JUDGMENT OF THE COURT (Second Chamber)

18 October 2007 *

In Case C-355/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Gerechtshof te Amsterdam (Netherlands), made by decision of 28 August 2006, received at the Court on 30 August 2006, in the proceedings

J.A. van der Steen

v

Inspector van de Belastingdienst Utrecht-Gooi/kantoor Utrecht

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, P. Kūris (Rapporteur) and C. Toader, Judges,

* Language of the case: Dutch.

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Commission of the European Communities, by D. Triantafyllou and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 June 2007

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(1) 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 'Sixth Directive').

2 The reference was made in proceedings between Mr van der Steen and the inspector van Belastingdienst Utrecht-Gooi/kantoor Utrecht ('the inspector') concerning the dismissal of an objection directed against a decision by the inspector to consider a company and the appellant himself — the only manager, shareholder and employee of that company — as a single fiscal entity for the levying of value-added tax ('VAT').

Legal context

Community rules

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 According to Article 4 of the Sixth Directive:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible

property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

...

4. The use of the word "independently" in paragraph 1 shall exclude employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links.

...'

National rules

5 Article 7(1) of the Wet op de omzetbelasting of 28 June 1968 (*Staatsblad* 1968, No 329, the 'Turnover Tax Law') provides:

'A trader is any person who carries on a business independently'.

6 Under Article 7(2) of the Turnover Tax Law, a 'business' includes both the exercise of a trade or profession and the exploitation of property for the purpose of obtaining income on a continuing basis.

7 Under Article 7(4) of the Turnover Tax Law:

'Natural persons and bodies within the meaning of the General Law on national taxation who are traders within the meaning of this Article, who are resident, established or have a fixed establishment in the Netherlands, if they are financially, economically and organisationally linked in such a way that they form an entity, are — upon application by one or several of them or in the absence of such an application, in the form of a decision by the inspector that is subject to appeal — to be treated as a single trader from the first day of the month following that during which the inspector adopted the decision. Rules for setting up, altering and terminating the fiscal entity may be laid down by ministerial order.'

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

8 Until 6 March 1998, Mr van der Steen ran a one-man business providing cleaning services, in which capacity he was a trader within the meaning of the Turnover Tax Law.

9 From 6 March 1998, the appellant became the director and sole shareholder of the private limited company established on 4 July 1991, J.A. van der Steen

Schoonmaakdiensten BV ('the company'), which took over and continued the business previously carried on by the one-man business. The company was as such an undertaking within the meaning of the Turnover Tax Law.

10 Mr van der Steen had concluded a contract of employment with the company under which he received a fixed monthly salary and an annual holiday payment of 8% of his yearly salary. The company deducted income tax and compulsory social insurance premiums from his salary. The company did not employ anyone apart from him.

11 When the company became insolvent, bankruptcy proceedings were commenced during December 2002 and the company was declared bankrupt on 5 January 2005.

12 It is apparent from the letter of 18 December 2002 that Mr van der Steen asked the inspector for a separate VAT number from that of his company so that he and his company would not form a fiscal entity within the meaning of the Turnover Tax Law.

13 By decision of 28 April 2004, the inspector decided that, with effect from 1 May 2004, Mr van der Steen and the company would constitute a fiscal entity within the meaning of Article 7(4) of the Turnover Tax Law. In support of his decision, he referred to judgment No 35 775 of the Hoge Raad der Nederlanden of 26 April 2002. Ruling on an objection, the inspector confirmed his position on 16 August 2004, citing a decision of the Staatssecretaris van Financiën (State Secretary for Finance) of 24 July 2002, based on that judgment.

14 Mr van der Steen brought an action against the inspector's decisions before the Gerechtshof te Amsterdam, which points out that it is a prerequisite for those decisions that the appellant should qualify as a trader for the purposes of the Turnover Tax Law, but is uncertain whether such an assessment is compatible with Community law.

15 In the view of the Gerechtshof te Amsterdam it cannot be said that Mr van der Steen stands in the position of employee vis à vis the company. None the less, it asks whether, in applying the provisions of Article 7(4) of the Turnover Tax Law — which transpose the provisions of the second paragraph of Article 4(4) of the Sixth Directive into national law —, the appellant can be regarded as carrying out his work independently without however being regarded as independently carrying out economic activity within the meaning of Article 4(1) of the Sixth Directive.

16 In those circumstances, the Gerechtshof te Amsterdam decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 4(1) of the Sixth Directive to be interpreted as meaning that if a natural person has the sole activity of actually carrying out all work ensuing from the activities of a private limited company of which he is the sole manager, sole shareholder and sole "member of staff", that work is not an economic activity because it is carried out in the course of the management and representation of the private limited company and thus not in economic dealings?'

The question

17 By its question, the Gerechtshof te Amsterdam essentially asks whether, for the purposes of the second paragraph of Article 4(4) of the Sixth Directive, a natural person carrying out all work in the name and on behalf of a company that is a taxable person pursuant to a contract of employment binding him to that company of which he is also the sole shareholder, the sole manager and the sole member of staff, is himself a taxable person within the meaning of Article 4(1) of the Sixth Directive.

18 It must be recalled from the outset that under Article 4(1) of the Sixth Directive, a taxable person is any person who independently carries out any economic activity specified in paragraph 2 of the same Article.

19 The first paragraph of Article 4(4) of the Sixth Directive states that the word 'independently' excludes employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

20 The second paragraph of Article 4(4) states that Member States, subject to the consultations provided for in Article 29 of the Sixth Directive, may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links.

21 In that regard, it must be found that, in a situation of the kind before the national court, the two persons concerned have a relationship of employer and employee.

22 First, while the company's cleaning services were carried out exclusively by Mr van der Steen, contracts for the provision of cleaning services were entered into by the company, which paid the appellant a fixed monthly salary and annual holiday payment. The company deducted income tax and social security contributions from his salary. Therefore, Mr van der Steen depended on the company to determine his remuneration.

23 Secondly, Mr van der Steen, at the time of providing services in his capacity as employee, did not act in his own name, on his behalf and under his own responsibility, but on behalf and under the responsibility of the company.

24 Thirdly, the Court of Justice has held that with regard to remuneration, there is no relationship of employer and employee where the persons concerned bear the economic risk entailed in their activity (see Case C-202/90 *Ayuntamiento de Sevilla* [1991] ECR I-4247, paragraph 13).

25 In this connection, the Gerechtshof te Amsterdam makes clear that Mr van der Steen did not bear any economic business risk in acting as manager and performing the work in the course of the company's dealings with third parties.

26 It follows that an employee in the position of the appellant in the main proceedings could not be considered to be a taxable person within the meaning of Article 4(1) of the Sixth Directive.

27 The judgments in Case C-107/94 *Asscher* [1996] ECR I-3089 and Case C-23/98 *Heerma* [2000] ECR I-419 cannot lead to a different interpretation of that provision.

28 In *Heerma*, having found that the letting of property by a person to the partnership of which he is a member and for which he receives rent constitutes a supply for consideration within the meaning of Article 2 of the Sixth Directive, the Court held, in paragraph 17, that a partner who lets immovable property to the partnership of which he is a member and which is itself a taxable person acts independently within the meaning of Article 4(1) of the Sixth Directive.

29 Similarly, in paragraph 18 of that judgment, the Court explained that, in so far as the activity at issue is concerned, there is between the partnership and the partner no relationship of employer and employee similar to that mentioned in the first subparagraph of Article 4(4) of the Sixth Directive. On the contrary, in letting tangible property to the partnership, the partner acts in his own name, on his own behalf and under his own responsibility, even if he is at the same time manager of the lessee partnership.

30 In the case at issue in the main proceedings, the parties agree that even though Mr Van der Steen was the only director and the sole shareholder of the company, he performed his work under a contract of employment. It follows that Mr van der Steen's situation is not the same as that described in *Heerma* and that — as stated by the Advocate General in point 22 of her Opinion — in so far as the work the appellant provided to the company fell within the scope of that contract of employment, it is in principle excluded from the scope of VAT by the clear terms of Article 4(4) of the Sixth Directive.

31 Moreover, the reasoning adopted by the Court — which held, in paragraph 26 of *Asscher*, that a director of a company of which he is the sole shareholder does not carry out his activity in the context of a relationship of subordination, and so is to be treated not as a 'worker' within the meaning of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) but as pursuing an activity as a self-employed person within the meaning of Article 52 of the EC Treaty (now, after amendment, Article 43 EC) — cannot be applied to the case at issue in the main proceedings, which is unrelated to the freedom of movement for persons and only concerns VAT and the definition of 'taxable person' in respect of VAT.

32 In the light of the foregoing, the answer to the question must be that for the purposes of the application of the second paragraph of Article 4(4) of the Sixth Directive, a natural person carrying out all work in the name and on behalf of a company that is a taxable person pursuant to a contract of employment binding him to that company of which he is also the sole shareholder, the sole manager and the sole member of staff, is not himself a taxable person within the meaning of Article 4(1) of that Directive.

Costs

33 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:

For the purposes of the application of the second paragraph of Article 4(4) 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, a natural person carrying out all work in the name and on behalf of a company that is a taxable person pursuant to a contract of employment binding him to that company of which he is also the sole shareholder, the sole manager and the sole member of staff, is not himself a taxable person within the meaning of Article 4(1) of that Directive.

[Signatures]