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Judgment of the Court of 4 October 1995. - Finanzamt Uelzen v Dieter Armbrecht. - Reference for a preliminary ruling: Bundesfinanzhof - Germany. - VAT - Taxable transactions. - Case C-291/92.

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Keywords

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Tax provisions ° Harmonization of laws ° Turnover tax ° Common system of value added tax ° Sixth Directive ° Scope ° Sale by a taxable person of an item of property partly reserved for his private use ° Reserved part excluded from the VAT system ° Right to deduct limited to the part used for business purposes

(Council Directive 77/388, Arts 2(1), 17(2) and 20(2))

Summary

Where a taxable person within the meaning of Article 2(1) of the Sixth Directive (77/388) on the harmonization of the laws of the Member States relating to turnover taxes sells property part of which he had chosen not to use for business purposes but to reserve for his private use, he does not act with respect to the sale of that part as a taxable person. Such a transaction is not, therefore, liable to VAT.

There is no provision in the Directive which precludes a taxable person who wishes to retain part of an item of property amongst his private assets from excluding it from the VAT system. In such a case, apportionment between the part allocated to the taxable person' s business activities and the part retained for private use must be based on the proportions of private and business use in the year of acquisition and not on a geographical division. The taxable person must, moreover, throughout his period of ownership of the property in question, demonstrate an intention to retain part of it amongst his private assets.

Where the taxable person has made that choice at the time of acquiring the property, only the part of the property assigned to his business is to be taken into account for the application of Article 17(2) of the Directive regarding the right to deduct input tax, and the adjustment of such deductions under Article 20(2) must be limited to that part.

Parties

In Case C-291/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Finanzamt Uelzen

and

Dieter Armbrecht

on the interpretation of Articles 5(1), 17(2) and 20(2) 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,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler, P.J.G. Kapteyn, C. Gulmann and P. Jann (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, J.L. Murray (Rapporteur), D.A.O. Edward, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Mr Armbrecht, by Bernd Kleemann, Steuerberater,

° the German Government, by Ernst Roeder, Ministerialrat in the Federal Ministry of the Economy, and Claus-Dieter Quassowski, Regierungsdirektor in the same ministry, acting as Agents, and

° the Commission of the European Communities, by Henri Étienne, Principal Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Finanzamt Uelzen, represented by Christel Kuwert, Ministerialraetin in the Finance Ministry of Lower Saxony, acting as Agent, of Mr Armbrecht, of the German Government and of the Commission at the hearing on 17 June 1993,

after hearing the Opinion of the Advocate General at the sitting on 15 September 1993,

having regard to the order of 13 December 1994 reopening the oral procedure,

after considering the answers to the written questions put by the Court, submitted on behalf of:

° Mr Armbrecht, by Bernd Kleemann,

° the German Government, by Ernst Roeder,

° the French Government, by Edwige Belliard, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Jean-Louis Falconi, Foreign Affairs Secretary in the same directorate, acting as Agents,

° the Portuguese Government, by Luis Fernandes, Director of the Legal Service in the Directorate-General for European Community Affairs in the Ministry of Foreign Affairs, and Angelo Seiça Neves, Legal Officer in the same directorate, acting as Agents,

° the United Kingdom, by Lindsey Nicoll, of the Treasury Solicitor' s Department, acting as Agent, and

° the Commission of the European Communities, by Juergen Grunwald, of the Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Finanzamt Uelzen, represented by Christel Kuwert, of Mr Armbrecht, of the German Government and of the Commission at the hearing on 14 March 1995,

after hearing the Opinion of Advocate General Jacobs at the sitting on 6 April 1995,

gives the following

Judgment

Grounds

1 By order of 28 April 1992, received at the Court on 1 July 1992, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 5(1), 17(2) and 20(2) 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 Directive").

2 Those questions were raised in proceedings brought by Mr Armbrecht against a decision of the Finanzamt Uelzen (Tax Office, Uelzen) concerning the determination of the turnover tax payable for 1981.

3 Mr Armbrecht, a hotelier, owned a building comprising a guesthouse, a restaurant and premises used as a private dwelling. In 1981, he sold that building for a price of DM 1 150 000 "plus 13% VAT".

4 Under Paragraph 4(9)(a) of the Umsatzsteuergetsetz (Law on Turnover Tax) 1980, transactions governed by the Grunderwerbsteuergesetz (Law on Land Transfer Tax) are exempted from turnover tax. However, Paragraph 9 of the Law on Turnover Tax allows taxable persons to treat such transfers as taxable when they are made "to another trader for the purposes of his business". Under that paragraph, Mr Armbrecht opted for taxation on the sale of his building.

5 In his turnover tax declaration for 1981, Mr Armbrecht regarded only the sale of that part of his building which was used for professional purposes as subject to turnover tax; he treated the DM

157 705 received in respect of the private dwelling as exempt from turnover tax and accordingly invoiced the purchaser for turnover tax only on the former part.

6 Following an inspection, the Tax Office imposed turnover tax on the sale of the private dwelling. Mr Armbrecht challenged that decision in proceedings before the Finanzgericht Niedersachsen (Finance Court, Lower Saxony), which considered that when a building is used partly for business purposes and partly as a private dwelling, it is subdivided into two economically separate items for the purposes of the rules on value added tax ("VAT"). Since Mr Armbrecht had not invoiced the purchaser for VAT on the sale of the private dwelling, the Finanzgericht considered that he was not liable for the tax on that sale.

7 The Tax Office appealed against that ruling. Being in doubt as to the interpretation of the Directive, as regards both its applicability to the property sold by Mr Armbrecht and the extent of the deduction entitlement for which it provides, the Bundesfinanzhof decided to stay the proceedings until the Court had given a preliminary ruling on the following questions:

"(1) Where an immovable property is disposed of, does the portion of the property used for business purposes constitute a separate item of supply for the purposes of Article 5(1) of the Directive?

(2) Is an immovable property of which part of the rooms are used for private purposes and part for business purposes used wholly for the purposes of taxable transactions of the business under Article 17(2) of the Directive, or is it also possible for just the portion used for the purposes of the business to be assigned to the business?

(3) Can the adjustment of the input-tax deduction under Article 20(2) of the Directive be limited to the portion of an immovable property used for business purposes?"

8 Under Article 2(1) of the Directive, supplies of goods or services effected for consideration within the territory by a taxable person acting as such are subject to VAT.

9 Article 5(1) provides: '" Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner".

10 Article 13(B) of the Directive sets up a series of exemptions for transactions in respect of immovable property, including:

"(g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a);

(h) the supply of land which has not been built on other than building land as described in Article 4(3)(b)".

11 Article 13(C) adds the following proviso to those exemptions:

"Member States may allow taxpayers a right of option for taxation in cases of:

(a) ...

(b) the transactions covered in B ... (g) and (h) above.

Member States may restrict the scope of this right of option and shall fix the details of its use."

The first question

12 The German Government stresses that Mr Armbrecht' s property forms a single item in German civil law and is entered as such in the land register. It should therefore be treated as a single item

for the application of the Directive.

13 It is true that Article 5(1) of the Directive does not define the extent of the property rights transferred, which must be determined in accordance with the applicable national law, but the Court has held that the objective of the Directive, which is to base the common system of VAT on a uniform definition of taxable transactions, would be jeopardized if the preconditions for a supply of goods, which is one of the three taxable transactions, varied from one Member State to another (Case C-320/88 Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe [1990] ECR I-285).

14 Consequently, the national law applicable in the main proceedings cannot provide the answer to the question raised, which concerns not the civil law applicable to supply but whether the transaction is subject to the tax.

15 The first question must therefore be understood as seeking to ascertain whether, where a taxable person sells property part of which he had chosen to reserve for his private use, he acts with respect to the sale of that part as a taxable person within the meaning of Article 2(1) of the Directive.

16 It is clear from the wording of Article 2(1) of the Directive that a taxable person must act "as such" for a transaction to be subject to VAT.

17 A taxable person performing a transaction in a private capacity does not act as a taxable person.

18 A transaction performed by a taxable person in a private capacity is not, therefore, subject to VAT.

19 Nor is there any provision in the Directive which precludes a taxable person who wishes to retain part of an item of property amongst his private assets from excluding it from the VAT system.

20 This interpretation makes it possible for a taxable person to choose whether or not to integrate into his business, for the purposes of applying the Directive, part of an asset which is given over to his private use. That approach concurs with one of the basic principles of the Directive, namely that a taxable person must bear the burden of VAT only when it relates to goods or services which he uses for private consumption and not for his taxable business activities. The availability of that option does not impede the application of another rule stated by the Court in Case C-97/90 Lennartz v Finanzamt Muenchen III [1991] ECR I-3795, to the effect that capital goods used both for business and private purposes may none the less be treated as business goods the VAT on which is in principle wholly deductible.

21 As the Advocate General pointed out in point 50 of his Opinion, apportionment between the part allocated to the taxable person' s business activities and the part retained for private use must be based on the proportions of private and business use in the year of acquisition and not on a geographical division. The taxable person must, moreover, throughout his period of ownership of the property in question, demonstrate an intention to retain part of it amongst his private assets.

22 The German Government cannot object to the foregoing on the ground that, by authorizing Member States to restrict the scope of any right of option for taxation which they may allow their taxpayers in respect of transactions exempted under Article 13(B)(g) and (h) of the Directive and to fix the details of its use, Article 13(C) empowers the German legislature to impose on a taxable person the taxation of the property in its entirety in a case such as the present.

23 Such an approach is incompatible with the Directive. The right of option provided for in Article 13(C), whilst making it possible to transform an exempted transaction into a taxable transaction and entitling the taxpayer to deduct input tax, does not enable a supply which does not fall within the scope of the tax as defined in the Directive to be transformed into a taxable supply.

24 The answer to the first question must therefore be that, where a taxable person sells property part of which he had chosen to reserve for his private use, he does not act with respect to the sale of that part as a taxable person within the meaning of Article 2(1) of the Directive.

The second question

25 By its second question, the national court seeks to ascertain whether, where a taxable person sells property part of which he had chosen at the time of acquisition not to assign to his business, he was entitled, while he was operating that business, to deduct from the tax which he was liable to pay the VAT due or paid on the whole of the property in accordance with Article 17(2) of the Directive, or whether only the part of the property assigned to his business was to be taken into account for the application of that provision.

26 Article 17(2)(a) of the Directive provides that, in so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay value added tax due or paid in respect of goods or services supplied or to be supplied to him.

27 It is only to the extent that an item is used for the purposes of his taxable transactions that a taxable person may deduct from the tax which he is liable to pay the VAT due or to be paid in respect of that item.

28 It is established that if the taxable person chooses to exclude part of an item of property from his business assets, that part never forms part of those assets. He cannot, therefore, be regarded as using goods forming part of his business assets for the purposes of Articles 5(6) and 6(2)(a) of the Directive. Consequently, that part, which is not used for providing taxable business services or deliveries, does not fall within the scope of the VAT system and must not be taken into account for the application of Article 17(2)(a) of the Directive.

29 The answer to the second question must therefore be that, where a taxable person sells property part of which he had chosen at the time of acquisition not to assign to his business, only the part of the property assigned to his business is to be taken into account for the application of Article 17(2) of the Directive.

The third question

30 In its third question, the national court asks whether the adjustment of the input-tax deduction under Article 20(2) of the Directive may be limited to the part of the property assigned to the business.

31 Article 20(2) of the Directive provides:

"In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one-fifth of the tax imposed on the goods. The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured."

32 Since, as is clear from the answer given to the second question, the right to deduct input tax under Article 17(2) of the Directive applies only to the part of the relevant asset assigned to the

business, the adjustment of that deduction must also be limited to that part of the asset.

33 The answer to the third question must therefore be that the adjustment of the input-tax deduction under Article 20(2) of the Directive must be limited to the part of the property assigned to the business.

Decision on costs

Costs

34 The costs incurred by the German, French, Portuguese and United Kingdom Governments and 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

in answer to the questions referred to it by the Bundesfinanzhof by order of 28 April 1992, hereby rules:

1. Where a taxable person sells property part of which he had chosen to reserve for his private use, he does not act with respect to the sale of that part as a taxable person within the meaning of Article 2(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.

2. Where a taxable person sells property part of which he had chosen at the time of acquisition not to assign to his business, only the part of the property assigned to his business is to be taken into account for the application of Article 17(2) of the said directive.

3. The adjustment of the input-tax deduction under Article 20(2) of the said directive must be limited to the part of the property assigned to the business.