Case C-271/06

Netto Supermarkt GmbH & Co. OHG

v

Finanzamt Malchin

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Sixth VAT Directive – Article 15(2) – Exemption for supplies of goods for export to a destination outside the Community – Conditions for exemption not fulfilled – Proof of export falsified by the purchaser – Supplier acting with due commercial care)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive

(Council Directive 77/388, Art. 15(2))

Article 15(2) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, must be interpreted as not precluding a Member State from granting an exemption from value added tax on the supply of goods for export to a destination outside the European Community, where the conditions for such an exemption are not met, but the taxable person was not able to recognise – even by exercising due commercial care – that they were not met, because the export proofs provided by the purchaser had been forged.

The objective of preventing tax evasion referred to in Article 15 of the Sixth Directive sometimes justifies stringent requirements as regards the obligations of suppliers as persons liable to payment of value added tax. However, any sharing of the risk between the supplier and the tax authorities, following fraud committed by a third party, must be compatible with the principle of proportionality. That will not be the case if a tax regime imposes the entire responsibility for the payment of value added tax on suppliers, regardless of whether or not they were involved in the fraud committed by the purchaser. It would clearly be disproportionate to hold a taxable person liable for the shortfall in tax caused by fraudulent acts of third parties over which he has no influence whatsoever.

On the other hand, it is not contrary to Community law to require the supplier to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion. Accordingly, the fact that the supplier acted in good faith, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that supplier can be obliged to account for the value added tax after the event.

Likewise, it would be contrary to the principle of legal certainty if a Member State which has laid down the conditions for the application of the exemption of supplies of goods for export to a destination outside the Community by prescribing, among other things, a list of the documents to be presented to the competent authorities, and which has accepted, initially, the documents

presented by the supplier as evidence establishing entitlement to the exemption, could subsequently require that supplier to account for the value added tax on that supply, where it transpires that, because of the purchaser's fraud, of which the supplier had and could have had no knowledge, the conditions for the exemption were in fact not met.

(see paras 21-26, 29, operative part)

JUDGMENT OF THE COURT (Fourth Chamber)

21 February 2008 (*)

(Sixth VAT Directive – Article 15(2) – Exemption for supplies of goods for export to a destination outside the Community – Conditions for exemption not fulfilled – Proof of export falsified by the purchaser – Supplier acting with due commercial care)

In Case C?271/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 2 March 2006, received at the Federal Finance Court on 22 June 2006, in the proceedings

Netto Supermarkt GmbH & Co. OHG

v

Finanzamt Malchin,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, (Rapporteur), E. Juhász, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Netto Supermarkt GmbH & Co. OHG, by V. Booten and J. Sprado, Rechtsanwälte,

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Polish Government, by E. O?niecka-Tamecka, acting as Agent,

– the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 15(2) 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 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18, 'the Sixth Directive').

2 The reference was made in the course of proceedings between Netto Supermarkt GmbH & Co. OHG ('Netto Supermarkt') and Finanzamt Malchin (Tax Office, Malchin, 'the Finanzamt') regarding the refusal of the latter to grant Netto Supermarkt exemption from value added tax ('VAT') for the years 1995 to 1998.

Legal context

Community legislation

3 Article 15 of the Sixth Directive, headed 'Exemption of exports from the Community and like transactions and international transport', provides:

'Without prejudice to other Community provisions Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

…

2. the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a purchaser not established within the territory of the country, with the exception of goods transported by the purchaser himself for the equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use;

In the case of the supply of goods to be carried in the personal luggage of travellers, this exemption shall apply on condition that:

– the traveller is not established within the Community,

– the goods are transported to a destination outside the Community before the end of the third month following that in which the supply is effected,

– the total value of the supply, including value added tax, is more than the equivalent in national currency of [EUR] 175, fixed in accordance with Article 7(2) of Directive 69/169/EEC …; however, Member States may exempt a supply with a total value of less than that amount.

For the purposes of applying the second subparagraph:

– a traveller not established within the Community shall be taken to mean a traveller whose domicile or habitual residence is not situated within the Community. For the purposes of this provision, “domicile or habitual residence” shall mean the place entered as such in a passport, identity card or other identity documents which the Member State within whose territory the supply takes place recognises as valid,

– proof of exportation shall be furnished by means of the invoice or other document in lieu thereof, endorsed by the customs office where the goods left the Community.

Each Member State shall transmit to the Commission specimens of the stamps it uses for the endorsement referred to in the second indent of the third subparagraph. The Commission shall transmit this information to the tax authorities in the other Member States.

…’

National legislation

4 As regards supplies within the Community, Paragraph 6a(4) of the 1993 Law on Turnover Tax (Umsatzsteuergesetz 1993, BGBl. 1993 I, p. 565, ‘the UStG’) contains a provision on the protection of legitimate expectations, which is worded as follows:

‘If the operator treats a supply as exempt from tax even though the conditions under paragraph 1 are not met, the supply is nevertheless to be regarded as tax-exempt if the claiming of the tax exemption is based on incorrect statements by the purchaser and the operator was not able to recognise the incorrectness of those statements, even by exercising due commercial care. In that case the purchaser owes the unpaid tax.’

5 As regards export supplies from the Community, German tax law contains no such provision on the protection of legitimate expectations.

6 In addition, Paragraph 227 of the 1977 Tax Code (Abgabenordnung 1977) provides:

‘The tax authorities may waive, in whole or in part, claims arising from a liability to tax where it would be unfair to pursue them in the circumstances of the particular case; on the same conditions, amounts which have already been paid may be reimbursed or set off.’

The main proceedings and the question referred for a preliminary ruling

7 From 1992 to 1998 Netto Supermarkt, which operates several discount supermarkets in the German Land of Mecklenburg-Western Pomerania, refunded to its customers several thousand German marks which they had paid in the form of VAT. It had decided to make those reimbursements to nationals of non-member countries if they were able to show proof of export outside the Community of goods bought on the occasion of non-commercial trips, with such proof consisting, first, of the impression of the customs stamp half on the voucher and half on the customs form and, second, of the foreign national presenting his passport.

8 In 1998 Netto Supermarkt asked the Hauptzollamt Neubrandenburg (Principal Customs Office, Neubrandenburg) to check whether the customs stamp No 73 and the customs forms on which it appeared were counterfeit. The Principal Customs Office initially gave a negative answer, but later informed Netto Supermarkt that the documents submitted to it by Netto Supermarkt had been examined again and been found to be falsified. Subsequently, the tax investigation office found that, between 1993 and 1998, a substantial proportion of the proofs of export of goods had been counterfeited by Polish nationals with the help of forged customs forms or that the alleged

proofs of export had been marked with a forged customs stamp. By this means, Polish nationals claimed reimbursement of VAT from Netto Supermarkt, which the latter refunded to them.

9 In 1999 the Finanzamt assessed Netto Supermarkt to payment of the additional VAT due for the years 1993 to 1998, corresponding to the turnover actually generated during those years.

10 By decision of 14 February 2000, the Finanzamt refused Netto Supermarkt's request for exemption from the VAT retrospectively demanded for those years. Netto Supermarkt objected to that refusal decision.

11 By decision of 3 May 2000, the Finanzamt upheld only part of the objection. It granted an exemption from VAT for the years 1993 and 1994, on the basis that the tax assessments for those years could no longer be amended, and remitted the interest for the years 1993 to 1997. The Finanzamt rejected the remainder of Netto Supermarkt's objection by holding that the latter owed the tax because it had not been able to produce proper proof of the export which gave rise to the VAT exemption. According to the Finanzamt, Netto Supermarkt should have examined the genuineness of the proofs of export earlier and, by showing proper care, could have prevented a fraud lasting for years. In addition, the Finanzamt considered that the fact that Netto Supermarkt had contributed to elucidating the facts did not affect the amount of VAT payable by that company.

12 Netto Supermarkt subsequently challenged that decision to refuse in part of 3 May 2000 by application to the Finanzgericht (Finance Court), seeking an exemption from the VAT retrospectively demanded for the years 1995 to 1998. The Finanzgericht rejected the application.

13 Netto Supermarkt brought an appeal before the Bundesfinanzhof (Federal Finance Court), in which it submitted that the Finanzgericht should have considered the supplies of goods to Polish purchasers to be exempt, by applying – by analogy – the national rule on the protection of legitimate expectations referred to in Paragraph 6a(4) of the UStG, which is a rule that applies to intra-Community supplies. In its appeal, Netto Supermarkt also relies on the principle of fairness laid down in Paragraph 227 of the 1977 Tax Code.

14 Having regard to the principle of the protection of legitimate expectations, the Bundesfinanzhof considers that, in any event, it is in doubt whether – under Community law – export supplies from the Community can be exempt if the operator making the supply was unable – even by exercising due commercial care – to recognise that the export proofs provided by the purchaser had been falsified, even where the conditions of exemption of an export supply are objectively absent because, as in this case, the documents submitted as bearing proof of export had been forged.

15 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to request a preliminary ruling from the Court of Justice on the following question:

'Do the provisions of Community law on exemption from tax for exports to a third country preclude the granting of exemption from tax by the Member State on the grounds of fairness where the conditions for exemption are not satisfied but the taxable person was unable, even by exercising due commercial care, to recognise that they were not met?'

The question referred for a preliminary ruling

16 By its question the Bundesfinanzhof asks, essentially, whether Article 15(2) of the Sixth Directive must be interpreted as precluding a Member State from granting an exemption from VAT on the supply of goods for export to a destination outside the Community, where the conditions for such an exemption are not met, but the taxable person was not able to recognise – even by

exercising due commercial care – that they were not met, because the export proofs provided by the purchaser had been forged.

17 As is clear from the first part of the first sentence of Article 15 of the Sixth Directive, it is for the Member States to lay down the conditions for the application of the exemption for the supply of goods for export to a destination outside the Community. That provision also provides that Member States must lay down those conditions in particular for the purpose 'of preventing any evasion, avoidance or abuse'.

18 However, it must be noted that, in the exercise of the powers conferred on them by Community directives, Member States must respect the general principles of law that form part of the Community legal order, which include, in particular, the principles of legal certainty and proportionality and the principle of protection of legitimate expectations (see, to that effect, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheideand Others* [1997] ECR I-7281, paragraphs 45 to 48; Case C-384/04 *Federation of Technological Industriesand Others* [2006] ECR I-4191, paragraph 29; and Joined Cases C-181/04 to C?183/04 *Elmeka* [2006] ECR I-8167, paragraph 31).

19 In particular, as regards the principle of proportionality, the Court has already held that, in accordance with that principle, the Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant Community legislation (see *Molenheide and Others*, paragraph 46, and Case C?409/04 *Teleos and Others* [2007] ECR I-0000, paragraph 52).

20 Therefore, whilst it is legitimate for the measures adopted by the Member State to seek to preserve the rights of the public exchequer as effectively as possible, such measures must not go further than is necessary for that purpose (see, in particular, *Molenheide and Others*, paragraph 47, and *Federation of Technological Industriesand Others*, paragraph 30).

21 In this respect, it must be noted that, in the field of VAT, suppliers act as tax collectors for the State and in the interest of the public exchequer (see Case C-10/92 *Balocchi* [1993] ECR I-5105, paragraph 25). Those suppliers are liable to payment of VAT even though VAT, as a tax on consumption, is ultimately borne by the final consumer (see Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, paragraphs 22 and 28).

22 This is why the objective of preventing tax evasion referred to in Article 15 of the Sixth Directive sometimes justifies stringent requirements as regards suppliers' obligations. However, any sharing of the risk between the supplier and the tax authorities, following fraud committed by a third party, must be compatible with the principle of proportionality (*Teleos and Others*, paragraph 58).

23 That will not be the case if a tax regime imposes the entire responsibility for the payment of VAT on suppliers, regardless of whether or not they were involved in the fraud committed by the purchaser (see, to that effect, *Teleos and Others*, paragraph 58). As the Advocate General has pointed out in point 45 of his Opinion, it would clearly be disproportionate to hold a taxable person liable for the shortfall in tax caused by fraudulent acts of third parties over which he has no influence whatsoever.

24 On the other hand, as the Court has already held, it is not contrary to Community law to require the supplier to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (see *Teleos and Others*, paragraph 65, and the case-law cited there).

25 Accordingly, the fact that the supplier acted in good faith, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that supplier can be obliged to account for the VAT after the event (see *Teleos and Others*, paragraph 66).

26 Likewise, it would be contrary to the principle of legal certainty if a Member State which has laid down the conditions for the application of the exemption of supplies of goods for export to a destination outside the Community by prescribing, among other things, a list of the documents to be presented to the competent authorities, and which has accepted, initially, the documents presented by the supplier as evidence establishing entitlement to the exemption, could subsequently require that supplier to account for the VAT on that supply, where it transpires that, because of the purchaser's fraud, of which the supplier had and could have had no knowledge, the conditions for the exemption were in fact not met (see, to that effect, *Teleos and Others*, paragraph 50).

27 It follows that a supplier must be able to rely on the lawfulness of the transaction that he carries out without risking the loss of his right to exemption from VAT, if, as in the case in the main proceedings, he is in no position to recognise – even by exercising due commercial care – that the conditions for the exemption were in fact not met, because the export proofs provided by the purchaser had been forged.

28 Moreover, it must be added that, contrary to what has been submitted by the German Government, the case-law of the Court in the field of customs law – according to which an operator who cannot provide evidence that the conditions necessary for the grant of remission from export or import duties are satisfied must bear the consequences arising from that inability, despite having acted in good faith – cannot be relied on in a situation such as that in the case in the main proceedings, in order to call in question the foregoing considerations. As the Advocate General has noted in point 53 of his Opinion, that case-law cannot be transposed to the specific situation of a taxable person under the common system of VAT put in place by the Sixth Directive, because of the differences in structure, object and purpose between such a system and the Community regime on the levying of customs duties.

29 Having regard to all of the foregoing considerations, the answer to the question referred must be that Article 15(2) of the Sixth Directive must be interpreted as not precluding a Member State from granting an exemption from VAT on the supply of goods for export to a destination outside the Community where the conditions for such an exemption are not met, but the taxable person was not able to recognise – even by exercising due commercial care – that they were not met, because the export proofs provided by the purchaser had been forged.

Costs

30 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 15(2) 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, as amended by Council Directive 95/7/EC of 10 April 1995, must be interpreted as not precluding a Member State from granting an exemption from value added tax on the supply of goods for export to a destination outside the European Community, where the conditions for such an exemption are not met, but the taxable person was not able to recognise – even by exercising due commercial care – that they were not met, because the export proofs provided by the purchaser had been forged.

[Signatures]

* Language of the case: German.