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## 61982J0294

Judgment of the Court of 28 February 1984. - Senta Einberger v Hauptzollamt Freiburg. - Reference for a preliminary ruling: Finanzgericht Baden-Württemberg - Germany. - Import turnover tax - Smuggled drugs. - Case 294/82.

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## Keywords

*TAX PROVISIONS - HARMONIZATION OF LAWS - TURNOVER TAX - COMMON SYSTEM OF VALUE-ADDED TAX - TAX ON IMPORTATION - APPLICATION TO THE UNLAWFUL TRAFFIC IN DRUGS - NOT PERMISSIBLE - CRIMINAL SANCTIONS FOR OFFENCES - POWER OF THE MEMBER STATES*

*( COUNCIL DIRECTIVES 67/228 , ART . 2 AND 77/388 , ART . 2 )*

## Summary

ILLEGAL IMPORTS OF DRUGS INTO THE COMMUNITY , WHICH CAN GIVE RISE ONLY TO PENALTIES UNDER THE CRIMINAL LAW , ARE ALIEN TO THE PROVISIONS OF THE SIXTH DIRECTIVE ON THE HARMONIZATION OF THE LAWS OF THE MEMBER STATES RELATING TO TURNOVER TAXES - COMMON SYSTEM OF VALUE-ADDED TAX : UNIFORM BASIS OF ASSESSMENT . ACCORDINGLY ARTICLE 2 THEREOF MUST BE INTERPRETED AS MEANING THAT NO IMPORT TURNOVER TAX ARISES UPON THE UNLAWFUL IMPORTATION INTO THE COMMUNITY OF DRUGS WHICH ARE NOT CONFINED WITHIN ECONOMIC CHANNELS STRICTLY CONTROLLED BY THE COMPETENT AUTHORITIES FOR USE FOR MEDICAL AND SCIENTIFIC PURPOSES . THAT INTERPRETATION APPLIES ALSO TO ARTICLE 2 OF THE SECOND DIRECTIVE ON THE HARMONIZATION OF VALUE-ADDED TAX .

THAT FINDING IS WITHOUT PREJUDICE TO THE POWERS OF MEMBER STATES TO IMPOSE APPROPRIATE PENALTIES IN RESPECT OF CONTRAVENTIONS OF THEIR DRUGS LAWS , WITH ALL THE ATTENDANT CONSEQUENCES , IN PARTICULAR FINES .

## **Parties**

*IN CASE 294/82*

*REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE FINANZGERICHT ( FINANCE COURT ) BADEN-WURTTENBERG FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN*

*SENTA EINBERGER , SCHALLSTADT-WOLFENWEILER ,*

*AND*

*HAUPTZOLLAMT ( PRINCIPAL CUSTOMS OFFICE ) FREIBURG ,*

## **Subject of the case**

*ON THE INTERPRETATION OF ARTICLE 2 ( 2 ) OF THE SIXTH COUNCIL DIRECTIVE OF 17 MAY 1977 ON THE HARMONIZATION OF THE LAWS OF THE MEMBER STATES RELATING TO TURNOVER TAXES - COMMON SYSTEM OF VALUE-ADDED TAX : UNIFORM BASIS OF ASSESSMENT ( OFFICIAL JOURNAL 1977 L 145 , P . 1 ),*

## **Grounds**

*1 BY ORDER OF 29 OCTOBER 1982 , RECEIVED AT THE COURT REGISTRY ON 17 NOVEMBER 1982 , THE FINANZGERICHT ( FINANCE COURT ) BADEN-WURTTENBERG REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY A QUESTION ON THE APPLICATION OF TURNOVER TAX TO SMUGGLED DRUGS .*

*2 THE DISPUTE IN THE MAIN PROCEEDINGS CONCERNS THE DETERMINATION OF THE TURNOVER TAX APPLICABLE UPON THE IMPORTATION OF QUANTITIES OF MORPHINE WHICH , HAVING BEEN ILLEGALLY IMPORTED INTO THE FEDERAL REPUBLIC OF GERMANY , WERE SOLD IN SWITZERLAND IN CONTRAVENTION OF THE BETAUBUNGSMITTELGESETZ ( GERMAN DRUGS LAW ) BY THE PLAINTIFF IN THE MAIN*

PROCEEDINGS . FOR THOSE OFFENCES SHE WAS GIVEN A SUSPENDED SENTENCE OF ONE YEAR ' S IMPRISONMENT BY A GERMAN CRIMINAL COURT .

3 THE FINANZGERICHT HAS RAISED THE QUESTION WHETHER THE MORPHINE IS SUBJECT TO TURNOVER TAX UNDER COMMUNITY LAW . IT POINTS OUT IN THAT RESPECT THAT , IN ITS JUDGMENT OF 26 OCTOBER 1982 ( CASE 240/81 ( 1982 ) ECR 3699 ), THE COURT STATED THAT THE INTRODUCTION OF THE COMMON CUSTOMS TARIFF NO LONGER LEFT A MEMBER STATE THE POWER TO APPLY CUSTOMS DUTIES TO DRUGS WHICH HAD BEEN SMUGGLED IN AND EITHER DESTROYED AS SOON AS THEY HAD BEEN DISCOVERED OR REMOVED FROM THE CUSTOMS TERRITORY BEFORE DISCOVERY BUT DID LEAVE IT FULL FREEDOM TO TAKE CRIMINAL PROCEEDINGS IN RESPECT OF OFFENCES COMMITTED .

4 THE FINANZGERICHT REFERRED , AS REGARDS THE FACTS OF THE CASE , TO ITS FINDINGS IN CASE 240/81 , NAMELY THAT THE MORPHINE WAS NOT MANUFACTURED IN THE FEDERAL REPUBLIC OF GERMANY AND THAT THE QUANTITY OF THAT PRODUCT SOLD BY THE PLAINTIFF IN THE MAIN PROCEEDINGS HAD BEEN SMUGGLED INTO GERMAN TERRITORY IN ORDER TO BE ILLEGALLY RE-EXPORTED TO A THIRD COUNTRY . THE FINANZGERICHT REFERS TO THE ABOVE-MENTIONED JUDGMENT OF THE COURT AND ASKS WHETHER THE ABSOLUTE PROHIBITION OF IMPORTATION AND MARKETING OF DRUGS WHICH PREVENTS THE APPLICATION OF CUSTOMS DUTIES ALSO PRECLUDES THE COLLECTION OF TURNOVER TAXES ON IMPORTATION .

5 HAVING REGARD TO THOSE CONSIDERATIONS , THE FINANZGERICHT SUBMITTED THE FOLLOWING QUESTION FOR A PRELIMINARY RULING :

'' IS THE IMPOSITION OF IMPORT TURNOVER TAX ON DRUGS COMPATIBLE WITH ARTICLE 2 ( 2 ) OF THE SIXTH COUNCIL DIRECTIVE OF 17 MAY 1977 ON THE HARMONIZATION OF THE LAWS OF THE MEMBER STATES RELATING TO TURNOVER TAXES - COMMON SYSTEM OF VALUE-ADDED TAX : UNIFORM BASIS OF ASSESSMENT ( OFFICIAL JOURNAL 1977 L 145 , P . 1 ), IF MEMBER STATES ARE NOT PERMITTED TO LEVY CUSTOMS DUTY?

''

6 IT SHOULD BE NOTED IN THE FIRST PLACE THAT THE FINANZGERICHT REFERS TO THE SIXTH DIRECTIVE IN ITS REFERENCE FOR A PRELIMINARY RULING , WHEREAS IT IS APPARENT FROM THE DOCUMENTS BEFORE THE COURT THAT THE IMPORTS OF DRUGS REGARDING WHICH THE NATIONAL COURT IS TO GIVE JUDGMENT TOOK PLACE IN 1974 , THAT IS TO SAY BEFORE THE ENTRY INTO FORCE OF THAT DIRECTIVE AND THEREFORE WHILE THE SECOND DIRECTIVE APPLIED ( OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1967 , P . 16 ). HOWEVER , IT APPEARS THAT THERE IS NO DIFFERENCE BETWEEN THOSE TWO DIRECTIVES AS REGARDS THE ESSENTIAL ISSUE IN THIS CASE , EITHER IN THE WORDING OF THE RELEVANT PROVISIONS OR IN THEIR CONTEXT ; CONSEQUENTLY , THE INTERPRETATION TO BE GIVEN BY THE COURT OF ARTICLE 2 ( 2 ) OF THE SIXTH DIRECTIVE WILL APPLY EQUALLY TO ARTICLE 2 ( B ) OF THE SECOND DIRECTIVE .

7 ARTICLE 2 OF THE SIXTH DIRECTIVE , IN DEFINING THE SCOPE OF VALUE-ADDED TAX , MENTIONS :

'' 1 . THE SUPPLY OF GOODS OR SERVICES EFFECTED FOR CONSIDERATION WITHIN THE TERRITORY OF THE COUNTRY BY A TAXABLE PERSON ACTING AS SUCH ;

## 2.THE IMPORTATION OF GOODS '' .

8 IT IS TO BE NOTED THAT THE SIXTH DIRECTIVE CONTAINS A SERIES OF SPECIFIC PROVISIONS COVERING ALL IMPORTS , THAT IS TO SAY IMPORTS INTO THE COMMUNITY BOTH OF GOODS FROM NON-MEMBER COUNTRIES AND OF GOODS FROM ANOTHER MEMBER STATE , THOSE PROVISIONS BEING FOUND IN PARTICULAR IN ARTICLES 3 , 7 , 10 ( 3 ), 11 ( B ), 14 , 17 AND 23 OF THAT DIRECTIVE .

9 THUS , A DISTINCTION MUST BE DRAWN BETWEEN THE TRANSACTIONS REFERRED TO IN THE FIRST AND SECOND PARAGRAPHS OF ARTICLE 2 , WHICH ARE BASED ON DIFFERENT ECONOMIC AND LEGAL CONSIDERATIONS .

10 THE COURT MAKING THE REFERENCE WAS THEREFORE CORRECT TO RELATE THE QUESTION SUBMITTED FOR A PRELIMINARY RULING ONLY TO ARTICLE 2 ( 2 ), THAT IS TO SAY TO THE IMPORTATION OF GOODS , AND MORE PARTICULARLY TO THE IMPORTATION OF GOODS FROM NON-MEMBER COUNTRIES , AS INDICATED IN THE ORDER MAKING THE REFERENCE . MOREOVER , THE QUESTION SUBMITTED FOR A PRELIMINARY RULING DOES NOT CONCERN THE IMPORTATION OF ILLEGAL PRODUCTS IN GENERAL BUT ONLY THE ILLEGAL IMPORTATION OF DRUGS .

11 IN THOSE CIRCUMSTANCES , THE QUESTION ARISES WHETHER OR NOT , IN THE ABSENCE OF EXPRESS PROVISIONS IN THE DIRECTIVE IN REGARD THERETO , THE ILLEGAL IMPORTATION OF DRUGS CONSTITUTES A TAXABLE TRANSACTION OR WHETHER THE DIRECTIVE MUST BE INTERPRETED AS LEAVING THE MEMBER STATES A POWER OF DECISION IN THAT RESPECT . 12 IN THE FIRST PLACE IT MUST BE STATED THAT THE DIRECTIVE MAY NOT BE INTERPRETED AS LEAVING THAT QUESTION OUTSIDE ITS SCOPE WITH THE RESULT THAT IT WOULD BE FOR EACH OF THE MEMBER STATES TO DECIDE THAT QUESTION FOR ITSELF . SUCH AN INTERPRETATION WOULD BE IRRECONCILABLE WITH THE AIM PURSUED BY THE DIRECTIVE WHICH IS TO ACHIEVE FAR-REACHING HARMONIZATION IN THAT AREA , PARTICULARLY WITH REGARD TO THE BASIS OF ASSESSMENT TO VALUE-ADDED TAX .

13 THAT HAVING BEEN ESTABLISHED , IT IS ALSO APPARENT FROM ITS CONTEXT AND OBJECTIVES THAT THE SIXTH DIRECTIVE PRECLUDES THE LEVYING OF VALUE-ADDED TAX ON DRUGS WHEN THEY ARE ILLEGALLY IMPORTED INTO THE COMMUNITY . THAT CONCLUSION IS UNAVOIDABLE , IN VIEW OF THE PREVIOUS DECISION OF THE COURT PRECLUDING THE COLLECTION OF CUSTOMS DUTIES IN THOSE SAME CIRCUMSTANCES , BY REASON OF THE FACT THAT THE LEGAL SITUATION , REPRESENTED IN THIS INSTANCE BY THE CHARGEABLE EVENT , IS ESSENTIALLY THE SAME IN THE TWO CASES .

14 AS REGARDS THE NON-COLLECTION OF CUSTOMS DUTIES WHEN DRUGS ARE ILLEGALLY IMPORTED , REGARD MUST BE HAD TO THE DECISIONS OF THE COURT TO THE EFFECT THAT WHEN DRUGS ARE IMPORTED INTO THE COMMUNITY OTHERWISE THAN THROUGH STRICTLY CONTROLLED ECONOMIC CHANNELS FOR USE FOR MEDICAL AND SCIENTIFIC PURPOSES , NO CUSTOMS DEBT ARISES ( SEE JUDGMENT OF 5 FEBRUARY 1981 IN CASE 50/80 HORVATH ( 1981 ) ECR 385 , AND THE JUDGMENTS OF 26 OCTOBER 1982 IN CASE 221/81 WOLF ( 1982 ) ECR 3681 AND CASE 240/81 EINBERGER ( 1982 ) ECR 3699 ).

15 THE COURT HELD THAT DRUGS NOT DISTRIBUTED THROUGH CHANNELS STRICTLY CONTROLLED BY THE COMPETENT AUTHORITIES FOR USE FOR MEDICAL AND SCIENTIFIC PURPOSES WERE , BY DEFINITION , SUBJECT TO A TOTAL PROHIBITION AND MARKETING IN THE COMMUNITY AND THAT , FOR THAT REASON , THOSE DRUGS WERE NOT LIABLE TO CUSTOMS DUTIES WHERE THEY REMAINED WITHIN ILLEGAL CHANNELS ,

REGARDLESS OF WHETHER THEY WERE DISCOVERED AND DESTROYED OR WERE NOT DETECTED BY THE AUTHORITIES .

16 THAT REASONING CANNOT BE CONFINED TO THE COLLECTION OF CUSTOMS DUTIES ON IMPORTATION BUT APPLIES ALSO TO THE COLLECTION OF TURNOVER TAX ON IMPORTATION . 17 IN THAT CONNECTION , IT MUST BE EMPHASIZED THAT THE PURPOSE OF THE DIRECTIVES ON HARMONIZATION OF THE LAWS OF THE MEMBER STATES ON TURNOVER TAXES IS TO ESTABLISH A COMMON SYSTEM OF VALUE-ADDED TAX AND IN PARTICULAR A UNIFORM BASIS OF ASSESSMENT THROUGHOUT THE COMMUNITY , JUST AS THE COMMON CUSTOMS TARIFF ESTABLISHES A COMMUNITY REGIME FOR CUSTOMS DUTIES .

18 THE TWO CHARGES DISPLAY COMPARABLE ESSENTIAL FEATURES SINCE THEY ARISE FROM THE FACT OF IMPORTATION OF GOODS INTO THE COMMUNITY AND THE SUBSEQUENT DISTRIBUTION THEREOF THROUGH THE ECONOMIC CHANNELS OF THE MEMBER STATES AND SINCE EACH CONSTITUTES A COMPONENT OF THE SALE PRICE WHICH IS CALCULATED IN A SIMILAR MANNER BY SUCCESSIVE TRADERS . THEIR PARALLEL NATURE IS CONFIRMED BY THE FACT THAT ARTICLE 10 ( 3 ) OF THE SIXTH DIRECTIVE AUTHORIZES MEMBER STATES TO LINK THE CHARGEABLE EVENT AND THE DATE WHEN THE TURNOVER TAX ON IMPORTATION FALLS DUE WITH THOSE LAID DOWN FOR CUSTOMS DUTIES .

19 MOREOVER , IN THIS CASE , FOR THE PURPOSES OF BOTH CHARGES , THE RELEASE OF THE GOODS IN QUESTION INTO THE ECONOMIC AND COMMERCIAL CHANNELS OF THE COMMUNITY IS BY DEFINITION ABSOLUTELY PRECLUDED .

20 ACCORDINGLY , AS THE COURT HAS ALREADY HELD IN RELATION TO CUSTOMS DUTIES ON IMPORTATION , ILLEGAL IMPORTS OF DRUGS INTO THE COMMUNITY , WHICH CAN GIVE RISE ONLY TO PENALTIES UNDER THE CRIMINAL LAW , ARE WHOLLY ALIEN TO THE PROVISIONS OF THE SIXTH DIRECTIVE ON THE DEFINITION OF THE BASIS OF ASSESSMENT AND , IN CONSEQUENCE , TO THE ORIGINATION OF A TURNOVER TAX DEBT .

21 THAT FINDING IS WITHOUT PREJUDICE TO THE POWERS OF MEMBER STATES TO IMPOSE APPROPRIATE PENALTIES IN RESPECT OF CONTRAVENTIONS OF THEIR DRUGS LAWS , WITH ALL THE ATTENDANT CONSEQUENCES , IN PARTICULAR FINES .

22 THE REPLY TO THE QUESTION SUBMITTED MUST THEREFORE BE THAT ARTICLE 2 OF THE SIXTH DIRECTIVE MUST BE INTERPRETED AS MEANING THAT NO IMPORT TURNOVER TAX ARISES UPON THE UNLAWFUL IMPORTATION INTO THE COMMUNITY OF DRUGS WHICH ARE NOT CONFINED WITHIN ECONOMIC CHANNELS STRICTLY CONTROLLED BY THE COMPETENT AUTHORITIES FOR USE FOR MEDICAL AND SCIENTIFIC PURPOSES . THAT INTERPRETATION APPLIES ALSO TO ARTICLE 2 OF THE SECOND DIRECTIVE .

## **Decision on costs**

### **COSTS**

23 THE COSTS INCURRED BY THE GERMAN GOVERNMENT , THE FRENCH GOVERNMENT AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE

CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

## **Operative part**

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE FINANZGERICHT BADEN-WURTTENBERG BY ORDER OF 29 OCTOBER 1982 , HEREBY RULES :

ARTICLE 2 OF THE SIXTH COUNCIL DIRECTIVE OF 17 MAY 1977 ON THE HARMONIZATION OF THE LAWS OF THE MEMBER STATES RELATING TO TURNOVER TAXES - COMMON SYSTEM OF VALUE-ADDED TAX : UNIFORM BASIS OF ASSESSMENT ( OFFICIAL JOURNAL 1977 L 145 , P . 1 ) MUST BE INTERPRETED AS MEANING THAT NO IMPORT TURNOVER TAX ARISES UPON THE UNLAWFUL IMPORTATION INTO THE COMMUNITY OF DRUGS NOT CONFINED WITHIN ECONOMIC CHANNELS STRICTLY CONTROLLED BY THE COMPETENT AUTHORITIES FOR USE FOR MEDICAL AND SCIENTIFIC PURPOSES . THAT INTERPRETATION APPLIES ALSO TO ARTICLE 2 OF THE SECOND DIRECTIVE ON THE HARMONIZATION OF VALUE-ADDED TAX .