In Case 278/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof [Federal Finance Court] for a preliminary ruling in the action pending before that court between

CHEM-TEC B. H. NAUJOKS, Koblenz-Bubenheim,

and

HAUPTZOLLAMT [Principal Customs Office] KOBLENZ,

on the interpretation of tariff heading 35.06 of the Common Customs Tariff,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: S. Rozès
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted by the parties under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts

The product whose classification for tariff purposes is at issue in this case is a transferable adhesive strip known as "Scotch 465" which Chem-Tec B. H.

Naujoks, Koblenz-Bubenheim, the plaintiff in the main action, put into free circulation until July 1974. According to the order making the reference, the product consists of a double-sided adhesive strip and a paper strip treated with silicone on both surfaces (lining paper). The paper strip is glazed or sprayed on one side with glue. The adhesive strip is used in such a way that the adhesive surface is applied to a sheet of paper and the paper strip treated with silicone is then peeled off. In that way the glue is completely detached from the paper strip and the paper requiring adhesion is pressed on to the glue with the result that the two sheets of paper are joined together. The paper strip is therefore not bonded as well.

The product was initially classified in tariff heading 48.15 A of the Common Customs Tariff "Other paper and paperboard, cut to size or shape: Adhesive strips of a width not exceeding 10 cm, the coating of which consists of unvulcanized natural or synthetic rubber", attracting duty at a rate of 6.5 %, and subsequently in subheading 40.05 C "Plates, sheets and strip, of unvulcanized natural or synthetic rubber, ... C. Other", attracting duty at a rate of 4 %.

As a result of an opinion given by the Staatliche Materialprüfungsamt Nordrhein-Westfalen [National Material Examination Office, North Rhine-Westphalia] and of a report drawn up by the Zolltechnische Prüfungs- und Lehranstalt [Customs Laboratory and Training College] Hamburg-Atlona, the product was classified under tariff subheading 39.02 C XII "Polymerization and co-polymerization products (for example polyethylene ...): ... C. Other: Acrylic polymers, methacrylic polymers, ...," attracting duty at a rate of 16.8 %.

A second report drawn up by the Customs Laboratory and Training College, Cologne, led to the final classification of the adhesive strip in heading 35.06 "Prepared glues not elsewhere specified or included; products suitable for use as glues put up for sale by retail as glues in packages not exceeding a net weight of 1 kg," attracting duty at a rate of 15.2 %.

In its action before the Finanzgericht [Finance Court], the plaintiff claimed that customs duties should be levied on the basis of tariff subheading 40.05 C or 39.02 B, or alternatively on the basis of subheading 35.06 A.

The plaintiff lodged an appeal with the Bundesfinanzhof [Federal Finance Court] against the Finanzgericht's decision dismissing its claim.

The Bundesfinanzhof supports, in principle, the decision to classify the product under heading 35.06 on the ground that it must be classified according to the material which constitutes its essential property, namely the adhesive strip *stricto sensu* which has the properties of glue.

However, before it gave judgment the Bundesfinanzhof referred the following two questions to the Court for a preliminary ruling:

"A. Is tariff heading 35.06 of the Common Customs Tariff to be interpreted as also including a product described as 'adhesive paper strip' or as 'strip, of unvulcanized synthetic rubber' wound on to a spool and consisting of a double-sided adhesive strip and a strip of paper (treated with silicone) separating the adhesive strips which have been rolled up and which is used in such a way that the paper strip is peeled off and therefore does not adhere when the double-sided adhesive strip is applied?

B. If the answer to the first question is in the affirmative, how is the concept 'put up for sale by retail in packages not exceeding a net weight

of 1 kg' in tariff subheading 35.06 B to be interpreted? Does the product described in Question A. fulfil those conditions by reason only of the fact that the glue along the whole length of the adhesive strip is joined to a paper strip with the result that the latter may be regarded as a package, or must the adhesive strips within the required weight limit be contained in special packages and in addition be marked as glue by written indications?"

Written observations were submitted, under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, by the plaintiff, represented by H. Ditges, Rechtsanwalt at the Landgericht [Regional Court], Bonn, and by the Commission, represented by its legal adviser, R. Wägenbaur, acting as Agent, assisted by T. van Rijn.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure whilst requesting the plaintiff and the Commission to reply before the sitting to the questions set out below.

By order of 17 June 1981, the Court decided, pursuant to Article 95 (1) of the Rules of Procedure, to assign the case to the Second Chamber.

II — The relevant provisions

The General Rules of the Common Customs Tariff provide

". . .

3. When for any 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.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets, 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.

. . ."

The three headings referred to are worded in the following terms:

(a) "40.05 Plates, sheets and strip of unvulcanized natural or synthetic rubber, other than . . .

. . .

C. Other."

The Notes relating to Chapter 40 provide, *inter alia:*

"1. . . . throughout the Tariff the expression 'rubber' means the following products, whether or not vulcanized or hardened: natural rubber, balata, gutta-percha and similar natural gums, synthetic rubber, . . .

. . .

4. In Note 1 to this Chapter and in headings Nos 40.02, 40.05 and 40.06, the expression 'synthetic rubber' is to be taken to apply to:

(a) Unsaturated synthetic substances which can be irreversibly transformed into non-thermoplastic substances by vulcanization with sulphur and which, when so vulcanized as well as may be (without the addition of any substances such as plasticizers,

fillers or reinforcing agents not necessary for the cross-linking), can produce substances which, . . ., will not break on being extended . . .

Such substances include . . . polybutadiene

. . .

(c) Natural rubber modified by grafting or mixing with artificial plastic material, de-polymerized natural rubber, . . .

(b) "39.02 Polymerization and co-polymerization products (for example, polythylene, polytetrahaloethylenes, polyisobutylene polystyrene, polyvinyl chloride, polyvinyl acetate, polyvinyl chloroacetate and other polyvinyl derivatives, polyacrylic and polymethacrylic derivatives, coumaroneindene resins):

. . .

B. Adhesive strips of a width not exceeding 10 cm, the coating of which consists of unvulcanized natural or synthetic rubber . . .

C. Other:

. . .

XII. Acrylic polymers, methacrylic polymers and acrylomethacrylic co-polymers . . ."

The Notes relating to Chapter 39 provide that:

"1. This Chapter does not cover:

. . .

(c) Synthetic rubber, as defined for the purposes of Chapter 40, or articles thereof;

. . .

3. Headings Nos 39.01 to 39.06 are to be taken to apply to materials in the following forms only:

(a) Liquid or pasty including emulsions, dispersions and solutions;

. . ."

(c) "35.06 Prepared glues not elsewhere specified or included; products suitable for use as glues put up for sale by retail as glues in packages not exceeding a net weight of 1 kg:

A. Prepared glues not elsewhere specified or included:

I. Vegetable glues:

(a) Obtained from natural gums

(b) Other

II. Other glues

B. Products suitable for use as glues put up for sale by retail as glues in packages not exceeding a net weight of 1 kg"

As far as the packaging is concerned, the Explanatory Notes to the Customs Cooperation Council Nomenclature specify that:

"The packages in which glues are usually put up for sale by retail include glass bottles or jars, metal boxes, collapsible metal tubes, cartons, paper bags, etc.; sometimes the 'packaging' is merely a paper band wrapped round, for example, a slab of bone glue. A small brush of the appropriate type is sometimes packed

with glues (e.g., those put up in jars or tins ready for direct use). Such brushes are classified with the glues if packed therewith."

III — Written observations

First question

The plaintiff emphasizes in the first place that the product is an adhesive strip with a constant thickness of 0.05 mm, without any backing. It is adhesive on both sides and is utilized in the manufacture of paper, for example endless sticking together two continuous sheets of paper, for glueing together continuous sheets of aluminium, a process used in the furniture industry to join together ornamental mouldings, and it is used on other occasions when the adhesive strip to be applied must not be thickened unnecessarily by the addition of backing. The adhesive strip is supplied, according to requirements, in different widths and lengths, for example it may be exactly 12 mm wide (for joining together ornamental mouldings, for example) and 914 metres long or it may be supplied in the other widths in which adhesive strips are normally produced; 19 mm, 25 mm, 30 mm, 38 mm, 50 mm, 75 mm, etc.

For the purpose of permanently joining together different materials, an adhesive strip of this type is of no use whatever as a substitute for liquid glue. Liquid glue cannot be used for certain special purposes. Only adhesive strips may be used for such purposes because the glues mentioned in heading 35.06 are not supplied in constant widths, lengths or thicknesses but in tubes or barrels, for example.

It follows, according to the plaintiff, that the product is not covered by heading 35.06.

The plaintiff also contends that tariff heading 48.15 is inappropriate for "Scotch 465" since there is no paper backing in the middle of the strip and the lining paper can be of no account in this case as regards classification for tariff purposes since it is peeled off after the adhesive strip has been applied. Subheading 39.02 C XII is also inappropriate since it covers acrylic polymers which are in the form of strip or tape but lack any adhesive property of their own. That is clear from the Explanatory Notes to the Customs Cooperation Council Nomenclature relating to Chapter 39 of the Common Customs Tariff of the European Communities. Those Notes clearly indicate that Chapter 39 does not include: "(e) Synthetic rubber as defined in Note 4 to Chapter 40, and articles thereof". Consequently, the double-sided transferable adhesive strip at issue in the present case is covered not by Chapter 39 but by Chapter 40 of the Common Customs Tariff because it is more accurately described in the latter inasmuch as the strip is of synthetic rubber within the meaning of Chapter 40, in the form authorized thereunder. Thus only subheading 40.05 C in Chapter 40 contains a more accurate description of the product and confirmation that "Scotch 465" is covered by that Chapter is to be found in the Explanatory Notes relating thereto. In accordance with General Rule 3 (a) for the Interpretation of the Nomenclature of the Common Customs Tariff, the chapter which provides the most specific description takes precedence, that is to say the chapter in which the goods which are to be classified for tariff purposes are clearly described.

The Notes relating to Chapter 40 are contradictory. Heading 40.05 expressly covers only unvulcanized rubber provided that, as is stated in Note 4, it displays certain features following vulcanization. In the plaintiff's opinion, therein lies a contradiction. It is possible to ascertain what synthetic rubber is only by chemical analysis. Moreover, it stands to reason that the synthetic rubber contained in "Scotch 465" is not vulcanized. Vulcanization consists in incorporating sulphur in its finest form in the rubber (as is also stated in Note 4, in

contradictory fashion, in the case of rubber expressly classified under heading 40.05 as unvulcanized rubber). However, the Explanatory Notes relating to heading 40.02 of the Common Customs Tariff expressly refer by name to polybutadiene, which is used in the manufacture of "Scotch 465", as a substance which displays all the characteristics required by, and is fully in conformity with the results of the test prescribed by Note 4, with the result that, in any event, the evidence yielded by an examination serves no purpose: see the notes to the Customs Cooperation Council Nomenclature relating to heading 40.02 A. (2): "The synthetic substances having these characteristics include: (2) polybutadiene (BR)".

Accordingly, the plaintiff proposes that the first question should be answered in the negative.

The *Commission* draws attention to the fact that the adhesive strips are not expressly referred to in heading 35.06 and that the Common Customs Tariff, even though it does not contain any heading encompassing such strips in general terms, includes them in several headings but takes account on each occasion of their material quality and their use.

Relying on the description of the product in the order making the reference, the Commission concludes that the sole purpose of the strip of paper is to separate the double-sided adhesive strips. Since those strips may be used directly as a glue, after the paper has been removed, the article in question has the appearance of a glue-based product which has undergone a particular process and takes the form of an adhesive strip. The Commission therefore proposes that the first question should be answered in the affirmative.

Second question

1. The *plaintiff* contends that recourse to subheading 35.06 B leads to an incorrect interpretation of the term "package". A package can be conceived of only in the form of a folding box or carton. A strip of between 55 mm and 914 mm in length cannot constitute a package. To describe the paperlining of "Scotch 465" as "non-active paper" is inaccurate since the adhesive strip cannot be manufactured and used without the lining paper. The latter cannot be regarded as a package within the meaning of heading 35.06 B. That is confirmed by the list of receptacles (glass bottles or jars, metal boxes or tubes, cartons and paper bags) set out in the Explanatory Notes to the Customs Cooperation Council Nomenclature on heading 35.06 B. It is also incorrect for the customs authorities, when using the expressions roll, protective paper, packages in which the product is put up for sale by retail, to refer expressly to "the roll" on which the wording is marked and which constitutes the basis for the definition of the expression "put up for sale by retail". The adhesive strips could also be delivered wound round an unmarked non-adhesive core, that is to say a simple white paper bound core and the description of the article would appear on the label affixed to the outside of the carton, together with other indications relating to width and length and the directions for use. Accordingly, only cartons in which "Scotch 465" is imported may be regarded as receptacles. There are no imports of "Scotch 465" put up for sale by retail in packages not exceeding a net weight of 1 kg. (subheading 35.06 B) but, as is apparent from samples despatched separately, the rolls are supplied packed in cartons each of which contains between 144 and 20 or fewer rolls according to the width of the adhesive strip. The various rolls placed in a carton are not packed in individual folding boxes or in another wrapper or package. Such a carton weighs between 8 and 16 kg, including the contents.

With regard to that point too, the plaintiff proposes that the question should be answered in the negative.

2. The Commission emphasizes first of all that there are no legal provisions in the Common Customs Tariff on that point. The Explanatory Notes to the Customs Cooperation Council Nomenclature must be interpreted broadly. The example of the slab of bone glue wound round with a simple paper wrapper shows that not only packages in the strict sense of the word, such as glass bottles or jars, metal or cardboard boxes, paper bags etc., but also materials used in certain specific cases as wrapping may be regarded as packages.

The expression "put up for sale by retail in packages not exceeding a net weight of 1 kg" in heading 35.06 should be interpreted as including goods which are identifiable as being intended for sale directly to consumers without further packaging.

The Commission therefore proposes that the second question should be answered as follows:

The expression "put up for sale by retail ... in packages not exceeding a net weight of 1 kg" in subheading 35.06 B must be interpreted as including adhesive strips which are wound on to a spool and all identifiable as being intended for sale directly and without further packaging."

IV — Questions put by the Court

The Court put the following questions to Chem-Tec and the Commission:

"1. In view of the fact that subheading 35.06 A covers *prepared glues not elsewhere specified or included* and that subheading 35.06 B *covers products suitable for use as glues* put up for sale by retail as glues in packages not exceeding a net weight of 1 kg, *the plaintiff in the main action and the Commission* are requested to state their views on the relationship between the two subheadings as regards the products in question and on the question whether and, as the case may be, to what extent the substances listed in headings 39.02 C XII and 40.05 may themselves be described as 'prepared glues'?

2. *The plaintiff in the main action* is requested to state its views on the following two questions:

   (a) Is it possible to manufacture, using the substances referred to in headings 39.02 C XII and 40.05, products for use as glues put up in ordinary packages such as bottles, jars, boxes, tubes etc?

   (b) Have the rolls of adhesive strip imported by the plaintiff or by others actually been sold by retail and if so, in what quantities. If they have, could the rolls be sold individually or were they sold exclusively in cartons?

3. Can the *Commission* supply the Court with information on the position adopted by the custom authorities of the other Member States on the classification for tariff purposes of the products in question and on the reasons for that position?"

In reply to Questions (1) and (2), parts (a) and (b), the *plaintiff* emphasizes in the first place that the substances

specified in heading 39.02 C XII are artificial thermoplastic materials which are light-resistant and weatherproof, often transparent (such as plexiglas) or also, for example, suitable for being woven in the form of fibres (orlon). None of these factors applies to the case of the adhesive strip in question. Furthermore, the Explanatory Notes to the Customs Cooperation Council Nomenclature relating to Chapter 39 provide, under Point 1 of the General Considerations: "Headings 39.01 to 39.06 cover the materials of this chapter in the following forms: 1. Liquids or pastes: these may be the basic plastic material which requires 'curing' by heat or otherwise to form the finished material, or may be emulsions, dispersions or solutions of the uncured or partly-cured materials".

The same Notes state in the second paragraph of the General Considerations relating to Chapter 39: "If a plastic material can be repeatedly softened by heat and shaped, it is termed 'thermoplastic'." From a chemical point of view, there is no doubt that acrylic polymers etc., under tariff subheading 39.02 C XII, are thermoplastic substances. However, "Scotch 465", is not a thermoplastic adhesive strip which is capable of being softened by heat or shaped, nor is it a strip which may be used only after such treatment. As a finished adhesive strip, the product is in its final state, and cannot be softened by heat or shaped and its use does not depend on its being heated. Therein lies the important and fundamental difference between the strip and the substances covered by Chapter 39 (39.02 C XII), regardless of the fact that from a chemical point of view, acrylic or acrylatic glues constitute rubber products.

Next, the plaintiff states that no substance falling within tariff subheading 39.02 C XII may be described as a "prepared glue". It would be wholly inappropriate to wish to use the substances referred to in that subheading as adhesive substances which are, moreover, put up in ordinary containers, for example, bottles, jars, boxes, tubes etc.

Similarly, Question (2) (a) relating to tariff heading 40.05 calls for a negative answer.

Tariff heading 40.05 covers unvulcanized rubber and expressly refers to synthetic rubber. That is confirmed by the notes relating to tariff heading 40.02 which state what is to be understood by synthetic rubber.

At the same time, Chapter 40 covers all the varieties of rubber falling within its terms only if they take certain forms, for example, slabs, sheets or strip and not if they are in a liquid state, in lumps or in other similar forms.

Acrylic or acrylatic glues such as "Scotch 465", which takes the form of a transferable adhesive strip, can come only within tariff heading 40.05 since acrylatic glues are synthetic rubbers and do not correspond to the data given, for example, in tariff subheading 39.02 C XII though they do, in this case, fulfil all the conditions laid down by heading 40.05 as well as by the explanatory notes and the notes relating to that heading.

In the figurative though not in the broad sense, "Scotch 465" is admittedly a glue, (a glue) of synthetic rubber covered by subheading 40.05. A "glue" of that kind, that is to say an adhesive strip of that kind (such as "Scotch 465") cannot, however, be packed in tubes, jars, bottles or boxes since it cannot be introduced into such receptacles and, even on the assumption that it could, it would be necessary to determine how to extract the adhesive strip from such packages and how to use it since it is not a very fluid substance like glue and cannot be applied in the same way. It would quite

simply be reduced to an unusable lump. Unlike glue, the adhesive strip has, it should be borne in mind, properties specific to itself (static viscosity, a thickness, width and length which are constant, that is to say, not extensible), which constitute peculiarities and properties relevant to its classification for tariff purposes.

The latter point also constitutes an answer to the first question which seeks to ascertain whether the substances listed in tariff heading 40.05 may be described, as such, as "prepared glues". That description is out of the question both from the chemical point of view and from that of the Common Customs Tariff and its explanatory notes.

With regard to the first part of the first question, the plaintiff refers to the above-cited explanatory notes relating to subheading 35.06 B and contends that the glues mentioned therein cannot include adhesive strips, particularly since the glues covered by heading 35.06 may also be applied by using a brush which is sometimes provided free of charge.

As regards Question (2) (b), the plaintiff emphasizes that the transferable adhesive strip 465 is intended for industrial uses, for example in the furniture industry for joining ornamental mouldings and in the paper manufacturing industry for interlacing (joining) sheets of paper, especially very fine sheets of silk paper. It is particularly the manufacture of very fine silk paper which illustrates the requirements which have to be met by the transferable adhesive strip "Scotch 465", requirements which cannot be satisfied by any glue, any adhesive substance in the nature of glue or any adhesive substance put up in the same package or wrapping as glue. The adhesive substance on the transferable strip must not greatly add to the thickness of or pierce the very fine silk paper with the result that one layer of paper accidentally adheres to the next layer. It must immediately adhere firmly to the precise place on the specific width prescribed by the manufacturing process. Similarly, there should not be any impurities on the edges of the strip which would unduly add to the thickness, and might reduce the effect of adhesion and render the paper unusable or make it possible for the joint to tear. Such impurities would undoubtedly appear, if the adhesive strip were sold in individual rolls or in bulk, for example when they are sold from the shelf. The articles are therefore sold in the closed receptacles in which they are supplied, that is to say in specific quantities put up in different cartons according to their width and length.

As far as the industrial use of the adhesive strip is concerned, the sale of the product in the form of rolls is out of the question since in most cases larger quantities are bought and used every time.

It would be quite unusual and absolutely impossible to market an adhesive strip by weight since the latter is of no importance and only the width and the length are relevant. Classification for tariff purposes by weight would therefore be contrary to accepted practice.

The *Commision's* answer to the Court's first question is as follows:

1. The products in tariff heading 39.02 C XII and in heading 40.05 which may be used as glues fall within tariff heading 35.06 A as "prepared glues" only if they are "prepared", that is to say if they contain the additives needed for adhesion or if their ingredients are mixed with a view to adhesion.

2. In the absence of additives needed for adhesion, that is to say if they have not been "prepared" within the meaning of the Common Customs Tariff, the adhesive products falling within tariff heading 39.02 C XII and heading number 40.05 continue (to the extent to which it is technically possible) to be covered by those tariff headings.

3. If unprepared products of that kind falling within tariff heading 39.02 C XII and heading 40.05 "are put up for sale by retail as glues in packages not exceeding a net weight of 1 kg", they are products within the meaning of tariff heading 35.06 B. That classification for tariff purposes, which derives from Rule 1 of the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff, is unequivocally confirmed by the explanatory notes to that nomenclature. In that connection, the following should be compared:

   (a) the Explanatory Notes to Chapter 39 of the Customs Cooperation Council Nomenclature, "General Considerations", 6 (d), last phrase;

   (b) the Explanatory Notes to the Customs Cooperation Council Nomenclature relating to heading 40.06, under (c).

(The notes are worded as follows:

General (Chapter 39)

"6. . . .

The chapter also *excludes:*

. . .

(d) Preparations specifically formulated for use as glues, consisting either of a mixture of several artificial plastic materials falling individually within different headings of the present Chapter, or of artificial plastic materials which, apart from any permitted additions to the products of this Chapter, contain other added substances not falling in Chapter 39 (e.g., waxes). These are classified in *heading 35.06* as are products of headings 39.01 to 39.06 put up for sale by retail as glues in packages not exceeding a net weight of 1 kg.

. . .";

Note relating to heading 40.06

"The present heading *excludes:*

. . .

(c) Rubber solutions or dispersions with added fillers, vulcanizing agents and resins, for use as glues, and rubber solutions or dispersions put up for sale by retail as glues in packages not exceeding a net weight of 1 kg (heading 35.06).")

As regards the third question put by the Court, the Commission pointed out that a special meeting of the Committee on Nomenclature has been convened in order to classify the product in question and that all the Member States have agreed to the classification of the goods in heading 35.06 B.

V — Oral procedure

At the sitting on 12 November 1981, oral argument was presented by the following: H. Ditges, Rechtsanwalt, Bonn, für Chem-Tec B. H. Naujoks; R. Wägenbaur, Legal Adviser to the Commission of the European Communities; acting as Agent, assisted by T. van Rijn, a member of the Commission's Legal Department, and by Mr Straub, for the Commission. Mr Naujoks, owner of the undertaking Chem-Tec and his employee Mrs Walta replied to questions put to them by the Court.

The Advocate General delivered her opinion at the sitting on 17 December 1981.

Decision

1 By order of 11 November 1980, received at the Court on 15 December 1980, the Bundesfinanzhof [Federal Finance Court] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of tariff heading 35.06 of the Common Customs Tariff which is worded as follows:

"35.06 Prepared glues not elsewhere specified or included; products suitable for use as glues put up for sale by retail as glues in packages not exceeding a net weight of 1 kg:

A. Prepared glues not elsewhere specified or included:

I. Vegetable glues:

(a) Obtained from natural gums

(b) Other

II. Other glues

B. Products suitable for use as glues put up for sale by retail as glues in packages not exceeding a net weight of 1 kg."

2 The questions have arisen in connection with a dispute between the competent customs authority and a German undertaking, which from October 1973 until July 1974 put into free circulation in the Federal Republic of Germany a product known as "transferable adhesive strips", having the trade-name "Scotch" and the serial number 465.

3 It is clear from the order making the reference to the Court that the product in question consists of an adhesive layer which is pressed on a strip of paper treated with silicone on both sides and which is wound, together with the strip of paper, on to a cardboard spool. When it is used, the adhesive layer is applied, with the aid of the paper strip, to one of the surfaces requiring adhesion, then the paper strip is peeled off and the other surface requiring adhesion is pressed on to the adhesive layer formerly protected by the paper strip. Thus the paper strip serves as the necessary backing for the adhesive layer when the latter is manufactured, as a material for protecting and

isolating the layer until it is used, and as a technical means for applying the layer on the first surface requiring adhesion, but it is not used in the actual process of joining the surfaces together.

4 Initially, the goods were classified, in accordance with the declarations made by the importing undertakings, as " adhesive paper strip the coating of which consists of unvulcanized synthetic rubber" falling within subheading 48.15 A and, subsequently, as " strip, of unvulcanized synthetic rubber" falling within subheading 40.05 C. After it had commissioned a number of expert studies of the product, the customs administration amended its decisions relating to classification and applied first subheading 39.02 C XII ("Polymerization . . . products . . .: Acrylic polymers . . ") and finally subheading 35.06 B referred to above.

5 Against that decision classifying "Scotch 465" in subheading 35.06 B, a classification confirmed, moreover, at a meeting of the Committee on Common Customs Tariff Nomenclature, the importing undertaking brought an action before the Finanzgericht Rheinland-Pfalz [Finance Court, Rhineland-Palatinate], claiming that the goods should be classified in subheading 40.05 C, referred to above, alternatively in subheading 39.02 B ("Polymerization . . . products; Adhesive strips . . . the coating of which consists of unvulcanized . . . synthetic rubber") or, as a further alternative, in subheading 35.06 A.

6 Following the Finanzgericht's dismissal of the action, the undertaking lodged an appeal on a point of law ("Revision") with the Bundesfinanzhof [Federal Finance Court]. Although that court inclines to the view that the product is in fact a glue, it doubts whether the paper strip may be considered a package. On those grounds, the Bundesfinanzhof referred the following two questions to the Court for a preliminary ruling:

"A. Is Tariff heading 35.06 of the Common Customs Tariff to be interpreted as also including a product described as 'adhesive paper strip' or as 'strip, of unvulcanized synthetic rubber' wound on to a spool and consisting of a double-sided adhesive strip and a strip of paper (treated with silicone) separating the adhesive strips which have been rolled up and which is used in such a way that the paper strip is peeled off and therefore does not adhere when the double-sided adhesive strip is applied?

B. If the answer to the first question is in the affirmative, how is the concept 'put up for sale by retail . . . in packages not exceeding a net

weight of 1 kg' in tariff subheading 35.06 B to be interpreted? Does the product described in Question A fulfil those conditions by reason only of the fact the the glue along the whole length of the adhesive strip is joined to a paper strip with the result that the latter can be regarded as a package, or must the adhesive strips within the required weight limit be contained in special packages and in addition be marked as glue by written indications?"

First question

7 In its first question, the Bundesfinanzhof asks, in substance, whether the customs authorities have applied the Common Customs Tariff correctly by basing their final decision on classification for tariff purposes not on the characteristics of the paper strip but on those of the adhesive layer, and not on the chemical composition of the latter, as requested by the plaintiff, but by reference to its function.

8 According to Rule 3 (a) and (b) of the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff, when the goods are *prima facie* classifiable under two or more headings, the heading providing the most specific description must take precedence and goods consisting of different materials must be classified by reference to the material which gives them their essential character.

9 In that regard, the contested product is clearly distinguishable from the adhesive strips which are expressly referred to in various headings and sub-headings of the Common Customs Tariff and classified by reference to the material quality of the strip in question. Those strips are coated on either or both surfaces with an adhesive layer. The strip itself is used in the joining process and ensures firm adhesion. However, in the case of a product such as the one at issue in this case, where the paper strip is peeled off before adhesion, it is exclusively the adhesive layer which gives the product its essential character. That character consists precisely in the fact that it is capable of being used as a glue. For such a product, which is not referred to or included as a prepared glue in another heading, heading 35.06 is the one which provides the most specific description. The fact that the adhesive layer is also in the form of a strip, as a result of the manner in which it is manufactured and in order to facilitate its use, in no way affects that conclusion.

10 Accordingly, the answer to be given to the first question of the Bundesfinanzhof is that tariff heading 35.06 of the Common Customs Tariff must be interpreted as also including a product described as "adhesive paper strip" or as "strip, of unvulcanized synthetic rubber" wound on to a spool and consisting of a double-sided adhesive strip and a strip of paper (treated with silicone) separating the adhesive strips which have been rolled up and which is used in such a way that the paper strip is peeled off and therefore does not adhere when the double-sided adhesive strip is applied.

Second question

11 In its second question, the Bundesfinanzhof asks, in the first place, whether the strip of paper wound, together with the adhesive layer, on to a cardboard spool may be considered as a product put up in a package within the meaning of subheading 35.06 B of the Common Customs Tariff or whether the application of that subheading presupposes that the rolls are placed in special packages.

12 For the purpose of the reply to the first part of the second question, it is necessary to begin by considering the scheme of heading 35.06. As in the case of other tariff headings, heading 35.06 is subdivided into a general subheading (35.06 A) and a specific subheading (35.06 B) which relates to products put up for sale by retail and makes them subject to a higher rate of duty than that levied on imported products which are to be sold directly to consumers and therefore require further packaging after they have been put into free circulation. In that regard, the fact that an imported product is, as the plaintiff maintains, normally used in industry and that in consequence is not offered for sale by retail, is not of decisive importance. The subheading providing the most specific description remains applicable if the product is objectively suitable, given the form in which it is presented, for sale by retail, without further packaging.

13 In the light of those considerations, the concept of "package" must be given a wide interpretation if, from every other point of view, the product is suitable for direct sale to the consumer, without any further packaging.

14 Such a wide interpretation is moreover supported by the Explanatory Notes to the Customs Cooperation Council Nomenclature which, according to the consistent case-law of the Court, constitutes an important factor in the

interpretation of the Common Customs Tariff. The explanatory notes to subheading 35.06 B list examples of packages of the most varied kinds and certainly do not prevent the pace of technical development from being taken into account which, in the case of packages, is particularly swift. In keeping with that approach, a paper strip which is treated with silicone, is rolled on to an adhesive layer constituting the essential component of the product and thus serves to protect it, may in principle be described as a package.

15 The arguments of the plaintiff on that point and the doubts expressed by the Bundesfinanzhof concern in particular the fact that the paper strip not only fulfils the function which is typical of a package, namely to ensure the conservation and protection of the product, but also constitutes the necessary backing for the adhesive layer when it is manufactured and a technical means for applying the layer to the first surface requiring adhesion.

16 In that connection, however, it should be pointed out that the trend of technical developments in relation to packages is precisely towards endowing them with several functions. Even ordinary metal tubes in which glues are often packed and which are expressly mentioned in the explanatory notes to the relevant subheading constitute both impermeable receptacles which are necessary when the glue is manufactured and a means of determining the amount required when the glue is applied on the first surface requiring adhesion. It follows that additional functions such as those described are insufficient to deprive the strip of paper of its character as a package.

17 Moreover, the plaintiff has contended before the Court that the paper strip is inadequate for the purpose of protecting the adhesive layer against any impurities which may cling to its edges and that such impurities reduce the effect of adhesion and may render the glued product unusable. For that reason, the rolls are not suitable for being sold separately but solely in cartons such as those in which the product has been imported, each of which contains a large number of rolls. That attests to the product's use for industrial purposes. Thus, in order to be sold by retail, the product requires further packaging.

18 Since those arguments were not, according to the documents in the file on the case produced before the Court, put forward in the proceedings before

the national court and since the facts on which the plaintiff seeks to found these arguments are not included amongst those set out by the Bundesfinanzhof in the questions which it has referred to the Court for a preliminary ruling, it will be for the national court, if appropriate, taking into account the criteria for interpretation provided by the Court of Justice, to rule on the validity of the arguments as well as on any other matters of fact, such as the net weight of the rolls, not raised in the questions submitted for a preliminary ruling.

19 Accordingly, the answer to be given to the first part of the second question is that the expression "put up for sale by retail . . . in packages not exceeding a net weight of 1 kg" in subheading 35.06 B is to be interpreted as meaning that the paper strip described above may be considered a package but that the classification of the rolls in that subheading presupposes that they are suitable for sale by retail without any additional packaging and that the net weight of the rolls, that is to say the weight of the adhesive layer, does not exceed 1 kg.

20 In the final part of its second question, the Bundesfinanzhof asks secondly whether the package must bear a written indication that the product in question is glue.

21 According to the Explanatory Notes to the Customs Cooperation Council Nomenclature on subheading 35.06 B such an indication is required in the case of products which may be used for purposes other than those for which glues are employed. If, on the other hand, a product can be used only as an adhesive, there is nothing in the wording of that subheading or in the notes relating thereto to suggest that it is necessary for the package to bear any indication as to the use of the product.

22 Accordingly, the answer to be given to the second part of the second question is that if the product cannot be put to any use other than that of an adhesive, the package need not, for the product to be classified in subheading 35.06 B, bear any indication as to its use.

Costs

23 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable. As these

proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs as a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 11 November 1980, hereby rules:

1. **Tariff heading 35.06 of the Common Customs Tariff must be interpreted as also including a product described as "adhesive paper strip" or as "strip, of unvulcanized synthetic rubber" wound on to a spool and consisting of a double-sided adhesive strip and a strip of paper (treated with silicone) separating the adhesive strips which have been rolled up and which is used in such a way that the paper strip is peeled off and therefore does not adhere when the double-sided adhesive strip is applied.**

2. **The expression "put up for sale by retail... in packages not exceeding a net weight of 1 kg" in subheading 35.06 B is to be interpreted as meaning that the paper strip described above may be regarded as a package but that the classification of the rolls in that subheading presupposes that they are suitable for sale by retail without any additional packaging and that the net weight of the rolls, that is to say the weight of the adhesive layer, does not exceed 1 kg.**

3. **If the product cannot be put to any use other than that of an adhesive, the package need not, for the product to be classified in subheading 35.06 B, bear any indication as to its use.**

Due Chloros Grévisse

Delivered in open court in Luxembourg on 11 February 1982

J. A. Pompe
Deputy Registrar

O. Due
President of the Second Chamber