

# 61986J0269

Judgment of the Court (Sixth Chamber) of 5 July 1988. - W. J. R. Mol v Inspecteur der Invoerrechten en Accijnzen. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - VAT on the illegal supply of narcotic drugs within the territory of a Member State. - Case 269/86.

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## Keywords

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*Tax provisions - Harmonization of laws - Turnover tax - Common system of value-added tax - Tax on the supply of goods within the territory of a Member State - Application to unlawful traffic in narcotic drugs - Not permissible - Criminal sanctions for offences - Powers of the Member States - Illegal supplies of amphetamines - Not liable to value-added tax*

*( Council Directive 77/388, Art . 2 )*

## Summary

*The unlawful supply of narcotic drugs on the domestic market of a Member State, which, like the unlawful importation of such drugs into the Community, can give rise only to penalties under the criminal law, is alien to the provisions of the Sixth Directive on the harmonization of the laws of the*

*Member States relating to turnover taxes . Consequently, Article 2 of the Sixth Directive must be interpreted as meaning that no liability to turnover tax arises upon the unlawful supply of narcotic drugs effected for consideration within the territory of a Member State in so far as the products in question are not confined within economic channels strictly controlled by the competent authorities for use for medical and scientific purposes .*

*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 of a pecuniary nature .*

*The unlawful supply of amphetamines is also not liable to value-added tax in so far as the products in question are not confined within economic channels strictly controlled by the competent authorities .*

## **Parties**

*In Case 269/86*

*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*

*W . J . R . Mol, Haule,*

*and*

*Inspecteur der Invoerrechten en Accijnzen, Leeuwarden,*

*on the interpretation of Article 2 of the Sixth Council Directive ( 77/388/EEC ) 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 ),*

*THE COURT ( Sixth Chamber )*

*composed of O . Due, President of the Chamber, T . Koopmans, K . Bahlmann, C . Kakouris and T . F . O' Higgins, Judges,*

*Advocate General : G . F . Mancini*

*Registrar : B . Pastor, Administrator*

*after considering the observations submitted on behalf of*

*W . J . R . Mol, by Mr De Wal;*

*the Federal Republic of Germany, by Martin Seidel and Alfred Dittrich, acting as Agents;*

*the French Republic, by Gilbert Guillaume and Bernard Botte, acting as Agents;*

*the Kingdom of the Netherlands, by E . F . Jacobs and*

*G . M . Borchardt, acting as Agents,*

*the Commission of the European Communities, by Johannes Fons Buhl and Marten Mees, acting as Agents;*

*having regard to the Report for the Hearing and further to the hearing on 29 October 1987,*

*after hearing the Opinion of the Advocate General delivered at the sitting on 21 April 1988,*

*gives the following*

*Judgment*

## **Grounds**

*1 By a judgment of 29 October 1986, which was received at the Court on 5 November 1986, the Hoge Raad der Nederlanden ( Supreme Court of the Netherlands ) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 2 of the Sixth Council Directive ( 77/388/EEC ) 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 ) (" the Sixth Directive ").*

*2 That question was raised in proceedings between the Netherlands tax authorities and Mr Mol, who had sold amphetamines contrary to the Netherlands law on drugs, relating to the charging of turnover tax on that trade in amphetamines . When the Gerechtshof ( Regional Court of Appeal ) Leeuwarden gave judgment in favour of the tax authorities, Mr Mol made an application for a review on the ground, inter alia, that the transactions in question were not liable to turnover tax because they were illegal .*

*3 Considering that the dispute raised an issue which has not yet been resolved in any decision of the Court, in particular that of 28 February 1984 in Case 294/82 Einberger v Hauptzollamt Freiburg (( 1984 )) ECR 1177, the Hoge Raad referred the following question to the Court for a preliminary ruling :*

*"Must Article 2 of the Sixth Directive be interpreted as meaning that the supply of amphetamines for consideration within the national territory cannot be subject to value-added tax inasmuch as such supply is forbidden by law?"*

*4 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .*

*5 It must first be observed that in fact the national court' s question has two limbs, the first seeking to establish whether Article 2 of the Sixth Directive is to be interpreted as meaning that no liability to turnover tax arises upon the unlawful supply of narcotic drugs effected for consideration within the territory of the country and the second whether, if so, the illegal supply of amphetamines is also not liable to value-added tax .*

*The first limb of the question*

*6 It should be pointed out that in its judgment in Einberger ( cited above ) the Court interpreted Article 2 ( 2 ) of the Sixth Directive 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 .*

*7 Mr Mol and the Commission consider that the solution adopted in that judgment should also be applied as regards transactions within one country . They argue that the Court' s reasoning in that judgment was essentially that narcotic drugs are, by definition, subject to a total prohibition on their importation and marketing in the Community and therefore the supply of narcotic drugs within the territory of the country also falls outside the scope of the Sixth Directive .*

8 The Governments of the Kingdom of the Netherlands, the French Republic and the Federal Republic of Germany contend that the judgment in *Einberger* is confined to the unlawful importation of narcotic drugs and therefore does not prejudice any decision on the supply of narcotic drugs within the territory of the country, especially since the Court expressly pointed out in that judgment that there are economic and legal differences between those two transactions . In the case of importation the chargeable event for purposes of value-added tax is essentially the same as the chargeable event for purposes of customs duties, whereas supply within the territory of the country is taxable only where it is effected for consideration by a taxable person acting as such .

9 In view of those diverging arguments it must be pointed out that Article 2 of the Sixth Directive defines the scope of value-added tax in the following terms :

"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 " .

10 In this context the preliminary observation should be made that the first limb of the national court' s question relates exclusively to the unlawful supply of narcotic drugs within the territory of the Member State in question . The question whether such a transaction is liable to value-added tax has not yet been the subject of a decision by the Court, which, apart from judgments relating to the customs treatment of smuggled drugs, has had occasion to rule, in the judgment in *Einberger*, cited above, only on the interpretation of Article 2 ( 2 ) of the Sixth Directive in relation to the unlawful importation of narcotic drugs into the Community . That judgment did not settle the question of unlawful supply within the territory of the country .

11 In the absence of express provisions governing that point in the Sixth Directive, the first question to arise is whether or not the unlawful supply of narcotic drugs within the territory of the country constitutes a taxable transaction or whether the directive must be interpreted as leaving that decision to the Member States .

12 It should be observed that, as the Court has already stated with regard to the importation of drugs in its judgment in *Einberger*, the directive may not be interpreted as leaving that question outside its scope . 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 scope of value-added tax .

13 It must next be considered whether, having regard to its context and objectives, the Sixth Directive precludes the levying of value-added tax on narcotic drugs when they are unlawfully supplied within the territory of the country .

14 It should be observed that the Sixth Directive is based on Articles 99 and 100 of the EEC Treaty and its objective is the harmonization or approximation of the legislation of the Member States on turnover taxes "in the interest of the common market " . According to the third and fourth recitals in the preamble to the directive, the establishment of a common system of value-added tax should assist the effective liberalization of the movement of persons, goods, services and capital, the integration of national economies, and also the achievement of a common market permitting fair competition and resembling a real internal market .

15 Since the harmfulness of narcotic drugs is generally recognized, there is a prohibition in all the Member States on marketing them, with the exception of strictly controlled trade for use for medical and scientific purposes . As the Court has already held with regard to the illegal importation of narcotic drugs into the Community, in its judgment in *Einberger*, such drugs are, by

definition, subject to a total prohibition on importation and marketing in the Community . The Court added that such goods, whose release into the economic and commercial channels of the Community is absolutely precluded and whose illegal importation 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 provisions on the origination of a turnover tax debt .

16 That reasoning also applied to the levying of value-added tax on supply within the territory of the country . The unlawful movement of narcotic drugs within the territory of the country, which likewise can give rise only to penalties under the criminal law, is as alien to the aforementioned objectives of the Sixth Directive, and, in consequence, to the origination of a turnover tax debt, as the unlawful importation of narcotic drugs .

17 The argument to the contrary put forward by the three governments intervening in this case seems to be motivated by fear that it will be impossible to distinguish in the case-law between illegal dealings in narcotic drugs and other unlawful economic operations and that as a result of the more favourable tax treatment of unlawful trade in general the principle of the fiscal neutrality of the value-added tax system will thus be undermined .

18 It must be acknowledged that the principle of fiscal neutrality does in fact preclude, as far as the levying of value-added tax is concerned, a generalized differentiation between lawful and unlawful transactions . However, that is not true in the case of the supply of products, such as narcotic drugs, which have special characteristics inasmuch as, because of their very nature, they are subject to a total prohibition on their being put into circulation in all the Member States, with the exception of strictly controlled economic channels for use for medical and scientific purposes . In a specific situation of that kind where all competition between a lawful economic sector and an unlawful sector is precluded, the fact that no liability to value-added tax arises cannot affect the principle of fiscal neutrality .

19 For the same reason it is not possible to accept the three governments' argument based on Article 4 ( 1 ) of the Sixth Directive that any economic activity "whatever the purpose or results of that activity" is subject to value-added tax . Although in defining the term "taxable person" Article 4 ( 1 ) covers economic activities in general without drawing a distinction between lawful and unlawful activities, that fact is irrelevant as regards the tax regime applicable to narcotic drugs, since they are already excluded from the scope of value-added tax as defined in Article 2 of the Sixth Directive .

20 It must be added that 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 of a pecuniary nature .

21 The reply to the first limb of the question must therefore be that Article 2 of the Sixth Directive must be interpreted as meaning that no liability to turnover tax arises upon the unlawful supply of narcotic drugs effected for consideration within the territory of the country in so far as the products in question are not confined within economic channels strictly controlled by the competent authorities for use for medical and scientific purposes .

*The second limb of the question*

22 The second limb of the national court' s question seeks to establish whether the rule that no liability to turnover tax arises in the case of the unlawful supply of narcotic drugs within the territory of the country also applies to the unlawful supply of amphetamines .

23 In that connection it must be observed that it appears from the observations submitted to the Court in this case that in view of the recognized harmfulness of amphetamines trade in such drugs

*is generally prohibited in all the Member States .*

*24 That legal situation is reflected at international level by the Convention on Psychotropic Substances, 1971 ( United Nations Treaty Series 1019, No 14956 ), which aims, inter alia, to prevent illicit trafficking in amphetamines; however, that Convention has not been signed by some Member States, including the Netherlands, and therefore does not constitute a basis for the interpretation of Community law .*

*25 It must next be observed that the prohibition under the national law of the Member States on trading in amphetamines is subject to certain exceptions as regards the use of amphetamines which are very limited and strictly controlled by the competent authorities . For instance, the Member States party to the aforementioned Convention make provision for the exceptions contained in the Convention itself . Article 5 ( 2 ) and Article 4 of the Convention provide that trade in amphetamines is not prohibited for use for medical or scientific purposes; the Convention also authorizes the carrying by international travellers of small quantities of preparations for personal use, the use of psychotropic substances in industry for the manufacture of non-psychotropic substances or products and the use of psychotropic substances for the capture of animals by specifically authorized persons, provided however that those uses are strictly controlled by the competent authorities .*

*26 It follows that, as far as the application of the Sixth Directive is concerned, amphetamines are in the same category as narcotic drugs . They are therefore excluded from the scope of value-added tax as defined in Article 2 of the Sixth Directive except for strictly controlled uses for purposes clearly defined by national law .*

*27 The reply to the second limb of the question must therefore be that the unlawful supply of amphetamines is also not liable to value-added tax in so far as the products in question are not confined within economic channels strictly controlled by the competent authorities .*

## **Decision on costs**

### **Costs**

*28 The costs incurred by the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable . Since 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 ( Sixth Chamber ),*

*in answer to the question referred to it by the Hoge Raad der Nederlanden, by judgment of 29 October 1986, hereby rules :*

*( 1 ) 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 - must be interpreted as meaning that no liability to turnover tax arises upon the unlawful supply of narcotic drugs effected for consideration within the territory of the country in so*

*far as the products in question are not confined within economic channels strictly controlled by the competent authorities for use for medical and scientific purposes .*

*( 2 ) The unlawful supply of amphetamines is also not liable to value-added tax in so far as the products in question are not confined within economic channels strictly controlled by the competent authorities .*