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Opinion of Mr Advocate General Mischo delivered on 19 May 1998. - Société financière d'investissements SPRL (SFI) v Belgian State. - Reference for a preliminary ruling: Tribunal de première instance de Liège - Belgium. - VAT - Limitation period - Starting-point - Method of determination. - Case C-85/97.

European Court reports 1998 Page I-07447

Opinion of the Advocate-General

1 The Tribunal de Première Instance (Court of First Instance), Liège has to resolve a dispute between Société Financière d'Investissements SPRL (hereinafter `SFI') and the Belgian State. The dispute concerns a sum of VAT owed by SFI, for the recovery of which the Belgian tax authorities issued a payment order. SFI applied to have that payment order set aside on various grounds. In particular, it asserts that the recovery action brought by the tax authorities is time-barred and that the method of calculation adopted by the authorities for determining the value of the benefit in kind constituted by the provision of a company car to a partner or an employee for private journeys is legally incorrect. Since SFI's arguments rely on Community law, the national court has referred the following two questions to the Court for a preliminary ruling:

`(1) Is the position taken by the VAT authorities, that the limitation period for the collection of tax runs from the 20th of the month following the quarter in which registration for VAT took place, as regards taxable transactions carried out before that registration, compatible with Articles 4 and 10 of the Sixth VAT Directive?

(2) Does a system under which VAT on a benefit in kind granted to an employee is calculated on a VAT inclusive basis when Belgian VAT is paid by the employer and on a VAT exclusive basis when VAT of another Member State is paid offend against Article 95 of the Treaty of Rome and the principle of $fiscal neutrality$ laid down by the Sixth VAT Directive?'

2 The order for reference gives very little information on the factual and legislative background to the dispute before the national court. It seems to me that this lack of detail concerning the context in which the preliminary questions have been raised, which, in other circumstances, could constitute a hindrance to the provision of a useful reply, does not pose a real problem here. In its first question, the national court sets out the position of the Belgian tax authorities on the determination of the starting-point of the limitation period for the recovery of VAT and asks whether that position, which, it must be assumed, results from a correct interpretation of the relevant national provisions, is compatible with Community law and, more specifically, with Articles 4 and 10 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 (1) (hereinafter `the Sixth Directive'). That is a question which can be resolved without knowledge of SFI's dealings with the tax authorities.

3 The second question is formulated less clearly, if only because it uses terminology - `calculated on a VAT inclusive basis' and `calculated on a VAT exclusive basis' - which is not found in the Community VAT directives. Moreover, the Court is asked to exercise its review in relation to a provision of the Treaty as well as in relation to a principle of the Community VAT system. However, its complexity is more apparent than real. From the documents in the file and the observations put forward during the oral procedure it is clear that the issue is in fact that of determining the tax base to be taken into account when VAT is applied to a benefit in kind provided to an employee in the form of goods on which VAT has been paid in another Member State. That question also can be usefully answered without any reference to SFI's precise circumstances.

The first question

4 As regards the first question, it will be noted, first, that, although the Court is asked to assess the compatibility with Community law of the position taken by the tax authorities, that is because SFI disputes that position by putting forward arguments based on Community law. According to SFI, a limitation period must start to run in favour of a debtor from the time when his debt arises and when, correlatively, the creditor is entitled to assert his claim.

5 However - and according to SFI this is where Community law comes in - Article 10(1) of the Sixth Directive provides as follows:

`1. (a) "Chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes "chargeable" when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.'

6 According to this reasoning, the date from which the limitation period starts to run is determined by Community law, since that date cannot be different from the date on which the tax becomes chargeable, which is itself determined by the Sixth Directive as the date when the chargeable event, as defined by the directive, occurs. Having chosen another date, the argument runs, the Belgian legislature was in breach of the Sixth Directive and SFI, like any other taxable person, is entitled to rely on that breach.

7 Although on the face of it that reasoning appears rigorous, it must nevertheless be rejected since it rests on certain false premisses. The first false premiss lies in a misconception of chargeability. The fact that a tax becomes chargeable does not cause it to become immediately payable. A tax becomes chargeable because the taxed transaction has been carried out, or, to use the words of the Sixth Directive, because the chargeable event has occurred. However, the fact that the tax

becomes chargeable certainly does not mean that the person liable has to pay it forthwith. Can one imagine a trader sending each day to the revenue authority the amount of VAT for which he is liable in respect of sales effected during the day? Such a sensible distinction between chargeability and payment is made, not surprisingly, by the Community legislature. In the Sixth Directive, it appears not only in Article 10, the terms of which I have just cited, but also in Article 22, which, in paragraphs 4 and 5, provides:

`4. Every taxable person shall submit a return within an interval to be determined by each Member State. This interval may not exceed two months following the end of each tax period. The tax period may be fixed by Member States as a month, two months, or a quarter. However, Member States may fix different periods provided that these do not exceed a year.

The return must set out all the information needed to calculate the tax that has become chargeable and the deductions to be made, including, where appropriate, and in so far as it seems necessary for the establishment of the tax basis, the total amount of the transactions relative to such tax and deductions, and the total amount of the exempted supplies.

5. Every taxable person shall pay the net amount of the value added tax when submitting the return. The Member States may, however, fix a different date for the payment of the amount or may demand an interim payment.'

8 It is thus apparent, and could not be more clearly so, that chargeability is a technical concept which should not be confused with the obligation actually to make payment of VAT. It occurs, in particular, in the deduction mechanism, which is a feature of the Community VAT system, as described in Article 17(1) of the Sixth Directive, under which the right to deduct arises at the time when the deductible tax becomes chargeable. Moreover, by its very structure, the deduction mechanism, which is governed by Articles 17 to 20 of the Sixth Directive, clearly shows that the amount of VAT payable by a trader will not, in principle, be that resulting from the taxable transactions which he has carried out and which have rendered VAT chargeable, since it will be necessary, in order to determine the actual amount payable to the revenue authority, to deduct the VAT credits available to the trader by virtue of the tax which he will have paid when purchasing from his suppliers the goods and services necessary for the pursuit of his activities. The fact that what is chargeable and what is payable do not match means that, as both a conceptual and a tax procedure matter, there must be no confusion between chargeability and the starting-point of the limitation period.

9 The second false premiss on which SFI's reasoning is based lies in its view of the scope of the Sixth Directive. As far as SFI is concerned, the detailed rules for the collection of VAT are covered by the harmonisation achieved by that directive. However, that is manifestly not the case.

10 A mere glance at the subdivisions of the Sixth Directive is enough to show, as the Belgian Government rightly points out, that, although the directive covers all the substantive-law aspects of the Community VAT system, it is far from laying down all the detailed procedural rules for the operation of the system, the only provisions which it devotes to them being those of Title XIII relating to the obligations of persons liable for payment, which includes Article 22 cited above. Moreover, it will be noted in passing that Article 22 itself leaves the Member States a significant margin of discretion, whether in fixing the tax period following the end of which the taxable person must produce a return, or in determining the interval within which that return must be submitted, or in fixing the date for the actual payment of the tax by the taxable person. (2)

11 Confirmation of the fact that the detailed rules for the collection of VAT are largely unharmonised will be found in Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties, (3) and in respect of value added tax, as amended by Council Directive

79/1071/EEC of 6 December 1979. (4) As the Belgian Government points out, Directive 76/308 not only contains no reference to common rules governing the recovery of VAT, but expressly provides, in Article 6(1): `At the request of the applicant authority, the requested authority shall, in accordance with the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State in which the requested authority is situated, recover claims which are the subject of an instrument permitting their enforcement', which assumes the absence of a common system for the recovery of VAT.

12 It remains to be examined, in relation to the first question, whether the Belgian legislature has made proper use, compatible with Community law, of the freedom which it is allowed by the Sixth Directive to lay down rules for the recovery of VAT by establishing a system under which the limitation period starts to run from the 20th of the month following the quarter in which registration for VAT took place as regards taxable transactions carried out before that registration. The Court has consistently held that, even when they act within the scope of the procedural autonomy afforded to them by Community law, Member States must not lay down the procedures governing actions for safeguarding rights which individuals derive from the direct effect of Community law by laying down the rules which are less favourable than those governing similar domestic actions or which are such as to render virtually impossible the exercise of rights conferred by Community law. (5)

13 It should be made clear from the outset that, under the Belgian rules, the limitation period for businesses which are already registered runs from the 20th of the month following the quarter in which the taxable transaction was carried out, that is to say, from the exact day on which the time-limit set for the business to submit its return for that quarter expires. That has not been, and could hardly be, disputed.

14 The choice under the Belgian tax rules of the date on which both submission of the return and payment must take place is fully within the limits set out in Article 22(4) and (5) of the Sixth Directive, and the fixing of the same date as the starting-point of the limitation period certainly has the virtue of consistency. As the United Kingdom Government has appositely pointed out, it would be extremely odd if a limitation period started to run in the taxable person's favour before the date on which the tax authorities, having received his return, were actually in a position to verify his honesty by carrying out whatever checks seem appropriate to them, and to decide on the adjustments called for by any inaccuracies in that return. It would be a boon to tax evaders and would seriously prejudice the effectiveness of officials responsible for recovering VAT if the limitation period, which is intended to guarantee legal certainty for honest traders but at the same time might provide impunity for those who are less honest, were to run from a date when the tax authorities, for want of possession of the taxable person's return, are utterly powerless to act to protect the interests of the public purse, since evasion can be established only from the time of submission of a false return.

15 Is the arrangement under that system in the particular case of a new taxable person, whereby the starting-point of the limitation period shifts to the 20th of the month following the quarter in which registration was carried out by the tax authorities, objectionable?

16 It is true that, at the time of the facts of the case before the national court, the Community rules did not provide for registration and that taxable person status does not result from registration but from satisfaction of the conditions laid down by Article 4 of the Sixth Directive. However, I do not see any basis for considering that, by deferring the taxable person's obligation to submit a return and the associated obligation to pay until after registration, the Belgian tax rules have infringed the limits placed by the Court's case-law on the procedural autonomy of Member States. On the contrary, it seems to me that, by fixing as the anchor point in dealings between the tax authorities and the taxable person the date of registration, that is to say, the date on which the authorities took, as it were, formal note of the statement of commencement of activity provided for by Article

22(1) of the Sixth Directive, the Belgian rules take into account the requirements of legal certainty. Once registered, the taxable person should no longer have any doubt either as to the length of time available to him to discharge his periodic obligations or with regard to the limitation period from which he may benefit. Similarly, registration will enable the tax authorities to open a file in the taxpayer's name and to ensure that it is monitored regularly, whereas the receipt of returns and payments from an unidentified taxable person and registered as such could be a source of confusion which would certainly harm first and foremost the proper working of the administration but also be potentially detrimental to the taxable person himself.

17 It seems to me that to start organising dealings between the taxable person and the authorities from the point which is constituted by registration is a matter of common sense and could not be construed as an intention to restrict the exercise of the taxpayer's rights.

18 As far as the first question is concerned, I therefore conclude that the Sixth Directive, in particular Articles 4, 10(1) and 22 thereof, does not preclude national rules under which the limitation period for the recovery of VAT runs from the 20th of the month following the quarter in which registration for VAT took place, as regards taxable transactions carried out before that registration.

The second question

19 As regards the second question, I shall be brief, if only because the oral procedure disclosed a convergence of opinions as to the answer for which it calls.

20 As I have already indicated in point 3 above, this question borrows from tax- law theory terminology not found in the Sixth Directive. However, there is no doubt that what the national court is seeking to ascertain is the tax base for the calculation of the VAT which, pursuant to Article 6(2) of the Sixth Directive, is payable on the grant by a business of benefits in kind to its employees where the business has turned to a provider of services established in another Member State in order to obtain the service from which it wishes the employees concerned to benefit. More specifically, must that taxable basic amount include the VAT on the provision of services from another Member State which has been paid there?

21 As the Commission quite rightly states, it is necessary to refer to Article 11(A)(1)(c) of the Sixth Directive, which states that the taxable amount is, `in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services', and to ask whether `the full cost' means the cost inclusive of all tax or the cost exclusive of VAT.

22 It is clear from the very essence of the Community system of VAT, which was designed to replace the old systems of cascade taxes with a neutral system, that the tax must always be charged on a taxable amount which includes no VAT.

23 That rule was already contained in Article 8 of the Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax, (6) and was strongly reaffirmed by the Court in its judgment in the Schul case, (7) which concerned the taxation of imported second-hand goods. It is restated in Article 11 of the Sixth Directive with regard to VAT on importation.

24 The rule in question is therefore a completely general one which does not apply in different ways depending on whether the supply of services is carried out by a provider established within the national territory or by a provider established in another Member State.

25 It therefore matters little, as the Belgian Government acknowledges, that in SFI's case the vehicles which it provides to members of its staff for their private use have been leased to it by a

provider of services established in Luxembourg.

26 In all cases, it is the value of the supply exclusive of VAT which must be used as the taxable amount for the purposes of the taxation provided for by Article 6(2) of the Sixth Directive.

27 Since that is the case, it is not clear where any discrimination could arise with regard to services supplied from another Member State. Observance of the principle of fiscal neutrality inherent in the Community system of VAT takes away any legitimate interest which SFI has in relying not only on Article 95 of the EC Treaty, assuming that that provision, which refers to products, can extend to a supply of services from another Member State, but also on Article 59 of the EC Treaty, from which it would be necessary to argue whether the Belgian tax system had the effect of rendering less attractive for Belgian undertakings supplies of services offered by providers established in other Member States, which is not the case.

28 There nevertheless remains, it seems, a disagreement between SFI and the Belgian Government over the way in which the Belgian tax authorities calculated the VAT payable by SFI, the latter claiming that the tax authorities did not in fact take into account a taxable amount exclusive of tax.

29 That is a question of fact which it is not for the Court to resolve and which, moreover, the Court would be unable to examine since the necessary information is not included among the documents at its disposal.

30 I would nevertheless observe that when, in its written observations, SFI mentions a number of figures and proposes a method for calculating the VAT for which it would actually be liable, it does not perhaps argue as rigorously as it should.

31 Starting from the assertion that the taxable amount taken by Belgian authorities was an amount which included VAT paid in Luxembourg, it then goes on to make a calculation to arrive at the correct taxable amount, that is to say, the value exclusive of VAT, for which purpose it takes into account a VAT rate of 25%, which corresponds to the rate applied in Belgium.

32 However, if the Belgian tax authorities wrongly took into account as the taxable amount an amount including Luxembourg VAT, the VAT rate in question was 15% and not 25%.

33 I suppose that this confused issue could be settled before the national court in due course.

34 Since the Court must confine itself to providing an interpretation of Community law, I propose that the answer to be given to the second question should be that, in the case referred to in Article 6(2) of the Sixth Directive, the taxable amount to be taken into account must not include VAT borne by the business when paying for the goods or the service which it provides to its staff for their private use.

Conclusion

35. Having come to the end of my Opinion, I suggest that the Court answer the first question as follows:

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, in particular Articles 4, 10(1) and 22 thereof, does not preclude national rules under which the limitation period for the recovery of VAT runs from the 20th of the month following the quarter in which registration for VAT took place, as regards taxable transactions carried out before that registration.

I propose that the second question be answered as follows:

In the case referred to in Article 6(2) of the Sixth Directive 77/388, the taxable amount to be taken into account must not include VAT borne by the business when paying for the goods or the services which it provides to its staff for their private use.

(1) - OJ 1977 L 145, p. 1.

(2) - Judgment in Case 42/83 Dansk Denkavit [1984] ECR 2649, rightly referred to by the German Government in its written observations.

(3) - OJ 1976 L 73, p. 18.

(4) - OJ 1979 L 331, p. 10.

(5) - See, in particular, the judgment in Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen [1995] ECR I-4705.

(6) - OJ, English Special Edition Series 1967 (I), p. 16.

(7) - Case 15/81 [1982] ECR 1409.