JUDGMENT OF THE COURT (Fifth Chamber)

6 February 2003 *

In Case C-185/01,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Auto Lease Holland BV

and

Bundesamt für Finanzen,

on the interpretation 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 (OJ 1977 L 145, p. 1),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, P. Jann, S. von Bahr and A. Rosas (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,

— the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents, and A. Böhlke, Rechtsanwalt,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2002,

gives the following

Judgment

1 By order of 22 February 2001, received at the Court on 30 April 2001, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation 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 (OJ 1977 L 145, p. 1; 'the Sixth Directive').

2 That question was raised in proceedings between Auto Lease Holland BV ('Auto Lease') and the Bundesamt für Finanzen (Federal Tax Office, 'the Bundesamt') concerning that company's right to a refund of the value added tax ('VAT') on the fuel supplied in its name and at its expense by German undertakings to the lessees of vehicles.

Legal framework

Community legislation

3 Article 2(1) of the Sixth Directive makes 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' subject to VAT.

4 Under Article 5(1) of the Sixth Directive, '"[s]upply of goods" shall mean the transfer of the right to dispose of tangible property as owner'. According to Article 6(1) of that directive, '"[s]upply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5'.

5 Articles 8 and 9 of the Sixth Directive concern the place of taxable transactions. Article 8(1)(b), which relates to the supply of goods, provides that, in the case of goods not dispatched or transported, the place of supply of goods is to be deemed to be the place where the goods are when the supply takes place. Article 9(1) of that directive, relating to the supply of services, states that the place where a service is supplied is to be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied.

6 Article 11(A)(1)(a) of the Sixth Directive provides that the taxable amount in respect of supplies of goods or services within the territory of the country, other than those referred to in Article 11(A)(1)(b) to (d), is to be '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 the heading 'Origin and scope of the right to deduct', Article 17(2) and (3) of the Sixth Directive provides:

'2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

...

3. Member States shall also grant to every taxable person the right to a deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

(a) transactions relating to the economic activities as referred to in Article 4(2) carried out in another country, which would be eligible for deduction of tax if they had occurred in the territory of the country;

...'.

8 The arrangements for the refunds provided for in Article 17(3) of the Sixth Directive are determined by Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11). Under that directive, any taxable person established in a Member State who has paid VAT in respect of services or goods supplied to him in the territory of another Member State may apply to the second State for the refund of that VAT on condition that he has not supplied any goods or services deemed to be supplied in the territory of that Member State.

National legislation

9 The legislation applicable at the material time was the Umsatzsteuergesetz (Law on Value Added Tax) of 1980 and the Umsatzsteuer-Durchführungsverordnung (Value Added Tax Implementation Regulations) also of 1980. Those regulations lay down a procedure for refund of VAT to taxable persons not established in the territory of the country.

Main proceedings and the question referred for a preliminary ruling

10 Auto Lease is a leasing company with its registered office in the Netherlands, which makes motor vehicles available to its clients. In return for use of the vehicle, the lessee pays to Auto Lease the monthly instalments stipulated in the leasing contract.

11 Auto Lease also offers the lessee the option of entering into a fuel management agreement with it. The agreement permits the lessee to fill up his motor vehicle with fuel and from time to time to purchase oil products, in the name and at the expense of Auto Lease. For that purpose the lessee receives a so-called ALH-Pass as well as a fuel credit card from the German credit card company DKV. That card names Auto Lease as the DKV customer. DKV regularly submits its account to Auto Lease and itemises the various supplies per vehicle.

12 The lessee pays to Auto Lease each month in advance one twelfth of the likely annual petrol costs. At the end of the year, the account is then settled according to actual consumption. There is a supplementary charge for fuel management.

13 The order for reference shows that Auto Lease pays VAT in the Netherlands on all the leasing supplies 'including the fuel costs'.

14 In so far as the fuel costs are based on supplies by German undertakings, Auto Lease applied for the refund of the VAT charged by the German authorities on the supplies of fuel effected during the years 1989 to 1993.

15 The Bundesamt initially granted the applications in respect of the years 1989 to 1991, but then amended the decisions relating to those years by setting the refund at DEM 0 and demanding repayment of the amounts previously refunded. Lastly, it rejected from the outset the refund applications in respect of the years 1992 and 1993. In its view, the costs relating to the VAT paid on inputs had not been incurred for Auto Lease, but for the lessee concerned.

16 The objections lodged by Auto Lease against those decisions were dismissed as was the action brought before the Finanzgericht Köln (Finance Court, Cologne) (Germany).

17 Auto Lease appealed against the judgment of the Finanzgericht Köln to the Bundesfinanzhof. That court set the judgment aside and referred the case back to the court of first instance. According to the Bundesfinanzhof, the Finanzgericht should not have left unanswered the question whether the oil companies had supplied the fuel directly to the lessee or initially to Auto Lease. In the latter case, it would indeed be doubtful whether it was within the territory of the country where the fuel was purchased that the fuel was subsequently supplied by Auto Lease to the lessees or whether Auto Lease had effected a single supply, taxable in the Netherlands, which also included the fuel management. Only after further clarification of the facts should a question be referred to the Court for a preliminary ruling.

18 In the second set of proceedings, the Finanzgericht Köln held that there had not been any supply of fuel by those oil companies to Auto Lease. According to that court, it is a question of supplies of fuel effected by those oil companies, in the territory of the Member State charging VAT, to the lessees. The claim was therefore rejected.

19 Auto Lease appealed on a point of law (Revision) against that judgment to the Bundesfinanzhof. It is applying for that judgment to be set aside and for the VAT refund initially granted to be allowed. It also claims that the Bundesamt should be ordered to set the refund of VAT paid on inputs at the sums which it required in respect of the years 1992 and 1993.

20 Taking the view that the dispute before it requires the interpretation of the Sixth Directive, the Bundesfinanzhof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Where a lessee fills up a leased car in the name and at the expense of the lessor at filling stations, is there a supply of fuel by the lessor to the lessee and must tax be

paid on this supply at the place of supply within the meaning of Article 8(1)(b) of Directive 77/388/EEC or is the "onward supply" included in the lessor's supply of a service that is taxable under Article 9 of Directive 77/388/EEC?'

The question referred for a preliminary ruling

21 By its question, the national court seeks in substance to ascertain whether Auto Lease may obtain the refund of VAT relating to the fuel purchased in Germany by lessees of vehicles in order to fill up the vehicles which are the subject-matter of a leasing contract.

22 As the Advocate General rightly pointed out in points 18 to 22 of his Opinion, the reference from the Bundesfinanzhof raises two questions.

23 The first question relates to the interpretation of Article 5 of the Sixth Directive. It seeks to ascertain whether, in the circumstances of the main proceedings, there is a supply of fuel by the lessor of a motor vehicle to the lessee where the lessee fills up the leased vehicle at filling stations. However, that question raises the issue whether there was previously a supply of fuel to Auto Lease by oil

companies or whether those companies supplied that fuel directly to the lessee. If the oil companies supplied the fuel directly to the lessee and not to Auto Lease, the question of how to classify the onward supply allegedly effected by Auto Lease to the lessee does not arise.

24 The second question arises only in the event that the oil companies supplied the fuel to Auto Lease. In that case, it needs to be established whether the onward supply by Auto Lease to the lessee is an independent supply, taxable in the place where the fuel was when it was supplied (that is, in Germany), or whether it forms part of the leasing service, taxable in the place where the lessor has established its business (that is, in the Netherlands).

Observations submitted to the Court

25 The German Government and the Commission consider that the supply of fuel by the oil companies is, in the circumstances of the main proceedings, effected solely to the lessees.

26 The German Government states that, under Article 5(1) of the Sixth Directive, 'supply of goods' means the transfer of the right to dispose of tangible property as owner. The Court clarified that definition in particular in its judgment in Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, according to which, in the government's submission, it is the transfer of economic

ownership, not the transfer of legal ownership, which is relevant. The German Government considers that, none the less, it is not inconceivable that a person other than the acquirer, in the present case the lessor, might be the recipient of the supply of fuel. In the light of the circumstances of the main proceedings, there is nothing to suggest that that is so.

27 The Commission first of all rejects the possibility of applying Case 165/86 *Intiem* [1988] ECR 1471, which was put forward by the national court. It considers that the circumstances of the main proceedings differ from those in *Intiem*. In that case, employees filled up their own vehicles at the employer's expense in order to use them for their professional activities. By contrast, in the main proceedings, the lessees are not employees of Auto Lease and they use the fuel for their own needs.

28 The Commission submits that the supplies were effected at Auto Lease's expense only ostensibly. The monthly payments made to Auto Lease by the lessees represent only an advance. The decisive element is the actual consumption established at the end of the year, for which the lessees are financially responsible. The costs of the supply of fuel are thus wholly borne by the lessees. Auto Lease acts as a supplier of credit vis-à-vis the lessees and receives a specific payment in respect of its services.

29 Consequently, the German Government and the Commission conclude that the fact of filling up the tanks of motor vehicles amounts to a direct supply of fuel by the oil companies to the lessees, which means that the question raised by the Bundesfinanzhof is not relevant.

30 It is only in the alternative that the German Government and the Commission examine the question whether the supply of fuel is an onward supply to the lessees in the context of a single supply of 'leasing' services or in the context of a principal supply independent of that under the leasing contract. They consider that the facts in the main proceedings, when examined in the light of the Court's case-law, show that two separate supplies are at issue: a supply of a leasing service and a supply of fuel. The onward supply of fuel to the lessees thus amounts, in that case, to a principal supply, the place of which should be determined in accordance with Article 8(1)(b) of the Sixth Directive.

The answer of the Court

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

32 As the Court found in paragraphs 7 and 8 of *Shipping and Forwarding Enterprise Safe*, it is clear from the wording of that provision that '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 the owner of the property. The purpose of the Sixth Directive might be jeopardised if the preconditions for a supply of goods — which is one of the three taxable transactions — varied from one Member State to another, as do the conditions governing the transfer of ownership under civil law.

33 Consequently, in order to answer the question referred, it is necessary to determine to whom, whether the lessor or the lessee, the oil companies transferred, in the main proceedings, that right actually to dispose of the fuel as owner.

34 It is common ground that the lessee is empowered to dispose of the fuel as if he were the owner of that property. He obtains the fuel directly at filling stations and Auto Lease does not at any time have the right to decide in what way the fuel must be used or to what end.

35 The argument to the effect that the fuel is supplied to Auto Lease, since the lessee purchases the fuel in the name and at the expense of that company, which advances the cost of that property, cannot be accepted. As the Commission rightly contends, the supplies were effected at Auto Lease's expense only ostensibly. The monthly payments made to Auto Lease constitute only an advance. The actual consumption, established at the end of the year, is the financial responsibility of the lessee who, consequently, wholly bears the costs of the supply of fuel.

36 Accordingly, the fuel management agreement is not a contract for the supply of fuel, but rather a contract to finance its purchase. Auto Lease does not purchase the fuel in order subsequently to resell it to the lessee; the lessee purchases the fuel, having a free choice as to its quality and quantity, as well as the time of purchase. Auto Lease acts, in fact, as a supplier of credit vis-à-vis the lessee.

37 In the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling must be that Article 5(1) of the Sixth Directive is to be interpreted as meaning that there is not a supply of fuel by the lessor of a vehicle to the lessee where the lessee fills up at filling stations the vehicle which is the subject-matter of a leasing contract, even if the vehicle is filled up in the name and at the expense of that lessor.

38 In those circumstances, it is not necessary to answer the second question raised by the order of the Bundesfinanzhof (see paragraph 24 above).

Costs

39 The costs incurred by the German 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 Bundesfinanzhof by order of 22 February 2001, hereby rules:

Article 5(1) 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 is to be interpreted as meaning that there is not a supply of fuel by the lessor of a vehicle to the lessee where the lessee fills up at filling stations the vehicle which is the subject-matter of a leasing contract, even if the vehicle is filled up in the name and at the expense of that lessor.

Wathelet Timmermans Jann

von Bahr Rosas

Delivered in open court in Luxembourg on 6 February 2003.

R. Grass — Registrar

M. Wathelet — President of the Fifth Chamber