OPINION OF ADVOCATE GENERAL JACOBS
delivered on 21 September 1994 *

My Lords,

1. Where a provision of a Commission regulation which classified certain important parts of video recorders under the Combined Nomenclature code for complete video recorders proved to be inconsistent with a subsequent opinion issued by the Customs Cooperation Council and was consequently deleted by a later Commission regulation, was the former regulation applicable even though the code itself remained unchanged throughout the relevant period or does the later regulation have retroactive effect so as to be applicable to goods imported before it entered into force? That, essentially, is the issue on which the Finanzgericht Rheinland-Pfalz seeks a ruling from the Court in the present case.

Relevant Community legislation

2. Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff [1] replaced, with effect from 1 January 1988, the existing Council regulations in this sphere, namely Council Regulation (EEC) No 950/68 on the Common Customs Tariff [2] and Council Regulation (EEC) No 97/69 on measures to be taken for the uniform application of the nomenclature of the Common Customs Tariff. [3] The second and third recitals in the preamble to Regulation No 2658/87 explain the purpose of the regulation as follows:

'... the collection and exchange of data on the statistics of external trade of the Community can best be achieved through the use of a Combined Nomenclature replacing the existing Common Customs Tariff and Nimexe nomenclatures, in order to meet tariff and statistical requirements simultaneously;

... the Community is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, known as the "harmonized system", which is intended to replace the Convention of 15 December 1950 on Nomenclature for the Classification of Goods in Customs Tariffs; whereas, as a consequence, the said

* Original language: English.

1 — OJ 1987 L 256, p. 1.

2 — OJ, English Special Edition 1968(I), p. 275.

3 — OJ, English Special Edition 1969(I), p. 12.

Combined Nomenclature must be established on the basis of the harmonized system.'

3. Article 1 of the regulation establishes the Combined Nomenclature in the following terms:

'1. A goods nomenclature, hereinafter called the "Combined Nomenclature", or in abbreviated form "CN", is hereby established to meet, at one and the same time, the requirements both of the Common Customs Tariff and of the external trade statistics of the Community.

2. The Combined Nomenclature shall comprise:

(a) the harmonized system nomenclature;

(b) Community subdivisions to that nomenclature, referred to as "CN subheadings" in those cases where a corresponding rate of duty is specified;

(c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.

3. The Combined Nomenclature is reproduced in Annex I.

The autonomous and conventional rates of duty of the Common Customs Tariff and the supplementary statistical units, as well as other necessary information, are laid down in the said Annex.'

4. Article 3(1) of the regulation provides:

'Each CN subheading shall have an eight digit code number:

(a) the first six digits shall be the code numbers relating to the headings and subheadings of the harmonized system nomenclature;

(b) the seventh and eighth digits shall identify the CN subheadings. When a heading or subheading of the harmonised system is not further subdivided for Community purposes, the seventh and eighth digits shall be "00".'

5. Throughout the period in question in the main proceedings, i. e. from 25 October 1988 to 25 October 1991, the relevant CN codes [4] read as follows:

'8521	Video recording or reproducing apparatus:
8521 10	— Magnetic tape-type:
...	
8521 10 39	— — Other
...	
8522	Parts and accessories of headings Nos 8519 to 8521
8522 10 00	— Pick-up cartridges
8522 90	— Other
...	
8522 90 99	— — Other.'

6. Article 9 of Regulation No 2658/87 provides for the adoption of measures by the Commission relating *inter alia* to:

'(a)application of the Combined Nomenclature ... concerning in particular:

— the classification of goods in the nomenclatures referred to in Article 8,

4 — The Combined Nomenclature, originally set out in Annex I to Regulation No 2658/87, was amended during the relevant period pursuant to Article 9 of the regulation by Commission Regulations (EEC) Nos 3174/88 (OJ 1988 L 298, p. 1), 2886/89 (OJ 1989 L 282, p. 1), 2472/90 (OJ 1990 L 247, p. 1) and 2587/91 (OJ 1991 L 259, p. 1). Pursuant to Article 12 of Regulation No 2658/87 the amended nomenclature is reproduced in each of those regulations.

Pursuant to that provision Commission Regulation (EEC) No 2275/88 [5] classified certain goods in the Combined Nomenclature. Item 9 of the annex to that regulation contained the following classification:

Description of the goods	Classification (CN code)	Reasons
Mechanical assembly for a video recording or reproducing apparatus of CN code 8521, equipped with recording and reproducing heads (Mecadeck).	8521 10 39	Classification is determined by the provisions of general rules 1, 2(a) and 6 and the texts of CN codes 8521, 8521 10 and 8521 10 39. This mechanical assembly presents the essential characteristics of a video recording or reproducing apparatus.

The regulation thus classified 'mecadecks' as a complete video recording or reproducing apparatus rather than as a part of such an apparatus.

7. On 7 April 1991 the Customs Cooperation Council issued an opinion (cited at paragraph below) classifying a mechanical assembly for a video recording or reproducing apparatus as a part of such an apparatus under heading 8522.90 of the Harmonized System Nomenclature.

8. In accordance with that opinion the Commission, by Regulation (EEC) No 3085/91, [6] deleted Item 9 of the annex to Regulation No 2275/88 with effect from 23 October 1991.

The facts of the main proceedings and questions put to the Court

9. From 3 June 1988 GoldStar Europe GmbH (hereinafter 'GoldStar') imported from South Korea drive mechanisms of video-cassette recorders labelled as 'deck ass'y', either separately or together with main board assemblies labelled as 'main board ass'y'. Both types of goods were ini-

5 — OJ 1988 L 200, p. 10.

6 — OJ 1991 L 291, p. 12.

tially classified as parts of video recorders under CN Code 8522 90 99 and attracted duty at a rate of 5.8%. Following the adoption of Regulation No 2275/88 the defendant in the main proceedings, the Hauptzollamt Ludwigshafen, concluded that the goods in question fitted the description of 'mecadecks' in the regulation and should have been classified under CN Code 8521 10 39 as 'other video recording or reproducing apparatus', attracting duty at a rate of 14%. Accordingly it imposed duty at the higher rate in respect of both previous and subsequent imports. Following the adoption of Regulation No 3085/91, amending Regulation No 2275/88, GoldStar applied to the defendant, on 25 October 1991, for repayment of the additional duty levied on goods imported during the previous three years, i. e. from 25 October 1988. The defendant refused to repay the duty, and so GoldStar appealed to the Finanzgericht Rheinland-Pfalz. Before that court it contended, first, that there were essential differences between a 'mecadeck' and a 'deck ass'y' and that the latter, even in conjunction with a 'main board ass'y', did not constitute a video apparatus and, in the absence of a number of important components, did not have the essential characteristics of such an apparatus. It argued secondly that Regulations Nos 2275/88 and 3085/91 were merely declaratory, being intended to ensure uniform application of the Combined Nomenclature and not to modify the scope of the relevant CN codes; Regulation No 3085/91, modifying a classificatory practice recognized by the Commission to be incorrect, was accordingly applicable to earlier imports, particularly since the wording of the relevant codes had at all material times remained unchanged.

10. In order to resolve the dispute the Finanzgericht has sought a preliminary ruling from the Court on the following questions:

'(1) Was Commission Regulation (EEC) No 2275/88 of 25 July 1988 concerning the classification of certain goods in the Combined Nomenclature valid in so far as it classified under CN Code 8521 1039 the "mechanical assembly for a video recording or reproducing apparatus of CN Code 8521, equipped with recording and reproducing heads (mecadeck)" described in Item 9 of the annex to the regulation?

(2) If the first question is answered in the affirmative:

Does Commission Regulation (EEC) No 3085/91 of 21 October 1991 amending Commission Regulation (EEC) No 2275/88 have retroactive effect, in the sense that it is applicable to goods imported before it entered into force?

(3) If the second question is answered in the negative:

What are the "essential characteristics" (see the entry under "Reasons" for Item 9 of the Annex to Regulation No 2275/88) or the "essential character" (see General Rule 2(a)) which led the Commission to classify "mecadecks" as complete video recording or reproducing apparatus under Code 8521?'

Question 1

11. In its written observations the Commission, in answering the Finanzgericht's first question, deals with the issues raised by all three questions. Responding first of all to a point raised by the Finanzgericht in its order for reference, it contends that Regulation No 2275/88 is not invalid simply because the Nomenclature Committee (i. e. the Committee established by Article 7 of Regulation No 2658/87 comprising national customs experts and chaired by representatives of the Commission) failed to give its opinion within the time-limit set by its chairman and before the adoption of the regulation. According to the Commission, Article 10(1) and (2) of Regulation No 2658/87 require the Commission to defer application of measures only if they are not in accordance with the opinion of the Committee. A failure by the Committee to give an opinion must be treated as a favourable opinion.

12. With respect to the validity of Item 9 of the annex to Regulation No 2275/88, the Commission observes that the decisive criterion for the purposes of tariff classification is generally the objective characteristics and properties of the relevant goods, as defined in the wording of the headings and subheadings of the Common Customs Tariff ('the Tariff') and in the notes to sections and chapters. The Commission is also empowered by Articles 9(1)(a) and 10 of Regulation No 2658/87 to classify certain goods itself. According to the Commission, such classifications must not however amend the wording of the Tariff or the content of the headings and subheadings. None the less it claims that it has a wide margin of discretion in choosing between headings, and that the Court's review is limited to examining whether the Commission has committed a manifest error or a misuse of powers. The Commission must, it observes, also take account of the explanatory notes and opinions of the Customs Cooperation Council since its failure to do so would undermine the uniform application of the nomenclature in the framework of the International Convention on the Harmonized System.

13. Applying those principles to the present case, the Commission asserts that the mechanical assembly for a video recorder known as a 'mecadeck' possesses the 'essential character' of a complete video recorder for the purposes of Rule 2(a) of the General Rules for the Interpretation of the Com-

bined Nomenclature. It is that part of the apparatus which contains all the components characterizing the functioning of the apparatus, namely video recording and reproduction. At the time of the adoption of the regulation there was nothing to the contrary in the explanatory notes or opinions of the Customs Cooperation Council. Item 9 of the annex was therefore valid at the time of the adoption of the regulation.

14. The Commission, referring to *Biegi* v *Hauptzollamt Bochum*,[7] observes that classificatory regulations do not in principle have retroactive effect. The position, it asserts, is different if a regulation merely clarifies the legal position existing prior to its entry into force. According to the Commission, that was not the case here. The opinion of the Customs Cooperation Council, which was given at the initiative of the Japanese delegation, was adopted by a 14 to 8 majority. Although the Commission remained convinced of the correctness of its view, it was obliged to amend Regulation No 2275/88 in order to ensure uniform application of the nomenclature within the territory of the Contracting Parties to the Convention on the Harmonized System. The Commission accepts that the Customs Cooperation Council's opinion constitutes a possible interpretation of the Tariff. However, prior to the opinion considerable uncertainty prevailed. In that connection the Commission refers to a letter sent by the Nomenclature and Classification Directorate of the Customs Cooperation Council to the Korean Embassy stating that the Community's earlier classification of 'mecadecks' could not be regarded as an infringement of its obligations under the Convention on the harmonized system; the letter states that 'the Secretariat is of the view that this is not a matter of legal obligation but rather a question of the interpretation of the legal text' and that 'there will always be borderline cases where different legal interpretations can be applied'.

15. In my view the Commission's observations are in all essential respects convincing. I do not think, first of all, that Regulation No 2275/88 can be considered invalid because the Commission brought it into force immediately rather than deferring its application for three months under Article 10(2) of Regulation No 2658/87. Article 10, which lays down the procedure for the adoption of measures under Article 9, provides:

'1. The representative of the Commission shall submit to the committee a draft of the measures to be adopted. The committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

2. The Commission shall adopt the measures, which shall apply immediately. How-

7 — Case 158/78 [1979] ECR 1103.

ever, if those measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event the Commission shall defer application of the measures which it has decided upon for three months from the date of such communication.

3. The Council, acting by qualified majority, may take a different decision within the period referred to in paragraph 2.'

16. The wording of Article 10(2) indicates that the measures decided upon by the mission are to apply immediately unless they conflict with an opinion adopted by the requisite majority of the Nomenclature Committee. The wording of the regulation differs in this respect from that of its predecessor, Regulation No 97/69. [8] Article 3(2) of that regulation, as amended by Council Regulation (EEC) No 2055/84, [9] expressly equated the case where no opinion was delivered with the case where the proposed regulation was not in accordance with the opinion of the Committee. It read as follows:

'(a) The Commission shall adopt the proposed Regulation where it is in accordance with the opinion of the Committee.

(b) Where the proposed Regulation is not in accordance with the opinion of the Committee, *or if no opinion is delivered*, the Commission shall without delay propose to the Council the provisions to be adopted.

The Council shall act by qualified majority.

(c) If, within three months of the proposal being submitted to it, the Council has not acted, the proposed Regulation shall be adopted by the Commission.' [My emphasis]

The omission of the italicized words in Article 10(2) of Regulation No 2658/87 makes it clear that the Commission may bring the classificatory measure into force immediately both where the measure is in accordance with the opinion of the Committee and where the Committee has failed to issue an opinion within the time-limit laid down by its chairman. It may be noted that there is no suggestion in this case that the time-limit laid down by the Commission representative chairing the Committee was unreasonably short or indeed that there was any other irregularity in the proceedings of the Committee.

8 — See note above.

9 — OJ 1984 L 191, p. 1.

17. I turn next to the extent of the Commission's power to adopt measures classifying goods under the Tariff and the scope of the Court's review of such measures. The Court has had occasion to consider this question in several cases. For example, in *Vismans Nederland* v *Inspecteur der Invoerrechten en Accijnzen*, [10] which concerned a classificatory regulation adopted by the Commission under the aforesaid Regulation No 97/69, the Court held (at paragraph 13 of the judgment):

'... in relation to the interpretation of the Common Customs Tariff, the Council has conferred upon the Commission, acting in cooperation with the Customs experts of the Member States, a wide margin of discretion in defining the subject-matter of tariff headings falling to be considered for the classification of particular goods, provided only that the provisions adopted by the Commission do not amend the text of the Tariff ... .'

See also the judgments in *The Queen* v *HM Customs and Excise, ex parte Imperial Tobacco*, [11] and the *Bagusat* cases. [12]

18. In his Opinion in the first *Bagusat* case [13] Advocate General Mayras suggested, in relation to a Commission classificatory regulation adopted in accordance with the opinion of the Nomenclature Committee, that 'in this field the power of review of this Court is limited and ... a declaration of invalidity can be based only on a clear error or on a misuse of powers. This Court cannot substitute its own evaluation for that of the Committee on Nomenclature'.

19. Advocate General Mayras's comments are in line with the Court's finding in that case that no factor had been disclosed to show that the Commission had exceeded the limits of its discretion, and with the finding in the second *Bagusat* case, [14] concerning the same regulation, that no factor had been disclosed to suggest that the Commission's classification was 'manifestly incorrect'.

20. It is true that in this case no opinion was issued by the customs experts of the Member States sitting on the Nomenclature Committee, so that there could be no question of the Court's substituting its own evaluation for that of the Committee. However, I do not consider that point decisive. The Commission complied fully with the procedural requirements laid down by Regulation No 2658/87 by referring the matter to the Com-

10 — Case C-265/89 [1990] ECR I-3411.

11 — Case 141/86 [1988] ECR 57.

12 — Case 37/75 *Bagusat* v *Hauptzollamt Berlin-Packhof* [1975] ECR 1339, and Joined Cases 87, 112 and 113/79 *Bagusat* v *Hauptzollamt Berlin-Packhof* [1980] ECR 1159.

13 — At p. 1350.

14 — Paragraph 14 of the judgment.

mittee and by refraining from adopting the measure until the time-limit laid down by the chairman of the Committee had expired. It was therefore entitled to adopt a classificatory measure in accordance with its own evaluation.

21. Before turning to the question whether the Commission's classification of 'mecadecks' in Regulation No 2275/88 constituted a proper exercise of its discretion in this matter, I should point out that in my view that classification was not rendered invalid simply because it proved to be incompatible with a subsequent opinion issued by the Customs Cooperation Council. Certainly, in exercising its discretion in this area the Commission must take into account the explanatory notes and opinions of the Customs Cooperation Council with a view to ensuring uniform application of the nomenclature within the territories of the Contracting Parties to the Convention on the harmonized system. As the Court held in *Nederlandse Spoorwegen* v *Inspecteur der Invoerrechten en Accijnzen*: [15]

'It is true that these classification opinions do not bind the Contracting Parties but they have a bearing on interpretation which is all the more decisive because they emanate from an authority entrusted by the Contracting Parties with ensuring uniformity in the interpretation and application of the nomenclature. When, furthermore, such an interpretation reflects the general practice followed by the Contracting States, it can be set aside only if it appears incompatible with the wording of the heading concerned or goes manifestly beyond the discretion conferred on the Customs Cooperation Council.'

However, as the Court noted in *Van de Kolk*: [16]

'When the Customs Cooperation Council's interpretation of the Nomenclature is not binding on the Community, or if it has not given an interpretation, the Community legislature has the power to interpret, by means of regulations and subject to review by the Court of Justice, the Nomenclature as it is to be applied by the Community.'

22. The whole purpose of classificatory regulations — and for that matter opinions of the Customs Cooperation Council — is to clarify the law in borderline cases, i. e. where several different classifications of goods are possible. In the absence of an opinion issued by the Customs Cooperation Council the Commission has the power to interpret the Harmonized System Nomenclature as it is to

15 — Case 38/75 [1975] ECR 1439, paragraphs 24 and 25 of the judgment.

16 — Case C-233/88 *Gijs van de Kolk-Douane Expediteur* v *Inspecteur der Invoerrechten en Accijnzen* [1990] ECR I-265, paragraph 10 of the judgment.

be applied in the Community, subject to review by the Court. In such borderline cases it is of course always possible that the Customs Cooperation Council will subsequently come to another view. The Community must then take account of that view unless it is incompatible with the wording of the heading concerned or manifestly exceeds the discretion conferred upon the Customs Cooperation Council. However, it does not follow that an earlier classification decided upon by the Commission is thereby rendered invalid. In exercising its discretion at a given time the Commission must take account of a number of matters, including the notes to headings and sections in the Tariff, the explanatory notes to the Combined Nomenclature and the explanatory notes and opinions of the Customs Cooperation Council. It must of course be able, if necessary, to review a particular classification in the light of relevant developments, such as the issue of an opinion by the Customs Cooperation Council. Provided that in adopting a classificatory regulation the Commission acts within the limits of its discretion in the light of the circumstances prevailing at the time, the validity of the regulation cannot be affected by the fact that subsequent developments necessitate a reappraisal of the classification.

23. Support for that proposition is to be found in previous judgments of the Court. For example, in *Compagnie d'Approvisionnement* v *Commission* [17] the Court stated unequivocally that:

'The validity of a regulation cannot be called in question because of events which took place at a later date.' [18]

24. Furthermore, the contrary view would be inconsistent with the requirements of legal certainty. It would be impossible for the Commission to amend a classificatory regulation in the light of subsequent developments without calling in question the treatment of past transactions. A reclassification might moreover lead to a higher rather than lower rate of duty being charged; if in such a case the earlier regulation imposing a lower rate of duty were invalid, it is possible that the customs authorities might seek retrospectively to impose additional duty on goods that had already been sold, notwithstanding the fact that at the time of importation the classification was thought to be correct.

25. Accordingly, it remains necessary to consider whether the Commission, by classifying 'mecadecks' under CN Code 8521 10 39, exceeded the limits of its powers by choosing a manifestly incorrect classification amounting in effect to an amendment of the Tariff. In my view it did not.

17 — Joined Cases 9 and 11/71 [1972] ECR 391, paragraph 39 of the judgment.

18 — See also Case 40/72 *Schroeder* v *Germany* [1973] ECR 125, paragraph 14 of the judgment, and Joined Cases C-267/88 to C-285/88 *Wuidart and Others* v *Laiterie Coopérative Eupenoise* [1990] ECR I-435, paragraph 14.

26. The Court has consistently held that:

'... in the interests of legal certainty and ease of verification, the decisive criterion for the customs classification of goods must generally be their objective characteristics and properties, as defined by the wording of the headings of the Common Customs Tariff and the notes to the sections or chapters'. [19]

27. Reference should also be made to Rule 2(a) of the General Rules for the Interpretation of the Combined Nomenclature, which form part of the Nomenclature as originally set out in Annex I to Regulation No 2658/87. Rule 2(a) provides:

'Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.'

28. It is necessary therefore to identify the essential characteristics of a video recording or reproducing apparatus and to determine whether 'mecadecks', although incomplete, possess the essential character of such an apparatus.

29. The essential characteristic of a video recorder and reproducer is its capacity to record and reproduce visual images and sound. In technical terms, it records electrical impulses (signals) corresponding to visual images and sound on a medium, normally magnetic tape, and converts recorded signals into visual images and sound: see the Explanatory Notes of the Customs Cooperation Council relating to heading 8521.

30. What then are the components of the apparatus which give it that essential character? The documents before the Court indicate that the apparatus comprises in particular the following parts: a tape-deck assembly, a main board assembly consisting of the necessary electrical control circuitry, a tuner, a timing mechanism, a keyboard, a cassette

19 — *Vismans Nederland*, note above, paragraph 14 of the judgment; see also Case 164/88 *Ministère Publique* v *Rispal* [1989] ECR 2041 and Case C-233/88 *Gijs van de Kolk*, cited at note above.

housing assembly as well as various casing panels. The deck assembly comprises a precise arrangement of the following components:

transducers for video and sound information (video and audio heads), which during the recording process convert electrical and video information into magnetic information which can be recorded on the magnetic tape and, during the reproduction process, convert the magnetic information on the tape into electrical signals;

a transducer for control information (control head), which serves to record on, and reproduce information from, the magnetic tape in a way that ensures a specified and controlled speed of transportation of the magnetic tape on the tape-deck;

a transducer for erasing recorded information (erasing head), which erases magnetic information stored on the magnetic tape;

other electro-magnetic transducers with special functions such as the reproduction of still pictures;

electric motors, which provide the movement necessary for the recording and reproduction processes.

31. From the above description it is clear that it is the components of the deck assembly, in particular the video and sound heads, the control head and the other electromagnetic transducers, which give the apparatus its essential character. It is those components which, mounted in a precise manner on the tape-deck, serve primarily to perform the apparatus's basic functions of video recording and reproduction.

32. It appears that the 'mecadeck' referred to in Item 9 of the annex to Regulation No 2275/88 incorporates those components. Item 9 itself defines a 'mecadeck' as the 'mechanical assembly for a video recording or reproducing apparatus ..., equipped with recording and reproducing heads'.

33. Reference may also be made to the opinion of the Customs Cooperation Council, published with the Explanatory Notes of the Customs Cooperation Council (COM/AS — 7 July 1991, p. 39E), which reads as follows:

'8522.90 1. **Mechanical assembly** for video recording or reproducing apparatus consist-

ing of a chassis on which are mounted the following main parts:

(i) a cylinder assembly comprising an upper rotating cylinder integral with the video heads, a fixed lower cylinder and a motor. The assembly writes the video signals on the magnetic tape and reads those signals;

(ii) a sound head which writes the audio signals on the magnetic tape and reads those signals;

(iii) an erasing head which erases the prerecorded signals at the time of recording;

(iv) a capstan which keeps the magnetic tape playing at a fixed speed.

Classification as part of the appropriate apparatus.'

34. Although the term 'mecadeck' is not used in the opinion itself, the documents produced to the Court, in particular Document 35.479 of the Customs Cooperation Council, confirm that 'mecadeck' was the abbreviation used to refer to the mechanical assembly for a video recorder and reproducer which was the subject of the discussions in the Cooperation Council and of the opinion.

35. At the hearing the Court put a question to the Commission concerning the proportion of the price of a complete video recorder represented by the mecadeck. The Commission and GoldStar disagree on that question. In its written reply to the Court's question the Commission claims that during the period in question mecadecks accounted for between 30 and 40% of the total value of complete video recorders. GoldStar disputes those figures and produces invoices showing that the deck assembly constitutes 15 or 19% of the selling price of a video recorder, depending on the model.

36. The comparison made by GoldStar between the cost of the deck assembly and the selling price of a complete video recorder is inappropriate since the selling price presumably includes other costs such as wages and overheads and also profit. A more relevant ratio for present purposes would be the proportion of the total cost of the components of the apparatus represented by the deck assembly. This would probably be significantly higher. It is in any event clear that

the deck assembly constitutes a significant proportion of the total cost of the apparatus.

37. The Explanatory Notes to Rule 2(a) of the General Rules for the Interpretation of the Harmonized System make no reference to the value of components. However, in its observations on the Commission's reply GoldStar refers to Explanatory Note VIII to Rule 3 of the General Rules. Rule 3(b) provides that:

'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.'

Explanatory Note VIII states that:

'The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.'

GoldStar contends that that note must also be taken into consideration for the purpose of interpreting Rule 2(a) on incomplete or unfinished articles. Since the deck assemblies cannot be considered to have the essential character of complete video recorders on the basis of other criteria, reference must be made to the criterion of value.

38. However, it is far from clear that the criteria enumerated in Explanatory Note VIII, formulated with mixtures and composite goods in mind, may be applied by analogy — and without any modification — to incomplete or unfinished articles. Moreover, even supposing that to be the case, the criterion of value is merely one of a number of factors mentioned in Explanatory Note VIII, which refers *inter alia* to 'the role of a constituent material in relation to the use of the goods'. It would fall to the Commission, in the exercise of its discretion, to consider what weight was to be attached to each criterion in the circumstances. The Commission would in my view be entitled to conclude that value was not the decisive criterion in this case. Let us suppose, for example, that the remaining components of the video recorder, including the board assembly, were

imported as a single item of goods. Even though they account for the larger part of the cost of the complete apparatus, it is doubtful whether, without the deck assembly which contains the components that most directly perform the particular functions of a video recorder, they could properly be regarded as having the essential character of the complete apparatus for the purposes of Rule 2(a). That the value of a component is not conclusive for the purposes of classification under Rule 3(b) is, moreover, clear from the judgment in *Schickedanz* v *Oberfinanzdirektion Frankfurt am Main*, [20] where the Court held that sports shoes with uppers of textile fabric on to which were sewn pieces of leather were to be classified as 'Other footwear' rather than as 'Footwear with uppers of leather', notwithstanding the fact that the leather covered approximately 70% of the textile fabric and was of greater value. At paragraph 12 of the judgment the Court stated that:

'The intrinsic value of the pieces of leather in relation to the textile fabric does not suffice for a finding that it is the leather which gives the essential character to the upper.'

20 — Case 298/82 [1984] ECR 1829.

39. It would certainly have been possible for the Commission to take the view that it was the deck assembly and the main board assembly containing the electrical circuitry which together gave the apparatus its essential character. However, the Commission cannot in my view be said to have made a manifest error in coming to the view which it did.

40. In my opinion, therefore, the Commission was acting within the limits of its discretion in concluding that a 'mecadeck' had the essential character of a complete video recording and reproducing apparatus for the purposes of General Rule 2(a) and hence should be classified under CN Code 8521 10 39.

Question 2

41. By this question the national court asks whether Regulation No 3085/91 has retroactive effect so as to apply to goods imported before it entered into force.

42. In my view, it is clear that it does not. In *Biegi* v *Hauptzollamt Bochum* [21] the Court held at paragraph 11:

'A regulation specifying the conditions for classification in a tariff heading or subheading is of a legislative nature and cannot have retroactive effect.'

43. The Commission appears to suggest that a regulation may have retroactive effect in so far as it merely clarifies the existing legal position. It would however be more correct to say that in such circumstances a classificatory regulation may provide guidance as to how the Tariff was to be interpreted prior to the entry into force of the regulation. In any event, as the Commission correctly observes, Regulation No 3085/91 was manifestly not intended to confirm the existing legal position. As is apparent from its preamble and its provisions, the regulation amended the existing position in order to bring the Community legislation into line with the opinion of the Customs Cooperation Council.

21 — See note above.

Question 3

44. By this question the national court asks the Court, in substance, to identify the essential characteristics or the essential character which justified the classification of 'mecadecks' as a complete video recording or reproducing apparatus. The purpose of its question is to enable it to determine whether the classification of 'mecadecks' in Item 9 of the annex to Regulation No 2275/88 was applicable to the goods imported by Gold-Star.

45. The answer to this question follows from my answer to Question (1). The essential characteristic of a video recording or reproducing apparatus is its capacity to record and reproduce visual images and sound. The Commission was entitled, in the exercise of its discretion in this matter, to conclude that a 'mecadeck' or mechanical assembly for a video recording or reproducing apparatus has the essential character of the complete apparatus because it has mounted on it, appropriately arranged, the components which perform the apparatus's essential functions of video recording and reproduction, in particular the video, sound and erasing heads.

Conclusion

46. I am accordingly of the opinion that the questions referred to the Court by the Finanzgericht Rheinland-Pfalz should be answered as follows:

(1) Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Item 9 of the annex to Commission Regulation (EEC) No 2275/88.

(2) Commission Regulation (EEC) No 3085/91 does not have retroactive effect so as to be applicable to goods imported before it entered into force.

(3) Before the entry into force of Regulation No 3085/91, a 'mecadeck' or mechanical assembly for a video recording or reproducing apparatus could be regarded as having the essential character of the complete apparatus, within the meaning of Rule 2(a) of the General Rules for the Interpretation of the Combined Nomenclature, by reason of the fact that it had mounted on it, appropriately arranged, the components which performed the apparatus's essential functions of video recording and reproduction, in particular the video, sound and erasing heads.