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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 30 April 1998. - A.J. van der Kooy v Staatssecretaris van Financiën. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Part Four of the EC Treaty - Article 227 of the EC Treaty - Article 7(1)(a) of Sixth Directive 77/388/EEC - Goods in free circulation in overseas countries and territories. - Case C-181/97.

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Opinion of the Advocate-General

1 In these proceedings, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) seeks to ascertain whether the entry into a Member State of a vessel which was in free circulation in one of the overseas countries and territories (hereinafter `OCT') is in principle subject to value added tax (`VAT').

2 The question arose in proceedings brought by the owner of the vessel against the Netherlands Administration, challenging the notice of assessment of VAT issued in respect of the import of that vessel, which came from the Netherlands Antilles.

The facts, the main proceedings and the preliminary question

3 As described in the order for reference, the events giving rise to the main proceedings are as follows:

- The motor vessel Joshua, built in 1964 in Haarlem as a fishing vessel, was sold in 1984 to Caribbean Chartering & Sales Ltd, of Nassau, Bahamas, and accordingly was removed from the customs territory of the European Community. In 1985 and 1986 it was converted into a cruising vessel in the Netherlands.

- On 22 April 1993 the vessel was sold to the appellant, who resides in the Netherlands, and to J. Wielinga, who resides in Curaçao. From 15 May 1993 the vessel, flying the flag of the United Kingdom, lay in the port of Scheveningen, where on 20 May 1993 it was noticed by customs officials from Hoofddorp. The appellant was on board the vessel.

- The Netherlands tax administration issued a notice of assessment of VAT in the amount of NLG 157 500 in respect of import of the vessel under Article 18 of the Wet op de omzetbelasting (Law on Turnover Taxes) 1968, no exemption being available under Article 21 of that Law.

- Mr van der Kooy appealed against that assessment to the Gerechtshof (Regional Court of Appeal), Amsterdam, which dismissed the appeal on the ground that the territory of the Netherlands Antilles, from which the vessel had come, `did not form part of the territory of a

Member State for the purposes of the Sixth Directive'.

4 He appealed against the judgment of the Gerechtshof, Amsterdam, to the Hoge Raad der Nederlanden, which stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

`In the light of Article 132(1) and Article 227 of the EC Treaty, is Article 7(1)(a) of the Sixth Directive to be interpreted as meaning that the importation into the Netherlands of a ship which was previously in free circulation in the Netherlands Antilles is to be regarded as the entry into the Community of a product which does not fulfil the conditions of Articles 9 and 10 of the EC Treaty?'

Admissibility of the preliminary question

5 In its observations, the French Government considers that, in view of the extremely succinct statement of facts contained in the order for reference, (1) which does not allow the nature of the dispute in the main proceedings to be clearly determined, the Court of Justice should declare the question inadmissible.

6 In that government's view, the factual particulars in the order for reference do not disclose why the national court considers that there is a link between the vessel and an OCT or what is meant in this case by the fact that the vessel `was previously in free circulation in the Netherlands Antilles'. Nor is it stated whether the appellant's vessel was merely calling at port in the Netherlands or whether it was being used by Mr van der Kooy for private or commercial purposes.

7 In the French Government's view, those omissions concerning the origin and use of the vessel make it impossible to give an interpretation of Community law which is conducive to giving a decision in the main proceedings. Moreover, they prevent the Member States and Community institutions wishing to do so from submitting observations under Article 20 of the EC Statute of the Court of Justice. Those circumstances, seen in the light of the Meilicke (2) and Saddik (3) cases, should lead to the preliminary question being declared inadmissible.

8 For my part, whilst recognising that a more detailed account of the facts would have been desirable, I consider that the essential features of the dispute can be seen in the order for reference. The doubts entertained by the French Government are certainly well founded, but the Court of Justice must work on the basis of the facts which the national court considers proved, and should not look at the evidence on which those facts are based.

9 Accordingly, I do not think it appropriate to uphold the objections made by the French Government concerning the admissibility of the preliminary question: on the contrary, the premisses relied on by the national court, one of which is the prior link between the vessel and an OCT, will have to be accepted as they stand. That the vessel was in free circulation in the Netherlands Antilles is regarded as proven by the Hoge Raad, whose question consists specifically in determining whether or not the entry into the Netherlands of a vessel in such circumstances constitutes an importation within the meaning of the Sixth Directive.

10 Nor do I consider the request for reformulation of the question, unilaterally made by the appellant in the main proceedings, to be well founded. By making that request, the appellant seeks to act in the stead of the referring court in requesting the preliminary ruling. After accusing the Hoge Raad of erring as to the origin of the vessel, (4) the appellant requests that the Court of Justice rule that a vessel originating in one of the Member States retains that status at all times and therefore meets the requirements of Article 9 of the Treaty.

11 The national court makes no reference whatsoever to that matter, which is not at issue in the question submitted by it, being merely one of the surrounding factual circumstances. It is not therefore appropriate to reformulate the question, since the Court of Justice has repeatedly held

(and recently confirmed) (5) `... that, under the division of jurisdiction provided for by Article 177 of the Treaty in preliminary-ruling proceedings, it is for the national court alone to determine the subject-matter of the questions which it wishes to refer to the Court. The Court cannot, at the request of one party to the main proceedings, examine questions which have not been submitted to it by the national court. If, in view of the course of the proceedings, the national court were to consider it necessary to obtain further interpretations of Community law, it would be for it to make a fresh reference to the Court (Case 311/84 CBEM v CLT and IPB [1985] ECR 3261, paragraph 10; Case C-337/88 SAFA v Aministrazione delle Finanze dello Stato [1990] ECR I-1, paragraph 20; and Case C-196/89 Nespoli and Crippa [1990] ECR I-3647, paragraph 23)'.

The applicable Community provisions

(i) Provisions concerning VAT

12 Article 2 of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (6) (hereinafter `the Sixth Directive') provides that imports of goods are subject to VAT.

13 Article 7 of the Sixth Directive, (7) which defines taxable events, provides:

`1. "Importation of goods" shall mean:

(a) the entry into the Community of goods which do not fulfil the conditions laid down in Articles 9 and 10 of the Treaty establishing the European Economic Community ...

(b) the entry into the Community of goods from a third territory, other than the goods covered by (a).'

14 Article 3 of the Sixth Directive (8) provides, under the heading `Territorial application':

`(1) For the purposes of this directive:

- "territory of a Member State" shall mean the territory of the country as defined in respect of each Member State in paragraphs 2 and 3,

- "Community" and "territory of the Community" shall mean the territory of the Member States as defined in respect of each Member State in paragraphs 2 and 3,

- "third territory" and "third country" shall mean any territory other than those defined in paragraphs 2 and 3 as a territory of a Member State.

(2) For the purposes of this directive, the "territory of the country" shall be the area of application of the Treaty establishing the European Economic Community as defined in respect of each Member State in Article 227.

...'

(ii) Provisions concerning the OCTs

15 The third paragraph of Article 227 of the EEC Treaty, which defines the territorial scope of the Treaty, brings within its scope the OCT listed in Annex IV as countries and territories to which `[t]he special arrangements for association set out in Part Four of this Treaty shall apply'. The Netherlands Antilles have appeared on that list since 1964.

16 Article 3(r) of the EC Treaty (9) provides that the activities of the Community are to include, as provided in the Treaty and in accordance with the timetable set out therein, `the association of

overseas countries and territories in order to increase trade and promote jointly economic and social development'.

17 Part Four of the Treaty (Articles 131 to 136) is entitled `Association of the overseas countries and territories'. The purpose of that association, pursuant to Article 131, is to promote the economic and social development of the OCT and to establish close economic relations between them and the Community as a whole.

18 Article 132 of the Treaty provides:

`Association shall have the following objectives.

1. Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to this Treaty.

...'

19 Article 133 of the Treaty provides:

`1. Customs duties on imports into the Member States of goods originating in the countries and territories shall be prohibited in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty.

2. Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be progressively abolished in accordance with the provisions of Articles 12, 13, 14, 15 and 17.

...'

20 Finally, Article 136 of the Treaty provides:

`For an initial period of five years after the entry into force of this Treaty, the details of and procedure for the association of the countries and territories with the Community shall be determined by an Implementing Convention annexed to this Treaty.

Before the Convention referred to in the preceding paragraph expires, the Council shall, acting unanimously, lay down provisions for a further period, on the basis of the experience acquired and of the principles set out in this Treaty.'

21 On the day of the importation at issue in these proceedings, there was applicable, ratione temporis, Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories of the European Economic Community (10) (hereinafter `Decision 91/482'), which, according to Article 241 thereof, entered into force on 20 September 1991; pursuant to Article 240(1) of that decision, it was to apply for a period of 10 years `from 1 March 1990'. (11)

22 Article 101 of that decision provides:

`1. Products originating in the OCT shall be imported into the Community free of customs duties and charges having equivalent effect.

2. Products not originating in the OCT but which are in free circulation in an OCT and are re-exported as such to the Community shall be accepted for import into the Community free of customs duties and taxes having equivalent effect providing that they:

- have paid, in the OCT concerned, customs duties or taxes having equivalent effect of a level equal to, or higher than, the customs duties applicable in the Community on import of these same

products originating in third countries eligible for the most-favoured-nation clause,

- have not been the subject of an exemption from, or a refund of, in whole or in part, customs duties or taxes having equivalent effect,

- are accompanied by an export certificate.

...'

The answer to the preliminary question

23 My reasoning will be along the following lines:

(a) I shall first describe the legal rules on trade between the OCT (specifically the Netherlands Antilles) and the Community, as provided for by the Treaty and interpreted in recent case-law of the Court of Justice;

(b) I shall then analyse the concepts of importation and `entry into the Community of goods' in relation to the territorial scope of the Sixth Directive;

(c) I shall finally conclude that the `entry into the Community of goods' - and therefore import thereof for the purposes of VAT under Article 7 of the Sixth Directive - occurs when, on fulfilment of the other requirements, the good in question comes from one of the OCT where it was in free circulation.

(i) Trade between the OCT and the Community

24 In my Opinion in Road Air I emphasise that, in defining the legal rules on relations between the OCT and the Community, it was important to clarify `the extent to which each of the provisions of the EEC Treaty may be applied to them, having regard to Articles 131 to 136 of that Treaty.'

25 The general answer given to that question by the Court of Justice is to be found in its judgment of 12 February 1992 in Leplat: `That association [of the OCT with the Community] is the subject of arrangements defined in Part Four of the Treaty (Articles 131 to 136), with the result that, failing express reference, the general provisions of the Treaty do not apply to the OCT'. (12)

26 By virtue of the association of the Community with the OCT, therefore, the latter are not directly and automatically covered by all Community law, (13) whether primary law or secondary: on the contrary, it will be necessary in each case to decide, in the light of Articles 131 to 136 of the EC Treaty, what Community provisions are applicable to them and to what extent.

27 In the Road Air case, the issue was whether Part Four of the EEC Treaty, at the relevant date in the main proceedings (June 1991), precluded the levying of customs duty on the importation into the Community of goods originating in a third country which were in free circulation in the Netherlands Antilles.

28 The Court's answer was that the provisions of Part Four were to be interpreted as not precluding the levying of customs duties, and that they should be levied in accordance with Decision 91/482, cited above, a provision validly laid down by the Council under the power conferred on it by Article 136 of the Treaty.

29 The legal basis for that answer comprised, in short, the following points:

(a) The OCT do not form part of the customs territory of the Community and their trade with the latter do not enjoy the same status as trade between Member States. The latter trade comprises intra-Community operations, whereas trade between the OCT and the Community involves

genuine imports.

(b) Article 133(1) of the Treaty does not apply to products which, after importation into those countries and territories, are thereafter re-exported to one of the Member States.

(c) To interpret that provision otherwise - for example, to the effect that, for products of that kind, the OCT should be granted a regime similar to that operated between the Member States themselves - would mean `... that the OCT would form part of the common customs area, a result which goes far beyond what was envisaged by the Treaty'. (14)

(d) In each case, it is necessary to observe the decisions which the Council has adopted for the period in question on the basis of Article 136 of the Treaty.

30 Neither in Part Four of the Treaty nor in the Council decisions adopted under Article 136 thereof are there any provisions referring to the imposition of VAT on imports from the OCT. The special rules for association of the OCT do not therefore involve any special arrangements regarding VAT.

31 It is true that, under Decision 91/482, products originating in OCT are allowed to be imported into the Community free of customs duties and charges having equivalent effect (Article 101(1)). It is also true that that exemption also applies to products which do not originate in the OCT but are in free circulation in an OCT and are re-exported as such to the Community, provided that they have paid in the OCT concerned customs duties or charges having equivalent effect of a level equal to or higher than the customs duties applicable in the Community.

32 However, there is no question of either exemption applying to VAT, since VAT is neither a customs duty nor an equivalent charge. The Court of Justice gave a ruling to that effect in its judgment of 5 May 1982 in Schul. (15) It is therefore inappropriate to contend for an analogy in order to extend to an indirect levy such as VAT provisions laid down for and applicable only to customs duties or charges having an effect equivalent thereto.

(ii) The taxable event under the Sixth Directive - the `importation of goods' - and the scope thereof

33 By virtue of Articles 3 and 7 of the Sixth Directive, in conjunction with Article 227 of the Treaty, for VAT purposes in principle a good is imported (that is to say its `entry into the Community' occurs) when it comes from one of the OCT. There are two clear reasons for that statement.

34 First, the OCT do not form part of the `territory of a Member State' in the sense given to that term by Article 7 of the Sixth Directive. The reference made in paragraph 1 of that article to paragraphs 2 and 3 thereof makes it clear that the `territory of a country' is as defined for each Member State by Article 227 of the Treaty, a provision which, for its part, provides that not the Treaty, but rather the special Association rules referred to earlier, are to apply to the OCT.

35 Second, the territorial scope of the Sixth Directive does not even coincide with the entire `territory' of each country or Member State since certain national territories thereof (16) - where, in contrast to the OCT, the Treaty does apply, in whole or in part, as the case may be - are likewise not regarded as the `territory of the country' for the purposes of the Sixth Directive. (17)

36 In conclusion, the Sixth Directive does not allow the entry of goods from the OCT to be classified as intra-Community transactions: they are treated as genuine imports. Those countries and territories, which fall neither within the Community customs area nor within the scope of the Treaty - subject to the provisions applicable under the special Association rules in Article 226(3) - do not constitute `the territory of a Member State' for purposes of applying VAT.

37 That conclusion, moreover, is consistent with the scheme of the Sixth Directive: if even certain national territories to which the Treaty is, in principle, applicable, are regarded for VAT purposes as `third territories', a fortiori the same view must be taken of the OCT, whose links with the Treaty,

as such, are less strong than those of the third territories.

38 Both the Commission and the French and Netherlands Governments reach that same conclusion, which also coincides with the view of the national court. (18) The appellant in the main proceedings is also compelled to admit that Article 7 of the Sixth Directive would, in principle, justify the levying of VAT on the import transaction with which the main proceedings are concerned. Although in his observations submitted to the Court of Justice the appellant challenges the VAT assessment, he does so not because he denies that the entry of a vessel originating in an OCT or in free circulation there constitutes an import transaction, but for a quite different reason: in his view, the vessel was not, in this case, a good fulfilling the conditions laid down in Articles 9 and 10 of the EEC Treaty.

39 This problem, to which I referred earlier, (19) was not raised by the referring court and, in my opinion, cannot properly be considered by the Court of Justice. Such a course is precluded, first, by the fact that the national court accepts as proven the non-Community origin of the vessel and expressly rejects the appellant's arguments in that connection. (20) Second, the inadequacy of the factual information as to the vicissitudes afflicting the legal status of the vessel over the years would preclude an unassailable ruling.

40 The appellant contends in his observations, primarily, that the vessel, having been built in the Netherlands, originated from one of the Member States and never lost that status, so that it cannot be regarded as having been imported. In the order for reference, quite properly, the opposite view is taken. A number of established facts are relevant here (the removal of the vessel from the Community customs territory, its sale to a Bahamas company, and so forth) and there are other factors not recorded in the proceedings. The appraisal and legal characterisation, in the light of the relevant provisions, (21) are in both cases matters for the national court, not for the Court of Justice in preliminary-ruling proceedings.

41 The same must be said of the two submissions advanced by the appellant in the alternative, namely, first, that the vessel already fulfilled the conditions laid down in Article 10 of the Treaty and, second, that Article 101(2) of Decision 91/482, cited above, applies by analogy.

42 As regards the first, suffice it to say that there is no information whatsoever to support the view that the vessel was already in free circulation in a Member State before its import into the Netherlands.

43 As regards the analogous application of Article 101(2) of Decision 91/482 (which allows deduction from the customs import duties payable in the Community of the amount of those which, under the same heading, were previously paid in an OCT before re-exportation into the Community), I have already pointed out that there is no similarity of circumstances as between customs duties - or charges having equivalent effect - and VAT, a fact which prevents the application by analogy contended for. (22)

44 In any event, I repeat, the national court has not raised any of the above points concerning either the origin of the imported item of goods or possible deduction of a hypothetical tax similar to VAT, such as might exist in the Netherlands Antilles and might have been levied on that item of goods. I consider, therefore, that the Court of Justice should confine itself to answering the preliminary question in the terms in which it was framed.

Conclusion

45 I therefore suggest that the Court of Justice give the following answer to the question submitted by the Hoge Raad of the Netherlands:

The entry into the Netherlands of an item of goods which was in free circulation in the Netherlands Antilles and does not meet the requirements of Articles 9 and 10 of the EC Treaty must be classified as entry into the territory of the Community and therefore as the importation of an item of goods for the purposes of Article 7 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment.

(1) - In its observations, the Netherlands Government also recognises that the order for reference describes the dispute very briefly.

(2) - Case C-83/91 [1992] ECR I-4871.

(3) - Order of 23 March 1995 in Case C-485/93 [1995] ECR I-511.

(4) - The appellant's contention is that the vessel, having been built in the Netherlands, originated in a Member State and does not lose that status in any circumstances, with the result that at all times it fulfils the conditions laid down by Article 9 of the Treaty, even after leaving Community territory.

(5) - Case C-189/95 Franzén [1997] ECR I-5909, paragraph 79.

(6) - OJ 1977 L 145, p. 1.

(7) - As amended by Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47).

(8) - 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).

(9) - As amended by Article G(2) of the Treaty on European Union.

(10) - OJ 1991 L 263, p. 1; corrigendum OJ 1991 L 331, p. 23.

(11) - Concerning the problems of retroactivity raised by that provision, see points 24 to 43 of my Opinion in Case C-310/95 Road Air [1997] ECR I-2229, referred to in paragraph 47 of the judgment of the Court of Justice of 22 April 1997.

(12) - Case C-260/90 Leplat [1992] ECR I-643, paragraph 10.

(13) - The Court of Justice, in paragraph 62 of its Opinion 1/78 of 4 October 1979 (ECR 2871) and in paragraph 17 of its Opinion 1/94 of 15 November 1994 (ECR I-5267), in referring to the OCT, states that they are countries and territories which are dependent on the Member States but remain outside the sphere of application of Community law.

(14) - Paragraph 34 of Road Air, cited above.

(15) - Case 15/81 [1982] ECR 1409, paragraph 21.

(16) - As in the case of the island of Helgoland and the territory of Büsingen, in the case of the Federal Republic of Germany; Ceuta, Melilla and the Canary Islands, in the case of Spain; Livigno, Campione d'Italia and the national waters of Lago di Lugano, in the case of the Italian Republic; the Overseas Departments, in the case of the French Republic; and Mount Athos in the case of the Hellenic Republic.

(17) - The rationale for that exclusion is set out in the recitals in the preamble to Directive 92/111, cited above: `in order to guarantee the neutrality of the common system of turnover tax in respect of the origin of goods, the concept of a third territory and the definition of an import must be supplemented ... certain territories forming part of the Community customs territory are regarded as third territories for the purposes of applying the common system of value added tax ... value added tax is therefore applied to trade between the Member States and those territories according to the same principles as apply to any operation between the Community and third countries.'

(18) - `The Hoge Raad shares the view of the Gerechtshof that the territory of the Netherlands Antilles cannot be regarded as the "territory of a Member State" within the meaning of Article 3(1) and (2) of the Sixth Directive in conjunction with Article 227 of the EC Treaty, and that, in the absence of the requisite implementing measures, under Article 132(1) of the EC Treaty it likewise cannot be treated as such for the purposes of levying the tax on business turnover.'

(19) - See points 10 and 11 above.

(20) - See part 3.3 of the order for reference, as regards `assessment of the grounds of appeal'.

(21) - Inter alia, Article 4 of Council Regulation (EEC) No 2913/92 of 12 October 1992 approving the Community customs code (OJ 1992 L 302, p. 1) provides: `Without prejudice to Articles 163 and 164, Community goods shall lose their status as such when they are actually removed from the customs territory of the Community'.

(22) - The appellant invokes, to that end, the judgment of the Court of Justice in Case 47/84 Sécretaire d'État aux Finances v Schul [1985] ECR 1491, but that decision is concerned with a different problem, and one which, moreover, relates to a period before changes were made affecting VAT in relation to intra-Community transactions: the issue was whether it was appropriate to include or exclude from the taxable amount for VAT the amount of that tax, already paid in the exporting State, when a good from another Member State was imported into a Member State by a private individual.