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Judgment of the Court (First Chamber) of 17 September 1997. - Fazenda Pública v Solisnor-Estaleiros Navais SA, also represented: Ministério Público. - Reference for a preliminary ruling: Supremo Tribunal Administrativo - Portugal. - VAT - Article 33 of the Sixth VAT Directive - Maintenance of stamp duties - Stamp duty on the value of contracts relating to the construction of an oil tanker. - Case C-130/96.

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Keywords

Tax provisions - Harmonization of laws - Turnover taxes - Common system of value added tax - Prohibition of the levying of other national charges which can be characterized as turnover taxes - Purpose - Meaning of 'turnover taxes' - Scope - Stamp duty levied on only a portion of economic transactions - Not included

(Council Directive 77/388, Art. 33)

Summary

Since the purpose of Article 33 of Sixth Directive 77/388 on the harmonization of the laws of the Member States relating to turnover taxes is to prevent the functioning of the common system of value added tax from being jeopardized 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, that provision does not preclude the maintenance of a national charge which, having the characteristics of a stamp duty levied on works contracts and contracts for the supply of materials or any kind of consumer article, to the exclusion of a large portion of economic transactions in the Member State concerned, is not a general tax since it is not intended to apply to all economic transactions in the Member State concerned and does not therefore have one of the essential characteristics of value added tax.

Parties

In Case C-130/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Supremo Tribunal Administrativo (Portugal) for a preliminary ruling in the proceedings pending before that court between

Fazenda Pública

and

Solisnor-Estaleiros Navais SA

also represented: Ministério Público,

on the interpretation of Article 33 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 (OJ 1977 L 145, p. 1) and of Article 378 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23),

THE COURT

(First Chamber),

composed of: L. Sevón, President of the Chamber, P. Jann and M. Wathelet (Rapporteur), Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- the Fazenda Pública, by Maria Aldina Moreira;

- Solisnor-Estaleiros Navais SA, by Manuel Rodrigues, of the Almada Bar;

- the Portuguese Government, by Luís Fernandes, Director of the Legal Service in the European Communities General Directorate in the Ministry of Foreign Affairs, and Rui Barreira, Adviser in the Legal Studies Centre of the Presidency of the Council of Ministers, acting as Agents;

- the Commission of the European Communities, by António Caeiro, Legal Adviser, and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Solisnor-Estaleiros Navais SA, represented by Manuel Rodrigues, the Portuguese Government, represented by Luís Fernandes and Ana César Machado, Assistant in the Lisbon Law Faculty, acting as Agent, and the Commission, represented by António Caeiro, at the hearing on 29 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 13 March 1997,

gives the following

Judgment

Grounds

1 By judgment of 28 February 1996, received at the Court on 24 April 1996, the Supremo Tribunal Administrativo (Supreme Administrative Court) referred for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 33 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 (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive') and of Article 378 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, hereinafter 'the Act of Accession').

2 That question has arisen in a dispute between Solisnor-Estaleiros Navais SA (hereinafter 'Solisnor') and the Fazenda Pública (Public Treasury) concerning payment of a charge introduced in the form of a stamp duty by Article 91 of the Tabela Geral do Imposto do Selo (General Scale of Stamp Duties, hereinafter 'the TGIS').

3 On 4 June 1992 Solisnor paid stamp duty amounting to ESC 43 586 400 in respect of a works contract concluded on 28 December 1989 with Sociedade Portuguesa de Navios e Tanques SA for the construction of an oil tanker for transporting crude oil.

4 Solisnor subsequently sought to have the imposition of that charge set aside before the Tribunal Tributário de Primeira Instância (Fiscal Court of First Instance), Setúbal, which, by a judgment of 21 March 1994, upheld Solisnor's application on the ground that it was contrary to Article 33 of the Sixth Directive.

5 Article 33 provides: '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'.

6 The Fazenda Pública appealed to the Supremo Tribunal Administrativo against the judgment of the Tribunal Tributário de Primeira Instância, Setúbal, arguing that the stamp duty was not a turnover tax and for that reason was not contrary to Article 33 of the Sixth Directive.

7 Solisnor contended that, in view of its characteristics as a general tax on consumption and one proportional to the price of services, the stamp duty was a turnover tax, within the meaning of Article 33, and was accordingly incompatible with the common system of VAT.

8 According to the documents in the case, Article 1 of the stamp duty regulation approved by Decree No 12700 of 20 November 1926 provides that the charge is to be levied generally on 'all the documents, books, papers, acts and products specified in the TGIS'. More specifically, it is to be levied, pursuant to Article 91 of the TGIS, on 'works contracts and contracts for the supply of materials or any kind of consumer article'. The amount of stamp duty is calculated on the basis of a rate, varying according to the subject-matter of the contract, applied to the value of the act.

9 Article 91 of the TGIS was repealed by Article 3 of Decree-Law No 223/91 of 18 June 1991, the preamble to which justified the abolition of the articles relating to works contracts - including Article

91 - on the ground of their 'incompatibility with the general tax on consumption covered by value added tax'.

10 In its judgment making the reference, the Supremo Tribunal Administrativo points out that on 28 December 1989, the date of the taxable event, Article 91 of the TGIS was still in force, even though the Portuguese Republic had been required since 1 January 1989, in accordance with Article 395 of and Annex XXXVI, Section II, to the Act of Accession, to adopt the measures necessary to ensure compliance with the Sixth Directive. The national court is, however, uncertain whether or not the maintenance of such a charge was authorized by Article 378 of the Act of Accession and Annex XXXII thereto, which allow the Portuguese Republic to grant tax exemptions and to establish a number of derogations.

11 The national court has accordingly considered it appropriate to refer the following question to the Court for a preliminary ruling:

'Is the stamp duty having the characteristics mentioned above to be regarded as a turnover tax within the meaning of Article 33 of the abovementioned Sixth Directive, subject to a possible derogation under Article 378 of the Act annexed to the Treaty of Accession or any other provision of Community law?'

12 By its question, the national court is seeking in substance to ascertain whether Article 33 of the Sixth Directive precludes the maintenance of a national charge having the characteristics of a stamp duty which is levied on works contracts and contracts for the supply of materials or any kind of consumer article and for which the contract value is the basis of assessment. If the answer is in the affirmative, it asks whether the maintenance of such a charge is authorized by Article 378 of and Annex XXXII to the Act of Accession or by any other provision of Community law.

13 The Court has consistently held (see, in particular, Case 295/84 *Rousseau Wilmot v Organic* [1985] ECR 3759, paragraph 16; Case C-347/90 *Bozzi v Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e dei Procuratori Legali* [1992] ECR I-2947, paragraph 9; and Case C-208/91 *Beaulande v Directeur des Services Fiscaux, Nantes* [1992] ECR I-6709, paragraph 12) that, in leaving the Member States free to maintain or introduce certain indirect taxes such as excise duties on condition that they are not taxes which can be 'characterized as turnover taxes', Article 33 of the Sixth Directive seeks to prevent the functioning of the common system of VAT from being jeopardized 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 VAT.

14 Taxes, duties and charges which have the essential characteristics of VAT must in any event be treated as such measures, even though they are not identical to VAT in all respects. As the Court has pointed out many times, those characteristics are as follows: VAT applies generally to transactions relating to goods or services; it is proportional to the price of those goods or services, irrespective of the number of transactions which take place; it is charged at each stage of the production and distribution process; and, finally, it is imposed on the added value of goods and services, the tax payable on a transaction being calculated after deduction of the tax paid on the previous transaction (see, in particular, Case 252/86 *Bergandi v Directeur Général des Impôts* [1988] ECR 1343, paragraph 15; Joined Cases 93/88 and 94/88 *Wisselink and Others v Staatssecretaris van Financiën* [1989] ECR 2671, paragraph 18; Case C-109/90 *Giant v Gemeente Overijse* [1991] ECR I-1385, paragraphs 11 and 12; Case C-200/90 *Dansk Denkvit and Poulsen v Skatteministeriet* [1992] ECR I-2217, paragraph 11; *Bozzi*, cited above, paragraph 12; and *Beaulande*, cited above, paragraphs 12 and 14).

15 It follows that Article 33 of the Sixth Directive does not preclude the maintenance or introduction of stamp duties or other types of taxes, duties or charges provided that they do not have the essential characteristics of VAT.

16 It is therefore necessary to consider whether a charge of the type described by the national court has such characteristics.

17 Suffice it to note in this regard that stamp duty of the kind described by the national court is not a general tax since it is not intended to apply to all economic transactions in the Member State concerned (see, to this effect, *Beaulande*, paragraph 16). According to Article 1 of the stamp duty regulation, the duty is levied solely on 'the documents, books, papers, acts and products specified in the TGIS', and, more specifically, according to Article 91 of the TGIS, on 'works contracts and contracts for the supply of materials or any kind of consumer article', to the exclusion of a large portion of economic transactions in the Member State concerned, such as contracts for the supply of services or contracts for the sale of movable property, referred to respectively in the former Articles 141 and 50(1)(a) of the TGIS, which have now been repealed.

18 It is true that, as is clear from the documents in the case, Article 91 of the TGIS was originally part of a system for taxing the generality of transactions relating to goods and services. However, one by one various categories of economic transactions have been excluded from the scope of that system following the repeal of a number of articles of the TGIS, such as Articles 50(1)(a) and 141 mentioned above, when the VAT Code came into force in the Portuguese legal system (see Article 2(2)(d) of Decree-Law No 394-B/84 of 26 December 1984, D.R., Series I, No 297, as amended by Law No 3/86 of 7 February 1986, D.R., Series I, No 32).

19 In those circumstances, and without its being necessary to examine its other specific features, it must be held that a tax of the type referred to by the national court does not have one of the essential characteristics of VAT.

20 The answer to the question submitted must therefore be that Article 33 of the Sixth Directive must be construed as not precluding the maintenance of a national charge having the characteristics of a stamp duty levied on works contracts and contracts for the supply of materials or any kind of consumer article, to the exclusion of a large portion of economic transactions in the Member State concerned.

Decision on costs

Costs

21 The costs incurred by the Portuguese Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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

(First Chamber)

in answer to the question referred to it by the Supremo Tribunal Administrativo by judgment of 28 February 1996, hereby rules:

Article 33 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 must be construed as not precluding the maintenance of a national charge having the characteristics of a stamp duty levied on works contracts and contracts for the supply of materials or any kind of consumer article, to the exclusion of a large portion of economic transactions in the Member State concerned.