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.

mentioned by the Commission in this connection, do *not* contribute to healing the wound. They cannot therefore be regarded as being intended for *medical* purposes.

As the Commission acknowledges, it is, however, not so clear that it is also impossible to regard those cloths as "being intended for surgical purposes". In my view, that is not clear even if one agrees with the Commission that the decisive point is that the products in question must be articles used directly in the practice of surgery and not articles having a completely different function, such as the improvement of hygiene. The Commission, in formulating that criterion, adheres closely to one which was regarded as decisive by the Tariefcommissie in a judgment given in a similar case on 20 September 1967 (Case No 11308 T).

There are two grounds on which I consider the said criterion not to be decisive for the problem at hand. In the first place, operating cloths like those at issue here are certainly much more directly concerned in the performance of operations than the cloths and covers mentioned by the Commission in this connection. Unlike the said cloths and covers, each of the operating cloths in question is produced for one specific operation. In this sense such operating cloths are indeed put up for a surgical purpose as required by the wording of tariff heading 30.04. Secondly, on the basis of their composition and their function or purpose, the operating cloths may more easily be brought within the basic concept of "wadding, gauze, bandages and similar articles" contained in tariff heading 30.04 than the aforesaid sheets and covers. During the operation they are used *inter alia* to absorb blood, noxious substances and moisture, as the Commission conceded at the hearing. Unlike the Commission, I consider that this purpose is largely comparable to that of wadding, gauze and bandages not impregnated or coated with pharmaceutical substances and put up for *surgical* purposes (a clear distinction being drawn with the medical purposes which are mentioned separately in tariff heading 30.04). In this connection I also consider that the Commission cannot derive support from Regulation No 1484/70 of 24 July 1970 (Official Journal, English Special Edition 1970 (II), p. 480). The drawsheets with which that regulation is concerned not only clearly have no medical or surgical purpose but also cannot, by reason of their composition, be regarded as articles related ("similar") to wadding, gauze and bandages.

The argument which the Commission, at the end of its written observations, bases on the contents of the list of articles in Note 3 to Chapter 30 of the Common Customs Tariff lends support, in my opinion, to the view that operating cloths indeed fall under tariff heading 30.04. The list of articles in Note 3 — such as sterile surgical catgut and similar sterile suture materials, sterile laminaria, sterile absorbable surgical haemostatics and even dental cements — suggests that a broad interpretation should be given to the basic terms used in tariff heading 30.04, since those articles bear equally little, or indeed less, relation, as regards composition and function, to wadding, gauze and bandages than do operating cloths.

Despite this unclear relationship as regards composition and function the legislature considered it necessary expressly to except all those articles (the ones mentioned in Note 3 to Chapter 30) from heading 30.04 in favour of another tariff heading (in this case heading 30.05). That clearly shows that tariff heading 30.04 must in principle be given a broad interpretation. It certainly cannot be proper to infer from the express exclusion of those articles, which are plainly considered in principle to be similar to "wadding, gauze and bandages", in favour of another tariff heading that articles which are *not* expressly mentioned in that list of exceptions and which also fall within the terms of tariff heading 30.04, broadly construed, should simply be rendered liable to the higher tariffs of heading 48.21 D. At the hearing the Commission's representative sought to avoid the implications of the express exception through the argument that the exclusion from tariff heading 30.04 of the articles listed in Note 3 is necessary because *some* of them, namely the absorbable surgical haemostatics mentioned in paragraph (c) and the first-aid boxes and kits mentioned in paragraph (g), do in fact resemble wadding, gauze and bandages. However, since the exception refers to "*the* articles" [1] and not to "*some* articles" specified in Note 3, that argument is, in my opinion, of no avail. *All* the articles listed in Note 3 are clearly excluded from tariff heading 30.04.

A general comparison of the nature of the products falling within tariff heading 30.04 and the products falling within tariff heading 48.21 shows in addition that the operating cloths in question are clearly more closely related, as regards composition and function, to the products of the first-mentioned tariff heading than to the "other articles" of the last-mentioned tariff heading and that the definition contained in the first-mentioned tariff heading is decidedly more specific. Therefore, in accordance with General Rule A 3 (a) of the Common Customs Tariff (the present version, which in this respect is unaltered, is in Official Journal L 355 of 23. 11. 1981), tariff heading 30.04 should be applied in this case because, for the reasons which have already been stated, operating cloths may be regarded both as paper articles and as "similar articles ... put up ... for ... surgical purposes" within the meaning of the last-mentioned tariff heading.

Finally, I must now also consider whether other arguments of the Commission which were only advanced in the course of the oral procedure should cause a different view to be taken in this case. The Commission argued then that only articles used by the surgeon in *direct connection with the wound* may be classified under tariff heading 30.04, including articles which are used *after* the operation to cover the wound. I concede that that affords a clear criterion for distinguishing between the two tariff headings which also accords with the wording of tariff heading 30.04. None the less, having regard to the trading objectives pursued by means of tariff headings, I consider that the closer relationship, as regards composition and function, of the operating cloths in question with the articles listed in tariff heading 30.04 than with the articles listed in tariff heading 48.21 D, in conjunction with the other

1 — Translator's note: The definite article is not used in the English version of heading 30.04.

arguments mentioned by me, is conclusive. Since sheets, covers, operating gloves, mouth filters and hair caps serve a different purpose and are not so often, or not at all, put up in retail packings for each specific operation their classification is not affected by that conclusion.

Nor am I led to a different conclusion by the new heading 48.21 F I (articles of a kind used for surgical, medical or hygienic purposes, not put up for retail sale) which was introduced by Council Regulation (EEC) No 3002/81 of 19 October 1981 (Official Journal L 301 of 22 October 1981, p. 1) and which was discussed at the hearing. Even if this amendment to tariff heading 48.21 were to apply to this case (which it does not), it would merely emphasize, by indicating another tariff heading for articles used *inter alia* for surgical purposes (but *not* put up for retail sale), that tariff headings are designed to take into account considerations of commercial policy. In this instance it is clear that the difference in packing for wholesale or for retail sale was decisive; it was not simply a technical criterion relating to operations, as was suggested by the Commission at the hearing.

I am accordingly of the opinion that the question submitted to the Court should, contrary to the Commission's submission, be answered as follows:

On a proper construction of heading 30.04 of the Common Customs Tariff, sterile cloths for covering the area round a wound during an operation, such as those in question in the present case, must be regarded as "articles similar to wadding, gauze and bandages put up in retail packings for surgical purposes".