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Judgment of the Court of 12 June 1979. - Ketelhandel P. van Paassen BV v Staatssecretaris van Financiën / Inspecteur der Invoerrechten en Accijnzen ; Minister van Financiën v Denkavit Dienstbeteen BV. - References for a preliminary ruling: Hoge Raad - Netherlands. - A single entity for tax purposes. - Joined cases 181 and 229/78.

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Summary

Parties

Subject of the case

Grounds

Decision on costs

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Keywords

1 . TAX PROVISIONS - HARMONIZATION OF LEGISLATION - TURNOVER TAX - COMMON SYSTEM OF VALUE-ADDED TAX - SPECIAL NATIONAL SYSTEMS - CONDITIONS FOR ADOPTION - MANDATORY CONSULTATION WITH COMMISSION - ARRANGEMENTS THEREFOR

(COUNCIL DIRECTIVE NO 67/228 , ART . 16)

2 . TAX PROVISIONS - HARMONIZATION OF LEGISLATION - TURNOVER TAX - COMMON SYSTEM OF VALUE-ADDED TAX - PERSONS SUBJECT THERETO - NATIONAL SYSTEM UNDER WHICH UNDERTAKING IS A SINGLE ENTITY FOR TAX PURPOSES - CONDITIONS FOR ADOPTION

(COUNCIL DIRECTIVE NO 67/228 , ANNEX A , POINT 2)

Summary

1 . ARTICLE 16 OF THE SECOND COUNCIL DIRECTIVE (NO 67/228/EEC) ON THE HARMONIZATION OF LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES DOES NOT LAY DOWN ANY PARTICULAR PROCEDURE FROM THE POINT OF VIEW OF THE FORM OF THE REFERENCE TO THE COMMISSION , BUT IT DOES REQUIRE THAT SUCH REFERENCE SHOULD BE MADE ' ' IN GOOD TIME ' ' , THAT IS TO SAY THAT THE COMMISSION SHOULD BE GIVEN A REASONABLE PERIOD OF TIME TO EXAMINE THE

DOCUMENTS SENT TO IT , THAT IT SHOULD KNOW THE PURPOSE FOR WHICH THE MEMBER STATE HAS SENT THEM TO IT AND THAT THEY SHOULD CONTAIN COMPLETE INFORMATION ENABLING THE COMMISSION - IN ACCORDANCE WITH ARTICLE 101 OF THE TREATY - TO FIND THAT A DIFFERENCE BETWEEN THE PROVISIONS LAID DOWN BY LAW , REGULATION OR ADMINISTRATIVE ACTION IN MEMBER STATES IS DISTORTING THE CONDITIONS OF COMPETITION IN THE COMMON MARKET AND THAT THE RESULTANT DISTORTION NEEDS TO BE ELIMINATED .

2 . A MEMBER STATE HAS ADOPTED A SYSTEM SUCH AS THAT REFERRED TO IN THE FOURTH PARAGRAPH OF POINT 2 ' ' REGARDING ARTICLE 4 ' ' OF ANNEX A TO DIRECTIVE NO 67/228/EEC IF IT HAS LAID DOWN IN ITS LEGISLATION THAT TURNOVER TAX SHALL BE LEVIED INTER ALIA ON THE SUPPLY OF GOODS AND SERVICES BY UNDERTAKINGS , AFTER ENTERING INTO THE CONSULTATIONS TO WHICH REFERENCE IS MADE IN ARTICLE 16 OF THE DIRECTIVE , EVEN THOUGH IT HAS NOT DEFINED THE CONCEPT OF AN UNDERTAKING OTHERWISE THAN AS ' ' ANY PERSON WHO INDEPENDENTLY CARRIES ON BUSINESS ' ' .

Parties

IN JOINED CASES 181 AND 229/78

REFERENCES TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE HOGE RAAD (SUPREME COURT) OF THE NETHERLANDS FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT (IN CASE 181/78) BETWEEN

KETELHANDEL P . VAN PAASSEN B.V . , WATERINGEN (NETHERLANDS)

AND

STAATSSECRETARIS VAN FINANCIEN (SECRETARY OF STATE FOR FINANCE) / INSPECTEUR DER INVOERRECHTEN EN ACCIJNZEN (INSPECTOR OF CUSTOMS AND EXCISE), THE HAGUE ,

AND (IN CASE 229/78) BETWEEN

MINISTER VAN FINANCIEN (MINISTER FOR FINANCE), THE HAGUE ,

AND

DENKAVIT DIENSTBETOON B.V . , VOORTHUIZEN (NETHERLANDS),

Subject of the case

ON THE INTERPRETATION 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) IN PARTICULAR ARTICLE 4 THEREOF AND POINT 2 ' ' REGARDING ARTICLE 4 ' ' OF ANNEX A THERETO ,

Grounds

1 BY JUDGMENTS DATED 6 SEPTEMBER AND 11 OCTOBER 1978 , WHICH WERE LODGED AT THE COURT REGISTRY ON 11 SEPTEMBER 1978 AND 13 OCTOBER 1978 , THE HOGE RAAD OF THE NETHERLANDS REFERRED SEVERAL QUESTIONS 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) IN PARTICULAR ARTICLE 4 THEREOF AND POINT 2 ' ' REGARDING ARTICLE 4 ' ' OF ANNEX 4 THERETO .

2 THESE QUESTIONS ARISE IN TWO CASES BETWEEN A COMPANY AND THE NETHERLANDS MINISTRY FOR FINANCE , WHICH IMPOSED AN ADDITIONAL ASSESSMENT TO TURNOVER TAX ON EACH OF THE TWO COMPANIES CONCERNED ON THE GROUNDS THAT DID NOT HAVE THE CAPACITY OF AN ' ' UNDERTAKING ' ' , BECAUSE ALTHOUGH INDEPENDENT FROM THE LEGAL POINT OF VIEW THEY WERE BOTH LINKED TO THIRD COMPANIES BY ECONOMIC , FINANCIAL AND ORGANIZATIONAL RELATIONSHIPS AND THEREFORE CONSTITUTED WITH THOSE COMPANIES A ' ' SINGLE ENTITY FOR TAX PURPOSES ' ' AND CONSEQUENTLY COULD NOT BRING VALUE-ADDED TAX INTO THEIR INTERNAL TRANSACTIONS WITH THOSE THIRD COMPANIES , AND THAT THE COMPANIES HAD WRONGFULLY RECOVERED INPUT TAX .

3 IN ORDER TO RESOLVE THIS ISSUE , THE NATIONAL COURT SUBMITTED FOUR IDENTICAL QUESTIONS IN EACH OF THE JOINED CASES . THE FIRST AND THIRD OF THEM ARE VERY CLOSELY CONNECTED , AND SHOULD THEREFORE BE DEALT WITH TOGETHER .

4 IN ITS FIRST QUESTION , THE NATIONAL COURT ASKS WHETHER ' ' A MEMBER STATE HAS ADOPTED A SYSTEM SUCH AS THAT REFERRED TO IN POINT 2 ' ' REGARDING ARTICLE 4 ' OF ANNEX A TO THE SECOND DIRECTIVE , IF IT HAS LAID DOWN BY A LAW THAT TURNOVER TAX SHALL BE LEVIED INTER ALIA ON THE SUPPLY OF GOODS AND SERVICES BY UNDERTAKINGS AND IF THE CONCEPT OF AN UNDERTAKING IS NOT SUBSEQUENTLY DEFINED IN THAT LAW MORE CLOSELY THAN AS ' ANY PERSON WHO INDEPENDENTLY CARRIES ON BUSINESS ' , WHILE FROM THE PREPARATORY STAGES OF THE LAW PRIOR TO ITS COMING INTO FORCE IT IS CLEAR THAT THE CONCEPT OF AN UNDERTAKING CAN ALSO COVER A COMBINATION OF PERSONS WHO , ALTHOUGH INDEPENDENT FROM THE LEGAL POINT OF VIEW , ARE , HOWEVER , ORGANICALLY LINKED TO ONE ANOTHER BY ECONOMIC , FINANCIAL AND ORGANIZATIONAL RELATIONSHIPS ' ' , AND IN THE THIRD , IF QUESTION 1 IS ANSWERED IN THE AFFIRMATIVE , IT ASKS WHETHER ' ' THE NETHERLANDS ENTERED INTO THE CONSULTATIONS TO WHICH REFERENCE IS MADE IN POINT 2 ' ' REGARDING ARTICLE 4 ' OF ANNEX A TO THE SECOND DIRECTIVE ' ' . THIS QUESTION IS IN EFFECT AN EXTENSION OF QUESTION 1 , BECAUSE IF QUESTION 3 IS ANSWERED IN THE NEGATIVE THIS WOULD THREATEN TO DEPRIVE AN AFFIRMATIVE ANSWER TO QUESTION 1 OF ANY EFFECT , SINCE THE PROVISION REFERRED TO IN QUESTION 3 REQUIRES A MEMBER STATE TO CONSULT THE COMMISSION WHEN IT IS CONTEMPLATING THE ADOPTION OF THE SYSTEM OF A SINGLE ENTITY FOR TAX PURPOSES .

5 IN ORDER TO ANSWER THESE QUESTIONS , IT IS FIRST NECESSARY TO STATE THAT ARTICLE 2 OF THE SECOND DIRECTIVE MAKES ' ' THE SUPPLY OF GOODS AND THE

PROVISION OF SERVICES WITHIN THE TERRITORY OF THE COUNTRY BY A TAXABLE PERSON AGAINST PAYMENT ' ' SUBJECT TO VALUE-ADDED TAX - AS FROM 1 JANUARY 1972 , THE DATE ON WHICH THE MEMBER STATES WERE TO IMPLEMENT THE PROVISIONS OF THE SAID DIRECTIVE - AND THAT ARTICLE 4 DEFINES A ' ' TAXABLE PERSON ' ' AS ' ' ANY PERSON WHO INDEPENDENTLY AND HABITUALLY ENGAGES IN TRANSACTIONS PERTAINING TO THE ACTIVITIES OF PRODUCERS , TRADERS OR PERSONS PROVIDING SERVICES , WHETHER OR NOT FOR GAIN ' ' .

6 THE EXPRESSION ' ' INDEPENDENTLY ' ' IS DEFINED IN THE FOURTH PARAGRAPH OF POINT 2 ' ' REGARDING ARTICLE 4 ' ' OF ANNEX A - AN INTEGRAL PART OF THE SECOND DIRECTIVE BY VIRTUE OF ARTICLE 20 THEREOF - AS MEANING THAT IT ' ' MAKES IT POSSIBLE FOR EACH MEMBER STATE NOT TO CONSIDER AS SEPARATE TAXABLE PERSONS , BUT AS ONE SINGLE TAXABLE PERSON , PERSONS WHO , ALTHOUGH INDEPENDENT FROM THE LEGAL POINT OF VIEW , ARE , HOWEVER , ORGANICALLY LINKED TO ONE ANOTHER BY ECONOMIC , FINANCIAL OR ORGANIZATIONAL RELATIONSHIPS ' ' .

7 IT IS ACCEPTED BY THE NATIONAL COURT THAT THE SYSTEM THUS DESCRIBED , KNOWN AS THE ' ' SINGLE ENTITY FOR TAX PURPOSES ' ' , TRADITIONALLY FORMED PART OF THE INTERNAL LEGAL ORDER OF THE NETHERLANDS BEFORE THE INTRODUCTION OF THE VAT SYSTEM AND THAT ' ' FROM THE PREPARATORY STAGES OF THE TURNOVER TAX LAW 1968 BEFORE IT CAME INTO FORCE IT IS CLEAR THAT THE LEGISLATURE WISHED TO GIVE THE CONCEPT ' UNDERTAKING ' AS DESCRIBED IN ARTICLE 7 (1) OF THE LAW NO OTHER CONTENT ' ' (JUDGMENT OF THE HOGE RAAD OF 6 SEPTEMBER 1978 IN THE VAN PAASSEN CASE) .

8 ACCORDING TO POINT 2 ' ' REGARDING ARTICLE 4 ' ' OF ANNEX A THAT SYSTEM COULD BE EXPRESSLY ALLOWED , IN NATIONAL LEGISLATION INTRODUCING THE PROVISIONS OF THE DIRECTIVE RELATING TO VAT INTO ITS INTERNAL LEGAL ORDER , PROVIDED THAT THE MEMBER STATE ENTERED INTO THE CONSULTATIONS MENTIONED IN ARTICLE 16 OF THE SECOND DIRECTIVE .

9 THEREFORE THE QUESTION IS WHETHER THE MEASURES ADOPTED BY THE NETHERLANDS GOVERNMENT TO INTRODUCE THE PROVISIONS OF THE DIRECTIVES ON VAT INTO ITS INTERNAL LEGAL ORDER WERE BROUGHT TO THE ATTENTION ON THE COMMISSION IN ACCORDANCE WITH THE REQUIREMENTS OF ARTICLE 16 .

10 ARTICLE 16 DOES NOT LAY DOWN ANY PARTICULAR PROCEDURE FROM THE POINT OF VIEW OF THE FORM OF THE REFERENCE TO THE COMMISSION , BUT IT DOES REQUIRE THAT SUCH REFERENCE SHOULD BE MADE ' ' IN GOOD TIME ' ' , THAT IS TO SAY THAT THE COMMISSION SHOULD BE GIVEN A REASONABLE PERIOD OF TIME TO EXAMINE THE DOCUMENTS SENT TO IT , THAT IT SHOULD KNOW THE PURPOSE FOR WHICH THE MEMBER STATE HAS SENT THEM TO IT AND THAT THEY SHOULD CONTAIN COMPLETE INFORMATION ENABLING THE COMMISSION - IN ACCORDANCE WITH ARTICLE 101 OF THE TREATY - TO FIND THAT A DIFFERENCE BETWEEN THE PROVISIONS LAID DOWN BY LAW , REGULATION OR ADMINISTRATIVE ACTION IN MEMBER STATES IS DISTORTING THE CONDITIONS OF COMPETITION IN THE COMMON MARKET AND THAT THE RESULTANT DISTORTION NEEDS TO BE ELIMINATED .

11 THE CORRESPONDENCE SENT TO THE COMMISSION BY THE NETHERLANDS GOVERNMENT CONCERNING THE PREPARATORY STAGES AND PUBLICATION OF THE NETHERLANDS TURNOVER TAX LAW 1968 COMPRISES THREE LETTERS :

(1) A LETTER OF 3 NOVEMBER 1967 TRANSMITTING ' ' THE DRAFT LAW , THE STATEMENT OF THE GROUNDS ON WHICH IT WAS BASED AND ANNEXES , IN

CONNEXION WITH THE PROVISIONS OF THE COUNCIL DIRECTIVES OF 11 APRIL 1967 '' ,

(2) A LETTER OF 24 APRIL 1968 TRANSMITTING AMENDMENTS TO THE DRAFT LAW , STATING THAT THE COMMUNICATION IS '' IN CONNEXION WITH THE PROVISIONS OF THE COUNCIL DIRECTIVES OF 11 APRIL 1967 '' , AND

(3) A LETTER OF 16 JULY 1968 SENDING THE COMMISSION A COPY OF THE '' STAATSBLED 329 '' (OFFICIAL COLLECTION OF LAWS , REGULATIONS AND STATUTORY INSTRUMENTS , NO 329) , IN WHICH THE LAW OF 28 JUNE 1968 WAS PUBLISHED , AND EXPRESSLY STATING THAT , '' THIS COMMUNICATION IS INTENDED TO SATISFY THE PROVISIONS OF THE COUNCIL DIRECTIVES WHICH PROVIDE FOR A CONSULTATION PROCEDURE IN A CERTAIN NUMBER OF CASES IN WHICH THE MEMBER STATE CONCERNED MUST REFER THE MATTER TO THE COMMISSION IN GOOD TIME '' ; THE LETTER LISTED A CERTAIN NUMBER OF PARTICULAR POINTS IN RESPECT OF WHICH CONSULTATIONS WERE REQUESTED , BUT THE QUESTION RAISED IN THIS CASE - EXEMPTION FROM VAT UNDER THE SYSTEM OF THE SINGLE ENTITY FOR TAX PURPOSES - DID NOT APPEAR IN THAT LIST .

HOWEVER IT MUST BE NOTED THAT :

(1) ALTHOUGH THE EXPRESSION '' CONSULTATIONS '' WAS USED ONLY IN THE LAST LETTER , THE SOLE PURPOSE OF ALL THIS CORRESPONDENCE WAS TO SATISFY THE OBLIGATION TO ENTER INTO CONSULTATIONS , SINCE NO PROVISION IN THE DIRECTIVES REQUIRED ANY TRANSMISSION OF NATIONAL TEXTS TO THE COMMISSION EXCEPT IN RELATION TO REQUESTS FOR CONSULTATIONS .

(2) THE COMMISSION RECEIVED COMPLETE INFORMATION CONCERNING THE NETHERLANDS LEGISLATION ENACTED IN THE FIELD OF VAT SINCE IT WAS SENT THE DRAFT LAW , THE AMENDMENTS THERETO , THE DEFINITIVE TEXT AND THE STATEMENT OF THE REASONS ON WHICH IT WAS BASED , WHICH WAS VERY DETAILED INTER ALIA AS TO THE CONCEPT OF AN '' UNDERTAKING '' WHICH COVERS THAT OF A SINGLE ENTITY FOR TAX PURPOSES (ANNEXES TO THE REPORTS OF THE SECOND CHAMBER , 1967/1968-9234 , NO 3 , P . 31 , RIGHT-HAND COLUMN , PENULTIMATE PARAGRAPH) .

(3) THE MATTER WAS REFERRED TO THE COMMISSION IN GOOD TIME , SINCE THE LAST REFERENCE WAS MADE IN JULY 1968 WHILST THE DIRECTIVE DID NOT HAVE TO BE IMPLEMENTED UNTIL 1 JANUARY 1972 , AND THE COMMISSION THEREFORE HAD MORE THAN THREE YEARS TO MAKE ANY NECESSARY OBSERVATIONS TO THE NETHERLANDS GOVERNMENT .

12 IT MUST THEREFORE BE FOUND THAT , HAVING REGARD TO THE TERMS OF ARTICLE 16 OF AND POINT 2 '' REGARDING ARTICLE 4 '' OF ANNEX A TO THE SECOND DIRECTIVE , THE GOVERNMENT OF THE NETHERLANDS FULFILLED THE OBLIGATIONS IMPOSED BY THE DIRECTIVE IN ORDER TO RETAIN THE SYSTEM OF THE SINGLE ENTITY FOR TAX PURPOSES IN FORCE IN ITS LEGISLATION .

13 THEREFORE THE ANSWER TO QUESTIONS 1 AND 3 SHOULD BE THAT A MEMBER STATE HAS ADOPTED A SYSTEM SUCH AS THAT REFERRED TO IN THE FOURTH PARAGRAPH OF POINT 2 '' REGARDING ARTICLE 4 '' OF ANNEX A TO THE SECOND DIRECTIVE IF IT HAS LAID DOWN IN ITS LEGISLATION THAT TURNOVER TAX SHALL BE LEVIED INTER ALIA ON THE SUPPLY OF GOODS AND SERVICES BY UNDERTAKINGS , AFTER ENTERING INTO THE CONSULTATIONS TO WHICH REFERENCE IS MADE IN ARTICLE 16 OF THE DIRECTIVE , EVEN THOUGH IT HAS NOT DEFINED THE CONCEPT OF AN UNDERTAKING OTHERWISE THAN AS '' ANY PERSON WHO INDEPENDENTLY CARRIES ON BUSINESS '' .

14 QUESTIONS 1 AND 3 OF THE NATIONAL COURT HAVING BEEN ANSWERED TOGETHER IN THE AFFIRMATIVE , THERE IS NO NEED TO ANSWER QUESTIONS 2 AND 4 .

Decision on costs

COSTS

15 THE COSTS INCURRED BY THE GOVERNMENTS OF THE NETHERLANDS AND THE FEDERAL REPUBLIC OF GERMANY AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . MOREOVER , AS THESE PROCEEDINGS ARE IN THE NATURE OF A STEP IN THE ACTIONS PENDING BEFORE THE HOGE RAAD , 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 HOGE RAAD BY JUDGMENTS DATED 6 SEPTEMBER AND 11 OCTOBER 1978 , HEREBY RULES :

A MEMBER STATE HAS ADOPTED A SYSTEM SUCH AS THAT REFERRED TO IN THE FOURTH PARAGRAPH OF POINT 2 '' REGARDING ARTICLE 4 '' OF ANNEX A TO THE SECOND DIRECTIVE IF IT HAS LAID DOWN IN ITS LEGISLATION THAT TURNOVER TAX SHALL BE LEVIED INTER ALIA ON THE SUPPLY OF GOODS AND SERVICES BY UNDERTAKINGS , AFTER ENTERING INTO THE CONSULTATIONS TO WHICH REFERENCE IS MADE IN ARTICLE 16 OF THE DIRECTIVE , EVEN THOUGH IT HAS NOT DEFINED THE CONCEPT OF AN UNDERTAKING OTHERWISE THAN AS '' ANY PERSON WHO INDEPENDENTLY CARRIES ON BUSINESS '' .