OPINION OF ADVOCATE GENERAL JACOBS
delivered on 9 June 1994 *

My Lords,

1. The plaintiff in the main proceedings (Neckermann Versand AG, hereafter 'Neckermann') operates throughout the Federal Republic of Germany numerous department stores and other retail businesses, and in particular carries out mail order transactions. For those purposes it imports, *inter alia*, textiles.

2. In 1988 and 1989 Neckermann imported articles of clothing which it declared as pyjamas. The defendant customs authority (Hauptzollamt Frankfurt am Main-Ost) decided subsequently, as a result of an auditor's report, that the goods in question should have been classified as upper garments and trousers and, in one case, as an ensemble. Since that classification entailed the application of a higher rate of duty, the customs authority made a supplementary demand for duty. The customs authority based its view partly on the application by analogy of two Commission regulations concerning the customs classification of certain goods (Commission Regulations (EEC) No 548/89 [1] and No 812/89 [2]), which stated that certain garments could not be classified as nightdresses because they were not clearly identifiable as being intended for wearing *exclusively* as nightwear.

3. Neckermann challenged the decision to reclassify the goods before the Hessisches Finanzgericht, which has requested a preliminary ruling on the following questions:

'(1) Is heading 6108 of the Combined Nomenclature to be interpreted to the effect that only sets of two knitted garments which, according to their outward appearance, are to be worn exclusively in bed must be considered to be pyjamas?

* Original language: English.

1 — OJ 1989 L 60, p. 31.
2 — OJ 1989 L 86, p. 25.

(2) If Question 1 is answered in the negative:

Is it sufficient, in order for garments of the type mentioned to be classified as pyjamas, for example under CN Code 6108 3190 0000, that according to the generally accepted view in trade in the Member State concerned at the time of customs clearance the goods in question may, in addition to other uses, also be worn in bed?'

4. The Combined Nomenclature for the Common Customs Tariff was laid down in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff. [3] Under Article 12 of that regulation the Commission adopts each year by means of a regulation 'a complete version of the Combined Nomenclature together with the corresponding autonomous and conventional rates of duty of the Common Customs Tariff, as it results from measures adopted by the Council or by the Commission'. In the period in which the disputed importations took place the applicable versions of the Combined Nomenclature were contained in the original Regulation No 2658/87 and in Annex 1 to Commission Regulation (EEC) No 3174/88 of 21 September 1988. [4]

5. The wording of heading 6108 of the Combined Nomenclature was the same in both regulations. I will quote the relevant part:

'6108 Women's or girls' slips, petticoats, briefs, panties, nightdresses, pyjamas, négligés, bathrobes, dressing gowns and similar articles, knitted or crocheted:

— Slips and petticoats:

...

— Briefs and panties:

...

— Nightdresses and pyjamas:

6108 31 — Of cotton:

6108 31 10 — Nightdresses

6108 31 90 — Pyjamas

3 — OJ 1987 L 256, p. 1.
4 — OJ 1988 L 298, p. 1.

6108 32 — Of man-made fibres:

— Of synthetic fibres:

16108 3211 — Nightdresses

6108 3219 — Pyjamas

6108 3290 — Of artificial fibres

6108 3400 — Of other textile materials'.

6. In my view, the questions raised by the Hessisches Finanzgericht are not difficult to answer. The essential elements are to be found in the observations of the Commission.

7. As the Commission points out, the Court has consistently held that the decisive criterion for the classification of goods for customs purposes must in general be sought in their objective characteristics and properties as defined by the wording of the relevant heading of the Common Customs Tariff and the notes relating to the relevant sections or chapters thereof. [5]

8. Heading 6108 refers to 'women's or girls' ... pyjamas ... knitted or crocheted'. According to ordinary usage, pyjamas are garments that are suitable for wearing in bed. The essential issue that arises in these proceedings is whether, in order to be classified as pyjamas, a garment must be wholly and exclusively suitable for wearing in bed or whether it suffices that that should be the primary purpose of the garment.

9. As the Commission points out, the Explanatory Notes of the Customs Cooperation Council may be used as an aid to the interpretation of the Combined Nomenclature. [6] Reference may also be made to the Explanatory Notes to the Combined Nomenclature of the European Community.

10. The Commission observes that, although the Explanatory Notes of the Customs Cooperation Council do not contain any express definition of the term 'pyjamas', the

5 — See, for example, Case 145/81 *Hauptzollamt Hamburg-Jonas v Wünsche* [1982] ECR 2493, paragraph 12 of the judgment.

6 — Case C-265/89 *Vismans Nederland* [1990] ECR I-3411, paragraph 18 of the judgment.

notes on the interpretation of the term 'track suits' in heading 6112 may be applied by analogy. According to the Explanatory Notes, that heading includes:

'Track suits ... which, because of their general appearance and the nature of the fabric, are clearly meant to be worn exclusively or mainly in the pursuit of sporting activities.'

The Commission observes that, if that formulation is applied by analogy, it is possible to deduce that pyjamas are garments which, because of their general appearance and the nature of the fabric, are clearly meant to be worn exclusively or mainly in bed.

11. According to the Commission, that definition of pyjamas is confirmed by a number of classification regulations adopted by the Commission, in particular Regulation (EEC) No 893/93, [7] where it is stated (in an annex) that certain goods cannot be classified as pyjamas because they are not 'exclusively or mainly for use as nightwear'.

12. Moreover, the Commission's Nomenclature Committee (textile sector) decided, at its session on 12 and 13 October 1993, to introduce a similar definition of pyjamas into the Explanatory Notes on the Combined Nomenclature of the European Community. The note on heading 6108 now states that the heading applies to crocheted or knitted women's or girls' pyjamas which, because of their general appearance and the nature of the fabric, are clearly meant to be worn exclusively or mainly as nightwear. The Commission states that the amendment of the Explanatory Notes has a purely declaratory function; it does not change the law, but simply clarifies the existing legal position and thus constitutes an aid to interpretation which is relevant even as regards the classification of goods imported in 1988 and 1989.

13. I am in full agreement with the Commission's observations, as summarized above, and consider therefore that the expression 'women's or girls' ... pyjamas' in heading 6108 of the Combined Nomenclature should be interpreted as applying to garments which, because of their general appearance and the nature of the fabric, are clearly meant to be worn exclusively or mainly in bed.

7 — OJ 1993 L 93, p. 5.

14. There is one final point of general interest that is perhaps worth addressing. The national court refers in question (2) to the possibility of classifying goods on the basis of the generally accepted view in trade in the Member State of importation. That seems to imply that the classification of goods might vary depending on the point of entry into the customs territory of the Community. It is for example conceivable that a garment might, as a result of climatic and cultural differences in the Member States, be considered suitable for outdoor wear in one country but fit only for wearing in bed in another country. However, the very concept of a common customs tariff implies that goods imported into the Community should be subject to the same rate of duty regardless of the Member State of importation. Hence it is important when interpreting the tariff headings of the Combined Nomenclature to avoid using any criteria that might lead to a different classification depending on the country of importation. In the present case, for example, the suitability of a garment for wearing in bed must be assessed in the light of the habits, not of one Member State, but of the Community as a whole. Obviously it may be difficult in practice for national authorities to make such an assessment, but it is none the less worth stressing that the attempt must be made.

Conclusion

15. Accordingly, I am of the opinion that the questions referred to the Court by the Hessisches Finanzgericht should be answered as follows:

The expression 'women's or girls' ... pyjamas' in heading 6108 of the Combined Nomenclature for the Common Customs Tariff, in the versions laid down in Annex 1 to Council Regulation (EEC) No 2658/87 and in Annex 1 of Commission Regulation (EEC) No 3174/88, must be interpreted as applying to garments which, because of their general appearance and the nature of the fabric, are clearly meant to be worn exclusively or mainly in bed.