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Case C-98/05

De Danske Bilimportører

v

Skatteministeriet

(Reference for a preliminary ruling from the Østre Landsret)

(Sixth VAT Directive – Article 11(A)(2)(a) and (3)(c) – Taxable amount – Registration duty on new motor vehicles)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Taxable amount

(Council Directive 77/388, Art. 11(A)(2)(a) and (3)(c))

In the context of a contract of sale providing that, in accordance with the buyer's intended use of the vehicle, the dealer will supply it registered and for a price which includes the registration duty on new motor vehicles he paid before supplying the vehicle, that duty, for which the occurrence triggering liability is not the supply of the vehicle but its first registration in national territory, is not covered by the concept of taxes, duties, levies and charges within the meaning of Article 11(A)(2)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes which must be included in the taxable amount. Such a duty corresponds to an amount received by the taxable person from the purchaser of the vehicle as repayment for expenses paid out in the name and for the account of the latter within the meaning of Article 11(A)(3)(c) which must be excluded from the taxable amount.

(see paras 14, 16, 30, operative part)

JUDGMENT OF THE COURT (First Chamber)

1 June 2006 (*)

(Sixth VAT Directive – Article 11(A)(2)(a) and (3)(c) – Taxable amount – Registration duty on new motor vehicles)

In Case C-98/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Østre Landsret (Denmark), made by decision of 11 February 2005, received at the Court on 24 February 2005, in the

proceedings

De Danske Bilimportører

v

Skatteministeriet,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues, K. Lenaerts (Rapporteur), M. Ilešić and E. Levits, Judges,

Advocate General: J. Kokott,

Registrar: H. von Holstein,

having regard to the written procedure and further to the hearing on 23 February 2006,

after considering the observations submitted on behalf of:

- De Danske Bilimportører, by K. Dyekjær, advokat,
- the Danish Government, by J. Molde, acting as Agent, assisted by K. Hagel-Sørensen, advokat,
- the Netherlands Government, by H.G. Sevenster and D.J.M. de Grave, acting as Agents,
- the Commission of the European Communities, by N.B. Rasmussen and D. Triantafyllou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 March 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 11(A)(2)(a) and (3)(c) 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 and – corrigendum – OJ 1977 L 149, p. 26) (hereinafter ‘the Sixth Directive’).

2 This reference was made in the course of proceedings between De Danske Bilimportører (hereinafter ‘DBI’), a trade association of importers of motor vehicles in Denmark, and the Skatteministeriet (Danish Ministry of Fiscal Affairs) regarding the position of a registration duty on new motor vehicles (hereinafter ‘the registration duty’) in the light of the taxable amount for the purposes of value added tax (hereinafter ‘VAT’).

Legal context

Community legislation

3 Article 11 of the Sixth Directive, which is in Title VIII entitled ‘Taxable Amount’, provides that:

'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;

...

2. The taxable amount shall include:

(a) taxes, duties, levies and charges, excluding the value added tax itself;

(b) incidental expenses such as commission, packing, transport and insurance costs charged by the supplier to the purchaser or customer. Expenses covered by a separate agreement may be considered to be incidental expenses by the Member States.

3. The taxable amount shall not include:

...

(c) the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account. The taxable person must furnish proof of the actual amount of this expenditure and may not deduct any tax which may have been charged on these transactions.'

National legislation

4 The registration duty was introduced by the Law on compulsory registration of motor vehicles (lov om registreringspligt af motorkøretøjer) in the version laid down in Codified Law No 977 of 2 December 2002 (hereinafter 'the Law on registration duty').

5 Under Article 1 of that law, registration duty is chargeable on 'motor vehicles that are to be registered under the Law on road traffic'. It falls due on presentation of the motor vehicle for registration. Permission to use vehicles on public roads in Denmark is conditional on payment of the duty.

6 Under article 8(1) of the Law on registration duty, the taxable value of a new motor vehicle is 'its ordinary price including value added tax but excluding the duty under the present law'. As regards used motor vehicles, inter alia those imported as personal property in connection with moving house and motor vehicles rebuilt, for example after a road accident, VAT is also included as part of the basis of assessment for the registration duty.

7 Under Paragraph 14 of the Law on registration duty a person who in the course of trade sells vehicles that are subject to that duty may register with the customs and tax authorities. Unlike the legal approach which prevails as regards certain other goods which are subject to excise duty, such registration is an option and not a duty as regards car dealers. A registered dealer receives a credit for settlement which relieves him of the obligation to pay the duty in cash on presentation of the vehicle for registration.

The facts which gave rise to the dispute in the main proceedings and the questions referred for a preliminary ruling

8 In the course of January 1999, DBI bought a new car intended for the use of its director.

9 According to the national court, as is usual in Denmark when a motor vehicle is purchased from an authorised dealer, the dealer dealt with registration of the vehicle in the purchaser's name and the provision of number plates before supplying the car.

10 The invoice for the purchase of the vehicle refers to a total price of DKK 498 596. That price can be broken down as follows: (1) the amount charged by the dealer to the purchaser, excluding VAT and registration duty; (2) VAT at the standard rate of 25% on the price of the vehicle and (3) registration duty on the sum of (1) and (2) subject to certain adjustments and deductions.

11 As it considered that the method of calculation set out in the previous paragraph is contrary to the provisions of Article 11(A) of the Sixth Directive and that VAT must be based on the total price of the vehicle including the registration duty, DBI brought an action before the Østre Landsret (Eastern Regional Court).

12 It is clear from the order for reference that, depending on whether VAT is calculated employing the method used by the Danish tax authorities or in accordance with the method advocated by DBI, there is a difference of DKK 14 899 in the amount of the total price of the vehicle. That difference can be explained by the progressive nature of the registration duty.

13 As it considered that the judgment of the Court in Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065 did not contain any answer which was relevant to the outcome of the proceedings pending before it, the Østre Landsret decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 11(A)(2)(a) in conjunction with Article 11(A)(3)(c) of the Sixth ... Directive to be interpreted as meaning that a registration duty for motor vehicles (cars) must be included in the taxable amount for VAT, where a purchase agreement is entered into for the supply of a new motor vehicle for use for carrying passengers, where the motor vehicle is supplied, in accordance with the purchase agreement and the purchaser's intended use, by the dealer to the consumer already registered and for an overall price which includes both the price paid to the dealer and also the [registration] duty?

2. May a Member State arrange its tax system in such a way that the registration duty is regarded as an expense which the dealer pays on behalf of the final purchaser, so that it is the final purchaser who is directly liable to pay the duty?

3. Is it of significance with respect to Questions 1 and 2 that a car may be purchased and supplied without payment of registration duty, which will be possible if the purchaser does not intend to use the car for ordinary carriage of passengers or goods within the area in which the Law on road traffic applies?

4. Is it of significance that used motor vehicles are to a not insubstantial extent imported or brought inter alia as goods in connection with a transfer of residence by the final consumer, who pays the registration duty himself without the intervention of a dealer?

5. Is it of significance that the liability to registration duty arises or falls due – possibly as an expense – before the liability to VAT arises or it falls due?'

The questions referred for a preliminary ruling

14 By its questions, which should be examined together, the national court is essentially asking whether a registration duty such as that at issue in the main proceedings must be included in the taxable amount as a duty within the meaning of Article 11(A)(2)(a) of the Sixth Directive when a dealer supplies a vehicle already registered for a price including that duty in accordance with the purchase agreement for that vehicle and the purchaser's intended use of it or, on the contrary, be excluded from that amount in accordance with Article 11(A)(3)(c).

15 According to Article 11(A)(1)(a) of the Sixth Directive, the taxable amount within the interior of the country is, in respect of supplies of goods, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser. Article 11(A)(2) and (3) enumerate certain items which are to be included in the taxable amount and other items which are not to be included (Case C-126/88 *Boots Company* [1990] ECR I-1235, paragraph 15).

16 In accordance with Article 11(A)(2)(a) of the Sixth Directive, taxes, duties, levies and charges, excluding the value added tax itself must be included in the taxable amount.

17 As the Advocate General observed at points 16 and 17 of her Opinion, in order for such items to fall within the scope of the basis of assessment, even though they do not represent any added value and do not constitute the financial consideration for the supply of the goods, they must be directly linked to that supply (see to that effect Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraphs 11 and 12; Case C-33/93 *Empire Stores* [1994] ECR I-2329, paragraph 12; and Case C-380/99 *Bertelsmann* [2001] ECR I-5163, paragraphs 17 and 18).

18 In the present case, as the Danish and Netherlands Governments and the Commission of the European Communities have stated, the occurrence that triggers liability to the registration duty is not the supply of the vehicle but its first registration in Danish territory (see *De Danske Bilimportører*, paragraph 34, and Case C-138/04 *Commission v Denmark*, not published in the ECR, paragraph 12).

19 That analysis is borne out by the fact, which constitutes the subject-matter of the third question referred by the national court, that a new car bought for a purpose other than being put into circulation within the areas in which the Danish Law on road traffic applies (for example, a collector's vehicle, a vehicle intended for use exclusively on private ground or a vehicle destined for transfer outside the national territory) does not give rise to the levying of the registration duty in spite of a supply taking place within that territory.

20 Such an analysis is also borne out by the fact, mentioned in the fourth question referred by the national court, that the registration duty is due in certain situations in which there is no supply within Danish territory, such as that of a vehicle transferred by its owner to Denmark in connection with moving house and intended for use on public roads in that Member State or that of a vehicle rebuilt after a road accident and again employed for such use.

21 Contrary to the submission made by DBI, the link between the levying of the duty and registration of the vehicle cannot, in those circumstances, be regarded as meeting only the national authorities' aim of ensuring effective control over the levying of a duty which is, in reality, linked to the supply. On the contrary, it reflects the real nature of that duty and the occurrence that triggers liability to it, it being a duty directly related to registration, liability to which depends on presentation of the motor vehicle for registration with a view to its use on public roads in Denmark.

22 It is true that, as DBI states, when an authorised dealer contractually undertakes to supply a

vehicle after having had it registered, as is usually the case, according to the national court, at the time of purchase of a vehicle from such a dealer, the point at which VAT becomes chargeable is subsequent to that at which the registration duty falls due and registration duty is included in the amount invoiced to the purchaser at the time that vehicle is supplied.

23 However, and in answer to the fifth question referred by the national court, that circumstance cannot conceal the existence of a conceptual difference between the respective occurrences triggering liability to the registration duty and to VAT, rendering the former independent of the latter.

24 The same is true of the argument, also relied on by DBI, that national legislation on price labelling requires dealers to state the total price of the vehicle including registration duty in their advertising.

25 Accordingly, when, as in the case in the main proceedings, the registration duty has been paid by the dealer on account of a contractual obligation to supply to the purchaser a vehicle which is registered in the purchaser's name, the invoicing of that duty to the purchaser must be held to correspond to a repayment for expenses paid out by the dealer in the name and for the account of that purchaser and not to consideration for the goods supplied. Such a duty can therefore be regarded only as an element in the dealer's books which constitutes a suspense account within the meaning of Article 11(A)(3)(c) of the Sixth Directive.

26 As the Advocate General observed at point 42 of her Opinion, it is important to note in that regard that, under a contract of sale such as that at issue in the main proceedings, the registered dealer who pays the registration duty before supplying the vehicle does not do so in his own interest but in that of the purchaser who wishes to take possession of a new vehicle registered in his name and appropriate for driving legally on public roads in Denmark.

27 Admittedly, as DBI states, the registered dealer is, in such a case, the person responsible for payment of the registration duty to the competent tax authorities. The fact remains that, as regards that duty, the person liable for payment is the purchaser of the vehicle, as is shown by the fact that the dealer subsequently passes on to that purchaser the amount of the duty he has paid.

28 In answer to the second question, it is also important to point out that, subject to certain exceptions which are not relevant in the present case, the taxation of motor vehicles has not been harmonised and differs considerably from one Member State to another. Member States are therefore free to exercise their powers of taxation in that area provided they do so in compliance with Community law (Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 40, and Case C-464/02 *Commission v Denmark* [2005] ECR I-7929, paragraph 74).

29 Consequently, in view of the provisions in Article 11(A)(3)(c) of the Sixth Directive, it must be accepted that a Member State may impose a duty on new motor vehicles for which the occurrence triggering liability to the duty is the first registration of the vehicle in the territory of that State and the person responsible for payment is the purchaser of the vehicle and which, when it is paid by a dealer on account of a contractual obligation to supply the vehicle registered in the purchaser's name, corresponds to an amount advanced by the dealer in the name and for the account of that purchaser.

30 Accordingly, the answer to the questions referred to the Court must be that, in the context of a contract of sale providing that, in accordance with the buyer's intended use of the vehicle, the dealer will supply it registered and for a price which includes the registration duty he paid before supplying the vehicle, that duty, for which the occurrence triggering liability is not the supply of the vehicle but its first registration in national territory, is not covered by the concept of taxes, duties,

levies and charges within the meaning of Article 11(A)(2)(a) of the Sixth Directive. Such a duty corresponds to an amount received by the taxable person from the purchaser of the vehicle as repayment for expenses paid out in the name and for the account of the latter within the meaning of Article 11(A)(3)(c).

Costs

31 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

In the context of a contract of sale providing that, in accordance with the buyer's intended use of the vehicle, the dealer will supply it registered and for a price which includes the registration duty on new motor vehicles he paid before supplying the vehicle, that duty, for which the occurrence triggering liability is not the supply of the vehicle but its first registration in national territory, is not covered by the concept of taxes, duties, levies and charges within the meaning of Article 11(A)(2)(a) 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. Such a duty corresponds to an amount received by the taxable person from the purchaser of the vehicle as repayment for expenses paid out in the name and for the account of the latter within the meaning of Article 11(A)(3)(c).

[Signatures]

* Language of the case: Danish.