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Judgment of the Court (Sixth Chamber) of 9 July 1992. - "K" Line Air Service Europe BV v Eulaerts NV and Belgian State. - Reference for a preliminary ruling: Rechtbank van eerste aanleg Brussel - Belgium. - VAT - Minimum base of assessment for second-hand cars. - Case C-131/91.

European Court reports 1992 Page I-04513

Keywords

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Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Basis of assessment ° Sale of second-hand cars between taxable persons ° National system setting aside the basis of assessment under the Sixth Directive in favour of a minimum basis ° Not permissible

(Council Directive 77/388, Arts 11, 27 and 32)

Summary

The Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes is to be interpreted as precluding national legislation laying down, in respect of the sale of second-hand cars between taxable persons, a minimum basis of assessment for VAT which is different from that provided for by Article 11 of the directive, according to which the taxable amount is, in respect of supplies of goods, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser.

Such legislation cannot be justified either by Article 32 of the directive, which does not cover sales of second-hand goods where, because such sales are between taxable persons who have been able to exercise the right to a deduction on capital goods, there is no risk of double taxation, or by Article 27 which, whilst authorizing special derogations in order to prevent certain types of tax evasion or avoidance, does not permit a general derogation from the rules of Article 11 such as the substitution of a minimum basis of assessment for the price agreed between the parties.

Parties

In Case C-131/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by Rechtbank van Eerste Aanleg te Brussel (Court of First Instance, Brussels), for a preliminary ruling in the proceedings pending before that court between

"K" Line Air Service Europe BV

and

Eulaerts NV,

Belgian State,

on the interpretation of Articles 11 and 27 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 (OJ 1977 L 145, p. 1) and of Articles 9 to 11 of the EEC Treaty,

THE COURT (Sixth Chamber),

composed of: F.A. Schockweiler, President of the Chamber, G.F. Mancini, C.N. Kakouris, M. Diez de Velasco and J.L. Murray, Judges,

Advocate General: M. Darmon,

Registrar: D. Triantafyllou, Administrator,

after considering the written observations submitted on behalf of:

° Eulaerts NV by H. van den Keybus, of the Brussels Bar;

° the Belgian State, by I. Maselis, of the Brussels Bar;

° the Commission of the European Communities, by J. Foens Buhl, Legal Adviser and Pieter van Nuffel, of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of Eulaerts NV, represented by H. van den Keybus and M. Eulaerts, of the Brussels Bar, the Belgian State and the Commission at the hearing on 7 May 1992,

after hearing the Opinion of the Advocate General at the sitting on 24 June 1992,

gives the following

Judgment

Grounds

1 By judgment of 2 May 1991, received at the Court on 16 May 1991, the Rechtbank van Eerste Aanleg, Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 11 and 27 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 (OJ 1977 L 145, p. 1, "the Sixth Directive"), and of Articles 9 to 11 of the EEC Treaty.

2 That question was raised in proceedings between "K" Line Air Service Europe BV ("' K' Line"), on the one hand, and Eulaerts NV and the Belgian State, on the other, relating to the determination of the basis for charging VAT on second-hand cars in Belgium.

3 Article 35(1) of the Belgian VAT Code of 3 July 1969 lays down the option of fixing a minimum basis of assessment for the taxation of motor vehicles. That article was implemented by Royal Decree No 17 of 20 July 1970, which had fixed the minimum basis for charging VAT on both new and second-hand cars. The decree was repealed by Royal Decree No 17 of 20 December 1984, and the minimum basis of assessment was retained only for second-hand cars.

4 Article 1 of Royal Decree No 17 of 20 December 1984 lays down a minimum basis for charging VAT on second-hand cars supplied to, or imported by, users. Under Article 2(1) of the decree, the basis of assessment may not be lower than a specified percentage of the list price. The percentages are fixed according to the period of time which has elapsed between the date on which the vehicle was first used and the date on which it was supplied or imported.

5 The case-file shows that in 1987 "K" Line, the plaintiff in the main proceedings, sold a used car to Eulaerts, the first defendant in the main proceedings. Both companies are taxable persons for VAT purposes.

6 "K" Line sent an invoice for the price of the car, namely the price agreed between seller and purchaser, and the VAT calculated on the basis of that price. The invoice was settled. In the course of an inspection, the tax authorities noted that under the relevant Belgian legislation VAT should have been calculated by reference to the minimum basis of assessment for second-hand cars (namely 55% of the list price), and claimed from "K" Line in addition the VAT payable on the difference between the price and the minimum basis of assessment. That amount was paid by "K" Line.

7 "K" Line thereupon claimed the amount of the additional VAT from Eulaerts who refused to pay it, however, on the ground that the introduction of a minimum basis of assessment was contrary to the provisions of the Sixth Directive. "K" Line therefore instituted proceedings against Eulaerts before the Rechtbank van Eerste Aanleg for reimbursement of the additional amount of VAT. Subsequently, the Belgian State was also joined to the proceedings with a view to securing reimbursement of that sum should the relevant legislation be found to be contrary to the Sixth Directive.

8 Taking the view that the solution of the dispute depended on the interpretation of certain provisions of Community law, the Rechtbank van Eerste Aanleg decided to stay the proceedings

pending a preliminary ruling by the Court on the following question:

"Are the provisions of Royal Decree No 17 of 20 July 1970, as amended by Royal Decree No 17 of 20 December 1984, enacted in implementation of Articles 35 and 52 of the VAT Code, contrary to Articles 11 and 27 of the Sixth VAT Directive and to the principle of the free movement of goods, as provided for in Articles 9, 10 and 11 of the EEC Treaty?"

9 Reference is made to the report for the hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 It should be noted, as a preliminary matter, that in proceedings under Article 177 of the EEC Treaty the Court is not competent to make a ruling on the compatibility of national law with the Treaty. However, it is competent to provide the national court with all material relating to the interpretation of Community law which may enable it to determine the issue of compatibility for the decision in the case before it.

11 The national court' s question should therefore be viewed as being in two separate parts, one pertaining to whether the provisions of the Sixth Directive are to be interpreted as precluding national legislation laying down, in respect of the sale of second-hand cars between taxable persons, a minimum basis of assessment for VAT which is different from that provided for by Article 11 of the directive, and the other pertaining to whether Articles 9 to 11 of the EEC Treaty prohibit national legislation of that kind.

12 With regard to the second part of the question, that is to say the interpretation of provisions of the EEC Treaty relating to customs duties and to charges having equivalent effect, it suffices to note that the main proceedings only concern the determination of the basis of assessment for VAT payable on the sale in Belgium of a second-hand car, which has already been used in that country, by one taxable person to another, both of whom are established there. The present case, therefore, has no external aspect making it necessary to interpret Articles 9 to 11 of the EEC Treaty in order to resolve the dispute.

13 The question which then remains to be considered is whether the provisions of the Sixth Directive are to be interpreted as precluding national legislation laying down a minimum basis of assessment which differs from that provided for by Article 11 of the directive, in respect of the sale of second-hand cars between taxable persons.

14 In order to reply to that question, the first point to note is that, under Article 11A(1)(a) of the Sixth Directive, the taxable amount within the country is, in respect of supplies of goods, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser.

15 However, Article 32 of the Sixth Directive makes specific provision for second-hand goods in the following terms:

"The Council, acting unanimously on a proposal from the Commission, shall adopt before 31 December 1977 a Community taxation system to be applied to used goods, works of art, antiques and collectors' items.

Until this Community system becomes applicable, Member States applying a special system to these items at the time this directive comes into force may retain that system."

16 According to the proposals for a directive presented by the Commission to the Council on 11 January 1978 (OJ 1978 C 26, p. 2) and on 11 January 1989 (OJ 1989 C 76, p. 10), the aim of the special system of taxing used goods, whose adoption is provided for by the first paragraph of

Article 32, is to ensure that goods on which VAT has been definitively charged are not taxed a second time upon their reintroduction into commercial channels, without the tax still included in their price being taken into consideration.

17 In interpreting Article 32 of the directive, the Court held, in its judgment in Case C-165/88 ORO Amsterdam Beheer BV and Concerto BV v Inspecteur der Omzetbelasting [1989] ECR 4081, that until the Community legislature has taken action, it is necessary to continue to apply Article 32 of the Sixth Directive, which merely authorizes Member States that apply a special system of VAT to second-hand goods to retain that system.

18 It is therefore necessary to consider whether Article 32 of the Sixth Directive may be relied upon in order to apply a basis of assessment different from that provided for by Article 11 of the directive, in respect of the sale of used cars between taxable persons.

19 In examining that point, it should first be noted that the purpose of Article 32 of the Sixth Directive, in the context of the common system of VAT, is to provide for the adoption of a special system for the taxation of goods on which VAT has definitively been charged and which may, therefore, on their reintroduction into commercial channels, be taxed a second time without the tax still included in their price being taken into account. It follows that capital goods, even if used, on which a taxable person has been able to exercise his right to a deduction do not come within the scope of Article 32.

20 Furthermore, where, as in the present case, a new car has not been supplied to a final consumer but to a taxable person who has used it as capital goods, that person has been able to deduct the VAT paid on the purchase of the car from the VAT payable in respect of his activity. When the taxable person resells the car, after using it, he does so after deducting the VAT paid at the previous stage. Accordingly, there can be no double taxation and the transaction cannot therefore be considered to come within the ambit of Article 32.

21 It follows from all the foregoing considerations that Article 32 of the Sixth Directive is to be interpreted as not covering national legislation which, like that at issue in the main proceedings, provides, by way of derogation from Article 11 of the Sixth Directive, for a minimum basis of assessment applicable to supplies of used goods on which the right to a deduction had been exercised by taxable persons. Accordingly, such supplies must be taxed by reference to the basis of assessment laid down in Article 11 of the Sixth Directive.

22 It remains to be ascertained, however, whether the minimum basis for charging VAT so established may be regarded as a derogation authorized under Article 27 of the Sixth Directive.

23 In that connection, Article 27(1) of the Sixth Directive provides as follows:

"The Council, acting unanimously on a proposal from the Commission, may authorize any Member State to introduce special measures for derogation from the provisions of this directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage."

24 Furthermore, as the Court pointed out in its judgment in Case 324/82 Commission v Belgium [1984] ECR 1861, national measures designed to prevent tax evasion or avoidance may not in principle derogate from the basis for charging VAT laid down in Article 11, except within the limits strictly necessary for achieving that aim. In the same judgment, the Court considered that the contested Belgian derogation, which set the minimum basis for charging VAT on the supply or import of new cars as the catalogue price of the car in question, did not fulfil the requirements laid down in Article 27 of the Sixth Directive. It took the view that the Belgian legislation at issue entailed such a complete and general amendment of the basis of assessment that it was

impossible to accept that it contained only the derogations needed to avoid the risk of tax evasion or avoidance. Moreover, the measures at issue were disproportionate to the aim in view in so far as they departed in a general and systematic way from the rules laid down in Article 11 of the Sixth Directive.

25 Measures of the kind at issue in the present case derogate from the general rules laid down in Article 11 of the Sixth Directive even more completely and generally than those on which the Court had occasion to adjudicate in its judgment in Commission v Belgium. In that case, the Belgian State was criticized for not taking into account, in determining the basis of assessment, the discounts or rebates allowed on prices. In the present case, it is the price itself as agreed between the parties which was not taken into account and was replaced by the minimum basis of assessment.

26 It must therefore be concluded that a measure such as the minimum basis of assessment imposed by the Belgian legislature on the sale of second-hand cars between taxable persons does not constitute a derogation authorized under Article 27 of the Sixth Directive.

27 In the light of the foregoing considerations, the answer to the question referred by the Rechtbank van Eerste Aanleg, Brussels, must be that the Sixth Directive is to be interpreted as precluding national legislation laying down, in respect of the sale of second-hand cars between taxable persons, a minimum basis of assessment for VAT which is different from that provided for by Article 11 of the directive.

Decision on costs

Costs

28 The costs incurred by the Commission of the European Communities, 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.

Operative part

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Rechtbank van Eerste Aanleg, Brussels, by order of 2 May 1991, hereby rules:

The Sixth Council Directive 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 ° is to be interpreted as precluding national legislation laying down, in respect of the sale of second-hand cars between taxable persons, a minimum basis of assessment for VAT which is different from that provided for by Article 11 of the directive.