JUDGMENT OF THE COURT (Fifth Chamber)
3 December 1998 *

In Case C-381/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal de Première Instance de Nivelles (Belgium) for a preliminary ruling in the proceedings pending before that court between

Belgocodex SA

and

Belgian State

on the interpretation of 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 (OJ, English Special Edition 1967, p. 14) and of Article 13C of the Sixth Council Directive (77/388/EEC) of 17 May 1997 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),

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the First Chamber, acting as President of the Fifth Chamber, J. C. Moitinho de Almeida, C. Gulmann, L. Sevón and M. Wathelet, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Belgocodex SA, by Philippe Malherbe, Denis Waelbroeck and Pierre-Philippe Hendrickx, of the Brussels Bar,

— the Belgian Government, by Jan Devadder, General Adviser in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, assisted by Bernard van de Walle de Ghelcke and Guido De Wit, of the Brussels Bar,

— the Commission of the European Communities, by Hélène Michard and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Belgocodex SA, the Belgian Government and the Commission at the hearing on 18 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 17 September 1998,

gives the following

Judgment

1 By judgment of 3 November 1997 received at the Court on 7 November 1997, the Tribunal de Première Instance (Court of First Instance), Nivelles, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of 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 (OJ, English Special Edition, 1967, p. 14, hereinafter 'the First Directive') and of Article 13C 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, hereinafter 'the Sixth Directive').

2 The question has been raised in proceedings between the Belgian company Belgocodex SA (hereinafter 'Belgocodex') and the Belgian authorities responsible for administering value added tax (hereinafter 'the VAT administration') concerning the right to opt for taxation in the case of the letting and leasing of immovable property.

3 Article 2 of the First Directive 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.

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.

...'

4 Article 13B of the Sixth Directive 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 ...

Member States may apply further exclusions to the scope of this exemption.'

5 Under the heading 'Options', Article 13C of the Sixth Directive 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.'

6 In Belgium, the Law of 28 December 1992 amending the VAT Code and the Code of Registration, Mortgage and Registry Charges (*Moniteur Belge* of 31 December 1992, p. 27577) inserted into the Belgian VAT Code Article 44(3)(2)(c), under which value added tax is payable on 'lettings to a taxable person, for the purposes of his economic activity, of buildings other than those subject to a (financial leasing) contract 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'. That Law entered into force on 1 January 1993. However, the implementing measures provided for by the Law have not been adopted.

7 Article 44(3)(2)(c) was repealed by the Law of 6 July 1994 laying down fiscal provisions (*Moniteur Belge* of 16 July 1994, p. 18705; this Law is known as a 'Loi de réparation'). Pursuant to Article 91 of that Law, the provision was repealed retroactively from 1 January 1993.

8 According to the judgment referring the question for a preliminary ruling, in 1990 Belgocodex acquired a 25% share in a complex consisting of land and buildings which were to be renovated as offices or shops. The renovation work, which began in 1990 and continued until 1993, was carried out by a contractor which invoiced its services by charging value added tax.

9 Having let the building to a taxable person which uses it for its economic activities, Belgocodex, pursuant to Article 44(3)(2)(c) of the VAT Code, deducted the input tax charged in respect of the renovation work done on the building let.

10 Following an inspection carried out in 1995, the VAT administration disallowed the deductions of value added tax made between 1 July 1990 and 31 December 1994 in relation to a principal amount of BFR 1 852 365 plus interest for late payment and fines. It maintained that the letting of immovable property was an exempt activity for which deduction of input tax was not allowed.

11 On 3 June 1996, Belgocodex brought an action before the Tribunal de Première Instance, Nivelles, against that decision, claiming that it was entitled to deduct input tax by virtue of the Law of 28 December 1992, which had introduced a right of option in the matter and that the Loi de réparation, which abolished the right of option and thereby the possibility of deducting input tax, was contrary to the Community directives on value added tax.

12 Taking the view that the outcome of the case depended on the interpretation of the First and Sixth Directives, the Tribunal de Première Instance, Nivelles, decided to stay proceedings and to refer 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 legislation of Member States concerning 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?'

The question referred for a preliminary ruling

13 The plaintiff in the main proceedings considers that this question must be answered in the affirmative. In its view, the VAT exemption for lettings of immovable property to lessees liable to pay VAT is contrary to the principle of fiscal neutrality laid down in Article 2 of the First Directive since it breaks the chain of deductions and increases the fiscal charge. Given its nature as a derogation, this exemption should be interpreted narrowly. The fact that, in Article 13 C, the Sixth Directive invites the Member States to reduce the scope of the exemption for lettings of immovable property by allowing them to give taxpayers the possibility of opting for taxation shows that Community convergence and harmonisation must go in the direction of making such lettings subject to tax. It follows that, where a Member State has decided to reduce the scope of the exemption, it can no longer change its mind and reintroduce the exemption at a later date.

14 The Belgian Government and the Commission, on the other hand, consider that the Member States may at any time reverse a decision to grant an option and apply instead the exemption regime under Article 13B of the Sixth Directive and that Article 2 of the First Directive does not preclude the Belgian legislature's action. In their view, the power which Member States have under Article 13C to grant taxpayers the right to opt for taxation of certain lettings of immovable property also implies the opposite possibility, namely withdrawal of the option and reintroduction of the exemption provided for by Article 13B.

15 It must be recalled in this regard that Title X (Articles 13 to 16) of the Sixth Directive establishes a system of exemption from VAT for certain transactions. The exemptions include, under Article 13B(b), the letting and leasing of immovable property. However, as far as these transactions are concerned, Member States have the power, under point (a) of the first paragraph of Article 13C, of reintroducing liability to tax, by means of a right of option which they may allow their taxpayers to exercise. Under the second paragraph of Article 13C, Member States may restrict the scope of this right of option and fix the details of its use.

16 As the Court has held previously, Member States may, by virtue of this power, allow persons benefiting from the exemptions provided for by the Directive to waive the exemption in all cases or within certain limits or subject to certain detailed rules (judgment in Case 8/81 *Becker* [1982] ECR 53, paragraph 38).

17 As the Commission also points out, it follows that the Member States have a wide discretion under Article 13B and C. It is for them to assess whether they should or should not introduce the right of option, depending on what they consider to be expedient in the situation existing in their country at a given time. The freedom to grant or decline to grant the right of option is not restricted in time or by the fact that a contrary decision had been adopted in the past. Member States may therefore, within the sphere of their national powers, also revoke the right of option after

having introduced it and return to the basic rule that letting and leasing of immovable property are exempt from tax.

18 Contrary to what the plaintiff in the main proceedings argues, this solution is not called in question by the principle of fiscal neutrality. Admittedly, this principle, which is laid down in Article 2 of the First Directive and which is inherent in the common system of value added tax, requires, as the fourth and fifth recitals of the Sixth Directive state, that all economic activities should be treated in the same way (judgment in Case C-155/94 *Wellcome Trust* v *Commissioners of Customs & Excise* [1996] ECR I-3013, paragraph 38).

19 However, it does not have the effect attributed to it by the plaintiff in the main proceedings. Since the implementation, by the Sixth Directive, of the harmonised system of exemptions, it is no longer possible to derogate from that system on the basis of a provision of the First Directive. Furthermore, the principle of fiscal neutrality does not preclude the introduction, by a national legislature, of a series of exceptions to the rule of liability to tax, which are, moreover, expressly provided for in Title X of the Sixth Directive. However, where a national legislature has granted taxpayers the right of option, it cannot be inferred from the principle of fiscal neutrality that its choice is irreversible.

20 The plaintiff in the main proceedings can find no support for its case in the judgment in Case C-35/90 *Commission* v *Spain* [1991] ECR I-5073.

21 The Court there held that, if a Member State abolishes an exemption provided for by Article 28 of the Sixth Directive, it may not later reintroduce the exemption. However, that judgment concerned a provision of the Sixth Directive which is not comparable to Article 13C. Article 28 concerns the transitional period which followed the adoption of the Sixth Directive. During that period, Member States were allowed to continue to exempt from VAT certain transactions for a given period for the purpose of facilitating the transition and to allow a progressive adaptation

of national laws in the areas in question (Case C-35/90 *Commission* v *Spain*, cited above, paragraph 9). Once the transitional period was over, the Member States were, however, required to abolish the exemptions completely, which precluded any possibility of restoring an exemption previously abolished.

22 That is not so in a case such as that in point in the main proceedings, which concerns a right of option not subject to any limitation in time. As the Advocate General points out in paragraph 24 of his Opinion, the case-law cited cannot therefore be transposed to the case under consideration here.

23 Finally, the plaintiff in the main proceedings urges the Court to hold that the principle of protection of legitimate expectations and the principle of legal certainty preclude retroactive repeal of the national legislation in question. It contends that, upon the adoption of the Belgian Law of 28 December 1992, it could legitimately count on the right of option, whether the Royal Decree implementing Article 44(3)(2)(c) of the Belgian VAT Code was adopted or not.

24 Similarly, the Commission submits that, although the Member State in question was at liberty to reverse its decision to introduce a right of option, it could not deny the existence of the rights to deduction arising under the Sixth Directive. Since Article 17 of the Sixth Directive provides that the right to deduct is to arise at the time when the deductible tax becomes chargeable, it follows that a Member State cannot retroactively disregard the rules on the right of deduction once such a right has been made available.

25 The Belgian Government explained at the hearing that, although the aforementioned Royal Decree was not a prerequisite for the entry into force of the provision introducing the right of option, the fact that the decree which was to implement that provision was never adopted precluded the exercise by a taxable person of such a right.

26 It must be recalled in this regard that the principle of protection of legitimate expectations and the principle of legal certainty form part of the Community legal order and must be observed by the Member States when they exercise the powers conferred on them by Community directives. However, in the specific circumstances of the present case, it is not for this Court but for the national court to determine whether a breach of those principles has been committed by the retroactive repeal of a law in respect of which the implementing decree was never adopted.

27 In view of the foregoing, the answer to the question submitted must be that Article 2 of the First Directive does not preclude a Member State

— which has availed itself of the possibility provided for by Article 13C of the Sixth Directive and

— which has thus granted its taxpayers the right to opt for taxation of certain lettings of immovable property

from abolishing, by means of a subsequent law, that right of option and thus reintroducing the exemption.

It is for the national court to determine whether a breach of the principle of protection of legitimate expectations or of the principle of legal certainty has been committed by the retroactive repeal of a law in respect of which the implementing decree has not been adopted.

Costs

28 The costs incurred by the Belgian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Tribunal de Première Instance de Nivelles by judgment of 3 November 1997, hereby rules:

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 is to be interpreted as not precluding a Member State which

— **has availed itself of the possibility provided for by Article 13C 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 and**

— has thus granted its taxpayers the right to opt for taxation of certain lettings of immovable property

from abolishing, by a subsequent law, that right of option and thus reintroducing the exemption.

It is for the national court to determine whether a breach of the principle of protection of legitimate expectations or of the principle of legal certainty has been committed by the retroactive repeal of a law in respect of which the implementing decree has not been adopted.

Jann Moitinho de Almeida Gulmann

Sevón Wathelet

Delivered in open court in Luxembourg on 3 December 1998.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber