JUDGMENT OF THE COURT (Fifth Chamber)
1 April 2004 *

In Case C-320/02,

REFERENCE to the Court under Article 234 EC by the Regeringsrätten (Sweden) for a preliminary ruling in the proceedings pending before that court between

Förvaltnings AB Stenholmen

and

Riksskatteverket,

on the interpretation of Article 26a of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 94/5/EC of 14 February 1994 (OJ 1994 L 60, p. 16),

* Language of the case: Swedish.

THE COURT (Fifth Chamber),

composed of: P. Jann, acting as President of the Fifth Chamber, A. Rosas (Rapporteur) and S. von Bahr, Judges,

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Förvaltnings AB Stenholmen, by M. Ljungqvist, Verkställande direktör,

— Riksskatteverket, by L. Hamberg, acting as Agent,

— Commission of the European Communities, by E. Traversa and L. Parpala, acting as Agents,

having regard to the Report of the Judge-Rapporteur

after hearing the Opinion of the Advocate General at the sitting on 10 July 2003,

gives the following

Judgment

1 By order of 10 September 2002, received at the Court on 13 September 2002, the Regeringsrätten (Supreme Administrative Court, Sweden) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 26(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 94/5/EC of 14 February 1994 (OJ 1994 L 60, p. 16) ('the Sixth Directive').

2 These questions were raised in a dispute between Förvaltnings AB Stenholmen (hereinafter 'Stenholmen'), a Swedish company which manages riding schools and buys and sells horses, and the Riksskatteverket (National Tax Board) regarding taxation of the sale of horses which have been trained.

Legal background

3 Article 2 of the Sixth Directive provides that the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to value added tax ('VAT').

4 Article 5(1) of the Sixth Directive provides:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

5 Article 5(2) of that directive gives several examples of tangible property. It does not explicitly mention animals.

6 Article 11A(1)(a) of the Sixth Directive provides:

'The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies'.

7 Article 26(a), inserted into the Sixth Directive by Directive 94/5, provides for special arrangements applicable in particular to second-hand goods.

8 According to the third and fifth recitals to Directive 94/5, these special arrangements are intended to avoid double taxation and distortion of competition between taxable persons.

9 In order to attain this objective, Article 26(a)B of the Sixth Directive provides that VAT is payable only on the profit margin made by the taxable dealer when he himself has acquired the goods without being able to deduct input VAT, namely when the goods were supplied to him:

— 'by a non-taxable person,

— or

— by another taxable person, in so far as the supply of goods by that other taxable person is exempt in accordance with Article 13(B)(c),

— or

— by another taxable person in so far as the supply of goods by that other taxable person qualifies for the exemption provided for in Article 24 and involves capital assets,

— or

— by another taxable dealer, in so far as the supply of goods by that other taxable dealer was subject to value added tax in accordance with these special arrangements.'

10 Article 26aA gives the following definitions:

'...

(d) second-hand goods shall mean tangible movable property that is suitable for further use as it is or after repair, other than works of art, collectors' items or antiques and other than precious metals or precious stones as defined by the Member States;

(e) taxable dealer shall mean a taxable person who, in the course of his economic activity, purchases or acquires for the purposes of his undertaking, or imports with a view to resale, second-hand goods and/or works of art, collectors' items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale;

...'

11 Article 26a of the Sixth Directive was transposed into Swedish law by Chapter 9 of the Mervärdeskattelagen (Law on value added tax) (1994:200, hereinafter 'ML').

The dispute in the main proceedings and the questions referred to the Court

12 Stenholmen wishes to buy young horses from private individuals in order to train them as riding horses and then sell them on. In order to clarify the tax consequences of that business, the company referred the following question to the Skatterättsnämnden (Revenue Law Commission):

'Is a horse — which is bought as an untrained young horse from a private individual (rather than a breeder) and is sold as a riding horse after training — to be regarded as second-hand goods at the time of sale, so that the rules on profit margin taxation can be applied?'

13 In a preliminary opinion of 12 November 2001 the Skatterättsnämnden replied to that question in the negative. The grounds for that opinion, as set out in the order for reference, are as follows:

'The definition of the term second-hand goods specifies that, apart from having been used, the goods must be suitable for further use as they are or following repair. Under the definition, it seems that it must be determined whether the goods are second-hand at the time the — subsequent — dealer acquires them. That can also be inferred from the provisions which define the term taxable dealer. The goods are thus sold on in the condition in which they were acquired, or — it may be assumed — if they are in a bad condition and thus do not fulfil a function which is normal and expected in those goods, after they have been rendered usable again by repair.

It clearly follows that, before the goods are sold on, as long as they have been in the dealer's possession, they cannot have acquired characteristics which affect their value other than by repair or similar. That may be considered to be the case irrespective of whether the characteristics were added through a biological process or in some other way. Living, growing organisms, whether animals or plants, undergo changes during their life cycles such that they can be considered, to a greater or lesser extent, to be continuously acquiring new characteristics which may affect their value.

Moreover, it must be borne in mind that, leaving aside the term second-hand goods, there is no doubt that the goods covered by Chapter 9a of the ML constitute inanimate objects which, with the exception of certain collectors' items, have been manufactured. In normal usage the term second-hand goods tends to be reserved for such objects, rather than living organisms, and the word 'repair' suggests something manufactured, the function of which can be restored by repair.

In the light of the above observations and since the animals in the present case have, moreover, been endowed with skills as riding horses, which they did not have previously, or at least when Stenholmen acquired them, or did not have to the same extent as when they were sold on, the Skatterättsnämnden finds that the sale of horses cannot be classified as sales of second-hand goods.'

14 Stenholmen appealed to the Regeringsrätten against that preliminary opinion. The Riksskatteverket contends that the Regeringsrätten should uphold the contested preliminary opinion.

15 In the view of the Regeringsrätten, in its order for reference, animals and other living organisms are goods within the meaning of the Community legislation on value added tax. It is not certain, however, that living animals can be regarded as second-hand goods under that legislation.

16 Considering it necessary to obtain an interpretation of Community law on this point, the Regeringsrätten decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Can an animal be considered to be second-hand goods?

If that question is answered in the affirmative, the Court is asked to answer the following question.

2. Is an animal which is purchased from a private individual (rather than a breeder) and which is sold, after training, for a specific purpose to be considered to be second-hand goods?'

The questions referred to the Court

17 It is appropriate to consider the questions together.

Observations submitted to the Court

18 All the parties accept that animals are goods within the meaning of the Sixth Directive.

19 With regard to the first question, Stenholmen and the Commission consider that an animal may be regarded as second-hand goods in accordance with Article 26a of the Sixth Directive, even when it was bought from a private individual (other than the breeder) and sold on after having been trained for a specific use.

20 They draw attention to the aim of the special arrangements applicable to second-hand goods, which is to avoid cumulative taxation and note that to exclude animals from the scope of application of those arrangements would undermine them. Stenholmen states that traders dealing in animals would be disadvantaged in comparison to other categories of traders dealing in other second-hand goods.

21 With regard to the second question, Stenholmen and the Commission consider that the status of second-hand goods depends solely on the criteria set out in Article 26aB of the Sixth Directive, that is to say essentially the fact that input VAT cannot be deducted. The seller's status or the future use of the animal should not be taken into consideration.

22 The Rikskatteverket relies on the same arguments, in essence, as those put forward by the Skatterättsnämnden in the reasons for its preliminary opinion. It maintains that the essential part of the value of a future transfer of a horse sold on after having been trained for a specific use arises from the training process and that it would be economically unfair and contrary to the intention of the legislature to tax only the economic value created during the final phase of the economic cycle if the horse was bought from a private individual or non-taxable person.

The Court's response

23 Firstly, as stated in Case 10/87 (*Tattersalls* [1988] ECR 3281), animals are tangible property within the meaning of Article 5 of the Sixth Directive.

24 Furthermore, it should be noted that nothing in Article 26a of the Sixth Directive indicates that the special arrangements applicable to the supply of second-hand goods do not apply to the supply of animals such as horses.

25 On the contrary, as Advocate General Stix-Hackl noted at point 34 of her Opinion, to exclude those supplies from the special arrangements applicable to second-hand goods would be contrary to the express intention of the legislature to avoid double taxation, as set out in the third and fifth recitals to Directive 94/5. To tax the supply by a taxable dealer of an animal such as a horse, bought from a private individual and sold on after training, on the basis of its total price would theoretically amount to double taxation since, however large that part of the price attributable to the training, part of the price would continue to represent the purchase price, including, in almost all cases, a sum paid in respect of input VAT by the private individual, which neither he nor the taxable dealer could deduct.

26 Therefore the restrictive interpretation put forward by the Riksskatteverket of the term 'as it is or after repair' in the definition of second-hand goods found in Article 26aA of the Sixth Directive cannot be accepted. In this context it is of little import that the increase in value of the animal in question does not arise from a 'repair' in the strict meaning of the term, but from, for example, a biological process or the training of the animal.

27 Furthermore, it should be noted that the common system of VAT aims in principle to tax the economic value added at different stages in the production and distribution process, until the phase of final use, by taxable persons acting as such, within the meaning of the Sixth Directive. It is clear that in a situation such as that at issue in the main proceedings, it would be contrary to this system to tax the entire sale price asked by the taxable dealer instead of only the economic value added when the animal was in his possession.

28 Accordingly, contrary to the argument of the Riksskatteverket, it is neither economically unfair nor contrary to the intention of the Community legislature to tax only the economic value added at this final phase of the economic cycle.

29 It follows from all the foregoing considerations that the answer to the national court's questions must therefore be:

— Article 26a of the Sixth Directive must be interpreted as meaning that live animals may be considered to be second-hand goods within the meaning of that provision.

— Thus an animal bought from a private individual (other than the breeder) which is sold on after training for a specific use may be considered to be second-hand goods.

Costs

30 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the questions referred to it by the Regeringsrätten by order of 10 September 2002, hereby rules:

1. **Article 26a 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 — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 94/5/EC of 14 February 1994, must be interpreted as meaning that live animals may be considered to be second-hand goods within the meaning of this provision.**

2. **Thus an animal bought from a private individual (other than the breeder) which is sold on after training for a specific use may be considered to be second-hand goods.**

Jann Rosas von Bahr

Delivered in open court in Luxembourg on 1 April 2004.

R. Grass
Registrar

V. Skouris
President