JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 5 FEBRUARY 1981 [1]

Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA (preliminary ruling requested by the Hoge Raad der Nederlanden)

"VAT — Provision of services"

Case 154/80

Tax provisions — Harmonization of legislation — Turnover taxes — Common system of value-added tax — Provision of services — Basis of assessment — Consideration, directly linked to the service, capable of being expressed in money and having a subjective value

(Council Directive 67/228, Arts 2 and 8 (a): Annex A, point 13)

A provision of services is taxable within the meaning of the Second Directive on the harmonization of legislation of Member States concerning turnover taxes, when the service, in the terms of Art. 2 of that instrument, is provided against payment and the basis of assessment for such a service consists, in the terms of Article 8 (a) as amplified by point 13 of Annex A, of everything received in return for the provision of the service. There must therefore be a direct link between the service provided and the consideration received. Such consideration must be capable of being expressed in money and have a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria.

Therefore there can be no question of any consideration within the meaning of Article 8 (a) of the directive in the case of a cooperative association running a warehouse for the storage of goods which does not impose any storage charge on its members for the service provided.

In Case 154/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] for a preliminary ruling in the action pending before that court between

1 — Language of the Case: Dutch.

STAATSSECRETARIS VAN FINANCIËN [Secretary of State for Finance]

and

COÖPERATIEVE AARDAPPELENBEWAARPLAATS GA, a cooperative association, Heinkenszand,

on the interpretation of Article 8 of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p. 16),

THE COURT (Second Chamber),

composed of: P. Pescatore, President of Chamber, A. Touffait and O. Due, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedures

Article 2 (a) of the Second Directive on harmonization of turnover taxes provides that:

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

(a) The supply of goods and the provision of services within the territory of the country by a taxable person against payment;"

and Article 8 provides:

"The basis of assessment shall be:

(a) in the case of supply of goods and the provision of services, everything which makes up the consideration

for the supply of the goods or the provision of services, including all expenses and taxes except the value-added tax itself".

Finally in Annex A point 13 regarding Article 8 (a) provides that:

"The expression 'consideration' means everything received in return for the supply of goods or the provision of services, including incidental expenses (packing, transport, insurance, etc.) that is to say not only the cash amounts charged, but also, for example, the value of the goods received in exchange or, in the case of goods or services supplied by order of a public authority, the amount of the compensation received".

The question raised by the Hoge Raad concerns the nature of a service provided by a cooperative association for the benefit of its members in respect of which the inspector sent a notice of assessment to additional turnover tax.

The cooperative association is an undertaking within the meaning of the Wet op de omzetbelasting [Law on Turnover Tax] of 1968; it runs a cold-storage depot in which it lays in potatoes and stores them at constant temperature for the account of its members. Each grower owning shares is entitled to deposit 1 000 kilograms of potatoes a year for each share against payment of a storage charge fixed by the cooperative and payable at the end of the season.

For reasons of financial policy, namely pending the sale of the cold-store, the cooperative did not "impose or receive" in the financial years 1975 and 1976 any storage charge as remuneration for the services it provided; consequently, in the belief that its services had been provided for no consideration and were therefore exempt from tax, it completed its turnover tax declarations accordingly.

But the inspector thought that the cooperative had nevertheless charged its members something in return owing to the reduction in value of their shares owing to the non-collection of their storage charges and he therefore assessed what was received in return to be the storage charge ordinarily charged, namely HFL 0.02 per kilogram of potatoes, and he issued a notice of assessment to additional tax amounting to HFL 2 145.

The cooperative referred that notice of assessment to the Gerechtshof arguing that since the term consideration as defined in Article 8 of the de Wet op de omzetbelasting has a subjective character it had provided its services without consideration because it had not charged anything in return.

The Gerechtshof upheld that application and set aside the notice of assessment on the ground that it had not been proved that anything of value had been charged or paid in return so that the services in question had not therefore been provided for consideration.

The Secretary of State for Finance appealed against that judgment on the ground that there was an infringement of Article 8 of the Wet op de omzetbelasting.

Acting on the opinion of its Advocate General, Mr Van Soest, the Hoge Raad stayed the proceedings and by judgment of 25 June 1980 submitted the following question to the Court of Justice for a preliminary ruling:

"A cooperative association incorporated under Netherlands law runs in accordance with its stated objects a potato storage depot. The members of the association have the right against it and the obligation towards it to put in

store each year 1 000 kilograms of potatoes for each share certificate issued by the association in their possession in return for a storage charge fixed each year by the association payable at the end of the season. Pursuant to a decision by the association, in a given year, no storage charge may be imposed.

In such a case is there consideration within the meaning of the opening words and paragraph (a) of Article 8 of the Second Directive?"

The judgment making the reference to the Court was registered at the Court Registry on 2 July 1980.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By order of 19 November 1980 the Court decided to assign the case to the Second Chamber in accordance with Article 95 (1) of the Rules of Procedure.

II — Observations lodged under Article 20 of the Protocol on the Statute of the Court

A — Observations of the Netherlands Government

The *Netherlands Government* contends that the terms of Article 8 (a) of the Second Directive themselves give some indication of the scope which those who drafted the directive intended to give to the basis of assessment and that the terms of point 13 of Annex A "clearly illustrate that the scope which those who drafted the directive wished to give to the basis (for assessment) is such that it should not be taken as meaning only the amount received". What is more any other interpretation would mean that other kinds of consideration might escape turnover tax, for example, the set-off of debts, services likewise paid for in kind, those for which consideration is given in the form of stocks or shares, or services for which a right is assigned in return.

The Netherlands Government, relying on several decisions by the Tariefcommissie, contends that that court has by implication decided in each of the instances mentioned above that "the person for whose benefit the service was effected had provided something in return."

The Netherlands Government is furthermore of the opinion that "the conditions for 'being charged' and 'being paid' ... are not necessarily fulfilled only when a document has been issued by which the creditor brings his debt to the notice of the debtor or there is a proof of a debt actually received"; to support that view it refers to other decisions of the Tariefcommissie and to a judgment of the Hoge Raad.

In the present case the cooperative in question — "contrary to practice" — did not charge or receive any dues for 1975 and 1976 in respect of the storage facilities offered to its members which had the immediate effect of lowering the value of its members' shares and that loss constitutes, according to the Netherlands

Government, the consideration for the service provided by the cooperative.

Consequently the Netherlands Government believes that the question submitted to the Court "must be answered in the affirmative".

B — Observations of the Commission

1. The *Commission* recalls that the main object of the First Directive on harmonization of turnover taxes was to convert those taxes into a Community system of value-added taxation whose structure and detailed rules for application are given by the Second Directive and it then examines at length Article 8 of that directive in conjunction with Article 2 of the directive and in the light of point 13 of Annex A.

According to the Commission the effect of those provisions is that the provision of a service is taxable only if the service was given for valuable consideration and the basis for assessment is the value of that consideration, that is to say, everything received in return for the service: therefore there must be a "direct relationship between the service provided and the consideration received". It further follows from those provisions that "the consideration must be capable of being expressed in money", that interpretation being confirmed by Article 9 of the Second Directive which stipulates that the standard rate of the tax shall be fixed at a percentage of the basis of assessment. That basis of assessment is formed by the consideration of what is actually received in return or "in other words, by the 'subjective' value and not an 'objective' or rather 'normal' value, that is to say, by a value estimated according to objective criteria".

The Commission then sets out to furnish proof for its argument, contending first of all that it is to be found in the differing definition concerning the basis of assessment in the case of the importation of goods, since, in that case, there is reference to the "normal price" in Regulation No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (Official Journal, English Special Edition 1968 (I), p. 170).

The same applies to the supply of goods in two particular cases — provided for by Article 5 (3) (a) of the Second Directive in relation to (1) the appropriation by a taxable person, from his undertaking, of goods which he applies to his own private use or transfers free of charge, (2) the use for the needs of his undertaking, by a taxable person, of goods produced or extracted by him or by another person on his behalf — the basis of assessment is the "normal" value "by way of clear exception to the principle of the 'subjective' value which is applicable generally to the supply of goods and to the provision of services".

The Commission states that the nature of VAT explains why "the Second Directive is based generally on 'subjective' value as a criterion for assessment in regard to internal trade". It is in the nature of a tax on consumption which means that it is the actual outlay of the consumer which must be taxed and that it is only when no price has been paid by the consumer that there is cause to adopt the criterion of normal value. In this respect the Second Directive refers to that

criterion in the specific case of the supply of goods but not in the case of the provision of services. The question of using "normal" value is tied up with the question whether that use "is necessary to prevent a distortion of competition or unjustified fiscal advantages". The two particular cases cited above together with point 6 of Annex A show that "an attempt is made to achieve taxation which is as neutral as possible", sometimes by widening the field of taxation, sometimes by abolishing the right to deduct the input tax.

Consequently, if it is assumed that the storage was undertaken free of charge and did not therefore constitute a taxable transaction, it must also be said that the cooperative is not entitled to deduct VAT on the goods and services utilized to enable that storage to be provided. But the Gerechtshof rejected that subsidiary submission of the inspector and the Hoge Raad does not deal with it.

Finally, to end its argument, the Commission submits that the Netherlands Wet op de omzetbelasting of 1968 adopted pursuant to the First Directive is also based on the "subjective" aspect of the value to be taken into consideration as the basis of assessment and only departs from that principle in respect of "a few exceptions in the case of the supply of goods and none in the case of services". Article 8 thereof makes "consideration" the criterion for assessment and "consideration" is defined as "the total amount — or, if that received in return does not consist of money, the total value of that received in return — which is charged for the supply of goods or for a service, or, if more is provided in return than is actually charged, that which is provided in return". The distinction between the supply of goods and services is also conveyed in the definition of services contained in the Law; "all services, not consisting in the supply of goods, which are provided for consideration" (Article 4 (1) of the said Law); the words "for consideration" do not reappear in the definition of the supply of goods because certain supplies of goods are also taxable where there is no consideration. Consequently the definition of taxable events referred to in Article 1 of the Netherlands Law does not contain the qualifying words "for valuable consideration" and is somewhat different from that of the Second Directive which expressly adopts that requirement. That difference explains why "the Hoge Raad did not also add the words 'against payment'; used in Article 2 of the directive, to its request for a preliminary ruling".

2. In order to reply to that question asked by the Hoge Raad to establish whether storage services undertaken by the cooperative association are subject to VAT, the Commission believes that it is important to establish whether those services were provided for valuable consideration and whether in return for those services the association received something capable of being expressed in monetary terms by applying "subjective" criteria.

At first sight it might be difficult to consider the service provided as having been effected for valuable consideration because nothing had been received in return for it: it was therefore a service provided free of charge and that is the

view which has been taken by the Gerechtshof.

The Commission nevertheless examines the argument of the inspector that the benefit provided by the members to the cooperative association lay in their acceptance of a reduction in the value of their shares in proportion to the usual storage charge not collected in 1975 and 1976. But the Commission feels that it is difficult to determine with any certainty the real effect which the annual decision on the storage charges had on the value of the shares because that value could also be influenced one way or the other by various other factors. Whilst accepting that such a decision constitutes an exceptional measure the Commission believes that this fact cannot constitute sufficient reason for there to be question of consideration and of a taxable service. What is more the inspector's view — fixing a storage duty regarded as "normal" — is not in accordance with the scheme of the directive which is based on subjective value.

The Commission subsequently wonders whether the reduction in the value of the shares really constitutes consideration from the members for the service of storing their potatoes. It first of all believes that it does not seem permissible to regard the acts of a cooperative as being those of its members since under the scheme of the Second Directive such cooperatives are considered to be taxable entities. It subsequently argues that a close relationship should exist between the acceptance of the reduction in value of the shares and the storing of the potatoes carried out in return. The Commission believes however "that it is not possible to be sure either in the period prior to the decision or in the following season that all the storage services were effected for the benefit of members who, at the time of the decision, were in fact members and who as a result thereby incurred, in the inspector's view, a reduction in value of their shares as a result of the decision". Finally there only remains the question of the amounts of the consideration which should be expressed in money. The inspector finally calculated that consideration by applying "the most usual price" for the storage charge. That is not only an arbitrary criterion but more importantly it refers to "normal" value contrary to the scheme of the Second Directive.

Lastly the Commission wonders "whether in the absence of any obligation or express authorization contained in the Second Directive it is permissible solely in the case of cooperative associations and similar kinds of undertakings to depart from the principle of consideration actually received and therefore to subject the pricing and management policy of those cooperatives to special fiscal criteria which do not apply to other kinds of undertakings. Neither the wording nor the scheme of the Second Directive gives any such indication (and moreover the same applies to the Sixth Directive too)".

Consequently the Commission "accordingly believes that in the case raised by the Hoge Raad there can be no question of a service subject to value-added tax because the service in question was not

provided against payment within the meaning of Article 2 of the Second Directive but free of charge as the cooperative association did not stipulate or receive anything in return for the services which it provided or at any rate it did not stipulate or receive anything in return from its members whereof the real value could be determined pursuant to Article 8 (1) (a) taken together with point 13 of Annex A to that directive".

III — Oral procedure

The Netherlands Government represented by Mr Borchardt, acting as Agent and the Commission, represented by Mr Fischer, Legal Adviser, acting as Agent, presented oral argument and answered questions put to them by the Court (Second Chamber) at the sitting on 18 December 1980.

The Advocate General delivered his opinion at the same sitting.

Decision

1 By a judgment of 25 June 1980 which was received at the Court on 2 July 1980 the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question as to the interpretation of Article 8 of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p. 16).

2 That question was raised in the context of a dispute between the Staatssecretaris van Financiën [Secretary of State for Finance] and an agricultural cooperative association which runs a potato warehouse, over the fact that, having decided not to collect any storage charge for 1975 and 1976 from its members for the storage of potatoes, the association considered that since those services were provided for no payment they should not be subject to turnover tax.

3 However the fiscal authorities took the view that the cooperative had nevertheless charged its members something in return owing to the reduction in the value of their shares as a result of the non-collection of the storage charges for the two years in question and having assessed what was received in return to be the storage charge ordinarily imposed it issued a notice of assessment to additional tax.

4 The cooperative referred that notice of assessment to the Gerechtshof, The Hague, arguing that, since the term consideration [vergoeding] as defined in Article 8 of the Wet op de omzetbelasting (Law on Turnover Tax) has a subjective character, the cooperative had provided its services for no consideration because it had not required anything in return.

5 The Gerechtshof upheld the application and the Staatssecretaris van Financiën appealed against that judgment.

6 In order to resolve the dispute the Hoge Raad put the following question:

"A cooperative association incorporated under Netherlands law runs in accordance with its stated objects a potato storage depot. The members of the association have the right against it and the obligation towards it to put in store each year 1 000 kilograms of potatoes for each share certificate issued by the association in their possession in return for a storage charge fixed each year by the association payable at the end of the season. Pursuant to a decision by the association, in a given year, no storage charge may be imposed.

In such a case is there consideration within the meaning of the opening words and paragraph (a) of Article 8 of the Second Directive?"

7 By that question the Hoge Raad is in substance asking what is the correct interpretation of the term "consideration" contained in Article 8 (a) of the Second Directive.

8 The question which is thus raised must be resolved in the light of the entire provisions of the Second Directive.

9 It should be noted in the first place that the expression in issue is part of a provision of Community law which does not refer to the law of the Member States for the determining of its meaning and its scope; it follows that the interpretation, in general terms, of the expression may not be left to the discretion of each Member State.

10 Furthermore the Community legislature has been careful to clarify the expression "consideration" in Annex A — which by Article 20 of the Second Directive is an integral part thereof — under point 13 regarding Article 8 (a) in so far as the term should be understood as meaning "everything received in return for ... the provision of services, including incidental expenses (packing, transport, insurance, etc.) that is to say not only the cash amounts charged, but also, for example, the value of the goods received in exchange or, in the case of goods or services supplied by order of a public authority, the amount of the compensation received".

11 It should then be emphasized that Article 8 (a), which defines the basis of assessment of value-added tax stating that is shall be in the case of the provision of services "everything which makes up the consideration for the provision of services", and clarified as just stated above, must be compared to Article 2 which stipulates as being solely capable of being subject to value-added tax "the provision of services within the territory of the country by a taxable person against payment".

12 So a provision of services is taxable, within the meaning of the Second Directive, when the service is provided against payment and the basis of assessment for such a service is everything which makes up the consideration for the service; there must therefore be a direct link between the service provided and the consideration received which does not occur in a case where the consideration consists of an unascertained reduction in the value of the shares possessed by the members of the cooperative and such a loss of value may not be regarded as a payment received by the cooperative providing the services.

13 What is more it follows from the use of the expressions "against payment" and "everything received in return" first that the consideration for the provision of a service must be capable of being expressed in money, which is further confirmed by Article 9 of the Second Directive which stipulates that "the standard rate of value-added tax shall be fixed ... at a percentage of the basis of assessment", that is to say at a certain proportion of that which constitutes the consideration for the provision of services, which implies that such consideration is capable of being expressed in an amount assessed in money; secondly that such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria.

14 Consequently a provision of services for which no definite subjective consideration is received does not constitute a provision of services "against payment" and is therefore not taxable within the meaning of the Second Directive.

15 It follows therefrom that there can be no question of any consideration within the meaning of the opening words and subparagraph (a) of Article 8 of the Second Directive 67/228 of the Council of 11 April 1967 in the case of a cooperative association running a warehouse for the storage of goods which does not impose any storage charge on its members for the service provided.

Costs

16 The costs incurred by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that Court.

On those grounds,

THE COURT (Second Chamber)

in answer to the question referred to it by the Hoge Raad der Nederlanden by judgment of 25 June 1980, hereby rules:

There can be no question of any consideration within the meaning of the opening words of subparagraph (a) of Article 8 of the Second Directive 67/228 of the Council of 11 April 1967, on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax,

(Official Journal, English Special Edition 1967, p. 16) in the case of a cooperative association running a warehouse for the storage of goods which does not impose any storage charge on its members for the service provided.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 5 February 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 18 DECEMBER 1980

My Lords,

My own view is that this is a very simple case and I need not take time to consider my opinion.

I entirely agree with the Commission's conclusion. The crux in my opinion is that there is nothing here that can be described as a "payment" within the meaning of Article 2 (a) of the Directive, nothing that can be described as "consideration" within the meaning of Article 8 — consideration for the service provided for the members of the association — and nothing that can be described as "received" by the association within the meaning of point 13 of Annex A. Certainly the reduction in the value of their shares suffered by the members cannot be so described. One cannot in my opinion escape from the fact that there is no payment by the members and no receipt by the association. To cover such a case as this, one would need a specific provision deeming there to be consideration where there is not.