JUDGMENT OF THE COURT
1 APRIL 1982 [1]

Staatssecretaris van Financiën v Hong Kong Trade Development Council (reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Refund of value added tax)

Case 89/81

Tax provisions — Harmonization of legislation — Turnover taxes — Common system of value added tax — Taxable person — Concept — Person providing services free of charge — Excluded

(Council Directive 67/228, Art. 4)

A person who habitually provides services for traders, free of charge in all cases, cannot be regarded as a taxable person within the meaning of Article 4 of the Second Directive on the harmonization of legislation of Member States concerning turnover taxes.

In Case 89/81

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 proceedings pending before that court between

STAATSSECRETARIES VAN FINANCIËN [Secretary of State for Finance] of the Netherlands

and

HONG KONG TRADE DEVELOPMENT COUNCIL, Amsterdam,

1 — Language of the Case: Dutch.

on the interpretation of Article 4 and the first sub-paragraph of Article 11 (2) of the Second Council Directive, 67/228/EEC, 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

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

The Hong Kong Trade Development Council is an organization founded in 1966 under Hong Kong law with the object of promoting trade between Hong Kong and other countries. Its legal form appears to be — according to the Hoge Raad — that of "bedrijfschap" [trade organization] or "produktschap" [production board] as provided for by Netherlands law, that is to say an organization or body governed by public law. It has opened offices in various important trade centres, including Amsterdam in 1972.

The activities carried out by the office in Amsterdam consist in providing information and advice about Hong Kong and the possibilities of trade with Hong Kong for traders in the Netherlands and in Europe in general who request it and also providing similar information concerning the Netherlands and Europe for undertakings in Hong Kong. All such information is provided free of charge.

The Director of the Amsterdam office, although appointed by the Governor of Hong Kong by agreement with the Trade Council, is not in the service of the Hong Kong authorities.

The Amsterdam office has its expenses paid by the Hong Kong organization, whose income is provided partly in the form of a grant from the Hong Kong Government and partly from a charge of 0.5% of the value of products imported into and exported from Hong Kong.

Having applied in 1973 for approval as an undertaking within the meaning of the second directive on value added tax, the respondent in the main proceedings received, until 1978 and in respect of each application submitted by it, a refund from the Inspector of Taxes of the input taxes paid in respect of its activities in Amsterdam, but in all cases "subject to amendment upon subsequent investigation".

After carrying out a check at the beginning of 1978, the Inspector took the view that the respondent in the main proceedings was not an undertaking and made an adjusted assessment requiring repayment of the amounts which the Netherlands Government had paid between 1973 and 1978. In response to an objection, the Inspector reduced the assessment "to the amount in respect of the year 1978", namely HFL 9 987.06.

That decision was the subject of an appeal to the Gerechtshof, [Regional Court of Appeal], Amsterdam which by judgment of 6 May 1980 held that since the respondent was regularly and independently engaged in "business in society by satisfying the needs of the community for such guidance and assistance", it constituted an undertaking and might consequently "deduct the turnover tax charged to it by other undertakings".

That decision was contested by the Staatssecretaris van Financiën who, in his submissions before the Hoge Raad, stated that the Gerechtshof "was not entitled to decide that the Trade Council must be treated as an undertaking within the meaning of the Wet op de Omzetbelasting [Law on turnover tax]" in the first place on the ground that since its activities are carried on free of charge it cannot be regarded under Netherlands law as being an undertaking and, in the second place, that Article 11 of the Second Directive prevents it from obtaining any refund of input tax.

Having regard to the concurring opinion of Mr Advocate General van Soest, the Hoge Raad decided to stay the proceedings and referred two questions to the Court:

"1. Can a person who habitually provides services for traders be regarded as a taxable person within the meaning of Article 4 of the Second Directive [of the Council of the European Economic Community of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes] in the event of those services being provided free of charge?

2. If Question 1 is answered in the affirmative:

Does the first sentence of Article 11 (2) of the Second Directive prevent the deduction of turnover tax on goods and services used for the purpose of providing services as aforesaid?"

The order making the reference was received at the Court Registry on 14 April 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Netherlands Government, represented by Mr Plug, the Secretary General and acting Minister for Foreign Affairs, acting as Agent, by the respondent in the main proceedings, represented by G. H. Warning, and by the Commission of the European Communities, represented by D. Gilmour, assisted by Th. Van Rijn, members of its Legal Department, acting as Agents.

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.

II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice

A — First question

The *Netherlands Government* is of the opinion that to answer the questions raised it is appropriate also to have regard to the aim and scope of the system of value added tax. Accordingly, it considers the wording of Article 2 of the First Directive and that of Article 2 of the Second Directive to be relevant. It follows from those provisions that "in the case of operations carried out free of charge, which are therefore not taxable, the Community system of value added tax no longer operates and the stage of consumption has in fact been reached".

As regards the first question, the Netherlands Government maintains that the respondent in the main proceedings cannot be regarded as a taxable person on the ground that, in its view, there can be no economic activity within the meaning of Annex A, paragraph 2, regarding Article 4 of the Second Directive, where services are provided free of charge in all cases. On the other hand, if a supplier of goods or services occasionally provided services for no consideration, that would not mean that there was no activity involving the provision of services within the meaning of the Second Directive, which was also true in Case 154/80 *Coöperatieve Aardappelenbewaarplaats*, judgment of 5 February 1981 ([1981] ECR 445).

The Netherlands Government considers that its opinion is confirmed by the provisions of Article 12 (2) of the Second Directive and by Annex A, paragraph 25, regarding Article 12 (2), which impose on the taxable person the obligation to issue an invoice which must show separately the price exclusive of tax and the corresponding tax. According to the Netherlands Government "it would be somewhat absurd to impose those conditions if a supplier or provider of services who delivers goods or provides services free of charge must also be regarded as a taxable person within the meaning of Article 4 of the Second Directive".

In consequence, "the Netherlands Government is of the opinion that a person who habitually provides services on behalf of undertakings cannot be regarded as a taxable person within the meaning of Article 4 of the Second Directive if such provision of services is carried out free of charge. In that connection, it is of the opinion that the answer to the first question must be negative."

The *respondent in the main proceedings*, after pointing out that the principle of neutrality must be observed with regard to value added tax, states the view that, as far as that tax is concerned, "maximum neutrality is achieved where the group of those who are defined as taxable persons is as wide as possible". For that reason, Article 4 of the Second Directive makes it clear that "the pursuit of profit is not a precondition for the status of taxable person".

In Annex A, paragraph 2, regarding Article 4, it is stated in the first place in the first subparagraph that the expression "activities of producers, traders or persons providing services" is to be understood in a wide sense, then, in the second subparagraph, that if a Member State intends not to tax certain activities it is to achieve that purpose by means of exemptions rather than by restricting the concept of taxable person, and finally in the third subparagraph, that Member States are entitled to regard as a taxable person anyone who engages, albeit occasionally, in transactions pertaining to

economic activities, which — according to the respondent in the main proceedings — was taken up in Article 4 of the Sixth Directive.

Therefore only a wide interpretation of the concept of taxable person is appropriate "within the framework of the European turnover tax".

Moreover that interpretation is confirmed by the provisions of Articles 2 and 6 of the Second Directive.

In fact, according to Article 2, the provision of services within national territory by a taxable person, against payment, is subject to value added tax. If any of these three conditions is not fulfilled, the provision of services is not taxable, but still constitutes a provision of services — thus, the provision of services effected outside national territory by a taxable person constitutes a provision of services (see the second subparagraph of Article 11 (2) of the Second Directive).

Therefore, the provision of services free of charge may in principle also be regarded as a provision of services within the meaning of the Second Directive.

According to the respondent in the main proceedings, the question whether the provision of services free of charge may be considered as a provision of services within the meaning of the Second Directive must be examined in the light of Article 6 thereof which regards as the "provision of services" "any transaction which does not constitute a supply of goods within the meaning of Article 5". That definition is so wide that it includes the provision of services free of charge.

Nevertheless, to reach the conclusion on that basis that a supplier of goods or services providing services in that way is a taxable person, a further requirement is, according to Article 4 of the Second Directive, that the transaction in question should pertain to an "economic activity". The latter expression, used in Annex A, paragraph 2, regarding Article 4, must be understood in a wide sense.

In conclusion, the respondent in the main proceedings is of the opinion that in consequence of the nature of value added tax, on the one hand, and of the combined effect of Articles 2, 4 and 6 of the Second Directive on the other hand, "anyone who habitually provides free of charge services representing an economic activity must be regarded as a taxable person within the meaning of Article 4 of the Second Directive".

The *Commission* emphasizes in the first place that the Hong Kong legislation setting up the Trade Development Council seems to indicate that "that organization may, with regard both to its structure and to its activities, be considered as falling more within the public sector than within the private sector", a question which the Netherlands courts should examine on the basis both of Netherlands law and of Hong Kong law.

It then puts Article 4 of the Second Directive back into its immediate context, before raising the question whether the Hong Kong Trade Development Council is a taxable person within the meaning of that article. It takes the view that to interpret that provision regard should be had to Article 4 of the Sixth Directive, one of the aims of which was to define the concept of taxable person.

According to the Commission, "at first sight", the respondent in the main proceedings is a taxable person, being a person who provides services, even though not for gain, thus unequivocally falling within the terms of the provision in question.

Moreover, neither Annex A nor Article 4 of the Sixth Directive contradicts the "clear meaning of Article 4" of the Second Directive and the Commission takes the view in particular that "there is

hardly any doubt that promotional activities" of the type of those carried on by the respondent in the main proceedings "are of an economic nature" and that it is of little importance that those activities are not paid for by the direct beneficiaries of them.

The only reason for contesting those conclusions is found in the provisions of Annex A, paragraph 2, of the Second Directive which exclude from the concept of taxable person corporate bodies governed by public law in respect of activities which they pursue as public authorities. But it is for the Netherlands courts to decide whether the respondent in the main proceedings falls within that category which is excluded from the concept of taxable person.

In consequence, the Commission proposes that the first question should be answered as follows:

"Any person who habitually renders services to undertakings without charge to the beneficiary may be regarded as a taxable person within the meaning of Article 4 of the Second Directive".

B — Second question

Having replied to the first question in the negative, the Netherlands Government considers "that there is no reason to answer the second question".

The *respondent in the main proceedings* is of the opinion in the first place that this question should be examined not only in relation to the wording of Article 11 of the Second Directive — in which case the answer "is so simple that it must be admitted that it is not the one which the Hoge Raad seeks" — but also "in conjunction" with the Netherlands Law on turnover tax.

In fact, the question for which an answer is actually sought is "whether the Netherlands tax administration may rely upon the Second Directive where the latter provides, as in the case in point, for a right to deduct which is more restrictive than that provided for by the Netherlands Law of 1968 on turnover tax".

It is a question of determining whether — in the same way as private individuals may in certain cases avail themselves in legal proceedings of the provisions of directives — national authorities also have "that right where a directive confers upon them a right which is more extensive than that provided under their own legislation".

In this case, the relevant provision of the Netherlands Law, Article 15, did not exclude "deduction of the input tax paid in respect of services provided for the carrying out of non-taxable transactions". Thus, it appears from that provision that the Netherlands legislature has not complied with the obligation laid down in the first sentence of Article 11 (2) of the Second Directive.

For this type of dispute, a specific procedure is laid down in Articles 169 and 170 of the Treaty Rome; it would therefore "not be correct" to seek to achieve the same object by the indirect means of Article 177.

Moreover, the interests of the Netherlands Government are not harmed since the government itself is the author of its own law. And if it did regard its interests as being harmed, all it would need to do would be to change the law.

Finally, the case-law of the Court shows that it has relied on equitable grounds to support the direct effect of directives. In particular it is clear from the judgment of 6 October 1970 (Case 9/70 *Franz Grad* [1970] ECR 825), in particular paragraph 5 of the decision, that the Court has expressed "the idea of protection of the individual". It is

recognized, as a matter of legal theory, that directives may not impose obligations on individuals but may only confer rights on them".

In consequence, the respondent in the main proceedings takes the view that "the Netherlands authorities are not entitled to limit the right to deduct the input tax paid in respect of non-taxable transactions in reliance on the Second Directive".

The *Commission* considers that, in so far as it may be necessary to reply to the second question, the appropriate view is that "Article 11 (2), first sentence, manifestly prevents deduction of the turnover tax on goods and services used for the provision of services by the Hong Kong Trade Development Council", since by virtue of Article 2 only services provided against payment are subject to value added tax (see paragraph 12 of the decision of 5 February 1981, judgment cited above) and that there may therefore be no deduction of value added tax levied on the value of goods and services used for the provision of goods and services free of charge, on the ground that the transaction is not taxable.

The Commission further adds that, as far as the respondent in the main proceedings is concerned, whether or not it is regarded as a taxable person, the result is the same with regard to the deduction of value added tax paid in respect of inputs — no such deduction is possible.

In consequence, the Commission proposes that the following answer should be given to the second question:

"The first paragraph of Article 11 (2) of the Second Directive prevents the deduction of turnover tax levied on goods and services used for the provision of services free of charge".

III — Oral procedure

At the sitting on 12 January 1982 oral argument was presented and replies to questions put by the Court were given by the following. Mr Bijl, acting as expert, for the Netherlands Government; and Thomas Van Rijn, acting as Agent, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 2 March 1982.

Decision

1 By a judgment of 8 April 1981, which was received at the Court on 14 April 1981, the Hoge Raad [Supreme Court] of the Netherlands submitted to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 4 and 11 of the Second Council Directive, 67/228/EEC, 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 The questions were raised in proceedings between the Staatssecretaris van Financiën [Secretary of State for Finance] of the Netherlands and the Hong Kong Trade Developement Council [hereinafter referred to as the "Trade Council"], an organization founded in Hong Kong in 1966 with the object of promoting trade between Hong Kong and other countries, which opened an office in Amsterdam in 1972. Its activities in the Netherlands consist in providing free of charge for traders information and advice about Hong Kong and the opportunities for trade with Hong Kong and also in providing similar information concerning the European market for Hong Kong traders. The income of the Amsterdam office is provided in the form of a fixed annual grant from the Hong Kong Government and from the proceeds of a charge amounting to 0.5% of the value of products imported into and exported from Hong Kong.

3 The dispute between the Netherlands tax authorities and the Trade Council arose from the fact that the Netherlands authorities, having until 1978, "subject to amendment upon subsequent investigation", refunded to the Trade Council the amount of value added tax invoiced by undertakings which had provided it with services or supplied it with goods, ceased to regard it as a taxable person and accordingly reclaimed the above-mentioned amount which, according to the tax authorities, had been improperly refunded. The matter was brought before the Hoge Raad, which referred the following two questions to the Court:

"1. Can a person who habitually provides services for traders be regarded as a taxable person within the meaning of Article 4 of the Second Directive [of the Council of the European Economic Community of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes] in the event of those services being provided free of charge?

2. If question 1 is answered in the affirmative: Does the first sentence of Article 11 (2) of the Second Directive prevent the deduction of turnover tax on goods and services used for the purpose of providing services as aforesaid?"

4 Article 4, which is referred to in the first question, provides:

"'Taxable person' means any person who independently and habitually engages in transactions pertaining to the activities of producers, traders or persons providing services, whether or not for gain."

5 The national court places emphasis on the fact that, in the case before it, the Trade Council's services are in all cases provided free of charge, because in Article 4, which defines a taxable person, the "transactions" pertaining to the activities of producers, traders or persons providing services are not described, whereas Article 2 of the same directive states that only services provided by a taxable person against payment are to be subject to value added tax. Consideration of those two articles, a literal analysis of which is not *prima facie* an appropriate way to resolve the issue as to whether or not an organization which habitually provides services free of charge may be regarded as a taxable person, indicates that it would be advisable to identify the relevant features of the common system of value added tax in the light of its purpose.

6 That purpose, which the Second Directive mentions in its preamble whilst at the same time referring to the First Directive, 67/227, of the same date (Official Journal, English Special Edition 1967, p. 14), is evident from the preamble to the latter directive, which refers to the need to achieve such harmonization of legislation concerning turnover taxes as will eliminate factors which may distort conditions of competition and therefore to secure neutrality in competition, in the sense that within each country similar goods should bear the same tax burden, whatever the length of the production and distribution chain.

7 In order to attain that objective, the First Directive provides in the first paragraph of Article 2 that the principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

8 The way in which that principle, which is based on the price of the goods and services, is to be applied is indicated in the second paragraph of the same article, as follows:

"On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components."

In addition, the third paragraph provides that the common system of value added tax is to be applied up to and including the retail trade stage.

9 Under that system it is clear that tax is no longer deductible when the chain of transactions has come to an end. It is then charged to the final consumer who cannot pass on the amount of the tax unless there is a further transaction in which a price is paid.

10 Where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the free services in question are therefore not subject to value added tax. In such circumstances the person providing services must be assimilated to a final consumer because he is at the final stage of the production and distribution chain. In fact, the link between him and the recipient of the goods or service does not fall within any category of contract likely to be the subject of tax harmonization giving rise to neutrality in competition; in those circumstances, services provided free of charge are different in character from taxable transactions which, within the framework of the value added tax system, presuppose the stipulation of a price or consideration.

11 That difference is apparent from the context of the provision of which an interpretation is requested. The requirement that taxable transactions must be effected against payment is confirmed by the fact that the economic activities of taxable persons, within the meaning of Annex A, paragraph 2, first

subparagraph, are necessarily activities which are carried on with the object of obtaining payment of consideration or which are likely to be rewarded by the payment of consideration, because if they are free of charge in all cases they do not fall within the system of value added tax, since they cannot, according to Article 8, constitute a basis of assessment. The need for payment is also clear from Article 12 of the same directive which imposes on every taxable person the obligation to issue an invoice in respect of goods supplied and services provided by him to another taxable person, to keep accounts to make possible inspection by the tax authorities and to lodge a declaration each month containing all the information required for calculation of the tax.

12 The context of Article 4 of the Second Directive, the interpretation of which is involved in this case, and the cohesion of the system clearly prove therefore that a person providing services free of charge in all cases cannot be regarded as a taxable person within the meaning of that article.

13 Consequently, the reply which should be given to the first question is that a person who habitually provides services for traders, in all cases free of charge, cannot be regarded as a taxable person within the meaning of Article 4 of the Second Directive.

14 Since the first question submitted by the Hoge Raad has been answered in the negative, there is no need to consider the second question.

Costs

15 The costs incurred by the Netherlands 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, in the nature of 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,

in reply to the questions submitted to it by the Hoge Raad by order of 8 April 1981, hereby rules:

A person who habitually provides services for traders, in all cases free of charge, cannot be regarded as a taxable person within the meaning of Article 4 of the Second Directive.

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 1 April 1982.

J. A. Pompe
Deputy Registrar

G. Bosco
President of the First Chamber,
acting as President