OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 9 March 1988

My Lords,

On 24 November 1969 a German company Dr D. Goerrig GmbH ('Goerrig') imported into the Federal Republic of Germany 30 drums of a product which it declared as 'sodium boronate solution, other hydrides' under Common Customs Tariff (CCT) subheading 28.57 A, under which the rate of duty was 6.4%. The goods were initially given customs clearance as requested, but on 17 March 1970 the Hauptzollamt (Principal Customs Office) Geldern ('the Hauptzollamt') issued a notice of reassessment classifying the product as a preparation (sodium boronate in a solution of sodium hydroxide) under CCT subheading 38.19 T, under which the rate of duty was 14.4%, and demanding payment of additional import duty.

Goerrig challenged that reassessment. Its case was, in essence, that the product imported was the sodium boronate and that the sodium hydroxide solution with it was a stabilizer. It pointed to Note 1 to Chapter 28 of the CCT. The version in force at the time of the importation (*Journal Officiel* 1968, L 72, p. 126) read:

'Except where their context otherwise requires, the headings of this Chapter are to be taken to apply only to:

(a) Separate chemical elements and separate chemically defined compounds, whether or not containing impurities;

(b) Products mentioned in (a) above dissolved in water;

(c) Products mentioned in (a) above 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 some types of use rather than for general use;

(d) The products mentioned in (a), (b) or (c) above with an added stabilizer necessary for their preservation or transport.'

Subsequently a paragraph (e) was added to Note 1, in the following terms: 'The products mentioned in (a), (b), (c) or (d) above with an added anti-dusting agent or a colouring substance added to facilitate their identification or for safety reasons, provided that the additions do not render the product

particularly suitable for some types of use rather than for general use'.

Goerrig's action against the Hauptzollamt was dismissed by judgment of the Finanzgericht (Finance Court) Düsseldorf of 13 April 1978 on the grounds that the product could not be classified under Chapter 28 of the Common Customs Tariff since the stabilizer was not added later but was already produced at the time of manufacture and was left in the solution. On appeal by Goerrig, the Bundesfinanzhof (Federal Finance Court) quashed the Finanzgericht's decision by judgment of 2 December 1980 and referred the case back to the Finanzgericht. The Bundesfinanzhof held that: Note 1 (d) to Chapter 28 of the CCT had been wrongly applied. The word 'added' did not mean that the stabilizer had to be added subsequently. It was necessary to establish whether the imported product, without taking into account the aqueous sodium hydroxide contained therein, could be regarded as dissolved in water within the meaning of Note 1 (b) to Chapter 28 of the CCT and whether the aqueous sodium hydroxide contained in the product was necessary merely as a stabilizer for the preservation or transport of the product dissolved in water or whether it was left in the product for other reasons, for example of an economic nature, or whether it was intended to serve other purposes.

The Finanzgericht commissioned an expert report from Dr Klaus Diemert of the Institute for Inorganic and Structural Chemistry I of the University of Düsseldorf to examine these questions. In his report, dated 20 July 1982, he found that the chemical imported by Goerrig consisted of an aqueous solution containing 12% by weight of $NaBH_4$ (sodium borohydride, or sodium boronate) and about 40% by weight of NaOH (sodium hydroxide solution). The imported aqueous sodium boronate solution, leaving aside the sodium hydroxide solution, constituted a separate chemical compound. Sodium boronate is a dangerous product which can decompose rapidly, giving off explosive and poisonous gases. A sodium hydroxide solution reduces the speed of decomposition of the aqueous sodium boronate solution. It was therefore right in this case to ascribe to the sodium hydroxide solution the function of a stabilizer. What concentration of sodium hydroxide solution sufficiently stabilizes a solution for the purposes of storage and transport can be determined only if the conditions of storage and transport are known. He estimates that a sodium hydroxide solution of at least 30% by weight is required if it is desired to store or transport aqueous sodium boronate solutions for a period of a few weeks, but that for a longer period of preservation a further increase in the sodium hydroxide concentration is to be preferred. Given that the saturation limit of the solution is to be found at a concentration of 12.9% by weight of sodium boronate to 46.9% by weight of sodium hydroxide solution, he concludes that the concentration of sodium hydroxide solution selected (40%) was therefore appropriate for the storage and transport of sodium boronate solutions.

The Finanzgericht accepted Dr Diemert's evidence. By judgment of 10 November 1982 it held that, according to Note 1 (b) to Chapter 28 of the CCT, sodium boronate solution should as such (without the aqueous sodium hydroxide) be classified under Chapter 28 of the CCT as a separate

chemically defined compound dissolved in water. It held that aqueous sodium hydroxide was a stabilizer necessary for the preservation or transport of sodium boronate solution, within the meaning of Note 1 (d) to Chapter 28 of the CCT. Accordingly it held, allowing Goerrig's action, that the product should be classified under CCT subheading 28.57 A.

The Hauptzollamt in its turn appealed to the Bundesfinanzhof, which quashed the Finanzgericht's second decision by a judgment of 12 June 1986 and referred the case back again to the Finanzgericht. According to the Bundesfinanzhof, the Finanzgericht had failed to recognize that a product may not be classified under Chapter 28 if the stabilizer contained therein has the effect of rendering the product suitable, within the meaning of Note 1 to Chapter 28 of the CCT, for uses for which, without the stabilizer, it could not be applied. The Bundesfinanzhof held that, for the purposes of Note 1 (d) to Chapter 28 of the CCT, the classification of a product depends not only on whether the stabilizer is necessary, by reason of the state and quantity in which it is present, for preservation and transport but also on whether it makes possible types of use other than those of preservation or transport. Although these last words do not appear in Note 1 (d) the Bundesfinanzhof thought they were to be read in in the light of the Explanatory Notes to the Nomenclature of the Customs Cooperation Council.

The Finanzgericht took the opposite view. In its decision of 19 February 1987 it held in that regard: 'Although Note 1 (c) to Chapter 28 of the Common Customs Tariff expressly provides, in the case of solvents, that the solvent may not render the product particularly suitable for some types of use rather than for general use, there is no such restriction in Note 1 (d) with regard to stabilizers. To apply that restriction by analogy, by way of interpretation based on the Explanatory Notes to the Nomenclature of the Customs Co-operation Council, would constitute an unlawful substantive amendment of the Common Customs Tariff'.

Accordingly, by that decision, it suspended the proceedings and referred the following question to the Court for a preliminary ruling:

'Is Note 1 (d) to Chapter 28 of the Common Customs Tariff to be interpreted as meaning that a stabilizer necessary for the transport of a product may not make other uses possible?'

The question itself does not specify whether it is 'other uses' of the stabilizer or the basic product plus the stabilizer. The text of the order for reference and the 1986 judgment of the Bundesfinanzhof seem, however, to indicate that the 'other uses' referred to are other uses of the product itself with its stabilizer rather than other uses of the stabilizer alone.

The Commission and the Hauptzollamt initially approached the case on the basis

that the sodium hydroxide solution was present in quantities greater than were necessary to stabilize the sodium boronate. The Commission thought that a concentration of only 0.1% was necessary, as against the 40% actually present. It appears, however, that that was a mistake. The lower figure would apply to sodium boronate in the crystalline state, but this case concerns sodium boronate in an aqueous solution, having different properties. Dr Diemert's finding that a 40% concentration was necessary for the purpose of stabilising an aqueous sodium boronate solution, was accepted by the Finanzgericht in its 1982 judgment. That finding was not overturned by the Bundesfinanzhof in its 1986 judgment, and the Finanzgericht has reaffirmed it in the order for reference ('As is clear from the evidence furnished to the court, the stabilizer in question here is necessary for the transportation of the product'). The case before this Court should therefore be approached on the basis that a 40% concentration was necessary as a stabilizer. There is, in any event, no evidence to contradict that conclusion reached by Dr Diemert.

Nor is it established that the use of the solution of sodium hydroxide as a stabilizer was a devious means of importing it without paying duty.

For the purposes of Note 1 (d) to Chapter 28 it is thus clear that the sodium hydroxide solution is a 'stabilizer' and that the quantity used was 'necessary' for the preservation or the transport of the sodium boronate solution. That solution was, as the Finanzgericht found, a separate chemically defined compound dissolved in water within paragraph 1 (b) of the Note. The express terms of Note 1 (d) are thus satisfied.

Is it necessary to read in a condition analogous to that to be found in Note 1 (c) that a solvent (other than water) must not 'render the product particularly suitable for some types of use rather than for general use', and in Note 1 (e) in relation to anti-dusting agents and colouring substances which was introduced subsequently?

The Commission argues that it should be read in and that the omission of these words in Note 1 (d) was not intentional. I do not accept that: it seems to me that the wording of Note 1 (d) should be considered to have been chosen deliberately. Moreover, the Community legislator has had frequent opportunity to amend Note 1 (d) by adding such a condition (in fact every time that it has re-enacted the CCT) but it has always refrained from doing so. Most strikingly it did not do so when it introduced Note 1 (e). Moreover, when it replaced the CCT nomenclature with the Combined Nomenclature (CN) with effect from 1 January 1988 (see Council Regulation No 2658/87, Official Journal 1987, L 256, p. 1), the Community legislator re-enacted Note 1 (d) to Chapter 28 word for word in the same terms as were used in the CCT in 1968.

It seems to me that the express wording of Note 1 (d) in this respect is clear and that neither Note 1 read as a whole nor the intention of the legislator (as far as it can be discerned) provide grounds for adding in the implied condition contended for.

If these words are clear then they should not be affected by any contrary meaning given in the Explanatory Notes to the Nomenclature of the Customs Cooperation Council.

I am not satisfied in any event that those Explanatory Notes do indicate a contrary meaning for present purposes. It is true that the eighth paragraph of the 'General' notes to Chapter 28 of the Nomenclature of the Customs Cooperation Council provides:

'Products added to certain chemicals to keep them in their original physical state are also to be regarded as stabilizers, provided that the quantity added in no case exceeds that necessary to achieve the desired result and that the addition does not alter the character of the basic product and render it particularly suitable for some types of use rather than for general use.'

That paragraph, by the words 'are also to be regarded as', seems to relate to what might be called 'deemed stabilizers': it is, however, to be noted that the preceding paragraph dealing with 'stabilizers' (which the sodium hydroxide solution clearly is here) does not contain any such qualification.

I consider thus that the fact that the basic product plus the stabilizer could be used for purposes other than those for which the basic product could be used does not take the basic product outside Note 1 (d) so long as it is clear that what is added to the basic product is a stabilizer necessary for the preservation or transport of the basic product. What is 'necessary' obviously has a quantitative as well as qualitative element and if the amount of stabilizer used is beyond anything reasonably necessary for the purpose of stabilising the product then it could be said that the product is taken outside Chapter 28. Equally, different considerations obviously apply if it is shown (as it is not shown in this case) that the stabilizer is used for the devious purpose of importing something essentially different from the basic product on its own.

If I had come to the view that the question of the national court was not so much directed to the basic product plus the stabilizer as to the stabilizer alone, I would have concluded that the fact that the stabilizer can have other subsequent uses does not necessarily take the basic product outside Note 1 (d) so long as the stabilizer is shown to be 'necessary' for the preservation or transport of the basic product. In many cases it seems likely that removing the stabilizer to get back to the basic product will destroy the stabilizer but if it can be used again the basic product is still in my view within Chapter 28.

In all the circumstances, in my opinion, the answer to the question referred should be on the lines that:

Note 1 (d) to Chapter 28 of the Common Customs Tariff contains no requirement to the effect that a stabilizer necessary for the transport of a product may not make other uses of the product plus the stabilizer possible.

The costs of the Commission are not recoverable. The costs of the parties to the main action are a matter for the national court.