OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 16 SEPTEMBER 1975 [1]

Mr President,
Members of the Court,

In the Rules for the interpretation of the nomenclature of the Common Customs Tariff which preface the Common Customs Tariff it is stated, I refer to the version in Regulation No 2658/74 of the Council of 15 October 1974 (OJ No L 295 of 1. 11. 1974), *inter alia* under 2 (b):

'The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3'.

Rule 3 states:

'When for any reason, goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the more specific description shall be preferred to headings providing a more general description.

(b) Mixtures and composite goods which consist of different materials or are made up of different components and which cannot be classified by reference to 3 (a) shall be classified as if they consisted of the material or component which gives the goods their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which involves the highest rate of duty . . .'

The present case, which the Bundesfinanzhof by order dated 12 February 1975 has referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty, is concerned with the interpretation of this provision.

Baupla GmbH, Saarlouis, which is concerned with the import and sale of building materials, obtained, as is possible under German law, an official tariff classification opinion in respect of facing board. The goods in question are apparently compressed wood fibre board impregnated with an asphalt layer on the front. The asphalt layer is in turn encrusted with mineral grains and bears a stamped pattern. The Oberfinanzdirektion Köln stated in its classification opinion of 15 May 1972 that the goods were classifiable under heading No 48.09 of the Common Customs Tariff which covers 'building board of wood pulp or of vegetable fibre, whether or not bonded with natural or artificial resins or with similar binders' and for which a customs rate of 15 % (independent rate) or 11 % (Treaty rate) applies. Baupla does not consider this classification right. In its opinion the goods are classifiable under heading 68.08 which covers 'articles of asphalt or of similar material (for example, a petroleum bitumen or coal tar pitch)' and for which a customs rate of 8 % (independent rate) or 3 % (Treaty rate) applies. Baupla therefore objected to the tariff classification.

By decision of 25 June 1973 the objection was dismissed on the ground that the criterion was general rule 3 (b), that is, what was to be regarded as giving the goods 'their essential character'. In the case of the facing board referred to by Baupla this could only be the wood pulp which gave the goods their shape and strength and from which building board is essentially made.

Baupla completely agrees with the reference to Rule 3 (b). It takes the view, however, that the material which gives the goods their essential character is in actual fact the asphalt, because it has the

1 — Translated from the German.

quality determining its use for covering the external walls of houses — protection against damp penetration. Therefore and for other reasons, which no longer concern us, only classification under heading 68.08 comes into question. Baupla accordingly brought the decision on the objection before the Bundesfinanzhof and thus the proceedings began from which the aforementioned reference for a preliminary ruling arose.

In dealing with the case the question has arisen for the Bundesfinanzhof whether in respect of Rule 3, to which reference has rightly been made according to Rule 2 (b), it is really the principle contained in 3 (b) and not rather that in Rule 3 (a) which is relevant. This could lead to classification under heading 48.09, because with regard to the purpose of the goods the description of heading 48.09 is more specific than that of heading 68.08. On the other hand the Bundesfinanzhof anticipates that Rule 3 (a) would involve problems of interpretation with respect to goods for which two or more headings come into consideration corresponding to the different materials from which the goods are made.

These problems arise not least from the Explanatory Notes to the Brussels Nomenclature on this general rule in which it is stated;

'if two or more headings each refer to one only of the materials or substances contained in mixed or composite goods, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description than the others. In such cases, the classification of the goods shall be determined by Rule 3 (b) or 3 (c).'

Having regard to this the Bundesfinanzhof stayed the proceedings and referred the following question for a preliminary ruling:

'Is Rule 3 (a) of the Rules for the interpretation of the nomenclature of the Common Customs Tariff to be interpreted as meaning that when a mixture is classifiable under two or more headings, each of which relates to one of the materials composing the mixture, the heading which provides the most specific description is not to be preferred and that the goods are to be classified under Rules 3 (b) or 3 (c)?'

Only the plaintiff in the main action and the Commission of the European Communities have made observations on this question. They have come essentially to the same conclusion. Let me say immediately that I too agree with this conclusion, especially on the basis of the thorough analysis made by the Commission.

First of all I must stress, as does the Commission, that in fact — and the Bundesfinanzhof, too, appears to proceed on this basis — there is within Rule 3 an order of precedence; Rule 3 (b) can accordingly come into question only when Rule 3 (a) cannot be applied. Rule 3 (a) is a mandatory provision and therefore it is important to determine its meaning precisely.

In interpreting Rule 3 (a) it is conceivable, certain customs authorities apparently have this tendency, simply to keep to the literal meaning. It would accordingly mean that whenever several headings come into consideration, the fact that one of them contains in some form a more specific description is sufficient for this to be applied. This would doubtless have the advantage of simplicity, which in customs proceedings can certainly not be left out of account.

In the case of composite goods where there are several relevant headings each of which applies to a component, arbitrary results could obviously arise in a numer of cases, as the Commission has shown. On the one hand this is bound up with greater or lesser degree of precision in the wording of the tariff headings, as has emerged in the course of

the preparation of the individual chapters of the nomenclature of the Customs Tariff, that is, in part fortuitously; on the other hand this situation could arise from the fact that the part played by the various components and their importance would be left out of account.

If it was sought to avoid or at least keep in check such arbitrary results which are not in harmony with the meaning and system of the Common Customs Tariff, it would at least be necessary to have regard to the relative part played by the various components and their importance, that is, in the case of composite goods to have regard to the heading with a more specific description only if the material to which it relates is to be regarded as the more important component. There would no longer be simplicity, one of the main reasons for the application of Rule 3 (a), for it is apparent that its ascertainment would frequently be just as difficult and contestable as that of the material which gives the goods their essential character under Rule 3 (b). Moreover it may be objected, as the Commission has observed, that if the classification turns on the composition of goods the criterion expressly provided for in Rule 3 (b) of the component which gives the goods their essential character cannot be disregarded in favour of a criterion which is not mentioned (the relative importance of a component of goods).

This clearly shows that in interpreting Rule 3 (a) the wording must not be unduly stressed but rather is it necessary to bring equally into perspective the meaning and purpose of the Customs Tariff, its system and the laws of logic.

As the Commission has rightly stressed, Rule 3 (a) necessitates a comparison; but a comparison of the precision of concepts presupposes comparability.

This can be said to be the case if two concepts stand in the relationship of a wider and a narrower concept. The components characterizing the narrower concept must include all the characteristics which define the wider concept and further specific characteristics in addition. There is thus comparability of descriptions of goods only if they contain common characteristics which are to be ascertained on the basis of criteria according to which the relevant headings define the goods comprised and if a description contains further subsidiary characteristics which then justify speaking of a more specific description. The Commission rightly stressed that a judgment as to the more specific nature of the descriptions of goods which relate to their components is possible only if the descriptions relate to goods of the same basic material. There is no comparability and no possibility of applying Rule 3 (a) if in the case of goods consisting of more than one material or substance each of the descriptions relates to a different component and the aforesaid conditions are not satisfied.

The Commission has rightly referred to the statements contained in the Explanatory Notes to the Brussels Nomenclature on Rule 3 (a) and which, as has repeatedly been stressed in the case-law of the Court, in the absence of Community provisions in the matter afford an authoritative source for the interpretation of the Common Customs Tariff. They state expressly, to repeat it once more:

'if two or more headings each refer to one only of the materials or substances contained in mixed or composite goods, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description than the others. In such cases, the classification of the goods shall be determined by Rule 3 (b) or 3 (c).'

It may not be objected that the Rules for the interpretation are thus being disregarded, for Rule 3 (b) expressly presupposes that mixtures and composite

goods which consist of different materials or are made up of different components may well be classified by reference to 3 (a).

The view advocated by the Commission does not in any way mean that the application of Rule 3 (a) must, generally speaking, be ruled out in the case of composite goods. As we have seen, not all headings relate to the composition of goods, but many of them relate to goods in their mixed condition on the basis of the descriptions used and the relevant rules. If, however, such headings compete with one another the application of Rule 3 (a) is quite possible. This is also possible, as the case-law has shown, if several headings come into consideration one of which relates to one of the materials of a composite product whereas the other covers the product in its composite condition. Even on a restrictive application of Rule 3 (a) there remains sufficient room for its application to cases of mixtures; to this extent it is certainly not wholly deprived of its function.

With regard to the case in the main action which relates to composite goods and in which the various relevant headings relate simply to individual components, it accordingly follows that Rule 3 (a) cannot be applied because the descriptions are not comparable. Consequently Rule 3 (b), that is the ascertainment of the material which gives the goods their essential character, is the criterion for the purposes of classification. I do not need to go into detail on this. The court before which the main action is proceeding must ascertain all that is necessary and, in appropriate circumstances, the Explanatory Notes to the Brussels Nomenclature on Rule 3 (b) mentioned by the Commission may be of use to it.

In view of all this I propose that the question of the Bundesfinanzhof should be answered as follows:

When a composite product is *prima facie* classifiable under two or more headings, each of which relates to a component of the product, then none of them may be regarded as the more specific vis-à-vis the other even though it describes the goods contained in it more completely or more precisely than the others. In such cases there can be no classification by reference to Rule 3 (a) but Rules 3 (b) or 3 (c) of the General Rules must be applied.