OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 17 DECEMBER 1981 [1]

Mr President,
Members of the Court,

This request for a preliminary ruling has been referred to you by the Bundesfinanzhof (Federal Finance Court). The reference should be seen against the background of the last stage of a long-standing dispute between Chem-Tec B. H. Naujoks, Koblenz, and the Hauptzollamt (Principal Customs Office) for that city.

I — The facts are as follows:

1. Chem-Tec regularly imports from the United States different types of adhesive strip for various purposes, including strips known as "transferable adhesive strips", bearing the trade-name " Scotch" and the serial number 465.

Between October 1973 and July 1974, Chem-Tec cleared through customs and put into free circulation in the Federal Republic of Germany adhesive strips of that type which were first declared as "adhesive paper strip of a width not exceeding 10 cm, the coating of which consists of unvulcanized synthetic rubber" and later as "strip, of unvulcanized synthetic rubber; Other".

Finally, the product has experienced, in the terms used by Counsel for one of the parties, a veritable "migration" from one heading of the Common Customs Tariff to another. To summarize the essence of that "migration", I shall confine myself to informing the Court that the strips have been successively classified by the Federal customs administration in tariff subheadings 48.15 A (normal rate of duty charged at the time: 6.5%), 40.05 C (rate of duty: 4%), 39.02 C XII (rate of duty: 16.8%) and, lastly, 35.06 B (rate of duty: 15.2%).

The first two of these classification decisions were in line with the declarations made by Chem-Tec when it imported successive consignments of the strips in question. The last two classification decisions were adopted by the customs administration after it had commissioned a number of reports from various bodies. The final classification decision which has given rise to the main action was adopted on 14 June 1976 by the Hauptzollamt Koblenz following a complaint submitted by Chem-Tec as a result of the notice of rectification issued after the classification of the product in subheading 39.02 C XII.

The importer disagreed with that decision and brought an action before the Finanzgericht Rheinland-Pfalz [Finance Court, Rhineland-Palatine]. That court upheld the administrative decision classifying "Scotch 465" in subheading 35.06 B and Chem-Tec lodged en appeal on a point of law "Revision" with the Bundesfinanzhof.

2. To achieve a better understanding of the case, it is important to describe the product at issue and its use. The product consists of a transferable double-sided adhesive strip consisting essentially of polybutadiene. It is 0.05 mm thick and 5 cm wide. Every layer of the strip is separated by a strip of paper, treated with silicone on both sides, called "lining paper". The tape is wound on to a cardboard spool.

1 — Translated from the French.

According to the information provided by Chem-Tec, "Scotch 465" in described as a transferable strip because it has no "backing". The adhesive material is applied directly to the lining paper. The absence of any "backing" makes it possible to produce a very thin double-sided adhesive strip which is used, for example, in the paper manufacturing industry for the endless sticking together of two continuous sheets of paper.

As is apparent from both the order making the reference and the consistent explanations furnished by Chem-Tec, "Scotch 465" is utilized in the following manner:

It is unrolled and joined together with the strip of lining paper to one of the sheets of paper requiring adhesion. The lining paper is then peeled off, whereupon the second sheet of paper is pressed on to the first sheet. Thus by this process, the two sheets of paper in the example which I have selected are solidly joined together.

In the light of those technical peculiarities, the Bundesfinanzhof inclines to the view that the goods must be classified in tariff heading 35.06, a view shared by the Hauptzollamt and confirmed by the Finanzgericht. However, it has referred the matter to the Court for a preliminary ruling in the first place because of the difficulties encountered by the German customs administration in classifying the product and, secondly, because, according to Chem-Tec, the contested strips have not been uniformly classified in all the Member States. That is so particularly in France and the Netherlands.

However I would observe that, after the order making the reference was issued, another fact came to light. In reply to a question put to it by the Court, the Commission stated that at the 267th meeting of the Committee on Common Customs Tariff Nomenclature, convened in order to determine the classification for tariff purposes of adhesive strips of the kind at issue, all the Member States agreed that they should be classified in subheading 35.06 B. However, no definitive conclusions may be drawn from that fact. As the Court has stated in its judgment of 15 February 1977 in Joind Cases 67 and 70/76 *Dittmeyer* v *Hauptzollamt Hamburg-Waltershof* [1977] ECR at p. 238, paragraph 4 of the decision) and the First Chamber has repeated in its judgment of 11 July 1980 in Case 798/79 *Haupzollamt Köln-Rheinau* v *Chem-Tec* [1980] ECR at p. 2646, paragraph 11 of the decision), "although the opinions of the Committee on Common Customs Tariff Nomenclature constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States and as such may be considered as a valid aid to the interpretation of the tariff, nevertheless such opinions do not have legally binding force so that, where appropriate, it is necessary to consider whether their content is in accordance with the actual provisions of the Common Customs Tariff and whether they alter the meaning of such provisions".

II — The first question raised by the Bundesfinanzhof relates to the scope of tariff heading 35.06. More precisely, it seeks to ascertain whether that heading may apply to a product described as "adhesive paper strip" or as "strip, of unvulcanized synthetic rubber" wound on to a spool and consisting of a double-sided adhesive strip and a strip of paper (treated with silicone) separating the adhesive surfaces which is intended to be peeled off when the adhesive strip is applied.

1. Heading 35.06 of the Common Customs Tariff is worded as follows:

"A. Prepared glues not elsewhere specified or included:

I. Vegetable glues:

. . .

II. Other.

B. Products suitable for use as glues put up for sale by retail as glues in packages not exceeding a net weight of 1 kg."

That heading in the last in Chapter 35 of the Common Customs Tariff (Albuminoidal substances; glues; enzymes) and therefore has a residual character. The feature common to the goods covered by subheadings A and B in heading 35.06 is clearly their adhesive property, their function as glue.

It is clear from the outset, in view of the nature of the product in question, that only subheadings 35.06 A II and 35.06 B are relevant. Therefore, the product described by the court making the reference must be assessed by reference to those subheadings alone.

2. In Chem-Tec's opinion, the question raised must be answered in the negative. The undertaking contends that the determinant feature of adhesive strip "Scotch 465" is not its adhesive property but the fact that it is in the form of a strip. Its argument is to the effect that the adhesive strip is not used as glue ("das Klebeband dient nicht als Klebstoff") but as a technical aid ("sondern als technisches Hilfsmittel") for industrial purposes, in particular, as I have said, in the paper manufacturing industry. Admittedly, it does not dispute by that argument that "Scotch 465" fulfils the function of an adhesive, for that would be to deny an obvious fact. However, if I have correctly understood the undertaking's position, in substance it rejects the assimilation of "Scotch 465", an extremely complex product which moreover is in the form of strips, to glues *stricto sensu*, whether liquid or solid ("Klebstoffe, Kleber oder Leime").

The customs administration on the other hand maintains that it is the adhesive property of "Scotch 465" which justifies its classification in tariff subheading 35.06 B and constitutes the reason on which the contested decision of 14 June 1976 of the Hauptzollamt Koblenz was based. The file on the case shows that the Hauptzollamt took its decision in particular on the basis of the results of the reports drawn up in January 1975 and April 1976 by the Zolltechnische Prüfungs- und Lehranstalt (Customs Laboratory and Training College), Hamburg-Altona. After it had examined the product, the Institute came to the conclusion that "the entire *adhesive strip* . . ." was composed of acrylic polymer reinforced by glass fibre" with the result that it could not be regarded as synthetic rubber within the meaning of subheading 40.05 C. Thus, it was on the basis of the adhesive property of "Scotch 465" that the customs administration finally decided where to classify the product.

The solution of the problem raised therefore consists in determining whether "Scotch 465" must be regarded primarily as a strip or as an adhesive. If Chem-Tec's point of view is adopted and the product is to be considered essentially as a strip, the question raised by the Bundesfinanzhof must be answered in the negative. If the view expressed by the customs administration and shared by the Commission is adopted, and paramount importance is attached to the product's adhesive property, then the question must be answered in the affirmative.

3. Part of the answer lies in the fact that, as the Commission has rightly pointed out, the Common Customs Tariff contains no heading which expressly includes adhesive strips. The latter are however covered by several headings:

Subheading 39.01 B:
Condensation, polycondensation and polyaddition products, . . .

Subheading 39.02 B:
Polymerization and co-polymerization products;

Subheading 39.03 A:
Regenerated cellulose; . . .;

Subheading 48.15 A:
Other paper and paperboard . . .;

Subheading 59.11 AI:
Rubberized textile fabrics, other than rubberized knitted or crocheted goods.

The above list shows that it is the material quality ("die stoffliche Beschaffenheit"), in other words the composition of the adhesive strip, which the Common Customs Tariff takes into account for the purposes of its classification.

In this case, as the Bundesfinanzhof rightly points out, the product in question constitutes an assemblage containing both a double-sided adhesive strip and a strip of paper treated with silicone separating the adhesive surfaces. However, as Chem-Tec itself acknowledges "the lining paper is not material . . . as regards classification for tariff purposes". Thus the terms in which heading 35.06 is couched are to be examined with reference exclusively to the adhesive strip ("Klebestreifen") *stricto sensu.*

4. Let me state here and now that, in my opinion, this question must be answered in the affirmative.

The argument to the contrary is based on the use of the term "Leim" in the German translation of the Explanatory Notes to the Customs Cooperation Council Nomenclature on subheading 35.06 B which appears, in fact, to be incapable of covering a product of the type in question.

That argument alone strikes me as untenable when measured against all those which may be put forward to counter it. The first of those counter-arguments, derived from the terms of the heading under consideration, is in itself sufficient to refute it. Since the authors of the Common Customs Tariff chose forms of wording which are very wide in scope when they drafted heading 35.06 (A. Prepared glues not elsewhere specified or included, B. Products suitable for use as glues . . .), in the German version of which the word "Klebstoff" is included, which is much wider than the term "Leim", it is clear that they intended to include in that heading all adhesives not covered by another heading in Chapter 35.

This is reinforced by the fact that none of the notes to the Common Tariff or to the Customs Cooperation Council Nomenclature explains what is to be understood by "glues" or "products suitable for use as glues". On the other hand, the Explanatory Notes to the Common Customs Tariff and to the Customs Cooperation Council Nomenclature include widely differing glues such as those prepared from lichens or gluten (Vienna glue) (Note to the Common Customs Tariff on subheading A.I.b) or "preparations specifically formulated for use as glues consisting", for example, "of a mixture of several artificial plastic materials falling individually within different headings of . . .Chapter [39]" (paragraph (d) of the

Notes to the Customs Cooperation Council Nomenclature on subheading A).

The meaning of the expression "products suitable for use as glues" is not made clear either in the Explanatory Notes to the Common Customs Tariff or in those to the Customs Cooperation Council Nomenclature, to which the former refer only "as regards the packages in which these products are put up". If the authors of those notes have not considered it useful to provide further clarification of what that expression is to be understood as meaning, the reason is probably that is difficult to conceive of a wider expression than "products [of all kinds] [1] . . .". Indeed, there is no doubt, in my opinion, that the expression includes not only conventional glues but also an adhesive product for use for a specific purpose, such as the strip at issue in these proceedings.

Therefore the first question raised by the Bundesfinanzhof must undoubtedly be answered in the affirmative.

III — The second question seeks to ascertain whether or not the product at issue satisfies the requirements embodied in the phrase "put up for sale by retail (. . .) in packages not exceeding a net weight of 1 kg" characteristics which an adhesive product must display in order to be classified in subheading 35.06 B. The Bundesfinanzhof is particularly anxious for the Court to determine whether the product at issue fulfils those conditions by reason only of the fact that the glue ("Klebstoff") along the entire length of the adhesive strip is joined to a paper strip which then constitutes the packaging or whether the adhesive strips must be contained in special packages in compliance with the required weight limit and in addition be marked as an adhesive by written indications.

1 — Translator's note: The words in square brackets do not appear in the English text.

1. In the grounds on which the order making the reference is based, the Bundesfinanzhof clarifies the above question by inquiring, in the first place, "whether the paper strip, which is peeled off when the adhesive strip is actually applied, is to be regarded as a package within the meaning of that tariff heading".

In the course of the lengthy procedure concerning the classification of the product, the first positive answer to the question was given, it would appear, by the Customs Laboratory and Training College, Hamburg-Altona, in its above-mentioned reports of January 1975 and 2 April 1976, requested by the Zollamt [Customs Office]. According to those reports, as quoted in the judgment of the Finanzgericht "the adhesive strip wound on to a spool, not exceeding one kg in weight, should be regarded as put up for sale by retail". In view of the terms in which subheading 35.06 B is couched, that opinion seems to imply that the winding of the product on to a spool constitutes both the packaging and the manner in which the product is put up for sale by retail.

In its judgment of 11 November 1976, the Finanzgericht Rheinland-Pfalz answers the question along the same lines, but with greater precision , when it states that the packaging of the adhesive substance consists in the fact that the latter "is spread on a paper strip and wound on to a spool".

In the course of these proceedings for a preliminary ruling, the Commission has adopted a similar point of view. Admittedly, it has acknowledged that, in the present case, it would be artificial to consider the strip of paper on which the adhesive substance is spread as a package. However, in its view, it would also be going too far to require the strips to be contained in special packages, for example, cardboard boxes. It would be sufficient, for the requirements of tariff

subheading 35.06 B to be satisfied in that respect, if the strips were "identifiable as being intended for sale directly to consumers without further packaging".

In my opinion, that approach is incompatible with the unequivocal wording of the heading under consideration which includes the word "package ..." and, accordingly, with General Rule No 1, for the Interpretation of the Nomenclature of the Common Customs Tariff which states that classification is to be "determined according to the terms of the headings". Admittedly, those terms are capable of being interpreted, in particular with the aid of the Explanatory Notes to the Common Customs Tariff and, in addition, the Explanatory Notes to the Customs Cooperation Council Nomenclature. However, they may not be given an interpretation so wide as to render certain of them meaningless.

That is precisely the result of the interpretation suggested by the Commission. In support of that interpretation, the Commission relies primarily on the Explanatory Notes to the Customs Cooperation Council Nomenclature relating to subheading 35.06 B. However, it is impossible to place on an equal footing "a paper band wrapped round ... a slab of bone glue", which is referred to in those Notes and is a genuine, if scant packaging, on the one hand, and on the other the lining paper separating the adhesive surfaces in this case which fulfils an entirely different function, as Chem-Tec has stated without being contradicted.

Those strips of paper treated with silicone, "lining paper" as they are known, constitute indispensable components in the manufacture and use of the adhesive strips at issue. As I have said, those strips are, as is true moreover of all double-sided adhesive strips, subsequently wound on to a cardboard spool. To prevent the different adhesive layers from sticking together, which would render them unusable, it is necessary to separate them with the strips of paper, which thus enable the adhesive tape to be unrolled and applied to the articles requiring adhesion.

The finding that the "lining paper" constitutes the necessary backing of the adhesive strip itself may not be dismissed on the ground that it is peeled off when the tape is applied. That merely proves that the paper does not form an integral part of the product at issue, which is only the adhesive substance, but it is not sufficient to enable the conclusion to be drawn that it is a package. It may not be argued from the fact that a component is indispensable for the use of a product and is withdrawn upon use that it constitutes the packaging for that product.

Accordingly, I am inclined therefore to take the view that the answer to the first part of the second question raised by the Bundesfinanzhof should be that the adhesive strips in question must be contained in special packages which do not exceed the weight limit prescribed by the terms of subheading 35.06 B.

2. The Bundesfinanzhof asks, in the alternative, "whether, in order that it can be regarded as 'put up for sale by retail', indications of some kind are needed as to the product's nature as glue".

The Explanatory Notes to the Customs Cooperation Council Nomenclature on subheading 35.06 B provide that:

"Products having other uses in addition to use as glues (e.g. dextrins, methyl cellulose in granules) are classified in the present heading only if there is some indication on the packages that they are intended for sale as glue."

It follows — and common sense appears to dictate — that, *a contrario,* if a product can be used only as an adhesive it is unnecassry to refer to its use.

In the present case, if the product at issue can be put to any use other than that of an adhesive and if it is not marked as an adhesive on the package, the second precondition for its classification in subheading 35.06 B, namely that is must be "put up for sale by retail" is certainly not fulfilled. However, if other possibilites are envisaged (the product can be used for purposes other than those for which an adhesive is employed and the package bears an indication that it is intended for that purpose, or the product can be used only as an adhesive and may or may not bear an indication that it constitutes an adhesive) it is necessary, in my opinion, to consider from a number of other points of view whether it is in fact put up for sale by retail.

Chem-Tec maintains that the product at issue does not fulfil that condition for the simple reason that it is intended only for industrial use. Its principal customers are, it has explained to the Court, undertakings engaged in the manufacture of paper and also some firms in the electrical industry and in the machine tools industry. However, is it possible to conclude *ipso facto* that "Scotch 465" as it is now packaged, may not be sold by retail? I am entirely in agreement on that point with the Finanzgericht Rheinland-Pfalz which takes the view that it is crucial "to ascertain whether the product is imported in a package in which it is capable of being sold by retail, irrespective of the actual purpose for which it is imported".

Another argument along those lines which is worthy of consideration has been put forward by the Commission. Although I cannot agree with its interpretation of the term "package", derived from the Explanatory Notes to the Customs Cooperation Council Nomenclature, I share its view that it follows from those Notes that the expression "put up for sale by retail" must be given a wide interpretation. The reason for this is based in the first place on the different types of packages listed in those Notes and considered as packages for sale by retail (glass bottles or jars, metal boxes or tubes, cartons, paper bags etc.) and, secondly, from the fact that the list is given merely for guidance, as shown by the use of the expressions "usually" and "etc. . . .". As the Commission has stated, it follows that goods which are identifiable as being intended for sale directly to consumers without further packaging are to be considered as "put up for sale by retail".

The question whether the strips imported by Chem-Tec between October 1973 and July 1974 comply with those criteria is, in accordance with the consistent case-law of the Court, a question of fact which only the Bundesfinanzhof, as a national court, has jurisdiction to resolve (see, for example, Case 158/78 of 28 March 1979 *Biegi* v *Hauptzollamt Bochum* [1979] ECR at p. 1121, paragraph 17 of the decision; Case 183/78 of 31 March 1979 *Galster* v *Hauptzollamt Hamburg-Jonas* [1979] ECR at p. 2011, paragraph 15 of the decision).

In conclusion, I propose that the Court should rule that:

1. Tariff heading 35.06 of the Common Customs Tariff must be interpreted as also including a product described as "adhesive paper strip" or as "strip, of unvulcanized synthetic rubber" wound on to a spool and consisting of a double-sided adhesive strip and a strip of paper (treated with silicone) separating the adhesive strips which have been wound round be spool and which is used in such a way that the paper strip must be peeled off the double-sided adhesive strip at the time of use.

2. Such a product does not fulfil the requirements embodied in the expression "put up for sale by retail (. . .) in packages not exceeding a net weight of 1 kg" in subheading 35.06 B by reason of the mere fact that the glue along the whole length of the adhesive strip is applied to a paper strip since the latter cannot be regarded as a package. The strip must be contained in a special package which does not exceed the prescribed weight limit, and it must in addition be capable of being identified as intended for sale directly to consumers without further packaging.