JUDGMENT OF THE COURT (Grand Chamber)

6 September 2011 *

In Case C-398/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Østre Landsret (Denmark), made by decision of 12 October 2009, received at the Court on 14 October 2009, in the proceedings

Lady & Kid A/S,

Direct Nyt ApS,

A/S Harald Nyborg Isenkram- og Sportsforretning,

KID-Holding A/S

v

Skatteministeriet,

* Language of the case: Danish.

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, K. Schiemann and D. Šváby, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, E. Juhász, M. Safjan (Rapporteur), M. Berger and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 28 September 2010,

after considering the observations submitted on behalf of:

— Lady & Kid A/S and Others, by H. Peytz, advokat,

— the Danish Government, by T. Winkler, acting as Agent, assisted by S. Fugleholm, advokat,

— the European Commission, by R. Lyal and N. Fenger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 December 2010,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Community law on recovery of amounts wrongly paid.

2 The reference has been made in the course of proceedings between Lady & Kid A/S ('Lady & Kid'), Direct Nyt ApS ('Direct Nyt'), A/S Harald Nyborg Isenkram- og Sportsforretning ('Harald Nyborg') and KID-Holding A/S ('KID-Holding') and Skatteministeriet (the Danish Ministry of Fiscal Affairs) concerning the repayment of a tax levied in breach of Community law ('the unlawful tax').

Legal context

3 By Law No 840 of 18 December 1987, the Kingdom of Denmark introduced, with effect from 1 January 1988, a business tax known as the employment market contribution (arbejdsmarkedsbidrag; 'the Ambi'). The Ambi, the rate of which was fixed at 2.5 %, was, in principle, calculated on the same basis as value added tax ('VAT'). However, it was not payable upon import of goods into Danish territory, but was charged on the imported goods' full sale price upon first sale in Denmark.

4 In return for the introduction of the Ambi, a number of social charges of employers, which had to be paid by Danish undertakings in the sum of around DKK 10 300 per full-time employee, had been abolished.

5 The purpose of the fiscal reform was to eliminate the link between the contributions to be paid and the number of employees, in order to stimulate growth and develop employment, while retaining neutrality as regards public finances.

6 The Ambi was levied on Danish undertakings between 1 January 1988 and 31 December 1991 inclusive, Law No 840 of 18 December 1987 having been repealed by a law of 21 December 1991 having effect from 1 January 1992.

7 During 1989, the lawfulness of the Ambi was contested by importing undertakings before the Østre Landsret (Eastern Regional Court) (Denmark), which considered it necessary to refer to the Court of Justice the question of the compatibility of the Ambi with Community law. In reply, by the judgment in Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217, the Court held that Article 33 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 1988 L 145, p. 1) precludes a tax such as the Ambi, since such a tax:

— is paid both on activities subject to VAT and on other industrial or commercial activities which consist in the supply of services for consideration;

— is charged, in the case of undertakings which were taxable persons for VAT purposes, on the same basis of assessment as that used for VAT, in other words as a percentage of the volume of sales after deduction of purchases;

— unlike VAT, is not paid upon import, but is charged on the full sale price of imported goods upon the first sale in the Member State concerned;

— unlike VAT, does not have to be indicated separately on invoices; and

— is charged alongside VAT.

8 Following that judgment, Law No 389 of 20 May 1992, which entered into force on 22 May 1992, laid down the arrangements for reimbursement of the Ambi unlawfully levied. It contains, inter alia, the following provisions:

'*Article 1*

It shall be decided according to the general rules of Danish law whether, and in the particular case, to what extent there is a claim for reimbursement or compensation in connection with amounts which have been paid into the State Treasury pursuant to Law No 840 of 18 December 1987 on the employment market contribution, as amended.

Article 2

…

(2) The amount claimed shall be specified and reasons shall be given therefor, and it shall be accompanied by documentation which makes it possible to assess in detail whether the party subject to the contribution has suffered a loss.

…'

9 Law No 389 of 20 May 1992 has been supplemented by Bulletin No 122 of 10 July 1996 which, for the purposes of administrative treatment of reimbursement cases, laid down the conditions to be met by the importing undertaking, namely:

— the undertaking must have been in genuine competition with Danish producers of equivalent goods;

— the undertaking must have saved less in employer social security contributions, etc., than it has paid by way of the Ambi;

— the undertaking's competitive position must be worsened as a result of the restructuring, that is to say labour-intensive Danish products must be involved, so that the Danish undertaking saved more in employer social security contributions than the importer did on competing products;

— the Danish competitors must have saved substantially more in employer social security contributions than they have paid by way of the Ambi;

— the loss of competitiveness must be significant; and

— the Ambi must not have been passed on through price increases.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 The applicants in the main proceedings, which were all active in retail trade, lodged, in 1997 and 1998, complaints before the Københavns Byret (District Court, Copenhagen) (Denmark) against the Skatteministeriet seeking the annulment of the decisions rejecting their applications for reimbursement of the Ambi wrongly levied. The ground given for the refusal was that the undertakings' savings during the period when they were liable to pay the Ambi as a result of the abolished employer social security contributions exceeded the Ambi paid in that period, which meant that the undertaking had received full coverage for the Ambi paid.

11 In its judgment of 16 December 2002, the Københavns Byret found in favour of the Skatteministeriet in all four cases. On 13 January 2003 appeals were lodged against those judgments with the Østre Landsret.

12 It is apparent from the decision for reference that:

— KID-Holding operated, under the trade name Daells Varehus, a large department store with many different products, including imported textile goods. That undertaking paid a total of DKK 20 053 556 in Ambi and saved a total of DKK 23 151 291 in employer social security contributions.

— Lady & Kid operated, under the names Daells Discount A/S and Madeleine, a number of discount shops with a limited selection of Daells Varehus product ranges, largely textile goods. That undertaking paid DKK 779 986 in Ambi and saved a total of DKK 1 872 901 in employer social security contributions in the same period.

— Harald Nyborg operated a number of department stores, selling inter alia hardware, sports equipment, automobile accessories and agricultural implements. That undertaking paid DKK 5 333 609 in Ambi and saved DKK 3 322 105 in employer social security contributions.

— Direct Nyt operated solely a mail order business for imported goods. The undertaking paid DKK 709 933 in Ambi and, not having any employees, did not save any employer social security contributions.

13 During the proceedings before the Østre Landsret, the Skatteministeriet recognised that Harald Nyborg and Direct Nyt had, to a certain extent, sold products competing with equivalent, labour-intensive Danish goods, that the abolition of the employer social security contributions had not had an effect on prices of the labour-intensive Danish goods and that the two undertakings, for reasons of competition, were not in a position to raise their prices by the amount of the increased costs in the form of the Ambi. Accordingly, taking the view that the Ambi had not been passed on in other forms, the Skatteministeriet decided to reimburse the Ambi to those undertakings in the amounts, respectively, of DKK 760 349, together with the interest applicable, and DKK 319 469, also with the interest applicable.

14 During those proceedings, the parties to the main proceedings also agreed that 35 % of Harald Nyborg's purchases were imported goods and that 84 % of the Ambi paid by that undertaking related to those goods, and that 40 % of Daells Varehus's purchases were imported goods, and that 94 % of the Ambi paid by that undertaking related to those goods. Similarly, the parties have accepted that the previous employer social security contributions had affected the trade in imported goods as much, in proportion, as the trade in Danish goods.

15 The applicants in the main proceedings having called into question the compatibility of national law and the rejection decisions of the Skatteministeriet with Community law, the Østre Landsret found it necessary to request a ruling from the Court on the interpretation of Community law on recovery of amounts wrongly paid. Accordingly, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the Court's judgment of 14 January 1997 in Joined Cases C-192/95 to C-218/95 *Comateb and Others* [[ECR I-165]] to be interpreted as meaning that the passing on of an unlawful levy on a product presupposes that the levy is passed on to the buyer of the product in the individual transaction, or may the passing-on in the prices also take place in the prices of other products in completely different transactions, either before or after the relevant sale of products, for example, with the result that an overall assessment is made of the passing-on over a four-year period involving a large number of product groups, including both imported and non-imported products?

2. Is the Community law concept of "passing-on" to be understood as meaning that an unlawful levy on a sale of products may be regarded as passed on only if the price of the product is higher than that price which applied immediately before the levy was introduced, or may the levy also be regarded as passed on where the undertaking subject to the levy, at the same time as the introduction of the unlawful levy, saved on other levies charged on other bases, and the undertaking therefore maintained its prices unchanged?

3. Is the Community law concept of "unjust enrichment" to be understood as meaning that the reimbursement of an unlawful levy on a sale of goods may be regarded as giving rise to unjust enrichment, where the undertaking, before or after the sale of the taxable product, has made a saving as a result of the abolition of other

levies charged on other bases, if it is assumed that that abolition of other levies also benefits other undertakings, including undertakings which did not pay the unlawful levy or only paid it to a lesser extent?

4. If it is assumed that an unlawful levy, as a result of its structure, has had the effect that proportionately more has been paid in levies by undertakings which imported goods than by undertakings which to a greater extent purchased domestic goods, and, at the same time as the unlawful levy was introduced, another lawful levy was charged on another basis which proportionately affected both undertakings to the same extent, irrespective of the composition of the undertaking's purchases, then guidance is sought on the following:

   (a) whether Community law allows for whole or partial refusal to reimburse the unlawful levy to an undertaking which imports goods on grounds of passing-on and unjust enrichment, in so far as the refusal leads to a situation in which the undertaking, as a result of having paid relatively more of the unlawful levy than a corresponding undertaking which purchased equivalent goods domestically, will thereby, all other things being equal, be placed in a worse position as a result of the tax restructuring and the refusal to reimburse than corresponding undertakings which to a greater extent purchased domestic goods;

   (b) whether the reimbursement of the unlawful levy in the relevant situation may conceptually give rise to "unjust enrichment" and may therefore be refused, if the reimbursement – even if the levy is regarded as having been passed on – is necessary in order to achieve a situation in which the effect of the tax restructuring, after any reimbursement, all other things being equal, remains the same for undertakings which imported products as for undertakings which purchased domestic products;

(c) whether refusal to reimburse in such a situation, which leads to undertakings which to a greater extent purchased domestic products and thus obtained an advantage in relation to undertakings which to a greater extent imported products, is otherwise contrary to Community law, including the principle of equal treatment; and

(d) whether the answer to question 3 means that it is not justified to refuse reimbursement of an unlawfully charged levy on grounds of unjust enrichment, to the extent that such reimbursement merely cancels out the advantage for those undertakings which purchased domestic products in relation to undertakings which to a greater extent imported products.'

Consideration of the questions referred

The second and third questions

16 The second and third questions, which it is appropriate to consider first and together, must be understood as asking whether the mere passing on of an unlawfully charged levy by an increase in the sale price of goods on which that levy was made can, in the event of recovery of amounts wrongly paid, give rise to unjust enrichment of the taxpayer of whether unjust enrichment can also follow from a saving made as a result of the concomitant abolition of other levies charged on a different basis, even where the taxpayer has not altered its sale prices.

17 In that regard, it must be borne in mind that the right to a refund of charges levied in a Member State in breach of the rules of European Union law is the consequence and complement of the rights conferred on individuals by provisions of European Union law prohibiting such charges. The Member State is therefore required in principle to repay charges levied in breach of European Union law (see Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145, paragraph 30; Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 35; and Case C-264/08 *Direct Parcel Distribution Belgium* [2010] ECR I-731, paragraph 45).

18 However, by way of exception to the principle of reimbursement of taxes incompatible with European Union law, repayment of a tax wrongly paid can be refused where it would entail unjust enrichment of the persons concerned. The protection of the rights so guaranteed by the legal order of the European Union does not require repayment of taxes, charges and duties levied in breach of European Union law where it is established that the person required to pay such charges has actually passed them on to other persons (see *Comateb and Others*, paragraph 21).

19 In such circumstances, the burden of the charge levied but not due has been borne not by the trader, but by the purchaser to whom the cost has been passed on. Therefore, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge (*Comateb and Others*, paragraph 22).

20 None the less, since such a refusal of reimbursement of a tax levied on the sale of goods is a limitation of a subjective right derived from the legal order of the European Union, it must be interpreted narrowly. Accordingly, the direct passing on to the purchaser of the tax wrongly levied constitutes the sole exception to the right to reimbursement of tax levied in breach of European Union law.

21 The Court has also held that, even where it is established that the burden of the charge levied though not due has been passed on to third parties, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment, since even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his sales (see *Comateb and Others*, paragraphs 29 to 32; *Michaïlidis*, paragraphs 34 and 35; and *Weber's Wine World and Others*, paragraph 98 and 99).

22 Similarly, the Member State may not reject an application for reimbursement of an unlawful tax on the ground that the amount of that tax has been set off by the abolition of a lawful levy of an equivalent amount.

23 Although reimbursement of an unlawful levy to a trader who has passed on the amount to his customers can, in the conditions set out above, lead to unjust enrichment, that is not so in the case of an alleged abolition of other taxes in relation to the introduction of a tax contrary to European Union law.

24 That abolition falls within the ambit of choices made by the State in the field of taxation which express its general policy in economic and social matters. Such a choice can easily have the most diverse of consequences which, disregarding the potential difficulties in ascertaining whether and, if so, to what extent one tax has, in reality, purely and simply replaced another, preclude the reimbursement of an unlawful tax in such a context's being regarded as giving rise to unjust enrichment.

25 That conclusion cannot be called into question by the Court's judgments in Case 177/78 *McCarren* [1979] ECR 2161 and Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083. Even if, in paragraph 25 of the judgment in *McCarren* and

paragraph 41 of the judgment in *Apple and Pear Development Council*, the Court did not rule out that the national court, applying its national law, could take into consideration possible methods of refusing reimbursement of an unlawful tax other than passing on, it must be noted that the Court, in paragraph 20 of the present judgment, states that the direct passing on of the tax wrongly levied to the purchaser constitutes the sole exception to the right to reimbursement of tax levied in breach of European Union law.

26 The answer to the second and third questions is therefore that the recovery of sums wrongly paid can give rise to unjust enrichment only when the amounts wrongly paid by a taxpayer under a tax levied in a Member State in breach of European Union law have been passed on direct to the purchaser. Consequently, European Union law precludes a Member State from refusing reimbursement of a tax wrongfully levied on the ground that the amounts wrongly paid by the taxpayer have been set off by a saving made as a result of the concomitant abolition of other levies, since such a set-off cannot be regarded, from the point of view of European Union law, as an unjust enrichment as regards that tax.

27 Having regard to the reply given to the second and third questions, it is not necessary to answer the first and fourth questions.

Costs

28 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 (Grand Chamber) hereby rules:

The rules of European Union law on recovery of sums wrongly paid must be interpreted to the effect that recovery of sums wrongly paid can give rise to unjust enrichment only when the amounts wrongly paid by a taxpayer under a tax levied in a Member State in breach of European Union law have been passed on direct to the purchaser. Consequently, European Union law precludes a Member State from refusing reimbursement of a tax wrongfully levied on the ground that the amounts wrongly paid by the taxpayer have been set off by a saving made as a result of the concomitant abolition of other levies, since such a set-off cannot be regarded, from the point of view of European Union law, as an unjust enrichment as regards that tax.

[Signatures]