

# 61981J0089

Judgment of the Court of 1 April 1982. - Staatssecretaris van Financiën v Hong-Kong Trade Development Council. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Refund of value added tax. - Case 89/81.

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## Keywords

*TAX PROVISIONS - HARMONIZATION OF LEGISLATION - TURNOVER TAXES - COMMON SYSTEM OF VALUE ADDED TAX - TAXABLE PERSON - CONCEPT - PERSON PROVIDING SERVICES FREE OF CHARGE - EXCLUDED*

*( COUNCIL DIRECTIVE 67/228 , ART . 4 )*

## Summary

*A PERSON WHO HABITUALLY PROVIDES SERVICES FOR TRADERS , FREE OF CHARGE IN ALL CASES , CANNOT BE REGARDED AS A TAXABLE PERSON WITHIN THE MEANING OF ARTICLE 4 OF THE SECOND DIRECTIVE ON THE HARMONIZATION OF LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES .*

## Parties

*IN CASE 89/81*

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

STAATSSECRETARIES VAN FINANCIEN ( SECRETARY OF STATE FOR FINANCE ) OF THE NETHERLANDS

AND

HONG KONG TRADE DEVELOPMENT COUNCIL , AMSTERDAM ,

## **Subject of the case**

ON THE INTERPRETATION OF ARTICLE 4 AND THE FIRST SUB-PARAGRAPH OF ARTICLE 11 ( 2 ) OF THE SECOND COUNCIL DIRECTIVE , 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 ),

## **Grounds**

1 BY A JUDGMENT OF 8 APRIL 1981 , WHICH WAS RECEIVED AT THE COURT ON 14 APRIL 1981 , THE HOGE RAAD ( SUPREME COURT ) OF THE NETHERLANDS SUBMITTED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY TWO QUESTIONS ON THE INTERPRETATION OF ARTICLES 4 AND 11 OF THE SECOND COUNCIL DIRECTIVE , 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 ).

2 THE QUESTIONS WERE RAISED IN PROCEEDINGS BETWEEN THE STAATSSECRETARIS VAN FINANCIEN ( SECRETARY OF STATE FOR FINANCE ) OF THE NETHERLANDS AND THE HONG KONG TRADE DEVELOPEMENT COUNCIL ( HEREINAFTER REFERRED TO AS THE '' TRADE COUNCIL '' ), AN ORGANIZATION FOUNDED IN HONG KONG IN 1966 WITH THE OBJECT OF PROMOTING TRADE BETWEEN HONG KONG AND OTHER COUNTRIES , WHICH OPENED AN OFFICE IN AMSTERDAM IN 1972 . ITS ACTIVITIES IN THE NETHERLANDS CONSIST IN PROVIDING FREE OF CHARGE FOR TRADERS INFORMATION AND ADVICE ABOUT HONG KONG AND THE OPPORTUNITIES FOR TRADE WITH HONG KONG AND ALSO IN PROVIDING SIMILAR INFORMATION CONCERNING THE EUROPEAN MARKET FOR HONG KONG TRADERS . THE INCOME OF THE AMSTERDAM OFFICE IS PROVIDED IN THE FORM OF A FIXED ANNUAL GRANT FROM THE HONG KONG GOVERNMENT AND FROM THE PROCEEDS OF A CHARGE AMOUNTING TO 0.5% OF THE VALUE OF PRODUCTS IMPORTED INTO AND EXPORTED FROM HONG KONG .

3 THE DISPUTE BETWEEN THE NETHERLANDS TAX AUTHORITIES AND THE TRADE COUNCIL AROSE FROM THE FACT THAT THE NETHERLANDS AUTHORITIES , HAVING UNTIL 1978 , '' SUBJECT TO AMENDMENT UPON SUBSEQUENT INVESTIGATION '' , REFUNDED TO THE TRADE COUNCIL THE AMOUNT OF VALUE ADDED TAX INVOICED BY UNDERTAKINGS WHICH HAD PROVIDED IT WITH SERVICES OR SUPPLIED IT WITH GOODS , CEASED TO REGARD IT AS A TAXABLE PERSON AND ACCORDINGLY RECLAIMED THE ABOVE-MENTIONED AMOUNT WHICH , ACCORDING TO THE TAX AUTHORITIES , HAD BEEN IMPROPERLY REFUNDED . THE MATTER WAS BROUGHT BEFORE THE HOGE RAAD , WHICH REFERRED THE FOLLOWING TWO QUESTIONS TO THE COURT :

'' 1 . CAN A PERSON WHO HABITUALLY PROVIDES SERVICES FOR TRADERS BE REGARDED AS A TAXABLE PERSON WITHIN THE MEANING OF ARTICLE 4 OF THE SECOND DIRECTIVE ( OF THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY OF 11 APRIL 1967 ON THE HARMONIZATION OF LEGISLATION OF MEMBER STATES CONCERNING TURNOVER TAXES ) IN THE EVENT OF THOSE SERVICES BEING PROVIDED FREE OF CHARGE?

2. IF QUESTION 1 IS ANSWERED IN THE AFFIRMATIVE : DOES THE FIRST SENTENCE OF ARTICLE 11 ( 2 ) OF THE SECOND DIRECTIVE PREVENT THE DEDUCTION OF TURNOVER TAX ON GOODS AND SERVICES USED FOR THE PURPOSE OF PROVIDING SERVICES AS AFORESAID?

''

4 ARTICLE 4 , WHICH IS REFERRED TO IN THE FIRST QUESTION , PROVIDES :

''' TAXABLE PERSON ' MEANS 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 . ''

5 THE NATIONAL COURT PLACES EMPHASIS ON THE FACT THAT , IN THE CASE BEFORE IT , THE TRADE COUNCIL ' S SERVICES ARE IN ALL CASES PROVIDED FREE OF CHARGE , BECAUSE IN ARTICLE 4 , WHICH DEFINES A TAXABLE PERSON , THE '' TRANSACTIONS '' PERTAINING TO THE ACTIVITIES OF PRODUCERS , TRADERS OR PERSONS PROVIDING SERVICES ARE NOT DESCRIBED , WHEREAS ARTICLE 2 OF THE SAME DIRECTIVE STATES THAT ONLY SERVICES PROVIDED BY A TAXABLE PERSON AGAINST PAYMENT ARE TO BE SUBJECT TO VALUE ADDED TAX . CONSIDERATION OF THOSE TWO ARTICLES , A LITERAL ANALYSIS OF WHICH IS NOT PRIMA FACIE AN APPROPRIATE WAY TO RESOLVE THE ISSUE AS TO WHETHER OR NOT AN ORGANIZATION WHICH HABITUALLY PROVIDES SERVICES FREE OF CHARGE MAY BE REGARDED AS A TAXABLE PERSON , INDICATES THAT IT WOULD BE ADVISABLE TO IDENTIFY THE RELEVANT FEATURES OF THE COMMON SYSTEM OF VALUE ADDED TAX IN THE LIGHT OF ITS PURPOSE .

6 THAT PURPOSE , WHICH THE SECOND DIRECTIVE MENTIONS IN ITS PREAMBLE WHILST AT THE SAME TIME REFERRING TO THE FIRST DIRECTIVE , 67/227 , OF THE SAME DATE ( OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1967 , P . 14 ) , IS EVIDENT FROM THE PREAMBLE TO THE LATTER DIRECTIVE , WHICH REFERS TO THE NEED TO ACHIEVE SUCH HARMONIZATION OF LEGISLATION CONCERNING TURNOVER TAXES AS WILL ELIMINATE FACTORS WHICH MAY DISTORT CONDITIONS OF COMPETITION AND THEREFORE TO SECURE NEUTRALITY IN COMPETITION , IN THE SENSE THAT WITHIN EACH COUNTRY SIMILAR GOODS SHOULD BEAR THE SAME TAX BURDEN , WHATEVER THE LENGTH OF THE PRODUCTION AND DISTRIBUTION CHAIN .

7 IN ORDER TO ATTAIN THAT OBJECTIVE , THE FIRST DIRECTIVE PROVIDES IN THE FIRST PARAGRAPH OF ARTICLE 2 THAT THE PRINCIPLE OF THE COMMON SYSTEM OF VALUE ADDED TAX INVOLVES THE APPLICATION TO GOODS AND SERVICES OF A GENERAL TAX ON CONSUMPTION EXACTLY PROPORTIONAL TO THE PRICE OF GOODS AND SERVICES , WHATEVER THE NUMBER OF TRANSACTIONS WHICH TAKE PLACE IN THE PRODUCTION AND DISTRIBUTION PROCESS BEFORE THE STAGE AT WHICH TAX IS CHARGED .

8 THE WAY IN WHICH THAT PRINCIPLE , WHICH IS BASED ON THE PRICE OF THE GOODS AND SERVICES , IS TO BE APPLIED IS INDICATED IN THE SECOND PARAGRAPH OF THE SAME ARTICLE , AS FOLLOWS :

'' ON EACH TRANSACTION , VALUE ADDED TAX , CALCULATED ON THE PRICE OF THE GOODS OR SERVICES AT THE RATE APPLICABLE TO SUCH GOODS OR SERVICES , SHALL BE CHARGEABLE AFTER DEDUCTION OF THE AMOUNT OF VALUE ADDED TAX BORNE DIRECTLY BY THE VARIOUS COST COMPONENTS . ''

IN ADDITION , THE THIRD PARAGRAPH PROVIDES THAT THE COMMON SYSTEM OF VALUE ADDED TAX IS TO BE APPLIED UP TO AND INCLUDING THE RETAIL TRADE STAGE .

9 UNDER THAT SYSTEM IT IS CLEAR THAT TAX IS NO LONGER DEDUCTIBLE WHEN THE CHAIN OF TRANSACTIONS HAS COME TO AN END . IT IS THEN CHARGED TO THE FINAL CONSUMER WHO CANNOT PASS ON THE AMOUNT OF THE TAX UNLESS THERE IS A FURTHER TRANSACTION IN WHICH A PRICE IS PAID .

10 WHERE A PERSON ' S ACTIVITY CONSISTS EXCLUSIVELY IN PROVIDING SERVICES FOR NO DIRECT CONSIDERATION , THERE IS NO BASIS OF ASSESSMENT AND THE FREE SERVICES IN QUESTION ARE THEREFORE NOT SUBJECT TO VALUE ADDED TAX . IN SUCH CIRCUMSTANCES THE PERSON PROVIDING SERVICES MUST BE ASSIMILATED TO A FINAL CONSUMER BECAUSE HE IS AT THE FINAL STAGE OF THE PRODUCTION AND DISTRIBUTION CHAIN . IN FACT , THE LINK BETWEEN HIM AND THE RECIPIENT OF THE GOODS OR SERVICE DOES NOT FALL WITHIN ANY CATEGORY OF CONTRACT LIKELY TO BE THE SUBJECT OF TAX HARMONIZATION GIVING RISE TO NEUTRALITY IN COMPETITION ; IN THOSE CIRCUMSTANCES , SERVICES PROVIDED FREE OF CHARGE ARE DIFFERENT IN CHARACTER FROM TAXABLE TRANSACTIONS WHICH , WITHIN THE FRAMEWORK OF THE VALUE ADDED TAX SYSTEM , PRESUPPOSE THE STIPULATION OF A PRICE OR CONSIDERATION .

11 THAT DIFFERENCE IS APPARENT FROM THE CONTEXT OF THE PROVISION OF WHICH AN INTERPRETATION IS REQUESTED . THE REQUIREMENT THAT TAXABLE TRANSACTIONS MUST BE EFFECTED AGAINST PAYMENT IS CONFIRMED BY THE FACT THAT THE ECONOMIC ACTIVITIES OF TAXABLE PERSONS , WITHIN THE MEANING OF ANNEX A , PARAGRAPH 2 , FIRST SUBPARAGRAPH , ARE NECESSARILY ACTIVITIES WHICH ARE CARRIED ON WITH THE OBJECT OF OBTAINING PAYMENT OF

CONSIDERATION OR WHICH ARE LIKELY TO BE REWARDED BY THE PAYMENT OF CONSIDERATION , BECAUSE IF THEY ARE FREE OF CHARGE IN ALL CASES THEY DO NOT FALL WITHIN THE SYSTEM OF VALUE ADDED TAX , SINCE THEY CANNOT , ACCORDING TO ARTICLE 8 , CONSTITUTE A BASIS OF ASSESSMENT . THE NEED FOR PAYMENT IS ALSO CLEAR FROM ARTICLE 12 OF THE SAME DIRECTIVE WHICH IMPOSES ON EVERY TAXABLE PERSON THE OBLIGATION TO ISSUE AN INVOICE IN RESPECT OF GOODS SUPPLIED AND SERVICES PROVIDED BY HIM TO ANOTHER TAXABLE PERSON , TO KEEP ACCOUNTS TO MAKE POSSIBLE INSPECTION BY THE TAX AUTHORITIES AND TO LODGE A DECLARATION EACH MONTH CONTAINING ALL THE INFORMATION REQUIRED FOR CALCULATION OF THE TAX .

12 THE CONTEXT OF ARTICLE 4 OF THE SECOND DIRECTIVE , THE INTERPRETATION OF WHICH IS INVOLVED IN THIS CASE , AND THE COHESION OF THE SYSTEM CLEARLY PROVE THEREFORE THAT A PERSON PROVIDING SERVICES FREE OF CHARGE IN ALL CASES CANNOT BE REGARDED AS A TAXABLE PERSON WITHIN THE MEANING OF THAT ARTICLE .

13 CONSEQUENTLY , THE REPLY WHICH SHOULD BE GIVEN TO THE FIRST QUESTION IS THAT A PERSON WHO HABITUALLY PROVIDES SERVICES FOR TRADERS , IN ALL CASES FREE OF CHARGE , CANNOT BE REGARDED AS A TAXABLE PERSON WITHIN THE MEANING OF ARTICLE 4 OF THE SECOND DIRECTIVE .

14 SINCE THE FIRST QUESTION SUBMITTED BY THE HOGE RAAD HAS BEEN ANSWERED IN THE NEGATIVE , THERE IS NO NEED TO CONSIDER THE SECOND QUESTION .

## **Decision on costs**

### **COSTS**

15 THE COSTS INCURRED BY THE NETHERLANDS GOVERNMENT AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE ; AS THESE PROCEEDINGS ARE , IN 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 REPLY TO THE QUESTIONS SUBMITTED TO IT BY THE HOGE RAAD BY ORDER OF 8 APRIL 1981 , HEREBY RULES :

A PERSON WHO HABITUALLY PROVIDES SERVICES FOR TRADERS , IN ALL CASES FREE OF CHARGE , CANNOT BE REGARDED AS A TAXABLE PERSON WITHIN THE MEANING OF ARTICLE 4 OF THE SECOND DIRECTIVE .