masks which, although covering only the mouth and nose, serve as protection against toxic chemical products, dust, smoke and fog and which are intended to be used once only.

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 11 July 1980.

For the Registrar

J. A. Pompe
Deputy Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 19 JUNE 1980

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling by the Bundesfinanzhof. The appellant in the proceedings before that Court is the Hauptzollamt Köln-Rheinau. The respondent is a firm called Chem-Tec, whose business includes the importation into the Federal Republic of Germany of disposable filter masks. The question at issue in the proceedings is the correct tariff classification of those masks. They are simple masks, which, according to the description of them given by the Bundesfinanzhof in the question that it has referred to the Court, "cover only nose and mouth, provide protection from poisonous chemicals, dust, smoke and fog, and are intended to be used once." In the body of the order for reference the Bundesfinanzhof explains that, thanks to the oval shape of their nose and mouth piece, which fits the curves of the face, to their side straps and to a metal clip intended to be pressed down on the bridge of the nose, "these appliances are easy to wear, let the air through easily and therefore ensure easy breathing." I need not, I think, enlarge on that description of the masks because the Court asked to be supplied with a specimen of them and, in response to

that request, a whole box of different sorts of them was sent to us by Chem-Tec; Your Lordships have seen them.

According to the Commission the difficulty in classifying them for tariff purposes arises from the circumstance that they are products of a kind that was unknown at the time when the Common Customs Tariff (the "CCT") was drawn up. On behalf of Chem-Tec we were told that it had been importing such masks since 1965, and that for many years they had been classified under tariff heading 90.18. Certainly it appears from the papers before us that, in 1972, in the case of a consignment of 8 500 masks imported by Chem-Tec from the United States of America, the German customs authorities accepted that that was the correct heading. On the occasion, however, of a subsequent importation by Chem-Tec of similar masks, in 1973, the German customs took a different view and claimed that they should be classified under heading 59.03. The appropriate rate of duty under heading 90.18 is 6½ %, whereas under heading 59.03 it is 12 %. Hence the present litigation.

Heading 90.18 is in these terms:

"Mecano-therapy appliances; massage apparatus; psychological aptitude-testing apparatus; artificial respiration, ozone therapy, oxygen therapy, aerosol therapy or similar apparatus; breathing appliances (including gas masks and similar respirators)".

Heading 59.03 reads:

"Bonded fibre fabrics, similar bonded yarn fabrics and articles of such fabrics, whether or not impregnated or coated".

The dispute between the parties came at first instance before the Finanzgericht of Düsseldorf, which, on 27 January 1977, delivered judgment in favour of Chem-Tec. The Finanzgericht held that the function of the masks determined their tariff classification, so that the correct heading was 90.18. It rejected a submission of the Hauptzollamt that because of their simplicity the masks could not qualify as "breathing appliances". The Finanzgericht pointed out that, as regards such factors as weight, volume, number of components or technical complexity, no objective criterion of sufficient certainty in its application could be established.

It is from that judgment that the Hauptzollamt now appeals to the Bundesfinanzhof, whose order for reference to this Court is dated 16 October 1979.

The question referred to the Court by the Bundesfinanzhof is, briefly stated, whether the phrase "breathing appliances (including gas masks and similar respirators)" in tariff heading 90.18 of the CCT includes simple filter masks of the kind described in the order for reference. The Bundesfinanzhof does not ask the Court any question about heading 59.03. I understand the reason for that to be that these masks are undoubtedly articles of bonded fabrics within heading 59.03, but that, if they are also breathing appliances within heading 90.18, the latter will, by virtue of Rule 3 (a) of the General Rules for the interpretation of the nomenclature of the CCT, prevail as being the heading that "provides the most specific description".

Observations have been submitted to the Court only on behalf of Chem-Tec and of the Commission. Chem-Tec of course contends that the masks are within

heading 90.18. The Commission accepts that their function is such as to bring them within that heading, but it submits that that is not enough, that an article, in order to be within heading 90.18, must also be sufficiently complex to constitute an "appliance" within the meaning of that heading, and that these masks do not fulfil that requirement. The argument of the Commission to that effect appears to be wholly based on the Explanatory Notes of the CCC Nomenclature. The Commission concedes that it is not easy to specify with precision what degree of complexity is required for an article to constitute an "appliance" in this context according to the view for which it contends.

There are of course two authentic texts of the CCC Nomenclature, the English and the French. In the English and French texts of the CCT, heading 90.18 is in the same terms as in the English and French texts (respectively) of the CCC Nomenclature. That is, incidentally, also true in the case of heading 59.03.

Thus the crucial phrase in the English text is "breathing appliances (including gas masks and similar respirators)". That phrase clearly envisages that there is a narrow category of articles called "gas masks", which belongs to a wider category called "respirators", which in turn belongs to a wider category still called "breathing appliances". In other words an article may be a breathing appliance without being a respirator, and it may be a respirator without being a gas mask.

The French text of heading 90.18 is as follows:

"Appareils de mécanothérapie et de massage; appareils de psychotechnie, d'ozonothérapie, d'oxygénothérapie, de réanimantion, d'aérosolthérapie et autres appareils respiratoires de tous genres (y compris les masques à gaz)".

That text too therefore recognizes the existence of the narrow category of "gas masks" ("masques à gaz"), but what the English text refers to, in effect, as "breathing appliances including respirators" the French text describes as "appareils respiratoires de tous genres". The two texts must however mean the same thing, and I can only suppose that the reason why they are differently structured is that there are not available in the French language distinct expressions corresponding to the English "breathing appliances" and "respirators" respectively — hence the addition in the French text of the words "de tous genres" to indicate that the words "appareils respiratoires" are to be interpreted widely, that is as corresponding to the English "breathing appliances" rather than merely to "respirators". (The wording of heading 90.18 in the Danish, Dutch, German and Italian texts of the CCT corresponds to that of the French.)

From that analysis I conclude that the expressions "breathing appliances" and "appareils respiratoires de tous genres" must be given a wide interpretation. In my opinion, provided that an article can properly be referred to as an "appliance", or as an "appareil", in ordinary parlance, and that its function is to enable someone to breathe where otherwise he could not or to breathe cleaner air than otherwise he could, it is within heading 90.18. I therefore agree with the Finanzgericht that the masks here in question are within that heading.

I particularly agree with the Finanzgericht that a legislative instrument imposing fiscal liabilities should not, unless its language compels such an interpretation, be interpreted as requiring imprecise criteria to be applied. I also agree of course with the submission of Counsel for Chem-Tec at the hearing that the fact that an article is simple, light and cheap does not mean that it is not technologically advanced.

I turn to the Explanatory Notes on which the Commission relies.

The Commission cites firstly two paragraphs from the Notes on the "General Content and Arrangement" of Chapter 90 of the CCC Nomenclature. Those paragraphs read as follows:

"The present Chapter covers a wide variety of instruments and apparatus which are, as a rule, characterised by their high finish and high precision. Most of them are used mainly for scientific purposes (laboratory research work, analysis, astronomy, etc.), for specialised technical and industrial purposes (measuring and checking, observation, etc.) or for medical purposes.

...

There are certain exceptions to the general rule that the instruments and apparatus falling within this Chapter are high precision types. For example, the Chapter also covers ordinary goggles (heading 90.04), simple magnifying glasses and non-magnifying periscopes (heading 90.13), divided scales and school rules (heading 90.16) and fancy hygroscopes, irrespective of their accuracy (heading 90.23)."

Manifestly those paragraphs, taken together, do not mean that an article is excluded from Chapter 90 if it is simple.

Next the Commission refers to the Notes on heading 90.18 itself as they stood prior to October 1979. There is no doubt that, if I am right in my interpretation of that heading as comprising a wide category of "breathing appliances" (or "appareils respiratoires de tous genres") within which there is a narrow category of "gas masks" (or "masques à gaz"), those notes are inaptly framed. They are, so far as relevant, put under two distinct headings: "(VII) breathing appliances" and "(VIII) gas masks and similar respirators" — in the French text "(VII) appareils respiratoires" and "(VIII) masques a gaz". Not only does that layout suggest that "breathing appliances" and "gas masks and similar respirators" are different categories of goods, rather than a wide category including a smaller one, but the notes themselves under each heading are couched in terms that suggest that "breathing appliances" are a narrow category and "gas masks and similar respirators" a wider one. I need not, I think, take up Your Lordships' time reading those notes in full. What is to some extent material for present purposes is that under "(VIII) gas masks and similar respirators" the notes, after mentioning more elaborate appliances, continue:

"A more simple type protects only the mouth and the nose; it consists of a sheath held in place by one or more

elastic ribbons, and contains a filtering or absorbent material (asbestos wool, sponge rubber, cotton wadding, etc., which may be impregnated or not) easily replaced after use."

The notes then make three exceptions, which may or may not be justified by the wording of the CCC Nomenclature, but which are at all events not material for present purposes.

Lastly the Commission refers to a "corrigendum" to the notes that was agreed upon by the CCC in October 1979, i.e. after the Finanzgericht had delivered judgment in this case and more or less contemporaneously with the reference by the Bundesfinanzhof to this Court. The effect of that corrigendum (the terms of which are annexed to the Commission's written observations) is expressly to state that "masks for protection against dust, odours, etc., not equipped with a replaceable filter, but consisting of several layers of bonded fibre fabric, whether or not treated with activated carbon or having a central layer of synthetic fibres" are covered by heading 59.03 and excluded from heading 90.18.

Counsel for the Commission outlined to us at the hearing the story of how that corrigendum came to be made. He told us that early in 1979 one of the Member States of the Community (he did not say which one) raised the question with the Commission and that it was discussed at a meeting of the CCT Nomenclature Committee in March of that year. At first the representatives of the Member States held different opinions on it, but in the end they came to a unanimous decision to the effect that the product should be classified under tariff heading 59.03. That view was communicated to the CCC on the occasion of a meeting that it held in June of the same year. The CCC referred it to a working party, upon whose report the CCC approved the decision in October.

The question arises to what extent that "decision" is binding on this Court.

The CCC's authority to issue Explanatory Notes is derived from Articles III and IV of the Convention on Nomenclature for the Classification of Goods in Customs Tariffs signed in Brussels on 15 December 1950. According to the English text of Article IV(c) their purpose is to act "as a guide to the interpretation and application of the Nomenclature". (The French text does not use any word equivalent to "guide"). If one contrasts that wording with the wording of Article IV(e), which relates to proposals for amending the Convention, and with that of Article IX(d), which enables Contracting Parties in dispute to agree to accept a recommendation of the CCC as binding, one sees clearly, in my opinion, that the Explanatory Notes cannot amend the Nomenclature and are not intended to have a binding effect. In Case 11/79 the *Cleton* case [1979] ECR 3069, (see paragraph 12 of the judgment) the Court

referred to them, rightly in my opinion, as "merely an interpretative instrument of an administrative nature". It is indeed because that is their nature that an Explanatory Note may be referred to as an aid to interpretation even though published after the date of the relevant importation or exportation in a particular case. There are authorities in this Court to the effect that the Explanatory Notes to the CCT are to be ignored if they contradict the terms of the CCT itself — 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. The same must be true, in my opinion, of the CCC's Explanatory Notes. It follows, in my opinion, that if Your Lordships share my view as to the correct interpretation of the terms of heading 90.18, Your Lordships should disregard the "corrigendum" of October 1979.

In the result I am of the opinion that Your Lordships should answer the question referred to the Court by the Bundesfinanzhof in the affirmative.