JUDGMENT OF THE COURT (THIRD CHAMBER)
6 OCTOBER 1982 [1]

# Nederlandsch Bevrachtingskantoor BV v Inspecteur der Invoerrechten en Accijnzen, Amsterdam (reference for a preliminary ruling from the Tariefcommissie, Amsterdam)

(Common Customs Tariff — Surgical covering cloths)

Case 37/82

*Common Customs Tariff — Tariff headings — "Wadding, gauze, bandages and similar articles ... impregnated or coated with pharmaceutical substances or put up in retail packings for medical or surgical purposes" within the meaning of heading 30.04 — Meaning — Surgical covering cloths — Included*

Surgical covering cloths which consist of strips of cellulose separated by a layer of synthetic material and which are not impregnated or coated with pharmaceutical substances but are individually packed in envelopes in sterile conditions for retail for surgical purposes and are used only once in surgical operations for the purpose of covering the patient's body in such a way that the area of the operation is left clear must be regarded as articles similar to wadding, gauze or bandages within the meaning of heading 30.04 of the Common Customs Tariff.

In Case 37/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tariefcommissie [administrative court of last instance in revenue matters], Amsterdam, for a preliminary ruling in the action pending before that court between

NEDERLANDSCH BEVRACHTINGSKANTOOR BV, Amsterdam,

and

INSPECTEUR DER INVOERRECHTEN EN ACCIJNZEN [Inspector of Customs and Excise], AMSTERDAM,

1 — Language of the Case: Dutch.

on the interpretation of heading 30.04 of the Common Customs Tariff,

THE COURT (Third Chamber),

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

## JUDGMENT

## Facts and Issues

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

### I — Facts and written procedure

On 11 January 1980 Nederlandsch Bevrachtingskantoor BV, the plaintiff in the main action, submitted a customs declaration for importation into the Netherlands of "surgical covering cloths", described in the declaration as "articles of bonded fibre fabrics for medical use, heading 59.03". The goods in question are rectangular sheets measuring 65 cm × 45 cm, individually packed in a hermetically sealed envelope, on which is printed *inter alia* "sterile disposable poly-towel 3520-S" and "surgical covering cloth" and "sterilized with ethylene oxide". These surgical covering cloths consist of three sheets laid one on top of the other and sealed around the edges; there is one layer of blue material, one white and a sheet of synthetic plastic material in the middle.

The director of the Ministry of Finance's laboratory in Amsterdam came to the conclusion after an examination that both the blue and white layers should be regarded as paper. That conclusion was confirmed by a report from the fibre institute TNO in Delft.

In accordance with the declaration the goods were first of all classified under heading 59.03 of the Tariff. After an objection lodged by the plaintiff, who considered that the goods were intended for medical use and ought to be classified under heading 30.04, the Inspecteur der Invoerrechten en Accijnzen classified the goods in question under subheading 48.21 D. In the view of the Netherlands authorities, although the goods are used for operations, they cannot be compared with wadding, gauze and bandages classified under heading 30.04; rather, they are comparable to operating sheets and similar articles also used to improve hygiene during an operation and thus to avoid as far as possible any risk of infection.

Nederlandsch Bevrachtingskantoor BV, appealed against the decision of the Inspecteur der Invoerrechten en Accijnzen to the Tariefcommissie. The Tariefcommissie took the view that the interpretation of heading 30.04 of the Common Customs Tariff was in issue and decided by order of 13 January 1982 to stay the proceedings and refer the following question to the Court of Justice of the European Communities for a preliminary ruling:

"Can covering cloths such as those in issue in these proceedings — which consist of strips of cellulose separated by a layer of synthetic material, are not impregnated or coated with pharmaceutical substances but are individually packed in envelopes in sterile conditions for retail for surgical purposes, and are used only once in surgical operations for the purpose of covering the patient's body in such a way that the area of the operation is left clear — be regarded as articles similar to wadding, gauze or bandages within the meaning of heading 30.04 of the Common Customs Tariff?"

The order making the reference was lodged at the Court Registry on 22 January 1982.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice written observations were submitted by the Commission, represented by T. van Rijn, a member of its Legal Department, acting as Agent. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and to refer the case to the Third Chamber.

## II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *Commission* begins its observations by saying that the question of interpretation raised by the Tariefcommissie involves determining whether covering cloths may be regarded as falling within the description "wadding, gauze, bandages and similar articles ... put up in retail packings for medical or surgical purposes".

In the Commission's view, covering cloths are not similar to wadding, gauze and bandages because their function is different. They are not intended to cover a wound or part of the body in order to facilitate or accelerate healing; their function is solely to cover the body around the wound for reasons of hygiene without contributing to healing the wound itself.

In addition, the Commission considers that covering cloths are not intended either for medical or surgical purposes. In that respect, it observes that covering cloths in no way contribute to healing the wound and submits that the words "articles intended for surgical purposes" must be strictly construed. Such articles are those used directly in the practice of surgery and not articles having another function such as, for example, the improvement of hygiene.

In the Commission's view, heading 48.21 D of the Common Customs Tariff in the version in force in 1980 (Council Regulation No 3000/79 of 20. 12. 1979, Official Journal L 342) is applicable. In support of that argument the Commission refers also to the tariff classification of a product which, in its view, has a function similar to that of the surgical covering cloths, namely drawsheets, classified by Regulation No 1484/70 of the Commission of 24 July 1970 (Official Journal, English Special Edition 1970 (II) p. 480) under subheading 48.21.

In conclusion the Commission proposes that the Court should answer the question put to it for a preliminary ruling by the Tariefcommissie as follows:

"On a proper construction of heading 30.04 of the Common Customs Tariff, surgical covering cloths such as those in question in the present case cannot be regarded as articles similar to wadding, gauze or bandages put up in retail packings for medical or surgical purposes."

III — Oral procedure

At the sitting on 17 June 1982 oral argument was presented for the Commission of the European Communities by T. van Rijn, a member of its Legal Department.

The Advocate General delivered his opinion at the sitting on 15 July 1982.

## Decision

1 By order of 13 January 1982, which was received at the Court on 22 January 1982, the Tariefcommissie [administrative court of last instance in revenue matters], Amsterdam, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of tariff heading 30.04 of the Common Customs Tariff.

2 That question was raised in the course of a dispute between the Nederlandsch Bevrachtingskantoor BV and the Inspecteur der Invoerrechten en Accijnzen [Inspector of Customs and Excise], Amsterdam, on the tariff classification of surgical covering cloths.

3 Such surgical covering cloths are rectangular in shape and consist of three sheets laid one on top of the other and sealed around the edges. The two

outer sheets are of paper, whilst the inner sheet is of plastic. Such surgical covering cloths, which are completely sterile, are intended for use during surgical operations in order to cover the patient's body in such a way that the area of the operation is left clear. Although the cloths are neither impregnated nor treated with bactericides, the parties to the main action concur in considering that they fulfil an antiseptic function.

4 According to the plaintiff in the main action, such surgical covering cloths must be classified under heading 30.04 of the Common Customs Tariff, which is worded as follows: "wadding, gauze, bandages and similar articles (for example dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in retail packings for medical or surgical purposes . . ."

5 The Inspecteur der Invoerrechten en Accijnzen considers that the surgical covering cloths cannot be treated as equivalent to wadding, gauze and bandages since, unlike the latter products, they do not cover the area of the operation. According to him, such cloths are comparable to operating sheets, which are not classified under tariff heading 30.04. He suggests that they should be classified under tariff heading 48.21 D, which at the time of the importation in question was worded as follows:

"48.21: Other articles of paper pulp, paper, paperboard or cellulose wadding:

A. . . .

B. . . .

C. . . .

D. Other . . ."

6 Those were the circumstances in which the national court referred the following question to the Court of Justice:

"Can covering cloths such as those in issue in these proceedings — which consist of strips of cellulose separated by a layer of synthetic material, are not impregnated or coated with pharmaceutical substances but are individually packed in envelopes in sterile conditions for retail for surgical purposes, and are used only once in surgical operations for the purpose of covering the patient's body in such a way that the area of the operation is

left clear — be regarded as articles similar to wadding, gauze or bandages within the meaning of heading 30.04 of the Common Customs Tariff?"

7 In the observations which it has submitted to the Court the Commission maintains that the heading of the Common Customs Tariff to be applied in this case is heading 48.21 D. According to it, surgical covering cloths are not similar to wadding, gauze and bandages in so far as they do not, like the latter products, facilitate or accelerate the healing of the wound but fulfil a purely hygienic function. In addition the Commission considers that surgical covering cloths cannot be regarded as being intended for surgical purposes within the meaning of heading 30.04 because that heading refers solely to articles used directly in the practice of surgery to the exclusion of those having an entirely different function such as, for example, the improvement of hygiene.

8 Having regard to the arguments thus summarized, it is appropriate to observe that the composition and form of the products listed under tariff heading 30.04 differ so greatly from one product to another that it is impossible to consider that the similar products mentioned in that tariff heading can be identified on the basis of those criteria. In fact, as the Commission emphasized in its observations, the similarity between those products lies in their function, which is to cover or protect a wound in order to facilitate or accelerate healing.

9 It cannot be contested that surgical covering cloths used in order to maximize asepsis during a surgical operation are intended to facilitate the recovery of the patient by reducing the risk of infection. It follows that surgical covering cloths must be regarded as products similar to those listed under tariff heading 30.04.

10 A further condition for the classification of these surgical covering cloths under tariff heading 30.04 is that they should either be impregnated or coated with pharmaceutical substances or be put up in retail packings for medical or surgical purposes. It is agreed that the products are neither impregnated nor coated with pharmaceutical substances but that they are, on the other hand, put up in retail packings. The Commission, however, disputes that they are used for medical or surgical purposes.

11 Although the point does not appear to have been raised before the Tariefcommissie it should nevertheless be made clear, in order to enable that court correctly to apply the relevant provisions of the Common Customs Tariff, that, if it is established that surgical covering cloths are specially designed for use in the course of surgical operations and in order to prevent any risk of contamination or infection thereby created, it cannot be denied that they are employed for surgical purposes.

12 Accordingly, the reply to the question submitted by the Tariefcommissie must be that surgical covering cloths which consist of strips of cellulose separated by a layer of synthetic material and which are not impregnated or coated with pharmaceutical substances but are individually packed in envelopes in sterile conditions for retail for surgical purposes and are used only once in surgical operations for the purpose of covering the patient's body in such a way that the area of the operation is left clear must be regarded as articles similar to wadding, gauze or bandages within the meaning of heading 30.04 of the Common Customs Tariff.

## Costs

13 The costs incurred by the Commission of the European Communities, which 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 on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the Tariefcommissie, Amsterdam, by order of 13 January 1982, hereby rules:

**Surgical covering cloths which consist of strips of cellulose separated by a layer of synthetic material and which are not impregnated or coated with pharmaceutical substances but are individually packed in envelopes in sterile conditions for retail for surgical purposes and are used only once**

**in surgical operations for the purpose of covering the patient's body in such a way that the area of the operation is left clear must be regarded as articles similar to wadding, gauze or bandages within the meaning of heading 30.04 of the Common Customs Tariff.**

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 6 October 1982.

P. Heim
Registrar

A. Touffait
President of the Third Chamber

# OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 15 JULY 1982 [1]

*Mr President*
*Members of the Court,*

In this case the question arises whether operating cloths whose composition is that described by the court making the reference come under heading 30.04 or heading 48.21 D of the Common Customs Tariff in the version in force in the relevant period.

Under the first-mentioned tariff heading come: "Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in retail packings for medical or surgical purposes, other than goods specified in Note 3 to this chapter."

It is clear that if that first tariff heading is not applicable the second-mentioned tariff heading is the only one which may be considered applicable (other articles of paper pulp, paper, paperboard or cellulose wadding, residuary category D, in the version contained in Council Regulation No 3000/79 of 20 December 1979 [Official Journal L 342 of 31 December 1979]).

Only the Commission has submitted written observations. I share the Commission's opinion that the operating cloths in question, unlike wadding, gauze, bandages and the other articles

1 — Translated from the Dutch.