61986C0127

Opinion of Mr Advocate General Mischo delivered on 9 February 1988. - Ministère public and Ministre des Finances du royaume de Belgique v Yves Ledoux. - Reference for a preliminary ruling: Cour d'appel de Liège - Belgium. - Value-added tax - Temporary importation of a motor vehicle for business and private use. - Case 127/86.

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Opinion of the Advocate-General

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Mr President,

Members of the Court,

1 . Mr Ledoux, the defendant in the main proceedings, was charged with having unlawfully imported into Belgium, the country in which he resides, a motor vehicle registered in France and belonging to the French company which employs him, on the basis that on 22 February 1983 he used the vehicle away from the route he took when travelling to work, that is to say, he used it for private purposes . It can be seen from the file that the said vehicle was placed at the disposal of the accused under the terms of his contract of employment and he was entitled to use it both for his work and for leisure purposes .

2 . It appears that at the material time there was a practice in Belgium, which has been subsequently officially authorized by a circular of the Belgian Customs and Excise Department of 1 May 1984, permitting frontier workers normally resident in Belgium to use a vehicle placed at their disposal by an employer established in another Member State on the Belgian part of the journey from their homes to their foreign workplace . However, that practice did not cover the secondary use of such a vehicle for private purposes .

3 . The question which the cour d' appel (Court of Appeal), Liège, before which the dispute in the main proceedings was brought after the tribunal correctionnel (Criminal Court), Neufchâteau, had acquitted Mr Ledoux, has referred to the Court seeks essentially to know whether the Community rules, in particular those dealing with VAT, permit a Member State to require payment of the VAT due upon importation where a resident uses, for the performance of his duties under his contract of employment and for leisure purposes, a vehicle placed at his disposal by his employer, who is established in another Member State in which VAT has been paid, the vehicle remaining the property of the said employer and the importation into the user' s country of residence being merely temporary .

4 . The particular Community rules applicable at the material time were those in the Sixth Council Directive of 17 May 1977 (Directive 77/388 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value-added tax : uniform basis of assessment) (Official Journal L 145, p . 1).

5 . Since then, Council Directive 83/182 of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (Official Journal L 105, p . 59) was adopted and came into effect on 1 January 1984 . Obviously, I can refer to that text only incidentally and can use it only as a source of interest in the reasoning which must be constructed on the basis of the law applicable at the material time . Furthermore, Directive 83/182 does not provide for tax exemption in regard to temporary importations of the kind at issue here . However, on 4 February 1987, the Commission submitted a proposal to the Council for an amendment to Directive 83/182, inserting in it a provision covering that situation (Official Journal C 40 of 18 February 1987, p . 7).

6 . Article 2 of the Sixth Directive provides as follows :

"The following shall be subject to value-added tax :

(1) ...;

(2) the importation of goods ".

7 . Article 10 (3) provides that as regards imported goods, "the chargeable event shall occur and the tax shall become chargeable at the time when goods enter the territory of the country ..." (subparagraph 1), except where goods are placed under arrangements for temporary admission (subparagraph 4).

8 . Unlike what occurs in regard to the "supply of goods" within the country, which requires "the transfer of the right to dispose of tangible property as owner" (Article 5 (1)), it is therefore in principle the mere physical fact of importation, that is to say the entry of the goods into the country, which gives rise to VAT liability . Whether the person importing the goods is the owner or the user thereof is irrelevant . Under Article 21 (2) the person liable to pay tax on importation is "the person or persons designated or accepted as being liable by the Member States into which the goods are imported ".

However, those who drafted the Sixth Directive manifestly regarded the mere physical fact of importation as too rigid because in Article 14, they provided for exemptions from VAT on importation . In particular, Article 14 (1) provides that :

"Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemption and of preventing any possible evasion, avoidance or abuse :

...

(c) importation of goods declared to be under temporary importation arrangements, which thereby qualify for exemption from customs duties, or which would so qualify if they were imported from a third country;

...".

10 . Article 14 (2) adds that until the entry into force of Community tax rules clarifying the scope of the said exemptions and the detailed rules for their implementation,

"Member States may :

- maintain their national provisions in force on matters related to the above provisions,

- adapt their national provisions to minimize distortion of competition and in particular the non-imposition or double imposition of value-added tax within the Community,

- use whatever administrative procedures they consider most appropriate to achieve exemption ."

11 . The Court was called upon to interpret those provisions on three occasions, in its judgments in Carciati (1), Abbink (2)and Profant . (3)

12 . Carciati was concerned with a situation very different from that of Mr Ledoux inasmuch as the vehicle was not re-exported every day to the Member State in which was situated the undertaking which owned it but seems to have been used semi-permanently in the country of residence of the user .

13 . In Abbink, too, a return journey was not made every day . Furthermore, in both of those cases the Court considered the problem in the light only of the principles of the Treaty concerning the free movement of goods, as was required by the terms of the questions referred to it .

14 . In its judgment in Profant, the most recent case on the subject, the Court considered the problem of exemptions in a wider context .

15 . After noting that according to Article 14, the national provisions in question were to be maintained in force "on matters related to" the exemptions provided for by the Community rules and were to be adapted to minimize cases of double imposition of value-added tax within the Community, the Court added that those requirements had in turn to be viewed in the light of one of the objectives of the harmonization of value-added tax which is, as stated in one of the recitals in the preamble to the Sixth Directive, to make further progress in the effective removal of restrictions on the movement of persons and goods and the integration of national economies .

16 . The Court concluded that those considerations showed that "the authorities of the Member States do not enjoy a complete discretion in implementing the exemptions under Article 14 of the Sixth Council Directive, for they have to observe the fundamental objectives of the harmonization of value-added tax such as, in particular, to facilitate the free movement of persons and goods and to prevent cases of double taxation . It follows that in applying their national provisions on exemptions from value-added tax to motor vehicles used by students from another Member State the tax authorities of a Member State are required to apply the concept of temporary importation in such a way as to avoid derogating, by taxing their vehicles twice, from the freedom of nationals of Member States to pursue their studies in the Member State of their choice" (paragraphs 24 to 26). The Court concluded that in such a case, the rules of Community law preclude the levying by a Member State of value-added tax on importation .

17 . I consider that the reasoning used in Profant may be transposed to the problem before the Court in this case . It is true that Mr Profant, unlike Mr Ledoux, did not have his principal residence in the country of importation . It is also true that the Court expressly added that the result would have been otherwise if the person in question, who had got married in the interim, and his wife "settled in the host Member State in such a way as to manifest their intention of not returning to the Member State of origin" (paragraph 27). In such a situation, the importation would no longer be temporary but would become definitive .

18 . However, it can be argued that in this case the fact that the car is imported into Mr Ledoux' s country of residence does not prevent the importation from being temporary since the car continues to be the property of the employer established in the neighbouring country, is regularly re-exported to that country and will return there definitively not later than upon the termination of Mr Ledoux' s contract of employment .

19 . Since the importation of the goods, regardless of who imports them, constitutes the chargeable event in regard to VAT, its temporary nature should, of itself, be sufficient to justify the exemption .

20 . If a market "resembling a real internal market" (fourth recital in the preamble to the Sixth Directive) is to be achieved, double taxation is in fact quite inconceivable in such a situation . Nevertheless, double taxation subsists in principle even in cases (such as this one) where in practice, in accordance with the judgments in Schul I (4)and Schul II, (5)no VAT may be collected in the importing country because the rate of VAT applicable there is lower than that applicable in the exporting country .

21 . On the other hand, there is no double taxation and an exemption in the country of temporary importation would not be justified if VAT had not been paid in the exporting country or if it had been reimbursed .

22 . It is therefore quite correct for both Directive 83/182, cited above, (last recital in the preamble and Article 4 (1) (c)) and Directive 85/362 on the temporary importation of goods other than means of transport (Seventeenth Council Directive of 16 July 1985, Official Journal L 192, p . 20, Article 10 (c)) to make the exemption subject to an express condition that the goods have been liable to VAT in the exporting Member State and have not benefited, by virtue of their exportation, from any exemption from VAT .

23 . On the other hand, it must be established that the vehicle was actually placed at the disposal of the worker by his employer, that is to say, that this is not a case of fraud such as false registration of a vehicle in a neighbouring country whereas it in fact belongs to the user . However, proof of the ownership of the vehicle by the employer may be established by fairly simply administrative techniques .

24 . Furthermore, I regard it as revealing that for temporary imports of goods other than means of transport, Article 10 (d) of Council Directive 85/362, cited above, requires that the goods in question should "belong to a person established outside the territory of the Member State of importation ".

25 . It should also be noted for Directive 83/182 did not deal with all imaginable and possible cases of temporary importation of motor vehicles and certainly does not constitute the final stage of development in that matter . To prove my point, I would refer to Article 9 (1) of that directive which permits the Member States to maintain and/or introduce more liberal arrangements than those provided for in the directive and to the Commission' s proposal for supplementary provisions to which I referred at the beginning .

26 . There is thus no imperative reason inherent in the requirements of the common system of VAT to make the grant of exemptions for the temporary importation of motor vehicles subject in this sort of situation to a condition that the user has his normal residence in a Member State other than that into which the vehicle is being imported .

27 . In the second place, it should be borne in mind that the exemptions provided for in Article 14 of the Sixth Directive should be granted by the Member States "without prejudice to other Community provisions" while continuing to respect the fundamental aim of promoting free movement of persons .

28 . Let me draw attention to the third and fourth recitals in the preamble to Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p . 475), which state expressly that :

"... freedom of movement constitutes a fundamental right of workers and their families (which) must be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services;

The fifth recital in the preamble adds that :

"... the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons ... and also that obstacles to the mobility of workers shall be eliminated ."

29 . Furthermore, under Article 5 of the Treaty, the Member States have a general obligation to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community, to faciliate the achievement of the Community' s tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty .

30 . A Member State infringes that general obligation to cooperate if, by adopting a national measure, it contributes to the maintenance or introduction of an obstacle to free movement of workers who, although residing on its territory, exercise their activities in another Member State .

31 . That is what a Member State does if, by charging VAT twice, it obliges a frontier worker in practice to give up certain advantages granted to him by his employer solely on the ground that the worker has his residence on that State' s territory . The worker is thus placed at a disadvantage in regard to working conditions compared to his colleagues residing in the country in which their employer is established and having the benefit of the same advantage in kind . The attraction of employment in a Member State other than that in which he has his residence is thereby diminished, which directly affects the exercise of his right to freedom of movement within the Community .

32 . The same reasoning holds good when the employer also permits the vehicle to be used for private purposes . It may be considered in that case that that is part of the remuneration, in the broadest sense, paid to the worker . Furthermore, such an advantage in kind may well, in certain

cases, be compensated for by a salary slightly lower than would be paid to workers who did not enjoy it .

33 . The Commission correctly emphasizes on page 10 of its written observations that "part of the remuneration paid to a worker residing in another Member State would in fact be rendered useless by the legislation of the country of residence, whereas in regard to the country of employment there is complete equality of remuneration between residents and non-residents, as is required by Article 48 of the Treaty and provided for in detail by Article 7 of Regulation No 1612/68 on free movement of workers within the Community ".

34 . It is interesting to note in this context that all those who benefit under Article 4 of Directive 83/182 from an exemption for the use in the course of their work of a vehicle of which they are the proprietor do not lose that exemption if, at the end of their day' s work, they use the vehicle for private purposes (for example, to go to a restaurant or to the beach). I therefore consider that there is no real reason to deny a worker in the position of Mr Ledoux the right to use the vehicle placed at his disposal by his employer under the terms of his contract of employment for private purposes .

35 . As the Court has already seen, the Belgian authorities were perfectly well aware of the problem of the use by a frontier worker of a vehicle placed at his disposal by his employer to travel from his home to his place of work because they first tolerated, then officially permitted that use on a trial basis with effect from 1 May 1984 . Furthermore, the circular of 1 May 1984 issued by the Belgian customs authorities has the merit of dealing also with the case in which several workers are driven back to the country in which they live in a staff transport vehicle which remains overnight in that country .

36 . For the reasons set out above, I consider that those rules should have been introduced on a definitive basis and not merely on a trial basis (with the possibility of withdrawing them without notice, see page 7 of the circular of 1 May 1984) and that it should not have been possible to withdraw the benefit of those exemptions if the vehicle was used secondarily for private purposes .

37 . For all of those reasons, I propose that the Court should reply as follows to the question referred to it by the cour d' appel, Liège :

"The rules of Community law, in particular those dealing with value-added tax, prevent a Member State from collecting value-added tax on the temporary importation of a motor vehicle belonging to an employer established in another Member State in which value-added tax has been paid when the vehicle is used by an employee residing in the first Member State under the terms of his contract of employment and for leisure purposes ."

(*) Translated from the French .

(1) Judgment of 9 October 1980 in Case 823/79 Carciati ((1980)) ECR 2773 .

(2) Judgment of 11 December 1984 in Case 134/83 Abbink ((1984)) ECR 4097 .

(3) Judgment of 3 October 1985 in Case 249/84 Ministère public v Profant ((1985)) ECR 3237 .

(4) Judgment of 5 May 1982 in Case 15/81 Schul v Inspecteur des droits d' importation et des accises ((1982)) ECR 1409 .

(5) Judgment of 21 May 1985 in Case 47/84 Secrétaire d' état aux finances v Schul ((1985)) ECR 1491 .