JUDGMENT OF THE COURT (FIFTH CHAMBER)
11 DECEMBER 1984 [1]

Criminal proceedings against Jan Gerrit Abbink (reference for a preliminary ruling from the Arrondissementsrechtbank, Arnhem)

(Temporary importation of motor vehicles — Exemption from import duty)

Case 134/83

Free movement of goods — National legislation prohibiting residents from using vehicles admitted under temporary importation rules — No exception for use without intention of evading tax — Compatibility with the Treaty — Period concerned
(Council Directive No 83/182/EEC)

The rules of the EEC Treaty relating to the free movement of goods do not preclude national legislation from imposing on persons residing in the territory of a Member State a prohibition, subject to criminal penalties, on the use of motor vehicles admitted under temporary importation arrangements and thus exempt from payment of value-added tax, even if that legislation makes no exception for cases in which such vehicles are used without any intention of evading tax.

That statement applies only to the period before the entry into force of Council Directive No 83/182/EEC, which governs the matter as from that date.

In Case 134/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arrondissementsrechtbank [District Court], Arnhem, for a preliminary ruling in the criminal proceedings pending before that court against

JAN GERRIT ABBINK, Rijnsburg, Netherlands,

1 — Language of the Case: Dutch.

on the interpretation of provisions of the EEC Treaty relating to the free movement of goods with regard to national legislation making it an offence for persons resident in the territory of a Member State to use motor vehicles covered by temporary import rules and consequently imported free of import duty, even if such temporary use is made without any intention of evading tax,

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the observations submitted under 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 procedure

1. According to the order for reference and the case file, the defendant in the main proceedings, a Netherlands passport holder and resident at Rijnsburg in the Netherlands, works as a driver salesman for his son's wholesale flower business at Saarbrücken, Federal Republic of Germany, where he also possesses a residence permit.

A large proportion of the flower and plant supplies of his son's business are obtained at the auction market in Aalsmeer in the Netherlands.

Flowers bought at the auction are sold and delivered by the defendant who transports them from Aalsmeer to Saarbrücken.

To make the trips necessary for obtaining the supplies of flowers and transporting them to the places of delivery to customers in Germany, between which he stays for a short time in the middle and at the end of the week with his family at Rijnsburg, the defendant uses a lorry and a private vehicle which are the property of his son's business or leased and which have German registration plates.

On 7 December 1981 the Netherlands customs authorities found that the defendant was driving in the Netherlands a private vehicle registered in Germany in contravention of Article 25 of the Beschikking Vrijstellingen — Tariefbesluit [Tariff (Exemptions) Order] 1960 since the import duty required for that purpose had not been paid.

He was reported for contravening the relevant customs provisions and the competent Inspector of Customs and Excise demanded from him the import duty payable, which was HFL 8 508.

Mr Abbink appealed to the Taxation Chamber of the Gerechtshof [Regional Court of Appeal], Arnhem, against the Inspector's decision rejecting his objection.

Mr Abbink was the subject of concurrent criminal proceedings before the Politierechter [Magistrate] at the Arrondissementsrechtbank [District Court], Arnhem, for having infringed provisions and rules of Netherlands legislation governing the temporary importation of certain means of transport within the Community.

The Arrondissementsrechtbank, Arnhem, referring to the second subparagraph of Article 7 (1) of Council Directive 83/182/EEC 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 1983, L 105, p. 59) and to Article 7 (2), governing the determination of the place of residence of individuals and the means of proof of residence, considered it established that the defendant in the main proceedings was resident in the Netherlands.

It also considered that Articles 3 to 6 of Directive 83/182/EEC, concerning the tax exemptions referred to in Article 1 to be granted upon the temporary importation of certain means of transport for private or business use and private vehicles, were not applicable in this case so that the defendant could not rely upon those provisions in order to claim tax exemption for the importation of a vehicle.

The Arrondissementsrechtbank further referred to the judgment of the Court of Justice delivered on 9 October 1980 in Case 823/79, *Carciati* [1980] ECR 2773 in which the Court ruled that the rules of the EEC Treaty relating to the free movement of goods do not preclude national legislation from imposing on persons residing in the territory of a Member State a prohibition, subject to criminal penalties, on the use of motor vehicles admitted under temporary importation arrangements and thus exempt from payment of value-added tax.

The Arrondissementsrechtbank then referred to the Commission's answer to written question No 22/82 submitted on 17 March 1982 by Mr Rogalla, a Member of the European Parliament, on the use of properly licensed and taxed motor vehicles in the Member States of the European Community. In that answer (Official Journal 1982, C 262, p. 1) the Commission representative, referring to the judgment in *Carciati* stated that the temporary use of a

foreign vehicle by a resident of a given country could not be prohibited, provided that there was no intention to evade tax.

Having decided that there was no intention to evade tax in this case and in view of that answer the Arrondissementsrechtbank, Arnhem, by order of 30 May 1983, stayed the proceedings and requested the Court of Justice to rule on the question whether, in view of the Commission's answer to written question No 22/82, national legislation making it a criminal offence for persons resident in the territory of a Member State to use motor vehicles covered by temporary importation rules and consequently exempt from import duty is compatible with the provisions of the EEC Treaty on the free movement of goods if such temporary use is made without any intention of evading tax.

2. The order of the Arrondissementsrechtbank, Arnhem, was received at the Court Registry on 11 July 1983. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were lodged on 6 September 1983 by the Commission of the European Communities, represented by A. Haagsma and R. D. Gilmour, acting as Agents, by the defendant in the main proceedings, represented by B. Coops, Advocate, and by the Netherlands Government, represented by I. Verkade, Secretary General at the Ministry for Foreign Affairs.

Upon 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 28 March 1984 made pursuant to Article 95 (1) and (2) of the Rules of Procedure the Court assigned the case to the Fifth Chamber.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court

1. The *Netherlands Government* believes that its national legislation is not contrary to Community law. In this regard it refers first to the judgment delivered by the Court on 9 October 1980 in Case 823/79 *Carciati.*

It points out that the Court stated first of all that under the Community legislation on value-added tax the Member States retained broad powers to regulate temporary importation in order, in particular, to prevent tax evasion, provided that excessive use was not made of that power.

The Court then held that:

"As regards the prohibition imposed by a Member State on persons resident in its territory on the use of vehicles imported temporarily tax-free, it is an effective way of preventing tax frauds and ensuring that taxes are paid in the country of destination of the goods" (paragraph 10).

It follows that the Netherlands legislation governing tax exemptions, which is not fundamentally different from the legislation considered by the Court in the passage just cited, cannot be regarded as an excessive measure.

Support for that view is to be found in Council Directive 83/182/EEC. Based on the principle that tax must be paid in the Member State of residence, that directive establishes that the tax exemption to be granted upon temporary imports into a Member State is to be available only to the residents of other Member States (Article 3).

The Netherlands Government states two reasons why it cannot agree with the interpretation placed upon the judgment in Case 823/79 to the effect that the use by residents of vehicles exempt from tax on account of their temporary importation cannot be prohibited if the users of the vehicles have no intention to evade tax.

The first reason is that such an interpretation introduces a subjective element (the intention of the person concerned) which is not to be found in the Court's judgment in *Carciati* in which it was held (in paragraph 10) that a general prohibition imposed on residents on using motor vehicles imported temporarily free of tax is in itself an effective way of preventing fraud.

The second reason is the difficulty in determining whether or not the driver of the vehicle had any intention of evading tax. If the tax authorities in the Member States had to prove in each individual case that the person concerned intended to evade tax, their task would be virtually impossible and this would lead to widespread tax evasion.

The Netherlands Government points out that in this regard the Advocate General stated in Case 823/79 that: "As for the prohibition imposed by a Member State on persons residing therein against using vehicles which have been temporarily imported free of tax, that constitutes — as is rightly observed in the Commission's observations — the only truly effective way of preventing tax evasion and of ensuring that the tax is paid in the country of destination of the goods." He went on "It is clear that if persons resident in the importing State were also allowed to use motor vehicles imported temporarily tax-free, it would be exceedingly difficult to identify cases of fraud" ([1980] ECR at p. 2784).

The Netherlands Government accordingly submits that a prohibition such as that laid down in Article 25 of the Beschikking Vrijstellingen Tarifbesluit 1960 cannot be considered contrary to the principles of the free movement of goods and for that reason the Netherlands authorities also have the power to impose criminal penalities for any breach of that prohibition in accordance with paragraph 11 of the Court's judgment in Case 823/79.

2. The *defendant in the main proceedings* states that he is being prosecuted, as an employee of an undertaking established in the Federal Republic of Germany, for contravening provisions of Netherlands legislation governing the temporary importation of certain means of transport within the Community.

He contends that the proceedings against him were wrongly brought because he was acting upon and carrying out the instructions of his employer and secondly

neither he nor his employer had any intention of importing a vehicle without paying tax.

He observes that if the Netherlands legislation governing the temporary importation of certain means of transport were applied strictly, a car with German number plates driven by a person who also resides in the Netherlands would have to be cleared through customs each time it passed over the frontier between the Federal Republic of Germany and the Netherlands and a special consumption tax would have to be paid.

As the taxes paid in the Netherlands are not refunded upon the re-importation of a vehicle into the Federal Republic of Germany, the result is that the taxes must be paid twice for the use of such a vehicle within the EEC.

Such legislation is unreasonable and in flagrant breach of the Community provisions on the free movement of goods within the EEC.

Whether turnover tax and special consumption tax are payable depends in this case solely on the nationality of the driver whilst the fact that he is acting upon the instructions of his foreign employer and that the vehicle is used exclusively for carrying out those instructions is irrelevant. The fact that on each occasion the vehicle in question is in the country of importation for only one or two days or for very short periods has no importance either.

He accordingly concludes that a national law or provision based upon such a law which in the specific situation described above gives the national tax authorities the power to demand turnover tax and special consumption tax from the driver in person and the national authorities responsible for prosecuting criminal offences the power to commence criminal proceedings against the driver is clearly contrary to and incompatible with the Community provisions on the free movement of goods within the EEC.

3. The *Commission* of the European Communities discusses the practical significance of the problems raised by this case and makes a legal analysis of the effect which the relevant legislation and practices of the Member States have on the free movement of goods and workers and on the right of establishment.

As regards the practical aspect of the problem, the Commission points out that the establishment of the common market has the effect of creating an increasing number of "trans-frontier" ties of a family and business nature involving the use of road vehicles.

This, it explains, is because business is often done across frontiers and people may work on one side of a frontier and live on the other side so that they travel to and return from work in cars which are either registered in their name in the country in which they reside or registered in their name or that of the employing firm in the country in which they work.

The Commission points out that such vehicle usage is governed by fiscal legislation whose underlying principle is that a resident of Country A must not drive in his own country a vehicle registered in Country B and that such a

prohibition is necessary in order to prevent tax evasion because without it value-added tax and road-vehicle tax would easily be evaded.

The Commission considers however that the personal and economic circumstances in question are now so complex and varied that an outright prohibition on driving a car registered in another country no longer meets the requirements of daily life from the personal and business point of view.

It then sets out the annoying problems which are thus created for the individuals and the businesses concerned which, without having any intention of evading tax, are subject to such an outright prohibition. It cites by way of example a number of cases concerning the private use of cars, the business use of commercial vehicles, the private and business use of vehicles belonging to a business and the particular case of a national of the Federal Republic of Germany who was prohibited from using in his country a car which he had rented in another Member State until his own car, which had been damaged in an accident abroad, was repaired.

Individuals affected by the absolute prohibition must often either give up their job in order to maintain their family life or give up their family life in order to keep their job. In some situations the nationality of the driver of a goods vehicle prevents goods from being delivered since a lorry may be seized if the driver does not have the "right" nationality. Lastly, the economic ability of an individual to exercise his freedom of establishment is impaired by the fact that problems of this kind arise at frontiers unless the "right" national is employed to drive one's vehicle and the vehicle is registered in the "right" country so as to prevent it from being seized in one country or another.

The Commission then observes that some of these problems have been overcome by Directive 83/182/EEC.

It points out, however, that those tax exemptions concern only three kinds of situation:

(a) Where a non-resident temporarily imports a private vehicle or various other means of transport for a limited period of time (Article 3);

(b) Where a private vehicle is temporarily imported for business use provided also that the person importing it normally resides outside the State of importation (Article 4) and

(c) Where a vehicle is used to travel to and return from work and the driver's residence and place of work are located in different countries, provided that the vehicle is registered in the country of residence.

In the Commission's view, those tax exemptions, which moreover do not cover "commercial" vehicles (that is to say, according to Article 2 (a) of the directive, vehicles intended for transporting persons and goods or for special use), are not sufficient for resolving the problems which have to be faced by individuals whose circumstances are not covered by the directive and who, being

obliged to travel between their place of residence and the place of work located in different countries, fall under the aforementioned prohibition.

It points out that, in order to resolve those problems, the Community is endeavouring to bring about gradual harmonization in accordance with the principles laid down in Directive 83/182/EEC.

The main problem arises from the original definition of the term "importation" in 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, 13. 6. 1977). The mere crossing of a frontier by a motor vehicle is considered an importation of goods, whether or not the vehicle was used for a purpose other than to take the driver on an errand or to deliver goods.

The Commission makes the following observations on the question whether national legislation making it an offence for residents in the territory of a Member State to use motor vehicles covered by temporary importation rules and consequently imported free of import duty is compatible with the provisions of the EEC Treaty if such temporary use is made without any intention of evading tax.

Dealing first with the free movement of goods, it points out that a similar question was submitted to the Court in Case 823/79 *Carciati* in which the Court held that Member States retain broad powers to take action in respect of temporary importation specificially for the purpose of preventing tax evasion and that if the measures adopted for that purpose are not excessive they are compatible with the principle of the free movement of goods.

The Commission observes, however, that the facts in *Carciati* were different from those of the present case because they concerned an Italian resident driving in Italy a vehicle registered in Germany whose owner had left it behind in order to be able to use it when he came to stay in Italy.

The Commission therefore takes the view that the question still remains whether the relevant national fiscal provisions hinder the free movement of goods inasmuch as they constitute a quantitative restriction on exports or a measure having equivalent effect which is contrary to Article 34. In this regard it considers that the relevant national provisions are in fact designed to prevent tax evasion and have no purposes which the Court, in a consistent line of decisions (for example in Case 15/79, *Groenveld* v *Produktschap voor Vee en Vlees*, [1979] ECR 3409), has held to be contrary to Article 34 of the Treaty.

However, the Commission raises the question whether such an interpretation of Article 34 of the Treaty takes sufficient account of the facts of the present case. It accordingly considers that an outright prohibition imposed on a person residing in the Netherlands against driving a vehicle registered in another Member State, even if this is done in order to export goods from the Netherlands to another Member State, is an obstacle to normal trade and thus constitutes a measure having an effect equivalent to a restriction on imports prohibited by Article 34.

In the Commission's view, despite the wide powers which Member States have in fiscal matters, such an outright prohibition is excessive. Where a vehicle

belongs to a company established outside the Netherlands whose business consists of purchasing flowers in one country and selling them in another, it must be free to employ whom it wishes to drive its vehicles so that it can carry on business lawfully without any intention of evading tax. The prohibition laid down by the Netherlands legislation restricts the company's freedom to conduct its business as it wishes and impedes exports contrary to Article 34.

In the present case there is also a breach of Article 48 which provides that:

"Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest."

It points out that Article 48 was implemented by Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475) and that therefore the crucial question in the present case is whether the rights conferred by Article 48 and Regulation No 1612/68 may be invoked by a national of State A against restrictions imposed by that State if such measures affect his right to take up employment in State B. The Commission considers that it is a question of "reverse discrimination" which as such has apparently still not been decided by the Court. This question has been raised in connection with Article 52 in Case 115/78, *Knoors,* [1979] ECR 399, Case 136/78, *Auer,* [1979] ECR 437, and in Case 246/80, *Broekmeulen* v *Huisarts Registratie Commissie,* [1981] ECR 2311 and has also been raised in Case 175/78, *Regina* v *Saunders,* [1979] ECR 1129, a case directly concerning Article 48. To some extent the judgments delivered in the *Knoors* and *Auer* cases might be contradictory in so far as in the *Knoors* case a Netherlands national was allowed to invoke provisions of Community law against the Netherlands whereas in the *Auer* case a French national was not allowed to invoke provisions of Community law against France. It adds, however, that the distinguishing feature in those two cases seems to have been the state of secondary law which was decisive for the outcome of both cases.

The Commission also refers to the *Broekmeulen* case which mainly turned on the interpretation of Directive 75/362/EEC even if it is stated in a passage in paragraph 20 of the decision that Articles 48, 52 and 59 may be relied upon by a national as against the government of his country. In the *Saunders* case Mr Advocate General Warner, commenting on the *Knoors* case, expressed the opinion that nothing that the Court had stated thereto could be considered as stating a sweeping principle that no provision of the Treaty, or no provision of it about the free movement of persons, could apply in a case wholly internal to a Member State.

The Commission considers that, irrespective of the *ratio decidendi* of the judgments in the *Knoors, Auer* and *Broekmeulen* cases — for this case is not one wholly internal to a Member State but one directly affecting the possibility for workers to find employment in another Member State — if the

defendant in this case had been resident in Germany, the prohibition laid down by the national legislation in question would undoubtedly not have applied to him.

The effect of that prohibition is that a Netherlands national may not take up employment in another country, in this case Germany, if the employment requires him to drive his employer's vehicles on lawful business to and from the Netherlands. Such a restriction therefore constitutes an infringement of Article 48 of the EEC Treaty.

The question also arises whether the provisions in question constitute a restriction upon the freedom of establishment provided for in Article 52. For reasons similar to those stated by Mr Advocate General Warner in the *Saunders* case, the Commission believes that in an appropriate case the rights conferred by Article 52 may also be relied upon by the person concerned in his own Member State.

No Member State may adopt laws or practices to prevent its own nationals from freely exercising the right of establishment in another Member State.

The Treaty requires that a national of a Member State, such as the defendant's employer established in the Federal Republic of Germany, must not be restricted, when carrying on his business, in his choice of employees by problems concerning nationality required for driving his business vehicles; in the present case a German undertaking employing a German driver would not encounter the same difficulties. The Commission therefore considers that such restrictions arising from the unlimited exercise by Member States of their sovereign powers in fiscal matters indirectly affect the actual exercise of the right of establishment as provided for in the Treaty since they influence the choice of employees.

In conclusion the Commission observes that it might be argued that the most that may be required of Member States in this regard is that they should allow vehicles to be used on their roads for business purposes but should be entitled to maintain an absolute prohibition where the carrying on of a business involves problems such as employees' travelling to and from work or visiting their families on the other side of the frontier. However, in the Commission's view, such a narrow view of fiscal sovereignty seems to take no account of the reality of daily business and private life.

The Commission acknowledges that it is necessary to base fiscal control in this field on a presumption that some fraud will take place. However, it considers that such a presumption must not lead to results entirely out of proportion to the problem in question or contrary to other relevant rules of Community law. In this regard it refers to the judgment of the Court in the *Gaston Schul* case ([1982] ECR 1409, paragraph 33 at p. 1431) in which it was held that:

"The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market. It is important

that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market."

The Commission also points out that, in assessing the present case in the light of the problems which it describes, it must be borne in mind that there is in fact a conflict of laws which arises in many other cases owing to the existence of links to two different countries.

It may be that, if the arguments it advances in its written observations are considered separately, they are open to the criticism that the facts of this case do not strictly speaking meet the substantive requirements of Articles 34, 48 or 52 as hitherto interpreted and applied. Nevertheless, it believes that considered in its entirety the present case exemplifies a particularly acute problem and reveals a state of affairs incompatible with the fundamental principles of the common market.

In view in particular of the judgment of the Court in the "Cassis de Dijon" case (Case 120/78 [1979] ECR 649, paragraphs 8 and 14) it therefore proposes that the question of the national court should be answered as follows:

"In the present state of Community law obstacles to the free movement of goods, the free movement of workers and the exercise of the right of establishment or the freedom to provide services must be accepted in so far as they are necessary in order to satisfy requirements relating in particular to effective fiscal control.

However, an outright prohibition imposed on a person resident in the territory of a State against driving in that State a vehicle registered in another State goes further than is necessary for that purpose and as such cannot override the fundamental freedoms conferred by the Treaty."

III — Oral procedure

At the hearing on 20 June 1984 the Danish Government, represented by Mr Mikaelsen, and the Commission, represented by Mr Haagsma, acting as Agent, presented oral argument and answered questions put by the Court.

The Advocate General delivered his opinion at the sitting on 29 September 1984.

Decision

1 By order of 30 May 1983, received at the Court on 11 July 1983, the Arrondissementsrechtbank [District Court], Arnhem, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the provisions of the EEC Treaty on the free movement of goods.

2 That question was raised in the course of criminal proceedings brought against the defendant in the main proceedings for offending against the provisions of Netherlands law regarding the temporary importation of certain means of transport within the Community.

3 According to the order of the national court and the documents in the case, the offence with which the defendant in the main proceedings was charged was that, contrary to the provisions of Article 25 of the Beschikking Vrijstellingen-Tariefbesluit [Tariff (Exemption) Order] 1960, he drove in the Netherlands a passenger car registered in the Federal Republic of Germany belonging to his employer — a flower wholesaler established in Saarbrücken — without having paid import duties on the car, although he was normally resident in the Netherlands. The car was used for purchasing flowers in the Netherlands for delivery in the Federal Republic of Germany.

4 Before the Arrondissementsrechtbank, Arnhem, the defendant in the main proceedings relied on the provisions of the EEC Treaty, arguing that the relevant national legislation making it an offence for Netherlands residents to use a vehicle registered in another Member State without providing for any exception in cases in which such a vehicle is used for the purposes of the driver's employment without any intention of evading tax is contrary to Community law.

5 The national court first referred to Council Directive 83/182/EEC 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 1983, L 105, p. 59). It decided that that directive was adopted after the alleged offence was committed and also that it could not be successfully relied upon by the defendant in order to claim exemption from import duties.

6 The national court then referred to the judgment of 9 October 1980 in Case 823/79, *Carciati,* [1980] ECR 2773, in which the Court held that the rules of the EEC Treaty relating to the free movement of goods do not preclude the imposition by national rules on persons residing in the territory of a Member

State of a prohibition, subject to criminal penalties, on the use of motor vehicles admitted under temporary importation arrangements and thus exempt from payment of value-added tax.

7 Finally, the national court referred to the answer given to written question No 22/82 submitted on 17 March 1982 by a Member of the European Parliament (Official Journal 1982, C 262, p. 1). In its answer the Commission, referring to the Court's judgment in the *Carciati* case, stated that the temporary use of a foreign vehicle by a resident of a given country could not be prohibited provided that there was no intention of evading tax.

8 Taking the view that in this case the defendant had no intention of evading tax, the Arrondissementsrechtbank stayed the proceedings and referred the following question to the Court:

"In view of the Commission's answer is national legislation making it a criminal offence for persons resident in the territory of a Member State to use motor vehicles covered by temporary importation rules and consequently exempt from import duty compatible with the provisions of the EEC Treaty on the free movement of goods if such temporary use is made without any intention of evading tax?"

9 The Netherlands Government suggests that the Court should follow its decision in the *Carciati* case cited above and give an answer in this case consistent with that decision without taking into account subjective factors such as whether or not there is an intention of evading tax. Not only did that decision contain no proviso to that effect but, since it is virtually impossible for the national authorities of the importing State to detect an intention of evading tax, such an exception would lead to widespread tax evasion. Therefore, according to the Netherlands Government, a general prohibition imposed on persons resident in the importing State against using vehicles imported free of tax is necessary, because it is in itself an effective means of preventing tax evasion.

10 At the hearing the Danish Government also expressed the view that in practice it would be very difficult to determine whether or not a foreign

vehicle was being used in the importing State with the intention of evading tax and that it would also be difficult to arrive at a precise definition of such an intention. It therefore suggested that the Court should confirm its decision in *Carciati* by stating, as it did in that judgment, that national legislation which prohibits residents without exception from using a vehicle registered in another Member State accords with the principle of proportionality and that it is therefore compatible with Community law. According to the Danish Government, support for such an interpretation is to be found in the subsequent Council Directive 83/182/EEC of 28 March 1983, which makes tax exemptions on temporary imports conditional on the exempted vehicle not being disposed of, hired out or lent in the Member State into which it is temporarily imported.

11 The Commission takes the view that national legislation such as that referred to by the national court in this case may constitute an obstacle to the free movement of goods and workers and to the exercise of the right of establishment and the freedom to provide services. In its view, that obstacle must be accepted so far as it is necessary in order to satisfy essential requirements of, in particular, effective fiscal control of vehicles imported free of tax. However, an absolute prohibition imposed on every person resident in a Member State against driving in that State a vehicle registered in another Member State is excessive because it goes further than is necessary for that purpose and cannot therefore override the fundamental freedoms conferred by the Treaty.

12 It should first be pointed out that the question raised by the national court only concerns the period before the entry into force of Council Directive 83/182/EEC of 28 March 1983, which governs the matter as from that date.

13 As the Court stated in its judgment in *Carciati* until the entry into force of the new directive the Member States retained broad powers to take action in respect of temporary importation, specifically for the purpose of preventing tax evasion, and, provided that the measures adopted to that end were not excessive, they were compatible with the principle of the free movement of goods. In the same judgment the Court recognized that the prohibition imposed by a Member State on persons resident in its territory on the use of

vehicles imported temporarily tax-free was an effective way of preventing tax evasion and of ensuring that taxes were paid in the goods' country of destination. Finally, the Court stated that, provided that the provisions such as those contained in the legislation in question in that case were found to be compatible with the rules of the Community legal order, there were no grounds for calling in question the power of a Member State to impose criminal penalties for contravenions of the national legislation.

14 Those statements are not invalidated by the fact that the national legislation does not provide for any exception in cases in which vehicles are used without the intention of evading tax. Indeed, legislation designed to prevent tax evasion must inevitably be based on objective, verifiable criteria. That is not the case with a criterion based on the intention of the person concerned.

15 Such legislation must not however lead to double taxation. As the Court held in its judgment of 5 May 1982 in Case 15/81, *Schul* v *Inspecteur der Invoerrechten en Accijnzen,* [1982] ECR 1409, "value-added tax which a Member State levies on the importation of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation constitutes internal taxation in excess of that imposed on similar domestic products within the meaning of Article 95 of the Treaty, to the extent to which the residual part of the value-added tax paid in the Member State of exportation which is still contained in the value of the product on importation is not taken into account."

16 The reply to the question put by the Arrondissementsrechtbank, Arnhem, must therefore be that the rules of the EEC Treaty relating to the free movement of goods do not preclude national legislation from imposing on persons residing in the territory of a Member State a prohibition, subject to criminal penalties, on the use of motor vehicles admitted under temporary importation arrangements and thus exempt from payment of value-added tax, even if that legislation makes no exception for cases in which such vehicles are used without any intention of evading tax.

Costs

17 The costs incurred by the Netherlands Government, the Danish Government and 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 proceedings are concerned, a step in the proceedings before the national court, costs are a matter for that court.

On those grounds

THE COURT (Fifth Chamber)

in answer to the question submitted to it by the Arrondissementsrechtbank, Arnhem, by an order dated 30 May 1983, hereby rules:

The rules of the EEC Treaty relating to the free movement of goods do not preclude national legislation from imposing on persons residing in the territory of a Member State a prohibition, subject to criminal penalties, on the use of motor vehicles admitted under temporary importation arrangements and thus exempt from payment of value added tax, even if that legislation makes no exception for cases in which such vehicles are used without any intention of evading tax.

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 11 December 1984.

The Registrar
by order

H. A. Rühl
Principal Administrator

O. Due
President of the Fifth Chamber