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Opinion of Mr Advocate General Alber delivered on 17 September 1998. - Belgocodex SA v Belgian State. - Reference for a preliminary ruling: Tribunal de première instance de Nivelles - Belgium. - First and Sixth VAT Directives - Letting and leasing of immovable property - Right to opt for taxation. - Case C-381/97.

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Opinion of the Advocate-General

A - Introduction

1 In this reference for a preliminary ruling the Tribunal de Première Instance (Court of First Instance), Nivelles, has referred a question to the Court concerning the taxation of the letting of immovable property pursuant to 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'). It seeks to ascertain, in particular, the extent to which a right to opt for taxation of an otherwise tax-exempt letting of immovable property once granted by a Member State - in this case Belgium - can be repealed subsequently with retroactive effect. Such a right of option gives a taxable person the option of waiving the exemption from tax which would normally apply to lettings of immovable property and instead have such lettings subject to value added tax, thereby acquiring a related right to deduct input tax. (2)

2 The plaintiff in the initial proceedings, Belgocodex SA (hereinafter `the plaintiff'), disputes whether a Member State can abolish such a right of option with retroactive effect once it has granted it. In 1990, Belgocodex acquired a 25% share in a complex which was subsequently fully renovated as offices and shops. The plaintiff does not use the building itself but has let it to a taxable person which uses the leased premises for its economic activities. The plaintiff wishes to reclaim part of the costs of the renovation work which lasted from 1990 to 1993 by deducting the input tax charged for that work.

3 The letting of immovable property is, in principle, exempt from taxation pursuant to Article 13B of the Sixth Directive, which, under the heading `Other exemptions', provides:

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

...

(b) the leasing or letting of immovable property ...

...'.

4 Pursuant to Article 13C of the Sixth Directive, Member States may, however, make available the option of subjecting the leasing of immovable property to tax. Article 13C thus provides:

`Member States may allow taxpayers a right of option for taxation in cases of:

(a) letting and leasing of immovable property;

... .

Member States may restrict the scope of this right of option and shall fix the details of its use.'

5 In a Law of December 1992 (`the 1992 Law'), which inserted Article 44(3)(2)(c) into the Belgian VAT Code, Belgium availed itself of the option provided by Article 13C of the Sixth Directive. Article 44(3)(2)(c) provides that value added tax is payable on `lettings to a taxable person for the purposes of his economic activity of buildings ... where the lessor has given notice of his intention to let the building subject to tax; the King shall determine the form of the option, the manner of exercising it and the conditions which the leasing contract must meet.' The Law came into force on 1 January 1993. The King, however, never issued the measures provided for by the Law.

6 The plaintiff considers that it may opt for taxation and thereby claim the right to deduct input tax. The Belgian Government, on the other hand, views the letting and leasing of immovable property as a tax-exempt activity, basing this view on the fact that the Law of July 1994 (`the 1994 Law') repealed Article 44(3)(2)(c) of the Belgian VAT Code with retroactive effect. Furthermore, argues the Belgian Government, the right of option provided for could not have had any legal effect as the King never issued the implementing measures.

7 The plaintiff considers that, once granted, a right of option cannot then be repealed with retroactive effect. The reintroduction of the tax exemption for the letting of immovable property to taxable persons (which is the basic rule provided for by the Sixth Directive) infringes the principle of neutrality and is contrary to the basic principle of the value added tax system - which allows no exceptions. This is set out in Article 2 of the First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (3) (hereinafter `the First Directive'). The first paragraph of Article 2 provides: `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 tax is charged.' The second paragraph provides: `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.'

8 Because of the questions arising as to the interpretation of the Sixth Directive, the court hearing the case has referred the following question to the Court for a preliminary ruling:

`Does Article 2 of the First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, which establishes the principle of a common system of value added tax, prevent a Member State - in this case Belgium - which has availed itself of the possibility provided for by Article 13C of the Sixth Council Directive 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, and has thus given its taxpayers the right to opt for taxation of certain lettings of immovable property, from abolishing, in a subsequent law, that right of option and thus reintroducing the exemption in full?'

B - Opinion

9 The national court refers in its question to both the First and the Sixth VAT Directives. Accordingly, one must first consider the relationship between the two directives. Article 1(1) of the First Directive provides that the Member States are to replace their existing system of turnover taxes by the common system of value added tax, which is described in Article 2 of the First Directive.

10 Pursuant to Article 1(1) of the Sixth Directive, the system of value added tax introduced by the First Directive is to be adapted to conform to the provisions of the Sixth Directive. (4)

11 This leads the Commission to conclude that the application of the common system of taxes is governed in particular by the provisions of the Sixth Directive. It further implies that the provisions of the Sixth Directive can no longer be called into question by reference to the provisions of the First Directive on the common system of value added tax. This applies, for example, to tax exemptions provided for under the Sixth Directive. The eleventh recital in the preamble states that a common list of tax exemptions should be drawn up in order to ensure a uniform collection of own resources in all the Member States. These common tax exemptions are defined in the Sixth Directive as part of the entire system of value added tax and its application. They may very well - and this is also the argument advanced by the Belgian Government - derogate from the general system.

12 The disputed Belgian provision falls, therefore, to be examined by reference to the provisions of the Sixth Directive. Of particular relevance here is Article 13, which, in Part B, sets out the tax exemptions applying to the letting and leasing of immovable property, while Part C allows Member States to grant taxable persons the right to opt for taxation in the case of letting and leasing of immovable property. It is common ground between the parties that in introducing its 1992 Law Belgium has availed itself of the option provided for in Article 13C.

13 There is disagreement, however, as to whether such a right of option was in fact granted in the present case. The Belgian Government considers that the 1992 Law was one which, in the absence of implementing measures which were to have been adopted by the King, could have no legal effect and that it therefore could simply be revoked with retroactive effect. As all parties have submitted, it is, however, for the court referring the question for a preliminary ruling to rule on this point. There is much to support the argument that the Law acquired legal force despite the absence of the royal implementing measures, as it would not otherwise have needed to be expressly repealed by the 1994 Law. As long as it existed, one could reasonably expect that the royal measures would be adopted. These were probably not an express precondition for the validity of the Law. However, as I have explained, this point is one which ultimately must be determined by the national court.

14 Should the national judge come to the conclusion that in the present case Belgian law confers no rights on individual taxable persons, it must be pointed out that repeal of the 1992 Law, which would then have to be regarded as having no effect, might breach the principles of legal certainty and of the protection of legitimate expectations. As the Commission rightly states, one must then consider whether the letting was not perhaps already subject to tax and whether the taxable person had taken this into account or whether a deduction of input tax was permissible.

15 The following observation may be added here:

It is true that in considering whether a Member State has availed itself of the option allowed by Article 13C, the question is not whether or not the Sixth Directive has been implemented. Thus, the taxable person could not have acquired a right to deduct tax by virtue of the direct effect of the Directive. As the Belgian Government has, however, already enacted and then repealed the Law in question, it might be thought that the Government had committed itself in some way to granting a right of option in accordance with the Sixth Directive, thereby allowing a parallel to be drawn with direct effect in relation to the right to deduct tax.

16 Should the national court come to the conclusion that the Belgian Law granted an option in accordance with Article 13C of the Sixth Directive, the question arises whether this option could have been withdrawn without contravening the Sixth Directive. The Commission and the Belgian Government say that it could.

17 In this regard, it must be observed first of all that the Sixth Directive gives Member States a wide discretion under Article 13C. Thus, it is for each Member State to decide whether to introduce the right of option in the first place. If a Member State does so, it has the further possibility of determining its scope and the details of its use. If, then, a Member State is at liberty to decide whether and in what manner it will grant such a right of option, there is no obvious reason why it should not also be able to withdraw such a right.

18 The Commission refers in this context to the judgment in the Italittica (5) case. In that judgment, the Court held with reference to the provisions of the Sixth Directive - in that case Article 10(2) - that these were to be interpreted broadly, as the Community legislature had allowed the Member States a broad discretion.

19 The Belgian Government submits in this regard that Article 13C clearly does not have direct effect due to the broad discretion given to the Member States. (6) According to Community law, the Belgian legislature was, therefore, entirely at liberty to grant or not to grant the right of option. Article 13C thus does not prevent Member States from withdrawing this option and maintaining or reintroducing the rules in Article 13B.

20 It should be noted, furthermore, that the Sixth Directive assumes, in principle, that the letting and leasing of immovable property are to be exempt from tax, even if this represents a derogation from the system of tax as defined in the First Directive. Under the Sixth Directive, a Member State can give taxable persons the possibility of opting for taxation. There is no evident reason why a Member State which has availed itself of this derogation should not be allowed to revert to the basic rule, which provides for tax exemption. The fact that this tax exemption is - as the plaintiff claims - actually a derogation from the general system of value added tax is immaterial. It is permitted under the Sixth Directive and, therefore, cannot - as already mentioned - be contrary to the First Directive.

21 Nor are the rules which the Commission initially provided for in the draft Directive relevant here. The plaintiff drew attention to the fact that in its first draft of the Sixth Directive the Commission had wished to subject all lettings of immovable property for commercial purposes to value added tax. The only decisive point, however, is what tax exemptions are provided for under the Sixth Directive as actually enacted. Under its provisions, there is no general right of option; one exists only if it is granted by the Member States.

22 The plaintiff, unlike the Commission and the Belgian Government, takes the view that, once it has exercised the option provided for under Article 13C to tax lettings and leasings - at the option of taxable persons - a Member State can no longer go back on its decision. In support of this view, the plaintiff cites the case-law of the Court on Article 28 of the Sixth Directive. Article 28(3) of the Sixth Directive allows the Member States, during a certain transitional period, to continue to tax, for example, certain turnover exempt from tax pursuant to Article 13 or grant the taxable persons

the possibility to opt for taxation of the transactions exempt from tax under Annex G.

23 In its established case-law on Article 28, the Court held, in relation to a disputed Spanish regulation which subjected certain services to the general VAT system, that: `Since the Kingdom of Spain subjected the provision of the services in question ... to the general scheme of VAT by Law ... it could no longer subsequently claim the right to continue to exempt those activities pursuant to Article 28(3)(b) of the Sixth Directive.' (7) So, reversion to the exception was not allowed. In the present case, however, the reversion is back to the rule (in the Sixth Directive), even though the possibility provided for therein itself represents an exception to the First Directive.

24 The case-law cited cannot be applied to the granting of a right of option pursuant to Article 13C. Article 28 is part of Title XVI of the Sixth Directive, headed `Transitional Provisions'. It contains provisions applying to the transition or adaptation of national laws to the Sixth Directive. Accordingly, the provisions of Article 28(3) are only intended to apply for a `transitional period'. As Belgium rightly argues, they entail a temporary authorisation to tax or exempt from tax certain transactions, which do not correspond to the general effect of the Sixth Directive. Against this background, the Court held that this possibility could no longer be used if the Member State had already laid down rules or provided for taxation in a certain field in accordance with the Sixth Directive.

25 The plaintiff considers that the parallel with the present case lies in the fact that exempting the letting of immovable property to a taxable person contravenes the principle of neutrality of value added tax enshrined in the First Directive. The plaintiff explains, by way of an example, that the exemption from tax of the letting of immovable property results in unequal treatment thereby breaching the principle of neutrality, depending on whether a company uses its property itself for the purposes of its economic activity or lets it out. In the latter case, it cannot deduct tax on any costs of renovation. Those costs are therefore added to the rent and passed on by the tenant to his customer, which produces a snowball effect on value added tax to be paid.

26 The plaintiff goes on to argue that if a Member State adapts its tax laws by granting a right of option pursuant to Article 13C to conform with the provisions of the First Directive, it may no longer - just as in the case of Article 28 - go back on its decision.

27 But the exemption of letting and leasing of immovable property from value added tax, which the plaintiff considers to be not in conformity with the system, is precisely the basic position under the Sixth Directive. It is not evident, therefore, why a Member State - having availed itself of the possibility provided in the Directive of granting a right of option - should be prevented from returning to the basic position. If the plaintiff is arguing that a Member State which has availed itself of the possibility offered by Article 13C may no longer go back on its decision, this would mean that a Member State which has availed itself of the possibility of derogation may no longer return to the basic rule. This is quite the opposite of what the case-law of the Court on Article 28 - as explained above - provides, namely that a Member State, once it has adjusted its tax laws to conform to the provisions of the Sixth Directive, may no longer revert to the exceptions under Article 28.

28 The plaintiff also refers in its argument to the Opinion in Case C-35/90 cited above. In that case, the Advocate General also reached the conclusion that the derogation available under Article 28 could no longer be used if a regulation conforming with the Directive had been introduced or already existed. The plaintiff relies in particular on the argument that this `... would be contrary to the principles of general application and neutrality of the tax,' which underlie the Directive and which `are an essential key in interpreting derogating provisions ...'. (8) The plaintiff considers that the reintroduction of the exemption in the present case is contrary to the principles of neutrality and the general application of the tax and that on this ground alone it cannot be allowed.

29 It is appropriate to mention here, however, that the Advocate General too took as his reference the rule laid down in the Sixth Directive and only examined the principles of general application and neutrality of the tax as laid down in the First Directive as a supplementary line of argument. Thus, he reasoned that an exemption would not be compatible with the abovementioned principles, but went on to say: `... apart from the fact that it is quite excluded by the clear terms of the provision ...'. (9) This shows that, in his view too, the crucial provision is that which is expressly laid down in the Sixth Directive.

30 He also referred to the judgment in the Kerrutt case from which he quotes, `... its wording [that of Article 28(3)(b)] precludes the introduction of new exemptions or the extension of the scope of existing exemptions after the date of entry into force of the directive.' (10) This also suggests for him that it was the provisions of the Sixth Directive and the exemptions or impositions of tax provided for therein which mattered and not the First Directive, which merely established the system but does not govern its implementation.

31 Thus the Court also held in its judgment: `... the extension of the transitional scheme of exemptions from VAT beyond the period originally provided for cannot justify the right of Member States to grant exemptions which they were not authorised to grant. Such a right would compromise the object of Article 28(3)(b), which is to enable a progressive adjustment of the national laws in the areas in question.' (11) As Belgium has, however, reintroduced an exemption which is expressly provided for in the Directive, and not one which (as in the judgment cited) it was not authorised to grant, it is not clear why the Member State should be prevented from doing so. It must, therefore, be concluded that a Member State which avails itself of the possibility available under Article 13C may also go back on this decision.

32 Finally, it remains to be examined whether the granting of such an option pursuant to Article 13C of the Sixth Directive may also be revoked with retroactive effect. Even the Commission considers that this might pose problems in relation to rights to deduct tax which have already arisen. The common system of value added tax of the First Directive as well as of the Sixth Directive provides that the taxable person may deduct value added tax due or paid in respect of goods and services supplied to him by another taxable person and which he has used for the purposes of his own taxable transactions (Article 17(2) of the Sixth Directive). Article 17(1) provides that this right to deduct arises when the deductible tax becomes chargeable. There is thus a link between taxation and the right to deduct.

33 The Court has thus held `that the scheme of the directive is such that ... by availing themselves of an exemption persons entitled thereto necessarily waive the right to claim a deduction in respect of input ...'. (12) The `right of deduction ... is an integral part of the VAT scheme and in principle may not be limited.' (13)

34 This means, and the Commission agrees, that taxable persons who opted for taxation when the Belgian Law (purportedly) applied are entitled to a right of deduction which cannot, therefore, be retroactively disallowed. The Commission and the Belgian Government agree that these existing deduction rights should be respected.

35 As regards the case before the national court, however, the Belgian Government points out that the plaintiff did not expressly exercise its right of option. According to the Court, the exercise of a right of option which has been granted is a matter for the taxable person alone. (14) On the other hand, the last sentence of Article 13C provides that the Member States are to fix the details of its use. Accordingly, and this is common ground, it is for the national judge to decide whether or not the plaintiff's exercise of its right of option was effective.

36 The parties do not agree on this question. The plaintiff considers that it has done everything necessary to expressly assert its right of option. It claimed a deduction and drew attention to the fact that the rent should actually have been taxed. It was unable to bring the value added tax into account as the relevant implementing measures had not yet been adopted.

37 The Belgian Government, however, considers that the option could only then have been effectively exercised if Belgocodex SA had formally stated this intention to the authorities and charged the relevant taxes on the rent and passed these on to the State. As previously mentioned, it is, however, a matter for the national judge to decide this point having regard to the link between taxation and the right to deduct.

38 It is appropriate at this stage to draw attention once again to the considerations mentioned at points 14 and 15 above, given that the same must apply to the exercise of the right of option as to the introduction or validity of the right of option itself. Even if Article 13C of the Sixth Directive leaves it to the Member States to restrict the scope of the right of option and to fix the details of its use - and such measures have still not been adopted under Belgian law - it must none the less be remembered in the present case that the reason why taxable persons who decide to use the option cannot properly exercise it is precisely because the relevant measures have not yet been adopted by the Government. So, the requirements placed on the exercise of the right of option must not be too strict, as otherwise the right of deduction under Article 17 of the Sixth Directive, which is an integral part of the system of value added tax, would be affected. Where the right to opt for taxation is withdrawn with retroactive effect, only persons who have not in any way indicated their decision to exercise the right of option should be denied the right to assert a claim.

C - Conclusion

39 On the basis of the foregoing considerations, I propose that the question referred to the Court should be answered as follows:

Article 2 of the First VAT Directive does not preclude interpreting the provisions of the Sixth VAT Directive, in particular, Articles 13C and 13B(b), as not preventing a Member State which has availed itself of the possibility provided for by Article 13C of the Sixth Directive and given taxable persons the right to opt for the taxation of certain lettings of immovable property from revoking that right of option by a subsequent - even retroactive - law and thus reintroducing the exemption in full. This only applies, however, to the extent that rights of deduction (as defined in Article 17 of the Sixth Directive) that have arisen by virtue of the taxable person's making clear that he wishes to exercise the option are not impaired.

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

(2) - The proceeds of the leasing or letting will otherwise probably be subject to income tax or some comparable tax.

(3) - OJ, English Special Edition 1967, p. 14.

(4) - Article 1(1) provides: `Member States shall modify their present value added tax systems in accordance with the following Articles.'

(5) - Judgment in Case C-144/94 Ufficio IVA di Trapani v Italittica [1995] ECR I-3653.

(6) - The direct effect of Article 13B was confirmed - as the Commission also submits - in the judgment in Case 8/81 Becker. In its reasons the Court stated inter alia `that Article 13(C) does not in any way confer upon the Member States the right to place conditions on or to restrict in any manner whatsoever the exemptions provided for by Part (B). It merely reserves the right to the Member States to allow, to a greater or lesser degree, persons entitled to those exemptions to opt for taxation themselves, if they consider that it is in their interest to do so' (Case 8/81 Becker v Finanzamt Münster-Innenstadt [1982] ECR 53, at paragraph 39).

(7) - Judgment in Case C-35/90 Commission v Spain [1991] ECR I-5073, at paragraph 7.

(8) - Opinion of Advocate General Tesauro in Case C-35/90 (judgment cited in footnote 7), point 5.

(9) - Opinion in Case C-35/90 (cited in footnote 8), point 5 (my emphasis).

(10) - Opinion in Case C-35/90 (cited in footnote 8), point 5, and judgment in Case 73/85 Kerrutt v Finanzamt Mönchengladbach-Mitte [1986] ECR 2219, at paragraph 17.

(11) - Judgment in Case C-35/90 (cited in footnote 7), at paragraph 9.

(12) - Judgment in Case 8/81 (cited in footnote 6), at paragraph 44.

(13) - Judgment in Case C-62/93 BP Supergas v Greek State [1995] ECR I-1883, at paragraph 18.

(14) - Judgment in Case 8/81 (cited in footnote 6), at paragraph 38.