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Case C?594/10

T.G. van Laarhoven

v

Staatssecretaris van Financiën

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Sixth VAT Directive — Right to deduct input tax — Limitation — Use of goods forming part of the assets of a business for the private use of the taxable person — Fiscal treatment of private use of goods that are assets of the business)

Summary of the Judgment

Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Taxable transactions — Taxable amount — Use by the taxable person, for both business and private purposes, of vehicles forming part of his business

(Council Directive 77/388, Arts 6(2), first para. (a), and 11A(1)(c))

Article 6(2)(a) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, read together with Article 11A(1)(c) of the same directive, must be interpreted as precluding national fiscal legislation which initially authorises a taxable person whose passenger vehicles are used for both business and private purposes to deduct input value added tax immediately and in full, but which subsequently provides, as regards private use of those vehicles, for annual taxation based — for determining the taxable amount of value added tax owed in a given financial year — on a flat-rate method of calculating expenses relating to such use which does not take account on a proportional basis of the actual extent of that private use.

(see para. 38, operative part)

JUDGMENT OF THE COURT (Third Chamber)

16 February 2012 (*)

(Sixth VAT Directive — Right to deduct input tax — Limitation — Use of goods forming part of the assets of a business for the private use of the taxable person — Fiscal treatment of private use of goods that are assets of the business)

In Case C?594/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 29 October 2010, received at the Court on 17 December 2010, in the proceedings

T.G. van Laarhoven

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta (Rapporteur), E. Juhász and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2011,

after considering the observations submitted on behalf of:

– Mr van Laarhoven, by himself,

– the Netherlands Government, by C. Wissels and M. Bulterman, acting as Agents,

– the United Kingdom Government, by C. Murrell, acting as Agent,

– the European Commission, by L. Lozano Palacios and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 17(6) 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18, ‘the Sixth Directive’).

2 The reference has been made in proceedings between Mr van Laarhoven and the Staatssecretaris van Financiën (State Secretary for Finance) concerning value-added tax (‘VAT’) due on private use by a taxable person of passenger vehicles forming part of the assets of his business.

Legal context

European Union (‘EU’) law

3 Under Article 2 of the Sixth Directive ‘the following shall be subject to [VAT] …: the supply of goods or services effected for consideration within the territory of the country by a taxable person

acting as such’.

4 Article 6(2)(a) of that directive treats as a supply of services for consideration ‘the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the [VAT] on such goods is wholly or partly deductible’.

5 Under Article 11A(1)(c) of the Sixth Directive, the taxable amount is to be, ‘in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services’.

6 Article 17 of the same directive, as amended by Article 28f of that directive, provides:

‘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) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

...

6. Before a period of four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of [VAT]. [VAT] shall in no circumstances be deductible in respect of expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force.

... .’

7 Article 20(1) and (2) of the Sixth Directive provides:

‘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, nor in the case of applications for the purpose of making gifts of small value and giving samples specified in Article 5(6). However, Member States may require adjustment in cases of transactions remaining totally or partially unpaid and of theft.

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.

... .’

The Netherlands legislation

8 Article 2 of the Law on turnover tax of 1968 (Wet op de omzetbelasting 1968, ‘the Law on VAT’) states:

‘A trader may deduct from the tax to be paid on supplies of goods and services the tax charged on supplies of goods and services to him, acquisitions of goods effected by him within the Community and imports of goods intended for him.’

9 Article 15 of the Law on VAT is worded as follows:

‘1. The tax referred to in Article 2 which is deductible by the trader shall be:

(a) the tax which, in the period covered by the return, other traders have charged him by means of an invoice issued in accordance with the applicable rules, in respect of supplies of goods and services which they have made to him;

...

6. The detailed rules concerning the tax deduction are determined by ministerial decree where the goods and services are also used by the trader for purposes other than his taxed operations … . The detailed rules concerning the deduction of the tax are determined by ministerial decree where a passenger vehicle is also used by the trader for private purposes. In that context, it is possible to provide that the exclusion of goods used by the trader in his business is not taken into consideration.

... .’

10 Article 15(1) of the Decree implementing the Law on turnover tax 1968 (Uitvoeringsbeschikking omzetbelasting 1968, ‘the Decree relating to VAT’), adopted in implementation of Article 15(6) of that law, provides:

‘The tax which is applied to the possession — including the acquisition — by a trader of a passenger vehicle also used other than in the course of the business (private use) is first deducted as if the vehicle were exclusively used in the course of the business; next, having regard to private use, an amount of tax of 12% is due, annually, on the amount of the costs which for income tax purposes would be taken into account as a reduction if the vehicle, for that tax, were accounted for in the assets of the business. In that regard, the use of the vehicle for private purpose is established on the basis of the difference between the total kilometres covered by the vehicle during a financial year and the total kilometres covered for the business at the time of collecting income tax. That tax is due during the last fiscal period of the financial year.’

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

11 Mr van Laarhoven is the sole proprietor of a tax consultancy. In 2006 two passenger vehicles successively formed part of the assets of the business. Mr van Laarhoven used the two vehicles for both business and private purposes.

12 During that year Mr van Laarhoven drove the vehicles more than 500 kilometres for private purposes. In his VAT return for the period 1 October until 31 December 2006 he declared, as regards that private use and taking account of Article 15 of the Decree relating to VAT, EUR 538

owed in respect of that tax and he paid that tax.

13 However, Mr van Laarhoven lodged an objection seeking to obtain repayment of that amount. Since that objection was dismissed by order of the Inspector, he brought an appeal before the Rechtbank te Breda against that order. As the Rechtbank te Breda declared the appeal unfounded by judgment of 3 March 2008, Mr van Laarhoven brought an appeal in cassation against that judgment before the Hoge Raad der Nederlanden.

14 The latter court, referring to Article 17(6) of the Sixth Directive, considers that the Kingdom of the Netherlands had adopted fiscal legislation which limited the VAT deduction for passenger vehicles used by a person for purposes other than those of his business. That legislation, set out in Article 15(6) of the Law on VAT, read together with Article 15(1) of the Decree relating to VAT, provides that VAT on the acquisition of such vehicles is initially deducted as if they were used exclusively for business purposes. Subsequently, the person is annually liable for an amount of VAT on such private use. That amount is calculated on the basis of a fixed percentage of a flat-rate amount of costs which, for income tax purposes, are deemed not to have been incurred for the business. That flat-rate amount is itself fixed on the basis of a percentage of the list price or the value of each vehicle.

15 The referring court also states that some amendments were adopted after the entry into force of the Sixth Directive, which amended Article 15(1) of the Decree relating to VAT. First, the fixed percentage mentioned above was amended several times and, second, the amount of the reduction to which that fixed percentage is applied was raised. Those amendments to that Decree have generally had an adverse effect on the taxable person as regards the amount considered for deduction as private use of a vehicle forming part of the assets of the business, and as a consequence, on the amount of the VAT deduction.

16 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does the second subparagraph of Article 17(6) of the Sixth Directive preclude amendments to deduction-limiting legislation such as that in question, according to which a Member State has sought to take advantage of the possibility, for which that provision provides, of (retaining) the exclusion of deduction in respect of certain goods and services if, as a consequence of those amendments, the amount excluded from deduction has been increased in most cases, but the approach and scheme of the deduction-limiting legislation have remained unchanged?

2. If the answer to the first question is in the affirmative, should the national courts refrain from applying the deduction-limiting legislation as a whole, or is it sufficient for them to refrain from applying the legislation to the extent that it has increased the scale of the exclusion or restriction existing at the time when the Sixth Directive entered into force?’

Consideration of the questions referred

Preliminary observations

17 It must be noted that the question, as formulated by the national court, concerns the interpretation of Article 17(6) of the Sixth Directive.

18 The national court refers to that provision of the Sixth Directive, since it considers that the Netherlands fiscal legislation which gave rise to the main proceedings, that is Article 15(1) of the Decree relating to VAT, constitutes a rule which restricts the taxable person’s right to deduct input VAT upon the acquisition of a passenger vehicle which forms part of the assets of the business,

but which is also used for private purposes by the taxable person.

19 In the light of that consideration, and taking account of the fact that the fiscal legislation at issue in the main proceedings was amended several times since the entry into force of the Sixth Directive in the Netherlands, the national court wonders if Article 15(1) of the Decree relating to VAT complies with Article 17(6) of that directive.

20 It should be borne in mind, in that regard, that the second subparagraph of Article 17(6) of the Sixth Directive, which is a derogation, authorises the Member States to retain their existing legislation as at the date of entry into force of the Sixth Directive in regard to exclusion from the right of deduction until the Council adopts the provisions envisaged by the first subparagraph of Article 17(6) (see Case C?345/99 *Commission* v *France* [2001] ECR I?4493, paragraph 19, and Case C?371/07 *Danfoss and AstraZeneca* [2008] ECR I?9549, paragraph 28).

21 The referring court takes the view that the successive amendments to the Netherlands fiscal legislation might have led to an even greater restriction on the right to deduct than that resulting from the provisions applicable on the date of the entry into force of the Sixth Directive, such a limitation being likely to exceed the power granted to the Member States under the second subparagraph of Article 17(6).

22 It must be pointed out, however, that in accordance with the first part of the first sentence of Article 15(1) of the Decree relating to VAT, the tax paid at the time of acquiring a passenger vehicle used other than in the course of the business is deducted immediately and in full, as if that vehicle were used exclusively for business purposes. It is only subsequently, by applying the second part of that sentence, that private use of the vehicle is subject to flat-rate taxation.

23 Article 15(1) therefore draws a distinction between the immediate and full deduction of input VAT and the taking into account for tax purposes of private use of a vehicle at a later stage, namely when calculating the trader’s income tax at the end of the last tax period of the financial year at issue.

24 It follows that the fiscal process forming the subject-matter of the dispute in the main proceedings in no way adversely affects the right to deduct VAT as regards the acquisition of a passenger vehicle used for both business and private purposes by a trader and therefore cannot be characterised as a limitation to the right to deduct VAT paid at the time of acquiring that vehicle.

25 That process may be regarded as complying with settled case-law of the Court of Justice, according to which, where capital goods are used both for business and for private purposes, the taxable person has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business, (ii) retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes (see Case C?434/03 *Charles and Charles-Tijmens* [2005] ECR I?7037, paragraph 23 and case-law cited, and Case C?72/05 *Wollny* [2006] ECR I?8297, paragraph 21).

26 Should the taxable person choose to treat capital goods used for both business and private purposes as business goods, the input VAT on the acquisition of those goods is, in principle, immediately deductible in full (see *Charles and Charles-Tijmens*, paragraph 24, and *Wollny*, paragraph 22).

27 However, in such a case, the right to immediately and fully deduct VAT paid at the time of the acquisition leads to the corresponding obligation to pay VAT on private use of the business assets (see *Charles and Charles-Tijmens*, paragraph 30, and *Wollny*, paragraph 24). To that end,

Article 6(2)(a) of the Sixth Directive treats use for private purposes in the same way as the supply of services for consideration, so that the taxable person must, in accordance with Article 11A(1)(c) of the same directive, pay VAT on expenses relating to that use (see Case C?269/00 *Seeling* [2003] ECR I?4101, paragraphs 42 and 43).

28 Accordingly, in those circumstances and taking account of the case-law referred to in the three previous paragraphs, it is necessary to understand the questions raised by the referring court as seeking an interpretation of the provisions of the Sixth Directive on the taxation of private use of a passenger vehicle forming part of the assets of a business.

29 The fact that the national court has, formally speaking, worded the questions referred for a preliminary ruling with reference to a provision of the Sixth Directive applicable to different situations does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in the wording of its questions (see, to that effect, Case C?368/09 *Pannon Gép Centrum* [2010] ECR I?7467, paragraph 33 and case-law cited).

Consideration of the questions referred

30 Having regard to the foregoing, it must be considered that, by its two questions, which should be examined together, the national court asks, in essence, whether Article 6(2)(a) of the Sixth Directive read together with Article 11A(1)(c) of that directive must be interpreted as precluding national fiscal legislation which initially authorises a taxable person whose passenger vehicles are used for both business and private purposes to deduct input VAT immediately and in full, but which subsequently provides, as regards private use of those vehicles, for annual taxation based — for determining the taxable amount of VAT owed in a given financial year — on a flat-rate method of calculating expenses relating to such use.

31 As regards that taxation and as was stated at paragraph 27 of this judgment, Article 11A(1)(c) of the Sixth Directive provides that the taxation must be made on the basis of the full cost to the taxable person of providing the services at issue (see *Charles and Charles-Tijmens*, paragraph 25, and Case C?460/07 *Puffer* [2009] ECR I?3251, paragraph 41).

32 It follows from the foregoing that in order to provide the referring court with useful pointers, it is necessary to interpret the concept of ‘the full cost to the taxable person of providing the services’ set out in Article 11A(1)(c).

33 In that regard, it is important to note that, first, as the Advocate General stated at paragraphs 28 and 29 of her Opinion, even if the Member States have a certain margin of discretion as regards the principles governing the determination of those costs, and such a margin permits, to a certain extent, flat-rate methods of calculation, it must be ensured that any flat-rate method of calculating the VAT payable by the taxable person satisfies, in particular, the principle of proportionality, in that such a flat-rate determination must necessarily be proportional to the extent of private use of the goods at issue.

34 While benefiting from such a margin of discretion, the Member States are bound to respect the objective underlying Article 11A(1)(c) of the Sixth Directive, namely to determine the taxable amount corresponding to the private use of those goods.

35 Second, the determination of the full cost to the taxable person must avoid giving a taxable person who uses an asset forming part of his business also for private use an unjustified economic advantage by comparison with a final consumer, which would result from the fact that that taxable person deducted VAT to which he was not entitled (see, to that effect, *Wollny*, paragraph 35).

36 In those circumstances, it is for the national court, which has sole jurisdiction to interpret its national law, to determine, having regard to the pointers provided by the Court, whether the methods of calculating the taxable amount of VAT payable for private use of the goods forming part of the assets of the business, provided for by the Netherlands fiscal legislation, may be considered to be in accordance with the concept of 'the full cost to the taxable person of providing the services' within the meaning of Article 11A(1)(c) of the Sixth Directive.

37 To that end, it is for the national court to interpret domestic law, so far as possible, in the light of the wording and the purpose of that provision of the Sixth Directive with a view to achieving the results sought by the latter, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive, setting aside, if necessary, any contrary provision of national law (see Case C?414/07 *Magoora* [2008] ECR I?10921, paragraph 44 and case-law cited).

38 In the light of the above observations, the answer to the questions must be that Article 6(2)(a) of the Sixth Directive, read together with Article 11A(1)(c) of the same directive, must be interpreted as precluding national fiscal legislation which initially authorises a taxable person whose passenger vehicles are used for both business and private purposes to deduct input VAT immediately and in full, but which subsequently provides, as regards private use of those vehicles, for annual taxation based — for determining the taxable amount of VAT owed in a given financial year — on a flat-rate method of calculating expenses relating to such use which does not take account on a proportional basis of the actual extent of that use.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Third Chamber) hereby rules:

Article 6(2)(a) 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, as amended by Council Directive 95/7/EC of 10 April 1995, read together with Article 11A(1)(c) of the same directive, must be interpreted as precluding national fiscal legislation which initially authorises a taxable person whose passenger vehicles are used for both business and private purposes to deduct input value added tax immediately and in full, but which subsequently provides, as regards private use of those vehicles, for annual taxation based — for determining the taxable amount of value added tax owed in a given financial year — on a flat-rate method of calculating expenses relating to such use which does not take account on a proportional basis of the actual extent of that private use.

[Signatures]

* Language of the case: Dutch.