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JUDGMENT OF THE COURT (Fifth Chamber)

19 December 2013 (\*)

(VAT – Directive 2006/112/EC – Article 146 – Exemptions on exportation – Article 131– Conditions laid down by Member States – National legislation requiring that property intended to be exported leave the customs territory of the European Union within a fixed period of 90 days after supply)

In Case C-563/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Hungary), made by decision of 18 October 2012, received at the Court on 5 December 2012, in the proceedings

**BDV Hungary Trading Kft, in liquidation,**

v

**Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó Főigazgatósága,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 24 October 2013,

after considering the observations submitted on behalf of:

- BDV Hungary Trading Kft, in liquidation, by Á. Gerey and D. Sobor, ügyvédek,
- the Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó Főigazgatósága, by Zs. Szilveszter and Zs. Tamásné Kajati, jogtanácsos,
- the Hungarian Government, by K. Szíjjártó, M.Z Fehér and G. Koós, acting as Agents,
- the Greek Government, by I. Pouli and M. Tassopoulou, acting as Agents,
- the European Commission, by L. Lozano Palacios, V. Bottka and A. Sipos, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 15 of 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), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1) ('the Sixth Directive'), and Articles 131, 146 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between BDV Hungary Trading Kft ('BDV'), in voluntary liquidation, and the Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó F?igazgatósága (Regional Tax Directorate General for Central Hungary of the National Tax and Customs Office), concerning exemption from value added tax ('VAT') of supplies of goods dispatched or transported outside the European Union.

## **Legal context**

### *European Union law*

3 Article 15(1) and (2) of the Sixth Directive states:

'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 possible evasion, avoidance or abuse:

(1) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;

(2) the supply of goods dispatched or transported to a destination outside the territory of the country as defined in Article 3 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;

...'

4 Pursuant to Articles 411 and 413 thereof, Directive 2006/112 repealed and replaced, as from 1 January 2007, the European Union legislation on VAT, including the Sixth Directive. According to the first and third recitals in the preamble to Directive 2006/112, the recasting of the Sixth Directive was necessary in order to present all the applicable provisions in a clear and rational manner and in an improved structure and drafting which would not, in principle, bring about material change. The provisions of Directive 2006/112 are therefore identical, essentially, to the corresponding provisions of the Sixth Directive.

5 According to Article 14(1) of Directive 2006/112:

"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

6 According to Article 131 of that directive:

'The exemptions provided for in Chapters 2 to 9 [of Title IX of Directive 2006/112] shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

7 Article 146(1), in Chapter 6 of Title IX of that directive, entitled 'Exemptions on exportation', provides:

'Member States shall exempt the following transactions:

- (a) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;
- (b) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a customer not established within their respective territory, with the exception of goods transported by the customer himself for the equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use;

...'

8 Article 273 of Directive 2006/112 provides:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.'

#### *Hungarian law*

9 Paragraph 11(1) of Law No LXXIV of 1992 on value added tax (*Magyar Közlöny* 1992/128) ('the old VAT law') defines the concept of 'exportation of goods' as follows:

'Exportation of goods: any supply of goods as a direct result of which the customs authorities, at the latest on the last day of the third month after that supply, release the goods for export to a third country, as final destination. The goods may not have been used or processed between the time of supply and when they leave the territory, without prejudice to their testing or trial production.'

10 Under Paragraph 29 of that law:

'The following shall be exempt from tax:

- (a) the exportation of goods,

...'

11 Law No CXXVII of 2007 on value added tax (*Magyar Közlöny* 2007/155) ('the new VAT law') entered into force on 1 January 2008. Paragraph 98 of that law provides:

'(1) Supplies of goods by post or transported from a country to a country outside the European Community shall be exempt from tax provided that the posting or transport:

- (a) is carried out by the supplier himself or by a third party acting on his behalf;
- (b) is carried out by the buyer himself or by a third party acting on his behalf where the additional conditions provided for in Paragraph 98(3) and (4) and in Paragraphs 99 and 100 of the present law are satisfied.

(2) subparagraph 1 is applicable where the following conditions are satisfied:

(a) the authority dispatching the goods from the territory of the European Community must have certified that they have left that territory at the time of supply or, at the latest, within 90 days after that supply, and

(b) the goods supplied may not, within the period provided for in point (a), have been used in accordance with their intended use or otherwise processed, without prejudice to their testing or trial production.'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

12 In 2007 and 2008, BDV was engaged in wholesale trade in tinned food. In the course of its business, that undertaking sold the goods it manufactured in Hungary in third countries. The contracts concluded with purchasers established outside the customs area of the European Union contained one of the international commercial terms drawn up by the International Chamber of Commerce (so-called 'Incoterms 2000'), namely the 'ex-works' or EXW clause, meaning that the purchaser collects the goods at the gates of the vendor's premises.

13 During a tax inspection of BDV, relating to the period from 1 January 2007 until 31 December 2009, excluding the period from 1 July 2007 until 31 March 2008, the tax authorities found that, in its VAT accounts and in its VAT returns relating to the inspection period, that undertaking had classified certain of its transactions as export sales, although the goods to be exported had left the customs territory of the European Union after expiry of the time-limit laid down, in that regard, in Article 11(1) of the old VAT law and, since 1 January 2008, in Article 98(1) of the new VAT law.

14 By decision of 22 October 2010, the Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó F?igazgatósága ordered BDV to pay additional tax by way of a tax adjustment and a fine and late payment penalty, on the ground that the goods were dispatched to the third countries after expiry of the time-limit laid down in the national legislation.

15 BDV brought an action against that decision, claiming that those provisions of the old and new VAT laws were contrary to both the Sixth Directive and Directive 2006/112. In its action, it maintained that all the supplies covered by that decision were in fact dispatched outside of the European Union. Moreover, under the 'ex-works' contract term, the purchasers are responsible for the transport of the goods. Therefore, by regularly reminding the purchasers of the need to transport the goods outside of the European Union within the requisite periods, it demonstrated the required diligence.

16 The Budapest Környéki Törvényszék (Regional Court, Budapest) upheld BDV's action. That court held that the time-limit for the goods to leave the European Union provided for by the Hungarian legislation cannot be applied where it has been established that the goods have in fact been exported. The conditions that the Member States may set for the application of the exemption on exportation, according to the Court's case-law, should neither exceed what is necessary to attain the objectives defined by the Sixth Directive and Directive 2006/112 nor undermine VAT neutrality.

17 The defendant at first instance brought an appeal against that judgment before the Kúria (Supreme Court). It claimed that, in accordance with national legislation, a sale may be classified as an exempt supply of goods for export only where the goods leave the territory of the European Union within the time-limit defined by that legislation.

18 The Kúria held, in that regard, that that time-limit for export is not a procedural time-limit, a so-called 'technical time-limit', which may be subject to correction, but a 'substantive limitation period'. Accordingly, if the tax authorities find that that time-limit has been exceeded, the financial transactions concerned cannot be classified as 'exempt supplies of goods for export' and are, therefore, taxable.

19 In those circumstances, the Kúria decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. May Article 15 of the [Sixth Directive] and Article 146 of [Directive 2006/112] be interpreted as meaning that the transport outside Community territory of goods intended for export must take place within a defined period in order to qualify as an exempt supply of goods for export?

2. Do the conditions of supply: whether the vendor, the purchaser or the supplier acted in good or bad faith, with due care or negligently; the period for declaration; or the fact that the goods are actually exported after the time-limit but within the limitation period for charging the tax have any effect on the answer to question 1?

3. Is it compatible with the principles of tax neutrality, legal certainty and proportionality for the rules of a Member State to provide for additional conditions to the provisions of the [above] Directives, and to make qualification as an exempt supply for export subject to a combination of several objective conditions that do not appear in [those] Directives?

4. May Article 15 of the [Sixth Directive] and Articles 131 and 273 of [Directive 2006/112] be interpreted as meaning that, in the interests of preventing tax evasion, abuse and avoidance and of the correct charging and collection of tax, the Member State may also attach the conditions that are contained in Paragraph 11(1) of [the old law on VAT] or in Paragraph 98(1) of [the new VAT law] to exempt exports?

5. Is it consistent with the fundamental principles of Union law and the provisions of the [Sixth Directive and Directive 2006/112] for the tax authority, in cases where such conditions, which do not appear in [Article 15 of the Sixth Directive and Article 146 of Directive 2006/112], are not met, to alter the classification of an exempt export and order the taxpayer to pay tax? If so, in what circumstances is this possible?'

### **The questions referred for a preliminary ruling**

20 First of all, it should be noted that the questions referred concern both the Sixth Directive and Directive 2006/112, whereas the dispute in the main proceedings concerns sales which were carried out after 1 January 2007. As has been stated in paragraph 4 of the present judgment, Directive 2006/112 repealed and replaced, from that date, the Sixth Directive. In those circumstances, the questions referred must be examined solely in relation to the provisions of Directive 2006/112.

21 By its questions, which should be examined together, the referring court asks, in essence, whether Articles 146(1) and 131 of Directive 2006/112 must be interpreted as precluding national legislation according to which, in the context of export supplies, goods intended to be exported

from the European Union must have left the territory of the European Union within a fixed period of three months or 90 days following the date of supply, where merely exceeding that time-limit results in the definitive loss for the taxable person of the right to exemption in relation to that supply.

22 As is apparent from the order for reference, those questions relate, in particular, to whether national legislation may require, in the case of a supply of goods intended for export, that the export take place within such a period in order for that supply to be regarded as an exempt supply of goods for export.

23 In that regard, it should be noted that, under Article 146(1)(b) of Directive 2006/112, the Member States are to exempt supplies of goods dispatched or transported to a destination outside the European Union by or on behalf of a customer not established within that territory. That provision must be read in conjunction with Article 14(1) of that directive, according to which 'supply of goods' means the transfer of the right to dispose of tangible property as owner.

24 It is apparent from those provisions and, in particular, having regard to the term 'dispatched' in Article 146(1)(b) that the export of goods is effected and the exemption of the supply of goods for export becomes applicable when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported outside the European Union and that, as a result of that dispatch or that transport, they have physically left the territory of the European Union (see, with regard to intra-Community supplies, Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraph 42; Case C-285/09 *R* [2010] ECR I-12605, paragraph 41; and Case C-273/11 *Mecsek-Gabona* [2012] ECR, paragraphs 31 and 32 and the case-law cited).

25 In the main proceedings, it is not disputed that supplies of goods within the meaning of Article 14 of Directive 2006/112 have taken place and that the goods concerned by the transactions at issue in the main proceedings have physically left the territory of the European Union.

26 In contrast with the provisions of Directive 2006/112 relating to the right to deduct relied on by the Hungarian Government, under which that right is generally exercised during the same period as that during which it has arisen, Article 146(1)(b) of that directive does not lay down a condition that the goods intended for export must have left the territory of the European Union within a specified period in order for the export exemption provided for in that article to be applicable. Such a period is provided for only as an exception in Article 147(1)(b) of that directive with respect to goods to be carried in the personal luggage of travellers.

27 It follows that the classification of a transaction as a supply for export under Article 146(1)(b) of Directive 2006/112 cannot depend on compliance with a specific time-limit within which the goods concerned must have left the customs territory of the European Union, non-compliance with which would result in the definitive loss of the export exemption for the taxable person.

28 However, as is apparent from Article 131 of Directive 2006/112, the exemptions provided for in Chapters 2 to 9 of Title IX of that directive, which includes Article 146, apply in accordance with conditions which the Member States are to lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

29 In the exercise of the powers conferred on them by Article 131, the Member States must respect the general principles of law that form part of the legal order of the European Union, including, in particular, the principles of legal certainty and proportionality and the principle of

protection of legitimate expectations (see, to that effect, Case C-271/06 *Netto Supermarkt* [2008] ECR I-7771, paragraph 18; *R*, paragraph 45 and the case-law cited).

30 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 European Union legislation (see, in particular, Case C-84/09 *X* [2010] ECR I-11645, paragraph 36 and the case-law cited).

31 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 (*Netto Supermarkt*, paragraph 20).

32 Concerning the objective pursued by the time-limit provided for by the old and new VAT laws for the dispatch of goods intended for export from the customs territory of the European Union, the Hungarian Government stated that that time-limit is necessary in order to ensure that the condition of dispatch which the export exemption entails is satisfied and that the tax authorities are able to prevent tax evasion, avoidance and abuse.

33 In that regard, it must be borne in mind that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (Case C-285/11 *Bonik* [2012] ECR, paragraph 35 and the case-law cited). Therefore, the Court has held that the objective of preventing tax evasion sometimes justifies stringent requirements as regards suppliers' obligations (see, to that effect, *Teleos and Others*, paragraph 58; and *Netto Supermarkt*, paragraph 22).

34 Therefore, in principle, Member States are entitled to fix a reasonable time-limit for export, taking account of the commercial practices of third States in the field of export in order to check whether goods supplied for export have in fact left the European Union.

35 As the Commission stated in its observations, imposing a specific time-limit on the vendor of goods intended for export, after which those goods must have left the customs territory of the European Union, is an appropriate measure for that purpose.

36 However, such a time-limit, the expiry of which allows the supply of goods for export to be taxed, must not go beyond what is necessary for that purpose.

37 In that regard, it should be noted, first of all, that the fact that a supply of goods for export is taxed in accordance with legislation such as that at issue in the main proceedings where the goods concerned have not left the territory of the European Union within the period laid down in that legislation, does not in itself mean that that legislation should be regarded as disproportionate. In accordance with the fundamental principle of the common system of VAT, that tax applies to each transaction by way of production or distribution (see, inter alia, Case C-146/05 *Collée* [2007] ECR I-7861, paragraph 22; and *Bonik*, paragraph 28). It follows that a supply of goods intended to be exported may, in principle, be taxed where the transaction in question does not satisfy, within a reasonable period laid down by the applicable national legislation, the conditions of Article 146(1)(b) of Directive 2006/112.

38 However, according to the information provided by the referring court, the period for export at issue in the main proceedings is a substantive limitation period, failure to observe which cannot be remedied. Therefore, where goods intended to be exported do not leave the territory of the European Union within the period prescribed by the old and new VAT laws, the supply of those goods is definitively taxed, even if those goods actually left the European Union after expiry of the

time-limit provided for by that legislation.

39 In that regard, it should be noted that national legislation, such as that at issue in the main proceedings, which makes export exemptions subject to a time-limit for dispatch with the aim, in particular, of combatting tax evasion and avoidance, without thereby allowing taxable persons to show, in order to benefit from that exemption, that the dispatch condition has been satisfied after expiry of that time-limit, and without providing a right for the taxable person to have VAT already paid as a result of failing to comply with that time-limit reimbursed once he provided evidence that the goods had left the customs territory of the European Union, goes beyond what is necessary in order to attain that objective.

40 In circumstances where the conditions for export exemption laid down in Article 146(1)(b) of Directive 2006/112, in particular, the requirement that the goods concerned leave the customs territory of the European Union, are satisfied, no liability to pay VAT arises in respect of such a supply (see, by analogy, *Collée*, paragraph 30 and the case-law cited). In those circumstances, there no longer exists, in principle, a risk of tax evasion or loss of tax which could justify the transaction concerned being taxed.

41 Therefore, it must be held that national legislation such as that at issue in the main proceedings goes beyond what is necessary in order to attain the objective of preventing tax evasion and avoidance.

42 In the light of the foregoing considerations, the answer to the questions referred is that Articles 146(1) and 131 of Directive 2006/112 must be interpreted as precluding national legislation under which, in the context of a supply for export, goods intended to be exported from the European Union must have left the territory of the European Union within a fixed period of three months or 90 days following the date of supply, where merely exceeding that time-limit results in the definitive loss for the taxable person of the right to exemption in relation to that supply.

### **Costs**

43 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 (Fifth Chamber) hereby rules:

**Articles 146(1) and 131 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation under which, in the context of a supply for export, goods intended to be exported from the European Union must have left the territory of the European Union within a fixed period of three months or 90 days following the date of supply, where merely exceeding that time-limit results in the definitive loss for the taxable person of the right to exemption in relation to that supply.**

[Signatures]

\* Language of the case: Hungarian.