Ordonnance de la Cour
Case C-395/02

Transport Service NV

v

Belgische Staat

(Reference for a preliminary ruling from the Rechtbank van eerste aanleg te Antwerpen)

(Article 104(3) of the Rules of Procedure – First and Sixth VAT Directives – Principle of fiscal neutrality – Application of VAT to each production or distribution transaction – Recovery)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Supply of goods wrongly invoiced as being exempt from tax – Recovery, after the event, from the taxable person making the supply – Not a breach of the principle of fiscal neutrality – Tax on the later sale of the goods to the end user paid to the public purse – Not relevant

(Council Directives 67/227 and 77/388)

The principle of the neutrality of the common system of value added tax does not preclude a Member State from recovering value added tax, after the event, from a taxable person which has wrongly invoiced a supply of goods as being exempt from that tax. It is irrelevant, in that regard, whether the value added tax on the later sale of the goods concerned to the end user has been paid to the public purse or not.

(see para. 3, operative part)

ORDER OF THE COURT (Fifth Chamber)
3 March 2004(1)

(Article 104(3) of the Rules of Procedure – First and Sixth VAT Directives – Principle of fiscal neutrality – Application of VAT to each production or distribution transaction – Recovery)

In Case C-395/02,
REFERENCE to the Court under Article 234 EC by the Rechtbank van eerste aanleg te Antwerpen (Belgium) for a preliminary ruling in the proceedings pending before that court between
Transport Service NV

and

Belgische Staat, third party:**Bea Cars BVBA,**
on the interpretation of the principle of the neutrality of the common system of value added tax,

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, S. von Bahr (Rapporteur) and R. Silva de Lapuerta, Judges,
Advocate General: L.A. Geelhoed,
Registrar: R. Grass,
after hearing the Opinion of the Advocate General,

Order

1 By judgment of 4 November 2002, received at the Court Registry on 11 November 2002, the Rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of the principle of the neutrality of the common system of value added tax (hereinafter 'VAT').
2 That question was raised in the course of a dispute between Transport Service NV (hereinafter 'Transport Service') and the Belgian State concerning the recovery by the latter of the VAT on the supply tax-free by Transport Service of two vehicles to a purchaser residing in another Member State, a supply which, according to the Belgian State, has not been shown to be genuine.

Legal background
3 Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition, 1967 (I), p. 14), as last amended by 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 First Directive'), is worded as follows:
'The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which the tax is charged.
On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.
The common system of value added tax shall be applied up to and including the retail trade stage.'
4 Under Article 2(1) of Sixth Directive 77/388, in the version thereof resulting from Council Directive 92/111/EEC of 14 December 1992 (OJ 1992 L 384, p. 47), (hereinafter 'the Sixth Directive'), VAT is chargeable on the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.
5 Article 21(1)(a) of the Sixth Directive provides:
'The following shall be liable to pay value added tax:
1. under the internal system:
(a) the taxable person carrying out the taxable supply of goods or of services, other than one of the supplies of services referred to in (b).
…

Member States may provide that someone other than the taxable person shall be held jointly and severally liable for payment of the tax'.

6 The first subparagraph of Article 28(c)A(a) of the Sixth Directive provides:

'Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Articles 5 and 28(a)(5)(a), dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.'

The dispute in the main proceedings and the question referred for a preliminary ruling

7 The referring court states that, according to an invoice of 18 January 1994, Transport Service sold two Mercedes vehicles, at a cost of BEF 2 061 646, to Mr Schellinck, residing in Luxembourg.

8 It is apparent from the judgment of referral that, following an inspection on 30 September 1998, in the course of which the genuineness of the supply of the vehicles in question to the Luxembourg customer was put in question, the Finance Ministry drew up, on 22 February 1999, a final report stating that Transport Service was liable to the Belgian State for BEF 422 637 in respect of VAT and BEF 845 274 by way of statutory penalty and for interest for delay in payment. A final demand was served on that company on 26 May 1999.

9 On 24 June 1999, Transport Service lodged an objection to that demand. In its action against the Belgian State before the Rechtbank van eerste aanleg te Antwerpen, it joined Bea Cars BVBA (hereinafter 'Bea Cars'), a company governed by Belgian law, as intervener and third party.

10 The national court makes clear that, according to the Belgian State, the supply did not take place between Transport Service and Mr Schellinck, but between that company and Bea Cars. Therefore no exemption from VAT can be invoked for the supply of the vehicles in question and, therefore, Transport Service is liable for the VAT on the supply of the two vehicles.

11 Transport Service contends that it sold the two vehicles to Mr Schellinck on the express order of Bea Cars. In that respect, it acted in good faith and has evaded no VAT. Accordingly, if the referring court should hold that it remains liable for the VAT, Bea Cars, which misled it, should indemnify it and compensate it for the loss which it has suffered.

12 Bea Cars maintains that it is not in any way concerned with the objection raised by Transport Service, or, at least, that it cannot be liable for any amount of VAT, penalties or interest. It states that it paid the Belgian State the VAT due in respect of the resale of the two vehicles in question.

13 In addition, both Transport Service and Bea Cars argue that the Belgian State has infringed the principle of the neutrality of the common system of VAT, in that it is claiming from them the payment of the VAT and a penalty, even though it is not in any way disputed that that tax has been paid by the end user.

14 In those circumstances, the Rechtbank van eerste aanleg te Antwerpen decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the principle of the neutrality of value added tax preclude a Member State from claiming additional VAT from a taxable person which has issued an invoice, correctly or otherwise, in accordance with the VAT exemption applicable to intra-Community supplies (Article 39(a) of the Belgian VAT Code) where it is evident that the VAT has been paid by the end user and transferred to the Member State by the person who drew up the invoice issued to that end user?'

The question referred for a preliminary ruling

15 Since, in the light of its case-law, the answer to that question admits of no reasonable doubt, the Court, in accordance with Article 104(3) of the Rules of Procedure, informed the national court that it intended to give judgment by reasoned order and invited the parties referred to in Article 23 of the Statute of the Court of Justice to submit any observations which they might wish to make in that regard.

16 The Belgian State and the Commission of the European Communities stated that they had no objection. The other parties submitted no observations within the time-limits.

17 As a preliminary point, it is appropriate to note that under Article 2(1) of the Sixth Directive VAT is chargeable on the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.

18 However, under the first subparagraph of Article 28(c)A(a) of the Sixth Directive the Member States are to exempt supplies of goods dispatched or transported, by or on behalf of the vendor or the person acquiring the goods, out of the territory of a Member State but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.

19 It is for the national court to determine whether the supply in question in the main proceedings meets those conditions. If such is the case, no VAT is payable on that supply.

20 If the supply in question does not meet those conditions or the conditions of another exemption provided for by the Sixth Directive or of a derogation allowed thereunder, the Court has consistently held (see, in particular, Case C-318/96 *SPAR* [1998] ECR I-785, paragraph 23, and Joined Cases C?338/97, C?344/97 and C?390/97 *Pelzl and Others* [1999] ECR I?3319, paragraph 16), that the principle of the common system of VAT consists, by virtue of Article 2 of the First Directive, in the application to goods and services up to the retail stage of a general tax on consumption which is exactly proportional to the price of the goods and services, irrespective of the number of transactions which take place in the production and distribution process before the stage at which the tax is charged.

21 According to the fundamental principle which underlies that system resulting from Article 2 of the First and Sixth Directives, VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (see, in particular, Case C?98/98 *Midland Bank* [2000] ECR I-4177, paragraph 29, and Case C-497/01 *Zita Modes* [2003] ECR I-0000, paragraph 37).

22 It follows that, since a supply of goods such as that at issue in the main proceedings does not meet the conditions of the first subparagraph of Article 28(c)A(a) of the Sixth Directive, or those of another exemption provided for by that directive or of a derogation allowed thereunder, that supply is subject to VAT under Article 2(1) of the Sixth Directive.

23 Under Article 21(1)(a) of the Sixth Directive VAT is chargeable under the internal system on a taxable person carrying out a taxable supply of goods.

24 Accordingly, a taxable person who effects a supply of goods such as that at issue in the main proceedings, since it does not meet the conditions of the first subparagraph of Article 28(c)A(a) of the Sixth Directive or those of another exemption provided for by that directive or of a derogation allowed thereunder, is chargeable to VAT on that transaction.

25 That statement is not contradicted by the principle that the common system of VAT ensures neutrality of taxation of all economic activities which are subject to VAT, irrespective of their purpose or results (see, most recently, *Zita Modes*, cited above, paragraph 38), since, under Article 17 of the Sixth Directive, the taxable person is entitled to deduct that tax which, as an input, has directly been borne by the cost of the various components of the price of the goods concerned and from which the purchaser, provided that he is a taxable person, may in his turn, as a rule, deduct the VAT which he pays on such goods.

26 The question whether the VAT on the later sale of the goods concerned to the end user has or has not been paid to the public purse is irrelevant in that regard. Indeed, as has already been stated in paragraphs 20 and 21 of this order, VAT applies to each transaction

by way of production or distribution after deduction of the VAT directly borne by the various cost components, up to the retail stage.

27 As for the recovery of the VAT, it must be observed that the Sixth Directive contains no provision relating to that question. That directive merely defines, in Article 20, the conditions which must be complied with in order that deduction of input taxes may be adjusted at the level of the person to whom goods or services have been provided.

28 It is therefore, as a rule, for the Member States to lay down the conditions under which the tax authorities may recover VAT after the event, while remaining within the limits imposed by Community law.

29 In that regard, it must be noted that the measures which the Member States may adopt under Article 22(8) of the Sixth Directive in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives (see, in particular, Case C?454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I-6973, paragraph 59; and, equally, as regards the measures adopted by the Member States in order to preserve the rights of the public purse, Joined Cases C-286/94, C-340/95, C?401/95 and C?47/96 *Molenheide and Others* [1997] ECR I-7281, paragraphs 46 to 48).

30 In addition, as the Commission has rightly observed, it is clear from the Court's case-law that Community law does not prevent Member States from treating the issuing of irregular invoices as attempted tax evasion and imposing, in such a case, fines or penalty payments prescribed by their domestic law (see *Schmeink & Cofreth and Strobel*, cited above, paragraph 62).

31 Therefore, the reply to the question referred for a preliminary ruling must be that the principle of the neutrality of the common system of VAT does not preclude a Member State from recovering VAT, after the event, from a taxable person which has wrongly invoiced a supply of goods as being exempt from that tax. It is irrelevant, in that regard, whether the VAT on the later sale of the goods concerned to the end user has been paid to the public purse or not.

Costs

32 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Rechtbank van eerste aanleg te Antwerpen by order of 4 November 2002, hereby rules:

The principle of the neutrality of the common system of value added tax does not preclude a Member State from recovering value added tax, after the event, from a taxable person which has wrongly invoiced a supply of goods as being exempt from that tax. It is irrelevant, in that regard, whether the value added tax on the later sale of the goods concerned to the end user has been paid to the public purse or not.

Luxembourg, 3 March 2004.

R. Grass

C. Gulmann

Registrar

President of the Fifth Chamber

1 – Language of the case: Dutch.