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Judgment of the Court of 22 October 1974. - Demag AG v Finanzamt Duisburg-Süd. - Reference for a preliminary ruling: Finanzgericht Düsseldorf - Germany. - Case 27-74.

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Keywords

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1 . CUSTOMS DUTIES AND INTERNAL TAXATION - JOINT APPLICATION TO THE SAME CASE OF PROVISIONS RELATING THERETO - IMPOSSIBILITY THEREOF

(EEC TREATY, ARTICLES 12, 13 AND 95)

2 . PRELIMINARY RULING - JURISDICTION OF THE COURT - LIMITS

(EEC TREATY, ARTICLE 177)

3 . TAX PROVISIONS - INTERNAL TAXATION - CONCEPT

(EEC TREATY, ARTICLE 95)

Summary

1 . ARTICLES 12 AND 13 ON THE ONE HAND AND 95 ON THE OTHER CANNOT BE APPLIED JOINTLY IN THE SAME CASE .

2 . IN THE PROCEDURE FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE TREATY, THE COURT CANNOT CLASSIFY A SPECIFIC NATIONAL TAX FOR THE PURPOSE OF APPLYING COMMUNITY LAW, SINCE THE INTERPRETATION OF LEGISLATIVE AND OTHER ACTS OF A NATIONAL NATURE REMAINS WITHIN THE JURISDICTION OF THE

NATIONAL COURT AND THIS COURT IS COMPETENT ONLY TO INTERPRET AND ASSESS THE VALIDITY OF THE COMMUNITY ACTS REFERRED TO IN THE SAID ARTICLE .

HOWEVER, THE COURT IS COMPETENT TO INTERPRET COMMUNITY PROVISIONS IN ORDER TO ENABLE THE NATIONAL COURT TO APPLY THE RULES OF COMMUNITY LAW CORRECTLY TO THE NATIONAL PROVISION .

3 . A CHARGE WHICH SUBJECTS WITHOUT DISTINCTION INDUSTRIAL EXPORTS TO OTHER MEMBER STATES TO A FINANCIAL CHARGE BY PARTIALLY ABOLISHING THE EXONERATION FROM INTERNAL TAXATION AND WHICH IS CLOSELY INTEGRATED INTO THE NATIONAL SYSTEM OF TURNOVER TAX, COMES UNDER INTERNAL TAXATION WITHIN THE MEANING OF ARTICLE 95 ET SEQ . OF THE TREATY, AND CANNOT THEREFORE CONSTITUTE A CHARGE HAVING AN EFFECT EQUIVALENT TO A CUSTOMS DUTY WITHIN THE MEANING OF ARTICLE 12 OF THE TREATY .

Parties

IN CASE 27/74

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE FINANZGERICHT DUESSELDORF FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

DEMAG AG, DUISBURG

V

FINANZAMT DUISBURG-SUED

Subject of the case

ON THE INTERPRETATION OF ARTICLES 12, 96, 107 AND 109 OF THE EEC TREATY,

Grounds

1 BY ORDER DATED 8 MARCH 1974, FILED AT THE REGISTRY ON 19 APRIL 1974, THE FINANZGERICHT DUESSELDORF, PURSUANT TO ARTICLE 177 OF THE EEC TREATY, REFERRED TWO QUESTIONS ON THE INTERPRETATION OF ARTICLES 12 AND 107 TO 109 OF THE SAID TREATY .

THESE QUESTIONS ARE INTENDED TO ENABLE THE NATIONAL COURT TO ASSESS THE COMPATIBILITY WITH COMMUNITY LAW OF CERTAIN PROVISIONS OF A GERMAN LAW (GESETZ UEBER MASSNAHMEN ZUR AUSSENWIRTSCHAFTLICHEN ABSICHERUNG GEMAESS PAR . 4 DES GESETZES ZUR FOERDERUNG DER STABILITAET UND DES WACHSTUMS DER WIRTSCHAFT (ABSICHG) OF 29 NOVEMBER 1968 (BGB1 I, P . 1255).

2 UNDER THIS LAW, PASSED IN ORDER TO PUT A BRAKE ON EXPORTS AND TO PROMOTE IMPORTS IN ORDER TO REDUCE THE SURPLUS IN THE BALANCE OF PAYMENTS AND TO PREVENT INTERNAL DISEQUILIBRIUM, EXPORTS EFFECTED BETWEEN 29 NOVEMBER 1968 AND 31 MARCH 1970 WERE LIABLE TO A SPECIAL TURNOVER TAX, AT THE RATE OF 4 PER CENT IN GENERAL AND 2 PER CENT AS

REGARDS CERTAIN GOODS LISTED IN ANNEX I TO THE LAW ON TURNOVER TAX .

3 THE PLAINTIFF IN THE MAIN ACTION, HAVING BEEN REQUIRED TO PAY THIS SPECIAL TURNOVER TAX, BROUGHT AN ACTION BEFORE THE NATIONAL COURT CLAIMING THAT THE COLLECTION OF THIS TAX INFRINGED ARTICLE 12 OF THE TREATY .

ACCORDING TO THE FINANZAMT, THE DEFENDANT IN THE MAIN ACTION, THE SPECIAL TURNOVER TAX WAS PART OF THE NATIONAL SYSTEM OF TURNOVER TAX AND AS SUCH CAME NOT UNDER ARTICLE 12 BUT UNDER ARTICLE 95 ET SEQ . OF THE TREATY .

FIRST QUESTION

4 IT IS FIRST ASKED WHETHER THE PROHIBITION AGAINST THE INTRODUCTION OF CHARGES HAVING AN EFFECT EQUIVALENT TO CUSTOMS DUTIES UNDER ARTICLE 12 OF THE EEC TREATY INCLUDE THE INTRODUCTION OF A CHARGE WHICH

(A) SUBJECTS INDUSTRIAL EXPORTS TO OTHER MEMBER STATES OF THE COMMUNITY TO A FINANCIAL CHARGE OF 4 PER CENT, ALTERNATIVELY 2 PER CENT;

(B) WHICH IS DISGUISED BY THE NATIONAL LEGISLATOR AS A 'SONDERUMSATZSTEUER' (SPECIAL TURNOVER TAX);

(C) WHICH REFERS BACK TO THE CONCEPTS OF NATIONAL LAW ON TURNOVER TAX;

(D) WHICH HAS THE PURPOSE OF SUBJECTING EXPORTS TO A SPECIAL CHARGE NOT OTHERWISE EXISTING IN THIS FORM WITHIN THE TERRITORY OF THE EEC IN ORDER TO PREJUDICE THEIR ABILITY TO COMPETE WITH THE PRODUCTS OF THE OTHER MEMBER STATES, AND

(E) WHICH HAS AS A CONSEQUENCE THAT THE PRODUCTS EXPORTED ARE SUBJECT TO TAXATION BY BOTH THE COUNTRY OF ORIGIN AND THAT OF DESTINATION .

5 IT APPEARS FROM THE FILE THAT THE QUESTION SEEKS TO KNOW WHETHER A TAX SUCH AS IS MENTIONED COMES WITHIN THE CATEGORY OF CHARGES HAVING EQUIVALENT EFFECT REFERRED TO IN ARTICLE 12 OF THE TREATY OR WHETHER IT MAY BE REGARDED AS COMING UNDER INTERNAL TAXATION REFERRED TO IN ARTICLE 95 FROM THE FACT THAT IT IS INTEGRATED INTO THE NATIONAL SYSTEM OF TURNOVER TAX .

6 ARTICLES 12 AND 13 ON THE ONE HAND AND 95 ON THE OTHER CANNOT BE APPLIED JOINTLY IN THE SAME CASE, SINCE CHARGES HAVING AN EFFECT EQUIVALENT TO CUSTOMS DUTIES ON THE ONE HAND AND INTERNAL TAXATION ON THE OTHER ARE SUBJECT TO DIFFERENT SYSTEMS AND PROVISIONS .

FURTHER IT IS NOT ONLY TURNOVER TAX AND CHARGES OF A SIMILAR NATURE WHICH ARE TO BE REGARDED AS INTERNAL TAXATION BUT ALSO THE CHARGES AND OTHER MEASURES INTENDED TO COMPENSATE THE EFFECTS OF THESE CHARGES WITH REGARD TO IMPORT AND EXPORT OF GOODS .

7 WHEREAS ARTICLE 12 PROHIBITS MEMBER STATES FROM INTRODUCING BETWEEN THEMSELVES ANY NEW CUSTOMS DUTIES ON IMPORTS OR EXPORTS OR ANY CHARGES HAVING EQUIVALENT EFFECT, ARTICLE 95 IS LIMITED TO PROHIBITING DISCRIMINATION AGAINST THE PRODUCTS OF OTHER MEMBER STATES BY MEANS OF INTERNAL TAXATION .

THUS WHEREAS THE FIRST PROVISION AIMS AT ANY IMPEDIMENT TO INTRA-COMMUNITY TRADE, THE SECOND IS LIMITED TO IMPEDIMENTS OF A KIND WHICH FAVOUR NATIONAL PRODUCTS .

THIS DIFFERENCE IS CONFIRMED BY ARTICLE 96 WHICH PROVIDES THAT WHERE PRODUCTS ARE EXPORTED TO THE TERRITORY OF ANY MEMBER STATE, ANY REPAYMENT OF INTERNAL TAXATION SHALL NOT EXCEED THE INTERNAL TAXATION IMPOSED ON THEM, WHETHER DIRECTLY OR INDIRECTLY AND THUS LEAVES OPEN THE QUESTION WHETHER MEMBER STATES HAVE THE POWER TO REDUCE THE AMOUNT OF THE REPAYMENT, A MEASURE WHICH COULD, HOWEVER, AFFECT COMMUNITY TRADE .

8 IN THE PROCEDURE FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE TREATY, THE COURT CANNOT CLASSIFY A SPECIFIC NATIONAL TAX FOR THE PURPOSE OF APPLYING ARTICLES 12 AND 95, SINCE THE INTERPRETATION OF LEGISLATIVE AND OTHER ACTS OF A NATIONAL NATURE REMAINS WITHIN THE JURISDICTION OF THE NATIONAL COURT AND THIS COURT IS COMPETENT ONLY TO INTERPRET AND ASSESS THE VALIDITY OF THE COMMUNITY ACTS REFERRED TO IN THE SAID ARTICLE .

HOWEVER, THE COURT IS COMPETENT TO INTERPRET THE AFOREMENTIONED PROVISIONS OF THE TREATY IN ORDER TO ENABLE THE NATIONAL COURT TO APPLY THE RULE OF COMMUNITY LAW CORRECTLY TO THE TAX IN QUESTION .

9 IN THESE CIRCUMSTANCES IT IS RIGHT TO OBSERVE THAT A NATIONAL MEASURE DESCRIBED AS A 'SPECIAL TURNOVER TAX' AND WHICH 'REFERS BACK TO CONCEPTS OF NATIONAL LAW ON TURNOVER TAX' CAN SUBJECT COMMERCIAL EXPORTS TO OTHER MEMBER STATES TO A FINANCIAL CHARGE .

SUCH IS IN PARTICULAR THE CASE WHEN IT IS A QUESTION OF A GENERAL MEASURE WHICH APPLIES TO ALL EXPORTED PRODUCTS WITHOUT DISTINCTION AND WHEN PRACTICALLY THE SOLE EFFECT OF THE CHARGE IN QUESTION IS TO REDUCE THE EXONERATION OF THE EXPORTED PRODUCTS FROM TURNOVER TAX .

A CHARGE WHICH SUBJECTS WITHOUT DISTINCTION INDUSTRIAL EXPORTS TO OTHER MEMBER STATES TO A FINANCIAL CHARGE BY PARTIALLY ABOLISHING THE EXONERATION FROM INTERNAL TAXATION AND WHICH IS CLOSELY INTEGRATED INTO THE NATIONAL SYSTEM OF TURNOVER TAX, COMES UNDER INTERNAL TAXATION WITHIN THE MEANING OF ARTICLE 95 ET SEQ . OF THE TREATY, AND CANNOT THEREFORE CONSTITUTE A CHARGE HAVING AN EFFECT EQUIVALENT TO A CUSTOMS DUTY WITHIN THE MEANING OF ARTICLE 12 OF THE TREATY .

10 IN ADDITION, THE PLAINTIFF IN THE MAIN ACTION, OBSERVING THAT AS FROM 1 OCTOBER 1968 THE TURNOVER TAX IN THE FEDERAL REPUBLIC OF GERMANY HAD BEEN REPLACED BY A SYSTEM OF VALUE ADDED TAX, REFERRED TO ARTICLE 10 OF THE SECOND COUNCIL DIRECTIVE OF 11 APRIL 1967 ON THE HARMONIZATION OF LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES (OJ 71/67, P . 1303).

11 UNDER ARTICLE 10 (1) (A) EXEMPTION FROM VALUE ADDED TAX IS ACCORDED TO 'THE SUPPLY OF GOODS CONSIGNED OR TRANSPORTED TO PLACES OUTSIDE THE TERRITORY IN WHICH THE STATE CONCERNED APPLIES VALUE ADDED TAX '.

12 HOWEVER, THE PROVISION, BASED ON ARTICLES 99 AND 100 OF THE TREATY, IMPOSED OBLIGATIONS ON MEMBER STATES ONLY AS FROM 1 JANUARY 1972 (THIRD COUNCIL DIRECTIVE OF 9 NOVEMBER 1969, OJ L 320/69, P . 34).

13 SINCE THE GERMAN MEASURE IN QUESTION EXPIRED BEFORE THIS DATE, THE ARGUMENT IS NOT THEREFORE RELEVANT TO THE CASE .

SECOND QUESTION

14 THE SECOND QUESTION ASKS WHETHER THE 'POSSIBLE INFRINGEMENT' OF ARTICLE 12 OF THE TREATY COULD BE JUSTIFIED IN PARTICULAR UNDER ARTICLE 107 TO 109 OF THE TREATY, BY THE FACT THAT THE PURPOSE OF INTRODUCING THE CHARGE WAS TO AVOID A CURRENCY REVALUATION .

15 THIS QUESTION HAS BEEN ASKED IN THE EVENT OF THE FIRST QUESTION RECEIVING AN AFFIRMATIVE REPLY .

SINCE SUCH IS NOT THE CASE THE QUESTION DOES NOT ARISE .

Decision on costs

16 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES, AND THE FEDERAL REPUBLIC OF GERMANY, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE, AND AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, A STEP IN THE ACTION PENDING BEFORE A NATIONAL COURT, THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE FINANZGERICHT DUESSELDORF BY ORDER OF THAT COURT DATED 8 MARCH 1974, HEREBY RULES :

A CHARGE WHICH SUBJECTS WITHOUT DISTINCTION INDUSTRIAL EXPORTS TO OTHER MEMBER STATES TO A FINANCIAL CHARGE BY PARTIALLY ABOLISHING THE EXONERATION FROM INTERNAL TAXATION AND WHICH IS CLOSELY INTEGRATED INTO THE NATIONAL SYSTEM OF TURNOVER TAX, COMES UNDER INTERNAL TAXATION WITHIN THE MEANING OF ARTICLE 95 ET SEQ . OF THE TREATY, AND CANNOT THEREFORE CONSTITUTE A CHARGE HAVING AN EFFECT EQUIVALENT TO A CUSTOMS DUTY WITHIN THE MEANING OF ARTICLE 12 OF THE TREATY .