JUDGMENT OF THE COURT (Third Chamber)

14 July 2005 *

In Case C-435/03,

REFERENCE under Article 234 EC for a preliminary ruling from the Hof van Beroep te Antwerpen (Belgium), made by decision of 7 October 2003, received at the Court on 14 October 2003, in the proceedings

British American Tobacco International Ltd,

Newman Shipping & Agency Company NV

v

Belgian State,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, A. La Pergola, J.-P. Puissochet (Rapporteur) and J. Malenovský, Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

* Language of the case: Dutch.

having regard to the written procedure,

after considering the observations submitted on behalf of:

— British American Tobacco International Ltd, by M. Houben, advocaat, instructed by S. Crosby, Solicitor,

— Newman Shipping & Agency Company NV, by G. Huyghe and P. Hoogmartens, advocaten,

— the Belgian Government, represented initially by D. Haven, acting as Agent, and subsequently by M. Wimmer, acting as Agent, both assisted by M. van der Woude, avocat,

— the Greek Government, by S. Spyropoulos and M. Tassopoulou, acting as Agents,

— the Commission of the European Communities, by L. Ström van Lier and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation in particular of Articles 2, 5 and 27 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, 'the Directive').

2 The reference was made in the course of proceedings between British American Tobacco International Ltd ('BATI') and Newman Shipping & Agency Company NV ('Newman') and the Belgian State concerning payment of value added tax (VAT) on manufactured tobacco stored in a tax warehouse and declared missing as a result of thefts.

Law

Community legislation

3 Under Article 2 of the Directive:

'The following shall be subject to value added tax:

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.'

4 Article 5(1) of the Directive provides:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

5 Article 10(1) and (2) of the Directive provides:

'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.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. ...'

6 Under Article 11 of the Directive, the taxable amount, in respect of supplies of goods, is everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies.

7 Under Article 27 of the Directive, headed 'Simplification procedures':

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.

...

5. Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph 1 above.'

8 Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1) applies inter alia to manufactured tobacco, in accordance with Article 3(1).

9 Article 6(1) of Directive 92/12 provides:

'Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

Release for consumption of products subject to excise duty shall mean:

(a) any departure, including irregular departure, from a suspension arrangement;

...'

National legislation

10 Article 58(1) of the Belgian VAT Code provides:

'For manufactured tobacco imported into, acquired within the meaning of Article 25 *ter* or produced in Belgium, tax shall be charged whenever Belgian excise duty is to be paid in accordance with the statutory or regulatory provisions relating to the tax arrangements for tobacco. ...

...

The tax thus charged shall take the place of the tax to which importations, intra-Community acquisitions, and supplies of manufactured tobacco are subject.

The King shall lay down the detailed rules for charging the tax on manufactured tobacco and determine which persons shall be required to pay that tax.'

11 Article 58(1) of the VAT Code was in force at the time of adoption of the Directive. Pursuant to Article 27(5) of the Directive, the Kingdom of Belgium on 19 December 1977 notified Article 58 to the Commission. The notification read as follows:

'B. Prepayment of tax.

1. Manufactured tobacco products

In order to facilitate monitoring of the charging of VAT, the VAT that is due when manufactured tobacco products are supplied is paid on the price to be paid by the consumer at the same time as excise duty, when the manufacturer or importer purchases the tax stamps. No VAT is charged at later stages, but naturally no deduction can be made. All sales of manufactured tobacco products must be invoiced including VAT. ...'

12 Under Article 1 of Royal Decree No 13 of 29 December 1992 on the VAT arrangements for manufactured tobacco (*Belgisch Staatsblad*, 31 December 1992, p. 28086, 'Royal Decree No 13':

'Value added tax on manufactured tobacco ... shall be chargeable at the same time as excise duty.

...'

The main proceedings and the questions referred for a preliminary ruling

13 Newman operates a tax warehouse in Antwerp, in which manufactured tobacco products produced and packaged in Belgium by BATI, the owner of the goods, were stored. No tax stamps had been placed on them.

14 Cigarettes were stolen from the warehouse on 4 December 1995 and 29 January 1996 and in the night from 14 to 15 June 1998. The thefts were reported to the police.

15 The Belgian customs and excise authorities sent Newman a notice of assessment ordering it to pay excise duty and VAT in respect of the missing cigarettes, in accordance with the system established by Article 58(1) of the VAT Code. After an unsuccessful objection, Newman paid the sums demanded, but without prejudice to its rights as regards VAT. BATI reimbursed those sums to Newman in full.

16 Newman and BATI brought an action against the Belgian State in the Rechtbank van Eerste Aanleg te Antwerpen (Court of First Instance, Antwerp), seeking reimbursement of the sums paid.

17 That action was dismissed by judgment of 4 April 2001. In that judgment the Rechtbank van Eerste Aanleg considered that excise duty was due on goods which were missing as a result of thefts and that, under Article 58(1) of the VAT Code and Article 1 of Royal Decree No 13, VAT was also chargeable on those goods. The court also held that those provisions were intended to simplify the procedure for charging tax and complied with Article 27 of the Directive.

18 On 7 May 2001, the applicants in the main proceedings appealed against that judgment to the Hof van Beroep te Antwerpen (Court of Appeal, Antwerp).

19 As regards the excise duty, the Hof van Beroep found that a settlement had been agreed between the parties and implemented, thus putting an end to the dispute on the chargeability of duty.

20 As regards the VAT, the Hof van Beroep observed that, if the position of the customs and excise authorities accepted at first instance were adopted, there would be no need to examine whether the theft of goods can be regarded as a 'supply of goods' within the meaning of the Directive. The chargeable event for VAT would not be the supply or importation of the goods but the charging of excise duty.

21 Since it thus considered that the argument of the applicants in the main proceedings that the system established by Article 58(1) of the VAT Code and Article 1 of Royal Decree No 13 was not consistent with the Directive raised a serious point, the Hof van Beroep te Antwerpen decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Can there be a "supply of goods" within the meaning of the ... Directive, with the consequence that VAT can be charged:

— in the absence of any consideration?

— in the absence of transfer of the right to dispose freely of the goods as owner?

— if the goods cannot lawfully be placed on the market because they are stolen goods and/or contraband?

2. Is the answer to the first question different if the goods in question are products subject to excise duty, in particular manufactured tobacco?

3. If no excise duty is charged on products which are subject to excise duty, is it compatible with the provisions of the ... Directive to charge VAT in such a case?

4. May Member States supplement the categories of transaction subject to VAT if they lodge a notification, as referred to in Article 27(2) or Article 27(5) of the ... Directive, of their intention to charge VAT at national level in the event of theft of products subject to excise duty from a tax warehouse, or is Article 2 of the ... Directive exhaustive?

5. If a notification as referred to in Article 27(5) of the ... Directive relates only to the prepayment of VAT by means of tax stamps, may a Member State supplement the categories of transaction subject to VAT by, for example, requiring the payment of VAT where products subject to excise duty have been stolen from a tax warehouse?'

Materiality of the questions referred for a preliminary ruling

22 The first point to address is the Belgian Government's argument that the questions referred by the national court are immaterial and should be completely reformulated.

23 The Belgian Government submits that the questions proceed from a misinterpretation of the provisions of Article 58(1) of the VAT Code which it was authorised by the Council to retain, pursuant to Article 27(5) of the Directive.

24 It submits that the sole object of those provisions is to facilitate the charging of VAT before the occurrence of the chargeable event for VAT, and they do not create a new category of taxable transactions not provided for in the Directive. The VAT thus paid passes definitively to the State only if the advance VAT debt can subsequently be attributed to a taxable transaction.

25 It submits that, if such an attribution is ultimately not possible for want of a subsequent taxable transaction, the taxpayer is repaid the amount of the VAT, in accordance with Article 77 of the VAT Code and Articles 5 and 11 of Royal Decree No 13. That may be the case, in circumstances such as those at issue in the main proceedings, if the undertaking establishes that the missing goods have indeed been stolen and have not been supplied. The system notified on 19 December 1977 thus has no effect on the concept of 'supply of goods' within the meaning of Article 2 of the Directive, so that the fourth and fifth questions referred are of no relevance to the outcome of the main proceedings. The first, second and third questions are consequently also irrelevant.

26 However, the Belgian Government's argument does not allow the conclusion that the questions referred for a preliminary ruling are of no use for the national court.

27 First, it does not appear from the wording of the order for reference that reimbursement of the VAT paid in advance is possible in the event of the theft of goods subject to excise duty.

28 Second, even if it were assumed that national legislation provides for that possibility in such a case, the conditions of evidence required for reimbursement could seldom be satisfied. It is apparent from the Belgian Government's answer to a written question from the Court, relating to those conditions of evidence, that the victim of a theft of goods can obtain repayment of the VAT only if he succeeds in showing, first, that the goods have indeed been stolen and, second, that they have not been put on the market after the theft. That requirement of the proof of a negative, which is moreover outside the knowledge of the victim of the theft, makes it virtually impossible to make use of the right to repayment (see, to that effect, concerning the repayment of charges levied in breach of Community law, Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14, and Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 48).

29 It is apparent from the order for reference that the tobacco products at issue in the main proceedings were in fact stolen. The fact that payment of VAT on those goods subject to excise duty was demanded precisely following the theft shows that it was the theft itself that brought about the subjection to VAT. It was not a subsequent event, such as the possible introduction of the goods into commerce by the thieves, that was the decisive fact. Consequently, it was indeed the theft itself which was made into the chargeable event for VAT by the Belgian fiscal authorities.

30 In those circumstances, the national court's questions must be examined.

The first, second and third questions

31 By these questions, which should be taken together, the national court seeks to know, first, whether the theft of goods can be classified as a supply of goods for consideration within the meaning of Article 2 of the Directive and hence subject to VAT and, second, whether the fact that the main proceedings concern goods subject to excise duty affects that classification.

32 First, as the applicants in the main proceedings and the Commission rightly observe, the theft of goods, by definition, does not give rise to any financial counterpart for the victim of the theft. It therefore cannot as such be regarded as a supply of goods 'for consideration' within the meaning of Article 2 of the Directive (see, to that effect, Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 14).

33 Next, the theft of goods is not covered by the concept of 'supply of goods' under the Directive.

34 Under Article 5(1) of the Directive, '"[s]upply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

35 It follows from the wording of that provision that the concept of supply of goods does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner. That concept is in accordance with the purpose of the Directive, which is designed inter alia to base the common system of VAT on a uniform definition of taxable transactions (Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraphs 7 and 8).

36 The theft of goods makes the thief the mere possessor of the goods. It does not have the effect of empowering him to dispose of the goods under the same conditions as their owner. A theft cannot therefore be regarded as effecting a transfer, within the meaning of Article 5(1) of the Directive, from the victim to the thief.

37 Finally, contrary to the submissions of the Belgian and Greek Governments, the principle of fiscal neutrality does not require a theft of goods to be equated with a supply of goods, and does not preclude the analysis that such a theft does not in itself constitute a transaction subject to VAT.

38 The illegal importation and supply of goods such as the manufactured tobacco at issue in the main proceedings, which are not prohibited by their very nature or because of their special characteristics, are admittedly subject to VAT, since those goods are capable of being lawfully marketed and introduced into economic channels. Moreover, the principal of fiscal neutrality prevents any general distinction between lawful and unlawful transactions (see, to that effect, Case C-455/98 *Salumets and Others* [2000] ECR I-4993, paragraphs 19 and 20).

39 However, VAT is chargeable in such circumstances because the chargeable event of the tax, namely importation or the supply of goods, has occurred, subsequent to the theft, and the consideration for the transaction, which constitutes the taxable amount, has been identifiable.

40 As the Commission observes, such an analysis cannot apply to the theft as such, which does not in itself constitute a chargeable event for tax. Nor can it be justification for the subsequent operation — even if it is probable — of marketing the stolen goods being imputed to the person who is the victim of the theft, who is not the one who actually imports or supplies those goods. If, moreover, in the name of the principle of fiscal neutrality, the theft were regarded as a chargeable event for tax, irrespective of any importation or supply and hence in the absence of any identifiable consideration, the taxable amount would be entirely fictitious.

41 As to the circumstance that goods are, like those at issue in the main proceedings, subject to excise duty, that has no bearing on the answer to be given to the national court. No provision of the Directive links the chargeability of VAT to excise duty. The chargeable event for VAT, by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled, is the supply or importation of the goods, not the levying of excise duty on them.

42 The answer to the first, second and third questions must therefore be that the theft of goods does not constitute a supply of goods for consideration within the meaning of Article 2 of the Directive, and therefore cannot as such be subject to VAT. The circumstance that goods are, like those at issue in the main proceedings, subject to excise duty does not affect that conclusion.

The fourth and fifth questions

43 By these questions, the national court essentially asks whether a Member State which has been authorised, pursuant to Article 27(5) of the Directive, to apply arrangements for the advance payment of VAT by means of tax stamps is entitled, on the basis of that authorisation, to subject transactions to VAT other than those provided for in Article 2 of the Directive, by applying that tax to products subject to excise duty which are stolen from a tax warehouse.

44 As the Court has already held, the national derogating measures referred to in Article 27(5) of the Directive, which are allowed 'in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance', must be interpreted strictly (see, to that effect, Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paragraph 29). They may not derogate from the basis for charging VAT laid down in Article 11 of the Directive except within the limits strictly necessary for achieving that aim (Case C-63/96 *Skripalle* [1997] ECR I-2847, paragraph 24). The authorisation given pursuant to Article 27(5) of the Directive cannot extend beyond the purpose on the basis of which it was requested (see, to that effect, *Skripalle*, paragraph 30).

45 As the Belgian Government concedes, the sole purpose of the measures which the Kingdom of Belgium was authorised to retain pursuant to Article 27(5) of the Directive is to 'facilitate monitoring of the charging of VAT' by providing, in particular, that VAT is to be levied at the same time as excise duty, before the chargeable event for the tax occurs. Those measures thus relate to the time at which VAT becomes chargeable, so as to make it coincide with the time at which excise

duty is levied. They do not concern the rules for determining the transactions subject to VAT, and cannot therefore create a new category of taxable transactions not provided for in the Directive.

46 The retention of those measures was indeed authorised by the Council for the purpose both of simplifying the procedure for charging the tax and of countering tax evasion or avoidance, as is shown by the wording of the notification made pursuant to Article 27(5) of the Directive ('to facilitate monitoring of the charging of VAT'). However, the fact that the purpose of the authorisation was also to combat tax evasion or avoidance did not have the consequence of empowering the Kingdom of Belgium to subject transactions to VAT other than those set out in Article 2 of the Directive.

47 In any event, contrary to the submissions of the Greek Government, the creation of a category of transactions falling within the scope of VAT, not provided for in Articles 2 and 10 of the Directive, cannot be regarded as a derogation that is strictly necessary for preventing the risk of tax evasion or avoidance, and therefore cannot lawfully be adopted or retained on the basis of Article 27(5) of the Directive (see, to that effect, concerning too general amendments to the basis for charging VAT, *Commission* v *Belgium*, paragraph 31, Case C-131/91 *'K' Line Air Service Europe* [1992] ECR I-4513, paragraphs 24 and 25, and *Skripalle*, paragraphs 26 and 31).

48 Consequently, the authorisation granted to the Kingdom of Belgium under Article 27(5) of the Directive did not entitle that Member State to subject the theft of manufactured tobacco to VAT.

49 The answer to the fourth and fifth questions must therefore be that an authorisation to apply measures facilitating monitoring of the charging of VAT, granted to a Member State on the basis of Article 27(5) of the Directive, does not empower that State to subject transactions to that tax other than those set out in Article 2 of the Directive. Such an authorisation thus cannot provide a legal basis for national legislation subjecting to VAT the theft of goods from a tax warehouse.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) rules as follows:

1. **The theft of goods does not constitute a supply of goods for consideration within the meaning of Article 2 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 therefore cannot as such be subject to value added tax. The circumstance that goods are, like those at issue in the main proceedings, subject to excise duty does not affect that conclusion.

2. **An authorisation to apply measures facilitating monitoring of the charging of value added tax, granted to a Member State on the basis of Article 27(5) of the Sixth Directive 77/388, does not empower that State to subject transactions to that tax other than those set out in Article 2 of the Directive. Such an authorisation thus cannot provide a legal basis for national legislation subjecting to value added tax the theft of goods from a tax warehouse.**

[Signatures]