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# 61994C0217

Opinion of Mr Advocate General Elmer delivered on 2 May 1996. - Eismann Alto Adige Srl v Ufficio IVA di Bolzano. - Reference for a preliminary ruling: Commissione tributaria di primo grado di Bolzano - Italy. - Value added tax - Interpretation of Article 22(8) of the Sixth Directive (77/388/EEC) as amended by Directive 91/680/EEC - Equal treatment of domestic transactions and transactions carried out between Member States by taxable persons. - Case C-217/94.

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## Opinion of the Advocate-General

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*Introduction*

*1 In this case the Commissione Tributaria di Primo Grado di Bolzano (Tax Court of First Instance, Bolzano), Italy, has referred to the Court for a preliminary ruling a question as to whether Article 22(8) of the Sixth Council Directive on turnover tax (1) (hereinafter `the Directive') precludes national legislation which provides that goods being transported within a Member State must be accompanied by a special document.*

*The relevant national rules*

*2 Article 1(1), (2) and (3) and Article 2 of Presidential Decree No 627 of 6 October 1978 (hereinafter `the Decree') provides as follows:*

*`Article 1*

*Goods being transported shall during carriage be accompanied by the accompanying document ..., previously issued by the consignor ...*

*The document shall bear the date and a serial number and shall in all circumstances contain the following information: (a) ... (b) ... (c) ... (d) ... (e) ....*

*The document shall be made out in triplicate and shall bear the receipt of the carrier or his representative at the time of dispatch of the goods. One copy shall be retained by the consignor and the other two shall be taken by the carrier who, after obtaining the consignee's signature, shall retain one copy and hand the other to the addressee together with the goods carried.*

*Article 2*

*In the case of goods entering the customs area the document referred to in Article 1 shall be replaced by the definitive import declaration or by another customs document accompanying the*

*goods themselves or by a copy of the invoice signed by the declarant and endorsed by the customs authorities relating to the first importation of the goods into the territory of the State.*

*Goods for export shall be accompanied by the export declaration or a copy of the invoice or in default thereof by the accompanying document referred to in Article 1; in the last-mentioned case one copy of the document, signed by the declarant and endorsed by the customs authorities in connection with the shipment outside the customs territory shall be returned to the consignor by the carrier.'*

*Ministry of Finance Circular No 2/585001 of 5 January 1993 states:*

*`... After the opening of the Community's internal frontiers the duty to issue the accompanying document referred to in [the Decree] for goods transported applies only to inland carriage in which the point of departure and the place of destination are within the territory of the State, and to third countries.'*

*The facts*

*3 Eismann Alto Adige Srl (hereinafter `the Company'), whose registered office is in Bolzano, carries on the business of selling frozen foodstuffs and similar products on a door-to-door basis. The Company employs salesmen who travel round and call at private houses to take orders and deliver the goods ordered, either subsequently or there and then, depending upon the stock of goods in the vehicle.*

*4 In 1993 officers of the Guardia di Finanzas (tax police) noted during a roadside check and later at the Company's offices a considerable number of infringements in 1992 and 1993 of the aforementioned provisions of the Italian tax legislation on accompanying documents. On that occasion administrative fines were imposed upon the Company on 18 October 1993 ranging from LIT 89 124 000 to LIT 267 372 000.*

*5 The Company thereupon instituted proceedings before the Commissione Tributaria di Primo Grado di Bolzano claiming annulment of the fines on the ground that the provisions on accompanying documents were incompatible with Article 22(8) of the Directive as amended by Council Directive 91/680/EEC (hereinafter `the Amending Directive').*

*The relevant Community provisions*

*6 The Amending Directive was adopted with a view to the completion of the internal market as from 1 January 1993.*

*7 Article 7a (2) of the Treaty reads as follows:*

*`The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this article and of Articles ... 99 ... and without prejudice to the other provisions of this Treaty.*

*The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'*

*8 Article 99 of the Treaty reads as follows:*

*`The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market within the time-limit laid down in Article 7a.'*

*9 The Amending Directive, which was adopted in pursuance of Article 99, contains in the preamble the following recitals inter alia (the second, third, seventh, eighth, ninth and twelfth):*

*`... the completion of the internal market requires the elimination of fiscal frontiers between Member States and that to that end the imposition of tax on imports and the remission of tax on exports in trade between Member States be definitively abolished;*

*... fiscal controls at internal frontiers will be definitively abolished as from 1 January 1993 for all transactions between Member States;*

*...*

*... the achievement of the objective referred to in Article 4 of the First Council Directive of 11 April 1967, (3) as last amended by the Sixth Directive 77/388/EEC, requires that the taxation of trade between Member States be based on the principle of the taxation in the Member State of origin of goods and services supplied without prejudice, as regards Community trade between taxable persons, to the principle that tax revenue from the imposition of tax at the final consumption stage should accrue to the benefit of the Member State in which that final consumption takes place;*

*... however, the determination of the definitive system that will bring about the objectives of the common system of value added tax on goods and services supplied between Member States requires conditions that cannot be completely brought about by 31 December 1992;*

*... therefore, provision should be made for a transitional phase, beginning on 1 January 1993 and lasting for a limited period, during which provisions intended to facilitate transition to the definitive system for the taxation of trade between Member States, which continues to be the medium-term objective, will be implemented;*

*...*

*... the necessary pursuit of a reduction of administrative and statistical formalities for undertakings ... must be reconciled with the implementation of effective control measures and the need, on both economic and tax grounds, to maintain the quality of Community statistical instruments.'*

*10 Article 1(22) of the Amending Directive inserts in the Directive the following Title XVIa and Articles 28a to 28m:*

*`TITLE XVIa*

*TRANSITIONAL ARRANGEMENTS FOR THE TAXATION OF TRADE BETWEEN MEMBER STATES*

*...*

*Article 28h Obligations of persons liable for payment*

*Article 22 shall be replaced by the following:*

*"Article 22*

*Obligations under the internal system:*

*...*

*8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.*

*..."*

*...'*

*The question referred to the Court*

*11 By order of 12 July 1994 the Commissione Tributaria di Primo Grado di Bolzano referred the following question to the Court for a preliminary ruling:*

*`From 1 January 1993 onwards, is the application of the provisions laid down by Presidential Decree No 627 of 6 October 1978 to internal trade alone and not to transactions carried out between Member States as well contrary to the principle of equal treatment laid down in the consolidated version of Article 22(8) of the Sixth Council Directive 77/388/EEC of 17 May 1977?'*

*Admissibility*

*12 The Italian Government has claimed that the reference should be regarded as inadmissible because the question referred to the Court was irrelevant to the decision to be taken in the national proceedings, in which the problem is whether the trade activity pursued by the taxable person should be regarded, in the light of the Decree, as a `retail' sale or an `itinerant' sale. According to Article 3 of the Decree, accompanying documents must be issued for use in the case of carriage of goods supplied by itinerant sale. However, the Company has claimed before the national court that what is involved is a retail sale for which, under Article 4 of the Decree, the issue of accompanying documents is not required.*

*13 The Commission has contended that it is for the court of reference to assess whether a preliminary ruling is necessary to enable it to give judgment in the main proceedings.*

*14 I must emphasize that in accordance with the cooperation procedure involved in Article 177 of the Treaty, it is for the national court to assess whether it is necessary to seek a preliminary ruling in order to enable it to give judgment in the main proceedings. In Case 83/78 Pigs Marketing Board the Court declared as follows:*

*`As regards the division of jurisdiction between national courts and the Court of Justice under Article 177 of the Treaty the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, is in the best position to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment.' (4)*

*In Case C-387/93 Banchero (5) the Court declared:*

*`The Court has consistently held that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see inter alia the judgment in Case C-30/93 AC-ATEL Electronics Vertriebs v Hauptzollamt Muenchen-Mitte [1994] ECR I-2305, at paragraph 18).'*

*15 The court of reference has not committed itself in the order for reference as to whether this specific case is to be classified according to the rules of the Decree on itinerant sales or on retail sales. If necessary the national court will have to take a more detailed decision on the point in delivering judgment in the main proceedings. It has however regarded it as relevant to its decision to ask the Court of Justice for a preliminary ruling with regard to the relationship between the Italian rules on accompanying documents and Article 22(8) of the Directive. According to the Court's consistent case-law therefore, there are no grounds for the Court's refusing to answer the question put to it, which does not seem obviously irrelevant to the case pending before the national court.*

*Substance*

*16 However, the question is formulated in such a way that the Court of Justice is requested to take a decision as to the compatibility of Italian law with Community law. As the Court has consistently held, it has no jurisdiction in a question referred to it for a preliminary ruling to give a decision as to whether a national measure is consistent with Community law. Such a decision is a matter for the national court alone. The Court of Justice is, however, competent to provide the national court with the necessary criteria for the interpretation of Community law which may enable it to determine the issue of the compatibility of the national rules with Community law. (6) The question must therefore be reformulated.*

*17 The court of reference is really wishing to be informed whether the requirement of equal treatment in Article 22(8) must be interpreted as meaning that it precludes national rules imposing a requirement for accompanying documents in the case of domestic transactions in the relevant Member State when a similar requirement is not imposed on transactions carried out between Member States.*

*18 It should be stressed that the question raised relates only to whether the requirement of equal treatment in Article 22(8) precludes such national rules; it therefore does not concern an interpretation of that part of Article 22(8) which contains a prohibition of formalities connected with the crossing of frontiers.*

*The Commission has stated that in its view that prohibition is infringed in so far as a requirement is imposed for accompanying documents in connection with carriage as part of transactions carried out between Member States. In this connection the decisive factor is not whether the specific carriage is between places in several Member States inasmuch as, for example, carriage which, seen in isolation, is taking place between places in one Member State may also be a part of the complete carriage of goods between one Member State and another, for example where goods consigned by a vendor in Copenhagen to a purchaser in Rome are first transported by a carrier to Genoa and there following storage are reloaded on to another lorry which carries them on to Rome.*

*On this point I shall only observe that, in view of the manner in which the question is framed by the national court there are no grounds for the Court of Justice to consider the detailed content of the prohibition of formalities connected with the crossing of frontiers or to consider at all therefore whether the control (inspection), which is not carried out at the frontier itself but within the country, may conflict with that prohibition.*

*Procedure before the Court*

*19 The Company has stated inter alia that the obligation to issue accompanying documents in connection with carriage in Italy involves an infringement of the requirement in Article 22(8) of the Directive on equal treatment for domestic transactions and transactions carried out between Member States. That provision is unconditional and sufficiently precise to have direct effect so that the citizen may rely on the requirement of equal treatment in relation to the Member State concerned before the national courts.*

*20 The Italian Government, supported by the Portuguese Government, has claimed that the principle of equal treatment in Article 22(8) of the Directive must be understood as meaning that transactions carried out between Member States must not be subjected to stricter formalities than transactions carried out internally within a Member State. The purpose of the Amending Directive was to ensure that in connection with the elimination of fiscal frontiers there should be no relaxation of controls on transactions carried out between Member States. The Portuguese Government has particularly emphasized that the Amending Directive introduced a transitional system during which measures must be implemented to facilitate transition to the definitive system for the taxation of trade between Member States. The Amending Directive should not on the contrary change or simplify the rules on domestic transactions. Article 22(8) cannot therefore be accepted as containing a requirement that domestic transactions must not be subjected to other or stricter formalities than transactions carried out between Member States.*

*21 The Commission has stressed that there has not yet been any complete harmonization in the sphere of value added tax and that Title XVIa, inserted in the Directive by the Amending Directive, contains only a transitional system which in all essentials aims at regulating transactions carried out between Member States. The purpose of the Amending Directive was to eliminate fiscal frontiers and that necessitated the implementation of effective control measures and the maintenance of the quality of Community statistical instruments (see the recitals in the preamble to the Amending Directive).*

*22 In so far as harmonization has not taken place, it continues to be the responsibility of the Member States to ensure the collection and control of tax and that is what is expressed in the principal rule in Article 22(8), according to which Member States may impose other obligations which they deem necessary for the correct collection of tax and to prevent evasion. The expression `other obligations' shows that what is meant is such formalities for the purposes of collection and control as are not already regulated by the very detailed rules in Articles 22(1) to (7). Moreover these to a certain extent expressly impose on transactions carried out between Member States formalities which are not imposed on domestic transactions within a Member State.*

*23 When Article 22(8) includes with the authority to impose other formalities the restriction that there shall be equal treatment for domestic transactions and transactions carried out between Member States, that must be understood, in accordance with the whole purpose of the Amending Directive, as meaning that no other or stricter formalities may be imposed on transactions carried out between Member States than on transactions within the Member State concerned. Article 22(8) may for example entitle a Member State to prescribe that a taxable person is to provide a bank guarantee for his payment of value added tax and the requirement of equal treatment will then have the consequence that the Member State cannot require the bank guarantee to be greater in the case of transactions carried out between Member States than in the case of*

*domestic transactions.*

*24 On the other hand the Commission thinks that the rule does not prevent the imposition of other or stricter requirements with regard to domestic transactions than with regard to transactions carried out between Member States. The fact that so-called reverse discrimination is not excluded by the Directive may be seen in connection with the fact that in practice it is accepted that the Treaty does not prevent reverse discrimination in the fiscal sphere by domestic goods being subjected to higher tax than goods from other Member States, the more so as there may be reverse discrimination as regards the Member States' formulation of formal rules on the collection of tax in so far as harmonization has not taken place.*

*25 In those circumstances rules on accompanying documents which apply only to domestic transactions within a Member State may in the Commission's view be laid down within the framework of Article 22(8) of the Directive.*

*Discussion*

*26 As the Commission emphasizes, it is settled case-law that the Treaty does not prevent a Member State from imposing on domestic goods higher taxes than on imported goods. Thus in paragraphs 32 and 33 of its judgment in Case 86/78 Peureux, (7) the Court declared as follows:*

*`Although Article 95 prohibits any Member State from imposing internal taxation on products imported from other Member States in excess of that on national products, it does not prohibit the imposition on national products of internal taxation in excess of that on imported products.*

*Disparities of this kind do not come within the scope of Article 95, but result from special features of national laws which have not been harmonized in spheres for which the Member States are responsible.'*

*The Court's conclusion was as follows:*

*`Whether or not a domestic product - in particular certain potable spirits - is subject to a commercial monopoly, neither Article 37 nor Article 95 of the EEC Treaty prohibits a Member State from imposing on that domestic product internal taxation in excess of that imposed on similar products imported from other Member States.'*

*27 That case-law in the field of value added tax corresponds to the case-law in many other fields. Thus the Court has declared that a system in which different conditions apply to different goods but which does not raise obstacles to the importation or sale of imported or reimported goods is not covered by the prohibition in Article 30 of the Treaty. Furthermore, in relation to the general prohibition of discriminatory treatment, the Court has declared that `Community law does not apply to treatment which works to the detriment of retailers who sell national products as compared with retailers who sell imported products and which is put into effect by a Member State in a sector which is not subject to Community rules or in relation to which there has been no harmonization of national laws' (see Case 355/85 Cognet, (8) particularly at paragraphs 10 and 11, and Case 98/86 Mathot. (9)*

*28 That case-law regarding the general provisions of the Treaty, as emphasized by the Commission, must, basically also apply with regard to the Member States' entitlement, for purposes of collection and control, to impose formalities on domestic transactions which are not imposed on transactions carried out between Member States. But that is only the basis, since rules on harmonization, in this case in the field of value added tax, may be deemed to have as their purpose to lay down exhaustively the formalities with which the Member States may require compliance also as regards domestic transactions in the Member State concerned. We must therefore consider whether the Directive, as amended by the Amending Directive, has as its*

*objective such exhaustive harmonization, including domestic transactions within the Member States, that the Member States are precluded from imposing on domestic transactions, in accordance with the basis mentioned, technical requirements for the purposes of collection and control in accordance with the starting point mentioned, where similar requirements are not imposed on transactions carried out between Member States.*

*29 I think the first part of Article 22(8) of the Directive shows clearly that as regards value added tax there is no intention to regulate exhaustively in Community law the formal requirements which may be imposed for the purposes of collection and control. The provision specifically provides that the Member States may impose `other obligations which they deem necessary for the correct collection of tax and for the prevention of evasion'. These questions are thus still left basically to the Member States.*

*30 Since the second part of the paragraph then restricts the Member States' scope for laying down such rules by the condition that there shall be equal treatment for domestic transactions and transactions carried out between Member States, it is in my view most likely that that wording should be understood as a technical legal reiteration of the general prohibition of discrimination in the Treaty. That prohibition, as stated above, does not prevent higher taxes being imposed on domestic goods than on imported goods and even less does it therefore, we may conclude, prevent domestic transactions from being required to observe formalities which are not required in the case of transactions carried out between Member States.*

*31 One may imagine how the provision in Article 22(8) would have appeared if the second part had been omitted. Then the only restriction, contained in the provision, of the Member States' scope for imposing `other obligations' would have been that such obligations did not, in trade between Member States, give rise to formalities connected with the crossing of frontiers. Then, since this is at any rate a partially harmonized sphere, it might be doubtful whether the general prohibition of discrimination also applied with regard to the `other obligations' referred to in the provision. That doubt would be increased by the fact that Article 22(1) to (7) lays down detailed rules, which might also lead one to assume that Article 22(8) was also exhaustive. The general experience is that the more a subject is expressly regulated, the greater the basis for drawing opposite conclusions. The inclusion of the second part of Article 22(8) was therefore, I think, on technical legal grounds, well calculated to make it clear that the general prohibition of discrimination was applicable together with the prohibition of formalities connected with the crossing of frontiers.*

*32 It might certainly be argued that the second part of the provision uses the expression `equal treatment for domestic transactions and transactions carried out between Member States' and that that must indicate that the intention was to provide not only that transactions carried out between Member States must be treated equally with domestic transactions but also that domestic transactions should be treated equally with transactions carried out between Member States. In support of such an interpretation one might possibly also point to the consideration that value added tax has a neutral effect on goods and services of domestic origin and on those from other Member States as the case may be.*

*33 I must however stress that the second part of Article 22(8) of the Directive, as an exception to the main rules in the first part, must, in accordance with the Court's consistent case-law, be strictly interpreted.*

*34 Such an interpretation moreover agrees best both with the position of the provision in Title XVIa of the Directive on transitional arrangements for the taxation of `trade between Member States' and with the purpose of the provision. The Amending Directive, which gave the provision its present form, did not bring about any complete harmonization of the laws of the Member States' on value added tax. Reference is made to a transitional phase pending the determination of the definitive system that will bring about the objectives of the common system of value added tax on*

*goods and services supplied between Member States (see the eighth recital to the Amending Directive). The principal purpose of the Amending Directive was, as appears from the first, second and third recitals, (a) to complete the internal market, (b) to eliminate fiscal frontiers between Member States, (c) to abolish the imposition of tax on imports and the remission of tax on exports, and (d) to abolish fiscal controls at internal frontiers for all transactions carried out between Member States. That corresponds moreover to the content of the provisions authorizing the adoption of the Directive, namely Article 99 in conjunction with Article 7a.*

*35 I must also draw attention to the twelfth recital, which shows that the purpose of inter alia Article 22(8) was to reconcile reduction of administrative formalities for undertakings with effective control measures. Article 22(8) in this connection indicates that it is the Member States which, as long as there has been no complete harmonization of the rules for value added tax, are in the best and most immediate position to determine which control measures with regard to transactions within the relevant Member State are necessary and appropriate for guaranteeing the Member States' essential fiscal and economic interests in a correct collection of value added tax and the prevention of evasion.*

*36 To sum up I think in view of all the circumstances that the answer to the question raised should be that the requirement of equal treatment in Article 22(8) of the Directive must be interpreted as meaning that it does not preclude national rules which impose a requirement for accompanying documents in connection with domestic transactions in the Member State concerned where no corresponding requirement is imposed with regard to transactions carried out between Member States.*

*Conclusion*

*37 In view of the foregoing considerations I suggest that the Court should answer the question referred to it by the Commissione Tributaria di Primo Grado di Bolzano as follows:*

*The requirement of equal treatment in Article 22(8) 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, as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers must be interpreted as meaning that it does not preclude national rules which impose a requirement for accompanying documents in connection with domestic transactions in the Member State concerned, where no corresponding requirement is imposed with regard to transactions carried out between Member States.*

*(1) - 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) as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).*

*(2) - At the material time this was in fact Article 8a, but following the entry into force on 1 November 1993 of the Treaty on European Union it has become Article 7a.*

*(3) - OJ, English Special Edition 1967, p. 14.*

*(4) - [1978] ECR 2347, at paragraph 25.*

*(5) - [1995] ECR I-0000, at paragraph 15.*

*(6) - See, most recently, Case C-55/94 Gebhard [1995] ECR I-4165.*

*(7) - [1979] ECR 897.*

*(8) - [1986] ECR 3231.*

*(9) - [1987] ECR 809.*