OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 18 October 1988 *

Mr President,
Members of the Court,

1. The Bundesfinanzhof wishes the Court to state precisely the criteria for distinguishing calculating machines of tariff heading 84.52 from automatic data-processing machines of tariff heading 84.53.

2. Thereafter the Court is asked whether electronic devices which are intended principally for calculating but also for other operations, and which are programmable by a method which is more simple to use than the programming language BASIC are calculating machines or automatic data-processing machines for the purposes of the tariff headings mentioned above.

3. The main proceedings concern the classification of four types of machine imported from Japan, named 'programmable calculators' by the Casio company. The machines, which are described in the Report for the Hearing, can carry out individual calculations and complex calculation processes. Apparently they can also be made to use other programs (learning programs, musical programs, etc.).

4. I must state immediately that I consider that the distinction between calculating machines and automatic data-processing machines must be drawn on the basis of Note 3 A (a) of Chapter 84 of Council Regulation (EEC) No 3400/84 of 27 November 1984 amending Regulation (EEC) No 950/68 on the Common Customs Tariff,[1] which reads as follows:

'For the purposes of heading No 84.53, the expression "automatic data-processing machines" means:

(a) Digital machines having storages capable of storing not only the processing program or programs and the data to be processed but also a program for translating the formal programming language in which the programs are written into machine language. These machines must have a main storage which is directly accessible for the execution of a program and which has a capacity at least sufficient to store those parts of the processing and translating programs and the data immediately necessary for the current processing run. They must also be able themselves, on the basis of the instructions contained in the initial program, to modify, by logical decision, its execution during the processing run.'

5. Commission Regulation (EEC) No 1935/84 of 4 July 1984 on the classification of goods falling within subheading 84.53 B of the Common Customs Tariff[2] applied those criteria in order to classify a pocket computer, stating that:

Original language: French

1 — Official Journal L 320, 10. 12. 1984, p. 319
2 — Official Journal L 180, 7. 7. 1984, p. 10

'. . . the machines falling within subheading 84.52 A, although programmable, do not use, during their employment any data-processing language;

. . . the apparatus is a digital machine having memories capable of storing not only the processing program and the data to be processed but also a program for translating the formal programming language in which the programs are written (BASIC language) into machine language; furthermore, the machine is also able on the basis of the instructions contained in the initial program to modify by logical decision its executions during the process run;

. . . this machine meets the conditions required in Note 3 A (a) to Chapter 84 for automatic data-processing machines falling within subheading 84.53 B'.

6. Before determining what tariff heading is applicable to the machines in question in this case it must be ascertained whether they fulfil the requirements referred to in Note 3 A (a), an examination which is the responsibility of the national court. In this respect it is apparent that whatever their opinion on the relevance of the definition contained in that note the experts took the view that the machines, or at least some of them, could meet the criteria referred to therein.

7. If that is the case, I do not think it is possible to depart from the provisions of the Common Customs Tariff on the ground relied on by the Commission that the development of programming languages as simple as that of the machines in question could not be foreseen when Note 3 A (a) was drawn up. The distinction between simple languages and complex languages is nowhere alluded to by that provision.

8. In this respect the Court's judgment in *Analog Devices* should be recalled:

'Admittedly, it cannot be denied that the technical developments which have taken place in the industrial sector concerned, as a result of which the use of integrated circuits as basic units in the construction of cerrtain electronic microcircuits has become more widespread, justify the drawing up of a new customs classification. However, if that is the case, it is for the competent Community institutions to take account of it by amending the Common Customs Tariff. Failing such an amendment, the interpretation of the tariff cannot be adapted to changing processes'. [3]

9. The type of dynamic interpretation which the Commission suggests the Court should adopt could not be more clearly ruled out. Such an interpretation would force analyses, both hazardous and necessarily impermanent, of the performance of the computer languages used in order to define 'automatic data-processing machines'.

10. I do not think it necessary to advocate that course. I prefer a solution which corresponds both to the requirements of legal certainty and the wording of a provision which is devoid of any ambiguity.

3 — Judgment of 19 November 1981 in Case 122/80 [1981] ECR 2781, at paragraph 12

11. Consequently, I propose that the Court should rule as follows:

'The distinction between "calculating machines" within the meaning of tariff heading 84.52 and 'automatic data-processing machines' within the meaning of tariff heading 84.53 must be drawn on the basis of Note 3 A (a) of Chapter 84 of the Common Customs Tariff. A machine which meets the criteria set out in that provision must be classified as an automatic data-processing machine even if it is intended principally for calculating operations.'