JUDGMENT OF THE COURT (Fifth Chamber)
13 December 1989 *

In Case C-342/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) for a preliminary ruling in the proceedings pending before that court between

Genius Holding BV

and

Staatssecretaris van Financiën

on the interpretation of a number of provisions of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal L 145., p. 1),

THE COURT (Fifth Chamber)

composed of: Sir Gordon Slynn, President of Chamber, M. Zuleeg, R. Joliet, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: J. Mischo
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

the tax entity Genius Holding BV, the defendant in the main proceedings, by P. A. Dijkman Dulkes and J. A. F. van Haaster, authorized agents,

* Language of the case: Dutch.

the Netherlands Government, by H. J. Heinemann, Acting Secretary-General of the Ministry of Foreign Affairs, acting as Agent,

the Government of the Federal Republic of Germany, by M. Seidel and H.-J. Horn, acting as Agents,

the Spanish Government, by J. Conde de Saro and R. Garcia-Valdecasas y Fernández, acting as Agents,

the Commission of the European Communities, by J. F. Buhl, a member of its Legal Department, acting as Agent, assisted by M. Mees, of the Hague Bar,

having regard to the Report for the Hearing and after hearing the oral observations of the defendant in the main proceedings, of the Netherlands Government, represented by J. W. de Zwaan, acting as Agent, the Government of the Federal Republic of Germany, represented by J. Kraeusel, acting as Agent, the Spanish Government and the Commission of the European Communities, at the sitting on 15 February 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 March 1989,

gives the following

Judgment

1 By judgment of 28 October 1987, which was received at the Court on 4 November 1987, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of several provisions of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal L 145, p. 1, hereinafter referred to as 'the Sixth Directive').

2 Those questions arose in proceedings between the tax entity Genius Holding BV (called 'Genius BV' at the material time), whose premises are in IJmuiden and which carries out assembly and machine-tooling work, and the Staatssecretaris van Financiën (Secretary of State for Finance).

3 For the period from 1 July to 31 December 1982 inclusive, the amount of tax owed by Genius Holding, which uses subcontractors to fulfil its orders, was adjusted on the ground that, contrary to the legislation in force, it had deducted from the turnover tax due from it value-added tax (hereinafter referred to as 'VAT') invoiced to Genicon Montage BV by two subcontractors, Vissers Pijpleiding en Montage BV and Montagebedrijf J. van Mierlo.

4 Since the Inspecteur der Omzetbelasting (Turnover Tax Inspector) rejected Genius Holding's objection to the abovementioned adjustment, that company brought an action before the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam), which upheld the contested decision.

5 On appeal, the Hoge Raad considered that according to the rules of Netherlands law deduction was permitted only when the tax mentioned in the invoice was actually due. However, in accordance with the transfer rules applicable in the Netherlands to the activities in question by virtue of an authorization issued by the Council under Article 27 of the Sixth Directive, a subcontractor was not liable to pay VAT in respect of services rendered to a principal contractor, the tax being due only from the latter on the amount which he invoiced to the person who had placed the order. It followed that the appellant in the main proceedings could not deduct VAT on the basis that it was invoiced to the appellant by subcontractors contrary to the abovementioned rules.

6 Since it had doubts as to the compatibility of such rules with the Sixth Directive, the Hoge Raad stayed the proceedings and referred the following two questions to the Court for a preliminary ruling:

'(1) Does the right to deduct provided for in the Sixth Directive apply to the tax which is due solely because it is mentioned on the invoice?

(2) If so, does the directive still allow the Member States to exclude — either entirely or in certain special cases — the right to deduct such tax by laying down requirements regarding the invoice?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 For the purpose of the answer to be given to the first question, it should be pointed out that according to Article 17(2)(a) of the Sixth Directive, the taxable person is to be entitled to deduct from the tax which he is liable to pay

'value-added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person'.

9 The appellant in the main proceedings and the Commission maintains that that provision must be interpreted as meaning that any tax mentioned in the invoice may be deducted.

10 They consider that the interpretation to the effect that only taxes corresponding to the supply of goods or services may be deducted is contrary to the purpose of the system of deductions, which is designed to ensure, as the Court pointed out in its judgment of 14 February 1985 in Case 268/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655, complete neutrality in regard to the fiscal burden borne by all economic activities, regardless of their purpose or results, on condition that those activities are themselves subject to VAT. Since, under Article 21(1)(c) of the Sixth Directive, any person who mentions VAT on an invoice or other document serving as invoice is liable to pay that tax even if it is not legally due, the exclusion in such cases of the right to deduct implies the taxation of an activity in a manner contrary to the principle of the neutrality of VAT.

11 Furthermore, that interpretation would lead to traders being required to check whether the VAT being invoiced is legally due, which requires an assessment of the rate of tax chosen and a knowledge of the exemptions granted. It would therefore be an obstacle to the efficient conduct of commercial relations.

12 In that regard, it should be pointed out, first of all, that in drafting Article 17(2)(a), the Council departed both from the wording of Article 11(1)(a) of the Second Council Directive of 11 April 1967 (Official Journal, English Special Edition 1967, p. 16) and from that of Article 17(2)(a) of the Commission's proposal for a Sixth Directive (Official Journal C 80, 5.10.1973, p. 1), provisions under which the taxable person was entitled to deduct any tax invoiced to him in respect of goods or of services supplied to him.

13 It must be inferred from the changes made to the abovementioned provisions that the right to deduct may be exercised only in respect of taxes actually due, that is to say, the taxes corresponding to a transaction subject to VAT or paid in so far as they were due.

14 That interpretation of Article 17(2)(a) is confirmed by the other provisions of the Sixth Directive.

15 According to Article 18(1)(a), to exercise his right to deduct, the taxable person must hold an invoice, drawn up in accordance with Article 22(3)(b), which requires the invoice to state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions. In accordance with that provision, mention of the tax corresponding to the supply of goods and services is an element in the invoice on which the exercise of the right to deduct depends. It follows that that right cannot be exercised in respect of tax which does not correspond to a given transaction, either because that tax is higher than that legally due or because the transaction in question is not subject to VAT.

16 Furthermore, according to Article 20(1)(a), 'the initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular . . . where that deduction was higher or lower than that to which the taxable person was entitled'. It follows from that provision that where the deduction initially carried out does not correspond to the amount of the tax legally due, it has to be adjusted, even if it corresponds to the amount of the tax mentioned on the invoice or other document serving as invoice.

17 That interpretation of Article 17(2)(a) is the one which makes it best adapted to prevent tax evasion, which would be made easier if any tax invoiced could be deducted.

18 Finally, with regard to the argument put forward by the appellant in the main proceedings and the Commission to the effect that the fact of limiting the exercise of the right to deduct to taxes corresponding to the supply of goods and services calls into question the neutrality of VAT, it should be pointed out that, in order to ensure the application of that principle, it is for the Member States to provide in their internal legal systems for the possibility of correcting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith.

19 The answer to the first question should therefore be that the right to deduct provided for in the Sixth Council Directive, 77/388/EEC, of 17 May 1977 does not apply to tax which is due solely because it is mentioned on the invoice.

20 Having regard to the answer to the first question, there is no need to answer the second question referred to the Court.

Costs

21 The costs incurred by the Netherlands Government, the Spanish Government, the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not

recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 questions submitted to it by the Hoge Raad der Nederlanden, by judgment of 28 October 1987, hereby rules:

The right to deduct provided for in the Sixth Council Directive, 77/388/EEC, of 17 May 1977, does not apply to tax which is due solely because it is mentioned on the invoice.

Slynn Zuleeg

Joliet Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 13 December 1989.

J.-G. Giraud
Registrar

Gordon Slynn
President of the Fifth Chamber