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61978J0126

Judgment of the Court of 12 June 1979. - NV Nederlandse Spoorwegen v Staatssecretaris van Financiën. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Cash-on-delivery commission. - Case 126/78.

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Summary

Parties

Subject of the case

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Decision on costs

Operative part

Keywords

1 . TAX PROVISIONS - HARMONIZATION OF LEGISLATION - TURNOVER TAX - COMMON SYSTEM OF VALUE ADDED TAX - SERVICES SUBJECT THERETO - SERVICES ANCILLARY TO THE TRANSPORT OF GOODS - COLLECTION OF THE PRICE OF THE GOODS CARRIED - SPECIFIC TREATMENT - NOT PERMISSIBLE

(SECOND COUNCIL DIRECTIVE NO 67/288 , ANNEX B , ITEM 5)

2 . TAX PROVISIONS - HARMONIZATION OF LEGISLATION - TURNOVER TAX - COMMON SYSTEM OF VALUE ADDED TAX - SERVICES SUBJECT THERETO - EXEMPTION BY MEMBER STATES - CONDITIONS - MANDATORY TAXATION OF SERVICES ANCILLARY TO TRANSPORT OF GOODS

(SECOND COUNCIL DIRECTIVE NO 67/228 , ART . 6 (2) , ANNEXES A , ITEM 10 , AND B , ITEM 5)

Summary

1 . IF A CARRIER HAS UNDERTAKEN , IN ADDITION TO THE TRANSPORT OF THE GOODS , TO COLLECT THE PRICE OF THE GOODS BEFORE DELIVERING THEM TO THE CONSIGNEE (CASH-ON-DELIVERY SYSTEM) THE COLLECTION OF THAT PRICE IS A SERVICE ANCILLARY TO THE TRANSPORT WITHIN THE MEANING OF ANNEX B , ITEM 5 , TO THE SECOND COUNCIL DIRECTIVE NO 67/228 ON THE HARMONIZATION OF

LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES . IT FOLLOWS THAT FOR THE PURPOSES OF THE APPLICATION OF VALUE ADDED TAX MEMBER STATES ARE NOT EMPOWERED TO TREAT AN ANCILLARY SERVICE SUCH AS THE COLLECTION OF THE CASH-ON-DELIVERY PRICE SEPARATELY FROM THE SERVICE OF THE TRANSPORT OF GOODS .

2 . THE PROVISION ' ' REGARDING ARTICLE 6 (2) ' ' IN ANNEX A , ITEM 10 , TO DIRECTIVE NO 67/228 MUST BE INTERPRETED RESTRICTIVELY IN ORDER TO SAFEGUARD THE COHERENCE OF THE NEW SYSTEM AND THE NEUTRALITY IN COMPETITION WHICH IT SEEKS TO ESTABLISH . IT FOLLOWS THAT A MEMBER STATE CANNOT INSERT INTO ITS LEGISLATION A MEASURE EXEMPTING A SERVICE LISTED IN ANNEX B SAVE IN AN EXCEPTIONAL CASE WHICH JUSTIFIES AN ADVERSE EFFECT UPON NEUTRALITY IN COMPETITION . IT MUST BE CONCLUDED THAT THE COLLECTION OF THE PRICE OF GOODS TRANSPORTED , A SERVICE ANCILLARY TO THE TRANSPORT OF GOODS , CANNOT BE EXEMPTED FROM TURNOVER TAX SINCE IT IS INCLUDED IN THE AFOREMENTIONED ANNEX B , ITEM 5 , WHICH CONTAINS THE LIST OF SERVICES COMPULSORILY TAXABLE UNDER ARTICLE 6 OF THE DIRECTIVE . THE NATIONAL COURT MUST TAKE ACCOUNT OF THE COMBINED PROVISIONS OF ARTICLE 6 (2) AND OF ANNEX B , ITEM 5 .

Parties

IN CASE 126/78

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE HOGE RAAD OF THE NETHERLANDS FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

N.V . NEDERLANDSE SPOORWEGEN , UTRECHT ,

AND

STAATSSECRETARIS VAN FINANCIEN

Subject of the case

ON THE INTERPRETATION OF CERTAIN PROVISIONS OF THE SECOND COUNCIL DIRECTIVE (NO 67/228/EEC) OF 11 APRIL 1967 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1967 , P . 16) ON THE HARMONIZATION OF LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES - STRUCTURE AND PROCEDURES FOR APPLICATION OF THE COMMON SYSTEM OF VALUE ADDED TAX ,

Grounds

1 BY JUDGMENT DATED 24 MAY 1978 , RECEIVED AT THE COURT REGISTRY ON 2 JUNE 1978 , THE HOGE RAAD OF THE NETHERLANDS REFERRED SEVERAL QUESTIONS TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY ON THE INTERPRETATION OF CERTAIN PROVISIONS OF THE SECOND COUNCIL DIRECTIVE NO 67/228/EEC OF 11 APRIL 1967 ON THE HARMONIZATION OF LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES - STRUCTURE AND PROCEDURES FOR

APPLICATION OF THE COMMON SYSTEM OF VALUE ADDED TAX (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1967 , P . 16) AND MORE PARTICULARLY ANNEX B , ITEM 5 , THERETO .

2 THOSE QUESTIONS HAVE ARISEN IN PROCEEDINGS BETWEEN THE SECRETARY OF STATE FOR FINANCE AND A CARRIER ENGAGED IN THE TRANSPORT OF GOODS ON A CASH-ON-DELIVERY BASIS SUBJECT TO TRANSPORT CHARGES AND A '' CASH-ON-DELIVERY COMMISSION '' , THE LATTER BEING INCREASED BY TURNOVER TAX WHICH IT DEDUCTS IN ITS TAX DECLARATIONS . THE SECRETARY OF STATE FOR FINANCE TAKES THE VIEW THAT THE SAID COMMISSION , AS THE '' COLLECTION OF MONEYS PAYABLE '' MUST BE '' EXEMPT FROM TAX '' UNDER ARTICLE 11 (J) OF THE NETHERLANDS LAW OF 28 JUNE 1968 REPLACING THE EXISTING TURNOVER TAX BY A TURNOVER TAX IN ACCORDANCE WITH THE SYSTEM OF VALUE ADDED TAX .

3 THE FIRST QUESTION WHICH THE NATIONAL COURT HAS PUT IN CONNEXION WITH THAT DISPUTE IS AS FOLLOWS :

'' IF A CARRIER HAS UNDERTAKEN , IN ADDITION TO THE TRANSPORT OF THE GOODS , TO COLLECT THE PRICE OF THE GOODS BEFORE DELIVERING THEM TO THE CONSIGNEE (CASH-ON-DELIVERY SYSTEM) IS THE COLLECTION OF THAT PRICE A SERVICE ANCILLARY TO THE TRANSPORT WITHIN THE MEANING OF ITEM 5 OF ANNEX B TO THE SECOND DIRECTIVE OF THE COUNCIL OF THE EUROPEAN COMMUNITIES OF 11 APRIL 1967 ON THE HARMONIZATION OF LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES?

''

4 TO ANSWER THIS QUESTION THE OBJECTIVE OF THE DIRECTIVES ON TURNOVER TAXES SHOULD BE RECALLED , TOGETHER WITH THE FACT THAT THEY ARE BASED ON ARTICLES 99 AND 100 OF THE TREATY WHICH ARE CONCERNED WITH THE HARMONIZATION OF THE LAWS OF THE MEMBER STATES IN THE INTERESTS OF THE ESTABLISHMENT AND FUNCTIONING OF THE COMMON MARKET .

5 THE COUNCIL , IN THE FIRST DIRECTIVE NO 67/227 OF 11 APRIL 1967 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1967 , P . 14) , HAD REGARD TO THE FOLLOWING FACTS :

(A) THAT THE MAIN OBJECTIVE OF THE TREATY IS TO ESTABLISH , WITHIN THE FRAMEWORK OF AN ECONOMIC UNION , A COMMON MARKET WITHIN WHICH THERE IS HEALTHY COMPETITION AND WHOSE CHARACTERISTICS ARE SIMILAR TO THOSE OF A DOMESTIC MARKET ;

(B) THAT THE LEGISLATION OF THE MEMBER STATES INVOLVING CUMULATIVE MULTI-STAGE TAXES WERE DISTORTING COMPETITION AND HINDERING THE FREE MOVEMENT OF GOODS AND SERVICES WITHIN THE COMMON MARKET ,

AND , AFTER STUDYING THE MATTER , ADOPTED A COMMON SYSTEM OF VALUE ADDED TAX FOR ALL MEMBER STATES .

6 THAT SYSTEM ACHIEVES '' THE HIGHEST DEGREE OF SIMPLICITY AND OF NEUTRALITY '' WHEN THE TAX IS LEVIED IN AS GENERAL A MANNER AS POSSIBLE AND WHEN ITS SCOPE COVERS ALL STAGES OF PRODUCTION AND DISTRIBUTION AND THE PROVISION OF SERVICES .

7 THE OBJECTIVE OF THE FIRST STAGE OF THIS REPLACEMENT OF CUMULATIVE MULTI-STAGE TAX SYSTEMS BY THE COMMON SYSTEM OF VALUE ADDED TAX , EVEN IF THE RATES AND EXEMPTIONS ARE NOT HARMONIZED AT THE SAME TIME , IS THE ACHIEVEMENT OF NEUTRALITY IN COMPETITION IN THAT WITHIN EACH COUNTRY SIMILAR GOODS BEAR THE SAME TAX BURDEN , WHATEVER THE LENGTH OF THE PRODUCTION AND DISTRIBUTION CHAIN .

8 A SECOND COUNCIL DIRECTIVE , NO 67/228 , ALSO OF 11 APRIL 1967 , DREW UP A LIST OF SERVICES TO WHICH ARTICLE 6 (2) COMPULSORILY APPLIED THE COMMON SYSTEM IN ORDER TO GUARANTEE NEUTRALITY IN COMPETITION BETWEEN THE MEMBER STATES AND TO RESTRICT PROGRESSIVELY OR ABOLISH THE DIFFERENCES IN QUESTION SO THAT THE NATIONAL SYSTEMS OF VALUE ADDED TAX MIGHT BE BROUGHT INTO ALIGNMENT . THAT LIST , WHICH IS CONTAINED IN ANNEX B TO THE DIRECTIVE AND IS AN INTEGRAL PART THEREOF , HAS AN ITEM 5 WORDED AS FOLLOWS : ' ' TRANSPORT AND STORAGE OF GOODS , AND ANCILLARY SERVICES ' ' .

9 THE QUESTION THEREFORE IS WHETHER IN THE COMMON SYSTEM OF VALUE ADDED TAX MADE COMPULSORY BY THAT SECOND DIRECTIVE IN ALL MEMBER STATES FROM 1 JANUARY 1972 , WHICH IS THE DATE ON WHICH ALL MEMBER STATES HAD TO IMPLEMENT THE PROVISIONS OF THE SAID DIRECTIVE , THE COLLECTION OF THE PRICE OF GOODS CARRIED MUST OR MUST NOT BE TREATED AS A SERVICE ANCILLARY TO THE CARRIAGE OF THE GOODS .

10 IF THE CONTRACT FOR THE CARRIAGE OF GOODS ON A CASH-ON-DELIVERY BASIS IS CONSIDERED IN THE LIGHT OF THE AIMS OF THE DIRECTIVES ON THE HARMONIZATION OF LEGISLATIONS OF THE MEMBER STATES CONCERNING TURNOVER TAXES , THAT QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE .

11 IN STIPULATING THAT ' ' A CARRIER HAS UNDERTAKEN , IN ADDITION TO THE TRANSPORT OF THE GOODS , TO COLLECT THE PRICE OF THE GOODS BEFORE DELIVERING THEM TO THE CONSIGNEE (CASH-ON-DELIVERY SYSTEM) ' ' , THE NATIONAL COURT IS DESCRIBING A CONTRACT INVOLVING TWO SERVICES , THE SECOND OF WHICH (THE CASH COLLECTION) IS SO TIED UP WITH THE FIRST (THE CARRIAGE) BY THE INTENTION OF THE PARTIES THAT THE PERFORMANCE OF THE TWO SERVICES CANNOT BE SEPARATED , FOR THE DELIVERY BY THE CARRIER OF THE GOODS CARRIED TO THE CONSIGNEE CAN BE EFFECTED ONLY IF THE LATTER PAYS THE PRICE OF THE GOODS STIPULATED BY THE CONSIGNOR AND IN THE EVENT OF NON-PAYMENT THE CARRIER MAY NOT DELIVER THE GOODS TO THE CONSIGNEE .

12 IT THUS FOLLOWS FROM THIS ANALYSIS THAT SINCE THE PERFORMANCE OF THOSE TWO SERVICES IS INSEPARABLE , IT IS NECESSARY , IN ORDER TO ACHIEVE THE OBJECTIVE OF NEUTRALITY IN COMPETITION SOUGHT BY THE DIRECTIVES ON VALUE ADDED TAX , THAT THE COLLECTION OF THE PRICE OF GOODS CARRIED SHOULD BE TREATED AS A SERVICE ANCILLARY TO THE TRANSPORT OF GOODS AND THUS SUBJECT TO VALUE ADDED TAX IN ALL MEMBER STATES ; IN THIS WAY EQUALITY OF TREATMENT BETWEEN THE VARIOUS MODES OF TRANSPORT IS ASSURED AND THE SAME CONDITIONS APPLY TO THE TAXATION OF THE SERVICE IN ALL MEMBER STATES .

13 OTHERWISE , THAT IS TO SAY IF THE COLLECTION OF THE PRICE OF THE GOODS CARRIED WERE NOT TREATED AS A SERVICE ANCILLARY TO THE CARRIAGE OF THE GOODS , EACH MEMBER STATE WOULD REGAIN ITS LIBERTY TO TAX THE CASH COLLECTION SERVICE AS AN INDEPENDENT SERVICE , PERHAPS EVEN HAVING REGARD TO THE MODE OF TRANSPORT USED .

14 THE FIRST QUESTION THEREFORE SHOULD BE ANSWERED TO THE EFFECT THAT IF A CARRIER HAS UNDERTAKEN , IN ADDITION TO THE TRANSPORT OF THE GOODS , TO COLLECT THE PRICE OF THE GOODS BEFORE DELIVERING THEM TO THE CONSIGNEE (CASH-ON-DELIVERY SYSTEM) THE COLLECTION OF THAT PRICE IS A SERVICE ANCILLARY TO THE TRANSPORT WITHIN THE MEANING OF ANNEX B , ITEM 5 , TO THE SECOND DIRECTIVE OF THE COUNCIL OF THE EUROPEAN COMMUNITIES OF 11 APRIL 1967 ON THE HARMONIZATION OF LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES .

15 THE FOLLOWING IS THE SECOND QUESTION ASKED BY THE NATIONAL COURT :

'' IF SO , ARE THE MEMBER STATES FREE , IN THE APPLICATION OF THE TURNOVER TAX , TO TREAT AN ANCILLARY SERVICE SUCH AS THE AFORESAID COLLECTION OF THE CASH-ON-DELIVERY PRICE SEPARATELY IN SUCH A WAY THAT THE SERVICES OF TRANSPORT AND STORAGE OF GOODS REFERRED TO IN ITEM 5 OF ANNEX B ARE NOT EXEMPTED FROM TURNOVER TAX BUT THE ANCILLARY SERVICE OF COLLECTION OF MONEY IS SO EXEMPTED?

''

16 THE ANSWER TO THE FIRST QUESTION BASED ON A CONSIDERATION OF THE AIMS OF THE DIRECTIVES ON VALUE ADDED TAX MEANS THAT THE SECOND QUESTION MUST BE ANSWERED IN THE NEGATIVE .

17 FOR THE SAKE OF COMPLETENESS , HOWEVER , IT IS NECESSARY TO MENTION POINT 10 '' REGARDING ARTICLE 6 (2) '' OF ANNEX A , WHICH IS WORDED AS FOLLOWS : '' MEMBER STATES SHALL REFRAIN , AS FAR AS POSSIBLE , FROM GRANTING EXEMPTION FROM TAX IN RESPECT OF THE PROVISION OF THE SERVICES LISTED IN ANNEX B '' . THIS PROVISION ADVISING THE MEMBER STATES TO AVOID '' AS FAR AS POSSIBLE '' GRANTING EXEMPTION TO THE PROVISION OF SERVICES COMPULSORILY SUBJECT TO THE COMMON SYSTEM MUST BE INTERPRETED RESTRICTIVELY IN ORDER TO SAFEGUARD THE COHERENCE OF THE NEW SYSTEM AND THE NEUTRALITY IN COMPETITION WHICH IT SEEKS TO ESTABLISH . IT FOLLOWS THAT A MEMBER STATE CANNOT INSERT INTO ITS LEGISLATION A MEASURE EXEMPTING A SERVICE LISTED IN ANNEX B SAVE IN AN EXCEPTIONAL CASE WHICH JUSTIFIES AN ADVERSE EFFECT UPON NEUTRALITY IN COMPETITION .

18 SINCE NO ARGUMENT HAS BEEN ADVANCED TO THIS EFFECT IT MUST BE CONCLUDED THAT THE ANCILLARY SERVICE OF COLLECTION CANNOT BE EXEMPTED FROM TURNOVER TAX SINCE IT APPEARS IN ITEM 5 OF ANNEX B , WHICH CONTAINS THE LIST OF SERVICES COMPULSORILY TAXABLE UNDER ARTICLE 6 OF THE SECOND DIRECTIVE OF 11 APRIL 1967 .

19 THAT ANSWER ALSO SATISFIES THE FOURTH QUESTION WHICH IS ASKED IN THE EVENT OF THE SECOND QUESTION BEING ANSWERED IN THE NEGATIVE - AS IS THE CASE - SINCE THE FOURTH QUESTION ASKS WHETHER A NATIONAL COURT MUST TAKE ACCOUNT OF ARTICLE 6 (2) OF THE SECOND DIRECTIVE IN CONJUNCTION WITH THE PROVISIONS OF ANNEX B , ITEM 5 , AND THAT QUESTION MUST THEREFORE BE ANSWERED IN THE AFFIRMATIVE .

20 THE TWO PARTS OF THE THIRD QUESTION ARE ESSENTIALLY CONCERNED WITH THE CIRCUMSTANCES IN WHICH A MEMBER STATE MUST HAVE RECOURSE TO THE CONSULTATION PROCEDURE PROVIDED FOR IN ARTICLE 16 OF THE SECOND DIRECTIVE . THAT ARTICLE PROVIDES THAT A MEMBER STATE IS OBLIGED TO ENGAGE IN CONSULTATION ONLY IN THE CASES STIPULATED BY THE PROVISIONS OF THE

DIRECTIVE .

21 NO CONSULTATION IS PROVIDED FOR IN THE CASE OF APPLICATION OF THE COMBINED PROVISIONS OF ARTICLE 6 (2) OF THE SECOND DIRECTIVE AND ANNEX B , ITEM 5 . IN THOSE CIRCUMSTANCES THE THIRD QUESTION DOES NOT CALL FOR AN ANSWER .

Decision on costs

COSTS

22 THE COSTS INCURRED BY THE GOVERNMENT OF THE NETHERLANDS , THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . MOREOVER AS THESE PROCEEDINGS ARE , IN SO FAR AS THE APPELLANT IN THE MAIN PROCEEDINGS IS CONCERNED , IN THE NATURE OF A STEP IN THE PROCEEDINGS PENDING BEFORE THE HOGE RAAD , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HOGE RAAD BY JUDGMENT OF 24 MAY 1978 , HEREBY RULES :

1 . IF A CARRIER HAS UNDERTAKEN , IN ADDITION TO THE TRANSPORT OF THE GOODS , TO COLLECT THE PRICE OF THE GOODS BEFORE DELIVERING THEM TO THE CONSIGNEE (CASH-ON-DELIVERY SYSTEM) THE COLLECTION OF THAT PRICE IS A SERVICE ANCILLARY TO THE TRANSPORT WITHIN THE MEANING OF ANNEX B , ITEM 5 , TO THE SECOND DIRECTIVE OF THE COUNCIL OF THE EUROPEAN COMMUNITIES OF 11 APRIL 1967 ON THE HARMONIZATION OF LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES .

2 . FOR THE PURPOSES OF THE APPLICATION OF VALUE ADDED TAX MEMBER STATES ARE NOT EMPOWERED TO TREAT AN ANCILLARY SERVICE SUCH AS THE COLLECTION OF THE CASH-ON-DELIVERY PRICE SEPARATELY FROM THE SERVICE OF THE TRANSPORT OF GOODS .

3 . THE NATIONAL COURT MUST TAKE ACCOUNT OF THE COMBINED PROVISIONS OF ARTICLE 6 (2) OF THE SECOND DIRECTIVE AND OF ANNEX B , ITEM 5 , THERETO .