OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 22 May 2012(1)

Case C?165/11

Da?ové riadite?stvo Slovenskej republiky

v

Profitube spol. s.r.o.

(Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky, Slovakia)

(Value added tax – Goods imported from a non-member state and placed under a suspension arrangement in a customs warehouse in a Member State – Sale of goods with the suspension arrangement maintained – Supply of goods – Taxable transaction)

1. If a product is imported into the European Union using a suspension arrangement provided for in the customs rules, for example in order to be processed and then re-exported to a non-member state, that product does not acquire the status of Community goods. Accordingly, as far as Customs are concerned, no duty is due. What happens, however, if that product, which is in a customs warehouse, is sold by one EU business to another EU business while remaining, physically, in that same warehouse and, legally, under that suspension arrangement? In particular, must value added tax ('VAT') be paid on that sales transaction? That, in essence, is the question which the Slovak Supreme Court has put to the Court of Justice in its reference for a preliminary ruling.

I – **Legislative framework**

A – *Customs legislation*

2. The concept of the 'customs territory' of the European Union is defined in Article 3 of the Customs Code. (2) In particular, under that article, the customs territory is to comprise the territory of all the Member States, with the exception of those places expressly mentioned in that article.

3. Article 84 of the Customs Code lists '[s]uspensive arrangements': in particular, those include customs warehousing and inward processing in the form of a system of suspension. Such arrangements enable non-Community goods to be introduced into the customs territory of the European Union pursuant to Articles 98 and 114 without having to pay duties. Customs warehousing is designed to allow goods to be stored, while inward processing is designed to allow those goods to be processed.

4. Under Article 98(2) of the Customs Code, a customs warehouse is 'any place approved by and under the supervision of the customs authorities where goods may be stored under the conditions laid down'.

B – *VAT legislation*

5. At the time when the facts concerned in the main proceedings occurred, that is, in 2005-2006, the VAT legislation applicable was that contained in the Sixth Directive. (3)

6. According to Article 2 of the Sixth Directive, the following are to be subject to VAT:

'1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods'.

7. According to Article 5(1), the '[s]upply of goods' means 'the transfer of the right to dispose of tangible property as owner'.

8. For the purposes of the Sixth Directive, the territory of the European Union is defined in Article 3. It comprises the territory of the Member States, excluding the places expressly mentioned in that article.

9. Article 16 of the Sixth Directive contains some rules concerning exemptions from VAT. In particular, that article, as amended – using a curious legislative technique – by Article 28c of that directive, (4) provides as follows:

'1. Without prejudice to other Community tax provisions, Member States may, subject to the consultations provided for in Article 29, take special measures designed to exempt all or some of the following transactions …

…

B. supplies of goods which are intended to be:

…

(c) placed under customs warehousing arrangements or inward processing arrangements;

…

D. supplies of goods and of services carried out:

(a) in the places listed in B (a), (b), (c) and (d) and still subject to one of the situations specified therein;

…’

10. Thus, in essence, Article 16 of the Sixth Directive authorises the Member States to exempt from VAT the sale of goods which are subject to a customs suspension arrangement and which remain subject to that arrangement after their sale.

II – **Facts of the case, main proceedings and questions referred**

11. The case in the main proceedings concerns some semi-finished steel products (coils) imported from Ukraine on behalf of the Slovakian company Profitube and placed under a suspension arrangement in Slovakia. More specifically, the goods were placed under a customs warehousing arrangement at first, and then under an inward processing arrangement in order to be processed into structural steel.

12. The goods were then sold by Profitube to another Slovakian company, MERCURIUS, and were once again placed under the customs warehousing arrangement, without actually leaving the warehouse they had been stored in.

13. The Slovakian tax authorities requested payment of the VAT relating to that sale by Profitube to MERCURIUS, considering that transaction, for the purposes of VAT, to be a normal supply of goods subject to tax.

14. Profitube contested that assessment by the tax authorities in judicial proceedings, submitting that, since the goods in question are not considered Community goods under Customs law, those goods should not fall within the scope of the VAT rules either.

15. Profitube’s action was successful at first instance before the Krajský súd (Regional Court) of Bratislava, which annulled the assessment by the tax authorities. On appeal, however, that position was overturned by the Najvyšší súd (Supreme Court), the referring court in the present case, which considered the transaction to be subject to VAT.

16. However, Profitube brought an appeal before the Ústavný súd (Constitutional Court), which set aside the judgment of the Supreme Court and referred the case back to that court. In particular, according to the Constitutional Court, the Supreme Court had not sufficiently considered some provisions of Slovakian law that could endorse the primacy of the customs legislation over the legislation relating to VAT.

17. At that point, the Supreme Court decided to stay the proceedings and submit the following questions to the Court of Justice for a preliminary ruling:

‘1. In a situation in which, in 2005 and 2006, goods from a non?member state of the European Union (Ukraine) were placed in a public customs warehouse in the territory of a Member State of the European Union by an importer from that Member State, were subsequently processed in an inward processing suspension procedure in that customs warehouse, and the resulting product was not immediately exported within the meaning of Article 114 of Regulation No 2913/92 but instead was sold in that same warehouse by the processor of the goods to another company from that Member State, which did not release it from the customs warehouse for free circulation, but subsequently returned it to the customs warehousing procedure, is that sale of goods within the same customs warehouse still subject solely to Community customs rules, or has the legal situation been changed by that sale to the extent that the transaction is now subject to the system under the Sixth Council Directive of 17 May 1977 (77/388/EEC), i.e., is it possible, for the purpose of the system of value added tax under the Sixth Directive, to regard a public customs warehouse

located in the territory of a Member State as part of the territory of the Community, or the territory of that Member State, in accordance with the definitions provided in Article 3 of the Sixth Directive?

2. In light of the doctrine of abuse of rights developed by the Court of Justice of the European Union and concerning the application of the Sixth Directive (C?255/02 *Halifax and Others*), is it possible to treat the above as a situation in which the applicant, by selling goods in a public customs warehouse located in the territory of the Slovak Republic, has already made supply for consideration in the Slovak Republic?

3. If the reply to the first question is in the affirmative, in that the transaction in question is now subject to the system under the Sixth Directive, is that transaction then a chargeable event

a. under Article 10(1) and (2) of the Sixth Directive, with the tax becoming chargeable as a result of the delivery of the goods in the customs warehouse located in the territory of the Slovak Republic; or

b. on the ground that, after the goods were imported from a third country (Article 10(3) of the Sixth Directive), the customs procedure ended while the goods were held in storage in that customs warehouse upon sale thereof to another person from the Member State?

4. Are the objectives of the Sixth Directive as expressed in the preamble thereof, or the objectives of the GATT (WTO), attained if the sale of goods imported from a third country to a customs warehouse and then processed therein and sold to another person from that Member State in the customs warehouse in the territory of the Member State of the European Community is not subject to value added tax in that Member State?'

III – **Appraisal**

A – *The obligation to pay VAT (in particular, Questions 1 and 3)*

18. In general, VAT is payable on goods whenever they are imported or sold. In the present case, it is not disputed that there had been no importation from the time when the goods at issue in the main proceedings were placed under the customs suspension arrangement. Accordingly, any obligation to pay VAT may be based only on the existence of a 'supply of goods' displaying the characteristics mentioned in the Sixth Directive.

19. More specifically, as a general rule, VAT is payable, for a supply of goods, when three cumulative conditions are met. Under Article 2 of the Sixth Directive, first, the transaction must be a supply of goods effected for consideration; second, the supply must be effected by a taxable person acting as such.

20. Third, the transaction must be carried out *within the territory of the European Union*, as defined in Article 3 of the Sixth Directive.

21. In the present case, the referring court casts no doubt on the satisfaction of the first two conditions and it is not therefore necessary to examine them further. The sale was carried out for consideration by a taxable person acting as such, and involved the transfer by the seller to the buyer of the right to dispose of property as owner. The questions referred seek rather to clarify whether the third condition has also been met. According to the interpretation given by the applicant in the main proceedings, goods which are under a suspension arrangement (and therefore have not become Community goods under customs law) should not be considered as being situated, for the purposes of VAT, within the territory of the European Union. On the other

hand, all the other parties who have submitted observations in the present case have contended that the sale of the goods by Profitube to MERCURIUS was a normal economic transaction subject to VAT.

22. The questions raised by the national court lend themselves to being considered together, since they concern a single underlying issue. Moreover, as will be seen, if the answer to the questions is that the Sixth Directive requires payment of VAT, there is no need to answer Questions 2 and 4.

23. This is precisely my position. In my view, VAT is payable. No rule exists in EU law permitting exemption from the obligation to pay tax in a situation involving the sale of goods placed – and intended to remain – under a customs suspension arrangement.

24. First, it should be noted that, in EU law, the customs rules and the rules relating to VAT are two fundamentally different bodies of legislation. That does not mean, of course, that there are no reciprocal relations between the two: for example, Article 16 of the Sixth Directive, as can be seen, governs a situation to which both the customs rules and the rules relating to VAT must be applied. What must be clearly understood, however, is that two sets of rules are concerned which, on the one hand, have the same ranking as instruments of secondary legislation – so there can be no automatic primacy of the one over the other – and which, on the other hand, pursue totally different objectives. The fact that some goods are part of a ‘special’ arrangement under customs law does not mean that they must automatically receive special treatment under VAT law, and vice versa.

25. Second, for the purposes of VAT, a customs warehouse is indisputably a part of the territory of the European Union. The Sixth Directive expressly specifies those parts of the territory of the Member States to which the VAT system does not apply, and it does not mention customs warehouses. The Court itself has already found (in a case which had some similarities with the present case) that, for the purposes of VAT, a customs warehouse is part of the territory of the European Union. (5) More generally, as the case?law shows, the rules laid down in the Sixth Directive ‘have binding and mandatory force throughout the national territory of the Member States’. (6)

26. Accordingly, the fact that the goods supplied in the present case were physically situated in a customs warehouse is irrelevant for the purposes of VAT, just as it is irrelevant, in that regard, that those goods were subject to a customs suspension arrangement.

27. Moreover, *even in customs law, customs warehouses are part of the territory of the European Union*. The fact that the goods in those warehouses may have a special customs status, linked to their being easy to inspect, does not alter the fact that they are in no way extraterritorial locations: they are merely, as Article 98(2) of the Customs Code states, places approved by the customs authorities for storing goods in accordance with certain specific conditions.

28. Accordingly, a sale such as the one being examined by the court in the main proceedings is a supply of goods located within the territory of the European Union and is subject to the obligation to pay VAT.

29. Article 16 of the Sixth Directive also confirms, unequivocally in my view, that this interpretation is correct.

30. As can be seen above, that article states that the Member States may exempt certain transactions from VAT, including the supply of goods which are under a customs suspension arrangement and remain under that arrangement following that transaction. That means that a

Member State could decide to exempt a sale such as the one in question in the present case from VAT. (7) However, it is clear that, although the Sixth Directive states that the Member States may exempt transactions such as the one at issue in the present case from VAT, where that exemption is not granted, *the VAT will have to be paid*. It would make no sense to provide for the possibility of exemption from VAT if payment of that tax were not the general rule. In other words, the Sixth Directive *relies on the premiss that a sale of goods which are under a customs suspension arrangement is normally subject to VAT* and may be exempted only if the Member States decide to grant an exemption.

31. In the present case, it is clear from the observations submitted to the Court that Slovakia has not granted an exemption: the Slovakian Government itself has expressly confirmed that fact. However, it is clearly for the national court to establish whether or not there exist any national provisions which may have introduced the exemptions allowed under Article 16 of the Sixth Directive into national law.

B – *Questions 2 and 4*

32. In the light of the answer that I propose to give to the main question raised by the national court, it is not necessary for the Court to examine Questions 2 and 4, which have been formulated purely for examination if the Court were to affirm that, in a situation such as that at issue in the present case, VAT is not payable.

IV – **Conclusion**

33. In the light of the foregoing considerations, I propose that the Court give the following answer to the questions submitted by the Najvyšší súd Slovenskej republiky:

Unless a Member State has made use of the opportunity to grant an exemption under Article 16 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, the fact that a sale involves goods placed under a customs suspension arrangement and/or placed in a customs warehouse does not alter that sale’s being subject to value added tax.

1 – Original language: Italian.

2 – Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended.

3 – 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.

4 – The part of Article 28c which amends Article 16 was inserted by Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax – scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18).

5 – Case C?305/03 *Commission* v *United Kingdom* [2006] ECR I?1213, paragraph 40. The Court observed in that case that the opportunity for exemption provided for in Article 16 of the Sixth Directive relates to ‘transactions effected within the territory of the country’.

6 – Case C?111/05 *Aktiebolaget NN* [2007] ECR I?2697, paragraph 55.

7 – Some doubt may be expressed here, claiming that the exemption set out in Article 16 should

be applied only where there is a supply of goods whose customs status *remains unchanged* despite that transaction, whereas in the present case the goods were transferred at the moment of their supply from an inward processing arrangement to a customs warehousing arrangement. However, I maintain that such a reading would not be correct, and that the transferral from one suspension arrangement to another does not prevent that transaction from being exempted, provided that such exemption is provided for by the Member State concerned.