JUDGMENT OF THE COURT (Second Chamber)

16 September 2004 *

In Case C-382/02,

REFERENCE for a preliminary ruling under Article 234 EC

from the Vestre Landsret (Denmark), made by decision of 9 October 2002, received at the Court on 23 October 2002, in the proceedings

Cimber Air A/S

v

Skatteministeriet,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), J.N. Cunha Rodrigues and N. Colneric, Judges,

* Language of the case: Danish.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 4 March 2004,

after considering the observations submitted on behalf of:

— Cimber Air A/S, by R. Mikelsons, avocat,

— the Danish Government and Skatteministeriet, by J. Molde, acting as agent, assisted by P. Biering, avocat,

— the German Government, by M. Lumma, acting as Agent,

— the Commission of the European Communities, by E. Traversa and N.B. Rasmussen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 March 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 15(6), (7) and (9) 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 This reference was made in the course of proceedings between Cimber Air A/S ('Cimber Air') and the Skatteministeriet (Danish Ministry of Fiscal Affairs) concerning an application for a refund of the value added tax ('VAT') paid on supplies to aircraft for which no refund is available under the Danish VAT legislation.

Legal background

The Community legislation

3 Article 15 of the Sixth Directive, which governs exemption for exports outside the Community, for like transactions and international transport, provides:

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

1. the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;

2. the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a purchaser not established within the territory of the country, with the exception of goods transported by the purchaser himself for the equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use;

...

6. the supply, modification, repair, maintenance, chartering and hiring of aircraft used by airlines operating for reward chiefly on international routes, and the supply, hiring, repair and maintenance of equipment incorporated or used therein;

7. the supply of goods for the fuelling and provisioning of aircraft referred to in paragraph 6;

...

9. the supply of services other than those referred to in paragraph 6, to meet the direct needs of aircraft referred to in that paragraph or of their cargoes;

...'

The national legislation

4 The VAT exemption rules are contained in the lov om mervaerdiafgift (VAT Law) of 16 August 2000 (hereinafter 'the Law of 16 August 2000'). It governs the levying of VAT on supplies to airlines.

5 Article 34(1) of the Law of 16 August 2000, which deals with VAT exemptions for supplies to certain aircraft, provides:

'The following supplies of goods and services shall be exempt from tax:

...

7. necessary equipment and supplies delivered for use on board aircraft and ships engaged in international transport, excluding private aircraft ... and supplies of services intended for such aircraft ... ;

8. the sale and hiring of aircraft ... other than private aircraft and pleasure boats;

9. repairs, maintenance and modification of the aircraft referred to in subparagraph 8 ... and delivery, hiring, repairs and maintenance of their fixed equipment;

...

16. goods supplied for fuelling and provisioning, and other supplies to provisioning undertakings, and to ships and aircraft for consumption on board or sale to passengers, in accordance with customs legislation.'

6 Thus, under Article 34(1), subparagraphs 7 and 16, of the Law of 16 August 2000:

— take-off and landing taxes,

— fuel,

— catering,

— baggage handling

represent the 'supplies of goods' and 'supplies of services' referred to in Article 15(7) and (9) of the Sixth Directive and are VAT exempt only if they are for a flight bound abroad.

7 As regards purchases made for international flights, including transit flights, the VAT paid may be refunded under Article 45(3) of the Law of 16 August 2000; no refund is available for domestic flights.

The main proceedings and the questions referred to the Court of Justice

8 Cimber Air is an airline whose main activity consists in operating regular regional air services in Europe in cooperation with its two partners, SAS and Lufthansa. It operates on domestic routes in Denmark and on routes between Denmark and other countries. It also operates on routes which originate and terminate abroad.

9 In the main proceedings, the Skatteministeriet considers it inappropriate to exempt from VAT certain supplies to Cimber Air aircraft being used for domestic flights, that is to say flights between airports within Denmark, exemption being available only for aircraft being used for an international flight. Cimber Air considers that all

supplies to aircraft being used for domestic flights must benefit from the exemption because it operates chiefly on international routes.

10 Cimber Air therefore brought an action before the Vestre Landsret (Western Regional Court) for an order requiring the Skatteministeriet to recognise that the goods and services supplied to it after 30 April 2001 are VAT exempt, since international transport accounts for the major part of its business.

11 Cimber Air also claimed that the Skatteministeriet should be ordered to repay to it the VAT which, in its view, it wrongly paid in excess. That amount comprises the VAT which Cimber Air paid to its suppliers for various supplies made for or in relation to flights on entirely domestic routes.

12 The parties differs as to whether Article 15(7) and (9) of the Sixth Directive in conjunction with Article 15(6) preclude the levying of VAT on supplies to Cimber Air aircraft when such aircraft are operating on domestic routes, given that the company's flights are chiefly international.

13 In those circumstances, the Vestre Landsret stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Are Article 15(7) and (9) (referring to Article 15(6)) of the Sixth VAT Directive (Council Directive 77/388/EEC), to be interpreted as meaning that a Member

State is entitled not to exempt from VAT supplies to aircraft operating on a domestic route, regardless of the fact that the company using the aircraft operates chiefly on international routes, or is the Member State bound to exempt such supplies from VAT?

2. If the Court finds that supplies must be exempted from VAT if the airline operates chiefly on international routes, the Court is asked to state which criteria in the form of, for example, turnover, available seat-kilometres, passenger-kilometres or number of passengers and flights, are decisive under Article 15(6) for determining whether an airline can be said to be operating "chiefly" on international routes?'

The first question

14 By its first question the national court seeks essentially to ascertain whether Article 15(6), (7) and (9) of the Sixth Directive must be interpreted as meaning that the goods and services referred to by those provisions, supplied to aircraft which, although carrying out domestic flights, are used by airlines operating for reward chiefly on international routes, are VAT exempt.

Observations submitted to the Court

15 The Danish Government submits that, in so far as Article 15 of the Sixth Directive concerns exemption of exports outside the Community, paragraphs 7 and 9 of that

article can relate only to supplies of goods or services for international flights and the status of each aircraft movement should be assessed individually. Article 15(6), under which the supplies of goods or services referred to in that article must be considered in relation to the activities chiefly undertaken by the airline, constitutes an exception only to Article 15 interpreted as a whole.

16 The Danish Government states, in support of the interpretation for which it contends, that the provisions concerning exemption within the country are in Article 13 of the Sixth Directive. However, supplies to flights within the country are not exempted by the latter article, a fact which supports the argument that Article 15(7) and (9) of that directive are not concerned with supplies of goods or services for aircraft used on domestic routes, even though the company to which they belong may chiefly operate on international routes.

17 That view is shared by the Commission, which also observes that the provisions of the Sixth Directive on tax exemptions must be interpreted strictly in order to comply with the principle of fiscal neutrality. That principle requires equality of tax treatment for all national transport operations.

18 The Commission accepts that Article 15(6) of the Sixth Directive expressly derogates from the principle of fiscal neutrality but observes that there is nothing in the legislative history of that article to indicate that Article 15(7) and (9) allow such a derogation; the tax exemption referred to in those paragraphs can therefore cover only goods and services for aircraft used solely for international operations.

19 Cimber Air, supported at the hearing by the German Government, interprets Article 15(7) and (9) of the Sixth Directive differently. It considers that the VAT exemption for the supplies covered by those provisions applies to aircraft on domestic routes when the airline to which they belong operates for reward chiefly on international routes.

20 Cimber Air and the German Government consider that departure from the principle of fiscal neutrality to be justified by the difficulties involved in determining what proportion of the supplies to an aircraft that is used for both domestic and international flights should be exempt from VAT and what proportion should not.

21 They consider therefore that, for the supplies of goods and services referred to in Article 15(7) and (9) of the Sixth Directive to be exempt, the decisive criterion, by virtue of which the wording of those provisions overrides the principle of fiscal neutrality, is the fact that the aircraft benefiting from the exemption belongs to an airline that operates chiefly on international routes. That criterion enables the rules laid down by Article 15(6), (7) and (9) of the Sixth Directive to be applied simply and consistently.

22 On the basis of that interpretation, Cimber Air concludes that, in the circumstances of the main proceedings, the Danish rules and, pursuant to them, the application of the exemption only to aircraft being used for international flights are incompatible with Community law.

Findings of the Court

23 Exemptions constitute independent concepts of Community law which must be placed in the general context of the common system of VAT introduced by the Sixth Directive (see in particular Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 18; Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 21; and Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 25).

24 That system is based in particular on two principles. First, each supply of goods and services effected for consideration by a taxable person is subject to VAT. Second, in accordance with the principle of fiscal neutrality, economic operators carrying out the same transactions may not be treated differently in relation to the levying of VAT.

25 For those reasons, whilst it is common ground that the Sixth Directive may provide for exemptions which depart from the principles referred to in the foregoing paragraph, the Court considers that such exemptions must be interpreted strictly (see, to that effect, *SDC*, paragraph 20, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 12, and *Kügler*, paragraph 28).

26 In this case, pursuant to Article 15(7) and (9) of the Sixth Directive, the supply of goods for the fuelling and provisioning of aircraft referred to in Article 15(6) and the supply of services other than those mentioned in Article 15(6), to meet the direct needs of those aircraft or of their cargoes, are VAT exempt.

27 Article 15(6) is concerned with 'aircraft used by airlines operating for reward chiefly on international routes'.

28 Thus, contrary to the contentions of the Commission and the Danish Government, the exemption provided for in Article 15 of the Sixth Directive relates formally, both in paragraphs 7 and 9 and in paragraph 6 of that article, to domestic flights carried out by aircraft used by companies whose business is mainly international.

29 The fact, referred to by the Commission, that the exemptions within a Member State are provided for in Article 13 of the Sixth Directive and that the conditions for exemption in Article 15 thereof are completely harmonised cannot have the effect of giving Article 15 a meaning different from that which is clear from its wording.

30 The answer to be given to the first question must therefore be that Article 15(6), (7) and (9) of the Sixth Directive must be interpreted as meaning that the supplies of goods and services referred to in those provisions to aircraft which operate on domestic routes but are used by airlines chiefly operating for reward on international routes are exempt from VAT.

The second question

31 By its second question, the national court seeks essentially to ascertain which criteria should be used to determine whether an airline operates chiefly on international routes.

Observations submitted to the Court

32 The Commission and the Danish Government consider that it is unnecessary to answer this question in view of the answer which they suggest for the first question.

33 Cimber Air maintains that the word 'chiefly' used in Article 15(6) of the Sixth Directive must be examined having regard to an airline's operations on all its routes, so that a temporal analysis must be undertaken and also an analysis of the criteria governing production and sales.

34 It considers that the international portion of an airline's operations must be determined over a long period, so that, if it has, for several years, operated chiefly on international routes and in the course of one year it has done so to a lesser extent, that fact cannot give rise, in respect of that year, to different VAT treatment for the aircraft of that company.

35 As regards the criteria for determining the extent of an airline's operations on international routes, Cimber Air proposes that this should be measured in terms of seat-kilometres, thus enabling the proportion of turnover accounted for by international flights to be determined.

36 Cimber Air submits that indicators such as the number of paying passengers and the number of flights do not provide the same precise measure of the extent of an airline's business.

Findings of the Court

37 For the reasons set out in paragraphs 23 to 25 of this judgment, the term 'airlines operating for reward chiefly on international routes' has a Community meaning and must be interpreted strictly in so far as it serves as a basis for VAT exemptions.

38 That interpretation must take account of the divergence between certain language versions of the provision in question. The French, Italian, Spanish and Portuguese versions of Article 15(6) of the Sixth Directive use the word 'essentially' or the equivalent thereof, whereas the Danish, German, English and Dutch versions use, respectively, the words 'hovedsageligt', 'hauptsächlich', 'chiefly' and 'hoofdzakelijk'. According to the second group of expressions, the provision in question refers to airlines whose operations on international routes merely exceed their non-international operations, whereas, according to the first group of expressions, the international operations should account for almost all the business of those companies.

39 It may be deduced from the foregoing analysis that, in any event, it is necessary to treat as airlines operating chiefly on international routes those whose operations on non-international routes are found to be considerably less extensive than their international activities.

40 The answer to the second question must be that it is for the national courts to assess the extent of the international business and the extent of the non-international business of such companies. In doing so, they may take account of all information which indicates the relative importance of the type of operations concerned, in particular turnover.

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 (Second Chamber) rules as follows:

1. **Article 15(6), (7) and (9) 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 must be interpreted as meaning that the supplies of goods and services referred to in those provisions to aircraft which operate on domestic routes but are used by airlines chiefly operating for reward on international routes are exempt from VAT.**

2. **It is for the national courts to assess the extent of the international business and the extent of the non-international business of such companies. In doing so, they may take account of all information which indicates the relative importance of the type of operations concerned, in particular turnover.**

Signatures.