

## 61996C0130

Opinion of Mr Advocate General Léger delivered on 13 March 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.

*European Court reports 1997 Page I-05053*

### Opinion of the Advocate-General

*1 The question submitted in this case by the Supremo Tribunal Administrativo (Supreme Administrative Court) asks the Court, once again, to interpret Article 33 of the Sixth VAT Directive (1) (hereinafter the 'Sixth Directive'), which precludes Member States from maintaining or introducing charges which can be characterized as turnover taxes. The Portuguese court is seeking the information which will enable it to analyse the characteristics of a national charge in order to determine whether it is lawful.*

#### *I - Facts and national proceedings*

*2 The dispute before the national court arises from 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-Estaleiros Navais SA (hereinafter 'Solisnor') paid this duty in the amount of ESC 43 586 400 in respect of a works contract concluded on 28 December 1989 with Sociedade Portuguesa de Navios e Tanques SA (hereinafter 'Soponata') concerning construction of an oil tanker for transporting crude oil.*

*4 Solisnor subsequently requested, and obtained, annulment of the payment of that charge pursuant to a judgment delivered on 21 March 1994 by the Tribunal Tributário de Primeira Instância (Fiscal Court of First Instance), Setúbal. The Fazenda Pública (Public Treasury) appealed that judgment to the Supremo Tribunal Administrativo.*

*5 Before that court, the Fazenda Pública argues that the stamp duty is not a turnover tax and is therefore not contrary to Article 33 of the Sixth Directive. (2)*

6 For its part, Solisnor argues that, in the light of its characteristics as a general tax on consumption and one proportional to the price of the services, the stamp duty is a turnover tax, within the meaning of Article 33, and that this renders it incompatible with the common system of VAT. (3)

## *II - The stamp duty under Article 91 of the TGIS*

7 According to the national court, that duty is applicable generally to 'all the documents, books, papers, acts and products specified in the TGIS' (4) and, more specifically, to 'works contracts and contracts for the supply of materials or any kind of consumer article ...'. (5) The amount of the 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.

8 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 removal 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'. (6)

9 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 State had been required, since 1 January 1989, to adopt the measures necessary to comply with the Sixth Directive. (7)

10 The Supremo Tribunal Administrativo 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 in the terms 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?'

11 Article 378 of the Act of Accession of the Portuguese Republic refers to Annex XXXII, which sets out a list of measures applicable to the Portuguese Republic, including the Sixth Directive, and defines the conditions under which they are to apply. In the case of the Sixth Directive, Annex XXXII refers to the option which the Portuguese Republic is recognized as having, under certain conditions, to grant tax exemptions and to exempt a range of transactions. Article 378 and Annex XXXII cannot therefore, in view of their subject-matter, assist in the definition, for legal purposes, of the Portuguese stamp duty.

12 The Court has, in its case-law, demarcated the scope of Article 33 of the Sixth Directive, setting out criteria which enable the concept of turnover tax to be defined. It is appropriate to review those criteria in order to determine the precise nature of the stamp duty here in issue.

## *III - The concept of turnover tax within the meaning of Article 33 of the Sixth Directive*

13 Article 33 of the Sixth Directive provides as follows:

'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 The Court has, in its case-law, consistently taken the view that this provision '... does not preclude the maintenance or introduction of stamp duties or other kinds of taxes, duties or charges which do not have the essential characteristics of VAT'. (8) Member States are even entitled to

charge VAT concurrently with taxes, duties or charges other than turnover taxes. (9)

15 The reason for the prohibition on charging VAT concurrently with charges that can be characterized as turnover taxes lies in the existence of a harmonized system in the form of a common system of charges on added value.

16 The First VAT Directive (10) (hereinafter the 'First Directive') sets out the basic principles of this system. It states that the objective pursued is to '... achieve such harmonization of legislation concerning turnover taxes as will eliminate, as far as possible, factors which may distort conditions of competition ...'. (11) Within the logic of that text, harmonization supposes '... the abolition of cumulative multi-stage taxes' (12) in force in some Community States, the main characteristic of which is to tax, for each transaction, the total price, without any possibility of deducting tax paid at the preceding stage. Such a charge is in no way neutral in regard to the process of production and distribution since, by a mechanical effect, it favours integrated economic circuits and increases the price of goods and services in proportion to the level of the value created during the first stages of their production.

17 The Second VAT Directive (13) (hereinafter the 'Second Directive') implements this system based on a Community definition of VAT, thereby replacing national systems. Except within the special area of VAT, the fiscal competence of the Member States is preserved.

18 Article 33 of the Sixth Directive guarantees the consistency and durability of the common system by authorizing only taxes other than those meeting the criteria of turnover taxes. The wording, however, does not specify what is to be understood by charges which can be 'characterized as turnover taxes'.

19 The Court interpreted this concept in its judgment in *Rousseau Wilmot*:

'In leaving the Member States free to maintain or introduce certain indirect taxes such as excise duties on the 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 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.' (14)

20 The Court has added that 'taxes, duties and charges must ... be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT'. (15)

21 The first, second and third paragraphs of Article 2 of the First Directive define VAT and are worded as follows:

'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 the 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.

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.

The common system of value added tax shall be applied up to and including the retail trade stage.'

22 The Court has, in its case-law, derived from this definition the essential characteristics of VAT. It has stated that 'VAT applies generally to transactions relating to goods or services; it is proportional to the price of those goods or services; 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, since the tax payable on a transaction is calculated after deducting the tax paid on the previous transaction'. (16)

23 It is for that reason necessary to examine whether each of those elements features in a tax such as described in Article 91 of the TGIS', (17) which would, in that case, come under the prohibition in Article 33.

#### *IV - The legal nature of the stamp duty under Article 91 of the TGIS*

24 The Portuguese Government and the Fazenda Pública, which declares that it supports in full the written observations submitted by the former, (18) argue that the stamp duty 'is imposed on the act or contract, and not on the goods which are the subject-matter thereof' and that 'even if the contract is ineffective, invalid or is not implemented, the stamp duty ... remains due'. From this they infer that 'the charge is not imposed on the transaction, and therefore one cannot logically argue that the charge in question is a turnover tax'. (19)

25 The fact that the stamp duty is imposed on the contract and not on the transaction does not, in my view, suffice to allow classification as a turnover tax to be discounted. The written conditions of a contract constitute rules which the contracting parties have defined with a view to being bound by them. By making the value specified in the contract the basis for the charge, the national law thus refers to the price, which, in most cases, will be the actual price of the transaction underlying the charge.

26 It therefore strikes me as excessive to plead the risks of nullity or non-performance of the contracts, which are low in proportion to the number of contracts that are lawful and properly performed, for the purpose of arguing that there is a discrepancy between the act and the transaction which it organizes. I accordingly take the view that, in taxing a contract, the stamp duty is levied on a transaction in a manner comparable to a tax that is applied directly to the economic transaction itself.

27 A charge such as the stamp duty under Article 91 could be classified as a turnover tax, in the widest possible meaning of the term, since the taxable amount on which it is based consists in the value of the contract, which, in principle, represents the trader's turnover. This may be so a fortiori since the criterion of proportionality is not disputed, given that the stamp duty is quantified by application of a percentage to a taxable amount. (20) To resume the line of reasoning set out in the previous point, the proportionality of the charge to the price of the goods or services would be upset only if discrepancies that were frequent and of unequal value in relation to the price contractually defined resulted in that price bearing no relationship to the actual contract ultimately performed.

28 These factors, however, do not suffice. The criteria derived from the Court's case-law place a narrower meaning on the concept of turnover tax.

29 The Portuguese Government and the Fazenda Pública argue that the condition that the charge be general in character is not satisfied. In their view, the basis of assessment for the stamp duty is not the totality of the economic activity, but only a determined and specific supply of services. (21) The Commission takes an identical view. The contested charge affects essentially the formation of certain acts. Moreover, even when it affects goods and services, the stamp duty is not imposed on these in their totality, but is levied only on certain very clearly defined categories, such as works contracts. (22)

30 Solisnor, in contrast, contends that the stamp duty is not a specific charge levied on only one category of persons but is in fact a general tax (23) since it applies to all legal persons concluding works contracts.

31 The Court has ruled that a '... duty [which] is not ... intended to apply to all economic transactions in the Member State concerned' is not a general tax. (24)

32 There is in the present case no doubt that a tax such as that described by the national court is not general. While it applies to a large number of measures - which, moreover, it would be more accurate to describe as 'aids' given the size of the list in the Law - the stamp duty does not, however, relate to all economic transactions in the Member State concerned. The text of Article 1 of the stamp duty regulation (25) refers to 'documents, books, papers, acts and products specified in the TGIS', (26) which reveals the limiting nature of the charge in its widest definition. A fortiori, the Article 91 stamp duty, which is applicable to 'works contracts and contracts for the supply of materials or any kind of consumer article', cannot be regarded as being general in character, given the strict limitation on the subject-matter of the acts on which the duty can be levied.

33 The feature of being general in character, which the Court has laid down in its case-law, is thus absent in this case. It is next necessary to examine whether the stamp duty is levied at each stage in the production and distribution process.

34 The contract in question relates to the construction by Solisnor of an oil tanker ordered by Sopotata. In order to satisfy the condition just mentioned, each stage in the construction of the oil tanker, from the purchase of the raw materials to delivery of the vessel, ought to give rise to payment of the charge.

35 As appears from reading the text, and as the Commission indicates, the stamp duty seems to be applied only to part of the production process. (27) In order to determine whether Article 91 is sound in law, the national court will, in my view, have to examine whether each of phases contributing to the construction of the vessel can fall within the category of 'works contracts and contracts for the supply of materials or any kind of consumer article', in the words of Article 91. The national court must, in particular, examine whether the supplies of services effected in the context of contractual relations concluded between the trader and other professionals were subject to imposition of the stamp duty.

36 In order for a charge to be justifiably described as a turnover tax, it is further necessary, according to the Court's case-law, to demonstrate that the tax applied during previous transactions is deductible from the duty finally paid by the trader.

37 However, I do not think that the deductibility of input tax should constitute a mandatory condition governing classification as a turnover tax.

38 In any event, the criteria already examined are in this case sufficient to dispel any such classification of the disputed stamp duty.

39 More generally, it seems to me that, by making classification as a turnover tax subject to the requirement of a system of deduction, the objectives pursued by the common system of VAT, or at least some of them, risk being overlooked.

40 Under the terms of the First Directive, the harmonization of legislation concerning turnover taxes 'must result in the abolition of cumulative multi-stage taxes and in the adoption by all Member States of a common system of value added tax'. (28) To that end, Article 1 provides that 'Member States shall replace their present system of turnover taxes by the common system of value added tax ...'.

41 As I have already pointed out, (29) Article 33 of the Sixth Directive seeks to preserve the integrity of the common system of VAT. Its principal function is to guarantee the Community system against the introduction or maintenance of charges on turnover which, in the manner of cumulative multi-stage taxes, are liable to distort conditions of competition.

42 If input tax is not deductible, this results in the charge having a cumulative effect, (30) such that an interpretation under which Article 33 prohibits only deductible taxes would ultimately amount to authorizing reimposition of precisely the type of charges which the abovementioned directives set themselves the task of eliminating. (31)

43 It is for that reason that I propose that the Court should not make its assessment dependent on the existence of this factor within the legal system governing the Portuguese tax, and that it should thus take the view that the deductibility of a charge does not have any bearing on its nature as a turnover tax for the purposes of Article 33.

44 That nature will remain defined by its general character, its proportionality and - an essential condition in view of the position which it occupies in the definition of cumulative multi-stage taxes (32) - by the levying of the duty at each stage in the production and distribution process.

45 Turnover taxes having these characteristics alone are, in my view, among those which are most liable to jeopardize the functioning of the common system of VAT in so far as, whether deductible or not, they distort conditions of competition and adversely affect harmonization. (33)

46 In the event that deductibility is possible, 'the continued existence of national taxes essentially identical to value added tax would entail the application of a distinct rate in addition to the common rates, thereby enabling the harmonized system to be circumvented'. (34) Likewise, the 'possible difference[s] between the systems governing ... two taxes ... which, however, exhibit the same characteristics ... demonstrate that the overlap between value added tax and similar national taxes has a far from negligible effect on the uniform functioning of the common system'. (35)

47 Charges which, in addition to the abovementioned characteristics, (36) do not offer a possibility to deduct input tax upset, in the same way, the fiscal harmonization which has been pursued since the First Directive. They adversely affect the principle of neutrality laid down by the common system and brought into effect by the abolition of national cumulative multi-stage taxes. (37)

48 However, in the event that the Court should take the view that the deductibility of a charge must remain a determinant factor for the purpose of its legal classification, it should be noted that the Portuguese tax does not have this characteristic. Article 91 of the TGIS makes no reference to it. As the Commission points out, the stamp duty is levied on the gross amount of the contract price and not on the fraction of the price representing the value added relative to the expenditure which the trader has incurred in respect of input tax. (38) Furthermore, none of the interveners argues that the Article 91 stamp duty is deductible.

49 It follows that the Article 91 stamp duty does not satisfy the conditions which would make it a turnover tax and thus incompatible with the common system of VAT; accordingly, in my view, Article 33 of the Sixth Directive does not preclude a charge of this nature.

## Conclusion

*In the light of these considerations, I propose that the Court reply as follows to the question submitted:*

*Article 33 of 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 introduction or maintenance of a national charge having the characteristics of the stamp duty imposed by Article 91 of the 'Tabela Geral do Imposto do Selo'.*

*(1) - 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).*

*(2) - Page 2 of the French translation of the decision referring the case.*

*(3) - Ibid.*

*(4) - Article 1 of the stamp duty regulation, approved by Decree-Law No 12700 of 20 November 1926.*

*(5) - Article 91 of the TGIS.*

*(6) - Cited by the national court, p. 4 of the French translation of the decision referring the case.*

*(7) - Ibid. The date of 1 January 1989 was laid down in Annex XXXVI drawing up the list provided for in Article 395 of the Act of Accession of the Portuguese Republic to the European Community (Acts concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, OJ 1985 L 302, p. 397).*

*(8) - See, recently, Case C-208/91 Beaulande v Directeur des Services Fiscaux, Nantes [1992] ECR I-6709, paragraph 13.*

*(9) - Case 73/85 Kerrutt v Finanzamt Mönchengladbach-Mitte [1986] ECR 2219, paragraph 22, and Joined Cases 93/88 and 94/88 Wisselink and Others v Staatssecretaris van Financiën [1989] ECR 2671, paragraph 14.*

*(10) - First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).*

*(11) - Third recital in the preamble.*

*(12) - Fourth recital in the preamble.*

*(13) - 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 (OJ, English Special Edition 1967, p. 16).*

*(14) - Case 295/84 Rousseau Wilmot v Organic [1985] ECR 3759, paragraph 16, and, more recently, 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, emphasis added.*

- (15) - Case C-200/90 *Dansk Denkavit and Poulsen Trading v Skatteministeriet* [1992] ECR I-2217, paragraph 11, emphasis added.
- (16) - *Dansk Denkavit and Poulsen Trading*, cited above, paragraph 11. See also Case 252/86 *Bergandi v Directeur Général des Impôts* [1988] ECR 1343, paragraph 15, *Wisselink and Others*, cited above, paragraph 18, Case C-109/90 *Giant v Gemeente Overijse* [1991] ECR I-1385, paragraphs 11 and 12, *Bozzi*, cited above, paragraph 12, and *Beaulande*, cited above, paragraph 14.
- (17) - Page 4 of the French translation of the decision referring the case.
- (18) - Point 1 of its written observations.
- (19) - Page 10 of the French translation of the Portuguese Government's written observations. See also points 2.1 to 2.5 of the written observations of the *Fazenda Pública*.
- (20) - The rate in this case is 6\$.
- (21) - Point 18 of the Portuguese Government's written observations.
- (22) - Point 12 of its written observations.
- (23) - Page 14 of the French translation of its written observations.
- (24) - *Beaulande*, cited above, paragraph 16.
- (25) - Point 7 of the present Opinion.
- (26) - Emphasis added.
- (27) - Point 12 of its written observations.
- (28) - Fourth recital in the preamble. Point 16 of the present Opinion. See also the Opinion of Advocate General Mischo in *Wisselink and Others*, cited above, points 19 to 21.
- (29) - Point 18 of the present Opinion.
- (30) - Point 16 of the present Opinion.
- (31) - See, in particular, D. Berlin, 'Droit communautaire et fiscalité. Harmonisation des fiscalités', *Traité de droit européen*, in *Juris-Classeur 'Europe'*, 1996, vol. 4, fascicule 1630, paragraph 10 et seq.; P. Farmer and R. Lyal, *EC Tax Law*, 1994, p. 132 et seq.
- (32) - Point 16 of the present Opinion.
- (33) - I would point out that the sense of the Court's judgments interpreting Article 33 would not have been different in the absence of a criterion relating to deductibility. Thus, this situation would not have altered the classification of a tax such as the fiscal contribution described in *Dansk Denkavit and Poulsen Trading*, cited above, since the other conditions permitting it to be classified as a turnover tax were satisfied. Likewise, if this criterion had not been required, that would not have altered the content of the judgments holding that certain taxes were not turnover taxes, in so far as all those decisions, in so far as I am aware, were based on the finding that at least one condition other than that relating to deductibility had not been satisfied.



*(34) - Opinion of Advocate General Tesauro in Dansk Denkavit and Poulsen Trading, cited above, point 8.*

*(35) - Ibid.*

*(36) - Point 44 of the present Opinion.*

*(37) - Point 16 of the present Opinion.*

*(38) - Point 12 of the French translation of the written observations.*