JUDGMENT OF THE COURT (Sixth Chamber)
12 November 1998 *

In Case C-134/97,

REFERENCE to the Court under Article 177 of the EC Treaty by Skatterättsnämnden (Sweden) for a preliminary ruling in the proceedings for a preliminary decision brought before it by

Victoria Film A/S

on the interpretation of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21), in conjunction with Article 28(3)(b) 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) and point 2 of Annex F thereto,

THE COURT (Sixth Chamber),

composed of: G. Hirsch (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, G. F. Mancini, H. Ragnemalm, R. Schintgen and K. M. Ioannou, Judges,

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

* Language of the case: Swedish.

after considering the written observations submitted on behalf of:

— Riksskatteverket, by Leif Krafft, of the Solna Bar,

— the Swedish Government, by Erik Brattgård, *departementsråd* in the Department of Foreign Trade of the Ministry of Foreign Affairs, acting as Agent,

— the Finnish Government, by Tuula Pynnä, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Knut Simonsson and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Riksskatteverket, the Swedish Government and the Commission at the hearing on 30 April 1998,

after hearing the Opinion of the Advocate General at the sitting on 18 June 1998,

gives the following

Judgment

1 By decision of 20 February 1997, received at the Court on 7 April 1997, Skatterättsnämnden (Revenue Board) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of the Act

concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, 'the Act of Accession'), in conjunction with Article 28(3)(b) 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, 'the Sixth Directive') and point 2 of Annex F thereto.

2 Those questions have been raised in the context of an application for a preliminary decision submitted by Victoria Film A/S ('Victoria') to Skatterättsnämnden.

3 Victoria, which has its registered office in Denmark, engages in the activity of commercial film production in Sweden through its Swedish subsidiary. On 1 August 1996, Victoria began the production in Sweden of certain films for which the rights to exhibit them on television and in cinemas were to be assigned to other companies.

4 In Sweden, however, according to Article 11(1) of Title 3 of Mervärdesskattelagen (1994: 200) (Value Added Tax Law), as worded until 31 December 1996, in conjunction with the provisions of Lagen (1960: 729) om Upphovsrätt till Litterära och Konstnärliga Verk (Law on Copyright in Literary and Artistic Works), the assignment of copyright in cinematographic works is exempt from VAT. Following a legislative amendment, that has no longer been the case since 1 January 1997.

5 On 6 March 1996, Victoria applied to Skatterättsnämnden for a preliminary decision determining that the assignment of film rights was, even prior to 1 January 1997, subject to VAT so that it could claim deductions of input tax.

6 Victoria claims that the Kingdom of Sweden was not authorised to maintain such an exemption under Annex XV, IX (Taxation), point 2 (aa) of the Treaty of Accession in conjunction with Article 28(3)(b) of the Sixth Directive and point 2 of Annex F thereto.

7 Skatterättsnämnden can, upon application by a taxable person, give a preliminary decision on matters of taxation. Its function and the conditions under which it gives preliminary decisions are governed by Lagen (1951: 442) om Förhandsbesked i Taxeringsfrågor (Law on Preliminary Decisions on Matters of Taxation) and, so far as preliminary decisions on matters of value added tax are concerned, by Title 21 of Mervärdesskattelagen (Law on Value Added Tax).

8 Under those provisions, Skatterättsnämnden sits in two separate divisions, one for direct taxation and the other for indirect taxation. The Government appoints the 18 permanent members and deputy members for a maximum period of four years. The presidents of the two divisions are trained as judges and full-time members. The other members ordinarily work on a full-time basis in courts or tribunals, for public authorities, in private undertakings or for trade associations or organisations.

9 If Skatterättsnämnden finds that, in view of its contents, the application is not to be dismissed immediately, the observations of Riksskatteverket (National Tax Board) in the matter must be obtained. If the application is taken up for examination, Skatterättsnämnden rules, to the extent considered necessary, how the question referred to it is to be determined in relation to the applicant's assessment to tax.

10 A preliminary decision may be appealed against to Regeringsrätten (Supreme Administrative Court) by the applicant or by Riksskatteverket. A preliminary decision which has gained legal force serves as a guide in matters of assessment to tax if and to the extent to which the party seeking the ruling requests. A preliminary

decision is therefore binding on the State if the applicant makes a claim to this effect, subject to subsequent legislative or statutory amendment.

11 It was in those circumstances that Skatterättsnämnden referred the following questions to the Court:

'1. Does Article 28(3)(b) of the Sixth VAT Directive in conjunction with point 2 of Annex F to the Directive, and having regard to the terms of Annex XV, IX Taxation, point 2 aa, of the Treaty of Accession between the Member States of the European Union and Sweden concerning Sweden's accession to the European Union, mean that Sweden may have provisions in its national legislation having the tenor of Article 11(1) of Title 3 of the Value Added Tax Law as worded until 31 December 1996?

If the answer to that question is in the negative, an answer to the following question is sought:

2. Does the fact that Article 28(3)(b) does not allow national legislation to provide for an exemption from tax liability for the transactions referred to in Question 1 mean that this provision, Article 6(1) or any other provision of the Sixth Directive has so-called direct effect in this regard and can therefore be relied upon as against a national authority by the person dealing in such rights as a ground justifying treatment of those transactions as taxable transactions?

If, again, that question is answered in the negative, an answer to the following question is sought:

3. Can the person dealing in those rights still claim a right to deduct on the basis of Article 17(2) or another provision of the Directive, that is to say, does the provision have direct effect even though the transaction does not give rise to any output tax?'

12 The Commission submits that the Court has no jurisdiction to reply to the questions referred by Skatterättsnämnden. In particular, it submits that the latter is not a court or tribunal for the purposes of Article 177 of the Treaty, since its activities seem to be rather administrative in nature. In that context, the Commission points out that, even though it appears that an application for a preliminary decision is often lodged because there is a difference of view between the taxpayer and the tax administration, there does not appear to be any substantive difference between the decision delivered and a decision adopted by the tax administration in matters of taxation.

13 The Swedish Government, on the other hand, submits that Skatterättsnämnden is a court or tribunal within the meaning of Article 177 of the Treaty. It observes that proceedings are brought before Skatterättsnämnden in cases where there is a dispute since the taxpayer would not need a preliminary decision at all if he and the tax administration were in agreement over the tax question at issue.

14 In this connection, it should be observed that it has been consistently held that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4, and Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9).

15 However, although there are, in the present case, factors which might make it possible to consider that Skatterättsnämnden performs a judicial function, in particular the independence which its statutory origin confers on it and the power to deliver binding decisions in application of rules of law, other factors lead to the conclusion that it performs an essentially administrative function.

16 It should be borne in mind, in particular, that at the time when an application for a preliminary decision is lodged with Skatterättsnämnden the taxpayer's situation has not been the subject of any decision by the tax authorities. Skatterättsnämnden does not therefore have as its task to review the legality of the decisions of the tax authorities but rather to adopt a view, for the first time, on how a specific transaction is to be assessed to tax.

17 Where, upon application by a taxable person, Skatterättsnämnden gives a preliminary decision on a matter of assessment or taxation, it performs a non-judicial function which, moreover, in other Member States is expressly entrusted to the tax authorities. In this connection, so far as concerns the nature of the preliminary decisions given by Skatterättsnämnden, a comparison may be made with the situation which arises in matters of customs clearance where it is the national customs authorities which issue preliminary binding tariff information to individuals, on request, under Article 12 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

18 Skatterättsnämnden therefore acts in an administrative capacity when giving a preliminary binding decision, which serves the taxpayer's interest inasmuch as he is better able to plan his activities, but it is not called upon to decide a dispute. It is only where the taxpayer or Riksskatteverket brings an action challenging a

preliminary decision that the court or tribunal, before which the matter is thus brought, could, for the purposes of Article 177 of the Treaty, be regarded as performing a judicial function with the object of reviewing the legality of an act determining a taxpayer's assessment to tax.

19 The Court therefore has no jurisdiction to answer the questions referred by Skatterättsnämnden.

Costs

20 The costs incurred by the Swedish and Finnish Governments and by the Commission, which have 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 Skatterättsnämnden, the decision on costs is a matter for that body.

On those grounds,

THE COURT (Sixth Chamber)

hereby rules:

The Court has no jurisdiction to answer the questions referred by Skatterättsnämnden by its order for reference of 20 February 1997.

Hirsch Mancini Ragnemalm

Schintgen Ioannou

Delivered in open court in Luxembourg on 12 November 1998.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber