

61997J0181

Judgment of the Court (Fifth Chamber) of 28 January 1999. - A.J. van der Kooy v Staatssecretaris van Financiën. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Part Four of the EC Treaty - Article 227 of the EC Treaty - Article 7(1)(a) of Sixth Directive 77/388/EEC - Goods in free circulation in overseas countries and territories. - Case C-181/97.

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Keywords

Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Importation of goods - Entry into the Community - Meaning - Entry into a Member State of goods coming from the Netherlands Antilles - Covered

(EC Treaty, Art. 227; Council Directive 77/388, Art. 7(1); Council Decision 91/482)

Summary

It follows from the provisions of Articles 3 and 7, read together, of the Sixth Directive (77/388) on the harmonisation of the laws of the Member States relating to turnover taxes that the terms 'Community' and 'territory of the Community' relate to the area of application of the Treaty as defined for each Member State in Article 227 of the Treaty. In accordance with Article 227(3), the special arrangements for association set out in Part Four of the Treaty apply to the overseas countries and territories (OCTs), including the Netherlands Antilles. Under those arrangements, failing express reference, the general provisions of the Treaty do not apply to the OCTs. Consequently, the entry into a Member State of goods coming from the Netherlands Antilles cannot be categorised as an intra-Community transaction for the purposes of the Sixth Directive, unless a special provision so prescribes. There is no provision to that effect in the Sixth Directive or in Part Four of the Treaty or in Decision 91/482 on the association of the overseas countries and territories with the European Economic Community. The entry into a Member State of goods coming from the Netherlands Antilles must therefore be regarded as entry into the Community for the purposes of applying Article 7(1) of the Sixth Directive.

Parties

In Case C-181/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

A.J. van der Kooy

and

Staatssecretaris van Financiën

on the interpretation of Articles 132(1) and 227 of the EC Treaty and of Article 7(1)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1),

THE COURT

(Fifth Chamber),

composed of: J.-P. Puissechot, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, D.A.O. Edward (Rapporteur) and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr Van der Kooy, by G.J. Jansen and G.J. van Slooten, tax advisers,

- the Netherlands Government, by J.G. Lammers, Acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Directorate, Ministry of Foreign Affairs, and A. de Bourgoing, Chargé de Mission in the same directorate, acting as Agents, and

- the Commission of the European Communities, by B.J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by M. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; of the French Government, represented by A. de Bourgoing; and of the Commission, represented by P. van Nuffel, of its Legal Service, acting as Agent, at the hearing on 12 March 1998,

after hearing the Opinion of the Advocate General at the sitting on 30 April 1998,

gives the following

Judgment

Grounds

1 By judgment of 7 May 1997, which was received at the Court on 9 May 1997, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 132(1) and 227 of the EC Treaty and of Article 7(1)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) ('the Sixth Directive').

2 That question arose in the context of proceedings brought by Mr Van der Kooy challenging the notice of assessment of value added tax ('VAT') addressed to him by the Netherlands tax authorities in respect of the importation of a motor vessel from the Netherlands Antilles.

Community law

3 The territorial area of application of the EC Treaty is defined in Article 227(1) thereof by a list of the Member States, one of which is the Kingdom of the Netherlands. The Netherlands Antilles form part of that Kingdom.

4 By way of derogation from Article 227 of the Treaty, the Government of the Kingdom of the Netherlands obtained the right, by the 'Protocol on the application of the Treaty establishing the European Economic Community to the non-European parts of the Kingdom of the Netherlands' of 25 March 1957, to ratify the Treaty on behalf of the Kingdom in Europe and Netherlands New Guinea only.

5 The first paragraph of Article 227(3) of the Treaty provides: 'The special arrangements for association set out in Part Four of this Treaty shall apply to the overseas countries and territories listed in Annex IV to this Treaty.'

6 Originally, the Netherlands Antilles did not appear on that list. They were inserted by Convention 64/533/EEC of 13 November 1962 amending the Treaty establishing the European Economic Community to render the special association arrangements defined in Part Four thereof applicable to the Netherlands Antilles (JO 1964, 150, p. 2414), which entered into force on 1 October 1964.

7 Part Four of the Treaty is entitled 'Association of the overseas countries and territories'.

8 Article 131(1) of the EC Treaty reads: 'The Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, Denmark, France, Italy, the Netherlands and the United Kingdom.' It further states that those countries and territories are listed in Annex IV to the Treaty.

9 Article 132 of the Treaty provides:

'Association shall have the following objectives:

1. Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to this Treaty.'

10 Article 133 specifies:

`1. Customs duties on imports into the Member States of goods originating in the countries and territories shall be completely abolished in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty.

2. Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be progressively abolished in accordance with the provisions of Articles 12, 13, 14, 15 and 17.'

11 Article 136 provides:

`For an initial period of five years after the entry into force of this Treaty, the details of and procedure for the association of the countries and territories with the Community shall be determined by an Implementing Convention annexed to this Treaty.

Before the Convention referred to in the preceding paragraph expires, the Council shall, acting unanimously, lay down provisions for a further period, on the basis of the experience acquired and of the principles set out in this Treaty.'

12 On the basis of the second paragraph of Article 136 of the Treaty, the Council has adopted a series of decisions concerning the association of the overseas countries and territories ('the OCTs') with the European Economic Community. Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1, 'the Sixth OCT Decision') is applicable for a period of 10 years beginning on 1 March 1990. It does not contain any provisions relating to taxation.

13 Article 101 of the Sixth OCT Decision provides:

`1. Products originating in the OCT shall be imported into the Community free of customs duties and charges having equivalent effect.

2. Products not originating in the OCT but which are in free circulation in an OCT and are re-exported as such to the Community shall be accepted for import into the Community free of customs duties and taxes having equivalent effect providing that they:

- have paid, in the OCT concerned, customs duties or taxes having equivalent effect of a level equal to, or higher than, the customs duties applicable in the Community on import of these same products originating in third countries eligible for the most-favoured-nation clause,

- have not been the subject of an exemption from, or a refund of, in whole or in part, customs duties or taxes having equivalent effect,

- are accompanied by an export certificate.

...'

14 Article 102 of the Sixth OCT Decision prohibits the application of any quantitative restrictions or measures having equivalent effect to imports of products originating in the OCT.

15 Under Article 2(2) of the Sixth Directive, the importation of goods is subject to VAT.

16 Article 7(1) of the Sixth Directive provides that 'importation of goods' is to mean:

'(a) the entry into the Community of goods which do not fulfil the conditions laid down in Articles 9 and 10 of the Treaty ...'.

17 The territorial application of the Sixth Directive is defined in Article 3 thereof:

'(1) For the purposes of this Directive:

- "territory of a Member State" shall mean the territory of the country as defined in respect of each Member State in paragraphs 2 and 3,

- "Community" and "territory of the Community" shall mean the territory of the Member States as defined in respect of each Member State in paragraphs 2 and 3,

- "third territory" and "third country" shall mean any territory other than those defined in paragraphs 2 and 3 as the territory of a Member State.

(2) For the purposes of this Directive, the "territory of the country" shall be the area of application of the Treaty establishing the European Economic Community as defined in respect of each Member State in Article 227.'

The dispute in the main proceedings

18 The motor vessel *Joshua* was built as a fishing vessel in Haarlem, the Netherlands, in 1964. In 1984 it was sold to Caribbean Chartering & Sales Ltd in Nassau, Bahamas, and taken outside the customs territory of the European Community.

19 In 1985 and 1986 the vessel was converted in the Netherlands into a cruising vessel, and on 22 April 1993 was sold to Mr Van der Kooy, who is resident in the Netherlands, and Mr J. Wielinga, who is resident in Curaçao, Netherlands Antilles.

20 It appears from the observations of the Netherlands Government that on 8 April 1993 Mr Van der Kooy entered into a contract of agency with the companies *Pijnacker BV* and *Van der Vliet Quality Yachts BV*, both established in Muiden, the Netherlands, under which the latter company undertook to sell the vessel for the price of NLG 1 400 000. The contract provided that the *Joshua* was to be berthed at Scheveningen, the Netherlands, as from 15 May 1993.

21 As from that date, the *Joshua*, flying the flag of the United Kingdom, lay in the Port of Scheveningen with Mr Van der Kooy on board.

22 On 20 July 1993, the *Inspecteur van de Belastingdienst/Douane* (Inspector of Tax and Customs) for the district of Hoofddorp requested Mr Van der Kooy to pay turnover tax of NLG 157 500 (the basis of assessment being determined as NLG 900 000) on the ground that the vessel had been imported into the Netherlands within the meaning of Article 18 of the *Wet op de Omzetbelasting* (Law on Turnover Taxes) 1968 (1993 version), which is the provision intended to implement Article 7(1)(a) of the Sixth Directive.

23 The *Inspecteur van de Belastingdienst/Douane* dismissed Mr Van der Kooy's objection to his decision, which was upheld by the *Gerechtshof* (Regional Court of Appeal), Amsterdam.

24 Mr Van der Kooy appealed to the *Hoge Raad* to have the *Gerechtshof*'s judgment set aside. The *Hoge Raad* considers, as did the *Gerechtshof*, that the territory of the Netherlands Antilles cannot be regarded as the 'territory of a Member State' within the meaning of Article 3(1) and (2) of the Sixth Directive, read in conjunction with Article 227 of the Treaty, nor can it be treated as

such, by virtue of Article 132(1) of the Treaty, for the purposes of levying VAT if no implementing measure has been adopted to that effect.

The national court's question

25 Taking the view that the proper interpretation of Articles 132(1) and 227 of the EC Treaty and Articles 3(1) and (2) and 7(1)(a) of the Sixth Directive was not clear in the circumstances of the case, the Hoge Raad stayed proceedings and referred the following question to the Court for a preliminary ruling:

‘In the light of Article 132(1) and Article 227 of the EC Treaty, is Article 7(1)(a) of the Sixth Directive to be interpreted as meaning that the importation into the Netherlands of a ship which was previously in free circulation in the Netherlands Antilles is to be regarded as the entry into the Community of a product which does not fulfil the conditions of Articles 9 and 10 of the EC Treaty?’

Admissibility

26 The French Government considers that the request for a preliminary ruling is inadmissible in that it does not allow either the Court or such Member States as may intervene in the proceedings to provide a useful interpretation of Community law. The extremely succinct statement of the facts contained in the Hoge Raad's judgment does not reveal either the reasons for which that court considers the vessel's connection with the Netherlands Antilles to be established or the use to which it is put by Mr Van der Kooy in the Netherlands.

27 It has consistently been held that, in order to reach an interpretation of Community law which will be of use to the national court it is essential for that court to define the factual and legislative context of the questions referred or, at the very least, to explain the factual circumstances on which they are based (see, *inter alia*, Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others v Circostel* [1993] ECR I-393, paragraph 6; Case C-157/92 *Pretore di Genova v Banchero* [1993] ECR I-1085, paragraph 4; Case C-66/97 *Banco de Fomento e Exterior v Pechim and Others* [1997] ECR I-3757, paragraph 7; and Joined Cases C-128/97 and C-137/97 *Italia Testa and Modesti* [1998] ECR I-2181, paragraph 5).

28 The information provided in orders for reference not only enables the Court to provide a useful reply but also gives the Governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice. It is the Court's duty to ensure that the opportunity to submit observations is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties (*Banco de Fomento e Exterior*, cited above, paragraph 8).

29 In the present case, the Hoge Raad's judgment, whilst very succinct, none the less contains the essential circumstances of the dispute in the main proceedings.

30 As regards the findings of fact made by the national court, it must be noted that, as has been observed by the Advocate General at point 9 of his Opinion, the Court is in principle required to base its consideration on the premisses which the referring court regards as having been established; in the present case, those premisses include the vessel's previous ties with one of the OCTs.

31 The request for a preliminary ruling must therefore be held admissible.

Substance

32 By its question, the national court wishes to ascertain, in substance, whether the entry into a Member State of goods coming from the Netherlands Antilles must be regarded as entry into the Community for the purposes of applying Article 7(1) of the Sixth Directive.

33 The Netherlands and French Governments agree with the Commission that the territory of the Netherlands Antilles cannot be regarded as forming part of the territory of the Community for the purposes of Articles 3 and 7 of the Sixth Directive and Article 227 of the Treaty, nor can it be treated as such by virtue of Article 132(1) of the Treaty for the purpose of levying turnover tax if no implementing measure has been adopted to that effect.

34 It follows from the provisions of Articles 3 and 7 of the Sixth Directive, read together, that the terms 'Community' and 'territory of the Community' relate to the area of application of the Treaty as defined for each Member State in Article 227 of the Treaty.

35 Article 227 of the Treaty lists the States to which the Treaty is to apply, and the following paragraphs contain special provisions for certain specific territories.

36 In accordance with Article 227(3) of the Treaty and Convention 64/533, the special arrangements for association set out in Part Four of the Treaty apply to the OCTs, including the Netherlands Antilles.

37 Under those arrangements, failing express reference, the general provisions of the Treaty do not apply to the OCTs (Case C-260/90 *Leplat v Territory of French Polynesia* [1992] ECR I-643, paragraph 10).

38 Consequently, the entry into a Member State of goods coming from the Netherlands Antilles cannot be categorised as an intra-Community transaction for the purposes of the Sixth Directive, unless a special provision so prescribes.

39 There is no provision to that effect in the Sixth Directive. Nor, moreover, are there any rules providing for the application of VAT to imports from the OCTs in either Part Four of the Treaty or the Sixth OCT Decision.

40 It is true that Article 101 of the Sixth OCT Decision provides that products originating in the OCT and certain products which are in free circulation there are to be imported into the Community free of customs duties and charges having equivalent effect. However, a tax such as the VAT levied on imports of products into a Member State does not have the ingredients of a charge having an effect equivalent to customs duties (Case 15/81 *Schul v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, paragraph 21).

41 The Sixth OCT Decision therefore does not have the effect of bringing the territory of the Netherlands Antilles within the territorial scope of the Sixth Directive.

42 The answer to the national court's question must therefore be that the entry into a Member State of goods coming from the Netherlands Antilles must be regarded as entry into the Community for the purposes of applying Article 7(1) of the Sixth Directive.

Decision on costs

Costs

43 The costs incurred by the Netherlands and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings

are, for the parties to the main proceedings, 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

(Fifth Chamber),

in answer to the question referred to it by the Hoge Raad der Nederlanden by judgment of 7 May 1997, hereby rules:

The entry into a Member State of goods coming from the Netherlands Antilles must be regarded as entry into the Community for the purposes of applying Article 7(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers.