JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 2 JULY 1981 [1]

Smuling-De Leeuw BV
v Inspecteur der Invoerrechten en Accijnzen, Rotterdam
(preliminary ruling requested by the Tariefcommissie of the Netherlands)

"Common Customs Tariff — Tariff classification"

Case 160/80

Common Customs Tariff — Tariff headings — Natural gums, resins and other vegetable saps and extracts within the meaning of headings 13.02 and 13.03 — Concept — Gum produced on an industrial scale by means of a complex procedure — Exclusion

The systematic classification of goods in the various sections and chapters of the Common Customs Tariff does not allow a gum which is used as a thickener, even if as regards its nature and composition it corresponds to the goods described in headings 13.02 and 13.03, to be classified in one of the headings of Chapter 13 of the Common Customs Tariff since the gum is prepared on an industrial scale by the action of the bacterium xanthomonas campestris on a culture medium of maize sugar and maize starch.

In Case 160/80

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

SMULING-DE LEEUW BV, Rotterdam,

and

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

1 — Language of the Case: Dutch.

on the interpretation of headings 13.02, 13.03 and subheading 39.06 B of the Common Customs Tariff,

THE COURT (Second Chamber),

composed of: P. Pescatore, President of Chamber, A. Touffait and O. Due, Judges,

Advocate General: Sir Gordon Slynn
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

On 25 May 1977 Smuling-De Leeuw BV made an import declaration concerning "keltrol, a high polymer product". According to the Tariefcommissie, keltrol is the commercial name of a vegetable product, xanthan gum, manufactured by the biochemical industry by placing the bacterium xanthomonas campestris on a culture medium of maize sugar or maize starch and adding to it nitrogen, potassium phosphate and certain trace elements which three latter substances help to nurture micro-organisms.

The xanthan gum is created metabolically, in other words from the interaction of the bacteria. When this process is complete the product is placed in isopropyl alcohol and then dried and milled. There is no further chemical change. Xanthan gum is a hetero-polysaccharide with short side-chains, that is to say a natural high polymer in which each fraction of the molecular group consists of D-mannose, D-glucose and D-glucuronic acid molecules.

According to the Tariefcommissie it is common ground between the parties that that gum corresponds in respect of its structure and the way it is produced and used to the mucilages and thickeners derived from the vegetable products referred to in heading 13.03 of the Common Customs Tariff under which no customs duty is payable on importation.

Nevertheless the inspector, on his view of the tariff's own general plan which prevents classification of the imported product in heading 13.03, classified it in subheading 39.06 B of the Common Customs Tariff so that a customs duty of 16% was payable. When Smuling BV lodged an objection the inspector rejected it on 28 November 1977, upholding his decision.

The appellant in the main action lodged an appeal with the Tariefcommissie against that rejection of its objection requesting that the decision of the inspector should be set aside and that xanthan gum should be classified in subheading 13.03 C III of the Common Customs Tariff or in the alternative in heading 13.02 which likewise does not give rise to customs duty on importation.

The description of the three tariff headings referred to is as follows:

"13.02 Shellac, seed lac, stick lac and other lacs; natural gums, resins, gum-resins and balsams:

...

B. Other"

"13.03 Vegetable saps and extracts; pectic substances, pectinates and pectates; agar-agar and other mucilages and thickeners, derived from vegetable products:

...

C. Agar-agar and other mucilages and thickeners, derived from vegetable products:

III. Other"

"39.06 Other high polymers, artificial resins and artificial plastic materials, including alginic acid, its salts and esters; linoxyn:

...

B. Other".

The appellant in the main action argued before the Tariefcommissie that having regard to the terms of the heading and of the notes to Chapter 13 the product is specifically described in heading 13.03 so that pursuant to Article 4, Point 3 (a) of the Tariefbesluit [Tariff Decree] of 1960 it must be classified in that heading and that the condition laid down by the inspector to the effect that the products must be obtained *directly* from vegetable products cannot be inferred from the wording of the heading or from the explanatory note to it. These two passages merely state that the product must be derived: xanthan meets that condition. With regard to the argument of the inspector that the Common Customs Tariff has a particular structure of its own which entails the classification of goods in the tariff nomenclature in accordance with the specific rules applying thereto the appellant in the main action considers that it indeed follows a particular discipline that it is bound up with other such disciplines (in this case the disciplines of chemistry) and

any deviations therefrom are expressly provided for: there is no such provision in this case.

The inspector, having first recalled the "great similarity of xanthan with gums and mucilages from the point of view of biology and chemistry", maintains that the nomenclature of the Customs Cooperation Council (CCC) has a structure of its own which differs from other disciplines; the authors of the tariff envisaged as coming under Chapter 13 only products which occur naturally and which are not obtained industrially; consequently only classification in heading 39.06 is possible.

The Tariefcommissie declares that "... as regards its nature and composition, the product corresponds to the goods described in headings 13.02 and 13.03 and that at the same time it belongs to the high polymers to which heading 39.06 relates" and that it must be classified in accordance with the General Rules for the interpretation of the nomenclature of the Common Customs Tariff, in particular of Rule 3 (a) which states that "the heading which provides the most specific description shall be preferred to headings providing a more general description". Since the description "natural gums" or "mucilages and thickeners derived from vegetable products" is more specific than that of "other high polymers" headings 13.02 or 13.03 are applicable "if the imported product can be brought within the description of the three headings mentioned". However in view of the contention of the inspector concerning the general structure of the tariff the Tariefcommissie stayed the proceedings and, before giving a ruling, referred the case to the Court of Justice in order to obtain a reply to the following question:

"Does the systematic classification of goods under the various sections and chapters of the Common Customs Tariff not allow a gum, which is used as a thickener and which, as regards its nature and composition, corresponds to the goods described in headings 13.02 and 13.03, to be classified under one of the headings of Chapter 13 of the Common Customs Tariff if the gum is prepared on an industrial scale by the action of the bacterium xanthomonas campestris on a culture medium of maize sugar and maize starch?"

The judgment making the reference was recorded in the Court Registry on 10 July 1980.

On 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.

By an order of 3 December 1980 the Court, pursuant to Article 95 (1) of the Rules of Procedure, decided to assign the case to the Second Chamber.

II — Observations lodged under Article 20 of the Protocol on the Statute of the Court of Justice

A — Observations of the appellant in the main action

The *appellant in the main action* recalls first of all that only the basic regulations of the Council, the regulations on classification of the Commission and the case-law of the Court of Justice have binding force whilst the explanatory notes and the opinions on classification provided for under the Brussels Convention constitute valuable aids to interpretation of the tariff headings.

Then it recalls in addition that the parties are agreed that xanthan gum is a thickener obtained from vegetable substances and that it constitutes a natural gum. It nevertheless emphasizes the fact that, in its view, the description of that gum by the Tariefcommissie is "too weak" in that, it states that the gum in question "corresponds as regards its nature and composition ... to the goods described in headings 13.02 and 13.03" as the gum not only corresponds to such products but "is one of the products mentioned in those tariff headings". The difference in the points of view of the parties only appears with the argument of the inspector that "although the wording of the headings in fact indicates that headings 13.03 or 13.02 apply, the general plan of the tariff militates against it"; that argument is based not on a source of law having binding force but on the general plan of the Common Customs Tariff. According to the appellant in the main action the question submitted by the Tariefcommissie amounts to asking the Court whether that view of the inspector is valid, which entails a reply to the following three questions.

(a) In applying the wording of the tariff headings, which is in itself clear, is it nevertheless permissible to proceed on the basis of what is claimed to be the general plan of the nomenclature of the Common Customs Tariff?

The appellant considers that the reply to that question should be in the negative on the basis of the General Rules for the interpretation of the nomenclature of the Common Customs Tariff and more particularly on the general rule mentioned in A (1).

— According to that rule "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions". Consequently it is not permissible to depart from the terms of the headings as it is in particular through the literal interpretation of the wording of the provisions that uniformity is to be attained in the 80 or so countries which apply the nomenclature of the Customs Cooperation Council. In particular as there is no doubt that xanthan gum is either "a thickener, derived from vegetable products" of "a natural gum" it must be classified in one or other of the two headings 13.03 or 13.02.

— In view of the fact that it is stated as a basis of the general rule of interpretation cited above that "the titles or sections, chapters or subchapters are provided for ease of reference only" a general plan of the nomenclature which is founded on the titles of sections and chapters cannot be a decisive factor in the classification of goods.

— Finally, the principle of legal certainty requires that the nomenclature of the tariff be interpreted in an identical manner in all the States which are parties to the Convention. If it were accepted that the classification might be determined according to "the general plan of the tariff" that would involve a different application of the nomenclature and indeed a deviation from the express wording of the provisions.

(b) Are not the terms of headings 13.03 and 13.02 sufficiently clear to enable reliance to be placed on such a general plan in classifying goods in one or other of the two headings?

The grammatical interpretation of matters relating to the Common Customs Tariff is required to be much stricter than in other fields of law. The general plan of the Common Customs Tariff in fact constitutes an interpretation of the intention of the legislature and that intention may not in any case result in an interpretation which is at variance with the very terms of the headings. Since the terms of headings 13.03 and 13.02 "are completely clear" and the explanatory notes to these headings provide a complete list of various products of the kinds in question — certain specific products are indeed not classified in the headings where that kind of product is usually classified but that is purely and simply because "they are expressly referred to in other headings" — all the other products not referred to elsewhere must remain classified in headings 13.02 and 13.03. Accordingly all thickeners not mentioned elsewhere which are derived in any way whatever from vegetable products and all natural gums must, regardless of the methods and places of their production, be classified in headings 13.02 and 13.03.

(c) Although it has thus been established that the general plan of the Common Customs Tariff is irrelevant to classification thereunder can that gum nevertheless be classified in headings 13.03 or 13.02 because it is prepared on an industrial scale?

According to the appellant in the main action that question entails verifying whether the wording of the headings implies that products manufactured on an industrial scale cannot be classified under those headings. It considers that if that were so it would be necessary to add to the wording of those headings: "provided that such products are not produced on an industrial scale". Such an addition would not only be contrary to the rules set out in (a) and (b) but would also be at variance with the principle of legal certainty which entails that the classification of goods in the Common Customs Tariff must in principle be effected on the basis of their objective characteristics. It follows from the foregoing that "the objective characteristics and properties of the products supply the decisive criterion for their classification under the said tariff heading" as the Court stated *inter alia* in its judgment of 23 March 1972 *(Henck* v *Hauptzollamt Emden,* Case 36/71 [1972] ECR 187, at p. 198). Since xanthan gum corresponds to the properties and characteristics of the products classified in headings 13.02 and 13.03 it must be classified in those headings. Finally the appellant in the main action, relying on the report of Professor Vliegenthart, emphasizes that in the wording of the headings reference is made to certain products manufactured by industrial methods and in accordance with a more complex procedure than that which is necessary for the manufacture of xanthan gum.

It concludes that the reply to the question put by the Tariefcommissie should be in the negative.

B — Observations of the French Government

According to the *French Government* analysis of the Common Customs Tariff indicates that xanthan gum can only be classified in heading 39.06. In fact such an analysis shows that the products are classified on the basis of certain criteria, one of the most important being that of the added value embodied in the products. Thus a marked difference will often be found between non-processed and processed products. In this connexion the French Government cites the different classifications of minerals and metals, unprepared and prepared vegetables and coral in its natural state and coral which has been worked. Whilst such a criterion is not applicable to all chapters the French Government considers that Chapter 13 and the last two headings therein (13.02 and 13.03) form part of a general plan as "those two headings cannot in fact contain products which, like xanthan gum, are produced through a complex biochemical process".

— First xanthan gum does not fall within heading 13.02.

In fact it cannot be treated as equivalent to lac since that can only be obtained from certain tropical trees. Furthermore with regard to the other materials referred to in that heading the explanatory notes of the Customs Cooperation Council describe them as a "group of natural products" which have not been artificially processed or which have only been processed to a very small extent. Thus the principle governing that subheading covers only non-processed products and thereby excludes xanthan gum. Xanthan gum indeed in certain very rare cases occurs naturally but then it is not a material which is used commercially. In those circumstances the French Government considers that it is not inconceivable that a distinction could be drawn between natural xanthan gum which can be classified in Chapter 13 and xanthan gum obtained by biochemical process, which must be excluded therefrom.

— Furthermore xanthan gum does not fall within heading 13.03 as it is too complex to be brought within the classification system which has been adopted.

In fact with regard to subheading A concerning vegetable saps and extracts the explanatory notes indicate that they "are the raw materials for many manufactured products" and that they are excluded from the subheading "when, because of the addition of other substances, they have the character of food preparations, medicaments, etc".

Xantham gum is thus excluded.

With regard to subheading B dealing with pectic substances the explanatory notes state that they are polysaccharides commercially extracted from natural products. In relation to the chapter as a whole the inclusion of commercially-extracted products appears to constitute an exception and it must accordingly be interpreted narrowly. Furthermore the French Government considers that the "extraction" here referred to constitutes a simpler operation than that producing xanthan gum which appears furthermore

to be produced through a "manufacture".

Subheading C refers to agar-agar and other mucilages and thickeners. Xanthan gum is neither an agar-agar nor a simple thickener since it is used *inter alia* to stabilize suspension and emulsion and since logically the subheading excludes products which have been processed beyond a certain degree. The explanatory notes do indeed classify in that heading endosperm flour of locust beans "even if slightly modified by chemical treatment ...". Such toleration of a slight modification constitutes an exception in the classification of manufactured products which still assumes that there is in this field an implied principle in accordance with which the heading may only exceptionally extend to materials other than natural products.

Consequently the French Government considers that xanthan gum which is manufactured by means of a complex biochemical process and which cannot be classified anywhere else "must be placed" in the heading covering "other high polymers" (heading 39.06).

C — Observations of the Commission

The *Commission* maintains that xanthan gum cannot be classified in subheading 39.06 B on the grounds that:

1. Xanthan gum is not a high polymer produced industrially through biochemical action.

2. Although the chemical structure of that gum closely resembles certain products falling within heading 13.02 the gums there referred to are nevertheless of natural origin and form on certain trees by natural exudation or after an incision has been made, as is confirmed by the explanatory notes. Consequently xanthan gum cannot be classified in heading 13.02.

3. It is likewise impossible to classify xanthan gum in heading 13.03 since it does not constitute a thickener derived from vegetable products in view of the fact that it is produced from maize starch, which is already a product derived from vegetable matter. Thus xanthan gum is produced through a very complex synthesizing process whilst the products which are classified in heading 13.03 are derived from vegetable matter by simple methods. Accordingly it does not suffice that xanthan gum has properties comparable with the other products referred to in subheading 13.03.

4. In fact neither the properties of the product nor its manufacture or otherwise on an industrial scale are decisive for its classification in headings 13.02 and 13.03 but rather the fact that xanthan gum, being neither an extract nor derived from vegetable products by relatively simple means, is the product of an industrial process in which the basic substance, which furthermore is not a vegetable, undergoes fundamental structural modifications by means of a complex synthesizing procedure.

5. It is furthermore clear that a certain number of other high polymers and above all certain polysaccharides which resemble xanthan gum are classified in heading 39.06. The explanatory note to heading 39.06 shows that that heading includes not only artificial high polymers but also natural high polymers, as for example dextran, glycogen and heparin; "it is thus absurd not to classify xanthan gum in heading 39.06 since it is largely comparable to those products from the point of view of its structure and the method of production".

Consequently the Commission concludes "that there is an incompatibility between the systematic classification of the goods in the various sections and chapters of the Common Customs Tariff and the classification in one of the headings of Chapter 13 of a gum which is used as a thickener and which, as regards its nature and composition, corresponds to the goods described in headings 13.02 and 13.03, if the gum is prepared on an industrial scale by the action of bacteria on a culture medium of maize sugar or maize starch hydrolysed through enzymes."

III — Oral procedure

At the hearing on 26 March 1981 the plaintiff in the main action represented by P. N. Droog and D. Van Vliet, assisted by Professors J. E. G. Vliegenthart, B. Lindberg and K. Wallenfels as experts, and the Commission of the European Communities, represented by its Agent, Robert C. Fischer, presented oral argument and replied to questions put by the Court.

The Advocate General delivered his opinion at the sitting on 21 May 1981.

Decision

1 By a judgment of 27 June 1980, which was received at the Court Registry on 10 July 1980, the Tariefcommissie of the Netherlands referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of headings 13.02, 13.03 and subheading 39.06 B of the Common Customs Tariff.

2 This question arose in the course of proceedings concerning the tariff classification of "Keltrol F", or "xanthan" gum imported into the Netherlands by Smuling-De Leeuw BV, Rotterdam, which was classified by the Inspecteur der Invoerrechten en Accijnzen [Inspector of Customs and Excise] (hereinafter referred to as "the inspector"), Rotterdam, under subheading 39.06 B

of the Common Customs Tariff. This classification resulted in the imposition of customs duty on importation of 16 %.

3 The importer, having been unsuccessful in its objection to this classification, lodged an appeal with the Tariefcommissie against the rejection of its objection requesting that the decision of the inspector should be set aside and that the product should be classified in subheading 13.03 C III of the Common Customs Tariff or in the alternative in heading 13.02 to both of which a nil rate of duty applies.

4 The description of the three tariff headings referred to is as follows:

"13.02 Shellac, seed lac, stick lac and other lacs; natural gums, resins, gum-resins and balsams:

. . .

B. Other"

"13.03 Vegetable saps and extracts; pectic substances, pectinates and pectates; agar-agar and other mucilages and thickeners, derived from vegetable products:

. . .

C. Agar-agar and other mucilages and thickeners, derived from vegetable products:

III. Other"

"39.06 Other high polymers, artificial resins and artificial plastic materials, including alginic acid, its salts and esters; linoxyn:

B. Other"

5 The Tariefcommissie states that the product at issue "as regards it nature and composition, corresponds to the goods described in headings 13.02 and 13.03

and that at the same time it belongs to the high polymers to which heading 39.06 relates" and considers that General Rule A 3 (a) for the interpretation of the nomenclature of the Common Customs Tariff which states that "the heading which provides the most specific description shall be preferred to headings providing a more general description" must be applied. In the result the Tariefcommissie considers that headings 13.02 or 13.03 are applicable. However, in view of the contention of the inspector concerning the general plan of the tariff that products manufactured by biochemical processes, as in the case of the product in question, may not be classified, whatever the resemblance between industrial products and natural products, in Chapter 13 the headings of which relate to products obtained by means of simple, craft methods, the Tariefcommissie considered that a question of interpretation of the Common Customs Tariff was involved and that it was therefore bound to refer the case to the Court of Justice for a decision on that question of interpretation.

6 The Tariefcommissie therefore stayed the proceedings and referred to the Court of Justice the following question:

"Does the systematic classification of goods under the various sections and chapters of the Common Customs Tariff not allow a gum, which is used as a thickener and which, as regards its nature and composition, corresponds to the goods described in headings 13.02 and 13.03, to be classified under one of the headings of Chapter 13 of the Common Customs Tariff if the gum is prepared on an industrial scale by the action of the bacterium xanthomonas campestris on a culture medium of maize sugar and maize starch?"

7 It appears from the wording of the question and from the reasons upon which the judgment making the reference is based that the Court has to establish whether the product in question should be classified as "natural" gum within the meaning of heading 13.02, or as "other mucilage and thickener derived from vegetable products" within the meaning of subheading 13.03 C III, or again as "other high polymer", within the meaning of subheading 39.06 B.

8 From the explanations given to the Court during oral argument and also from the terms of the judgment making the reference it is essentially a

question of deciding whether or not the choice between the various possible classifications should be guided by a consideration of the fact that the product in question is manufactured on an industrial scale. In fact, however, although the question itself includes the expression "on an industrial scale" ("op industriële schaal") in describing the production, the objection of the inspector is stated by the court itself in its judgment to be based on the general plan of a tariff which distinguishes between "natural" products and products "produced by simple, craft methods on the one hand, and on the other hand, "industrial" products or, as in the present case, products "manufactured biochemically" but the distinction thus highlighted has a greater bearing on the method of production than on the quantity produced.

9 The classification of the gum in question in heading 13.03 or 13.02 of the Common Customs Tariff conflicts, not only with the wording of the headings themselves, but also with the internal logic of Chapter 13 which covered, at the time of the events at issue, on the one hand "primary vegetable products for dyeing or tanning", on the other hand "gums, resins and other vegetable saps and extracts". Whatever linguistic versions of the tariff there may be, the chief feature of interest in this case is the nature of "vegetable extracts" of the products in question, in other words the fact that they are the result of processing a vegetable constituent or a natural vegetable product. This being established, the classification in that chapter by way of exception of products obtained by processing vegetable substances may only be justified by an express statement appearing in the description of the goods falling within that chapter.

10 This is not so in the case of xanthan gum. Moreover, it is to be expected that Chapter 13 should contain no special description for this product, since it does not correspond, as regards its nature, to a vegetable extract. It is in fact a very complex product obtained by an industrial chemical process in which the bacterium xanthomonas campestris is placed on a culture medium of maize sugar or maize starch to which are added nitrogen, potassium phosphate and certain trace elements, these substances helping to nurture micro-organisms; the xanthomonas campestris metabolically turns the constituents of the medium on which it is placed into xanthan gum. The product so obtained is then placed in isopropyl alcohol and dried and finally milled. It may be concluded from this process that, even if vegetable extracts

are used in the composition of the culture medium and if its conversion is effected by a biological agent, the finished product results, not from the separation of a natural constituent of a vegetable or a vegetable extract but from a chemical change brought about through an industrial process. Xanthan gum is thus no longer a vegetable extract but a new substance manufactured by means of an industrial process of fundamental chemical conversion. In view of this finding it should be noted that even the documents submitted by the plaintiff in the main proceedings show that the products mentioned under heading 13.03 are obtained, either naturally, or by solution, or by a relatively simple chemical process.

11 It is therefore appropriate to state in reply to the Tariefcommissie that the systematic classification of the goods in the various sections and chapters of the Common Customs Tariff does not allow a gum which is used as a thickener, even if as regards its nature and composition it corresponds to the goods described in headings 13.02 and 13.03, to be classified in one of the headings of Chapter 13 of the Common Customs Tariff since the gum is prepared on an industrial scale by the action of the bacterium xanthomonas campestris on a culture medium of maize sugar and maize starch.

Costs

12 The costs incurred by the Commission of the European Communities and by the French Government are not recoverable.

13 As the 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 (Second Chamber)

in answer to the question referred to it by the Tariefcommissie, by a judgment of 27 June 1980, hereby rules:

The systematic classification of goods in the various sections and chapters of the Common Customs Tariff does not allow a gum which is used as a thickener, even if as regards its nature and composition it corresponds to the goods described in headings 13.02 and 13.03, to be classified in one of the headings of Chapter 13 of the Common Customs Tariff since the gum is prepared on an industrial scale by the action of the bacterium xanthomonas campestris on a culture medium of maize sugar and maize starch.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 2 July 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 21 MAY 1981

My Lords,

This case concerns a consignment of five 100 lb drums of a substance called "Keltrol F", which was manufactured by the Kelco Division of Merck & Co. Inc., an American undertaking, and imported into the Netherlands by Smuling-De Leeuw BV (which I shall call "Smuling"). Keltrol F appears to be the