OPINION OF MR ADVOCATE GENERAL CRUZ VILAÇA
delivered on 6 July 1988 *

Mr President,
Members of the Court,

1. The two questions which have been referred to the Court for a preliminary ruling were submitted by the Finanzgericht (Finance Court) Baden-Württemberg in a dispute between Albert Schmid, a German company, and the Hauptzollamt (Principal Customs Office) Stuttgart-West.

2. The plaintiff in the main proceedings imports beer in barrels or in bottles contained in plastic crates from Czechoslovakia into the Federal Republic of Germany. Under the contract concluded by the plaintiff, the price of the beer does not include the cost of the receptacles. Those receptacles, for which no rental fees or similar charges are payable, must be returned empty to the exporter, at the importing company's expense.

3. The loss of receptacles must be made good either in kind or by way of financial compensation corresponding to 75% of the new value of barrels or to 100% of the new value of bottles and crates.

4. The German customs administration demanded payment of customs duties from Albert Schmid on empty packings that were not returned and charged the rate applicable to beer (24%) on the amount of the compensatory payments. For that purpose, it relied on Articles 2 (3) and 3 (3) (a) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes. [1] According to Article 3 (3) (a), the price actually paid or payable (which determines the value of imported goods for customs purposes) is 'the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods'.

5. The plaintiff contested that decision of the Hauptzollamt in proceedings before the Finanzgericht and argued that the customs duty payable on the packing was already included in the duty paid on the beer, calculated in accordance with the price thereof. In support of that argument, it relied on Section II, D.1. of Part I of the Annex (Common Customs Tariff) to Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff, [2] as amended by Council Regulation (EEC) No 3333/83 of 4 November 1983. [3] For one thing, the aforesaid provision lays down that packings imported full and put into free circulation at the same time as the goods contained therein are, as a rule, to be chargeable at the same rate of customs duty as the goods themselves, where such goods are subject to an *ad valorem* customs duty. According to the plaintiff, it follows from that provision that the customs duties payable on the packings are included in the duties paid on the beer. Moreover, in its

* Translated from the Portuguese.

1 — OJ L 134, 31.5.1980, p. 1.
2 — OJ, English Special Edition 1968 (I), p. 275.
3 — OJ L 313, 4.11.1983, p. 1.

view, Regulation No 1224/80 does not permit a value for customs purposes to be fixed in respect of the packings.

6. In those circumstances, the Finanzgericht referred to the Court for a preliminary ruling two questions on the interpretation of the Common Customs Tariff annexed to Regulation No 950/68, as amended by Regulation No 3333/83. The questions are set out in the Report for the Hearing.

I — First question

7. In its first question, the Finanzgericht seeks to ascertain whether the beer barrels, beer bottles and plastic crates for beer bottles are to be regarded as *packings*, within the meaning of Section I, C.2 of Part I of the Common Customs Tariff, or as *transport devices*, within the meaning of the same provision of the Common Customs Tariff.

8. All the parties which have submitted observations in these proceedings (the plaintiff in the main proceedings, the Federal Government and the Commission) unanimously considered the barrels, bottles and crates to be packings.

9. Only the Finanzgericht expressed doubts and acknowledged that the barrels, bottles and crates could be regarded as transport devices.

10. The answer that I shall propose will reflect the first-mentioned solution, namely that the articles in question constitute packings.

11. That interpretation falls squarely within the definition of 'packings' in Section I, C.2 of Part I of the Common Customs Tariff: 'any external or internal containers, holders, wrapping or supports other than transport devices (e.g. transport containers), tarpaulins, tackle or ancillary transport equipment'.

12. In normal usage a distinction is generally drawn between articles whose usual purpose is to permit or facilitate transport and those whose purpose is to serve not as means of transport but as packings, although they may be used during transport and may help to facilitate it. Thus, barrels, bottles and crates are used in accordance with their specific function as packings or for storage purposes, independently of the fact that they are transported together with the goods they contain. That is not the case with regard to transport devices, whose purpose is spent with the transport unless they are converted, by altering the use to which they are to be put, into packings or anything else, like old electric tramways used as saloon bars or railway coaches used as sleeping accommodation.

13. There may be some uncertainty, in particular, in the case of crates since, as the national court has pointed out, they are used for transporting beer bottles and not the beer itself directly.

14. They may even be said to reveal the full extent of their usefulness only when it becomes necessary to *transport* the bottles which they contain.

15. It is no less true, however, that crates are normally used for the everyday storage of bottles, thereby fulfilling their usual function, one that is wholly unrelated to transport which nevertheless still constitutes a secondary or ancillary function of crates. As the Commission has pointed out in its observations, the fact that the crates, like the barrels or the bottles, are normally delivered with the goods in question to the final consumer clearly demonstrates that they are not 'transport devices' but 'packings' for beer.

16. What happens, as we can see in these proceedings, in the field of application of customs rules relating to the cross-frontier passage of goods is that the function performed by packings is closely connected with the transport of the goods.

17. The actual wording of Section I, C.2., the provision to be interpreted, would appear to dispel any doubts as to whether crates fall within the definition of packing, inasmuch as that definition refers to 'any *external* or internal containers' (emphasis added) and to 'supports'.

18. The same approach is evident in the definition of 'packings' in Article 14 (2) of Council Regulation (EEC) No 3599/82 of 21 December 1982 on temporary importation arrangements,[4] which, although couched in terms which differ from those used in Regulation No 950/68, is equally expressive as regards the scope of the definition.

4 — OJ L 376, 31.12.1982, p. 1.

19. According to that provision:

20. ' "Packings" means:

(a) holders used, or to be used, as external or internal coverings for goods;

(b) holders on which goods are, or are to be, rolled, wound or attached, but excluding packing materials such as straw, paper, glass wool and shavings when imported in bulk'.[5]

21. Consideration of certain other aspects of the relevant legislation lends support to the inference which may be drawn from that provision.

22. Thus, Article 11 (b) of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit[6] contains an illustrative list of what is to be understood by the expression 'means of transport', translated into German as 'Beförderungsmittel', which is the term used in the German version of Regulation No 3333/83 as the equivalent of 'transport device'. That provision refers to 'any road vehicle, trailer, semi-trailer', 'any railway car or wagon', 'any boat or ship', 'any aircraft' and 'any container within the meaning of the

5 — The plaintiff in the main proceedings also refers, in the same connection, to a proposal for a definition of packings drawn up by the Technical Committee on Customs Valuation of the Customs Cooperation Council, according to which all goods which are used to wrap, protect, stow or separate goods from other goods during transport are considered to be packings.

6 — OJ L 38, 9.2.1977, p. 1.

Customs Convention on containers'. In other words, we are a long way from a category which can encompass barrels, bottles or crates of beer. Clearly the Community legislature intended to treat as means of transport or as transport devices any articles intended to promote or to facilitate the movement of goods or persons from one place to another, in particular those capable of moving either wholly or in part by themselves.

23. Only containers would appear not to come within that framework since they are not capable of moving by themselves but only to the extent to which their support moves.

24. However, their purpose, or their greater suitability for the transport of goods, is self-evident and is the reason why the legislature made a point of including them amongst 'means of transport' or 'transport devices', even though there are circumstances in which they can also be used for the storage of goods. In order to dispel any doubts which might arise from that classification, the legislature expressly included them, both when it defined 'means of transport' in Regulation No 222/77 and when it defined 'packings' in Regulation No 3333/83.

25. The absence of any connection between 'containers' and 'crates for bottles' is now clearly apparent from the definition in Article 2 of Regulation (EEC) No 2096/87 of 13 July 1987 on the temporary importation of containers.[7] It follows from that definition (which is not reproduced here) that the term in question is a technical term corresponding to the English term 'container', which is in current usage, and is not to be confused with the much broader concept of a receptacle, which covers 'plastic crates' for bottles.

26. The fact that, in contrast to the French version of Regulation No 950/68, the reference in brackets to the English term 'containers' has been omitted from the German version in no way affects the correct interpretation of that term. Moreover, that was also the case with regard to the definition of 'means of transport' in Article 11 (b) of Regulation No 222/77.

27. Accordingly, the answer to the first question submitted by the national court must be that the articles in question are to be regarded as 'packings' within the meaning of the Common Customs Tariff annexed to Regulation No 950/68, as amended by Regulation No 3333/83.[8]

II — Second question

28. In its second question, the Finanzgericht seeks to ascertain in what manner duty is to be charged, pursuant to Section II, D.1 (a) of Part I of the Common Customs Tariff, on reusable packings that

7 — OJ L 196, 17.7.1987, p. 4.

8 — The substitution of the word 'Verpackungen' for the word 'Umschließungen', and the new wording of Section II, D.1. (a) of Part I of the Common Customs Tariff in Council Regulation (EEC) No 2658/87 of 23 July 1987 (OJ L 256, 7.9.1987, p. 1), should have relegated the problems of interpretation raised in these proceedings to the role of historical curiosities.

are to be returned empty to the exporter in another country:

(i) is duty to be charged on the full value of the packings whenever they enter the customs territory of the Community,

(ii) or is duty to be charged only on the packings which have gone astray and which, under the terms of the contract, must be made good to the seller,

(iii) or else are the packings to be considered exempt from duty, on the ground that the duty paid on the imported beer discharges the duty payable on the packings?

29. Essentially, the answer depends on the correct interpretation of the words: 'packings . . . imported full and put into free circulation at the same time as the goods contained therein shall be: (a) chargeable at the same rate of customs duty as the goods contained therein . . . '.

30. The practice of the German customs authorities — supported in these proceedings by the Commission — corresponds, as is clear from the summary of the facts set out at the beginning of this Opinion, to the second approach.

31. That was the interpretation challenged by the plaintiff in the main proceedings when it argued in favour of the third possible interpretation, that is to say that no further duty is chargeable on the packings even if they are not returned.

32. For its part, the national court suggests the possibility of applying the first solution, that is to say that duty is chargeable on all the packings whenever they cross the Community frontier.

33. I am quite certain that the answer to be given to the Finanzgericht's question must be based on the interpretation advocated by the Hauptzollamt.

34. That follows clearly and directly from the fact that the provision to be interpreted is set in the context of Section II, D.1, of which it forms part.

35. In the first place, it is apparent from a comparison between subparagraphs (a) and (b) that the legislature intended to exempt the packings in question from customs duties only on the specific conditions set out in subparagraph (b), which are as follows:

'(i) where the goods contained therein are free of customs duty,

(ii) where the goods contained therein are dutiable otherwise than by reference to weight or value, or

(iii) where the weight of the packings is not to be included in the dutiable weight of the goods contained therein'.

36. None of those conditions is satisfied in the present case, in which the goods contained in the packings are subject to an

ad valorem customs duty of 24%. For that reason subparagraph (a), which provides that packings are to be chargeable at the same rate of customs duty as the goods contained therein, is applicable.

37. That can only mean that the rate of customs duty payable on such packings must be the same as that applicable to the goods they contain.

38. That is immediately and unequivocally apparent from some of the different language versions of the Common Customs Tariff adopted by Regulation No 950/68 as amended by Regulation No 3333/83 (for instance the French and Italian versions), and from the corresponding Portuguese version of the new Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.[9] Moreover, that conclusion is particularly striking in the light of the English version of that regulation, which provides that 'packings ... shall be ... chargeable at the same rate of customs duty as the goods contained therein'.

39. The German version — the plaintiff in the main proceedings contends — is, however, more ambiguous. According to that version, packings imported full are to be 'durch den Zoll für die in ihnen verpackten Waren erfaßt'. Any doubts raised by that version cannot, however, call in question the interpretation resulting from the scheme of the provision and from the system established by the regulation of which that provision forms part.

40. Clearly, the Community legislature wished as far as possible to avoid applying to full packings treatment for customs purposes that was different from that accorded to the goods contained in the packings with which they constitute a whole for practical purposes.

41. For that reason, packings imported in those circumstances qualify for exemption from customs duties only where the goods they contain are also exempt or where one or more of the other conditions set out in subparagraph (b) are satisfied.

42. As the Commission points out in its observations, subparagraph (b) would make no sense at all and would be wholly unnecessary if packings imported full were never dutiable on the ground that the duties payable on them were always deemed to be discharged by the duties paid on the goods they contain.

43. On the other hand, it must be pointed out that this case also precludes the application of the rule in subparagraph D.1. (c), which provides — by derogation from subparagraphs (a) and (b) — for packings to be chargeable at the rates of customs duty appropriate to them, subject to the following conditions:

'(i) where they are not of a type normally used for the goods contained therein and have an independent and durable use other than as packings, or

(ii) where they have been used in order to evade payment of customs duties applicable thereto in accordance with their tariff description'.

9 — OJ L 256, 7.9.1987, p. 1.

44. Tax avoidance of any kind is not an issue in these proceedings, nor are the two cumulative conditions referred to in the first indent satisfied. Even on the assumption that the packings in question were considered to have 'an independent and durable use other than as packings' (which is still open to doubt), the fact remains that barrels, bottles and plastic crates must still be regarded as packings ('receptacles') of a perfectly normal kind for the goods (beer) they contain.

45. In conclusion, those packings must be chargeable at the same rate of *ad valorem* customs duty as that applicable to beer.

46. That, as we have seen, is the approach adopted by the German customs authorities with regard to receptacles that have gone astray and have not been returned, and it involves taking as the dutiable amount the financial compensation payable under the contract.

47. In my view, that approach is correct.

48. In order to determine the customs value of the packings it is necessary to take account of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes. [1]

49. Article 3 (1) of that regulation provides that 'the customs value of imported goods . . . shall be the transaction value, that is, the price actually paid or payable for the goods', the price, according to Article 3 (3), being 'the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods'.

50. Since the importer is required, under the contract, to make a compensatory payment to the Czechoslovakian seller for packings that are not returned, such payment constitutes 'the cost of containers which are treated as being one for customs purposes with the goods in question', such *cost*, according to Article 8 (1) (a) of Regulation No 1224/80, being added to the price of the imported goods since it is incurred by the buyer and was not included in the price actually paid or payable for the goods (contrary to the normal practice in the case of packings that are not reusable).

51. As for receptacles that are returned, they are not dutiable since the cost, not being incurred by the buyer, does not have to be added to the price paid or payable for the goods. Alternatively, the corresponding costs are apportioned among the various consignments of the goods contained in the receptacles on the basis of their useful life, and the price of the beer they contain therefore already includes a proportion of the cost of the packing, with the result that it is inappropriate to charge duty on the packing again.

1 — OJ L 134, 31.5.1980, p. 1.

III — Answers to the questions submitted for a preliminary ruling

52. In the light of the foregoing considerations, I suggest that the questions submitted by the Finanzgericht Baden-Württemberg for a preliminary ruling should be answered as follows:

'(1) The term "packing", defined in the final sentence of Section I, C.2 of Part I of the Common Customs Tariff annexed to Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff, as amended by Council Regulation (EEC) No 3333/83 of 4 November 1983, includes beer barrels, beer bottles and plastic crates for beer bottles, regardless of whether those articles have to be returned to the seller of the beer in another country.

(2) Section II, D.1 (a) of Part I of the Common Customs Tariff, which is annexed to the aforesaid regulation, must be interpreted as meaning that packings that are not returned are chargeable to duty at the same rate as the goods they contain since, according to Article 8 (1) (a) (ii) of Regulation (EEC) No 1224/80, the cost of those packings must be added to the value for customs purposes of the goods contained therein where that cost has to be incurred by the buyer and has not been included in the price actually paid or payable for the goods themselves.'