OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 10 July 2003 (1)

Case C-320/02

Förvaltnings AB Stenholmen

v

Riksskatteverket

(Reference for a preliminary ruling from the Regeringsrätten (Supreme Administrative Court (Sweden))

(Value added tax – The term ‘second-hand goods’ – Live animals – Training of horses)

I – **Introduction**

1. The present reference for a preliminary ruling concerns the interpretation of 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 (hereinafter: ‘the Sixth Directive’). The point at issue is whether live animals in general, and horses in particular, can be considered to be second-hand goods.

II – **Legal framework**

A – *Community law*

2. The relevant provision in the present case is Article 26a of the Sixth Directive. That rule, which was inserted by Directive 94/5/EC, (2) is entitled ‘Special arrangements applicable to second-hand goods, works of art, collectors’ items and antiques’.

3. Article 26a(B) lays down special arrangements for taxable dealers. Under that provision, supplies of second-hand goods, inter alia, effected by taxable dealers are subject to taxation of the profit margin. The taxable profit margin is equal to the differential between the resale price and the cost price. Second-hand goods which are supplied to the dealer by a non-taxable person, for example, are covered.

4. Article 26a(A) contains a number of legal definitions. The legal definition of the term ‘second-hand goods’ can be found in Article 26a(A)(d). It states:

‘second-hand goods shall mean tangible movable property that is suitable for further use as it is or after repair, other than works of art, collectors’ items or antiques and other than precious metals or

precious stones as defined by the Member States'.

B – *National law*

5. Chapter 9a of the Mervärdeskattelag (1994:200) (hereinafter: the Law on value added tax) contains special provisions on second-hand goods, works of art, collectors' items and antiques. Under Chapter 9a(4), second-hand goods are goods which have been used and are suitable for further use as they are or after repair, with certain exceptions that do not apply in the present case.

6. The rules in Chapter 9a of the Law on value added tax were devised in order to adapt to the rules of Community law on the subject.

III – **Facts, main proceedings and questions referred for a preliminary ruling**

7. Förvaltnings AB Stenholmen (hereinafter: 'Stenholmen') intends to buy young horses from private individuals in order to train them as riding horses and then sell them on. In order to clarify the tax consequences of its proposed business, the company referred the following question to the Skatterättsnämnden (Revenue Law Commission).

Is a horse – which is bought as an untrained young horse from a private individual (rather than a breeder) and is sold as a riding horse after training – to be regarded as second-hand goods at the time of sale, so that the rules on profit margin taxation can be applied?

8. The Skatterättsnämnden replied to that question in the negative by a preliminary decision of 12 November 2001, which was based on the following grounds:

9. Chapter 9a of the Law on value added tax contains provisions on 'profit margin taxation' on a taxable dealer's sales inter alia of second-hand goods. Under Paragraph 4, second-hand goods are goods which have been used and are suitable for further use as they are or after repair with the exception of, broadly speaking, real property, works of art, collectors' items or antiques, and goods which consist entirely or mainly of gold, silver or platinum, including unmounted natural or synthetic precious stones. Works of art, collectors' items and antiques, to which the provisions of Chapter 9a are also applicable, are given their own definitions in the subsequent Paragraphs 5 to 7. A taxable dealer is defined under the first subparagraph of Paragraph 8 as a taxable person who, in the course of his economic activity, acquires or imports second-hand goods, works of art, collectors' items or antiques with a view to selling them on.

10. In Chapter 1, Paragraph 6 of the Law on value added tax, goods are defined as material objects, including real property and gas, heat, refrigeration and electrical energy. The Skatterättsnämnden considers that, according to that definition, live animals are goods for the purposes of value added tax. However, in the present case the question is whether horses which have been acquired with a view to being sold on after training constitute second-hand goods to which the provisions on profit margin taxation could be applied. Goods such as fixtures intended for use in a business are not covered, as there is no intention to sell them on.

11. The definition of the term 'second-hand goods' specifies that, apart from having been used, the goods must be suitable for further use as they are or following repair. Under the definition, it seems that it must be determined whether the goods are second-hand at the time the – subsequent – dealer acquires them. That can also be inferred from the provisions which define the term 'taxable dealer'. The goods are thus sold on in the condition in which they were acquired, or – it may be assumed – if they are broken and thus do not fulfil a function which is normal and expected in those goods, after they have been rendered usable again by repair.

12. It clearly follows that, before the goods are sold on, as long as they have been in the dealer's possession, they cannot have acquired characteristics which affect their value other than by repair or similar. That may be considered to be the case irrespective of whether the characteristics were added through a biological process or in some other way. Living, growing organisms, whether animals or plants, undergo changes during their life cycles such that they can be considered, to a greater or lesser extent, to be continuously acquiring new characteristics which may affect their value.

13. Moreover, it must be borne in mind that, leaving aside the term 'second-hand goods', there is no doubt that the goods covered by Chapter 9a of the Law on value added tax constitute inanimate objects which, with the exception of certain collectors' items, have been manufactured. In normal usage the term 'second-hand goods' tends to be reserved for such objects, rather than living organisms, and the word 'repair' suggests something manufactured, the function of which can be restored by repair.

14. In the light of the above observations and since the animals in the present case have, moreover, been endowed with skills as riding horses, which they did not have previously, or at least when Stenholmen acquired them, or did not have to the same extent as when they were sold on, the Skatterättsnämnden finds that the sale of horses cannot be classified as sales of second-hand goods. The provisions of Chapter 9a of the Law on value added tax are thus not applicable to Stenholmen's business.

15. Stenholmen appealed to the Regeringsrätten (Supreme Administrative Court) against that preliminary decision, claiming that the question should be answered in the affirmative. The Riksskatteverket (National Tax Board) contends that the Regeringsrätten should uphold the preliminary decision.

16. In the view of the Regeringsrätten, animals and other living organisms are certainly goods within the meaning of the legislation on value added tax. Regarding a living animal as 'second-hand' is, however, barely consistent with the usual usage of the term. The question of the meaning of the expression 'second-hand goods' appears not to have been referred to the Court of Justice for a ruling thus far.

17. The Regeringsrätten is in some doubt as to how the term should be interpreted and has made reference to the Court of Justice pursuant to Article 234 EC for a preliminary ruling on the following questions:

1. Can an animal be considered to be second-hand goods?

If that question is answered in the affirmative, the Court is asked to answer the following question.

2. Is an animal which is purchased from a private individual (rather than a breeder) and which is sold, after training for a specific purpose, to be considered to be second-hand goods?

IV – **The first question**

18. The first question seeks an interpretation of Article 26a(A)(d) of the Sixth Directive.

A – *Main submissions of the parties*

19. *Stenholmen* first considers the positions taken before and by the national authorities. Furthermore, Stenholmen refers to the Court's case-law (3) on the legal assessment of animals as goods under the legislation on value added tax. No other conclusion can be drawn from Article

26a(A)(d). Similarly, the objective of avoiding double taxation and the objective of equal treatment, in terms of competition, of trade in second-hand goods pursued by the system of profit margin taxation suggest that animals are covered.

20. In the view of the *Riksskatteverket*, animals must be regarded as goods within the meaning of the Sixth Directive, but not as second-hand goods within the meaning of Article 26a. Animals are excluded because they can be neither sold on in the condition in which they were purchased nor repaired. Trained horses cannot be regarded as second-hand goods any more than other living organisms and their fruits, such as berries and mushrooms. In addition, a situation where no tax at all is incurred must be avoided.

21. The *Commission* states that Annex A to the Sixth Directive also covers stock farming and Annex C mentions, inter alia, horses. It follows that horses are also to be classified as second-hand goods.

B – *Assessment*

22. It should first be pointed out that the question referred seeks to ascertain whether animals *can* be considered to be second-hand goods within the meaning of Article 26a(A)(d) of the Sixth Directive and not whether they *must* be considered as such in all circumstances.

23. It must also be stressed that the classification of animals under civil law as goods or as a separate category is irrelevant for the purposes of resolving this point of value added tax law. First, the term ‘second-hand goods’ should be interpreted autonomously under Community law and, secondly, the civil-law interpretation would be contrary to the principle of uniform interpretation, which is important in value added tax law, because, on account of the Member States’ different civil-law provisions, the relevant Community law would be interpreted and applied differently from one Member State to the next.

24. The way to approach answering the first question is indicated by the Sixth Directive, which is the subject-matter of the present case. Annex A II(1) expressly includes ‘stock farming’. Services in connection with stock, i.e. animals, are thus expressly encompassed.

25. The legal definition of the term ‘second-hand goods’ in Article 26a(A)(d) of the Sixth Directive covers only ‘tangible movable property’. In this connection it should be pointed out that neither this nor any other provision expressly excludes animals from the scope of the special arrangements laid down in Article 26a. Nor do the elements laid down in that provision automatically lead to the conclusion that animals cannot be second-hand goods within the meaning of the Sixth Directive.

26. As regards the first element, ‘property’, reference is made to a judgment of the Court according to which horses are to be regarded as goods for the purposes of turnover tax law. (4)

27. The second element, ‘movable’, suggests that animals are also covered, since animals – the present case concerns live horses – can generally move by themselves, unlike many goods.

28. The third element, ‘tangible’, is also satisfied by animals, and therefore by horses, since they are creatures with a tangible body.

29. The remaining fourth requirement is that the property is ‘suitable for further use as it is or after repair’. This can also apply to animals.

30. This is not precluded by the fact that animals – and not only horses – can also be trained and can thus be used in a different way to previously; for example, after a basic training, horses

can be used as dressage and jumping horses, or even eventing horses.

31. In particular, the horses at issue in the present case were suitable for use as they were prior to the purchase by Stenholmen; they needed only to be further trained. Horses are often sold on or exchanged by their owners, even after they have already been used at shows. The acquirer may be either another private individual or a dealer, who sells on the horse, in the present case after further training.

32. Even though it is entirely feasible to take the view that there are cases where an animal is not to be considered to be second-hand goods, it cannot be inferred that animals cannot in principle be considered to be second-hand goods. However, the question asked by the referring court addresses precisely this fundamental possibility.

33. In these proceedings, it is not therefore necessary to clarify the questions also raised by the Riksskatteverket whether newborn horses or picked berries should also be regarded as second-hand goods. An answer to those questions would not be admissible simply on procedural grounds, because the questions were not actually asked in the main proceedings.

34. Lastly, reference is made to the purpose of Article 26a, inserted by Directive 94/5/EC, which is to avoid double taxation. This would not occur, however, if in certain cases not only the profit margin was taxed, but also the total value.

35. Furthermore, Article 26a of the Sixth Directive is also intended to prevent competitive disadvantages for dealers in second-hand goods. However, this group of traders not only includes antique dealers, but horse dealers can also be included.

36. The answer to the first question must therefore be that an animal can in principle be considered to be second-hand goods within the meaning of Article 26a(A)(d) of the Sixth Directive.

V – **The second question**

A – *Main submissions of the parties*

37. *Stenholmen* takes the view that the application of the special arrangements for second-hand goods should not depend on their characteristics. According to the legal definition contained in Article 26a(A)(d), the crucial factor is that the goods must be ‘tangible movable property’. Therefore, a distinction should not be drawn between different types (levels of training) of horses. They should not be regarded as a new article within the meaning of the judgment in *Van Dijk’s Boekhuis*. (5) No distinction should be drawn depending on the person who purchases the goods, i.e. whether a horse is purchased by the breeder or by someone else, for example a private individual.

38. The applicability of profit margin taxation depends solely on the satisfaction of the requirements laid down in Article 26a(B)(2) of the Sixth Directive. However, those requirements are not the subject of the question referred for a preliminary ruling.

39. Furthermore, other Member States would also apply the system of profit margin taxation to horses.

40. The *Riksskatteverket*, which examines the second question only in the alternative, considers that the economic activity is not the selling on, but the training of the horse. However, Article 26a of the Sixth Directive applies only where goods are purchased with a view to being sold on. Nevertheless, the activity of training consists specifically in changing the goods, the horse. This is a normal activity of purchasing with a view to changing the goods and subsequent selling

on. If only the profit margin was taxed, in certain cases this could mean that only the added value obtained in the last phase of the chain would be taxed.

41. In the view of the *Commission*, it is not the future use of the horse that is relevant, but the economic processes to which the horse was subject before it was sold to the taxable person.

42. The Commission also points out that the Community's value added tax legislation is intended to avoid double taxation. Whilst the value added tax system does not cover newborn animals, which are not subject to any value added tax before their supply to the dealer, it does cover animals which were first supplied to a non-taxable person and then sold to a dealer.

B – *Assessment*

43. It should first be pointed out that the second question also concerns only a certain aspect of the special arrangements laid down in Article 26a of the Sixth Directive (the system of profit margin taxation), namely 'second-hand goods' as a condition for applicability. The question therefore concerns the interpretation of Article 26a(A)(d) of the Sixth Directive. Unlike the first question, it does not address the general legal problem of the classification of animals in general, but – on the basis of the main proceedings – the specific classification of an animal which is purchased from a private individual, rather than a breeder, and which is sold – after training for a specific purpose – as second-hand goods.

44. The point of law is raised in the light of the law on value added tax against the following economic background:

In the present case there is, as usual, a sales chain, but, leaving aside the final consumer, it consists not only of economic operators. In fact, one of the links in the chain is a non-taxable person, a private individual. It is irrelevant here whether that private individual acquired his horse, which he sold to a taxable person, the dealer, from a private individual or from a trader, for example the breeder. The dealer acquires the horse in order to train it. According to the facts of the main proceedings, the case concerns, to be precise, further training of an already trained horse.

45. It is unusual, compared with the 'normal' sales chain, for a private individual to appear within the chain but this does not occur only in the trade in horses. Article 26a(A)(d) of the Sixth Directive itself contains important examples of goods that are often purchased from private individuals, such as jewellery or antiques.

46. It follows from my arguments on the first question concerning the wording of Article 26a(A)(d) of the Sixth Directive, as far as the second question is concerned, that animals purchased from a private individual, rather than a breeder, can be considered to be second-hand goods. Strictly speaking, however, the purchase from a private individual does not affect classification as second-hand goods, but represents another condition for the applicability of the special arrangements laid down in Article 26a of the Sixth Directive.

47. It is equally irrelevant for the purpose of classification as second-hand goods that, after being purchased by the dealer, an animal, in this case a horse, is *sold on* by him. This also relates to an aspect of the special arrangements laid down in Article 26a of the Sixth Directive that is not at issue in the present case, namely the supply by a taxable dealer.

48. On the other hand, it might be crucial that the goods, in this case the horse, are sold on by the dealer himself only after training for a specific purpose.

49. It should be stressed in this connection that the referring court does not raise the question of the treatment of the training activity under the law on value added tax. However, the Riksskatteverket could proceed from this basis.

50. It is not clear from the papers in the case-file in what condition the horses were at the time of purchase from the private individual, i.e. how they could be used. Whilst the Skatterättsnämnden was asked the question about the treatment of untrained horses, in its written observations in this reference for a preliminary ruling Stenholmen takes the view that the purchase concerned jumping horses, which were merely to be given further training.

51. In the latter case it can be assumed that the horses are – to quote Article 26a(A)(d) of the Sixth Directive – 'suitable for further use' as they are. They are suitable for further use before and after their training. As Stenholmen rightly states, it is always the same horse and the same function. Such horses are therefore to be considered to be 'second-hand goods' within the meaning of Article 26a(A)(d) of the Sixth Directive.

52. However, a different view could be taken in the case of horses that are trained for a different purpose from that which they previously served. This would, at least, concern the case where the horse is to be broken in for the first time. But even in the case of horses that were already being used as jumping horses, circumstances may mean that they can no longer be used – by their present rider or by any other – as jumping horses, in particular at riding shows. Lastly, mention should be made of the – admittedly rare – case where horses are first used as dressage horses and then as jumping horses or vice versa. However, this often happens without any separate training in the interim.

53. A further point of law is raised by the acquisition of an additional skill, e.g. training through endurance tests, that is to say training as an eventing horse.

54. Trade with inclusive training of horses can therefore cover a wide variety of cases. Since, however, in a reference for a preliminary ruling the Court does not have to resolve all cases that actually arise or the specific facts of the case, in these proceedings it is only possible to list general legal criteria which national courts have to take into consideration in dealing with the specific facts of the case.

55. For the set of problems at issue, a distinction should be drawn between 'second-hand goods' and 'new' articles. To that end, reference is made to the judgment in *Van Dijk's Boekhuis*, which has been mentioned several times in these proceedings. According to that judgment, an article is 'new' 'when the work ... results in an article whose function, according to generally accepted views, is different from that of the materials provided'. (6)

56. This case-law could now be generally applied in such a way that the change in function is isolated as a criterion and made into a general distinctive characteristic. However, this is militated against by the fact that the judgment concerned the interpretation of the term 'made' and it is not possible for a new horse to be made through training of any kind.

57. However, even taking the change in function as the basis, the question is raised whether and when such a change takes place in the case of horses. It is thus perfectly possible to hold the opinion – which is supported by generally accepted views – that dressage, jumping and eventing horses, as well as Andalusians or horses that are trained in the Western riding style, have the same function, that is to say as saddle horses in general. On the other hand, driving horses, racehorses or trotters could form a separate category. However, another argument against this is the fact that at an even more abstract level all these horses have the same function: they serve as

sports horses. These should be distinguished from – increasingly rare – workhorses. Another separate category would be formed by horses that are traded for their meat.

58. Aside from these distinctive features relating to the different possible uses for horses in general, the question arises as to what is important in assessing the function: the intention of the seller, the intention of the purchaser (e.g. acquisition for participation in jumping competitions from a certain level), the objective suitability of the horse in question or its former use.

59. These circumstances show that in practice the criterion of the change in function raises extremely difficult issues of classification, at least in connection with animals. Because of the associated legal uncertainty for the economic groups concerned, such a criterion does not therefore appear to be very suitable.

60. Treating the horse purchased by an economic operator from a non-taxable person as second-hand goods is consistent with the objective of avoiding double taxation, pursued by the insertion of Article 26a of the Sixth Directive. That objective is intended to be guaranteed through profit margin taxation.

61. If the horses were not treated as second-hand goods within the meaning of the provision in question, they would – reintroduced into commercial circulation – be fully taxed once again. On the other hand, horses that were sold directly by one private individual to another private individual, i.e. without the horse trader who provides training (the dealer) as an intermediary, would be subject only to the tax that is incurred on the sale to the first private individual. This difference in treatment would lead to a distortion of competition between direct sales and transactions through commercial channels. (7) However, it is the objective of Article 26a of the Sixth Directive and the intention of the Community legislature to avoid such distortion, as can be seen from Directive 94/5, which introduced these special arrangements. In the absence of special arrangements for the trade in horses, the contested provisions on second-hand goods are therefore also applicable to cases such as the main proceedings.

62. In conclusion, it should also be pointed out that the application of profit margin taxation does not mean that the value added by the training of the horse is untaxed. On the contrary, the profit margin taxation assesses specifically the profit margin, i.e. the differential. The higher the value added, which is expressed in the selling price obtained, the higher the profit margin. It is thus ensured that the training of horses is taken into account in the same way as the repair expressly provided for in Article 26a(A)(d), which applies in the case of antiques for example.

63. The answer to the second question must therefore be that an animal which is purchased from a private individual (rather than a breeder) and which is sold, after training for a specific purpose, can be considered to be second-hand goods.

VI – **Conclusion**

64. In the light of the foregoing, it is proposed that the Court give the following answers to the questions referred for a preliminary ruling:

1. An animal can be considered to be second-hand goods within the meaning of Article 26a(A)(d) of 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.

2. An animal which is purchased from a private individual (rather than a breeder) and which is sold, after training for a specific purpose, can be considered to be second-hand goods within the

meaning of Article 26a(A)(d) of 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 – Original language: German.

2 – Council Directive 94/5/EC of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388/EEC – Special arrangements applicable to second?hand goods, works of art, collectors' items and antiques (OJ 1994 L 60, p. 16).

3 – Case 10/87 *Tattersalls* [1988] ECR 3281.

4 – Case 10/87 (cited in footnote 3).

5 – Case 139/84 *Van Dijk's Boekhuis* [1985] ECR 1405.

6 – Case 139/84 (cited in footnote 5), paragraph 22.

7 – With regard to these negative effects against the background of the former legal situation, see the judgment in Case 17/84 *Commission* v *Ireland* [1985] ECR 2375, paragraphs 14 and 17.