JUDGMENT OF THE COURT (First Chamber)

17 July 2008 *

In Case C-426/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Wojewódzki Sąd Administracyjny w Białymstoku (Poland), made by decision of 27 June 2007, received at the Court on 14 September 2007, in the proceedings

Dariusz Krawczyński

v

Dyrektor Izby Celnej w Białymstoku,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano, M. Ilešič (Rapporteur), E. Levits and J.-J. Kasel, Judges,

* Language of the case: Polish.

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

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Krawczyński, by W. Kłoskowski, radca prawny,

— Dyrektor Izby Celnej w Białymstoku, by W. Dziemiach, radca prawny,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Commission of the European Communities, by D. Triantafyllou and K. Herrmann, acting as Agents,

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

gives the present

Judgment

1 This reference for a preliminary ruling concerns the interpretation, first, of Article 33(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 (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1), ('the Sixth Directive') and, second, of the first paragraph of Article 90 EC.

2 The reference has been made in proceedings between Mr Krawczyński and the Dyrektor Izby Celnej w Białymstoku (Director of the Customs Chamber, Białystok) concerning the excise duty imposed on him in connection with the sale of second-hand motor vehicles prior to their initial registration in Poland.

Legal framework

Community legislation

3 Article 33(1) of the Sixth Directive provides:

'Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided however that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

National legislation

4 Article 2 of the Polish Law on Excise Duty (ustawa o podatku akcyzowym) of 23 January 2004 (Dz. U No 29, heading 257), in the version applicable to the main proceedings ('the 2004 Law'), states:

'For the purposes of the present Law, the terms below shall be construed as follows:

…

(11) “intra-Community acquisition”: the transfer of goods subject to excise duty from the territory of a Member State to Poland;

…’

5 Article 10(1) of the 2004 Law is worded as follows:

‘The tax base, where the rate is expressed as a percentage of the basis of assessment, shall be:

(1) the amount due on the sale, in Poland, of goods subject to excise duty, minus the amount of the tax on goods and services or of the amount of excise duty due on those goods;

(2) the amount which the purchaser is obliged to pay for the goods subject to excise duty, in the case of intra-Community acquisition;

(3) the amount due on the supply of goods subject to excise duty in the territory of a Member State, in the case of supply within the Community;

(4) the customs value of the goods subject to excise duty, plus the amount of customs duties due, in the case of importation, having regard to paragraphs 6 to 9.’

6 Article 75 (1) and (3) of the 2004 Law provides:

‘(1) The rate of tax on goods subject to non-harmonised excise duty shall be 65% of the base defined in Article 10, except for the rate applicable to electrical power.

…

(3) The minister competent in matters of public finances may, by order, reduce the rates of excise duty provided for in paragraphs 1 and 2 and differentiate them according to types of goods, and determine the conditions of application thereof.’

7 Article 79 of the 2004 Law states:

‘The taxpayer shall be entitled to deduct from the amount of the excise duty the excise duty paid by him, at the time of the acquisition of goods subject to non-harmonised excise duty, on a sale or a taxable import.’

8 According to Article 80 (1) to (4) of the 2004 Law:

‘(1) Passenger cars not registered in Poland in accordance with the road traffic provisions shall be subject to excise duty.

(2) The following shall be subject to excise duty:

(1) persons effecting any sale of passenger cars before their initial registration in Poland;

(2) importers and persons effecting acquisitions in the Community.

(3) Excise duty on cars arises:

(1) in the case of sale, as from the issue of the invoice and, at the latest, within seven days from the day on which the goods are delivered;

(2) in the case of importation, as from the day on which the customs debt arises for the purposes of customs law;

(3) in the case of acquisition in the Community, from the time of acquisition of the right to use the passenger car as owner and, at the latest, from its registration in Poland in accordance with the road traffic provisions.

(4) The minister competent in matters of public finances may, by order, determine the information concerning passenger cars, including the permissible carrying capacity, for the purposes of charging excise duty, in the light of the solutions applied by the specific taxation provisions and the need to ensure proper charging of excise duty.'

9 Article 81(1) of the 2004 Law is worded as follows:

'Persons effecting, within the Community, intra-Community acquisitions of passenger cars not registered in Poland in accordance with the road traffic provisions shall be required:

(1) to submit, at the time of importation into Poland, a simplified declaration to the appropriate customs office within five days of the date of the acquisition in the Community;

(2) to pay excise duty no later than the date of registration of the car in Poland.'

10 Under Article 82(3) of the 2004 Law, in the case of an intra-Community acquisition of a passenger car, the taxable amount is the amount which the purchaser is required to pay to the vendor.

11 Article 7 of the Order of the Minister for Finance on the lowering of the rates of excise duty (rozporządzenie Ministra Finansów w sprawie obniżenia stawek podatku akcyzowego) of 22 April 2004 (Dz. U No 87, heading 825), in the version applicable to the main proceedings ('the 2004 Order'), and Annexes 1 and 2 thereto indicate that, for cars which are new or less than two years old the rate of excise duty is 3.1% or 13.6% depending on engine capacity and that, by contrast, for vehicles over two years old, that rate is fixed using a calculation formula laid down in Article 7(2) of the 2004 Order and varies according to the age of the vehicle, attaining a maximum of 65% of the tax base.

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

12 By decision of 7 November 2005, the Naczelnik Urzędu Celnego w Białymstoku (Director of the Customs Office, Białystok) set at PLN 11 066 the amount of excise duty for which Mr Krawczyński was liable in respect of the sale in Poland of five motor vehicles before their initial registration in Poland, based on the excise duties which he was obliged to declare and to pay, which he failed to do.

13 Mr Krawczyński lodged an appeal against that decision, claiming that the excise duty payable should be fixed at a total of PLN 4 599, because he considered essentially that he had the right, pursuant to Article 79 of the 2004 Law, to deduct from the amount payable the excise duty which he had paid, at the time of the acquisition of goods subject to non-harmonised excise duty, on a taxable sale or import, even if he had not submitted the declaration provided for in that regard.

14 The Dyrektor Izby Celnej w Białymstoku, by decision of 19 January 2006, dismissed the appeal. In his decision, he emphasised essentially that persons effecting any sale of motor vehicles in Poland before their initial registration there are liable for excise duty and that, in order to enjoy the abovementioned right to a deduction, the taxpayer must lodge with the customs office responsible an excise duty declaration, calculate the excise duty which is due and pay that amount within the period laid down by the legislation.

15 Mr Krawczyński brought an action against that decision dismissing his appeal before the Wojewódzki Sąd Administracyjny w Białymstoku (Regional Administrative Court, Białystok). He claims in particular that sales of second-hand vehicles which are already registered in Poland are exempt from excise duty irrespective of their age, whereas the same exemption does not apply to sales of second-hand vehicles imported from other Member States. Sales of the latter vehicles before they are registered in Poland are subject to an excise duty the amount of which depends on the age of the vehicle. Mr Krawczyński concludes from this that the Republic of Poland

imposes on second-hand vehicles imported from other Member States an excise duty in excess of that charged on similar domestic products.

16 By contrast, the Dyrektor Izby Celnej w Białymstoku is of the view that the Republic of Poland does not discriminate in any way between motor vehicles on the basis of their place of origin, inasmuch as the decisive criterion for imposing excise duty on them is that they are not registered on Polish territory and not the fact that the vehicles originate in a Member State other than the Republic of Poland.

17 In those circumstances, the Wojewódzki Sąd Administracyjny w Białymstoku decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can excise duty introduced in a Member State, such as that provided for by [the 2004 Law], which is charged on any sale of passenger cars before their initial registration in national territory, be characterised as a form of unlawful turnover tax for the purposes of Article 33(1) of the Sixth Directive …?

If the first question is to be answered in the negative:

(2) Is excise duty such as that at issue in these proceedings pending before the Wojewódzki Sąd Administracyjny w Białymstoku, which is charged on any sale of passenger cars before their initial registration in national territory, contrary to Article 90 EC — which prohibits discrimination and the protectionist application of a domestic tax system in favour of similar domestic products — where such duty is not charged on the sale of second-hand cars previously registered in the Republic of Poland?'

The questions referred for a preliminary ruling

The first question

18 It should first be recalled that, in accordance with settled case-law, in order to decide whether a tax, duty or charge can be characterised as a turnover tax within the meaning of Article 33(1) of the Sixth Directive, it is necessary, in particular, to determine whether it has the effect of jeopardising the functioning of the common system of value added tax ('VAT') by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT (Joined Cases C-283/06 and C-312/06 *KÖGÁZ and Others* [2007] ECR I-8463, paragraph 34 and the case-law cited).

19 The Court has stated in that regard that taxes, duties and charges must, in any event, be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT, even if they are not identical to it in every way (*KÖGÁZ and Others*, paragraph 35 and the case-law cited).

20 Article 33(1) of the Sixth Directive, however, does not preclude the maintenance or introduction of a tax which does not display one of the essential characteristics of VAT (*KÖGÁZ and Others*, paragraph 36 and the case-law cited).

21 The Court has established the essential characteristics of VAT. According to its case-law there are four such characteristics: VAT applies generally to transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; that tax is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place, and the amounts paid during the preceding stages of the production and distribution process

are deducted from the VAT payable by a taxable person, with the result that that tax applies, at any given stage, only to the value added at that stage and the final burden of that tax rests ultimately on the consumer (*KÖGÁZ and Others*, paragraph 37 and the case-law cited).

22 With regard to the first of those characteristics, that is to say, the general application of VAT to transactions relating to goods or services, it must be pointed out, as stated moreover by the Dyrektor Izby Celnej w Białymstoku, the Polish Government and the Commission of the European Communities, that the excise duty at issue in the main proceedings is charged, pursuant to Article 80(2)(1) of the 2004 Law, only on sales transactions relating to motor vehicles before their first registration on Polish territory.

23 Having regard to that fact, the excise duty in question cannot be considered as being charged in a general manner on all transactions relating to goods or services.

24 Consequently, since the excise duty at issue in the main proceedings does not have the first of the characteristics referred to in paragraph 21 of this judgment, it is not necessary to establish whether that excise duty has the other three essential characteristics of VAT.

25 It is thus clear that a tax having characteristics such as those of the excise duty at issue in the main proceedings differs from VAT to such an extent that it cannot be characterised as a turnover tax for the purposes of Article 33(1) of the Sixth Directive.

26 In the light of the foregoing, the answer to the first question must be that Article 33(1) of the Sixth Directive is to be interpreted as not precluding an excise duty, such as

that provided for in Poland by the 2004 Law, which is charged on all sales of motor vehicles before their first registration on national territory.

The second question

27 The referring court asks essentially whether an excise duty which is charged on all sales of motor vehicles before their first registration on national territory is contrary to Article 90 EC, in so far as the sale of second-hand cars already registered in the Republic of Poland is exempt from such duty.

28 It is therefore necessary to establish whether such a system does not lead to higher taxation of second-hand vehicles imported from a Member State other than the Republic of Poland, and which are consequently not registered in Poland, than of second-hand vehicles already on the national market and which are registered in Poland.

29 As a preliminary point, it must be noted that an excise duty such as that imposed by the national legislation at issue in the main proceedings comes under the general system of internal taxation on goods and must therefore be examined in the light of Article 90 EC (see, to that effect, Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraph 24).

30 It should be recalled that the Court has held that Article 90 EC supplements, within the system of the EC Treaty, the provisions on the abolition of customs duties and charges having equivalent effect. Its aim is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States (*Brzeziński*, paragraph 27 and the case-law cited).

31 In relation to the taxation of imported second-hand vehicles, Article 90 EC seeks to ensure the complete neutrality of internal taxation as regards competition between products already on the domestic market and imported products (Case C-74/06 *Commission* v *Greece* [2007] ECR I-7585, paragraph 24 and the case-law cited).

32 In addition, a system of taxation may be considered compatible with Article 90 EC only if it is so arranged as to exclude any possibility of imported products being taxed more heavily than similar domestic products, so that it cannot, in any event, have discriminatory effect (*Brzeziński*, paragraph 40 and case-law cited).

33 In that context, it is necessary to establish whether the excise duty at issue in the main proceedings is levied in the same way both for the sale of an imported second-hand motor vehicle and for a second-hand motor vehicle already registered in Poland, those two categories of vehicles constituting similar products within the meaning of the first paragraph of Article 90 EC.

34 When that comparison is being made, a distinction must be drawn between two categories of vehicles, with the first category comprising those which are sold second-hand during the two calendar years following their manufacture — the year of manufacture being considered to be the first calendar year — and the second category comprising those sold second-hand after that two-year period (*Brzeziński*, paragraph 34).

35 With regard to passenger cars sold new or second-hand during that two-year period, the 2004 Order makes clear that they are subject to excise duty calculated according to the same rate (see, to that effect, *Brzeziński*, paragraph 35).

36 Regarding second-hand vehicles less than two years old, it is, more specifically, for the national court to ascertain, in the light of, in particular, the 2004 Order, whether

they are in reality subject to the same burden because of the excise duty, by virtue of the fact that the residual amount of that duty incorporated into the market value of second-hand vehicles registered in Poland is equal to the amount of the same duty imposed on similar second-hand vehicles originating in a Member State other than the Republic of Poland (*Brzeziński*, paragraph 36).

37 By contrast, the rate of excise duty imposed on second-hand vehicles sold more than two years after their date of manufacture is calculated using the formula provided for in Article 7 of the 2004 Order. The application of that formula results in a situation in which the rate increases with the age of the vehicle (see, to that effect, *Brzeziński*, paragraph 37).

38 It is for the national court to examine whether such an increase in the rate is imposed only on second-hand vehicles originating in a Member State other than the Republic of Poland and whether, by contrast, for second-hand vehicles which were registered when they were new in Poland, the rate of residual excise duty incorporated into the price of such a vehicle remains constant (*Brzeziński*, paragraph 38).

39 In the light of the above considerations, the answer to the second question must be that the first paragraph of Article 90 EC is to be interpreted as precluding an excise duty, such as that at issue in the main proceedings, in so far as the amount of the duty imposed on the sale, before their first registration, of second-hand vehicles imported from another Member State exceeds the residual amount of the same duty incorporated into the market value of similar vehicles previously registered in the Member State which introduced that duty. It is for the national court to examine whether the legislation at issue in the main proceedings, and in particular the application of Article 7 of the 2004 Order, has such an effect.

Limitation of the temporal effects of this judgment

40 In its written observations submitted to the Court, the Polish Government asks the Court, should it find national legislation such as that at issue in the main proceedings to be incompatible with Article 90 EC, to place a temporal limit on the effects of the judgment.

41 In support of its request, that government refers, first, to the fact that, when the national legislation at issue in the main proceedings was adopted, it took into account the judgments of the Court even it they did not concern legal and factual situations similar to those of the present case. It then goes on to argue that, despite the fact that certain provisions of the 2004 Order do not, according to the Commission and the Court, comply with the first paragraph of Article 90 EC, since they provide for an increase in the rate of excise duty with the age of the vehicle, such a finding cannot be sustained with regard to the other provisions of that order. With regard to those provisions, it submits, the Court may place a temporal limit on the effects of the present judgment.

42 It should be recalled in this connection that it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relations established in good faith (Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 35 and the case-law cited).

43 Such a restriction may, according to the Court's settled case-law, be allowed only in the actual judgment ruling upon the interpretation sought (*Meilicke and Others*, paragraph 36 and the case-law cited).

44 Indeed, there must necessarily be a single occasion when a decision is made on the temporal effects of the requested interpretation, which the Court gives of a provision of Community law. In that regard, the principle that a restriction may be allowed

only in the actual judgment ruling upon that interpretation guarantees the equal treatment of the Member States and of other persons subject to Community law, under that law, fulfilling, at the same time, the requirements arising from the principle of legal certainty (*Meilicke and Others*, paragraph 37).

45 The present reference for a preliminary ruling concerns, essentially, the question of the compatibility with the first paragraph of Article 90 EC of an excise duty which is levied on the sale of motor vehicles before their initial registration on national territory. In that regard, it follows from paragraph 41 of the judgment in *Brzeziński* that the first paragraph of Article 90 EC is to be interpreted as precluding an excise duty, in so far as the amount of the duty imposed on second-hand vehicles over two years old acquired in a Member State other than that which introduced such a duty exceeds the residual amount of the same duty incorporated into the market value of similar vehicles previously registered in the Member State which introduced that duty. It is for the national court to examine whether the legislation at issue in the main proceedings, and in particular the application of Article 7 of the 2004 Order, has such an effect.

46 As indicated in paragraph 62 of *Brzeziński*, the Court did not limit the temporal effects of that judgment.

47 It is therefore not appropriate to limit the temporal effects of the present judgment.

Costs

48 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 (First Chamber) hereby rules:

1. **Article 33(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, as amended by Council Directive 91/680/EEC of 16 December 1991, is to be interpreted as not precluding an excise duty such as that provided for in Poland by the Law on Excise Duty (ustawa o podatku akcyzowym) of 23 January 2004, which is charged on all sales of motor vehicles before their first registration on national territory.**

2. **The first paragraph of Article 90 EC is to be interpreted as precluding an excise duty, such as that at issue in the main proceedings, in so far as the amount of the duty imposed on the sale, before their first registration, of second-hand vehicles imported from another Member State exceeds the residual amount of the same duty incorporated into the market value of similar vehicles previously registered in the Member State which introduced that duty. It is for the national court to examine whether the legislation at issue in the main proceedings, and in particular the application of Article 7 of the Order of the Minister for Finance on the lowering of the rates of excise duty (rozporządzenie Ministra Finansów w sprawie obniżenia stawek podatku akcyzowego), has such an effect.**

[Signatures]