JUDGMENT OF THE COURT (Second Chamber)

16 December 2010 *

In Case C-430/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 9 October 2009, received at the Court on 2 November 2009, in the proceedings

Euro Tyre Holding BV

v

Staatssecretaris van Financiën,

* Language of the case: Dutch.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, U. Lõhmus (Rapporteur), A. Ó Caoimh and P. Lindh, Judges,

Advocate General: J. Kokott,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Euro Tyre Holding BV, by T.C. van Zwieten, belastingadviseur,

— the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

— the Greek Government, by K. Georgiadis, M. Germani and M. Tassopoulou, acting as Agents,

— the European Commission, by D. Triantafyllou and W. Roels, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first subparagraph of Article 28c(A)(a) 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), as amended by Council Directive 96/95/EC of 20 December 1996 (OJ 1996 L 338, p. 89; 'the Sixth Directive'), read in conjunction with Articles 8(1)(a) and (b), 28a(1)(a) and 28b(A)(1) of that directive.

2 The reference has been made in the course of proceedings between Euro Tyre Holding BV ('ETH') and the Staatssecretaris van Financiën (State Secretary for Finance) concerning notices of additional assessment to value added tax ('VAT') to which that company was subject following a transaction relating to goods which were the subject of two successive supplies.

Legal context

The Sixth Directive

3 Article 8(1)(a) and (b) of the Sixth Directive provides:

'The place of supply of goods shall be deemed to be:

(a) in the case of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person: the place where the goods are at the time when dispatch or transport to the person to whom they are supplied begins. …

(b) in the case of goods not dispatched or transported: the place where the goods are when the supply takes place.'

4 According to the first subparagraph of Article 28a(1)(a) of the Sixth Directive:

'The following shall also be subject to [VAT]:

(a) intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such who is not eligible for the tax

exemption provided for in Article 24 and who is not covered by the arrangements laid down in the second sentence of Article 8(1)(a) or in Article 28b(B)(1).'

5 Article 28b(A)(1) of that directive provides:

'The place of the intra-Community acquisition of goods shall be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends.'

6 The first subparagraph of Article 28c(A)(a) of that directive is worded as follows:

'Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Article 5, dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.'

7 Article 22 of the Sixth Directive, in the version resulting from Article 28h thereof, imposes several obligations on persons liable to payment concerning, in particular, account keeping, invoicing, VAT returns and recapitulative statements which they are required to lodge with the tax authorities. The first subparagraph of Article 22(6)(b) provides:

'Every taxable person identified for [VAT] purposes shall also submit a recapitulative statement of the acquirers identified for [VAT] purposes to whom he has supplied goods under the conditions provided for in Article 28c(A)(a) and (d), and of consignees identified for [VAT] purposes in the transactions referred to in the fifth subparagraph.'

National legislation

8 It is apparent from the written submissions made to the Court by the Netherlands Government that the national provisions applicable to the main proceedings are those resulting from the Law of 1968 on turnover tax (Wet op de omzetbelasting 1968) of 28 June 1968 (*Staatsblad* 1968, No 329, 'the Law of 1968').

9 According to Article 5 of the Law of 1968, the place of supply, in the case where the goods concerned by the supply are dispatched or transported, is the place where the dispatch or transport begins.

10 Under Article 9(2)(b) of the Law of 1968, the rate of tax is 0 % for the supply of goods or services listed in Table II of that law, provided that the conditions laid down by a general measure of administration are satisfied.

11 Position a. 6 in Table II, in the version in force at the time of the facts in the main proceedings, referred to 'goods which are transported to another Member State where those goods are subject there to a tax following an intra-Community acquisition of those goods.'

The main proceedings and the question referred for a preliminary ruling

12 ETH is a Netherlands company whose commercial activity was to supply spare parts for automobiles and other vehicles. During the period from 1 October 1997 to 31 January 1999 ETH sold, on various occasions, consignments of tyres under 'ex warehouse' conditions of supply to two companies established in Belgium, Miroco BVBA and VBS BVBA (respectively 'Miroco' and 'VBS' or, together, 'the purchasers'). Those conditions of supply meant that ETH would deliver the goods to its warehouse in Venlo (Netherlands) and that the transport from the warehouse would be on behalf of and at the risk of the purchasers. When the sales agreements were concluded the purchasers informed ETH that the goods would be transported to Belgium.

13 ETH issued invoices to the purchasers in respect of those sales which made no mention of VAT. The purchasers paid for the goods before they were delivered.

14 Before the goods were delivered pursuant to the sales agreements, the purchasers sold the goods on, each for their own part, to Banden Decof NV ('Decof'), a company established in Belgium, subject to the conditions of supply that the transport of the goods to Decof's premises was on behalf of and at the risk of Miroco or of VBS.

15 The goods were collected by a representative of Miroco or of VBS from ETH's warehouse in the Netherlands and transported directly to Decof's premises in Belgium by means of a lorry and driver supplied for consideration by Decof to those companies. At each collection, the driver supplied to ETH a declaration signed by him stating that the goods were transported to Belgium. ETH was subsequently informed that the goods had not been transported to the purchasers. ETH was not involved in the transport.

16 Prior to the supplies, the tax authorities had confirmed at ETH's request that the purchasers' VAT identification numbers were correct. Subsequently, ETH had, with regard to those supplies, submitted the statement referred to in Article 22(6)(b) of the Sixth Directive.

17 Following an investigation at ETH in 1999, the Inspector, as the competent authority in the Netherlands for the collection of VAT, rejected the statement requesting application of a zero rate of tax and notified to that company two notices of additional assessment to VAT concerning the period from 1 January 1997 to 31 December 1998 and the period of January 1999 respectively. After a first objection, the Inspector annulled the notices of additional assessment because they contained an error in the name of the addressee. Having corrected that error, the Inspector issued two new notices of additional assessment. Following a new objection, the Inspector reduced the amount of the first additional assessment and upheld the amount of the second additional assessment.

18 ETH brought an action against the latter notices of additional assessment before the Gerechtshof te 's-Hertogenbosch. In its judgment of 6 March 2007, that court held that the intra-Community transport between the Netherlands and Belgium occurred in the context of supplies by the purchasers to Decof. Accordingly, in the light of Case C-245/04 *EMAG Handel Eder* [2006] ECR I-3227, that court held that ETH was not entitled, in respect of its supplies to the purchasers, to apply the exemption in respect

of an intra-Community supply provided for in Article 28c(A)(a) of the Sixth Directive. That court however found, for other reasons, that the action was well founded in part and reduced the two disputed notices of additional assessment. ETH brought an appeal on a point of law against that judgment before the referring court.

19 It is in those circumstances that the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'In the light of Article 28c(A)(a) of the Sixth Directive [relating to VAT], and of Article 8(1)(a) and (b), the first subparagraph of Article 28a(1)(a), and … Article 28b(A) … [(1)] of the Sixth Directive, where, with regard to the same goods, two successive supplies are effected between taxable persons acting as such, in respect of which there is one single intra-Community dispatch or one single intra-Community transport, how should one determine to which supply the intra-Community transport should be ascribed, when the transport of the goods is effected by or on behalf of the person who acts both in the capacity of purchaser for the first supply and in the capacity of vendor in the second supply?'

The question referred for a preliminary ruling

20 By its question, the referring court essentially asks whether, when goods are the subject of two successive supplies between different taxable persons acting as such, but of a single intra-Community transport, that transport should be ascribed to the first or second supply, given that that transaction therefore falls within the concept of an intra-Community supply for the purposes of the first subparagraph of Article

28c(A)(a) of the Sixth Directive, read in conjunction with Article 8(1)(a) and (b), the first subparagraph of Article 28a(1)(a), and Article 28b(A)(1) of that directive.

21 It is apparent from the order for reference that, by that question, the national court seeks to obtain clarification in relation to the answer given by the Court in *EMAG Handel Eder*. In paragraph 45 of that judgment and in the first subparagraph of paragraph 1 of the operative part thereof, the Court ruled that, where two successive supplies of the same goods, effected for consideration between taxable persons acting as such, gives rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be ascribed to only one of the two supplies, which alone will be exempted from tax under the first subparagraph of Article 28c(A)(a) of the Sixth Directive. In that connection, the referring court observes that the Court did not specify how one should determine to which of those two supplies the transport should be ascribed.

22 The case which gave rise to the judgment in *EMAG Handel Eder* was factually similar to that in the main proceedings. That case concerned two successive supplies of the same goods which had been the subject of a single intra-Community transport. Just as in the main proceedings, the two supplies involved three taxable persons established in two different Member States. However, in that case, the intermediate purchaser had received a request to supply goods from the final purchaser before acquiring those goods from his supplier, while the main proceedings concern a situation in which the intermediate purchaser sells on to the final purchaser the goods that the intermediate purchaser has previously acquired from his supplier and in which no prior order has been placed.

23 In paragraph 38 of *EMAG Handel Eder*, the Court held that, even if two successive supplies give rise only to a single movement of goods, they must be regarded as having followed each other in time.

24 As regards the place of those two supplies, the Court held that, if the first of the two successive supplies is the supply which involves the intra-Community dispatch or transport of goods and which, therefore, has as a corollary an intra-Community acquisition taxed in the Member State of arrival of that dispatch or transport, the second supply is deemed to occur in the place of the intra-Community acquisition preceding it, that is, in the Member State of arrival. Conversely, if the supply involving the intra-Community dispatch or transport of goods is the second of the two successive supplies, the first supply, which, necessarily, occurred before the goods were dispatched or transported, is deemed to occur in the Member State of the departure of that dispatch or transport (*EMAG Handel Eder*, paragraph 50).

25 Therefore, only the place of the supply which gives rise to the dispatch or intra-Community transport of goods is determined in accordance with Article 8(1)(a) of the Sixth Directive; that place is deemed to be in the Member State of the departure of that dispatch or transport. The place of the other supply is determined in accordance with Article 8(1)(b) of that directive; that place is deemed to be either in the Member State of departure or in the Member State of arrival of that dispatch or transport, according to whether that supply is the first or the second of the two successive supplies (*EMAG Handel Eder*, paragraph 51).

26 Those considerations can be transposed to circumstances such as those of the case in the main proceedings.

27 As regards the question to which supply the intra-Community transport should be ascribed if it is effected by or on behalf of the person who, as first person acquiring the goods and second supplier, was involved in both supplies, it should be pointed out that the Sixth Directive does not lay down any general rule in this regard. The answer to that question depends on an overall assessment of all the specific circumstances

from which it is possible to determine which supply fulfils all the conditions relating to an intra-Community supply.

28 In that regard, it should be borne in mind that, just like other expressions which define taxable transactions for the purposes of the Sixth Directive (see, inter alia, Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraph 44, and Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 41), the meanings of 'intra-Community supply' and 'intra-Community acquisition' are objective in nature and apply without regard to the purpose or results of the transactions concerned (Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraph 38; and Case C-285/09 *R.* [2010] ECR I-12605, paragraph 39).

29 It also follows from the Court's case-law that exemption of the intra-Community supply of goods for the purposes of the first subparagraph of Article 28c(A)(a) of the Sixth Directive becomes applicable only if the right to dispose of the goods as owner has been transferred to the person acquiring the goods, if the supplier establishes that those goods have been dispatched or transported to another Member State and if, as a result of that dispatch or transport, they have physically left the territory of the Member State of supply (see, to that effect, *Teleos and Others*, paragraph 42; Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 23; and Case C-84/09 *X* [2010] ECR I-11645, paragraph 27).

30 Even if the referring court raises only the question of the condition relating to intra-Community transport, it is necessary also to take into account the two other conditions set out in the previous paragraph, since the circumstances in which those conditions are fulfilled may be relevant to the assessment of the condition at issue in the main proceedings.

31 As regards, first of all, the transfer of the right to dispose of the goods as owner in the context of supplies effected successively, it should be borne in mind that the Court held, in paragraph 38 of *EMAG Handel Eder*, that the intermediary acquiring the goods can transfer the right to dispose of the goods as owner to the second person acquiring the goods only if it has previously been transferred to him by the first vendor.

32 In circumstances such as those at issue in the main proceedings, it must therefore be held that the collection of the goods from ETH's warehouse by the representative of the first person acquiring the goods must be regarded as the transfer to that person of the right to dispose of the goods as owner, and should be ascribed to the first supply.

33 However, that circumstance does not of itself suffice to justify the conclusion that the first supply constitutes an intra-Community supply. It cannot be ruled out that the second transfer of the power to dispose of the goods as owner may also take place in the Member State of the first supply, before the intra-Community transport has occurred. In such a case, the intra-Community transport could no longer be ascribed to that supply.

34 In a situation where the person acquiring the goods obtains the right to dispose of the goods as owner in the Member State of supply and undertakes to transport them to the Member State of destination, as occurs with supplies having as a condition that the goods be collected from the supplier's warehouse, account must be taken, as far as possible, of the purchaser's intentions at the time of the acquisition, provided that they are supported by objective evidence (see, to that effect, *X*, paragraph 47 and case-law cited).

35 In this case, if the purchasers, as the first persons acquiring the goods, expressed their intention to transport the goods to a Member State other than the State of supply and presented their VAT identification number attributed by that other Member State, ETH was entitled to consider that the transactions that it effected constituted intra-Community supplies.

36 However, after the transfer to the person acquiring the goods of the right to dispose of the goods as owner, the supplier effecting the first supply might be held liable to VAT on that transaction if he had been informed by that person of the fact that the goods would be sold on to another taxable person before they left the Member State of supply and if, following that information, the supplier omitted to send the person acquiring the goods a rectified invoice including VAT.

37 Next, as regards the condition relating to evidence, inasmuch as it constitutes one of the conditions of exemption referred to in paragraph 29 of this judgment, it should be pointed out that, even if it is incumbent as a rule on the supplier to establish that the goods have been dispatched or transported to another Member State, in circumstances where the right to dispose of the goods as owner is transferred to the person acquiring the goods in the Member State of supply and where it is for that person acquiring the goods to dispatch or transport the goods out of the Member State of supply, the evidence that the supplier might submit to the tax authorities depends essentially on information that he receives for that purpose from the person acquiring the goods.

38 It is apparent from the Court's case-law that it is legitimate to require, in such a case, that the supplier act in good faith and take every reasonable measure in his power to ensure that the transaction that he effects does not lead to his participation in tax fraud. However, once the supplier has fulfilled his obligations relating to evidence of an intra-Community supply, where the contractual obligation to dispatch or transport the goods out of the Member State of supply has not been satisfied by the per-

son acquiring the goods, it is the latter who should be held liable for the VAT in that Member State (see, to that effect, *Teleos and Others*, paragraphs 66 and 67).

39 It is apparent from the documents before the Court that, in the main proceedings, ETH, in classifying its supply as intra-Community and exempting it from VAT, relied on the purchasers' Belgian VAT identification number, verification of which it requested from the Netherlands tax authorities, and on the purchasers' declaration, supplied when the goods were collected from ETH's warehouse, stating that those goods would be transported to Belgium. The question whether ETH fulfilled its obligations relating to evidence and of diligence by acting in that manner is a matter for the referring court to assess on the basis of the conditions laid down in that connection by national law.

40 Lastly, in respect of the condition relating to the dispatch or transport of the goods out of the Member State of supply, it should be pointed out that, although, as is apparent from paragraph 45 of *EMAG Handel Eder*, the question who holds the right to dispose of the goods during the intra-Community transport is irrelevant, the circumstance that that transport is effected by the owner of the goods or on his behalf might none the less play a role in the decision of whether to ascribe that transport to the first or second supply. However, in cases where the transport is effected by or on behalf of the person who participates in both transactions, as in the main proceedings, that circumstance is not decisive.

41 Accordingly, the fact that, in the main proceedings, the second person acquiring the goods was involved in the transport is not a factor supporting the conclusion that that transport must be ascribed to the second supply.

42 Similarly, the circumstance that the goods were not transported to the address of the first persons acquiring the goods does not exclude the possibility that the transport

was effected in the context of the first supply, inasmuch as the application of the exemption to an intra-Community supply is subject to the condition that the transport must finish in a Member State other than the Member State of supply, the address at which the transport finishes being irrelevant in this respect.

43 That interpretation is not invalidated by the wording of Article 28b(A)(1) of the Sixth Directive, according to which the place of the intra-Community acquisition of goods is deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends. As is apparent from the Court's case-law, the purpose of the transitional arrangements for the taxation of trade between Member States, of which that provision forms part, is to transfer the tax revenue to the Member State in which final consumption of the goods supplied takes place (see, to that effect, Joined Cases C-536/08 and C-539/08 *X and fiscale eenheid Facet-Facet Trading* [2010] ECR I-3581, paragraphs 30 and 31) and not to determine which person effected an intra-Community supply.

44 In view of the foregoing considerations, the answer to the question referred is that, when goods are the subject of two successive supplies between different taxable persons acting as such, but of a single intra-Community transport, the determination of the transaction to which that transport should be ascribed, namely the first or second supply — given that that transaction therefore falls within the concept of an intra-Community supply for the purposes of the first subparagraph of Article 28c(A)(a) of the Sixth Directive, read in conjunction with Article 8(1)(a) and (b), the first subparagraph of Article 28a(1)(a), and Article 28b(A)(1) of that directive — must be conducted in the light of an overall assessment of all the circumstances of the case in order to establish which of those two supplies fulfils all the conditions relating to an intra-Community supply.

45 In circumstances such as those at issue in the main proceedings, in which the first person acquiring the goods, having obtained the right to dispose of the goods as

owner in the Member State of the first supply, expresses his intention to transport those goods to another Member State and presents his VAT identification number attributed by that other State, the intra-Community transport should be ascribed to the first supply, on condition that the right to dispose of the goods as owner has been transferred to the second person acquiring the goods in the Member State of destination of the intra-Community transport. It is for the referring court to establish whether that condition has been fulfilled in the case pending before it.

Costs

46 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 (Second Chamber) hereby rules:

When goods are the subject of two successive supplies between different taxable persons acting as such, but of a single intra-Community transport, the determination of the transaction to which that transport should be ascribed, namely the first or second supply — given that that transaction therefore falls within the concept of an intra-Community supply for the purposes of the first subparagraph of Article 28c(A)(a) 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, as amended by Council Directive 96/95/EC of 20 December 1996, read in conjunction with

Article 8(1)(a) and (b), the first subparagraph of Article 28a(1)(a), and Article 28b(A)(1) of that directive — must be conducted in the light of an overall assessment of all the circumstances of the case in order to establish which of those two supplies fulfils all the conditions relating to an intra-Community supply.

In circumstances such as those at issue in the main proceedings, in which the first person acquiring the goods, having obtained the right to dispose of the goods as owner in the Member State of the first supply, expresses his intention to transport those goods to another Member State and presents his value added tax identification number attributed by that other State, the intra-Community transport should be ascribed to the first supply, on condition that the right to dispose of the goods as owner has been transferred to the second person acquiring the goods in the Member State of destination of the intra-Community transport. It is for the referring court to establish whether that condition has been fulfilled in the case pending before it.

[Signatures]