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Opinion of Mr Advocate General Jacobs delivered on 7 February 1991. - NV Giant v Gemeente Overijse. - Reference for a preliminary ruling: Bestendige Deputatie van de Provincieraad van Brabant - Belgium. - Interpretation of Article 33 of the Sixth VAT Directive. - Case C-109/90.

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Opinion of the Advocate-General

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My Lords,

1. In this case, the Bestendige Deputatie (executive branch) of the Provincieraad (Provincial Council) of Brabant, Belgium, has asked for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Article 33 of the Sixth VAT Directive (Directive 77/388/EEC 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 1977 L 145, p. 1). Article 33 provides as follows:

"Without prejudice to other Community provisions, the provisions of this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes."

The case turns on the meaning of the expression "turnover taxes" for the purposes of that provision.

2. The main action arises out of a claim made against NV Giant by the Commune of Overijse for the payment of tax in respect of the year 1988. The claim is based on a local regulation dated 2 March 1983, approved by the Bestendige Deputatie on 31 December 1983, under which any person who organizes public performances or entertainments within the area of the Commune, and for which those attending or participating are required to pay an entrance fee, is liable to a special tax on the gross amount of all receipts. The tax in question is imposed on the total amount of the entrance fees, rents and cloakroom charges, proceeds from the sale of programmes or dance cards and refreshments and any other charges. The claim made by the Commune relates to a dance hall operated by Giant and is for tax on its receipts at the rate of 25%.

3. Giant appealed against this claim to the Bestendige Deputatie of the Provincieraad of Brabant, before which it maintained that the contested tax was in substance a turnover tax within the meaning of Article 33 of the Sixth VAT Directive and that the Commune was not therefore entitled to levy it. The Bestendige Deputatie has submitted the following question to the Court for a

preliminary ruling:

"Is the tax regulation of the Commune of Overijse dated 2 March 1983, by which any person who habitually or occasionally organizes public performances or entertainments within the area of the Commune and requires those attending or participating to pay an entrance fee must pay a special tax on the amount of all receipts and by which in particular an annual tax of 25% is imposed on dance halls and restaurants connected therewith on the total amount of entrance fees, rents and cloakroom charges, the sale of programmes or dance cards, the proceeds from any refreshments and contributions or consideration which may replace or supplement such fees or prices, as well as any other charges, contrary to the prohibition on the imposition of any taxes on turnover other than VAT laid down by Article 33 of Directive 77/388/EEC, or not?".

4. The Court clearly cannot answer this question as framed, for it asks for a ruling on the compatibility with the Sixth VAT Directive of a specific provision of national law. It is well established that the Court has no jurisdiction in proceedings under Article 177 to give such a ruling. I would therefore interpret the question as asking in essence whether a provision possessing the characteristics of the contested local regulation is compatible with Article 33 of the directive.

5. Before examining the substance of the question, it is necessary to consider the jurisdiction of the Bestendige Deputatie to make use of the procedure established by Article 177. That procedure is available only to a "court or tribunal of a Member State" and the question arises whether the Bestendige Deputatie constitutes such a body.

6. It appears that, in Belgium, each provincial council elects from among its members a Bestendige Deputatie, which acts under the chairmanship of the governor of the province, who is appointed by the King. The role of the Bestendige Deputatie is mainly administrative, but for historical reasons it also has jurisdiction in disputes over local taxes. In exercising this jurisdiction, the Bestendige Deputatie holds public hearings in accordance with an adversarial procedure and is required to give reasons for its decisions.

7. The jurisdiction of the Bestendige Deputatie in disputes over local taxes is now based on a Belgian Law of 23 December 1986 (Moniteur belge, 12. 2. 1987, p. 1993). Article 7 of that Law provides that where the dispute relates to a sum of not less than BFR 10 000, appeal from the decisions of a Bestendige Deputatie lies to a Cour d' appel. Where the sum in issue is less than BFR 10 000, a Bestendige Deputatie sits as a tribunal of last resort, although its decisions are subject to review on a point of law ("recours en cassation").

8. In the light of these factors, I have no doubt that the Bestendige Deputatie must, in the circumstances of the main action, be regarded as a court or tribunal of a Member State within the meaning of Article 177. Its jurisdiction to make a reference to this Court under that article is not therefore in doubt.

9. As for the substance of the question referred, the Court' s case-law makes it clear that Community law does not at present contain any restrictions on the power of the Member States to introduce taxes other than turnover taxes: see Joined Cases 93/88 and 94/88 Wisselink, ECR 2671, paragraph 13, and Case 252/86 Bergandi [1988] ECR 1343, paragraph 10. Moreover, the fact that a tax is levied on a transaction which is already subject to VAT and that double taxation of that transaction may result does not necessarily mean that the tax constitutes a turnover tax for the purposes of Article 33 of the Sixth VAT Directive: see Case 73/85 Kerrutt [1986] ECR 2219, paragraph 22; Wisselink, cited above, paragraph 14.

10. According to the Court' s decision in Wisselink, the purpose of Article 33 is "to prevent the functioning of the common system of value added tax from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial

transactions in a way comparable to value added tax" (paragraph 17). It is therefore necessary to determine whether the local tax at issue in these proceedings is levied in a way comparable to VAT and whether it consequently jeopardizes the functioning of the common system of value added tax.

11. The essential characteristics of the VAT system were described by the Court in Wisselink as follows:

"The principle of the common system of value added tax consists ... in the application to goods and services up to the retail stage of a general tax on consumption which is exactly proportional to the price of the goods and services, irrespective of the number of transactions which take place in the production and distribution process before the stage at which the tax is charged. However, value added tax is chargeable on each transaction only after deduction of the amount of value added tax borne directly by the cost of the various price components. The procedure for deduction is so arranged ... that taxable persons are authorized to deduct from the value added tax for which they are liable the value added tax which the goods have already borne" (paragraph 18).

12. As the Commission points out, the disputed tax differs from VAT in a number of respects. In the first place, it is not of general application: it applies only within a limited geographical area and to a limited class of goods and services (see Wisselink, paragraph 20). Moreover, because it is based on gross receipts rather than on the value added at the stage of each transaction, it is not possible to establish precisely what fraction of the tax on each sale or provision of services may be taken to have been passed on to the consumer.

13. However, there is in my view a more basic distinction between the disputed tax and VAT. As the passage from Wisselink set out at paragraph 11 above makes clear, VAT is charged at each stage in the process of production and distribution. Taxable persons may deduct from the amount of tax payable the VAT which the goods have already borne. These characteristics, which are fundamental to the VAT system, are not possessed by the disputed tax.

14. I conclude that the tax in issue is not levied in a way comparable to VAT and that it is not likely to compromise the functioning of the VAT system. In my view, it does not therefore constitute a turnover tax within the meaning of Article 33 of the Sixth VAT Directive.

15. Accordingly, I am of the opinion that the question referred by the Bestendige Deputatie should be answered as follows:

"A local tax imposed annually on dance halls and restaurants connected therewith in respect of entrance fees, rents and cloakroom charges, proceeds from the sale of programmes or dance cards and refreshments and any other receipts which replace or supplement such charges does not constitute a turnover tax within the meaning of Article 33 of Council Directive 77/388/EEC of 17 May 1977."

(*) Original language: English.

Translation