in fact, whether the tablets contained more than a very small quantity of hypericin, since if there were a medically significant dose, a Medicines Act licence, which the product lacked, would be required.

83. In our view this product does have some superficial claim to be considered a medicament, because of Dr Longstaff's recognition of the therapeutic value of hypericin. However, we accept what he says in relation to the dosage and conclude that this product too fails the *Bioforce* test. There was simply no evidence before us that it had any therapeutic or prophylactic effect. While we were also left in some doubt whether any of the constituents of the tablets, apart from the vitamins, had any nutritional value, the fact that vitamins are included, coupled with the recommendation that the tablets be swallowed with food, can, we think, lead only to the conclusion that the most appropriate classification of this product is as a food supplement, within code 210690 92.

84. **Adrenal-Lyph Plus.** This product is described in the appellant's literature as "a high potency adrenal with synergistic support." It is said to contain "adrenal" which, elsewhere in the appellant's literature, is defined as a "nutro-trophic process gland", whole pituitary, parotid and a number of minerals and vitamins. It is, again, imported in tablet form and, for the reasons we have already given, we conclude that it cannot come within Chapter 29, and that the code declared on importation was consequently incorrect.

85. Following Mr Galloway's intervention, the appellant accepted that its original classification under heading 29.36 was inappropriate and argued that this product should be classified with the same code as St John's-Dep, namely 300450 10.

86. This is one of the products subjected to veterinary inspections on importation. Dr Longstaff's unchallenged evidence was that in order to pass a veterinary test of that kind, the glandular material included would have to be heated to such an extent that any therapeutic value it might ever have had was destroyed; Mr Eddie had agreed that it was subjected to some heat treatment. The appellant's literature does not give any indication at all of the condition for which the product might be used as a treatment and none was advanced in the evidence; thus it seems to us clear that this product cannot conceivably pass the *Bioforce* test. We are therefore satisfied that it does not come within heading 30.04. We had no evidence before us of the nutritional value of the product but

it contained some vitamins and (according to the dosage recommendations) it is intended to be consumed with food; the inescapable conclusion is that, like the products with which we have already dealt and for the same reasons, it is a food supplement correctly allocated to code 210690 92.

87. **Exspore.** This product is described in the appellant's literature as a "caprylic acid/citrus seed formula" and is said to contain caprylic acid, a number of minerals and plant extracts, some material of bovine origin, glandular extracts and large quantities of lacto bacillus bulgaricus and lacto bacillus bifidus. It is imported in tableted form. There was, again, no evidence that the tableting materials were required for any of the permitted purposes. For the same reasons as before we conclude that this product too cannot come within Chapter 29 and was incorrectly declared on importation.

88. Mr Galloway proposed that this product too was properly classed within heading 30.04, though within a sub-heading (300490 19) which carries the description "other: put up in forms or in packings of a kind sold by retail: other". Since there was no dispute that the product was so put up, and that it could not come within any of the more specific descriptions of heading 30.04, the only question for our consideration was whether it could be regarded as a medicament. No therapeutic or prophylactic value was advanced for this product, save that Mr Galloway, in the correspondence, had described it as "an anti-candida agent, to attack fungal growth".

89. Dr Longstaff likened this product to a dose of yoghurt mixed with herbs and spices. Most of its constituents, he said, had no known therapeutic or prophylactic purpose, though they might be of nutritional value. He agreed that some of the ingredients might have the beneficial effect of clearing the gut after a stomach upset – as would yoghurt – but he could not regard it as a medicament or pharmaceutical product in any usual sense of those terms. It had no Medicines Act licence. It does not seem to us that either Mr Galloway's claim or Dr Longstaff's concession is enough to satisfy the "tight, certain and focussed" *Bioforce* test. We are satisfied that this product cannot come within heading 30.04, but its nutritional value leads to the conclusion that it is properly to be regarded as a food supplement within code 210690 92.

90. **Paragard** is described in the appellant's catalogue as a "potent herbal formula designed to support a healthy intestinal environment". It contains several different plant extracts and vitamin C. It is claimed in the catalogue that it includes "botanicals listed by the Merck Index as anthelmintic (antiparasitic) ... and anti-bacterial". This is one of the products which the appellant imports in bulk (though already made up into capsules) and has packaged within the UK, but that difference from the products we have already considered is in our view insufficient to bring it within Chapter 29; it is the added ingredients, rather than the packaging, which disqualifies it.

91. Mr Galloway contended in the correspondence that this product should be classed within heading 30.03, which is appropriate for "medicaments ... consisting of two or more constituents which have been mixed together for

therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale." More specifically, he suggested code 300390 90, which includes merely "other"; there is no more detailed description. Heading 30.03 contrasts most obviously with heading 30.04, which relates to products which *are* put up in measured doses, although 30.03 requires a mixture of constituents while heading 30.04 permits, but does not require, a mixture; we do not need to examine the other differences between the two headings for present purposes. It is, however, clear that heading 30.03 is not available in this instance since, although the product meets the requirement that it should be a mixture, it fails the second test because it is put up in measured doses, which we consider includes encapsulation.

92. In case we are wrong in that conclusion, we should record Miss Whipple's argument that – leaving aside how the product is put up – there is no material distinction to be drawn between headings 30.03 and 30.04. The wording of the two headings is very similar, particularly in relation to the purpose, or effect, of the constituents. Although there is, apparently, no authority dealing directly with heading 30.03, it seems to us that, in interpreting the requirements which must be satisfied if a product is to come within this heading, there is indeed no practical distinction to be drawn between it and heading 30.04 and that the *Bioforce* test is apposite.

93. Here, the appellant comes close to claiming a therapeutic effect, though on closer analysis it is clear that a claim that the product contains certain constituents is not the same as a claim that they are included in a therapeutic dose. Moreover, the mere fact that certain constituents are included is not, we think, by itself an indication that any particular effect "concentrated on precise functions of the human organism" will necessarily follow. Dr Longstaff told us that he had serious doubts whether the product had in any event the therapeutic value the catalogue suggested and said that if the appellant's claims were correct, the product would need a Medicines Act licence. The appellant did not put forward any evidence to support any possible therapeutic effect and it seems to us that this product must inevitably fail the *Bioforce* test, thus excluding it from heading 30.04 and from 30.03 if we are right in our view that the *Bioforce* test applies to that heading.

94. By contrast with others of the appellant's products, the recommendation in the literature is that this product be ingested not with food, but between meals. Nevertheless, if the capsules are not ingested for medicinal purposes and no other possibility is advanced, we think the conclusion must be that they are consumed as a food or food supplement and, despite that difference between this product and the others, which in any event we think is of little significance, we conclude that it too is properly classified under code 210690 92.

95. **PROstate Formula** is described in the appellant's literature as "a synergistic combination of herbs, vitamins and minerals providing nutritional support of the prostate gland." Rather to our surprise, it was held out as suitable for use by both men and women. The active ingredients are described as saw palmetto and zinc; the remaining ingredients are vitamins and vegetable

extracts. It is produced in tableted form and is another of the products which the appellant imports in bulk. Because it contains tableting materials it was, for the reasons we have already given, incorrectly declared within Chapter 29. In the correspondence Mr Galloway advanced code 300390 90, the same code as he had advanced for Paragard. For the same reasons as we have recited in relation to that product, it cannot come within heading 30.03, but it might come within 30.04.

96. As we have indicated, this product is held out as providing "nutritional support." Dr Longstaff said he knew of no therapeutic value to any of the ingredients and this product too lacked a Medicines Act licence. There was no material before us to indicate what, if any, therapeutic or prophylactic effect this product might have and it does not begin to satisfy the *Bioforce* test. There is no indication in the literature whether this product should be taken with food or between meals but we are left in no doubt, not least by its description as a "nutritional support", that it should be classified as a food supplement within code 210690 92.

97. **Glucosamine sulfate.** This product consists of glucosamine sulfate (the only active ingredient) in a dose of 500mg per capsule. It is imported in bulk, but already in capsule form. For the reasons we have already given, we conclude that this factor alone disqualifies the product from classification under Chapter 29.

98. Although the appellant had declared this product within heading 29.36, Mr Galloway proposed code 293299 70, which includes "heterocyclic compounds with oxygen hetero atom(s) only: other: other cyclic acetals and internal hemiacetals, whether or not with other oxygen functions, and their halogenated, sulphonated, nitrated or nitrosated derivatives." Dr Longstaff accepted that glucosamine sulfate was a cyclic acetal within this description and we have concluded that this product could come within code 293299 70 but for the overarching objection that it is imported in capsule form.

99. The appellant's literature comes close to claiming a therapeutic effect, stating that "a high potency dose of glucosamine sulfate ... is known to be important in cartilage repair and function ... it is involved in joint maintenance and synovial fluid production ... glucosamine sulfate is listed as a proven chondoprotective agent, which has been thoroughly researched for its role in cartilage production and protection." Although classification within Chapter 30 had not been proposed by Mr Galloway, Dr Longstaff had nevertheless considered whether it might be appropriate, as indeed GIR rule 3 requires.

100. He accepted that glucosamine sulfate was recognised as having a therapeutic effect in the treatment of arthritis. However, he said, ingested in the form in which it was contained in these tablets, it would be metabolised by the body and broken down into its constituent parts. Although those constituent parts could well be beneficial to the body, they would be beneficial in the nutritional rather than the therapeutic sense. Nevertheless, he did not rule out entirely the possibility that this product could have uses in the treatment of

damaged tissues, and in particular in bone regeneration. He was quite sure that it could not properly be regarded as a pharmaceutical product or a medicament, in the conventional sense of those terms.

101. It seems to us that, of all the products we have been asked to consider, this product has the greatest potential to satisfy the *Bioforce* test. The lack of a Medicines Act licence counts against it, but more important, in our view, is the fact that we have no evidence of an actual therapeutic or prophylactic effect. It may well be (and Dr Longstaff's evidence supported the proposition) that glucosamine sulfate has the powers claimed for it. The difficulty for the appellant is that it has not produced any evidence that the dosage contained in these tablets – even leaving aside Dr Longstaff's objection that it would be metabolized – has any identifiable effect. The claim that glucosamine sulfate "is known to be important in cartilage repair and function", true though it may be, is in our view too imprecise to match the "tight, certain and focussed approach" described by Laws J in *Cedar Health*.

102. Having excluded Chapter 29 and headings 30.03 and 30.04, and being left with Dr Longstaff's evidence that the product has a nutritional value, we conclude that it must be a food supplement within code 210690 92.

103. **T-Lyph** is described in the appellant's literature as a "thyroxin-free thyroid concentrate" in tablet form, each tablet containing thyroxin-free thyroid, parotid and tableting agents. There is no indication of the benefits of consuming the tablets. This product, too, is imported in the form of capsules and, for the same reason as applies to the preceding products, is disqualified from Chapter 29.

104. Mr Galloway suggested code 300120 90. Heading 30.01 applies to "glands and other organs for organo-therapeutic uses, dried, whether or not powdered, extracts of glands or other organs or of their secretions for organo-therapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included." The additional digits of the full code proposed by Mr Galloway merely add "other", though in its context this means of non-human origin. Miss Whipple contended that, the wording being so similar, such products too must be considered in the same light as those within heading 30.04, that is by reference to their actual therapeutic value, rather than by reference only to the materials which they contain. We agree with that argument, which, indeed, Mr McKay did not seek to challenge.

105. Dr Longstaff's evidence, again unchallenged and which we accept, was that since thyroxin was the active ingredient of the thyroid gland, its removal negated any therapeutic effect which the product might otherwise have had. The thyroid gland would need to be heat treated in order to meet veterinary requirements and, like Adrenal Lyph Plus, this product was not dissimilar from (as Dr Longstaff put it) an Oxo cube in capsule form. The product could not be classified in heading 30.01 as it had no demonstrable therapeutic or prophylactic effect – we heard no evidence to the contrary – and it therefore

failed the *Bioforce* test. We agree with that conclusion. We were left with no clear impression of any nutritional value in this product but since it is intended to be ingested (the recommendation is to take one tablet daily with food) and, presumably, digested we conclude that it too is properly classified as a food supplement within code 21069092.

Conclusions on classification issue

106. We are, therefore, satisfied that the Commissioners are right and that each of the appellant's products is properly classified as a food supplement within code 210690 92. Subject to the remission argument, to which we now turn, the post-clearance demands against which the appeal has been brought were correctly raised; we understand there is no challenge to their arithmetic.

The remission claim

107. The claim for remission derives from Council Regulation 2913/92/EEC, which established the Community Customs Code. Article 239 of the Regulation provides as follows:

"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 I upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

"However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases."

108. It was common ground that Articles 236, 237 and 238, which deal with irregular payments of import duty and defective goods, are of no application in this case, and that no question of deception arises. If the appellant is able to bring itself within Article 239, therefore, it must demonstrate the existence of a "situation" arising in circumstances where no "obvious negligence" is to be attributed to it. We will return to the meaning of those expressions.

109. The procedure to be adopted is set out in the implementing provision envisaged in the second indent of Article 239(1), namely Commission Regulation 2454/93/EEC. It was accepted that the only relevant regulation is Article 905:

"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.

"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."

110. We do not need to deal with the detail of the procedure (which appears in the following Articles of the 1993 Regulation). Suffice to say that unless a case comes within Article 899 (which it was agreed this case does not), Article 905 requires the respondents to submit a claim for remission within Article 239 to the European Commission for decision, unless it is sure that such a claim cannot succeed. It is the respondents' refusal to take that course which has led to this part of the appeal.

111. In *Eyckeler & Malt AG v Commission of the European Communities* (Case No T—42/96) [1998] ECR II—401 the European Court succinctly explained how Article 905 is applied in practice:

"74 First, it should be pointed out that the administrative customs procedure for the remission of import duties involves two separate stages. The first is at national level. The person liable must submit his application for remission to the national administration. If the national administration considers that the remission should not be granted, it may, according to the rules, adopt a decision to that effect without submitting the application to the Commission. Such a decision may be reviewed by the national courts. In contrast, if the national

administration either has doubts concerning the remission, or believes that the remission should be granted, it must submit the application to the Commission for a decision. The second stage of the procedure is thus at Community level and the national authorities submit the file relating to the person liable to the Commission. After consulting a group of experts composed of representatives of all the Member States, the Commission then decides whether the application for remission is justified."

112. We do not need to consider Article 899 (which deals with particular situations which do not arise here) save to mention its definition of "the person concerned", which (as Miss Whipple accepted) plainly includes the appellant. The issue before us is whether the appellant has satisfied the two conditions – that is, whether it has established a "special situation" in which "no obvious negligence" may be attributed to it. If so, or if it has demonstrated that there is evidence supporting the conclusion that a "special situation" exists but "obvious negligence" does not, it is entitled to have the respondents refer its claim to the Commission; if not, the claim is bound to fail, since the respondents are required to reject it. The respondents have refused to refer the claim to the Commission because, as Miss Whipple's skeleton argument trenchantly puts it, "... the appellant's case for remission under Article 239 is hopeless. Of this the Commissioners have no doubt".

113. The essence of the appellant's case on the remission issue, as Mr McKay put it, is that the history of the case itself amounts to a "special situation" and, he argued, the appellant was certainly not guilty of any negligence. It had quite reasonably relied upon the advice given to Mr Eddie senior and to Mrs Eddie when they began importing products similar to those which are the subject of this appeal. The Commissioners had had the opportunity in September 1992 to examine all of the appellant's products but either did not do so, or alternatively did examine them but came to the wrong conclusion; and their failure then to come to the correct conclusion and advise the appellant of its error in classification induced in the appellant the reasonable belief that it was correctly classifying its products, apart from those three singled out by Customs as having been incorrectly classified – indeed the very fact that three were singled out but Mr Eddie was advised that the remainder were correctly classified negated any possible negligence. Thereafter, the Commissioners had frequently inspected the appellant's consignments, knowing that many of the items within them contained materials of animal derivation (implying that they had considerable detailed knowledge of the appellant's products) yet at no time until 1998 was any further comment made about the nature of the appellant's products. He relied too on the large number of "Route 1" inspections, and what he described in his skeleton argument as "the very high degree of supervision and involvement of the Commissioners in the appellant's importation of products over the years". Accordingly, he argued, the appellant had continued to declare the products it was importing, believing on reasonable grounds that it was correctly

classifying them. If the products were incorrectly classified, the Commissioners must themselves bear much of the blame while the appellant had quite properly relied on what it had been told – so could not be negligent – and it was unreasonable of the respondents not to refer the claim for remission to the Commission.

114. Miss Whipple's response, briefly put, was that there was no "special situation" within the meaning of Article 905.1 – this was a simple case of error – and that although the appellant had been in no way guilty of any deception, it was certainly guilty of "obvious negligence" within the meaning of that paragraph since it had failed to discharge its duty of ensuring that the products were correctly declared on importation. It was not sufficient to rely on the Commissioners, still less sufficient to assume, in the absence of any comment to the contrary, that the imports were correctly classified.

115. There is a small difference of wording between Article 239 of the 1992 Regulation, referring to "situations ... resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned" and Article 905 of the 1993 Regulation, which uses the phrase "a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned". Although neither Regulation defines "situation" or "special situation" in this context, it appears that in practice the two are to be regarded as synonymous. Indeed, the difference between the two regulations was not even mentioned by the Court of Justice in *Reiner Woltmann v Hauptzollamt Potsdam* (Case No C—86/97) [1999] ECR I—1065, in which the meaning of the expression "special situation" was considered. There, the importer sought the remission of customs duty on cigarettes which he had imported but which were then stolen. At paragraph 18 of its judgment the Court said:

"It is clear from the scheme of section IV, Title IV, Chapter 3, of the Regulation that Article 905 introduces into Community customs law a general fairness clause intended to cover exceptional situations which, in themselves, do not fall within any of the cases provided for in Articles 900 to 904 of the Regulation."

116. The Court then went on to say, at paragraph 21:

"In undertaking its examination, in the light of the objective of fairness underlying Article 239 of the Code, the customs authority must confine itself to verifying whether the circumstances relied on are liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business."

117. It will be observed that the Court did not use the word "special" but preferred "exceptional" (we recognise that the English text has been translated from the original German and may not reflect all the nuances of the judgment) but it is nevertheless clear that what the Court had in mind was that something very much out of the ordinary must be shown if those provisions are to be relied upon.

118. There was nothing before us to suggest that the appellant was in any way disadvantaged by comparison with its competitors, the situation envisaged in *Woltmann's* case. Miss Whipple contended, for the respondents, that other importers of similar goods would have been paying duty under Chapter 21. That contention must, we think, be regarded as supposition since we heard no evidence to support it but, more pertinently, the appellant produced nothing to show the contrary – for example, that its competitors were in fact importing similar goods under Chapter 29, without objection from Customs, or that they, unlike the appellant, had been given clear and correct advice by Customs and had acted upon it.

119. Mr McKay did not challenge Miss Whipple's contention by producing evidence that the appellant was in any way at a disadvantage by comparison with its competitors; his case, as we understood it, was that the appellant was placed at a financial disadvantage by its having priced its goods upon the assumption that (in the more recent years) no import duty was payable, whereas it was now faced with a large demand for unpaid duty. His point was the simple one that Customs' failure to advise the appellant correctly was, alone, sufficient to amount to a "special situation".

120. The philosophy behind the application of Article 239 emerges from the jurisprudence of the European Court of Justice, and in particular from the case of *Söhl & Söhlke v Hauptzollamt Bremen* (Case No C—48/98) [1999] ECR I—7911. The court explained the circumstances of the case in this way:

"19Söhl & Söhlke imports goods under outward processing arrangements and re-exports some non-Community goods introduced into the customs territory of the Community. In 1994 non-Community goods were regularly dispatched to Bremen under the transit procedure, presented at the Hauptzollamt and released for temporary storage with Söhl & Söhlke.

"20 In August 1993Söhl & Söhlke informed the Hauptzollamt that computerisation of its customs calculations, which would enable clearance to be effected more rapidly, had not yet been completed and consequently it would not always be possible to meet the 20-day time-limit for customs clearance laid down in Article 49(1) of the Customs Code.

"21 In January 1994 the Hauptzollamt informed Söhl & Söhlke that, having regard to the entry into force of the Customs Code on 1 January 1994, it would no longer draw its attention to the expiry of time-limits in respect of goods released to it for temporary storage. At the same time Söhl & Söhlke was informed that a customs debt on importation had been incurred under Article 204(1)(a), read in conjunction with Article 49, of the Customs Code.

"22 From mid-February to the end of 1994 Söhl & Söhlke regularly failed to meet the prescribed time-limits for assigning to goods a customs-approved treatment or use. By a letter of 12 October 1994, the

Hauptzollamt pointed out to Söhl & Söhlke the consequences of that behaviour in terms of customs debts and requested it to set out its reasons for failing to meet the deadlines. Söhl & Söhlke did not reply to that letter but subsequently made several requests for the timelimit to be extended, referring to the considerable backlog of work that had unforeseeably arisen as a result of the computerisation of its accounting procedure and staff shortages due to illness. The Hauptzollamt refused several of those requests by a decision of 20 December 1994.

"23 Between 20 October 1994 and 15 February 1995 the Hauptzollamt issued 125 notices of assessment on the basis of Article 204(1)(a) of the Customs Code concerning customs clearances carried out between February and December 1994.

"24 Söhl & Söhlke lodged objections against all the notices of assessment, essentially arguing that no customs debt had been incurred under Article 204(1)(a) of the Customs Code because its failures had had no significant effect on the correct operation of the temporary storage or customs procedure in question. In the alternative, it applied, pursuant to Article 239 of the Customs Code, read in conjunction with Article 900(1)(o) of the implementing Regulation, for repayment of the import duties that had been paid.

"25 By two decisions of 23 May 1995 the Hauptzollamt rejected the objections lodged by Söhl & Söhlke and dismissed its application made in the alternative for repayment ..."

121. The facts of that case are, of course, quite different from those with which we are concerned. What is of importance here is the answer given by the Court of Justice to the seventh of the questions referred to it, in the course of the proceedings, by the German court. The court described the question in this way:

"45 By its seventh question the national court asks essentially, first, whether the terms 'offenkundige Fahrlässigkeit', 'offensichtliche Fahrlässigkeit', and 'große Fahrlässigkeit', which appear respectively in the German version of Article 212a of the Customs Code, as amended by Regulation No 82/97, Article 239 of the Customs Code and Article 859 of the implementing Regulation and correspond to the terms 'manifest negligence' and 'obvious negligence' in the English version, have the same meaning. Secondly, the national court asks what are the criteria for determining whether or not there is obvious negligence within the meaning of Article 239 of the Customs Code. Lastly, it asks whether it is possible to conclude that there was no obvious negligence ('offensichtliche Fahrlässigkeit') within the meaning of the second indent of Article 239(1) of the Customs Code where noncompliance with the time-limit laid down in Article 49(1) of the Customs Code, which is regarded as constituting obvious negligence ('große Fahrlässigkeit') within the meaning of the second indent of Article 859

of the implementing Regulation, results in a customs debt being incurred pursuant to Article 240(1)(a) of the Customs Code ..."

122. The court put the answer in this way:

"51 As regards the second part of the seventh question, it should be observed first of all that, as is evident from paragraphs 46 to 49 of this judgment, the second indent of Article 239(1) of the Customs Code and the other provisions of the Customs Code or the implementing Regulation which form the subject matter of this judgment refer to the same concept of 'obvious negligence'.

"52 Secondly, the repayment or remission of import and export duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure and, consequently, the provisions which provide for such repayment or remission are to be interpreted strictly. Since a lack of 'obvious negligence' is an essential condition of being able to claim repayment or remission of import or export duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited.

"53 Thirdly, it appears that the Customs Code brought together the provisions of customs law which had previously been dispersed in a large number of Community regulations and directives. When that happened Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979. L 175, p 1) was essentially reproduced in Article 239 of the Customs Code. Therefore the case law of the Court concerning the former must also apply to the latter.

"54 It follows from the judgment in Case C—250/91 *Hewlett Packard France* [1993] ECR I—1819, paragraph 46, that Article 13 of Regulation No 1430/79 and 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), 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. It follows that the conditions to which the application of those articles is made subject, that is to say that no negligence or deception may be attributed to the person concerned in the case of Article 13 of Regulation No 1430/79 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 5(2) of Regulation No 1697/79, must be interpreted in the same manner.

"55 Moreover, in its judgment concerning Article 5(2) of Regulation No 1697/79 in Case C—64/89 *Deutscher Fernsprecher* [1990] ECR I—2535, paragraph 19, the Court held that the question whether or not an error committed by the customs authorities was detectable by a trader had to be examined taking account in particular of the precise nature of the error, the professional experience of, and the care taken by, the trader.

"56 By analogy with those criteria, in order to determine whether or not there is 'obvious negligence' within the meaning of the second indent of Article 239(1) of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader.

"57 As regards the professional experience of the trader, it is necessary to examine whether or not he is a trader whose business activities consist mainly in import and export transactions and whether he had already gained some experience in the conduct of such transactions.

"58 As regards the care taken by the trader, it must be noted that, where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions.

"59 It is for the national court to determine, on the basis of those criteria, whether there is obvious negligence on the part of the trader.

"60 In those circumstances, the answer to the second part of the seventh question must be that in order to determine whether or not there is 'obvious negligence' within the meaning of the second indent of Article 239(1) of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred and the professional experience of, and the care taken by, the trader. It is for the national court to determine, on the basis of those criteria. Whether there is obvious negligence on the part of the trader."

123. The Court put the approach a little differently in the *Eyckeler & Malt* case, to which we referred earlier in this decision, and on which Mr McKay relied. There, it said, of Article 13 of Regulation 1430/79 (the predecessor of Article 905):

"132 According to settled case-law, Article 13 constitutes a general equitable provision designed to cover situations other than those which arose most often in practice and for which special provision could be made when Regulation 1430/79 was adopted ... It is intended to apply, *inter alia*, where the circumstances characterising the relationship

between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred ...

"133 The Commission must therefore assess all the facts in order to determine whether they constitute a special situation within the meaning of that provision ... Although it enjoys a margin of assessment in that respect ... it is required to exercise that power by actually balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk..."

124. We accept Miss Whipple's argument that an importer seeking the benefit of Article 239 must be able to show that his "situation", or "special situation", is not merely out of the ordinary, but is in some way exceptional; so much is apparent from *Woltmann's* case. Whether there is "obvious negligence" is to be tested by reference to the criteria identified in the case of *Söhl & Söhlke*, and in particular in paragraph 60 of the judgment. On the other hand, we accept the force of Mr McKay's argument, supported by *Eyckeler & Malt*, that the equity of the trader's position must be borne in mind.

125. We turn therefore to consider our findings of fact in this case, and having done so, to consider whether the appellant has satisfied the relevant tests.

Analysis of the remission issue

126. We accept that the classification of the appellant's imports is not straightforward, in that it is not immediately obvious which tariff heading is more appropriate. It is not unreasonable to look first to heading 29.36 for vitamin tablets, since that heading clearly is designed for vitamins; and we recognise, too, that Dr Longstaff's view that Chapter 29 cannot include vitamin products already made into tablets is one reached only after some analysis of the wording, though we do not ourselves think it a difficult conclusion to reach.

127. In *Customs and Excise Commissioners v Invicta Poultry Limited* (1997, unreported) Lightman J said, of the requirement imposed by Article 220(b) that, in order to obtain relief under that Article, the error in question could not reasonably have been detected by the person concerned:

"In determining whether this condition is satisfied, all the circumstances of the individual case must be assessed objectively, taking into account the nature of the error, the professional experience of the trader concerned and the degree of care which he has exercised ...

"It is well established that in conducting this exercise it must be taken into account that a trader has available to detect any error the [Official] Journal and the provisions of Community law there printed. The principle is clear that 'everyone was deemed to know the law' ... This principle is more realistically understood and applied under Community

law than it is under English law: the trader is only expected to derive from the Journal such knowledge as would be derived by an attentive reader. Where the complexity of the law is such as to defeat the reasonable efforts of such a reader, a greater knowledge and understanding may not be attributed to him: whether it will or not depends on all the circumstances ..."

128. In the Court of Appeal in the same case ([1998] EWCA Civ 775, 6 May 1998), Buxton LJ went a little further:

" ... 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 ..."

129. There is no exact parallel between Articles 220(b) and 239, though the guidance set out in those passages seem to us to be useful in both contexts. Here, as Mr Eddie junior conceded, he had made no effort to read the Journal or any other publication dealing with the tariffs. Had he read only the CN and the chapter notes he would, in our view, at the least have realised that there was some doubt whether heading 29.36 was available. Nevertheless, if the appellant's error had been limited to misdeclaration within heading 29.36 of vitamin tablets, and the respondents had accepted such declarations without demur for many years, the appellant might have a case for remission under Article 239.

130. What is obvious, however, is that products which contain no vitamins at all cannot possibly be correctly classified under a tariff heading of "provitamins and vitamins"; yet this heading was used for almost all of the appellant's products, whether or not they contained vitamins, and whether or not they were essentially vitamin products. Thus while complexity of the law might amount to a ground for remission if one considers only vitamin products, that cannot be the case when one considers other products; even the most cursory examination of the CN would show that heading 29.36 was inappropriate. Moreover, even in those cases in which heading 29.36 was, at least arguably, available, the appellant indiscriminately classified all its products within code 293690 90, making no attempt to allocate, for example, vitamin B6 products to the code specifically provided for it. It cannot avail the appellant to say that the law is complex if, as seems to us to be patently the case, its officers have made no real attempt to understand it.

131. In our view the relevance of the trader's experience is essentially this: less can realistically be expected of a trader who, occasionally or perhaps even only once, imports goods as an incidental to his business, than of a trader whose business is the import of goods. There are obviously other categories between those extremes, but that does not assist the appellant – the importation of its products is central to its business. We heard evidence from Mr Eddie junior and Mrs Eyres, in particular, that consignments arrived frequently and,

as we understood it, all of the products sold by the appellant were imported from the USA. In our view it is not open to the appellant to contend that any lack of experience counts in its favour; if it suffered from such a lack it derived from Mr Eddie junior's reluctance to concern himself with the detail of the appellant's declarations.

132. We turn, last, to consider the degree of care exercised by the appellant. We accept that Mr Eddie senior and Mrs Eddie made enquiries of the respondents before they embarked on commercial importations of products such as those with which we are concerned. We are unable to make any finding about what precisely Mr or Mrs Eddie said to the Customs officers about the nature of the products, nor about the nature of the advice which was offered to them. There was no contemporaneous documentation available to us, and, given the lapse of twenty years or so, Mr Eddie senior's recollection was understandably somewhat vague. We are, however, satisfied that he and his wife were frank and open with the Customs officers with whom they dealt at that time and that they believed that the goods they were importing were correctly classified. We accept too that Mr Eddie junior, when he became involved, believed that the products were correctly classified. However, we find that he did not make any active enquiry of his own, at any time, and notwithstanding the changes in the appellant's imported product range over the years. In particular, he did not read the Official Journal or any documentation produced by Customs.

133. While we accept that Mr Eddie came away from the 1992 inspection with the impression that, save for the three singled out products, the company's imports were correctly classified and that this impression was fortified by his belief that subsequent inspections of the appellant's consignments were rigorous, we have concluded that Mr Eddie's view of the matter was induced by his reluctance to involve himself in matters which, as he readily conceded, he did not fully understand. Instead, he relied too heavily upon his import agents and upon Customs officers to take the initiative in advising him. There is no evidence, nor was it suggested, that Mr Eddie or any other officer of the appellant made any application for a BTI until 1998, nor even sought an informal written ruling. Despite the 1992 events, and the subsequent veterinary inspections, we have concluded that Mr Eddie junior did not appreciate as fully as he should have done the importance of correctly classifying the appellant's goods, to the extent that his diligence fell significantly short of that reasonably to be expected of a professional importer.

134. We are equally satisfied that, despite Mr Eddie's belief, the 1992 events could not properly be regarded as an audit. Only some – albeit about three quarters – of the appellant's imported products were included in it. Only three were singled out for detailed examination, but all three were found to have been incorrectly declared. It was, to put it at its lowest, risky to assume from the absence of adverse comment that all the others were correctly classified. Though we believe he was doing his best to recall the events of that occasion, and to tell us the truth, we doubt Mr Eddie's evidence that the Customs officers

involved on that occasion said, in clear terms, that the goods included in the consignment, apart from the three identified items, were correctly classified; we think it much more likely that they took the more negative line that they had no reason to object to the tariff classification used by the appellant.

135. Similarly, we cannot regard the veterinary inspections as an indication that Customs were auditing the appellant's products; we consider that they were no more than a check on the animal content of the importations. We regard the other inspections, when consignments had been opened, as likely to be due to checks that the goods in the consignment corresponded with the paperwork, and no more. Certainly there was no evidence, rather than supposition, to support the opposite conclusion.

136. We take also into account in this context the fact that many of the products which the appellant was importing under the heading "provitamins and vitamins" did not contain any vitamins at all. That point seems to us to encapsulate the problem it faces in this case in relation to its standard of care. While we do not doubt that the appellant, and Mr Eddie junior in particular, have acted in good faith throughout, it seems to us quite obvious that no real thought has been given to the nature of the products that the appellant was importing; in essence, it seems to have been regarded as sufficient that Customs had accepted declarations under heading 29.36 in the past for declarations under that heading to be made in the future.

137. Mr McKay's argument that there was a "special situation" depends upon our accepting that the appellant was entitled to rely upon Customs to advise it of the correct classification of its products. However, in our view the weight of authority is against that proposition.

138. In *Hewlett Packard France v Directeur Général des Douanes* (Case No C—250/91) 1993 ECR I—1819 the Court of Justice was required to consider the application of Article 5(2) of Council Regulation (EEC) No 1697/79, the forerunner of Article 220(2)(b) of Regulation 2913/92/EEC, on which this appellant too had originally relied although, as we have mentioned, it did not pursue this ground of appeal. The requirements of Article 220(2)(b) are not identical to those of Article 239 but, as the Court indicated in *Söhl & Söhlke* (see para 54 of the judgment, set out above, in which the *Hewlett Packard* case was mentioned), they give rise to similar considerations. A trader seeking relief under Article 220(2)(b) must show an error by the customs authorities which was not reasonably detectable by the person liable for the duty. In *Hewlett Packard* the Court said (at para 21 of the judgment):

" ... such an error is made by the authorities competent to effect recovery to which that provision [ie Article 220(2)(b)] refers where, despite the number and size of the imports made by the person liable, those authorities raised no objection concerning the tariff classification of the goods in question, even though a comparison between the tariff heading declared and the explicit description of the goods in accordance

with the indications of the nomenclature would have disclosed the incorrect tariff classification."

139. That passage certainly gets Mr McKay's argument off the ground, although Miss Whipple suggested that one of the essential features which the Court of Justice considered must be present if an error were to be established, that is that the importer's declarations were complete, was not satisfied. We think Miss Whipple is probably right, but we did not explore that argument fully (since Article 220(2)(b) was not in issue) and we do not need to determine it for present purposes. It is when one turns to the requirement that the error could not reasonably have been detected that it is apparent that the appellant's argument cannot succeed. As the Court of Justice made clear at para 58 of its judgment in *Söhl & Söhlke*, if there should be any doubt, the onus was on the importer to make enquiries. It may be that Mr Eddie junior did not suffer from any doubts, but in our view he should have done. A simple comparison of what the appellant was importing with the CN would have revealed that some, at least, of the appellant's products could not conceivably be correctly classified as vitamins. It is obvious that the appellant could reasonably have discovered this mistake; its problem here is that it made no attempt to do so.

140. Instead, it was abundantly clear from the evidence that we heard from Mr Eddie junior and from his father, that the appellant had in fact relied on Customs. At the outset, when Mr Eddie senior began to import the products, that might be regarded as reasonable. Some seventeen years later, however, when the consignment with which we are concerned was examined, the nature of the appellant's business had expanded significantly and its product range had changed. Unlike Mr Eddie senior for his clinical practice, it was not importing products for incidental use in its principal business; its principal business consisted of such imports. As Mr Eddie junior correctly accepted, the responsibility for declaring its imports correctly lay upon the appellant. The appellant knew, or ought to have known, precisely what it was importing, but it is unrealistic to believe that Customs would have the same intimate knowledge. It is, we recognise, clear that the appellant changed its declarations when required to do so, but that is very different from a finding that, by mere acquiescence (and we are not satisfied there was anything more), Customs have induced the appellant to make incorrect declarations, believing them to be correct.

141. We have already mentioned our conclusion that the appellant's import agents seem to have played a relatively minor part in ensuring that the tariff declarations were correct. We may be doing them an injustice; but even if we are it cannot affect the outcome of this appeal. We agree with Lightman J, in *Invicta Poultry*, (albeit reciting what was common ground) that "the knowledge of [importer] and customs agent is to be aggregated". If the appellant failed to seek the advice of its import agent, that failure of itself seems to us to be negligent; if it did, the appellant is "fixed" with that advice, whether or not it was correct – and there is correspondingly even less justification for its reliance on Customs.

Conclusions on the remission issue

142. The evidence we heard has driven us to the conclusion that the standard of care taken by the appellant falls far short of that to be expected of a professional importer. It is reasonable to expect that an importer as substantial as the appellant will take steps to ensure that each of its imports is correctly declared on entry and, if it is unable to determine for itself, by comparison of the product with the CN, what is the correct tariff classification, that it should take professional advice and, better still, seek BTIs. The appellant has plainly not done so but has relied instead on what seems to us to be best described as wishful thinking.

143. Unfortunate though it undoubtedly is to be faced with a very substantial claim for duty, we do not accept that the appellant has shown "special" or "exceptional" circumstances; nor do we find that equity demands that it should be afforded relief. We are satisfied that its failure to declare the goods correctly is due to its own lack of care, and that it could have no legitimate expectation that the respondents would, in effect, discharge its duty of care for it.

144. Miss Whipple's description of the claim for remission as "hopeless" seems at first sight a harsh one, even allowing for her need to justify the respondents' view that there was no evidence supporting a reference to the Commission in this case. However, in our view it is a fair description; the claim for remission has no merit and was bound to fail.

145. We accordingly resolve the entire appeal in favour of the respondents. Miss Whipple did not ask for costs, and there will be no direction in that respect.