automatic result of the temperature selected. It does not apply to machines made solely for the purpose of changing the temperature of the surrounding atmosphere, where the degree of humidity of that atmosphere changes only as an automatic result, which can neither be regulated nor adjusted, of the temperature.

2. **In so far as the concept of relative humidity to which the national court has referred corresponds to that of the degree of humidity, the expression "for changing the temperature and humidity of air" means changing the relative humidity.**

Mertens de Wilmars O'Keeffe Koopmans

Delivered in open court in Luxembourg on 4 October 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 13 SEPTEMBER 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Tariefcommissie of the Netherlands. There is pending before that tribunal an appeal by J. Cleton en Co. B.V., of Rotterdam, which I shall call for short "Cleton", against a decision of the Inspector of Customs and Excise at Rotterdam ("Inspecteur der Invoerrechten en Accijnzen te Rotterdam") as to the classification under the Common Customs Tariff, the "CCT", of certain goods imported by Cleton into the Netherlands in March and April 1976.

Those goods were machines, described in the invoices as "Thermo-King transport refrigeration Units", which are used to cool and often also to heat the

load compartments of lorries and trailers. About 20 models were imported differing as to capacity, motor power, etc. Two of those models (XKW 10 and 20) are not designed for heating; they can only cool. According to the findings of the Tariefcommissie each machine consists of a compressor, a condenser and a motor mounted in a housing outside the load compartment, and of a fan and an evaporator mounted in a housing within the load compartment. The evaporator includes a defrosting unit and a drip pan. The two housings are linked by bolts and leads and thus form a single unit.

The Inspector classified the goods under CCT Heading 84.12, which comprises:

"Air conditioning machines, self-contained, comprising a motor-driven fan and elements for changing the temperature and humidity of the air."

The relevant rate of duty under that Heading is 8%.

Since the case turns largely on the meaning of the word "for" in Heading 84.12, I think it may be helpful if I mention at once that its equivalents in the texts of the CCT in the other Community languages are:

— in Danish: "til";

— in Dutsch: "voor";

— in French: "propre à";

— in German: "zu(m)";

— in Italian: "per".

Cleton's contention was, and is, that, since the purpose of the Thermo-King machines is only to change the temperature of the air and not to change its humidity, they do not come within Heading 84.12. Cleton contended, and contends, that they should be classified under Heading 84.15 which comprises:

"Refrigerators and refrigerating equipment (electrical and other) . . ."

The relevant rate of duty under that Heading is 5%.

Cleton concedes, as I understand it, that an effect of the operation of the machines is or may be to reduce the humidity of the air. That is because of the well-know fact that, at any given temperature and pressure, a particular volume of air can hold only a certain amount of water vapour. If the temperature is reduced the amount of water vapour that the air can hold is reduced and condensation may take place. But, says Cleton, that effect is not sought to be achieved by the Thermo-King machines; it is a side effect of the achievement of the purpose for which they are designed. We were told on behalf of Cleton that, indeed, the Thermo-King machines are designed to avoid the dehumidifying effect so far as possible, because that effect is undesirable in that it causes drying of the products constituting the load and icing up of the refrigeration unit. In particular, we were told, the dehumidifying effect is

reduced by the use of large cooling coils; in air conditioning units, in contrast, small cooling coils are used deliberately for the purpose of exploiting the drying effect. Whether all those factual data are correct or not is of course a matter for the Tariefcommissie, not for this Court.

The questions referred to the Court by the Tariefcommissie are these:

"1. Should heading 84.12 of the Tariff be interpreted as meaning that the words 'air-conditioning' in conjunction with the words 'changing the temperature and humidity of air' also include the maintenance by mechanical or other means of a pre-selected temperature coupled with a change in the humidity that is not sought and cannot be regulated?

If the Court answers the first question in the affirmative:

2. Should heading 84.12 of the Tariff be interpreted as meaning that the words 'air-conditioning' should be understood to include the maintenance by mechanical or other means of only a pre-selected lowering of the temperature, coupled with a change in the humidity which is not sought and cannot be regulated?

If the Court answers the first question in the negative:

3. What is then to be understood under the term 'humidity' used in heading 84.12? Is the term to be understood as meaning relative humidity or absolute humidity?"

As Your Lordships see, the Tariefcommissie does not ask the Court any question as to the interpretation of Heading 84.15.

The Court invited written submissions by the parties before the hearing on a number of questions. One of these was whether Heading 84.59 might be relevant in the case of the Thermo-King machines that are designed both to heat and to cool, if they should be held not to be within Heading 84.12, and whether Note 5 to Chapter 84 of the CCT might then be in point.

Heading 84.59 is one of the "residual" headings in Chapter 84. It comprises:

"Machines and mechanical appliances, having individual functions, not falling within any other heading of this Chapter . . ."

Note 5 reads, so far as material, as follows:

"A machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose. . . . a machine . . . for which no one purpose is the principal purpose is . . . to be classified in heading No. 84.59 . . ."

The relevant rate of duty under that heading would be 6%.

In their answers to the Court's question, Cleton, the Inspecteur and the Commission all agreed that, in the circumstances envisaged, Note 5 would be in point. Cleton and the Inspector were at one in saying, however, that the principal purpose of all the Thermo-King machines was to cool, and that, in the case of those that could also heat, heating was a subsidiary function. On that footing Note 5 would point to heading 84.15 rather than to heading 84.59. The Commission expressed doubt as to whether the heating function of the machines in question could be dismissed

as subsidiary. It referred in particular to a claim made in a brochure put in evidence by Cleton that the thermostat in one of the Thermo-King models "provides accurate close control from — 20 °F to + 80 °F" or, in some versions of the brochure, "from — 29 °C to + 27 °C". I confess to having some sympathy with the Commission on this point, particularly as we were told on behalf of Cleton that one reason for the addition of the heating function to these machines was to enable the temperature of certain cargoes to be kept up to the desired level when they were being transported at times and in areas where the outside temperature was below freezing. There again, however, it is not for this Court to determine such questions of fact. On this part of the case, at least, the law is clear. Assuming that the machines in question are not within heading 84.12, they will be within heading 84.15 if refrigeration is their principal purpose and within heading 84.59 if no one purpose for which they are used is the principal purpose.

So I turn to the Tariefcommissie's first question, i.e. essentially to the question whether heading 84.12 includes a machine designed to maintain a pre-selected temperature but which may also effect a change in humidity "that is not sought and cannot be regulated".

In my opinion, having regard to the wording of heading 84.12, the answer to that question must be "No". Heading 84.12 comprises only machines "for changing the temperature and humidity of the air". That wording is not apt to cover a machine designed only to change the temperature, and which changes the humidity as an unsought side effect. Moreover, in answer to another question put to them by the Court, Cleton, the Inspector and the Commission all agreed that that side effect occurs also in an ordinary refrigerator of heading 84.15. The circumstance that it occurs cannot therefore result in the machine in question falling within heading 84.12.

That interpretation of heading 84.12 is confirmed by the Explanatory Notes issued by the Customs Co-operation Council (the "CCC"). Those Notes state among other things:

"This heading covers certain apparatus for maintaining required conditions of temperature and humidity in closed spaces . . .

. . .

The heading applies *only* to machines which are:

(1) . . .

(2) Designed to change both the temperature (a heating or cooling element or both) and the humidity (a humidifying or drying element or both) of air . . .

(3) . . .

In these machines the elements for humidifying or drying the air may be separate from those for heating or cooling it. However, certain types incorporate only a single unit which changes both the temperature and, by condensation, the humidity of air. These air-conditioning machines cool and dry (by condensation of water vapour on a cold coil) the air of the room in which they are installed . . .

. . .

The heading *excludes*:

(a) Apparatus which, although self-contained and incorporating a motor-driven fan, has the sole function of changing either temperature or humidity of the air . . .

(b) . . ."

It seems that what caused the Inspector to classify the Thermo-King machines under heading 84.12 was a classification slip issued by the Tariff Committee of the Benelux Economic Union in 1967, i.e. before the adoption of the CCT. That classification slip is quoted in the Order for Reference, where however it is mistakenly attributed to the Committee on CCT Nomenclature. I think that all I need say about it is that, in so far as it is inconsistent with the terms of the CCT as correctly understood, it must be ignored — consider Case 14/70 *Bakels* v *Oberfinanzdirektion München* [1970] 2 ECR 1001.

We were referred also to the Commission's "Notes Explicatives du Tarif Douanier des Communautés Européennes". Those "Notes", as the "Avertissement" at the beginning of them makes clear, are not intended to supersede the Explanatory Notes issued by the CCC, but only to supplement them. As the Commission does not publish its "Notes" in English, I will read the relevant passage from the French version. It is as follows:

"84.12: *Groupes pour le conditionnement de l'air comprenant, réunis en un seul corps, un ventilateur à moteur et des dispositifs propres à modifier la température et l'humidité*

Restent classés dans cette position les groupes de climatisation qui ne comportent pas de dispositif de réglage du degré hygrométrique de l'air, pour autant qu'ils présentent les caractéristiques énumérées dans les notes explicatives de la NCCD, n° 84.12.

Ainsi par exemple relèvent de cette position les 'unités de chauffage et de réfrigération pour trains routiers' destinées à réfrigérer ou à réchauffer le compartiment à marchandises et, en même temps, à en modifier, par condensation, la teneur en humidité."

That passage was added to the "Notes" on 1 January 1978 and the Court invited the Commission's submissions on the question whether, that being so, it could have any bearing in relation to importations that took place in 1976. The Commission replied, rightly in my opinion, that since its "Notes" have no legal effect, but are merely an aid to interpretation, they may be invoked as such regardless of their date. It is otherwise of course in the case of Regulations made by the Commission under Council Regulation (EEC) No 97/69, which do, within limits, have a binding effect — see Case 30/71 *Siemers* v *HZA Bad Reichenhall* [1971] 2 ECR 919, Case 77/71 *Gervais-Danone* v *HZA München*, ibid. p. 1127 and Case 37/75 *Bagusat* v *HZA Berlin Packhof* [1975] 2 ECR 1339.

At all events it appears to me that that passage in the "Notes" in no way detracts from the conclusion that Heading 84.12 is not intended to cover a piece of equipment designed to change

only the temperature of air and which changes its humidity only as an unsought side effect; on the contrary. The first paragraph in the passage makes it clear that it refers only to air conditioning equipment having the characteristics specified in the CCC's Explanatory Notes to Heading 84.12. Beyond that, all that the first paragraph seems to say is that it is immaterial whether or not the equipment includes a device enabling the humidity to be regulated. The second paragraph positively confirms that conclusion, for the use of the phrase "destinées à" shows that the relevant criterion is the purpose or function of the equipment, not the effects that it may incidentally bring about. I would add that, if, contrary to what appears to me to be their meaning, the Commission's "Notes" were inconsistent with the terms of the CCT as correctly understood, they too would fall to be ignored — see Case 149/73 *Witt* v *HZA Hamburg-Ericus* [1973] 2 ECR 1587 and Case 183/73 *Osram* v *Oberfinanzdirektion Frankfurt* [1974] 1 ECR 477 (paragraph 12 of the Judgment), and consider Cases 69 & 70/76 *Dittmeyer* v *HZA Hamburg Waltershof* [1977] 1 ECR 231.

Notwithstanding the wording of Heading 84.12 itself, and the terms of the CCC's and of its own Explanatory Notes, the Commission argued that the Inspector had been right in classifying the Thermo-King machines under that Heading. The reason why it did so was, if I understood it correctly, that, as we were told, and as indeed is apparent from a study of the CCC's Explanatory Notes to Headings 84.12 and 84.15, there is a close similarity between the components of refrigerating machines of the kind here in question and the components of air conditioning machines that use a cold coil to dry the air. The Commission referred us to the cases in which the Court has held that, in general, for the sake of legal certainty and that of ease of administration the classification of goods under the CCT should be based on their objective characteristics and properties.

The Court has however never stated that rule otherwise than as a general one, to which exceptions can be envisaged. See the formulation of it in the Judgments in Case 36/71 *Henck* v *HZA Emden* [1972] 1 ECR 187 (paragraph 4), Case 128/73 *Past* v *HZA Freiburg* [1973] 2 ECR 1277 (paragraph 3), Case 185/73 *HZA Bielefeld* v *König* [1974] 1 ECR 607 (paragraph 18), Case 53/75 *Belgium* v *Vandertaelen* [1975] 2 ECR 1647 (paragraph 9), Cases 98 & 99/75 *Carstens Keramik* v *Oberfinanzdirektion Frankfurt* [1976] 1 ECR 241 (paragraph 7), Case 38/76 *LUMA* v *HZA Duisburg* [1976] 2 ECR 2027 (paragraph 7) and Case 62/77 *Carlsen-Verlag* v *Oberfinanzdirektion Köln* [1977] 2 ECR 2343 (paragraph 3). An exception to the general rule was made by the Court in Case 149/73 *Witt* v *HZA Hamburg-Ericus* [1973] 2 ECR 1587 (the "reindeer meat" case) on the ground that the wording of the CCT required it.

It seems to me that here too the wording of the CCT requires an exception to be made, because it clearly provides for the machines in question to be classified according to their purpose or function.

I do not wish to belittle the difficulties facing customs officers, but this is not the only type of goods for the classification of which they may need expert help. Moreover, as the brochures that were put in by Cleton illustrate, the purpose or function of a machine may often be ascertained from the publicity material issued by its manufacturer or importer.

I am accordingly of the opinion that, in answer to the Tariefcommissie's first question, Your Lordships should rule that heading 84.12 of the CCT does not comprise a machine of which the only purpose is to maintain a preselected temperature but which may also effect an unsought change in humidity.

If that is right, the Tariefcommissie's second question does not call for an answer.

Its third question, Your Lordships remember, is whether the term "humidity" used in heading 84.12 connotes "relative humidity" or "absolute humidity".

There is no dispute as to the meaning of the expressions "relative humidity" and "absolute humidity". "Absolute humidity" means the actual amount of water vapour present in a given volume of air. "Relative humidity" is the proportion or percentage that that amount bears to the maximum amount of water vapour that the same volume of air could hold at its actual temperature and pressure.

Cleton submits that heading 84.12 must be referring to relative humidity, because that is what is important for people's comfort. The Commission on the other hand submits that the heading must be referring to absolute humidity, because a change of temperature always affects relative humidity except in the one case of air that is at saturation point being cooled: in that case condensation takes place and the relative humidity remains 100%. It is also true of course that, at any given temperature and pressure, the relative humidity of air can only be changed by changing its absolute humidity.

In my opinion the authors of the CCT were not concerned with the distinction between relative humidity and absolute humidity. They cannot have intended to exclude from heading 84.12 machines for changing the absolute humidity of air. I note that humidifiers and de-humidifiers are expressly mentioned in the CCC's

Explanatory Notes to the Heading. On the other hand they cannot have regarded relative humidity as irrelevant in the context of air conditioning.

I therefore think that, in answer to the Tariefcommissie's third question, Your Lordships should rule that the term "humidity" in heading 84.12 comprises both relative humidity and absolute humidity.