|

62000J0062

Judgment of the Court (Fifth Chamber) of 11 July 2002. - Marks & Spencer plc v Commissioners of Customs & Excise. - Reference for a preliminary ruling: Court of Appeal (England & Wales) (Civil Division) - United Kingdom. - Sixth VAT directive - National legislation retroactively curtailing a limitation period for repayment of sums unduly paid - Compatibility with the principles of effectiveness and of the protection of legitimate expectations. - Case C-62/00.

European Court reports 2002 Page I-06325

Keywords

1. Acts of the institutions - Directives - Implementation by Member States - Need to ensure the effective application of directives - Obligations of the national courts

(EC Treaty, Art. 5 and Art. 189, third para. (now Art. 10 EC and Art. 249, third para., EC))

2. Acts of the institutions - Directives - Direct effect - Scope - Not limited to cases of failure to transpose correctly or of incorrect transposition - Possibility for individuals to rely on provisions having direct effect where transposition measures have been applied imperfectly

(EC Treaty, Art. 189, third para. (now Art. 249, third para., EC))

Summary

$$1. The Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty (now Article 10 EC) to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts. It follows that in applying domestic law the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive, in order to achieve the purpose of the directive and thereby comply with the third paragraph of Article 189 of the Treaty (now the third paragraph of Article 249 EC).

(see para. 24)

2. Individuals are entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it. In fact, the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive and a Member State remains bound actually to ensure full application of the directive even after the adoption of those measures.

(see para. 27)

3. The principles of effectiveness and of the protection of legitimate expectations preclude national legislation retroactively curtailing the period within which repayment may be sought of sums paid by way of VAT collected in breach of provisions with direct effect of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, such as those in Article 11A(1) of that directive.

In fact, whilst the principle of effectiveness does not preclude national legislation reducing the period within which repayment of sums collected in breach of Community law may be sought it is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the original legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.

Moreover, the principle of the protection of legitimate expectations precludes a national legislative amendment which retroactively deprives a taxable person of the right enjoyed prior to that amendment to obtain repayment of taxes collected in breach of provisions of the Sixth Directive with direct effect.

(see paras 38, 46-47, operative part)

Parties

In Case C-62/00,

REFERENCE to the Court under Article 234 EC for a preliminary ruling by the Court of Appeal (Civil Division) (England and Wales) in the proceedings pending before that court between

Marks & Spencer plc

and

Commissioners of Customs & Excise,

on the interpretation of Community law on the recovery of sums unduly paid,

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward and A. La Pergola (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Marks & Spencer, by D. Waelbroeck, avocat, and D. Milne QC, instructed initially by Walker Martineau and then by Forbes Hall, Solicitors,

- the United Kingdom Government, by J.E. Collins, acting as Agent, K.P.E. Lasok QC and P. Mantle, Barrister,

- the Commission of the European Communities, by P. Oliver, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Marks & Spencer, the United Kingdom Government and the Commission at the hearing on 18 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 24 January 2002,

gives the following

Judgment

Grounds

1 By order of 14 December 1999, received at the Court on 28 February 2000, the Court of Appeal (Civil Division) (England & Wales) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Community law on the recovery of sums unduly paid.

2 The question was raised in proceedings between Marks & Spencer plc (Marks & Spencer) and the Commissioners of Customs & Excise (the Commissioners), who are responsible for the collection of value added tax (VAT) in the United Kingdom, concerning repayment of VAT overcharged to Marks & Spencer.

Legal background

Community legislation

3 Article 11 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, the Sixth Directive) provides as follows:

A. Within the territory of the country

1. The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, 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 for such supplies including subsidies directly linked to the price of such supplies;

....

National legislation

4 Both the parties to the main proceedings and the referring court affirm that Article 11A(1)(a) of the Sixth Directive was not properly implemented in the United Kingdom until 1 August 1992, when the Finance (No 2) Act 1992 amended section 10(3) of the Value Added Tax Act 1983.

5 The latter provision is now worded as follows:

If the supply is for a consideration not consisting or not wholly consisting of money, its value shall be taken to be such amount of money as, with the addition of the tax chargeable, is equivalent to the consideration.

6 As regards the legislation on repayment of amounts of VAT unduly paid, the relevant provisions of section 24 of the Finance Act 1989 provided (with effect from 1 January 1990) as follows:

(1) Where a person has paid an amount to the Commissioners by way of value added tax which was not tax due to them, they shall be liable to repay the amount to him.

(2) The Commissioners shall only be liable to repay an amount under this section on a claim being made for the purpose.

...

(4) No amount may be claimed under this section after the expiry of six years from the date on which it was paid, except where subsection (5) below applies.

(5) Where an amount has been paid to the Commissioners by reason of a mistake, a claim for the repayment of the amount under this section may be made at any time before the expiry of six years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

...

(7) Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of value added tax by virtue of the fact that it was not tax due to them.

....

7 Section 24 of the Finance Act 1989 was repealed and replaced by section 80 of the Value Added Tax Act 1994 with effect from 1 September 1994. The material parts of section 80 follow the wording of section 24 almost exactly.

8 On 18 July 1996, a Government minister, Her Majesty's Paymaster General, announced in Parliament that, in view of the increasing risk for the Treasury posed by claims for the refund of sums wrongly collected by way of tax, it was the Government's intention in the 1997 Finance Bill to alter the limitation period for refund claims concerning VAT and other indirect taxes, reducing it to three years. The new limitation period was intended to apply immediately to claims already made on the date of the announcement so as to prevent the change in the law from being deprived of its effect by the passage of time before the parliamentary process could be concluded.

9 On 4 December 1996, the House of Commons voted in favour of the Government's budget proposals, including the proposal announced on 18 July 1996, which was included in the Finance

Bill as section 47.

10 The Finance Act 1997 was enacted on 19 March 1997. Section 47(1) of the Act amended section 80 of the Value Added Tax Act 1994. Subsection (5) was repealed and subsection (4) was amended so as to provide as follows:

The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim.

11 So far as is here relevant, section 47(2) of the Finance Act 1997 provides:

... subsection (1) above shall be deemed to have come into force on 18 July 1996 as a provision applying, for the purposes of the making of any repayment on or after that date, to all claims under section 80 of the Value Added Tax Act 1994, including claims made before that date and claims relating to payments made before that date.

Facts and main proceedings

12 Marks & Spencer is a retailer established in the United Kingdom specialising in the sale of food and clothing.

13 Marks & Spencer sold gift vouchers to corporate purchasers at a price which was less than their face value. The gift vouchers were then sold or given away to third parties who could redeem them by returning them to Marks & Spencer and receiving, in return, goods equivalent in price to the face value of the vouchers.

14 In December 1990 Marks & Spencer informed the Commissioners that in its view it should account for VAT on the amounts which it received when it sold the vouchers and not on their face value.

15 In January 1991 the Commissioners ruled that Marks & Spencer should account for VAT on the face value of the vouchers. It proceeded to do so until the Court of Justice gave judgment on that question in Case C-288/94 Argos Distributors [1996] ECR I-5311). In that case, the Court held that Article 11A(1)(a) of the Sixth Directive must be interpreted as meaning that, when a supplier has sold a voucher to a buyer at a discount and promised to accept that voucher subsequently at its face value in full or part payment of the price of goods purchased by a customer who was not the buyer of the voucher, and who does not normally know the actual price at which the voucher was sold by the supplier, the consideration represented by the voucher is the sum actually received by the supplier upon the sale of the voucher.

16 As a result of that judgment it became apparent that the VAT regime applied by the Commissioners to the gift vouchers sold by Marks and Spencer was incorrect. Therefore, by a letter dated 31 October 1996, Marks & Spencer submitted a claim to the Commissioners in respect of the period from May 1991 to August 1996 for repayment of VAT in the amount of £2 638 057 which it had overpaid as a result of that error. That claim was further particularised in letters dated 6 and 22 November 1996.

17 By a letter dated 11 December 1996, the Commissioners stated that they were prepared to repay that part of the VAT relating to the sale of gift vouchers during the period not affected by the introduction of the three-year limitation period which came into effect on 18 July 1996. The corresponding repayment of £1 913 462 was made to Marks & Spencer on 15 January 1997.

18 Marks & Spencer requested an internal review of the decision of the Commissioners to apply the three-year limitation period to its claim. The Commissioners maintained their position.

19 On 15 April 1997 Marks & Spencer challenged that decision before the VAT and Duties Tribunal, London, which dismissed Marks & Spencer's application on 22 April 1998. Marks & Spencer appealed to the High Court of Justice of England and Wales, Queen's Bench Division, which dismissed the appeal by decision of 21 December 1998. Marks & Spencer then appealed to the Court of Appeal.

20 By judgment of 14 December 1999, the Court of Appeal dismissed Marks & Spencer's appeal relating to the claim for repayment of VAT wrongly paid in respect of the sale of gift vouchers for the period from August 1992 to August 1996 inclusive.

21 However, the Court of Appeal considered that the outcome of the dispute relating to the repayment of the VAT wrongly paid in respect of the sale of gift vouchers from May 1991 to July 1992 depended on the interpretation of Community law, and decided to stay proceedings on that part of the action and to refer the following question to the Court of Justice for a preliminary ruling:

In the circumstances in which a Member State has failed to implement properly in its domestic legislation Article 11A of Council Directive 77/388, is it compatible with the principle of the effectiveness of the rights that a taxable person derives from Article 11A, or with the principle of the protection of legitimate expectations, to enforce legislation which removes with retrospective effect a right under national law to reclaim sums paid, by way of VAT, more than three years before the claim is made?

The question referred

22 As a preliminary remark, it is important to note that it is clear from the order for reference that the Court of Appeal considers that Article 11A(1) of the Sixth Directive is unconditional and sufficiently precise and that it therefore gives Marks & Spencer rights on which it may rely before a national court, albeit only as regards the period during which that provision had not yet been correctly implemented in the domestic law of the United Kingdom, that is to say, before 1 August 1992. That is why the Court of Appeal limited its question to the case where a Member State has not properly implemented Article 11A of the Sixth Directive.

23 The referring court proceeded on the premiss that if a Member State has correctly implemented the provisions of a directive, such as Article 11A(1) of the Sixth Directive, in domestic law, individuals are thereby deprived of the possibility of relying before the courts of that Member State on the rights which they may derive from those provisions.

24 In that regard, it should be remembered, first, that the Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty (now Article 10 EC) to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, inter alia, Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 41). It follows that in applying domestic law the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive, in order to achieve the purpose of the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) (see, in particular, Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20).

25 Second, as the Court has consistently held, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Case 8/81 Becker [1982] ECR 53, paragraph

25; Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraph 29; and Case C-319/97 Kortas [1999] ECR I-3143, paragraph 21).

26 Third, it has been consistently held that implementation of a directive must be such as to ensure its application in full (see to that effect, in particular, Case C-217/97 Commission v Germany [1999] ECR I-5087, paragraph 31, and Case C-214/98 Commission v Greece [2000] ECR I-9601, paragraph 49).

27 Consequently, the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.

28 As the Advocate General noted in point 40 of his Opinion, it would be inconsistent with the Community legal order for individuals to be able to rely on a directive where it has been implemented incorrectly but not to be able to do so where the national authorities apply the national measures implementing the directive in a manner incompatible with it.

29 As regards the provisions of Article 11A(1) of the Sixth Directive, the Court has held that they confer on individuals rights on which they may rely before the national courts (Case C-62/93 BP Supergas [1995] ECR I-1883, paragraph 35).

30 According to well-established case-law, the right to obtain a refund of charges levied in a Member State in breach of rules of Community law is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the Court (see, inter alia, Case 309/85 Barra [1988] ECR 355, paragraph 17; BP Supergas, paragraph 40; Case C-343/96 Dilexport [1999] ECR I-579, paragraph 23; and Joined Cases C-397/98 and C-410/98 Metallgesellschaft and Others [2001] ECR I-1727, paragraph 84).

31 It follows from all those considerations that the fact that a Member State has correctly implemented the provisions of Article 11A(1) of the Sixth Directive in domestic law does not deprive individuals of the possibility of relying, before the courts of that State, on the rights which they derive from those provisions and, in particular, the right to recover amounts collected by a Member State in breach of them.

32 As the Court has consistently held, in the procedure laid down by Article 234 EC for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it (see, inter alia, Case C-334/95 Krüger [1997] ECR I-4517, paragraph 22, and Case C-88/99 Roquette Frères [2000] ECR I-10465, paragraph 18). To that end, the Court may have to reformulate the question referred to it (Krüger, paragraph 23, and Roquette Frères, paragraph 18).

33 Accordingly, the question must be construed as asking essentially whether national legislation retroactively curtailing the period within which repayment may be sought of sums paid by way of VAT collected in breach of provisions of the Sixth Directive with direct effect, such as those contained in Article 11A(1) of that directive, is compatible with the principles of effectiveness and of the protection of legitimate expectations.

The principle of effectiveness

34 It should be recalled at the outset that in the absence of Community rules on the repayment of national charges wrongly levied it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (see, inter alia, Case C-228/96 Aprile [1998] ECR I-7141, paragraph 18, and the judgments cited above in Dilexport, paragraph 25, and Metallgesellschaft, paragraph 85).

35 As regards the latter principle, the Court has held that in the interests of legal certainty, which protects both the taxpayer and the administration, it is compatible with Community law to lay down reasonable time-limits for bringing proceedings (Aprile, paragraph 19, and the case-law cited therein). Such time-limits are not liable to render virtually impossible or excessively difficult the exercise of the rights conferred by Community law. In that context, a national limitation period of three years which runs from the date of the contested payment appears to be reasonable (see, in particular, Aprile, paragraph 19, and Dilexport, paragraph 26).

36 Moreover, it is clear from the judgments in Aprile (paragraph 28) and Dilexport (paragraphs 41 and 42) that national legislation curtailing the period within which recovery may be sought of sums charged in breach of Community law is, subject to certain conditions, compatible with Community law. First, it must not be intended specifically to limit the consequences of a judgment of the Court to the effect that national legislation concerning a specific tax is incompatible with Community law. Secondly, the time set for its application must be sufficient to ensure that the right to repayment is effective. In that connection, the Court has held that legislation which is not in fact retrospective in scope complies with that condition.

37 It is plain, however, that that condition is not satisfied by national legislation such as that at issue in the main proceedings which reduces from six to three years the period within which repayment may be sought of VAT wrongly paid, by providing that the new time-limit is to apply immediately to all claims made after the date of enactment of that legislation and to claims made between that date and an earlier date, being that of the entry into force of the legislation, as well as to claims for repayment made before the date of entry into force which are still pending on that date.

38 Whilst national legislation reducing the period within which repayment of sums collected in breach of Community law may be sought is not incompatible with the principle of effectiveness, it is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the original legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.

39 In that connection it should be noted that Member States are required as a matter of principle to repay taxes collected in breach of Community law (Joined Cases C-192/95 to C-218/95 Comateb and Others [1997] ECR I-165, paragraph 20, and Dilexport, paragraph 23), and whilst the Court has acknowledged that, by way of exception to that principle, fixing a reasonable period for claiming repayment is compatible with Community law, that is in the interests of legal certainty, as was noted in paragraph 35 hereof. However, in order to serve their purpose of ensuring legal certainty limitation periods must be fixed in advance (Case 41/69 ACF Chemiefarma v

Commission [1970] ECR 661, paragraph 19).

40 Accordingly, legislation such as that at issue in the main proceedings, the retroactive effect of which deprives individuals of any possibility of exercising a right which they previously enjoyed with regard to repayment of VAT collected in breach of provisions of the Sixth Directive with direct effect must be held to be incompatible with the principle of effectiveness.

41 That applies notwithstanding the argument of the United Kingdom Government to the effect that the enactment of the legislation at issue in the main proceedings was motivated by the legitimate purpose of striking a due balance between the individual and the collective interest and of enabling the State to plan income and expenditure without the disruption caused by major unforeseen liabilities.

42 Whilst such a purpose may serve to justify fixing reasonable limitation periods for bringing claims, as was noted in paragraph 35, it cannot permit them to be so applied that rights conferred on individuals by Community law are no longer safeguarded.

The principle of the protection of legitimate expectations

43 The United Kingdom Government maintains that the principle of the protection of legitimate expectations is not relevant in a dispute such as that in the main proceedings. It submits that determination of the procedural rules governing claims for the recovery of overpayments of VAT is entirely a matter of domestic law, subject only to observance of the Community-law principles of equivalence and effectiveness. If the principle of the protection of legitimate expectations were applicable in the dispute in the main proceedings, the only expectation would be that individuals are entitled to have their claims dealt with in accordance with the procedural rules of national law, which happened in the present case.

44 In that connection, the Court has consistently held that the principle of the protection of legitimate expectations forms part of the Community legal order and must be observed by the Member States when they exercise the powers conferred on them by Community directives (see, to that effect, Case 316/86 Krücken [1988] ECR 2213, paragraph 22, Joined Cases C-31/91 to C-44/91 Lageder and Others [1993] ECR I-1761, paragraph 33, Case C-381/97 Belgocodex [1998] ECR I-8153, paragraph 26, and Case C-396/98 Schlossstrasse [2000] ECR I-4279, paragraph 44).

45 The Court has held, in particular, that a legislative amendment retroactively depriving a taxable person of a right to deduction he has derived from the Sixth Directive is incompatible with the principle of the protection of legitimate expectations (Schlossstrasse, cited above, paragraph 47).

46 Likewise, in a situation such as that in the main proceedings, the principle of the protection of legitimate expectations applies so as to preclude a national legislative amendment which retroactively deprives a taxable person of the right enjoyed prior to that amendment to obtain repayment of taxes collected in breach of provisions of the Sixth Directive with direct effect.

47 In the light of all those considerations, the reply to the question referred must be that national legislation retroactively curtailing the period within which repayment may be sought of sums paid by way of VAT collected in breach of provisions of the Sixth Directive with direct effect, such as those in Article 11A(1), is incompatible with the principles of effectiveness and of protection of legitimate expectations.

Decision on costs

Costs

48 The costs incurred by the United Kingdom Government and the Commission, 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 submitted to it by the Court of Appeal (Civil Division) (England & Wales) by order of 14 December 1999, hereby rules:

National legislation retroactively curtailing the period within which repayment may be sought of sums paid by way of VAT collected in breach of provisions with direct effect of Sixth 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, such as those in Article 11A(1), is incompatible with the principles of effectiveness and of the protection of legitimate expectations.