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Judgment of the Court (Second Chamber) of 15 January 1998. - Belgische Staat v Ghent Coal Terminal NV. - Reference for a preliminary ruling: Hof van Cassatie - Belgium. - Value added tax - Sixth VAT Directive - Article 17 - Right to deduct - Adjustment of deductions. - Case C-37/95.

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Keywords

Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Deduction of input tax - Deduction of tax payable on goods and services supplied for the purpose of investment work intended to be used in connection with taxable transactions - Impossibility for the taxable person to use the goods and services in question for the purposes intended - Irrelevant in regard to the right to deduct - Possibility of adjusting the deduction originally made under the conditions set out in Article 20(3) of the Sixth Directive

(Council Directive 77/388, Arts 17(2) and 20(3))

Summary

Article 17 of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be construed as allowing a taxable person acting as such to deduct the value added tax payable by him on goods or services supplied to him for the purpose of investment work intended to be used in connection with taxable transactions. The right to deduct remains acquired where, by reason of circumstances beyond his control, the taxable person has never made use of those goods or services for the purpose of carrying out taxable transactions. A supply of investment goods during the adjustment period, where such occurs, may give rise to an adjustment of the deduction under the conditions set out in Article 20(3) of the directive.

Parties

In Case C-37/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Belgian Hof van Cassatie for a preliminary ruling in the proceedings pending before that court between

Belgian State

and

Ghent Coal Terminal NV

on the interpretation of Article 17 of the 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),

THE COURT

(Second Chamber),

composed of: H. Ragnemalm, President of the Sixth Chamber, acting as President of the Second Chamber, G.F. Mancini (Rapporteur) and G. Hirsch, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Belgian State, by Jan Devadder, General Adviser in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, assisted by Ignace Claeys Bouùaert, Advocate with right of audience before the Belgian Hof van Cassatie, and Bernard van de Walle de Ghelcke, of the Brussels Bar,

- Ghent Coal Terminal NV, by Pierre Van Ommeslaghe, Advocate with right of audience before the Belgian Hof van Cassatie,

- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Gereon Thiele, Assessor in that Ministry, acting as Agents,

- the Greek Government, by Michail Apessos, Deputy Legal Adviser in the State Legal Council, Maria Basdeki, Agent for Legal Proceedings in the State Legal Council, and Anna Rokofyllou, Special Adviser to the Deputy Minister for Foreign Affairs, acting as Agents, and

- the Commission of the European Communities, by Berend Jan Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Belgian State, represented by Bernard van de Walle de Ghelcke; Ghent Coal Terminal NV, represented by Martin Lebbe, of the Brussels Bar; the Greek Government, represented by Michail Apessos and Anna Rokofyllou; and the Commission, represented by Berend Jan Drijber, at the hearing on 11 July 1996,

after hearing the Opinion of the Advocate General at the sitting on 11 July 1996,

gives the following

Judgment

Grounds

1 By decision of 10 February 1995, received at the Court on 16 February 1995, the Belgian Hof van Cassatie (Court of Cassation) referred for a preliminary ruling under Article 177 of the EC Treaty a question concerning the interpretation of Article 17 of the 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, hereinafter `the Directive').

2 That question arose in a dispute between the Belgian State and Ghent Coal Terminal NV (`Ghent Coal') concerning payment of an amount of value added tax (`VAT') which Ghent Coal deducted in respect of certain investment work which it had carried out.

3 Article 17 of the Directive provides as follows:

`1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. 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:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

(b) value added tax due or paid in respect of imported goods;

...'

4 The adjustment of deductions is governed by Article 20, which provides as follows:

`1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where that deduction was higher or lower than that to which the taxable person was entitled;

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where purchases are cancelled or price reductions are obtained; however, adjustment shall not be made in cases of transactions remaining totally or partially unpaid and of destruction, loss or theft of property duly proved or confirmed ...

2. 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.

...

3. In the case of supply during the period of adjustment capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. Such business activities are presumed to be fully taxed in cases where the delivery of

the said goods is taxed; they are presumed to be fully exempt where the delivery is exempt. The adjustment shall be made only once for the whole period of adjustment still to be covered.

...'

5 In Belgium, the supply of land is exempt from VAT.

6 In 1980, Ghent Coal purchased land in the harbour area of Ghent. It subsequently carried out investment work and immediately deducted the VAT paid on the goods and services relating to that work for the period between 1 January 1981 and 31 December 1983.

7 On 1 March 1983, on the initiative of the city of Ghent, Ghent Coal exchanged the land in question for other land situated elsewhere in the Ghent harbour area. Consequently, it never used the land in respect of which it had carried out the investment work giving rise to the deduction.

8 It is not disputed that the investment was in the normal course of events to have been used in taxable transactions, or that the exchange had been neither foreseen nor planned in advance by Ghent Coal, which was unable to avoid it from an economic point of view and for which it even constituted a case of economic force majeure.

9 Following investigations carried out in 1984, the tax authorities concluded that Ghent Coal had not used the land in question for the purpose of carrying out taxable transactions and accordingly sought repayment of the VAT deducted in connection with the investment work carried out on the land in question, along with payment of a fine and default interest.

10 Ghent Coal initially accepted the view taken by the tax authorities. On 27 March 1986, however, it brought proceedings against the Belgian State before the Rechtbank van eerste Aanleg (Court of First Instance), Ghent, which, by judgment of 4 April 1990, dismissed its application. However, by judgment of 26 October 1992, the Hof van Beroep (Court of Appeal), Ghent, upheld the appeal lodged by Ghent Coal. The Belgian State thereupon sought to have that judgment set aside.

11 The Belgian State takes the view that, when goods or services supplied have given rise to a deduction but have never been used for the purpose of carrying out taxable transactions, the right to deduct must be retroactively withdrawn and the deducted VAT repaid in full.

12 Ghent Coal argues that the right to deduct VAT due or paid in respect of goods or services originally intended to be used for the purpose of carrying out taxable transactions is an absolute right and cannot therefore be called into question even if the person concerned has never actually made use of those goods or services.

13 Since it took the view that an interpretation of Article 17 of the Directive was necessary to resolve the dispute before it, the Belgian Hof van Cassatie decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

`Does Article 17 of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes mean that the right to deduct remains in existence for value added tax on investments which were originally intended for use in the undertaking but which, for reasons beyond its control, were never in fact put into use by the undertaking?'

14 By its question, the national court is essentially asking whether Article 17 of the Directive must be construed as allowing a taxable person acting as such to deduct VAT which he is liable to pay on goods or services supplied to him for the purposes of investment work intended to be used in taxable transactions and, if so, whether the right to deduct remains acquired where, by reason of circumstances beyond his control, the taxable person has never made use of that investment work in order to carry out taxable transactions.

15 With regard to the first part of this question, the Court has stated repeatedly that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of value added tax consequently ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way (see in particular Case 268/83 Rompelman v Minister van Financiën [1985] ECR 655, paragraph 19, and Case 50/87 Commission v France [1988] ECR 4797, paragraph 15).

16 In the absence of any provision empowering the Member States to limit the right of deduction granted to taxable persons, that right must be exercised immediately in respect of all the taxes charged on transactions relating to inputs. Such limitations on the right of deduction must be applied in a similar manner in all the Member States and therefore derogations are permitted only in the cases expressly provided for in the Directive (see, in particular, Commission v France, cited above, paragraphs 16 and 17, Case C-97/90 Lennartz v Finanzamt München III [1991] ECR I-3795, paragraph 27, and Case C-62/93 BP Supergas v Greek State [1995] ECR I-1883, paragraph 18).

17 It follows that a taxable person acting as such is entitled to deduct the VAT payable or paid for goods or services supplied to him for the purpose of investment work intended to be used in connection with taxable transactions.

18 With regard, next, to the second part of the question, it follows from paragraph 15 of the judgment in Lennartz, cited above, that the use to which the goods and services are put merely determines the extent of the initial deduction to which the taxable person is entitled under Article 17 and the extent of any adjustments in the course of the following periods.

19 Furthermore, in its judgment in Case C-110/94 INZO v Belgian State [1996] ECR I-857, concerning the position of an undertaking which had never effected any taxable transaction, the Court ruled, at paragraphs 20 and 21, that the right to deduct, once it has arisen, remains acquired even if the planned economic activity has not given rise to taxable transactions.

20 Likewise, the right to deduct remains acquired where the taxable person has been unable to use the goods or services which gave rise to a deduction in the context of taxable transactions by reason of circumstances beyond his control.

21 It also follows from the judgment in INZO (paragraph 24) that in cases of fraud or abuse, in which the person concerned, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively on the ground that those deductions were made on the basis of false declarations.

22 However, when circumstances beyond the control of the taxable person have prevented him from using the goods or services giving rise to deduction for the needs of his taxable transactions, there is no risk of fraud or abuse capable of justifying subsequent repayment.

23 Finally, it must be pointed out that a supply of investment goods during the adjustment period, such as occurred in the main proceedings in this case, may give rise to an adjustment of the

deduction under the conditions set out in Article 20(3) of the Directive.

24 The answer to the question submitted must therefore be that Article 17 of the Directive must be construed as allowing a taxable person acting as such to deduct the VAT payable by him on goods or services supplied to him for the purpose of investment work intended to be used in connection with taxable transactions. The right to deduct remains acquired where, by reason of circumstances beyond his control, the taxable person has never made use of those goods or services for the purpose of carrying out taxable transactions. A supply of investment goods during the adjustment period, where such occurs, may give rise to an adjustment of the deduction under the conditions set out in Article 20(3) of the Directive.

Decision on costs

Costs

25 The costs incurred by the German 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

(Second Chamber),

in answer to the question referred to it by the Belgian Hof van Cassatie by decision of 10 February 1995, hereby rules:

Article 17 of the 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 must be construed as allowing a taxable person acting as such to deduct the VAT payable by him on goods or services supplied to him for the purpose of investment work intended to be used in connection with taxable transactions. The right to deduct remains acquired where, by reason of circumstances beyond his control, the taxable person has never made use of those goods or services for the purpose of carrying out taxable transactions. A supply of investment goods during the adjustment period, where such occurs, may give rise to an adjustment of the deduction under the conditions set out in Article 20(3) of Directive 77/388.