JUDGMENT OF THE COURT (First Chamber)

13 December 2007 *

In Case C-374/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Düsseldorf (Germany), made by decision of 6 September 2006, received at the Court on 14 September 2006, in the proceedings

BATIG Gesellschaft für Beteiligungen mbH

v

Hauptzollamt Bielefeld,

THE COURT (First Chamber),

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

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 6 September 2007,

after considering the observations submitted on behalf of:

— BATIG Gesellschaft für Beteiligungen mbH, by M. Dettmeier, Rechtsanwalt,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— the Portuguese Government, by L. Fernandes and A. Simões, acting as Agents,

— the Commission of the European Communities, by W. Mölls, acting as Agent,

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 Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity) (OJ 2003 L 122, p. 36; 'Directive 92/12').

2 The reference was made in the context of a dispute between BATIG Gesellschaft für Beteiligungen mbH ('BATIG') and the Hauptzollamt Bielefeld ('Hauptzollamt') concerning the latter's refusal to reimburse the amount paid to obtain tax marks which were later affixed to cigarette packets intended for the German market but stolen in Ireland during despatching.

Legal context

Community law

3 Pursuant to Article 1(1) thereof, Directive 92/12 lays down the arrangements for products subject to excise duties.

4 Article 3(1) of Directive 92/12 states that the Directive applies at Community level to manufactured tobacco.

5 Article 6 of Directive 92/12 provides:

'1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

Release for consumption of products subject to excise duty shall mean:

(a) any departure, including irregular departure, from a suspension arrangement;

(b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;

(c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where

release for consumption takes place or shortages are recorded. Excise duty shall be levied and collected according to the procedure laid down by each Member State, it being understood that Member States shall apply the same procedures for levying and collection to national products and to those from other Member States.'

6 Under the first subparagraph of Article 20(1) of Directive 92/12, '[w]here an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15(3), without prejudice to the bringing of criminal proceedings'.

7 Article 21(1) and the second subparagraph of Article 21(2) of Directive 92/12 states:

'1. Without prejudice to Article 6(1), Member States may require that products released for consumption in their territory shall carry tax markings or national identification marks used for fiscal purposes.

2. ...

Without prejudice to any provisions they may lay down in order to ensure that this Article is implemented properly and to prevent any fraud, evasion or abuse, Member States shall ensure that these marks or markings do not create obstacles to the free movement of products subject to excise duty.'

8 Article 22(1) and (2) of Directive 92/12 provide:

'1. In appropriate cases, products subject to excise duty which have been released for consumption may, at the request of a trader in the course of his business, be eligible for reimbursement of excise duty by the tax authorities of the Member State where they were released for consumption when they are not intended for consumption in that Member State.

However, Member States may refuse request for reimbursement where it does not satisfy the correctness criteria they lay down.

2. In the application of paragraph 1, the following provisions shall apply:

(a) before dispatch of the goods, the consignor must make a request for reimbursement from the competent authorities of his Member State and provide proof that the excise duty has been paid. However, the competent authorities may not refuse reimbursement on the sole grounds of non-presentation of the document prepared by the same authorities certifying that the initial payment had been made;

...

(d) products subject to excise duty and released for consumption in a Member State and thus bearing a tax marking or an identification mark of that Member State may be eligible for reimbursement of the excise duty due from the tax authorities of the Member States which issued the tax markings or identification marks, provided that the tax authorities of the Member State which issued them has established that such markings or marks have been destroyed.'

9 Under Article 2(1)(a) of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40), cigarettes are to be considered to be manufactured tobacco.

10 Article 10(1) of Directive 95/59 states, inter alia, that '[a]t the final stage at the latest the rules for collecting the excise duty shall be harmonized' and that '[d]uring the preceding stages the excise duty shall, in principle, be collected by means of tax stamps'.

National law

11 Paragraph 1 of the German law on tobacco tax (Tabaksteuergesetz) of 21 December 1992 (BGBl. 1992 I, p. 2150), in the version in force at the time of the facts in the main proceedings ('the TabStG'), provides that the excise duty on tobacco affects cigarettes, cigars and cigarillos, and smoking tobacco (manufactured tobacco).

12 Paragraph 12(1) and (2) of the TabStG, entitled 'Use of tax markings, tax declaration', states:

'(1) Duty in respect of tobacco products is to be paid by means of the use of tax markings. The use of tax markings includes cancelling the tax markings and affixing them to the individual packaging. Tax markings must be used when duty becomes chargeable.

(2) The manufacturer or importer must apply for the tax markings on the officially prescribed form and must calculate the tax markings liability itself on the form (tax return). ... The tax becomes chargeable on receipt of the tax markings in the sum of their excise value. If the tax markings are dispatched, the second working day after dispatch is deemed to be the date of receipt. The recipient is the debtor ...'

13 Paragraph 22(1) to (3) of the TabStG, entitled 'Waiver, reimbursement of duty', provides:

'(1) The duty shall be waived or reimbursed on application if manufactured tobacco is taken into a tax warehouse or taken out or exported subject to tax control from the tax territory to another Member State. Importers and authorised consignees who are not tax warehousekeepers shall also have the duty waived or reimbursed to them if manufactured tobacco which they import or receive subject to tax control is destroyed or denatured.

(2) If the duty is paid by means of the use of tax markings it will be waived or reimbursed only if the tax markings have been destroyed or rendered invalid whilst subject to tax control and the contents of the packaging are still complete.

(3) Subparagraph 1 applies by analogy if tax markings which have not yet been cancelled are returned to the Hauptzollamt or if tax markings which have been cancelled have been destroyed or rendered invalid whilst subject to tax control and the duty has not become chargeable.'

The main proceedings and the question referred

14 On 1 April 2004 Tuxedo GmbH ('Tuxedo') — the legal predecessor to BATIG — received tax markings from the Hauptzollamt with a total value of EUR 184 170.46 for cigarettes manufactured in Ireland by P.J. Carroll & Co. Ltd ('Carroll') and intended for the German market.

15 Tuxedo sent those tax markings to Carroll which affixed them to individual packets of cigarettes. Carroll then dispatched those cigarettes to a commercial partner established in the Netherlands under intra-community duty suspension arrangements. However, all of the cigarettes were stolen from the port of Dublin (Ireland) on 29 April 2004.

16 Carroll paid excise duty in the sum of EUR 277 587.30 to the Irish customs authorities because of the departure of the cigarettes from the duty suspension arrangement in Ireland.

17 On 18 August 2004 Tuxedo applied to the Hauptzollamt for reimbursement of the sum of EUR 184 445.64 which it had paid to obtain the tax markings on the ground that those markings could no longer be used for the purposes of paying German tobacco duty. According to Tuxedo, it could be presumed that all the stolen cigarettes would be sold on the British black market.

18 By decision of 30 August 2004, upheld, upon opposition by Tuxedo, by decision of 15 October 2004, the Hauptzollamt refused the reimbursement on the ground that the recipient had to bear the risk of the loss of the tax markings. The Hauptzollamt considered that it could not be ruled out that the stolen packets of cigarettes carrying those markings were sold in German tax territory. In addition, it argued that the tax markings had neither been destroyed nor rendered invalid as required by Paragraph 22(3) of the TabStG.

19 Tuxedo thus brought an action before the Finanzgericht Düsseldorf. It claims, essentially, that an amount due by way of tax markings which does not merge with a subsequently or simultaneously supervening tobacco duty is contrary to Directive 92/12. It argues that it is apparent from that directive that excise duties may be collected only in the Member State where the offence or irregularity was committed during the duty suspension arrangement even if another Member State stipulates the use of tax markings. Otherwise, there would be multiple charging of excise duties which would affect intra-community trade within the meaning of the second paragraph of Article 21(2) of Directive 92/12.

20 The Hauptzollamt objects that, as a result of the receipt of the German tax markings, the debt relating thereto became chargeable. Given the absence of the return, destruction or invalidity of those markings it is not possible to reimburse the amount paid for them. It argues that no further German tobacco duty exists in addition to the tobacco duty collected in Ireland, but a debt resulting from the acquisition of German tax markings, with the effect that there can be no talk of

double taxation. It is true that there is a double charge but it is inherent in the system of Directive 92/12. There are no obstacles to the free movement of goods subject to excise duty since that double charge occurs only where there is a previous irregularity.

21 Considering an interpretation of Directive 92/12 to be necessary for it to be able to give judgment in the case before it, the Finanzgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Should ... Directive [92/12] ... be interpreted as meaning that a Member State which has collected excise duty for ... tobacco [products] by means of issuing tax markings is obliged to reimburse the recipient of the tax markings for the sum paid for them if ... tobacco [products] furnished with those tax markings in another Member State depart[s] from the duty suspension arrangement irregularly with the consequence that the [other] Member State collects excise duty for ... tobacco [products] from the trader established there who dispatched the manufactured tobacco under intra-community duty suspension arrangements?'

The question referred

22 It should be pointed out, at the outset, that the tax markings obtained by Tuxedo from the German tax authorities were affixed to the tobacco products while those goods were still under a duty suspension arrangement and, thus, while excise duties were not yet chargeable.

23 In addition, it is not disputed that BATIG, the legal successor to Tuxedo, was not able to furnish evidence to the German authorities that the tobacco products which were stolen in Ireland during despatching would not be sold in Germany.

24 Therefore, by its question for referral, the national court asks whether Directive 92/12 precludes the legislation of a Member State which excludes the reimbursement of the amount paid to obtain tax markings of that Member State when those markings have been affixed to products subject to excise duty before being released for consumption in that Member State, when those products have been stolen in another Member State, involving the payment of excise duties in that other Member State, and when evidence has not been furnished that the stolen products will not be marketed in the Member State which issued those markings.

25 Article 6 of Directive 92/12 states that excise duty is to become chargeable at the time of release for consumption and that the chargeability conditions and rate of excise duty to be adopted are to be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place. Article 21(1) of Directive 92/12 makes it possible for the Member States to require that products released for consumption in their territory are to carry tax markings. Finally, Article 10(1) of Directive 95/59 provides that, during the stages preceding that of the harmonisation of the rules for collecting the excise duty, the latter is, in principle, to be collected by means of tax stamps.

26 In the light of those provisions, it appears that the issuing of tax markings to an economic operator by a Member State constitutes, for that Member State, a means of collecting excise duty in advance on products which the operator intends to release for consumption in that Member State.

27 Furthermore, it is not disputed that a tax marking, once affixed to individual packets of cigarettes, such as those at issue in the main proceedings, cannot be removed without being destroyed. Consequently, when an economic operator affixes tax markings issued by a Member State to such products, which he intends to release for consumption in that Member State, it must be considered that that Member State collects, in advance, the excise duties on those very products.

28 Thus, in the case in the main proceedings, BATIG paid the German excise duty for the stolen products in advance.

29 In addition, when, as in the case in the main proceedings, tobacco products circulating under suspension of duties are stolen, their theft constitutes an irregular departure from a suspension arrangement within the meaning of Article 6(1)(a) of Directive 92/12, so that the excise duty becomes chargeable in the Member State in which the goods were stolen, in accordance with Article 20(1) of that directive.

30 Thus, in the case in the main proceedings, the excise duties on the stolen products became chargeable in Ireland.

31 However, the fact that the tax markings were not able to serve as payment of the excise duties does not necessarily imply that the operators concerned have a right to reimbursement of the amount paid to obtain those marks.

32 As rightly pointed out by the Advocate General in points 33 to 35 of his Opinion in the case which gave rise to the judgment in Case C-494/04 *Heintz van Landewijck* [2006] ECR I-5381, tax markings have an intrinsic value which distinguishes them from straightforward documents representing the payment of a sum of money to the tax authorities in the Member State in which those markings were issued.

33 In the case of loss, such markings are capable of being used for unlawful purposes since their mere presence on the products subject to excise duty constitutes a presumption that the excise duties have been paid in the Member State in which the markings were issued and, consequently, permits them to be marketed in that Member State.

34 It should be pointed out, in that context, that, as the Court has already held, the cigarette market particularly lends itself to the development of unlawful trade (see Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 87, and Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 72).

35 Thus, when an economic operator who has obtained tax markings is not able to furnish evidence that those marks will not be used to market products subject to excise duty in the Member State in which those marks were issued, that State has a legitimate interest in refusing to reimburse the amount paid.

36 The Court ruled to that effect in the judgment in *Heintz van Landewijck*, cited above, in which the issue was whether Directive 92/12 precludes the legislation of a Member State which does not provide for the restitution of the amount of customs duty paid by means of obtaining tax markings, when those tax markings have gone missing before being affixed.

37 In that case, Heintz van Landewijck SARL had obtained from the Netherlands authorities tax markings for tobacco products, but those markings had gone missing before being affixed. That company, which sought restitution of the amount paid to obtain those markings, claimed, inter alia, that the products subject to excise duty had not been released for consumption in the Netherlands.

38 The Court held that Directive 92/12 does not preclude the Member States from laying down national rules which, in a case where tax markings go missing, place the financial responsibility for the loss of those markings on the purchaser (*Heintz van Landewijck*, paragraph 41).

39 The Court also held that such national rules cannot be regarded as contrary to the principle of proportionality. It found that a national law which allowed the purchaser of tax markings to obtain reimbursement simply by claiming that they had gone missing would be likely to encourage abuse and evasion, the prevention of which is precisely one of the objectives pursued by Community law (*Heintz van Landewijck*, paragraphs 42 and 43).

40 It found, accordingly, that national rules which place the financial responsibility on the purchaser where tax markings go missing, contribute to the achievement of the aim of preventing the fraudulent use of those markings and do not exceed what is necessary to pursue that objective, since they do not exclude any possibility of reimbursement or offsetting in other situations, such as the loss of the markings due to accident or force majeure (*Heintz van Landewijck*, paragraph 44).

41 The Court expressly dismissed the argument that the risk that the missing tax markings would be misused was minimal, finding that there was nevertheless a risk of abuse (*Heintz van Landewijck*, paragraph 45).

42 Unlike in the case which gave rise to the judgment in *Heintz van Landewijck*, the tax markings at issue in the main proceedings had already been affixed to the tobacco products aimed at the German market and it is those products which went missing following the theft. Those factual differences cannot however lead to a different conclusion to the one arrived at by the Court in that case.

43 First, Directive 92/12 does not govern the case of a disappearance of products already bearing the tax markings of a Member State before they are released for consumption in that State — as in the case in the main proceedings — any more than that of a disappearance of such markings before they are affixed to the products — as in the case which gave rise to the judgment in *Heintz van Landewijck*.

44 It is true, as pointed out by the Commission of the European Communities, that Article 20 of Directive 92/12 determines the Member State which has the exclusive right to collect excise duties where an irregularity or offence has been committed in the course of a movement, such as an irregular departure from a suspension arrangement.

45 However, that article, which applies whether the products having given rise to the irregularity or the offence have been furnished in advance with tax markings or not, in no way seeks to specify who — the economic operator or the Member State concerned — must bear the consequential risk of the disappearance of tax markings which have already been affixed to those products.

46 Second, the possibility of obtaining a refund for the tax markings simply by claiming that the products on which they were affixed have gone missing would also be likely to encourage abuse and evasion.

47 In circumstances such as those in dispute in the main proceedings, there is a real risk that the stolen products might be marketed in the Member State which issued the tax markings. Since those products carry tax markings of that State, those products may be introduced with ease onto the official market for tobacco products in that State.

48 It is true that excise duty is collected, in any case, on the stolen products in the Member State in which the irregular departure from the suspension arrangement was certified. However, the risk of fraud cannot be dismissed in the case where the amount of excise duties in force in the Member State which issued the tax markings would be greater than the amount in force in the Member State in which the irregular departure from the suspension arrangement was certified. In such a case, it cannot be ruled out that a dishonest operator might claim that his goods have been stolen in the second Member State, pay less excise duty than the reimbursement of the tax markings obtained in the first Member State, then, finally, sell those goods, still bearing those markings, on the market in that State.

49 In any event, even in the absence of any fraud on the part of the economic operator holding the goods, the fact that the excise duty has been paid in another Member State has no bearing on the risk that the goods, once stolen, might be sold by the perpetrator of the theft on the official market of the Member State which issued the tax markings, thus depriving that Member State of tax revenue to which it is entitled.

50 However, the Commission submits that, once the tax markings have been affixed to the sales packaging, the consequences which need to be determined are those relating to the disappearance of the products themselves and not of the tax markings as such.

51 According to the Commission, those consequences must be determined in the light of the rules harmonising the collection of excise duties. First, it is apparent from Directive 92/12 that the right to collect excise duty belongs, in a situation such as the one at issue in the main proceedings, exclusively to the Member State in which the theft took place. Second, the objective of preventing double taxation, which is pursued by that directive would be reduced to nothing if, in the case in the main proceedings, alongside the tax due in Ireland, the advance payment were to remain definitively in the hands of the German tax authorities.

52 Those arguments must be dismissed.

53 First, the tax markings retain an intrinsic value even after being affixed to products. As has been pointed out in paragraphs 46 to 49 of this judgment, their mere presence on the sales packaging of stolen products is capable of encouraging the selling of those products on the official market of the Member State which issued those marks, a fraud contrary to the interests of that State.

54 That risk differs from the one generally faced by every Member State, namely contraband tobacco products. Tobacco products which do not bear the tax markings of a Member State can be sold only on the black market in that Member State.

55 Second, although Directive 92/12 seeks to harmonise the procedures for collecting excise duty by pursuing a double objective of effectively levying excise duties in a single Member State, which is the Member State in which the products are released for consumption, it must be noted that the Community legislature has not established prevention of double taxation as an absolute principle.

56 It is apparent from Article 22(1) and (2) of Directive 92/12 that, when products released for consumption in a first Member State and thus carrying a tax marking of that Member State are intended to be consumed in another Member State and are dispatched to that Member State, it is not sufficient, to obtain reimbursement of the excise duty paid in the first Member State, to establish that excise duty has been paid in the Member State of consumption, but it is also necessary that the destruction of the tax marks of the first Member State be certified by the tax authorities of that State.

57 It is apparent from that provision that, since the tax authorities of the Member State which issued the tax markings are not able to certify that those markings have been destroyed, the products to which those markings were affixed will give rise to payment of excise duties at the same time in both the Member State in which they were released for consumption and in the State in which they are intended to be consumed. By that provision, the Community legislature favoured the prevention of abuse and fraud to the detriment of the principle that taxation should occur in only one Member State.

58 Admittedly, as submitted by the Commission, in situations governed by Articles 22(1) and (2) of Directive 92/12, the excise duty of which reimbursement is sought from a Member State was chargeable in that State, whereas, in the case in dispute in the main proceedings, the excise duties have never been chargeable in Germany.

59 However, it would be paradoxical if the reimbursement of the tax markings affixed to the products subject to excise duty were authorised in a situation such as that in the main proceedings, in which no control of the destination of the stolen products is possible, whereas Article 22(2)(d) of Directive 92/12 makes the reimbursement of the excise duty contingent on the finding that the marks proving payment of that duty have been destroyed, in circumstances in which the risk of abuse and fraud is lower.

60 In addition, the Commission submits that a Member State is not entitled to make the reimbursement of tax markings contingent on the furnishing of evidence that they have been destroyed or that the stolen products have not been sold on the market of the Member State which issued those markings since it is impossible to furnish such evidence.

61 However, even supposing that to be the case, that argument cannot be upheld since it is precisely that impossibility which illustrates the reality of the risk of those goods being marketed in the Member State which issues the tax markings and, consequently, the reality of the risk of use of those markings, which would legitimate the Member State's refusal to reimburse the cost of those markings.

62 In addition, besides theft, other situations are envisageable of advance payment of the excise duty by affixing tax markings of a Member State which are not then released for consumption in that Member State, for example when an economic operator changes the destination of the products. In such a case, the operator is in a position to furnish evidence that the markings which have already been affixed have been destroyed and to obtain from the Member State which issued those markings reimbursement of the amount paid to obtain them.

63 It should be added that there is no legal obligation to affix tax markings to the packaging of products subject to excise duty before their departure from the suspension arrangement in the Member State which issued those marks, since the excise duties for those products have still not, by definition, become chargeable. Even if practical needs justify the affixing by an operator of tax markings during the process of packaging the products subject to excise duty, even though those products are under a suspension arrangement, as was the case with Tuxedo in the case in the main proceedings, it none the less remains a choice made freely and in respect of which the operator must assume the consequences in the event that those products are stolen.

64 The answer to the question referred must thus be that Directive 92/12 does not preclude the legislation of a Member State which excludes the reimbursement of the amount paid to obtain tax markings issued by that Member State when those markings have been affixed to products subject to excise duty before being released for consumption in that Member State, when those products have been stolen in another Member State, involving the payment of excise duties in that other Member State, and when evidence has not been furnished that the stolen products will not be marketed in the Member State which issued those markings.

Costs

65 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:

Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity), does not preclude the legislation of a Member State which excludes the reimbursement of the amount paid to obtain tax markings issued by that Member State when those markings have been affixed to products subject to excise duty before being released for consumption in that Member State, when those products have been stolen in another Member State, involving the payment of excise duties in that other Member State, and when evidence has not been furnished that the stolen products will not be marketed in the Member State which issued those markings.

[Signatures]