JUDGMENT OF THE COURT (Eighth Chamber)

9 June 2011 *

In Case C-285/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Spain), made by decision of 26 April 2010, received at the Court on 7 June 2010, in the proceedings

Campsa Estaciones de Servicio SA

v

Administración del Estado,

THE COURT (Eighth Chamber),

composed of K. Schiemann, President of the Chamber, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: J. Mazák,
Registrar: C. Strömholm, Administrator,

* Language of the case: Spanish.

having regard to the written procedure and further to the hearing on 31 March 2011,

after considering the observations submitted on behalf of:

— Campsa Estaciones de Servicio SA, by F. Bonastre Capell, abogado,

— the Spanish Government, initially by B. Plaza Cruz, and subsequently by S. Centeno Huerta, acting as Agents,

— the European Commission, by I. Martínez del Peral and R. Lyal, 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 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 has been made in proceedings between Campsa Estaciones de Servicio SA ('Campsa') and the Administración del Estado concerning a notice of assessment issued by the Oficina Nacional de Inspección (National Inspection Office), on the value added tax ('VAT') for the year 1993.

Legal context

European Union legislation

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

4 Article 5(6) and (7) of the Sixth Directive provides:

'6. The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the [VAT] on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. However, applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business shall not be so treated.

7. Member States may treat as supplies made for consideration:

(a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the [VAT] on such goods, had they been acquired from another taxable person, would not be wholly deductible;

(b) the application of goods by a taxable person for the purposes of a non-taxable transaction, where the [VAT] on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with subparagraph (a);

(c) ... the retention of goods by a taxable person or his successors when he ceases to carry out a taxable economic activity where the [VAT] on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with subparagraph (a).'

5 Article 6(2) and (3) of the Sixth Directive provides:

'2. The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the [VAT] on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

...

3. ... Member States may treat as a supply of services for consideration the supply by a taxable person of a service for the purposes of his undertaking where the [VAT] on such a service, had it been supplied by another taxable person, would not be wholly deductible.'

6 Article 11A(1) of the Sixth Directive, relating to the taxable amount for VAT within the territory of a country, states:

'The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, 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 including subsidies directly linked to the price of such supplies;

(b) in respect of supplies referred to in Article 5(6) and (7), the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply;

(c) in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services;

(d) in respect of supplies referred to in Article 6(3), the open market value of the services supplied.

... ’

7 Article 27 of the Sixth Directive provides:

‘1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.

3. The Commission shall inform the other Member States of the proposed measures within one month.

4. The Council’s decision shall be deemed to have been adopted if, within two months of the other Member States being informed as laid down in the previous paragraph, neither the Commission nor any Member State has requested that the matter be raised by the Council.

5. Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph 1 above.'

8 By Council Decision 2006/387/EC of 15 May 2006 authorising the Kingdom of Spain to apply a measure derogating from Article 11 and Article 28*e* of the Sixth Directive (OJ 2006 L 150, p. 11), the Kingdom of Spain, in accordance with the procedure laid down in Article 27(1), (2), (3) and (4) of the Sixth Directive, was authorised to introduce a measure derogating from the general rule for determining the taxable amount laid down in Article 11A(1)(a) of the Sixth Directive. Article 1 of that Decision states:

'... the Kingdom of Spain is hereby authorised to provide that the taxable amount of a supply of goods or services or of an intra-Community acquisition of goods shall be the same as the open-market value... where the consideration is significantly lower than the open-market value and the recipient of the supply, or in the case of an intra-Community acquisition, the acquirer, does not have a right to full deduction....

This measure may only be used in order to prevent tax avoidance or evasion and when the consideration on which the taxable amount would otherwise be based has been influenced by family, management, ownership, financial or legal ties...'

9 Article 11A of the Sixth Directive was amended by Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388 as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations (OJ 2006 L 221,

p. 9). Directive 2006/69 introduced, inter alia, a new paragraph 6 into Article 11A of the Sixth Directive. Under that paragraph, Member States may, in order to prevent tax evasion or avoidance, take measures to ensure that the taxable amount in respect of a supply of goods or services is the open market value of the transaction where the consideration is, according to circumstances, lower or higher than that open market value and where there is a connection between the parties to the transaction.

10 The authorisation granted to the Kingdom of Spain under Decision 2006/387 expired when Directive 2006/69 entered into force.

11 The option open to Member States, in the case of transactions between connected parties and in order to prevent tax evasion or avoidance, of taking measures to ensure that the taxable amount is the open market value of the transaction is now granted to them by Article 80 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which is currently in force.

National law

12 Article 78(1) of Law 37/1992 on Value Added Tax (Ley 37/1992 del Impuesto sobre el Valor Añadido) of 28 December 1992 (BOE No 312 of 29 December 1992, p. 44247), as worded at the time of the events in the main proceedings ('Law 37/1992'), established the general rule for determining the taxable amount as follows:

'The taxable amount shall be constituted by the total amount of the consideration for taxable transactions received from the customer or third parties.'

13 Article 79(5) of Law 37/1992, however, provided as follows:

'Where parties to taxable transactions are connected and agree prices which are patently lower than open market prices, the taxable amount may not be lower than that which would result from the application of the rules set out in paragraphs (3) and (4) above.'

14 Article 79 of Law 37/1992 established, in paragraphs (3) and (4) thereof, specific rules for determining the taxable amount in cases of application of goods and services for the private use of a taxable person. Those cases corresponded to the situations envisaged in Articles 5(6) and 6(2) of the Sixth Directive.

15 Following the adoption of Directive 2006/69, Law 36/2006 on measures for the prevention of tax evasion (Ley 36/2006 de medidas para la prevención del fraude fiscal) of 29 November 2006 (BOE No 286 of 30 November 2006, p. 42087) amended Article 79(5) of Law 37/1992. The wording of that provision was adapted in order to reflect the amendments made by Directive 2006/69 to Article 11A of the Sixth Directive, in particular the new paragraph 6 of that article.

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

16 On 31 December 1993, Campsa sold Repsol Combustibles Petrolíferos SA a number of service stations located in Spain for a total of ESP 1 732 419 313. It is not disputed that that sale was a transaction between connected parties within the meaning of Article 79(5) of Law 37/1992.

17 On 7 July 1998, the Spanish Finance Inspectorate notified Campsa that it disputed Campsa's VAT return for the year 1993, as it took the view that the rule for determining the taxable amount laid down in Article 79(5) of Law 37/1992 should have been applied to that sale, since it was characterised by a connection between the parties concerned and as those parties had agreed prices which were patently lower than market prices. The Finance Inspectorate thus assessed the correct taxable amount at ESP 4 076 112 060. A notice of assessment relating to the VAT for the year 1993, based on that estimated taxable amount, was issued on 11 December 1998.

18 The Tribunal Económico-Administrativo Central (Central Economic and Administrative Court) upheld that notice of assessment by a decision of 21 February 2001. Campsa brought an appeal against that decision before the Sala de lo Contencioso-Administrativo de la Audiencia Nacional (Contentious Administrative Chamber of the National High Court), which dismissed it by a judgment of 30 April 2004. Campsa lodged an appeal in cassation against that judgment before the referring court.

19 The Tribunal Supremo (Supreme Court) considers that, in order to resolve the dispute before it, it is required, inter alia, to establish whether the general rule for determining the taxable amount laid down in Article 11A(1)(a) of the Sixth Directive must be applied to transactions between connected parties, as that directive does not contain any specific rule for determining the applicable taxable amount in such cases.

20 The Tribunal Supremo takes the view that the interpretation of European Union law gives rise to reasonable doubts. It notes that the case-law of the Court appears to support the application of that general rule and that it was only following the assessment in question that the Kingdom of Spain obtained authorisation to derogate from it. It states, however, that since the entry into force of Directive 2006/69, Member States have the option, without requesting prior authorisation, of implementing specific derogating measures determining the taxable amount, such as that which was authorised by Decision 2006/387, and that that option remains open under Directive 2006/112. Moreover, the Abogado del Estado (State Legal Counsel) submits before the Tribunal Supremo that the application of Article 79(5) of Law 37/1992 was not contrary to European Union law, even before the adoption of Decision 2006/387,

in particular because the Sixth Directive allowed for the choice of the open market value in cases of application of goods and services for the private use of a taxable person within the meaning of Articles 5(6) and 6(2) of the Sixth Directive, including for transactions between connected parties.

21 In those circumstances, the Tribunal Supremo decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Did the [Sixth Directive] permit Member States to enact legislation whereby, for transactions between connected parties where the price was patently lower than the open market value, the taxable amount was other than that determined by Article 11A(1)(a) to be generally applicable – namely, the consideration – by extending the scope of the rules on application of goods and services for private use (as was done by Article 79(5) of [Law 37/1992], before its amendment by Law 36/2006...), when the specific procedure provided for in Article 27 of the Sixth Directive to obtain authorisation for derogation from the general rule was not followed, such derogation being obtained by [the Kingdom of] Spain only after [Decision 2006/387]?'

Consideration of the question referred

22 By its question the referring court asks whether the Sixth Directive must be interpreted as not precluding a Member State from applying, to transactions between connected parties having agreed a price which is patently lower than the open market value, a rule for determining the taxable amount other than the general rule laid down in Article 11A(1)(a) of the Sixth Directive by extending the scope of the rules

for determining the taxable amount on the application of goods and services for the private use of a taxable person within the meaning of Articles 5(6) and 6(2) of the Sixth Directive, when the procedure provided for in Article 27 of the Sixth Directive to obtain authorisation to introduce a measure thus derogating from the general rule has not been followed by that Member State.

23 The Spanish Government submits that it was legitimate, in circumstances such as those provided for in Article 79(5) of Law 37/1992, for a Member State to establish a different taxable amount from the general taxable amount laid down in Article 11A(1)(a) of the Sixth Directive. That national provision observed the principles of tax neutrality and of equal treatment and was compliant with the Sixth Directive, since it was intended to combat tax evasion. The Spanish Government indicates furthermore that the option open to Member States of introducing derogating measures of that type was granted to them by Directive 2006/69 and remains open under Directive 2006/112.

24 On the other hand, Campsa and the European Commission submit that the Sixth Directive, prior to the amendment made by Directive 2006/69, did not permit Member States, in circumstances such as those provided for in Article 79(5) of Law 37/1992, to establish a rule for determining the taxable amount other than that laid down in Article 11A(1)(a) of the Sixth Directive without having obtained the authorisation provided for in Article 27 of that directive to introduce such a derogating measure.

25 In that regard, it should be borne in mind, first, that the possibility of classifying a transaction as 'a transaction for consideration' within the meaning of Article 2 of the Sixth Directive requires only that there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person. Thus, the fact that the price paid for an economic transaction is higher or

lower than the cost price, and, therefore, higher or lower than the open market value, is irrelevant as regards that classification (see, to that effect, Case C-412/03 *Hotel Scandic Gåsabäck* [2005] ECR I-743, paragraph 22). The same applies to the connection which might exist between the parties to the transaction.

26 Second, under the terms of Articles 5(6) and (7) and 6(2) and (3) of the Sixth Directive, which treat certain transactions for which no consideration is actually received by the taxable person as transactions effected for consideration, there is no reason to apply the rules determining the taxable amount laid down in Article 11A(1)(b), (c) and (d) of the Sixth Directive except to transactions effected free of charge (see, to that effect, *Hotel Scandic Gåsabäck*, paragraph 24).

27 It follows that, where consideration has been agreed and actually paid to the taxable person in direct exchange for the goods he has delivered or the service he has provided, that transaction must be classified as a transaction for consideration, regardless of whether it is effected between connected parties and the price agreed and actually paid is patently lower than the open market price. The taxable amount of such a transaction must, therefore, be determined in accordance with the general rule stated in Article 11A(1)(a) of the Sixth Directive.

28 According to settled case-law, in accordance with that general rule, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria. Moreover, that consideration must be capable of being expressed in money (*Hotel Scandic Gåsabäck*, paragraph 21 and case-law cited).

29 In that regard it is true, as the Spanish Government pointed out, that the principle of equal treatment, of which the principle of tax neutrality is a specific expression at the level of secondary European Union law and in the specific area of taxation, requires similar situations not to be treated differently unless differentiation is objectively justified (Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraphs 49 and 51, and Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 44).

30 However, in so far as transactions, such as those in the main proceedings, in which a price patently lower than the open market price has been agreed are none the less transactions for consideration in which an actual consideration able to serve as the taxable amount has been received, the principle of equal treatment is not, in itself, such as to necessitate applying to them the rules for determining the taxable amount which were laid down for transactions effected free of charge for the estimation, in the absence of any actual consideration, of such a taxable amount according to objective criteria, as those two types of transaction are not comparable.

31 Moreover, it should also be borne in mind in that regard that the European Union legislature provided that, in accordance with the provisions of Article 27 of the Sixth Directive, Member States may, if required, be authorised to derogate from the rules in that directive and in particular from that in Article 11A(1)(a) thereof (see, inter alia, *Hotel Scandic Gåsabäck*, paragraph 26).

32 However, the Court has already held that new specific measures, derogating from the Sixth Directive, do not accord with European Union law unless they remain within the limits of the objectives referred to in Article 27(1) of that directive and have also been notified to the Commission and impliedly or expressly authorised by the Council in the circumstances specified in subparagraphs (1), (2), (3) and (4) of Article 27 (Case C-5/84 *Direct Cosmetics* [1985] ECR I-617, paragraph 24, and Case C-62/93

BP Soupergaz [1995] ECR I-1883, paragraph 22). Moreover, a Member State may not rely, as against a taxable person, on a provision derogating from the scheme of the Sixth Directive and enacted in breach of the duty of notification imposed by Article 27(2) of that directive without infringing the Treaty establishing the European Community (now the Treaty on the Functioning of the European Union) (see, to that effect, *Direct Cosmetics*, paragraph 37, and Case C-494/04 *Heintz van Landewijck* [2006] ECR I-5381, paragraph 48).

33 Clearly, a provision such as Article 79(5) of Law 37/1992 constitutes a new derogating measure within the meaning of Article 27(1) of the Sixth Directive. Regardless of the fact that, as the Spanish Government maintained at the hearing, Article 79(5) corresponds to a provision which was transposed into Spanish law by Law 30/1985 on Value Added Tax (Ley 30/1985 del Impuesto sobre el Valor Añadido) of 2 August 1985 (BOE No 190 of 9 August 1985, p. 25214), by which the Kingdom of Spain, in view of its accession to the European Communities, transposed, inter alia, the Sixth Directive into national law, that provision was none the less adopted after 1 January 1977.

34 In the case of accession, a reference to a date laid down in European Union law, in the absence of a provision to the contrary in the Act of Accession or some other European Union document, also applies to the acceding State, even if that date is prior to the date of its accession (Case C-366/05 *Optimus - Telecomunicações* [2007] ECR I-4985, paragraph 32). As regards the Kingdom of Spain, the date of 1 January 1977 has not been amended either by the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23) or by any other document. It may not therefore be considered that a provision such as Article 79(5) of Law 37/1992 could fall within the scope of Article 27(5) of the Sixth Directive.

35 It follows that the adoption of Article 79(5) of Law 37/1992 by the Kingdom of Spain fell within the scope of the procedure laid down in Article 27(1) to (4) of the Sixth

Directive and should therefore have been notified and authorised in accordance with that procedure. It is not in dispute that, at the time of the events in the main proceedings, that national provision had not been the object of such a notification and authorisation and it has not been established that the position was any different as regards the corresponding provision which featured in Law 30/1985. Consequently, the fact that such a derogating measure had not, at that time, been notified and authorised in accordance with the procedure laid down in Article 27(1), (2), (3) and (4) of the Sixth Directive is sufficient to support a finding that it may not be applied by a Member State and enforced against a taxable person.

36 It is true, as the Spanish Government indicated at the hearing, that the Court held, in paragraph 50 of *Heintz van Landewijck*, that late notification of a derogating measure cannot entail the same consequences, in respect of enforceability, as a failure to notify. However, that assertion, first, concerned a situation in which the derogating measure in question fell within the scope of Article 27(5) of the Sixth Directive, a situation which the Court distinguished from that of a measure falling within Article 27(1), and had been notified in breach of the deadline for notification established in Article 27(5) of the Sixth Directive but prior to the facts giving rise to the dispute brought before the national court, and secondly was responding to the question whether such a derogating measure should remain inapplicable even after that late notification (see *Heintz van Landewijck*, paragraphs 47 to 51).

37 Those circumstances are not comparable to those in the main proceedings. Therefore, it cannot be inferred from that judgment that, because a national measure falling within Article 27(1) of the Sixth Directive has been the subject of a notification to the Commission and of an authorisation by the Council following the events in the main proceedings, it must be possible to apply that national provision to events which took place prior to its notification.

38 It should also be borne in mind that the risk of tax evasion, which, according to the Spanish Government, Article 79(5) of Law 37/1992 aimed to combat, may be dealt with only by a request by the Member State concerned under Article 27 of the Sixth Directive to introduce measures derogating from that directive in order to prevent certain types of tax evasion or avoidance (see, to that effect, *Hotel Scandic Gåsabäck*, paragraph 26), a request which was only made following the events in the main proceedings.

39 Finally, the fact, noted inter alia by the referring court and the Spanish Government, that, since the entry into force of Directive 2006/69, Member States have the option, without having to seek prior authorisation, and in order to prevent tax evasion or avoidance, of taking measures to ensure that the taxable amount is the open market value of the transaction in certain cases where there is a connection between the parties to the transaction has no effect on the fact that, at the time of the events in the main proceedings, the Sixth Directive did not grant them any such option beyond the procedure laid down in Article 27(1), (2), (3) and (4) of that directive.

40 It follows from all the foregoing that the Sixth Directive must be interpreted as precluding a Member State from applying to transactions, such as those in the main proceedings, effected between connected parties having agreed a price which is patently lower than the open market price, a rule for determining the taxable amount other than the general rule laid down in Article 11A(1)(a) of that directive, by extending the scope of the rules for determining the taxable amount on the application of goods and services for private use by a taxable person, within the meaning of Articles 5(6) and 6(2) of that directive, when the procedure provided for in Article 27 of that directive to obtain authorisation for such derogation from that general rule has not been followed by that Member State.

Costs

41 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 (Eighth Chamber) hereby rules:

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, must be interpreted as precluding a Member State from applying to transactions, such as those in the main proceedings, effected between connected parties having agreed a price which is patently lower than the open market price, a rule for determining the taxable amount other than the general rule laid down in Article 11A(1)(a) of that directive, by extending the scope of the rules for determining the taxable amount on the application of goods and services for private use by a taxable person, within the meaning of Articles 5(6) and 6(2) of that directive, when the procedure provided for in Article 27 of that directive to obtain authorisation for such derogation from that general rule has not been followed by that Member State.

[Signatures]