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Judgment of the Court (Fifth Chamber) of 27 October 1993. - Muys' en De Winter's Bouw- en Aannemingsbedrijf BV v Staatssecretaris van Financiën. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Adjustment of turnover tax - Sixth VAT Directive. - Case C-281/91.

European Court reports 1993 Page I-05405

Summary

Parties

Grounds

Decision on costs

Operative part

Keywords

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Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Exemptions provided for by the Sixth Directive ° Exemptions in respect of transactions relating to the granting of credit ° Grant, by the supplier of goods or services, of deferral of payment of the price in return for the payment of interest ° Exemption ° Grant of deferral until delivery ° Taking account of the interest as part of the consideration ° Taxation

(Council Directive 77/388, Arts 11(A)(1)(a) and 13(B)(d)(1))

Summary

Article 13(B)(d)(1) of the Sixth Directive (77/388) on the harmonization of the laws of the Member States relating to turnover taxes must be interpreted as meaning that a supplier of goods or services who authorizes his customer to defer payment of the price, in return for payment of interest, is in principle making an exempt grant of credit within the meaning of that provision. However, where a supplier of goods or services grants his customer deferral of payment of the price, in return for payment of interest, only until delivery, that interest does not constitute consideration for the grant of credit but part of the consideration obtained for the supply of goods or services within the meaning of Article 11(A)(1)(a) of the Sixth Directive.

Parties

In Case C-281/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden (Third Chamber) for a preliminary ruling in the proceedings pending before that court between

Muys' en De Winter' s Bouw- en Aannemingsbedrijf BV

and

Staatssecretaris van Financiën

on the interpretation of Article 13(B)(d)(1) 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 COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, R. Joliet, G.C. Rodríguez Iglesias, F. Grévisse and M. Zuleeg, Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

° the appellant in the main proceedings, by S.T.M. Beelen and Mariken E. van Hilten, Coopers & Lybrand, Tax Advisers, Rotterdam, the Netherlands,

° the Netherlands Government, by B.R. Bot, Secretary-General of the Ministry of Foreign Affairs, acting as Agent,

° the Government of the Federal Republic of Germany, by E. Roeder and C.-D. Quassowski, acting as Agents,

° the Spanish Government, by A.J. Navarro González, Director-General for Community Legal and Institutional Coordination, and A.H. Hernández-Mora, Abogado del Estado, of the Department for Community Contentious Proceedings, acting as Agents,

° the Greek Government, by N. Mavrikas, Assistant Legal Adviser to the State Legal Counsel, acting as Agent,

° the Commission of the European Communities, by J.F. Buhl, Legal Adviser, and B.J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the appellant in the main proceedings, represented by S.T.M. Beelen and E.J. Janzen, Tax Advisers, Rotterdam, the Government of the Netherlands, represented by J.W. de Zwaan, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, the German Government, the Danish Government, represented by J. Molde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, the Greek Government, and the Commission of the European Communities, at the hearing on 21 January 1993,

after hearing the Opinion of the Advocate General at the sitting on 3 March 1993,

gives the following

Judgment

Grounds

1 By judgment of 30 October 1991, which was received at the Court on 6 November 1991, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 13(B)(d)(1) 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, hereinafter "the Sixth VAT Directive").

2 That question was raised in proceedings between the company Muys' en De Winter' s Bouw- en Aannemingsbedrijf (hereinafter "the appellant in the main proceedings") and the Staatssecretaris van Financiën (State Secretary for Finance) in the matter of an adjustment of value added tax ("VAT") notified by the latter.

3 The appellant in the main proceedings is a building company which concludes "purchasing and works contracts" under which it essentially undertakes either to supply a plot of land and construct a dwelling or, in certain cases, complete the construction of a dwelling, or else to construct a building divided into flats and supply to the customer part of the building and of the land associated therewith together with a right to the exclusive user of that part of the building for the purposes of habitation.

4 Under those contracts, the price of constructing the building is paid by instalments depending on the progress of the work. The price of the land is paid either when the contract is concluded or shortly thereafter or else by instalments concurrently with the price of the construction.

5 However, under those contracts a customer may defer payment of the amount due in respect of the land and/or the construction until the date when property in the land and the completed building is transferred to him. Such deferral of payment is generally made conditional on the customer' s paying a deposit of 10% of the total price of the land and the construction. In such case, the purchaser has to pay interest on the amount of the deferred payment.

6 As far as concerns the interest payable on instalments of the price of the construction which fell due, the Netherlands tax authorities applied Article 11(1)(j)(1) of the Wet op Omzetbelasting 1968 (Law on Turnover Tax 1968), transposing Article 13(B)(d)(1) of the Sixth VAT Directive, which exempts "the granting and the negotiation of credit and the management of credit by the person granting it".

7 However, they refused to apply the exemption to the interest due on the price of the land at the date of delivery where it was stipulated that the price should be paid at that date. Consequently, they notified to the appellant in the main proceedings an adjustment of turnover tax amounting, after an abatement, to HFL 37 269.86 for the period from 1 January 1981 to 31 December 1984.

8 The appellant in the main proceedings brought an action against that decision in the *Gerechtshof* (Regional Court), The Hague. That court confirmed the view taken by the tax authorities on the ground that, in this case, the interest charged between the conclusion of the contract and the transfer of property in the land could not be regarded as consideration for the granting of credit but was part of the actual consideration for the supply of the land.

9 The appellant in the main proceedings thereupon appealed on a point of law to the *Hoge Raad der Nederlanden*, which stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

"Where a purchase and construction agreement between a building contractor and a buyer provides that payment for the supply of the land pursuant to the agreement must be made on or shortly after conclusion of the agreement, but may be deferred to the time of the supply on payment of interest, is that interest to be regarded as being in the nature of consideration for a loan, as provided for in Article 13(B)(d)(1) of the Sixth Directive, or is that interest part of the payment for the supply of the land?"

10 Reference is made to the Report for the Hearing for a fuller account of the facts and legal background of the main proceedings, 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.

11 Article 13(B)(d)(1) of the Sixth VAT Directive provides:

"... Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(d) ...

1. the granting and the negotiation of credit and the management of credit by the person granting it."

12 It should be held in limine that deferred payment of the purchase price of goods, in return for payment of interest, may in principle be regarded as a grant of credit which is exempt within the meaning of that provision.

13 Although the exemptions provided for in Article 13 are to be interpreted strictly (see Case 348/87 *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* [1989] ECR 1737), nevertheless, in the absence of any specification of the identity of the lender or the borrower, the expression "the granting and the negotiation of credit" is in principle sufficiently broad to include credit granted by a supplier of goods in the form of deferral of payment. Contrary to the Commission's view, the wording of that provision in no way suggests that there is any limitation on the scope of Article 13(B)(d)(1) only to loans and credits granted by banking and financial institutions.

14 That interpretation is borne out by the objective of the common system introduced by the Sixth VAT Directive, which aims in particular to secure equal treatment for taxable persons. That principle would be disregarded if a purchaser were to be taxed on credit granted by his supplier, whereas a purchaser seeking credit from a bank or another lender received an exempted credit.

15 The national court's question refers to the specific situation in which a supplier of goods, in this case land, grants his customer the possibility, in return for payment of interest, of deferring

payment of the price until delivery only. The Court must therefore assess whether that situation is also a grant of credit.

16 The first subparagraph of Article 10(2) of the Sixth VAT Directive provides:

"The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed ...".

Consequently, the taxable amount has to be determined only at the time of delivery.

17 Under Article 11(A)(1)(a) of the Sixth VAT Directive, the taxable amount is:

"everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party ...".

18 Under those provisions, where the supplier of goods agrees that the purchaser, in return for payment of interest, should defer payment of the price until delivery, the total value of the goods must be regarded as including that interest, even if the contract treats it as distinct from the price.

19 Accordingly, the reply to be given to the national court's question is that Article 13(B)(d)(1) of the Sixth VAT Directive must be interpreted as meaning that a supplier of goods or services who authorizes his customer to defer payment of the price, in return for payment of interest, is in principle making an exempt grant of credit within the meaning of that provision. However, where a supplier of goods or services grants his customer deferral of payment of the price, in return for payment of interest, only until delivery, that interest does not constitute consideration for the grant of credit but part of the consideration obtained for the supply of goods or services within the meaning of Article 11(A)(1)(a) of the Sixth VAT Directive.

Decision on costs

Costs

20 The costs incurred by the Netherlands, German, Danish, Spanish and Greek Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

Operative part

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Hoge Raad der Nederlanden, by judgment of 30 October 1991, hereby rules:

Article 13(B)(d)(1) 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, must be interpreted as meaning that a supplier of goods or services who authorizes his customer to defer payment of the price, in return for payment of interest, is in principle making an exempt grant of credit within the meaning of that provision. However, where a supplier of goods or services grants his customer deferral of payment of the price, in return for payment of interest, only until delivery, that interest does not constitute

consideration for the grant of credit but part of the consideration obtained for the supply of goods or services within the meaning of Article 11(A)(1)(a) of the Sixth VAT Directive.