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Judgment of the Court of 13 July 1989. - Wisselink en Co. BV and others v Staatssecretaris van Financiën. - References for a preliminary ruling: Hoge Raad - Netherlands. - First, Second and Sixth Directive on turnover tax - Special consumption tax on passenger cars. - Joined cases 93/88 and 94/88.

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Keywords

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Tax provisions - Harmonization of legislation - Turnover taxes - Common system of value-added tax - Prohibition on the levying of other domestic taxes which can be characterized as turnover taxes - Aim - "Turnover taxes" - Meaning - Special consumption tax of the same type as the Netherlands Bijzondere Verbruiksbelasting van personenauto' s - Exclusion

(Council Directive 77/388/EEC, Art . 33)

Summary

Article 33 of the Sixth Directive (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes, which leaves the Member States free to maintain or introduce certain indirect taxes provided that they are not taxes which can be "characterized as turnover taxes", seeks to prevent the functioning of the common system of value-added tax from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial transactions in a way comparable to value-added tax . The specific meaning which the term "turnover tax" has in the context of Article 33 must be determined in the light of that objective .

A special consumption tax such as the Bijzondere Verbruiksbelasting van personenauto' s (BVB) levied in the Netherlands, which, besides the value-added tax provided for by Community directives, is charged upon the supply or importation of passenger cars and motorcycles, does not exhibit the characteristics of a turnover tax within the meaning of that provision in view of the

following factors :

Although the BVB is a consumption tax whose basis of assessment is proportional to the price of the goods, it is not a general tax since it is charged only on two categories of specific products .

It is not levied on the movement of goods and services nor charged on commercial transactions in a way comparable to value-added tax since it is applied once only, at the time of supply by the manufacturer or at the time of importation, and is then passed on in full at the next marketing stage without being levied anew .

Although the BVB paid is not deductible, it forms an integral part of the cost price of the car; secondhand cars, other than those which are imported, are no longer subject to the tax .

The basis for charging the BVB is the list price of the car, net of value-added tax, and where value-added tax is payable, it is calculated on the consideration actually obtained by the supplier, including the BVB .

In addition, the BVB does not jeopardize the functioning of the common system of value-added tax since it is levied alongside that tax and not wholly or partly in place thereof .

Parties

In Joined Cases 93/88 and 94/88

REFERENCE to the Court under the first and third paragraphs of 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

Wisselink & Co . BV, Amsterdam,

and

Netherlands Secretary of State for Finance,

and between

Abemij BV, Hart Nibbrig and Greeve BV and Others, Sassenheim,

and

Netherlands Secretary of State for Finance,

on the interpretation of the First Council Directive (66/227/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (Official Journal, English Special Edition 1967, p . 14), the Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (Official Journal, English Special Edition 1967, p . 16), and 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

composed of : O . Due, President, T . Koopmans and R . Joliet, Presidents of Chambers, Sir Gordon Slynn, G.F . Mancini, C.N . Kakouris, F.A . Schockweiler, G.C . Rodríguez Iglesias and M . Díez de Velasco, Judges,

Advocat General : J . Mischo

Registrar : D . Louterman, Principal Administrator

after considering the observations submitted on behalf of

Wisselink and Abemij, the plaintiffs in the main proceedings, represented by D.G . van Vliet, of the Amsterdam Bar,

the Netherlands Government, represented by E.F . Jacobs, of the Ministry of Foreign Affairs,

the United Kingdom, represented by J.A . Gensmantel, of the Treasury Solicitor' s Department,

the Commission of the European Communities, represented by H . Étienne, Principal Legal Adviser, and by B.J . Drijber, a member of the Commission' s Legal Department, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 12 April 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 27 April 1989,

gives the following

Judgment

Grounds

1 By two judgments of 9 March 1988, which were received at the Court on 17 March 1988, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of the First Council Directive (67/227/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes, the Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes and 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 (hereinafter referred to as "the First Directive", "the Second Directive" and "the Sixth Directive" respectively).

2 Those questions were raised in two disputes, one between Wisselink & Co . BV and the Netherlands Secretary of State for Finance (Case 93/88), and the other between Abemij BV and Others and the Netherlands Secretary of State for Finance (Case 94/88), concerning the application of a special tax on the supply and importation of passenger cars by the Netherlands .

3 It is apparent from the documents before the Court that before the introduction, on 1 January 1969, of the system of value-added tax, turnover tax was levied in the Netherlands according to the cumulative multi-stage tax system at different rates, the highest being 25% and applying, in particular, to the supply and importation of cars (Wet op de Omzetbelasting (Law on Turnover Tax) 1954). That system was replaced by a system comprising, besides the value-added tax provided for by the Community directives, a special consumption tax on passenger cars levied either upon supply or upon importation (Bijzondere Verbruiksbelasting van personenauto' s (special consumption tax on passenger cars), hereinafter referred to as "the BVB "). That tax is governed by Article 50 of the Wet op de Omzetbelasting (Law on Turnover Tax) of 28 June 1968

and Article 25 of the Uitvoeringsbesluit Omzebelasting (Turnover Tax Implementation Order) 1968 .

4 Since the plaintiffs in the main proceedings claimed that the BVB was incompatible with Community law, the national court hearing the case decided in each case to refer to the Court two questions for a preliminary ruling :

The first question, which is identical in both cases, is worded as follows :

"Do the provisions of the First, Second and Sixth Directives preclude the levying of a special consumption tax on passenger cars ((as described in the reference for a preliminary ruling))?"

The second question in Case 93/88 is worded as follows :

"If ((the answer to the first question is in the affirmative)), must the conclusion be drawn that a taxable person may, pursuant to Article 17 of the Sixth Directive, deduct a special consumption tax on passenger cars borne by him in the way described ... from the tax which he is liable to pay, even if the national legislation makes no provision for such a deduction?"

The second question in Case 94/88 is worded as follows :

"If ((the answer to the first question is in the affirmative)), must the conclusion be drawn that a special consumption tax on passenger cars such as that which the appellant is liable to pay under Netherlands legislation on account of the importation of passenger cars in the period to which the case relates may not be levied at all or that it must be levied on a different basis ?".

5 Reference is made to the Report for the Hearing for a fuller account of the legal and factual background to the cases and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

The first question

6 By its first question the national court seeks to ascertain whether the provisions of the First, Second and Sixth Directives preclude the levying of a special consumption tax on passenger cars, such as the BVB .

7 In that regard, it should be pointed out first of all that the First and Second Council Directives of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes imposed on the Member States the obligation to adopt a system of value-added tax .

8 The Member States were thus prohibited from maintaining, either wholly or in part, or re-introducing, either wholly or in part, any turnover taxes under the cumulative multi-stage tax system . If the Member States had been allowed to introduce other kinds of turnover tax besides value-added tax, the objectives underlying the common system of turnover tax would have been jeopardized .

9 The plaintiffs in the main proceedings claim that the BVB constitutes a disguised version of the old Netherlands turnover tax levied under the cumulative multi-stage system, and was therefore contrary to the common system of value-added tax . In support of that view they rely on the place occupied by that tax in the Netherlands tax system and on the work of the Netherlands Parliament preparatory to the adoption of Article 50 of the Law on Turnover Tax .

10 It must be emphasized, however, that the reasons for the introduction of a national tax into internal law and the circumstances surrounding its introduction cannot affect its nature with regard to Community law . The compatibility of a national tax with Community law does not depend either on its designation or on the national legislative procedures by which it was introduced into national

law, but on its objective characteristics .

11 The special tax in question is not levied in a manner which is comparable to that of the old cumulative multi-stage tax . It is levied once only, upon supply or importation . It cannot therefore be argued that the old system of cumulative multi-stage taxes is partly maintained by the BVB .

12 However, even if a national tax is not levied according to the old system, it might still prove to be contrary to Community law if it prevents the proper working of the common system of value-added tax, introduced by the First and Second Directives of 11 April 1967 and supplemented, in particular, by the Sixth Directive of 17 May 1977, which, whilst replacing the Second Directive, further defined and reinforced the structure and detailed rules of application of the common system of value-added tax .

13 Community law, as it now stands, does not, however, contain any specific provision designed to exclude or limit the power of the Member States to introduce taxes other than turnover taxes . That power is expressly confirmed by Article 33 of the Sixth Directive, which provides that : "Without prejudice to other Community provisions, the provisions of this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes ".

14 As the Court pointed out in its judgment of 8 July 1986 in Case 73/85 Kerrutt v Finanzamt Moenchengladbach-Mitte ((1986)) ECR 2219, it is apparent from Article 33 that Community law permits systems of taxation which are concurrent with the system of value-added tax . The Member States may therefore introduce taxes which cannot be characterized as turnover taxes even where, as in this case, charging them on a transaction which is already subject to value-added tax leads to the double taxation of that transaction .

15 The answer to the first question therefore depends on whether the special tax at issue, as described in the order for reference, must be regarded as a turnover tax within the meaning of Article 33 of the Sixth Directive .

16 According to the Court' s judgment of 27 November 1985 in Case 295/84 Rousseau Wilmot SA v Caisse de Compensation de l' Organisation Autonome Nationale de l' Industrie et du Commerce (Organic) ((1985)) ECR 3759, the term "turnover tax" has a specific meaning in the context of Article 33 of the Sixth Directive . The Court stated that, in order to resolve the problem raised, the scope of Article 33 had to be determined in the light of the role of that provision in the harmonized system of turnover tax, which takes the form of a common system of value-added tax .

17 It also follows from that judgment that Article 33 of the Sixth Directive, which leaves the Member States free to maintain or introduce certain indirect taxes, provided that they are not taxes which can be "characterized as turnover taxes", seeks to prevent the functioning of the common system of value-added tax from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial transactions in a way comparable to value-added tax .

18 As the Court has held, in particular in its judgment of 27 November 1985 in Case 295/84 Rousseau Wilmot cited above) and its judgment of 3 March 1988 in Case 252/86 Bergandi v Directeur-Général des Impots ((1988)) ECR 1343, the principle of the common system of value-added tax consists, by virtue of Article 2 of the First Directive, in the application to goods and services up to the retail stage of a general tax on consumption which is exactly proportional to the price of the goods and services, irrespective of the number of transactions which take place in the production and distribution process before the stage at which the tax is charged . However, value-added tax is chargeable on each transaction only after deduction of the amount of value-added tax borne directly by the costs of the various price components . The procedure for deduction is so

arranged by Article 17(2) of the Sixth Directive that taxable persons are authorized to deduct from the value-added tax for which they are liable the value-added tax which the goods have already borne .

19 It is necessary, therefore, to determine whether the levying of the BVB jeopardizes the functioning of the common system of value-added tax at the present stage in the harmonization of taxation in the Community in so far as the BVB is charged on passenger cars in a way comparable to value-added tax .

20 Although the BVB is a consumption tax whose basis of assessment is proportional to the price of passenger cars, it is not a general tax since it is charged only on two categories of specific products, namely passenger cars and motorcycles . Nor is it a tax on the movement of goods and services, or a tax which is charged on commercial transactions in a way comparable to value-added tax, since it is applied once only, at the time of supply by the manufacturer or at the time of importation, and is then passed on in full at the next marketing stage without being levied anew . The BVB paid is not deductible but forms an integral part of the cost price of the car; secondhand cars, other than those which are imported, are no longer subject to the BVB . Furthermore, the BVB does not jeopardize the functioning of the common system of value-added tax since it is levied alongside that tax and not wholly or partly in place thereof . Finally, the basis for charging the BVB is the list price of the car, net of value-added tax, and where value-added tax is payable, it is calculated on the consideration actually obtained by the supplier, including the BVB .

21 It is clear from those considerations that a tax of the kind referred to by the national court does not exhibit all features of a turnover tax within the meaning of Article 33 of the Sixth Directive .

22 It must also be emphasized that the problems raised by these two cases differ appreciably from those in which the Court gave judgment on 10 April 1984 in Case 324/82 Commission v Kingdom of Belgium ((1984)) ECR 1861 and on 4 February 1988 in Case 391/85 Commission v Kingdom of Belgium ((1988)) ECR 579 . In its judgment of 10 April 1984 the Court held that the Sixth Directive precluded the retention of the list price as the basis for charging value-added tax on cars . In its judgment of 4 February 1988, the Court considered that the obligation to comply with the first judgment precluded the adoption of a registration tax on new saloon cars and estate cars which was based on the list price and from which an exemption was granted up to the amount forming the taxable amount for value-added tax purposes when the vehicle was supplied or imported, since those rules presupposed the retention of the list price as the basis for the taxation of new saloon cars and estate cars . The BVB, however, is a tax which is independent of value-added tax and which always forms part of the taxable amount for value-added tax purposes .

23 Finally, the plaintiffs in the main proceedings, referring to the reservation "without prejudice to other Community provision" set out in Article 33 of the Sixth Directive, argue that the levying of the BVB is contrary to Article 95 of the Treaty .

24 With regard to that argument, it must be pointed out that, according to the national court' s findings, the BVB, which is charged on imported vehicles and vehicles of domestic origin alike, does not give rise to any discriminatory or protective effect . Such a tax is not therefore incompatible with Article 95 of the Treaty .

25 Accordingly, the answer to the first question submitted in the two cases by the Hoge Raad must be that the provisions of the First, Second and Sixth Directives do not preclude the levying of a special consumption tax on passenger cars such as the BVB .

The second question

26 In view of the answer given to the first question, the second question in each case is devoid of purpose .

Decision on costs

Costs

27 The costs incurred by the Netherlands Government, the United Kingdom 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

in answer to the questions submitted to it by the Hoge Raad der Nederlanden, by judgments of 3 March 1988, hereby rules :

The provisions of the First, Second and Sixth Directives on turnover tax do not preclude the levying of a special consumption tax on passenger cars such as the Bijzondere Verbruiksbelasting van personenauto' s .