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JOINED OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 21 APRIL 1988. - W. J. R. MOL V INSPECTEUR DER INVOERRECHTEN EN ACCIJNZEN. - REFERENCE FOR A PRELIMINARY RULING FROM THE HOGE RAAD DER NEDERLANDEN. - CASE 269/86. - VERENIGING HAPPY FAMILY V INSPECTEUR DER OMZETBELASTING. - REFERENCE FOR A PRELIMINARY RULING FROM THE GERECHTSHOF, AMSTERDAM. - VAT CHARGED ON THE ILLEGAL SUPPLY OF DRUGS WITHIN A MEMBER STATE. - CASE 289/86.

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Opinion of the Advocate-General

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Mr President,

Members of the Court,

1 . In Cases 269/86 and 289/86 to which this Opinion refers, the Court has once again to determine whether illegal dealing in drugs is subject to value-added tax .

I shall commence by summarizing the facts of the first case . In early 1983 Mr Willem Mol, a Dutch national, was charged and arrested for having sold a number of lots of amphetamines . At the same time, the Dutch tax authorities served on him an assessment to turnover tax for the period 1 September 1982 to 31 March 1983 on the ground that he had dealt in amphetamines as a trader and that that dealing, albeit unlawful, had to be subject to tax . After bringing an unsuccessful action against that assessment before the Gerechtshof (Regional Court of Appeal), Leeuwarden, Mr Mol appealed to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). There he argued that since such dealing was anti-social and punishable by law it could not give rise to a liability to tax .

The Hoge Raad considered that in order to resolve the dispute it was necessary for Article 2 (1) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes (Official Journal 1977, L 145, p . 1) to be interpreted from a point of view which had not yet been considered by the Court of Justice . Accordingly, pursuant to the third paragraph of Article 117 of the EEC Treaty it suspended the proceedings by judgment of 29 October 1986 and referred the following question to the Court :

"Must Article 2 of the Sixth Directive be interpreted as meaning that the supply of amphetamines for consideration within the national territory cannot be subject to value-added tax inasmuch as such supply is forbidden by law?"

Let us now turn to Case 289/86 . The socio-cultural association, Happy Family, runs a youth centre in Amsterdam in which a "house dealer" sells soft drugs to its members, part of the proceeds accruing to the association . House dealers' activities are to some extent institutionalized . Under the guidelines issued by the Dutch public prosecutors' office on the investigation and prosecution of offences against the Opiumwet (Opium Law 1928) a house dealer is defined as a "dealer in hemp products who, with the trust and protection of those in charge of a youth centre, obtains sole permission to deal in that centre ". In theory, house dealers may be prosecuted; however, since it has established other priorities in controlling drug dealing, the public prosecutors' office does not prosecute them provided that they are not found dealing in public in a blatant manner (Staatscourant 18.7.1980, p . 137).

The tax authorities also served a tax assessment upon Happy Family in respect of the period 13 September 1984 to 31 March 1985 . Happy Family appealed against that assessment to the Gerechtshof (Regional Court of Appeal), Amsterdam, on the ground that according to the Court' s judgment of 28 February 1984 (Case 294/82 Einberger v Hauptzollamt Freiburg "Einberger II" ((1984)) ECR 1177) profits on drug trading are not liable to tax; by judgment of 28 October 1986 the national court referred the following questions for a preliminary ruling :

"1 . Following the judgment of the Court of Justice of the European Communities of 28 February 1984 in Case 294/82 Einberger v Hauptzollamt Freiburg must Article 2 (1) of the Sixth Council Directive be interpreted as meaning that upon the supply of narcotic drugs within the territory of a Member State no turnover tax arises either?

2 . If Question 1 must be answered in the affirmative, does that answer apply to the supply of all kinds of narcotic drugs, including the supply of hemp products?

3 . If Question 2 must also be answered in the affirmative, can the fact that a policy of restraint pursued by the competent judicial authorities as regards the prosecution of offences makes it possible in certain circumstances to provide prohibited supplies of hemp products be a ground for taking a different view of the question whether turnover tax is due upon the supply of such products?"

Clearly the question put by the Hoge Raad corresponds to the first of the questions put by the Gerechtshof . This, together with the identical subject-matter of the two cases, justifies their being considered together . Of course, I shall consider the Gerechtshof' s second and third questions separately (in sections 5 and 6 below).

In both proceedings the French, German and Netherlands Governments and the Commission of the European Communities have lodged written observations; in addition, the Netherlands Government and the Commission took part in the hearing . In Case 289/86 Happy Family lodged written observations and took part in the hearing, whereas in Case 269/86 Mr Mol merely took part in the oral proceedings .

2 . For the sake of a better understanding of the issues it is worthwhile calling the relevant Community legislation to mind . It can be reduced to Articles 2 (1) and 4 (1) of the Sixth Directive . Article 2 (1) provides that "the supply of goods or services effected for consideration within the territory of the country by a taxable person ..." is to be subject to value-added tax . Article 4 (1) provides that '" taxable person' shall mean any person who independently carries out in any place any economic activity ... whatever the purpose or results of that activity ".

As far as illegally imported drugs in particular are concerned, reference should also be made to four judgments of the Court, of which three concern the liability of such goods to customs duties (judgment of 5 February 1981 in Case 50/80 Horvath v Hauptzollamt Hamburg Jonas ((1981)) ECR 385, and the judgments of 26 October 1982 in Case 221/85 Wolf v Hauptzollamt Duesseldorf ((1982)) ECR 3681, and in Case 240/81 Einberger v Hauptzollamt Freiburg "Einberger I" ((1982)) ECR 3699) and one whether the unlawful importation of drugs can give rise to liability to turnover tax (judgment of 28 February 1984 in Case 294/82 Einberger II, cited above). All those judgments enshrine the same principle : unless they are confined within controlled channels and are intended for use for medical or scientific purposes, there is an absolute ban on the importation and marketing of drugs in the Community; hence, if drugs are discovered or are undetected by the authorities, they cannot give rise to liability to customs duty or to tax (see the judgment in Einberger II, paragraphs 14, 15 and 16).

3 . Unlike the cases which the Court has considered hitherto, these cases are concerned, not with the unlawful importation of drugs, but with the supply of drugs for consideration within the territory of a Member State . In essence, what the two Dutch courts are now asking is whether the principle set out above is applicable thereto .

The Member States which have submitted observations suggest that the Court should answer that question in the negative, supporting that view with a series of arguments based either on the provisions and objectives of the Sixth Directive or on the iniquitous or dangerous effects of extending the judgment in Einberger II beyond its original limits . In particular, the first set of arguments refer to (a) Article 4 (1), insofar as it determines that the purpose and the results of an economic activity have no bearing on whether that activity is subject to value-added tax (the Netherlands, France); (b) the objective of value-added tax, which is to impose a comprehensive tax on final consumption within the territory of the country and takes no account of the possible unlawfulness of the transaction whereby the consumer obtains the product (Federal Republic of Germany) and (c) the difference between the event which caused the tax to arise in these two cases (supply within the territory) and in the case (importation) in which the Court held that no liability to tax arose .

According to the second set of arguments, when the judgment in Einberger II is applied to the facts in question it (d) ends up by giving preferential tax treatment to the illegal market over the legal market and, within the context of the illegal market, to dealing in drugs over the "black economy" or dealing in arms or pornography (Netherlands, Germany); (e) by adversely affecting the harmonization of taxable transactions which is pursued by the directive, falls within legal systems which subject sales of drugs to different rules . It is manifest from the third question put by the Gerechtshof that conduct which is prohibited and strictly repressed in some Member States is expressly tolerated in others (France).

The appellants in the two main proceedings and the Commission express the opposite view . They maintain that the Court' s case-law is completely transposable to cases of this type, with the result that the supply of drugs in the territory of a Member State must be held not to be liable to tax .

4 . It was held in the judgment in Einberger II that illegal imports of drugs were not subject to customs duties and value-added tax on the basis of the bans on importation and marketing to which such substances are subject in all the Member States as a result of the international

commitments which they have assumed (Single Convention on Narcotic Drugs, New York, 30 March 1961, and Convention on Psychotropic Substances, Vienna, 21 February 1971, in United Nations Treaty Series, Volumes 520 and 1019, pages 151 and 175). In my view that factor is of great relevance to these two cases . By bringing the two prohibitions together, in fact, the Court seems to consider that drugs fall outside lawful economic channels in the various Member States . The fact that drugs are physically present in the Member States because they are manufactured domestically rather than being imported has no significance; in both cases, to utilize the wording of paragraph 13 of the judgments in Wolf and Einberger I, what is decisive is that they may not be "integrated into the economy of the Community ".

Having said that, let us turn to the arguments put forward by the Member States which have submitted observations . Their arguments based on the wording or the objectives of the directive seem, in my view, to be generally very weak . For instance, it is obvious that by using the term "economic activity" or by setting out its intention to tax "final consumption", the directive refers to goods which are integrated into the economy of the Community and hence excludes from its field of application products which do not satisfy that requirement . Furthermore, it cannot be said that the Community legislature pays no heed to the unlawfulness of the transaction by which the final consumer acquires the goods; Article 5 (1) provides that '" supply of goods' shall mean the transfer of the right to dispose of tangible property as owner", and it is possible to become owner only as the result of an event or legal act which the law recognizes as causing a person to have dominion over a thing . Finally, although the directive does makes a distinction as regards taxable events between import value-added tax and value-added tax charged within the territory of the country (Article 2 (1) and (2)), it is also certain that the objectives of the two taxes coincide and, as the Commission observed in answering a question put by the Court, "importation constitutes ((simply)) the first supply within the country ".

The arguments based on the alleged adverse effects which the judgment in Einberger II would be liable to have were it applied here are equally unacceptable . The first argument was also put forward in the proceedings which resulted in the judgment in the Einberger II case, and I shall respond to it, as I did then, by observing that it can be assessed only from the ethical and political point of view : legally it is of no avail because the wealth acquired by the dealer - that is to say the value of the drugs sold - is merely de facto since it is not the result of a "transfer" within the meaning of Article 5 (1), cited above, (for a similar argument see Berliri, Princìpi di diritto tributario, Milan 1972, p . 102). Neither can it be said that if drug dealing is taken outside the scope of value-added tax, it will be put in a privileged position compared with trading in weapons or pornography . Albeit within narrow limits, those goods are obtainable in legal channels; in no event are drugs so obtainable . In fact, it is not possible for drugs to be acquired lawfully by persons as consumers, only as patients (Wattel, Belastingsheffing van de onderwereld; het EG-Hof en de drugshandel, in Weekblad voor fiscaal recht, 1987, p . 363).

In conclusion, I do not deny that since the area of drugs is subject to rules of varying strictness in the various systems the judgment in Einberger II may detract from the harmonization of taxable transactions . However, it is a fact that that observation is as valid for imports as it is for supplies within the territory of a country and hence it is directed not so much at the extension of the principle laid down in the Einberger II judgment but rather at the principle itself . Criticism, albeit by implication, of a court judgment is permissible; but until such time as the Court is moved to change its mind it leaves matters as they stand . In other words, for the present it is possible only to observe hoc iure utimur .

5 . Consequently the Hoge Raad' s question and the Gerechtshof' s first question should be answered as follows : in so far as sales of drugs within the territory of a Member State take part outside legal Community channels they cause no liability to value-added tax to arise . Having reached that conclusion we must tackle the Gerechtshof' s second question . After remarking that the illegal imports with which the Court had to deal in its previous judgments were all of hard drugs

(heroin, morphine, cocaine), the Gerechtshof wishes to establish whether the rule that no turnover tax arises also applies to sales of soft drugs and, in particular, of hemp products .

It is clear from the national court' s judgment that the proceeds whose liability to value-added tax is under discussion arise as a result of the sale of hashish, that is to say of a substance which, according to the international rules cited in section 3 above (Article 2 (1) of the 1961 Convention and Schedule I thereto), is in all respects a drug . Consequently hashish, too, is subject to the absolute prohibitions on importation and marketing in the various Member States (see, as far as the Netherlands is concerned, Article 3 of the Opiumwet) which led the Court to categorize narcotics as goods incapable of being "integrated into the economy of the Community"; and it seems to me that this is a sufficient basis for concluding that the answer given to the first question is fully applicable thereto .

6 . The third question raises more complex problems . The Gerechtshof asks the Court whether if sales of hashish are held not to be liable to value-added tax must a different view of the question be taken where the national judicial authorities forgo prosecuting dealers in certain circumstances .

I have already adverted to the limits within which that policy of restraint is practised in referring to the content of the directives of the Netherlands public prosecutor' s office (section 1 above). It should be added that in its written observations and even more at the hearing the Commission painted a picture of sales of hashish in the Netherlands according to which those limits are thin if not even non-existent : thus, far from stopping outside youth centres and in cases of blatant dealing, the authorities' permissiveness even tolerates the appearance on the signs or in the windows of numerous coffee shops in the main Dutch cities of a picture of a leaf of Indian hemp . The Commission infers from that state of affairs that "albeit distributing an unlawful product, the taxable person carries out transactions which are regarded as lawful ". Consequently they are liable to value-added tax .

Obviously I am in no position to pronounce on the reliability of the information provided by the Commission; however, the conclusions drawn therefrom are, in my view, to be rejected . Let us not forget that in the Netherlands the public prosector is not under an obligation to prosecute offences which come to his notice; as a result, the failure to take criminal proceedings - even if that is not a sporadic occurrence but reflects a definite policy (which is usually justified by the need to concentrate the available resources on curbing more alarming forms of criminality) - does not eradicate or detract from the illegality of the conduct tolerated . Moreover, we have not only the Netherlands Government' s word that the sale of hashish remains an offence, that is also recognized by the national court and, what is more important, by the competent international authority . In 1983 an inspection committee of the International Narcotics Control Board examined the practice in question in order to determine whether it was compatible with the obligations incumbent upon the Netherlands under the New York Convention, and it took the view that the practice was fully correct (Twede Kamer der Staten-Generaal 1983-84, 17867, No 7).

Since, in addition, the supply of an illegal product cannot be regarded as being lawful unless Article 5 (1) of the Sixth Directive is ignored, the Commission' s argument is fundamentally unfounded . The "policy of restraint" which is the subject of the Gerechtshof' s question therefore cannot affect the answer which I gave to the second question .

7 . In the light of the above considerations I propose that the Court should answer the questions put by the Hoge Raad der Nederlanden by judgment of 29 October 1986 in the proceedings between Willem Mol and Inspecteur der Invoerrechten en Accijnzen, Leeuwarden, and by the Gerechtshof, Amsterdam, by judgment of 28 October 1986 in the proceedings between Vereniging Happy Family and Inspecteur der Omzetbelasting, Amsterdam, in the following terms :

"Article 2 (1) of Council Directive 77/388 of 17 May 1977 must be interpreted as meaning that supplies effected for consideration within the territory of a Member State of drugs outside

economic channels strictly controlled by the competent authorities for use for medical and scientific purposes are not liable to value-added tax ."

That conclusion is unaffected by the fact that the drugs sold are hemp products and that, in pursuing a policy of restraint, the relevant judicial authorities allow prohibited sales of such products to take place in certain circumstances without their giving rise to criminal consequences .

(*) Translated from the Italian .