JUDGMENT OF THE COURT (First Chamber)
23 January 1986 *

In Case 39/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal d'instance [District Court], Bordeaux, for a preliminary ruling in the proceedings pending before that court between

G. Bergeres-Becque

and

Chef de service interrégional des douanes [Head of the Inter-Regional Customs Service], Bordeaux

on the interpretation of Article 95 of the EEC Treaty,

THE COURT (First Chamber)

composed of: R. Joliet (President of the Chamber), G. Bosco and T. Koopmans, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Mrs Bergeres-Becque, the plaintiff in the main proceedings, by O. de Blay de Gaix, of the Bordeaux Bar,

the Netherlands Government, by E. F. Jacobs, acting as Agent,

the French Government, by R. Abraham, acting as Agent,

the Commission of the European Communities, by its Legal Adviser, J. F. Buhl,

* Language of the Case: French.

after hearing the Opinion of the Advocate General delivered at the sitting on 28 November 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By a judgment of 24 January 1985, which was received at the Court on 11 February 1985, the tribunal d'instance de Bordeaux referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Article 95 of the Treaty and on the provisions of the Sixth Council Directive, No 77/388 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 (Official Journal, L 145, p. 1).

2 The questions were raised in proceedings relating to value-added tax charged by the French customs administration on a second-hand vehicle imported from Belgium by a national of that Member State residing in France. The taxpayer, who had received the vehicle as a gift, challenged the manner in which the VAT levied on importation was calculated, the customs administration having charged the rate applicable in France, namely 33 1/3% on the value of the vehicle determined on the basis of a price quotation for second-hand vehicles habitually applied in France.

3 The tribunal d'instance de Bordeaux, before which an action was brought, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Article 95 of the EEC Treaty prohibits Member States from imposing value-added tax 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, to the extent to which the residual part of the value-added tax paid in the Member State of exportation and still contained in the value of the product on importation is not taken into account. In applying that principle, is it necessary to make a distinction depending on whether the transaction is effected for valuable consideration or for nothing?

(2) If not, must value-added tax be levied on the product's value inclusive of all taxes in the State of exportation, less the residual portion of the value-added tax still contained in the product's value at the time of importation, or is the taxable amount to be the tax-free value of a similar product in the State of importation?

(3) May the portion of value-added tax due to the State of importation be calculated by means of a differential rate (the rate charged in the State of importation less the rate charged in the State of exportation) applied to a tax-free value which will be determined on the basis of the answer to the alternative set out in Question 2? If not, must the residual portion of the value-added tax paid in the Member State of exportation which is still contained in the product's value at the time of importation be set off against the amount of value-added tax charged on importation? Or must that residual portion be reimbursed by the Member State of exportation?'

4 Observations were submitted by the plaintiff in the main proceedings, the Netherlands Government and the Commission. The French Government was represented at the hearing.

5 The first question begins by setting out the Court's decision in its judgment of 5 May 1982 (Case 15/81 *Gaston Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409) to the effect that Article 95 of the Treaty prohibits Member States from imposing value-added tax on the importation of products from other Member States 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, to the extent to which the residual part of the value-added tax paid in the Member State of exportation and still contained in the value of the product when it is imported is not taken into account. The question seeks to ascertain whether, in applying that rule, a distinction must be made according to whether or not the transaction is effected for valuable consideration.

6 The plaintiff in the main proceedings, the Netherlands Government and the Commission consider that such a distinction should not be made. On the other hand, the French Government considers that an importer of goods transferred without consideration is not entitled to deduct the VAT paid in the Member State of exportation and to which the goods are still liable if the importer did not personally pay that tax when he acquired the goods.

7 It must be observed, first, that according to Article 2 (2) of the Sixth Directive 'the importation of goods' is subject to VAT, and that according to Article 7 of the directive 'importation of goods' means the entry of goods into the territory of the country. In the aforementioned judgment of 5 May 1982, the Court concluded from the foregoing that as regards imports, the chargeable event is constituted by the mere entry of the goods into the territory of the Member State concerned 'whether or not there is a transaction and irrespective of whether the transaction is carried out for valuable consideration or free of charge'.

8 It must also be observed that second-hand goods imported by a private person and which that person obtained as a gift are necessarily subject, as are goods imported by a private person in the context of a sale or other transaction for valuable consideration, to payment of the VAT to which they were liable in the Member State of exportation.

9 The reply to the first question must therefore be that for the purposes of applying Article 95 of the Treaty where value-added tax is levied on the importation of goods by a non-taxable person, no distinction should be made according to whether or not the transaction giving rise to the importation was effected for valuable consideration.

10 The second question concerns the way in which the taxable amount is determined. In its judgment of 21 May 1985 (Case 47/84 *Staatssecretaris van Financiën* v *Gaston Schul* [1985] ECR 1491), the Court held that where a Member State charges VAT on the importation, from another Member State, of goods supplied by a private person, the taxable amount does not include the VAT paid in the Member State of exportation that is still contained in the value of the goods at the time of importation. The question seeks to ascertain whether or not that value is to be determined according to the rules for assessment applicable in the Member State of importation.

11 The plaintiff in the main proceedings, the Netherlands Government and the Commission claim that the value at the time of importation should be fixed on the basis of the rules applicable in the country of exportation. According to the French Government, VAT payable on importation should be calculated on the basis of the value before tax of the goods being imported and that value is the same as the customs value determined according to the methods usually employed in the country of importation.

12 The reply to the question is to be found in the provisions of the Sixth Directive. Article 11 (B) (1) of that directive states that the taxable amount for the purposes of levying VAT on the importation of goods where no price is paid or to be paid by the importer is the open market value of the goods, which is defined as 'the amount which an importer at the marketing stage at which the importation takes place would have to pay to a supplier at arms length in the country from which the goods are exported at the time when the tax becomes chargeable under conditions of fair competition to obtain the goods in question'.

13 Article 11 (B) (2) permits the Member States to adopt as the taxable amount the customs value as defined in Regulation No 803/68, which has been replaced in the meantime by Council Regulation No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (Official Journal, L 134, p. 1). Articles 2 to 7 of that regulation lay down the detailed rules for determining that value. According to Articles 4 and 5, the provisions relevant to this case, the customs value where no price is paid or to be paid is to be the transaction value of identical or similar goods sold for export to the Community and exported at or about the same time as the goods being valued.

14 It follows that where a Member State levies value-added tax on the importation from another Member State of goods supplied by a non-taxable person, the taxable amount does not include the amount of value-added tax paid in the exporting Member State which is still contained in the value of the goods when they are imported; that value is to be determined on the basis of the relevant data in the exporting Member State.

15 The third question concerns the calculation of the residual portion of the VAT paid in the Member State of exportation which is still contained in the value of the goods at the time of importation.

16 While the present proceedings were pending, a reply was given to an identical question in the judgment of 21 May 1985 cited above. In those circumstances, and since no new argument was presented to the Court on this point, reference should be made to that reply.

17 The reply to the third question should therefore be that the amount of the value-added tax paid in the exporting Member State which is still contained in the value of the goods when they are imported is equal:

(a) to the amount of value-added tax actually paid in the exporting Member State less a percentage representing the proportion by which the goods have depreciated, if the value of the goods has decreased between the date on which the value-added tax was last charged in the exporting Member State and the date of importation;

(b) to the full amount of value-added tax actually paid in the exporting Member State, if the value of the goods has increased over the same period.

Costs

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

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the tribunal d'instance de Bordeaux by a judgment of 24 January 1985, hereby rules:

(1) For the purposes of applying Article 95 of the EEC Treaty where value-added tax is levied on the importation of goods by a non-taxable person, no distinction should be made according to whether or not the transaction giving rise to the importation was effected for valuable consideration.

(2) Where a Member State levies value-added tax on the importation from another Member State of goods supplied by a non-taxable person, the taxable amount does not include the amount of the value-added tax paid in the exporting Member State which is still contained in the value of the goods when they are imported; that value is to be determined on the basis of the relevant data in the exporting Member State.

(3) The amount of the value-added tax paid in the exporting Member State which is still contained in the value of the goods when they are imported is equal:

(a) to the amount of value-added tax actually paid in the exporting Member State less a percentage representing the proportion by which the goods have depreciated, if the value of the goods has decreased between the date on which value-added tax was last charged in the exporting Member State and the date of importation;

(b) to the full amount of value-added tax actually paid in the exporting Member State, if the value of the goods has increased over the same period.

Joliet Bosco Koopmans

Delivered in open court in Luxembourg on 23 January 1986.

P. Heim
Registrar

R. Joliet
President of the First Chamber